



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

RICHARD J. TORNETTA, Individually)
and on Behalf of All Others Similarly)
Situating and Derivatively on Behalf of)
Nominal Defendant TESLA, INC.,)

Plaintiff,)

v.)

C.A. No. 2018-0408-KSJM

ELON MUSK, ROBYN M. DENHOLM,)
ANTONIO J. GRACIAS, JAMES)
MURDOCH, LINDA JOHNSON RICE,)
BRAD W. BUSS, and IRA EHRENPREIS,)

Defendants,)

-and-)

TESLA, INC., a Delaware Corporation,)

Nominal Defendant.

DIRECTOR DEFENDANTS' PRETRIAL BRIEF

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PRELIMINARY STATEMENT

In March 2018, 73% of Tesla’s disinterested voting stockholders approved a compensation plan (“2018 Plan” or “Plan”) for Tesla’s CEO, Elon Musk (“Musk”). The Plan was designed to maximize stockholder value by incentivizing Musk to focus his efforts on transforming Tesla and delivering explosive growth for its stockholders at a critical time in the Company’s history. The 2018 Plan offered Musk the opportunity to share in the gains for Tesla’s stockholders if—and only if—Tesla proved its value both to the market and through its core financial results; if Musk vested in any stock options under the 2018 Plan, *at least 90% of the value he created would accrue directly to Tesla stockholders.*

The Plan, although highly ambitious and challenging, was considered attainable under Musk’s leadership. And the Plan has worked exactly as hoped. Under Musk’s leadership, Tesla’s value has increased by more than 1,200% since the Plan was implemented—from about \$53 billion to over \$690 billion—making Tesla the 6th most valuable company in the world. Not surprisingly, even Plaintiff’s counsel conceded that Tesla stockholders “would be happy if [Tesla’s] market cap is at \$650 billion.”¹ Tesla’s explosive value growth has been

¹ Mot. To Dismiss Tr. 108:13-14 (May 9, 2019) (Dkt. No. 28).

accompanied by a nearly 5x increase in annual revenue. Once a consistently unprofitable company, Tesla has now achieved 13 consecutive quarters of sustained bottom-line profitability.

Musk bore the risk associated with the 2018 Plan, while Tesla stockholders got the lion's share of the upside. Under the Plan, Musk receives no salary, no cash bonuses, and no equity that vests simply by the passage of time. The Plan consists of 12 tranches of stock options; the first required Musk to nearly *double* Tesla's market capitalization (from \$53 billion to \$100 billion) *and* meet a specified revenue or adjusted EBITDA goal. Each remaining tranche required an increase of Tesla's market capitalization by an *additional* \$50 billion (up to \$650 billion) and the achievement of an additional operational milestone tied to Tesla's top-line (revenue) or bottom-line (adjusted EBITDA) growth. Under the demanding terms of the 2018 Plan, Musk would receive *nothing* if, for example:

- Tesla's market capitalization grew from about \$53 billion to \$99 billion (nearly doubling Tesla's market capitalization but failing to hit the first market capitalization milestone);
- Tesla's market capitalization grew to \$200 billion, but Musk had not led Tesla to achieve \$20 billion in revenue or \$1.5 billion in adjusted EBITDA for four consecutive fiscal quarters (providing significant stockholder value but failing to hit an operational milestone); or
- Musk led Tesla to revenue results that were approximately 15x Tesla's revenue in 2017, but the market did not value Tesla as a \$100 billion company (providing strong financial results but without nearly doubling the market capitalization).

In fact, Musk was paid nothing for more than two years under the Plan, as the first tranche did not vest until May 2020.²

The trial evidence will establish that the 2018 Plan is entirely fair. The Board followed an entirely fair process, led by an independent Compensation Committee, and culminating in approval by Tesla's disinterested stockholders. Through that process, the Board secured Musk's services at an entirely fair—and entirely contingent—price.

The process was robust. The Compensation Committee and the Board (with Musk and Kimbal Musk recused) carefully developed the Plan to pair the efforts of a one-of-a kind leader with a company that stood at the crossroads of survival and total failure. Board members spent approximately eight months considering and vetting potential plan terms with the aid of well-qualified outside advisors, including Compensia and Wilson Sonsini, and in consultation with major Tesla stockholders. They worked with key members of Tesla's management to understand the Company's roadmap and ambitious prospects. They negotiated with Musk for a series of stockholder-friendly provisions designed to further align his interests with Tesla's long-term stockholders. After releasing a 68-page Proxy

² JX1234.0049, Tesla Form DEF14-A (May 28, 2020).

detailing the terms of the Plan, the Board placed the final decision in the hands of Tesla's stockholders.

The 2018 Plan was designed with Musk in mind. The Plan designed and approved by the Board was not a typical pay package intended to compensate the ordinary executive for overseeing the day-to-day operations of a mature company. That is because Musk is not the typical CEO. Musk is intimately involved in all aspects of Tesla's operations, from its strategic direction to its product design. He has been instrumental in transforming Tesla from a high-end electric sports car manufacturer to far more than just a car company.

Musk has a proven track record of visionary, transformational leadership at Tesla and elsewhere. Despite the time and energy he has invested in Tesla, being Tesla's CEO has never been Musk's only job. When the 2018 Plan was approved, he was (and remains) co-founder, CEO, and Chief Technology Officer of SpaceX—a company critical to the success of NASA's space program and one of the most valuable private companies in the world. He also held (and holds) prominent founder and executive roles at several companies in the infrastructure, AI, and neurotechnology spaces.

Tesla's survival was uncertain in 2017. When the 2018 Plan was designed and approved, it was far from certain that Musk and Tesla would be able to achieve any, much less all, of the Plan's milestones. In 2017, Tesla was burning

cash; was facing an “existential crisis” with Model 3 production issues; had never been sustainably profitable; had never produced a mass-market vehicle; and was engaged in a “bet-the-company” effort to become the first company in nearly a century successfully to do so. The market harbored substantial doubt that Tesla would be able to overcome these obstacles, let alone achieve the explosive growth necessary to achieve the Plan’s milestones. During this time, Tesla was called “the most shorted stock in the US market” and contemporaneous market commentators doubted its path to success.³ Plaintiff’s own expert witness wrote in 2017 that “[n]one of [Tesla’s] bets appear particularly promising”⁴ and that even if Tesla became profitable, it would require a “boatload of faith” to justify even Tesla’s pre-Plan valuation.⁵

At this critical juncture, the Board knew Musk’s continued leadership was essential to Tesla’s survival; they also understood Musk was motivated by ambitious goals, perhaps uniquely so. Under Musk’s prior compensation plan (“2012 Plan”), which was also fully at risk, Musk had led Tesla from a \$3.6 billion company to a disruptive force in the auto industry, growing its valuation to

³ JX1385.0042-45, Gompers Rebuttal (quoting the *Financial Times*).

⁴ JX0575.0005, Vox (Aug. 1, 2017).

⁵ *Id.*

\$53 billion and surpassing traditional giants like GM and Ford. The 2012 Plan was nearing completion in 2017.

The 2018 Plan was audacious. The 2018 Plan was far bolder than the 2012 Plan. When Tesla’s disinterested stockholders approved the 2018 Plan, Tesla was the 244th largest company and the 7th largest automobile manufacturer in the world. Achieving the 2018 Plan’s outer tranche—a market capitalization of \$650 billion paired with exponential top- and bottom-line growth—would have made Tesla the 5th most valuable public company *in the world*, behind only established technology giants Apple, Amazon, Alphabet (Google), and Microsoft. And achieving even the 2018 Plan’s *first* tranche—a market capitalization of \$100 billion and at least one operational milestone—would require Tesla to double in market capitalization, becoming the world’s second most valuable automotive company. Even Plaintiff’s counsel agreed it is “pretty extraordinary” that Musk had to “bring the company to double market cap” before he saw “the first dollar from this plan”.⁶

Plaintiff’s theory seems to be that Tesla’s success was a foregone conclusion because Tesla’s internal projections showed it expected to realize three of the operational milestones within two years of the 2018 Plan.⁷ But the 2018

⁶ Mot. To Dismiss Tr. 108:21-109:5.

⁷ Verified Am. Compl. ¶¶ 154-163 (Mar. 2, 2022) (Dkt. No. 209) (“AC”).

Plan’s milestones were not “modest” incremental increases that were easily achievable based on Tesla’s then-current trajectory; they were huge goals that assumed extraordinary effort and execution from Musk and his Tesla team, consistent with optimistic and aspirational projections that assumed Musk’s leadership. The Committee, its advisors and disinterested market participants contemporaneously recognized that the Plan was very challenging.

The 2018 Plan has worked. As a result of Tesla’s extraordinary growth under Musk’s leadership, he has achieved 11 of the 12 tranches under the 2018 Plan. And Tesla’s disinterested stockholders have received more than 90% of the value created through Musk’s extraordinary efforts. As a Tesla stockholder, Plaintiff has been a direct beneficiary of the 2018 Plan (despite not casting a vote); his holdings have appreciated by more than 1,000% since 2018.⁸

Plaintiff claims that the Plan was unnecessary to incentivize Musk to devote his attention to Tesla and was instead a “spring-loaded” gift to Musk from Tesla’s allegedly conflicted and controlled Board. But compensation earned for driving extraordinary stockholder results is not a gift. At a critical juncture for the Company, the Plan motivated Musk to focus his exceptional talents on Tesla when Musk’s future with Tesla was uncertain, especially given his other interests and

⁸ JX1378, Tornetta Dep. 29:3-31:17, 77:1-81:13.

opportunities. Tesla’s Directors, themselves substantial Tesla stockholders (as well as fiduciaries), had no incentive to dilute themselves. And they were neither conflicted nor controlled. The Board supported the 2018 Plan because they believed it had the best chance of maximizing stockholder value and retaining Musk—a conclusion Tesla’s disinterested stockholders likewise reached when a vast majority approved the Plan. Their vote should be respected.

* * *

At the Motion to Dismiss stage, Plaintiff’s unfairness allegations, even accepted as true (as they must be), were “on the very outer margins of adequacy” and “cleared the bar, albeit just barely” for pleading purposes.⁹ Trial will establish that Plaintiff’s claims—based entirely on hindsight bias—are unsupported and that Plaintiff’s claims fail under any standard of review.

STATEMENT OF FACTS

A. Tesla Is a One-of-a-Kind Clean Energy Company

Tesla is a Delaware corporation headquartered in Austin, Texas.¹⁰ It was co-founded by Musk in 2003 as a small-scale startup; in 2008, it debuted its first product—the Tesla Roadster.¹¹ The first generation Roadster was a high-

⁹ Op. at 35, 37 (Sept 20, 2019) (Dkt. No. 32) (“MTD Op.”).

¹⁰ JX1427.0001, Tesla Form 8-K (Dec. 1, 2021).

¹¹ JX1544.0003, Tesla Form S-1 (Jan. 29, 2010).

performance, battery-powered electric sports car, produced in small quantities for a niche set of consumers. Yet from Tesla’s earliest days, Musk envisioned taking Tesla from a high-end electric sports car manufacturer to the world’s first (and only) vertically integrated clean energy company.¹² In 2006, Musk published the Tesla Motors Master Plan, announcing that Tesla’s mission is to accelerate the world’s transition to sustainable energy and to “expedite the move from a mine-and-burn hydrocarbon economy towards a solar electric economy”.¹³ The Master Plan also provided a roadmap: “Build sports car, use that money to build an affordable car, use *that* money to build an even more affordable car, while doing the above, also provide zero emission electric power generation options.”¹⁴

Over the past 16 years, under Musk’s stewardship, Tesla has fulfilled the Master Plan and—against all odds—become a profitable, massively valuable company. As of Tesla’s founding, there had not been a successful startup in the auto industry since Chrysler was founded in 1925.¹⁵ And with the exception of Ford, Tesla is the only American car manufacturer to have avoided bankruptcy.¹⁶

¹² JX1105.0004, Tesla FY 2018 Form 10-K (Feb. 19, 2019).

¹³ JX0048.0001, Master Plan.

¹⁴ *Id.* at .0004.

¹⁵ JX1386.0093, Murphy Opening.

¹⁶ JX1374, Musk Dep. 99:12-22; JX0274.0001, Master Plan, Part Deux.

Tesla has not only survived but thrived. Today, Tesla designs and manufactures electric vehicles (“EVs”), currently offering four cars: the Model S, Model 3, Model X, and Model Y.¹⁷ The Company sells innovative solar energy products and battery storage products.¹⁸ Tesla is the world’s largest manufacturer of EVs (in 2020, 23% of all EVs sold worldwide;¹⁹ and 79% of all new EVs registered in the U.S.²⁰); the largest manufacturer of lithium-ion batteries for use in EVs and stationary energy storage systems in the U.S. (accounting for more than 80% of domestic production capacity²¹); and among the largest domestic installers of solar energy systems.²² And Tesla, under Musk’s leadership, expects to accelerate further the world’s transition to sustainable energy.

Tesla’s operational growth under Musk’s leadership has been matched by tremendous stockholder value creation. Since its 2010 IPO, Tesla has grown from a market capitalization of less than \$2 billion to become one of the world’s

¹⁷ JX1440.0005, Tesla FY 2021 Form 10-K (Feb. 4, 2022).

¹⁸ *Id.* at .0006; JX1203.005, Tesla FY 2019 Form 10-K (Feb. 13, 2020).

¹⁹ JX1605.0001, Electrek (Feb. 6, 2021).

²⁰ JX1609.0001, Electrek (Mar. 17, 2022).

²¹ JX1608.0001, Visual Capitalist (Feb. 28, 2022); JX1606.0001, Clean Technica (Aug. 13, 2021).

²² JX1610.0001, Chris Crowell, *How Tesla Dropped to Fourth in U.S. Solar Market Share While Freedom Forever Gained*, Solar Builder (Mar. 30, 2022).

most valuable companies. Today, Tesla is valued in excess of \$690 billion, more than the market capitalizations of the next eight most valuable automobile manufacturers combined.

B. Elon Musk Is Tesla’s Visionary Leader and a Serial Successful Entrepreneur

Musk is Tesla’s co-founder and longtime Board member. He personally invested millions in Tesla’s early financing rounds.²³ He has served as Tesla’s CEO and Chief Product Architect since 2008. As of the 2018 Plan, Musk was Tesla’s largest stockholder and beneficially owned 21.9% of the outstanding shares of Tesla common stock.²⁴ Since 2012, Musk has been compensated entirely through purely performance-based stock option awards.²⁵ He has never accepted a guaranteed salary for his service as Tesla’s CEO (aside from a nominal \$1 payment).

Musk is one of the world’s most accomplished technology entrepreneurs. He founded Zip2, an internet technology company, in 1995 (when he was 24 years old).²⁶ In 1999, he sold Zip2 for approximately \$300 million to

²³ JX1386.0011-12, Murphy Opening.

²⁴ Answer ¶ 10; JX0878.0024, 2018 Proxy.

²⁵ JX0878.0009, 2018 Proxy.

²⁶ JX1544.0128, Tesla Form S-1 (Jan. 29, 2010).

Compaq,²⁷ and founded X.com, which became PayPal.²⁸ Musk and his co-founders sold PayPal to eBay for approximately \$1.5 billion in 2002.²⁹

In 2002, Musk founded SpaceX, an aerospace manufacturer and provider of space transportation and communications services, which is today one of the world's most valuable private companies.³⁰ Since SpaceX's founding, Musk has served as its CEO, CTO, and Chairman. Between 2015 and 2016, Musk founded (or co-founded) Neuralink, a neurotechnology company that develops implantable brain-machine interfaces; OpenAI, an artificial intelligence research laboratory; and The Boring Company, an infrastructure and tunnel construction company.³¹

C. Tesla's Directors Are Experienced and Sophisticated

When Tesla's Board approved the 2018 Plan (subject to the disinterested stockholders' approval), there were nine members,³² all distinguished business people with more than 200 years of collective experience leading

²⁷ *Id.*

²⁸ JX0214.0003-06, Vance, Ashlee, *Elon Musk: Tesla, SpaceX, and the Quest for a Fantastic Future* (2d ed. 2017).

²⁹ *Id.*

³⁰ JX1544.0001, Tesla Form S-1 (Jan. 29, 2010).

³¹ JX1474.0016, Tesla Form DEF14A (June 23, 2022).

³² JX0791.0001, Board Minutes (Jan. 21, 2018).

businesses worldwide. The Board was intimately familiar with Tesla's operations, growth prospects, and the challenges it faced. Each Director was a Tesla stockholder whose interests directly aligned with other Tesla stockholders.³³ And each voting Director approved the Plan.³⁴

1. The Compensation Committee

The Compensation Committee led the 2018 Plan process. It was comprised of four independent directors: Committee Chair Ira Ehrenpreis, Robyn Denholm, Brad Buss, and Antonio Gracias.³⁵

Ira Ehrenpreis is a prominent venture capitalist and experienced investor in the energy innovation sector. He earned a B.A. from UCLA and a JD/MBA from Stanford. Ehrenpreis is currently a founder and managing partner of DBL Partners, a leading venture capital firm that focuses on companies with sustainable energy profiles. Previously, he was managing partner of Technology Partners, a lead investor in Tesla's pre-IPO financing rounds; he joined Tesla's

³³ JPTO ¶¶ 63, 80, 86, 90, 108, 123, 128, 135, 144.

³⁴ JPTO ¶ 233. As noted below, Elon and Kimbal Musk were recused from the vote and Jurvetson was on leave at the time.

³⁵ JX0878.0033, 2018 Proxy.

Board in connection with that investment.³⁶ As of the 2018 Plan, Ehrenpreis and funds he managed beneficially owned 89,540 Tesla shares (including options).³⁷

Brad Buss is an experienced corporate finance executive and has served on the boards of several leading technology and manufacturing companies, including Advance Auto Parts and Cavium. Buss also served as the CFO of SolarCity from August 2014 through February 2016.³⁸ As of the 2018 Plan, Buss beneficially owned 140,123 Tesla shares (including options).³⁹

Robyn Denholm is a corporate finance and operations executive who has served on the boards of leading technology companies, including ABB and Echelon Corporation. She has been a member of the Tesla Board since August 2014 and Chair since November 2018.⁴⁰ As of the 2018 Plan, Denholm beneficially owned 99,110 Tesla shares (including options).⁴¹

Antonio Gracias, a graduate of Georgetown and the University of Chicago, is an experienced private equity investor and operator with extensive

³⁶ JX1372, Ehrenpreis Dep. 399:17-400:1; 401:15-402:1.

³⁷ JPTO ¶ 90.

³⁸ *Id.* ¶ 78.

³⁹ *Id.* ¶ 80.

⁴⁰ *Id.* ¶¶ 82-83.

⁴¹ *Id.* ¶ 86.

experience in high-growth technology and manufacturing investing. Gracias is the founder of Valor Equity Partners, a lead investor in Tesla's pre-IPO financing rounds.⁴² He served on Tesla's Board from 2007 to 2021 and was Lead Independent Director from 2010 to 2019.⁴³ As of the 2018 Plan, Gracias and funds he managed beneficially owned 483,939 Tesla shares (including options).⁴⁴

2. Tesla's Other Directors

When the Tesla Board approved the Plan, James Murdoch, Linda Johnson Rice, Steve Jurvetson, Kimbal Musk, and Elon Musk were also members of the Board.

James Murdoch is an experienced chief executive who has served on the boards of leading companies, including 21st Century Fox, Sky, News Corp., GlaxoSmithKline and Sotheby's. As of the 2018 Plan, Murdoch beneficially owned 10,485 Tesla shares (including options).

Linda Johnson Rice is an experienced chief executive and director who has served on the boards of leading media and technology companies. As of

⁴² *Id.* ¶ 100.

⁴³ *Id.* ¶¶ 98-99; JX1362, Gracias Dep. 35:1-2; JX1234.0016, Tesla DEF14A (May 28, 2020).

⁴⁴ JPTO ¶ 108.

the 2018 Plan, Johnson Rice held options to purchase approximately 16,668 Tesla shares.⁴⁵

Steve Jurvetson is a prominent venture capitalist and experienced technology investor. He was on a leave of absence from the Board during its consideration of the 2018 Plan and therefore did not vote on the Plan.⁴⁶

Kimbal Musk, Elon Musk's brother, is an experienced entrepreneur in the technology, culinary and non-profit sectors. Kimbal was recused from all consideration of the 2018 Plan.⁴⁷

Plaintiff's claims against Kimbal and Jurvetson have been dismissed with prejudice.⁴⁸

Elon Musk was recused from all consideration of the Plan.

D. 2017 Was a Pivotal Year for Tesla and Musk's Future at the Company Was Uncertain

2017 was a make-or-break year for Tesla. Tesla's long-term success depended on its ability to profitably produce Model 3 (its affordable electric car), a key step in Tesla's original Master Plan. In addition to its Fremont factory, Tesla had invested approximately \$2 billion in building its first Gigafactory (a massive

⁴⁵ *Id.* ¶ 128.

⁴⁶ *Id.* ¶ 133; JX0791.0001, Board Minutes (Jan. 21, 2018).

⁴⁷ JX1352, Kimbal Dep. 174:3-4.

⁴⁸ Stipulation & Order (Oct. 27, 2021) (Dkt. No. 171).

lithium-ion battery and vehicle component factory in Nevada); by early 2017, Tesla had almost half a million customer deposits for Model 3s.⁴⁹ Tesla's success hinged on its ability to ramp Model 3 production.⁵⁰

The market knew Tesla was at an inflection point. As of 2017, Tesla was the most shorted stock in the U.S. market; investors doubted whether Tesla would survive.⁵¹ For example, Plaintiff's expert Brent Goldfarb contemporaneously wrote that Tesla's valuation was the product of a bubble⁵² and its "probability of failure must be high".⁵³

At that time, Musk's continued leadership of Tesla was far from certain. He had publicly stated that he was considering stepping down as CEO following Model 3's introduction.⁵⁴ As Musk has testified, he would "have gladly given up the role to someone else" who could do the job.⁵⁵ And he held prominent

⁴⁹ JX1412, Murphy Dep. 95:13-96:12.

⁵⁰ *Id.* at 85:13-94:2; JX1374, Musk Dep. 99:7-22, 100:1-3, 136:4-21.

⁵¹ JX1385.0042-45, Gompers Rebuttal.

⁵² JX1037.0002, Vox (May 30, 2018).

⁵³ JX0575.0007, Vox (Aug. 1, 2017).

⁵⁴ JX0840.0001, DealBook New York Times (Jan. 23, 2018).

⁵⁵ JX1374, Musk Dep. 222:21-223:11.

roles at other companies where he could spend less time on the “production hell” and focus on his passions of design, engineering, and space exploration.

E. The 2012 Plan Had Largely Served Its Purpose by 2017

At the very moment Tesla needed Musk’s leadership, Musk’s prior compensation plan had nearly run its course. The 2012 Plan, a purely performance-based plan developed by the Board with Compensia’s assistance, consisted of 10 equal tranches of Tesla stock options, each vesting only if Tesla achieved both a market capitalization milestone and an operational milestone.⁵⁶

The 2012 Plan was bold. Each tranche required Musk to increase Tesla’s market capitalization by \$4 billion—an increment greater than Tesla’s entire market capitalization when the Board approved the plan (approximately \$3.2 billion).⁵⁷ The operational milestones required Tesla, under Musk’s leadership, to accomplish specified product-related goals, such as developing and launching Model X and Model 3, and reaching aggregate production of 300,000 vehicles.⁵⁸ The 2012 Plan was “viewed at the time as very difficult to achieve”.⁵⁹

⁵⁶ JX0154.0026, 2013 Proxy.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ JX0878.0041, 2018 Proxy.

The 2012 Plan worked, as illustrated by the chart below.⁶⁰ In only five years, Tesla’s market capitalization grew by over 15x from \$3.2 billion to \$53 billion, creating \$50 billion in stockholder value.⁶¹

COMPARISON OF 2012 AND 2018 CEO PERFORMANCE AWARDS		
	2012 AWARD	2018 AWARD
% COMPENSATION AT-RISK	100%	100%
MARKET CAPITALIZATION AT TIME OF AWARD	\$3.2 Billion	\$59 Billion
% OUTSTANDING SHARES VESTING PER TRANCHE	0.5%	1.0%
MARKET CAPITALIZATION INCREMENT PER TRANCHE	\$4 Billion	\$50 Billion ¹
OPERATIONAL MILESTONES	Primarily Product Development	Revenue and Adjusted EBITDA
NUMBER OF TRANCHEs	10	12
POST-EXERCISE HOLD PERIOD	---	5 Years
TOTAL SHAREHOLDER VALUE CREATED AT FINAL MARKET CAP MILESTONE	\$40 Billion	~\$600 Billion

(1) Each tranche, other than the first, requires an additional \$50 billion in market capitalization; 1st tranche milestone is \$100 billion; last tranche is \$650 billion

Under the 2012 Plan, Tesla’s increase in value was matched by significant operational growth: Tesla (i) successfully launched Model S (an award-

⁶⁰ *Id.* at .00013.

⁶¹ Tesla’s market capitalization was approximately \$59 billion as of the Proxy (February 2018) (as shown in the chart below) and \$53 billion as of the stockholder approval (March 2018).

winning⁶² and top-selling luxury sedan in markets around the world⁶³);
(ii) developed and launched Model X (an innovative all-electric SUV);
(iii) designed, launched and began to produce Model 3 (Tesla’s “affordable, high volume car”); and (iv) increased its total annual vehicle production from approximately 3,000 total vehicles in 2012⁶⁴ to more than 250,000 vehicles in 2017.⁶⁵

Tesla’s accomplishments under the 2012 Plan required extraordinary effort from Musk. Just to name a few examples, Musk moved his desk to the production line, routinely slept at the factory during a particularly difficult period, and personally tested Model Xs to ensure that Tesla was able to overcome the quality control issues it was experiencing during the production ramp.⁶⁶

As of March 31, 2017, Musk had achieved the market capitalization and operational milestones for seven of the tranches in the 2012 Plan, and two

⁶² JX1604.0001, InsideEVs (July 11, 2019).

⁶³ JX1600.0001, Fortune (Feb. 11, 2016); JX1601, Forbes (Apr. 6, 2016).

⁶⁴ JX0147.0004, Tesla FY 2012 10-K (Mar. 7, 2013).

⁶⁵ JX1105.0045, Tesla FY 2018 10-K (Feb. 19, 2019).

⁶⁶ JX0260.0001, Business Insider (May 9, 2016).

additional operational milestones were considered “probable of achievement” (for accounting purposes) in the near future.⁶⁷

F. The Board Considers a New Plan To Secure Musk’s Leadership for the Long Term and Embarks on a Robust Process To Develop the Plan

In April 2017, with the 2012 Plan nearing completion, and with apprehension about securing Musk’s services for the future as Tesla confronted existential challenges to its success, Ehrenpreis contacted Musk to understand what it would take for Musk to make another long-term commitment to Tesla.⁶⁸ Musk reiterated his interest in stepping back from the CEO role after the Model 3 launch, but expressed willingness to re-commit to Tesla if the Board designed another purely performance-based compensation plan that, like the 2012 Plan, tied his compensation to Tesla’s growth and stockholder value.⁶⁹ Ehrenpreis began brainstorming a new compensation plan that would emphasize stockholder alignment and at-risk compensation like the 2012 Plan but that was significantly more ambitious and reflected Tesla’s then-current business strategy and financials.⁷⁰

⁶⁷ JX0396.0023, Tesla Form 10-Q (May 9, 2017).

⁶⁸ JX1372, Ehrenpreis Dep. 37:2-20.

⁶⁹ *Id.* at 54:8-56:14.

⁷⁰ *Id.* at 52:15-56:14.

At a June 6, 2017 Board meeting, Ehrenpreis updated the Board “on the status and near fulfillment” of the 2012 Plan and that “plans were underway to design [Musk’s] next compensation program”.⁷¹ Under Ehrenpreis’s direction, Tesla management took steps to begin the process of developing the 2018 Plan, including organizing initial meetings with qualified compensation consultants to advise on the Plan.⁷²

On June 23, 2017, the Compensation Committee met to discuss a potential new compensation plan for Musk.⁷³ The Committee discussed the success of the 2012 Plan and the importance of Musk as “a key driver of [Tesla]’s success”.⁷⁴ The Committee concluded that “it would be in Tesla’s interest, and in the interest of its stockholders to structure a compensation package that would keep [him] as the Company’s fully-engaged CEO”.⁷⁵

The Committee also discussed advisors for the Plan. For outside counsel, the Committee engaged Wilson Sonsini.⁷⁶ For a compensation consultant,

⁷¹ JX0407.0002, Board Minutes (June 6, 2017).

⁷² JX1372, Ehrenpreis Dep. 13:22-14:1, 208:11-210:6; JX0421, June 19, 2017 Email.

⁷³ JX0439.0001, Comp. Committee Minutes (June 23, 2017).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at .0002.

the Committee discussed the pros and cons of three compensation consultant options and decided to engage Compensia because of, among other reasons, Compensia's experience with the 2012 Plan.⁷⁷ The Board also retained Aon to provide accounting advisory services for the Plan.⁷⁸

Following the meeting, the Compensation Committee formed the CEO Equity Award Working Group, which included the Compensation Committee, outside advisors and key members of Tesla management.

Over the next seven months, the Board and their advisors worked to develop a new compensation plan that would (i) completely align Musk's interests with those of Tesla stockholders; (ii) incentivize Musk to remain committed to Tesla; (iii) push him to deliver tremendous increases in market capitalization; and (iv) promote Tesla's long-term financial stability.

Under Ehrenpreis's leadership, the Board's process included, among other things:

- Seven Compensation Committee meetings (one attended by the full Board except Elon and Kimbal) featuring robust discussions of the Plan's design, detailed presentations from Tesla's outside advisor Compensia, and extensive conversations about how to best motivate Musk;⁷⁹

⁷⁷ *Id.*

⁷⁸ JX1267.010-14; JX0456.0001 June 26, 2017 Email.

⁷⁹ Compensation Committee Minutes: JX0439.0001 (June 23, 2017); JX0511.0001 (July 7, 2017); JX0571.0001 (Aug. 1, 2017); JX0597.0002 (Aug. 14,

- Four meetings of the full Board (with Elon and Kimbal recused) building on the work of the Compensation Committee;⁸⁰
- Four formal meetings of the CEO Equity Award Working Group (as well as numerous discussions between meetings) to drill down on specifics of the Plan and develop a framework that would be maximally stockholder-friendly and promote sustainable, organic growth of the Company;⁸¹
- Discussions with some of Tesla's largest institutional stockholders to obtain their feedback on the 2012 Plan and any new compensation package for Musk, including regarding the milestones; and
- Negotiations with Musk regarding the Plan's terms, including the number of options to be awarded and a holding period applicable to any shares received.

The following chart identifies the Director and advisor attendance at each formal meeting where the 2018 Plan was discussed:

2017); JX0617.0002 (Sept. 8, 2017); JX0663.0003 (Nov. 9, 2017); JX0697.0003 (Dec. 8, 2017).

⁸⁰ Board Minutes: JX0407.0002 (June 6, 2017); JX0635.0001 (Sept. 19, 2017); JX0669.0001 (Nov. 16, 2017); JX0729.0001 (Dec. 12, 2017); JX0791.0001 (Jan. 21, 2018); JX0948.0002 (Mar. 13, 2018).

⁸¹ Working Group Emails/Invites: JX456.0001; JX0475.0001; JX0494.0001; JX0514.0001; JX0532.0001; JX0581.0001; JX1267.0010, Responses 2, 3.

**Tesla Board Meetings Where 2018 Plan Was Discussed
June 2017 – January 2018**

Date	Board Members in Attendance									Advisors Present	
	Buss	Denholm	Gracias	Ehrenpreis	Murdoch	Rice	Jurvetson	E. Musk	K. Musk	WSGR	Compensia
06/06/17 (B)	X	X	X	X			X	X	X		
06/23/17 (CC)	X	X	X	X							
07/07/17 (CC)	X	X	X	X						X	X
08/01/17 (CC)	X	X	X	X	X*	X*	X*			X	X
08/14/17 (CC)	X	X	X	X							
09/08/17 (CC)	X	X	X	X							
09/19/17 (B)	X	X	X	X	X	X	X			X	X
11/09/17 (CC)	X	X	X	X							
11/16/17 (B)	X	X	X	X	X	X				X	X
12/08/17 (CC)	X	X	X	X							
12/12/17 (B)	X	X	X	X	X	X				X	X
01/21/18 (B)	X	X	X	X	X	X				X	X

Asterisk (*) signifies the individual was an observer. "B" denotes a meeting of the Board. "CC" denotes a meeting of the compensation committee.

Sources: TSLA-Tornetta-0318776; TESLA0000001; TSLA-Tornetta-0303826; TSLA-Tornetta-0303902; TSLA-Tornetta-0303616; TSLA-Tornetta-0303908; TSLA-Tornetta-0303905; TSLA-Tornetta-0303822; TSLA-Tornetta-0303968; TESLA0000269; TSLA-Tornetta-0316944.

G. Tesla Internally Develops Financial Projections and Publicly Discloses Certain Metrics

As the Board and its advisors were developing the 2018 Plan, Tesla management was considering a debt offering in connection with the significant expenditure of Model 3 production. In anticipation of this offering, Tesla sought to secure a credit rating from S&P and Moody's.

Like many companies, Tesla develops internal projections in the ordinary course of business. Specifically, Tesla develops internal one-year and three-year financial projections to help management and the Board “develop clarity” on Tesla’s “product road map”, scaling and investment strategy, and plans “to bring . . . products to market”.⁸²

⁸² JX1336, Ahuja Dep. 324:13-327:3.

Tesla’s forecasting process—for internal projections and public disclosures—involves setting aspirational “stretch targets” of the “best projection of what [the company] could do”, assuming that “Elon is engaged immensely and he’s contributing immense value”.⁸³ Tesla’s projections thus involve a “huge degree of risk . . . in terms of the challenges and the work ahead for the company and Elon to deliver these projections”.⁸⁴ Tesla approaches projections with this philosophy because “if you have two sets of targets”, people “won’t actually try to meet the real target, which is the stretch target”.⁸⁵

In July 2017, Tesla management updated its three-year financial projections (“July 2017 Projections”) to share them with S&P and Moody’s.⁸⁶ The July 2017 Projections estimated (in billions)⁸⁷:

	2018	2019	2020
Revenue	\$27.4	\$41.9	\$69.6
Adjusted EBITDA	\$3.8	\$8.1	\$14.4

⁸³ *Id.* at 338:24-339:3, 359:9-16, 407:20-408:2.

⁸⁴ *Id.* at 375:20-376:4; *see* JX1374, Musk Dep. 197:17-18.

⁸⁵ JX1362, Gracias Dep. 296:9-23, 299:9-10.

⁸⁶ JX0529.0001-22, Tesla Credit Output Spreadsheet; *see* JX1602.0001, July 15, 2017 Email, *et al.*; JX0573.0001-13, Tesla 2017-2020 Financial Plan (July 2017); JX1374, Musk Dep. 189:25-190:10.

⁸⁷ JX1468.0055-56, Gompers Surrebuttal, Ex. 1.

Because Tesla operates from a single set of financial projections, the July 2017 Projections shared with the credit rating agencies were consistent with Tesla's public disclosures at the time. For example, on its Q1 2017 earnings call, Tesla disclosed its goal to deliver 500,000 vehicles in 2018 and 1 million by 2020.⁸⁸ Tesla's vehicle projections are a key input underlying its financials.⁸⁹

In December 2017, as the Board was finalizing the 2018 Plan terms, Tesla updated its projections for 2018 ("December 2017 Projections") to reflect, among other things, the difficulties Tesla was experiencing with the Model 3 production ramp.⁹⁰ Compared to the July 2017 Projections, the December 2017 Projections forecast lower 2018 vehicle deliveries and total revenue (\$27.4 billion), but higher adjusted EBITDA (\$4.3 billion) as a result of different pricing assumptions, among other factors.⁹¹

Consistent with its internal December 2017 Projections, Tesla publicly disclosed the difficulties it was experiencing with the Model 3 production ramp. For example, on November 1, 2017, Tesla disclosed that it expected to

⁸⁸ JX0390.0008, Q1 2017, Tesla Earnings Call (May 3, 2017).

⁸⁹ JX1485, Gompers Dep. 189:20-190:1.

⁹⁰ *See* JX0658.0004-5, Tesla Form 8-K (Nov. 1, 2017).

⁹¹ JX0749.0001, Dec. 18, 2017 Email; JX0751.0002-23, Tesla Board Materials, 2018 Operating Plan (Dec. 12, 2017).

reach a weekly production rate of 5,000 Model 3s by late Q1 2018, rather than in 2017, as previously disclosed.⁹²

H. The Board Finalizes the 2018 Plan

On January 21, 2018, the Compensation Committee presented the proposed terms of the 2018 Plan to the Board. Like the 2012 Plan, the 2018 Plan is purely performance-based. The 2018 Plan offers Musk the opportunity to secure 12 total tranches of options, each representing 1% of Tesla's total outstanding shares as of January 21, 2018; the Plan requires both a market capitalization milestone and an operational milestone for any tranche of options to vest.⁹³ Each market capitalization milestone requires an increase of \$50 billion (greater than the market capitalizations of both Ford and GM at the time), and 12x the increase required for each tranche in the 2012 Plan.⁹⁴ The market capitalization milestones must be sustained for (1) a six calendar month trailing average and (2) a 30 calendar day trailing average (both based on trading days). The operational milestones require Tesla to achieve either adjusted EBITDA targets (\$1.5-\$14

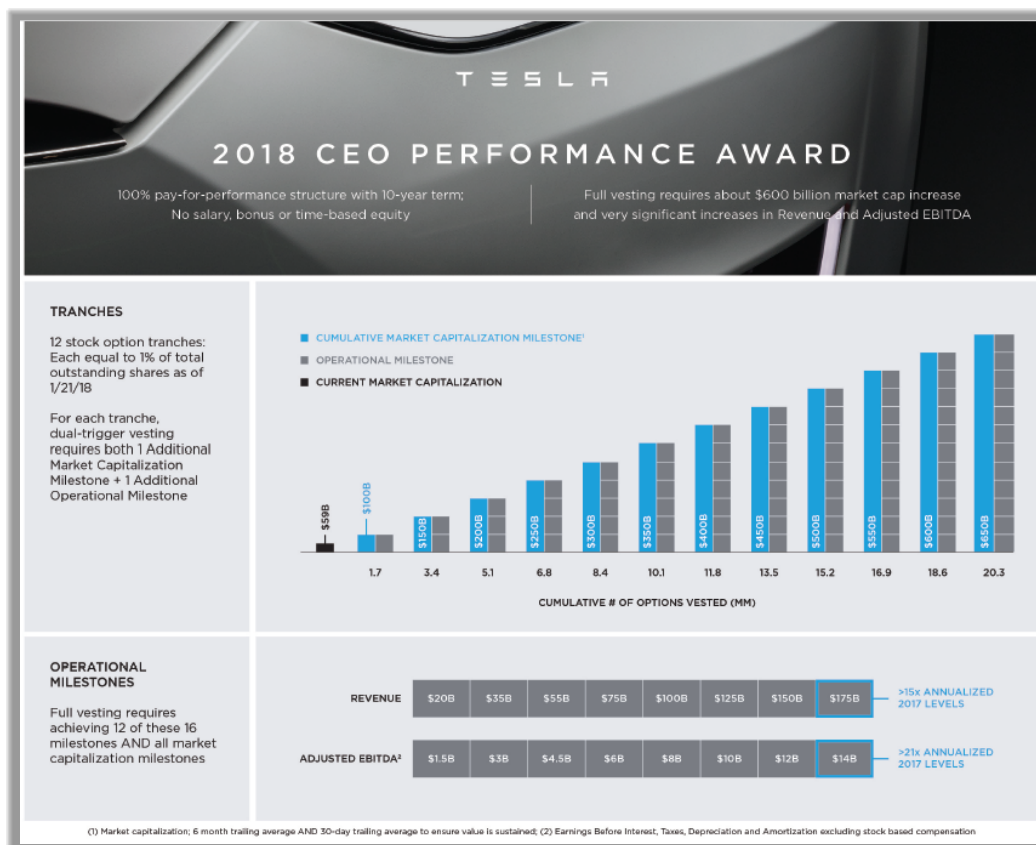
⁹² Compare JX0658.0004, Tesla Form 8-K (Nov. 1, 2017), with JX0577.0004, Tesla Form 8-K (Aug. 2, 2017).

⁹³ JX0878.0014, 2018 Proxy.

⁹⁴ JX0878.0013, 2018 Proxy.

billion) or revenue targets (\$20-\$175 billion) for four consecutive fiscal quarters.⁹⁵

The key terms are set out in the below graphic⁹⁶:



In addition to the ambitious market capitalization and operational milestones, the Board secured additional terms designed to further align Musk’s interests with Tesla stockholders and incentivize his long-term commitment to the Company. The 2018 Plan includes:

- A five-year post-exercise holding period.

⁹⁵ JX0878.0015, 2018 Proxy.

⁹⁶ JX0761.0001, Infographic.

- An employment requirement for continued vesting under which Musk must remain (1) Tesla’s CEO or (2) Executive Chairman and Chief Product Officer. If Musk is employed at Tesla in any other role, he will no longer be able to vest under the 2018 Plan.
 - A provision stating that upon a change in control where Tesla is acquired, vesting of milestones under the 2018 Plan will be based solely on the market capitalization milestones and will not require the achievement of a matching operational milestone. This provision is intended to align Musk’s interests with Tesla’s other stockholders with respect to evaluating potential takeover offers.
 - A provision pursuant to which vesting of the 2018 Plan is subject to a clawback in the event that financial statements are restated in a way that a tranche would not have otherwise vested.
 - A provision requiring the market capitalization and operational milestones be adjusted higher to account for acquisition activity that could be considered material to the achievement of the milestones. This term is designed to ensure that Musk is invested in Tesla’s organic growth.
- I. The Board Approves the 2018 Plan Subject to the Stockholder Vote**

With Elon and Kimbal Musk recused, and Jurvetson on leave, the Board approved the 2018 Plan on January 21, 2018.⁹⁷ Although neither NASDAQ rules nor Delaware law required it, the Board expressly conditioned the 2018 Plan on approval by a majority of Tesla’s disinterested voting stockholders (excluding shares held by Elon and Kimbal Musk).⁹⁸

⁹⁷ JX0791.0001, Board Minutes (Jan. 21, 2018).

⁹⁸ JX0878.0026, 2018 Proxy.

J. The Board Issues a Detailed Proxy Regarding the 2018 Plan

On February 8, 2018, in advance of the March 21, 2018 stockholder vote, Tesla filed a 68-page definitive Proxy.⁹⁹ The Proxy provided detailed information concerning the 2018 Plan, including its terms, purpose, structure, potential cost, and the process by which the Board developed it.

The Proxy disclosed (and further explained) the 2018 Plan's terms, including the market capitalization and operational milestones required for each tranche to vest¹⁰⁰:

Table 1. Vesting Requirements for Performance-Based Option.			
Tranche #	Number of Shares Subject to Option	Market Capitalization Milestones ²	Vesting Requirements ¹
			Operational Milestones ²
1	1,688,670	\$100,000,000,000	Achievement of any 1 of the 16 milestones listed in Table 2
2	1,688,670	\$150,000,000,000	Achievement of any 2 of the 16 milestones listed in Table 2
3	1,688,670	\$200,000,000,000	Achievement of any 3 of the 16 milestones listed in Table 2
4	1,688,670	\$250,000,000,000	Achievement of any 4 of the 16 milestones listed in Table 2
5	1,688,670	\$300,000,000,000	Achievement of any 5 of the 16 milestones listed in Table 2
6	1,688,671	\$350,000,000,000	Achievement of any 6 of the 16 milestones listed in Table 2
7	1,688,670	\$400,000,000,000	Achievement of any 7 of the 16 milestones listed in Table 2
8	1,688,670	\$450,000,000,000	Achievement of any 8 of the 16 milestones listed in Table 2
9	1,688,670	\$500,000,000,000	Achievement of any 9 of the 16 milestones listed in Table 2
10	1,688,670	\$550,000,000,000	Achievement of any 10 of the 16 milestones listed in Table 2
11	1,688,670	\$600,000,000,000	Achievement of any 11 of the 16 milestones listed in Table 2
12	1,688,671	\$650,000,000,000	Achievement of any 12 of the 16 milestones listed in Table 2
Total:	20,264,042		

Table 2. Operational Milestones.		
	Operational Milestones ²	
	Revenue-Based Operational Milestones	Adjusted EBITDA-Based Operational Milestones
\$20,000,000,000	\$	1,500,000,000
\$35,000,000,000	\$	3,000,000,000
\$55,000,000,000	\$	4,500,000,000
\$75,000,000,000	\$	6,000,000,000
\$100,000,000,000	\$	8,000,000,000
\$125,000,000,000	\$	10,000,000,000
\$150,000,000,000	\$	12,000,000,000
\$175,000,000,000	\$	14,000,000,000

⁹⁹ JX0878.0001, 2018 Proxy.

¹⁰⁰ JX0878.0053, 2018 Proxy.

If all tranches of the 2018 Plan were achieved, the Proxy explained, Tesla would be “one of the most valuable companies in the world with a market capitalization of at least \$650 billion—more than 10x today’s value”.¹⁰¹ And it disclosed that Tesla stockholders would realize over 90% of the value accrued to Tesla should Musk successfully lead Tesla to achieve all 12 tranches¹⁰²:

Total Tranches Earned	Proposed Grant (12%)			
	CEO Value Realized (\$B)	Shareholder Value Realized (\$B)	% of Value Realized by CEO via Award	% of Value Realized to Shareholders
0 Tranches	\$ 0.0	<\$ 40.9	0.0%	100.0%
2 Tranches	\$ 1.4	\$ 90.9	1.6%	98.4%
4 Tranches	\$ 6.3	\$190.9	3.3%	96.7%
8 Tranches	\$25.3	\$390.9	6.5%	93.5%
12 Tranches	\$55.8	\$590.9	9.4%	90.6%

The Proxy disclosed that the 2018 Plan was based on the 2012 Plan.¹⁰³ It described Tesla’s growth under the 2012 Plan and explained that Musk and Tesla had achieved all but one of the milestones set forth in the 2012 Plan before the expiration of its 10-year term, even though the 2012 “milestones were viewed at the time as very difficult to achieve”.¹⁰⁴

¹⁰¹ JX0878.0003, 2018 Proxy.

¹⁰² JX0878.0024, 2018 Proxy.

¹⁰³ JX0878.0008-10, 2018 Proxy.

¹⁰⁴ *Id.*

While the 2018 Plan’s milestones were “challenging”, “ambitious” and based on “stretch goals”, the Proxy conveyed that they were ultimately considered “attainable” under Musk’s continued leadership.¹⁰⁵ The Proxy further disclosed that the Board had conditioned the 2018 Plan on the approval of Tesla’s disinterested voting stockholders, explaining that it “will be effective only if approved by a majority of the total votes of shares of Tesla common stock not owned [by Elon or Kimbal Musk] . . . cast in person or by proxy”.¹⁰⁶

K. Tesla Updates Its Financial Projections

In March 2018, Tesla updated its three-year financial projections (“March 2018 Projections”),¹⁰⁷ which it again shared with S&P and Moody’s as part of their ongoing review of the Company.¹⁰⁸ Compared to the 2017 projections, Tesla’s March 2018 Projections (in billions) reflected lower vehicle deliveries, revenue, and adjusted EBITDA for 2018 and 2019, demonstrating, among other things, Tesla’s continued challenges with the Model 3 production ramp.¹⁰⁹

¹⁰⁵ *Id.* at .0004, .0023.

¹⁰⁶ *Id.* at .0026.

¹⁰⁷ JX0952.0001 Mar. 13, 2018 Email; JX0953, Tesla Board Materials (Mar. 13, 2018).

¹⁰⁸ JX1603 (to S&P); JX0973 (to Moody’s).

¹⁰⁹ JX0973 (to Moody’s).

	2018	2019	2020
Revenue	\$23.4	\$35.2	\$68.1
Adjusted EBITDA	\$2.1	\$5.8	\$11.4

Consistent with its internal March 2018 Projections, Tesla publicly disclosed its continued difficulties with the Model 3 ramp,¹¹⁰ as well as updates to its vehicle gross margin expectations¹¹¹ and growth and gross margin expectations for Tesla’s energy business.¹¹²

L. Following Extensive Disclosures and Market Commentary, Tesla’s Disinterested Stockholders Approve the 2018 Plan

On March 21, 2018, Tesla’s disinterested voting stockholders overwhelmingly approved the 2018 Plan, with 73% of disinterested shares voting in favor.¹¹³ At the time, approximately 60% of Tesla’s stock was held by sophisticated institutional investors with fiduciary duties to their own clients.¹¹⁴

Tesla’s disinterested stockholders approved the 2018 Plan despite publicly available “vote against” recommendations from proxy advisory services ISS and Glass Lewis. ISS stated that it believed the 2018 Plan’s “design and terms

¹¹⁰ JX0870.0007, Tesla Form 8-K (Feb. 7, 2018).

¹¹¹ JX0870.0010; JX0871.0008, Thomson Reuters, TSLA – Q4 2017, Tesla Earnings Call (Feb. 7, 2018).

¹¹² JX0870.0011, Tesla Form 8-K (Feb. 7, 2018).

¹¹³ JX0979, Tesla Form 8-K (Mar. 21, 2018).

¹¹⁴ JX1468.0040-41, Gompers Surrebuttal ¶ 72.

carry a number of risks that, when coupled with [the Plan’s] unparalleled magnitude, overshadow the underlying rationale for the grant.”¹¹⁵ Similarly, Glass Lewis told stockholders that “while the significant rigor of the award [was] clear, we ultimately consider potential costs, and moreover, the dilutive impact of the grant to be too great.”¹¹⁶ Glass Lewis further noted that “the lower tiers of the goals are relatively much more attainable” given the Plan’s 10-year term, “potentially allowing for sizable payments without commensurately exceptional achievement”.¹¹⁷

Both proxy advisors recognized that the Plan was audacious. ISS stated that achieving it would require “significant and perhaps historic achievements” and “significant growth”.¹¹⁸ Glass Lewis recognized that achieving the 2018 Plan would “require growth in multiples” that “appear stretching by any benchmark”, including operational milestones “set at 15 to 21 times last fiscal year results” and market capitalization milestones that “require double-digit growth to a size comparable to the largest publicly traded US firms”.¹¹⁹

¹¹⁵ JX0983, ISS Proxy Paper (Mar. 21, 2018).

¹¹⁶ JX0931, Glass Lewis Proxy Paper (Feb. 28, 2018).

¹¹⁷ *Id.*

¹¹⁸ JX0983, ISS Proxy Paper (Mar. 21, 2018).

¹¹⁹ JX0931, Glass Lewis Proxy Paper (Feb. 28, 2018).

M. Tesla Prospers Under the 2018 Plan

Under Musk's leadership, Tesla has grown exponentially in the years following the 2018 Plan. In only four years, Tesla's market capitalization has increased more than 13x, from \$53 billion to over \$690 billion.

The success, however, was not immediate. Tesla missed the ambitious forecasts in the March 2018 Projections (which were lower than the July and December 2017 Projections).¹²⁰ Tesla's actual 2018 revenue was nearly \$2 billion lower than Tesla's March 2018 Projections (the lowest of the three), while Tesla's actual 2019 and 2020 revenues were 41% and 55% less, respectively, than the revenues forecasted in Tesla's March 2018 Projections.¹²¹ Similarly, Tesla did not hit its adjusted EBITDA projections in 2019 and 2020.¹²² Accordingly, the Plan's first tranche did not vest until May 2020.¹²³ Musk was not paid for more than two years under the Plan.

Eventually, under Musk's leadership, Tesla successfully navigated its manufacturing and other challenges and the market capitalization exponentially increased. Tesla's massive value increase is grounded in significant operational

¹²⁰ JX1362, Gracias Dep. 296:9-23, 299:9-10.

¹²¹ JX1402.0055, Murphy Rebuttal.

¹²² JX1468.0017, Gompers Surrebuttal ; JX1323.0007 (Tesla Form 8-K EX-99.1 filed Jan. 27, 2021).

¹²³ JX1234.0049, Tesla Form DEF 14A (May 28, 2020).

growth in the face of increasing competition in the EV market.¹²⁴ Among other achievements, Tesla:

- Successfully ramped up production of the affordable, high-volume Model 3, making it the best-selling electric car in world history,¹²⁵ the first electric car to pass one million units in global sales,¹²⁶ and the best-selling premium sedan of any type globally;
- Developed and launched the Model Y (an award-winning luxury compact SUV¹²⁷);
- Built new Gigafactory manufacturing facilities in Austin, Berlin, and Shanghai to bolster its manufacturing capabilities domestically and in the critical European and Chinese markets¹²⁸; and
- Increased its total annual vehicle production from approximately 100,000 vehicles in 2017¹²⁹ to more than 300,000 vehicles *per quarter* in 2022.¹³⁰

Tesla's annual revenue has increased from \$11.8 billion in 2017 to more than \$55 billion.¹³¹ And Tesla's adjusted EBITDA has grown from

¹²⁴ JX0575, Vox (Aug. 1, 2017).

¹²⁵ JX1272, Interesting Engineering (Aug. 13, 2020).

¹²⁶ JX1607, Clean Technica (Aug. 26, 2021).

¹²⁷ JX1358.0011, Tesla FY 2020 10-K (Apr. 30, 2021).

¹²⁸ *Id.*

¹²⁹ JX0335.0042, Tesla FY 2017 10-K (Mar. 1, 2017).

¹³⁰ JX1456.0037, Tesla FY 2022 Q1 10-Q (Apr. 25, 2022).

¹³¹ *Id.* at .0030.

\$644.2 million¹³² in 2017 to more than \$14 billion.¹³³ Indeed, under the 2018 Plan, Tesla has become cash flow positive and sustainably profitable and experienced 13 consecutive profitable quarters since Q3 2019.¹³⁴ As of Q3 2022, Musk has earned 11 of the 12 tranches potentially available under the 2018 Plan, with the remaining tranche (\$75 billion in annualized revenue) deemed probable of achievement under applicable accounting standards.

In 2018, Musk steered Tesla through the “existential crisis” it faced during its “bet the company” Model 3 ramp, requiring him to spend late nights and weekends on the production line and resort to sleeping on the factory floor¹³⁵—efforts that Plaintiff’s own expert contemporaneously described as “heroic” and “unprecedented”.¹³⁶

In 2019 and 2020, Musk led Tesla through the Model Y production, ultimately launching six months ahead of schedule. In 2020, Musk also led Tesla to achieve sustained profitable volume production—a feat matched by no other

¹³² JX1385.0033, Gompers Rebuttal.

¹³³ JX1456.0030, Tesla 2022 Q1 10-Q (Apr. 26, 2022).

¹³⁴ JX1611, Bloomberg (May 16, 2022).

¹³⁵ JX1336, Ahuja Dep. 20:12-24; JX1372, Ehrenpreis Dep. 62:12-63:5, 63:17-64:23, 335:17-337:7; JX1362, Gracias Dep. 302:14-303:2; JX1374, Musk Dep. 101:2-11.

¹³⁶ JX1065.0003, Goldfarb Ex. 9; JX1060.0004, Goldfarb Ex. 8.

automotive startup since Chrysler in the 1920s¹³⁷ (and which Plaintiff's expert contemporaneously doubted Tesla ever could achieve).¹³⁸

Over this same period, Musk negotiated directly with China for permission to build the Shanghai Gigafactory, securing such permission, thereby becoming the only U.S. auto manufacturer permitted to operate a 100% U.S. company-owned manufacturing facility in China, and then building it in record time.

With these feats, plus the 2016 acquisition of SolarCity, Tesla is now a fully vertically integrated renewable energy company with the ability to harness solar energy generation technology to power electric vehicles and next generation battery technology.

Tesla's accomplishments since approval of the 2018 Plan are powerful evidence of the Plan's success in motivating Musk to stay actively engaged and focused on Tesla's growth and longevity. And Tesla's stockholders have reaped the benefits of that growth.

¹³⁷ JX1374, Musk Dep. 104:13-105:6; JX1362, Gracias Dep. 286:16-287:9; JX0575.0002, Goldfarb Ex. 6.

¹³⁸ JX1065.0003-04, Goldfarb Ex. 9; JX1060.0003, Goldfarb Ex. 8.

ARGUMENT

Trial will establish that the 2018 Plan is entirely fair. It created enormous value for stockholders and secured Musk’s services at an entirely fair—and entirely contingent—price (Section I.A), following an entirely fair process led by an independent Compensation Committee and culminating in approval by Tesla’s disinterested stockholders (Section I.B). Before they overwhelmingly voted to approve the 2018 Plan, Tesla’s disinterested stockholders were fully informed of all material facts regarding the Plan and the value proposition it presented to stockholders, including with respect to its terms, design, the process leading to it, and the Board’s expectations regarding its achievability. (Section II.) Although the Plan is entirely fair, trial also will show that there is no basis for reviewing it under that standard, because Musk is not a controlling stockholder and the 2018 Plan was approved by an independent Board majority and Tesla’s disinterested stockholders. (Section III.) Plaintiff’s ancillary unjust enrichment claim also fails. (Section IV.)

I. THE 2018 PLAN IS ENTIRELY FAIR.

Entire fairness has “two basic aspects: fair dealing and fair price.”¹³⁹

Although both aspects must be considered, the Delaware Supreme Court has

¹³⁹ *Weinberger v. UOP, Inc.*, 457 A.2d 701, 711 (Del. 1983); *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1162-63 (Del. 1995) (“*Technicolor II*”).

explained that “whether the price was a fair one” is the “paramount consideration”.¹⁴⁰ The evidence will demonstrate that the 2018 Plan was entirely fair because it secured Musk’s visionary leadership and incentivized the creation of extraordinary stockholder value at an entirely fair price and resulted from a fair process.¹⁴¹ Because the 2018 Plan was “approved by an informed vote of a majority of the minority shareholders”, Plaintiff ultimately should bear the burden of demonstrating it is unfair.¹⁴² Regardless of which Party bears the burden of proof, however, the 2018 Plan’s price and process satisfy entire fairness review.

A. The 2018 Plan Secured Musk’s Focus on Tesla at an Entirely Fair Price

Fair price involves the consideration of “all relevant factors” and may encompass “proof of value by any techniques or methods which are generally considered acceptable in the financial community”.¹⁴³ When evaluating the fairness of a transaction, the Court must evaluate the terms of the exchange—what Tesla “gave” versus what Tesla “got”.¹⁴⁴

¹⁴⁰ *Ams. Mining Corp.*, 51 A.3d at 1244; *eBay Domestic Hldgs., Inc. v. Newmark*, 16 A.3d 1, 42 (Del. Ch. 2010); *In re Tesla Motors, Inc. S’holder Litig.*, 2022 WL 1237185, at *31 (Del. Ch. Apr. 27, 2022).

¹⁴¹ *Ams. Mining*, 51 A.3d at 1244.

¹⁴² *Id.* at 1240.

¹⁴³ *Weinberger*, 457 A.2d at 713.

¹⁴⁴ *In re S. Peru Copper Corp. S’holder Derivative Litig.*, 52 A.3d 761, 801-02 (Del. Ch. 2011), *aff’d sub nom. Ams. Mining Corp. v. Theriault*, 51 A.3d 1213

In the executive compensation context, the Court also may consider: (i) the compensation of similarly situated executives; (ii) the executive’s ability; (iii) whether the compensation bears a reasonable relation to the success of the corporation; (iv) the amount previously received as compensation; and (v) whether increases in compensation are geared to increases in the value of services rendered.¹⁴⁵ The trial evidence will establish that the “price” of the 2018 Plan—what Musk could *potentially* get—is more than fair to Tesla’s stockholders.

1. By 2017, Musk Had Proven Himself a Valuable Asset to Tesla

The 2018 Plan is not an ordinary compensation plan for an ordinary CEO managing the day-to-day affairs of a company. It pays no guaranteed salary or bonus, nor does it provide any equity compensation that vests with the passage of time. Instead, with its entirely performance-based structure—requiring achievement of audacious market capitalization, revenue and adjusted EBITDA

(Del. 2012); *Dieckman v. Regency GP LP*, 2021 WL 537325, at *35 (Del. Ch. Feb. 15, 2021).

¹⁴⁵ *Wilderman v. Wilderman*, 315 A.2d 610, 615–16 (Del. Ch. 1974); see *Gonzalez v. Ward*, 841 A.2d 307, 2004 WL 77862, at *2 (Del. Jan. 15, 2004). *Wilderman* and other cases identify an additional factor—whether the IRS allows the corporation to deduct the compensation—that is not relevant here. JX1386.0091, Murphy Opening.

goals—it more closely resembles a high-reward venture capital investment in Musk as an asset to Tesla.¹⁴⁶

When designing the 2018 Plan, the Tesla Board was well-acquainted with how valuable Musk could be to Tesla. Musk was a key driver of Tesla’s strategy from the earliest days. Under Musk’s leadership, Tesla—initially a one-product startup—launched three vehicles core to Tesla’s EV offerings today. Between 2012 and 2017, Tesla established itself as a first-of-its-kind vertically integrated clean energy company. During that period, Musk’s high-risk, high-reward 2012 Plan also resulted in a 1,350% increase in Tesla’s market capitalization. The Board understood that an investment in Musk could reap massive rewards for Tesla’s stockholders.

2. The Board Reasonably Concluded an Audacious Plan Was Necessary To Motivate Musk

Plaintiff asserts that the 2018 Plan was unnecessary to motivate Musk to continue to lead Tesla for a variety of reasons. But Plaintiff’s allegations boil down to the position that Musk should be happy to work for free. Plaintiff’s arguments fail for various reasons.

¹⁴⁶ JX1385.0021-22, Gompers Rebuttal.

First, Plaintiff asserts that the Plan was “unnecessary” because Musk purportedly “had no intention of leaving or quitting Tesla”.¹⁴⁷ Yet the Board understood a real risk otherwise. Plaintiff quotes a May 2017 earnings call in which Musk stated, “I intend to be actively involved with Tesla for the rest of my life.”¹⁴⁸ But Plaintiff omits what Musk said next: “But that doesn’t mean I should be CEO forever.” The extent of Musk’s involvement in Tesla and the degree to which he would focus on Tesla was uncertain. The Model 3 production ramp had taken a serious toll on Musk and he had publicly stated that he was considering stepping down as CEO after its introduction.¹⁴⁹ In addition, Musk was increasingly (and publicly) focused on his role as SpaceX’s CEO and had recently founded several other new ventures.

Second, Plaintiff contends that the Plan “failed to contain any provision that would actually require E. Musk to dedicate to Tesla his time, focus or attention”.¹⁵⁰ But Plaintiff has no evidence that Musk would have accepted a term that required him to abandon his other interests. Indeed, Musk’s ambitions

¹⁴⁷ AC ¶ 7.

¹⁴⁸ *Id.* at ¶¶ 36, 147 ; JX0390.0020-21, Q1 2017, Tesla Earnings Call (May 3, 2017).

¹⁴⁹ JX0840.0001, DealBook New York Times (Jan. 23, 2018).

¹⁵⁰ AC ¶¶ 2, 149.

are part of what makes him a unique CEO. Nor did it make sense to require Musk to devote a specific number of hours or days per week to Tesla. A CEO of a large public company does not punch a clock. In any event, under the proposed plan, Musk would not earn any compensation at Tesla unless he drove tremendous growth, which could not be accomplished without significant time and attention from the CEO.

Third, Plaintiff asserts that the Plan “is (and was) wholly unnecessary to incentivize” Musk because his existing “outsized equity stake” in Tesla (~22% at the time of the Plan’s approval) gave him a “substantial financial incentive to continue to devote substantial time, energy and effort into” Tesla.¹⁵¹ But this again ignores the opportunity cost to Musk of serving as Tesla’s CEO and trying to achieve audacious goals. Former Tesla CFO Deepak Ahuja explained it well: “Hypothetically Elon could step back, hire another CEO who ... achieved 10, 20 percent growth, became an average company and not an extraordinary company, and he could still be satisfied with it while he goes and creates some other things which create immense value and which excite him in a different way.”¹⁵² In other words, “[Musk] could go and create immense value doing other things which could

¹⁵¹ *Id.* at ¶ 145.

¹⁵² JX1336, Ahuja Dep. 111:7-16.

far exceed the value from just being a passive investor in Tesla.”¹⁵³ In that hypothetical, the Tesla stockholders would have missed out on hundreds of billions of dollars of value creation.

Fourth, Plaintiff argues that the 2018 Plan is improper because Musk intended to use the option grants (if vested) “to fund his personal ambition to colonize Mars.”¹⁵⁴ Plaintiff focuses on the wrong side of the give/get exchange. What matters is whether the Plan is fair to Tesla stockholders. As long as Musk drives massive value creation for Tesla stockholders, as he has, they should be indifferent to how he spends his money. Stated differently, by approving the 2018 Plan, the Tesla stockholders were not paying for Musk’s Mars ambitions (or any other ventures); they were investing in the future of Tesla. And that investment has paid off.

3. Musk’s Compensation Under the 2018 Plan Is Directly Tied to Tesla’s Success

The compensation available to Musk under the Plan did not merely bear a “reasonable relation” to Tesla’s success¹⁵⁵—it was directly and entirely tied to Tesla’s success and stockholder value. Plaintiff criticizes the 2018 Plan because

¹⁵³ *Id.* at 114:8-11.

¹⁵⁴ AC ¶ 1.

¹⁵⁵ *Wilderman*, 315 A.2d at 615.

it is “unprecedented”.¹⁵⁶ But that was the point—by design, the 2018 Plan is unprecedented in its ambition and emphasis on stockholder alignment. Plaintiff cannot dispute that for Musk to achieve all 12 of the 2018 Plan’s tranches, he will have to generate nearly \$600 billion in stockholder value. And Plaintiff cannot dispute that if Musk achieves all 12 of the 2018 Plan’s tranches, more than 90% of the value created will have accrued directly to Tesla’s stockholders. No other company has attempted such audacious performance goals in an executive compensation package.

The 2018 Plan was purely pay-for-performance. To vest any tranches of the 2018 Plan, Musk had to deliver *both* direct returns to stockholders, in the form of \$50 billion increases in Tesla’s market capitalization, and financial stability to Tesla in the long term, in the form of significant adjusted EBITDA and revenue results. The tranches were also subject to cliff vesting. If Musk failed to deliver on the market capitalization milestones or the operational milestones—even if he came close to meeting either or both—he would receive no compensation.

4. The 2018 Milestones Were Difficult And Tesla’s Success Was Not a Foregone Conclusion

Plaintiff alleges that the Board understood that the 2018 Plan “would very likely provide E. Musk with billions of dollars in compensation within just the

¹⁵⁶ *E.g.*, AC ¶ 140; JX1384.0011, .0114, .0116, Dunn Opening.

first few years of the Grant’s ten-year duration.”¹⁵⁷ However, the contemporaneous documentary record, the testimony of the witnesses involved in crafting the Plan (including former Tesla CFO Deepak Ahuja), and expert testimony will show that when the Plan was approved, Tesla’s success was far from certain.

To achieve *any* of the 2018 Plan’s tranches, Musk would have to lead Tesla on an explosive growth trajectory. Defendants submit that the difficulty of the milestones—growing a company’s market capitalization 10x *and* revenue up to 15x or adjusted EBITDA up to 21x—is obvious to any objective audience. The Tesla Board disclosed to stockholders its view of the Plan’s milestones, including the following characterizations (among others): “challenging”; “hard-to-achieve”; “ambitious”; “very difficult”; “stretch goals”; and “may appear ... impossible to others”.¹⁵⁸

Not surprisingly, when the Plan was announced, market commentary revealed skepticism of Musk’s ability to achieve the Plan because of its difficulty. Media reports called the Plan a publicity stunt.¹⁵⁹ In January 2018, Andrew Ross Sorkin of *The New York Times* described the milestones as “jaw-dropping” and

¹⁵⁷ AC ¶ 2.

¹⁵⁸ JX0878.0004, 0008, 0022, 2018 Proxy.

¹⁵⁹ JX0844.0001, Harvard Business Review (Jan. 24, 2018).

noted that many considered the \$650 billion market capitalization goal to be “laughably impossible”.¹⁶⁰ Numerous independent equity research analysts expressed their view that Tesla would not be able to achieve the 2018 Plan’s milestones.¹⁶¹

Defendants will provide extensive evidence at trial to bolster the common sense conclusion that the 2018 Plan’s milestones qualify as *at least* “very difficult”. For example, Defendants’ expert Professor Paul Gompers will explain:

- The 2018 Plan’s market capitalization milestones were ambitious, whether measured against large automotive firms (both mature and during their periods of significant growth) or successful high-growth technology companies.¹⁶²
- The 2018 Plan’s revenue milestones required Tesla to maintain a revenue growth trajectory on par with that of the most successful technology firms in history, and that growing like a successful automotive company or even a slightly less-successful technology firm would result in the achievement of few (if any) revenue milestones.¹⁶³
- The 2018 Plan’s Adjusted EBITDA milestones likewise required Tesla (which had not been consistently profitable as of early 2018) to grow its profitability like an extremely successful technology firm to achieve the Adjusted EBITDA milestones.¹⁶⁴

¹⁶⁰ JX0840.0001, DealBook New York Times (Jan. 23, 2018).

¹⁶¹ JX1385.0042-46, Gompers Rebuttal.

¹⁶² *Id.* at .0037-40.

¹⁶³ *Id.* at 0023-31.

¹⁶⁴ JX1385.0031-35, Gompers Rebuttal.

5. Nothing in Tesla’s Internal Projections Undermines the Plan’s Difficulty

Plaintiff contends the 2018 Plan was readily achievable because Tesla’s internal projections suggested the Company “would achieve several tranches” of the Plan within the “first few years” of its enactment (which Plaintiff asserts was concealed from Tesla stockholders).¹⁶⁵ But Tesla’s internal projections are entirely consistent with the disclosed terms of the 2018 Plan.

Plaintiff’s characterization of Tesla’s internal projections ignores important context concerning how Tesla runs its business. Tesla views all aspects of its business through an ambitious lens and engages in highly aggressive forecasting—for internal forecasts and publicly disclosed projections.¹⁶⁶ Tesla has “only one set of books . . . there’s not one set for the agencies and the street and one set for [the company]. There is one plan.”¹⁶⁷ As Tesla’s former CFO Deepak Ahuja explained, “Nothing that Elon touches or does is not bold and super stretched and aggressive”.¹⁶⁸ The Company’s internal projections therefore included “stretch targets” of the “best projection of what [the company] could do”—*assuming* that “Elon is engaged immensely and he’s contributing immense

¹⁶⁵ AC ¶ 6.

¹⁶⁶ JX1362, Gracias Dep. 290:19-291:2.

¹⁶⁷ *Id.* at 290:19-291:2.

¹⁶⁸ JX1336, Ahuja Dep. 46:16-18

value”.¹⁶⁹ In other words, the internal projections were considered very difficult yet attainable.

The same is true of the milestones in the 2018 Plan. The Proxy disclosed that the milestones (described in detail) were ambitious yet ultimately attainable with maximum effort from Musk and his team: “[T]he [2018 Plan] . . . will help focus everyone on achieving the market capitalization and operational milestones that, while challenging, *the Board believes are attainable* for Tesla.”¹⁷⁰

The Proxy also made clear that the Plan’s goals were the Company’s goals—again, there was one set of books and one plan:

- “We like setting challenging, hard-to-achieve goals for *ourselves*, and then focusing *our efforts* to make them happen.”¹⁷¹
- “As Tesla continues to grow, we have created a new 10-year performance award for Elon that incentivizes him to not only continue to lead Tesla over the long-term, but to help *the company* achieve these great goals.”¹⁷²
- “[T]he Board believes that Tesla has the potential to become one of the most valuable companies in the world. The [2018 Plan] is based on a vision of *making Tesla a \$650 billion company*.”¹⁷³

¹⁶⁹ JX1336, Ahuja Dep. 338:24-339:3, 359:9-16, 407:20-408:2.

¹⁷⁰ JX0878.0023, 2018 Proxy.

¹⁷¹ *Id.* at .0004.

¹⁷² *Id.* at .0003.

¹⁷³ *Id.* at .0022.

Although Tesla, like other public companies, does not disclose its internal operating plans or projections, the Proxy did inform stockholders that the Board considered such internal plans and projections in forming the Plan’s milestones: “In establishing the Revenue and Adjusted EBITDA milestones, *the Board carefully considered* a variety of factors, including *Tesla’s growth trajectory and internal growth plans. ...*”¹⁷⁴

Those internal growth plans are entirely consistent with the goals in the 2018 Plan. There is no dispute that the Board believed it was “very difficult” but possible to achieve certain milestones within the first few years of the Plan. But that was not a secret. Any reasonable stockholder would have understood from the Proxy that if Tesla, under Musk’s leadership, were to achieve the 2018 Plan’s milestones within the 10-year term of the Plan, at least *some* milestones necessarily must be achieved within the Plan’s first few years.¹⁷⁵ As former CFO Ahuja testified, given the “big range in the revenue and EBITDA and market cap valuation” milestones, it would have been “impossible for all [the operational milestones] to occur in years 8, 9, 10”.¹⁷⁶

¹⁷⁴ *Id.* at .0018.

¹⁷⁵ JX1336, Ahuja Dep. 425:19-426:14; JX1334, Murdoch Dep. 351:18-352:11.

¹⁷⁶ JX1336, Ahuja Dep. 426:3-7.

In addition, as the evidence at trial will show, the key information underlying Tesla's internal projections was public well before the stockholder vote on the 2018 Plan.¹⁷⁷ Tesla regularly disclosed its vehicle production and delivery goals, which are a key input underlying its financials.¹⁷⁸ In 2017 and 2018, Tesla was (as usual) aggressive in its production and delivery goals. For example, the first revenue-based operational milestone under the 2018 Plan is \$20 billion, and the March 2018 Projections showed that Tesla expected to surpass \$20 billion in revenue in 2018, with about \$18 billion attributable to automotive revenue.¹⁷⁹ At the time of the March 2018 stockholder vote, Tesla had publicly disclosed vehicle production forecasts that (using simple math) would yield approximately \$18 billion in revenue.¹⁸⁰

Based on Tesla's public disclosures, contemporaneous market participants, including equity research analysts, routinely developed and published their own estimates of Tesla's expected performance. The market is well aware of Tesla's stretch approach to forecasting, and commentators at the time had often

¹⁷⁷ JX1468.0008-34, Gompers Surrebuttal.

¹⁷⁸ JX0390. 0010-11, Q1 2017, Tesla Earnings Call (May 3, 2017); JX1485, Gompers Dep. 189:20-190:1.

¹⁷⁹ JX0878.0015, 2018 Proxy.

¹⁸⁰ Defs.' SJ Opp. at 40-42.

discussed Tesla’s projection misses.¹⁸¹ Even Plaintiff’s expert contemporaneously observed that Tesla “consistently missed” its own ambitious performance targets.¹⁸²

The market had ample information about Tesla’s key metrics to develop a fully informed view (whether bullish, skeptical, or somewhere in between) about Tesla’s future growth in the next few years. The analysts largely got it right. As shown in the chart below, Tesla missed the targets in its internal projections,¹⁸³ and analysts’ projections were in line with Tesla’s actual performance.

Additionally, the inputs to the Company’s financial projections were constantly in flux, as Tesla’s product roadmap and other initiatives evolved. For example, the July 2017 Operating Plan contemplated Tesla discontinuing production of the Model S and Model X by 2020, though Tesla continues to sell both cars today.¹⁸⁴ But the Board expected that product plans would evolve;

¹⁸¹ JX1468.0016, Gompers Surrebuttal.

¹⁸² JX1065.0001, Washington Post (Aug. 31, 2018); JX0575.0005-06, Vox (Aug. 1, 2017); JX1037.0003, Vox (May 30, 2018); *see also* JX1341, Denholm Dep. 366:17-18, 370:6–8; JX1372, Ehrenpreis Dep. 261:7-11; JX1362, Gracias Dep. 296:14-23, 299:9–10; JX1374, Musk Dep. 187:14–16, 197:17-19.

¹⁸³ JX1402.0054-56, .0080-81, Murphy Rebuttal.

¹⁸⁴ JX0573.0003, 2017-2020 Financial Plan (July 2017); JX1440.0005, Tesla FY 2021 10-K (Feb. 4, 2022).

indeed, that was a key reason for including financial operational milestones in the 2018 Plan, instead of specific product goals (as in the 2012 Plan).

<i>In billions</i>	July 2017 Projections ¹⁸⁵	Dec. 2017 Projections ¹⁸⁶	Mar. 2018 Projections ¹⁸⁷	Analysts (as of Mar. 20, 2018) ¹⁸⁸	Tesla's Actuals ¹⁸⁹
Revenue					
2018	\$27.5	\$27.4	\$23.4	\$14.0 – \$26.3	\$21.5
2019	\$41.9	-	\$35.2	\$20.2 – \$38.8	\$24.6
2020	\$69.6	-	\$68.1	\$24.4 – \$46.0	\$31.5
Adjusted EBITDA					
2018	\$3.8	\$4.3	\$2.1	\$1.0 – \$2.7	\$2.4
2019	\$8.1	-	\$5.8	\$2.2 – \$5.7	\$3.0
2020	\$14.4	-	\$11.4	\$3.9 – \$7.7	\$5.8

In any event, Plaintiff's focus on when Tesla aimed to hit certain operational milestones is misplaced. As the Proxy made clear, Musk could not vest *any* tranche of the 2018 Plan based on the achievement of operational milestones alone—Tesla's market capitalization must also increase by increments of \$50 billion.

¹⁸⁵ JX1468.0055-56, Gompers Surrebuttal, Ex. 1.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at .0057.

¹⁸⁹ *Id.* at .0017; JX1323.0007, Tesla Form 8-K (Jan. 27, 2021).

6. Plaintiff Confuses Accounting Disclosures for Actual Value

Plaintiff’s claims that stockholders were not informed that “based on Tesla’s contemporaneous operating plans, three operational milestones would be probable of achievement within the near-term”,¹⁹⁰ rests on a fundamental misunderstanding of the accounting process. “Probability of achievement” is an accounting concept that applies to the operational (performance) milestones in the 2018 Plan and determines when Tesla begins to recognize stock-based compensation expense for the options under the Plan. Under applicable accounting rules, on a quarterly basis, Tesla must determine which operational milestones, if any, are “probable of achievement” (more than 70% likely). As of the March 2018 vote, there had not been a probability determination with respect to the operational milestones because, as disclosed in the Proxy, compensation expense for each tranche of the 2018 Plan is based on the accounting grant date fair value of the award (on a per tranche basis), which could not be finalized until the stockholders approved the 2018 Plan.

Plaintiff’s argument also ignores that the Proxy does disclose the “grant date fair value” (known as ASC 718)—an accounting term representing the stock-based compensation expense a company recognizes for an option award, not

¹⁹⁰ AC ¶ 158.

the value to Musk or to Tesla's stockholders. While flawed as a measure of value, the ASC 718 disclosure (\$2.6 billion) directly undercuts Plaintiff's arguments regarding the projections because ASC 718 assumes *all* operational milestones are achieved with 100% probability.

7. The 2018 Plan Contains Significant, Stockholder-Friendly Terms

The 2018 Plan was designed specifically to promote value for stockholders. In addition to the ambitious operational and market capitalization milestones, the Plan included various provisions aligning the interests of Musk and Tesla stockholders:

Post-Exercise Holding Period: Any options awarded would be subject to a five-year post-exercise holding period during which Musk cannot sell any stock (exercised options) earned under the 2018 Plan.¹⁹¹ This was the longest such period considered by the Compensation Committee; it is 12x the holding period ordinarily applicable to option grants for named executive officers under Tesla's corporate governance policy.¹⁹² For Musk's options to have value, Tesla's stock price at the time of exercise must be above the options' strike price (Tesla's stock price as of January 19, 2018). And once exercised, the value of the resulting

¹⁹¹ JX0791.0018, Board Minutes (Jan. 21, 2018).

¹⁹² JX0510.010, July 7, 2017 Email.

shares would be directly tied to Tesla's success or failure for the next five years (functioning as a kind of value "clawback" if Tesla did not maintain its stockholder value).

Plaintiff complains that this holding period did nothing to prevent Musk from selling his other Tesla shares. But Plaintiff does not identify any compensation plan where the recipient agrees to a restriction on stock he *already* holds. No rational executive would agree to such a term. In any event, given the holding period for any options awarded under the Plan, Musk had no incentive to take any actions with his existing stock that would negatively impact Tesla's value.

M&A Adjustments: The Compensation Committee also negotiated adjustments to milestones in the event of M&A activity, ensuring that any milestones achieved would be the result of organic value creation for stockholders, rather than potentially dilutive transactions.¹⁹³ The M&A adjustments secured by the Committee are more stockholder-friendly than those initially proposed by Musk. The adjustments apply to both market capitalization and operational milestones (contrary to Musk's preference that only market capitalization milestones be adjusted),¹⁹⁴ apply on a cumulative basis to each unvested tranche

¹⁹³ JX0878.0019, 2018 Proxy.

¹⁹⁴ *Id.* at .0055; JX0783.

(contrary to Musk’s preference for one-off, per-deal adjustments),¹⁹⁵ and have lower transaction value triggers than Musk proposed.¹⁹⁶

No Dilution Protection: The Compensation Committee determined that the 2018 Plan would consist of options totaling up to 12% of Tesla’s total outstanding shares as of the initial grant. By fixing the size of the option award at the grant date, the Committee placed the cost of future dilution—a substantial cost given Tesla’s philosophy favoring equity-based compensation¹⁹⁷—on Musk, contrary to his expressed goal of “increas[ing] his fully-diluted stake by 10%.”¹⁹⁸

Musk Must Lead Tesla: The 2018 Plan also contains an employment requirement under which Musk must remain (1) Tesla’s CEO or (2) Executive Chairman and Chief Product Officer.¹⁹⁹ If Musk is employed at Tesla in any other role, he will no longer be able to vest under the 2018 Plan. This term requires Musk to continue to lead Tesla (strategically and operationally) to receive any payout from the Plan.

¹⁹⁵ JX0878.0055, 2018 Proxy; JX0783.0002, Jan. 17, 2018 Email.

¹⁹⁶ JX0878.0017, 2018 Proxy; JX0784.0001, Jan. 17, 2018 Email.

¹⁹⁷ MTD Op. 17; JX0791; JX0570.0012, .0024, CEO Equity Award Slide Deck.

¹⁹⁸ JX0687.0002, Dec. 4, 2017 Email.

¹⁹⁹ JX0791.0012, .0024, Board Minutes (Jan. 21, 2018).

8. Tesla’s Disinterested, Informed Stockholders Confirmed the Plan’s Fairness When They Overwhelmingly Voted To Approve It

Tesla’s disinterested stockholders confirmed that the Plan was fair to them. The Board voluntarily put the Plan’s value proposition to them. The Proxy disclosed a maximum theoretical value of \$55.8 billion to Musk if he was able to increase Tesla’s market cap by \$600 billion. In effect, the Proxy asked stockholders whether they approved of Tesla paying Musk a 9.3% equity stake (\$55.8 of \$600 billion) in exchange for leading Tesla to \$650 billion in market cap *plus* unprecedented annual revenues or earnings within ten years—and ***nothing*** if he could not at least double the company’s market capitalization.²⁰⁰

Tesla’s disinterested stockholders overwhelmingly concluded that this arrangement was fair to them, with approximately 73% of the votes cast—largely by sophisticated institutional investors²⁰¹— in favor of the Plan.²⁰² As this Court has recognized, their approval is “compelling evidence that the price was fair”.²⁰³

²⁰⁰ JX1362, Gracias Dep. 259:18–23.

²⁰¹ JX1468.0040-41, Gompers Surrebuttal.

²⁰² JX0979.0003, Tesla Form 8-K (Mar. 21, 2018).

²⁰³ *In re Tesla Motors, Inc. S’holder Litig.*, 2022 WL 1237185, at *44; *Technicolor II*, 663 A.2d at 1176 (approval by overwhelming majority of disinterested stockholders constitutes “substantial evidence of fairness”); *Gesoff v. IIC Indus., Inc.*, 902 A.2d 1130, 1148 (Del. Ch. 2006).

B. The 2018 Plan Was the Product of a Fair Process

Fair process “embraces questions of when the transaction was timed, how it was initiated, structured, negotiated, disclosed to the directors, and how the approvals of the directors and the stockholders were obtained.”²⁰⁴ The fair process prong of the entire fairness inquiry does not require a finding of perfection;²⁰⁵ indeed, “perfection is not possible, or expected”.²⁰⁶

Trial will demonstrate that the process was robust, led by an independent and engaged Compensation Committee and its advisors and approved by an independent Board majority. Tesla’s major stockholders provided input on the 2018 Plan while it was being developed. Ultimately, the disinterested stockholders spoke with their votes by overwhelmingly approving the Plan.

1. The Compensation Committee Initiated the 2018 Plan To Secure Musk’s Continued Focus at a Critical Time for Tesla

Plaintiff alleges that Musk “and his loyalists outlined the fundamental contours of his preferred compensation plan long before any involvement from Tesla’s Compensation Committee.”²⁰⁷ But the trial evidence will show that it was

²⁰⁴ *Weinberger v. UOP, Inc.*, 457 A.2d at 711.

²⁰⁵ *Technicolor II*, 663 A.2d at 1179.

²⁰⁶ *Weinberger*, 457 A.2d at 709 n.7; *Brinckerhoff v. Texas E. Prod. Pipeline Co., LLC*, 986 A.2d 370, 395 (Del. Ch. 2010).

²⁰⁷ AC ¶ 2.

the Compensation Committee—not Musk—that initiated the 2018 Plan.²⁰⁸

Specifically, around April 2017, Committee Chair Ehrenpreis began considering a new potential compensation package for Musk because Musk’s 2012 Plan had nearly run its course. To evaluate potential options, Ehrenpreis spoke with Musk regarding whether he would be willing to commit to Tesla in the long term and whether he would be willing to accept a compensation plan that was entirely performance-based (like the 2012 Plan) but even more ambitious.²⁰⁹

The Compensation Committee—not Musk—initiated consideration of a new compensation plan when it was important for Tesla that it do so.²¹⁰

Ehrenpreis and the Committee recognized that Tesla was in a critical period of its history and in its relationship with Musk.²¹¹ Tesla and Musk were facing “production hell” on the “bet the company” Model 3 production ramp and attempting to become the first modern automotive company to achieve profitable volume production. Musk had achieved 7 of the 10 tranches of the 2012 Plan (with two additional tranches deemed probable of achievement) and had no

²⁰⁸ *Cf. Weinberger*, 457 A.2d at 711 (finding unfair dealing where challenged transaction was “entirely initiated” by majority stockholder).

²⁰⁹ JX1372, Ehrenpreis Dep. 20:11-22, 53:8-24, 77:19-78:18, 139:5-140:11.

²¹⁰ *Cf. Weinberger*, 457 A.2d at 711 (recognizing that “serious time constraints . . . set by” majority stockholder indicated unfair dealing).

²¹¹ AC ¶ 2.

additional compensation plan in place. The Committee was therefore considering whether (and how) it could keep Musk’s efforts focused on Tesla.

As the trial witnesses will testify, between April 2017 and January 2018, the Compensation Committee, the Board, Tesla management, and third-party advisors worked closely to develop a new compensation plan that would promote top-line and bottom-line growth of Tesla and incentivize Musk to continue focusing on building Tesla into one of the most successful companies in the world.²¹²

Contrary to Plaintiff’s allegations that Musk “controlled the process” and “sought out advisors to justify the Grant”²¹³, the Compensation Committee, with Ehrenpreis at the helm as an engaged and proactive Committee Chair, drove the 2018 Plan process. At various points, the independent members of the Board met with Musk to share their thinking, get his perspective and ultimately negotiate the terms of the Plan with him. Plaintiff does not (and cannot) explain how a board could develop an executive compensation plan *without* engaging at all with the recipient of that plan. Simply put, Musk was a *counterparty*—not a controller.

²¹² JX0454.0001, June 26, 2017 Letter.

²¹³ AC ¶ 48.

2. The Compensation Committee Structured the Plan in Consultation with Tesla’s Largest Disinterested Stockholders To Incentivize Extraordinary Stockholder Value Creation

In July 2017, the Committee met with Tesla’s largest institutional stockholders to obtain their views regarding a new compensation package for Musk and solicit their feedback on the 2012 Plan.²¹⁴ Stockholders told the Committee they “favored the approach used in the 2012 Award, especially when coupled with Mr. Musk’s lack of traditional non-performance based types of compensation”.²¹⁵ Stockholders offered suggestions regarding the operational milestones; they generally favored financial milestones focused on top-line and bottom-line growth.²¹⁶

With input from Tesla’s largest stockholders and its expert advisors, the Compensation Committee decided to model the 2018 Plan on the 2012 Plan, which the Board believed “had served shareholders and the Company so effectively”.²¹⁷ The Compensation Committee determined to keep the key stockholder-friendly feature of the 2012 Plan—purely performance-based compensation—but to massively increase the goals. The 2018 Plan also featured

²¹⁴ JX0530 July 15, 2017 Email; JX0983, ISS Proxy Paper.

²¹⁵ JX0530 July 15, 2017 Email.

²¹⁶ JX0878, 2018 Proxy.

²¹⁷ *E.g.*, JX0571, Comp. Committee Minutes (Aug. 1, 2017); JX0506, July 7, 2017 Compensia Presentation.

numerous stockholder friendly terms, as discussed above (Section I.A.7), such as a holding period, no dilution protection for Musk, and M&A adjustments.

3. Traditional Benchmarking Was Ill-Suited for this Unprecedented Plan

The evidence will demonstrate that the 2018 Plan cannot be compared to “peer” CEO compensation plans because no other compensation plans offer such direct, at-risk alignment with stockholder wealth creation. The Compensation Committee understood that there are no compensation plans comparable to the 2018 Plan, except the prior (and successful) 2012 Plan. The compensation plans identified by Plaintiff and his experts include options that vest solely with the passage of the time (and are therefore not purely performance-based) and do not contain performance milestones (if any) nearly as challenging as the 2018 Plan’s.²¹⁸

Similarly, there are no comparable executives to Musk. Musk is involved in all aspects of the business, from strategy to implementation. As Tesla’s former General Counsel, Todd Maron, explained, “Elon was dogged in his determination at Tesla...the emotional, physical commitment that he gave to the company was overwhelming.”²¹⁹ As discussed above (Statement of Facts, Section

²¹⁸ JX1386.0082-84, Murphy Opening; *see also* JX1373, Brown Dep. 106:10-22.

²¹⁹ JX1365, Maron Dep. 113:15-19.

B), Musk’s ventures outside of Tesla present substantial opportunity costs to remaining with Tesla.²²⁰ Time and attention devoted to Tesla means less time Musk could focus on SpaceX, Neuralink or the Boring Company.

There are also no comparable companies. Tesla is neither a purely automotive firm nor a purely energy firm, nor is it valued like either. In designing the 2018 Plan, the Board and its advisors reviewed the growth trajectory and historical performance of certain high-growth disruptive technology companies (*i.e.*, Amazon, Intel, Apple and Google), but understood that these firms do not engage in vehicle manufacture or energy production, limiting the value of the comparison.²²¹

In sum, the Compensation Committee had no “peer” CEO compensation plans to consider because Tesla and the 2018 Plan are unique.

4. The Board Was Fully Informed Regarding the 2018 Plan

The Compensation Committee kept the full Board apprised of their work on the 2018 Plan.²²² At the outset of the process, Ehrenpreis, on behalf of the Committee, informed the full Board of his conversations with Musk and that

²²⁰ JX1386.0081, Murphy Opening.

²²¹ JX1386.0080-81, Murphy Opening.

²²² *Cf. Weinberger*, 457 A.2d at 712 (finding unfair dealing where directors negotiating transaction concealed information from outside directors).

plans were underway to develop a new compensation plan.²²³ As negotiations continued, Ehrenpreis and the Committee updated the non-Committee Directors through full Board meetings and by including non-Committee Directors (other than Elon and Kimbal Musk) in Committee meetings regarding the Plan.²²⁴

5. The Compensation Committee and Board Were Independent, Disinterested, and Not Beholden to Musk

Directors of Delaware corporations are presumed to have acted properly in the discharge of their duties. Plaintiff claims that each of the Directors who voted to approve the 2018 Plan had a disabling conflict with Musk, but trial will not support this allegation.²²⁵ Plaintiff will be unable to prove that the Directors received a personal benefit from the 2018 Plan or were beholden to Musk, *i.e.*, that they were “so close” that the “non-interested director[s] would be more willing to risk his or her reputation than risk the relationship with the interested director.”²²⁶

Plaintiff alleges that the Directors were beholden to Musk because they (i) have personal and business ties to Musk, (ii) purportedly were appointed to

²²³ JX0402.

²²⁴ *E.g.*, JX0631 Board Minutes (Sept. 19, 2017); JX0571, Comp. Committee Min. (Aug. 1, 2017).

²²⁵ AC ¶¶ 49, 127.

²²⁶ *Robotti & Co., LLC v. Liddell*, 2010 WL 157474, at *12 (Del. Ch. Jan. 14, 2010).

the Tesla Board by Musk, and (iii) receive compensation for their service on Tesla's Board. But none of these things demonstrates a lack of independence.

Directors' social and business ties to one another are insufficient to show a lack of independence.²²⁷ And, to the extent that Directors have become wealthy through their investments in Tesla, that does not make them beholden to Musk; that makes them savvy early investors who saw Tesla's potential, when most others did not.

Similarly, a director is not beholden to the individual who appointed her to the board solely by virtue of her appointment.²²⁸ Regardless, the trial evidence will show that the Musk did not appoint—and does not have the power to appoint or remove—any of the Directors. Rather, the Directors either joined the Board as a condition of their own pre-IPO investments in Tesla or after being nominated by the Nominating and Governance Committee and elected by Tesla's stockholders.

Finally, compensation for board service does not render a director beholden unless such compensation is material *and* the party to which the director

²²⁷ See, e.g., *Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart*, 845 A.2d 1040, 1051 (Del. 2004); *Crescent/Mach I Partners, L.P. v. Turner*, 846 A.2d 963, 980-81 (Del. Ch. 2000).

²²⁸ *Aronson v. Lewis*, 473 A.2d 805, 816 (Del. 1984), *overruled by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000).

is allegedly beholden has the “unilateral power” to determine whether the benefit continues.²²⁹ The trial evidence will establish that (i) Musk does not have the power to alter Director compensation or to remove Directors from the Board and (ii) the Director’s equity compensation aligned their interests with Tesla’s stockholders and against any wasteful, excessive or dilutive compensation package for Musk.²³⁰

The Directors will testify that they voted to approve the 2018 Plan because they were motivated in good faith by the desire to maximize value for Tesla’s stockholders, not because of any influence by Musk.²³¹

6. The Board Empowered Tesla’s Disinterested Stockholders with the Final Say on the 2018 Plan

Although it was not required by either Delaware law or NASDAQ rules to do so, the Board conditioned the 2018 Plan on the approval of a majority of votes cast by Tesla’s disinterested stockholders (*i.e.*, excluding Elon Musk’s and

²²⁹ *Gantler v. Stephens*, 2008 WL 401124, at *13 (Del. Ch. Feb. 14, 2008), *rev’d on other grounds*, 965 A.2d 695 (Del. 2009); *MCG Cap. Corp. v. Maginn*, No. CIV.A. 4521-CC, 2010 WL 1782271, at *20 (Del. Ch. May 5, 2010).

²³⁰ *Orman v. Cullman*, 794 A.2d 5, 27 n.56 (Del. Ch. Mar. 1, 2002); *In re IXC Communications, Inc. v. Cincinnati Bell, Inc.*, 1999 WL 1009174, at *6-7 (Del. Ch. Oct. 27, 1999); *In re Oracle Corp.*, 867 A.2d 904, 930 (Del. Ch. 2004), *aff’d sub nom. In re Oracle Corp. Derivative Litig.*, 872 A.2d 960 (Del. 2005) (TABLE), JX0335.0146-47, Tesla FY 2016 10-K.

²³¹ *See Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1174 (Del. 1995).

Kimbal Musk’s shares). The Board therefore voluntarily afforded Tesla’s disinterested stockholders “one of the most extolled and powerful protections” recognized under Delaware corporate law,²³² in the form of a binding up or down vote on the final terms of the 2018 Plan. About 73% of the votes cast by Tesla’s disinterested stockholders were in favor of the Plan.²³³ As this Court has recognized, their approval constitutes “substantial evidence of fairness”.²³⁴

II. TESLA’S STOCKHOLDERS WERE FULLY INFORMED

Plaintiff alleges that Tesla stockholders were not fully informed of all material facts relevant to the 2018 Plan when they overwhelmingly voted to approve it. Plaintiff is wrong. The Proxy disclosed the process the Board followed in designing the Plan, the Plan’s final terms (including a maximum theoretical value of \$55.8 billion to Musk), and the Board’s expectations as to the Plan’s achievability.

An omitted fact is material only where “there is a substantial likelihood that a reasonable shareholder would consider it important in deciding

²³² *In re Tesla Motors, Inc. S’holder Litig.*, 2022 WL 1237185, at *36 (Del. Ch. Apr. 27, 2022).

²³³ JX0979.0003, Tesla Form 8-K (Mar. 21, 2018).

²³⁴ *Technicolor II*, 663 A.2d at 1176; *see also ACP Master v. Sprint Corp.*, 2017 WL 3421142, at *29 (Del. Ch. July 21, 2017) (approval by 70% of disinterested stockholders is “compelling evidence that the price was fair”); *Gesoff v. IIC Indus., Inc.*, 902 A.2d 1130, 1148 (Del. Ch. 2006).

how to vote.”²³⁵ In other words, to be material, an omitted fact must have “significantly altered the ‘total mix’ of information made available”.²³⁶ Plaintiff will be unable to point to any undisclosed information that would have altered the view of a reasonable stockholder.

A. Achievability of The 2018 Plan

Plaintiff alleges that the Proxy did not disclose the Board’s views concerning the achievability of the Plan’s terms. But as described at length above (Section I.A.5), the trial evidence will support that (i) the Board (and the market) believed the 2018 Plan milestones to be attainable but highly difficult to achieve and (ii) the purportedly undisclosed internal projections were in fact understood by the market.

B. Independence of the Compensation Committee and Board

Plaintiff alleges that the Proxy was misleading because it described the Compensation Committee members and other voting Directors as “independent” but failed to disclose purportedly “significant potential conflicts”.²³⁷

²³⁵ *Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, 944 (Del. 1985) (quoting *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)).

²³⁶ *Arnold v. Soc’y for Sav. Bancorp, Inc.*, 650 A.2d 1270, 1277 (Del. 1994) (quoting *TSC Indus.*, 426 U.S. at 449).

²³⁷ AC ¶¶ 164-65.

As discussed *supra*, the Proxy correctly noted the Compensation Committee members and other voting Directors were “independent” under NASDAQ rules.²³⁸ They indisputably are. The evidence will establish that each was also independent of Musk as a matter of Delaware law.²³⁹ Regardless, the material facts regarding the Directors’ relationships with Musk (and his business ventures) were all plainly and repeatedly disclosed to Tesla’s stockholders and understood by the market. For example, Plaintiff alleges that Ira Ehrenpreis’s fund, DBL Investors, participated in SolarCity’s Series D venture funding round.²⁴⁰ These facts were included in Tesla and SolarCity’s SEC filings and were easily accessible by stockholders.²⁴¹

C. Negotiations

Plaintiff also alleges that the Proxy misleadingly disclosed that the Committee engaged in “six months of active and ongoing discussions” regarding

²³⁸ JX0878.0033, 2018 Proxy.

²³⁹ *In re Om Grp., Inc. S’holders Litig.*, 2016 WL 5929951, at *15 & n.84 (Del. Ch. Oct. 12, 2016).

²⁴⁰ AC ¶ 248.

²⁴¹ JX0253.0021, Tesla Schedule 14A (Apr. 15, 2016); JX0296.0117, SolarCity Schedule 14A (Oct. 12, 2016).

the Plan when “in reality” it was “devised by E. Musk and his loyalists months before the full Compensation Committee’s involvement.”²⁴²

The Proxy does not disclose this alleged “reality” because that is not what happened. The Proxy accurately disclosed the robust process—the Compensation Committee discussed and deliberated about aspects of the 2018 Plan in detail with its advisors and the independent Board members.²⁴³ The months-long process was well documented and involved careful consideration of the Plan’s terms with the goal of aligning Musk’s interests with that of Tesla’s stockholders.

D. Role and Retention of Advisors

Plaintiff alleges that the Proxy failed to disclose that the Compensation Committee’s outside legal and compensation advisors, Wilson Sonsini and Compensia, respectively, were “selected” by Musk and Tesla management “before the Compensation Committee’s involvement”.²⁴⁴ The Proxy does not disclose this because it is not true. At the June 23, 2017 meeting (early in the process), after considering other compensation candidates,²⁴⁵ the Compensation

²⁴² AC ¶¶ 166-67.

²⁴³ *E.g.*, JX1402.0024-25, Murphy Rebuttal.

²⁴⁴ AC ¶ 168.

²⁴⁵ JX0439.0002, Comp. Committee Minutes (June 23, 2017).

Committee approved the engagement of Compensia; the Committee also decided to engage Wilson Sonsini, the outside counsel that assisted with the 2012 Plan.²⁴⁶

E. Comparator Companies for Adjusted EBITDA Milestones

Plaintiff alleges that the Proxy failed to disclose that only one of the comparator companies (Amazon) was used to determine the adjusted EBITDA milestones for the 2018 Plan, and, further, that it was “the lowest of any of the companies considered comparable, and therefore the adjusted EBITDA milestones were lower than they otherwise would—and should—be.”²⁴⁷

The Proxy is accurate. As set forth above, the Committee considered multiple potential comparator companies in setting the Plan’s adjusted EBITDA targets.²⁴⁸ The EBITDA margin inherent in the Plan’s milestones was known because the Proxy revealed the EBITDA-to-revenue margin to be 7.5%–8.6% for the first three milestones and exactly 8% for all other milestones, and the historical EBITDA margins of comparator companies were also publicly available.²⁴⁹

“There are limitless opportunities for disagreement on the appropriate valuation methodologies to employ, as well as the appropriate inputs to deploy within those

²⁴⁶ *Id.* at .0009-18.

²⁴⁷ AC ¶ 169.

²⁴⁸ JX0686.

²⁴⁹ JX1468.0035-37, Gompers Surrebuttal .

methodologies.”²⁵⁰ Plaintiff’s attempt to create a disclosure issue out of a substantive disagreement with the comparator companies used to set the 2018 Plan’s EBITDA milestones should be rejected.²⁵¹

F. Musk’s Allocation of Time

Plaintiff alleges that “stockholders were not told that E. Musk spent only about half his professional time on Tesla”.²⁵² This information is not material to stockholders. The Plan was results-based. Musk works notoriously hard—up to 120 hours a week.²⁵³ Although he spends considerable time at Tesla’s manufacturing facilities, he does not bill by the hour. No reasonable stockholder would believe that the percentage of Musk’s professional time devoted to Tesla was relevant to whether he could achieve the goals presented in the 2018 Plan.

Additionally, Plaintiff is wrong. Musk told stockholders on numerous occasions that he spends about 90% of his working time divided between Tesla and SpaceX.²⁵⁴ At the 2017 annual stockholder meeting, Musk publicly stated that he

²⁵⁰ *Teamster Members Ret. Plan v. Dearth*, 2022 WL 1744436, at *13 (Del. Ch. May 31, 2022) (citation omitted); *Feldman v. AS Roma SPV GP, LLC*, 2021 WL 3087042, at *7 (Del. Ch. July 22, 2021); *Globis Partners, L.P. v. Plumtree Software, Inc.*, 2007 WL 4292024, at *11 (Del. Ch. Nov. 30, 2007).

²⁵¹ Compare AC ¶¶ 100-112 with AC ¶ 169.

²⁵² AC ¶ 170.

²⁵³ JX1061.0003, New York Times. (Aug. 16, 2018).

²⁵⁴ JX0408.0013, Tesla Shareholder/Analyst Call (June 6, 2017).

spent, “probably about half of [his] time [] between SpaceX and Tesla”.²⁵⁵ And Musk’s outside business interests were well known to Tesla’s stockholders, including through Tesla’s public filings.²⁵⁶ Plaintiff’s attempts to convert a complaint about lack of a time requirement into a disclosure deficiency should be rejected.²⁵⁷

G. Effect of Non-Vote or Abstention

Plaintiff alleges that the Proxy “misleadingly disclosed that ‘[i]f you are the stockholder of record and you fail to vote, it will have no effect on the CEO Performance Award’” because, he claims, “[i]n reality, each non-vote actually reduced the denominator for determining whether the Grant received approval, and thus increased the likelihood of the Grant’s approval.”²⁵⁸

Plaintiff’s allegation makes no sense: a non-vote reduced the denominator for votes both in favor and against the 2018 Plan. To the extent this “amplif[ied] the power of each vote cast” regarding the 2018 Plan, it did so equally between “for” and “against” votes. The Proxy plainly disclosed that the proposal regarding the 2018 Plan required approval by a majority of the votes “cast in

²⁵⁵ *Id.*

²⁵⁶ JX0048.0001, The Master Plan.

²⁵⁷ *Gantler v. Stephens*, 2008 WL 401124, at *20 (Del. Ch. Feb. 14, 2008), *rev’d*, 965 A.2d 695 (Del. 2009).

²⁵⁸ AC ¶ 171.

person or by proxy at the Special Meeting” (excluding Elon or Kimbal Musk’s shares).²⁵⁹ No reasonable stockholder could be misled by the Proxy’s disclosure.

III. MUSK IS NOT A CONTROLLING STOCKHOLDER

Plaintiff argues that the 2018 Plan is subject to entire fairness review because Musk is allegedly Tesla’s controlling stockholder and a majority of Tesla’s Board allegedly suffered from disabling conflicts with respect to the 2018 Plan. As set forth above, the 2018 Plan is entirely fair. But the evidence will also demonstrate that Musk is not a controlling stockholder and that the Court should grant deference to the Board.²⁶⁰

A. Musk Does Not Control the Board Generally and Did Not Control Any Aspect of the 2018 Plan

When the 2018 Plan was approved, Musk held about 22% of Tesla’s common stock. Plaintiff cannot show, as they must, that Musk, as a minority stockholder, “*exercises control* over the business affairs of” Tesla²⁶¹ or exercised control over the 2018 Plan.²⁶² Control must be *actual*, rather than theoretical.²⁶³

²⁵⁹ JX0878.0029, 2018 Proxy.

²⁶⁰ *See Brehm v. Eisner*, 746 A.2d 244, 263 (Del. 2000).

²⁶¹ *Sheldon v. Pinto Tech. Ventures, L.P.*, 220 A.3d 245, 251 (Del. 2019) (citing *In re KKR Fin. Hldgs. LLC S’holder Litig.*, 101 A.3d 980, 991 (Del. Ch. 2014)).

²⁶² *Carsanaro v. Bloodhound Techs., Inc.*, 65 A.3d 618, 659 (Del. Ch. 2013).

²⁶³ *Weinstein Enters., Inc. v. Orloff*, 870 A.2d 499, 507 (Del. 2005).

And the “actual control test is not an easy one to satisfy as stockholders with very potent clout have been deemed, in thoughtful decisions, to fall short of the mark.”²⁶⁴

Under Delaware law, “the focus of the [controller] inquiry [is] on the *de facto* power of a significant (but less than majority) shareholder, which, when coupled with other factors, gives that shareholder the ability to dominate the corporate decision-making process.”²⁶⁵ For a minority stockholder to be deemed a controlling stockholder, he must wield “a *combination* of potent voting power and management control such that the stockholder could be deemed to have effective control of the board without actually owning a majority of stock”.²⁶⁶

The evidence will demonstrate that Musk did not control the 2018 Plan or the process leading up to it. Indeed, he was involved in the process only as the *counterparty*. As set forth above (Section I.B.1), the Compensation Committee—not Musk—drove the process that led to the 2018 Plan, and the

²⁶⁴ *Sciabacucchi v. Liberty Broadband Corp.*, 2017 WL 2352152, at *16 (Del. Ch. May 31, 2017) (quotations omitted).

²⁶⁵ *Superior Vision Servs., Inc. v. ReliaStar Life Ins. Co.*, 2006 WL 2521426, at *4 (Del. Ch. Aug. 25, 2006) (emphasis supplied).

²⁶⁶ *Corwin v. KKR Fin. Hldgs. LLC*, 125 A.3d 304, 307 (Del. 2015) (emphasis added).

voting Directors exercised their independence and approved the 2018 Plan based on its corporate merits, not any influence from Musk.

The Board disabled any alleged influence that Musk could have at both the Board and stockholder levels by excluding Elon and Kimbal Musk (i) from Board discussions and votes regarding the 2018 Plan²⁶⁷ and (ii) from the stockholder vote. In short, Musk did not and could not control either of the constituencies necessary for its approval—here, the Board and Tesla’s disinterested stockholders.

Plaintiff’s attempt to establish that Musk controls Tesla will establish only that Musk is an extremely engaged and hands-on CEO who is intimately involved in all aspects of Tesla’s operations, from strategy to product design and under whose dedicated leadership Tesla and its stockholders have prospered.²⁶⁸ Such CEO traits should be encouraged (as the 2018 Plan did), not subject the Board’s decision to heightened scrutiny.

B. The Presumption of Inherent Coercion Should Not Apply Here

The evidence will establish that the presumption of “inherent coercion”—which has been directly and repeatedly criticized by the very same

²⁶⁷ The Board’s decision to exclude Elon and Kimbal Musk from Board deliberations regarding the 2018 Plan complied with NASDAQ’s rules. *See* JX0063.0006, NASDAQ R. 5605(d)(1)(C).

²⁶⁸ *E.g.*, AC ¶ 3.

jurist who first referred to the concept²⁶⁹—should not apply on the facts of this case. There will be no evidence at trial that Musk controlled, coerced or otherwise improperly persuaded any disinterested Tesla stockholder with respect to the 2018 Plan.

Instead, Tesla’s disinterested stockholders—among them the largest and most sophisticated institutional investors in the country—were consulted by the Committee (not Musk) regarding the Plan’s terms and were voluntarily given the final say on the Plan by the Board. There will be no evidence that Tesla’s institutional stockholders would support Musk in value-destructive actions or voted for the 2018 Plan for any reason other than that they independently concluded that it was in the best interests of their investors.

C. MFW’s Procedures Should Not Be Required To Obtain Business Judgment Review of a Routine Compensation Decision

Defendants acknowledge that this Court concluded that the ratifying vote of Tesla’s disinterested stockholders was insufficient, without a fully functioning special committee, to obtain business judgment review of the 2018 Plan.²⁷⁰ As set forth above, the 2018 Plan passes muster under the exacting entire

²⁶⁹ William T. Allen, Jack B. Jacobs & Leo E. Strine, Jr., *Function Over Form: A Reassessment of Standards of Review in Delaware Corporation Law*, 56 Bus. L. 1287, 1308 (2001); see also *Optimizing the World’s Leading Corporate Law* at 6; *id.* at 31.

²⁷⁰ MTD Op. 26 & nn.96-100 (collecting other Chancery cases).

fairness standard. But, for the reasons set forth at the motion to dismiss stage, Defendants respectfully maintain that implementing both of *MFW*'s dual protections should not be required to obtain business judgment review of nonextraordinary transactions with controlling stockholders—such as executive compensation plans—that do not statutorily require both board approval and a majority vote of outstanding shares. As this Court noted, “nothing in *MFW* or its progeny would suggest the Supreme Court intended to extend [*MFW*'s] holding to other transactions involving controlling stockholders.”²⁷¹

IV. MUSK WAS NOT UNJUSTLY ENRICHED

The unjust enrichment claim against Musk is duplicative of the fiduciary duty claims.²⁷² Because the evidence will demonstrate that Plaintiff's fiduciary duty claims should not prevail, the Court should “treat[] [the] duplicative fiduciary duty and unjust enrichment claims in the same manner” and enter judgment in Musk's favor as to Plaintiff's unjust enrichment claim.²⁷³

²⁷¹ MTD Op. 33 & n.125. *Optimizing The World's Leading Corporate Law*, at 6.

²⁷² MTD Op. 28.

²⁷³ *Gamco Asset Mgmt. Inc. v. iHeartMedia Inc.*, 2016 WL 6892802, at *2, *19 (Del. Ch. Nov. 29, 2016); *Frank v. Elgamal*, 2014 WL 957550, at *31 (Del. Ch. Mar. 10, 2014), *order enforced*, (Del. Ch. 2014).

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(16,500 word limit pursuant to Dkt. 224)