



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

RICHARD J. TORNETTA, derivatively
on behalf of all other similarly situated
stockholders of TESLA, INC.,

Plaintiff,

v.

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.

C.A. No. 2018-0408-KSJM

**PUBLIC VERSION
AS FILED ON
NOVEMBER 1, 2022**

PLAINTIFF'S PRE-TRIAL BRIEF

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GLOSSARY

Ahuja	Deepak Ahuja
Aon/Radford	Aon plc. and its successors and predecessors
Audit Committee	The Audit Committee of the Board of Directors of Tesla, Inc.
Board	The Board of Directors of Tesla, Inc.
Brown	Tom Brown
Burg	Jon Burg
Buss	Brad W. Buss
CEO	Chief Executive Officer
CFO	Chief Financial Officer
Chang	Jonathan Chang
COO	Chief Operating Officer
Committee	The Compensation Committee of the Board of Directors of Tesla, Inc.
Company	Tesla, Inc.
Compensia	Compensia, Inc.
DBL	DBL Partners and its affiliates (other than Tesla, Inc.), subsidiaries, successors and predecessors
Defendants	Elon Musk, Robyn M. Denholm, Antonio J. Gracias, James Murdoch, Linda Johnson Rice, Brad W. Buss, and Ira Ehrenpreis
Denholm	Robyn M. Denholm

DFJ	Draper Fisher Jurvetson and its affiliates (other than Tesla, Inc.), subsidiaries, successors and predecessors
Ehrenpreis	Ira Ehrenpreis
FDS	Fully Diluted Shares
F.W. Cook	Federick W. Cook & Co.
GC	General Counsel
GDFV	Grant Date Fair Value
Glass Lewis	Glass, Lewis & Co.
Gracias	Antonio J. Gracias
Grant	Elon Musk's 2018 stock grant from Tesla, Inc.
Huh	Yun Huh
IPO	Initial Public Offering
ISS	Institutional Shareholder Services, Inc.
Johnson Rice	Linda Johnson Rice
K. Musk	Kimbal Musk
Lupa	Lupa Systems
Maron	Todd Maron
Murdoch	James Murdoch
Musk	Elon Musk
Neuralink	Neuralink Corporation
PayPal	PayPal Holdings, Inc.
PDCC	The permanent disclosure controls committee of Tesla, Inc.

Proxy	Tesla, Inc. proxy statement dated February 8, 2018
Rothenberg	Phillip Rothenberg
SEC	U.S. Securities and Exchange Commission
Semler Brossy	Semler Brossy Consulting Group LLC
SolarCity	SolarCity Corporation
SpaceX	Space Exploration Technologies Corp.
Stockholder Vote	The stockholder vote to approve the Grant on March 21, 2018
Telstra	Telstra Corporation Limited
Tesla	Tesla, Inc.
The Boring Company	TBC – The Boring Company
TOS	Total Outstanding Shares
Twitter	Twitter, Inc.
Valor	Valor Equity Management LLC, and its affiliates (other than Tesla, Inc.), subsidiaries, successors and predecessors
WSGR	Wilson Sonsini Goodrich & Rosati

CITATION CONVENTIONS

Description	Citation
Deposition Transcript of Deepak Ahuja (JX1336)	“Ahuja: ___”
Deposition Transcript of Tom Brown (JX1373)	“Brown: ___”
Deposition Transcript of Jon Burg (JX1363)	“Burg: ___”
Deposition Transcript of Brad W. Buss (JX1347)	“Buss: ___”
Deposition Transcript of Jonathan Chang (Day 1: JX1369; Day 2: JX1379)	“Chang: ___”
Deposition Transcript of Robyn Denholm (Day 1: JX1340; Day 2: JX1341; Day 3: JX1351)	“Denholm: ___”
Deposition Transcript of Ira Ehrenpreis (JX1372)	“Ehrenpreis: ___”
Deposition Transcript of Paul Gompers (Day 1: JX1407; Day 2: JX1485)	“Gompers: ___”
Deposition Transcript of Antonio Gracias (JX1362)	“Gracias: ___”
Deposition Transcript of Todd Maron (Day 1: JX1365; Day 2: JX1375)	“Maron: ___”
Deposition Transcript of James Murdoch (JX1334)	“Murdoch: ___”
Deposition Transcript of Elon Musk (JX1374)	“Musk: ___”
Deposition Transcript of Kimbal Musk (JX1352)	“K.Musk: ___”
Deposition Transcript of Phuong Phillips (JX1348)	“Phillips: ___”
Deposition Transcript of Linda Johnson Rice (JX1375)	“Rice: ___”
Deposition Transcript of Gabrielle Toledano (JX1371)	“Toledano: ___”
Deposition Transcript of Martin Viecha (JX1333)	“Viecha: ___”
Expert Report of Brian D. Dunn (JX1384)	“Dunn Opening: ___”

Description	Citation
Rebuttal Report of Brent Goldfarb (JX1401)	“Goldfarb Rebuttal: ___”
Rebuttal Report of Andrew P. Restaino (JX1403)	“Restaino Rebuttal: ___”
Joint Trial Exhibit	“JX ___”
Pre-Trial Order	“PTO ¶ ___”

PRELIMINARY STATEMENT

This action challenges the largest compensation grant in human history. The Grant was:

- paid to a *part-time* executive who conceived of and dictated its fundamental terms;
- approved by a *conflicted* Committee and supine Board with none of the traditional “benchmarking” that is grist for the mills of all executive compensation consultants;
- secured with a materially misleading and omissive proxy statement; and
- demanded for the avowed purpose of colonizing Mars (the planet).

The rich record developed here will prove each of these points by at least a preponderance.

The requested relief is straightforward: a declaration that the Grant fails for want of approval by fully-informed stockholders or, alternatively, is subject to the entire fairness review, which Defendants fail. Either way, the result is the same: the Grant’s invalidation.

The route to this relief is likewise straightforward. The Grant was *subject to and contingent upon* the approval of non-Musk stockholders. The Proxy soliciting approval of the Grant was materially misleading and omissive, including its

description of Committee members as “independent” despite their numerous indisputable conflicts, and its characterization of *all* the milestones that triggered vesting as “stretch” goals selected to be “very difficult to achieve” without disclosing that three such milestones were embedded in the Company’s forecast and formally deemed probable of achievement *as of the date of the stockholder vote*. Any action by stockholders based on a materially misleading proxy is a nullity and the Grant fails.

In addition *and* in the alternative, the Court will reach the same liability finding and same remedy if it concludes that (i) entire fairness applies because a majority of the Board—or Committee—that approved the Grant was not independent of Musk, *or* Musk controlled Tesla either generally or regarding the Grant specifically; *and* (ii) that Defendants fail to demonstrate that the largest compensation grant in human history—paid for part-time effort—was entirely fair.

The record presented at trial will be detailed. The decision to be made is straightforward. The Proxy was materially misleading and Defendants can never prove the entire fairness of this historic Grant, let alone for part-time work. Judgment should be entered for Plaintiff and the Grant should be nullified.¹

¹ Plaintiff takes no position on whether Musk should receive compensation for any contributions post-dating the Grant. That separate and distinct compensation decision is not the subject of this action.

STATEMENT OF FACTS

I. MUSK CONTROLLED TESLA

A. Elon is Tesla, Tesla is Elon

Musk is a Tesla co-founder,² has been Tesla’s CEO, President, and Chief Product Officer since 2008,³ and served as Tesla’s Chairman from 2004 until November 7, 2018,⁴ when he was forced to resign pursuant to a settlement with the SEC (the “SEC Settlement”).⁵ Musk leads Tesla as the Company’s public face and often characterized Tesla as “my company” or “Elon’s company.”⁶ As an industry expert aptly stated: “*Elon is Tesla, Tesla is Elon.*”⁷

Musk dominates Tesla’s corporate strategy, authoring Tesla’s “Master Plan” in 2006 and “Master Plan, Part Deux” in 2016, which both detailed “a plan” for achieving Tesla’s “mission or vision.”⁸ Musk also closely manages Tesla, including its personnel decisions.⁹ He “generally interviews all high-level” candidates seeking

² PTO ¶¶44; *In re Tesla Motors, Inc. S’holder Litig.* (“*SolarCity Post-Trial Opinion*”), 2022 WL 1237185, at *3 (Del. Ch. Apr. 27, 2022) (“Defendant, Elon Musk, is Tesla’s co-founder and largest stockholder.”).

³ JX1256.0029.

⁴ JX1083.

⁵ JX1070; JX1057.

⁶ JX0390.0020; Musk:28:9-13.

⁷ JX0192.

⁸ PTO ¶¶47-48; Musk:33:17-34:19; JX0048; JX0274.

⁹ Ahuja:60:15-23.

Tesla employment¹⁰ and controls “executive decision-making in terms of [] hiring and firing.”¹¹ Musk also makes Tesla senior executive compensation “recommendation[s] in the first instance.”¹²

Musk has a history of firing employees who disagree with him and has been characterized as an “unapproachable tyrant who devalues the contributions of the staff, and may fire them on a whim.”¹³ For example, when discussing Musk’s Grant, Tesla’s Chief People Officer, Gabrielle Toledano, stated: “Elon will fire me Tuesday anyway for sending market rate compensation to him.”¹⁴

Musk manages Tesla with little regard for the Board. For example, in March 2021, Musk appointed himself Tesla’s “Technoking”—a role Musk unilaterally created and compared to being a “monarch”¹⁵—without consulting Tesla’s directors.¹⁶ Despite receiving no Board input or authorization, Tesla

¹⁰ Viecha:32:4-10.

¹¹ Murdoch:116:19-24; *see also* K.Musk:137:7-9 (employees at Tesla knew that Elon would “fir[e] [them] if they are not able to perform”).

¹² Musk:61:5-7; *see also* Murdoch:116:19-24.

¹³ JX0925.0005.

¹⁴ JX0875.0001; *see also* Musk:22:11–27:08.

¹⁵ PTO¶46; Musk:24:6-8.

¹⁶ Musk:23:2-3, 25:13-15, 85:9-6; Denholm:150:6-17 (testifying that the Board did not ask or authorize Musk to take the title “Technoking”); Murdoch:388:7-23 (testifying Murdoch thinks he first learned of Musk’s new title via tweet); K.Musk:130:21-131:3 (testifying he first heard the word “Technoking” over

announced in an SEC filing that “the title[] of Elon Musk [has] changed to Technoking of Tesla.”¹⁷ Further, Gracias testified that Musk could sell Tesla if he wanted, the Board could not stop him.¹⁸

Musk also flaunted the SEC Settlement, which required Tesla to create a PDCC to oversee Musk’s “public statements regarding Tesla.”¹⁹ Musk ignored the PDCC’s authority, acknowledging that it “does not routinely review [his] tweets before”²⁰ he publishes them and that Musk unilaterally decided what tweets the PDCC reviewed.²¹ After amending the SEC Settlement to make “the terms...more precise,” the SEC twice accused Musk of violating those terms by tweeting without Company approval.²² Musk could not recall any action taken by Denholm or the

Twitter); Ehrenpreis:129:1-18 (testifying Ehrenpreis knew nothing about Musk’s new “Technoking” title).

¹⁷ JX1331.

¹⁸ Gracias:309:4-9.

¹⁹ JX1076; *see* JX1118 (Musk stating: “I want to be clear. I do not respect the SEC. I do not respect them.”).

²⁰ Musk:11:9-14; *accord* JX1118 (“Q. None? Does someone have to read them before they go out? A. No.”).

²¹ Musk:13:4-8 (“If there is something *I* think would have a material effect on the stock price or...a major effect on earnings or revenue forecasts or things like that...that would fall under the most likely to review situation.” (emphasis added)).

²² Musk:12:9-20, 13:4-8; *see also* JX1109 (“In its complaint, the SEC cited an interview Musk gave...when he said the company doesn’t need to review his tweets.”).

PDCC to address his tweets following the SEC’s accusations,²³ and Musk confirmed the PDCC imposed no consequences for his violative tweets.²⁴

Meanwhile, Musk openly provoked the SEC—Tesla’s key regulator—tweeting: “SEC, three letter acronym, middle word is Elon’s,”²⁵ which Musk testified was “sort of a Rorschach test” that *might* stand for “Save Elon’s Company.”²⁶ Likewise, Musk openly violated the provisions of the SEC Settlement during his deposition when he challenged the veracity of the SEC’s charges against him, which Musk claimed was necessitated by his oath to testify truthfully.²⁷

B. Musk’s Significant Stock Ownership

Musk has been Tesla’s largest stockholder since Tesla’s June 2010 IPO.²⁸ As of December 31, 2017, Musk owned 21.9% of the outstanding shares of Tesla common stock.²⁹

²³ Musk:13:9-13, 14:9-12.

²⁴ JX0925.

²⁵ Musk:28:2-6.

²⁶ Musk:28:9-11.

²⁷ Musk:27:23-28:21, 30:7-31:5.

²⁸ PTO¶67; JX0076; JX1474.0070; JX1440.0030.

²⁹ JX1025.0051.

C. Musk’s Control Over the Board

Almost the entire nine-member Board, which includes Musk, lacked independence from Musk when the Grant was approved.

1. K. Musk

K. Musk is Musk’s brother.³⁰

2. Gracias

Gracias was a Tesla director from 2007 to 2021³¹ and served on the Committee from 2009 to April 2019.³²

Gracias is one of Musk’s closest “friend[s]” dating to roughly 2004.³³ Their relationship includes vacationing together in the Bahamas and Wyoming, socializing with one another’s families, including on holidays, and Gracias staying at Musk’s home in Los Angeles numerous times.³⁴ Gracias attended Musk’s second wedding,³⁵ was a groomsman in K. Musk’s wedding,³⁶ and is friendly with Musk’s

³⁰ PTO¶142; K.Musk:11:13-15.

³¹ PTO¶99; Gracias:35:1-2; JX0878.0038.

³² PTO¶100; JX1025.0026.

³³ Musk:214:7-10; Gracias:22:19-21, 58:6-8; JX1255.0005.

³⁴ Gracias:58:6-8, 58:16-19, 65:4-68:4, 68:13-21, 69:17-25, 70:13-72:5, 74:10-23, 83:2-11; K.Musk:66:11-15, 68:1-69:9.

³⁵ Gracias:63:22-64:2.

³⁶ K.Musk:87:20-88:7.

and K. Musk’s mother and sister.³⁷ Gracias was one of a select few to whom Musk turned for support after suffering a personal tragedy.³⁸ Musk also consulted with Gracias regarding SpaceX around the time Musk founded SpaceX in 2002.³⁹

Gracias—personally and through his private equity firm Valor⁴⁰—has collectively invested *over half-a-billion dollars* in essentially *all* of Musk’s entities (*i.e.*, PayPal, Tesla, SpaceX, SolarCity, The Boring Company, and Neuralink):

³⁷ Gracias:83:24-84:20.

³⁸ Gracias:73:25-74:23; K.Musk:66:12-15.

³⁹ Gracias:25:16-26:13.

⁴⁰ PTO¶100.

ENTITY	AMOUNT INVESTED	DATE
PayPal ⁴¹	\$1,000,000	1999-2000
Tesla ⁴²	\$15,000,000	2005-2010
SpaceX ⁴³	\$400,000,000 - \$500,000,000	2002-2021
SolarCity ⁴⁴	\$25,000,000	2012 (at the latest)
The Boring Company ⁴⁵	\$15,000,000-\$20,000,000	2017-2018
Neuralink ⁴⁶	\$15,000,000-\$20,000,000	2017-2019

⁴¹ PTO ¶116; Gracias:20:6-24.

⁴² Gracias:38:4-14.

⁴³ PTO ¶115; Gracias:29:9-30:3. Gracias (personally and through Valor) invested around \$25M in SpaceX “[d]uring its infancy.” Gracias:28:9-15.

⁴⁴ PTO ¶¶111, 117; Gracias:43:13-21, 41:11-19; JX1545.0137.

⁴⁵ PTO ¶119; Gracias:45:17-20; JX1515.0002 (Musk founded The Boring Company in 2016); JX1531.0003-.04 (total offering amount of over \$112M sold to 31 investors as of early 2018). Gracias was one of the first investors in The Boring Company. Gracias:45:2-16

⁴⁶ PTO ¶118; Gracias:51:4-11, 15-22; JX1532.0003-.04 (\$27M sold to 12 investors as of August 2017, with total offering amount of over \$100M); JX1533.0004 (\$39M sold to seven investors as of May 2019, with total offering amount of over \$51M); JX350.0002 (Neuralink registered as a California company in July 2016 and raised \$27M toward \$100M target as of August 2017).

As of December 31, 2017, Gracias and Valor beneficially owned 483,939 shares of Tesla common stock worth approximately \$150M⁴⁷ and 7,117,235 shares of SpaceX worth *approximately \$961M*.⁴⁸

Gracias's investments with Musk entities began with PayPal in 2000, were highly profitable, and are now worth *billions* of dollars.⁴⁹ For example, as of May 6, 2021, Gracias and his affiliates owned approximately \$1B worth of Tesla stock,⁵⁰ and his pre-tax profit from his Tesla investment was ~\$900M-\$1B.⁵¹ As of April 2018, March 2020, and May 2021, Gracias's and Valor's \$400M-\$500M SpaceX investment was worth \$1.2B, \$1.6B, and \$2B-\$3B, respectively.⁵²

Gracias has served as a SpaceX director since 2010⁵³ and served as a SolarCity director from February 2012 until its acquisition by Tesla in November 2016.⁵⁴ Given his relationship with Musk and Musk-controlled entities, "Gracias was

⁴⁷ PTO¶108.

⁴⁸ PTO¶114; JX1270.0002.

⁴⁹ PTO¶110, 116; Gracias:20:6-12, 28:9-29:19, 30:12-18, 38:4-11, 43:13-22, 45:17-20, 51:4-11, 136:7-137:2; JX1254.0030; JX1270.0002.

⁵⁰ Gracias:136:7-11.

⁵¹ Gracias:136:18-137:2.

⁵² JX1270.0002; Gracias:30:12-18.

⁵³ PTO¶113; Gracias:32:17-21, 33:17-19.

⁵⁴ PTO¶112; Gracias:41:1-19.

recused from certain discussions regarding, and from voting on, [Tesla's] Acquisition [of SolarCity].”⁵⁵

Musk invested approximately \$5M-\$10M in Valor's Fund II—*i.e.*, the same Valor Fund that initially invested in SpaceX⁵⁶— in or around 2007.⁵⁷ Gracias also (i) invested in K. Musk's business ventures,⁵⁸ (ii) helped K. Musk found—and served on the Board of—K. Musk's charity,⁵⁹ and (iii) used testimonials from Musk and Musk's cousin (Peter Rive) to promote Valor.⁶⁰

Gracias has also been close friends with K. Musk for approximately twenty years.⁶¹

3. Ehrenpreis

Ehrenpreis—personally, through his investment firm DBL,⁶² and through other affiliated entities—has invested tens of millions of dollars in Musk-controlled companies:

⁵⁵ *SolarCity Post-Trial Opinion*, 2022 WL 1237185, at *5.

⁵⁶ Gracias:28:11-13.

⁵⁷ Gracias:56:19-57:3.

⁵⁸ Gracias:79:5-11.

⁵⁹ Gracias:79:8-80:1, 81:14-23.

⁶⁰ JX1472.

⁶¹ K.Musk:52:18-19, 66:9-10.

⁶² PTO ¶¶91, 94.

ENTITY	AMOUNT INVESTED	DATE
SpaceX ⁶³	\$45,000,000	2014 (at the latest)-2021
The Boring Company ⁶⁴	\$10,000,000	2016-2019
Neuralink ⁶⁵	\$1,000,000	2016-2017
Tesla ⁶⁶	\$13,400,000	2007-2008

As of December 31, 2017, Ehrenpreis and DBL beneficially owned 89,540 shares of Tesla common stock⁶⁷ worth approximately \$27.9M and 343,602 shares of SpaceX worth approximately \$46M.⁶⁸ As of April 2018 and March 2020, the SpaceX shares were worth \$58,068,738 and \$75,592,440, respectively.⁶⁹

Ehrenpreis is Musk’s self-described “friend” with whom Musk has had a personal and professional relationship for approximately 15 years.⁷⁰ That

⁶³ Ehrenpreis:392: 3-393:16; JX154.0017.

⁶⁴ PTO¶94; Ehrenpreis:395:16-17; JX1515.0002; JX1531.0003-.04; JX1535.0004 (\$117M sold to 20 investors as of July 26, 2019, with total offering amount of over \$120M).

⁶⁵ PTO¶95; Ehrenpreis:395:18-396:5; JX1532.0003-04.

⁶⁶ JX72.0167-68 (Ehrenpreis invested in Tesla through Technology Partners Fund VIII, L.P., for which he served as its general partner and a managing member).

⁶⁷ PTO¶90.

⁶⁸ PTO¶92; JX1025.0048; JX1270.0001-02.

⁶⁹ JX1270.0002.

⁷⁰ Musk:215:13-14 (“Q. [D]o you consider [Ehrenpreis] a friend? A. Yes.”); K.Musk:59:17-18 (testifying Ehrenpreis and Musk are “friends”).

relationship has been broadcast on Twitter. Ehrenpreis thanked Musk for announcing Ehrenpreis first among a select few to receive the first Model X vehicles:⁷¹



Ira Ehrenpreis
@IraEhrenpreis



It's X time!!! A total honor to be the first one last night to congratulate Elon and get my new keys!

3:55 PM - Sep 30, 2015

♡ 28 👤 [See Ira Ehrenpreis's other Tweets](#)

⁷¹ JX0229.

Ehrenpreis was the first director to put his check down—to be “first in line”—to purchase the first Tesla Model 3,⁷² but then gifted his right to the first Model 3 to Musk for his 46th birthday.⁷³ In response, Musk tweeted:⁷⁴



And Musk and Ehrenpreis have publicly exchanged expressions of “Love” and appreciation:⁷⁵

⁷² Ehrenpreis:410:11-16.

⁷³ Ehrenpreis:411:6-19; JX0518.

⁷⁴ JX0518.

⁷⁵ JX0304.



Ehrenpreis has also been K. Musk’s “close friend and business associate” dating back to 1998.⁷⁶ Ehrenpreis invested in K. Musk’s business ventures⁷⁷ and attended K. Musk’s wedding in Spain.⁷⁸ Ehrenpreis also publicly referred to Musk’s and K. Musk’s mother, Maye Musk, as an “inspiration” and “role model”:⁷⁹

⁷⁶ JX0106; *see also* K.Musk:59:9-10.

⁷⁷ Ehrenpreis:397:6-20.

⁷⁸ K.Musk:87:20-25; Gracias:86:24-87:9.

⁷⁹ JX1528; Ehrenpreis:411:20-23.



Ehrenpreis and his children have also socialized with Gracias and his children.⁸⁰

4. Buss

Musk appointed Buss to the Board in November 2009 (before Tesla's IPO), where Buss remained until June 2019.⁸¹ Buss served on the Committee.⁸²

As of September 23, 2016, ~45% of Buss's total assets (worth ~\$54M) were directly attributable to Musk and Musk-affiliated companies.⁸³ Musk personally recruited Buss out of retirement to serve as SolarCity's CFO,⁸⁴ which Buss did from August 2014 to February 2016.⁸⁵ According to SolarCity's Definitive Proxy

⁸⁰ Gracias:88:19-89:4.

⁸¹ 1142.0002; JX1228.0033.

⁸² JX1025.0031.

⁸³ JX1167; *SolarCity Post-Trial Opinion*, 2022 WL 1237185, at *4 & n.26.

⁸⁴ *SolarCity Post-Trial Opinion*, 2022 WL 1237185, at *4; Buss:20:21-23.

⁸⁵ PTO¶78; JX0379.0025. Buss also served as a consultant for SpaceX after he retired as CFO. Buss:20:21-23; JX0254.0047.

Statement dated April 16, 2016, Buss received **\$31.755M** in compensation for his eighteen months of service,⁸⁶ prompting Glass Lewis to advise: “[W]e do not believe that shareholders should consider Mr. Buss to be independent.”⁸⁷

Buss also earned substantial compensation for his decade-long service on Tesla’s Board, including \$4.9M in 2015,⁸⁸ \$3.4M in 2017,⁸⁹ and \$6.9M in 2018.⁹⁰ Between 2013 and 2019, Buss realized a nearly \$24.2M gain from selling some of the options he received as director compensation prior to the Grant process.⁹¹ As of May 20, 2019, Buss owned 1,540 Tesla shares personally and 11,808 shares through the Buss Family Trust.⁹² Since leaving the Board in June 2019, Buss has had no full-time employment.⁹³

5. Denholm

Denholm has served on the Board since August 2014 and as Board Chair since November 8, 2018.⁹⁴ Musk selected Denholm as Chair after resigning his

⁸⁶ JX0254.0047.

⁸⁷ JX1034.0011.

⁸⁸ JX0253.0044.

⁸⁹ JX0895.0029.

⁹⁰ JX1138.0071.

⁹¹ JX0161; JX0168; JX0262; JX1106; JX1117; JX1145.

⁹² JX1145.

⁹³ JX1469.0003.

⁹⁴ JX0187; JX1083.

Chairmanship pursuant to the SEC Settlement.⁹⁵ Denholm served on the Committee from August 2014 to the present.⁹⁶

Denholm is one of the world's highest-paid directors,⁹⁷ receiving \$7.2M in 2014,⁹⁸ \$4.6M in 2015,⁹⁹ \$4.9M in 2017,¹⁰⁰ \$6.9M in 2018,¹⁰¹ \$2.7M in 2019,¹⁰² and \$5.8M in 2020.¹⁰³

Denholm has made *more than a quarter of a billion dollars* selling only some of the options she received as director compensation prior to the Grant process, including \$88M in 2020,¹⁰⁴ \$112M in 2021,¹⁰⁵ and \$80M in 2022.¹⁰⁶ Denholm characterized the \$88M gain from her 2020 sale of Tesla options as “relatively material” to her.¹⁰⁷

⁹⁵ Denholm:95:14-16.

⁹⁶ PTO¶84.

⁹⁷ JX1239.

⁹⁸ JX0209.0049.

⁹⁹ JX0253.0044.

¹⁰⁰ JX1025.0046.

¹⁰¹ JX1138.0071.

¹⁰² JX1234.0057.

¹⁰³ JX1404.0055.

¹⁰⁴ JX1249; JX1289; JX1293; JX1300.

¹⁰⁵ JX1355; JX1396; JX1406; JX1421.

¹⁰⁶ JX1439; JX1443; JX1465; JX1471.

¹⁰⁷ Denholm:111:2-112:6.

Prior to becoming Tesla’s Chair, Denholm was COO and then CFO at Telstra until resigning in May 2019, which was her only other publicly disclosed income source between February 2016 and May 2019.¹⁰⁸ Relative to her Tesla compensation, Denholm’s Telstra compensation was marginal—\$655,867 in 2017,¹⁰⁹ \$1.3M in 2018,¹¹⁰ and \$853,560 in 2019.¹¹¹

6. Murdoch

Murdoch has been on the Board since July 2017,¹¹² first met Musk in the late 1990s,¹¹³ and has been friends with Musk since approximately 2006.¹¹⁴ Murdoch has invested over \$70M in SpaceX personally and through his private investment company, Lupa.¹¹⁵

Murdoch socializes with Musk and their respective families, including vacations to the Bahamas, Mexico, and Israel in 2016-2018,¹¹⁶ and family barbecues

¹⁰⁸ Denholm:94:7-96:21.

¹⁰⁹ JX0600.0002; JX1507.

¹¹⁰ JX1062.0002; JX1508.

¹¹¹ JX1163.0002; JX1509.

¹¹² PTO¶122; JX1474.

¹¹³ Murdoch:32:11-17; Musk:214:11-18.

¹¹⁴ Murdoch:40:11-41:12.

¹¹⁵ Murdoch:23:1-24:14.

¹¹⁶ JX1260.0005; JX1264.0005; Murdoch:31:8-32:2, 38:18-39:19, 41:13-44:15, 43:21-44:4,44:16-24, 53:1-54:6; K.Musk:68:8-69:4.

with their children.¹¹⁷ Murdoch is “friend[s]” with K. Musk¹¹⁸ and attended K. Musk’s wedding in Spain,¹¹⁹ and Murdoch and his wife have dined with K. Musk and his wife.¹²⁰

7. Jurvetson

Jurvetson served on the Board from 2009 to 2020 and has been a “close friend” of Musk since 1995.¹²¹ Jurvetson frequently vacationed, attended birthday parties, and attended Burning Man with Musk and K. Musk.¹²² Jurvetson was a Managing Director of DFJ,¹²³ in which Musk was an investor and limited partner.¹²⁴ DFJ invested in Musk-affiliated companies, including SpaceX, for which Jurvetson served as a director.¹²⁵ Jurvetson also invested in K Musk’s businesses and attended K. Musk’s wedding in Spain.¹²⁶

* * *

¹¹⁷ Murdoch:43:7-15.

¹¹⁸ K.Musk:87:14-15.

¹¹⁹ K.Musk:86:15-16.

¹²⁰ K.Musk:87:16-19.

¹²¹ K.Musk:76:2-14; Gracias:102:23-25.

¹²² K.Musk:81:9-82:1.

¹²³ PTO¶130.

¹²⁴ Gracias:94:15-24; K.Musk:82:25-83:4, 84:6-18; JX1268.0047-48; JX1270.

¹²⁵ Gracias:94:15-24; K.Musk:82:25-83:4, 84:6-18; JX1268.0031.

¹²⁶ K.Musk:82:21-24, 87:20-25.

Tesla’s massive director compensation—\$8,706,126 per director on average for 2018, representing **25.6x** the median of all peer groups¹²⁷—further undercuts the Board’s independence.

Sophisticated market participants such as ISS and Barron’s questioned the Board’s willingness to “stand up to Musk,”¹²⁸ and noted “Musk has pretty much had his way with the board over the years.”¹²⁹

D. Musk’s Control Over the Committee

When the Grant was formulated and approved, the Committee consisted of Gracias, Ehrenpreis (Chair), Buss, and Denholm,¹³⁰ none of whom were independent of Musk.

E. Other Indicia of Musk’s Control

First, Tesla has repeatedly acknowledged Musk’s powerful influence over the Company, publicly disclosing, *e.g.*: “[Tesla is] highly dependent on the services of Elon Musk, [who is] highly active in [the Company’s] management, [and if Tesla were to lose his services, it could] disrupt our operations...delay the development

¹²⁷ Dunn Opening:74-75. Tesla’s Board consistently ranks as the highest- or second-highest paid board in America. *See, e.g.*, JX1161.

¹²⁸ JX0940.

¹²⁹ JX0865.

¹³⁰ JX1025.0026, 0031; JX1536.0010; JX0068.0005.

and introduction of our vehicles and services, and negatively impact our business...as well as cause our stock price to decline.”¹³¹

Second, Musk conceded—in a subpoena served on his behalf in *Twitter v. Musk*—that he controls Tesla. The subpoena requests “the document collection and retention policies maintained by *Tesla, SpaceX, or other entities controlled by [Musk]* that You learned over the course of representing *[Musk], Tesla, or any other [Musk]-controlled entity* in any engagement or potential engagement.”¹³²

Third, Musk has his own set of rules at Tesla. For example, Tesla has fired employees for “aggressive behavior towards people,”¹³³ but never disciplined Musk for such behavior.¹³⁴ Moreover, Musk represented in *Twitter v. Musk* that he has his own set of confidentiality-related rules at Tesla. Musk (alone) “had ‘unrestricted’ personal use of his Tesla email account [and] ‘no one’ at Tesla can access those emails without Musk’s consent except ‘to the extent legally necessary[.]’”¹³⁵ The Court accepted Musk’s representation, holding, *inter alia*: “The court has little doubt that...[Musk] has the power to direct operational decisions [at Tesla].”¹³⁶

¹³¹ JX0335.0025-26.

¹³² JX1505; JX1537.

¹³³ Toledano:285:11-23.

¹³⁴ *Id.*

¹³⁵ JX1538.0014-15.

¹³⁶ *Id.*

Fourth, as part of Tesla’s IPO, Musk negotiated a “supermajority [2/3] voting requirement” for any stockholder measure to force change at Tesla, giving Musk effective veto power over such measures.¹³⁷ The Board opposed any stockholder effort to remove that provision, which persisted into 2022.¹³⁸

II. MUSK’S 2009 AND 2012 GRANTS

A. The 2009 Grant

In 2009, the Board granted Musk a compensation plan (the “2009 Grant”)¹³⁹ consisting of options to purchase (i) 4% of Tesla’s fully-diluted shares, one-fourth of which vested immediately, with the remainder vesting monthly over three years; and (ii) an additional 4% of Tesla’s shares, subject to Tesla’s achievement of four Model S-related operational milestones (*i.e.*, 1% per milestone).¹⁴⁰

In 2010 and 2011, Musk received no equity grants because the Committee “believed [Musk’s] existing [2009 Grant] already provided sufficient motivation for Mr. Musk to perform his duties as [CEO].”¹⁴¹

¹³⁷ JX0323.0033.

¹³⁸ JX1234.0026; JX1404.0021; JX1500.

¹³⁹ PTO¶188.

¹⁴⁰ PTO¶189; JX0068.0002-03.

¹⁴¹ JX0878.0011.

B. The 2012 Grant

In 2012, the Board granted Musk options that vested upon achieving certain operational milestones (the “2012 Grant”).¹⁴² The ten-year 2012 Grant had ten tranches, each providing Musk 0.5% of Tesla’s total issued and outstanding shares (*i.e.*, 5% total).¹⁴³ Each tranche required Tesla to (i) increase market capitalization by \$4B and (ii) achieve an additional operational milestone.¹⁴⁴

The 2012 Grant’s disclosed GDFV was \$78,110,730.¹⁴⁵ As of April 7, 2017, six of the 2012 Grant’s tranches had vested and been certified by the Committee, providing Musk 3% of Tesla’s total outstanding shares, leaving four of the 2012 Grant’s ten tranches outstanding, and more than five years remaining on the 2012 Grant’s ten-year term.¹⁴⁶ The 2012 Grant expired on August 13, 2022, with nine of its ten tranches achieved.¹⁴⁷

III. MUSK AND HIS LOYALISTS ORCHESTRATE HIS DESIRED GRANT

On April 8, 2017—one day after the Committee certified the vesting of the sixth 2012 Grant tranche—Ehrenpreis and Musk discussed Musk’s new

¹⁴² PTO ¶¶ 192-194; JX0154.0026.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ JX0154.0031.

¹⁴⁶ JX0379.0037.

¹⁴⁷ JX1474.0061; JX1481.0008.

compensation plan.¹⁴⁸ Musk testified that in that initial conversation, he proposed “something similar to what was done in the past” but with “a larger amount,” and “something that would result in...owning 10 percent of the company, incrementally taking into account dilution of my own shares.”¹⁴⁹ Musk told Ehrenpreis the Grant should provide 1% of Tesla’s stock per tranche.¹⁵⁰ Ehrenpreis and Musk also agreed on \$50B market capitalization milestones.¹⁵¹ Musk and Ehrenpreis then promptly communicated Musk’s desired new plan to Tesla’s then General Counsel Maron.¹⁵²

Maron served as Musk’s personal divorce attorney before Musk recruited him as Tesla’s General Counsel, notwithstanding Maron’s lack of corporate, securities, or regulatory experience.¹⁵³ Maron was overcome by emotion when testifying about Musk, explaining he “care[d] about [Musk] a tremendous amount” and has “always cared about him and wanted him to have...success in life.”¹⁵⁴

¹⁴⁸ JX0362.0002.

¹⁴⁹ Musk:144:19-145:8.

¹⁵⁰ Musk:147:25-148:10 (“Q. Who came up with the 1 percent per tranche? A. I think I might have suggested that....”).

¹⁵¹ Musk:146:25-147:5 (“Q. Who came up with the \$50 billion market cap milestone? A. [I]t came out of a discussion with Ira.”).

¹⁵² Maron:127:13-128:12, 132:2-17, 133:12-135:1; JX0368.0002.

¹⁵³ Maron:19:8-20:4.

¹⁵⁴ Maron:199:12-13, 200:1-5.

After receiving instructions from Musk and Ehrenpreis, Maron immediately reached out to Tesla's CFO Ahuja, who reported directly to Musk.¹⁵⁵

No later than April 9, 2017, Maron enlisted his Deputy GCs Chang and Rothenberg and Associate General Counsel Huh.¹⁵⁶ On April 10, Rothenberg and Huh discussed the Grant with WSGR,¹⁵⁷ Musk's preferred legal advisor that "ha[d] been used by Tesla for a long time in various matters."¹⁵⁸

On May 12, 2017, with the Grant process well-underway, Musk told Tesla co-founder Straubel regarding his new grant: "I'm planning on something really crazy, but also high risk."¹⁵⁹ On May 21, 2017, Tesla began modeling the Grant.¹⁶⁰

By June 2017, Tesla was planning an "accelerated" process with Board approval of the Grant in "a little over one month" (*i.e.*, July 2017).¹⁶¹ On or around June 18, 2017, Tesla enlisted Compensia to advise regarding the Grant.¹⁶² Tesla also contacted compensation consultant Semler Brossy, which explained that no other

¹⁵⁵ Maron:129:8-13, 130:19-131:2; JX0369.0002-03; JX0363.0001.

¹⁵⁶ Maron:129:24-130:12, 132:2-24; JX0364.0001; JX0363.0001; JX1543.

¹⁵⁷ JX1260.0009, Response 4.

¹⁵⁸ Musk:90:16-21.

¹⁵⁹ JX0399.

¹⁶⁰ JX0445.0002.

¹⁶¹ JX0418.

¹⁶² PTO¶154; JX1252.0016.

compensation plans “meet the standard that [Tesla was] considering” for the Grant, and F.W. Cook, which described the Grant as “precedent setting for a public company” and noted that F.W. Cook’s interview with Tesla had been in a “somewhat confrontational tone.”¹⁶³

On June 19, 2017, Tesla informed Compensia’s Brown that he would be “working towards”¹⁶⁴ a grant comprising (i) 1% of Tesla’s shares per tranche; (ii) operational milestones; and (iii) market capitalization milestones with \$50B increments (*i.e.*, the general structure determined by Musk and Ehrenpreis in April).¹⁶⁵ Two days later, on June 21, Tesla management—this time including Ehrenpreis—again spoke with Brown, confirming that the Grant would entail “Mkt cap goals at \$50B each” and “Operational Goals.”¹⁶⁶

That same day, Brown contacted Aon/Radford’s Burg to ask what his “bandwidth look[ed] like over the next 3 weeks” to work on the Grant, because “the client [*i.e.*, Tesla] want[ed]” an extremely accelerated process.¹⁶⁷

¹⁶³ JX0433; JX0434.

¹⁶⁴ Maron:169:19-170:10.

¹⁶⁵ JX0434.0003-04.

¹⁶⁶ JX0434.0002-03.

¹⁶⁷ JX0527.0002.

IV. THE COMMITTEE IS BELATEDLY THRUST INTO—AND FAILS TO MEANINGFULLY ENGAGE IN—THE GRANT PROCESS

At a June 6, 2017 Board meeting chaired by Musk, Ehrenpreis updated the Board regarding the near fulfillment of the 2012 Grant, and—with Musk still in attendance—announced that “plans were underway to design the next compensation program for [] Musk.”¹⁶⁸

On June 18, 2017—over *two months* after Musk and Ehrenpreis established the Grant’s fundamental contours—Maron emailed the Committee: “We would like to discuss Elon’s next stock *grant*.”¹⁶⁹

On June 23, 2017, the Committee held its first Grant-related meeting, during which Ehrenpreis merely (i) discussed generally the need for a new Musk plan, and (ii) “informed the Committee that...he and [Tesla] management had been speaking with several potential consultants.”¹⁷⁰ The Committee was not informed of the pre-determined fundamental Grant terms (which ultimately never changed).¹⁷¹ That same day, Rothenberg internally circulated Tesla’s Grant model—created in *May* 2017—confirming the Grant would entail (i) dual-triggered operational and

¹⁶⁸ JX0407.0001-02.

¹⁶⁹ JX0420 (emphasis added).

¹⁷⁰ JX0439.0002.

¹⁷¹ JX0439; Phillips:174:3-176:10 (the Grant structure previously discussed with Compensia on June 19 and 21, 2017 calls was *not* disclosed to the Committee during the June 23 meeting); Denholm:193:8-15.

market capitalization milestones, (ii) \$50B market capitalization milestones, and (iii) 1% of Tesla’s shares per tranche.¹⁷² The \$57.6B maximum Grant value calculated therein¹⁷³ closely aligned with the \$55.8B maximum value ultimately disclosed in the Proxy.¹⁷⁴ The Committee did not receive or discuss that model.

At the June 23 meeting, the Committee learned of the breakneck schedule for Grant approval and immediately rubber-stamped engaging WSGR and Compensia, which had already been working for Tesla on the Grant.¹⁷⁵ Compensia subsequently recommended Tesla engage Aon/Radford to perform valuation services, which Tesla promptly did.¹⁷⁶ Musk retained no advisors.¹⁷⁷

Throughout the process—including before the Committee’s June 23 kick-off meeting—Musk’s friend and business partner Ehrenpreis served as “point person” for the Committee’s advisors,¹⁷⁸ and almost exclusively handled Grant-related discussions with Musk.¹⁷⁹ Gracias—the other most conflicted Committee

¹⁷² JX0445.0002.

¹⁷³ *Id.*

¹⁷⁴ PTO¶254; JX0787.0024.

¹⁷⁵ JX0439.0002.

¹⁷⁶ PTO¶151; JX0454.

¹⁷⁷ Musk:170:8-10.

¹⁷⁸ Rice:108:21-109:1.

¹⁷⁹ Murdoch:199:13-20 (“[T]he full committee [was not] part of those conversations.”).

member—played a supporting role to Ehrenpreis, while Buss and Denholm were largely sidelined.¹⁸⁰

On June 26, 2017, Tesla reaffirmed its intention to secure Board approval of the Grant by late July.¹⁸¹ Brown and Burg believed that timeline—which Gracias stated likely emanated from Ehrenpreis¹⁸²—was “aggressive” and too “fast,” and Brown therefore “pushed for a little bit more time so that we would have a timeline I thought we could manage to.”¹⁸³

V. THE COMMITTEE AND BOARD DELIVER MUSK’S PREFERRED GRANT

A. The Committee Delivers the Pre-Ordained Fundamental Terms

The fundamental Grant terms never meaningfully changed from those determined before the first Committee meeting, and the conflicted Committee never meaningfully negotiated with Musk. Gracias, for example, explained he did not “think about” negotiating in terms of the smallest compensation package that would adequately incentivize Musk, or “the least amount he’s going to take[.]”¹⁸⁴ Maron confirmed it “was a cooperative, collaborative process,” and could not recall

¹⁸⁰ Maron:261:11-262:8; Brown:211:24-213:12.

¹⁸¹ JX0456.

¹⁸² Gracias:240:8-10.

¹⁸³ Brown:165:7-11; Burg:73:13-22.

¹⁸⁴ Gracias:255:22-256:9, 273:16-274:3, 230:1-4, 245:4-10, 245:13-20.

anybody taking an adversarial position in Grant-related discussions.¹⁸⁵ Ehrenpreis testified that he and Musk “were not on different sides of things” during their discussions regarding the Grant.¹⁸⁶

Rather, the Committee affirmatively advanced Musk’s Grant-related agenda. For example, Ehrenpreis solicited “creative options” for “getting a bigger discount” on the Grant’s GDFV to make the Grant *appear* less valuable without changing the amount of equity transferred to Musk.¹⁸⁷ Burg suggested the five-year holding period for exercised shares, which would provide Aon/Radford a (questionable) basis to apply an “illiquidity discount” that would ultimately reduce the Grant’s GDFV by ~\$300M.¹⁸⁸ The holding period had no practical effect because the Grant did not prevent Musk from, *e.g.*, (i) selling his *existing* Tesla shares, or (ii) pledging his Tesla options and/or shares.¹⁸⁹

¹⁸⁵ Maron:100:11-101:21.

¹⁸⁶ Ehrenpreis:139:18-140:3.

¹⁸⁷ JX0535.

¹⁸⁸ JX0792.

¹⁸⁹ Restaino Rebuttal: 45-46. Ehrenpreis also explored excluding operational milestones and *only* including market capitalization milestones, making each tranche easier to achieve. *See* JX0423.

By August 1, 2017, the Committee knew the expected GDFV as Aon/Radford “calculat[ed] an estimated [GDFV] for the full award of [~\$2.0B - \$3.0B]” (*i.e.*, a range neatly encompassing the ultimate ~\$2.6B GDFV).¹⁹⁰

B. The Committee Forgoes Benchmarking Analyses

On July 6, 2017, Tesla’s timeline shifted to targeting Grant approval “in August or September instead of within the next couple weeks.”¹⁹¹ On July 7, the Committee held its second Grant-related meeting, and Compensia presented materials confirming the fundamental Grant terms established by Musk and Tesla before the Committee’s involvement.¹⁹² The appendices to those materials included certain information regarding the top-paid CEOs in 2016 and four other compensation grants from 2011 to 2015. That information—which Brown hoped presented a “clear statement that th[e Grant] would be an award that was larger than was otherwise available in any comparables”¹⁹³—was the *only* “benchmarking” information the Committee or Board received during the process.¹⁹⁴

¹⁹⁰ JX0566.0003.

¹⁹¹ JX0503.

¹⁹² PTO¶218; JX0515.0004.

¹⁹³ Brown:92:3-10.

¹⁹⁴ Brown:78:6-14; Burg:261:21-262:4.

Benchmarking is the foundation of a compensation advisor’s analysis,¹⁹⁵ as it constitutes the “market data” for a proposed compensation plan.¹⁹⁶ Brown confirmed Compensia typically provides benchmarking consisting of “an identified peer group, and comparable positions at a group of peer companies,”¹⁹⁷ but provided no benchmarking information to the Committee because (i) the Grant’s “contemplated quantum” had no comparables,¹⁹⁸ and (ii) when Tesla hired Compensia there was already an understanding of “what the award might look like” (*i.e.*, Musk and Tesla had already determined the Grant’s size and fundamental structure).¹⁹⁹ Denholm confirmed that the Grant’s “ambitious nature” meant “there weren’t any comparables” for benchmarking purposes.²⁰⁰

C. Tesla Management Designs Easier-to-Achieve Operational Milestones

Having chosen dual operational and market capitalization milestones, Tesla and its advisors sought to correlate them by “aligning” the operational milestones

¹⁹⁵ *See, e.g.*, Dunn Opening:83-84; Burg:27:6-9, 28:11-29:4 (testifying that compensation advisors provide benchmarking data to “fulfill their responsibilities”); Brown:57:1-16.

¹⁹⁶ Burg:26:22-27:9.

¹⁹⁷ *Id.*

¹⁹⁸ Brown:86:2-22.

¹⁹⁹ Brown:78:6-23.

²⁰⁰ Denholm:288:16-289:8, 305:13-20.

with the pre-determined \$50B market capitalization milestones because it only “ma[d]e sense” if they were “able to be achieved around the same time[.]”²⁰¹ Tesla explored operational milestones calibrated for Tesla to “achieve a milestone roughly once every 12 to 15 months over the next 3 years.”²⁰²

In determining the Grant’s operational milestones, Tesla used its internal operating plan and single set of projections,²⁰³ which were developed in the ordinary course, were the only projections relied on by the Board to run Tesla, and represented Tesla’s “best assumptions.”²⁰⁴ Tesla’s short-term and long-term forecasts derived from that single set of projections and were updated “on a regular basis.”²⁰⁵ Those projections were vetted by Tesla’s Audit Committee, the Board, and Musk himself, who was closely involved with creating Tesla’s internal plans.²⁰⁶

²⁰¹ Chang:342:19-343:7.

²⁰² JX0493.

²⁰³ *See, e.g.*, JX0878.0018 (“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[.]”).

²⁰⁴ Ahuja:324:16-22, 325:11-326:19, 338:9-13; Gracias:296:14-298:23.

²⁰⁵ Ahuja:326:6-19; Musk:191:10-17.

²⁰⁶ Ahuja:328:11-16, 354:7-12, 354:23-355:6; Gracias:295:14-296:8; JX0573.

On July 30, 2017, Musk told Maron: “Let’s put [my Grant] on hold for a few weeks[.]”²⁰⁷ The process thus significantly slowed, with only one Committee meeting in September and October combined.²⁰⁸

In September 2017, Tesla sought to develop achievable operational milestones, and analyzed information regarding, *e.g.*, the adjusted EBITDA/Revenue ratios of Tesla (31%) and its peers (*e.g.*, Apple (34%) and Google (42%)).²⁰⁹ However, Tesla ultimately based the Grant’s EBITDA milestones on a mere 8% EBITDA/Revenue margin,²¹⁰ making them significantly easier to achieve.²¹¹ Indeed, as late as December 2017, Tesla was using a 10% EBITDA/Revenue margin, but ultimately lowered it to 8%, decreasing the first operational milestone from \$2.1B to \$1.5B.²¹²

²⁰⁷ JX0654.

²⁰⁸ JX0618.0002.

²⁰⁹ JX0641; JX0643; Restaino Rebuttal:23-24. Those materials also demonstrated that Tesla had a market capitalization/adjusted EBITDA multiple of 34.6x, higher than Amazon (28x), Apple (12x), and Alphabet (*i.e.*, Google) (17x). JX0643. However, the Grant’s implied adjusted EBITDA multiple exceeded **50x**.

²¹⁰ JX0705.

²¹¹ Restaino Rebuttal:24-27.

²¹² JX0698.0002.

D. Musk Reactivates the Process and Negotiates (Only) Against Himself

On November 9, 2017, Musk emailed Maron about the Grant: “I’d like to move forward with that now, but in a reduced manner from before.”²¹³

Specifically, Musk desired a “10% increment in [his] Tesla ownership” achieved by reducing the number of tranches from fifteen to ten, but with each tranche providing him 1% of Tesla’s FDS (rather than TOS).²¹⁴ Musk also stated: “I’d like to take board action as soon as possible.”²¹⁵ Maron reported that directive to Ehrenpreis and Gracias, and the Committee’s process shifted to achieving Musk’s revised approach.²¹⁶

On November 20, 2017, Chang reported that 28,959,456 shares were necessary to provide Musk’s requested 10% of Tesla on an FDS basis, explaining: “The goal of this exercise is to increase [Musk’s] fully-diluted stake by 10%.”²¹⁷ Upon receiving those calculations, Musk responded: “That is more than intended. Let’s go with 10% of the *current* FDS number [*i.e.*, 20.591 million shares].”²¹⁸

²¹³ JX0678.0002.

²¹⁴ JX0678.0002.

²¹⁵ JX0678.0002.

²¹⁶ JX0670. *See also, e.g.*, JX0718 (“Our CEO grant[] is back and on a fast track now” due to “the urgent request.”); JX0717 (“We are back on with a vengeance....”).

²¹⁷ JX0673.

²¹⁸ JX0682 (emphasis added).

Musk testified that he “was actually surprised [Maron’s FDS number] was so high, and [] thought that was probably too high,” and thus directed Tesla to instead use the lower *current* FDS number.²¹⁹

Because the Board ultimately preferred the simplicity of TOS over FDS,²²⁰ the Committee granted Musk’s request for 10% of current FDS by providing twelve *TOS*-based tranches.²²¹ Musk testified that the shift from fifteen tranches to twelve tranches resulted from: “me negotiating against myself.”²²² Compensia had no knowledge that Tesla had backed into the Grant’s twelve-tranche structure.²²³

VI. TESLA WAS POISED FOR EXPONENTIAL GROWTH

A. Tesla Was at the S-Curve Inflection Point

The Model 3 was the first vehicle Tesla needed to mass produce. When mass production is successful, the production curve resembles the letter S:²²⁴

²¹⁹ Musk:257:6-10.

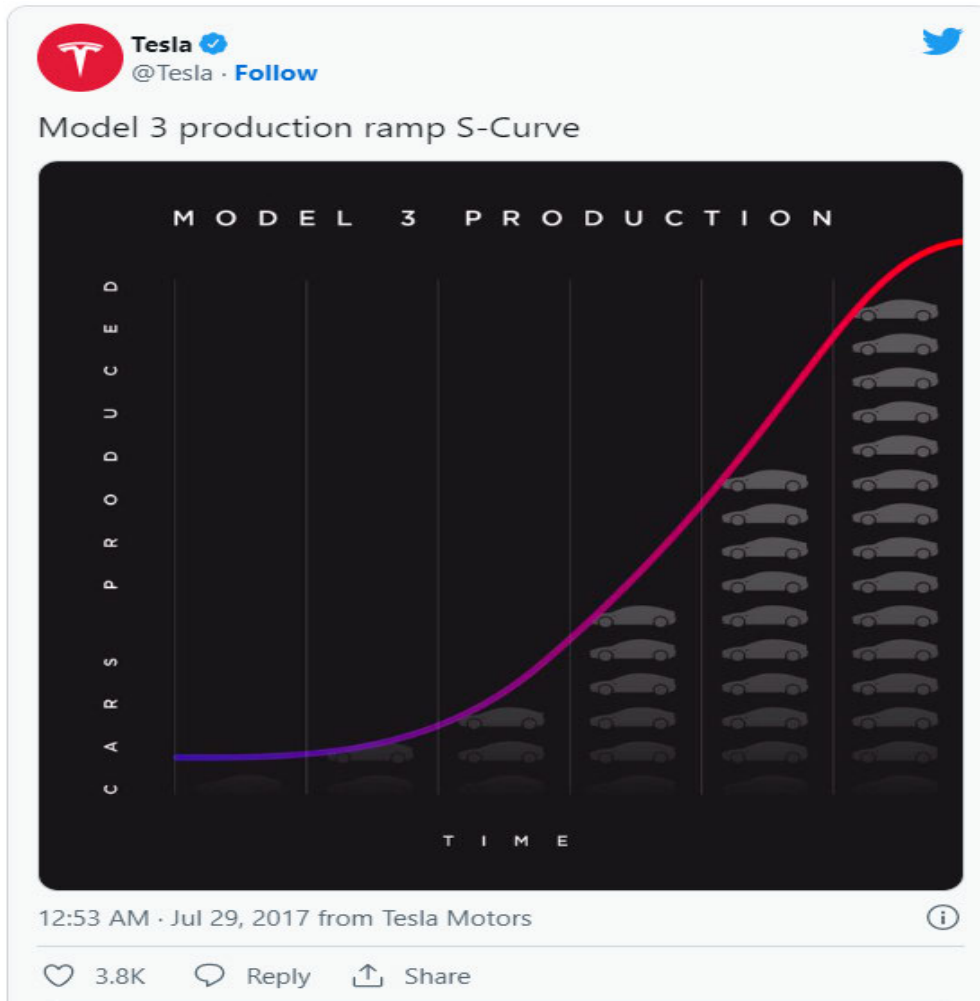
²²⁰ Maron:407:17-25.

²²¹ JX0702.

²²² Musk:261:22-263:4.

²²³ Brown:300-301.

²²⁴ JX1539; *see also* JX1401.0083.



As Musk explained: “[T]he production starts off slowly and then you gradually eliminate the constraints and eventually it starts taking off exponentially[.]”²²⁵

No later than July 2017, Tesla’s internal projections reflected that the S-curve’s exponential growth phase was imminent.²²⁶ In October 2017, Musk and Ahuja told the Audit Committee that the Model 3 was “*not* [] particularly difficult

²²⁵ JX0390.

²²⁶ See JX0662.0039; see also JX1394.0007.

to build” and Tesla expected the production rate to “soon enter the steep portion of the manufacturing S-curve.”²²⁷

In early 2018, Musk reaffirmed that Model 3 production would soon reach the “exponential growth” portion of the S-curve.²²⁸ Tesla management likewise viewed the Model 3 as “a \$22 billion per-annum revenue opportunity,” based on “expected production of 500k vehicles per-annum.”²²⁹ Because the Model 3 and Y shared the same platform, the Model 3 was a clear stepping-stone for the Model Y, compounding Tesla’s massive near-term growth opportunity.²³⁰ During Tesla’s February 7, 2018 earnings call, Musk predicted that Tesla would reach the top of the S-curve by mid-2018.²³¹ And Defendants’ expert Paul Gompers confirmed that Tesla was poised to hit the inflection point of the S-Curve in the first half of 2018.²³²

B. Tesla’s Internal Projections and Operating Plan Reflected that Several Grant Milestones Were Already Probable of Achievement

In late July 2017 (*i.e.*, during the Grant process), in connection with Tesla’s \$2.0B debt financing,²³³ Tesla disseminated to third-party lenders and rating

²²⁷ JX1540.0084 (emphasis added).

²²⁸ JX0390.

²²⁹ JX606.0015.

²³⁰ Goldfarb Rebuttal:27.

²³¹ Goldfarb Rebuttal:99.

²³² Gompers:357:2-7.

²³³ Ahuja:354:16-22; JX0573.

agencies its operating plan and projections.²³⁴ The projections—which the Audit Committee approved on August 3, 2017—presented the following forecasts:²³⁵

	TESLA, INC.’S JULY/AUGUST 2017 OPERATING PLAN		
	2018	2019	2020
Revenue	\$27.5B	\$41.9B	\$69.6B
Adjusted EBITDA	\$3.8B	\$8.1B	\$14.3B

On December 11, 2017, the Board received the following final operational milestone metrics:²³⁶

²³⁴ JX0539; JX0587; JX0555; JX0580 (“After a detailed discussion, the Committee approved the financial plan, including in connection with the rating agencies....”).

²³⁵ JX0539; *see also* JX0622 (“For context, we should be able to get to \$12 billion EBITDA in the next four to five years.”).

²³⁶ JX0734.

Final Revenue Milestones	Final Adjusted EBITDA Milestones
\$20B	\$1.5B
\$35B	\$3.0B
\$55B	\$4.5B
\$75B	\$6.0B
\$100B	\$8.0B
\$125B	\$10.0B
\$150B	\$12.0B
\$175B	\$14.0B

In December 2017, Ahuja developed and Musk approved Tesla’s then-current operating plan.²³⁷ The Board reviewed those projections at its December 12 meeting.²³⁸

The one-year projections underlying that operating plan forecasted \$27.4B in revenue and \$4.3B in EBITDA by late 2018.²³⁹

²³⁷ JX0728.

²³⁸ JX0740.0001-02 (Tesla operating plan and projections distributed to Board for December 12, 2017 meeting); JX0749 (December 18, 2017 internal Tesla email: “Here is the corporate model and the operating plan deck we reviewed with the directors last Thursday.”).

²³⁹ JX0740.0018 (Exhibit A (highlighting added)).

The Company’s “methodology” to determine probability of milestone achievement was to “*us[e] the operating plan of record,*”²⁴⁰ thus Tesla was predicting it would achieve three operational milestones in 2018 alone. The longer three-year projections underlying that operating plan reflected that by the end of 2019 and 2020, Tesla would achieve seven and eleven operational milestones, respectively:²⁴¹

	REVENUE		ADJUSTED EBITDA	
	2017 3-Yr LRP (July)	The Grant		2017 3-Yr LRP (July)
FY2018	\$27.5B	\$20B	\$1.5B	\$3.8B
FY2019	\$41.9B	\$35B	\$3B	\$8.1B
FY2020	\$69.9B	\$55B	\$4.5B	\$14.4B
		\$75B	\$6B	
		\$100B	\$8B	
		\$125B	\$10B	
		\$150B	\$12B	
		\$175B	\$14B	

In March 2018, Tesla provided to ratings agencies Tesla’s projections, which the Board reviewed at its March 13, 2018 meeting.²⁴² The projections were modestly revised downward, but still projected—as of the March 21, 2018

²⁴⁰ JX1019.0002.

²⁴¹ JX0582.

²⁴² JX0593 (Tesla operating plan and projections distributed to the Board for the March 13 meeting); JX0592 (“[H]ere’s the operating plan materials being reviewed with the [B]oard this afternoon.”).

Stockholder Vote—achievement of three operational milestones by June 30, 2019.²⁴³

The three-year projections reflected that by the end of 2019 and 2020, Tesla would achieve five and nine operational milestones, respectively.²⁴⁴

	REVENUE		ADJUSTED EBITDA	
	2018 3-YR LRP	The Grant		2018 3-YR LRP
FY2018	\$23.4B	\$20B	\$1.5B	\$2.1B
FY2019	\$35.2B	\$35B	\$3B	\$5.8B
FY2020	\$68.1B	\$55B	\$4.5B	\$11.4B
		\$75B	\$6B	
		\$100B	\$8B	
		\$125B	\$10B	
		\$150B	\$12B	
		\$175B	\$14B	

Ahuja testified that the March 2018 projections were the *lowest* projections from the Grant time period,²⁴⁵ and several Tesla executives affirmed the quality, accuracy, and truth of the information provided to ratings agencies.²⁴⁶

²⁴³ JX1023.0006 (Exhibit B).

²⁴⁴ JX0973; JX0974.

²⁴⁵ Ahuja:398:6-410:23, 416:12-420:4.

²⁴⁶ Maron:391:16-23 (“Tesla would do its...earnest best to...provide quality information” to the rating agencies); Ahuja:353:6-355:15 (projections provided to banks and/or rating agencies were “accurate and truthful”).

VII. THE BOARD APPROVES THE GRANT, THEN SECURES STOCKHOLDER APPROVAL VIA A MISLEADING AND OMISSIVE PROXY

A. The Board Approves the Grant

On January 21, 2018, the Board approved the Grant, which was expressly “subject to the Requisite Stockholder Approval.”²⁴⁷ Along with the four (conflicted) Committee members, Murdoch and Johnson Rice also approved the Grant.

The ten-year Grant consisted of twelve tranches, each representing 1,688,670 options (with a \$350.02 exercise price), totaling 20,264,042 Tesla shares.²⁴⁸ Consistent with the terms determined before the Committee process began, the Grant provided Musk approximately 1% of Tesla’s TOS per tranche,²⁴⁹ each achievable upon satisfaction of twin operational and market capitalization goals,²⁵⁰ with \$50B market capitalization increments (ranging from \$100B-\$650B).²⁵¹ Consistent with Musk’s December 1, 2017 directive, the Grant totaled ~10% of Tesla’s then-outstanding current FDS.

²⁴⁷ PTO¶233; JX0791.0004.

²⁴⁸ PTO¶236-238. Tesla enacted a 5-for-1 stock split on August 28, 2020. PTO¶42; JX1275.0003. Tesla enacted a 3-for-1 stock split on August 24, 2022. PTO¶43, 248; JX1504. Accordingly, 25,330,050 shares now underlie each Grant tranche. PTO¶248; JX1502.

²⁴⁹ PTO¶239.

²⁵⁰ PTO¶242.

²⁵¹ PTO¶241.

B. The Board Issues the Materially Deficient Proxy

The February 8, 2018 Proxy was materially deficient and misleading, failing to disclose, *e.g.*:

- The Committee’s potential conflicts with Musk—including hundreds of millions of dollars of investments in Musk-affiliated entities and longstanding personal relationships with Musk—despite repeatedly characterizing all the Committee members as “independent” in connection with the Grant;
- That three of the Grant’s operational milestones were probable of achievement within one-and-a-half years of the Grant date, despite affirmatively characterizing *all* the Grant’s milestones as challenging and difficult-to-achieve stretch goals;
- An accurate description of the Grant process, including the Grant discussions involving Musk *before* the Committee process began; and
- Musk’s competing interests, including that Musk was only allocating approximately half of his working time to Tesla.

C. Condemnation of the Grant

Proxy advisors and stockholders condemned the Grant. In recommending stockholders reject the Grant,²⁵² Glass Lewis criticized its (i) size, calling it “staggering relative to executive compensation levels among public companies worldwide”;²⁵³ (ii) transfer of wealth to Musk even for mediocre performance, noting Musk could realize “value of some \$1.4 billion” even if Tesla’s share price “only slightly outpace[s] [the] S&P 500 for the past five years” (*i.e.*, representing “a

²⁵² PTO¶166.

²⁵³ JX0931.0005.

sharp *deceleration* of growth compared to [Tesla]’s trailing five years”);²⁵⁴ and (iii) “high transfer of share ownership on an annual basis for an extended period [which] at a firm of any size and scope are largely unheard of.”²⁵⁵ Glass Lewis concluded: “Even giving credence to the paradigm by which long time horizons and stretching goals should command a higher cost of compensation, any relative comparison of the grant’s size would be akin to stacking nickels against dollars.”²⁵⁶

ISS also recommended stockholders reject the Grant, criticizing, *e.g.*, the Grant’s (i) “unprecedented” size and value, (ii) dilution to Tesla stockholders, and (iii) misalignment with its stated goal of securing Musk’s focus and attention on Tesla.²⁵⁷

Myriad sophisticated Tesla stockholders also criticized the Grant, stating that (i) Musk’s Tesla equity already sufficiently motivated him,²⁵⁸ (ii) the Grant’s size and dilution were excessive,²⁵⁹ (iii) the adjusted EBITDA milestones were too

²⁵⁴ JX0931.0006.

²⁵⁵ JX0931.0006.

²⁵⁶ JX0931.0007.

²⁵⁷ PTO¶164; JX0987.0005.

²⁵⁸ JX0547.

²⁵⁹ JX0968.0003; JX1541.0001.

low,²⁶⁰ and (iv) the Grant’s linear milestones were inappropriate for an “exponential company” like Tesla.²⁶¹

Facing that criticism, Musk directed that a large Tesla stockholder be informed that Musk would be “very offended by their action” if that stockholder voted against the Grant, and Musk would “convince them to divest from Tesla and any of my companies ever. They are not welcome.”²⁶²

D. A Majority of Tesla’s Outstanding Disinterested Shares Fail to Approve the Grant

On March 21, 2018—with only Musk and K. Musk recusing themselves—the Grant failed to garner the support of a majority of Tesla’s disinterested shares outstanding. According to the Company’s Form 8-K filed on March 21, 2018, just 48% of Tesla’s non-Musk-owned shares voted for the Grant.²⁶³

²⁶⁰ JX0838; JX0899.

²⁶¹ JX0800.

²⁶² JX1017.

²⁶³ JX0979.0003; PTO¶¶63-64. As of December 31, 2017, the Proxy reflects 168,878,154 shares of common stock outstanding, of which Musk owned 37,853,041. JX0878.0024. As of December 31, 2017, K. Musk owned 202,467 Tesla shares. JX1252.0030. Thus, Tesla had roughly 130,822,646 shares outstanding and not owned by Musk or K. Musk, of which 63,014,339 voted for the Grant.

E. Tesla Belatedly Reveals that Several Milestones Were Probable of Achievement *as of the Stockholder Vote*

At its April 2018 meeting, the Audit Committee—consisting of Committee members Gracias, Denholm, and Buss—stated: “Based on the March 13, 2018 Operating Plan reviewed with the Board, it was determined that 3 of the 12 milestones were probable of achievement within the next 1.5 years.”²⁶⁴ The Audit Committee also affirmed that three market capitalization milestones—and thus three tranches—were similarly “> 70% probable” by March 31, 2019.²⁶⁵

Not until May 7, 2018, when Tesla filed a Form 10-Q (the “May 10-Q”) for the quarter ending in March 2018, did stockholders learn that the Grant contained operational milestones that, *as of the March 21, 2018 Stockholder Vote*, were *already* deemed probable of achievement.²⁶⁶

The May 10-Q stated that, based on Tesla’s “financial projections,” as of March 2018, “the following performance milestones were considered probable of achievement”: (i) \$20B in revenue, (ii) \$1.5B in adjusted EBITDA, and (iii) \$3B in adjusted EBITDA.²⁶⁷ Critically, the May 10-Q also disclosed that “[s]tarting on *March 21, 2018* when the [G]rant was approved by stockholders,” Tesla began

²⁶⁴ JX1023.0006.

²⁶⁵ JX1023.0007.

²⁶⁶ PTO¶¶261-262; JX1031.0027.

²⁶⁷ JX1031.0027.

recording expense for the Grant, as required given Tesla’s knowledge *as of the stockholder vote* that several Grant milestones were probable of near-term achievement.²⁶⁸

VIII. THE GRANT IS UNFAIR

A. The Grant Is the Largest Compensation Plan Ever (by Multiples)

Compensia confirmed the Grant “will provide a larger compensation opportunity to the CEO than we have observed in the market,”²⁶⁹ and compensation expert Semler Brossy explained that even “highly leveraged plan designs *with very aggressive performance requirements*” cannot compare to the Grant.²⁷⁰ The Grant’s initially disclosed GDFV was \$2.615B—roughly **33x** larger than the \$78M GDFV of the Grant’s “closest comparison” (*i.e.*, the 2012 Grant). ISS—which calculated a \$3.7B GDFV—projected that the Grant represented **250x** the peer median for CEO compensation in 2017.²⁷¹ Compensia’s Committee presentation demonstrated that the Grant dwarfed the pay packages of even the highest-paid CEOs of public companies.²⁷²

²⁶⁸ JX1031.0027.

²⁶⁹ JX0440.0106.

²⁷⁰ JX0440.0014 (emphasis added).

²⁷¹ JX0916.

²⁷² JX0440.0116 (Exhibit C).

B. The Grant Was Unnecessary to Incentivize Musk

Musk's preexisting ~22% Tesla equity stake worth \$13.4B strongly motivated him to ensure Tesla's success.²⁷³ As Glass Lewis observed: "Musk's current holdings reflect over \$11 billion in personal exposure to the Company's share price performance[.]"²⁷⁴

Further, Musk contemporaneously and publicly avowed that he "intend[ed] to be actively involved with Tesla for the rest of [his] life,"²⁷⁵ and Tesla's Q&A regarding the Stockholder Vote affirmed that Musk was "heavily invested in Tesla, both financially and emotionally, and views Tesla as part of his family" and "[i]f the Plan is not approved, [Musk] would not quit Tesla."²⁷⁶ Similarly, Tesla deponents uniformly testified that they had no expectation that Musk would leave Tesla.²⁷⁷ Indeed, Tesla had no succession plan nor any ongoing process to even begin to identify a potential Musk successor.²⁷⁸

²⁷³ JX0878.0024.

²⁷⁴ JX0931.0007.

²⁷⁵ JX0390.0020.

²⁷⁶ JX0831.

²⁷⁷ Musk:106:25-107:4; Gracias:147:9-13, 229:4-9; Murdoch:145:2-146:12, 230:8-16; K.Musk:161:10-17, 173:16-20; Chang:173:6-16.

²⁷⁸ JX0966 ("T]he Board has not put a succession plan in place to provide investors [sic] an alternative."); JX0871 (Musk stating on February 7, 2018 earnings call: "[T]here's no actual search...going on for a new CEO because I expect to remain CEO for the foreseeable future."); Gracias:149:8-20, 162:18-21 ("Q: So other than

C. The Grant Failed to Achieve Its Stated Purpose

Despite its ostensible purpose of focusing Musk on Tesla, the Grant contains no provisions (i) requiring Musk to devote time or attention to Tesla; and/or (ii) restricting or limiting Musk's allocation of time or attention to non-Tesla endeavors.

Indeed, Musk testified that since the Grant's approval, he has spent a little more than half his time on Tesla matters and has dedicated substantial time and attention to various other endeavors, including:²⁷⁹

- SpaceX (where he served as Chairman, CEO and CTO)
- Open AI (where he served as Co-Founder and Co-Chair)
- Neuralink (where he served as Co-Founder)
- The Boring Company (where he served as Co-Founder)

For example, in an average week in early 2018, Musk worked on Tuesday, Wednesday and Friday at Tesla and Monday and Thursday at SpaceX (in Texas), with the balance of the week spent on his various other companies.²⁸⁰

the emergency plan that you have discussed, has Tesla ever identified a potential successor to Mr. Musk? A: No.”); Denholm:482:15-19; Buss:76:4-77:9, 167:9-14 (stating Musk did not intend to leave Tesla so the Board did not seriously entertain a succession plan); Murdoch143:3-22 (stating the Board undertook no efforts to identify a successor CEO in 2017-2018).

²⁷⁹ PTO ¶¶ 54, 57, 59, 61; JX1256.0034-35.

²⁸⁰ Musk:129:16-25.

Additionally, Musk entered an agreement to purchase Twitter, Inc., plans to complete that acquisition and reportedly will be Twitter's interim CEO after closing,²⁸¹ and Musk has also involved himself in the Ukraine-Russia conflict.²⁸²

D. The Grant Lacked Necessary Stockholder Protections

The Grant lacks any forfeiture or clawback mechanism if, *e.g.*: (i) Musk fails to provide sufficient—or *any*—time/attention to Tesla; (ii) Tesla's performance reaches—but then falls below—the operational and/or market capitalization milestones; (iii) Musk is terminated for cause or resigns without good reason; and/or (iv) Musk takes a leave of absence from Tesla (to visit Mars, for example).²⁸³ Rather, the only clawback derives from standard Tesla policy of clawing-back shares if Tesla restates its financial results, which has been in place since at least 2015.²⁸⁴

E. Tesla Projected Numerous Tranches Would Vest in the Near-Term

As discussed above, Tesla's single operating plan and contemporaneous projections—upon which Tesla's management and Board relied, and shared with

²⁸¹ JX1467.

²⁸² JX1545.

²⁸³ Musk has famously said that he wants to die on Mars, though “not on impact.” JX1542.

²⁸⁴ *See* PTO¶252; JX0878.0034; JX0209.0037; JX0831.0011 (“The award [only] contains a clawback provision that will result in the forfeiture of any award that is the result of financial results that were later restated.”).

third-party lenders and ratings agencies—reflected that Musk would achieve several tranches (worth billions of dollars) in the Grant’s first few years.

IX. TESLA’S PERFORMANCE PROVIDES MUSK TENS OF BILLIONS OF DOLLARS THROUGH THE GRANT

Tesla has achieved all twelve of the Grant’s market capitalization milestones²⁸⁵ and eleven operational milestones, thus vesting eleven of the Grant’s twelve tranches and providing Musk over **\$52.4B** in stock option gains over roughly four-and-a-half years.²⁸⁶

²⁸⁵ PTO¶276; JX1484.0032.

²⁸⁶ JX1484.0022; *see also* Goldfarb Rebuttal:12.

ARGUMENT

I. THE GRANT IS INVALID BECAUSE IT FAILED TO RECEIVE THE VALID STOCKHOLDER APPROVAL UPON WHICH IT WAS CONDITIONED

A. Because the Grant Was Conditioned on Stockholder Approval, Any Material Disclosure Failure Renders it Invalid

The Board’s January 21, 2018 Resolutions approving the Grant expressly state the Grant was “*subject to the Requisite Stockholder Approval,*” *i.e.*, “a vote on the [Grant] at any meeting of the Company’s stockholders at which the [Grant]...receive[s] the affirmative vote of the holders of a majority of the total votes of shares of the Company’s common stock[.]”²⁸⁷ Thus, the Board’s approval was expressly contingent upon stockholder approval.

It is fundamental to Delaware law that when a transaction is conditioned upon stockholder approval, that approval must be fully informed to validate the transaction.²⁸⁸ Thus, if Plaintiff establishes a single material disclosure failure, the Grant is invalid.

²⁸⁷ JX0791.0004-05 (emphasis added).

²⁸⁸ *See, e.g., Dieckman v. Regency GP LP*, 155 A.3d 358, 368 (Del. 2017) (finding disclosure failures precluded ratification given “obvious” “obligation not to mislead unitholders”); *In re Ebix, Inc. S’holder Litig.*, 2018 WL 3545046, at *6 (Del. Ch. July 17, 2018) (holding disclosure failures meant “the stockholder vote w[ould] be deemed uninformed [and] the 2010 Plan [] not ratified”); *Millenco L.P. v. meVC Draper Fisher Jurvetson Fund I, Inc.*, 824 A.2d 11, 19 (Del. Ch. 2002) (invalidating a stockholder vote “procured by the use of materially false and misleading proxy materials”).

B. Plaintiff Will Establish Several Material Disclosure Failures at Trial

1. Legal Standard for Disclosure Failures

“It is elementary that under Delaware law the duty of candor imposes an unremitting duty on fiduciaries, including directors and officers, to ‘not use superior information or knowledge to mislead others’”²⁸⁹ and Delaware directors must “disclose fully and fairly all material information within the board’s control[.]”²⁹⁰

Information is material if there is a “substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote[.]”²⁹¹ Likewise, an omission is material when the undisclosed information is “relevant and of a magnitude to be important to directors in carrying out their fiduciary duty of care in decision [] making.”²⁹²

A partial disclosure where “some material facts are not disclosed or are presented in an ambiguous, incomplete, or misleading manner, is not sufficient to

²⁸⁹ *City of Fort Meyers Gen. Emps.’ Pension Fund v. Haley*, 235 A.3d 702, 718 (Del. 2020) (citing *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1283 (Del. 1989)).

²⁹⁰ *Appel v. Berkman*, 180 A.3d 1055, 1060 (Del. 2018).

²⁹¹ *Id.*; accord *Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, 944 (Del. 1985) (citing *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)).

²⁹² *Haley*, 235 A.3d at 718 (citation omitted).

meet a fiduciary’s disclosure obligations.”²⁹³ “[O]nce [directors] travel down the road of partial disclosure...an obligation to provide the stockholders with an accurate, full, and fair characterization [attaches].”²⁹⁴

Finally, directors seeking stockholder action must disclose all material information, and stockholders are not required “to extract it from publicly available information[.]”²⁹⁵ This Court has repeatedly affirmed that material information must be disclosed in the filing soliciting stockholder action in a “clear and transparent manner,” and stockholders are not required to “go on a scavenger hunt” to discover material information.²⁹⁶

²⁹³ *Id.*

²⁹⁴ *Arnold v. Soc’y for Savings Bancorp, Inc.*, 650 A.2d 1270, 1280 (Del. 1994).

²⁹⁵ *In re Pattern Energy Grp. Inc. S’holders Litig.*, 2021 WL 1812674, at *72 (Del. Ch. May 6, 2021) (“[T]he Company’s stockholders were entitled to be told all material information when considering the Merger, without having to extract it from publicly available information.”); *accord Zalmanoff v. Hardy*, 2018 WL 5994762, at *5 (Del. Ch. Nov. 13, 2018), *aff’d*, 211 A.3d 137 (Del. 2019) (“Indeed, our law does not impose a duty on stockholders to rummage through a company’s prior public filings to obtain information that might be material to a request for stockholder action.”); *ODS Techs., L.P. v. Marshall*, 832 A.2d 1254, 1262 (Del. Ch. 2003) (“The failure to disclose [material information]...is not cured by reason that it could be uncovered by an energetic shareholder reading a[n] SEC filing.” (citation and internal quotation marks omitted)).

²⁹⁶ *Vento v. Curry*, 2017 WL 1076725, at *3-4 (Del. Ch. Mar. 22, 2017); *see also, e.g., Salladay v. Lev*, 2020 WL 954032, at *16 (Del. Ch. Feb. 27, 2020) (finding a disclosure insufficient because “[e]ither the stockholder would be unable to follow the necessary steps to conduct her analysis” or would be “required to undergo the sort of fact-finding expedition...that our case law discourages”).

2. Failure to Disclose the Committee Members' Potential Conflicts

The Board repeatedly disclosed that the Committee members were “independent” in connection with the Grant, yet failed to disclose that (i) Gracias and Ehrenpreis each had massive investments in Musk and his entities and a longstanding personal and professional relationship with Musk and (ii) Buss and Denholm had literally earned a fortune from Musk entities.

The Proxy’s introductory letter is purportedly “[f]rom the Independent Members of Tesla’s Board” who approved the Grant, and the first four signatories are Committee members Gracias (who is described as Tesla’s “Lead Independent Director”), Ehrenpreis, Buss, and Denholm.²⁹⁷ The Proxy then repeatedly disclosed that *all* the Committee members were independent, including by stating: (i) “The[] [Grant] discussions first took place among the members of the Compensation Committee of the Board...*all of whom are independent directors*;²⁹⁸ and (ii) “The independent members of the Board, *led by the members of the Compensation Committee*, spent more than six months designing [the Grant].”²⁹⁹

²⁹⁷ JX0878.0003.

²⁹⁸ JX0878.0010.

²⁹⁹ JX0878.0021.

Critically, “[w]here, as here, the omitted information goes to the independence or disinterest of directors who are identified as the company’s ‘independent’ or ‘not interested’ directors, the ‘relevant inquiry is not whether an actual conflict of interest exists, but rather whether full disclosure of *potential* conflicts of interest has been made.’”³⁰⁰

There can be no serious dispute that the Committee members had potential conflicts with Musk. Prior to approving the Grant, Gracias (i) personally and/or through Valor invested in almost *all* of Musk’s entities (*i.e.*, Tesla, SpaceX, SolarCity, The Boring Company, and Neuralink); (ii) had investments with Musk entities *worth (at least) approximately \$1B*; (iii) invested in K. Musk’s business ventures and helped him found—and served on the board of—K. Musk’s charity; (iv) received investments in Valor from Musk and K. Musk; (v) was a SpaceX director, and a SolarCity director before Tesla acquired it; and (vi) had a decades-long relationship with Musk that included vacationing with one another’s families, attending family gatherings and counseling Musk at a time of grief.³⁰¹

³⁰⁰ *Millenco*, 824 A.2d at 15 (emphasis added) (quoting *Wilson v. Great Am. Indus., Inc.*, 855 F.2d 987, 994 (2d Cir. 1988)); see also *Eisenberg v. Chi. Milwaukee Corp.*, 537 A.2d 1051, 1061 (Del. Ch. 1987) (“[T]he Court does not intend to suggest that those directors, in approving the offer, necessarily acted improperly....The only point made here is that [stockholders] were entitled to know that certain of their fiduciaries had a self-interest that was arguably in conflict with their own, and the omission of the fact was material.”).

³⁰¹ See *supra* 7-11.

Prior to approving the Grant, Ehrenpreis (i) personally and/or through DBL had made (and still maintained) *tens of millions of dollars* in investments in at least three Musk-controlled companies (in addition to Tesla); and (ii) had invested in K. Musk’s business ventures.³⁰² Ehrenpreis also had a longstanding personal relationship with Musk and K. Musk.³⁰³

Musk personally recruited Buss to serve as SolarCity’s CFO and Buss received approximately \$32M in that role, which he held less than two years before approving the Grant.³⁰⁴ Buss also earned a fortune through his approximately decade-long Tesla directorship, including earning approximately \$3.5M in 2017, and realizing a nearly **\$8.3M** gain through selling some of his directorship options between 2015 to 2017.³⁰⁵

In the four years preceding Denholm’s Grant approval, she was one of the world’s highest-paid directors, receiving compensation worth nearly **\$17M**.³⁰⁶

None of that indisputable information was disclosed.

³⁰² *See supra* 11-12.

³⁰³ *See supra* 12-15.

³⁰⁴ *See supra* 16-17.

³⁰⁵ *See supra* 17.

³⁰⁶ *See supra* 18. Denholm later exercised some of her options for more than a quarter-billion dollar gain, which was clearly material to her. *See supra* 19 (one year \$88M gain “relatively material” to her).

Under Delaware law, the Committee’s potential conflicts with Musk—the Grant counterparty—are patently material information requiring full disclosure.³⁰⁷ That is particularly true here, where the Board affirmatively touted the Committee members as “independent directors” leading a purportedly independent Committee that supposedly protected the Grant process from Musk’s influence.³⁰⁸

The Board’s failure to disclose *any* information regarding the Committee members’ potential conflicts invalidates the Grant.³⁰⁹

³⁰⁷ See, e.g., *In re Emerging Commc’ns, Inc. S’holders Litig.*, 2004 WL 1305745, at *37 (Del. Ch. May 3, 2004) (“[T]he disclosure documents misled minority stockholders...[because] there was no disclosure of [two committee members’] long-standing financial relationships with [the transaction counterparty]...The disclosure documents misleadingly suggested that the Special Committee, and perhaps a majority of the entire board, were independent.”); *Millenco*, 824 A.2d at 15-19; *In re Loral Space & Commc’ns Inc.*, 2008 WL 4293781, at *20-21 (Del. Ch. Sept. 19, 2008) (finding a committee chairman conflicted because of his personal and professional relationship with the transaction counterparty, which included directorships and “large blocks of stock” at companies controlled by the counterparty); *In re Orchard Enters., Inc. S’holder Litig.*, 88 A.3d 1, 21-22 (Del. Ch. 2014) (“This court has held that special committee members’ ‘prior...relationships’ with a controller ‘should have been disclosed’ because of the committee’s ‘role as negotiators on behalf of the minority stockholders.’”) (citation omitted).

³⁰⁸ See, e.g., *Emerging Commc’ns*, 2004 WL 1305745, at *37 (finding purportedly independent directors’ potential conflicts with a counterparty particularly material “because of their role as negotiators on behalf of the minority stockholders”).

³⁰⁹ See *Millenco*, 824 A.2d at 15-19 (invalidating a stockholder vote that “was procured by the use of materially false and misleading proxy materials,” which omitted information concerning two purportedly independent directors’ investments with an inside director).

3. Failure to Accurately Disclose the Grant Milestones' Achievability

The Board characterized each of the Grant's milestones as "challenging" and "difficult to achieve," but omitted that three performance milestones were probable of achievement within one-and-a-half years of the Grant date.

When, as here, a board chooses "to discuss a specific subject, it has long been understood that it cannot do so in a materially misleading way, by disclosing only part of the story, and leaving the reader with a distorted impression."³¹⁰

The Proxy consistently described *each* of the Grant's milestones as difficult, challenging, ambitious and/or "stretch" goals. The Proxy stated that (i) "*each* of the requirements underlying the performance milestones was selected to be *very difficult to achieve*,"³¹¹ (ii) the Board "based this new award on *stretch goals*,"³¹² (iii) the Grant's milestones were "*ambitious*,"³¹³ (iv) "[l]ike the Revenue milestones described above, the Adjusted EBITDA milestones are designed to be *challenging*,"³¹⁴ (v) "[t]he Board considers the Market Capitalization Milestones to

³¹⁰ *Appel*, 180 A.3d at 1060; *accord Orchard*, 88 A.3d at 16–17 (citing *Malone v. Brincat*, 722 A.2d 5, 12 (Del. 1998) ("The directors of a Delaware corporation are required to disclose fully and fairly all material information....")).

³¹¹ JX0878.0041 (emphasis added).

³¹² JX0878.0003.

³¹³ JX0878.0022 (emphasis added).

³¹⁴ JX0878.0018 (emphasis added).

be **challenging** hurdles,”³¹⁵ (vi) “Musk’s...compensation from Tesla will be dependent on him leading Tesla’s achievement of **challenging** milestones,”³¹⁶ and (vii) the milestones “would take many years, **if at all**, to be achieved.”³¹⁷

However, the record is clear that **before** the Stockholder Vote, the Board knew that at least three performance milestones were probable of achievement within one-and-a-half years. Tesla had one operating plan and set of projections, which were developed in the ordinary course and on which the Board relied to run Tesla.³¹⁸ The Board received and reviewed that operating plan and those projections, among other times, in July 2017³¹⁹ and on August 3, 2017,³²⁰ December 12, 2017,³²¹ and March 13, 2018³²² (*i.e.*, before the Stockholder Vote on the Grant). Those projections forecasted achievement of at least one revenue milestone and two adjusted EBITDA milestones by no later than mid-2019.³²³

³¹⁵ JX0878.0017 (emphasis added).

³¹⁶ JX0878.0022 (emphasis added).

³¹⁷ JX0878.0040 (emphasis added).

³¹⁸ *See supra* 35.

³¹⁹ JX0529; JX0556; Musk:189:25-190:10.

³²⁰ JX0573.

³²¹ JX0740.001-02; JX0749.0001-03.

³²² JX0953; JX0952.

³²³ *See supra* 41-44; Ahuja:402:19-406:9.

The reliability of Tesla’s operating plan and projections is beyond reasonable dispute, including because (i) Tesla maintained only one internal plan, which embedded Tesla’s most updated forecasts,³²⁴ representing the “best projection of what [Tesla] could do”;³²⁵ (ii) the operating plan and projections were developed by Tesla’s most knowledgeable insiders, including Ahuja and Musk, and with the best information available;³²⁶ and (iii) the projections were shared with third-party ratings agencies and underwriters³²⁷ as Tesla’s “best projection[s] of future performance.”³²⁸ The Audit Committee—including Committee members Gracias, Denholm, and Buss—also relied on the projections in determining that three of the Grant’s tranches (including the market capitalization milestones) were probable of achievement (*i.e.*, “> 70% probable”) as of March 21, 2019.³²⁹

Indeed, consistent with the operating plan and projections the Board reviewed in December 2017 and March 2018, Tesla began recognizing compensation expense for the Grant’s first three tranches as of the March 21, 2018 Stockholder Vote

³²⁴ Musk:191:10-17; Ahuja:326:10-15.

³²⁵ Ahuja:358:16-359:10.

³²⁶ *See supra* 35.

³²⁷ *See supra* 41-42, 43-44.

³²⁸ Ahuja:359:9-16.

³²⁹ *See supra* 43-44 (citing JX1023.0006-07).

because it deemed those tranches probable of achievement.³³⁰ Thus, the projections were sufficiently reliable to form the basis for Tesla’s GAAP accounting judgment to begin expensing the Grant.³³¹

When, as here, “management projections are made in the ordinary course of business, they are generally deemed reliable.”³³² Indeed, in *Chen v. Howard-Anderson*, this Court found undisclosed projections sufficiently reliable to overcome the defendants’ summary judgment motion.³³³

Having chosen to “travel[] down the road of partial disclosure” by characterizing *each* Grant milestone as “ambitious,” “difficult to achieve,” a “stretch goal,” and “challenging,” the Board’s “obligation to provide the stockholders with an accurate, full, and fair characterization”³³⁴ required, at minimum, disclosure of

³³⁰ See *supra* 49-50.

³³¹ Tesla’s actual performance supports the projections’ reliability. Tesla met two performance milestones—\$20B in revenue and \$1.5B in adjusted EBITDA—within approximately one year of Stockholder Approval. JX1136.25. Tesla missed a third performance milestone—\$3.0B in adjusted EBITDA—by only 1% as of June 30, 2019. JX1159.29.

³³² *Cede & Co. v. Technicolor, Inc.*, 2003 WL 23700218, at *7 (Del. Ch. July 9, 2004), *aff’d in part, rev’d in part*, 884 A.2d 26 (Del. 2005).

³³³ 87 A.3d 648, 688-89 (Del. Ch. 2014); see also *In re Tyson Foods, Inc.*, 919 A.3d 563, 593 (Del. Ch. 2007) (“Granting spring-loaded options, without explicit authorization from shareholders, clearly involves an indirect deception. A director’s duty of loyalty includes the duty to deal fairly and honestly with the shareholders[.]”).

³³⁴ *Arnold*, 650 A.2d at 1280.

known, material facts proving otherwise—*i.e.*, that Tesla’s best (and only) projections indicated that at least three Grant milestones (worth billions of dollars) were probable of achievement within 1.5 years of the Stockholder Vote. The Board’s failure to do so renders the Grant invalid.

4. Failure to Accurately Disclose the Grant Process

The Board’s disclosures create the materially misleadingly impression that the Committee originated the idea for the Grant, established its initial terms, then negotiated final terms at arm’s-length with Musk. In reality, the Grant’s fundamental terms were devised by Musk and his loyalists well before the full Committee’s involvement, and no meaningful negotiation over its fundamental terms ever occurred.

The Proxy’s less than two-page description of the “more than six month[]” Grant process represents that (i) “discussions [concerning the Grant] *first took place* among the members of the Compensation Committee,” (ii) the Committee “engaged in more than six months of active and ongoing discussions regarding [the Grant],” from which “Musk recused [hi]msel[f],” and (iii) during the process, the Committee

“negotiate[d] the terms of the award with [Musk].”³³⁵ Those disclosures were—individually and collectively—materially misleading, at best.

The record is clear that (i) the “first” discussions concerning the Grant involved Musk and were ongoing in early April 2017 (*i.e.*, over two-and-a-half months *before* the full Committee first discussed the Grant), and (ii) Musk and his loyalists determined the Grant’s fundamental structure before the Committee’s “first” Grant-related discussions and meeting.³³⁶ Indeed, Musk testified that in his initial April conversations regarding the Grant, he proposed to Ehrenpreis a compensation plan substantially similar to his ultimate Grant, including that it “would result in...[Musk] owning 10% of the Company” and tranches worth 1% of Tesla’s FDS, and they discussed \$50B market capitalization milestones.³³⁷ And by the Committee’s first meeting on June 23, 2017, Musk and Tesla management had already consulted with WSGR³³⁸ and Compensia,³³⁹ modeled the Grant,³⁴⁰

³³⁵ JX0878.0010-11; *see also* JX0878.0021 (“The independent members of the Board, led by the members of the Compensation Committee, spent more than six months designing [the Grant]....”).

³³⁶ *See supra* 25-28.

³³⁷ *See supra* 25-26 (citing Musk:144:19-148:10).

³³⁸ JX1260.0009 (“[Tesla] contacted WSGR on April 10, 2017 regarding the [Grant].”); JX0419 (“Further to our earlier meeting, below is a proposed timeline/action item list to implement a new CEO compensation package.”).

³³⁹ *See supra* 26-28.

³⁴⁰ *See supra* 29-30.

established an approval timeline,³⁴¹ and settled on the Grant’s fundamental structure—*i.e.*, market capitalization and operational milestones, \$50B market capitalization milestones, and tranches providing shares equivalent to 1% of Tesla.³⁴²

The record is also clear that, having established the Grant’s fundamental terms before the first Committee meeting, there was no subsequent substantive “negotiat[ion]...with [Musk]”³⁴³ over those terms, and Musk continued to control the process. For example, Musk directed when to stop and then resume the Committee’s process,³⁴⁴ and the Committee backed into the number of tranches to fulfill Musk’s desire for “10% of [Tesla’s] current FDS number.”³⁴⁵ Indeed, Musk described his decision to include twelve rather than fifteen tranches in the Grant as “me negotiating against myself[.]”³⁴⁶

“[Delaware] law is clear that when fiduciaries choose to provide the history of a transaction, they have an obligation to provide shareholders with ‘an accurate,

³⁴¹ *See supra* 30.

³⁴² *See supra* 29-30 (citing JX0434.0002-04; JX0447). Moreover, at its first meeting the Committee failed to even discuss those pre-baked Grant terms. *See id.*

³⁴³ JX0878.0011.

³⁴⁴ JX0564 (“Let’s put [my Plan] on hold for a few weeks[.]”); JX0664 (“I’d like to move forward with [my Plan] now....”).

³⁴⁵ JX0682.

³⁴⁶ Musk:262:18-263:4.

full, and fair characterization of those historic events.”³⁴⁷ That is particularly true where, as here, the omitted information is “necessary to acquaint...shareholders with the bargaining positions of [the parties].”³⁴⁸

The Board’s materially misleading description of the Grant process cultivated a materially false impression that, from the outset, the Committee was continuously, substantively, and meaningfully involved in an arm’s-length process, thereby preventing stockholders from understanding, *inter alia*, Musk’s substantial influence over the Grant’s process and terms. That failure renders the Grant invalid.

5. Failure to Disclose Musk’s Competing Interests

At the time of the Grant, Musk’s obligations at four companies *other than* Tesla occupied approximately 50% of his work hours, making him effectively a part-time CEO of Tesla. In soliciting stockholder approval of (by far) the largest compensation plan ever, the Board omitted not only that Musk was only spending

³⁴⁷ See, e.g., *David P. Simonetti Rollover IRA v. Margolis*, 2008 WL 5048692, at *12 (Del. Ch. June 27, 2008) (quoting *Globis Partners, L.P. v. Plumtree Software, Inc.*, 2007 WL 4292024, at *14 (Del. Ch. Nov. 30, 2007)).

³⁴⁸ See *Weinberger v. UOP, Inc.*, 457 A.2d 701, 703 (Del. 1983); see also *Clements v. Rogers*, 790 A.2d 1222, 1242-43 (Del. Ch. 2001) (“[T]he effective functioning of the Special Committee as an informed and aggressive negotiating force is of obvious importance to the public stockholders. When a Proxy Statement details the functioning of that process, it must do so in a fair and balanced manner that does not create a materially misleading impression of how the Committee actually operated in fact.”) (citations omitted).

approximately half of his working time at Tesla, but also that Musk owned, controlled, and/or worked at several other companies.

As summarized *supra*, Musk was actively engaged with SpaceX, The Boring Company, Neuralink, and OpenAI at the time of the Grant.³⁴⁹ Musk admitted that in the year before he received the Grant, he:

split the bulk (at least 90%) of his work hours, approximately 80 to 90 hours per week, between Tesla and SpaceX, with an allocation of 60% to Tesla and 40% to SpaceX. [Musk] allocated his remaining work hours (8-9 hours per week) between Neuralink, The Boring Company and Open[]AI.³⁵⁰

The Proxy vaguely mentions Musk’s “other business interests” *once*,³⁵¹ and never mentions SpaceX, Neuralink, The Boring Company, or OpenAI, much less Musk’s roles and/or obligations relating thereto.

The Board told stockholders the Grant was intended to “incentivize and motivate Mr. Musk to continue to not only lead Tesla over the long-term, but particularly in light of his other business interests, to devote his time and energy in

³⁴⁹ See *supra* 52-53.

³⁵⁰ *Id.*; see also, e.g., Musk:125:6-13, 125:20-23 (“Q. Is it also fair for me to understand that there were periods of time [pre-Grant] when you worked intensely on just SpaceX? A. Yes.”); Musk:129:16-23 (testifying that in early 2018, Musk’s “pattern” was to spend Monday and Thursday at SpaceX); JX0934 (“[t]he minimal time [Musk] is here [*i.e.*, at Tesla]” is “becoming more and more problematic”).

³⁵¹ JX0878.0023.

doing so.”³⁵² Information regarding Musk’s time allocation and competing interests—and thus his functionally part-time Tesla CEO role, which would persist given the Grant’s lack of limitations or requirements regarding Musk’s working time—is material because it relates directly to the “fairness of the consideration” received by stockholders through the Grant. “It is axiomatic that [such information concerning the] fairness of the consideration offered...is material[.]”³⁵³ Its omission renders the Grant invalid.

II. THE GRANT WAS NOT ENTIRELY FAIR

Entire fairness applies to conflicted controller transactions³⁵⁴ or when “at least half of the directors who approved [a] transaction were not disinterested or independent.”³⁵⁵ Under entire fairness, defendants must “demonstrate their utmost

³⁵² JX0878.0023.

³⁵³ *Gilmartin v. Adobe Res. Corp.*, 1992 WL 71510, at *10 (Del. Ch. Apr. 6, 1992); *see also Eisenberg*, 537 A.2d at 1059 (“Shareholders are entitled to be informed of information in the fiduciaries’ possession that is material to the fairness of the price.”); *Voigt v. Metcalf*, 2020 WL 614999, at *24 (Del. Ch. Feb. 10, 2020) (holding that information concerning the “fairness of the consideration offered in a [transaction]” is material and should “appear[] in plain English” in a proxy) (citation and internal quotations omitted)).

³⁵⁴ *Monroe Cnty. Emps.’ Ret. Sys. v. Carlson*, 2010 WL 2376890, at *1 (Del. Ch. June 7, 2010).

³⁵⁵ *Calesa Assocs., L.P. v Am. Cap., Ltd.*, 2016 WL 770251, at *9 (Del. Ch. Feb. 29, 2016).

good faith and the most scrupulous inherent fairness of the bargain”³⁵⁶ by proving “that the transaction was the product of both fair dealing and fair price”³⁵⁷ and “objectively fair, independent of the board’s beliefs[.]”³⁵⁸

Entire fairness applies here because (i) Musk controlled Tesla generally, (ii) Musk controlled Tesla regarding the Grant, (iii) at least half of the Committee was not independent of Musk, and (iv) at least half of the directors who approved the Grant were not independent of Musk. Defendants bear—and will fail to carry—the entire fairness burden at trial.

A. The Grant Is Subject to Entire Fairness

1. Entire Fairness Applies Because Musk Controlled Tesla

“[C]ontrol can be shown to exist generally or ‘with regard to the particular transaction that is being challenged.’”³⁵⁹ “Sources of influence and authority must be evaluated holistically, because they can be additive.”³⁶⁰

³⁵⁶ *Encite LLC v. Soni*, 2011 WL 5920896, at *20 (Del. Ch. Nov. 28, 2011) (citation omitted).

³⁵⁷ *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1163 (Del. 1995) (citation omitted).

³⁵⁸ *Gesoff v. IIC Indus., Inc.*, 902 A.2d 1130, 1145 (Del. Ch. 2006).

³⁵⁹ *In re Tesla Motors, Inc. S’holder Litig.* (“*SolarCity MSJ Opinion*”), 2020 WL 553902, at 4 (Del. Ch. Feb. 4, 2020) (internal citations omitted).

³⁶⁰ *Voigt*, 2020 WL 614999, at *13.

a. General Control

A minority stockholder that “exercises control over the business affairs of the corporation” is a controller.³⁶¹ There are many “possible sources of influence that could contribute to a finding of actual control,” including “relationships with particular directors,” “ownership of a significant equity stake (albeit less than a majority),” and “ability to exercise outsized influence in the board room or on committees, such as through high status roles like CEO, Chairman, or founder.”³⁶² “Different sources of influence that would not support [a finding] of control if held in isolation may, in the aggregate, support [a finding] of control.”³⁶³

First, as discussed above, Musk is Tesla’s co-founder and has occupied Tesla’s most important leadership positions, including when the Board approved the Grant.³⁶⁴

Second, Musk leads Tesla as its clear—and only—public face.³⁶⁵ “*Elon is Tesla, Tesla is Elon.*”³⁶⁶

³⁶¹ *Kahn v. Lynch Commc’n Sys., Inc.* (“*Kahn*”), 638 A.2d 1110, 1113 (Del. 1994) (emphasis removed); see also *FrontFour Cap. Grp. LLC v. Taube*, 2019 WL 1313408, at *21 (Del. Ch. Mar. 11, 2019).

³⁶² *Voigt*, 2020 WL 614999, at *12.

³⁶³ *Id.* at *13.

³⁶⁴ See *supra* 3.

³⁶⁵ *Cysive*, 836 A.2d at 552.

³⁶⁶ JX0192.

Third, Musk exercised “managerial authority”³⁶⁷ over Tesla. Musk, “by [his own] admission, [is] involved in all aspects of the company’s business,”³⁶⁸ has—as this Court has acknowledged—the “power to direct operational decisions,”³⁶⁹ and is the dominant force behind Tesla’s corporate strategy, which he has dictated for decades with his “Master Plan[s].”³⁷⁰ Musk also closely manages Tesla’s personnel decisions, including executive compensation, hiring, and firing.³⁷¹

Further, as discussed *supra* at pages 4 through 6, Musk manages Tesla without regard for the Board’s authority. For example, Musk anointed himself Tesla’s “Technoking” without consulting the Board and ignored the DCC created to police his communications with the public concerning Tesla.³⁷² Indeed, Gracias testified that if Musk wanted to sell Tesla, the Board would be unable to stop him.³⁷³

Fourth, Musk’s ~21.9% bloc made him Tesla’s largest stockholder.³⁷⁴

Fifth, in *Twitter v. Musk*, Musk admitted controlling Tesla.³⁷⁵

³⁶⁷ *Cysive*, 836 A.2d at 553.

³⁶⁸ *Id.* at 552.

³⁶⁹ JX1538.0014-15.

³⁷⁰ *See supra* 3-4.

³⁷¹ *See supra* 4.

³⁷² *SolarCity Post-Trial Opinion*, 2022 WL 1237185, at *33.

³⁷³ Gracias:309:4-9.

³⁷⁴ JX1025.0051.

³⁷⁵ *See supra* 22.

Sixth, Tesla has repeatedly acknowledged Musk’s influence over the Company.³⁷⁶

Seventh, as discussed above, Musk controlled the Board, most of whom—including every Committee member—had significant conflicts that rendered them “beholden to or under [Musk’s] control.”³⁷⁷ Copious precedent establishes conflicts arising from those directors’ business relationships with Musk,³⁷⁸ longstanding personal relationships with Musk,³⁷⁹ and/or receipt of massive (and material) compensation via Musk and his affiliated entities.³⁸⁰

³⁷⁶ JX1031.0052.

³⁷⁷ *Friedman v. Beningson*, 1995 WL 716762, at *4 (Del. Ch. Dec. 4, 1995); *see supra* 7-21.

³⁷⁸ *See, e.g., Sandys v. Pincus*, 152 A.3d 124, 134 (Del. 2016) (“[The] mutually beneficial network of ongoing business relationship[s]...ha[d] a material effect on the parties’ ability to act adversely toward each other.”); *In re The Limited., Inc.*, 2002 WL 537692, at *7 (Del. Ch. Mar. 27, 2002) (finding controller’s investment into a director’s interest can “reasonably be considered as instilling....a sense of ‘owingness’ to [the controller]”).

³⁷⁹ *See, e.g., Marchand v. Barnhill*, 212 A.3d 805, 820 (Del. 2019) (“[A]ny realistic consideration of the question of independence must give weight to [] important relationships and their natural effect on the ability of the parties to act impartially toward each other.”); *Del. Cnty. Emps. Ret. Fund v. Sanchez*, 124 A.3d 1017, 1022 (Del. 2015) (“Close friendships of [a decades-long] duration are likely considered precious by many people, and are rare. People drift apart for many reasons, and when a close relationship endures for that long [it can undermine a director’s independence]”).

³⁸⁰ *Sanchez*, 124 A.3d at 1020-21 (finding a director’s independence is undermined when his “personal wealth is largely attributable to business interests over which [an alleged controller] has substantial influence”); *Kahn v. Portnoy*, 2008 WL 5197164,

Eighth, a unique set of rules applies to Musk at Tesla, including regarding confidentiality and his behavior.³⁸¹

Ninth, Tesla had a supermajority provision effectively providing Musk veto power over stockholder initiatives.³⁸²

* * *

The foregoing facts establish that Musk generally controlled Tesla, independently triggering entire fairness.

2. Entire Fairness Applies Because Musk Controlled Tesla with Respect to the Grant

“[A] plaintiff also may prove that a defendant exercised actual control over the corporation with respect to a particular transaction[.]”³⁸³ A plaintiff can prove transactional control by showing the defendant “dominated and controlled the corporation, its board, or the deciding committee with respect to the challenged transaction.”³⁸⁴ Musk controlled Tesla regarding the Grant.

at *8-9 (Del. Ch. Dec. 11, 2008) (finding director fees that exceeded compensation from other employment material).

³⁸¹ *See supra* 23.

³⁸² *Id.*

³⁸³ *Basho Techs. Holdco B, LLC v. Georgetown Basho Invs., LLC*, 2018 WL 3326693, at *26 (Del. Ch. July 6, 2018).

³⁸⁴ *In re Tesla Motors, Inc. S’holder Litig.* (“*SolarCity MTD Opinion*”), 2018 WL 1560293, at *13 (Del. Ch. Mar. 28, 2018) (internal citation omitted).

a. Musk Controlled the Committee

A plaintiff proves transactional control by showing “that at least half of the [deciding committee] members were not independent of [the controller] when negotiating the Proposed Transactions.”³⁸⁵ Plaintiff easily satisfies that standard because *none* of the Committee members were independent of Musk.³⁸⁶ Therefore, the Grant is subject to entire fairness review.

b. Musk Dictated the Grant Terms

Another indicator of transactional control is control over the transaction terms.³⁸⁷ Musk dictated the Grant’s framework and financial terms, which remained fundamentally unchanged through approval.

During the first Grant-related discussions in early April 2017, Musk dictated that the Grant should provide him 10% of Tesla, and include tranches worth 1% of Tesla and agreed to \$50B market capitalization milestones.³⁸⁸ Tesla and Musk then

³⁸⁵ *FrontFour*, 2019 WL 1313408, at *22.

³⁸⁶ *See supra* 7-19, 21.

³⁸⁷ *Kahn v. Tremont*, 694 A.2d 422, 429 (Del. 1997) (“[T]he committee must function in a manner which indicates that the controlling shareholder did not dictate the terms of the transaction and that the committee exercised real bargaining power ‘at an arms-length.’”) (internal citations omitted); *Ams. Mining Corp. v. Theriault*, 51 A.3d 1213, 1245 (Del. 2012) (“[F]rom inception, the Special Committee fell victim to a controlled mindset and allowed [the controller] to dictate the terms and structure of the [transaction].”).

³⁸⁸ *See supra* 25-26 (citing Musk:144:19-148:10).

spent months devising the Grant, including by, *e.g.*, consulting advisors and modeling the Grant, all without the full Committee’s knowledge or input. By the Committee’s first Grant-related meeting, Musk and Tesla had established the Grant’s fundamental structure.³⁸⁹

Moreover, the Committee never engaged in meaningful negotiations with Musk,³⁹⁰ and the fundamental terms established before the Committee’s first meeting never changed.³⁹¹ Indeed, at his deposition, Gracias balked at the notion that “negotiations” occurred.³⁹² The Committee took no adversarial positions in what Maron described as a “cooperative, collaborative process.”³⁹³ As Ehrenpreis testified: “We were not on different sides[.]”³⁹⁴

³⁸⁹ *See supra* 25-26.

³⁹⁰ *See supra* 31-32.

³⁹¹ *See supra* 25-26, 45.

³⁹² *See, e.g.*, Gracias:230:1-4, 245:4-10, 245:13-20.

³⁹³ Maron:100:11-101:21; *supra* 31-32.

³⁹⁴ Ehrenpreis:139:18-140:3.

c. Musk Shaped the Grant's Timing

Another indicator of transactional control is whether the defendant controlled the transaction's timing.³⁹⁵ Musk shaped the Grant process's timing, decelerating and accelerating it as he pleased.

After its first meeting, the Committee scheduled final Grant approval for July 24, 2017.³⁹⁶ Ehrenpreis, presumably at Musk's behest, drove that timeframe,³⁹⁷ which was widely recognized as rushed.³⁹⁸

After fast-tracking the Grant process, Musk determined to pause it. On July 30, 2017, Musk emailed Maron: "Let's put [my Grant] on hold for a few

³⁹⁵ See, e.g., *FrontFour*, 2019 WL 1313408, at *25.

³⁹⁶ JX0457.

³⁹⁷ JX0564; Gracias:240:8-10 ("Q. Who created this timeline? A. ...I imagine Ira, but you know, he was driving this process.").

³⁹⁸ Brown:165:7-11 (calling the timeline "aggressive" and difficult to "manage to"); Burg:73:13-22 (testifying the timing was "fast" and having no understanding why the Grant needed such quick approval), *id.* 142:8-17 (same); PX302 (June 2017 Tesla management email acknowledging one-month timeline "may be a bit accelerated and may require pushing the comp consultant to keep up").

weeks.”³⁹⁹ Although Maron tried to convince Musk the process should continue, it seemingly stalled and then halted in October 2017.⁴⁰⁰

On November 9, 2017, Musk requested the Grant be quickly finalized: “I’d like to move forward with that now, but in a reduced manner from before,” and “I’d like to take board action as soon as possible[.]”⁴⁰¹ Five days later, Musk changed his mind, telling Maron: “Given recent developments, let’s pause for a week or two. This would be terrible timing.”⁴⁰²

By December 11, 2017, the Grant process was “back on with a vengeance.”⁴⁰³ The Board approved the Grant around six weeks later, on January 21, 2018.

d. Musk Negotiated Against (Only) Himself

Having dictated the Grant’s terms from the outset to a beholden Committee, Musk had little need to intervene in the process, except to negotiate against himself.

³⁹⁹ JX0564; Maron:185:5-15 (confirming Musk emailed him to slow down the process); Murphy:448:20-449:14 (“I saw some evidence that at some point Mr. Musk said let’s delay this thing....I certainly did see the one email or discussion from Mr. Musk saying, you know, let’s not do this right now.”).

⁴⁰⁰ PTO¶225. The Committee and Board conferred on Musk’s compensation package on September 19 and November 16, 2017, respectively. *See* JX0607; JX0669.

⁴⁰¹ JX0682.0002.

⁴⁰² JX0668; *see* JX0718 (“Our CEO grant is back and on a fast track now.”).

⁴⁰³ JX0717.

In November 2017, the plan contemplated fifteen tranches, each 1% of Tesla’s outstanding shares.⁴⁰⁴ Then—in his own words “negotiating against [him]self”⁴⁰⁵—Musk reduced the Grant to his original parameters: “[A] 10% increment in [Musk’s] Tesla ownership[.]”⁴⁰⁶

When Maron informed Musk that 28,959,456 options were necessary to provide Musk’s requested 10% of FDS post-Grant, Musk stated: “That is more than intended. Let’s go with 10% of the *current* FDS number, so 20.915M.”⁴⁰⁷ The Board then backed into Musk’s desired 10% increase on a post-Grant, current FDS basis by providing twelve tranches, each comprising 1% of TOS.⁴⁰⁸

3. Entire Fairness Applies Because at Least Half of the Directors Who Approved the Grant Were Conflicted

“[I]f a board approves a transaction and at ‘least half of the directors who approved the transaction were not disinterested or independent,’ then the transaction

⁴⁰⁴ Gracias:274:25-275:7 (“[W]e were talking about 15 and we ended up at 12.”).

⁴⁰⁵ Musk:261:22-263:4.

⁴⁰⁶ JX0682.

⁴⁰⁷ JX0682 (emphasis added).

⁴⁰⁸ JX0702 (December 12, 2017 email from Chang email to Ahuja calculating 20,173,860 share grant would equal “12% of TOS” and “9.8% of FDS”).

is subject to entire fairness review.”⁴⁰⁹ Here, a majority of the approving directors were not independent of Musk.

On January 21, 2018, Gracias, Ehrenpreis, Murdoch, Buss, Denholm, and Johnson Rice approved the Grant. All but Johnson Rice lacked independence from Musk.⁴¹⁰

B. Defendants Bear the Burden to Prove the Grant is Entirely Fair

“[T]he controlling shareholder bears the burden of proving two things about a transaction subject to entire fairness review: fair dealing and fair price.”⁴¹¹

To shift the burden, a defendant must demonstrate approval by either (i) a fully-informed, uncoerced majority-of-the-minority or (ii) an independent, well-functioning committee.⁴¹² Defendants can prove neither.

1. The Grant Was Not Approved by Fully-Informed Stockholders

To establish approval by a fully-informed majority of disinterested stockholders, Defendants must show that “stockholders were apprised of ‘all

⁴⁰⁹ *Salladay*, 2020 WL 954032, at *8 (internal citation omitted); *see also, e.g., In re KKR Fin. Holdings LLC S’holder Litig.*, 101 A.3d 980, 990 (Del. Ch. 2014) (“[Business judgment is overcome if] at least half of the directors who approved the transaction were not disinterested or independent.”).

⁴¹⁰ *See supra* 7-21.

⁴¹¹ *Monroe*, 2010 WL 2376890, at *1.

⁴¹² *See, e.g., Kahn*, 638 A.2d at 1117.

material information’ related to that transaction.”⁴¹³ As explained above, the Proxy was materially deficient for several reasons.⁴¹⁴

2. The Grant Was Not Approved by an Independent, Well-Functioning Committee

As detailed above, each member of the Committee lacked independence from Musk.⁴¹⁵

Nor can Defendants establish that the Committee was well-functioning,⁴¹⁶ *i.e.*, “function[ed] in a manner which indicates that the controlling shareholder did not dictate the terms of the transaction and that the committee exercised real bargaining ‘at an arms-length,’” permitting a “fair outcome equivalent to a market-tested deal[.]”⁴¹⁷

⁴¹³ *In re Volcano Corp. S’holder Litig.*, 143 A.3d 727, 748 (Del. Ch. June 30, 2016).

⁴¹⁴ *See supra* 46, 55-71.

⁴¹⁵ *See supra* 7-19, 21; *Orchard*, 88 A.3d at 25 (“At a minimum, to obtain burden shifting, the members of the committee must be disinterested and independent.”).

⁴¹⁶ *See, e.g., Frederick Hsu Living Tr. v. Oak Hill Cap. P’rs III, L.P.*, 2020 WL 2111476, at *34 (Del. Ch. May 4, 2020) (“To shift the burden of proof, a special committee must be well-functioning.”) (citing *In re S. Peru Copper Corp. S’holder Derivative Litig.*, 52 A.3d 761, 789 (Del. Ch. 2011), *aff’d sub nom Ams. Mining*, 51 A.3d at 1213)).

⁴¹⁷ *Loral*, 2008 WL 4293781, at *22 (emphasis added) (quoting *Tremont*, 694 A.2d at 429).

First, at its first Grant-related meeting, the Committee was handed a fundamentally pre-baked Grant and consultants tasked with effecting it.⁴¹⁸

Second, the Committee never engaged in meaningful negotiation with Musk; the only meaningful negotiation was between Musk and himself.⁴¹⁹ Instead, the Committee actively lobbied to make the Grant easier to achieve and less likely to offend stockholders.⁴²⁰

Third, Ehrenpreis—one of the most conflicted Committee members—chaired the Committee and spearheaded its process,⁴²¹ and was effectively the only member who engaged with advisors.⁴²²

Fourth, the Committee neither requested nor received benchmarking data, the fundamental grist of compensation decisions.⁴²³

⁴¹⁸ *Valeant Pharms. Int’l v. Jerney*, 921 A.2d 732, 747 (Del. Ch. 2007) (finding unfair dealing where “the process the [compensation] committee followed was one designed simply to justify a predetermined outcome dictated by [the recipient of the bonuses]”).

⁴¹⁹ Musk:261:22-263:4.

⁴²⁰ *See supra* 32.

⁴²¹ PTO¶88; Chang:229:9-17, 382:1-12; Murdoch:199:13-20, 200:4-15, 283:5-16.

⁴²² *See supra* 11-16, 25-28, 30.

⁴²³ *See supra* 33-34; *see also* JX0867 (Tesla’s Proxy advisor Innisfree responding to Maron’s suggestion to highlight Tesla’s compensation consultant retention: “[T]he use of the comp consultant...is not our strongest point (as there are no comparisons to this plan).”).

C. Defendants Cannot Establish that the Grant was Entirely Fair

Defendants cannot carry their burden to prove “that the transaction was the product of both fair dealing *and* fair price.”⁴²⁴

1. Defendants Cannot Establish Fair Dealing

Fair dealing “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.”⁴²⁵ The “inquiry examines...the source of the idea and who was the driving force behind it.”⁴²⁶ “The various dimensions of fair dealing can interact and elide such that a particular instance of unfair dealing affects multiple phases of the process.”⁴²⁷

The Grant process was unfair for numerous reasons.

First, the Board breached its disclosure duties by securing Grant approval via the materially deficient Proxy,⁴²⁸ independently rendering the process unfair.⁴²⁹

⁴²⁴ *Cinerama*, 663 A.2d at 1163 (quotations omitted).

⁴²⁵ *Weinberger*, 457 A.2d at 711.

⁴²⁶ *Frederick Hsu*, 2020 WL 2111476, at *36.

⁴²⁷ *Basho*, 2018 WL 3326693, at *36.

⁴²⁸ *See supra* 46, 55-71.

⁴²⁹ *See Weinberger*, 457 A.2d at 703 (“Material information, necessary to acquaint those shareholders with the bargaining positions of Signal and UOP, was withheld under circumstances amounting to a breach of fiduciary duty. We therefore conclude that this merger does not meet the test of fairness[.]”).

Second, each Committee member lacked independence from Musk.⁴³⁰

Third, Musk was “the source of the idea [for the Grant] and...the driving force behind it,”⁴³¹ establishing its fundamental terms before the full Committee’s involvement.⁴³²

Fourth, the Committee did not meaningfully negotiate against Musk concerning the Grant’s fundamental structure, but instead engaged in a “cooperative [and] collaborative” process antithetical to arm’s-length bargaining.⁴³³ Musk dictated the Grant’s terms and timing, and the Committee effected those wishes.

Fifth, the Committee actively advanced Musk’s interests, including by devising ways to mask the Grant’s true value and make the milestones easier to achieve.⁴³⁴

Sixth, five of the six directors who approved the Grant were conflicted.⁴³⁵

⁴³⁰ *See supra* 7-19, 21.

⁴³¹ *Frederick Hsu*, 2020 WL 2111476, at *36.

⁴³² *See supra* 25-28.

⁴³³ *See supra* 31-32.

⁴³⁴ *See supra* 32.

⁴³⁵ *See supra* 7-21.

2. Defendants Cannot Establish Fair Price

“In the fair price analysis, the court looks at the economic and financial considerations of the transaction to determine if it was substantively fair.”⁴³⁶ Where a transaction results from unfair dealing, the process “infect[s] the fairness of the price.”⁴³⁷

Defendants cannot prove the Grant’s terms were fair.

a. The Grant Was Unnecessary

The Grant was unnecessary to achieve its primary purported goal, to ensure Musk would remain at Tesla.⁴³⁸

Musk repeatedly—and publicly—confirmed he would stay at Tesla with or without the Grant. During a May 2017 earnings call, Musk stated, “I intend to be actively involved with Tesla for the rest of my life,”⁴³⁹ and Musk testified to the same.⁴⁴⁰ Further, Musk was “heavily invested in Tesla, both financially and

⁴³⁶ *Ravenswood Inv. Co., L.P. v. Estate of Winmill*, 2018 WL 1410860, at *13 (Del. Ch. Mar. 21, 2018).

⁴³⁷ *Bomarko, Inc. v. Int’l Telecharge, Inc.*, 794 A.2d 1161, 1183 (Del. Ch. 1999), *aff’d*, 766 A.2d 437 (Del. 2000).

⁴³⁸ *See, e.g.*, JX0878.0008 (stating the Grant was necessary to “ensure[] Mr. Musk’s active leadership of Tesla over the long-term”).

⁴³⁹ JX0390.0020.

⁴⁴⁰ Musk:96:6-22.

emotionally, and view[ed] Tesla as part of his family.”⁴⁴¹ Defendants uniformly testified that they believed Musk would not leave Tesla,⁴⁴² and the Investor Q&A for the Stockholder Vote acknowledged: “If the Plan is not approved, Elon would not quit Tesla.”⁴⁴³

Moreover, Musk’s approximately ~22%/\$13.4B pre-Grant equity stake strongly motivated him to ensure Tesla’s success (and prevent its failure).⁴⁴⁴ Indeed, notwithstanding the Grant’s unprecedented magnitude, Musk stood to reap significantly *more* via his pre-existing holdings:

⁴⁴¹ TSLA-Tornetta-022804-05; JX0831.0013; *see also* Chang:170:4-173:4 (testifying Musk has an “emotional attachment to Tesla” that has “never wavered”).

⁴⁴² *See supra* 51-52.

⁴⁴³ JX0831.

⁴⁴⁴ *See* JX0994; JX0993 (ISS noting that “most founder/CEO[‘s] in high risk industries receive only nominal compensation!”); JX0973 (Nuveen/TIAA stating: “Comp is excessive: other key founders (Larry Page, Bezos) do not get successive grants like this and their large ownership stake is enough of a motivation for them.”); Gracias:207:17-208:13.

STOCK PRICE INCREASE	VALUE OF EXISTING TESLA HOLDINGS	GAIN FROM EXISTING TESLA HOLDINGS	GAIN FROM GRANT
5%	\$21.9B	\$8.5B	\$0
10%	\$33.9B	\$20.5B	\$1.8B
20%	\$76.1B	\$62.7B	\$16.3B
27%	\$133.8B	\$120.4B	\$62.7B

Musk’s overriding desire to maximize his resources to colonize Mars⁴⁴⁵ further ensured he would remain at Tesla, as his future wealth overwhelmingly depended on Tesla’s success. Furthermore, as of the December 31, 2017, Musk had pledged significant quantities of his Tesla shares, further incentivizing him to stay at Tesla to ensure its success.⁴⁴⁶

Indeed, Tesla was so confident that Musk would stay that it had no succession plan and no process to create one.⁴⁴⁷ Musk confirmed pre-Grant: “[T]here’s no...active or passive search going on for a new CEO because I expect to remain CEO for the foreseeable future.”⁴⁴⁸

⁴⁴⁵ JX0564; JX0664; Gracias:208:14-25.

⁴⁴⁶ See, e.g., PTO¶66; JX1256.0032-33 (Musk collateralized approximately 36% of his Tesla options “to secure personal indebtedness.”); Gracias:156:14-21.

⁴⁴⁷ See *supra* 52.

⁴⁴⁸ JX0871.

b. The Grant’s Design Defied its Purported Goal of Focusing Musk on Tesla

The Proxy stated: “The Board designed the [Grant] to incentivize and motivate Mr. Musk to continue to not only lead Tesla over the long-term but particularly in light of his other business interests, to devote his time and energy in doing so.”⁴⁴⁹ However, although Musk was allocating only half of his working time to Tesla, the Grant lacked *any* provision addressing Musk’s allocation of time and/or focus among Tesla and any other competing endeavor(s).⁴⁵⁰ Indeed, the Grant does not even require Musk to remain Tesla’s CEO.⁴⁵¹

As discussed above, the Grant also lacks any clawback of vested options—including if Musk fails to provide sufficient (or any) attention to Tesla, is terminated for cause, resigns without good reason or takes a leave of absence—other than a provision duplicating Tesla’s standard clawback policy upon financial restatement.⁴⁵²

⁴⁴⁹ JX0878.0023.

⁴⁵⁰ See JX0931.0007 (“[T]he overall proposal is peculiar in that it provides increasingly outsized compensation for levels of success,...while at the same time allowing Mr. Musk to maintain his distance from the Company or even increase it.”).

⁴⁵¹ See JX0878.0008 (noting the Grant permits Tesla “to bring in another CEO...at some point in the future”); JX0729.0002.

⁴⁵² See *supra* 53-54.

c. The Grant Provides Outsized Payouts for Probable Results

Rather than sizing Musk’s compensation using competitive market-based benchmarks or imposing genuinely demanding milestones relative to Tesla’s internal projections, the Board handed Musk a Grant wherein (i) the first three tranches—collectively worth several billion dollars—were greater than 70% probable of achievement within *1.5 years* of the Grant date, and (ii) Tesla expected to achieve several more tranches in the following three years.⁴⁵³

Indeed, the Board and management expected Tesla to achieve most—or all—of the milestones. For example, materials circulated at the Board’s January 21, 2018 Grant approval meeting state that “achievement of all milestones is not necessarily expected to take 10 years,”⁴⁵⁴ and Ahuja projected Tesla would reach \$12B in EBITDA—the *seventh* of eight EBITDA milestones—within three-to-four years of the Grant Date.⁴⁵⁵

The Grant also provided exorbitant payouts for even modest results, relative to Tesla’s past performance. As Glass Lewis noted, Tesla could unlock the first two

⁴⁵³ See *supra* 49-50.

⁴⁵⁴ JX0794.0012.

⁴⁵⁵ JX0549. When determining the revenue milestones, Ahuja described \$10B in increased revenue—*i.e.*, revenue sufficient for Tesla to achieve at least the first revenue milestone—as “trivial.” JX0369.

tranches even with a “sharp *deceleration* of growth compared to the Company’s trailing five years compound growth rates of 68% and 95% for market cap and revenue, respectively.”⁴⁵⁶

Finally—and perversely—as Tesla’s market capitalization increases, the market capitalization milestones become increasingly *easier* to achieve on a percentage basis, yet the value to Musk of each tranche *increases* (given the increasing difference between the strike price and Tesla’s then-current stock price).⁴⁵⁷

d. The Grant Is the Largest Compensation Plan Ever, with No Comparables

“[W]here,” as here, “the pricing terms of a transaction that is the product of an unfair process cannot be justified by reference to reliable markets by comparison to substantial and dependable precedent transactions, the burden of persuading the court of the fairness of the terms will be exceptionally difficult.”⁴⁵⁸

Defendants cannot prove fair price through comparables because none exist.

The Grant is the largest compensation plan in history, with a \$2.6B+ GDFV and maximum value exceeding \$55.8B (*i.e.*, greater than Tesla’s entire 2017 market

⁴⁵⁶ JX0931.0006.

⁴⁵⁷ Murdoch:316:16-23, 317:8-18; Gompers:332:2-18.

⁴⁵⁸ *Valeant*, 921 A.2d at 748.

capitalization).⁴⁵⁹ In Glass Lewis’s words: “[T]he disclosed dollar value cost of the grant is staggering relative to executive compensation levels among public companies worldwide,” and “any relative comparison of the grant’s size” to any other compensation plan “would be akin to stacking nickels against dollars.”⁴⁶⁰ ISS calculated the Grant’s value as **250x** greater than that of 2017 peer median CEO compensation,⁴⁶¹ determining that the Grant’s “magnitude alone warrants an against recommendation not only for say-on-pay but also compensation committee members for poor stewardship. This is just absurd.”⁴⁶²

The Grant’s cost to Tesla stockholders is also incomparable. Glass Lewis calculated the Grant’s dilutive effect at 1.07% per year, **35x** higher than the average CEO equity grants among US Megacap firms.⁴⁶³ “Such high transfers of share ownership on an annual basis for an extended period at a firm of any size and scope are largely unheard of.”⁴⁶⁴

⁴⁵⁹ JX0878.0007.

⁴⁶⁰ JX0931.0005, 07; *see also* JX1034.

⁴⁶¹ JX0916.

⁴⁶² JX0841; JX0987.001-03.

⁴⁶³ JX0931.0006.

⁴⁶⁴ *Id.*

The only remotely comparable compensation plan was Musk’s 2012 Grant,⁴⁶⁵ yet the Grant’s GDFV is approximately **33x** that of the 2012 Grant, even though by 2018 (i) Tesla was a substantially larger and more stable company, and (ii) Musk had a substantially larger stake in Tesla (~22% of Tesla shares worth \$13.4B in 2018 vs. ~15% of Tesla’s shares worth \$429M in 2012).⁴⁶⁶

Defendants cannot show the Grant was fairly-priced.^{467, 468}

D. The Court Should Invalidate the Grant

“In determining damages, the powers of the Court of Chancery are very broad in fashioning equitable and monetary relief under the entire fairness standard as may be appropriate, including rescissory damages.”⁴⁶⁹ “Delaware law dictates that the scope of recovery for a breach of the duty of loyalty is not to be determined narrowly.”⁴⁷⁰

⁴⁶⁵ *See supra* 50-51.

⁴⁶⁶ *See* JX0121.0045. The 2012 Plan was approved on August 1, 2012, and closing share price on July 31 was \$27.42—15,644,795 x \$27.42 = ~\$429M.

⁴⁶⁷ *Valeant*, 921 A.2d at 744 (finding unfair price where there was “[no] proof in the record of substantial comparable transactions to which the court might look to find support for the payment of bonuses of this size”).

⁴⁶⁸ Because the Grant was unfair and unjustifiable, Defendants are also liable for unjust enrichment and waste. Plaintiff expressly reserves the right to challenge, on appeal, the Court’s dismissal of the waste claim.

⁴⁶⁹ *Int’l Telecharge, Inc. v. Bomarko, Inc.*, 766 A.2d 437, 440 (Del. 2000).

⁴⁷⁰ *Thorpe v. CERBCO, Inc.*, 676 A.2d 436, 445 (Del. 1996).

Because the defective Grant process diverged so substantially from the standards of fair dealing as to foreclose the ability to determine fair value and terms for the Grant, it should be invalidated. Additionally, Plaintiff seeks equitable rescission of all options issued under the Grant.⁴⁷¹

CONCLUSION

For the foregoing reasons, and based on the evidence to be presented at trial, the Court should invalidate the Grant and provide Plaintiff judgment on his claims.

⁴⁷¹ *Sanders v. Wang*, 1999 WL 1044880, at *13 (Del. Ch. Nov. 8, 1999) (ordering “cancellation or rescission” of a share grant that failed to receive stockholder approval and exceeded the authority of an ESOP, imposition of a “constructive trust” over the recipients, and “an accounting for any profits or benefits directly traceable to these . . . shares”).

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⁴⁷² The word limit is 16,500 pursuant to the Court's October 19, 2022 Order (Trans. ID 68277328). If text in embedded images were counted toward the word limit, the word count would be 16,497.

CERTIFICATE OF SERVICE

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