

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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<b>UNITED STATES SECURITIES AND EXCHANGE COMMISSION</b>	:	
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<b>Plaintiff,</b>	:	
	:	
v.	:	Civil Action No. 1:18-cv-8865-LJL
	:	
<b>ELON MUSK,</b>	:	
	:	
<b>Defendant.</b>	:	
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<b>UNITED STATES SECURITIES AND EXCHANGE COMMISSION</b>	:	
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<b>Plaintiff,</b>	:	
	:	
v.	:	Civil Action No. 1:18-cv-8947
	:	
<b>TESLA, INC.,</b>	:	
	:	
<b>Defendant.</b>	:	
	:	

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**PLAINTIFF SECURITIES AND EXCHANGE COMMISSION’S MOTION AND MEMORANDUM FOR AN ORDER TO TRANSFER FUNDS FOR DISTRIBUTION**

**NOTICE OF MOTION**

PLEASE TAKE NOTICE that upon the accompanying Motion, Memorandum, Declaration, and Proposed Order, and all other papers and proceedings herein, Plaintiff Securities and Exchange Commission (the “SEC” or “Commission”) will move this Court, the Honorable Lewis J. Liman, for an Order to Transfer Funds for Distribution so that the Court-appointed Distribution Agent can distribute the funds to investors eligible for a distribution payment pursuant to the Court-approved Distribution Plan (the “Plan”).

**MOTION**

In accordance with the Plan approved by this Court on March 25, 2022, Plaintiff, the SEC, respectfully submits this motion for an order: (1) directing the SEC, in accordance with directions to be provided by the Distribution Agent, to transfer \$41,532,229.44 to the escrow account established by the Distribution Agent at the Huntington National Bank, N.A. (the “Bank”); and (2) directing the Distribution Agent to distribute those funds to Eligible Claimants in accordance with the Plan.

The grounds for this Motion are set forth in the accompanying Memorandum and Declaration.

**MEMORANDUM IN SUPPORT OF MOTION TO TRANSFER FUNDS**

**I. Background**

On September 27, 2018, the Commission filed a civil action against Defendant Musk alleging violations of the federal securities laws in connection with certain false and misleading statements by Musk. On October 16, 2018, the Court entered the Final Judgment that required Musk to pay a civil penalty of \$20,000,000.00 and permanently enjoined Musk from violating Section 10(b) of the Securities Exchange Act of 1934 (“Exchange Act”) and Rule 10b-5 thereunder. On September 29, 2018, the Commission filed a related civil action against Defendant Tesla alleging violations of the federal securities laws also in connection with Musk’s false and misleading statements. On October 16, 2018, the Court entered the Final Judgment that required Tesla to pay a civil penalty of \$20,000,000.00 and permanently enjoined Tesla from violating Exchange Act Rule 13a-15. As required by the Final Judgments, together Defendants have paid a total of \$40,000,000.00 to the Commission.

On February 6, 2019, the Court entered an Order consolidating the two civil actions for the post-judgment purpose of distributing the funds paid by Defendants.

By Order entered February 26, 2020, the Court established a Fair Fund so that the civil penalties paid by Defendants can be distributed to harmed investors (the “Fair Fund”), and appointed Miller Kaplan Arase LLP. (“Miller Kaplan”) as the tax administrator of the Fair Fund.

The Fair Fund resides in an interest-bearing account at the U.S. Treasury’s Bureau of Fiscal Services (“BFS”). The Fair Fund currently has a balance of \$42,304,753.44.

On May 12, 2021, the Court entered an Order appointing Rust Consulting, Inc. (“Rust”) as the Distribution Agent for the Fair Fund, to assist in overseeing the administration and the distribution of the Fair Fund in coordination with Commission staff, pursuant to the terms of the Plan. On March 25, 2022, upon motion of the SEC, the Court approved the Plan.

## **II. The Claims Process**

As described below and in the accompanying Declaration, Rust has completed the Claims Process, and an independent third-party firm has completed agreed upon procedures in accordance with the Plan. Based on these processes, the Distribution Agent is now ready to distribute the Fair Fund to Eligible Claimants in accordance with the Plan.

On May 20, 2022, Rust caused Postcard Plan Notice to be mailed to 4,036 Potential Claimants. *See* Declaration of Jason Rabe at ¶4, attached hereto as Exhibit A (hereinafter “Rabe Decl.”). In May 2022, Rust also opened a dedicated P.O. Box, email address, website, and toll-free telephone for the Fair Fund distribution. Rabe Decl. ¶¶ 6 – 12. In May and June of 2022, Rust published the Summary Notice in the Wall Street Journal and Investor’s Business Daily and caused the Summary Notice to be transmitted over the PR Newswire. *Id.* at ¶ 9. Rust received

and processed 6,396 Claims Forms. *Id.* at ¶19. Of the 6,396 Claims Forms received; Rust recommended that 3,715 of these Claims share in the distribution of the Fair Fund. *Id.*

Pursuant to paragraph 66 of the Plan, to maintain a high level of quality control, Rust retained an independent third-party firm to perform a set of agreed upon procedures, review a statistically significant sample of the Claims to ensure accurate and comprehensive application of the Plan of Allocation. The final report was sent to the Commission on August 1, 2023

## **II. The Distribution and the Requested Relief**

In accordance with the Plan, Rust has established a reserve of \$772,523.89, leaving a Net Available Fair Fund of \$41,532,229.55. *Id.* at ¶ 21. It has further established an Escrow Account and Deposit Account at the Bank in accordance with paragraph 72 of the Plan.

Rust has prepared and submitted to the SEC staff the Payee List, including the names, addresses, and Distribution Payments of all Eligible Claimants. *Id.* at ¶ 25. Each Eligible Claimant's Distribution Payment has been calculated in accordance with the Plan. Rust has also submitted to the SEC staff a "Reasonable Assurances Letter" representing that the Payee List: (a) was compiled in accordance with the Plan; (b) is accurate as to Eligible Claimants' names, addresses, and Eligible Loss Amount; and (c) provides all information necessary to make a distribution payment to the Eligible Claimant. The SEC staff has reviewed and accepted the Payee List and Reasonable Assurances Letter.

Pursuant to the Payee List, the finalized Distribution Payments to the 3,350 Eligible Claimants totals \$41,532,229.44. *Id.* at ¶ 21. Eligible Claimants will receive approximately 51.7% of their calculated Recognized Loss amount. *Id.* In accordance with paragraph 80 of the Plan, and because all conditions precedent have been completed, the SEC now asks this Court for an Order directing the SEC to transfer the Net Available Fair Fund to the Bank in accordance

with directions provided by Rust, for distribution to Eligible Claimants pursuant to the Plan. In accordance with the Plan, Rust will use its best efforts to commence mailing Distribution Payment checks or effect wire transfers within ten (10) days of the transfer of funds to the Bank. All funds shall remain in the Escrow Account, separate from Bank assets, until needed to satisfy a presented check or issue a wire. All checks presented for payment will be subject to “positive pay” controls before being honored by the Bank.

Upon completion of the distribution process, in accordance with the Plan, the SEC will move the Court for an Order approving the final accounting, discharging the Distribution Agent, and terminating the Fair Fund.

#### **IV. Conclusion**

WHEREFORE, for all the foregoing reasons, the Commission respectfully requests that this Court enter the attached proposed Order and grant such other relief as the Court deems just and proper.

Dated: August 23, 2023

Respectfully Submitted,

/s/ Adriene Mixon

Adriene Mixon

Assistant Chief Litigation Counsel

Attorney for Plaintiff

U.S. Securities and Exchange Commission

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Los Angeles, CA 90071

Tel: (202) 551-4463

Email: [MixonA@sec.gov](mailto:MixonA@sec.gov)

**CERTIFICATE OF SERVICE**

I, Adriene Mixon, Counsel for the United States Securities and Exchange Commission certify that on August 23, 2023, a true and correct copy of Plaintiff Securities and Exchange Commission's Motion and Memorandum for an Order to Transfer Funds for Distribution was served electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's system.

s/ Adriene Mixon  
Adriene Mixon

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

UNITED STATES SECURITIES AND  
EXCHANGE COMMISSION,

Plaintiff,

v.

ELON MUSK

Defendants.

Civil Action No. 1:18-cv-8865-AJN-GWG

UNITED STATES SECURITIES AND  
EXCHANGE COMMISSION,

Plaintiff,

v.

TESLA, INC.,

Defendants.

Civil Action No. 1:18-cv-8947

**DECLARATION OF JASON RABE IN SUPPORT OF THE  
SECURITIES AND EXCHANGE COMMISSION'S MOTION  
TO DISTRIBUTE FAIR FUND**

I, Jason Rabe, pursuant to 28 U.S.C. § 1746, declare and state as follows:

1. I am a Program Manager at Rust Consulting, Inc. ("Rust"), the Distribution Agent in this action. Pursuant to this Court's Order from May 12, 2021 (Dkt. No. 55), Rust was appointed as Distribution Agent for the Fair Fund.

2. The Fair Fund and any interest or earnings, less Administrative Costs (the “Net Available Fair Fund”) will be distributed to Preliminary Claimants who submitted a timely and valid Claim Form (or “Claim”) pursuant to the Plan of Distribution (the “Plan”).

3. I submit this declaration (“Declaration”) in support of the Securities and Exchange Commission’s (the “Commission” or “SEC”) motion to distribute the Net Available Fair Fund to Eligible Claimants. I am over eighteen years of age and not a party to this action. This Declaration is based on my personal knowledge as well as information provided to me by my colleagues. If called to testify regarding the facts in this Declaration, I could do so competently.

**POSTCARD PLAN NOTICE**

4. Rust maintains a proprietary database with names and addresses of the largest and most common banks, brokers, and other nominees that it uses to notify record holders of class actions and Fair Funds. Rust’s proprietary database contains 4,036 names and addresses. On May 20, 2022, Rust caused the Postcard Plan Notice to be mailed to the 4,036 mailing records contained in the Rust record holder mailing database.

5. In response to the Postcard Plan Notice mailing, Rust received bulk requests from brokers and other nominees for 26,996 Postcard Plan Notices for them to forward to their customers. Rust also received an additional 67,102 names and addresses of Preliminary Claimants from brokerage firms, banks, institutions and other nominees, in the form of disks, emails, labels and lists, requesting that the Postcard Plan Notices be mailed to these individuals.

6. Rust leases and maintains a Post Office Box (P.O. Box 44, Minneapolis, MN 55440-0044) for the receipt of all undeliverable mail and written communications necessary to implement the Fair Fund.



7. Rust attempted to locate a new address for 1,047 Postcard Plan Notices that were returned as undeliverable without forwarding addresses by the United States Postal Service (“USPS”) through an information supplier to which Rust subscribes, and mailed a Postcard Plan Notice to 87 Preliminary Claimants where an updated mailing address was identified.

8. In total, Rust disseminated approximately 98,221 Postcard Plan Notices to Preliminary Claimants.

### **SUMMARY NOTICE**

9. In accordance with the Plan, Rust caused the Summary Notice to be published in Investor’s Business Daily the week of May 30, 2022 and The Wall Street Journal on June 3, 2022. Rust also caused the Summary Notice to be transmitted over the PR Newswire on June 3, 2022.

### **TOLL-FREE TELEPHONE NUMBER AND WEBSITE**

10. Rust established a toll-free telephone number (1-877-576-9981) with an Interactive Voice Response System (“IVR”) and live operators to assist Preliminary Claimants with questions about the Fair Fund. This system became operational on May 20, 2022. The IVR and recorded information are available 24 hours a day, 7 days a week. Live operators are available during regular business hours.

11. Rust also established and maintains a website ([www.SECvTeslaFairFund.com](http://www.SECvTeslaFairFund.com)) that enables Preliminary Claimants and other individuals to obtain information about the Fair Fund and to access important documents related to the Fair Fund. The website allows Preliminary Claimants to view answers to frequently asked questions and contains a list of important dates, including the deadline to file their Claim Form. The Website also contains “links” to the Postcard Plan Notice, Plan Notice, Claim Form, Plan, Plan of Allocation, and Order Approving the Plan. The “links”

permit any person with internet access to view and download these documents at their convenience. Preliminary Claimants could also submit their Claim Form online through the website.

12. An email address (info@SECVTeslaFairFund) was also setup to provide Preliminary Claimants with another means to contact the Distribution Agent with any questions or to find out more information about the Fair Fund.

### **CLAIMS PROCESS**

13. The Postcard Plan Notice advised Preliminary Claimants that if they purchased or acquired Tesla common stock, listed on a U.S. Exchange and registered with the Commission and traded under the symbol TSLA during the Relevant Period,<sup>1</sup> they may be eligible for a distribution from the Fair Fund. To be considered, Preliminary Claimants were required to submit a completed Claim Form with necessary documentation, and return it to the Distribution Agent postmarked no later than September 17, 2022. Claim Forms could also be submitted on the Fair Fund's website no later than 11:59 p.m. EDT on September 17, 2022.<sup>2</sup>

14. Claim Status Notices were sent to all Potential Claimants that submitted a Claim Form beginning on December 16, 2022. These notices advised the Potential Claimant of the Distribution Agent's determination of the eligibility of their Claim Form (eligible, partially or wholly deficient, or ineligible) and their calculated Recognized Loss.

15. For Claim Forms found to be deficient, the Claim Status Notice provided the reason(s) for the deficiency, notifying the Potential Claimant of the opportunity to cure such

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<sup>1</sup> Relevant Period is defined in the Plan of Allocation as "between 12:48:16 p.m. EDT on August 7, 2018 and 4:00 p.m. EDT August 8, 2018."

<sup>2</sup> In consultation with the SEC, the filing deadline was extended for another week, until September 24, 2022.

deficiency, and provided instructions regarding further necessary actions. In the event the Claim was denied, the Claim Status Notice stated the reason(s) for such denial and notified the Potential Claimant of their opportunity to request reconsideration of their Claim. The Claim Status Notice provided forty-five (45) days from the date of the notice to respond.

16. Rust contacted the banks, brokers and other nominees (“Nominees”) who submitted claim/transactional data electronically to confirm their submissions and notify the filer of their Claim(s) statuses. Rust provided all Nominees who submitted electronically filed Claims, a Transaction Report in Microsoft Excel format, listing the individual transactions and/or entire Claims that were found to be deficient or ineligible so that the Nominee had the opportunity to correct the deficient condition or request reconsideration of the Claim. The Transaction Report also identified the Claims that were in good standing and provided the calculated Recognized Loss for each Claim listed.

17. Following the mailing of the Claim Status Notices, Rust received and processed responses to documentation and information requests, as well as other correspondence relating to the Claims.

18. Pursuant to paragraph 66 of the Plan, to maintain a high level of quality control, Rust retained an independent third-party firm to perform a set of agreed upon procedures, review a statistically significant sample of the Claims to ensure accurate and comprehensive application of the Plan of Allocation. The final report was sent to the Commission on August 1, 2023.

19. Rust received and processed 6,396 Claims Forms.<sup>3</sup> The Claims were submitted by Preliminary Claimants either through the website (416), by submitting a hard-copy Claim Form

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<sup>3</sup> There must be a final cut-off date after which no additional Claims or responses to Claim Status Notices may be

(318), or electronically (5,662) using a filing template provided by the Distribution Agent. Of the 6,396 Claim Forms received, Rust recommended that 3,715 of these Claims share in the distribution of the Fair Fund.

20. Prior to the disbursement of the Net Available Fair Fund, the Distribution Agent will establish an escrow account with Huntington National Bank, and an associated (linked) checking account. The funds transferred to the escrow account shall be invested and reinvested pursuant to the Plan in short-term U.S. Treasury securities backed by the full faith and credit of the United States Government or an agency thereof. As checks are presented each day, only enough funds to cover the presented checks will be moved from the escrow account to the associated checking account.

21. The balance of the Net Available Fair Fund, after taking into account a reserve for Administrative Costs,<sup>4</sup> is \$41,532,229.55. Pursuant to paragraph 71 of the Plan, Rust provided a Payee List to the Commission of all Eligible Claimants and their calculated Recognized Loss and the amount of their Distribution Payment. The finalized Distribution Payments to the 3,350 Eligible Claimants totaled \$41,532,229.44.<sup>5</sup> Eligible Claimants will receive approximately 51.7% of their calculated Recognized Loss amount.

22. The Minimum Distribution Amount per the Plan of Allocation is \$10.00. If an Eligible Claimant's distribution amount is less than this amount, the Eligible Claimant will be deemed ineligible to receive a Distribution Payment. A total of 365 Eligible Claimants were

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accepted. This is done so that there may be a proportional distribution of the Net Available Fair Fund. As a result, a cut-off date of November 29, 2022 was established.

<sup>4</sup> Reserve includes \$325,000.00 for future tax obligations and fees and expenses of the Tax Administrator (\$37,928.92) and the Distribution Agent (\$182,494.85). The reserve also includes an additional amount of \$227,100.12 to cover the unpaid Distribution Agent's administrative costs incurred through June 30, 2023.

<sup>5</sup> An amount of \$0.11 was not allocated due to rounding.

excluded from the prepared Payee List as a result and shall be sent a separate notification regarding their ineligibility.

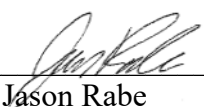
23. As required by federal law, the approved list of Eligible Claimants was compared to the OFAC (Office of Foreign Assets Control) Sanctions Lists for any potential matches. There were no Claims identified during this OFAC screening process that would require further information from Eligible Claimants or require removal from the Payee List.

24. All distribution payments shall be accompanied by a statement characterizing the distribution, the tax treatment of the distribution is the responsibility of each Payee and the Payee should consult his, her, or its tax advisor for advice regarding the tax treatment of the distribution, checks will be void and cannot be reissued after ninety (90) days from the date the original check was issued, and contact information for the Distribution Agent for questions regarding the Distribution Payment.

25. A copy of the Payee List is provided to Commission with this Declaration along with a reasonable assurances letter. As set forth in the Payee List and reasonable assurances letter, the Net Available Fair Fund amount shall be disbursed to the 3,350 Eligible Claimants; the Payee List was compiled in accordance with the approved Plan; it provides all currently known contact information necessary to make a disbursement to each Eligible Claimant listed; and all of the information on the Payee List provided to the Commission is verified as complete and accurate.

26. I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 21st day of August 2023.

  
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Jason Rabe  
Program Manager  
Rust Consulting, Inc.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES SECURITIES AND  
EXCHANGE COMMISSION

Plaintiff,

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**ORDER TO TRANSFER FUNDS FOR DISTRIBUTION**

The Court, having reviewed the Motion of Plaintiff Securities and Exchange Commission (the “SEC” or “Commission”) for an Order to Transfer Funds for Distribution, the accompanying Memorandum of Law in Support thereof, the Declaration of Jason Rabe, Project Manager at Rust Consulting, Inc., the Distribution Agent in this matter, and the Distribution Agent having provided the SEC with a Payee List and Reasonable Assurances letter in accordance with the Court-approved Plan of Distribution (the “Plan”), and for good cause shown,

**IT IS HEREBY ORDERED** that:

1. The Motion is **GRANTED**;

2. In accordance with directions to be provided to the SEC staff by the Distribution Agent, the SEC shall transfer \$41,532,229.44 to the escrow account established by the Distribution Agent at Huntington National Bank; and
3. The Distribution Agent shall distribute those funds to Eligible Claimants in accordance with the Plan.

**IT IS SO ORDERED.**

Dated: August \_\_, 2023

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Honorable Lewis J. Liman  
United States District Judge