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February 21, 2023

VIA ECF

Catherine O'Hagan Wolfe
Clerk of Court
U.S. Court of Appeals for the Second Circuit
Thurgood Marshall United States Courthouse
40 Foley Square
New York, NY 10007

Re: United States Securities & Exchange Commission v. Musk, No. 22-1291

Dear Ms. Wolfe:

Appellant Elon Musk respectfully submits as supplemental authority the February 2, 2023 verdict of the U.S. District Court for the Northern District of California in *In re Tesla, Inc. Sec. Litig.*, 3:18-cv-04865-EMC (N.D.Cal.), Dkt. 671, finding that Mr. Musk did not violate Section 10(b) and Rule 10b-5 in posting the tweets underlying the consent decree presently on appeal before this Court.

In its answering brief in this appeal, the SEC relied on its allegations that Mr. Musk had previously made materially false statements on Twitter as supporting its arguments opposing modification of the consent decree. *See* Answering Br. at 32, 38, 41, 46. The SEC specifically pointed to *In re Tesla*, suggesting that, because the district court in that case had found the tweets false on summary judgment, Mr. Musk violated the securities laws in 2018 and the SEC settlement was justified. Answering Br. at 9 n.2.¹ But the Northern District of California district court left to the jury the question of the materiality of the tweets, along with the remaining elements of a Section 10(b) claim. *In re Tesla, Inc. Sec. Litig.*, Dkt. 387.

Now, in light of the jury's finding that Mr. Musk's tweets did not violate Rule 10b-5, the SEC lacks support both for the consent decree itself and for its arguments on appeal. The jury's

¹ SEC also cited *In re Tesla* as indicating that shareholders were fairly concerned by Mr. Musk's tweets, Answering Br. at 47—a concern that the nine jurors apparently did not have.

verdict provides further reason why the public interest in avoiding unconstitutional settlements easily subsumes the SEC's purported stake in the consent decree. Likewise, the jury's verdict confirms the propriety of applying the unconstitutional conditions doctrine, which prohibits deals achieved "through gimmickry, which converted a valid [settlement] into 'an out-and-out plan of extortion,'" *Dolan v. City of Tigard*, 512 U.S. 374, 387 (1994) (citation omitted), to excise the unconstitutional prior restraint from the consent decree.

Very truly yours,

A handwritten signature in black ink, appearing to be 'AS' followed by a long horizontal flourish.

Alex Spiro

Cc: Dan Berkovitz
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