EFiled: Aug 04 2025 04:46PM EDT
Transaction ID 76787710
Case No. 2024-0560-KSJM

**IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE**

| | |
|---|---|
| MICHAEL PERRY, Derivatively on Behalf of Nominal Defendant TESLA, INC.,<br><br>Plaintiff,<br><br>v.<br><br>ELON MUSK, ROBYN M. DENHOLM, IRA EHRENPREIS, HIROCHIMI MIZUNO, JOE GEBBIA, JAMES MURDOCH, KIMBAL MUSK and KATHLEEN WILSON-THOMPSON,<br><br>Defendants,<br><br>and<br><br>TESLA, INC.,<br><br>Nominal Defendant. | C.A. No. 2024-0560-KSJM |

# NOMINAL DEFENDANT TESLA, INC.'S OPENING BRIEF IN SUPPORT OF ITS MOTION TO DISMISS THE AMENDED COMPLAINT

**OF COUNSEL:**

**SULLIVAN & CROMWELL LLP**

Brian T. Frawley
Matthew A. Schwartz
Michael T. Lemanski
125 Broad Street
New York, New York 10004
(212) 558-4000

**DLA PIPER LLP (US)**

John L. Reed (#3023)
Ronald N. Brown, III (#4831)
1201 North Market Street, Suite 2100
Wilmington, Delaware 19801
(302) 468-5700

- and -

**RICHARDS, LAYTON & FINGER, P.A.**

Rudolf Koch (#4947)
Andrew L. Milam (#6564)
One Rodney Square
920 North King Street
Wilmington, Delaware 19801
(302) 651-7700

Dated: August 4, 2025

*Attorneys for Nominal Defendant Tesla, Inc.*

## TABLE OF CONTENTS

*Page*

## TABLE OF AUTHORITIES

**Page(s)**

**Cases**

**Statutes and Court Rules**

## PRELIMINARY STATEMENT

Delaware courts do not endorse—nor reward—a race to the courthouse designed to circumvent corporate governance changes. In April 2024, the board of directors of Tesla, Inc. publicly announced its intention to seek stockholder approval for the company's redomestication from Delaware to Texas under Section 266 of the Delaware General Corporation Law ("DGCL"). Both Tesla's preliminary and definitive proxy statements regarding the proposed redomestication included a copy of the company's proposed Texas Bylaws. These bylaws designated Texas as the exclusive forum for derivative actions brought on behalf of the company.

On June 13, 2024, Tesla's stockholders approved the redomestication and Tesla became a Texas corporation effective that same day. In anticipation of the impending redomestication, Michael Perry rushed to this Court to file a derivative lawsuit shortly before the redomestication. Perry filed a complaint on May 24, 2024, and served it on June 11, 2024 (the "Original Complaint"). This Court subsequently coordinated this lawsuit with two now-consolidated actions filed by the Employees' Retirement System of Rhode Island ("ERSRI") and the Cleveland Bakers and Teamsters Pension Fund on June 10, 2024, and June 13, 2024, respectively. On April 4, 2025, Tesla moved to dismiss the coordinated actions. On June 10, 2025, Perry responded by filing the Amended Complaint (Trans. ID 76433087).

The Amended Complaint alleges that the Tesla Board and CEO Elon Musk breached their fiduciary duties by failing to monitor Musk's sales of Tesla stock in 2022, approximately two years before Perry initially filed his lawsuit. The Amended Complaint offers a host of conclusory allegations related to events that occurred years ago, none of which is alleged to have actually harmed the company. Perry's haste in filing this lawsuit is of no avail, and like the complaint in the consolidated action (C.A. No. 2024-0631-KSJM), his Amended Complaint should be dismissed for three independent reasons.

*First*, Perry's claims should be dismissed for improper venue under Court of Chancery Rule 12(b)(3). At the time Perry filed the Original Complaint, he knew that the stockholder vote on whether Tesla would convert to a Texas corporation was imminent, and that stockholder approval would subject the company to new bylaws requiring derivative lawsuits such as this one to be litigated in Texas. These bylaws, including the Texas forum-selection bylaw, took effect on June 13, 2024. Although Delaware courts have not addressed the impact of forum-selection bylaws on pending lawsuits, other courts, applying Delaware law, "frequently enforce forum selection clauses [in] bylaws that were not in effect when [the] litigation was filed." *In re Cerence S'holder Deriv. Action*, 2024 WL 5187699, at *3 n.4 (D. Mass. Dec. 20, 2024) (citing *City of Providence* v. *First Citizens BancShares, Inc.*, 99 A.3d 229, 241 (Del. Ch. 2014), *superseded on other grounds*

*by statute*, 8 *Del. C.* § 115). There is no reason to deviate from that practice here, as there is no concern about prejudice to Perry, given that: (i) Tesla stockholders voted to redomesticate and thereby be bound by the Texas Bylaws; (ii) Perry rushed to file his derivative lawsuit to avoid the imminent effect of the Texas forum-selection bylaw; (iii) there has been no material litigation activity in this Court; (iv) Perry served the Original Complaint mere days before Tesla redomesticated to Texas; and (v) Perry filed the Amended Complaint *a year after* the redomestication, adding new factual allegations that post-date even Tesla's original motion to dismiss, such as Perry's reliance on news articles from June 2, 2025, *see* AC ¶¶ 197-98.

*Second*, even if this Court concludes that this action is in the proper forum, the Amended Complaint should be dismissed under Court of Chancery Rule 23.1 because Perry failed to make a pre-litigation demand as Texas law requires in all cases to obtain derivative standing. The pre-litigation demand requirement is an internal affair of the corporation and therefore governed by the law of the state of incorporation, which in Tesla's case is Texas. *Sagarra Inversiones, S.L.* v. *Cementos Portland Valderrivas, S.A.*, 34 A.3d 1074, 1081 (Del. 2011). Perry initiated this action with stock governed by Delaware rights to control claims belonging to a then-Delaware corporation, but Perry no longer holds stock with Delaware rights, *New Enter. Assocs. 14, L.P.* v. *Rich*, 295 A.3d 520, 570 (Del. Ch. 2023), and Texas law now unambiguously governs Tesla's internal affairs, including regarding any demand

analysis—affairs of a foreign corporation which this Court has no interest in regulating, *McDermott Inc.* v. *Lewis*, 531 A.2d 206, 215-17 (Del. 1987).

Perry's attempt to front-run Tesla's redomestication does not alter the choice-of-law analysis. Perry served the Original Complaint barely 48 hours before Tesla became a Texas corporation. Under Delaware law, the relevant board for the purpose of the demand analysis is the board "that would *actually* be tasked with determining whether or not the corporation will pursue the litigation." *Park Empls.' & Ret. Bd. Empls.' Annuity & Benefit Fund of Chi.* v. *Smith*, 2016 WL 3223395, at *9 (Del. Ch. May 31, 2016), *aff'd*, 175 A.3d 621 (Del. 2017) (TABLE). By any measure, given the timing of Perry's lawsuit, only Tesla's Texas Board, which is subject to Texas fiduciary law, could have been tasked with considering a pre-litigation demand. Indeed, Tesla's Texas Board has an obligation to continuously evaluate what is in the best interests of Tesla and its assets (including litigation assets), and those questions, as well as the question of who has the authority to act on behalf of the company, are all governed by Texas law.

*Finally*, even if Delaware law were to apply to the demand question, Perry failed to plead with particularity demand futility as required under Delaware law. In attempting to establish that the Demand Board is not independent, Perry largely relies on this Court's finding in *Tornetta* that Musk controlled the Tesla Board with respect to his 2018 compensation package. *Tornetta* v. *Musk*, 310 A.3d

430, 520 (Del. Ch. 2024). But this Court's conclusion that Musk exhibited "transaction-specific" control in that case, which was influenced by the nature of the negotiation process, does not "carr[y] forward for all time." *Id.* at 510-11 & n.645 (citing *In re Tesla Motors, Inc. S'holder Litig.*, 2022 WL 1237185, at *37-38 (Del. Ch. Apr. 27, 2022)). The allegations in the Amended Complaint amount to nothing more than the Demand Board having conventional business and personal ties with Musk, which are the type of allegations that Delaware courts have repeatedly found do not support a finding of dependence. *See, e.g.*, *Beam* v. *Stewart*, 845 A.2d 1040, 1051-52 (Del. 2004); *In re The Trade Desk, Inc. Deriv. Litig.*, 2025 WL 503015, at *13 (Del. Ch. Feb. 14, 2025). In any event, Perry claims only that certain directors lack independence from Musk; that theory alleges no lack of independence for claims against the other board members. Perry also fails to plead that a majority of the Demand Board faces a substantial likelihood of liability on any one of his claims.

For these reasons, as well as those discussed below, the Court should grant Tesla's motion to dismiss the Amended Complaint.

## THE LITIGATION

Perry filed the Original Complaint on May 24, 2024, and served it on Tesla on June 11, 2024. On April 4, 2025, Tesla moved to dismiss Perry's lawsuit. On June 10, 2025, Perry filed the Amended Complaint in lieu of a response to the motion to dismiss.

### A. The Allegations of the Amended Complaint.

#### 1. Musk and Tesla Enter into Consent Decrees with the SEC.

On October 16, 2018, the U.S. Securities and Exchange Commission entered into a consent decree with Musk (the "Musk Consent Decree") and a separate consent decree with Tesla (the "Tesla Consent Decree") to settle fraud allegations related to Musk's use of his Twitter account. AC ¶¶ 41, 43; Ex. 1; Ex. 2.[1]

The Tesla Consent Decree required Tesla to pay a $20 million civil penalty, implement corporate governance reforms, and to "oversee all of Elon Musk's communications regarding the Company." Ex. 2 at Ex. 2, pp. 2, 5. Pursuant to the Tesla Consent Decree, the company created a Disclosure Controls Committee ("DCC"). AC ¶ 45.

[1] Citations herein to "Ex. __" are to the exhibits attached to the Transmittal Affidavit of John L. Reed, Esq., filed contemporaneously herewith.

The Musk Consent Decree required Musk to pay a $20 million civil penalty and enjoined Musk from violating Section 10(b) of the Securities Exchange Act and Rule 10b-5 promulgated thereunder. Ex. 1 at Ex. 2, pp. 1-2. The Musk Consent Decree also required him to comply with all procedures implemented by Tesla regarding disclosure controls and oversight. AC ¶ 42; Ex. 1 at Ex. 2, pp. 4-5.

In February 2019, the SEC brought a contempt motion against Musk, arguing that he had violated the Musk Consent Decree by allegedly failing to get pre-approval for a tweet. AC ¶ 51. Rather than litigate those allegations, Musk and the SEC entered into a superseding consent decree in April 2019, which enumerated the topics on which Musk was required to seek pre-approval. *Id.*; Ex. 3. Tesla and the SEC simultaneously entered into a superseding consent decree that reflected these amendments. Ex. 4.

In the years that followed, under Musk's leadership, Tesla enjoyed unprecedented and extraordinary growth, providing a return of over 2,400% for stockholders from May 2019 to January 2022. Tesla, Inc. Common Stock (TSLA) Charts, NASDAQ, https://www.nasdaq.com/market-activity/stocks/tsla/advanced-charting (last accessed Mar. 27, 2025).

### 2. Musk Sells Tesla Stock in Late 2021 and 2022.

In 2021, Tesla moved its corporate headquarters to Texas due to the state's "strategic advantages," including a strong business climate, diverse and skilled workforce, and availability of key resources. Ex. 5 at E-16.

In September of that year, Musk adopted a 10b5-1 plan to sell 10,275,000 shares of Tesla stock in November and December 2021, in connection with the exercise of options that were scheduled to expire in 2022. AC ¶ 123(a)-(c). Musk sold approximately $5 billion worth of Tesla stock in November 2021, and made additional stock sales in December 2021. *Id.* ¶ 123(a)-(b).

In 2022, Musk made several stock sales in connection with his purchase of Twitter. *See id.* ¶¶ 124, 126. In April 2022, Musk sold approximately $8.5 billion worth of Tesla stock. *Id.* ¶ 124(a). In August 2022, he sold approximately $6.9 billion of Tesla stock. *Id.* Musk tweeted on August 19, 2022, that he sold the stock to avoid an emergency sale if forced to close the Twitter deal and "some equity partners don't come through." *Id.* ¶ 124(c).

### 3. Musk Makes Additional Tesla Stock Sales in Late 2022.

In November and December 2022, Musk sold more Tesla shares. After forecasting about 50% growth in vehicle production and deliveries in October 2022, Musk sold approximately $3.9 billion in Tesla stock between November 4 and 8, 2022. AC ¶¶ 70-71, 97. These trades were publicly announced on November 8,

2022. *Id.* ¶ 97. Reports in early December suggested Musk sought loans to refinance approximately $3 billion in Twitter stock. *Id.* ¶ 98. After Tesla pre-cleared the trades, between December 12 and 14, 2022, Musk sold approximately $3.581 billion in Tesla stock. *Id.* ¶¶ 101-02. These trades were reported publicly on December 14, 2022. *Id.* ¶ 101.

Tesla's stock price fell in late December 2022 due to pandemic-related production delays and expanded buyer discounts. *Id.* ¶¶ 127, 131. A further decline occurred on January 3, 2023, after missed sales and delivery targets. *Id.* ¶¶ 78-79, 134.

On March 8, 2023, Perry sent Tesla a books-and-records demand, seeking a broad variety of Tesla Board materials and policies. Ex. 6 at 11-12. Following negotiations over the scope and propriety of the demand and the execution of a non-disclosure agreement in June 2023, Tesla made two document productions responsive to Perry's request in June and July 2023, respectively. Ex. 7; Ex. 8. More than half a year later, on February 15, 2024, Perry requested additional documents outside the scope of his original demand. Ex. 9 at 4. Following further negotiations, Tesla made two additional document productions in March 2024, Ex. 10; Ex. 11, and again produced documents to Perry on April 17, 2024. Ex. 12. Perry indicated interest in obtaining additional documents after the April 17, 2024 production but, ultimately, never followed up on the request.

### B. Tesla Seeks Stockholder Approval to Redomesticate.

On April 17, 2024, Tesla filed a preliminary proxy statement (the "Preliminary Proxy") announcing its intent to seek stockholder approval to redomesticate from Delaware to Texas. Ex. 13. This announcement came a year or more after the events at issue in the Amended Complaint, including the 2019 consent decrees Musk and Tesla entered into with the SEC, and the 2021 and 2022 stock sales. The Preliminary Proxy explained that the redomestication vote would occur at Tesla's June 13, 2024 Annual Meeting of Stockholders. Ex. 13 at 21-63. The special committee charged with evaluating the redomestication explained that Texas law would provide substantially equivalent stockholder rights as Delaware law, while enabling Tesla to "build[] on [its] relationships with the state and the local community"—relationships that are "critical to Tesla." Ex. 13 at E15-16.

On April 29, 2024, Tesla filed a definitive proxy statement (the "Definitive Proxy") seeking stockholder approval for the redomestication. If approved, the redomestication would "be effected through a conversion pursuant to Section 266 of the [DGCL]." Ex. 5 at 21. Upon redomestication, Tesla would "cease to be governed by [Tesla's] existing [Delaware] charter and bylaws and [would] be instead subject to the provisions of the proposed Texas Certificate of Formation . . . and the proposed Texas Bylaws." *Id.* These documents, included with both the Preliminary and Definitive Proxies, made clear that Texas courts would be the "sole

and exclusive forum for . . . any derivative action or proceeding brought on behalf of the corporation." Ex. 13 at 36, C-27; Ex. 5 at 36, C-27.

### C. Perry Rushes to the Courthouse Just Before Tesla Redomesticates.

On May 24, 2024, over a month after Tesla filed the Preliminary Proxy announcing the redomestication vote and nearly two years after the events described in his Amended Complaint, Perry filed the Original Complaint. Trans. ID 73207544. On June 11, 2024, just two days before the redomestication, Tesla's counsel accepted service of the Original Complaint. Trans. ID 73398605. The Original Complaint alleged that Musk sold Tesla stock in November and December 2022 while in possession of, and motivated by, adverse, material nonpublic information regarding falling demand for Tesla vehicles. Compl. ¶ 162. It also asserted a claim against Tesla's directors, alleging that they failed to maintain adequate internal controls and procedures related to Musk's stock sales and to ensure compliance with Tesla's Insider Trading Policy and the company's consent decree with the SEC. Compl. ¶ 154.

On June 13, 2024, Tesla's stockholders approved the redomestication with approximately 63% of outstanding shares (and 84% of the actually voted shares not affiliated with Elon or Kimbal Musk) voting in favor of the proposal. Ex. 14 at 2. Tesla then converted to a Texas corporation, governed by the Texas Certificate of Formation and Texas Bylaws, via filings with the Delaware Secretary of State and

the Texas Secretary of State, effective at 5:59 p.m. Eastern Time on June 13, 2024. Ex. 15, Ex. 16; *see also* Tex. Bus. Orgs. Code §§ 10.154-10.156.

On April 4, 2025, Tesla moved to dismiss Perry's Original Complaint.

**D. Perry Files the Amended Complaint a Year After Redomestication.**

On July 10, 2025, Perry filed his Amended Complaint instead of responding to Tesla's motion to dismiss. The Amended Complaint again asserts the two claims in his original complaint, adding factual allegations that post-date Tesla's motion to dismiss. *See* AC ¶¶ 197-98 (quoting news articles dated June 2, 2025). The Amended Complaint also adds a third claim for unjust enrichment against Elon Musk arising out of its allegations regarding Musk's stock sales. *Id.* ¶¶ 215-18.

## ARGUMENT

The Amended Complaint should be dismissed for any of three independent reasons: (1) the action is in an improper forum; (2) the issue of whether Perry has standing to pursue his derivative action is governed by Texas law—a demand-required jurisdiction—which mandates dismissal for lack of standing; and (3) even if Delaware law were applied, Perry has failed to adequately plead demand futility.

### I. The Amended Complaint Should Be Dismissed For Improper Venue.

The Amended Complaint should be dismissed under Court of Chancery Rule 12(b)(3) based on the Texas forum-selection clause in Tesla's bylaws. *Centene Corp.* v. *Accellion, Inc.*, 2022 WL 898206, at *5 (Del. Ch. Mar. 28, 2022). Following redomestication, Tesla's stockholder-approved bylaws mandate that Texas, not Delaware, is the exclusive proper forum for these actions. Delaware courts "enforce the forum selection bylaws in the same way" they enforce "any other forum selection clause, in accordance with the principles set down by the United States Supreme Court in [*M/S Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1 (1972)]." *Boilermakers Loc. 154 Ret. Fund* v. *Chevron Corp.*, 73 A.3d 934, 940 (Del. Ch. 2013). Under these principles, forum-selection clauses are "presumptively valid and should be specifically enforced unless the resisting party clearly show[s] that enforcement would be unreasonable and unjust, or that the clause [is] invalid for such reasons as fraud and overreaching." *Sylebra Cap. P'rs Master Fund, Ltd.* v. *Perelman*, 2020

WL 5989473, at *10 (Del. Ch. Oct. 9, 2020) (quoting *Ingres Corp.* v. *CA, Inc.*, 8 A.3d 1143, 1146 (Del. 2010)).[2]

Tesla's forum-selection bylaw unambiguously requires this derivative action to be litigated in Texas. Perry's tactical decision to file his lawsuit in Delaware shortly before Tesla's redomestication to Texas—a move subject to stockholder approval and explicit notice of the Texas forum-selection bylaw—does not negate the bylaw's enforceability. Nor can Perry meet his burden to show that enforcing the bylaw would be unreasonable or unjust. Enforcement is not only reasonable but equitable. Tesla is now a Texas corporation, Perry has failed to make a demand on the board of a Texas entity, and Texas courts are fully capable of adjudicating the claims.

### A. The Forum-Selection Bylaw Requires Perry's Lawsuit to Be Litigated in Texas.

It is undisputed that Tesla is a Texas corporation and its bylaws require all derivative actions to be filed in Texas. The company's bylaws provide:

> Unless the corporation consents in writing to the selection of an alternative forum, the sole and exclusive forum for . . . any derivative action or proceeding brought on behalf of the corporation . . . shall be the Business Court in the Third Business Court Division ("Business Court") of the

[2] Delaware courts apply Delaware law to determine whether to dismiss a lawsuit pursuant to a foreign corporation's forum-selection bylaw. *See Sylebra*, 2020 WL 5989473, at *10. However, in this case, that choice-of-law question matters little because Texas applies the same *Bremen* test. *See In re Automated Collection Techs., Inc.*, 156 S.W.3d 557, 559 & n.3 (Tex. 2004).

> State of Texas (provided that if the Business Court determines that it lacks jurisdiction, the United States District Court for the Western District of Texas, Austin Division (the "Federal Court") or, if the Federal Court lacks jurisdiction, the state district court of Travis County, Texas).

Ex. 17 at 33.[3] By its plain terms, the forum-selection bylaw authorized by stockholders in the redomestication mandates dismissal of these "derivative action[s]" because it requires that such lawsuits be litigated in Texas. *Id.*; *see Boilermakers*, 73 A.3d at 951 (treating "forum selection bylaws [that] address internal affairs claims," such as derivative claims, as enforceable).

The presumptive enforceability of Tesla's forum-selection bylaw is not altered by its adoption shortly after Perry originally filed his action. Delaware courts enforce forum-selection bylaws under "fundamental principles of corporate and contract law." *Mack* v. *Rev Worldwide, Inc.*, 2020 WL 7774604, at *8 (Del. Ch. Dec. 30, 2020). This "contract is, by design, flexible and subject to change in the manner that the DGCL spells out and that investors know about when they purchase stock." *Id.* (quoting *Boilermakers*, 73 A.3d at 939). Thus, when a company amends its bylaws, those amendments are immediately binding on the stockholders, as the stockholders had a "reasonable expectation" that the bylaws may be amended at any

[3] In May 2025, Tesla made technical revisions to clarify the scope of its forum-selection bylaw. *Compare* Ex. 17 at 33 *with* Ex. 18 at 35. These changes are immaterial for the purposes of this litigation.

time. *City of Providence*, 99 A.3d at 240. For that reason, this Court has held that an otherwise-valid fee-shifting bylaw "is enforceable against members who joined the corporation before the [bylaw's] enactment" because the members had "agreed to be bound by rules that may be adopted and/or amended from time to time by the board." *ATP Tour, Inc.* v. *Deutscher Tennis Bund*, 91 A.3d 554, 560 (Del. 2014) (quotations omitted) (citing *Boilermakers*, 73 A.3d at 956).

While Delaware courts have not explicitly addressed the enforceability of a recently adopted forum-selection bylaw on a pending lawsuit, other courts applying Delaware law "frequently enforce forum selection clauses pursuant to bylaws that were not in effect when litigation was filed." *In re Cerence S'holder Deriv. Action*, 2024 WL 5187699, at *3 n.4 (citing *City of Providence*, 99 A.3d at 241, and *Kidsco Inc.* v. *Dinsmore*, 674 A.2d 483, 492 (Del. Ch.), *aff'd*, 670 A.2d 1338 (Del. 1995) (TABLE)). In *Sanchez* v. *Robbins*, for example, a stockholder of a California corporation brought a derivative action in California. 2024 WL 2952546, at *1 (Cal. Ct. App. June 12, 2024). The following month, the corporation's board of directors voted to redomesticate from California to Delaware, subject to stockholder approval, and stated that part of that redomestication would involve adopting a forum-selection bylaw requiring all derivative lawsuits to be heard in Delaware. *Id.* After stockholders approved the redomestication, the trial court dismissed the lawsuit pursuant to the forum-selection bylaw. Applying Delaware

law, the California Court of Appeal affirmed the dismissal, holding that forum-selection bylaws may apply to pre-existing lawsuits. *Id.* at *3. The court emphasized that Delaware law permits bylaws to govern "litigation filed before the bylaw was adopted." *Id.*; *see also Goldstein* v. *Neuman*, 2021 WL 5317198, at *3 (Cal. Ct. App. Nov. 16, 2021) ("Plaintiff has not cited, and we have not located, any authority holding that a newly enacted forum selection bylaw cannot be applied to pending litigation as a matter of law.") (citing *City of Providence*, 99 A.3d at 241).

The *Sanchez* court's conclusion is derived from Delaware principles. Delaware courts have explained that because a stockholder consents to be bound by future bylaws, a forum-selection bylaw is presumptively enforceable even if it was adopted after the wrongdoing alleged in the lawsuit. In *Sylebra*, for example, a corporation reincorporated from Delaware to Nevada and concurrently adopted a forum-selection bylaw requiring that all internal governance lawsuits be litigated in Nevada. 2020 WL 5989473, at *5-6. This Court dismissed the lawsuit pursuant to the Nevada forum-selection bylaw. *Id.* at *14. In doing so, it rejected the plaintiff's argument that the bylaw could not be enforced because the wrongdoing had allegedly started while the corporation was a Delaware corporation. *Id.* at *11-12. The Court explained that "[w]hether or not the alleged wrongdoing comes before or after the adoption of a forum selection bylaw is irrelevant in determining" the "enforceability of the bylaw," because "a stockholder in a Delaware corporation

gives consent to be bound by current *and future* bylaws when it buys stock." *Id.* at *11 (emphasis added).

Similarly, in *City of Providence*, a Delaware company entered into a merger agreement and concurrently adopted a forum-selection bylaw providing for exclusive jurisdiction of certain lawsuits in North Carolina. 99 A.3d at 230-31. A stockholder challenged the merger and argued that the forum-selection bylaw was unenforceable because it was adopted at the same time as the challenged merger. *Id.* at 240. This Court rejected those timing concerns, explaining that the fact that the forum-selection bylaw was "adopted . . . on an allegedly 'cloudy' day when it entered into the merger agreement . . . rather than on a 'clear' day is immaterial." *Id.* at 241. Nor did it matter that the bylaw would regulate "the forum for asserting claims that arose before it was adopted." *Id.* That argument was merely "a dressed-up version of the 'vested right' doctrine" that Delaware courts had "soundly rejected." *Id.* (citing *Kidsco*, 674 A.2d at 483, and *Boilermakers*, 73 A.3d at 955).

Accordingly, because a stockholder agrees to be bound by future bylaws when it buys stock, it follows that if the governing forum-selection bylaw requires a lawsuit be litigated in another forum, that bylaw is presumptively enforceable regardless of when it came into effect. The fact that the bylaw was adopted when the lawsuit was pending does not disturb that presumption. Indeed, in *Sanchez*, the relevant board did not even *recommend* a stockholder reincorporation vote until the

month after the lawsuit was filed, 2024 WL 2952546, at *1, *3, unlike here, where Perry sued over a month *after* the Tesla redomestication vote was announced and shortly before the vote took place. Yet the court in *Sanchez* enforced the forum-selection clause nonetheless. *Id.* at *3. Moreover, whatever limitations may apply to the scope of application of board-adopted forum bylaws, "[s]hareholder participation in the decision to adopt the forum selection bylaw distinguishes cases involving wholly unilaterally adopted adhesion contracts." *Id.* at *4. This Court should not part ways with Delaware precedent and other jurisdictions' logical approach.

### B. Perry Cannot Show that Enforcement of the Forum-Selection Bylaw Would Be Unreasonable or Unjust.

Because the forum-selection bylaw is presumptively enforceable, Perry can only avoid it by establishing that "enforcement would be unreasonable and unjust." *Sylebra*, 2020 WL 5989473, at *11 (quotations omitted). Under that standard, Perry "bears a heavy burden to demonstrate that enforcement . . . would place [him] at an unfair disadvantage." *Id.* (quotations and alterations omitted). He cannot do so here.

*First*, enforcement of Tesla's Texas forum-selection bylaw is inherently reasonable. The bylaw selects "the most obviously reasonable forum—[Tesla's] state of incorporation." *Boilermakers*, 73 A.3d at 953. The bylaw also selects "the second most obviously reasonable forum," the state in which Tesla is "headquartered." *City of Providence*, 99 A.3d at 235. Enforcing this bylaw respects Tesla's stockholders'

"decision[] to redomesticate," and aligns with the "values of flexibility and private ordering" that have long characterized Delaware law. *Maffei* v. *Palkon*, 2025 WL 384054, at *30 (Del. Feb. 4, 2025).

The derivative nature of this litigation makes enforcement of the forum-selection bylaw particularly sensible. In a derivative action, stockholders seek to control a corporate asset—the litigation. *See Smith*, 2016 WL 3223395, at *8. As explained further below (*see* Part II, *infra*), for the purpose of the demand futility analysis, Delaware courts focus on the board "that would *actually* be tasked with determining whether or not the corporation will pursue the litigation," even if that is not the same board that was in place when the lawsuit was filed. *Smith*, 2016 WL 3223395, at *9. Here, the relevant board is that of a Texas corporation, as Tesla's redomestication occurred on June 13, 2024. Perry served the Original Complaint two days before the redomestication, and filed the Amended Complaint a year later. Tesla's Board could not possibly "have had time to assess the Complaint in keeping with their fiduciary responsibilities before" the company became a Texas entity. *Id.*

*Second*, Perry cannot meet his "heavy burden to demonstrate that enforcement here would place [him] at an unfair disadvantage." *Sylebra*, 2020 WL 5989473, at *11 (quotations omitted). Perry cannot argue that there was any impropriety in the adoption of the bylaw. The bylaw was "adopted as part of [Tesla's] reincorporation" which the "shareholders overwhelmingly approved"—

"by extension approving the forum selection bylaw." *Sanchez*, 2024 WL 2952546, at *3.[4] There is "no indication the bylaw was adopted in response to plaintiff's litigation." *Sanchez*, 2024 WL 2952546, at *3. The reverse is the only reasonable inference: the lawsuit was timed precisely to circumvent the redomestication.

There is thus no prejudice to Perry in enforcing the bylaw such that enforcement could be considered unjust. Perry seeks to assert the rights of Tesla and to recover a judgment in favor of that Texas corporation. Perry rushed to file his claims knowing full well that redomestication—and with it an exclusive Texas forum-selection bylaw—was imminent. There have been no substantive proceedings of any kind in this Court.[5] And there is no question that Texas courts equally can adjudicate stockholder lawsuits like Perry's.[6] Because Perry could have chosen to

---

[4] This Court recently held that the stockholder vote on the redomestication was valid under Tesla's Charter. *Ball* v. *Tesla, Inc.*, 2025 WL 696598, at *1 (Del. Ch. Mar. 3, 2025).

[5] In similar circumstances addressing whether a hastily-filed lawsuit should be given priority under the first-filed doctrine, Delaware courts have not given deference to filing dates of pre-emptive filings designed to avoid litigation in another jurisdiction. *Zilberstein* v. *Frankenstein*, 2021 WL 5289104, at *4-5 (Del. Super. Nov. 12, 2021) ("Delaware courts have found actions filed in different jurisdictions to be contemporaneous despite a plaintiff technically filing first where there is no significant time difference, and the nature of the actions are similar suggesting that the plaintiff filed in an anticipatory nature."); *Sprint Nextel Corp*. v. *iPCS, Inc*., 2008 WL 2737409, at *15 n.123 (Del. Ch. July 14, 2008) ("This Court treats as simultaneous[] complaints filed within the same general time frame.").

[6] Moreover, given Delaware's strong presumption in favor of upholding parties' choice of forum, this Court cannot decline to enforce a forum-selection clause simply because the selected forum does not guarantee identical treatment, in all respects, of a plaintiff's claims. *See Sylebra*, 2020 WL 5989473, at *12; *Salzberg* v. *Sciabacucchi*, 227 A.3d 102, 132 (Del. 2020) ("[C]ourts [must] give as much effect as possible to forum-

bring his action in a Texas forum, he has "no business bringing [his] claims in this court." *Sylebra*, 2020 WL 5989473, at *9 (quotations omitted).

## II. Perry's Derivative Lawsuit Should Be Dismissed Because Demand Admittedly Was Not Made As Required Under Texas Law.

Perry's derivative action should also be dismissed under Court of Chancery Rule 23.1 for the independent reason that he did not make a pre-litigation demand on the Tesla Board in compliance with governing Texas law. Perry admits that no demand was made on the Tesla Board. AC ¶ 162 ("Plaintiff did not make a demand on the Board to bring this action . . . ."). The demand requirement is an issue of substantive law governed by the law of the state of incorporation. *Sagarra*, 34 A.3d at 1082. Where, as here, a plaintiff sued immediately in advance of a material change in the board, the court will look to the board that would have actually considered the demand in practice when evaluating derivative standing. *Smith*, 2016 WL 3223395, at *9. Here, that board is plainly Tesla's Texas Board, whose actions are governed by Texas law. Because Texas law applies to the demand question, and under Texas law a plaintiff is *required* in all cases to make a demand upon the board

---

selection clauses, and [] only deny enforcement of them to the limited extent necessary to avoid some fundamentally inequitable result or a result contrary to positive law.") (quotations omitted); *accord EpicentRx, Inc.* v. *Superior Ct. of San Diego Cnty.*, 2025 WL 2027272, at *1 (Cal. July 21, 2025) ("A forum selection clause is not unenforceable simply because it requires the parties to litigate in a jurisdiction that does not afford civil litigants the same right to trial by jury as litigants in California courts enjoy.").

prior to initiating derivative litigation, these cases should be dismissed. Tex. Bus. Orgs. Code § 21.553(a); *In re Schmitz*, 285 S.W.3d 451, 455 (Tex. 2009).

### A. Under the Internal Affairs Doctrine, Texas Law Applies to Perry's Demand Requirement.

The internal affairs doctrine is an "overarching" and "dominant" choice-of-law principle. *Sagarra*, 34 A.3d at 1081. The doctrine provides a clear rule: "[O]nly the law of the state of incorporation governs and determines issues relating to a corporation's internal affairs." *VantagePoint Venture P'rs 1996* v. *Examen, Inc.*, 871 A.2d 1108, 1113 (Del. 2005). The rule protects states' interests in "promoting stable relationships among parties involved in the corporations [they] charter[]" and preventing "corporations from being subjected to inconsistent legal standards." *Id.* at 1112. The doctrine is not only a conflict-of-laws principle but also a constitutionally-mandated one arising out of both the Fourteenth Amendment's Due Process Clause—because directors, officers, and stockholders have a "right . . . to know what law will be applied to their actions"—and the Commerce Clause—because no state has an interest in governing the "internal affairs of foreign corporations." *McDermott*, 531 A.2d at 216-17.

A "basic principle of corporate governance [is] that the decisions of a corporation—including the decision to initiate litigation—should be made by the board of directors or the majority of shareholders." *Kamen* v. *Kemper Fin. Servs., Inc.*, 500 U.S. 90, 101 (1991). As the Delaware Supreme Court has put it, "[t]he presuit

demand requirement is quintessentially an 'internal affair' that falls within the scope of the internal affairs doctrine" and thus is governed by the law of a corporation's state of incorporation. *Sagarra*, 34 A.3d at 1082. That is because the "decision to bring a lawsuit" "is a decision concerning the management of the corporation," which falls firmly within the "gravitational pull" of the internal affairs doctrine. *Id*. The pre-litigation demand question here is an internal affair governed by Texas law.

*First*, Tesla's Texas Board is the only board that could have considered any litigation demand, had one been made. To be sure, the default rule in Delaware is to test compliance with the demand requirement with respect to the board "as of the time the complaint is filed." *Rales* v. *Blasband*, 634 A.2d 927, 934 (Del. 1993). But that rule is just a shorthand reference to "the board that would be considering the demand." *Id.* at 933. For this reason, the Court of Chancery has rejected the filing date as the proper yardstick to measure compliance with the demand rule when that date "conflicts with the reality of which board was in place to assess demand futility." *Smith*, 2016 WL 3223395, at *9. Thus, this Court has ruled that the demand requirement should be assessed as of some later date "where equity dictates," particularly, as relevant here, where a plaintiff sues "just before" a change in the board composition. *Id*. at *2.

In *Smith*, a plaintiff brought a derivative action on behalf of a Delaware corporation under a demand futility theory. 2016 WL 3223395, at *7. About one month before the plaintiff filed his complaint, the company disclosed to its stockholders that it would hold new elections for its board of directors. The plaintiff, however, sued just two business days before the impending elections. *Id*. at *6-7. In this procedural context, Vice Chancellor Glasscock ruled (in a decision later affirmed by the Delaware Supreme Court) that the *post*-election board was the relevant demand board. *Id*. at *9. The Court emphasized that the purpose of the demand rule is to evaluate "the board that would *actually* be tasked with determining whether or not the corporation will pursue the litigation." *Id*. (emphasis in original). The Court reasoned that "[a]s a practical matter, even had the [old board] received a demand on [the day the complaint was filed], they would not have had time to assess the Complaint in keeping with their fiduciary responsibilities before being replaced by the new [board]." *Id*. Because of this, the Court found that "here, it was the [new board], not the [old board], that was in a position to *actually* assess the Plaintiff's Complaint." *Id*. (emphasis in original); *see also CDX Liquidating Tr.* v. *Venrock Assocs.*, 640 F.3d 209, 216 (7th Cir. 2011) ("The board would have assumed that, certainly from [the day of reincorporation] forward, the duties of the directors . . . would be governed by Delaware law.").

Accordingly, in Delaware, the demand requirement is assessed "by reference to the 'board that would *actually* be tasked with determining whether or not the corporation will pursue the litigation.'" *City of Cambridge Ret. Sys.* v. *Ersek*, 921 F.3d 912, 924 (10th Cir. 2019) (quoting *Smith*, 2016 WL 3223395, at *9). As former Chancellor Strine has put it, Delaware law does not require the "ridiculous result" of looking to the board in place when a lawsuit was filed, when a new board with a new composition would be the one actually considering the demand. *In re Puda Coal, Inc. S'holders Litig.*, C.A. No. 6476-CS, at 15-17 (Del. Ch. Feb. 6, 2013) (TRANSCRIPT) (looking to post-filing board where majority of the board resigned immediately after the filing of the complaint, leaving in place only one interested director).

That rule governs this case. On June 11, 2024, a mere two days before the redomestication, Tesla's counsel accepted service of the Perry Complaint. Trans. ID 73398605. "[T]he demand requirement of Chancery Rule 23.1 exists at the threshold, first to insure that a stockholder exhausts his intracorporate remedies, and then to provide a safeguard against strike suits." *Aronson* v. *Lewis*, 473 A.2d 805, 811-12 (Del. 1984). Yet, given the filing and service of these actions on the eve of Tesla's move to Texas or thereafter, Perry's intracorporate remedies could *only* be considered by Tesla's Texas Board in accordance with Texas law. *Ersek*, 921 F.3d at 924 (board member whose term ended 10 days after lawsuit filed not considered

in demand-futility analysis). Perry's eleventh-hour addition of new factual allegations to the Amended Complaint that post-date not only the redomestication, but also Tesla's motion to dismiss, underscores Perry's timing problem. *See* AC ¶¶ 197-98. In sum, it was Tesla's Texas Board, not the Delaware Board, that would have actually considered any demand made by Perry concerning the allegations in this lawsuit, and Texas law should therefore govern the demand requirement question.

*Second*, Perry's litigation rights, including the right to sue derivatively on behalf of Tesla, arise from the rights afforded to him by Texas law through his ownership of Tesla stock. It is blackletter law that "[a] share of stock represents a bundle of rights defined by the laws of the chartering state." *Rich*, 295 A.3d at 570. This bundle of rights includes stockholders' litigation rights. *Maffei*, 2025 WL 384054, at *28 n.252. When Tesla converted to a Texas corporation, Perry ceased to hold shares carrying the bundle of rights provided by Delaware law, and instead began to hold shares "carrying a different bundle of rights afforded by [Texas] law." *See id.*; 8 *Del. C.* § 266(d). Any standing Perry has to continue pursuing a derivative action on behalf of Tesla is therefore governed by Texas law, and, if the opposite were true, Perry would lose standing under the continuous-ownership requirement because he no longer owns stock in Tesla as a Delaware corporation. *See Lewis* v. *Anderson*, 477 A.2d 1040, 1046 (Del. 1984).

*Third*, application of Texas law to the demand requirement is fully consistent with Section 266(e) of the DGCL:

> The conversion of a corporation out of the State of Delaware in accordance with this section and the resulting cessation of its existence as a corporation of this State pursuant to a certificate of conversion to non-Delaware entity *shall not be deemed to affect any obligations or liabilities of the corporation incurred prior to such conversion or the personal liability of any person incurred prior to such conversion, nor shall it be deemed to affect the choice of law applicable to the corporation with respect to matters arising prior to such conversion*.

8 *Del. C.* § 266(e) (emphasis added). By the plain text of the statute, the conversion of a Delaware corporation into a corporation of another state does not affect the substantive law under which the liability of the corporation, or of individual directors or officers of that corporation, is governed for claims challenging fiduciary conduct before redomestication. But derivative standing is not a question of corporate or individual liability or obligation—it is a question of whether or not a stockholder-plaintiff has the *right* to "usurp the board's authority to control a corporate litigation asset." *In re TransUnion Deriv. S'holder Litig.*, 324 A.3d 869, 882 (Del. Ch. 2024). The logical corollary to the statutory standard in Section 266(e) is that the rights of stockholders to embroil a Texas corporation in litigation should be governed by Texas law, particularly when the Texas Board would consider any demand. The General Assembly's choice to identify certain questions of liability or obligations as being unaffected by a corporate conversion, while omitting mention of other

questions, should be given effect. *See Palese* v. *Del. State Lottery Off.*, 2006 WL 1875915, at *3 (Del. Ch. June 29, 2006), *aff'd*, 913 A.2d 570 (Del. 2006) (TABLE).

*Finally*, equitable considerations favor applying Texas law to determine Perry's derivative standing. When construing Rule 23.1, "equity drives the rule, not the reverse." *Smith*, 2016 WL 3223395, at *2. "A court faced with the issue of change in board composition during litigation must recognize that interest, tempered by the understanding that a corporate asset should be administered by the directors elected by the stockholders, free from interference by individual stockholders, except where corporate well-being requires otherwise." *Id.* Here, Perry sued well after Tesla announced its reincorporation vote based overwhelmingly on facts that had been in the public domain for years and, indeed, cut short his books-and-records inspection to front-run Tesla becoming a Texas corporation.

### B. Under Texas Law, Perry's Failure to Make a Demand Requires Dismissal of the Action.

Texas law requires the dismissal of this action. Perry lacks derivative standing to pursue this lawsuit because Texas law requires that a stockholder make a demand prior to the filing of a derivative complaint. Specifically, under Texas law:

> [a] shareholder may not institute a derivative proceeding until the 91st day after the date a written demand is filed with the corporation stating with particularity the act, omission, or other matter that is the subject of the claim or

> challenge and requesting that the corporation take suitable action.

Tex. Bus. Orgs. Code § 21.553(a). As the Texas Supreme Court has explained, Texas law indisputably "requires presuit demand in all cases; a shareholder [cannot] avoid a demand by proving it would have been futile." *Schmitz*, 285 S.W.3d at 455. Because Perry failed to make the required demand upon Tesla's Board, he lacks derivative standing and his lawsuit must be dismissed.

## III. Perry's Derivative Lawsuit Should Be Dismissed Because He Has Failed To Plead Demand Futility Under Delaware Law.

Finally, even if this Court is the proper forum, and even if Delaware law applies to the demand question, this lawsuit must still be dismissed under Court of Chancery Rule 23.1 because Perry has failed to plead with particularity demand futility with respect to a majority of the Demand Board.

It is "a bedrock of Delaware corporate law" that "the board of directors, not stockholders, manages the business and affairs of the corporation, including the business decision to cause the corporation to sue." *In re GoPro, Inc. S'holder Deriv. Litig.*, 2020 WL 2036602, at *8 (Del. Ch. Apr. 28, 2020). Accordingly, "Court of Chancery Rule 23.1 requires that a shareholder seeking to assert a claim on behalf of the corporation first make demand on the directors to obtain the action desired." *FLI Deep Marine LLC* v. *McKim*, 2009 WL 1204363, at *2 (Del. Ch. Apr. 21, 2009). And "[w]hen a derivative plaintiff seeks to avoid pre-suit demand and proceed with

litigation on behalf of the corporation," the plaintiff must "state with particularity the reasons for the shareholder's failure to make such effort." *Id.* at *2-3.

The demand futility pleading standard is a high bar that will be cleared only in a "rare case." *In re Citigroup Inc. S'holder Deriv. Litig.*, 964 A.2d 106, 121 (Del. Ch. 2009). Perry must plead with particularity that a majority of the Demand Board could not have properly considered a demand to sue because (1) they received "a material personal benefit from the alleged misconduct," (2) they "face[d] a substantial likelihood of liability on" the claims, or (3) they "lack[ed] independence" from someone who was interested under the first two prongs. *United Food & Com. Workers Union* v. *Zuckerberg*, 262 A.3d 1034, 1059 (Del. 2021). In doing so, Perry must "overcome a defendant-friendly presumption" that a corporate board acts "in good faith." *Trade Desk*, 2025 WL 503015, at *10. Perry's ill-conceived Amended Complaint fails to meet the high bar for pleading demand futility and thus cannot survive dismissal.

### A. The Amended Complaint Does Not Plead with Particularity that the Demand Board Lacks Independence.

Perry's Amended Complaint fails to plead with particularity that demand was futile because a majority of the Demand Board lacked independence. The Amended Complaint offers no theory at all of any lack of independence between any director and any interested person other than Musk, or with respect to any claims other than those asserted against Musk, thereby conceding the Demand Board's

discretion is not "sterilized" with regard to any of the other defendants. *See Zuckerberg*, 262 A.3d at 1060 (quotations omitted). Even as to Musk, the allegations regarding control establish only routine ties between a CEO and his board. Because of this, nothing prevents a majority of the Demand Board from properly considering a litigation demand for the claims at issue.[7]

In alleging that the Board lacked independence from Musk, Perry attempts to piggy-back off this Court's finding in *Tornetta* that the Tesla directors in that case—three of whom overlap with the Demand Board here—were not independent. *See* AC ¶¶ 161-62, 169. But it is well-established that director independence is "a case-by-case fact specific inquiry." *Teamsters Union 25 Health Servs. & Ins. Plan* v. *Baiera*, 119 A.3d 44, 61 (Del. Ch. 2015). Delaware courts' approach to the Tesla Board provides a perfect example of this fact-specific inquiry. When the Supreme Court affirmed the approval of Tesla's acquisition of SolarCity under entire fairness review, it concluded that even assuming that "the Tesla Board was conflicted," the record showed that the directors "were not 'dominated' or 'controlled' by Musk *when they voted to approve the Acquisition*." *In re Tesla Motors*, *Inc. S'holder Litig.*, 298 A.3d 667, 712 (Del. 2023) (emphasis added). By

[7] Here, the eight-member Demand Board consists of Elon Musk, Robyn Denholm, Ira Ehrenpreis, James Murdoch, Kimbal Musk, Joe Gebbia, Kathleen Wilson-Thompson, and JB Straubel.

contrast, this Court subsequently found in *Tornetta* that Musk did hold "transaction-specific control with respect to the Grant" at issue in that case. 310 A.3d at 501.[8] The Court reaffirmed, however, that independence is always case-specific. That is because "[w]hen assessing independence, Delaware courts consider not only the directors' relationships with the party to whom they are allegedly beholden, but also how they acted with respect to that party." *Tornetta*, 310 A.3d at 510. Thus, a finding of control in one case is "not a factual finding that carries forward for all time." *Id.* at 510 n.645.

**Kathleen Wilson-Thompson.** The Amended Complaint does not allege that Wilson-Thompson lacks independence and thus this Court must "presume [her] independence." *In re KKR Fin. Hldgs. LLC S'holder Litig.*, 101 A.3d 980, 995 (Del. Ch. 2014) ("Delaware law presumes the independence of corporate directors. To overcome that presumption, a plaintiff must allege facts as to the interest and/or lack of independence of the individual members of a board."), *aff'd*, 125 A.3d 304 (Del. 2015).

[8] The *Tornetta* directors are appealing this Court's findings that the Board was controlled with regard to that transaction. *See In re Tesla, Inc. Deriv. Litig.*, Nos. 534, 2024; 10, 2025; 11, 2025; 12, 2025 (Del.).

**Robyn Denholm.** The Amended Complaint alleges that Denholm is beholden to Musk (but not the other defendants) due to her compensation as a Tesla director. AC ¶ 169(f). It further alleges that Denholm has demonstrated "undue deference" to Musk based on her alleged performance as Chair of the DCC. AC ¶ 169(f). And it relies on this Court's finding in *Tornetta* that Denholm was not independent with respect to approving Musk's 2018 compensation package. AC ¶¶ 161-62, 169(f). However, these allegations do not concern the events at issue here, and are insufficient to satisfy Perry's Rule 23.1 obligation to show that Denholm is beholden to Musk with respect to the claims in this case.

Denholm's compensation does not render her beholden to Musk. Perry does not allege that Denholm's past compensation was excessive but instead pleads that Denholm has realized hundreds of millions of dollars in cash through sales of her Tesla stock. AC ¶ 169(f). As Delaware courts have recognized, if anything, substantial equity-based compensation aligns a director's interests even further with a company and its public stockholders. *See, e.g.*, *In re PLX Tech. Inc. S'holders Litig.*, 2018 WL 5018535, at *41 (Del. Ch. Oct. 16, 2018), *aff'd*, 211 A.3d 137 (Del. 2019) (TABLE). Moreover, Perry offers no explanation as to why remaining on the Tesla Board—without compensation—would be financially or personally material to Denholm despite her independent wealth.

Nor does Denholm's performance as DCC Chair render her beholden to Musk. Perry makes sweeping and conclusory allegations that Denholm exhibited "undue deference" and "fail[ed] to execute with any diligence her responsibilities" as Chair of the Committee. AC ¶ 169(f). Not only are those allegations unsupported by the facts in the Amended Complaint—they are contradicted by them. The Amended Complaint alleges that, far from neglecting to do "any diligence," the DCC would regularly meet to discuss Musk's tweets together with Tesla's legal counsel. *See* AC ¶¶ 92-93, 95, 109.

Perry's reliance on this Court's findings in *Tornetta* similarly fails to demonstrate Denholm's lack of independence. As noted, to determine whether a director is independent, a court "engages in a case-by-case fact specific inquiry." *Baiera*, 119 A.3d at 61. This is particularly true with respect to Denholm. In *Tesla Motors*, this Court concluded that Denholm had been "an independent, powerful and positive force" in the context of the SolarCity acquisition in 2016. 2022 WL 1237185, at *38. In *Tornetta*, the Court concluded that Denholm lacked independence, but only with regard to the 2018 compensation package, further noting that even this conclusion was not an easy one to make. 310 A.3d at 509-10 (explaining that other directors "present clearer calls"). Perry does not offer any specific allegations to show that Denholm was "so under [Musk's] influence that [her] discretion would be sterilized" with regard to his stock sales in 2021 or 2022. *Baiera*, 119 A.3d at 59.

**Ira Ehrenpreis.** The Amended Complaint alleges that Ehrenpreis lacks independence from Musk (but not from any other defendant) due to his compensation as a Tesla director and their longstanding personal ties. AC ¶ 169(e). It also alleges that Ehrenpreis lacks independence because he invested in SpaceX, personally and through his investment fund; a company at which he serves as a director does business with Tesla; and he has business dealings with Musk "in connection with Solar City." AC ¶ 169(e). These allegations do not suffice to show lack of independence.

As to Ehrenpreis's compensation, Perry has not alleged any facts to suggest that the compensation Ehrenpreis previously received is or ever was material in the context of his financial circumstances. If anything, the allegations of Ehrenpreis's business dealings, including those regarding SolarCity, undermine any inference that his Tesla director compensation "is financially material to him." *United Food & Com. Workers Union* v. *Zuckerberg*, 250 A.3d 862, 898-99 (Del. Ch. 2020), *aff'd*, 262 A.3d 1034 (Del. 2021).

Perry's allegations regarding Ehrenpreis's routine personal and financial ties to Musk also do not establish that Ehrenpreis is beholden. After all, "[m]ere allegations that [directors and executives] move in the same business and social circles, or a characterization that they are close friends, is not enough to negate independence for demand excusal purposes." *Beam*, 845 A.2d at 1051-52. Nor do

Ehrenpreis's alleged investments in Musk's companies negate his independence. In *Trade Desk*, for example, this Court held that a director was independent for demand purposes notwithstanding allegations that he was one of two initial investors in the company, made over $100 million dollars from that investment, had been one of the earliest directors, and the CEO of the company had invested in his fund. 2025 WL 503015, at *12-15. The same is true of Ehrenpreis's less substantial ties. Perry's "[m]ere recitation of the fact of past business or personal relationships . . . do[es] not provide the plus-factor [he] need[s] to overcome the general rule that past relationships do not call into question a director's independence." *Id.* at *13 (quotations omitted).

Finally, Perry likewise cannot rely on *Tornetta*. In *Tornetta*, the Court explained that it could *not* conclude that Ehrenpreis's alleged personal and business ties "rendered Ehrenpreis beholden to Musk in general." 310 A.3d at 509. Rather, the Court limited itself to finding that Ehrenpreis's "*actions in connection with the Grant* demonstrate that he was beholden *for that purpose*." *Id.* (emphasis added); *see also Tesla Motors*, 2022 WL 1237185, at *37. Accordingly, *Tornetta* actually refutes the suggestion that Ehrenpreis was beholden to Musk due to their social and business ties.

**JB Straubel.** The Amended Complaint alleges that Straubel is beholden to Musk (but not to any other defendant) because he has "long standing ties" to Tesla and Musk in that he is a co-founder of Tesla and Musk made a $10,000 investment

in Straubel's car battery company more than 20 years ago. AC ¶ 169(b). It alleges that Straubel served in various roles at Tesla, including Chief Technology Officer, and that, while serving as Tesla's CTO, Straubel requested to be considered for a compensation structure similar to that awarded to Musk in 2018 (and which this Court subsequently voided). AC ¶ 169(b). The Amended Complaint also alleges that Straubel has "deference to, fear of, and [is] intimidat[ed] by" Musk. AC ¶ 169(b).

*First*, Straubel's longstanding ties with Tesla and his status as co-founder and CTO do not negate independence. *See Beam*, 845 A.2d at 1051. In *Zuckerberg*, for example, this Court held, and the Supreme Court affirmed, that a director was independent for demand purposes even though he was one of the earliest investors in Facebook, was the longest-serving member of the board other than Zuckerberg, and was a partner at a firm that supported Zuckerberg's control of Facebook. 250 A.3d at 897-99; *see also Trade Desk*, 2025 WL 503015, at *12-15. The same is true with respect to Straubel's similar ties. And Straubel's alleged request for a compensation structure similar to Musk's is immaterial given the (conspicuous) lack of allegation as to whether his request was granted, or its implications for Straubel's independence with respect to demand in this case.

*Second*, the allegation that Straubel was deferential to and intimidated by Musk, based on a single outdated magazine quote, does not establish Musk's control over Straubel with regard to the events at issue. In 2022, Straubel stated to *Time* that "there's no real benefit" in trying to explain his relationship with Musk to the press because that would risk the journalist making an unintentional misstatement that could have Musk "more frustrated at you, or who knows what." AC ¶ 169(b). That vague statement does not support an inference of undue influence, deference, or fear, and does not raise a reasonable doubt as to Straubel's independence. *Cf. Trade Desk*, 2025 WL 503015, at *13 (a director's "favorable public statements" about the company and its CEO do not raise a reasonable doubt as to independence).

**James Murdoch.** The Amended Complaint alleges that Murdoch lacks independence from Musk (but not from other defendants) because he has "a close personal relationship with Musk." AC ¶ 169(d). It further alleges that Murdoch has invested in SpaceX. AC ¶ 169(d). And Perry yet again relies on *Tornetta*, suggesting its analysis proves that Murdoch is not independent for demand purposes. AC ¶ 161. None of these allegations is sufficient to allege that Murdoch is beholden to Musk for the purposes of demand in this case.

As with the other directors, this Court has repeatedly stated that mere allegations that parties share business and personal ties do not rebut the presumption of independence for demand purposes. *See Beam*, 845 A.2d at 1051; *Trade Desk*, 2025 WL 503015, at *12-15. While this Court did rely on Murdoch's "personal connection with Musk" in finding that he was not independent with regard to the 2018 compensation package, its analysis largely focused on the circumstances surrounding Murdoch's becoming a Board member, which occurred just a few months before the negotiations surrounding Musk's compensation. *Tornetta*, 310 A.3d at 459 & n.151, 510. The Amended Complaint by contrast concerns events that occurred years after Murdoch joined the Board, and it offers no reason why Murdoch cannot consider a demand in this case.

**Joe Gebbia.** The Amended Complaint alleges that Gebbia has a "close personal relationship with Musk" in that he attends parties with Musk and others at Tesla, lives near Musk, and has "reportedly been a frequent social companion" of Musk (but not any other defendant). AC ¶ 169(g). Yet again, Perry merely alleges the "kind of thin social-circle friendship" which Delaware courts have repeatedly held "are insufficient." *Del. Cnty. Empls. Ret. Fund* v. *Sanchez*, 124 A.3d 1017, 1022 (Del. 2015) (quotations omitted). For allegations of close personal ties to "raise a reasonable doubt whether a director can appropriately consider demand," the allegations must suggest that the relationship "rise[s] to the level of 'familial

loyalty and closeness.'" *Id.* at 1022 n.23 (quoting *Beam*, 845 A.2d at 1050). The Amended Complaint alleges nothing of the sort.

### B. The Amended Complaint Does Not Plead with Particularity a Substantial Likelihood of Liability.

Just as the Amended Complaint fails to plead that a majority of the Demand Board is beholden to Musk, it also fails to plead with particularity that a majority of the Demand Board faces a substantial likelihood of liability as to any of the claims asserted. This is a significant burden. The standard under Rule 23.1 is more demanding than the standard under Rule 12(b)(6). *In re Walt Disney Co. Deriv. Litig.*, 825 A.2d 275, 285 (Del. Ch. 2003). Under Rule 23.1, "pleadings must comply with stringent requirements of factual particularity that differ substantially from the permissive notice pleadings governed solely by Chancery Rule 8(a)." *Brehm* v. *Eisner*, 746 A.2d 244, 254 (Del. 2000). "[V]ague or conclusory allegations do not suffice to challenge the presumption of a director's capacity to consider demand," and "[t]his analysis is fact-intensive and proceeds director-by-director and transaction-by-transaction." *Trade Desk*, 2025 WL 503015, at *9 (quotations omitted).

> Although a short and plain statement showing that the pleader is entitled to relief is normally sufficient to state a claim, it does not satisfy the requirement of pleading more than a mere threat of liability. The court could not conclude that there is a substantial likelihood of liability from the face of a complaint unless the claim is pled with sufficient particularity to permit the court to reasonably reach the required conclusion.

*In re Baxter Int'l, Inc. S'holders Litig.*, 654 A.2d 1268, 1270 (Del. Ch. 1995).

For the reasons set forth in the director defendants' briefs in support of their accompanying motion to dismiss, the Amended Complaint here fails to plead legally cognizable claims under the liberal pleading standards of Rule 12(b)(6). "But even if the court were to draw a pleading stage inference" that some claim has been sufficiently pled against some defendant, that would not be sufficient to avoid dismissal under Rule 23.1 because the Amended Complaint lacks detailed allegations that a majority of the Demand Board "would face a substantial likelihood of liability" on any specific claim. *In re Camping World Hldgs., Inc. S'holder Deriv. Litig*., 2022 WL 288152, at *8 (Del. Ch. Jan. 31, 2022), *aff'd*, 285 A.3d 1204 (Del. 2022) (TABLE). Indeed, a majority of the Demand Board are not even defendants on two of the three claims, which are asserted only against Elon Musk. "It is unclear . . . how a majority of the Board could face a substantial likelihood of liability" where a majority of the Board are not named as defendants. *Melbourne Mun. Firefighters' Pension Tr. Fund* v. *Jacobs*, 2016 WL 4076369, at *13 (Del. Ch. Aug. 1, 2016), *aff'd*, 158 A.3d 449 (Del. 2017) (TABLE).

"Because demand was not futile as to a majority of the Demand Board as of the filing of the original complaint, Perry has failed to plead sufficient facts to cause the court to divest the Board of its authority to control the litigation asset." *Trade Desk*, 2025 WL 503015, at *30.

## CONCLUSION

For the above reasons, the Court should dismiss the Amended Complaint.

**DLA PIPER LLP (US)**

*/s/ John L. Reed*
John L. Reed (#3023)
Ronald N. Brown, III (#4831)
1201 North Market Street, Suite 2100
Wilmington, Delaware 19801
(302) 468-5700
john.reed@us.dlapiper.com
ronald.brown@us.dlapiper.com

-and-

**RICHARDS, LAYTON & FINGER, P.A.**

Rudolf Koch (#4947)
Andrew L. Milam (#6564)
One Rodney Square
920 North King Street
Wilmington, Delaware 19801
(302) 651-7700
koch@rlf.com
milam@rlf.com

*Attorneys for Nominal Defendant Tesla, Inc.*

**OF COUNSEL:**

**SULLIVAN & CROMWELL LLP**

Brian T. Frawley
Matthew A. Schwartz
Michael T. Lemanski
125 Broad Street
New York, New York 10004
(212) 558-4000

Dated: August 4, 2025

Words: 10,104/14,000