



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

MICHAEL PERRY, Derivatively on  
Behalf of Nominal Defendant TESLA,  
INC.,

Plaintiff,

v.

ELON MUSK, ROBYN M.  
DENHOLM, IRA ENHRENPREIS,  
HIROCHIMI MIZUNO, JOE  
GEBBIA, JAMES MURDOCH,  
KIMBAL MUSK and KATHLEEN  
WILSON-THOMPSON,

Defendants,

and

TESLA, INC., a Delaware corporation,

Nominal Defendant

Case No. 2024-0560-KSJM

**Public Redacted Version  
Filed May 30, 2024**

**VERIFIED STOCKHOLDER DERIVATIVE COMPLAINT**

Plaintiff Michael Perry (“Plaintiff”), by and through his undersigned attorneys, bring this stockholder derivative action on behalf of Nominal Defendant Tesla, Inc. (“Tesla” or the “Company”) against Elon Musk (E. Musk “E. Musk” or “Musk”) as the Company’s controlling stockholder for his misuse of material non-public information (“MNPI”) and against Tesla’s Board of Directors (“Board”) members sitting in November and/or December 2022 for breaching their fiduciary duties by allowing defendant Musk to circumvent Tesla’s Insider Trading Policy

and make sales of Tesla Stock while in possession of, and motivated by MNPI, and for failing to enforce the Consent Judgments in *SEC v. Musk* and *SEC v. Tesla, Inc.*, (U.S.D.C. S.D.N.Y.), case numbers 18-cv-8865 and 18-cv-8947, respectively, collectively (“SEC Actions”).

Plaintiff makes these allegations upon personal knowledge as to those allegations concerning himself and, as to all other matters, upon the investigation of counsel, which includes, without limitation, review and analysis of: (a) certain (partially redacted) books and records produced by Tesla in response to Plaintiff’s demands for books and records made pursuant to *Del. C. §220*; (b) public filings made by Tesla and other related parties with the U.S. Securities and Exchange Commission (“SEC”); (c) press releases, interviews, and other publications describing statements by certain of the Defendants and related nonparties; (d) news articles, stockholder communications, and postings on Tesla’s website and tweets by Musk; (e) Tesla’s corporate governance documents including its “Insider Trading Policy” (“ITP”); and (f) other publicly available information concerning Tesla and the Defendants.

## **NATURE AND SUMMARY OF THE ACTION**

1. This stockholder derivative action arises from November and December 2022 sales of approximately \$3,949,087,394 and \$3,581,026,532 respectively of Tesla stock totaling \$7,530,113,926 (the “Shares”) by Tesla’s controlling stockholder, Musk, in his individual capacity and through a revocable trust he controlled. It is alleged here that Musk made those trades while he was in possession of, and motivated by, MNPI in violation of his fiduciary duties to the Company. When the MNPI was revealed on and after the Shares were sold, Tesla’s stock declined sharply. This suit also asserts claims of breach of the fiduciary duty of loyalty against the Tesla directors sitting in November and December 2022 for allowing Musk’s sales of Tesla stock while in possession of MNPI and for failing to have Tesla and Musk comply with the Consent Judgment. (hereinafter described)

## **PARTIES**

### **Plaintiff**

2. Plaintiff is a shareholder of Tesla, was a shareholder of Tesla at the time of the wrongdoing alleged herein, and has been a shareholder of Tesla continuously since before the events described herein to date.

### **Nominal Defendant**

3. Nominal Defendant Tesla is a Delaware corporation with its headquarters in Austin, Texas. Tesla was founded in 2003 and went public on June 29, 2010. Tesla utilizes a proprietary technology to create highway capable electric vehicles as well as clean energy generation and storage products.

### **Defendants**

4. Defendant E. Musk is and/or was Chairman, Product Architect, CEO, the largest stockholder, and the defendant responsible for the Shares stock selling at issue here (hereinafter referred to as the “November Sales” and “December Sales” respectively and collectively as the “Sales.”). Musk co-founded Tesla and controls the Company and dominates its Board both now and in 2022 at the time of his sales. As Chairman and Product Architect, E. Musk helped design the Company’s Tesla Roadster. In October 2008, he took on the additional responsibility of CEO, overseeing daily operations as the Company was ramping up Roadster production and accelerating the development of its second vehicle, the Model S. In 2018, Musk was forced, as part of the Consent Judgment, to give up his role as Chairman of the Board, whereupon Defendant Robyn Denholm was chosen by Musk to replace him as Chair.

5. Defendant Robyn M. Denholm (“Denholm”) is currently and has been a member of the Tesla Board since August 2014 and was the Chair of the Tesla Board when E. Musk sold the Shares. Denholm also serves as Chair of the Audit Committee (“AC”) and a member of the Nominating and Governance Committee (“NGC”) and the Compensation Committee (“CC”). She was at all relevant times the Chair of Tesla’s Disclosure Controls Committee (“DCC”) which was created by the terms of the Consent Judgments in 2018.

6. Defendant Ira Ehrenpreis (“Ehrenpreis”) is currently and has been a member of the Tesla Board since 2007 including when E. Musk sold the Shares. At that time, Ehrenpreis was Chairman of both NGC and the CC.

7. Defendant James Murdoch (“Murdoch”) is currently and has been a member of the Tesla Board since 2017 including when E. Musk sold the Shares. At that time, Murdoch was also a member of Tesla’s AC.

8. Defendant Kimbal Musk (“K. Musk”) is currently and has been a member of the Tesla Board since 2004 including when E. Musk sold the Shares. K. Musk is the brother of defendant E. Musk and he is a director of SpaceX controlled by Musk.

9. Defendant Hirochimi Mizuno (“Mizuno”) was a member of Tesla’s Board of Directors when E. Musk sold the Shares but resigned from the Board in

mid-2023 reportedly (WSJ February 5, 2024) over corporate governance issues. At the time of the Sales, he was a member of the AC.

10. Defendant Joe Gebbia (“Gebbia”) is currently and has been a member of the Tesla Board since October 2022 and was a member of the Tesla Board when E. Musk sold the Shares.

11. Defendant Kathleen Wilson-Thompson (“Thompson”) is currently and has been a member of the Tesla Board since 2018 and was a member of the Tesla Board when E. Musk sold the Shares. At the time of the Sales, she was a member of the CC, NGC and DCC.

12. E. Musk, Thompson, Gebbia, K. Musk, Murdoch, Mizuno, Ehrenpreis, and Denholm are collectively referred to as the “Director Defendants.”

13. The Director Defendants constitute seven of Tesla’s current eight directors. Non defendant JW Straubel became a director of Tesla in 2023.

14. The claims against the Director Defendants are all claims alleging breach of duty of loyalty and are therefore beyond the reach of 8 *Del. C.* § 102(b)(7)’s exculpation or any similar provisions in Tesla’s charter or by laws.

## **DUTIES OF THE INDIVIDUAL DEFENDANTS**

### **A. Duties Of Delaware Directors**

15. By reason of their positions as directors of Tesla (and in the case of E. Musk because of his ability to control the business and corporate affairs of the Company), the Director Defendants owed Tesla and its shareholders fiduciary obligations of loyalty, good faith and due care, and were and are required to use their utmost ability to control and manage Tesla in a fair, just, honest and equitable manner. The Director Defendants were and are required to act in furtherance of the best interests of Tesla and its shareholders so as to benefit all shareholders equally and not in furtherance of their personal interest or benefit of E. Musk.

16. Because of their directorial and corporate governance committee positions with Tesla, each of the Director Defendants had access to the same MNPI that motivated E. Musk to sell the Shares.

17. By virtue of their duties, directors of Tesla were required to, among other things:

(a) ensure that the Company and Musk complied with legal obligations under the Consent Judgment and Tesla's policies and rules with respect to public statements about Tesla and with respect to sale or pledging of Tesla stock;

(b) prevent E. Musk and other insiders from acting upon material inside corporate information to benefit themselves;

(c) conduct the affairs of the Company in an efficient, business-like manner so as to make it possible to provide the highest quality performance of its business, to avoid wasting the Company's assets, and to maximize the value of the Company's stock;

(d) remain informed as to how Tesla conducted its operations, and, upon receipt of notice or information of imprudent or unsound conditions or practices, to make reasonable inquiry in connection therewith, and to take steps to correct such conditions or practices and make such disclosures as necessary to comply with applicable laws; and

(e) ensure that the Company and its directors and officers operated in a diligent, honest and prudent manner in compliance with all applicable laws, rules and regulations.

18. The conduct of the Director Defendants complained of herein involves a knowing and culpable violation of their obligations as directors of Tesla, the absence of good faith on their part, and a reckless disregard for their duties to the Company and its shareholders that the Director Defendants were aware or should



have been aware posed a risk of serious injury to the Company. The wrongful conduct described herein is not subject to any statutory or bylaw exculpation.

**B. Duties Imposed On Tesla  
Directors By Tesla Governance Documents**

**1. Tesla’s Insider Trading Policy (“ITP”)**

19. Tesla’s ITP (TSLA-Perry 220-00340) was [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

20. The ITP explains Tesla’s policies regarding MNPI:

... [REDACTED]

21. [REDACTED]

[REDACTED]

[REDACTED] *Id.*

22. The ITP describes “ [REDACTED]

[REDACTED]

[REDACTED]

23. The ITP defines [REDACTED]

[REDACTED]

[REDACTED]” (*Id.* at 345). The ITP gives [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].” *Id.* at 346.

24. The ITP requires “ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *Id.* at 349-350; 351-352.<sup>1</sup>

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<sup>1</sup> In the 220 productions, there was [REDACTED]  
[REDACTED].

25. The ITP warns [REDACTED]

[REDACTED]

26. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

27. [REDACTED]

[REDACTED]

[REDACTED] *Id.* at 344.<sup>2</sup>

28. Internally at Tesla, employees, including Musk, had [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. TSLA-Perry-220-000317-318.

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<sup>2</sup> The Company had advance notice of sale of shares in December 2022 because Musk needed a Rule 144 letter from Tesla.

29. ITP included [REDACTED]

[REDACTED]

30. [REDACTED]

[REDACTED]

31. [REDACTED]

[REDACTED]

## **2. The Code Of Business Ethics And Codes For CEO And Senior Financial Officers**

32. Tesla’s “Code Of Business Ethics” (“CoE”) applies to all Tesla’s employees and directors. Tesla also has a “Code Of Ethics for CEO and Senior Financial Officers” (“CoE/CEO”).

33. Tesla’s publicly available Code of Ethics includes a section entitled “Insider Trading” which states:

You may know important information about Tesla’s business that is not known to the public. Inside information—about things like upcoming product announcements, financial results or the number of vehicles produced and sold in a quarter, or innovation—has the potential to affect Tesla’s stock price. You should only trade Tesla stock when relying upon publicly available information. Never trade Tesla stock using inside information. Do not provide inside information to others outside Tesla, including family members or friends—as “tipping” others is just as illegal as engaging in insider trading yourself.

The same rules apply in cases where you become aware of inside information about other companies (such as Tesla partners)

because of your job at Tesla. Insider trading is always illegal, no matter whether it involves the stock of Tesla or another company.

Remember that, depending upon your job at Tesla, you may automatically be deemed an insider and prohibited from trading at certain times. Follow all directives in this regard. Please consult the Insider Trading Policy for more information and reach out to the Legal Department if you have any questions.

34. Tesla’s publicly disclosed policies concerning insiders’ stock are:

***Hedging, Short Sales and Rule 10b5-1 Trading Plans***

Tesla has an insider trading policy that prohibits all of our directors, officers and employees from, among other things, engaging in short sales, hedging or similar transactions designed to decrease the risks associated with holding Tesla securities. This prohibition encompasses transactions in publicly-traded options, such as puts and calls, and other derivative securities with respect to Tesla securities, but not transactions designed to facilitate portfolio diversification, such as broad-based index options, futures or baskets.

***Pledging of Shares***

The ability of our directors and executive officers to pledge Tesla stock for personal loans and investments is inherently related to their compensation due to our use of equity awards and promotion of long-termism and an ownership culture. See “*Executive Compensation—Pledging of Shares*” below for more details on Tesla’s policy regarding the pledging of Tesla stock by such individuals.

35. Executives such as Musk are subject to additional rules at Tesla:

**Code of Ethics for CEO and Senior Financial Officers**

The above Code of Business Ethics applies to all directors and employees of Tesla. The CEO and all senior financial officers, including the CFO and principal accounting officer, are bound by the

provisions set forth therein relating to ethical conduct, conflicts of interest and compliance with law. In addition to the Code of Business Ethics, the CEO and senior financial officers are subject to the following additional specific policies:

- a. The CEO and all senior financial officers are responsible for full, fair, accurate, timely and understandable disclosure in the periodic reports required to be filed by Tesla with the SEC. Accordingly, it is the responsibility of the CEO and each senior financial officer promptly to bring to the attention of the Disclosure Committee any material information of which he or she may become aware that affects the disclosures made by Tesla in its public filings or otherwise assist the Disclosure Committee in fulfilling its responsibilities as specified in Tesla's Disclosure Controls and Procedures Policy.
- b. The CEO and each senior financial officer shall promptly bring to the attention of the Disclosure Committee and the Audit Committee any information he or she may have concerning (a) significant deficiencies in the design or operation of internal controls which could adversely affect Tesla's ability to record, process, summarize and report financial data or (b) any fraud, whether or not material, that involves management or other employees who have a significant role in Tesla's financial reporting, disclosures or internal controls.
- c. The CEO and each senior financial officer shall promptly bring to the attention of the General Counsel or the Legal Department or the CEO and to the Audit Committee any information he or she may have concerning any violation of Tesla's Code of Business Ethics, including any actual or apparent conflicts of

interest between personal and professional relationships, involving any management or other employees who have a significant role in Tesla's financial reporting, disclosures or internal controls.

- d. The CEO and each senior financial officer shall promptly bring to the attention of the General Counsel or the Legal Department or the CEO and to the Audit Committee any information he or she may have concerning evidence of a material violation of the securities or other laws, rules or regulations applicable to Tesla and the operation of its business, by Tesla or any agent thereof, or of violation of the Code of Business Ethics or of these additional procedures.
  
- e. The Board of Directors shall determine, or designate appropriate persons to determine, appropriate actions to be taken in the event of violations of the Code of Business Ethics or of these additional procedures by the CEO and Tesla's senior financial officers. Such actions shall be reasonably designed to deter wrongdoing and to promote accountability for adherence to the Code of Business Ethics and to these additional procedures, and shall include written notices to the individual involved that the Board has determined that there has been a violation, censure by the Board, demotion or re-assignment of the individual involved, suspension with or without pay or benefits (as determined by the Board) and termination of the individual's employment. In determining what action is appropriate in a particular case, the Board of Directors or such designee shall take into account all relevant information, including the nature and severity of the violation, whether the violation was a single occurrence or repeated occurrences, whether the violation appears to have been intentional or

inadvertent, whether the individual in question had been advised prior to the violation as to the proper course of action and whether or not the individual in question had committed other violations in the past.

**3. Duties Imposed By DCC Charter, AC Charter, And NGC Charter**

a. DCC Charter

36. Tesla constituted a Disclosure Controls Committee as part of a settlement of SEC civil actions against Musk and Tesla arising out of Elon Musk's tweets of allegedly materially false and misleading information.

37. On October 16, 2018, Musk entered into the Consent Judgment with the SEC which permanently enjoined him from violating Section 10(b) and Rule 10b-5 thereunder and imposed a \$20 million civil fine upon him. *SEC v. Musk*, Case No. 18-cv-08865-LJL (S.D.N.Y.) (ECF No. 14). At the same time, Tesla agreed to a Consent Judgment in *SEC v. Tesla, Inc.*, Case No. 18-cv-08947-LJL (S.D.N.Y.) (ECF No. 14).

38. The original form of the Consent Judgment required Musk to *inter alia* resign from his role as Chairman of the Board of Tesla and not to seek or accept an appointment as Chairman for a period of three years thereafter, and to comply with all mandatory procedures implemented by Tesla regarding (i) the oversight of communications relating to Tesla made in any format including posts on social



media (e.g., Twitter) and on Tesla’s website; and (ii) the pre-approval of any such written communications that contain, or reasonably could contain, information material to Tesla or its shareholders, *id.* at ¶ 5(b); and to certify in writing his compliance with the first undertaking set forth above, *id.* at ¶ 5(c).

39. At the same time, Tesla agreed to a consent judgment against it (the “Tesla Consent”) in *SEC v. Tesla, Inc.*, Case No. 18-cv-08947-LJL (S.D.N.Y.) (ECF No. 14). The Tesla Consent required Tesla to implement mandatory procedures to oversee and pre-approve Musk’s Tesla-related written communications made in any format, including but not limited to Twitter posts, that reasonably could contain information material to the company or its shareholders. *Id.* at ¶ 6(d). The judgment further required that Tesla set forth in its disclosure policies and procedures “the definition of, and the process to determine, which of [Musk’s] communications contained or reasonably could contain, information material to [Tesla] or its shareholders.” *Id.*

40. The Consent Motion For Final Judgment against Tesla, Inc. (*SEC v. Tesla*, 18-cv-8947, (U.S.D.C. S.D.N.Y.) was entered October 16, 2018 and required Tesla, through its Board to, *inter alia*, “comply with the undertakings set forth in this Consent. . .”

41. As part of compliance with the Consent Judgment, Tesla constituted the DCC. As of the dates of E. Musk's Sales, the DCC had its own charter ("The "DCCC"), which was adopted July 11, 2018, which was "clarified and amended August 4, 2022."

42. On August 4, 2022, Tesla revised its DCC charter which composed upon members the duty to oversee implementation of the Consent Judgment; review compliance with the Consent Judgment; oversee controls and processes governing disclosed public statements that relate to Tesla; review and resolve conflicts of interest that involve any members of executive management.

43. The Consent Judgment, specifically identified as areas of communications requiring pre-approval by Tesla securities counsel: "production numbers or sales or delivery numbers;" and "Musk's acquisitions or dispositions of the Company's Securities." *SEC v. Tesla*, ECF No. 16-2.

44. In early December 2018, about two months after entry of the Consent Judgment, Musk in a 60 Minutes Interview admitted that no one reads his tweets before they are issued. *SEC v. Musk*. (ECF No. 18 at 14 of 17.).

45. Soon thereafter, Musk violated the original Consent Judgment.

46. On February 19, 2019, Musk tweeted that Tesla "will make around 500K" cars in 2019.

47. The SEC on February 25, 2019 brought a contempt motion arguing that the tweet violated the pre-approval requirement in the decree. *SEC v. Musk*, 18-cv-08865 (ECF No. 18). In April 2019, the SEC and Musk reached a superseding agreement to the original Consent Judgment to resolve the contempt motion. The superseding agreement has been, and will continue to be referred to as the “Consent Judgement.”

48. In its Motion and Memorandum in *SEC v. Musk* (ECF No. 18) and its Reply Memorandum, the SEC documented numerous instances of Musk’s circumvention of the pre-approval procedures in the original Consent Judgment. *See SEC v. Musk*, Reply, ECF No. 30 pages 12 of 18 through 14 of 18.

b. AC Charter

49. At the time of the Sales, Tesla had an AC with its own charter (“ACC”), which was adopted December 16, 2009, and modified on June 1, 2011; June 6, 2012; December 12, 2017; and December 28, 2021. Among the stated “purposes” of the ACC was to assist the board in oversight of the company’s compliance with legal and regulatory requirements. Among the AC’s “responsibilities” was “reviewing and discussing with management earnings releases. . . . Financial information and earnings guidance provided to the public, analysts and rating agencies.” And “reviewing prior to announcement, company press releases and other disclosures

containing financial information for the purpose of ensuring that such press releases and other disclosures properly disclosed . . .” GAAP information.

c. NGC Charter

50. At the time of the Sales, Tesla had a Nominating and Governance Committee (“NGC”) with its own charter (“NGCC”). The NGCC stated, *inter alia*, that the NGC had the following “responsibilities” with respect to “conflicts of interest”: “review actual and potential conflicts of interest of Board members and corporate officers, other than related party transactions reviewed by the AC, and approving or prohibiting any involvement of such persons in matters that may involve a conflict of interest or taking of a corporate opportunity.”

d. The Director Defendants’ on the AC, DCC and NGC Had Duties Relevant to the Sales

51. Since Tesla policies and codes and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder prohibit corporate officers and directors from trading on MNPI, and since E. Musk was an executive officer with de facto control and domination of the board and since E. Musk’s Sales involved a conflict of interest between E. Musk’s personal financial interests and his duties to Tesla, Musk’s Sales of the Shares came within the oversight duties of the DCC, AC and NGC.

52. At the time of the Sales, Defendants Denholm, Musk, and Hiromichi Mizuno were members of the AC; Defendants Denholm, Ehrenpreis, Murdoch, and

Wilson-Thompson were members of the NGC, and Defendants Denholm, Murdoch, and Thompson were members of the DCC.

## **SUBSTANTIVE ALLEGATIONS**

### **A. Tesla's Business**

53. Tesla designs, develops, manufactures, sells and leases high-performance fully electric vehicles and energy generation and storage systems.

54. Tesla sells its cars directly to customers via vehicle sales channels on its website and an international network of company-owned stores.

55. In 2022, Tesla had only four different consumer vehicles – the Model 3, Y, S and X.

56. Tesla sells its vehicles worldwide but does not break out sales or deliveries or orders by country, region, continent or sales channel.

57. Tesla identifies seven manufacturing facilities in its SEC filings, one of which is in Shanghai as one of five Tesla “gigafactory.”

58. Tesla reported that for 2021 it produced 930,422 vehicles and delivered 936,222 vehicles.

59. For the first quarter of 2022, Tesla reported that it produced 305,407 vehicles and delivered 310,048 vehicles.

60. For the second quarter of 2022, Tesla reported that it produced 563,987 vehicles and delivered 564,743 vehicles. At the same time in its Form 10-Q Tesla stated “. . . we expect to continue to benefit from a spike in demand in the automotive industry generally, as well as, ongoing electrification of the automotive section and increasing environmental awareness.”

61. In Tesla’s third quarter 2022 report issued October 24, 2022, Tesla reported that “through the third quarter” [*i.e.*, for the nine months ended September 30, 2022] it produced 929,910 vehicles and delivered 908,573 vehicles.

62. But Tesla explained away the seeming excess of production over deliveries in the third quarter by assuring investors that during the third quarter of 2022, it had “transitioned to a more even regional mix of vehicle builds each week, which led to an increase in cars in transit at the end of the quarter.” “Cars in transit” do not count as “delivered” and therefore revenues are recognized “related to cash and financing deliveries.” Tesla thereby implied that the gap between vehicles produced and delivered in Q3 was because of “in transit” vehicles. As such, this implication was supported by Musk’s statement at the earnings call with analysts on October 19 2022.

**A. 2022 Fourth Quarter Events And The MNPI**

**1. Musk's False and Misleading Statements About The Fourth Quarter**

63. At Tesla's October 19, 2022 earnings call with analysts for Tesla's Q-3 earnings released that day, Musk himself addressed analysts in his opening remarks and stated:

“As our factories ramp, we are looking forward to a record breaking Q-4.”

...

“So, Q-4 is looking extremely good.”

“We have excellent demand for Q-4 and we expect to sell every car we make as far into the future as we can see.”

“The factories are running at full speed and we're delivering every car we make and keeping operating margins strong.”

“Demand is a little higher than it would otherwise be.”

...

“We are extremely confident of the great Q-4. . . . and we anticipate continuing to grow our vehicle production, sales deliveries by, on average 50% a year as far into the future as we can see.”

...

64. On the October 19 conference call, when Musk was specifically asked whether Musk expected 50% growth in the Chinese domestic market, Musk

answered: “that we believe Tesla will continue to grow deliveries and revenue and production at a 50% or greater compound annual growth rate.”

65. During the October 19, 2022 earnings call with analysts in October 2022, Musk said Tesla’s Board thought it made sense to do a buyback and was likely to do some “meaningful buyback during the week of November 15-22, 2022, Musk repeated that and said it would be “up to the Tesla board” to decide.<sup>3</sup>

66. According to a Wall Street Journal article in the Saturday/Sunday April 6-7 2024 print edition titled “How Tesla Fell To Earth” by Rebecca Elliott, as of September 2022, waiting times for new Teslas in China “fell to about a month as of September 2022, from four plus months in the spring according to Bernstein Research.” She also wrote “Unsold inventory climbed to 13 days’ worth of supply in the final three months of 2022 from just four days in the second quarter.”

67. In late October 2022, Tesla cut prices in China around 7% to stimulate demand.

68. Musk himself was responsible for the market expectations that were disappointed by the January 2, 2023 announcement. At Tesla’s third quarter earnings

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<sup>3</sup> Rebecca Bellan, *What Would It Mean for Tesla to Buy Back Shares*, Tech Crunch, (November 23, 2022), <https://techcrunch.com/2022/11/23/what-it-would-mean-for-tesla-to-buy-back-shares/#:~:text=Buying%20back%20shares%20from%20the,often%20causes%20a%20price%20increase>



conference call on October 19, 2022, Tesla CFO Zachary Kirkhorn said Tesla would fall just short of its 50% sales growth target. But he was later contradicted by Musk who stated that Tesla would meet the 50% annual production and delivery growth goal. Since Tesla delivered 936,222 vehicles in 2021 50% growth implies 2022 deliveries of 1,404,333. In 2022, Tesla delivered only 1,313,851 vehicles. This was a nearly 100,000 vehicles miss.

69. A change in Tesla's production and delivery logistics made it even more likely that in mid-November 2022 E. Musk had MNPI of the Q-4 production and delivery numbers and their adverse impact on Tesla's previously projected numbers. By E. Musk's December 8, 2022 Tesla stock sales, E. Musk's access to Tesla's "real time data" meant E. Musk had MNPI.

70. Once the fourth quarter 2022 numbers were in, it was revealed that deliveries fell short of production by approximately 56,000 vehicles for the entire 2022. This revealed that in the fourth quarter, the production delivery gap widened by approximately 36,000 vehicles during the fourth quarter given Tesla's previous disclosures of production and delivery.

71. On January 3, 2023, the first trading day after the January 2, 2023 announcement when the numbers were announced, Tesla's stock dropped from a close of \$123.18 on December 30, 2022 to \$108.10 on January 3, 2023.

72. The SEC previously established in the hearings leading to the Consent Judgement that information about Tesla’s production and delivery forecasts were material to investors.

73. As late as November 15, 2022 the market was obviously ignorant of Tesla’s poor Q-4 because Tesla’s third largest individual shareholder, Leo Koguan, urged Tesla to buy back shares.

74. Moreover, according to analysts, investors’ visibility into Tesla’s operations in China were very limited due to the fact that Tesla’s Shanghai operations were set up as an “unrestricted subsidiary.”

**B. Musk’s Access To MNPI**

75. E. Musk was in possession of MNPI that motivated his Sales of the Shares. By the time of his November 2022 sales, half of Tesla’s 4th quarter 2022 financial results were available to E. Musk when he traded. E. Musk himself explained in an earnings call in April 2023 that:

Tesla received a “daily real-time update of how many cars were ordered yesterday, how many cars were produced yesterday;” that this data “does not have latency;” and touted that he is “not sure there’s any company on Earth that has better real-time data than Tesla, except maybe SpaceX Starlink.”<sup>4</sup>

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<sup>4</sup>Jonathan Weil, *Tesla’s Real-Time Order Data Could Shed Light on Elon Musk’s Share Sales*, WALL STREET JOURNAL (April 20, 2023), <https://www.wsj.com/livecoverage/stock-market-news-today-04-20->

76. Changes at Tesla gave insiders at Tesla even more visibility to quarterly results in advance of end of quarter. In an October 19, 2022 release of its third quarter financial results, Tesla included as Exhibit 99.1 to an 8-K of that same date, an item entitled “Tesla Vehicle Production & Deliveries And Date For Financial Results & Webcast For Third Quarter 2022.” In that release Tesla stated, in part:

Historically, our delivery volumes have skewed towards the end of each quarter due to regional batch building of cars. As our production volume continues to grow, it is becoming increasingly challenging to secure vehicle transportation capacity and at a reasonable cost during those peak logistics weeks. In Q3, we began transitioning to a more even regional mix of vehicle builds each week, which led to an issue in cars in transit at the end of the quarter. These cars have been ordered and will be delivered to customers upon arrival at their destination.

**C. The DCC Meetings**

77. Musk admitted in a Sixty Minutes interview in 2018 that it was not realistic to expect Denholm to supervise his tweets.

78. Tesla’s DCC members Denholm, Murdoch and Thompson were derelict in their duties when it came to E. Musk and failed to fulfill either the spirit or the letter of Tesla’s Consent Judgments with the SEC. In effect, they deviated from the SEC order having force of law and were disloyal to Tesla.

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2023/card/tesla-s-real-timeorder-data-could-shed-light-on-elon-musk-s-share-sales-lr8UXbCluZbv3ceaMJM4.

79. On June 1, 2021, the WSJ reported that the Tesla Board had twice been told by the SEC in 2020 that Musk had violated the decree provision requiring his tweets to be pre-approved by company lawyers.<sup>5</sup> The SEC referenced Musk’s tweets about Tesla’ solar roof production volumes and its stock price which it said are not pre-approved as required in a May 2020 letter to Tesla, the SEC reportedly said:

Tesla has abdicated the duties required of it by the Court’s Order.

80. The DCC is supposed to be the gatekeeper of Musk’s and Tesla’s compliance with the SEC decree, but Denholm, its chair, testified in the Musk Compensation trial that she did not know whether the DCC “received reports concerning human resources issues or conflicts of intent involving senior management.”

81. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]. Tesla Perry 220-000208-

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<sup>5</sup> Dave Michaels and Rebecca Elliot, *Tesla Failed to Oversee Elon Musk’s Tweets, SEC Argued in Letters*, WALL STREET JOURNAL, (June 1, 2021) [https://www.wsj.com/articles/tesla-failed-to-oversee-elon-musk-s-tweets-sec-argued-in-letters-11622582765?mod=latest\\_headlines](https://www.wsj.com/articles/tesla-failed-to-oversee-elon-musk-s-tweets-sec-argued-in-letters-11622582765?mod=latest_headlines)

000215. [REDACTED]

[REDACTED]

82. [REDACTED]

[REDACTED]

[REDACTED]. TSLA Perry-220-00297. It was described as a

[REDACTED] *Id.*

83. [REDACTED]

[REDACTED]. TSLA Perry 200-000460-474.

84. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] TSLA

Perry-220-000216-296.

**D. Musk's Sales**

85. Musk sold the following shares of his personally held Company stock in November and December 2022 while in possession of MNPI:

| <u>Filing Date</u>              | <u>Trade Date</u> | <u>Approximate<br/>Average Price<br/>Per Share</u> | <u>Quantity Sold</u>     | <u>Value</u>                  |
|---------------------------------|-------------------|--|--------------------------|-------------------------------|
| <b><u>November<br/>2022</u></b> |                   |  |                          |                               |
| 11/8/2022                       | 11/4/2022         | \$211.67   | 9,650,000                | \$2,012,758,726               |
| 11/8/2022                       | 11/7/2022         | \$202.96   | 5,450,000                | \$1,093,165,508               |
| 11/8/2022                       | 11/8/2022         | \$193.52   | 4,400,000                | \$843,163,160                 |
|                                 |                   | <b><u>Totals</u></b>                               | <b><u>19,500,000</u></b> | <b><u>\$3,949,087,394</u></b> |

| <u>Filing Date</u>              | <u>Trade Date</u> | <u>Approximate<br/>Average Price<br/>Per Share</u> | <u>Quantity<br/>Sold</u> | <u>Value</u>                  |
|---------------------------------|-------------------|--|--------------------------|-------------------------------|
| <b><u>December<br/>2022</u></b> |                   |  |                          |                               |
| 12/14/2022                      | 12/12/2022        | \$168.99   | 3,205,000                | \$540,195,541                 |
| 12/14/2022                      | 12/13/2022        | \$166.61   | 15,125,000               | \$195,281,9421                |
| 12/14/2022                      | 12/14/2022        | \$158.90   | 6,870,000                | \$1,088,011,570.27            |
|                                 |                   | <b><u>Totals</u></b>                               | <b><u>25,200,000</u></b> | <b><u>\$3,581,026,532</u></b> |

86. On November 8, 2022, Musk reported that he collectively sold 19,500,000 shares of Tesla stock on November 4, November 7 and November 8, 2022 at prices from \$189.57 per share to \$219.21 per share for total proceeds of \$3,949,087,394. Those sales were not reported as sales pursuant to a 10b5-1 plan. There was no public announcement made by Tesla or Musk concerning the November sales.

87. As reported in numerous press reports, in the first week of December, Elon Musk was in discussions to take margin loans on his Tesla stock to refinance approximately \$3 billion of Twitter stock. None of the reports indicated that Musk or Twitter was being required by the bank lenders of the \$3 billion to refinance.

88. On December 8, 2022, Musk tweeted that investors avoid making loans when the economic outlook is uncertain.

89. Several days after these reports of a margin loan emerged, Elon Musk sold 25,200,000 shares of Tesla stock for approximately \$3.581 billion.

90. Indeed, on December 14, 2022, Musk reported that he collectively sold 25,200,000 shares on December 12, December 13, and December 14, 2022 of Tesla stock at prices from \$156.14 per share to \$176.70 per share for total proceeds of \$3,581,026,532. Those sales were not reported as sales pursuant to a 10b5-1 plan.

91. On September 12, 2022, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. TSLA Perry 220-000528.

92. [REDACTED]

[REDACTED]. TSLA Perry 220-000475. [REDACTED]

[REDACTED].

93. In connection with Musk's December 12, 2022 sale of 3,205,000 shares of Tesla, [REDACTED]

[REDACTED]

[REDACTED]. TSLA-Perry-220-000351 [REDACTED]

[REDACTED]

[REDACTED] *Id.*

94. [REDACTED]

[REDACTED]

[REDACTED]

95. According to documents produced pursuant to Plaintiff's 220 demand

[REDACTED]

[REDACTED]

[REDACTED] *Id.* at 00009.

96. According to E. Musk's [REDACTED]

[REDACTED]

[REDACTED]



[REDACTED] E. Musk stated [REDACTED]

[REDACTED]

[REDACTED]. TSLA Perry-220-00014-16. Musk’s November and December 2022 shares sales of approximately 41.5 million shares represented [REDACTED]

[REDACTED]

[REDACTED]

97. On December 16, 2022, in response to a Tesla investor, Ross Gerber, questioning the massive stock sales, Musk tweeted “Tesla is executing better than ever.”



98. In December 2022, Musk said in a “Twitter Spaces that he’s not selling any Tesla stock next year “under any circumstances.”<sup>6</sup>

**E. The Timing And Amount Of Musk’s Sales Are Suspicious**

99. Tesla’s 2022 annual Proxy disclosed that E. Musk was the beneficial owner of 265,488,606 shares of Tesla’s common stock, of which 172,608,251 shares were held by the Elon Musk Revocable Trust (a “revocable trust” allows the grantor to retain control over property of the trust) dated July 22, 2003, and 92,880,355 shares issuable to Mr. Musk upon exercise of vested options exercisable within sixty days after March 21, 2022. The same filing repeated that E. Musk had pledged 89,186,960 shares of Tesla stock as collateral to secure certain person loans.

100. Musk previously disclosed his planned sales of Tesla stock via the execution of 10b-5-1 plans but admitted that he had no 10b5-1 plan for the November and December 2022 sales.

101. Musk’s \$5 billion in sales in November 2021 were pursuant to a 10b5-1 plan he entered into on or about September 14, 2021 according to his forms.

102. In Musk’s Form 4s reporting the November 2021 sale of shares of Tesla common stock, it was disclosed that “the transactions reported on the Form 4 were

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<sup>6</sup> Hope King, *Musk says he’s “definitely” not selling more Tesla stock next year*, AXIOS (December 22, 2022), <https://www.axios.com/2022/12/23/elon-musk-tesla-stock>

automatically effected pursuant to a Rule 10b5-1 trading plan previously adopted on September 14, 2021 and established by the Reporting Persons for the purpose of an orderly sale of shares related to the exercise of options scheduled to expire in 2022.” Musk has a “knack” for selling materials amounts of Tesla stock prior to the disclosure of material adverse non-public information which pressured Tesla’s stock price downward. The December 28, 2021 sales were made at prices between \$359.47 and \$373.00 per share. Thirty days later after reporting Q-4 sales numbers Tesla stock price declined to \$276.00.

103. The Form 4s reporting sales on December 28, 2021 stated: “This Rule 10b5-1 plan was completed on December 28, 2021.”

104. Musk sold \$8.5 billion of Tesla stock in April 2022, and \$6.9 billion in August 2022. On April 28, 2022, after his April 2022 sales, Musk tweeted the “No further TSLA sales planned after today.” In the next thirty days after this sale, Tesla stock began a decline from \$300 to \$209 on May 24, 2022.

105. On April 29, 2022, Bloomberg widely reported Musk’s promise not to sell any more Tesla shares in 2022 after his sale of \$4 billion shares.<sup>7</sup>

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<sup>7</sup> Dana Hull, Elon Musk Offloads \$4 Billion of Tesla Shares, Pledges No More Sales (April 28, 2022), <https://www.bloomberg.com/news/articles/2022-04-29/musk-reports-sale-of-3-15-million-tesla-shares-filing-shows-l2jrftji>. *See also* Bloomberg Ltr at 26 fn.

106. On August 19, 2022, after his August 2022 sales, he posted an identical tweet to the April 2022 tweet: “In the (hopefully unlikely) event that Twitter forces this deal to close and some equity partner don’t come through, it is important to avoid an emergency sale of Tesla stock.”

107. After Musk completed his sales, Tesla stock declined materially from the prices at which he sold. Tesla’s fourth quarter decline of approximately 33% was particular to Tesla: Ford and GM declined only 5%, while the NASDAQ was down only about 1%.

108. Tesla’s policies allow executives officers to pledge on making up to 25% of the value of Tesla stock. The December 2022 sales constituted one-third of Musk’s entire 2022 stock sales. The November and December 2022 sales were [REDACTED]

109. According to a September 20, 2023 article in the Wall Street Journal titled “DOJ Probes Musk’s Perks Since 2017,” in October 2022, Musk borrowed \$1 billion from SpaceX and repaid it in November 2022. There was no public announcement prior to the November sales that the November sales were part of Musk’s plan in connection with the financing of the purchase of Twitter.

110. Nor did Tesla’s production of documents pursuant to Plaintiff’s 220 demand [REDACTED]

[REDACTED]

[REDACTED]

111. The reasons referred to above for Musk’s sales are prima facie suspicious. In addition, Georgetown University securities professor, Donald Langevoort, has been quoted publicly regarding Musk’s December 2022 sales: “Is it suspicious? Yes. Is it entirely possible there are other explanations? Of course.” Duke University securities professor James Cox was publicly quoted as well: “This should be of great interest to the SEC.” Other evidence of suspiciously timed trading abounds as detailed herein.<sup>8</sup>

112. Musk’s sales in December 2022 were followed by announcements of material adverse news of events at Tesla which are reasonably believed to have been known to Musk when he made his November and/or December 2022 sales. On Tuesday, December 27, 2022, Tesla shares dropped 11% bringing total decline in share price for Tesla for December 2022 to 41%. That stock price drop appears to have been caused by a Wall Street Journal report that Tesla would consider a weeklong production halt at its Shanghai facility due to fresh Covid cases spreading

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<sup>8</sup>Ronny Reyes, *Is Elon Guilty of Insider Trading? Experts Question Why Musk Sold Nearly \$3.6 Billion Worth of Tesla Shares Just Three Weeks Before Company’s Value Nosedived Off Back Off Missed Targets* (January 20, 2023), <https://www.dailymail.co.uk/news/article-11658565/Elon-Musk-sold-nearly-3-6B-worth-Tesla-shares-company-said-missed-delivery-targets.html>.

among China's workforce.<sup>9</sup> Additionally, Reuters reported that when Tesla's Shanghai plant reopens in January it would do so for just seven days. During the holiday week in 2022, Tesla announced that it had expanded discounts in North America for buyers of certain models. It is almost likely that these actions were being considered and decided in November 2022, but almost certainly by December 8, 2022.

#### **F. The Post Trade Revelations And Impact On Tesla's Stock Price**

113. On Thursday, December 23, 2022, Tesla's stock plunged 9% after Tesla started to offer deep \$7,500 discounts to U.S. consumers on Models 3 and 4 in the U.S. The discounts were in addition to other late December incentives to boost 2022 sales.

114. This first of its kind and unexpected discount on Models 3 and 4 in the U.S. was offered and became public a few months after Tesla "downplayed concerns about demand."<sup>10</sup>

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<sup>9</sup> Raffaele Huang, *Tesla Extends Shutdown at Shanghai Plant in Rare Christmas Suspension*, WALL STREET JOURNAL (December 26, 2022), <https://www.wsj.com/articles/tesla-halts-auto-production-at-shanghai-plant-in-rare-christmas-suspension-11672056007>.

<sup>10</sup> Hyunjoo Jin, *Tesla Shares Tank After U.S. Discounts Doubled On Key Models* (December 22, 2022), <https://www.reuters.com/business/autos-transportation/tesla-offers-discount-some-car-models-us-canada-2022-12-22/>.

115. As a result of the discount, among other possible factors, one analyst “slashed his estimates for Tesla’s deliveries, sales, and profits.”<sup>11</sup>

116. In a matter of weeks after Musk’s December 2022 sales, analysts at Mizuho Securities reduced their price target for Tesla and noted “near term we see a potential weakness in Tesla sales as macro headwinds and a weaker consumer drive lower demand . . .”<sup>12</sup> On January 3, 2023, Tesla fell from over \$150 dollars to \$108 from its \$123 close on December 30, 2022 on Tesla’s release of Q-4 sales figures which fell short of Tesla target by 22,000 cars.

117. On Tuesday December 20, 2022, E. Musk tried to cover his tracks regarding his sales in November and December 2022 which were being publicly attributed by commentators to news of slow sales in China. Musk responded by tweeting in response to investor Rus Gerber’s tweet about Tesla’s stock price decline, that the decline was due to macro-economic factors such as interest rates, even though Tesla’s prices decline in fourth quarter 2022 was down 5% versus 12%

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<sup>11</sup> Brian Sozzi, *Tesla Delivery Numbers In Early 2023 Could Be A Letdown: Analyst* (December 22, 2022), <https://finance.yahoo.com/news/tesla-delivery-numbers-2023-discounts-demand-191144331.html>.

<sup>12</sup> Lora Kolodny, *Elon Musk Tries To Explain Why Tesla Shares Are Tanking* (December 20, 2022), <https://www.cnbc.com/2022/12/20/elon-musk-tries-to-explain-why-tesla-shares-are-tanking.html>.

for GM and 14% for the S&P.

118. Finally, on January 2, 2023, Tesla reported fourth quarter delivery numbers well short of both the company's forecast and analyst's expectations, triggering a decline in the stock price to a January 3, 2023 closing of \$108.10 per share.

119. Tellingly, at Tesla's January 25, 2023 earnings call, the first question was:

“Some analysts are claiming that Tesla orders, net of cancellations, came in at rates less than half of production in the fourth quarter, this has raised demand concerns. Can you elaborate on order trends so far this year and how they compare to current production rates?”

E Musk answered: “we already answered that question” and then “Demand far exceeds production.”

In that same call however Tesla's then CFO Zachary Kirkhorn stated that during Q-4, there were “various programs in place that we used in Q-4 that lowered ASPs.”

120. It is reasonable to infer that the material adverse news disclosed after Musk's December sales was known to Musk before his November or December 2022 Sales and motivated his Sales. Tesla obviously has the ability to tabulate quarterly and even monthly sales and deliveries quickly, as it did on October 2, 2022 when it reported (on a Sunday) that it sold 343,830 cars and SUVs in the quarter ended September 30, 2022 and produced 365,923 vehicles. At that time, analysts



calculated that by close of Q-3 Tesla had delivered 908,573 vehicles. Accordingly, the fourth quarter sales and delivery numbers needed to exceed 490,000 units to hit the targeted amounts identified by Musk at the October 2022 conference call.

**I. Musk's Insider Profits**

121. Musk sold approximately \$7,530,113,926 worth of TSLA stock in November and December 2022. Had he waited to make these sales until after the release of material adverse news regarding TSLA discounts, sales, orders, and deliveries on January 2, 2023, his sales would have netted him less than 55% of the amounts realized from his November and December 2022 sales.

122. Musk's insider profits for his November and December sales were approximately \$3 billion based on the January 3, 2023 closing price of \$108.10 per share.

**E. MUSK CONTROLS TSLA AND DEMAND FUTILITY**

**A. Musk Dominates Tesla**

123. In a recent book "Elon Musk" by Walter Isaacson, he describes Tesla's board as "usually very compliant," page 580.

124. The directors were grateful for, and beholden to Musk for his decision in 2020 to his offer to personally insure the board members due to the purported

“disproportionately high premiums quoted by insurance companies.” (Tesla Annual Report Form 10-K/A April 28, 2020).

125. Tesla’s Board of course agreed with Musk that Musk’s personal coverage of Tesla’s Board did not impair their independence.

126. Tesla determined not to renew its directors and officers liability insurance policy for the 2019-2020 year due to disproportionately high premiums quoted by insurance companies.<sup>13</sup> Instead, Elon Musk agreed with Tesla to personally provide coverage substantially equivalent to such a policy for a one-year period, and the other members of the Board are third-party beneficiaries thereof. The Board concluded that because such arrangement is governed by a binding agreement with Tesla as to which Mr. Musk does not have unilateral discretion to perform, and is intended to replace an ordinary course insurance policy, it would not impair the independent judgment of the other members of the Board.<sup>14</sup>

127. Since its inception as its co-founder, Musk has held and continues to hold the top prominent positions at Telsa with the highest decision-making authority.

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<sup>13</sup> The Stockholder Complaint blamed the “disproportionately high premiums quoted by insurance companies” on Elon’s behavior and the Board’s response, or rather lack thereof. The Complaint also inferred that Tesla’s legal troubles in the preceding year and the concern about future claims “almost certainly exacerbated the situation.” Verified Stockholder Derivative Complaint, *supra* note 41, ¶ 90.

<sup>14</sup> Tesla, Inc., Annual Report (Form 10-K/A) (Apr. 28, 2020).

His longstanding rein and influence over Tesla are well known and documented. Despite being a minority shareholder, he continues to control Tesla unabated because of a “complex form of control combination of his equity stake on one hand and supermajority voting provisions on the other,” and “Tesla’s bylaws contain supermajority voting requirements that require the approval of two-thirds of shares to OK major changes at the electric-car maker, including mergers, acquisitions or changes to the board’s compensation.”<sup>15</sup>

128. Under these esoteric bylaws, without Musk’s support, a minimum of 89.5% of outside shares must vote to approve key changes -- an incredibly high hurdle.<sup>16</sup>

129. Tesla’s SEC filings have also included various statements regarding Musk’s importance to the Company, including disclosure regarding Musk’s role in “recruiting executives and engineers, contributing to the Tesla Roadster’s engineering and design, raising capital for us and bringing investors to us, and raising public awareness of the Company,” as well as a risk factor providing that “[Tesla is] highly dependent on the services of Elon Musk, [who is] highly active in [the

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<sup>15</sup> Ronald Orol, How Elon Musk Controls Tesla With Only a Minority Ownership Stake (April 23, 2018), <https://www.thestreet.com/investing/stocks/how-elon-musk-controls-tesla-with-only-a-minority-stake-14564491>.

<sup>16</sup> *Id.*

Company's] management, [and if Tesla were to lose his services, it could] disrupt our operations, delay the development and introduction of our vehicles and services, and negatively impact our business, prospects and operating results as well as cause our stock price to decline.”

130. Musk himself has often referred to Tesla as “my company,” published two “Master Plans” in which he describes his strategic direction for Tesla, previously stated that had he not become CEO of Tesla “the company wasn’t going to make it” and labelled Tesla, SolarCity and SpaceX as a “pyramid” on top of which he sits.

131. Musk has also been known to sideline anyone who questions his authoritarian stranglehold over Tesla and demonstrated a willingness to remove individuals at Tesla who challenge him and/or his overall strategy for the Company.

132. For example, in August 2007, E. Musk, who held a Board meeting without giving notice to then-Tesla Motors’ CEO Martin Eberhard (“Eberhard”) in violation of the Company’s bylaws, removed Eberhard as CEO. In commenting on Eberhard’s firing, Mike Harrigan, VP of Marketing for Tesla at the time, said “[E. Musk] is the kind of boss where day to day you don’t know if you have a job or not.” Harrigan further noted that E. Musk’s demonstrated willingness to remove people “happened many times to many people, and that’s what happened with Martin

[Eberhard]. Once [E. Musk] determined that Martin [Eberhard] couldn't be the CEO of Tesla any longer, that was it.”

133. Dave Sullivan, an analyst with Auto Pacific, explained: “All the people that worship at the church of [E.] Musk will come at you with a pitchfork if you say something bad. . . . They're believers.”<sup>17</sup>

134. Despite the process agreed to between Musk, Tesla and the SEC with respect to pre-clearance of Musk public statements, in his excessive compensation trial, captioned *Tornetta v. Musk*, C.A. No. 2018-0408-KSJM in the Delaware Court of Chancery (“*Tornetta*”), Musk testified:

I “decide[s] a tweet might be one that is required to be reviewed under the settlement . . . submit[s] it to an in-house lawyer in advance of making it, wait[s] for some period of time that [he] decide[s] upon, and then tweet[s] if the lawyer hasn't given comments[.]”<sup>18</sup>

135. The *Tornetta* Opinion rendered January 30, 2024 found “Denholm described this process as ‘self-regulat[ing]’ and was ‘aware that [Musk] waits for some unspecified period of time and then just [tweets] if he doesn't hear back[.]’

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<sup>17</sup> Drake Baer, "Tesla's Original CEO Reveals What It's Like To Get Fired By Elon Musk," Business Insider, Nov. 18, 2014, <http://www.businessinsider.com/how-elonmusk-fired-tesla-ceo-2014-11>.

<sup>18</sup> *Tornetta v. Musk*, 2024 Del. Ch. LEXIS 27, at \*83 (Del. Ch. January 30, 2024)

After the SEC Settlement was amended, Musk made public statements about Tesla’s business prospects or plans without clearing them with anyone first.”<sup>19</sup>

136. The *Tornetta* Opinion also found “Denholm’s approach to enforcement of the SEC Settlement, including unawareness of one of its key requirements, suggests a new lackadaisical approach to her oversight obligations.”<sup>20</sup>

137. Other sources have questioned Denholm’s ability to control Musk:

Not every CEO in charge of a publicly traded stock market giant gets to act like Elon Musk. The world's richest man may have Robyn Denholm to thank for that.<sup>21</sup>

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Since Denholm became chair, Tesla's value has skyrocketed and peaked in early 2022 at just over \$1.2 trillion. It's now valued at \$600 billion — although that's still 12 times Ford's market cap. In that time, Musk has become more freewheeling in the way he operates too, raising questions about the checks and balances on his power.<sup>22</sup>

138. Despite the denunciation in the *Tornetta* Opinion of Musk’s near total dominance of Tesla’s board, Musk is unbowed. One day after the *Tornetta* Opinion was issued, Musk held a poll on X (“Twitter”) asking followers if they favored a

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<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at \*108.

<sup>21</sup> Hassan Chowdhury, *The Tesla Chair Was Meant to Rein in Elon Musk, But She’s Shunned the Spotlight. A Court Ruling Has Dragged Her into It*, Business Insider (Feb 21, 2024) <https://www.businessinsider.com/tesla-chair-robyn-denholm-lets-elon-musk-take-the-spotlight-2024-2>

<sup>22</sup> *Id.*

reincorporation of Tesla from Delaware to Texas. According to Musk, the poll was 87% in favor of moving. Whereupon Musk tweeted:

The public vote is unequivocally in favor of Texas! Tesla will move immediately to hold a shareholder vote to transfer state of incorporation to Texas.

139. Musk knew that the Board had to approve a shareholder vote to transfer incorporation as he alone could not do it, but Musk continues to exert his will upon the Board.

140. Recently, in a recent bid to force the Board to award him more stock, Musk himself admitted that what he is “aiming for is a strong influence but not control,” explaining that his desire for a 25% stake in the company would grant him the right amount of power while leaving room for his decisions to be challenged by other stakeholders, but fails to suggest how they might do so given the supermajority voting requirements in the bylaws.<sup>23</sup>

141. The majority of Tesla’s current board is comprised of the same members found by Delaware Court of Chancery not to be independent.

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<sup>23</sup> Hamza Shaban, *Telsa CEO Elon Musk Says He Wants Strong Influence But Not Control’ In Push For New Share Class* (January 25, 2024), <https://finance.yahoo.com/news/tesla-ceo-elon-musk-says-he-wants-strong-influence-but-not-control-in-push-for-new-share-class-162306811.html>.

142. On March 28, 2018, in *Tesla Motors Inc. S'holder Litig.*, 2018 WL 1500293 (Del. Ch. 2018), the Court found demand excused. Vice Chancellor Joseph R. Slights III issued a 58-page memorandum opinion stating that:

The combination of well-pled facts relating to Musk's voting influence, his domination of the board during the process leading up to the acquisition against the backdrop of his extraordinary influence within the company generally, the board level conflicts that diminished the board's resistance to Musk's influence, and the company's and Musk's own acknowledgements of his outsized influence, all told, satisfy plaintiffs' burden to plead that Musk's status as a Tesla controlling stockholder is reasonably conceivable.

143. In *Tornetta* fn. 5, the defendants conceded the issue of demand futility on the motion to dismiss *Tornetta* by not raising any Rule 23.1 dismissal grounds. That board included E. Musk, R. Denholm, J. Murdoch, I. Ehrenpreis and K. Musk, all of whom are still directors, constituting five of Tesla's eight current directors.

144. In the *Tornetta* Opinion, Chancellor McCormick methodically reviewed the evidence of each Board member's independence and held that E. Musk, K. Musk, J. Murdoch, I. Ehrenpreis and R. Denholm were not independent. Presently, the Board listed on Tesla's website consists of the following eight (8) individuals: E. Musk, Straubel, Denholm, Ehrenpreis, Gebbia, Murdoch, K. Musk and Wilson-Thompson.



**B. Demand Is Futile**

145. Plaintiff did not make a demand on the Board to bring this action because such demand would be futile given Chancellor McCormick's decision in *Tornetta* and the facts as alleged herein and, therefore, such a demand is excused.

146. As specified herein, demand is excused because this Verified Stockholder Derivative Complaint alleges with particularity that at least half of the members of the current Board are not independent and breached their fiduciary duties of loyalty, and good faith. Tesla's website admits that defendants E. Musk, K. Musk, and Straubel are not independent. Thus, Tesla acknowledges three of the four directors required to establish demand futility are not independent and only one other director is needed to establish futility.

147. The Director Defendants allowed E. Musk to circumvent Tesla's Insider Trading Policy to allow E. Musk to profit from misuse of MNPI.

148. Despite their duties and responsibilities, the members of the Board and AC failed to ensure that the Company had internal controls, policies and oversight mechanisms in place to prevent the wrongdoing alleged herein. As such, the Individual Defendants face a substantial threat of liability and cannot fairly consider a demand to commence litigation.

149. The Individual Defendants' conduct described herein and summarized above could not have been the product of legitimate business judgment as it was based on intentional, reckless and disloyal misconduct. Thus, none of the Individual Defendants can claim exculpation from their violations of duty pursuant to the Company's charter (to the extent such a provision exists). As a majority of the Individual Defendants face a substantial likelihood of liability, they are self-interested in the transactions challenged herein and cannot be presumed to be capable of exercising independent and disinterested judgment about whether to pursue this action on behalf of the shareholders of the Company. Accordingly, demand is excused as being futile.

150. Read together with the facts summarized above and alleged with particularity herein, pre-suit demand is also excused as futile for the following reasons:

(a) The principal professional occupation of defendant E. Musk is his employment with Tesla, pursuant to which he received and continues to receive substantial monetary compensation and other benefits. Furthermore, the Company admits that E. Musk is not independent in its Proxy Statement filed April 26, 2018. As of December 31, 2017, E. Musk owned 37,853,041 shares or 21.9% of the Company's shares, is Tesla's largest stockholder, and exercises domination and

control over all of the entire Board rendering each of the Individual Defendants not independent.

(b) Current Board member JB Straubel (“Straubel”) is the only one of Tesla’s eight current directors who joined after the sale of E. Musk’s shares having joined the Board in 2023. He has long standing ties to Tesla and E. Musk and is considered a co-founder of Tesla with E. Musk. Straubel met Musk in 2003 when Musk committed 10,000 in funding to Straubel’s lithium ion car battery company. For fourteen years, Straubel was Tesla’s Chief Technology Officer until 2019. Thereafter for an indeterminate period of time he remained a “Senior Advisor” (according to Company disclosures). According to the Verified Complaint in *Tornetta*, March 9, 2020, p. 32, when Straubel was still CTO, he asked E. Musk to consider for him similar compensation “equity incentives” as the Board awarded to E. Musk in 2018 and which were recently voided by decision of this Court on February 5, 2024. Reflecting his deference to, fear of, and intimidation by, E. Musk, Straubel was quoted in Time Magazine on May 19, 2022 saying: “I know people are fascinated by [my relationship] with Elon but there’s no real benefit trying to thread the needle on this. You’ll risk finding a way to piss him off on something that you

say, probably unintentionally, and then you have him more frustrated at you, or who knows what.”<sup>24</sup>.

(c) K. Musk lacks independence as he is the brother of E. Musk. The familial relationship renders demand futile as to defendants E. Musk and K. Musk. Additionally, K. Musk lacks independence due to the substantial compensation he receives for serving on Tesla’s Board. As reported in the Company’s proxy statements, in 2017 K. Musk received \$21,721 in compensation, in 2016 he received \$24,535 in compensation and in 2015 he received \$4,964,381 in director compensation. K. Musk is also a director of SpaceX and a limited partner of Valor Equity Partners II, L.P. (in which E. Musk has also invested) and Valor Equity Partners III-A, L.P., funds advised by VMC (defined below).

(d) Defendant Murdoch is not independent. In February 2023, Musk attended the Super Bowl with James Murdoch’s father and sister Elisabeth. Murdoch has for decades enjoyed a close personal relationship with Musk, their families have vacationed together numerous times, to Israel, Mexico and the Bahamas. Murdoch attended K. Musk’s wedding in 2018. Murdoch and his private investment Company have \$70 million invested in SpaceX.

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<sup>24</sup> Alejandro De La Garza, *JB Straubel Has a Fix for the Battery Problem*, Time Magazine, (May 19, 2022) <https://time.com/6176778/jb-straubel-battery-problem/>

(e) Defendant Ehrenpreis lacks independence as he is a manager of DBL Partners Fund III (“DBL III”). Ehrenpreis and DBL III are minority investors in SpaceX where defendant E. Musk is the Chief Executive Officer and lead designer. Ehrenpreis is a co-owner of DBL Partners. Another co-owner of DBL Partners is a manager of DBL Investors, which is also an investor in SpaceX. Ehrenpreis further serves as a member of the board of directors of Mapbox Inc., a provider of custom online maps (“Mapbox”). In December 2015, Tesla entered into an agreement with Mapbox relating to a vehicle map-related project, pursuant to which Tesla made a prepayment of \$3 million in 2016 for certain fees. Tesla will pay Mapbox to the extent any additional fees for services are incurred in excess of such prepaid fees. Defendant Ehrenpreis also lacks independence due to the substantial compensation he receives for serving on Tesla’s Board. According to the Company’s proxy statements, in 2017, Ehrenpreis received \$37,500 in compensation, in 2016 he received \$37,500 in compensation, and in 2015 he received \$7,239,683 in compensation. In 2013, Ehrenpreis “helped convince Musk to take over . . .” as CEO from Michael Marks. Isaacson at 167. Director Ehrenpreis further lack independence from each other and from E. Musk as a result of their business dealings in connection with Solar City and certain Solar City Agreements.

(f) Defendant Denholm lacks independence due to the substantial compensation she receives for serving on Tesla's Board. She has described her director compensation as "life changing." As reported in the Company's proxy statements, in 2017 Denholm received \$4,921,810 in compensation, in 2016 she received \$45,000 in compensation, in 2015 she received \$4,979,785 in director compensation, and in 2014 she received \$7,181,066 in compensation as a director of Tesla. From 2021-2022, Denholm sold a portion of her director grant Tesla options for \$280,000,000.

Denholm was elected to Tesla's board in 2014 and became chairperson in 2018 when Musk vacated that role as part of the SEC settlement in 2018. Additionally, while a Tesla director, Denholm was the executive vice president and COO and CFO of Juniper from February 2016, when Tesla was a customer of Juniper's networking equipment. To become Tesla Chairman, she reportedly resigned from a very remunerative full-time position as CFO of Telstra, Australian telecom.

Defendant Denholm has exhibited undue deference to Musk as demonstrated by her failure to execute with any diligence her responsibilities as Chair of Tesla's DCC in charge of compliance with the Consent Judgment and her half-tenth letter to

shareholders in the April 17, 2024 Proxy. This Court has observed that “Musk operates as if free of board oversight.”

(g) Defendant Gebbia is not independent due to the close personal relationship with Musk as reported in the WSJ February 20, 2024 as attending parties with Musk where illegal drug use occurred by Tesla officers and directors in contravention of Tesla policies. He lives near E. Musk in Austin and has reportedly been a frequent social companion of E. Musk.<sup>25</sup>

(h) Defendants K. Musk and Ehrenpreis also lack independence as a result of their business dealings in connection with SpaceX and certain SpaceX Agreements as described in the Company’s proxy statements filed in recent years.

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<sup>25</sup> Kirsten Grind, Emily Glazer, Rebecca Elliot, and Coulter Jones, *The Money and Drugs That Tie Elon Musk to Some Tesla Directors*, WALL STREET JOURNAL, (February 3, 2023) <https://www.wsj.com/tech/elon-musk-tesla-money-drugs-board-61af9ac4>.

## COUNT I

### BREACH OF FIDUCIARY DUTY OF LOYALTY AGAINST THE INDIVIDUAL DEFENDANTS

151. Plaintiff incorporates by reference and realleges each and every allegation as set forth above as if fully set forth herein.

152. Each of the Individual Defendants owed the Company and its shareholders the highest duties of loyalty, good faith, honesty, and care in conducting their affairs and the business of the Company.

153. Under the current circumstances, the Individual Defendants also had a duty to:

(a) act in the interests of the Company and all of its equity owners;

and

(b) act in accordance with the fundamental duties of loyalty, care

and good faith.

(c) act independently to ensure that the best interest of the corporation and its shareholders take precedence over any interest possessed by a director, officer, or controlling shareholder; and

(d) ensure that if there are conflicts of interest between the Individual Defendants' interests and their fiduciary obligations of loyalty, that they are resolved in the best interest of the Company and its public shareholders.



154. In causing or allowing Musk to sell shares in November and December 2022, the Company to fail to maintain adequate internal controls and procedures related to insider trading and failed to ensure that the provisions of the ITP were followed and failed to ensure that the provisions of the SEC Consent Judgment and its 2019 amendment were followed to prevent Musk from profiting from MNPI.

155. Each of the Individual Defendants had actual or constructive knowledge of Musk's November and December sales prior to their occurring but took no apparent action or investigation for either before or after the sales of Shares.

156. As a direct and proximate result of the Individual Defendants' failure to perform their fiduciary obligations, Tesla has sustained significant damages.

157. Accordingly, Plaintiff, as a shareholder of the Company, seeks monetary damages, injunctive remedies, and other forms of equitable relief on Tesla's behalf.

158. Plaintiff and the Company have no adequate remedy at law.

## **COUNT II**

### **DERIVATIVELY ON BEHALF OF TESLA AGAINST E. MUSK FOR BREACH OF FIDUCIARY DUTY AND DISGORGEMENT**

159. Plaintiff incorporates by reference and realleges each and every allegation set forth above, as though fully set forth herein.

160. As Tesla's controlling stockholder and by virtue of his position as the CEO of Tesla, E. Musk owed fiduciary duties of loyalty and good faith to the Company.

161. E. Musk possessed material, non-public information of Tesla, and used that information improperly in selling Tesla stock because he was motivated, in whole or in part, by the substance of that material, non-public information of Tesla, and acted with scienter.

162. By disposing of \$7,530,113,926 worth of Tesla stock in November and December 2022 while he was in possession of adverse, material non-public information, E. Musk exploited his position at Tesla, and he breached his fiduciary duties to Tesla. Because E. Musk sold this stock before the non-public information in his possession could be publicly disclosed and affect the Company's stock price, E. Musk improperly benefited from this breach of fiduciary duty.

163. E. Musk profited from his misconduct and his exploitation of material and adverse inside information.

164. Plaintiff, as a stockholder and a representative of Tesla, seeks disgorgement of all profits obtained as a result of such wrongful conduct and breach of fiduciary duties.

165. Plaintiff, on behalf of Tesla, has no adequate remedy at law.

## **RELIEF REQUESTED**

WHEREFORE, Plaintiff demand judgment as follows:

A. Determining that this action is a proper derivative action, that demand is excused, and certifying Plaintiff as an appropriate representative of Tesla for this action;

B. Finding that each of the Defendants breached their fiduciary duties as controlling stockholders and/or directors of the Company;

C. Awarding the Company the disgorgement of all insider trading profits from Musk, and from his affiliates, including all profits, benefits and other compensation obtained by their insider trading and further profits flowing therefrom;

D. Directing each of the Defendants to account to Tesla for any damages sustained or to be sustained by the Company and all profits, gains, and benefits obtained by the Defendants by reason of the wrongs alleged herein and awarding the Company all such damages against the Defendants;

E. Directing each of the Defendants to pay pre-and post-judgment interest at the highest rate allowable by law on the amount of damages awarded to the Company because of Defendants' actions as described herein;

F. Awarding to Plaintiffs the costs and disbursements of the action, including reasonable attorneys' fees, accountants' and experts' fees, costs, and expenses; and

G. Granting such other and further relief as the Court deems just and proper.

Dated: May 24, 2024  
**Public Redacted Version**  
**Filed May 30, 2024**

/s/ P. Bradford deLeeuw  
P. Bradford deLeeuw (DE Bar #3569)  
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY this 30th day of May, 2024 that I caused to be served a copy of the foregoing *Public Redacted Version of Verified Stockholder Derivative Complaint* upon all below-listed counsel in the manner indicated:

**Via E-Mail**

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/s/ P. Bradford deLeeuw  
P. Bradford deLeeuw (Del. Bar No. 3569)