IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE TESLA MOTORS, INC. STOCKHOLDER LITIGATION	)	Consolidated C.A. No. 12711-VCS

DEFENDANT'S PRETRIAL BRIEF

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PRELIMINARY STATEMENT

In 2006, Tesla announced a plan to pave the road to a more sustainable future by creating a vertically integrated clean energy company. The plan contemplated building three business lines, in phases: electric vehicles, battery storage and solar energy. A decade later, Tesla reached the final phase of this plan through its stock-for-stock acquisition of SolarCity (the "Acquisition"). Initial reactions were mixed: some analysts criticized the deal; others touted it as a visionary and necessary step toward Tesla's goal of becoming an integrated sustainable energy company. The leading proxy advisory service Institutional Shareholder Services (accurately) predicted that the Acquisition could put Tesla in a "league of its own".

Tesla's performance since the Acquisition is undisputed. Tesla's market capitalization has more than tripled. Tesla, which is now more valuable than Ford and General Motors *combined*, was never valued like an auto manufacturer. Instead, the market values Tesla as an integrated clean energy technology company that develops, manufactures and sells high-performance fully electric vehicles and state-of-the-art energy generation and storage systems.

Although transformational for Tesla, the Acquisition was unremarkable from a legal perspective. Delaware law did not even require Tesla's stockholders to approve the deal. But the Tesla Board (with Elon Musk and

Antonio Gracias recused) nevertheless conditioned the Acquisition, from the outset, on approval by a majority of Tesla's disinterested stockholders. And that approval was not a foregone conclusion. Indeed, Robyn Denholm, the disinterested, independent director who led the Tesla Board's negotiations, spent several months presenting and responding to stockholders, and educating proxy advisory firms, about the Acquisition. Armed with Tesla's comprehensive Proxy and analysis (good and bad) from numerous sources, the disinterested stockholders spoke with their votes: an overwhelming majority (85% of shares voted) approved the merger.

Plaintiffs' theory seems to be that these stockholders, mostly sophisticated institutional investors, were somehow completely duped into buying a worthless SolarCity. The evidence at trial will tell a very different story:

- The Acquisition was a routine corporate transaction between two public companies, known to be chaired by the same person;
- The Board pursued the merger only when the timing and price served Tesla's interests;
- Extensive due diligence provided the Board with all material information when they set the price and voted in favor of the deal;
- Following arms' length negotiations, Tesla ultimately leveraged SolarCity's short-term liquidity tightness to achieve a lower exchange ratio than even the bottom of the range of Tesla's original offer;
- Tesla acquired SolarCity for a modest premium to its market price, even before factoring in the significant synergies of the combination;

- SolarCity, which had publicly traded equity and made all its required SEC filings (including audited financial statements) and other public disclosures, with a market capitalization in excess of $2 billion;

- SolarCity, which also had bank-financed debt, was thoroughly analyzed by its lenders;

- During the Acquisition, SolarCity faced extensive additional scrutiny by the press and the market; and

- Accordingly, when the Tesla stockholders (none of whom Plaintiffs will call to testify at trial) voted overwhelmingly in favor of the Acquisition, they had all material information, including information about SolarCity's short-term liquidity issues.

Plaintiffs' theory—that SolarCity was on the brink of bankruptcy before Tesla's offer—conflates liquidity and solvency and rests on fundamental misunderstandings of the nature of SolarCity's business. To be clear, the evidence will demonstrate that at the time of the deal, SolarCity was solvent; indeed, it had substantial value, consistent with its market value of over $2 billion in the liquid and efficient market in which it traded. And, Tesla booked a gain on the Acquisition because the value of the SolarCity assets Tesla acquired exceeded the value of the Acquisition consideration (*i.e.*, Tesla recorded negative goodwill).

SolarCity's business model involved making significant upfront capital expenditures to install solar energy systems in exchange for long-term, recurring cash flows from the payments by SolarCity's customers on those systems. These installations were NPV-positive with negligible default rates,

though the cash flows might take decades to fully accrue. As of 2016, SolarCity had retained value of $2.2 billion (based on the net present value of cash flows from systems already installed and under contract), a value that exceeded the actual price Tesla paid at closing. The success of SolarCity's model relied on (i) access to capital (to fund new, NPV-positive installations) and (ii) the ability to manage cash flows to bridge the timing gap between initial capital outlays and the long-term value creation from the installations. SolarCity had both. Since its IPO in 2012, SolarCity enjoyed consistent access to the capital markets. In fact, in 2015 and the first half of 2016 alone, SolarCity raised more than $2.6 billion in the capital markets. SolarCity also had the ability to manage its finances to balance its desire to fund additional (and NPV-positive) installations against its immediate payment obligations; it was able to manage the cash flow constraints it was facing at the time.

In addition, the evidence will show that there was no material risk of insolvency leading up to or during the Acquisition: SolarCity never breached its liquidity covenants; never defaulted on its payment obligations; was never called into default by its lenders; never hired (or considered hiring) any restructuring advisors; and had an array of options to address any liquidity issues in the event it was not acquired by Tesla.

* * *

In sum, the Tesla Board decided to acquire a valuable company at a bargain—a move that served Tesla's long-held goal of creating a vertically integrated clean energy company. Tesla consummated the deal only after a fair process that culminated in approval by Tesla's informed and disinterested stockholders. Their vote should be respected.

ARGUMENT

The Acquisition should be subject to the deferential business judgment rule because the Acquisition was approved by both the Board and Tesla's disinterested stockholders, neither of whom were controlled by Elon Musk.[1] (Section I.) But even examined under the entire fairness standard, the evidence will establish that the Acquisition was executed at a fair price—the "paramount consideration" for the fairness inquiry—which resulted from a fair process that culminated in stockholder approval. (Section II.) And before they overwhelmingly voted in favor of the Acquisition, Tesla's stockholders were fully

[1] At this juncture, the only remaining Defendant is Elon Musk, who has no intention of settling and looks forward to defending the merits of the Solar City Acquisition at trial. As the Court is aware, the parties have agreed in principle to settle the claims against all other Directors with no admission of wrongdoing, and for a payment funded entirely by insurance proceeds. To be clear, the testimony of the other Directors will demonstrate that they voted for the Acquisition based on its corporate merits, and they stand firmly behind their votes. We believe the stockholders of Tesla stand behind their votes as well. The Acquisition achieved the vision for Tesla of a fully integrated sustainable energy company that was set out a decade before.

informed of all materials facts, including with respect to SolarCity's financial condition, Elon Musk's involvement in the Acquisition, and the status of the Solar Roof. (Section III.) Plaintiffs' claims, including their ancillary unjust enrichment and waste claims, therefore fail. (Section IV.)

I. Elon Musk Was Not a Controlling Stockholder

The issue of whether Elon Musk is a controlling stockholder for purposes of this matter has already been the subject of extensive briefing and argument. Following this Court's summary judgment decision, this issue remains open for trial.[2] Respectfully, Defendant submits that Plaintiffs should not be able to meet their burden of proving that Defendant is a controlling stockholder given their admission that they do not have any evidence that Musk controlled (or had the ability to control) even a single Tesla stockholder with respect to the Acquisition, let alone enough votes to approve it. That should require review under the deferential business judgment rule. Plaintiffs cannot overcome that deficiency unless the presumption of "inherent coercion" *alone*, without *any evidence*, is sufficient, even at trial, to demonstrate control.

The problems associated with the "inherent coercion" doctrine, including when (if at all) it should apply, may stem from the fact that the Supreme

[2] SJ Op. at 18, Dkt. 385.

Court has not addressed the controlling stockholder issue under the factual circumstances of this case.[3] Based on the current case law, this Court concluded that the inherent coercion doctrine applies here. For the reasons below, Defendant respectfully submits that, under the facts as will be proven at trial, this is not, and should not be, the law in Delaware.

A. Plaintiffs Should Be Required To Establish Musk Controlled the Transaction at Issue

Musk, as Tesla's co-founder and CEO, is the face of Tesla, but he held only 22% of its outstanding shares at the time of the Acquisition. To establish that a minority stockholder such as Musk is a controlling stockholder, Plaintiffs must prove that he actually controlled "the transaction at issue". *Olenik v. Lodzinski*, 208 A.3d 704, 718 n.72 (Del. 2019) (citing *In re Crimson Expl. Inc. S'holder Litig.*, 2014 WL 5449419, at *16 (Del. Ch. Oct. 24, 2014)).[4] That is, Plaintiffs should have the burden to establish that Musk controlled each constituency whose approval was needed to effect the Acquisition—here, the Tesla

[3] We note that this Court observed that rejection of the inherent coercion doctrine is perhaps the correct view. SJ Op. at 16.

[4] While Delaware cases, and this Court's summary judgment opinion, acknowledge that control may "exist generally or with regard to the particular transaction that is being challenged", SJ Op. at 11 (internal quotations omitted), Defendant respectfully submits that evidence of general control logically should not be sufficient to *prove* control at trial itself, where, as here, there will be unrebutted evidence that Musk did not exercise control over the challenged transaction.

Board and the majority of disinterested Tesla stockholders.[5] Plaintiffs, as the proponents of fiduciary duty claims that rely on the theory that Musk was a controlling stockholder, bear the burden of establishing such control.[6] So, the threshold question is: how does a fact-finder determine whether a minority stockholder exerted control over a particular transaction?

Under Plaintiffs' preferred approach (as outlined in this Court's summary judgment decision), a minority stockholder's control can be established by the mere presence of "managerial supremacy" qualities, such as being "hands-on", an "inspirational force", or "involved in all aspects of the company's business".[7] Once such personality traits are established, Plaintiffs contend, a minority stockholder should be treated as a controller for all purposes with respect

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[5] To be sure, there are several Delaware cases that state that control over the board is sufficient to establish control. *See, e.g.*, *Corwin v. KKR Fin. Holdings LLC*, 125 A.3d 304, 307 (Del. 2015); *In re Rouse Props., Inc.*, 2018 WL 1226015, at *11-*12 (Del. Ch. Mar. 9, 2018); *Larkin v. Shah*, 2016 WL 4485447, at *13 (Del. Ch. Aug. 25, 2016). That analysis should not apply, however, to a standard transaction (one that does not fundamentally alter stockholder rights) conditioned on the approval of a majority of disinterested stockholders. Control over the Board without control over the stockholders could not have secured approval of the Acquisition.

[6] *See Basho Techs. Holdco B, LLC v. Georgetown Basho Invs., LLC*, 2018 WL 3326693, at *1 (Del. Ch. July 6, 2018) (imposing fiduciary duties on non-majority blockholders where "plaintiffs proved at trial that [blockholders] exercised effective control" in connection with challenged transaction).

[7] SJ Op. at 11-12.

to that company, even absent any evidence that the minority stockholder actually could, or did, exercise control over any of the decision-makers necessary to effect the transaction. For a transaction that requires stockholder approval, as here, that means the fact-finder must simply *assume* control over sophisticated, independent institutional stockholders (and other stockholders), and ignore evidence that tells a different story. That assumption is the doctrine of inherent coercion.

Plaintiffs effectively concede that they cannot show that Musk is a controlling stockholder (if at all) unless this assumption is applied. As the Court noted, Plaintiffs admit that they have no actual evidence of Musk's control over the disinterested Tesla stockholders.[8]

Plaintiffs' approach proves too much. Taken to its natural conclusion, virtually all "hands-on" and "inspirational" CEOs with minority stock ownership would be deemed controllers. But companies should be incentivized to hire and retain such CEOs, not be subjected to a higher standard of scrutiny based solely on having done so, without any *actual* evidence of coercion by the executive. A broad presumption tells you nothing about how a CEO acted, or had the ability to act, with respect to the specific transaction at issue.[9]

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[8] SJ Op. at 9.

[9] The cases in which "managerial supremacy" qualities have guided the controlling stockholder determination did not actually turn on that consideration.

At trial, Plaintiffs should be required to present actual proof that Musk controlled the other Board members and the disinterested stockholders.[10] In other words, even assuming the inherent coercion doctrine applies in some circumstances, it should not be irrebuttable. And proving that a minority stockholder is a controlling stockholder is "no easy task". *Larkin*, 2016 WL 4485447, at *13 (finding no controlling stockholder where a group held a combined 23.1% of outstanding shares and "no facts suggest[ed] that [a member of the group] compromised or otherwise influenced other directors' free exercise of judgment"). A minority stockholder is not controlling unless he "exercises such formidable voting and managerial power that, as a practical matter, [he] is no

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See In re Cysive, Inc. S'holders Litig., 836 A.2d 531, 551-52 (Del. Ch. 2013) (involving no stockholder vote and a stockholder with a "large enough block of stock [35%] to be the dominant force"); *In re Loral Space & Comms., Inc.*, 2008 WL 4293781, at *18-19 (Del. Ch. Sept. 19, 2008) (involving no stockholder vote and a special committee that took active steps to avoid such a vote because it "knew that the stockholders would not approve" the proposed transaction); *In re Zhongpin Inc. S'holders Litig.*, 2014 WL 6735457, at *10 (Del. Ch. Nov. 26, 2014) (involving a transaction not conditioned, *ab initio*, upon unaffiliated stockholder approval and in which a stockholder vote was added only after price terms were set).

[10] Defendant respectfully submits that the standard should be proof of actual coercion, whether direct or, more likely, circumstantial evidence from which one could infer actual coercion. "Ability to coerce" is too vague and effectively shifts the burden to the defendant to disprove a hypothetical form of control. But that issue need not be resolved here because Plaintiffs admit there is no evidence of actual control or ability to control the disinterested stockholders. In fact, there is evidence to the contrary, as set forth in Section I.C below. All Plaintiffs have here is the presumption. That should not be enough.

differently situated than if [he] had majority voting control". *In re Morton's Rest. Grp. S'holders Litig.*, 74 A.3d 656, 664-65 (Del. Ch. 2013) (citation omitted) (finding a 27.7% stockholder with two employees on the board of directors was not a controlling stockholder). Even "stockholders with very potent clout have been deemed, in thoughtful decisions, to fall short of the mark". *In re PNB Holding Co. S'holders Litig.*, 2006 WL 2403999, at *9 (Del. Ch. Aug. 18, 2006). To prove control, the plaintiff must show multiple indicia of control, such as where the stockholder at issue has the right to appoint directors, wields coercive contractual rights, threatens retribution against management or the board, and dominates board discussions. *See, e.g.*, *Basho*, 2018 WL 3326693, at *28 (finding control based on these facts). Plaintiffs will be unable to meet this high bar.

B. The Evidence at Trial Will Establish That Musk Did Not Control the Tesla Board, Which Acted Independently with Respect to the Acquisition

The evidence will establish that the Tesla Board exercised its independence from Musk in connection with the Acquisition. Further, each Director that approved the Acquisition will testify that he or she did so based solely on its corporate merits, not because of any purported control by Musk or personal pecuniary interest. Because the evidence will establish that Musk did not and could not control Tesla's Board (either generally or with respect to this specific transaction), Plaintiffs' claims should fail.

1. Musk Did Not Control the Tesla Board as to the Acquisition

The trial evidence will show that Musk did not control the Tesla Board in connection with the Acquisition. Musk was recused from Board votes related to the Acquisition, and he did not exercise actual control over the other Board members. In fact, the Tesla Board exercised its independence from Musk. For example, when Musk first proposed an acquisition of SolarCity in February 2016, the Board declined to pursue it at that time, and instead directed Musk and Tesla management to focus on Model X production. Similarly, after the Board (without Musk) approved the Acquisition but before the stockholders had voted, the Board declined Musk's proposal to have Tesla provide SolarCity with short-term bridge financing; instead, the Board concluded that it was in the Tesla's stockholders' best interest for SolarCity to obtain this financing elsewhere. The Board, not including Musk, selected highly qualified financial and legal advisors. And a clearly independent Director led the negotiations. Musk did not even attempt to control Tesla's Board in connection with the Acquisition.

2. Tesla's Board Was Independent, Unconflicted and Could Not Be Controlled

The voting Directors were unconflicted, as well as independent of and not beholden to Musk. Indeed, the evidence will confirm that the Board was "motivated in good faith to achieve a transaction that was the best available for the

benefit of" the Tesla stockholders. *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1174 (Del. 1995) (citation omitted).

First, Musk did not have the ability to control Tesla's Board. Tesla's governing documents and Board structure prevented Musk, a 22% stockholder, from controlling the Board. For example, pursuant to Tesla's Bylaws and Charter, only the stockholders can remove Directors from the Board. Nor can Musk unilaterally prevent a Director from standing for reelection or alter a Director's compensation; he has never been on the nominating or compensation committees.

Second, the Tesla Board's compensation was not "of such subjective material importance to [them]" that it interfered with their independence. *Gantler v. Stephens*, 2008 WL 401124, at *13 (Del. Ch. Feb. 14, 2008) (citation omitted), *rev'd on other grounds*, 965 A.2d 695 (Del. 2009). The cash compensation that each Board member (other than Musk) received—$20,000 to $45,000 per year per Director—was not material in context. And the option grants aligned each Director's interests with the stockholders' interests. *In re Toys "R" Us, Inc. S'holder Litig.*, 877 A.2d 975, 1003-06 (Del. Ch. 2005).

Third, any alleged personal or business relationships among Directors were insufficient to affect their independence. The voting Directors will testify that their independence and disinterestedness was not compromised by any professional or social relationship with Musk or otherwise. To that end:

Denholm will establish, consistent with this Court's summary judgment opinion, that she is "indisputably not a dual fiduciary" and "indisputably had no financial interest in SolarCity".[11] Nor is she beholden to any member of Tesla's Board by virtue of any social ties. Plaintiffs focus on only one occasion when Denholm and her husband briefly met Gracias and his wife for a drink in Australia. In any event, this Court has already found that ordinary social relationships among Directors do not rise to the level of a conflict.[12]

Ehrenpreis will establish that there was no conflict between his fiduciary duty to Tesla and any duties to the investors in the venture capital funds he managed. Ehrenpreis's prior venture capital firm held positions in Tesla (but not SolarCity) stock that no longer existed at the time of the Acquisition. Unsurprisingly, there will be no evidence that any conflict arose simply because one of Ehrenpreis's funds had an investment in SpaceX (a non-party to the Acquisition) which, in turn, held certain bonds issued by SolarCity (representing an immaterial part of SpaceX's value at the time). Such attenuated economic links between Ehrenpreis and SolarCity cannot form the basis for a conflict of interest. *See Kahn v. M & F Worldwide Corp.*, 88 A.3d 635, 649 (Del. 2014) (to find a conflict, "[t]he court must conclude that the director in question had ties to the

[11] SJ Op. 34.

[12] *Id.*

person whose proposal or actions he or she is evaluating that are sufficiently substantial that he or she could not objectively discharge his or her fiduciary duties.").

Buss will establish that his small equity stake in SolarCity did not present any conflict. His SolarCity holdings are significantly outweighed in both dollar terms and by proportion of overall stake by his Tesla holdings. As Buss will explain, Plaintiffs' allegations regarding his purported compensation for his pre-Acquisition service as SolarCity's CFO are incorrect. Buss was primarily compensated in the form of stock options. Buss will testify that these options were never exercised because they were underwater, and he gave them up when he terminated his SolarCity consulting agreement.

Jurvetson will establish that there was no conflict between his fiduciary responsibilities to Tesla and his responsibilities to DFJ's investors or as a SpaceX board member. For Jurvetson, the Acquisition presented a value proposition that was beneficial to both Tesla's and SolarCity's stockholders. That SpaceX held certain bonds issued by SolarCity (representing an immaterial part of SpaceX's value at the time) did not cause any conflict between Jurvetson's fiduciary duties to SpaceX and Tesla. At the time he voted for the Acquisition, he did not even know what his relative stock holdings in Tesla and SolarCity were.

Kimbal Musk will establish that his small equity stake in SolarCity did not present a conflict and that he faithfully discharged his fiduciary duties to the Tesla stockholders in connection with the Acquisition. There is no evidence that Kimbal automatically deferred to his brother. Rather, the evidence will be that they had a history of a completely frank and robust exchange of sometimes contrary views in the businesses in which they worked together.

C. The Evidence at Trial Will Establish That Musk Did Not Control the Disinterested Tesla Stockholders

Plaintiffs will be unable to put forth *any* evidence at trial that Musk controlled, coerced or otherwise improperly persuaded any disinterested Tesla stockholder with respect to the Acquisition.[13] The majority of Tesla's disinterested stockholders, holding 62% of Tesla's outstanding shares at the time of the Acquisition, are sophisticated institutional investors, including the world's largest wealth managers. The notion that any of these entities would cower in fear of retribution by Musk is both implausible and unsupported by the record.

Four institutional stockholders alone—Fidelity, T. Rowe Price, Baillie Gifford and Vanguard—comprised 37% of the disinterested Tesla shares, and

[13] To be clear, it is not our position that approval by the disinterested stockholders "cleansed" a controlling stockholder transaction. Rather, even setting aside whether he controlled the Board (which he did not), Musk's inability to control the stockholders who supported the Acquisition means that he was not, in fact, a controlling stockholder.

collectively managed trillions of dollars' worth of assets as of 2016. Plaintiffs have no evidence that these stockholders failed to discharge their own fiduciary duties to maximize Tesla's value for their clients. Defendant, on the other hand, will establish that the Tesla stockholders eschewed Musk's purported influence: investors questioned the benefit of the deal and sought to talk to Directors other than Musk about the deal's potential merits. Denholm ultimately met with numerous investors, some of whom were initially skeptical about the deal. And stockholder approval was not a foregone conclusion: Lazard carefully tracked SolarCity shares, which were not trading in lockstep with Tesla shares, implying that the market believed there was a risk the deal may not close.[14] In addition, the stockholder vote tabulation was closely monitored by the Tesla Directors, who similarly did not believe stockholder approval was guaranteed.

II. The Acquisition Was Entirely Fair

Defendant maintains that the Acquisition should be subject to business judgment review. But even if the entire fairness standard applies, the evidence will demonstrate that the Acquisition was entirely fair because it was consummated at a fair price—the "paramount consideration" for the fairness inquiry—and resulted from a fair process, including approval by a majority of the

[14] JX2010, SC_Third_Parties_0019572 at '580.

disinterested stockholders. *Ams. Mining Corp. v. Theriault*, 51 A.3d 1213, 1244 (Del. 2012). Because the Acquisition was "approved by an informed vote of a majority of the minority shareholders" (*see* Section III), Plaintiffs ultimately should bear the burden of demonstrating the Acquisition was not entirely fair. *Id.* at 1240.

A. The Acquisition Was the Result of a Fair Process

Fair process "embraces questions of when the transaction was timed, how it was initiated, structured, negotiated, disclosed to the directors, and how the approvals of the directors and the stockholders were obtained." *Weinberger v. UOP, Inc.*, 457 A.2d 701, 711 (Del. 1983) (citations omitted). All aspects of a transaction "must be examined as a whole since the question is one of entire fairness. But perfection is not possible, or expected." *In re Trados Inc. S'holder Litig.*, 73 A.3d 17, 56 (Del. Ch. 2013) (internal citations and quotation marks omitted).

1. The Acquisition Process Was Initiated Only After Careful Deliberation by the Board

(a) Tesla's Plan Always Included Clean Energy

"[T]he overarching purpose of Tesla . . . is to help expedite the move from a mine-and-burn hydrocarbon economy towards a solar electric economy."[15]

[15] JX0012, *Tesla Master Plan* (Aug. 2, 2006).

Those words, written by Musk and published by Tesla in 2006—ten years before the Acquisition—confirm that Tesla's venture into clean energy was always part of the company's long-term vision. Tesla's public "master plan" was simple:

> Build sports car
> Use that money to build an affordable car
> Use *that* money to build an even more affordable car
> While doing above, also provide zero emission electric power generation options[16]

As explained below, when the timing was right, the Tesla Board executed the final step of this plan by evaluating various solar companies for a possible acquisition. Although SolarCity had long been on Musk's (and Tesla's stockholders') radar,[17] it was not the only target considered. But as the market leader in the residential and commercial solar markets in 2016, SolarCity was ultimately the obvious choice.

(b) The Gigafactory Created an Opportunity

In June 2014, Tesla broke ground on the Gigafactory, a massive battery manufacturing facility in Nevada (one of the largest buildings in the world). The Gigafactory, which is itself entirely powered by renewable energy, is a key

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[16] *Id.*

[17] The Master Plan states: "I should mention that Tesla Motors will be co-marketing sustainable energy products from other companies along with the car. For example, . . . we will be offering a modestly sized and priced solar panel from SolarCity, a photovoltaics company (where I am also the principal financier)." *Id.*

component of Tesla's vision for a sustainable energy future. Even at the beginning, the Gigafactory was projected to be capable of producing many more batteries than Tesla could sell in its fleet of electric vehicles, prompting Board-level discussions in March 2015 regarding a potential solar acquisition and possible alternate uses for Tesla's revolutionary battery technology.

In May 2015, Tesla announced the creation of Tesla Energy and debuted Powerwall and Powerpack, batteries for storing energy at homes and businesses. At the announcement, Musk explained a two-part solution to the problem of ever-increasing carbon emissions: combining energy generation (solar panels) and energy storage (battery)—the obvious answer to meeting both Tesla's and the Gigafactory's full potential.

(c) The Board Gives Serious Consideration to a Potential Solar Acquisition

In February 2016, with the Gigafactory operational, Musk and SolarCity CEO Lyndon Rive began informal discussions regarding a potential acquisition. On February 29, 2016, Musk convened a Special Board Meeting to consider a preliminary proposal to acquire SolarCity, the clear market leader at the time. As discussed above, the Board recognized the significant synergies that would result from a SolarCity acquisition. But it declined to proceed with an offer, opting instead to focus management's time and resources on Model X production and delivery challenges. In the meantime, the Board "authorized management to

gather additional details and to further explore and analyze a potential transaction with SolarCity or other related businesses".[18]

At the May 31, 2016 regular Board meeting, Musk again raised a possible solar acquisition. By that time, many of the Model X production challenges had been resolved, as Gracias and others will establish. The Board then authorized Tesla management to (i) "assess a potential acquisition of a solar energy company and to engage an independent financial advisor"; and (ii) instruct Wachtell Lipton (previously retained) "to undertake a review of a potential acquisition by [Tesla]".[19] After vetting various candidates, the Board retained Evercore as its independent financial advisor. Musk played no role in the selection of the legal or financial advisors. It is undisputed that Evercore and Wachtell are experienced, well-qualified advisors, widely considered among the leaders in their respective areas of expertise.

At a Special Board Meeting on June 20, 2016, Wachtell Lipton reviewed with the Board "certain legal matters, including the Tesla Board's fiduciary duties in relation to a potential acquisition of SolarCity or another solar energy company".[20] The Board then made five key process-related decisions:

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[18] JX0849, TESLA00001346, at '347.

[19] JX1131, TESLA00001455, at '456.

[20] JX2121, Proxy at 57.

- Recusal of Musk/Gracias from Voting: Due to their membership on the SolarCity board, Musk and Gracias "should recuse themselves from any vote by the Tesla Board on matters relating to a potential acquisition of SolarCity, including evaluation, negotiation and approval of the economic terms of any such acquisition".[21]

- Limited Involvement of Musk/Gracias: Tesla Board members "should have the opportunity to deliberate with respect to any potential SolarCity transaction outside" the presence of Musk and Gracias.[22] However, the Board also "determined that the strategic vision, expertise and perspectives of [Musk and Gracias] would continue to be helpful to the Tesla Board's evaluation of a potential [solar] acquisition".[23]

- Shareholder Vote Required: "[I]n the event that Tesla were to proceed with a potential acquisition of SolarCity, the consummation of such acquisition would be conditioned on the approval of a majority of disinterested SolarCity stockholders and Tesla stockholders voting on the transaction",[24] even though such a vote was not required by either Delaware law[25] or NASDAQ rules.[26]

- SolarCity Was the Best Target: Based on the Board's directive, Evercore presented an overview of the solar energy industry and nearly a dozen potential solar targets. Evercore concluded that SolarCity was the "the *most attractive asset* for Tesla in the solar market", given, among other things, its leading market share, geographic footprint, residential/commercial focus, technology,

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[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Lewis v. Ward*, 2003 WL 22461894, at *4 n.18 (Del. Ch. Oct. 29, 2003) ("In a triangular merger, the acquiror's stockholders generally do not have the right to vote on the merger.").

[26] *See* NASDAQ Listing Rule 5635(a).

vertical integration, customer service, growth, cost structure and profitability.[27] The Board agreed.

- SolarCity Offer: With Musk and Gracias recused and not present,[28] the Board approved a preliminary, non-binding proposal to acquire SolarCity at an exchange ratio of 0.122 to 0.131 shares of Tesla common stock for each share of SolarCity, subject to due diligence.

2. The Acquisition Was Strategically Timed

The evidence will show that the Acquisition moved forward because there was a clear window of opportunity for Tesla. Tesla pursued the Acquisition when it had the operational capacity to do so, after stabilizing the Model X production ramp. During Q1 2016, Model X faced production challenges because Tesla had "put too many new features and technologies, too many great things all at once into [Model X]", as well as due to a supplier shortage.[29] Accordingly, in February 2016, the voting Directors determined that Tesla's manufacturing and deployment teams should not take on another project at that time. By May 2016, the Model X bottleneck had been cleared and the Model 3 had not yet launched. Further, in June 2016, SolarCity was trading at about one-third of its 52-week high.

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[27] JX1234, TESLA00000001 at '021-'044 (emphasis added).

[28] As the Proxy explicitly discloses, Musk and Gracias attended the meeting for Evercore's presentation and the preliminary discussion with Evercore about, among other things, the value and structure of a potential acquisition proposal for SolarCity. They left the meeting before the Board's final deliberation and vote approving the offer to SolarCity. JX2121, Proxy at 59.

[29] JX0787, Q4 2015 Tesla Earnings Call Tr. at 9.

Against that backdrop, the timing of Tesla's June 2016 Board decision was opportune. By June 2016, Tesla's management could focus on the move into solar, and SolarCity's stock price made it an attractive target and financially beneficial to Tesla stockholders. Defendant's expert Dan Reicher, who has over 25 years of experience in clean energy and environmental policy, will testify that the timing of the Acquisition allowed Tesla to capitalize on (i) the solar industry's tremendous growth potential in 2016; (ii) a clean energy generation source; (iii) battery storage synergies and (iv) SolarCity's customer base and core competencies in serving those customers.

Shortly after the Acquisition, Tesla experienced unexpected issues with the Model 3 production ramp, in response to which it prioritized Model 3 production over continued solar growth (including by assigning legacy SolarCity employees and engineers to Model 3 production). Tesla has since been able to restore resources to Tesla Energy (including legacy SolarCity), and has experienced two consecutive quarters of growth in solar installations. Tesla is therefore still realizing the benefits of the strategic combination with SolarCity.

3. Negotiations Were Extensive, Hard Fought and Supported by Well-Qualified Advisors

The evidence will establish that the Board, aided by well-qualified advisors, conducted extensive diligence of SolarCity and was fully aware of all

material facts regarding SolarCity at the time it approved the Acquisition,[30] subject to the approval of Tesla's stockholders.[31] And, as discussed below, Tesla's stockholders were fully informed of all material facts regarding the Acquisition at the time they overwhelmingly voted to approve it. (Section III.)

(a) Denholm Led Tesla's Diligence

Denholm, a well-qualified Director whose independence cannot credibly be called into question, will testify that she led the extensive diligence and negotiations for the Acquisition. She spent hundreds of hours on the deal, attending numerous meetings, reviewing Evercore's analyses and other diligence and speaking with Tesla's advisors.

Evercore's diligence of SolarCity's financials was extensive. Courtney McBean, the Senior Managing Director on the Evercore team, will testify that Evercore recognized SolarCity was experiencing liquidity issues. Part of Evercore's analysis (including two DCF analyses) was therefore conducted using a Revised Sensitivity case to reflect conservative assumptions regarding SolarCity's prospects. McBean will explain that the Revised Sensitivity case was ultimately

[30] JX1737, TESLA00001115 at '120, '126.

[31] *Weinberger v. United Fin. Corp. of California*, 1983 WL 20290, at *12 (Del. Ch. Oct. 13, 1983) (noting the "difficult burden" of "prov[ing] at trial that the board acted without being fully informed").

more conservative than SolarCity management's sensitivity case (the "Liquidity Management Case").[32] The Tesla Board carefully reviewed Evercore's analyses.

Defendant's expert Jonathan Foster, who has 30 years of M&A experience, will testify that the Board's oversight and review of due diligence on SolarCity, led by Denholm as an unconflicted independent director, and the use of that information to inform Tesla's valuation of SolarCity and negotiations of the terms of the deal, is fully consistent with industry custom and practice.

(b) Negotiations Drove Down the Price, Which Tesla's Financial Advisor Declared Fair

Denholm will testify that Tesla's rigorous due diligence, and the Board's resulting understanding of (among other things) SolarCity's liquidity issues, led to a final offer below the bottom of Tesla's initial offer range, as summarized in the following table.[33]

[32] JX2121, Proxy at 76.

[33] *See id.* at 59-68.

Acquisition Offer Timeline		
Date	**Offering Party**	**Offer**
June 21, 2016	Tesla	.122-.131
July 23, 2016	SolarCity	.136
July 24, 2016	Tesla	.105
July 26, 2016	SolarCity	.1265
July 28, 2016	Tesla	.110

On July 30, 2016, the Tesla Board, with Gracias and Musk recused, held a special meeting to discuss the Acquisition. Evercore, as more fully reflected in its written fairness opinion, opined that the merger consideration was fair from a financial point of view to Tesla.[34] Evercore's opinion was supported by various valuation methodologies; the final Acquisition price was within or below the range of stock prices implied by each methodology.[35] The Tesla Board, with Musk and Gracias still recused, voted to approve the Acquisition.[36] The merger agreement was executed on July 31, 2016, and announced on August 1, 2016.[37]

4. The Acquisition Was Structured To Empower Disinterested Stockholders, and the Vast Majority of Voting Shares Approved It

The stockholder voting requirement also demonstrates that the Acquisition was fair. "[T]his court has suggested repeatedly that the presence of a

[34] *Id.*

[35] JX1737, TESLA00001115 at '128.

[36] JX2121, Proxy at 69-70.

[37] *Id.* at 70.

non-waivable 'majority of the minority' provision is an indicator at trial of fairness because it disables the power of the majority stockholder to both initiate and approve the merger." *Gesoff v. IIC Indus., Inc.*, 902 A.2d 1130, 1148 (Del. Ch. 2006). As the evidence will show, the Acquisition was structured from the outset to empower stockholders. And those stockholders were more than adequately informed by the detailed joint Proxy statement, extensive public commentary and significant dialogue with Tesla.

On August 31, 2016, in advance of the stockholder vote, Tesla filed with the SEC a preliminary version of the Proxy containing (i) descriptions of the deal process; (ii) Tesla's rationale for the Acquisition; (iii) Tesla's estimate of the cost synergies generated by the Acquisition; (iv) the fairness opinions of both Lazard and Evercore and their valuations of SolarCity; (v) details of the Directors' financial holdings in related companies; and (vi) the risks of the liquidity challenges faced by SolarCity.[38] The final joint Tesla and SolarCity Proxy, which incorporated by reference the recent filings of both public companies, was filed on October 12, 2016, more than a month before the stockholder vote.[39]

Tesla stockholders had the benefit of a vigorous public discussion regarding the merits of the transaction, including extensive public scrutiny and

[38] *See* JX1952, Tesla Preliminary Proxy (Form S-4).

[39] *See* JX2121, Proxy at 182-83.

mixed commentary from press and industry analysts. Credit Suisse, for example, stated that the deal "could be a steal for TSLA shareholders".[40] Weeks before the stockholder vote, Argus Research observed: "Tesla's offer represented about half of SolarCity's market value in mid-2015. The relatively low offer reflects SolarCity's slower growth and complex financial structure, as well as the increased scrutiny of government incentives for rooftop solar installations."[41]

But there was notable negative reaction as well. For example, in October 2016, Barclays expressed doubt about the deal: "We remain skeptical of the merits of the deal – cash burn is already intense at Tesla, the solar market is challenging . . . the addition of SolarCity adds about ~$200mn annually to Tesla's already prodigious capital funding needs."[42] A New York Times DealBook column captured the range of perspectives on the deal:

> "[The Acquisition] seems to be a deal where there is no other buyer and where Mr. Musk stands heavily on both sides of the deal, appearing to bail out a flailing solar company in which he happens to own a 21.9 percent stake. Or perhaps this is a deal where, once again, some just do not understand Mr. Musk's genius."[43]

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[40] JX1397, TESLA00309635 at '635.

[41] JX2211, Argus, *Tesla Motors, Inc.*, Oct. 31, 2016, at 2.

[42] JX2111, Barclays, *Three Hashtags Heading into 3Q*, Oct. 10, 2016, at 1, 8.

[43] JX1976, *Lawyers Burnish Tesla's Deal for SolarCity*, N.Y. TIMES, Sept. 2, 2016.

Given the mixed reactions, the Acquisition's approval by Tesla's disinterested Tesla stockholders—62% of whom were sophisticated institutional investors with fiduciary duties to maximize the interest of their clients—was far from guaranteed. Tesla hired Innisfree to advise on the stockholder vote and facilitate stockholder outreach. Innisfree informed Tesla that Tesla's four largest stockholders (Fidelity, T. Rowe Price, Baillie Gifford and Vanguard) would "conduct their own analyses and vote without regard to recommendations by proxy advisors".[44] As noted above, Denholm took a lead role in advocating for the Acquisition with investors, including the major institutional investors.

The proxy advisory services were also mixed. Glass Lewis recommended that Tesla stockholders vote against the Acquisition.[45] Glass Lewis expressed blunt skepticism that the Acquisition would lead to a market-dominating, vertically-integrated sustainable energy company, characterizing it as perhaps being "more realistically . . . a complex, high-risk bail-out of SolarCity by Tesla, the former of which is increasingly loss-making and cash flow negative, with seemingly limited stand-alone viability".[46] The leading proxy advisory

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[44] JX2015, EVR-TESLA_00232502 at '503.

[45] JX2247, TESLADIR0048999 at '007. The Glass Lewis report is discussed below in further detail. (*See* Section III.A.2.)

[46] *Id.* at '002.

service Institutional Shareholder Services ("ISS") ultimately recommended that stockholders vote in favor of the Acquisition, after Tesla presented the merits of the deal to ISS. ISS described the deal as "a necessary step towards [Tesla's] goal of being an integrated sustainable energy company."[47] This support was a "[h]uge win" for Tesla.[48]

The stockholder vote took place on November 17, 2016. More than 88% of the total votes cast were in favor of the Acquisition.[49] Removing SolarCity directors and executives (Musk, Gracias, and Straubel), the disinterested stockholder vote still succeeded by nearly 85%.[50] That is "substantial evidence of fairness". *Cinerama*, 663 A.2d at 1176 (affirming finding that "tender by an overwhelming majority of [target]'s stockholders to be tacit approval" of price and "substantial evidence of fairness").

B. The Acquisition Was Consummated at a Fair Price

When reviewing a transaction for entire fairness, the Court considers both fair process and fair price. "The paramount consideration, however, is whether the price was a fair one." *Ams. Mining*, 51 A.3d at 1244.

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[47] JX2242, EVR-TESLA_00217301 at '303.

[48] JX2250, TESLA00040230.

[49] JX2320, Tesla Current Report (Form 8-K) at 2 (Nov. 17, 2016).

[50] *Id.*

An assessment of fair price requires the Court to consider "the economic and financial considerations of the proposed merger, including all relevant factors: assets, market value, earnings, future prospects, and any other elements that affect the intrinsic or inherent value of a company's stock." *Cinerama*, 663 A.2d at 1162 (citation omitted). Fair price does not mean the lowest price an acquiror could extract; rather, it means a price "that a reasonable [transaction participant], under all of the circumstances, would regard as within a range of fair value." *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1134, 1143 (Del. Ch. 1994); *see Kahn v. Tremont Corp.*, 1996 WL 145452, at *1 (Del. Ch. Mar. 21, 1996) ("A fair price is a price that is within a range that reasonable men and women with access to relevant information might accept."), *rev'd on other grounds*, 694 A.2d 422 (Del. 1997). The particular components of value relevant to analyzing an acquisition are: "the going concern value of the firm as currently organized and managed and the 'synergistic value' to be created by the changes that the bidder contemplates." *Cinerama*, 663 A.2d at 1143.

Here, the evidence will show that (i) the Acquisition price, however measured, was fair, and (ii) SolarCity was plainly solvent and had various options for addressing its short-term liquidity issues.

1. The Acquisition Price Was Fair Under Any Appropriate Valuation Methodology

At the time of the deal, multiple parties, including the deal parties and their financial advisors, valued SolarCity using a variety of well-known valuation methods. SolarCity has since been analyzed by Defendant's valuation expert Professor Fischel using contemporaneous data and conservative assumptions. Each of these analyses concludes that SolarCity had significant positive value and that the Acquisition price was within or below applicable valuation ranges for SolarCity.

(a) Contemporaneous, Market-Based Evidence Will Show That the Acquisition Price Was Fair

Market evidence is the most appropriate starting point for determining whether the Acquisition consideration was fair. It is undisputed that SolarCity traded in a well-functioning, efficient market. The evidence will show that all material information pertinent to SolarCity's valuation—including the very liquidity concerns that Plaintiffs contend were undisclosed—was known to market participants. (*See* Section III.A.) As this Court has held, the "fact that a transaction price was forged in the crucible of objective market reality (as distinguished from the unavoidably subjective thought process of a valuation expert) is viewed as strong evidence that the price is fair." *Van de Walle v. Unimation, Inc.*, 1991 WL 29303, at *17 (Del. Ch. Mar. 7, 1991).

Prior to the Acquisition announcement, the market viewed SolarCity as having significant positive value. Tesla announced its offer to acquire SolarCity after trading hours on June 21, 2016; at closing that day, SolarCity's unaffected stock price was $21.19 per share, and SolarCity had a market capitalization of approximately $2.1 billion.

The final Acquisition consideration—0.110 Tesla shares for each share of SolarCity stock—was more than fair to Tesla stockholders. In dollar terms, the Acquisition consideration was $24.16 at the time the Acquisition was announced in June 2016 (based on the definitive terms and Tesla's unaffected stock price) and $20.35 at the time the Acquisition closed in November 2016 (based on Tesla's closing price the last trading day prior to close).[51]

Professor Fischel will testify at trial that the Acquisition price was consistent with contemporaneous market valuations of SolarCity, accounting for a modest premium to standalone value consistent with market premiums paid in

[51] Because Tesla's stock price fluctuated, the dollar value of the Acquisition consideration fluctuated over time. At closing, Tesla issued approximately 11.1 million shares of common stock, which were exchanged for all of the then-outstanding common stock of SolarCity. Tesla's stock price immediately prior to closing was just over $185 per share. Thus, at the time the Acquisition closed, the Acquisition price was $2.1 billion. *See* JX2443, Tesla Annual Report (Form 10-K) at 73 (Mar. 1, 2017). The Acquisition was widely reported as a $2.6 billion deal based on expectations regarding Tesla's stock price at the time it was announced.

precedent transactions. In particular, Professor Fischel will testify that SolarCity's stock price was consistent with other market indications of value because:

- Equity research analysts covering SolarCity prior to the announcement of definitive Acquisition terms valued it at a median price target of $24.55 per share (as discounted to account for forward price targets), a price that implies effectively *no* premium to Tesla's offer.

- Even the analysts Plaintiffs cite in support of their allegation that the Acquisition was a "bailout of SolarCity" valued SolarCity at a median price target of $20.35 per share (as discounted to account for forward price targets), which is very similar to SolarCity's unaffected standalone stock price.

- Those analysts who revised their price targets in light of the release of the Proxy (including those cited by Plaintiffs) valued SolarCity at a median price target of $16.20 per share (as discounted to account for forward price targets). Even if only these analyst targets are considered, the price Tesla paid reflects a reasonable premium well within precedential range, and that is before accounting for any synergies of the combination.

Fischel will further testify that the Acquisition consideration reflects a modest premium, consistent with premiums paid in similar transactions (whether computed upon the announcement of definitive terms or at closing, and using various methodologies to compute price at closing), as illustrated in the following chart:

Premium Paid					
Time	**Calculation Method**	**SCTY Standalone**	**Acquisition Price**	**Implied Premium**	**Range**
Announcement	Unaffected	$21.19	$24.16	14.0%	Below median
Closing	Median Change in Comparables	$16.16	$20.35	25.9%	Within range
Closing	Analysts	$16.20	$20.35	25.6%	Within range

Tesla's financial advisor, Evercore, contemporaneously reached a similar conclusion. In its fairness opinion, Evercore conducted a precedent premiums paid analysis, in which it compared the premium implied by Tesla's offer for SolarCity to the premiums associated with 17 precedent transactions. Evercore concluded that the Acquisition exchange ratio (0.110) was below the bottom end of the reference range of exchange ratios implied by the selected transactions (0.115-0.133).[52] This analysis, including the selected precedent transactions, was disclosed in the Proxy.[53]

(b) Cash Flow Evidence Will Show That the Acquisition Price Was Fair

Cash flow analyses, when conducted correctly, can be a useful valuation tool to corroborate market prices. Here, such analyses will confirm what the market evidence shows: that the Acquisition price was fair. In particular, the

[52] JX2121, Proxy at 80.

[53] *Id.* at 80.

evidence at trial will show that the Acquisition price (i) was within or below the bottom end of the valuation ranges implied by Evercore's contemporaneous sum-of-the-parts and whole company DCF analyses, and (ii) is consistent with the conservative DCF analysis conducted by Defendant's expert Professor Fischel.

Evercore's analyses, which factored in all material information concerning SolarCity's financial condition, demonstrate that Tesla paid a fair price for SolarCity. In connection with its fairness analysis, Evercore conducted (i) a DCF analysis of SolarCity as a whole ("WholeCo"); and (ii) a sum-of-the-parts DCF analysis ("SOTP") in which Evercore, consistent with SolarCity's business model and internal reporting, separately valued the DevCo and PowerCo segments of SolarCity before adding them together. Evercore's SOTP analysis excluded all non-recurring ITC cash flows from the terminal period.

Evercore conducted its WholeCo and SOTP DCF analyses across (i) management projections provided by SolarCity (the "Unrestricted Liquidity Case"), and (ii) the Revised Sensitivity case (using conservative assumptions to account for SolarCity's liquidity constraints). As shown in the chart below, each of Evercore's analyses concludes that the Acquisition exchange ratio (0.110) was either below the bottom end of, or within, the resulting valuation ranges.

Results of Evercore Analyses[54]				
Analysis	**Case**	**Implied Share Price**	**Implied Ratio Range**	**Actual Ratio to Implied Range**
WholeCo DCF	Unrestricted Liquidity	$37.51-$61.73	0.124-0.699 (IBES)[55]	Below
			0.083-0.464 (GSER)	Within
	Revised Sensitivity	$24.76-$42.72	0.082-0.484 (IBES)	Within
			0.055-0.321 (GSER)	Within
SOTP DCF	Unrestricted Liquidity	$31-$46	0.135-0.200	Below
	Revised Sensitivity	$16-$26	0.068-0.115	Within

Professor Fischel's analysis further confirms the fairness of the Acquisition price. Professor Fischel conducted a sum-of-the-parts analysis of SolarCity, consistent with the DCF analyses employed by both Evercore and Lazard. Fischel used projections by SolarCity management specifically designed to account for SolarCity's liquidity constraints. Among other things, those projections did not include any residential ITC-related cash flows in the terminal period, rendering his analysis conservative (more so than the analyses by Plaintiffs' experts). Even with these conservative assumptions, Fischel's SOTP

[54] JX1737, TESLA00001115 at '134-'137.

[55] In its WholeCo DCF analysis, Evercore computed indicative exchange ratio ranges using two different sets of projections for valuing Tesla, those prepared by Goldman Sachs Equity Research analysts ("GSER") and those prepared by the International Brokers' Estimate System ("IBES").

DCF analysis yields a standalone valuation range of $16.66 to $20.85, which demonstrates that the Acquisition price reflects a modest premium within precedential range.

2. Plaintiffs Conflate Short-Term Liquidity Constraints with Insolvency

Plaintiffs would have the Court ignore this contemporaneous evidence of how Tesla and everyone else—SolarCity, SolarCity's bank lenders, Evercore, Lazard, equity analysts, the market—valued SolarCity. Instead, Plaintiffs' valuation expert, Ronald Quintero, concludes that SolarCity was insolvent and therefore values SolarCity as if it needed to be liquidated, and its assets sold off at steep discounts in a fire sale. Based on this erroneous premise, Quintero opines that SolarCity's equity would be worthless. Quintero's opinions, which conflate insolvency with short-term liquidity issues, are wholly unsupportable.[56]

[56] Quintero alternatively posits that SolarCity was worth either $10.23, $6.14 or $1.59 per share—each drastically less than the company's contemporaneous market valuation—based on flawed WholeCo DCF and net asset value methodologies. Even these "counterfactuals" still effectively (and improperly) treat SolarCity as a "distressed" target. Quintero's DCF is also unreliable because, among other reasons, it (i) assumes SolarCity would not make up or otherwise replace any cash flows associated with the Solar ITC phase down (contrary to the evidence); (ii) fails to account for the retained value in PowerCo; (iii) fails to account for the conservative SolarCity projections; and (iv) is inconsistent with all contemporaneous market evidence.

The evidence unequivocally will establish that at the time of the Acquisition, SolarCity not only was solvent but had significant value:

SolarCity's Business Model: Much of SolarCity's business involved leasing solar panels to consumers, requiring significant upfront expenditures to cover the purchase, sale and installation of the solar systems. In exchange for incurring those upfront costs, SolarCity received long-term cash flows; customers paid for long-term solar panel leases and solar energy purchase contracts, which generally had 20-year terms, with an option to extend for another 10 years. SolarCity's installation of solar energy systems also generated certain valuable tax benefits, including accelerated depreciation and federal income tax credits (such as the Solar ITC),[57] and various other rebates and cash incentives from local and state government programs. Though they required significant upfront expenditure, SolarCity's installations were NPV positive because of the long-term, recurring cash flows they produced.

SolarCity monetized the long-term recurring cash flows through a variety of innovative financing structures, including special purpose vehicles

[57] At the time of the Acquisition, the Solar ITC was set to continue for another 3 years at full strength (until 2020), before gradually phasing down the tax credits available to certain installations. The evidence at trial will establish that SolarCity had the ability successfully to operate in a reduced Solar ITC environment, just as it positioned itself to do when the Solar ITC was expected to (but did not) phase out entirely in 2015.

known as variable interest entities ("VIEs") with third-party investors. In a typical VIE structure, SolarCity contributed assets (*i.e.*, contractual rights to its long-term customer payments and/or tax credits and incentives) to a bankruptcy remote subsidiary fund in exchange for upfront cash from third-party investors, who received an interest in the long-term recurring customer payments, with SolarCity retaining the residual interest in those cash flow streams. Under applicable accounting rules, the VIEs' assets and liabilities are consolidated into SolarCity's balance sheets for its financial reporting. This meant that the debt of separate, subsidiary entities that was nonrecourse to SolarCity (and which was completely serviced by the cash flows of those entities) was nevertheless shown on SolarCity's balance sheet as SolarCity debt, skewing the company's financial picture for anyone who did not appreciate the nonrecourse nature of the VIE debt.

Consistent with this structure, SolarCity had two internal operating segments: "DevCo", which acquired customers, installed systems, and conducted the up-front monetization and securitization of future cashflows, and "PowerCo", which operated and maintained previously installed systems and received the residual cashflows from the portion of future cashflows not monetized upfront (referred to as "retained" value). In the event that SolarCity faced extreme liquidity constraints (and it never did), SolarCity had the ability to suspend DevCo's growth-focused expenditures, while PowerCo would continue to receive

long-term recurring cash flows from customer payments on existing solar energy systems.

SolarCity's Balance Sheet: At the time of the Acquisition, SolarCity had net assets on its consolidated balance sheets of approximately $1.5 billion. That is, SolarCity's (and its subsidiaries') assets exceeded SolarCity's (and its subsidiaries') liabilities by $1.5 billion. And SolarCity's CEO at the time of the Acquisition, Lyndon Rive, will testify that SolarCity's consolidated balance sheets actually *understated* SolarCity's financial health because they included considerable debt from its bankruptcy-remote subsidiaries (the VIEs) that was serviced by the subsidiaries' cash flows and that was non-recourse to SolarCity itself. In fact, more than half ($1.7 billion) of Solar City's total debt ($3.2 billion) was non-recourse. Lyndon Rive will further testify that SolarCity never believed it was at risk of insolvency and never, for example, retained bankruptcy or restructuring advisors.

SolarCity's value will be further demonstrated by contemporaneous analysis conducted by KPMG. In connection with the Acquisition, Tesla retained KPMG to conduct a purchase price allocation (*i.e.*, to allocate the Acquisition consideration to the acquired assets and liabilities). Plaintiffs' expert Quintero relies heavily on KPMG's analysis for his (erroneous) conclusion that SolarCity was insolvent at the time of the Acquisition. In fact, KPMG's determination that

SolarCity had negative goodwill (the net assets Tesla acquired exceeded the consideration Tesla paid for those assets) undermines Quintero's conclusion.

Retained Value: As of 2016, the net present value to SolarCity of the retained cash flows residing in PowerCo from solar energy systems already installed and under contract exceeded $2.2 billion, *more than Tesla's actual purchase price of $2.1 billion in Tesla stock.* This retained value was valuable, unencumbered collateral that could be monetized in the event SolarCity needed to generate cash in the short term. But SolarCity never needed to monetize these cash flows because it was able to address its liquidity constraints through other means.

Cash Flow Management: At the time of the Acquisition, SolarCity was capable of managing the cash flow constraints it was facing—just as it always had—to navigate short-term liquidity tightness. As Tanguy Serra, SolarCity's then-CFO, will testify, SolarCity (i) used highly conservative liquidity projections to facilitate careful cash management; (ii) never breached its debt covenants (and even if it did, would still have at least $100 million on hand); (iii) was never projected to breach its debt covenants; (iv) never believed it was in serious jeopardy of tripping its debt covenants; (v) would likely not have been forced into default by its lenders even if it had breached its covenant; and (vi) had various ways of managing its cash flows to prevent any covenant violations.

Options To Address Liquidity Issues: The evidence will also establish that SolarCity had an array of available options to generate cash (if necessary) in response to short-term liquidity needs, none of which would have resulted in insolvency or liquidation. As Rick Van Zijl, Defendant's capital markets expert, will testify, SolarCity (i) had consistently been able to access the capital markets since its IPO; (ii) could have raised additional capital in the equity markets if it needed to do so; (iii) had in fact raised $2.6 billion in the capital markets in 2015 and the first half of 2016 (before even accounting for tax equity transactions); and (iv) could have securitized or borrowed against the roughly $2.2 billion in retained value in SolarCity's residual VIE interests.

III. Tesla's Stockholders Were Fully Informed

The evidence at trial will demonstrate that Tesla stockholders were fully informed of all material facts relevant to the Acquisition. "An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote." *Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, 944 (Del. 1985) (quoting *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)). In other words, an omitted fact is material only if it would have "significantly altered the total mix of information made available". *Arnold v. Soc'y for Sav. Bancorp, Inc.*, 650 A.2d 1270, 1277 (Del. 1994) (quoting *TSC Indus.*, 426 U.S. at 449).

A. All Material Facts Regarding SolarCity's Financial Condition Were Disclosed

Plaintiffs characterize SolarCity as a highly distressed company, unable to function as a going concern but for the Acquisition, "at serious risk of breaching the liquidity covenants in its revolver in 2016", with "limited options for outside financing" and "on the brink of insolvency".[58] Plaintiffs' allegations are unsupported. SolarCity was not insolvent. Far from it. SolarCity had billions of dollars in value, by various measurements, and was able to raise billions of dollars in the capital markets, including in 2016. It never breached its liquidity covenant, it never defaulted on its payment obligations and it never contemplated bankruptcy. SolarCity's liquidity challenges at the time of the Acquisition were largely due to its capital-intensive and high-growth business model, which could have been adjusted if the deal had not closed. And Tesla's stockholders were well aware of SolarCity's financial condition, including its liquidity circumstances, before voting on the Acquisition.

1. SolarCity's Financial Situation, Including the Short-Term Liquidity Constraints It Was Facing, Was Fully Disclosed

Prior to the Acquisition vote, Tesla stockholders had more than adequate information about SolarCity's financial situation. As explained in detail

[58] SJ Op. at 21.

in summary judgment briefing,[59] SolarCity's 10-K and 10-Q filings (which were incorporated by reference into the Proxy[60]) disclosed its key financial information, including (i) the existence and terms of SolarCity's covenants; (ii) the potential consequence of a breach (cross default and acceleration); (iii) SolarCity's quarterly cash balances; and (iv) SolarCity's debt maturities. These disclosures included information regarding SolarCity's liquidity situation. For example, SolarCity's quarterly report for the Q2 2016 disclosed that SolarCity had $145.7 million in cash on hand but had spent $389 million on operating activities as of the first half of 2016.[61]

The Proxy—filed in preliminary form by Tesla on August 31, 2016 and in definitive form by Tesla and SolarCity on October 12, 2016—disclosed, among other things, that SolarCity's liquidity situation was a significant topic of discussion between and among the deal parties and their advisors, including that:

- Negotiations focused on Tesla's rights "in the event that . . . SolarCity were to experience a default or another similar event under its existing financing arrangements";[62]

[59] Defs.' SJ Opp. § IV.A, Dkt. 315; Defs.' SJ Reply § IV.A, Dkt. 323.

[60] JX2121, Proxy at 181-83.

[61] JX1854, SolarCity Quarterly Report (Form 10-Q) at 5-6 (Aug. 9, 2016).

[62] *E.g.*, JX2121, Proxy at 65.

- SolarCity's Special Committee and its advisors frequently were discussing "SolarCity's near-term operational and liquidity position",[63] "alternative measures to generate additional near-term liquidity for SolarCity"[64], "SolarCity's liquidity needs and financing efforts"[65] and "near-term liquidity needs";[66] and

- Both financial advisors developed alternative, downside cases for SolarCity to address "certain liquidity constraints"[67] and SolarCity's projections showed only $10 million on consolidated unlevered free cash flow for the second half of 2016 and negative $189 million for 2017.[68]

2. Market Reaction Demonstrates That SolarCity's Financial Condition Was Well Known Prior to the Acquisition Vote

SolarCity's financial situation, including its short-term liquidity constraints, was a key topic in market commentary leading up to and during the Acquisition, including by analysts employed by the very institutions who voted in support of the Acquisition. Although Defendant disagrees with much of the commentary, the important point is that it was widely available for investors' consideration and was therefore factored into the market price.

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[63] *Id.* at 61-62.

[64] *Id.* at 63.

[65] *Id.* at 67.

[66] *Id.* at 69.

[67] *Id.* at 90.

[68] *Id.* at 105.

For example, after SolarCity's Q1 10-Q was released on May 10, 2016, Avondale Partners noted that SolarCity "struggles to grow within cash flow" and that "[c]apital constraints have clearly begun to impact the company's ability to compete".[69] Credit Suisse commented that if SolarCity lost access to capital, it "would have to dramatically cut headcount to remain solvent".[70]

After Tesla's June 21, 2016 announcement of the Acquisition proposal, Cowen and Company noted that "SolarCity has faced challenges and delays in raising capital, both through tax equity, syndication and other means."[71] Credit Suisse remarked that SolarCity was a "vociferous consum[er] of capital (SCTY needs ~$2b this year)" and indicated a risk that SolarCity would be "paralyzed without access to the capital markets . . . during the pending acquisition (this was the cause of massive issues that arose at Vivint Solar during the pending acquisition by SunEdison)".[72] Needham & Company expressed a belief that

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[69] JX1077, Avondale Partners, *SCTY – 1Q16 Review – Downgrade to MP*, May 10, 2016, at 1.

[70] JX1068, Credit Suisse, *Who Am I Now? Existential Questions Raised with Weak Bookings, Guidance Cut*, May 9, 2016, at 2.

[71] JX1270, Cowen and Company, *Keeping it All in the Family: Tesla Offers All-Stock Deal To Acquire SolarCity*, June 21, 2016, at 1.

[72] JX1271, Credit Suisse, *Powerhouse: Tesla Proposes Acquisition of SolarCity*, June 21, 2016, at 1.

"consummating the deal would not alleviate SCTY's near-term challenges", including "the huge funding need".[73]

Following the release of SolarCity's Q2 10-Q on August 8, 2016, Oppenheimer noted that SolarCity's "near-term financing requirements remain" in light of the fact that SolarCity had only secured funding commitments for about half of its installation guidance for the second half of 2016.[74] UBS commented on SolarCity's "declining liquidity" and stated its view that "[w]hile mgmt explains the TSLA bid is responsible for recent liquidity decline (down towards $146 Mn as of 2Q end and $215 Mn of late), we see the latest change in the definition of the secured credit facility coverage ratio as further illustrative of these pressures (shifting towards a definition which includes only recourse debt)."[75]

Following the August 31, 2016 Preliminary Proxy, UBS noted that "the company's $146M of cash prior to the recent bond raise suggests working capital could be tight as installs ramp into the back half of the year if the company is constrained from further capital".[76] UBS viewed "the paucity of debt deals and

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[73] JX1297, TESLADIR0040483.

[74] JX1864, Oppenheimer, *Preparing for the Transition*, August 9, 2016, at 1.

[75] JX1881, UBS, *Lingering Issues Add to Merits of Deal*, August 11, 2016, at 1.

[76] JX1983, UBS, *SolarCity Corp, Perusing the Disclosures*, September 6, 2016, at 1.

securitizations for SCTY as cautionary" and highlighted that SolarCity's "Management Recognizes Liquidity Challenges in downside case" (referring to the projections provided to Lazard).[77] Goldman Sachs noted a "heightened focus on liquidity post 2Q16 results ($145mn of cash) and a Solar bond sale primarily to related parties" and suggested that SolarCity's recent cash equity transaction would "provide cash support as the TSLA acquisition process plays out and help SCTY stay above a minimum liquidity covenant".[78] Of course, the analyst reports were not only publicly available but were themselves based on SolarCity's public disclosures.

On November 4, 2016, two weeks prior to the stockholder vote on the Acquisition, Glass Lewis, one of the largest proxy advisory firms, criticized the deal and recommended that stockholders vote against it.[79] In its recommendation, Glass Lewis publicly referred to the very information that Plaintiffs contend was concealed from stockholders when they later voted. Most notably, Glass Lewis issued the following opinions regarding the Acquisition:

- The Acquisition "arrangement may more realistically represent a complex, high-risk bail-out of SolarCity by Tesla, the former of which

[77] *Id.*

[78] JX2005, TESLA00012522.

[79] JX2247, TESLADIR0048999.

is increasingly loss-making and cash flow negative, with seemingly limited stand-alone viability";[80]

- The Acquisition is "a hastily-executed and marginally disguised effort to save a Musk-affiliated enterprise from possible insolvency";[81]

- "SolarCity['s] . . . rapidly deteriorating operating metrics" and "complex and unwieldy debt burden" means it is in need of "propping up";[82]

- "Much of our remaining skepticism . . . relates to the rather uncomfortable relationship between SolarCity's near-crippled financial position and Mr. Musk's personal interest—both direct and indirect—in preventing the rather pronounced, public collapse of an affiliate enterprise";[83]

- SolarCity has "well-documented free cash flow issues—i.e. a five-year cumulative burn of approximately $5,180.0 million, including a total outlay of approximately $2,632.1 million for FY2015—deteriorating operating metrics, meager cash position (i.e. $145.7 million as of June 30, 2016)";[84] and

- "[E]ven if the firm made no material capital investments and was unable to obtain additional capital, the simple operation of SolarCity's core business would drain the remainder of firm's liquid assets in less than three months."[85]

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[80] *Id.* at '002.

[81] *Id.* at '004.

[82] *Id.* at '002.

[83] *Id.* at '007.

[84] *Id.* at '005.

[85] *Id.* at '006.

Again, Defendant flatly disagrees with Glass Lewis's (and Plaintiffs') characterizations of the Acquisition and SolarCity. But there can be no dispute that they, and the facts underlying the characterizations, were publicly available to Tesla's stockholders prior to the vote.

3. There Is No Basis for Any Disclosure Claim Regarding the EY Analysis Regarding SolarCity

Plaintiffs contend that Defendant failed to disclose that SolarCity's auditors, Ernst & Young ("EY"), purportedly determined that SolarCity could not operate as a going concern on a standalone basis. As described above, the evidence at trial will demonstrate that all material information regarding SolarCity's financial condition was disclosed to Tesla's stockholders prior to their vote on the Acquisition in the Proxy and documents it incorporated by reference. In any event, there was no disclosure deficiency regarding the EY analysis for several reasons.

The analysis Plaintiffs reference was only a *draft*. In the final version, EY concluded that it "did not identify any events or conditions that lead [EY] to believe there was substantial doubt about [SolarCity's] ability to continue as a going concern for a reasonable period of time"[86], and SolarCity ultimately was issued an unqualified audit for fiscal year 2016.

[86] JX2450, EY-TES-EM-006468 at '497.

Even if EY had concluded that SolarCity was not a going concern (and it did not), Defendant could not have disclosed EY's analysis in connection with the Acquisition *because it did not exist at the time of the Acquisition*, even in draft form. The draft going concern analysis Plaintiffs cite is dated January 2017 (and concerns fiscal, and calendar, year 2017, after the Acquisition closed), and therefore could not have been disclosed before a November 2016 Acquisition vote.

In addition, the draft EY analysis contains speculative and highly conservative assumptions on various issues, including SolarCity's ability to adjust its financial priorities to ensure it could pay its debts as they came due. In particular, the draft EY analysis assumes that (i) SolarCity would be unable to raise any additional capital, and (ii) SolarCity's entire revolver would in fact come due in FY2017. Each of those assumptions is unsupported by the facts.

The evidence at trial will show that SolarCity was not at risk of insolvency at the time of the Acquisition. Among other options, SolarCity had more than adequate access to the capital markets; SolarCity could issue debt, conduct an equity raise, or continue to monetize future cash flows associated with solar energy installations through tax equity and cash equity transactions. And, if needed, SolarCity almost certainly could have (i) gotten a waiver from its lenders of any covenant breach, or (ii) amended and extended its revolver (so it would not be called due in its entirety in December 2017). SolarCity's long history with its

lenders (including 11 amendments to its revolver since 2013) fully supports these options being available to SolarCity. But SolarCity never had to pursue either one, because SolarCity never breached its liquidity covenant.

B. All Material Facts Regarding Musk's Involvement in the Acquisition Were Disclosed

1. Musk's August 1, 2016 Statement Regarding Recusal Was Accurate

On August 1, 2016, Tesla held a conference call to discuss the Acquisition, following the announcement of the merger agreement. During that call, Musk was asked about the go-shop provision in the agreement. He responded, in part: "I should point out I had no role in establishing this valuation for the offer that was made . . . . I was fully recused from the matter, so I know about as much as you do about how this price was obtained."[87] Plaintiffs contend that this statement is misleading. But Plaintiffs take the statement out of context. Read in context, it is accurate and consistent with the subsequently issued Proxy.

Musk's statement specifically refers to the July 28, 2016 Tesla offer that SolarCity accepted. The evidence at trial will establish that Musk had nothing to do with setting or developing Tesla's counterproposal to SolarCity of an exchange ratio of 0.110 (which was then accepted by SolarCity). In fact, Musk did not even attend the July 27 meeting at which the Tesla Board approved the 0.110

[87] JX1805, August 1, 2016, Tesla/SolarCity Conference Call Tr., at 6.

offer.[88] In addition, the transcript of the August 1 call included a notice, under the bolded heading "Important Additional Information and Where to Find It", informing stockholders that Tesla would file the Proxy and urging them to read it carefully.[89]

Even if there were a discrepancy between the call transcript and the subsequent S-4 disclosures (and there is not), it should not be the case that a passing comment on a live call renders inadequate a clear written statement in the subsequent definitive Proxy soliciting stockholder action.[90]

2. The Proxy Accurately Describes Musk's Involvement in the Acquisition

Plaintiffs contend that the Proxy itself does not accurately describe Musk's involvement in the Acquisition. That allegation is also wrong.

The Proxy discloses that Musk was recused only "from any vote by the Tesla Board on matters relating to a potential acquisition of SolarCity, including evaluation, negotiation, and approval of the economic terms of any such

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[88] JX1702, TESLA00001739.

[89] JX1805.

[90] Indeed, Plaintiffs' position cannot be reconciled with this Court's long-standing practice of remedying disclosure issues by ordering supplemental disclosures.

acquisition."[91] Plaintiffs urge the Court to construe this phrase as a representation that Musk was recused from—and not involved in—*any* aspect of the evaluation, negotiation or approval of the economic terms of the Acquisition. But the Proxy is clear that Musk was recused "from any *vote* by the Tesla Board [relating to evaluation, negotiation, and approval of the economic terms of] a potential acquisition of SolarCity".[92]

Moreover, even if Plaintiffs would rewrite one sentence of a 183-page filing (not counting incorporated documents), Musk's involvement is clear from the surrounding text. The Proxy discloses that the Tesla Board decided that "the strategic vision, expertise and perspectives of . . . Musk . . . would continue to be helpful to the Tesla Board's evaluation of a potential acquisition . . . because of [his] involvement in the solar industry."[93] Providing his vision, expertise and perspective necessarily involved participating in discussions with his fellow Directors regarding a potential acquisition. That is what he did. And the Proxy

[91] JX2121, Proxy at 59.

[92] Indeed, the Proxy later confirms that Musk was recused "from any vote by the Tesla Board on matters related to a potential acquisition of SolarCity, including *approval of* the economic terms of any such acquisition". JX2121, Proxy at 106 (emphasis added).

[93] *Id.* at 59.

discloses that Musk attended at least portions of various Board meetings about the Acquisition.[94]

Musk's participation in the Acquisition was entirely consistent with the Proxy's description. Musk did not participate in any vote about the Acquisition. Nor did he attend the portions of Tesla Board meetings concerning such votes. The Proxy discloses that Musk was on occasion asked by the non-recused Board members to provide his technical and strategic insights regarding the Acquisition, consistent with his role as Tesla's CEO.[95] Relatedly, the Proxy discloses that he participated in certain calls with Evercore to facilitate timely responses by SolarCity to Tesla's diligence requests. The evidence will show that he never modified, or even suggested modifications to, any Acquisition-related document prepared by Evercore.

C. All Material Facts Regarding the Solar Roof Were Disclosed

Tesla's Solar Roof product is a unique solar energy system in which a consumer's roof generates electricity through Solarglass tiles (small, weatherproof, shingle-sized panels containing solar cells). The Solar Roof is revolutionary. It provides all of the benefits of traditional solar energy systems while eliminating the aesthetic drawbacks inherent in those systems (because there are no obvious,

[94] *E.g.*, *id.* at 64, 66, 67.

[95] *Id.* at 66-67.

separate solar panels mounted to the roof). Tesla is currently producing and installing Version 3 of the Solar Roof, which Tesla debuted at a price point for most consumers lower than the cost of installing a new roof and traditional solar panels. At the time of the Acquisition, the Solar Roof was in development at SolarCity.

Tesla's (and SolarCity's) public statements regarding the Solar Roof at the time of the Acquisition were accurate and, where applicable, appropriately qualified as forward-looking goals.

SolarCity first publicly discussed the Solar Roof on its Q2 2016 earnings call, during which Musk and the Rives revealed that SolarCity was working on a new solar roof product, which was a "quite a difficult engineering challenge", but "one of the things [Musk was] really very excited about [for] the future".[96] In reaction to the announcement, technology news site Engadget observed: "SolarCity's Peter Rive says the company only started talking about roofing 'a couple of weeks ago,' but it's also going to be a key part of a ramp-up in production around the second quarter of 2017."[97]

Later, to help investors understand one aspect of the potential Tesla/SolarCity combination, the companies jointly presented the Solar Roof on

[96] JX1816, SolarCity Q2 2016 Earnings Call Tr. at 5-6.

[97] JX1875, *Elon Musk is Working on a Roof Made of Solar Panel*.

October 28, 2016.[98] During the presentation, Musk explained that Tesla was aiming to accelerate the advent to solar energy, with a three-part solution (which, as noted above, was set out in Tesla's 2006 strategy document): (i) solar power generation (the solar roof); (ii) storage (battery packs); (iii) and transportation (electric cars).[99] The stated *goal* was to develop solar roofs that "look better than a normal roof, generate electricity, last longer, have better insulation, and actually have . . . an installed cost that is less than a normal roof plus the cost of electricity".[100] Musk concluded the unveiling of the Solar Roof prototype by remarking "[t]hat's where we're headed, and I hope you agree that's the *future* we want."[101] At no point during the presentation did Musk discuss when the product would be available to consumers. Indeed, contemporaneous industry reports from the launch event noted that "[i]f shareholders were looking for a business strategy or a product launch timeline, they came away with less confidence than they started with."[102]

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[98] JX2199, Powerwall 2 and Solar Roof Launch at 15:18.

[99] *Id.* at 2:48.

[100] *Id.* at 2:02.

[101] *Id.* at 15:18.

[102] JX2200, *Elon Musk Unveiled a Solar Roof and Didn't Answer Any Pressing Questions*.

On the day of the presentation, Musk tweeted that "the Tesla solar roof is robust against any weather", which Plaintiffs allege would mislead investors to believe that the "product actually existed".[103] Given that a product launch timeline was not provided during the presentation, and Tesla described the product as its "vision" for the future, Musk's comments on Twitter would not mislead any reasonable investor as to the status of the solar roof.[104]

On November 1, 2016, Tesla published a Rule 425 Prospectus explaining that "the solar roof and Powerwall 2 *will* transform energy generation and storage".[105] The Prospectus stated that during the previous week's Powerwall and solar roof event, Tesla "shared [its] *vision* for how [it] can create this integrated sustainable energy *future*"—and it hopes readers agree that "this is the *future* we should all want".[106] This language was followed by a forward-looking statements disclaimer.[107] Similarly, Tesla's November 3, 2016 Rule 425

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[103] JX2193, @elonmusk, TWITTER (Oct. 28, 2016, 11:56 PM).

[104] JX2215; JX2234.

[105] JX2215 (emphasis added).

[106] *Id.* (emphases added).

[107] *Id.*

Prospectus described the solar roof as a component of Tesla's "vision" of the "future".[108]

Plaintiffs also claim that Musk falsely represented in a November 4, 2016 tweet and during the November 17, 2016 Special Shareholder Meeting that the "first solar deployments will start next summer" and that Tesla "expect[ed] to start doing solar roofs in volume in summer next year".[109] The evidence will show that these statements were consistent with Tesla's expectations at the time. For instance:

- On September 21, 2016, Peter Rive, then SolarCity's CTO, wrote: "For solar roof, we should *target* to just accept leads on [October 28] and guide towards quotes being available in December and installs starting in the summer of 2017 (pilot installs will start in q1)."[110]
- On October 21, 2016, Peter Rive wrote regarding the Solar Roof presentation, "Starting production in mid-2017."[111]
- October 25, 2016 Tesla talking points for the Solar Roof launch three days later state: "We will begin taking names for a waitlist starting on Oct. 28, 2016 and expect to begin production by mid-2017."

In fact, on May 10, 2017, Tesla began accepting online orders for the first version of the Solar Roof.[112] And on Tesla's August 3, 2017, Q2 2017

[108] JX2234.

[109] JX2241, @elonmusk, Twitter (Nov. 4, 2016, 7:55 AM); JX2313, Nov. 17, 2016 Tesla Extraordinary Meeting Call, at 4.

[110] JX2052, TESLA00047730 (emphasis added).

[111] JX2155, TESLA00131956.

earnings call, Musk and J.B. Straubel noted that they both had functioning Solar Roofs on their homes. As Musk explained: "Now it is a very challenging technical task to get this right, get the costs good, and streamline the installation process, ramp up the production. Again . . . it follows some of the S-curve to vehicles where it starts up very slow . . . but then it grows exponentially".[113] In October 2019, Tesla announced Version 3 of the Solar Roof, which Tesla was able to introduce at a price point lower than the cost of a roof and solar panels.

Each of these statements regarding the Solar Roof is true, and the material facts about it were disclosed to Tesla's stockholders.

IV. Plaintiffs' Ancillary Claims Will Fail at Trial

A. There Was No Unjust Enrichment

Plaintiffs' unjust enrichment claim is duplicative of their fiduciary duty claims.[114] Because the evidence at trial will demonstrate that Plaintiffs' fiduciary duty claims are meritless, the Court should "treat[] [the] duplicative fiduciary duty and unjust enrichment claims in the same manner" and enter judgment in Defendant's favor as to Plaintiffs' unjust enrichment claim as well.

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[112] JX2509, TESLA00034879.

[113] JX2541, Tesla Q2 2017 Earnings Call Tr. at 5-6.

[114] SJ Op. at 6 n.11.

See Gamco Asset Mgmt. Inc. v. iHeartMedia Inc., 2016 WL 6892802, at *2, *19 (Del. Ch. Nov. 29, 2016).

B. The Acquisition Was Not Wasteful

Waste claims are "difficult to prove", because, "[t]o recover on a claim of corporate waste, the plaintiffs must shoulder the burden of proving that the exchange was 'so one sided that no business person of ordinary, sound judgment could conclude that the corporation has received adequate consideration.'"[115]

Plaintiffs cannot come close to meeting that burden. As set forth above, SolarCity was a highly valuable company—with a market cap over $2 billion, and with retained value from already installed solar energy systems in excess of $2.2 billion—that was acquired by Tesla at a fair price, consisting of a modest premium to its market price.

In addition, judgment should be entered against Plaintiffs' waste claim because Tesla's fully informed, disinterested stockholders confirmed that the Acquisition was not a wasteful transaction when they voted to approve it. *See In re Merge Healthcare Inc. S'holders Litig.*, 2017 WL 395981, at *1 n.1 (Del. Ch. Jan. 30, 2017) ("[I]t is difficult to envision a majority vote in favor of a transaction

[115] SJ Op. at 34-35.

so unfavorable as to constitute waste."); *see Singh v. Attenborough*, 137 A.3d 151, 151-52 (Del. 2016) (mem.) ("[S]tockholders would be unlikely to approve a transaction that is wasteful.").

CONCLUSION

Tesla acquired the leading solar energy company to advance its long-standing strategy to become an integrated sustainable energy company with a virtuous circle of solar-powered batteries fueling electric vehicles and homes. That was an important step toward a sustainable future; it was also good business, and good for Tesla's stockholders. By any measure, the price Tesla paid for SolarCity was fair and the enormous benefits of the strategy to Tesla's stockholders are manifest. Plaintiffs' case is without merit, which the evidence at trial will establish.

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CERTIFICATE OF SERVICE

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