



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE TESLA MOTORS, INC.
STOCKHOLDER LITIGATION

Consolidated
C.A. No. 12711-VCS
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PLAINTIFFS' PRE-TRIAL BRIEF

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Acquisition or Bailout	The transaction between Tesla and SolarCity announced on August 1, 2016 and completed on November 21, 2016
Bank of America or BAML	Bank of America Merrill Lynch and its employees and subsidiaries
Buss	Brad W. Buss—Settling Defendant, Tesla director, and former SolarCity CFO
CEO	Chief Executive Officer
CFO	Chief Financial Officer
COO	Chief Operating Officer
Class	The certified class of Tesla stockholders, as defined in the Stipulated Order of Class Certification, dated April 18, 2019 [Trans. ID No. 63183922]
Credit Suisse	Credit Suisse Group AG
CTO	Chief Technology Officer
DBL	DBL Partners
DCF	Discounted Cash Flow
Defendant	Defendant Elon Musk
Denholm	Robyn M. Denholm—Settling Defendant and Tesla director
DFJ	Draper Fisher Jurvetson
E&Y	Ernst & Young LLP and its employees and subsidiaries
Ehrenpreis	Ira Ehrenpreis—Settling Defendant and Tesla director

Ellis	Bryan Ellis—SolarCity Senior Vice President of Finance and Analysis
Evanson	Jeffrey Evanson—Tesla Vice President of Investor Relations
Evercore	Evercore Partners L.L.C. and its employees and subsidiaries
Gracias	Antonio J. Gracias—Settling Defendant, Tesla director, SolarCity director, and SpaceX director
Initial Offer	Tesla’s first offer to acquire SolarCity at an exchange ratio of 0.122x to 0.131x Tesla shares for each SolarCity share, made on June 20, 2016
IPO	Initial Public Offering
Jurvetson	Stephen T. Jurvetson—Settling Defendant, Tesla director, and SpaceX director
Kendall	Don Kendall—SolarCity director and member of the SolarCity Special Committee
Kimbal	Kimbal Musk—Settling Defendant, Tesla director, and SpaceX director
The Kitchen	Restaurant services company founded by Kimbal Musk
KPMG	KPMG LLP
Lazard	Lazard Frères & Co. LLC and its employees and subsidiaries
Liquidity Covenant	The debt covenant imposed on SolarCity by its revolving credit facility, which required SolarCity to maintain an average monthly cash balance of approximately \$116 million at the time of the Merger
Liquidity Management Case	Downside SolarCity financial projections prepared by SolarCity management

Merger Agreement	The Agreement and Plan of Merger between Tesla and SolarCity, entered into on July 31, 2016
McBean	Courtney McBean—Managing Director at Evercore and Evercore’s 30(b)(6) designee
Model 3	Tesla’s mass-market electric car, announced in March 2016
Musk or Elon	Elon Musk—Defendant, Tesla Board Chairman, and Tesla CEO, SolarCity Board Chairman, and largest stockholder of each company
MW	Megawatt
PayPal	PayPal Holdings, Inc.
Pfund	Nancy Pfund—SolarCity director and member of SolarCity Special Committee
Plaintiffs	Plaintiffs Arkansas Teacher Retirement System, Roofers Local 149 Pension Fund, Oklahoma Firefighters Pension and Retirement System, KBC Asset Management NV, ERSTE-SPARINVEST Kapitalanlagegesellschaft m.b.H., Stichting Blue Sky Active Large Cap Equity Fund USA and Aaron Rocke
PIPE	Private investment in public equity
Proxy	The Form S-4 Registration Statement directed to Tesla and SolarCity stockholders and filed with the SEC dated August 31, 2016, as amended on September 19, 20, and 29, 2016 and October 7 and 11, 2016, and the Joint Proxy Statement/Prospectus filed pursuant to Rule 424(b)(3) on October 12, 2016, and amendments and supplements thereto
R&D	Research and development

Revised Sensitivity Case	Lowered SolarCity financial projections prepared by Evercore
Rive	Lyndon Rive—Musk’s cousin, and SolarCity co-founder, CEO, and director
The Rives	Lyndon Rive and Peter Rive (SolarCity director and CTO)
SEC	United States Securities and Exchange Commission
Serra	Tanguy Serra—SolarCity CFO and COO
Silevo	Silevo, Inc. (SolarCity subsidiary)
Solar ITC	Federal Solar Investment Tax Credit
SolarCity	SolarCity Corporation and its directors, employees, and subsidiaries
SolarCity Board	SolarCity board of directors at the time of the Acquisition
Solar Roof	Roof composed of solar tiles, which was in the conceptual stage at the time of the Acquisition
SPV	Special purpose vehicle
SpaceX	Space Exploration Technologies Corporation and its directors, employees, and subsidiaries
Special Committee	Committee formed by the SolarCity Board for the purpose of evaluating the Acquisition and alternative transactions
Tesla or the Company	Tesla Motors, Inc. and its directors, employees, and subsidiaries
Tesla Board or Board	Tesla board of directors at the time of the Acquisition

Unrestricted Liquidity Case	Initial SolarCity financial projections prepared by SolarCity management
Valor	Valor Management Corp. and its subsidiaries and affiliates
Wheeler	Jason Wheeler—Tesla CFO

CITATION CONVENTIONS

Document	Citation Format
Deposition Transcript of Hayden Barnard (JX2792)	“Barnard: ____”
Deposition Transcript of Gregory Bilicic (JX2786)	“Bilicic: ____”
Deposition Transcript of Brad W. Buss (JX2791)	“Buss: ____”
Deposition Transcript of Toby Corey (JX2771)	“Corey: ____”
Deposition Transcript of Robyn Denholm (JX2798)	“Denholm: ____”
Deposition Transcript of Ira Ehrenpreis (JX2784)	“Ehrenpreis: ____”
Deposition Transcript of Daniel Fischel (JX2876)	“Fischel: ____”
Deposition Transcript of Antonio Gracias (JX2755)	“Gracias: ____”
Deposition Transcript of Stephen T. Jurvetson (JX2892)	“Jurvetson: ____”
Deposition Transcript of Donald Kendall (JX2779)	“Kendall: ____”
Deposition Transcript of Kimbal Musk (JX2761)	“Kimbal: ____”
Deposition Transcript of Courtney McBean (JX2796)	“McBean: ____”
Deposition Transcript of Juergen Moessner (JX2874)	“Moessner: ____”
Deposition Transcript of Elon Musk (JX2789; JX2838)	“Musk: ____”
Deposition Transcript of Lyndon Rive (JX2777)	“L.Rive: ____”
Deposition Transcript of Tanguy Serra (JX2799)	“Serra: ____”
Deposition Transcript of Jeffrey B. Straubel (JX2780)	“Straubel: ____”
Deposition Transcript of Frederick Van Zijl (JX2868)	“Van Zijl: ____”
Deposition Transcript of Jason Wheeler (JX2793)	“Wheeler: ____”
Joint Exhibit	“JX ____”
Expert Report of Murray M. Beach (JX2834)	“BeachOR: ____”
Rebuttal Expert Report of Murray M. Beach (JX2847)	“BeachRR: ____”
Expert Report of Daniel R. Fischel (JX2839)	“FischelOR: ____”
Expert Report of Ronald G. Quintero (JX2840)	“QuinteroOR: ____”
Rebuttal Expert Report of Ronald G. Quintero (JX2854)	“QuinteroRR: ____”
Expert Report of Juergen Moessner (JX2833)	“MoessnerOR: ____”

PRELIMINARY STATEMENT

By early 2016, SolarCity was rapidly running out of cash and spiraling towards bankruptcy. Musk came to its rescue with Tesla's coffers. Musk caused Tesla to acquire the foundering solar energy company for billions of dollars of Tesla stock. In doing so, Musk breached his fiduciary duties to Tesla and its stockholders and wasted Tesla's assets.

Plaintiffs will prove at trial that Musk controls Tesla, and that he engineered and controlled the Bailout to benefit himself and SolarCity. A majority of the Tesla directors, like Musk, suffered from disabling conflicts of interest in the transaction or otherwise lacked independence from Musk. Accordingly, Musk must prove the Bailout was entirely fair.

He will fail. Musk made the process unfair and caused Tesla to pay an unfair price. The Board made no effort to protect stockholders from Musk's conflicting interests or influence over the transaction. In turn, Musk controlled the transaction process, pushing it through in time to save SolarCity from an otherwise inevitable collapse. Musk publicly championed the Bailout and solicited stockholder approval with materially false and misleading disclosures concerning, among other things: (i) SolarCity's financial condition; (ii) his personal involvement in the transaction process; and (iii) the status of SolarCity's Solar Roof product.

In addition, the evidence will show that SolarCity was not worth anywhere near the \$25.37 dollars per share Musk caused Tesla to pay for SolarCity and, in fact, was on the brink of insolvency. The transaction was not just financially unfair to Tesla stockholders, it was a waste of Tesla's assets.

Accordingly, Plaintiffs request judgment in favor of Tesla and the Class, along with an appropriate damages award or other equitable remedy to rectify the harm Musk caused.

STATEMENT OF FACTS

I. MUSK'S PYRAMID OF COMPANIES AND CONTROL OF TESLA

At the time of the Acquisition Musk sat atop Tesla, SolarCity, and SpaceX, which he publicly described as his "pyramid" of companies and a "house of cards." Although each company operated in a different industry, all three had the "Musk" brand, and Musk believed his success depended on all three surviving. He stated that "if one element of the pyramid...falters," the "house of cards...crumbles."¹

Tesla designs, develops, manufactures, and sells electric vehicles and energy storage products.² Musk is Tesla's public face and "visionary."³ Musk became

¹ JX1021:TESLA00019905.

² JX0824:4.

³ Buss:39:17-21;McBean:168:9-10.

Chairman of the Tesla Board in 2004⁴ and appointed himself CEO in 2008.⁵ Musk is Tesla's largest stockholder and owned 22.1% of the outstanding shares at the time of the Bailout.⁶ Tesla admits it is "highly dependent on the services of Elon Musk,"⁷ and that losing him could "disrupt [its] operations, delay the development and introduction of [its] vehicles and services, and negatively impact [its] business, prospects and operating results" as well as cause its stock price to decline.⁸

Musk dictates Tesla's operational and strategic decisions, from the design and engineering of Tesla's vehicles to its strategic planning.⁹ He also controls all hiring decisions and personally micromanages approval of "all expenses of any kind anywhere in the world, including parts, salary, travel expenses, rent, literally every payment that leaves [Tesla's] bank account."¹⁰

⁴ JX2641:9.

⁵ JX0260.

⁶ JX2286.

⁷ JX0824:23.

⁸ JX0824:22-23.

⁹ *See, e.g.*, JX1976 (Musk moves up "Solar roof launch"); JX3109 (Musk tweets: "Working on Top Secret Tesla Masterplan, Part 2"); JX3112 (Musk resigns as chair of Tesla Board following unauthorized going-private tweet).

¹⁰ JX3411.

Musk stacked the Tesla Board with individuals who are loyal to him. At the time of the Bailout, Tesla's Board included: (1) Musk; (2) Musk's brother, Kimbal Musk; (3) Musk's "close friend," Antonio Gracias, whose venture capital firm owned stock in both SolarCity and SpaceX;¹¹ (4) Musk's self-proclaimed "big fanboy," Steve Jurvetson, whose venture capital firm was a major investor in both SolarCity and SpaceX;¹² (5) Ira Ehrenpreis, whose venture capital firm was invested in SolarCity and SpaceX¹³ and identified both Musk and his cousin Lyndon Rive as "Advisors"¹⁴; (6) former SolarCity CFO Brad Buss, who made tens of millions of dollars from his roles in Musk's companies (including SolarCity); and (7) Robyn Denholm, who not even Musk believed could effectively "watch over" his conduct.¹⁵

SolarCity marketed, sold, and installed rooftop solar energy systems. Musk's cousins, the Rives, founded SolarCity in 2006 with Musk's financial backing. Musk was SolarCity's Chairman, its primary financier, and its largest stockholder, owning 21.9% of its outstanding shares at the time of the Acquisition.¹⁶

¹¹ Gracias:72:25-73:16.

¹² JX0766;Jurvetson:73:15-23;JX3105;JX3104.

¹³ Ehrenpreis:16:22-24;40:15-20.

¹⁴ JX0577:TESLADIR0028183.

¹⁵ JX3113.

¹⁶ JX2120:175.

SpaceX is a private aerospace manufacturer and space transport services company that Musk founded in 2002. Musk is SpaceX's Chairman, CEO, CTO, and controlling shareholder.¹⁷ A majority of the Tesla Board at the time of the Acquisition—Musk, Kimbal Musk, Gracias and Jurvetson—were directors of SpaceX at the same time.

II. SOLARCITY ENCOUNTERS A SEVERE LIQUIDITY CRISIS THAT WOULD PUSH IT TO THE BRINK OF INSOLVENCY

Prior to the Acquisition, SolarCity marketed and installed solar energy systems.¹⁸ SolarCity principally sold solar energy systems to customers at “little to no upfront costs.”¹⁹ SolarCity's flagship financing product was the “SolarLease,” which allowed customers to lease (rather than purchase) solar systems and make fixed monthly payments.²⁰ Similarly, SolarCity offered the “SolarPPA”—a “power purchase agreement” that charged customers monthly fees for energy use.²¹ Both products carried 20-year terms.²²

¹⁷ JX0995:7,52;JX0977:44;Gracias:197:5-13.

¹⁸ JX0107:2,5.

¹⁹ JX0780:4-6.

²⁰ JX0780:5-6.

²¹ *Id.*

²² *Id.*

The SolarLease and SolarPPA generated two primary assets for SolarCity: (i) monthly payments from the customers receiving the solar systems, and (ii) the rights to tax benefits associated with the Solar ITC.²³ At the time of the Acquisition, the Solar ITC allowed investors in solar systems to recoup 30% of the total cost through dollar-for-dollar federal tax credits.²⁴ When SolarCity leased a solar system through a SolarLease or SolarPPA, as opposed to a cash- or loan-based sale, the Solar ITC went to SolarCity.²⁵

To cover the upfront costs associated with the solar systems for the SolarLease and SolarPPA, SolarCity relied heavily on “project finance,” whereby third-party investors would provide upfront cash in exchange for the rights to tax credits and future customer lease payments.²⁶ Thus, SolarCity was essentially two companies acting in concert: (i) a development company that sold, marketed, and installed the solar systems (“DevCo”); and (ii) a holding company for securitizations that conducted the operational and financing activities necessary to finance new installations of solar energy systems (“PowerCo”).²⁷

²³ JX0780:5-6.

²⁴ Energy Policy Act of 2005, Title XIII, Subtitle C, sections 1335 and 1337.

²⁵ JX0780:6,14,42;Serra:42:14-43:8.

²⁶ JX2442:2-3.

²⁷ MoessnerOR:¶30.

SolarCity's business model was a failure, as it incurred massive operating losses through its entire existence.²⁸ During the five years preceding the Bailout, SolarCity reported over \$2.2 billion in net losses, which increased significantly year-over-year and culminated in over \$820 million in net losses in 2016.²⁹ SolarCity thus relied on the capital markets to survive.³⁰

In 2014, in a misguided attempt to cut costs, SolarCity acquired Silevo, a solar technology and manufacturing business that produced solar cells.³¹ Neither SolarCity nor Silevo had ever manufactured solar cells at scale. In 2014, SolarCity entered into an agreement with the State of New York to manufacture solar panels using Silevo technology at a to-be-built factory in Buffalo.³² The contract required SolarCity to meet certain build-out, production, and employment milestones for the factory and to expend significant capital to achieve these milestones.³³ If SolarCity failed, it would face massive penalties, in some circumstances in the hundreds of

²⁸ JX2442:28;JX0187:61.

²⁹ SolarCity reported \$113.7 million in losses in 2012, \$151.8 million in losses in 2013, \$375.2 million in losses in 2014, \$768.8 million in losses in 2015, and \$820.3 million in losses in 2016. JX2442:28;JX0187:39.

³⁰ JX0780:66;JX2840:Exs.12,15;JX0297:56,74,77.

³¹ Gracias:103:19-105:1.

³² JX0241.

³³ JX1587:TESLADIR0087820,8011,8043,8046.

millions of dollars.³⁴ By 2015, SolarCity and the State of New York broke ground on the factory, construction was underway, and SolarCity was expending substantial amounts to build the Buffalo “Gigafactory.”³⁵

Due to mounting debt obligations, lower than expected installations, and massive capital expenditures for Silevo and the Buffalo facility, SolarCity was rapidly running out of cash. By the fall of 2015, SolarCity was facing an undisclosed “major liquidity crisis.”³⁶ On September 20, 2015, SolarCity COO Tanguy Serra informed the executive management team that SolarCity’s “total war chest” of available cash, which started at \$1.1 billion in 2015, would be only \$200 million by year-end.³⁷ In response, Rive immediately instituted “weekly cash meetings” with members of the senior management team to monitor and manage SolarCity’s liquidity situation.³⁸

On September 29, 2015, Bryan Ellis, SolarCity’s Senior Vice President, Finance and Analysis, sounded the alarm that the situation was worse than

³⁴ JX1587:TESLADIR0087820,8043,8046.

³⁵ JX1587:TESLADIR0087820,8043.

³⁶ JX0491.

³⁷ *Id.*

³⁸ JX0503;JX0505;L.Rive:39:2-7. SolarCity management continued to hold these weekly cash meetings during 2016. L.Rive: 39:2-7.

expected.³⁹ SolarCity's cash was projected to drop to \$35 million the week of November 20,⁴⁰ which could cause material breaches under its debt instruments. SolarCity needed to maintain an average monthly cash balance of approximately \$116 million to remain in compliance with its Liquidity Covenant.⁴¹ A breach of the Liquidity Covenant would trigger an incurable default on SolarCity's revolver and cross-defaults on SolarCity's other debt instruments.⁴²

On October 15, 2015, Rive and his management team reported to the SolarCity Board, including Musk and Gracias, that the company needed to raise "\$180 to \$300m" in additional cash.⁴³ SolarCity management also reported that solar installations for 2015 were expected to be "920MW versus budget of 1.05GW," which would "reduce[] cash inflow."⁴⁴ On October 21, 2015, following a "weekly cash meeting," SolarCity's management team confirmed that "updated forecast

³⁹ JX0486:TESLADIR0023255.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² JX2002:3;Serra:82:19-24.

⁴³ JX0506:SC_Third_Parties_00021151.

⁴⁴ JX0506:SC_Third_Parties_0002150.

projects our December monthly average balance at ~\$91 million, which is \$24 million below our revolver covenant threshold of ~\$115 million.”⁴⁵

SolarCity immediately sought cash through an equity or convertible bond offering—public or private.⁴⁶ Investment banks told SolarCity that neither was a viable option.⁴⁷ Private equity investors had no interest in equity or convertible bonds and would only consider “very high coupon debt” that SolarCity management believed would likely be precluded by existing debt covenants.⁴⁸ In November 2015, SolarCity was able to secure limited funding with the assistance of an investment by Musk and Rive.⁴⁹ This cash infusion was only a temporary stopgap, and SolarCity continued to burn cash at an unsustainable rate.⁵⁰

III. MUSK USES HIS CONTROL TO BAIL OUT SOLARCITY

A. MUSK STARTS THE BAILOUT PROCESS

On February 2, 2016, at a SolarCity Board meeting, Musk received a presentation on SolarCity’s “2016 Liquidity by Month.”⁵¹ This analysis “show[ed]

⁴⁵ JX0522.

⁴⁶ JX0514:TESLA00529584.

⁴⁷ JX0527:TESLADIR0024715;JX0514:TESLA00529583-84;Buss:172:23-173:3.

⁴⁸ JX0514:TESLA00529583-84;Buss:165:18-166:3.

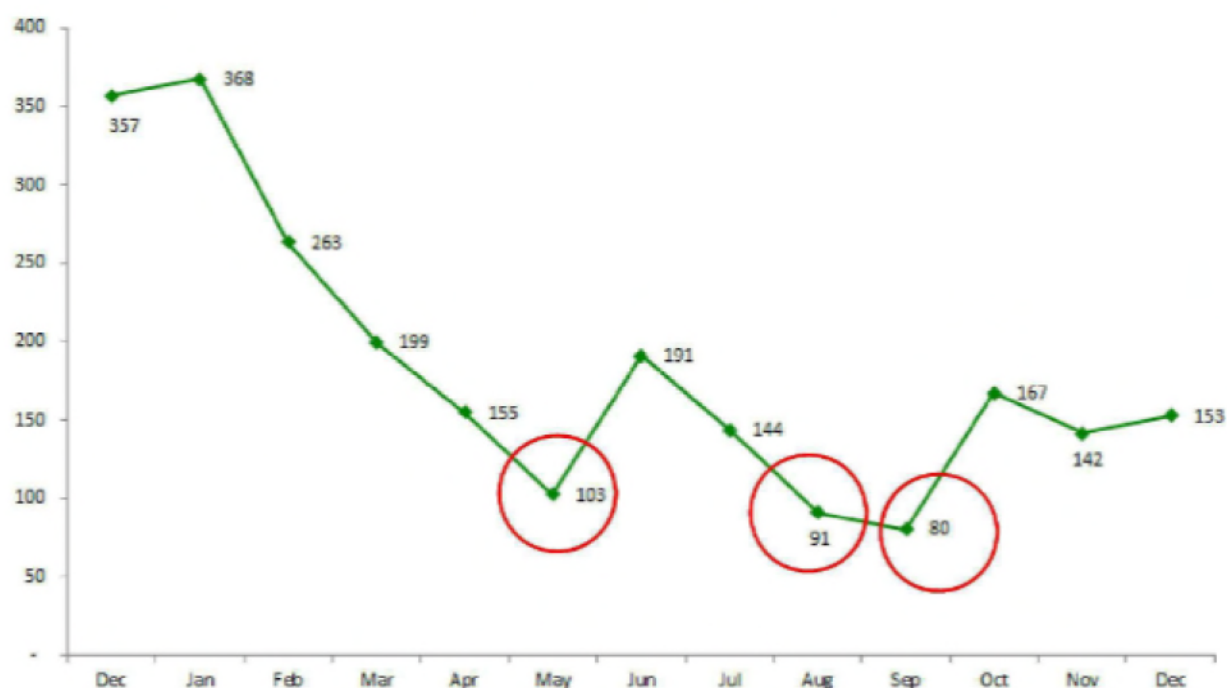
⁴⁹ JX0588:Item 1.01;JX0585.

⁵⁰ *See, e.g.*, JX0759:TESLA00137197;JX0733:TESLA00002326.

⁵¹ JX0738:TESLA00002334.

significant liquidity concerns,” including the likelihood of SolarCity violating the debt covenants on its revolving credit facility.⁵² Specifically, SolarCity forecast that cash balances would drop below the required amount under the liquidity covenant for the revolver in May 2016, August 2016, and September 2016:⁵³

2016 Liquidity by Month



- May/August/September currently show significant liquidity concerns
- Intra-month lows will likely be notably lower than end of month balances shown above
- Revolver Liquidity Covenant as of 12/31/2015 was \$116.3M

⁵² *Id.*

⁵³ *Id.*

Despite these dire conditions, SolarCity continued to assure the market that all was well. During a February 9, 2016 earnings call, SolarCity advised that it was targeting 1,250 MW installed during 2016 and boasted its forecasted growth for the year “would be the envy of most industries and companies in this country.”⁵⁴

Two days later, Rive convened an emergency “cash planning” meeting at his home with Musk and SolarCity management.⁵⁵ Rive and Musk discussed taking certain extreme measures to conserve cash and maintain compliance with the Liquidity Covenant.⁵⁶ SolarCity management started withholding payments from vendors, ranking accounts payable to decide whom to pay with its limited cash.⁵⁷ Management also developed “finance postpone guidelines” to prioritize or suspend specific solar system installations based on their cash impact because installations were cash-flow negative.⁵⁸ SolarCity further implemented a “hiring freeze” even though some departments lacked sufficient resources, like its information technology department that was “missing 40% of the calls.”⁵⁹

⁵⁴ JX0767:TESLA00308852.

⁵⁵ JX0777;L.Rive:71:5-13.

⁵⁶ L.Rive:71:12-21;JX0812;JX0794;JX1110:TESLA00527848-49.

⁵⁷ JX0882.

⁵⁸ JX0891:TESLA00530016.

⁵⁹ JX0735:TESLA00129744-45.

In the weeks after this meeting, Musk made the decision to have Tesla buy SolarCity. He called his cousin Rive and told him Tesla should acquire SolarCity.⁶⁰ Then, on the morning of February 27, Musk called Tesla's CFO, Wheeler, and ordered him to prepare a presentation within 48 hours,⁶¹ pitching an acquisition of SolarCity that Musk would present during an emergency meeting of the Tesla Board.⁶² On just one day's notice, Musk set a meeting for February 29.⁶³ The sole purpose of the meeting was to push an acquisition of SolarCity.⁶⁴

Wheeler's analysis showed that acquiring SolarCity would be "highly dilutive" under "all cases" and impose a substantial cash drain on Tesla, which was already dealing with its own operating losses.⁶⁵ During the meeting, no director asked Musk why it was so urgent that Tesla acquire SolarCity.⁶⁶ But the Board did not reject Musk's proposal. Instead, the Board "authorized management to gather additional details and to further explore and analyze" a SolarCity acquisition.⁶⁷

⁶⁰ L.Rive:73:19-25.

⁶¹ Wheeler:31:1-34:12;Denholm:62:12-63:13.

⁶² Wheeler:30:8-31:11.

⁶³ JX0848.

⁶⁴ *Id.*;JX0849.

⁶⁵ JX0849:TESLA00001347;JX0844:TESLADIR0080594.

⁶⁶ Denholm:60:24-61:6

⁶⁷ JX0849:TESLA00001347.

Simply raising the transaction to the Board appears to have helped SolarCity stockholders. Despite the small number of people aware of Musk's sudden interest in acquiring SolarCity, beginning on or around March 2, 2016, rumors of a potential acquisition began to leak into the market, causing SolarCity's stock price to rise from \$18.01 on March 1 to close at \$22.49 on March 3—a nearly 25% increase.⁶⁸

B. SOLARCITY'S PROBLEMS WORSEN AND IT HIDES ITS TRUE FINANCIAL CONDITION FROM STOCKHOLDERS

SolarCity's liquidity crisis deepened and demand for new systems declined during 2016. At an April 26 SolarCity Board meeting that Musk attended, Rive addressed "important/disturbing" issues concerning SolarCity's outlook and financial viability.⁶⁹ Rive provided lowered guidance that SolarCity expected installations of only 900 MW for 2016, 28% less than the 1,250 MW guidance he provided just two months earlier.⁷⁰ Rive also warned that "May – August are at risk of tripping [the revolver] covenant," and presented an "Updated 2016 Liquidity by Month" that showed intra-month cash balances dropping to \$73 million and remaining below the revolver's Liquidity Covenant through October 2016.⁷¹

⁶⁸ JX0870;BeachRR:¶¶14-16;JX3106;JX3107;JX3108.

⁶⁹ JX1007.

⁷⁰ JX1010:TESLA00531163.

⁷¹ JX1013.

SolarCity's Board, including Musk, concealed this information from the market. SolarCity's 10-Q included its standard liquidity disclaimers and represented that it would have sufficient cash to "meet cash requirements for the next 12 months."⁷² SolarCity said nothing about the immediate liquidity concerns or the analyses presented to the SolarCity Board. Similarly, in a public letter to stockholders on May 9, 2016, Rive misrepresented that "SolarCity kicked off 2016 with solid momentum in installations, financing, and core cash generation," and provided *overstated* revised guidance of 1,000 to 1,100 MW for 2016.⁷³ Since April, the SolarCity Board, including Musk and Gracias, knew that SolarCity was internally projecting only 900 MW of installations, which would put even more "downward pressure" on SolarCity's stock price if disclosed.⁷⁴

With installations dropping, SolarCity privately acknowledged that its sales division was "badly, badly broken."⁷⁵ Internal bookings reports were "drenched in a sea of red," and "opportunity creation" was trending down.⁷⁶ Approximately half

⁷² JX1072.

⁷³ JX1065:TESLA00606002.

⁷⁴ Bilicic:70:17-71:3;JX1453:TESLA00001859.

⁷⁵ JX1387;JX2305.

⁷⁶ JX1387:TESLA00725245.

of SolarCity's new customers were cancelling.⁷⁷ SolarCity was fighting "turnover" and "morale" problems among its sales staff and was "exposed and vulnerable" to losing its top sales talent.⁷⁸ SolarCity was further struggling with its "cost of acquisition" and "sales efficiency" due to a bloated sales organization.⁷⁹

Meanwhile, SolarCity was not generating the cash it projected raising through its structured finance operations. By March 2016, SolarCity's lenders had already pushed back on over \$335 million in tax equity financing requests, largely because of credit committee concerns.⁸⁰ Credit Suisse imposed onerous terms on SolarCity for a "back-leverage" transaction that closed on the last day of the first quarter of 2016, citing worries about SolarCity's ability to hit its deployment guidance.⁸¹ Bank of America, one of SolarCity's largest tax equity partners, began "pushing for significantly more insight into [SolarCity's] corporate financial situation."⁸² It demanded unprecedented due diligence from SolarCity before agreeing to finance

⁷⁷ JX2213;JX0381:TESLA00003515 (cancellation rates steadily increasing as of May 2015).

⁷⁸ Corey:37:2-38:10,42:18-43:21;Barnard:65:3-7;JX1000.

⁷⁹ Corey:33:3-9.

⁸⁰ JX0904:TESLA00553448.

⁸¹ JX0939.

⁸² JX1060:TESLA00837084.

an \$80 million tax equity fund in mid-June 2016.⁸³ It then insisted upon terms that created, in Rive’s own words, “the worst fund in the market.”⁸⁴ The resulting delays in closing planned tax equity, aggregation debt, and back-leverage transactions through the first two quarters of 2016 further exacerbated SolarCity’s liquidity crisis.⁸⁵

Musk and Rive spoke privately about the Bailout again in May 2016.⁸⁶ Rive told Musk that either the acquisition was “going to happen or we need to go out and raise equity financing.”⁸⁷ Musk confirmed that the status quo was not an option for SolarCity, testifying that “SolarCity either needed to raise capital or go through the acquisition, but it couldn’t be stuck in between.”⁸⁸ But SolarCity’s bankers had

⁸³ *Id.*

⁸⁴ JX2105 (“We don’t make money and the lenders hate the deal....The only reason we accepted the terms was because of the situation we were in at that time.”).

⁸⁵ JX1388 (“[BAML] see[s] 13 weeks—and key issue is that missing this debt significantly lowers our average weekly bank balance, which is a key revolver covenant.” “I think it would also be helpful to note during the next cashflow update to BAML that one of the primary reasons for the lower than expected aggregation debt over the next month relates to changes BAML required for Castello 3.”).

⁸⁶ L.Rive:95:6-12 (Q:“So during this time when cash is tight and you have to manage this and put off paying your accounts payable and maybe doing some payroll stuff, during that time period, in May 2016, you again spoke to Mr. Musk about Tesla acquiring SolarCity; correct? A:Correct.”).

⁸⁷ L.Rive:95:15-18.

⁸⁸ Musk:273:5-12.

already told Musk and Rive that an equity offering was off the table.⁸⁹ With its heavy leverage⁹⁰ and deepening liquidity crisis, additional debt was also not an option. As Musk explained it: “If [banks] think you’re running low—dangerously low on cash, then they don’t want to give you cash. But if they think you’ve got plenty of cash, they want to give you cash. It’s ironic.”⁹¹ A bailout from Tesla was SolarCity’s only option.

C. MUSK CHOOSES THE BAILOUT AND PUSHES THE TESLA BOARD TO OFFER A PREMIUM PRICE

Rive wanted to proceed with the acquisition in May, but Musk had to “push it to June.”⁹² Tesla was conducting a \$1.7 billion secondary offering in May, and the company had made no mention of any acquisition in its disclosures.⁹³ Musk knew that SolarCity faced an immediate “cash deficit problem” and could not survive even during the acquisition process without a cash infusion; so Musk promised Rive that

⁸⁹ *See supra* 10.

⁹⁰ SolarCity already owed \$375 million on its revolver, \$217 million in bonds, \$909 million in convertible debt, and an additional \$21 million in other recourse debt—the majority of which was due in 2017. JX1231.

⁹¹ Musk:275:7-276:13.

⁹² Musk:274:4-13.

⁹³ Musk:242:18-25.

he would “have [him] covered” for SolarCity’s near-term cash needs, *i.e.*, a bridge loan from Tesla, to keep SolarCity alive until closing.⁹⁴

On May 31, 2016, six days after closing Tesla’s secondary offering, Musk again brought the SolarCity acquisition to his Board.⁹⁵ Musk did not provide any new or different information from what he presented to the Board in February; and SolarCity again was the only acquisition target discussed.⁹⁶ The Board caved to Musk and authorized him and management to “engage an independent financial advisor on behalf of the Board and the Company” to advise on the Bailout.⁹⁷

On June 20, 2016, Musk called another special meeting of the Tesla Board. He came to the meeting with a fully formed offer to buy SolarCity, accompanied by an offer letter and blog post announcing the offer.⁹⁸ Musk also requested and received a draft presentation from Tesla’s financial advisor, Evercore, to review and comment on before the meeting.⁹⁹

⁹⁴ Musk:273:13-274:3;L.Rive:107:17-108:5;JX1451.

⁹⁵ Musk:242:18-25.

⁹⁶ JX1131.

⁹⁷ *Id.*

⁹⁸ JX1228;JX1231:TESLADIR84760-73;JX1224;Denholm:88:17-89:3.

⁹⁹ JX1227.

Although the Proxy suggests otherwise, Musk was an active participant at the June Board meeting. Musk raised price and negotiating tactics.¹⁰⁰ After Evercore recommended a \$25 to \$27 per share offer,¹⁰¹ Musk advocated for more: \$28.50, a 30% premium to SolarCity's market price.¹⁰² Abdicating his duties to *Tesla*, Musk explained the price had to be "publicly defensible" for *SolarCity*.¹⁰³

The conflicted Board acceded to Musk's control and influence. The full Tesla Board, including Musk and Gracias, discussed the specific exchange ratio of "0.122x to 0.131x" (the "Initial Offer"), representing \$26.50 to \$28.50 per SolarCity share.¹⁰⁴ After pushing the Board to offer a price that would advantage SolarCity, Musk (with Gracias) "recused" himself from the vote. The remaining directors approved the range Musk wanted.¹⁰⁵ Despite Musk's outsized influence at Tesla,

¹⁰⁰ McBean:91:12-17;JX1238;JX1239:EVR-TESLA_00186370-71 (June 20, 2016 Board meeting notes taken by Evercore team member; "Elon is talking abt negotiating tactics," and "Elon: whts the price we shd pay?").

¹⁰¹ JX1239:EVR-TESLA_00186370-71.

¹⁰² JX1238:EVR-TESLA_00186364 (June 20, 2016 Board meeting notes taken by Evercore team member: "Elon-30% over 4-week trailing (~\$28.50)");McBean:97:13-16 ("Q. And he suggested that offer should be in the middle of, for example, the precedent premium paid, correct? A. Yes.").

¹⁰³ McBean:97:10-12 ("Q. Mr. Musk conveyed to the board that the offer had to be publicly defensible, correct? A. Yes.").

¹⁰⁴ JX1228:TESLA00001461.

¹⁰⁵ JX1228:61-63.

the Board never considered forming a special committee or walling-off Musk from influencing the acquisition process. In Musk's own words: "I could not be recused from all discussions...I needed to voice my opinion, obviously."¹⁰⁶

Immediately after the Board meeting, on the evening of June 20, 2016, Tesla made the Initial Offer,¹⁰⁷ which was publicly disclosed after the markets closed on June 21, 2016.¹⁰⁸ Following the announcement, Tesla's stock price plummeted by more than 10%, wiping out \$3.07 billion of value—more than SolarCity's entire market capitalization.¹⁰⁹

On June 22, 2016, Tesla hosted a teleconference with analysts to discuss the Initial Offer.¹¹⁰ Musk represented that the Bailout effectively was a *fait accompli*, stating: "[T]he board opinion is unanimous for both companies. So, I mean, unless there's something discovered that like that I have no idea about or just or that nobody on the board has any idea about, which is extremely unlikely, then the board would—

¹⁰⁶ Musk:283:22-284:4.

¹⁰⁷ JX1233.

¹⁰⁸ JX1251:Ex.99.1.

¹⁰⁹ JX1590:TESLA00000716;BeachOR:¶¶33-34.

¹¹⁰ JX1321.

the independent board members would recommend in favor of completing a transaction somewhere in the price range that was mentioned, most likely.”¹¹¹

D. SOLARCITY’S DOWNWARD SPIRAL CONTINUED AFTER THE INITIAL OFFER

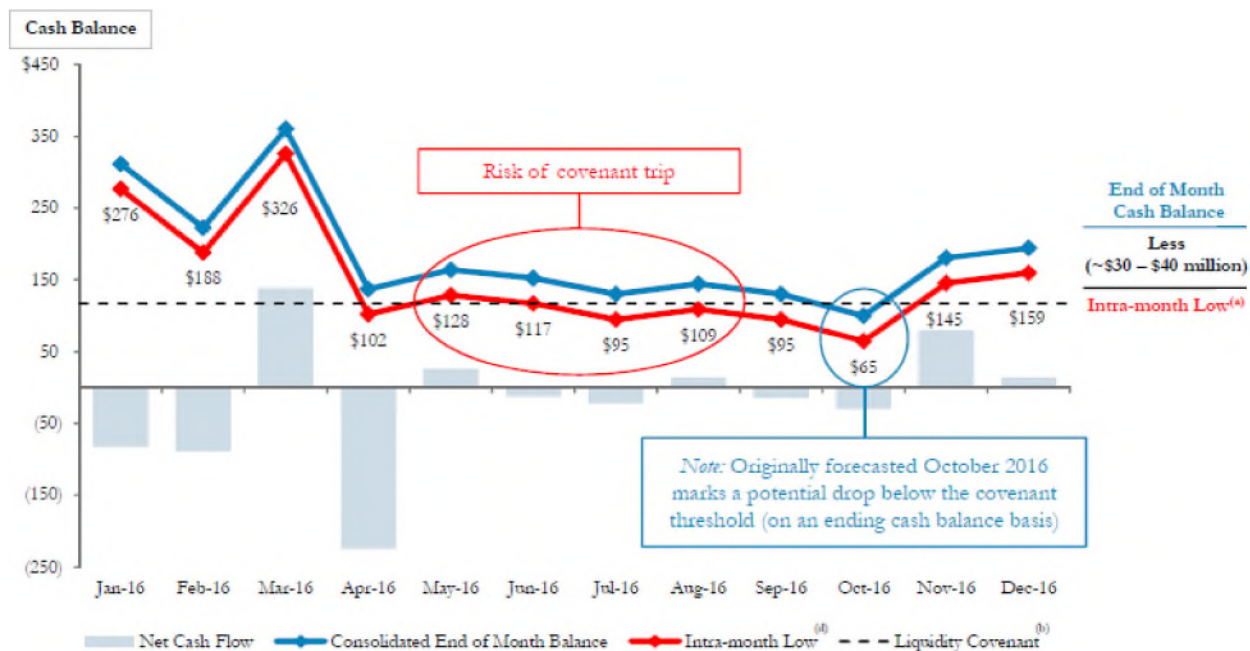
SolarCity—unlike Tesla—formed a Special Committee to evaluate the Initial Offer, and it retained Lazard as financial advisor.¹¹² Lazard quickly confirmed what Musk already knew: SolarCity was “on the brink of a liquidity event.”¹¹³ On July 9, 2016, Lazard prepared an analysis that showed SolarCity’s intra-month cash balances would dip well below the balance required by the Liquidity Covenant numerous times over the following few months, as would the end-of-month balance in October 2016:¹¹⁴

¹¹¹ JX1321:6.

¹¹² JX1347:TESLA00001843;JX1350.

¹¹³ JX1721:TESLA00001908.

¹¹⁴ JX1445:LAZ_TES00068748,50.



Thus, Lazard advised that SolarCity “was close to breaching a liquidity covenant under the Company’s revolving credit facility” and “would be operating with little margin for error until October 2016.”¹¹⁵ The situation was so dire that Lazard was “concerned about the company on a stand-alone basis going forward.”¹¹⁶

E. MUSK REMAINED INVOLVED ON BOTH SIDES

While the Board was deliberating the Bailout and conducting due diligence, Musk continued to receive news about SolarCity’s rapidly deteriorating financial condition from his cousin.¹¹⁷ Rive regularly provided Musk with “updates” on

¹¹⁵ JX1453:TESLA00001858.

¹¹⁶ Bilicic:42:2-18.

¹¹⁷ JX1451;JX1455.

SolarCity's cash position.¹¹⁸ On July 9, 2016, Rive told Musk that SolarCity was "running crazy close" as to its liquidity covenants, and he was "really afraid of the domino effect" that could result if SolarCity did not get cash it needed soon.¹¹⁹ The mere "notice of a covenant breach" would have caused "concern around other investors" that were acquiring SolarCity's securitizations and disrupt its complicated finance machinery.¹²⁰ The next day, Rive emailed Musk the "cash forecast [he] gave the board in April" and again warned of the "domino effect" that SolarCity faced due to its liquidity issues.¹²¹ Musk reassured Rive that "[he] would make sure that they were okay through an acquisition period" with respect to SolarCity's cash needs.¹²²

¹¹⁸ Musk:272:21-23 ("Q. Did he give you, throughout the time period, updated forecasts on low cash balances? A. I'm sure he gave me some updates."); L.Rive:106:6-12 (testifying that Rive had been "communicating that we're running low on cash for some time").

¹¹⁹ JX1451 (Rive's notes for call with Musk: "I told you that we are running crazy close"); L.Rive:107:5-11; Musk:272:10-273:12.

¹²⁰ L.Rive:130:22-131:19.

¹²¹ JX1455. To shield communications with Musk from discovery, Rive wrote: "I have added Seth [SolarCity's General Counsel] to the email so that the email [chain] can stay privilege. It is best to discuss most of this over the phone." *Id.*

¹²² Musk:273:13-25; JX1451 (Rive's notes for call with Musk, which state: "I mentioned that we need to raise capital but you told me no and that you will have me covered. I made it clear need the capital but if you have me covered okay.").

Armed with non-public information about how dire the situation had become, Musk accelerated his efforts to save SolarCity. On July 10, 2016, Musk told his executive assistant, “I need to talk to more of the investors that are either neutral or negative on the merger.... I should talk to Evanson [Tesla’s head of investor relations] for 15 mins to get his update. This really needs to happen with a supermajority of unaffiliated stockholders voting in favor.”¹²³ Evanson then told Tesla’s counsel that “Elon wants to do calls this week with any top 10 shareholders who have not expressed positive sentiments towards the deal. Arranging those calls now.”¹²⁴ By the morning of July 16, Musk had already spoken with “9 of [Tesla’s] top 12 investors.”¹²⁵ Musk also started meeting with SolarCity’s lenders and other potential financing sources to lobby for a bridge loan for SolarCity.¹²⁶

On July 14, 2016, Musk went behind the Tesla Board’s back to meet with SolarCity Special Committee member Don Kendall.¹²⁷ According to minutes of the

¹²³ JX1463. Musk had previously met “only rarely with investors.” JX1419.

¹²⁴ JX1479.

¹²⁵ JX1536.

¹²⁶ JX1472 (Evercore internal email stating: “Sounds like the banks are moving cautiously on the bridge. Also sounded like Elon is going to speak with GS in next 24 hours and it sounded like they were planning to have him speak to more of the banks.”); *see also* JX1669; JX1682.

¹²⁷ JX1499; *see also* JX1498 (Rive: “Is this Elon not speaking with his team again?”).

SolarCity Special Committee meeting held immediately after the call, Musk raised a variety of acquisition-related matters with Kendall, including “means to supply liquidity” to SolarCity in the near-term, SolarCity’s “interim operating covenants,” and “the offer price of the Tesla Proposal.”¹²⁸ Musk did not disclose this information at the next Tesla Board meeting.¹²⁹

Musk also had frequent meetings and discussions with Evercore, Tesla’s outside counsel, and Tesla management regarding the acquisition process and negotiation.¹³⁰ On July 15, 2016, Evercore updated Musk on its diligence progress, issues with Lazard providing timely information, and Evercore’s incorrect belief that Lazard was unaware of SolarCity’s high risk of default on its revolver.¹³¹ Musk “was surprised...that [Lazard] didn’t know that [SolarCity] could potentially default on its revolver.”¹³² Musk was “very concerned about the pace of diligence” and promptly resolved to “make the company move faster.”¹³³

¹²⁸ JX1499.

¹²⁹ JX1589.

¹³⁰ JX1526;JX1532;JX1619:EVR-TESLA_00196599.

¹³¹ JX1526;JX1528;McBean:163:24-164:8.

¹³² McBean:238:9-12.

¹³³ McBean:163:20-164:21.

On July 16, 2016, Musk began leading daily meetings with Evercore and Tesla management “to discuss gating items and progress” on the SolarCity acquisition.¹³⁴ These “daily check-in calls” addressed a wide range of acquisition-related issues, including “diligence reports” for the Tesla Board, Evercore’s “Financial Model” and “Valuation/Fairness opinion,” “Interim Bridge Financing” for SolarCity, and “Board review and approval.”¹³⁵ Musk admitted that he demanded these daily calls because he “need[ed] to stay on top of the acquisition.”¹³⁶ Evercore also regularly provided its board presentation materials and financial analyses to Musk for advance review and comment before they went to the Tesla Board.¹³⁷

F. MUSK PUSHED TO EXECUTE THE BAILOUT QUICKLY

In mid-July, Musk directed that Tesla should “announce [the Acquisition] in short order, possibly late next week, but more likely early the following week”—*i.e.* by July 23, 2016.¹³⁸ Musk’s directive was intended to get the Bailout approved by

¹³⁴ JX1526;McBean:168:11.

¹³⁵ JX1526:EVR-TESLA_00224682;JX1532.

¹³⁶ Musk:288:7-10.

¹³⁷ McBean:77:16-22,126:17-25. Evercore’s Managing Director could not recall a single instance where Evercore failed to provide Musk with an advance copy of its board presentations. McBean:77:23-78:8; *see also* Musk:285:15-22.

¹³⁸ JX1510:EVR-TESLA_00163111;JX1527:EVR-TESLA_0082473 (McBean advising her team: “We are running out time. Plan is to sign this week and fairness is on Monday.”); McBean:171:12-172:8.

Tesla's Board and publicly announced before SolarCity had to announce another guidance reduction for solar installations.¹³⁹

While due diligence was still ongoing, Evercore disclosed SolarCity's liquidity situation to the Tesla Board on July 19, 2016.¹⁴⁰ Evercore advised in its "Key Diligence Findings" that "SolarCity's intra-month cash balance dips below the covenant levels of \$116mm several times" over the next few months,¹⁴¹ and "a disclosure of default could impair SolarCity's ability to monetize future assets with Tax Equity, Back-levering and Cash Equity in the time frame required to maintain solvency."¹⁴² Evercore repeated these "Liquidity Concerns" to the Tesla Board numerous times and expressly identified them as "Key Information Discovered in Due Diligence that Impacts Value."¹⁴³

On July 18, 2016, Evercore's Fairness Committee refused to issue a fairness opinion within the Initial Offer range that Musk heavily influenced.¹⁴⁴ On July 21,

¹³⁹JX1453:TESLA00001859;JX1559:TESLA00001873;JX1673:TESLA00001736.

¹⁴⁰ JX1590:TESLA0000738.

¹⁴¹ JX1590:TESLA0000740.

¹⁴² JX1590:TESLA0000738.

¹⁴³JX1645:TESLA00001389;JX1672:TESLA00000872;JX1735:TESLA00001120.

¹⁴⁴ McBean:223:15-21 ("Q. When you met with your fairness committee on July 18th, they told you that they couldn't sign off on a fairness opinion within the range of the initial offer based off of what they were seeing; correct? [Objection] A. I believe that's true.").

Evercore had a private meeting with Musk to discuss its planned recommendation that Tesla lower its offer.¹⁴⁵ After getting Musk's feedback, Evercore made this recommendation to Tesla's Board.¹⁴⁶

On July 24, 2016, the Tesla Board met to discuss negotiations with SolarCity and whether to make a revised proposal. Wheeler told the Board that "only a fraction of [SolarCity's] corporate debt at the top of the capital structure [could] get paid-off from SCTY cash flows."¹⁴⁷ Musk pushed to make a counter-offer prior to the release of SolarCity's second quarter 2016 results and reduced installation guidance because the disclosures were expected to have a negative impact on SolarCity's stock price.¹⁴⁸ Musk also participated in the "negotiation strategy" discussion before leaving the end of the meeting.¹⁴⁹ The Board, however, would not authorize

¹⁴⁵ JX1625.

¹⁴⁶ McBean:266:16-20 ("Q. [Y]ou told Mr. Elon Musk that...you were going to recommend to the board a lower exchange ratio than the initial offer range, right? A. Yes.").

¹⁴⁷ JX1662:TESLADIR0089314.

¹⁴⁸ McBean:281:16-22.

¹⁴⁹ See JX1673:TESLA00001735;McBean:287:17-288:15.

a counter-offer until after a second meeting with Musk to obtain more information about SolarCity and clear the offer with him.¹⁵⁰

G. SOLARCITY STRUGGLES TO STAY AFLOAT

While Musk pushed Tesla's Board to make a quick counteroffer, SolarCity clawed to avoid violating its debt covenants. Because it had already started "pushing out" payments to vendors,¹⁵¹ SolarCity's only remaining lever was to forego required "capex spend" on its manufacturing facility and lease contract with the State of New York.¹⁵² Delays in capital expenditures subjected SolarCity to potential penalties of "\$41.2mm/yr."¹⁵³ By forgoing these expenditures, SolarCity passed the liability to Tesla post-Bailout.¹⁵⁴

Despite the efforts to conserve cash, SolarCity management still believed that it "would require approximately \$250 million to \$300 million of additional liquidity."¹⁵⁵ On July 21, 2016, Lazard advised the Special Committee "to consider the value of the Tesla Proposal...in terms of offering a solution to avoid the risk of

¹⁵⁰ JX1677;JX1681.

¹⁵¹ L.Rive:71:5-21;JX1559:1.

¹⁵² L.Rive:71:11-19;JX1641.

¹⁵³ JX1672:TESLA00000872.

¹⁵⁴ McBean:269:13-270:13.

¹⁵⁵ JX1559:TESLA00001872.

the downside liquidity scenario.”¹⁵⁶ Lazard told the Special Committee that SolarCity needed to take “prompt action”¹⁵⁷ to address its liquidity crisis: maintaining the “Status Quo” was no longer possible.¹⁵⁸

Tesla was SolarCity’s only option. Lazard “canvass[ed] the market” for a competing proposal; every other party declined to bid.¹⁵⁹ Lazard also contacted seven private equity firms about a “private investment in public equity,” or “PIPE,” transaction.¹⁶⁰ Each passed, citing “concerns about solvency, viability, and liquidity of the company and financing into a business that was not going to be viable for the long term.”¹⁶¹ Lazard also advised that even if a secondary equity offering were possible, SolarCity would be “forced to sell equity at a lower price, which could cause equity value destruction.”¹⁶² As Plaintiffs’ investment banking expert Murray

¹⁵⁶ JX1632:TESLA00001883;Kendall:21:5-22:7 (confirming that all other potential buyers chose to “pass”).

¹⁵⁷ JX1632:TESLA00001883.

¹⁵⁸ JX1707:SC_Third_Parties0025133.

¹⁵⁹ Kendall:21:5-22:7,24:21-25:22;JX1707:SC_Third_Parties0025130-31.

¹⁶⁰ Kendall:25:23-26:25;JX1632:TESLA00001883.

¹⁶¹ Bilicic:40:23-41:3.

¹⁶² JX1504:TESLA00001862.

Beach will testify, it was “highly unlikely” that SolarCity could have completed such a transaction and raised the cash it needed.¹⁶³

Meanwhile, demand for SolarCity’s solar systems continued to plummet.¹⁶⁴ To save costs, it terminated 4,163 of its employees throughout 2016.¹⁶⁵

IV. MUSK’S RELENTLESS PRESSURE, INFLUENCE, AND CONTROL CAUSED TESLA TO BUY SOLARCITY FOR AN UNFAIR PRICE

A. EVERCORE DELIVERS A “FAIRNESS OPINION” BASED ON UNREALISTIC PROJECTIONS FOR SOLARCITY

Unable to render a fairness opinion at the Initial Offer price, Evercore set about justifying the lower offer it discussed with Musk based on unrealistic projections for SolarCity and flawed financial analysis.¹⁶⁶ Evercore performed DCF analyses of SolarCity using two sets of forecasts. First, it used projections provided by SolarCity management in mid-July 2016—the “Unrestricted Liquidity Case”¹⁶⁷—that Evercore thought were overly optimistic.¹⁶⁸ After making repeated requests for a downside model from SolarCity, Evercore prepared its own “Revised

¹⁶³ BeachRR:¶66.

¹⁶⁴ See JX1903.

¹⁶⁵ JX2731:5.

¹⁶⁶ JX1736:TESLA00001742.

¹⁶⁷ JX2121:86,131.

¹⁶⁸ McBean:144:17-22.

Sensitivity Case” by arbitrarily reducing residential installations by 25% and commercial installations by 30%, with partially offsetting reductions in overhead and R&D expenses.¹⁶⁹ Musk’s management team approved the revised projections, which Evercore then used to support its fairness opinion.¹⁷⁰

Evercore’s DCF analysis resulted in an implausible range of \$37.51 to \$61.73 using the Unrestricted Liquidity Case, and a still unrealistic range \$24.76 to \$42.72 using the Revised Sensitivity Case.¹⁷¹ Evercore ultimately opined that the “Implied Transaction Price” of \$25.27 was fair.¹⁷²

After the Tesla Board approved the Bailout, SolarCity management finally provided downside projections,¹⁷³ euphemistically described in the Proxy as the “Liquidity Management Case.”¹⁷⁴ The Liquidity Management Case modeled a vastly curtailed SolarCity, contemplating the complete abandonment of all commercial, military, and utility sales, and the immediate discontinuation of Silevo

¹⁶⁹ JX1672:TESAL00000878-879.

¹⁷⁰ McBean:218:11-220:4;JX1735:TESLA00001124.

¹⁷¹ JX1735:TESLA00001136-37.

¹⁷² JX1735:TESLA00001134.

¹⁷³ JX1933.

¹⁷⁴ JX2121:103-05.

manufacturing activities.¹⁷⁵ Lazard’s DCF analysis using the Liquidity Management Case yielded values of only “\$10.50 to \$23.25” per share—*i.e.*, below the \$25.27 per share price Evercore deemed fair.¹⁷⁶

After learning of SolarCity’s alternate projections and assumptions, Evercore chose not to revisit the assumptions underlying its Revised Sensitivity Case, and the Tesla Board did not request Evercore to conduct any further analysis.¹⁷⁷ At an August 25, 2016 special meeting, Evercore inexplicably told the Tesla Board that the Liquidity Management Case did not alter its “prior valuation analysis.”¹⁷⁸ Content to move on without further inquiry, the Tesla Board did not “change[] its view as to the value of SolarCity.”¹⁷⁹

B. EVERCORE’S DCF ANALYSIS INCLUDED EXPIRED TAX CREDIT CASH FLOWS

In addition to relying on patently unreasonable projections, Evercore’s DCF analysis improperly included cash flows derived from the Solar ITC in the terminal period of its DCF analysis, which inflated its range. The Solar ITCs were scheduled

¹⁷⁵ JX1719:LAZ_TES00067198.

¹⁷⁶ JX1707:SC_Third_Parties0025099.

¹⁷⁷ See JX1933:TESLA00001760.

¹⁷⁸ JX1933:TESLA00001760.

¹⁷⁹ JX2121:94.

to decline from 30% for residential installations in 2016 to 10% for certain third-party owned residential systems in 2022 and credits for owner-purchased residential systems are eliminated altogether in 2022.¹⁸⁰

The cash flows from Solar ITCs were critical to SolarCity's business model. For the SolarCity Unrestricted Liquidity Case, approximately 45.8% of SolarCity's projected available cash through 2020 was attributable to "Tax Equity." The Revised Sensitivity Case attributed approximately 44.8% of the company's cash to Tax Equity.¹⁸¹ Musk knew that the ITC phase-out was a major problem for SolarCity. Before the June 20, 2016 Tesla Board meeting at which the Initial Offer was approved, Wheeler warned Musk that the "elimination of the solar investment tax credit in the future and/or the tightening of credit markets are substantial risks to SC's capital structure."¹⁸² SolarCity had no plan to replace the cash the securitization and sale of tax equity generated.¹⁸³

¹⁸⁰ JX1590:TESLA00000739;McBean:36:19-37:3,42:22-43:13;MoessnerOR:¶36.

¹⁸¹ JX1735:TESLA00001136-37.

¹⁸² JX1237:TESLA00094318.

¹⁸³ Barnard:53:4-12 ("Q. Before you left, were you involved in any either financial planning or forecasting for how SolarCity would deal with the phase-out of ITCs when that occurred in the future? A. No"); Gracias:98:17-99:20 ("Q. Did SolarCity have any plans in place in 2015 to address the phase-out of tax credits? A. I don't specifically remember the plans. I think generally the idea in 2015 was to—when credits were in place, to grow as fast as possible.").

In addition, the Solar ITC also drove consumer demand for solar systems.¹⁸⁴ “These incentives help catalyze private sector investments in solar energy, energy efficiency and energy storage measures, including the installation and operation of residential and commercial solar energy systems.”¹⁸⁵ Consequently, the phase-out of the Solar ITC will impair sales and installations.

Evercore failed to account for the financial impact of the phase-out of the Solar ITC. Instead, Evercore assumed the substantial cash flows SolarCity unrealistically projected to occur from the Solar ITCs in 2020 (the last year of the projection period) would continue forever, including these cash flows in the “terminal year” and growing them in perpetuity by 3.0 and 5.0%.¹⁸⁶

C. THE CONFLICTED BOARD APPROVES THE BAILOUT

On July 30, 2016, acting on rushed diligence and flawed financial analyses, the Board agreed to pay 0.110 of Tesla stock for each share of SolarCity stock.¹⁸⁷

¹⁸⁴ JX273:29 (noting that roughly a thousand members of the SEIA characterized “the ITC as the cornerstone of continued growth of solar energy in the United States”).

¹⁸⁵ JX780:10; *see also* Barnard:31:1-7 (“Q. So in terms of the impact of the ITC, while it’s in place – and this seems intuitive, but I imagine it helps demand. Is that an accurate statement? A. It creates urgency with consumers to make a decision because they can maximize their tax credit.”).

¹⁸⁶ JX1735:TESLA00001136-37.

¹⁸⁷ JX1736:TESLA00001742-43.

Tesla advised stockholders that this exchange ratio represented an equity value for SolarCity of approximately \$2.6 billion, or \$25.37 per share, based on the 5-day volume-weighted average price of Tesla stock.¹⁸⁸

V. MUSK’S MACHINATIONS CONTINUE THROUGH THE TESLA STOCKHOLDER VOTE

Musk knew that SolarCity needed to “solv[e] its liquidity crisis”¹⁸⁹ or it would not make it to close. Musk preferred that Tesla provide SolarCity with “bridge financing,” but considered that not “morally and legally defensible” so he found an “alternative.”¹⁹⁰ In August 2016, SolarCity offered \$124 million worth of 12-month 6.5% bonds; Musk and his cousins bought \$100 million of them to give SolarCity an immediate cash influx.¹⁹¹ Demonstrating that these “bond purchases” were intended as short-term bridge financing, during the first quarter of 2017, Tesla repaid Musk and his cousins for these bonds early, even though it did not benefit Tesla.¹⁹²

Having prevailed upon the conflicted Board to approve the Bailout and having engineered *de facto* bridge financing to mask SolarCity’s liquidity crisis, Musk

¹⁸⁸ JX1762:Ex.99.

¹⁸⁹ JX2038:TESLADIR0095852.

¹⁹⁰ Musk:298:20-300:11.

¹⁹¹ JX2121:138. SolarCity was only able to find buyers for \$18 million of the remaining \$24 million offered to the public.

¹⁹² Musk:409:2-16.

focused on the stockholder vote.¹⁹³ Musk recognized that “feedback from major investors [wa]s very negative on SolarCity,”¹⁹⁴ so he crafted a plan to “change investor sentiment.”¹⁹⁵ To swing votes in his favor, Musk touted the Silevo technology to Tesla’s stockholders, even though he knew well before the vote that Tesla would abandon that project,¹⁹⁶ and falsely represented the status of a new product called the “Solar Roof.”¹⁹⁷ Musk claimed that under Tesla’s control, SolarCity would manufacture and install roof tiles that had embedded solar cells, creating the appearance of an ordinary roof.¹⁹⁸

On October 28, 2016, Tesla and SolarCity held a joint press event to unveil the Solar Roof, including a product demonstration. Musk did not disclose that the roofs pictured were non-functioning prototypes.¹⁹⁹ On November 4, 2016, Musk doubled down on his false promises, telling investors that the “first solar roof

¹⁹³ JX2038:TESLADIR0095852-53;JX2031.

¹⁹⁴ JX2031.

¹⁹⁵ JX2038:TESLADIR0095852.

¹⁹⁶ JX2173:13 (representing that SolarCity had “*high-efficiency module manufacturing across multiple facilities* while also nearing completion on a 1 GW manufacturing facility in Buffalo”) (emphasis added);JX2215:15 (“Silevo has perfected a heterojunction cell using a six-inch wafer”).

¹⁹⁷ JX2038:TESLADIR0095852;JX2206;JX2234.

¹⁹⁸ JX2206:5.

¹⁹⁹ JX2206;Musk:39:6-11;JX2033.

deployments will start next summer.”²⁰⁰ On November 17, 2016, at the special stockholder meeting on the Bailout, Musk again represented that “we expect to start doing the solar roofs in volume somewhere next year.”²⁰¹

Musk’s statements were false and intentionally misleading. The Solar Roof was just a “nascent product” in 2016.²⁰² As of November 2016, SolarCity had “zero visibility on how much it is going to cost [to] make a solar roof, install it, R&D, where it will be manufactured, build up cost of getting raw materials, etc.” and SolarCity was “running blind” with respect to a solar roof.²⁰³ None of the solar roof tiles at Musk’s public demonstration were even operational. Tesla had not even addressed basic issues like fire code compliance and permitting for the Solar Roof as of Musk’s publicity tour.²⁰⁴ Musk admitted that creating a working and scalable Solar Roof tile presented a “hard problem” for Tesla to solve.²⁰⁵ Indeed, more than four years later, Tesla has not brought this “revolutionary” product to market “in

²⁰⁰ JX2241.

²⁰¹ JX2303:TESLA00115805.

²⁰² Wheeler:108:2-15.

²⁰³ JX2304:TESLA00095530.

²⁰⁴ JX2530:TESLA00108939-49;JX2505:TESLA00035448-49.

²⁰⁵ Musk:39:6-11.

volume” as Musk told investors. As of April 2019, Tesla had installed fewer than 100 Solar Roofs, consisting entirely of test prototypes.²⁰⁶

VI. SOLARCITY’S AUDITORS CONFIRM ITS INSOLVENCY

After the Bailout closed, SolarCity’s auditors at E&Y confirmed what Musk and the Tesla Board already knew: SolarCity was insolvent. In January 2017, E&Y discovered that the 2017 financial projections SolarCity provided for E&Y’s going concern analysis in August 2016²⁰⁷ did not include “two payments related to solar bonds—SpaceX as they were expecting a re-investment,” and excluded “payments of the corporate revolver which also will be due in FY17.”²⁰⁸ E&Y also discovered that “investors [in] SpaceX have put pressure on SpaceX to get the money back from SCTY,” and the payment, along with the revolver payments, had to be included when evaluating SolarCity’s solvency.²⁰⁹

These discoveries had serious consequences. For its 2016 year-end audit, E&Y concluded that SolarCity was “short of cash by \$169M of which if you take out SpaceX, they are barely at break even.”²¹⁰ Thus, E&Y’s January 2017 “going

²⁰⁶ Gracias:191:8-14.

²⁰⁷ JX2398:EY-TES-EM-000373.

²⁰⁸ JX2398:EY-TES-EM-000371.

²⁰⁹ JX2392:EY-TES-EM-000403.

²¹⁰ JX2398:EY-TES-EM-000371.

concern analysis” concluded “that as a standalone entity [SolarCity] will not have sufficient cash to meet its obligations as they come due.”²¹¹ Tesla had to sign an “Equity Confirmation Letter” on March 1, 2017, committing to make capital contributions to SolarCity for at least twelve months to support SolarCity’s ongoing operations.²¹² The need for Tesla to pay SolarCity’s bills was no surprise to Musk. On October 7, 2016, Wheeler told Musk that: (i) Tesla needed to provide a \$500 million “[c]apital infusion into SCTY to de-lever and de-risk the credit profile,”²¹³ and (ii) SolarCity had “massive capex needs” that required “\$2B+ in financing every year for the foreseeable future.”²¹⁴ Musk did not disclose this information about the capital infusions that would be required for SolarCity to Tesla stockholders.

VII. TESLA HAD NO INTEGRATION PLAN FOR SOLARCITY

Underscoring that the Merger was a *de facto* Bailout, the supposed \$150 million in annual synergies Tesla touted to stockholders were illusory. Tesla had no viable plan to integrate SolarCity, let alone extract synergies. Wheeler postponed a meeting with ratings agencies in October 2016 “due to the lack of financial details

²¹¹ JX2398:EY-TES-EM-000373.

²¹² JX2447.

²¹³ JX2102:TESLA00038957.

²¹⁴ JX1237.

about the combined business.”²¹⁵ On November 7, 2016, Tesla management started preparing Tesla’s “2017 Operating Plan,” and determined to exclude the SolarCity acquisition.²¹⁶ On November 17, 2016, Toby Corey, SolarCity’s President of Global Sales, recognized there was no integration plan, which would be a “morale killer and place[d] 2017 at risk.”²¹⁷ On November 19, 2016, just two days before the Bailout closed, Tesla’s Vice President of Investor Relations acknowledged to members of his staff that “we have no good internal projections for how this comes together.”²¹⁸

VIII. THE MODEL 3 PLAN MADE INTEGRATION IMPOSSIBLE

Tesla’s “organizational attention” at the time of the Bailout was focused on the Model 3 program.²¹⁹ On March 31, 2016, Tesla unveiled and began taking pre-orders for the Model 3, which was “a lower priced sedan designed for the mass market.”²²⁰ Musk represented to stockholders and consumers that production and deliveries would begin during 2017.²²¹ On April 7, 2016, Musk disclosed that Tesla

²¹⁵ JX2272:TESLA00095095.

²¹⁶ JX2297:TESLA00065829.

²¹⁷ JX2305:TESLA00078230.

²¹⁸ JX2322:TESLA00006499.

²¹⁹ Musk:326:23-327:9.

²²⁰ JX0824:4.

²²¹ *Id.*

had already received “325k” preorders for the Model 3,²²² which exceeded the total number of cars Tesla had produced and delivered for all other models since its 2010 IPO.²²³ In July 2016, Tesla senior management was anticipating that more than \$4 billion would be necessary for “Model 3 Capex,” and Tesla’s own cash balances were projected to reach a “low point of (\$700M)” in September 2017 before factoring in SolarCity’s own financial obligations.²²⁴

Musk knew before he pushed the Bailout that overcoming the “difficulties with the Model 3 program” and reaching high-volume production would be historically challenging.²²⁵ As Musk testified, “it’s been a century, a century, since any American carmaker has reached volume production. One hundred years, that’s how hard it is. Many have tried; they all failed.”²²⁶ Musk represented that the challenges with the Model 3 program left “major scar tissue in [his] brain” and was

²²² JX3103.

²²³ JX0105;JX0174;JX0298;JX0824.

²²⁴ JX1550:TESLA00247586.

²²⁵ Musk:72:6-23.

²²⁶ Musk:72:19-24.

a “very difficult distraction.”²²⁷ The Model 3 was and remains a “bet the company” program; if it does not succeed, “then Tesla would die.”²²⁸

IX. THE ACQUISITION PROVES TO BE A FAILURE

While Tesla was focused on the Model 3, Musk dismantled SolarCity. Although Musk conceded that Tesla paid for a “high growth” business,²²⁹ he eliminated SolarCity’s main sales channels to preserve the Tesla brand. Musk ended SolarCity’s relationships with “big box” retailers like with Home Depot and Best Buy,²³⁰ eliminated door-to-door and telephonic sales,²³¹ and stopped “mail drop” campaigns and advertising.²³² Further, Musk ordered the “redeployment of SolarCity resources towards the Model 3” after the Bailout closed.²³³ In fact, Musk ordered everyone who could possibly be taken off solar be redirected to the Model 3 program.²³⁴

²²⁷ Musk:99:3-22.

²²⁸ Musk:74:12-75:5.

²²⁹ Musk:214:12-14.

²³⁰ Musk:329:2-7.

²³¹ Musk:328:24-329:2.

²³² Musk:330:7-12,331:18-25.

²³³ Musk:51:24-52:1.

²³⁴ Musk:75:6-12.

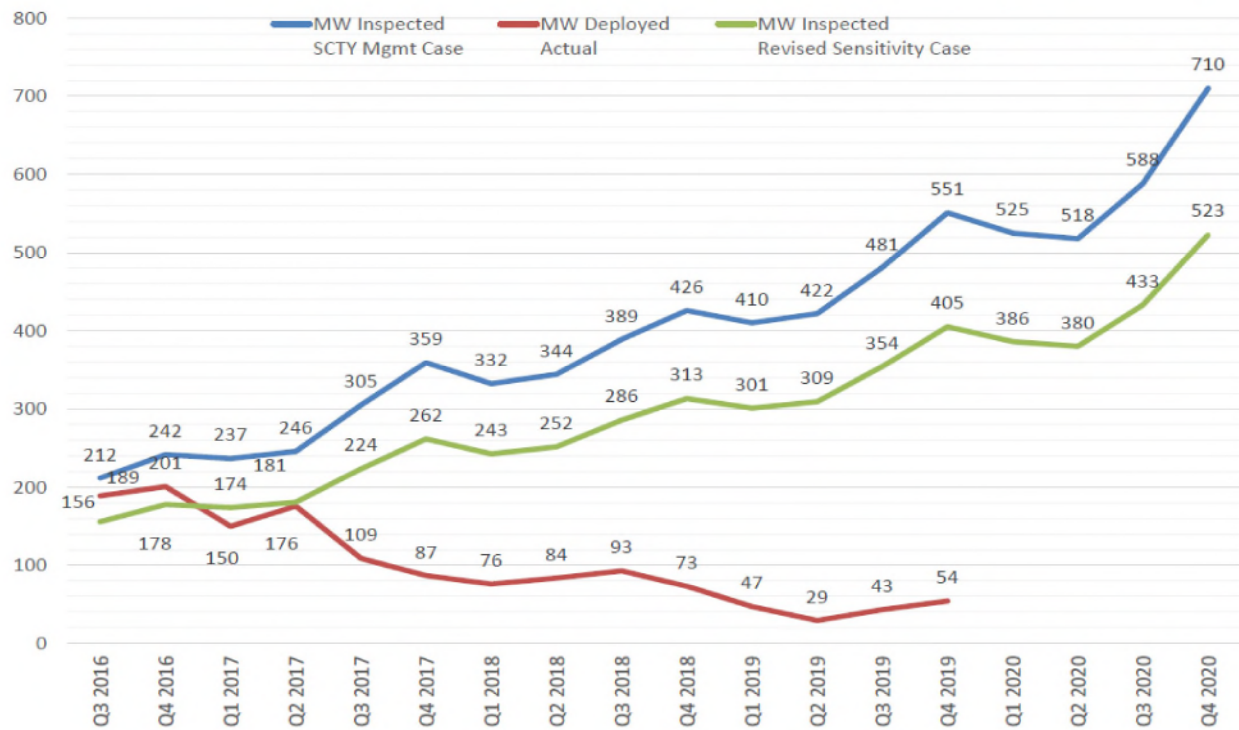
Musk also shelved Silevo because its technology was not scalable. From the summer 2016 through at least May 2019, there were no installations that included Silevo technology.²³⁵ While due diligence revealed that scaling the Silevo technology was integral to achieving SolarCity's cost-cutting projections, the Board never reevaluated the Bailout in light of this determination.²³⁶

With all of these changes, Tesla's solar deployments declined to nominal levels, far below the forecasted projections used to justify the Bailout. Tesla's most recently quarterly deployments were an **86.7%** miss compared to the Revised Sensitivity Case and a **90.2%** miss compared to the Unrestricted Liquidity Case, as demonstrated by the following chart:

²³⁵ JX1708:TESLA00104290;Straubel:52:18-56:24,106:19-107:10.

²³⁶ JX1584:TESLADIR0087007.

Forecasted MW Inspected v. Actual MW Deployed



ARGUMENT

I. ENTIRE FAIRNESS APPLIES

Musk must prove the entire fairness of the transaction because: (i) he was a controlling stockholder who stood on “both sides” of the Acquisition;²³⁷ and/or (ii) a majority of the Tesla Board “labor[ed] under actual conflicts of interest.”²³⁸

A. MUSK WAS TESLA’S CONTROLLING STOCKHOLDER

Musk generally controls Tesla and specifically controlled the Bailout. A minority blockholder is a controlling stockholder when he possesses “a combination of potent voting power and management control such that the stockholder could be deemed to have effective control of the board without actually owning a majority of stock.”²³⁹ “The requisite degree of control can be shown to exist generally or with regard to the particular transaction that is being challenged.”²⁴⁰

²³⁷ *Calesa Assocs., L.P. v. Am. Capital, Ltd.*, 2016 WL 770251, at *9 (Del. Ch. Feb. 29, 2016).

²³⁸ *In re Trados Inc. S’holder Litig.*, 73 A.3d 17, 44 (Del. Ch. 2013).

²³⁹ *Corwin v. KKR Fin. Holdings, LLC*, 125 A.3d 304, 307 (Del. 2015).

²⁴⁰ *Carsanaro v. Bloodhound Techs., Inc.*, 65 A.3d 618, 659 (Del. Ch. 2013) (internal citation omitted).

1. Musk's General Control

General control occurs when a minority blockholder “exercises control over the business affairs of the corporation.”²⁴¹ In *In re Cysive, Inc. Shareholder Litigation*,²⁴² the Court ruled that defendant Nelson Carbonell controlled the company after finding “he was the company’s visionary founder, CEO, and chairman” and “exercised more power than a typical CEO” due to his “influence over even the ordinary managerial operation of the company.”²⁴³ The Court further noted that Carbonell “would be perceived as having such capability by rational independent directors, public stockholders, and other market participants.”²⁴⁴

Here, Musk is no different.²⁴⁵ Like Carbonell, Musk exercises “managerial supremacy” at Tesla.²⁴⁶ Musk was Tesla’s Chairman, CEO, and largest stockholder.²⁴⁷ In SEC filings, the Board concedes that Tesla is “highly dependent on the services of Elon Musk”; he “is highly active in [Tesla’s] management”; and,

²⁴¹ *Ivanhoe Partners v. Newmont Mining Corp.*, 535 A.2d 1334, 1344 (Del. 1987).

²⁴² 836 A.2d at 531 (Del. Ch. 2003).

²⁴³ *In re Morton’s Rest. Grp., Inc. S’holders Litig.*, 74 A.3d 656, 665-66 (Del. Ch. 2013) (summarizing controller inquiry in *Cysive*) (internal quotations omitted).

²⁴⁴ *Cysive*, 836 A.2d at 553.

²⁴⁵ *See supra* 2-4.

²⁴⁶ *Cysive*, 836 A.2d at 552.

²⁴⁷ JX0824:9;JX2286.

if Tesla were to lose his services, it could “disrupt our operations, delay the development and introduction of our vehicles and services, and negatively impact our business, prospects and operating results.”²⁴⁸ Musk authored Tesla’s “Master Plan.”²⁴⁹ Musk even bragged on national television that his significant voting stake and influence over other Tesla shareholders allow him to “get anything done that I want.”²⁵⁰ As the Evercore team recognized: “This is Elon’s world and we are just living in it.”²⁵¹

2. Musk Controlled the Bailout

Musk engineered and controlled the Bailout. Transactional control exists when the minority blockholder “dominate[s] and control[s] the corporation, its board or the deciding committee with respect to the challenged transaction.”²⁵² In *In re Loral Space & Communications, Inc.*, the Court held a 35% owner/insider controlled the transaction at issue because he “controlled Loral’s decision to pursue the growth strategy that necessitated additional capital financing and the time table for obtaining

²⁴⁸ JX2443:22-23.

²⁴⁹ JX0012.

²⁵⁰ JX3113.

²⁵¹ JX1848:EVR-TESLA_00085390.

²⁵² *In re Tesla Motors, Inc. Stockholder Litig.*, 2018 WL 1560293, at *13 (Del. Ch. Mar. 28, 2018) (citing *In re Rouse Props., Inc. Fiduciary Litig.*, 2018 WL 1226015, at *12 (Del. Ch. Mar. 9, 2018)).

that capital,” and pushed the company to “embark on the process” that resulted in a fast-paced transaction which did not include a market check to assess the viability of alternative transactions.²⁵³

Here, Musk dominated Tesla, its management, its advisors, and the Board with respect to the Bailout.²⁵⁴ He needed Tesla to rescue SolarCity out of its “major liquidity crisis.”²⁵⁵ He approached the Board about the transaction in February and May of 2016, each time after discussing SolarCity’s dire financial condition with his cousin Rive.²⁵⁶ By June 20, 2016, the Board agreed to make the Initial Offer, even offering the increased price range Musk wanted.²⁵⁷ Proving his confidence that the Board would carry out his wishes, on June 22, 2016, Musk assured the market that the transaction was almost certain to occur because the Board’s opinion on the transaction was “unanimous.”²⁵⁸

²⁵³ 2008 WL 4293781, at *20-*21 (Del. Ch. Sept. 19, 2008).

²⁵⁴ *Id.*

²⁵⁵ JX0733:TESLA00002334;JX0777.

²⁵⁶ *See supra* 12-13,17-19.

²⁵⁷ *See supra* 20-21.

²⁵⁸ *See supra* n.111.

In addition to controlling the macro timing of the transaction, Musk also drove the “time table” for completing the Bailout once the Board made the Initial Offer.²⁵⁹ He took control of the transaction process when he became concerned about its pace, the risk of SolarCity defaulting on its revolver, and the disclosure of SolarCity’s dismal second quarter results and decreased installation guidance.²⁶⁰ Among other things, Musk:

- led “daily calls” with Evercore and Tesla’s senior management team to ensure continuous progress;²⁶¹
- set aggressive timelines for receiving a fairness opinion and Board approval;²⁶²
- made Evercore and Tesla management prepare revised projections, rather than wait for the downside case requested from SolarCity;²⁶³
- rushed other important due diligence;²⁶⁴ and

²⁵⁹ See generally *Loral Space*, 2008 WL 4293781, at *20-*21.

²⁶⁰ See *supra* n.133,138-139.

²⁶¹ See *supra* n.134.

²⁶² See *supra* n.138.

²⁶³ See *supra* n.135-138,169-170.

²⁶⁴ Tesla’s due diligence advisors at KPMG warned of the “risks to the process” because KPMG’s analyses would not be complete until several weeks after the Merger Agreement was signed. JX1733. KPMG indicated that “critical information requested for the S-4 and due diligence ha[d] not yet been provided,” and certain “key pieces of information” would not be provided “until sometime next week after signing.” *Id.*

- participated in the Board’s discussions regarding negotiating tactics, including the Board’s inexplicable decision to make a revised counter-offer before the announcement of SolarCity’s poor second quarter 2016 results.²⁶⁵

Additionally, contrary to public descriptions of his purported recusal, Musk was directly involved in setting the economic terms of the Bailout. Among other things, Musk:

- proposed the 30% premium reflected in the Initial Offer price, which halted SolarCity’s rapid stock price decline;²⁶⁶
- discussed the Initial Offer with Special Committee member Kendall;²⁶⁷
- received regular updates on valuation issues from Evercore during his daily calls;
- participated in private conversations with senior Evercore bankers;²⁶⁸ and
- discussed Evercore’s post-diligence, revised price recommendations prior to Evercore discussing them with the Board.²⁶⁹

²⁶⁵ *See supra* n.100,148-149.

²⁶⁶ *See supra* n.102.

²⁶⁷ *See supra* n.128.

²⁶⁸ JX1526:EVR-TESLA-00224682;JX1532.

²⁶⁹ *See supra* 137.

Indeed, the Board was unable to approve its first counteroffer to SolarCity until Evercore held an undisclosed meeting to “hear from [Elon]” and receive his approval.²⁷⁰

Musk also took it upon himself to procure stockholder approval of the Bailout. He uncharacteristically met privately with Tesla’s largest stockholders.²⁷¹ Musk publicly issued his “Master Plan: Part Deux,” advocating for the transaction while the Board’s diligence was still underway.²⁷² He advanced the timing of his Solar Roof demonstration to occur before the stockholder vote.²⁷³ And he personally made a number of false and misleading representations regarding the Solar Roof product and SolarCity’s financial condition to swing votes in his favor.²⁷⁴

B. THE TESLA BOARD WAS HEAVILY CONFLICTED

Entire fairness also applies because the majority of the Tesla Board was not disinterested and independent. “Entire fairness...applies when the board labors under actual conflicts of interest,” and “there were not enough independent and disinterested individuals among the directors making the challenged decision to

²⁷⁰ JX1227;JX1671.

²⁷¹ JX1419;JX1463;JX1479;JX1536.

²⁷² JX1618.

²⁷³ JX2038:TESLADIR0095852;JX0877.

²⁷⁴ *See supra* 38-40.

comprise a board majority.”²⁷⁵ “Classic examples of director self-interest in a business transaction involve either a director appearing on both sides of a transaction or a director receiving a personal benefit from a transaction not received by the shareholders generally.”²⁷⁶ Directors lack independence when their decision-making is subject to “extraneous considerations or influences.”²⁷⁷ For example, directors who are also principals of an investment fund face a “dual fiduciary problem,” which poses a conflict of interest when the fund has unique financial interests in a disputed transaction.²⁷⁸

1. Elon Musk

Musk’s conflicts of interest with respect to the Bailout need little elaboration. SolarCity, along with Tesla and SpaceX, formed Musk’s purported “pyramid” of companies. Musk helped his cousins found SolarCity. He was SolarCity’s Chairman and largest stockholder. He personally held \$65 million in SolarCity bonds as personal investments.²⁷⁹

²⁷⁵ *Trados*, 73 A.3d at 44; *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984) (holding that if “the transaction is not approved by a majority consisting of the disinterested directors, then the business judgment rule has no application”).

²⁷⁶ *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 362 (Del. 1993).

²⁷⁷ *Aronson*, 473 A.2d at 816.

²⁷⁸ *Trados*, 73 A.3d at 46.

²⁷⁹ JX2121:108,175.

Musk was also Chairman, CEO, CTO, and majority stockholder of SpaceX,²⁸⁰ which owned \$265 million in SolarCity bonds and had repeatedly rolled over its bond investments to help keep SolarCity afloat.²⁸¹ By 2016, SpaceX investors and federal legislators alike had begun questioning Musk's use of SpaceX funds to prop up SolarCity.²⁸²

Musk, along with each other Tesla director, had a financial interest in protecting his pyramid of companies, with a majority of directors having invested in all three.

2. Antonio Gracías

Gracias has long-standing financial ties to Musk. Gracias made his initial investment in Tesla in 2005 when Musk approached him about the opportunity, and Musk added Gracias to the Tesla Board in 2007.²⁸³ Gracias was an early investor in several other of Musk's companies, having also invested in PayPal, SolarCity, and SpaceX through his venture capital firms.²⁸⁴ At the time of the Bailout, Gracias

²⁸⁰ JX0977:44;Gracias:197:8-13.

²⁸¹ JX0325:SPACEX001037;Musk:197:1-198:9;JX2442:89(table).

²⁸² JX1021:TESLA00019911.

²⁸³ Gracias:25:1-26:6.

²⁸⁴ JX2739:18;Gracias:26:7-27:15.

served on the boards of Tesla, SolarCity, and SpaceX.²⁸⁵ He beneficially owned 211,584 shares of SolarCity common stock and 7,016,704 shares of SpaceX.²⁸⁶ Gracias founded, owns, and manages Valor;²⁸⁷ Musk has invested at least [REDACTED] in Valor funds.²⁸⁸

Gracias also has personal ties to Musk. Gracias is admittedly a close friend of Musk, has known him for roughly 20 years,²⁸⁹ and even provided a no-interest loan to Musk.²⁹⁰ Gracias is also a close to Musk's family, having attended family birthday parties²⁹¹ and vacationed with various members of the Musk family, including Elon Musk, Kimbal Musk, and the Rives.²⁹²

²⁸⁵ JX2739:18.

²⁸⁶ JX2739:18.

²⁸⁷ Gracias:19:16-20:21.

²⁸⁸ JX0010;JX0074;JX0748.

²⁸⁹ Gracias:26:7-21,72:25-73:21;JX2739:12.

²⁹⁰ Gracias:90:21-91:23.

²⁹¹ Gracias:76:12-77:5.

²⁹² Gracias:77:21-78:16,78:20-82:23.

3. Kimbal Musk

Kimbal Musk's conflicts were manifold. He is Elon's brother and a cousin of the Rives.²⁹³ They all vacation together.²⁹⁴ Each of Elon, the Rives, Gracias, and Pfund are invested in Kimbal's restaurant company, the Kitchen.²⁹⁵ Kimbal Musk was not capable of independently assessing the merits of the Bailout his brother and cousins so desperately needed.²⁹⁶

Moreover, Kimbal needed the Bailout, too. Kimbal Musk beneficially owned 147,541 shares of SolarCity common stock,²⁹⁷ with 147,101 shares pledged as collateral to secure personal indebtedness.²⁹⁸ Because of the steep declines in SolarCity's stock price, Kimbal was forced to settle a series of margin calls on that indebtedness.²⁹⁹ By consenting to the 30% premium Initial Offer and proceeding with the Bailout *before* SolarCity's second quarter 2016 results and guidance reductions, Kimbal was able to protect himself and his family.

²⁹³ K.Musk:37:1-16,49:3-5.

²⁹⁴ See, e.g., Gracias:78:20-81:10

²⁹⁵ K.Musk:20:19-23:9,29:7-9;Gracias:89:19-23.

²⁹⁶ *In re Tyson Foods, Inc. Consol. S'hareholder Litig.*, 919 A.2d 563, 584 (Del. Ch. 2007) (finding certain directors "lack independence by reason of consanguinity").

²⁹⁷ JX2742:7-9.

²⁹⁸ JX2742:17-18.

²⁹⁹ See, e.g., JX0519.

4. Steve Jurvetson

The Bailout created a dual-fiduciary conflict of interest for Jurvetson. He was a managing partner of Draper Fisher Jurvetson (“DFJ”), which collectively held 3,326,333 shares of SolarCity stock and was SolarCity’s fifth largest stockholder behind only Musk, Lyndon Rive, Peter Rive, and Fidelity.³⁰⁰ Through management fees and/or personal investments, Jurvetson had a financial interest in every DFJ fund.³⁰¹ Critically, Jurvetson’s economic incentives were aligned with *SolarCity*, not with Tesla, with respect to the Bailout.

Further, Jurvetson’s ownership of 7,008,576 shares of SpaceX stock at the time of the Acquisition gave him another reason to favor SolarCity over Tesla in connection with the Bailout.³⁰² A SolarCity collapse posed risk of default on its bonds, which would have been harmful to SpaceX, further aligning Jurvetson’s economic incentives with SolarCity.

Jurvetson’s ties to Musk further call his independence into question. Jurvetson has publicly called himself a “big fan/boy” of Musk and names “being

³⁰⁰ JX2721:175-176.

³⁰¹ Jurvetson:12:12-13:1.

³⁰² JX2744:8-10.

able to work with [Musk]” as “one of the greatest joys of [his] life.”³⁰³ Jurvetson has built his [REDACTED] net worth by identifying and “backing extraordinary entrepreneurs”³⁰⁴ like Musk, who was featured prominently in DFJ’s “marketing materials” that Jurvetson helped prepare.³⁰⁵ Jurvetson recently joined the initial outside financing round for Musk’s newest company—The Boring Company, which digs tunnels and manufactures flamethrowers.³⁰⁶

Moreover, Jurvetson admittedly has a personal relationship with Musk that extends beyond their business connections³⁰⁷ and has social relationships with Gracias, Kimbal Musk, and the Rives.³⁰⁸ After Jurvetson was forced to resign from the firm that bears his name in November 2017,³⁰⁹ Musk allowed Jurvetson to remain a director of Tesla and SpaceX.³¹⁰

³⁰³ JX3104;JX3105.

³⁰⁴ JX3115.

³⁰⁵ JX0766;JX2517;Jurvetson:72:5-75:18.

³⁰⁶ Jurvetson:13:18-23,15:5-11,101:16-19,114:11-115:6.

³⁰⁷ Jurvetson:117:4-23.

³⁰⁸ JX2744:12-15;Gracias:81:18-82:11;K.Musk:29:7-15.

³⁰⁹ JX3111.

³¹⁰ JX2768:13.

5. Ira Ehrenpreis

Like Gracias and Jurvetson, Ehrenpreis has a longstanding relationship with Musk and a history of investing in Musk-backed companies. Ehrenpreis has been a Tesla director since May 2007.³¹¹ Ehrenpreis invested in Tesla prior to its IPO through his former venture capital firm, Technology Partners.³¹²

After Technology Partners began to wind down its funds, Ehrenpreis co-founded DBL with Pfund.³¹³ At the time of the Bailout, Pfund served on the SolarCity Board and was one of two members of the SolarCity Special Committee.³¹⁴ Pfund manages DBL Equity Fund-BAEF II, L.P., which held 928,977 shares of SolarCity common stock at the time of the Acquisition.³¹⁵

DBL's promotional materials identify Tesla, SolarCity, and SpaceX as DBL portfolio companies that demonstrate the value of DBL's "impact investing" strategy³¹⁶—*i.e.*, investing with the goal of generating specific beneficial social or

³¹¹ JX0977:10.

³¹² Ehrenpreis:11:11-24.

³¹³ Ehrenpreis:13:6-14.

³¹⁴ JX2121:59-60,69.

³¹⁵ JX2120:176

³¹⁶ JX0577:TESLADIR0028183(at 2) ("Over the last eleven years, the success of our portfolio companies and double bottom line assistance to our management teams has helped to put impact investing on the map.").

environmental effects in addition to financial gains. Thus, SolarCity's failure would pose a risk to DBL's overall impact investing platform.

Like Jurvetson, Ehrenpreis used his connections to Elon to build his vast personal fortune. Ehrenpreis has admitted that his position on the Tesla Board "absolutely" proved to be "a real benefit in fund-raising;"³¹⁷ his affiliation with Tesla was "prominent in the marketing" of DBL;³¹⁸ and Musk has had "a significant influence on [his] professional career."³¹⁹ In fact, both Musk and Rive serve as advisors for an active DBL investment fund.³²⁰

In addition, DBL had a special interest because of its investments in SpaceX, which would have been exposed to losses on SolarCity's solar bonds in the event SolarCity was not able to pay its debt as it came due. At the time of the Bailout, DBL had invested approximately \$166 million in SpaceX.³²¹ Ehrenpreis invested the vast majority of this amount, \$136 million, through a special purpose vehicle ("SPV") that exists exclusively for the SpaceX investment.³²² Ehrenpreis has not set

³¹⁷ Ehrenpreis:62:20-63:1.

³¹⁸ Ehrenpreis:63:2-6.

³¹⁹ Ehrenpreis:10:10-16,57:8-13.

³²⁰ JX0577:TESLADIR0028183(at 5).

³²¹ Ehrenpreis:17:3-18:7.

³²² Ehrenpreis:19:8-15,19:20-25.

up SPVs for investments in any company other than SpaceX.³²³ Ehrenpreis beneficially owned 254,713 shares of SpaceX stock at the time of the Acquisition.³²⁴

6. Brad Buss

Buss, like Jurvetson and Ehrenpreis, owes much of his wealth to his relationship with Elon Musk. Buss joined the Tesla Board in 2009 before its IPO. Between Tesla's 2010 IPO and 2018, Buss earned over \$17 million in compensation as a result of his Tesla Board service.³²⁵ In 2014, Buss (at Musk's request) came out of retirement to become SolarCity's CFO.³²⁶ Buss remained CFO through the first quarter of 2016. Thus, he was still CFO when SolarCity fell into its liquidity crisis in 2015, with other senior executives becoming "beyond frustrated about [Buss] and his incompetence."³²⁷ Buss still earned more than **\$30 million** in compensation for this 18-month stint, after which he promptly re-retired.³²⁸ At the time of the Bailout,

³²³ Ehenpreis:19:20-21.

³²⁴ JX2741:9.

³²⁵ See JX0045:37;JX0070:35;JX0109:33;JX0190:50;JX0345:44;JX0977:40;JX2496:43; JX2641:43;JX2768:66.

³²⁶ JX0977:9.

³²⁷ JX0491.

³²⁸ JX0995:44.

Buss also owned 37,277 shares of SolarCity common stock.³²⁹ He had many personal and economic incentives to rescue SolarCity.

* * *

As these facts show, “there were not enough independent and disinterested individuals among the directors making the challenged decision to comprise a board majority.”³³⁰ Moreover, Musk’s various personal and business relationships with a majority of the directors, when coupled with their personal conflicts of interest in the Bailout, only reinforce Musk’s status as controlling stockholder.³³¹

II. THE ACQUISITION WAS NOT ENTIRELY FAIR

When the entire fairness standard applies, directors bear the burden of proof to establish “to the court’s satisfaction that the transaction was the product of both

³²⁹ JX2740:7-8.

³³⁰ *Trados*, 73 A.3d at 44.

³³¹ *See Tesla Motors*, 2018 WL 1560293, at *17 (“The question of whether a board is comprised of independent or disinterested directors is relevant to the controlling stockholder inquiry because the answer, in turn, will inform the court’s determination of whether the board was free of the controller’s influence such that it could exercise independent judgment in its decision-making.”) (citing *In re KKR Fin. Holdings, LLC S’holder Litig.*, 101 A.3d 980, 995 (Del. 2014)); *Calesa*, 2016 WL 770251, at *11(holding that plaintiff properly stated a claim that ACAS was a controlling stockholder because “a majority of the Board...was under the influence of, or shared a special interest with, ACAS in regard to the Transaction”).

fair dealing and fair price.”³³² “Not even an honest belief that the transaction was entirely fair will be sufficient to establish entire fairness. Rather, the transaction itself must be objectively fair, independent of the board’s beliefs.”³³³

Fair dealing “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.”³³⁴ “The various dimensions of fair dealing can interact and elide such that a particular instance of unfair dealing affects multiple phases of the process.”³³⁵ When a controlling stockholder “engages in an act of unfair dealing that it subsequently fails to disclose,” then “the act both provides evidence of unfairness in its own right and gives rise to an additional instance of unfairness in the form of a disclosure violation.”³³⁶

Fair price “relates to the economic and financial considerations of the proposed merger, including all relevant factors: assets, market value, earnings, future

³³² *Cinerama, Inc. v. Technicolor*, 663 A.2d 1156, 1163 (Del. 1995).

³³³ *Gesoff v. IIC Indus.*, 902 A.2d 1130, 1145 (Del. Ch. 2006).

³³⁴ *Weinberger v. UOP, Inc.*, 457 A.2d 701, 711 (Del. 1983).

³³⁵ *Basho Techs. Holdco B, LLC v. Georgetown Basho Invs., LLC*, 2018 WL 3326693, at *36 (Del. Ch. July 6, 2018).

³³⁶ *Id.* (collecting cases).

prospects, and any other elements that affect the intrinsic or inherent value of a company's stock.”³³⁷ “For purposes of determining fairness, as opposed to crafting a remedy, the court's task is not to pick a single number, but to determine whether the transaction price falls within a range of fairness.”³³⁸

Although the elements of entire fairness may be analyzed independently, “the test for fairness is not a bifurcated one as between fair dealing and price.”³³⁹ “[T]he two aspects of the entire fairness standard interact,” as process and negotiation failures can also “infect price.”³⁴⁰

Here, Musk will not be able to prove that the Bailout was entirely fair. Foremost, Musk timed and initiated the Bailout to benefit SolarCity—*not Tesla*. Although Musk has represented that a solar division had long been part of his strategic vision for Tesla, he took no steps to actually buy a solar company until he discussed SolarCity's dire financial situation with his cousin in February 2016.³⁴¹

February 2016 was not the time for Tesla's to engage in a capital-intensive acquisition of a financially distressed company in an adjunct business line. Tesla

³³⁷ *Weinberger*, 457 A.2d at 711.

³³⁸ *In re Dole Food Co. Stockholder Litig.*, 2015 WL 5052214, at *33 (Del. Ch. Aug. 27, 2015).

³³⁹ *Weinberger*, 457 A.2d at 711.

³⁴⁰ *Dole*, 2015 WL 5052214, at *34.

³⁴¹ JX0733;JX0777;L.Rive:71:1-21.

was in the midst of addressing serious issues with its Model X and was about to embark on a “bet-the-company” launch of the Model 3. No one else wanted to buy SolarCity, so there was no competing bidder to justify an accelerated timeline. Also, Tesla did not try to acquire any other solar business or start its own. SolarCity’s liquidity crisis is the only explanation for Musk’s sudden need for Tesla to acquire a solar company on an accelerated timetable in 2016.

The manner in which the Bailout was structured, negotiated, and approved by Tesla directors was also unfair. The Board did not form a special committee. Nor did it make any effort to prevent Musk from dominating the transaction process. Unsurprisingly, Musk—not the Board—controlled the Bailout. As explained above, he rushed the diligence process and compromised the work being done by Tesla’s financial advisors. He freely participated in the Board’s deliberations about the transaction and negotiating strategy and helped set the price for the transaction. Meanwhile, he was having unauthorized discussions with Rive and Kendall behind the backs of his fellow directors. He personally solicited stockholder support for the deal, while intentionally misrepresenting his significant role in the process, SolarCity’s true financial condition, and the actual status and prospects of its Solar Roof product.

The evidence likewise shows that Tesla paid an unfair price to acquire SolarCity. Tesla paid more than \$25 per share for SolarCity,³⁴² when SolarCity was insolvent and could not operate as a going concern. The evidence will show:

- Since the fall of 2015, SolarCity was at constant risk of tripping the liquidity covenant on its revolver—an incurable default that would threaten SolarCity’s entire business model.³⁴³
- By March 2016, SolarCity implemented drastic cash management plans that involved cancelling major installation projects and not paying its vendors.³⁴⁴
- By July 2016, Lazard determined that SolarCity was “on the brink of a liquidity event” and could no longer operate as “Status Quo.”³⁴⁵
- SolarCity only survived to the closing by stopping business lines, conducting large lay-offs, delaying Silevo expenditures, and taking a \$100 million short-term loan from Elon.³⁴⁶

³⁴² SolarCity stockholders received 0.110 Tesla share for each SolarCity shares. Using Tesla’s five-day volume weighted average price as of July 29, 2016 (the last trading day before the Bailout was announced), the merger consideration was \$25.37. Defendant’s expert, Dan Fischel, uses Tesla’s June 21, 2016 closing price to calculate an “Announced Merger Consideration” of \$24.16 and Tesla’s November 18, 2016 closing price to calculate an “Actual Merger Consideration” of \$20.35. FischelOR:¶12.

³⁴³ See *supra* 8-11, 14, 17-18, 22-24, 28-32, 40-41.

³⁴⁴ See *supra* 12.

³⁴⁵ See *supra* 22, 30-31.

³⁴⁶ See *supra* 12, 30, 37, 45.

- At the time of the Bailout, SolarCity was insolvent under numerous commonly accepted tests for measuring solvency.³⁴⁷
- Within weeks of the Bailout, SolarCity’s auditors determined “that as a standalone entity [SolarCity] will not have sufficient cash to meet its obligations as they come due.”³⁴⁸

Meanwhile, the Bailout was SolarCity’s only option. Every potential acquirer and PIPE investor that Lazard contacted passed.³⁴⁹ A secondary equity offering was likely impossible³⁵⁰ and, at best, would have led to “value destruction.”³⁵¹

Moreover, the Bailout has proven a failure. Tesla “paid for a high growth” company.³⁵² The Revised Sensitivity Case and Management Case forecasted that deployments would grow by 118% and 158%, respectively, over the four years following the transaction.³⁵³ Since the Bailout, however, solar deployments have plummeted.³⁵⁴ In short, Tesla did not get what it paid for.

³⁴⁷ *See infra* 73.

³⁴⁸ JX2398.

³⁴⁹ Kendall:24:21-26:25; JX1707:SC_Third_Parties0025130-31; JX1632.

³⁵⁰ *See supra* 31.

³⁵¹ JX1504.

³⁵² Musk:214:9-14.

³⁵³ JX1672.

³⁵⁴ *See supra* 46.

Musk offers little to overcome this evidence of unfair price. His experts rely predominantly on SolarCity's pre-Acquisition stock price, purported market efficiencies, and the value of the supposed synergies that could be obtained. However, in June 2016, when Musk announced the Initial Offer, Tesla's stock price declined by more than the value of the consideration paid in the Bailout, meaning the market valued SolarCity at *less than zero* in Tesla's hands.³⁵⁵ More fundamentally, as Evercore informed the Board, the market was unaware of the depth SolarCity's liquidity crisis.³⁵⁶

Thus, Musk will be unable to prove at trial that the Acquisition was "the product of both fair dealing and fair price,"³⁵⁷ and he should be held liable for the resulting damage caused to Tesla.³⁵⁸

³⁵⁵ JX1590.

³⁵⁶ JX1645;JX1672;JX1735.

³⁵⁷ *Cinerama*, 663 A.2d at 1163.

³⁵⁸ Even if Musk were afforded initial protections under the business judgment rule, those protections disappear when "the plaintiff shows that the directors breached their fiduciary duty of care or of loyalty or acted in bad faith." *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 52 (Del. 2006); *Cede*, 631 A.2d at 361 (holding there is no business judgment protection where "directors, in reaching their challenged decision, breached any one of the triads of their fiduciary duty.") For all of the same reasons that the acquisition process was unfair and resulted in an unfair price, Plaintiffs have rebutted the business judgment rule here and Musk must demonstrate the entire fairness of the Bailout.

III. MUSK MADE FALSE AND MISLEADING DISCLOSURES TO SECURE TESLA STOCKHOLDER APPROVAL OF THE TRANSACTION

In soliciting stockholder approval, Musk and the Board were “required to disclose fully and fairly all material information” within their control. *Malone v. Brincat*, 722 A.2d 5, 12 (Del. 1998). At trial, Plaintiffs will prove that Musk made false statements and omitted to disclose material facts concerning, among other things: (i) SolarCity’s true financial condition; (ii) his involvement in evaluating, negotiating, and setting the price paid in the Bailout; and (iii) the status of SolarCity’s Solar Roof “product.”

IV. THE ACQUISITION CONSTITUTED WASTE

Musk wasted Tesla’s assets on the Bailout. “The judicial standard for determination of corporate waste is well developed. Roughly, a waste entails an exchange of corporate assets for consideration so disproportionately small as to lie beyond the range at which any reasonable person might be willing to trade.” *Lewis v. Vogelstein*, 699 A.2d 327, 336 (Del. Ch. 1997); *see also In re Ezcorp Inc. Consulting Agreement Derivative Litig.*, 2016 WL 301245, at *31 (Del. Ch. Jan. 25, 2016) (holding that waste lies where the “economic terms” of the transaction are “so one-sided as to create an inference that no person acting in a good faith pursuit of the corporation’s interests could have approved the terms.”). Because SolarCity was

effectively worth nothing,³⁵⁹ and Tesla paid \$2.6 billion to acquire it, Tesla's acquisition of SolarCity constitutes waste.

³⁵⁹ *See infra* 73.

REMEDY

“Once liability has been found, and the court’s powers shift to the appropriate remedy, the Court of Chancery has broad discretion to craft a remedy to address the wrong.”³⁶⁰ When a breach results in an unfair price being paid in a corporate transaction, the Court may award damages equal to the difference between the price that the acquiring company paid and the fair value of the target.³⁶¹ “Responsible estimates that lack mathematical certainty are permissible so long as the court has a basis to make a responsible estimate of damages.”³⁶² “Unlike the more exact process followed in an appraisal action, damages resulting from a breach of fiduciary duty

³⁶⁰ *Brinckerhoff v. Enbridge Energy Co., Inc.*, 159 A.3d 242, 262 (Del. 2017).

³⁶¹ *In re Southern Peru Copper S’holder Derivative Litig.*, 52 A.3d 761, 815 (Del. Ch. 2011) (ordering damages “that approximates the difference between the price that the Special Committee would have approved had the Merger been entirely fair (i.e., absent a breach of fiduciary duties) and the price that the Special Committee actually agreed to pay”); *Strassburger v. Earley*, 752 A.2d 557, 579 (Del. Ch. 2000) (holding that compensatory damages should be equal to “the ‘fair’ or ‘intrinsic’ value of their stock at the time of the merger, less the price per share that they actually received.”).

³⁶² *Red Sail Easter Ltd. Partners, L.P. v. Radio City Music Hall Prods., Inc.*, 1992 WL 251380, at *7 (Del. Ch. Sept. 29, 1992).

are liberally calculated.”³⁶³ Furthermore, once disloyalty has been established, a fiduciary cannot be permitted to personally profit from his conduct.³⁶⁴

I. REMEDIES FOR TESLA

The Tesla stock used to acquire SolarCity was worth \$25.37 per SolarCity share as of August 1, 2016 and \$21.30 per SolarCity share on November 18, 2016, when the Bailout closed (or \$2.63 and \$2.21 billion, respectively).³⁶⁵

At trial, Plaintiffs will prove that SolarCity was insolvent and not a going concern at the time of the Bailout.³⁶⁶ Plaintiffs’ expert, Ronald G. Quintero (“Quintero”), has more than forty years of experience as a financial professional with an expertise in bankruptcy and insolvency,³⁶⁷ is a Certified Public Accountant, Certified Insolvency and Restructuring Advisor, Certified Turnaround Professor, and holds a Certification in Distressed Business Valuation.³⁶⁸ He performed 14 insolvency tests and concluded, like Tesla’s auditor E&Y, that “SolarCity was not viable as a going concern. SolarCity was insolvent and would have been unable to

³⁶³ *Southern Peru*, 52 A.3d at 814

³⁶⁴ *Thorpe v. CERBCO, Inc.* 676 A.2d 436, 445 (Del. 1996) (citing *Oberly v. Kirby*, 592 A.2d 445 (Del. 1991) and *In re Tri-Star Pictures*, 634 A.2d 319 (Del. 1993)).

³⁶⁵ JX1762:Ex.99.2;JX2443:73; JX2121:6.

³⁶⁶ QuinteroRR:¶¶14, 32.

³⁶⁷ QuinteroOR:¶3.

³⁶⁸ QuinteroOR:¶7.

satisfy its financial obligations, including recourse debt obligations, as a standalone entity, absent the Merger.”³⁶⁹ None of Musk’s experts have Quintero’s expertise and none performed analyses to assess SolarCity’s solvency.

DCF analyses are inappropriate for companies that are not going concerns “because a DCF assumes that the company being valued will have cash flows in perpetuity.”³⁷⁰ Instead, “the most relevant valuation premise is net liquidation value,”³⁷¹ which assumes the business is wound-up and the assets are liquidated.³⁷² Thus, Quintero performed a net liquidation value analysis³⁷³ and concluded that SolarCity’s liabilities exceeded the value of its assets, rendering SolarCity common stock worthless.³⁷⁴ Musk’s experts have not prepared a valuation analysis assuming SolarCity was not a going concern at the time of the Bailout.

Quintero also prepared a DCF valuation that would only be appropriate if SolarCity was found financially distressed, but still a going concern. Quintero used

³⁶⁹ QuinteroOR:¶¶9(a),56-101.

³⁷⁰ QuinteroRR:¶14.

³⁷¹ QuinteroOR:¶102.

³⁷² *Id.* ¶104 (citing AIRA Standards for Distressed Business Valuation (Medford, OR: Association of Restructuring Advisors, 2014) at 23).

³⁷³ QuinteroOR:¶107.

³⁷⁴ QuinteroOR:¶108.

financial projections based on Tesla’s Revised Sensitivity Case that Plaintiffs’ industry expert Juergen Moessner (“Moessner”) corrected to account for the expiration of the Solar ITC (the “SITC Phase Out Case”).³⁷⁵ The Solar ITCs were scheduled to decline from 30% for all commercial and residential systems in 2016 to 0% for owner-purchased residential systems and 10% for commercial and third-party owned residential systems by 2022. Moessner adjusted the projections because they included cash flows from the Solar ITC at a 30% rate in the final year of the projections (*i.e.* the terminal period of 2020). Moessner reduced the cash flows for the terminal period at the 30% level but conservatively included cash flows at the 10% level by assuming SolarCity could qualify for third-party owned residential systems, which was no guarantee.³⁷⁶ Quintero’s DCF analysis based on the SITC Phase Out Case valued SolarCity at \$6.14 per share.³⁷⁷ Musk’s experts did not prepare a proper DCF analysis that accounts for the Solar ITC phase-out.

Quintero also valued SolarCity using two cost approach methodologies, which would also only be appropriate if SolarCity was found financially distressed, but still a going concern. Quintero calculated that SolarCity’s adjusted appraised

³⁷⁵ QuinteroOR:¶9(e);MoessnerOR:¶¶8-9.

³⁷⁶ MoessnerOR:¶¶74-86,Ex. A.

³⁷⁷ QuinteroOR:¶9(e).

net asset value was \$10.23 per share on the Bailout closing date.³⁷⁸ He also found SolarCity's fair saleable net asset value was only \$1.59 per share on the Bailout closing date.³⁷⁹ Musk's experts have not prepared a valuation of SolarCity using any cost-approach methodology.

Musk's primary expert, Daniel Fischel, performed a flawed and unreliable analysis using a stock indexing methodology, concluding SolarCity's stock price would have declined from \$21.19 on June 21, 2016 to \$16.16 when the Bailout closed.³⁸⁰ Fischel's report contended the Bailout price is still justified by his implausible and unsupported \$1.1 billion synergy valuation, but he has already conceded that this valuation is overstated by hundreds of millions.³⁸¹ Fischel's unreliable methodology alone confirms Tesla substantially overpaid for SolarCity. As Plaintiffs' expert Murray Beach will show at trial, Fischel incorrectly used a June 21 start date for his stock indexing analysis, a date when SolarCity's stock price was already inflated by leaks about the premium Bailout. Using a true unaffected start

³⁷⁸ QuinteroOR:¶¶9(d),147.

³⁷⁹ QuinteroOR:¶¶9(d),147.

³⁸⁰ FischelOR:¶32. Fischel believes this analysis is more reliable than his DCF analysis. *Id.* ¶54.

³⁸¹ Fischel:199-201.

date results in valuations of \$8.43 and \$10.32 per share using Fischel's own methodology.³⁸²

As an alternative to money damages, the Court can fashion an equitable remedy by canceling the excessive shares of Tesla Musk obtained in the Bailout to disgorge him of personal profits derived by his misconduct.³⁸³

II. REMEDIES FOR THE CLASS

In addition to damages Tesla suffered, Plaintiffs and the Class likewise suffered a direct harm based on the dilution of their voting power in Tesla.³⁸⁴ Tesla issued approximately 11,080,333 shares of common stock as consideration for the Bailout, representing approximately 7.4% of the 149,792,626 shares of Tesla common stock outstanding just prior to the Bailout.³⁸⁵ Meanwhile, the approximate

³⁸² BeachRR:¶¶13-20.

³⁸³ *Gentile v. Rossette*, 906 A.2d 91, 103 (Del. 2006) (noting the option to cancel "overpayment" shares held by the controller on similar voting dilution claims); *Loral*, 2008 WL 4293781, at *31-33 (noting the court's broad equitable powers to rectify unfair transactions through altering the stockholdings of the controller); *Southern Peru*, 52 A.3d at 819 (noting possibility of returning shares issued in unfair merger).

³⁸⁴ *See Gentile*, 906 A.2d 91 at 101-102 ("The resulting reduction in economic value and voting power affected the minority stockholders uniquely, and the corresponding benefit to the controlling stockholder was the product of a breach of the duty of loyalty....").

³⁸⁵ JX2121:1,20.

2.4 million shares Musk personally received in the Bailout increased his ownership interest from 22.1% to 22.5% of Tesla's outstanding stock.³⁸⁶ Accordingly, the Bailout resulted in a significant dilution of the Class's voting interest in Tesla, and a transfer of economic interests and voting power for Musk.

CONCLUSION

Plaintiffs respectfully request that the Court enter judgment in their favor following trial and award appropriate damages and/or other equitable relief.

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³⁸⁶ JX2121:200.

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