



PlainSite®

Legal Document

Court of Chancery of Delaware
Case No. 12711-VCS
In Re Tesla Motors, Inc. Stockholder Litigation

Document 306



[View Document](#)



[View Docket](#)



IN THE COURT OF THE CHANCERY OF THE STATE OF DELAWARE

IN RE TESLA MOTORS, INC.
STOCKHOLDER LITIGATION

Consolidated
C.A. No. 12711-VCS
UNSEALED - SEPTEMBER 23, 2019

**PLAINTIFFS' OPENING BRIEF IN SUPPORT OF THEIR
MOTION FOR PARTIAL SUMMARY JUDGMENT**

GRANT & EISENHOFER P.A.

OF COUNSEL:

GRANT & EISENHOFER P.A.

Daniel L. Berger
485 Lexington Avenue
New York, NY 10017
Tel: (646) 722-8500
Fax: (646) 722-8501

Jay W. Eisenhofer (#2864)
Christine M. Mackintosh (#5085)
Kelly L. Tucker (#6382)
Vivek Upadhyaya (#6241)
123 Justison Street
Wilmington, DE 19801
Tel: (302) 622-7000
Fax: (302) 622-7100

**KESSLER TOPAZ MELTZER
& CHECK, LLP**

Lee D. Rudy
Eric L. Zagar
Robin Winchester
Justin O. Reliford
280 King of Prussia Road
Radnor, PA 19087
Tel: (610) 667-7706
Fax: (610) 667-7056

*Co-Lead Counsel for Co-Lead
Plaintiffs*

**ROBBINS GELLER RUDMAN
& DOWD LLP**

Randall J. Baron
David T. Wissbroecker
Maxwell R. Huffman
655 West Broadway, Suite 1900
San Diego, CA 92101
Tel: (619) 231-1058
Fax: (619) 231-7423

*Co-Lead Counsel for Co-Lead
Plaintiffs*

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
TABLE OF DEFINITIONS.....	vi
INTRODUCTION	1
STATEMENT OF FACTS	3
I. MUSK’S PYRAMID OF COMPANIES	3
II. SOLARCITY ENCOUNTERS A SEVERE LIQUIDITY CRISIS	8
III. MUSK INITIATES A PLAN TO BAIL OUT SOLARCITY	11
IV. TESLA OFFERS TO BUY SOLARCITY.....	13
V. MUSK PUSHES TO COMPLETE THE ACQUISITION	20
VI. DEFENDANTS APPROVE THE ACQUISITION BASED ON FLAWED FINANCIAL ANALYSES.....	30
A. Evercore Lacked Key Information.....	31
B. Evercore Failed to Account for the Phase-Out of the Solar ITCs.....	34
VII. MUSK’S MACHINATIONS CONTINUED.....	37
VIII. SOLARCITY’S AUDITORS CONFIRM THE COMPANY COULD NOT OPERATE AS A GOING CONCERN.....	40
ARGUMENT	42
I. AT TRIAL DEFENDANTS MUST PROVE ENTIRE FAIRNESS	42
A. Elon Musk	44
B. Brad Buss	45
C. Ira Ehrenpreis	46
D. Antonio Gracias.....	48

E.	Steve Jurvetson.....	49
F.	Kimbal Musk.....	52
G.	Robyn Denholm	53
II.	DEFENDANTS’ <i>CORWIN</i> DEFENSE FAILS AS A MATTER OF LAW	54
A.	SolarCity Was Facing a Serious Liquidity Crisis	55
B.	SolarCity’s Liquidity Problems Preceded Tesla’s Offer.....	59
C.	Musk Was Actively Involved in the Tesla Board’s Negotiation And Evaluation Of the Acquisition.....	61
D.	Evercore’s Flawed Financial Analyses and Advice.....	64
1.	Impact of Tax Equity	65
2.	Evercore’s Valuations.....	66
	CONCLUSION.....	67

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Albert v. Alex. Brown Mgmt. Servs., Inc.</i> , 2005 WL 2130607 (Del. Ch. Aug. 26, 2006)	55, 58, 61
<i>In re Answers Corp. S’holder Litig.</i> , 2014 WL 463163 (Del. Ch. Feb. 3, 2014)	2
<i>Arnold v. Society for Sav. Bancorp.</i> , 650 A.2d 1270 (Del. 1994)	54
<i>Aronson v. Lewis</i> , 473 A.2d 805 (Del. 1984)	43, 54
<i>Cede & Co. v. Technicolor, Inc.</i> , 634 A.2d 345 (Del. 1993)	43
<i>Chen v. Howard-Anderson</i> , 87 A.3d 648 (Del. Ch. 2014)	61
<i>Corwin v. KKR Fin. Holdings LLC</i> , 125 A.3d 304 (Del. 2015)	2, 42, 54, 55
<i>Crescent/Mach I Partners, L.P. v. Turner</i> , 846 A.2d 963 (Del. Ch. 2000)	64
<i>In re Dole Food Co., Inc. S’holder, Inc.</i> , No. 8703-VCL, Order Denying Motions for Summary Judgment (Del. Ch. Feb. 5, 2015)	42
<i>In re Dole Food Co., Inc. S’holder Litig.</i> , 2015 WL 5052214 (Del. Ch. Aug. 27, 2015)	1
<i>Eisenberg v. Chi. Milwaukee Corp.</i> , 537 A.2d 1051 (Del. Ch. 1987)	55, 58
<i>In re Emerging Communications</i> , 2004 WL 1305745 (Del. Ch. May 3, 2004)	59

<i>Kahn v. M&F Worldwide Corp.</i> , 88 A.3d 635 (Del. 2014)	42
<i>In re Lear Corp. S’holder Litig.</i> , 929 A.2d 94 (Del. Ch. 2007)	64
<i>Malone v. Brincat</i> , 722 A.2d 5 (Del. 1998)	54
<i>Maric Capital Master Fund, Ltd. v. Plato Learning, Inc.</i> , 11 A.3d 1175 (Del. Ch. 2010)	59
<i>In re Netsmart Techs., Inc. S’holders Litig.</i> , 924 A.2d 171 (Del. Ch. 2007)	64
<i>In re Orchard Enters., Inc. Stockholder Litig.</i> , 88 A.3d 1 (Del. Ch. 2014)	62, 64
<i>Paul v. Deloitte & Touche LLP</i> , 974 A.2d 140 (Del. 2009)	42
<i>In re Pure Resources</i> , 808 A.2d 421 (Del. Ch. 2002)	55, 61, 64, 67
<i>In re Saba Software, Inc. Stockholder Litig.</i> , 2017 WL 1201108 (Del. Ch. Mar. 31, 2017)	59
<i>In re Trados Inc. S’holder Litig.</i> , 73 A.3d 17 (Del. Ch. 2013)	1, 43, 54
<i>Zirn v. VLI Corp.</i> , 681 A.2d 1050 (Del. 1996)	59
Statutes	
26 U.S.C. § 48 (a)(6).....	35, 66
Energy Policy Act of 2005, Title XIII	5
Other Authorities	
Del. Ct. Ch. R. 56(c) (2016).....	42

Drake Baer, <i>The Making Of Tesla: Invention, Betrayal, And The Birth Of The Roadster</i> , Nov. 11, 2014, BUS. INSIDER.....	3
Sarah McBride & Dana Hull, <i>Elon Musk’s Boring Co. Raises \$120 Million in First Outside Investment</i> , BLOOMBERG, July 25, 2019.....	51
Michael Kanellos, <i>Tesla Delays Production of its Electric Sports Car</i> , CNET, SEPT. 25, 2007	4
Solar Energy Indus. Ass’n, Solar Investment Tax Credit (ITC).....	35
Theodore Schleifer, <i>Steve Jurevson Was Pushed Out of His Firm as the Lines Between Personal and Professional Crossed</i> , RECODE, Nov. 18, 2017.....	49
Theodore Schleifer, <i>DFJ Has Apologized for the Reported ‘Sex Party’ Event at Steve Jurevson’s Home</i> , RECODE, Jan. 11, 2018	50
Lesley Stahl Interview of Elon Musk, <i>Tesla CEO Elon Musk: The 60 Minutes Interview</i> , 60 MINUTES, Dec. 9, 2018	53

TABLE OF DEFINITIONS

Acquisition	The transaction between Tesla and SolarCity announced on August 1, 2016 and completed on November 21, 2016
Buss	Brad W. Buss—Defendant, Tesla Board member and former SolarCity CFO
CEO	Chief Executive Officer
CFO	Chief Financial Officer
COO	Chief Operating Officer
CTO	Chief Technology Officer
DBL	DBL Partners
DCF	Discounted Cash Flow
Defendants	Defendants Tesla, Buss, Denholm, Ehrenpreis, Gracias, Jurvetson, Elon Musk and Kimbal Musk
Denholm	Robyn M. Denholm—Defendant and Tesla Board member
DFJ	Draper Fisher Jurvetson
E&Y	Ernst & Young LLP
Ehrenpreis	Ira Ehrenpreis—Defendant and Tesla Board member
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—Defendant, Tesla Board member and SolarCity Board member
IPO	Initial Public Offering
Jurvetson	Stephen T. Jurvetson—Defendant and Tesla Board member
Kimbal	Kimbal Musk—Defendant and Tesla Board member
KPMG	KPMG LLP
Lazard	Lazard Frères & Co. LLC and its employees
Merger Agreement	The Agreement and Plan of Merger between Tesla and SolarCity, entered into on July 31, 2016
Musk, or Elon	Elon Musk—Defendant, Tesla Board Chairman and CEO, SolarCity Board Chairman and largest stockholder of each company
MW	Megawatt
Plaintiffs	Plaintiffs Arkansas Teacher Retirement System, Boston 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
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 amendments and supplements thereto
Rive	Lyndon Rive—SolarCity Board member and CEO
The Rives	Lyndon Rive and Peter Rive (SolarCity Board member and CTO)
SEC	United States Securities and Exchange Commission

Serra	Tanguy Serra—SolarCity CFO
Silevo	Silevo, Inc. (SolarCity subsidiary)
Silver Lake	Silver Lake Kraftwerk Fund, L.P.
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
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 strategic alternative transactions
Tesla, or the Company	Tesla Motors, Inc. and its directors, employees and subsidiaries
Tesla Board	Tesla board of directors at the time of the Acquisition
Valor	Valor Management Corp. and its subsidiaries and affiliates
Wheeler	Jason Wheeler—Tesla CFO

Plaintiffs respectfully submit this opening brief in support of their motion for partial summary judgment in the above-captioned action.¹

INTRODUCTION

Plaintiffs challenge Defendants' conflicted decision to approve a merger with SolarCity and the manner in which they solicited Tesla stockholder support. At trial, Plaintiffs will prove that SolarCity was not worth the price negotiated by Tesla's conflicted fiduciaries and was insolvent at the time of the Acquisition. In the meantime, there are two issues that the Court should resolve now based on undisputed facts.

First, Defendants have to prove that the Acquisition was entirely fair.² 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 comprise a board majority.”³ Here, a majority (if not all) of the Tesla Board were not disinterested and independent due to their direct

¹ References to “Ex. ___” herein are to the exhibits submitted with Plaintiff's Appendix of Documents Cited in Their Opening Brief in Support of Their Motion for Summary Judgment.

² See, e.g., *In re Dole Food Co., Inc. S'holder Litig.*, 2015 WL 5052214, at *3 (Del. Ch. Aug. 27, 2015) (explaining that “defendants moved for summary judgment on the standard of review and allocation of burden” and holding “that the defendants had not made the showing necessary to change the standard of review or shift the burden”).

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

financial interests in SolarCity and/or deep ties to Musk himself. Defendants have yet to dispute these conflicts in their motion to dismiss, and they have no basis to do so now or at trial. Accordingly, irrespective of Musk’s status as a controlling stockholder, Defendants bear the burden of proving that the transaction was entirely fair.

Second, Defendants cannot sustain any affirmative defense premised on the Tesla stockholder vote.⁴ To establish stockholder ratification, directors must demonstrate that no “troubling facts” were withheld from stockholders.⁵ Here, Defendants concealed a variety of troubling facts that are not subject to dispute. As discussed in detail below, Defendants withheld material information concerning: (i) SolarCity’s true financial condition, including a long-standing “liquidity crisis” that threatened its solvency and created the backdrop for Musk’s decision to pursue the Acquisition; (ii) Musk’s direct involvement in negotiating and evaluating the Acquisition; and (iii) Evercore’s financial analyses. Accordingly, stockholder ratification is inapplicable.

⁴ See *In re Answers Corp. S’holder Litig.*, 2014 WL 463163, at *9 n.92 (Del. Ch. Feb. 3, 2014) (addressing certain affirmative defenses at summary judgment).

⁵ *Corwin v. KKR Fin. Holdings LLC*, 125 A.3d 304, 312 (Del. 2015).

According, Plaintiffs respectfully request that the Court order that (1) Defendants bear the burden of proof under the entire fairness standard and (2) Defendants' stockholder ratification defense fails as a matter of law.

STATEMENT OF FACTS

I. MUSK'S PYRAMID OF COMPANIES

Tesla “design[s], develop[s], manufacture[s] and sell[s] high-performance fully electric vehicles and energy storage products.”⁶ In 2004, Musk became Chairman of the Tesla Board.⁷ In 2008, following disputes with Tesla's co-founders, Musk appointed himself CEO.⁸ Musk is Tesla's largest stockholder and owned 22.1% of the outstanding shares at the time of the Acquisition.⁹

Tesla debuted its Roadster in 2006 and began offering it to the public in 2008.¹⁰ The Roadster's \$98,000 price tag and Tesla's limited manufacturing

⁶ Ex.129 at 4.

⁷ Ex.143 at 9.

⁸ Drake Baer, *The Making Of Tesla: Invention, Betrayal, And The Birth Of The Roadster*, Nov. 11, 2014, BUS. INSIDER, <https://www.businessinsider.com/tesla-the-origin-story-2014-10>.

⁹ Ex.140; Ex.10 (Kimbal Musk Tr.) at 76:18-77:7.

¹⁰ Ex.117 at 69.

capability constrained production.¹¹ Tesla introduced the Model S in 2012¹² and Model X in 2015.¹³ Both were well-received, but Tesla continued to incur operating losses that required significant funding.¹⁴ In early 2016, commensurate with Musk's efforts to acquire SolarCity, Tesla unveiled its \$35,000 Model 3—Tesla's first attempt to reach a broader consumer market.¹⁵ The Model 3 was and remains a “bet the company” program; if it did not succeed, “then Tesla would die.”¹⁶ Musk anticipated that navigating the “difficulties with the Model 3 program” would be exceptionally difficult given that “it's been a century . . . since any American carmaker has reached volume production.”¹⁷

In July 2006, Musk's cousins Lyndon Rive (“Rive”) and Peter Rive co-founded SolarCity, which marketed and installed solar energy systems.¹⁸ Musk was Chairman of the SolarCity Board and its largest investor, owning 21.9% of its

¹¹ Michael Kanellos, *Tesla Delays Production of its Electric Sports Car*, CNET, Sept. 25, 2007, available at <https://www.cnet.com/news/tesla-delays-production-of-its-electric-sports-car>.

¹² Ex.120 at 4.

¹³ Ex.129 at 4.

¹⁴ See Ex.152 at ¶12, Exhibits 4-8.

¹⁵ Ex.132 at Exhibit 99.1 at 1.

¹⁶ Ex.9 (E. Musk Tr.) 74:12-75:5.

¹⁷ Ex.9 (E. Musk Tr.) 72:6-23.

¹⁸ Ex.121 at 2, 5.

outstanding shares at the time of the Acquisition.¹⁹ In 2008, SolarCity launched its flagship financing product, the “SolarLease,” through which customers leased solar systems, making fixed monthly lease payments.²⁰ In 2009, SolarCity introduced the “SolarPPA”—a “power purchase agreement” that charged customers fees for energy use.²¹ Both products involved “little to no upfront costs” for the customers and carried 20-year terms.²²

The SolarLease and SolarPPA generated assets for SolarCity, including: (i) future lease payments from the customers receiving the solar energy systems, and (ii) tax equity associated with the Solar ITC.²³ Under the Energy Policy Act of 2005, the Solar ITC allows for investors in solar energy systems to recoup 30% of the total cost of residential or commercial solar systems 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

¹⁹ Ex.137 (Proxy) at 175.

²⁰ Ex.128 at 5-6.

²¹ *Id.*

²² *Id.*

²³ Ex.128 at 5-6.

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

²⁵ Ex.128 at 6, 14, 42; Ex.12 (Serra Tr.) 42:14-43:8.

Because SolarCity covered the costs and expenses associated with the solar systems under both the SolarLease and SolarPPA, SolarCity needed ways to monetize the future cash flow streams and tax credits.²⁶ SolarCity did this by creating investment vehicles that bundled and sold the rights to receivables and tax assets to third-party investors.²⁷ 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”).²⁸

SolarCity was never profitable and incurred massive and growing operating losses.²⁹ During the five years leading up to the Acquisition, SolarCity reported over \$2.2 billion in net losses: \$113.7 million in 2012, \$151.8 million in 2013, \$375.2 million in 2014, \$768.8 million in 2015, and \$820.3 million in 2016.³⁰ SolarCity turned to the capital markets to fund these losses.³¹ From 2012 to 2014, SolarCity

²⁶ Ex.128 at 6, 17, 42; Ex.12 (Serra Tr.) 42:14-43:8.

²⁷ Ex.141 at 2-3.

²⁸ Ex.153, ¶30.

²⁹ Ex.141 at 28; Ex.123 at 61.

³⁰ Ex.141 at 28; Ex.123 at 39.

³¹ Ex.128 at 66.

was able to raise more money than it lost.³² In 2015, SolarCity’s capital raises could no longer keep up, and discretionary cash flow deficits outpaced the net funds raised.³³ This deficiency continued into 2016.³⁴

SpaceX—a private aerospace manufacturer and space transport services company founded by Musk—helped keep SolarCity afloat.³⁵ As SpaceX’s Chairman, CEO, CTO, and majority stockholder,³⁶ Musk caused SpaceX to purchase \$90 million in SolarCity bonds in March 2015, \$75 million in June 2015, and another \$90 million in March 2016.³⁷ These bond purchases violated SpaceX’s own internal policy, and SolarCity was the only public company in which SpaceX made any investments.³⁸

Prior to the Acquisition, Musk described Tesla, SolarCity, and SpaceX as a “pyramid” atop which he sat; it was “important that there not be some sort of house of cards that crumbles if one element of the pyramid . . . falters.”³⁹

³² Ex.152 at Exhibits 12, 15; Ex.125 at 56, 74, 77.

³³ Ex.152 at Exhibits 12, 15; Ex.128 at 59, 75, 77.

³⁴ Ex.152 at Exhibits 12, 15; Ex.141 at 41, 43.

³⁵ Ex.131 at 7, 52.

³⁶ *Id.*; Ex.130 at 44; Ex.6 (Gracias Tr.) 197:5-13.

³⁷ Ex.141 at 73.

³⁸ Ex.9 (E. Musk Tr.) 187:19-24; Ex.17.

³⁹ Ex.48 at TESLA00019905.

II. SOLARCITY ENCOUNTERS A SEVERE LIQUIDITY CRISIS

Unbeknownst to the market, by the fall of 2015, SolarCity was facing “a major liquidity crisis.”⁴⁰ In a September 20, 2015 email, SolarCity COO Tanguy Serra informed the executive management team that SolarCity’s “total war chest” of available cash, which was approximately \$1.1 billion at the start of the year, was forecasted to drop to approximately \$200 million by the end of the year.⁴¹ In response, Rive immediately instituted “weekly cash meetings” to monitor and manage SolarCity’s liquidity situation on a week-by-week basis.⁴²

SolarCity’s debt instruments imposed liquidity covenants that required SolarCity to maintain minimum cash balances.⁴³ As of late 2015 and early 2016, SolarCity’s revolving credit facility required an average monthly cash balance of approximately \$116 million.⁴⁴ A breach of this liquidity covenant would cause an incurable default on SolarCity’s revolver and trigger cross-defaults on SolarCity’s other debt instruments.⁴⁵

⁴⁰ Ex.19.

⁴¹ *Id.*

⁴² Ex.20; Ex.21; Ex.22; Ex.11 (L. Rive Tr.) 39:2-7. SolarCity management continued to hold these weekly cash meetings during 2016. Ex.11 (L. Rive Tr.) 39:2-7.

⁴³ Ex.33 at TESLA00002334.

⁴⁴ *Id.*

⁴⁵ Ex.101 at 3; Ex.12 (Serra Tr.) 82:19-24.

On October 15, 2015, Rive and Buss advised Musk and the remainder of the SolarCity Board that the company needed to raise between “\$180 to \$300m” in additional cash.⁴⁶ Rive and Buss also stated that solar installations for 2015 was expected to be “920MW versus budget of 1.05GW,” which has “reduced cash inflow.”⁴⁷ On October 21, 2015, following a “weekly cash meeting,” Bryan Ellis, SolarCity’s Senior Vice President, Finance and Analysis, advised the executive management team that his **“updated forecast projects our December monthly average balance at ~\$91 million, which is \$24 million below our revolver covenant threshold of ~\$115 million.”**⁴⁸

To address its cash need, SolarCity contacted several investment banks and private equity investors about an equity or convertible bond offering—public or private.⁴⁹ The banks told SolarCity that neither was a reasonable option for obtaining the amount of cash it needed.⁵⁰ The private equity investors had no interest in equity or convertible bonds in the amount SolarCity needed and would only

⁴⁶ Ex.23 at SC_Third_Parties_0002148, 151.

⁴⁷ *Id.* at 150.

⁴⁸ *See* Ex.26 (emphasis added).

⁴⁹ Ex.24 at TESLA00529584.

⁵⁰ Ex.27 at TESLADIR0024715, slide 6; Ex.24 at TESLA00529583-84.

consider “very high coupon debt” that SolarCity management believed would be very difficult to execute given “tough covenants” with their existing debt.⁵¹

In November 2015, leveraging Musk’s contacts and influence, SolarCity issued \$113 million in senior convertible notes to bring in some additional cash; Silver Lake bought \$100 million, Musk bought \$10 million, and Rive bought \$3 million.⁵² SolarCity acknowledged that the “[s]ausage Making was intense” with respect to the convertible notes.⁵³ This infusion, however, was an inadequate stop gap.

During a SolarCity Board meeting on February 2, 2016, SolarCity management provided an analysis of the Company’s “2016 Liquidity by Month.”⁵⁴ This analysis “show[ed] significant liquidity concerns,” including the likelihood of SolarCity violating the debt covenants on its revolving credit facility.⁵⁵ SolarCity management noted that cash balances were forecasted to drop below the required amount under the liquidity covenant for the revolver in May 2016, August 2016 and September 2016:⁵⁶

⁵¹ Ex.24 at TESLA00529583-84.

⁵² Ex.127 at Item 1.01; Ex.29.

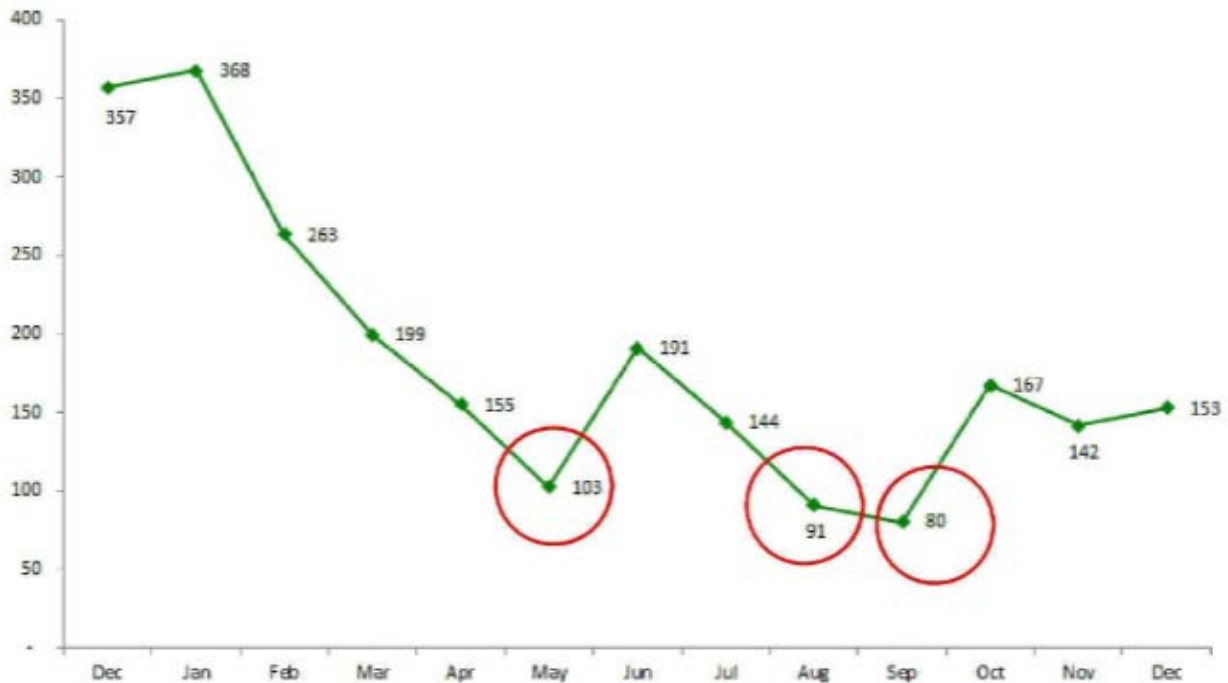
⁵³ Ex.30 at SC_Third_Parties_026752.

⁵⁴ Ex.33 at TESLA00002334.

⁵⁵ *Id.*

⁵⁶ *Id.*

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

III. MUSK INITIATES A PLAN TO BAIL OUT SOLARCITY

On February 11, 2016, Rive convened a “cash planning” meeting at his home with Musk and SolarCity management.⁵⁷ Rive and Musk discussed measures SolarCity could take to conserve cash and stave off its liquidity crisis, including

⁵⁷ Ex.35; Ex.11 (L. Rive Tr.) 71:5-13.

delaying payments to SolarCity's vendors.⁵⁸ Musk and Rive met again at a family vacation in Lake Tahoe from February 27 to February 29.⁵⁹

On the morning of February 27, 2016, Musk called Tesla CFO Wheeler and ordered him to prepare a presentation pitching an acquisition of SolarCity, to be presented during an "emergency meeting" of the Tesla Board.⁶⁰ Wheeler prepared the pitch in under "48 hours."⁶¹ Musk summoned an "emergency meeting" of the Tesla Board on February 29⁶² for the sole purpose of discussing an acquisition of SolarCity.⁶³ During this meeting, Tesla's remaining directors learned about Musk's proposal for Tesla buying SolarCity for the first time.⁶⁴

Wheeler's presentation made clear that buying SolarCity would be a financial disaster for Tesla. The transaction was projected to be highly dilutive to Tesla's earnings per share under all contemplated scenarios and would impose a substantial cash drain on the Company—above and beyond Tesla's own deeply negative cash

⁵⁸ Ex.11 (L. Rive Tr.) 71:12-21.

⁵⁹ Ex.31.

⁶⁰ Ex.14 (Wheeler Tr.) 30:8-31:11.

⁶¹ Ex.14 (Wheeler Tr.) 31:1-34:12; Ex.5 (Denholm Tr.) 62:12-63:13.

⁶² Ex.40.

⁶³ *Id.*; Ex.39.

⁶⁴ Ex.39; Ex. 13 (Ehrenpreis Tr.) 74:6-9.

flow.⁶⁵ The Board did not reject Musk’s proposal, as represented in the Proxy.⁶⁶ Instead, the Board “authorized management to gather additional details and to further explore and analyze” a SolarCity acquisition.⁶⁷

In the meantime, SolarCity management began to take drastic measures to preserve cash—including delaying payments to its vendors.⁶⁸ In March 2016, SolarCity management developed a “stacked ranking” of payments it owed to vendors to help it decide which payments to prioritize and which to postpone.⁶⁹ Management also developed “finance postpone guidelines” dictating whether SolarCity would complete or suspend specific solar system orders because of their cash impact.⁷⁰

IV. TESLA OFFERS TO BUY SOLARCITY

As SolarCity’s liquidity crisis deepened, SolarCity was also facing waning demand. On February 9, 2016, Rive advised stockholders that SolarCity was targeting 1,250 MW installed during 2016, while boasting that SolarCity’s

⁶⁵ Ex.39 at TESLA00001347.

⁶⁶ Ex.137 (Proxy) at 58.

⁶⁷ Ex.39 at TESLA00001347.

⁶⁸ *See, e.g.*, Ex.37; Ex.36; Ex.50 at TESLA00527848-49.

⁶⁹ Ex.42.

⁷⁰ Ex.43 at TESLA00530016.

forecasted growth for the year “would be the envy of most industries and companies in this country.”⁷¹

During an April 26, 2016 SolarCity Board meeting, Rive addressed “important/disturbing” issues concerning SolarCity’s outlook and financial viability.⁷² Rive provided the SolarCity Board with a “2016 Guidance Revision,” which indicated that SolarCity now expected installations of only 900 MW for 2016—a 28% reduction from the public guidance he provided just two months earlier.⁷³ Rive warned that “May – August are at risk of tripping [the revolver] covenant,” and he presented an “Updated 2016 Liquidity by Month” that showed intra-month cash balances dropping as low as \$73 million and remaining below the revolver’s liquidity covenant through October 2016.⁷⁴

Rive, Musk, and the other SolarCity directors, however, did not provide this information to the market. In a public letter to stockholders on May 9, 2016, Rive represented that “SolarCity kicked off 2016 with solid momentum in installations, financing, and core cash generation,” and provided updated guidance of 1,000 to

⁷¹ Ex.34 at TESLA00308852.

⁷² Ex.45.

⁷³ Ex.66 at TESLA00083975.

⁷⁴ *Id.* at TESLA00083970.

1,100 MW installed for 2016.⁷⁵ Rive knew that SolarCity would need to further reduce guidance when he announced the second quarter results in August 2016, which would put “downward pressure” on SolarCity’s stock price.⁷⁶

With installations dropping, SolarCity privately acknowledged that its sales division was “broke[n].”⁷⁷ Internal bookings reports were “drenched in a sea of red,” and “opportunity creation” was trending down.⁷⁸ Approximately half of SolarCity’s new customers were cancelling installations—with no associated cancellation fee.⁷⁹ With lagging demand, SolarCity was fighting “turnover” and low “morale” among its sales staff and was “exposed and vulnerable” to losing its top sales talent.⁸⁰ SolarCity was further struggling with its “cost of acquisition” and “sales efficiency” due to a bloated sales organization.⁸¹

With SolarCity’s financial condition and outlook worsening, Musk and Rive spoke privately about the Acquisition again in May 2016.⁸² Rive told Musk that

⁷⁵ Ex.41 at TESLA00606002.

⁷⁶ Ex.2 (Bilicic Tr.) 70:17-71:3; Ex.67 at TESLA00001859.

⁷⁷ Ex.61 at TESLA00725245; Ex.108 at TESLA00018410.

⁷⁸ Ex.61 at TESLA00725245.

⁷⁹ Ex.106 at TESLA00017626.

⁸⁰ Ex.4 (Corey Tr.) 37:2-38:10, 42:18-43:21; Ex.1 (Barnard Tr.) 65:3-7; Ex.44.

⁸¹ Ex.4 (Corey Tr.) 33:3-9.

⁸² Ex.11 (L. Rive Tr.) 95:6-12 (“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

either the acquisition was “going to happen or we need to go out and raise equity financing.”⁸³ SolarCity’s banks had already told Musk and Rive that an equity offering would not be feasible.⁸⁴ And with its already heavy debt load⁸⁵ and deepening liquidity crisis, taking on additional debt was also not an option. As Musk explained during his deposition: “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.”⁸⁶

During their private discussions in May 2016, Musk and Rive agreed to proceed with the bailout, but Musk said that he had no choice but to “push it to June.”⁸⁷ Tesla, after all, was in the midst of its own \$1.7 billion secondary offering.⁸⁸

payroll stuff, during that time period, in May 2016, you again spoke to Mr. Musk about Tesla acquiring? Correct.”)

⁸³ Ex.11 (L. Rive Tr.) 95:15-18; *see also* Ex.9 (E. Musk Tr.) 273:5-12 (“SolarCity either needed to raise capital or go through the acquisition, but it couldn’t be stuck in between.”).

⁸⁴ *Infra*, pp. 30-31.

⁸⁵ 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. *See* Ex.57 at TESLADIR0084668.

⁸⁶ Ex.9 (E. Musk Tr.) 275:24-276:13.

⁸⁷ Ex.9 (E. Musk Tr.) 274:4-13.

⁸⁸ Ex.9 (E. Musk Tr.) 242:18-25 (“Q. So now – and just so that we have the timing right, the stock sale went through on – the offering closed on May 25th and then at the next regular board meeting on May 31st, you once again brought up the issue of buying SolarCity, correct? [Objection]. A. Sounds right.”).

Musk told Rive that he would “have [him] covered” with respect to SolarCity’s near-term cash needs “through the acquisition period” to ensure the SolarCity could make it to closing.⁸⁹

The Tesla Board met on May 31, 2016.⁹⁰ Musk “once again brought up the issue of buying SolarCity.”⁹¹ SolarCity was again the only acquisition target discussed.⁹² The Board authorized Musk and Tesla management to “engage an independent financial advisor on behalf of the Board and the Company” to advise on the Acquisition.⁹³ Just three weeks later, on June 20, 2016, Musk called a special meeting of the Tesla Board to discuss approving a public offer to acquire SolarCity.⁹⁴ Tesla had retained Evercore as its financial advisor. A draft of its presentation concerning the SolarCity acquisition was sent to Musk for review and comment “per Elon’s request” the day before the meeting⁹⁵ and the materials were accompanied by

⁸⁹ Ex.9 (E. Musk Tr.) 273:13-274:3; Ex.11 (L. Rive Tr.) 107:17-108:5; Ex.66.

⁹⁰ Ex.51.

⁹¹ Ex.9 (E. Musk Tr.) 242:18-25.

⁹² Ex.51.

⁹³ Ex.51.

⁹⁴ Ex.59.

⁹⁵ Ex.54.

a draft offer letter to SolarCity and a draft blog post announcing a Tesla offer to acquire SolarCity.⁹⁶

At the June 20, 2016 meeting, Musk actively participated in the directors' discussion of possible exchange ratios.⁹⁷ Notes from the Board meeting reflect that after Evercore suggested an initial offer range of \$25-\$27 per share, Musk advocated for a higher price.⁹⁸ Musk suggested an acquisition price of \$28.50 per share because it reflected a 30% premium to SolarCity's market price.⁹⁹ Musk further explained that the price had to be "publicly defensible."¹⁰⁰

Consistent with Musk's recommendation, the Tesla Board approved an exchange ratio of "0.122x to 0.131x" (the "Initial Offer"), representing \$26.50 to \$28.50 per SolarCity share.¹⁰¹ Although Musk and Gracias nominally "recused"

⁹⁶ Ex.57 at TESLADIR84760-73; Ex.52; Ex.5 (Denholm Tr.) 88:17-89:3.

⁹⁷ Ex.8 (McBean Tr.) 91:12-17; Ex.55; Ex.56 at 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?").

⁹⁸ Ex.8 (McBean Tr.) 100:1-20.

⁹⁹ Ex.55 at EVR-TESLA_00186364 (June 20, 2016 Board meeting notes taken by Evercore team member: "Elon – 30% over 4-week trailing (~\$28.50)"); Ex.8 (McBean Tr.) 97:13-16 ("Q. And he suggested that offer should be in the middle of, for example, the precedent premium paid, correct? A. Yes.").

¹⁰⁰ Ex.8 (McBean Tr.) 97:10-12 ("Q. Mr. Musk conveyed to the board that the offer had to be publicly defensible, correct? A. Yes.").

¹⁰¹ Ex.59 at TESLA00001461.

themselves from the vote approving the Initial Offer,¹⁰² both were involved in the substantive discussions that led to the selection of the Initial Offer. Despite obvious conflicts, Defendants never considered forming a special committee to evaluate and approve the Acquisition. Musk admitted: “I could not be recused from all discussions . . . I needed to voice my opinion, obviously.”¹⁰³

On the evening of June 20, 2016, the Tesla Board made the Initial Offer to acquire SolarCity via a letter to Rive.¹⁰⁴ Tesla publicly disclosed the Initial Offer on June 21, 2016 and published the blog post announcing the deal that Musk presented to the Tesla Board the previous day.¹⁰⁵ Following the announcement, Tesla’s stock price plummeted more than 10 percent. Tesla’s market capitalization lost \$3.4 billion, more than SolarCity’s entire market capitalization.¹⁰⁶

On June 22, 2016, Tesla hosted a teleconference with analysts to discuss the Initial Offer.¹⁰⁷ Musk told the analysts that the Acquisition 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

¹⁰² *Id.* at 61-63.

¹⁰³ Ex.9 (E. Musk Tr.) 283:22-284:4.

¹⁰⁴ Ex.58.

¹⁰⁵ Ex.134 at Exhibit 99.1.

¹⁰⁶ Ex.80 at TESLA00000716.

¹⁰⁷ Ex.135.

that nobody on the board has any idea about, which is extremely unlikely, then the board would—the independent board members would recommend in favor of completing a transaction somewhere in the price range that was mentioned, most likely.”¹⁰⁸

V. MUSK PUSHES TO COMPLETE THE ACQUISITION

In response to the Initial Offer, the SolarCity Board formed the Special Committee, consisting of: (i) Nancy Pfund, who co-founded and co-manages DBL Partners with Ehrenpreis; and (ii) Don Kendall.¹⁰⁹ The Special Committee retained Lazard as financial advisor.¹¹⁰

Lazard quickly confirmed what Musk and the SolarCity Board already knew; SolarCity was “on the brink of a liquidity event.”¹¹¹ On July 9, 2016, Lazard provided the Special Committee with “an analysis of the Company’s near-term liquidity position.”¹¹² That analysis projected that SolarCity’s intra-month cash balances would dip well-below the \$117 million balance required by the liquidity covenant on the revolver numerous times over the next few months.¹¹³

¹⁰⁸ Ex.135 at 6.

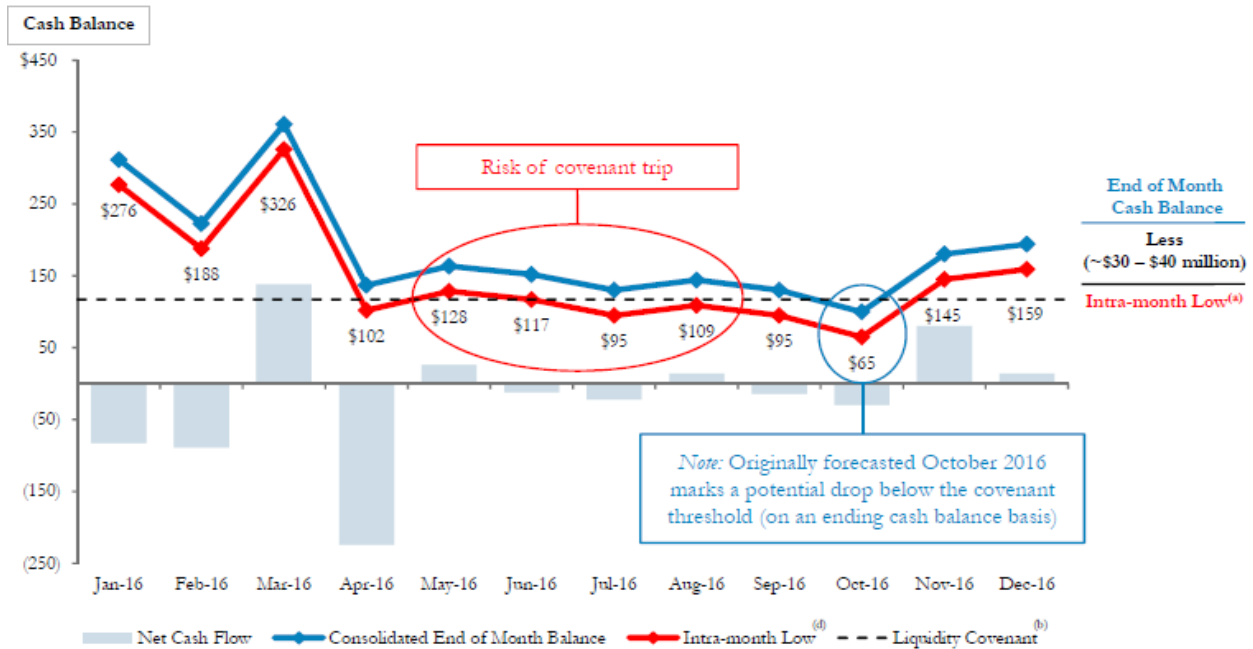
¹⁰⁹ Ex.107; Ex.116 at 3-4; Ex.7 (Kendall Tr.) 8:15-24.

¹¹⁰ Ex.60 at TESLA00001843.

¹¹¹ Ex.93 at TESLA00001908.

¹¹² Ex.67 at TESLA00001858-59.

¹¹³ Ex.65 at LAZ_TES00068748, 750.



Lazard advised the Special Committee 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.”¹¹⁴ The situation was so dire that Lazard was “concerned about the company on a stand-alone basis going forward.”¹¹⁵

After Tesla made the Initial Offer, Rive regularly provided Musk with “updates” on SolarCity’s cash position.¹¹⁶ During a conversation on the evening of

¹¹⁴ Ex.67 at TESLA00001858.

¹¹⁵ Ex.2 (Bilicic Tr.) at 42:2-18.

¹¹⁶ Ex.9 (E. Musk Tr.) 272:21-23 (“Q. Did he give you, through the time period, updated forecasts on low cash balances? A. I’m sure he gave me some updates.”); Ex.11 (L. Rive Tr.) 106:6-12 (testifying that Rive had been “communicating that we’re running low on cash for some time”); Ex.66; Ex.68.

July 9, 2016, Rive confirmed to Musk that SolarCity was “running crazy close” 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.¹¹⁷ As Rive testified, the mere “notice of a covenant breach” would cause “concern around other investors” that were acquiring SolarCity’s securitizations and disrupt its complicated finance machinery.¹¹⁸ The next day, Rive emailed Musk the “cash forecast [he] gave the board in April” and warned of the “domino effect” that SolarCity faced due to its liquidity issues.¹¹⁹ Musk again assured Rive that “[he] would make sure that they were okay through the acquisition period” with respect to SolarCity’s cash needs.¹²⁰

These conversations prompted Musk to ramp up his direct involvement and accelerate the acquisition process. On the evening of July 10, 2016, Musk told his executive assistant, who manages his schedule for all of his business ventures: “I

¹¹⁷ Ex.66 (Rive’s notes for call with Musk, which state: “I told you that we are running crazy close”); Ex.11 (L. Rive Tr.) 107:5-11; Ex.9 (Musk Tr.) 272:10-273:12.

¹¹⁸ Ex.11 (L. Rive Tr.) 130:22-131:19.

¹¹⁹ Ex.68. Perhaps hoping to shield this email and his 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.*

¹²⁰ Ex.9 (E. Musk Tr.) 273:13-25; Ex.66 (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.”).

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.”¹²¹ Musk’s meetings with Tesla investors reflected a significant change in approach, as he had met “only rarely with investors” before the Acquisition.¹²² In a July 12 email, Evanson relayed Musk’s demand to Tesla management, Evercore, and Tesla’s counsel, stating: “Elon wants to do calls this week with any top 10 stockholders who have not expressed positive sentiments towards the deal. Arranging those calls now.”¹²³ By the morning of July 16, Musk had already spoken with “9 of our top 12 investors.”¹²⁴

Musk did not limit his involvement to discussions with stockholders. With “the banks . . . moving cautiously” on bridge financing, Musk started meeting with SolarCity’s lenders and other potential financing sources to lobby for a bridge loan for SolarCity.¹²⁵ Musk also set up a telephonic meeting with Kendall for July 14,

¹²¹ Ex.69.

¹²² Ex.63.

¹²³ Ex.70.

¹²⁴ Ex.77.

¹²⁵ Ex.71 (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* Ex.90; Ex.87.

2016.¹²⁶ According to minutes of the 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.”¹²⁷

After his discussions with Rive, Musk began having frequent meetings and discussions with Evercore, Tesla’s outside counsel, and Tesla management regarding the acquisition process and negotiation.¹²⁸ On July 15, 2016, Evercore updated Musk on its progress in diligence, its issues with Lazard providing timely information, and Evercore’s belief that Lazard was unaware of SolarCity’s high risk of default on its revolver. Based on his discussions with Evercore, Musk “was surprised . . . that [Lazard] didn’t know that [SolarCity] could potentially default on its revolver.”¹²⁹ Accordingly, Musk became “very concerned about the pace of diligence” and promptly resolved to “make the company move faster.”¹³⁰

The following day, Musk ordered daily meetings with Evercore and Tesla management “to discuss gating items and progress,” covering numerous matters

¹²⁶ Ex.72 at TESLA00001866.

¹²⁷ *Id.*

¹²⁸ Ex.76; Ex.74; Ex.82.

¹²⁹ Ex.8 (McBean Tr.) 238:9-12.

¹³⁰ Ex.8 (McBean Tr.) 163:20-164:21.

from which Elon had purportedly recused himself.¹³¹ 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.”¹³² Evercore described Musk as a “leader” of these calls.¹³³ Musk admitted that he requested these daily calls because he “need[ed] to stay on top of the acquisition.”¹³⁴

Internal Evercore communications demonstrate that these meetings with Musk resulted in a directive to “announce [the Acquisition] in short order, possibly late next week, but more likely early the following week”—*i.e.* by July 23.¹³⁵ Although due diligence was far from complete and Tesla had not received a reliable set of financial projections from SolarCity, Musk’s directive ensured that the Acquisition would receive director approval and be publicly announced before SolarCity gave the market its planned reduction in guidance for solar installations.¹³⁶

¹³¹ Ex.76.

¹³² *Id.* at EVR-TESLA_00224682; Ex.74.

¹³³ Ex.8 (McBean Tr.) 168:11.

¹³⁴ Ex.9 (E. Musk Tr.) 288:7-10.

¹³⁵ Ex.73; Ex.75 (McBean advising her team: “We are running out time. Plan is to sign this week and fairness is on Monday.”); Ex.8 (McBean Tr.) 171:12-172:8.

¹³⁶ Ex.76; Ex.67 at TESLA00001859; Ex.78 at TESLA00001873.

On July 19, 2016, Evercore disclosed to the Tesla Board what Musk had known for months about SolarCity’s “Liquidity Situation.”¹³⁷ Discussing its “Key Diligence Findings,” Evercore advised that SolarCity’s revolver “carries a minimum cash balance covenant of \$116mm measured last day of each month,” and a breach of that covenant “will carry a default without a ‘cure’ period and could result in cross defaults in other debt instruments in the Company’s capital structure.”¹³⁸ Evercore explained that, based on the “July 13, 2016 weekly cash forecast, SolarCity’s intra-month cash balance dips below the covenant levels of \$116mm several times” over the next few months,¹³⁹ and that “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.”¹⁴⁰ Evercore repeated these “Liquidity Concerns” to the Tesla Board numerous times leading up to the approval of the Merger Agreement and expressly identified them as “Key Information Discovered in Due Diligence that Impacts Value.”¹⁴¹

¹³⁷ Ex.80 at TESLA00000737-38.

¹³⁸ *Id.*

¹³⁹ *Id.* at 740.

¹⁴⁰ *Id.* at 738.

¹⁴¹ Ex.83 at TESLA00001389; Ex.89 at TESLA00000872; Ex.94 at TESLA00001120.

On July 18, 2016, Evercore’s Fairness Committee refused to issue a fairness opinion within the Initial Offer range that Musk helped set.¹⁴² On July 21, before advising the Tesla Board of its recommendation for a reduced offer, Evercore privately discussed its recommendation with Musk.¹⁴³

Notably, Evercore regularly provided its board presentation materials and financial analyses to Musk for advance review and comment.¹⁴⁴ In fact, Courtney McBean, Managing Director at Evercore, could not recall a single instance where Evercore failed to provide Musk with an advance copy of its board presentations.¹⁴⁵

On July 24, 2016, the Tesla Board met to discuss the status of negotiations with SolarCity and whether to make a revised proposal. The Tesla Board specifically discussed whether to make a counter-offer to SolarCity prior to the release of SolarCity’s second quarter 2016 results and reduction of installation guidance – disclosures that were expected to have a negative impact on SolarCity’s

¹⁴² Ex.8 (McBean Tr.) 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.”).

¹⁴³ Ex.8 (McBean Tr.) 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.”).

¹⁴⁴ Ex.8 (McBean Tr.) 126:17-25; 81:17-18.

¹⁴⁵ Ex.8 (McBean Tr.) 77:16-78:8; *see also* Ex.9 (E. Musk Tr.) 285:15-22.

stock price.¹⁴⁶ The Proxy indicates that, during this meeting, the Tesla Board approved a revised proposal “at an exchange ratio of 0.105 shares of Tesla common stock for each share of SolarCity,” with Musk purportedly being recused from this decision.¹⁴⁷ Musk, in fact, not only participated in the Tesla Board’s discussion over “negotiation strategy” with SolarCity,¹⁴⁸ but the Tesla Board did not authorize Evercore to make a revised offer until after it held a second telephonic meeting with Musk later that day, convened for the sole purpose of obtaining more information from Musk about SolarCity in order to make a determination regarding price.¹⁴⁹

Meanwhile, SolarCity began taking additional steps to help maintain its cash balance and compliance with its debt covenants beyond just “pushing out” payments to vendors,¹⁵⁰ forgoing required “capex spend” related to its manufacturing facility and lease contract with the State of New York.¹⁵¹ By forgoing these capital expenditures, SolarCity effectively passed the liability on to Tesla post-

¹⁴⁶ Ex.8 (McBean Tr.) 281:16-22.

¹⁴⁷ Ex.137 (Proxy) at 67.

¹⁴⁸ Ex.86; Ex.8 (McBean Tr.) 287:17-288:15.

¹⁴⁹ Ex.85.

¹⁵⁰ Ex.11 (L. Rive Tr.) 71:5-21; Ex.78 at TESLA00001872 (July 18 Special Committee minutes indicating that “Management discussed the amount of payables overdue” and that SolarCity was “closely managing its payables”).

¹⁵¹ Ex.11 (L. Rive Tr.) 71:18-19; Ex.84.

Acquisition.¹⁵² Despite these efforts, SolarCity management still believed that SolarCity “would require approximately \$250 million to \$300 million of additional liquidity to maintain operational flexibility.”¹⁵³

Lazard advised the Special Committee on July 21, 2016 “to consider the value of the Tesla Proposal not just in terms of premium to the current trading price of [SolarCity’s] shares, if any, but also in terms of offering a solution to avoid the risk of the downside liquidity scenario.”¹⁵⁴ Lazard told the Special Committee that SolarCity needed to take “prompt action”¹⁵⁵ to address its liquidity crisis and maintaining the “Status Quo” was no longer possible.¹⁵⁶

The Special Committee’s sales process confirmed that Tesla’s bailout was SolarCity’s only option. Lazard “canvass[ed] the market” for a competing proposal, but every third party it contacted declined to make a bid.¹⁵⁷ Lazard also contacted seven private equity firms about a “private investment in a public company,” or

¹⁵² Ex.8 (McBean Tr.) 269:13-270:13.

¹⁵³ Ex.78 at TESLA00001872.

¹⁵⁴ Ex.81 at TESLA00001883; Ex.7 (Kendall Tr.) 21:5-22:7 (confirming that all other potential buyers chose to “pass”).

¹⁵⁵ Ex.81 at TESLA00001883.

¹⁵⁶ Ex.155 at SC_Third_Parties0025133.

¹⁵⁷ Ex.7 (Kendall Tr.) 24:21-25:22; Ex.155 at SC_Third_Parties0025130-31.

“PIPE,” transaction.¹⁵⁸ 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.”¹⁵⁹ Lazard further confirmed that in a secondary equity offering, SolarCity may be “forced to sell equity at a lower price, which could cause equity value destruction.”¹⁶⁰ Plaintiffs’ investment banking expert Murray Beach has also analyzed SolarCity’s potential options in a secondary equity offering and determined that it was “highly unlikely” that SolarCity could have completed such a transaction and raised the cash it needed.¹⁶¹

VI. DEFENDANTS APPROVE THE ACQUISITION BASED ON FLAWED FINANCIAL ANALYSES

By July 29, 2016, Tesla and SolarCity settled on a price of 0.110 of a Tesla share for each share of SolarCity stock.¹⁶² 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.¹⁶³ However, Tesla’s advisors at KPMG, which was hired to conduct due diligence, advised Tesla management that

¹⁵⁸ Ex.7 (Kendall Tr.) 25:23-26:25; Ex.81 at TESLA00001883.

¹⁵⁹ Ex.2 (Bilicic Tr.) 40:23-41:3.

¹⁶⁰ Ex.156 at TESLA00001862.

¹⁶¹ Ex.154 at ¶66.

¹⁶² Ex.91; Ex.93 at TESLA00001908.

¹⁶³ Ex.136 at Exhibit 99.2.

there were “risks to the process” because KPMG had only begun its work and, unlike a “typical merger process,” their analyses would not be complete until several weeks after the Merger Agreement was signed.¹⁶⁴

On July 30, 2016, the Tesla Board met to approve the Acquisition and receive Evercore’s fairness opinion,¹⁶⁵ but Evercore lacked key information from SolarCity at the time of the Acquisition, and Evercore’s valuations were materially flawed.

A. EVERCORE LACKED KEY INFORMATION

Evercore performed DCF analyses of SolarCity using two sets of projections.¹⁶⁶ The first set of forecasts were those that SolarCity management provided to Evercore in mid-July 2016—the “Unrestricted Liquidity Case.”¹⁶⁷ Evercore quickly determined that the Unrestricted Liquidity Case was too “optimistic” and that it needed a “downside model” from SolarCity that reflected “lower growth in megawatt[s] and installations.”¹⁶⁸

¹⁶⁴ Ex.95.

¹⁶⁵ Ex.96.

¹⁶⁶ Ex.94 at TESLA00001136-37.

¹⁶⁷ Ex.137 (Proxy) at 62, 105.

¹⁶⁸ Ex.8 (McBean Tr.) 144:17-22; Ex.94 at TESLA00001120 (Evercore fairness presentation identifying “SolarCity’s liquidity challenges” as a need for revised projections).

Evercore asked SolarCity and Lazard to provide a downside model “[m]ultiple times,” but Evercore “never received one before the board ultimately voted to approve the transaction.”¹⁶⁹ Instead, “Tesla ended up putting together its own sensitivity case,”¹⁷⁰ which is referred to in the Proxy as the “Revised Sensitivity Case.”¹⁷¹ The Revised Sensitivity Case modified SolarCity’s assumptions for residential and commercial deployments, while reducing both overhead and research and development costs.¹⁷²

Evercore’s DCF using the Unrestricted Liquidity Case resulted in a value range for SolarCity of \$37.51 to \$61.73 per share, while the value range for the DCF using the Revised Sensitivity Case was \$24.76 to \$42.72 per share.¹⁷³ With Evercore advising the Tesla Board that the “Implied Transaction Price” was \$25.27, these

¹⁶⁹ Ex.8 (McBean Tr.) 144:10-16 (“Q. You requested a downside model from SolarCity? A. Multiple times. Q. And you never received one before the board ultimately voted to approve the transaction, right? Q. Yes. We did not receive it.”); Ex.71 at EVR-TESLA_00224569 (email among Evercore advisory team discussing “the need to focus on the downsized model and that we would be asking Lazard to have one prepared”).

¹⁷⁰ Ex.8 (McBean Tr.) 154:21-155:1 (“Q. You didn’t wait for the downside case you requested and that Lazard told you shouldn’t be a problem to give you, right? A. They ultimately told us that they weren’t going to provide one to us, which is why Tesla ended up putting together its own sensitivity case.”).

¹⁷¹ Ex.137 (Proxy) at 104-05.

¹⁷² Ex.89 at TESLA00000878-879.

¹⁷³ Ex.94 at TESLA00001136-137.

valuations made it appear that the agreed-upon exchange ratio was financially fair.¹⁷⁴

With these valuations and Evercore's fairness opinion, the Tesla Board approved the Acquisition during the July 30 meeting.¹⁷⁵

In August 2016, SolarCity management finally provided Evercore with a downside case,¹⁷⁶ which is referred to in the Proxy as the "Liquidity Management Case."¹⁷⁷ The Liquidity Management Case assumed drastic changes to SolarCity's operations, including the termination of all commercial, military, and utility sales, and discontinuation of Silevo manufacturing activities.¹⁷⁸ These assumptions are not disclosed in the Proxy.¹⁷⁹ Lazard's DCF using the Liquidity Management Case resulted in a "per-share equity value reference range for SolarCity of approximately \$6.75 to \$19.25."¹⁸⁰ After correcting for a supposed "computational error," which the Proxy claims "double-counted SolarCity's projected outstanding indebtedness

¹⁷⁴ Ex.94 at TESLA00001134.

¹⁷⁵ Ex.96 at TESLA00001744-45.

¹⁷⁶ Ex.99.

¹⁷⁷ Ex.137 (Proxy) at 103-05.

¹⁷⁸ Ex.92 at LAZ_TES00067198.

¹⁷⁹ *See generally* Ex.137 (Proxy) at 103-05.

¹⁸⁰ Ex.137 (Proxy) at 92; Ex.92 at LAZ_TES00067141.

of \$400 million under its revolving credit facility,”¹⁸¹ Lazard’s DCF analysis still yielded values for SolarCity of only “\$10.50 to \$23.25” per share.¹⁸²

After learning of SolarCity’s alternate, lower projections, Evercore did not perform an additional DCF analysis and did not revisit the assumptions underlying its Revised Sensitivity Case, which still contained significant cash generation from business lines that would cease under the Liquidity Management Case.¹⁸³ Nor did the Tesla Board request that Evercore perform any revised analyses.¹⁸⁴ Instead, at an August 25, 2016 special meeting, Evercore orally advised the Tesla Board that the SolarCity Liquidity Management Case did not alter its “prior valuation analysis.”¹⁸⁵ Accordingly, the Tesla Board determined that the new information did not “change[] its view as to the value of SolarCity.”¹⁸⁶

B. EVERCORE FAILED TO ACCOUNT FOR THE PHASE-OUT OF THE SOLAR ITCs

¹⁸¹ Ex.137 (Proxy) at 91; Ex.100 at TESLA00001813.

¹⁸² Ex.155 at SC_Third_Parties0025099; Ex.137 (Proxy) at 92.

¹⁸³ See Ex.99 at TESLA00001760; Ex.94 at TESLA00001124; Ex.92 at LAZ_TES00067198.

¹⁸⁴ Ex.99 at TESLA00001760.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

Under existing law, by 2022, the Solar ITC will be phased out almost entirely.¹⁸⁷ At the time of the Acquisition, the Energy Policy Act of 2005 allowed for owners of solar energy systems to recoup 30% of the total cost of solar systems through dollar for-dollar federal tax credits.¹⁸⁸ For both residential and commercial systems, the Solar ITC declines to 26% of the total system costs in 2020 and drops again to 22% in 2021.¹⁸⁹ In 2022, the tax credit for commercial and certain third-party owned residential systems settles at a 10% rate, while credits for owner-occupied residential systems are eliminated altogether.¹⁹⁰

The tax equity from the SolarLeases and SolarPPAs is the lynchpin to SolarCity's business model. For the SolarCity Unrestricted Liquidity Case, approximately 45.8% of SolarCity's projected available cash through 2020 is attributable to "Tax Equity," while the Revised Sensitivity Case attributes approximately 44.8% of the company's cash to that source.¹⁹¹ Despite the

¹⁸⁷ Ex.153 at ¶36; Ex.8 (McBean Tr.) 36:19-37:3.

¹⁸⁸ Solar Energy Indus. Ass'n, Solar Investment Tax Credit (ITC), *at* <https://www.seia.org/sites/default/files/2019-07/SEIA-ITC-Factsheet-2019-July.pdf> (last visited on August 26, 2019); Ex.57 at TESLADIR0084677.

¹⁸⁹ 26 U.S.C. § 48 (a)(6); Ex.80 at TESLA00000739.

¹⁹⁰ Ex.80 at TESLA00000739; Ex.8 (McBean Tr.) 42:22-43:13.

¹⁹¹ Ex.94 at TESLA00001136-37.

importance of the Solar ITCs, SolarCity had no plan in place to offset the loss in cash generation from the securitization and sale of tax equity.¹⁹²

In addition, the Solar ITC also drives consumer demand. As SolarCity represented in filings with the SEC, “[t]hese 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.”¹⁹³ Consequently, the phase-out of the Solar ITC will impair SolarCity’s ability to sell solar systems in cash- and loan-based transactions.

In performing its whole-company DCF analyses, however, Evercore failed to account for the financial impact of the near total phase-out of the Solar ITC. Instead, Evercore adopted the forecasts for both the Unrestricted Liquidity Case and the Revised Sensitivity Case for the year 2020 to derive “terminal year” values and grew

¹⁹² Ex.1 (Barnard Tr.) 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. Q. Do you know whether any sort of financial planning took place in that regard while you were there? A. No.”); Ex.6 (Gracias Tr.) 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.”).

¹⁹³ Ex.128 at 10; *see also* Ex.1 (Barnard Tr.) 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.”).

them in perpetuity by 3-5%.¹⁹⁴ By doing so, Evercore incorrectly assumed that the cash generation SolarCity derives from Tax Equity sources (approximately 45% of total sources of cash) would remain in place and continue to grow in perpetuity, which ignores the phase-out. Thus, Evercore’s DCF contained a critical flaw with respect to the most important aspect of SolarCity’s cash generation.

VII. MUSK’S MACHINATIONS CONTINUED

After the Tesla Board approved the Acquisition, Musk grew concerned about the stockholder vote.¹⁹⁵ As Musk privately acknowledged to Rive, “the “[l]atest feedback from major investors is very negative on SolarCity.”¹⁹⁶ In response, Musk crafted a plan to “change investor sentiment.”¹⁹⁷

Foremost, Musk knew that SolarCity needed to “solv[e] its liquidity crisis.”¹⁹⁸ Musk preferred that Tesla directly provide SolarCity with “bridge financing,” but Musk and the Tesla Board recognized that was not “morally and legally defensible.”¹⁹⁹ Instead, SolarCity offered \$124 million in solar bonds in August

¹⁹⁴ Ex.94 at TESLA00001136-37.

¹⁹⁵ Ex.103 at TESLADIR0095852-53; Ex.102.

¹⁹⁶ Ex.102.

¹⁹⁷ Ex.103 at TESLADIR0095852.

¹⁹⁸ *Id.*

¹⁹⁹ Ex.9 (E. Musk Tr.) 298:20-300:11.

2016;²⁰⁰ Musk and his cousins purchased \$100 million, or approximately 80%, of them.²⁰¹ The bonds effectively acted as “bridge financing” and became a Tesla liability once the Acquisition closed.²⁰² Musk confirmed that Tesla promptly repaid these bonds during the first quarter of 2017, even though doing so served no benefit to Tesla.²⁰³

Musk also sought to change investor sentiment by holding a “public demo” regarding a new product: the solar roof.²⁰⁴ Per Musk, under Tesla’s control, SolarCity would manufacture and install roof tiles that had embedded solar cells, creating the appearance of an ordinary roof.²⁰⁵ On October 28, 2016, Tesla and SolarCity held a joint press event to unveil the solar roof.²⁰⁶ Musk advised stockholders and the market that “the goal is to have . . . solar roofs that look better than a normal roof, generate electricity, last longer, have better insulation, and actually have a cost—an installed cost that is less than a normal roof plus the cost of

²⁰⁰ Ex.137 (Proxy) at 112.

²⁰¹ *Id.*

²⁰² Ex.9 (E. Musk Tr.) 408:25-409:16.

²⁰³ *Id.*

²⁰⁴ Ex.103 at TESLADIR0095852.

²⁰⁵ Ex.139 at 1-2.

²⁰⁶ *Id.* at 1.

electricity.”²⁰⁷ On November 4, 2016, Musk indicated that the “first solar deployments will start next summer.”²⁰⁸ On November 17, 2016, at the special meeting of stockholders held to conduct the vote on the Acquisition, Musk represented that “we expect to start doing the solar roofs in volume somewhere next year.”²⁰⁹

Musk’s statements were unsupportable and directly contradicted by the contemporaneous record. By 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 they were “running blind” with respect to a solar roof.²¹⁰ None of the solar roof tiles at the public demonstration were even operational.²¹¹ Indeed, the solar roof was just a “nascent product.”²¹² As Musk admitted at his deposition, creating a working and scalable solar roof tile presents a “hard problem” for Tesla to solve.²¹³ And Tesla has yet to actually bring its product to market, let alone “in volume,” as Musk predicted.

²⁰⁷ Ex.138.

²⁰⁸ Ex.146.

²⁰⁹ Ex.109 at TESLA00115805.

²¹⁰ Ex.110 at TESLA00095530.

²¹¹ *See* Ex.9 (E. Musk Tr.) 39:6-11.

²¹² Ex.14 (Wheeler Tr.) 108:2-15.

²¹³ Ex.9 E. Musk Tr.) 39:6-11.

VIII. SOLARCITY'S AUDITORS CONFIRM THE COMPANY COULD NOT OPERATE AS A GOING CONCERN

Almost immediately after the Acquisition closed, SolarCity's auditors E&Y confirmed that SolarCity was, in fact, insolvent. In August 2016, E&Y conducted a going-concern analysis with respect to SolarCity in connection with the issuance of the Proxy for the Acquisition.²¹⁴ As part of the year-end audit process conducted in January 2017, E&Y discovered that the 2017 financial projections SolarCity provided to E&Y for the prior going-concern analysis 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."²¹⁵ E&Y had discovered that "other 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.²¹⁶

For its 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."²¹⁷ Thus, E&Y's January 2017 "going concern analysis" concluded "that as a standalone entity [SolarCity] will not have sufficient cash to meet its obligations as they come

²¹⁴ Ex.98.

²¹⁵ Ex.112 at EY-TES-EM-000371.

²¹⁶ Ex.111 at EY-TES-EM-000403.

²¹⁷ Ex.112 at EY-TES-EM-000371.

due.”²¹⁸ Although Musk had advised Tesla stockholders that SolarCity would add \$500 million in cash to Tesla’s bottom line within three years of the Acquisition,²¹⁹ Tesla had to sign an “Equity Confirmation Letter” on March 1, 2017, confirming “its present intent to, from time-to-time, make capital contributions to SolarCity for at least twelve months from the date of this letter, on fair and reasonable terms and in amounts as needed for general corporate purposes to support SolarCity on-going operations.”²²⁰ Wheeler advised Musk that Tesla needed to provide a \$500 million “Capital infusion into SCTY to de-lever and de-risk the credit profile.”²²¹

²¹⁸ *Id.* at EY-TES-EM-000373.

²¹⁹ Ex.157, at 1.

²²⁰ Ex.113.

²²¹ Ex.105 at TESLA00038957.

ARGUMENT

Summary judgment is appropriate when there is “no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.”²²² The party opposing summary judgment may not rest on mere denials and instead must “demonstrate that there are genuine issues of material fact that must be resolved at trial.”²²³

Plaintiffs raise two issues for adjudication. *First*, because the Tesla Board faced conflicts of interest in the Acquisition, Defendants must prove the entire fairness of the transaction irrespective of Musk’s control.²²⁴ *Second*, in soliciting stockholder votes, Defendants failed to disclose material facts, precluding a ratification defense.²²⁵

I. AT TRIAL DEFENDANTS MUST PROVE ENTIRE FAIRNESS

“Entire fairness, Delaware’s most onerous standard, applies when the board labors under actual conflicts of interest” and “there were not enough independent

²²² Ct. Ch. R. 56(c) (2016).

²²³ *Paul v. Deloitte & Touche LLP*, 974 A.2d 140, 145 (Del. 2009).

²²⁴ *See Kahn v. M&F Worldwide Corp.*, 88 A.3d 635 (Del. 2014) (affirming determination of applicable standard of review on motion for summary judgment); Ex.145 (*In re Dole Food Co., Inc. S’holder, Inc.*, No. 8703-VCL, Order Denying Motions for Summary Judgment (Del. Ch. Feb. 5, 2015) (determining that entire fairness applies at trial when ruling on motion for summary judgment)).

²²⁵ *Corwin*, 125 A.3d at 312.

and disinterested individuals among the directors making the challenged decision to comprise a board majority.”²²⁶ “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.”²²⁷ Directors lack independence when their decision-making is subject to “extraneous considerations or influences.”²²⁸ For example, directors who serve on a board because of their private equity firm’s investment in a company face a “dual fiduciary problem,” which poses a conflict of interest when the fund has unique financial interests in the disputed transaction.²²⁹

Here, Defendants did not even contest the issue of demand futility at the pleading stage given the Tesla Board’s conflicts.²³⁰ Instead, they sought dismissal because Musk was not a controller.²³¹ As discussed below, the undisputed facts demonstrate that a majority of the Tesla Board had financial interests on both sides

²²⁶ *In re Trados Inc. S’holder Litig.*, 73 A.3d 17, 44 (Del. Ch. 2013); *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”).

²²⁷ *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 362 (Del. 1993).

²²⁸ *Aronson*, 473 A.2d at 816.

²²⁹ *Trados*, 73 A.3d at 46.

²³⁰ *See generally* Defendants’ Opening Brief in Support of Motion to Dismiss the Second Amended Complaint (Trans. ID 60722267) (filed June 12, 2017).

²³¹ *Id.* at 2.

of the Acquisition and were not disinterested and independent. Thus, this Court can determine as a matter of law that the entire fairness standard of review applies at trial, with Defendants bearing the burden to prove fair process and fair price. This is true regardless of any disputes concerning Musk's control.

A. ELON MUSK

At the time of the Acquisition, Musk led a “pyramid” of companies, consisting of Tesla, SolarCity and SpaceX.²³² Musk was Tesla's Chairman, CEO, and largest stockholder, owning approximately 22.1% of the outstanding shares.²³³ Musk was SolarCity's Chairman and largest stockholder, owning approximately 21.9% of the outstanding shares, and held \$65 million in SolarCity bonds as personal investments.²³⁴ Musk's cousins, Lyndon and Peter Rive, co-founded SolarCity and were CEO and CTO, respectively, at the time of the Acquisition.²³⁵ Musk was also Chairman, CEO, CTO, and majority stockholder of SpaceX,²³⁶ which owned \$265

²³² Ex.48 at TESLA00019905.

²³³ See Ex.140.

²³⁴ Ex.137 (Proxy) at 108, 175. As of the closing, Musk secured his personal indebtedness with 7.7 million shares of his SolarCity stock. Ex.49 at TESLADIR0083472 (9.4 million shares pledged); Ex.137 (Proxy) at 107 (7.7 million shares pledged). If SolarCity's stock price dropped or the Company failed, Musk would have had to settle the margins on that indebtedness. Ex.49 at TESLADIR0083472-73.

²³⁵ See Ex.131 at 30.

²³⁶ Ex.130 at 44; Ex.6 (Gracias Tr.) 197:8-13.

million in SolarCity bonds at the time of the Acquisition and had repeatedly rolled over its bond investments at a time when SolarCity was facing a liquidity crisis.²³⁷

As discussed further below, each Tesla director had a direct financial interest in Musk's pyramid of companies, with a majority of directors having invested in all three. Moreover, Musk invested in his fellow directors' companies and investment vehicles, including: (i) Valor, which Gracias founded and manages;²³⁸ (ii) DFJ, which Jurvetson founded and co-managed at the time of the Acquisition;²³⁹ and (iii) the Kitchen Café, which Kimbal Musk founded and managed.²⁴⁰

B. BRAD BUSS

Buss served as a director of Tesla between 2009 and 2019.²⁴¹ In 2014, Musk personally lured Buss out of retirement to serve as SolarCity's CFO—a position Buss held from August 2014 and February 2016.²⁴² Buss received more than \$30 million for his 18 months of service and then promptly re-retired.²⁴³ Buss continued to serve as a consultant to SolarCity after his departure as CFO, including during the

²³⁷ Ex.17 at SPACEX001037; Ex.9 (Musk Tr.) 197:1-198:9; Ex.141 at 89 (table).

²³⁸ Ex.6 (Gracias Tr.) 83:17-84:7.

²³⁹ Ex.159.

²⁴⁰ Ex.6 (Gracias Tr.) 83:17-25, 86:3-5; Ex.115.

²⁴¹ Ex.130 at 9.

²⁴² *Id.*; Ex.3 (Buss Tr.) 15:22-23, 16:18-21, 17:25-18:10.

²⁴³ Ex.131 at 44.

Tesla Board's evaluation of the Acquisition.²⁴⁴ Following his resignation as SolarCity CFO and consultant, Buss's only income derives from his service as a director.²⁴⁵ At the time of the Acquisition, Buss beneficially owned 37,277 shares of SolarCity common stock.²⁴⁶ From 2010 when Tesla went public through 2018, Buss earned \$17,148,900 in compensation as a result of his Tesla Board service.²⁴⁷

C. IRA EHRENPREIS

Ehrenpreis has been a Tesla director since May 2007.²⁴⁸ From 2010 through 2018, Ehrenpreis earned \$18,976,132 from his Tesla Board service.²⁴⁹

Ehrenpreis invested in Tesla prior to its IPO through his former venture capital firm, Technology Partners.²⁵⁰ After Technology Partners began to wind-down its funds, Ehrenpreis co-founded DBL with Pfund.²⁵¹ Pfund served on the Tesla Board between 2006 and 2010.²⁵² At the time of the Acquisition, Pfund served on the

²⁴⁴ Ex.3 (Buss Tr.) 14:12-17; Ex.32 at TESLADIR0032967.

²⁴⁵ Ex.3 (Buss Tr.) 16:2-11.

²⁴⁶ Ex.151, Response to Interrogatory No. 1.

²⁴⁷ See Ex.118 at 37; Ex.119 at 35; Ex.122 at 33; Ex.124 at 50; Ex.126 at 44; Ex.130 at 40; Ex.142 at 43; Ex.143 at 43; Ex.144 at 66.

²⁴⁸ Ex.130 at 10.

²⁴⁹ See *supra* n.247.

²⁵⁰ Ex.13 (Ehrenpreis Tr.) 11:11-24.

²⁵¹ Ex.13 (Ehrenpreis Tr.) at 13:6-14.

²⁵² Ex.131 at 7.

SolarCity Board and was one of two members of the Special Committee that considered and approved the Acquisition.²⁵³

Ehrenpreis testified that his position on the Tesla Board “absolutely” proved to be “a real benefit in fund-raising;”²⁵⁴ his affiliation with Tesla was “prominent in the marketing” of DBL;²⁵⁵ and Musk has had “a significant influence on [his] professional career.”²⁵⁶ In fact, both Musk and Rive serve as advisors for an active DBL investment fund.²⁵⁷

DBL is also a substantial investor in SpaceX, having invested approximately \$166 million.²⁵⁸ Ehrenpreis invested the vast majority of this amount, \$136 million, through a special purpose vehicle (“SPV”) that exists exclusively for the SpaceX investment.²⁵⁹ Ehrenpreis has not set up SPVs for investments in any company other

²⁵³ Ex.137 (Proxy) at 59-60, 69.

²⁵⁴ Ex.13 (Ehrenpreis Tr.) 62:20-63:1.

²⁵⁵ *Id.* at 63:2-6.

²⁵⁶ *Id.* at 10:10-16, 57:8-13.

²⁵⁷ Ex.28 at TESLADIR0028183 p.5.

²⁵⁸ Ex.13 (Ehrenpreis Tr.) 17:3-18:7.

²⁵⁹ Ex.13 (Ehrenpreis Tr.) 19:8-15, 19:22-25.

than SpaceX.²⁶⁰ Ehrenpreis beneficially owned 254,713 shares of SpaceX stock at the time of the Acquisition.²⁶¹

D. ANTONIO GRACIAS

Gracias made his initial investment in Tesla in 2005 when Musk approached him about the opportunity, and Musk put Gracias on the Tesla Board in 2007.²⁶² Gracias became Tesla's "lead independent director" in connection with its IPO.²⁶³ From 2010 through 2018, Gracias earned \$25,466,604 from his Tesla Board service.²⁶⁴

Gracias was an early investor in several of Musk's companies, having invested in PayPal, Tesla, SolarCity, and SpaceX through his venture capital firms.²⁶⁵ Gracias served on the boards of all of the companies in Musk's "pyramid" at the time of the Acquisition.²⁶⁶ At the time of Acquisition, Gracias beneficially

²⁶⁰ Ex.13 (Ehrenpreis Tr.) 19:20-21.

²⁶¹ Ex.147 at 9.

²⁶² Ex.6 (Gracias Tr.) 25:1-26:6.

²⁶³ Ex.6 (Gracias Tr.) 21:22-22:3; 28:16-25.

²⁶⁴ *See supra* n.247.

²⁶⁵ Ex.148, Response to Interrogatory No. 8; Ex.6 (Gracias Tr.) 26:7-27:15.

²⁶⁶ Ex.148, Response to Interrogatory No. 8.

owned 211,584 shares of SolarCity common stock and 7,016,704 shares of SpaceX.²⁶⁷

Gracias founded, owns, and manages Valor. Musk has invested at least \$14 million in Valor funds.²⁶⁸ Gracias is a close friend of Musk's, has known him for almost 20 years,²⁶⁹ and even provided a no-interest loan to Musk.²⁷⁰ Gracias is also a close friend of the Musk family, attending family birthday parties²⁷¹ and vacationing with various members of the Musk family, including Elon, Kimbal, and the Rives.²⁷²

E. STEVE JURVETSON

In 2009, Musk put Jurvetson on the Tesla Board.²⁷³ Jurvetson was formerly a managing partner of DFJ.²⁷⁴ He left the firm in November 2017 amid allegations of sexual misconduct towards female employees.²⁷⁵ Despite what DFJ apparently

²⁶⁷ Ex.148, Response to Interrogatory No. 8.

²⁶⁸ Ex.15; Ex.16; Ex.115.

²⁶⁹ Ex.6 (Gracias Tr.) 26:7-21; 72:25-73:21; Ex.148, Response to Interrogatory No. 4.

²⁷⁰ Ex.6 (Gracias Tr.) 90:21-91:23.

²⁷¹ Ex.6 (Gracias Tr.) 76:12-77:5.

²⁷² Ex.6 (Gracias Tr.) 77:21-78:16. 78:20-82:23.

²⁷³ Ex.130 at 10.

²⁷⁴ *Id.*

²⁷⁵ Theodore Schleifer, *Steve Jurvetson Was Pushed Out of His Firm as the Lines Between Personal and Professional Crossed*, RECODE, Nov. 18, 2017, at

determined to be credible allegations of misconduct, Jurvetson was allowed to remain a director of Musk's Tesla and SpaceX.²⁷⁶ Though he has announced that he will not seek re-election to the Tesla Board at the 2020 annual stockholder meeting, that choice was his own and unrelated to the allegations of sexual and workplace misconduct.²⁷⁷ From 2010 through 2018, Jurvetson earned \$7,563,550 from his Tesla Board service.²⁷⁸

DFJ made a series of investments in SolarCity prior to its IPO and owned millions of shares of SolarCity stock at the time of the Acquisition.²⁷⁹ One of Jurvetson's then-partners at DFJ, John Fisher, was a SolarCity director at the time of the Acquisition.²⁸⁰ Jurvetson personally owned 1,672,381 shares of SolarCity stock at the time of the Acquisition.²⁸¹

<https://www.vox.com/2017/11/18/16647078/steve-jurvetson-dfj-women-silicon-valley-tech-allegations-fired>; Theodore Schleifer, *DFJ Has Apologized for the Reported 'Sex Party' Event at Steve Jurvetson's Home*, RECODE, Jan. 11, 2018, at <https://www.vox.com/2018/1/11/16880806/dfj-steve-jurvetson-sex-party-apology>.

²⁷⁶ Ex.144 at 13.

²⁷⁷ Ex.3 (Buss Tr.) 55:22-56:2.

²⁷⁸ *See supra* n.247.

²⁷⁹ *See, e.g.*, Ex.97.

²⁸⁰ Ex.137 (Proxy) at 107.

²⁸¹ Ex.149, Response to Interrogatory No. 1.

Jurvetson also beneficially owned 7,008,576 shares of SpaceX stock at the time of the Acquisition,²⁸² and each of Jurvetson, Fisher, and Randall S. Glein (another managing director of DFJ) served on SpaceX’s board of directors.²⁸³ Jurvetson recently joined the initial outside financing round for Musk’s newest company—The Boring Company, which digs tunnels and manufactures flamethrowers.²⁸⁴

Jurvetson is a friend of, and has a social relationship with, Gracias, Elon, Kimball, and the Rives.²⁸⁵ He attended Kimbal’s wedding,²⁸⁶ and Elon sleeps at Jurvetson’s family home on occasion.²⁸⁷

²⁸² Ex.149, Response to Interrogatory No. 1.

²⁸³ Ex.149, Response to Interrogatory No. 2.

²⁸⁴ Sarah McBride & Dana Hull, *Elon Musk’s Boring Co. Raises \$120 Million in First Outside Investment*, BLOOMBERG, July 25, 2019, at <https://www.bloomberg.com/news/articles/2019-07-25/elon-musk-s-boring-co-raises-120-million-in-first-outside-investment>.

²⁸⁵ Ex.149, Response to Interrogatory Nos. 4 & 5; Ex.6 (Gracias Tr.) 81:18-82:11; Ex.10 (K. Musk Tr.) 29:7-15 (“ . . . Steve and I have known each other for 25 years . . . ”).

²⁸⁶ Ex.6 (Gracias Tr.) 82:18-23.

²⁸⁷ Ex.114.

F. KIMBAL MUSK

In April 2004, Elon Musk put Kimbal Musk on the Tesla Board.²⁸⁸ Kimbal is Elon's brother and is also the Rives' cousin.²⁸⁹ Kimbal Musk beneficially owned 147,541 shares of SolarCity common stock at the time of the Acquisition, and also served as a director of SpaceX.²⁹⁰ At the time of the Acquisition, Kimbal Musk pledged 147,101 shares of his SolarCity stock as collateral to secure personal indebtedness.²⁹¹ Because of the steep declines in SolarCity's stock price, Kimbal was forced to settle a series of margin calls on that indebtedness.²⁹² Elon Musk, the Rives, Gracias, Pfund, Ehrenpreis, and Jurvetson have each invested in The Kitchen Café, Kimbal Musk's restaurant company.²⁹³

From 2010 through 2018, Kimbal Musk earned \$13,178,269 from his Tesla Board service.²⁹⁴ Because Elon is his brother, Tesla does not consider Kimbal to be "independent," but he was not recused from any aspect of the Acquisition.²⁹⁵

²⁸⁸ Ex. 130 at 10.

²⁸⁹ Ex.10 (K. Musk Tr.) 37:1-16; 49:3-5.

²⁹⁰ Ex.150, Response to Interrogatory Nos. 1, 2.

²⁹¹ Ex.150, Response to Interrogatory No. 8.

²⁹² *See, e.g.*, Ex.25.

²⁹³ Ex.10 (K. Musk Tr.) 20:19-23:9, 29:7-9; Ex.6 (Gracias Tr.) 89:19-23.

²⁹⁴ *See supra* n.247.

²⁹⁵ Ex.130 at 16; Ex.10 (K. Musk Tr.) 11:17-25.

G. ROBYN DENHOLM

Denholm has served as a director of Tesla since August 2014, and has chaired the Tesla Board since November 2018, replacing Musk as Board chair following Musk's settlement with the SEC.²⁹⁶ Denholm was purportedly appointed to supervise Musk and regulate his bad behavior, though Musk publicly stated that it was "not realistic" to imagine that Denholm—or anyone else at Tesla—would be able to do so.²⁹⁷ Denholm is friends with her fellow directors—for example, hosting Gracias when he visited Australia.²⁹⁸

Denholm's only source of income is her service as a director of Tesla, as she resigned from an executive position at another company when she became chair of the Tesla Board.²⁹⁹ From 2014 when she joined the Tesla Board through 2018, Denholm earned \$24,018,743 from her Tesla Board service.³⁰⁰

* * *

²⁹⁶ Ex.5 (Denholm Tr.) 13:13-14:5.

²⁹⁷ Lesley Stahl Interview of Elon Musk, *Tesla CEO Elon Musk: The 60 Minutes Interview*, 60 MINUTES, Dec. 9, 2018, available at <https://www.cbsnews.com/news/tesla-ceo-elon-musk-the-2018-60-minutes-interview/>.

²⁹⁸ Ex.6 (Gracias Tr.) 81:18-19:5.

²⁹⁹ Ex.5 (Denholm Tr.) 23:19-24:6.

³⁰⁰ See *supra* n.247.

Because these undisputed facts establish that “there were not enough independent and disinterested individuals among the directors making the challenged decision to comprise a board majority,”³⁰¹ the entire fairness standard applies, with the burden of proof borne by Defendants.

II. DEFENDANTS’ *CORWIN* DEFENSE FAILS AS A MATTER OF LAW

In soliciting stockholder approval, Defendants were “required to disclose fully and fairly all material information” within their control.³⁰² A misrepresented or omitted fact is material “if there is a substantial likelihood that a reasonable stockholder would consider it important in deciding how to vote” or if it “would have been viewed by the reasonable investor as having significantly altered the ‘total mix’ of information made available.”³⁰³ The “obligation [of disclosure] attaches to the proxy statements and any other disclosures in contemplation of stockholder action.” *Id.*

³⁰¹ *In re Trados Inc. S’holder Litig.*, 73 A.3d 17, 44 (Del. Ch. 2013); *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984) (holding that “if the transaction is not approved by a majority of consisting of the disinterested directors, then the business judgment rule has no application”).

³⁰² *Malone v. Brincat*, 722 A.2d 5, 12 (Del. 1998).

³⁰³ *Arnold v. Society for Sav. Bancorp.*, 650 A.2d 1270, 1277 (Del. 1994).

Defendants have interposed a ratification defense under *Corwin*.³⁰⁴ To prevail, Defendants must establish that: (i) Musk was not a controlling stockholder; and (2) the transaction was approved by an independent board majority and a fully informed, uncoerced stockholder vote.³⁰⁵ Accordingly, Plaintiffs are entitled to judgment as a matter of law that Defendants' *Corwin* defense fails.³⁰⁶

A. SOLARCITY WAS FACING A SERIOUS LIQUIDITY CRISIS

When considering a proposed merger or acquisition, information concerning the value of the target company “address[es] the most important issue to stockholders—the sufficiency of the consideration being offered” in the transaction.³⁰⁷ Stockholders must be “informed of information in the fiduciaries’ possession that is material to the fairness of the price.”³⁰⁸ Reasonable stockholders would want to know of a company’s “liquidity issues, steps that the management could take to improve liquidity, and alternatives to raise additional liquidity” to the extent they impact the fairness of a proposed transaction.³⁰⁹

³⁰⁴ Defendants’ Answer to the Second Amended Verified Class Action and Derivative Complaint at 140 (filed May 18, 2018) (Trans. ID 62046744).

³⁰⁵ *Corwin*, 125 A.3d at 312 & n.27.

³⁰⁶ Plaintiffs will prove at trial that Defendants cannot satisfy *any* of the prongs of the *Corwin* analysis.

³⁰⁷ *In re Pure Resources*, 808 A.2d 421, 449 (Del. Ch. 2002).

³⁰⁸ *Eisenberg v. Chi. Milwaukee Corp.*, 537 A.2d 1051, 1059 (Del. Ch. 1987).

³⁰⁹ *Albert v. Alex. Brown Mgmt. Servs., Inc.*, 2005 WL 2130607, at *1 (Del. Ch. Aug. 26, 2006).

Here, leading up to the Acquisition, SolarCity publicly represented that it had sufficient funds to meet its near-term cash requirements. Specifically, SolarCity stated in its May 10, 2016 Form 10-Q filing, which was incorporated by reference in the Proxy:

[E]xisting cash and cash equivalents . . . in addition to the funds available under our credit facilities and the funds available in our existing financing funds . . . ***will be sufficient to meet our cash requirements for at least the next 12 months.***³¹⁰

In a June 22 conference call announcing the Acquisition, a transcript of which was filed by Tesla as a Rule 425 Prospectus, Musk represented that SolarCity was “headed to cash flow positive situation for the next three to six months at the outside” and would therefore be in “a very healthy place from a cash flow standpoint in short order.”³¹¹

These statements were false. SolarCity internally projected that it would likely be in breach of the liquidity covenant for its revolver numerous times in 2016, which would trigger an event of default on its revolver and cross-defaults on other debt instruments, and SolarCity did not have enough cash to get through the year

³¹⁰ Ex.133 at 39; *see also* Ex.128 at 66.

³¹¹ Ex.135 at Exhibit 99.1 at 3.

without raising additional funds.³¹² The undisputed facts regarding SolarCity's financial condition demonstrate:

- E&Y determined that the company could not operate as a “going concern” on a standalone basis and did not have “sufficient cash to meet its obligations as they come due” during 2017.³¹³
- Musk and the entire Tesla Board knew that SolarCity’s projected cash balances would likely drop below the liquidity covenants on its revolver multiple times in 2016.³¹⁴
- SolarCity maintaining the “Status Quo” was no longer possible,³¹⁵ and if the Acquisition did not go through the company would have had to conduct a secondary equity offering because it was “running too tight” on cash.³¹⁶
- Evercore expressly recognized and repeatedly advised the Tesla Board that SolarCity’s liquidity problem was “Key Information Discovered in Due Diligence that Impacts Value.”³¹⁷

³¹² Ex.33 at TESLA00002334; Ex.46 at TESLA00002274; Ex.93 at TESLA00001908; Ex.64 at LAZ-TES00039330, at pp.2-5.

³¹³ Ex.98; Ex.112.

³¹⁴ Ex.33 at TESLA00002334; Ex.46 at TESLA00002274; Ex.68; Ex.80 at TESLA00000737-38.

³¹⁵ Ex.155 at SC_Third_Parties0025133.

³¹⁶ Ex.11 (L. Rive Tr.) 100:18-101:8 (“Q. And you needed closure again because if Tesla wasn’t going to buy SolarCity, you needed to do an equity offering? A. Correct. Q. Because you needed – I guess you needed more cash. A. It was running too tight.”).

³¹⁷ Ex.83 at TESLA00001389; Ex.89 at TESLA00000872; Ex.94 at TESLA00001120.

- SolarCity’s ongoing liquidity crisis prevented Evercore’s Fairness Committee from issuing a fairness opinion “within the range” of the Initial Offer that Musk helped set.³¹⁸
- SolarCity was delinquent its payments to vendors because it did not have the money to pay its bills on time.³¹⁹
- Evercore’s presentation to the Tesla Board on June 20, 2016 projected that SolarCity would be cash flow negative through 2017.³²⁰
- At the time of the Acquisition, the SEC prohibited SolarCity from saying it was “cash flow positive” because any positive “cash flow” was a creation of incoming financing, not profit.³²¹
- Wheeler advised Musk that Tesla needed to provide a \$500 million “[c]apital infusion into SCTY to de-lever and de-risk the credit profile.”³²²

By withholding these facts, Defendants prevented Tesla stockholders from being able to evaluate “the fairness of the price” proposed in the Acquisition because they lacked material information regarding SolarCity’s perilous liquidity situation.³²³

³¹⁸ Ex.8 (McBean Tr.) 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.”).

³¹⁹ *Id.*; Ex.37; Ex.38; Ex.11 (L. Rive Tr.) 91:23-21; Ex.36.

³²⁰ Ex.57 at TESLADIR0084660.

³²¹ Ex.160.

³²² Ex.105 at TESLA00038957.

³²³ *Eisenberg*, 537 A.2d at 1059; *Albert*, 2005 WL 2130607, at *1.

B. SOLARCITY'S LIQUIDITY PROBLEMS PRECEDED TESLA'S OFFER

Directors must be candid with stockholders and not “selectively disclose[]” only those facts that make a proposed transaction look financially fair while withholding others that may not.³²⁴ Directors must instead provide an “accurate, full, and fair characterization” and refrain from giving a mere “partial disclosure” on material issues.³²⁵

Here, the Proxy innocuously references SolarCity's liquidity situation and describes it as a byproduct solely of “Tesla's announced proposal to acquire SolarCity,” which purportedly caused “a delay in funding of new financing and project commitments.”³²⁶ With regard to SolarCity's efforts to raise capital as a means to enhance its liquidity, the Proxy again blames the Acquisition for interrupting those activities:

[C]ertain lenders appeared to be delaying funding certain financings of SolarCity as a result of the announcement of the Tesla proposal and that SolarCity was unable to access

³²⁴ *Maric Capital Master Fund, Ltd. v. Plato Learning, Inc.*, 11 A.3d 1175, 1178 (Del. Ch. 2010); *In re Emerging Communications*, 2004 WL 1305745, at *31 (Del. Ch. May 3, 2004) (holding that misrepresentations involving financial projections were “highly material” where knowledge of undisclosed information would have affected stockholders' understanding of value)

³²⁵ *Zirn v. VLI Corp.*, 681 A.2d 1050, 1056 (Del. 1996); *In re Saba Software, Inc. Stockholder Litig.*, 2017 WL 1201108, at *12 (Del. Ch. Mar. 31, 2017) (holding that stockholder vote was not fully informed where directors failed to disclose failed to disclose the “factual development that spurred the sales process”).

³²⁶ Ex.137 (Proxy) at 62.

the equity capital markets as it regularly did *as a result of the pending Tesla proposal*.³²⁷

The following undisputed facts demonstrate that SolarCity's liquidity crisis predated Tesla's Initial Offer and motivated Musk to pursue the Acquisition:

- As early as September 30, 2015, SolarCity management informed the SolarCity Board, including Musk and Gracias, that SolarCity faced a "major liquidity crisis."³²⁸
- SolarCity had been told by its bankers as early as October 2015, and through the time of the Acquisition, that a secondary offering would be "extremely tough" and would require a "[m]eaningful discount," even if one were possible.³²⁹
- At its February 2, 2016 meeting, the SolarCity Board discussed "significant liquidity concerns" that put SolarCity on track to breach its liquidity covenant in three separate months in 2016.³³⁰
- At its April 26, 2016 meeting, the SolarCity Board again discussed the Company's liquidity situation and management's belief that SolarCity was "at risk of tripping [the liquidity] covenant" in May through August 2016.³³¹
- Evercore's due diligence confirmed that SolarCity had "liquidity concerns" before the public offer."³³²

³²⁷ Ex.137 (Proxy) at 62 (emphasis added).

³²⁸ Ex.19; Ex.3 (Buss Tr.) 141:11-143:20; Ex.18; Ex.24.

³²⁹ Ex.27 at TESLADIR0024715, slide 6; Ex.24 at TESLA00529584.

³³⁰ Ex.33 at TESLA00002334.

³³¹ Ex.47 at TESLA00520067.

³³² Ex.8 (McBean Tr.) 130:11-12.

- Neither Lazard nor Evercore believed that Tesla’s offer was otherwise “constraining [SolarCity’s] ability to find financing” through the capital markets.³³³
- Existing lenders told SolarCity and Tesla that they were unwilling or unable to re-negotiate the terms of SolarCity’s existing facilities.³³⁴

In light of these undisputed facts, Defendants were obligated, but failed to, make full and fair disclosures informing stockholders of *all* of the reasons SolarCity had liquidity issues and difficulty accessing capital markets, not just selectively disclose one reason that served their narrative.³³⁵

C. MUSK WAS ACTIVELY INVOLVED IN THE TESLA BOARD’S NEGOTIATION AND EVALUATION OF THE ACQUISITION

With respect to the negotiation and evaluation process leading to a merger transaction, a company’s stockholders “are entitled to a balanced and truthful recitation of events, not a sanitized version that is materially misleading.”³³⁶ Directors are not permitted to use the proxy material as a “sales document” and must instead give “a fair and balanced factual description of the events leading up to the Merger Agreement.”³³⁷ With respect to the actions of conflicted directors,

³³³ Ex.2 (Bilicic Tr.) 25:15-19; Ex.8 (McBean Tr.) 132:15-19; 129:1-12, 130:20-132:14; Ex.62.

³³⁴ Ex.104 at TESLADIR0095939-40.

³³⁵ *Albert*, 2005 WL 2130607, at *1 (information regarding “liquidity issues” was material to stockholders).

³³⁶ *See Pure Res.*, 808 A.2d at 451.

³³⁷ *Chen v. Howard-Anderson*, 87 A.3d 648, 690 (Del. Ch. 2014).

stockholders are entitled to a candid explanation of the role they “played in the process.”³³⁸

Here, Defendants told Tesla investors that Musk recused himself from evaluating and negotiating the economic terms of the Acquisition. Specifically, the Proxy represents that at the June 20 Tesla Board meeting:

After discussion, the Tesla board determined . . . that Messrs. *Elon Musk and Antonio Gracias, as a result of their service on the SolarCity Board, should recuse themselves* from any vote by the Tesla Board on matters relating to a potential acquisition of SolarCity, *including evaluation, negotiation and approval of the economic terms of any such acquisition.*³³⁹

In addition, on an August 1, 2016 conference call concerning the public announcement of the Acquisition, Musk stated:

I had no role in establishing this valuation for the offer that was made, nor do I with any of the mechanics of that. . . . *I was fully recused from the matter*, so I know about as much as you do about how this price was obtained.³⁴⁰

Contrary to these representations, the undisputed facts show that Musk was deeply involved in evaluating and negotiating “the economic terms” of the Acquisition, that he had a lead role in establishing the valuation for the Initial Offer,

³³⁸ *In re Orchard Enters., Inc. Stockholder Litig.*, 88 A.3d 1, 26 (Del. Ch. 2014).

³³⁹ Ex.137 (Proxy) at 59 (emphases added).

³⁴⁰ Ex.158, at 6.

and that he was privy to all details concerning the economic terms of the Acquisition.

The following undisclosed facts are undisputed:

- Musk was present for Evercore’s entire presentation to the Tesla Board at the June 20 meeting, which included issues concerning “valuation,” “timing,” “strategy for negotiating,” and “exchange ratios.”³⁴¹
- Musk stated that the Initial Offer should be \$28.50 per share because it was a 30% premium to SolarCity’s five-day trailing stock price and was thus “publicly defensible;” the Board agreed to Musk’s proposal and set the initial offer price in the range of \$26.50-\$28.50 per share.³⁴²
- Musk had “daily check in calls” with Evercore, which addressed “Valuation/Fairness Opinion” and “Board review and approval.”³⁴³
- Evercore provided Musk with advance copies of its presentations to the Tesla Board “per Elon’s request.”³⁴⁴
- On July 24, Musk attended the portions of the Tesla Board meeting during which “SolarCity’s counteroffer, the valuation of SolarCity based on Tesla’s due diligence findings, and the negotiating strategy to be employed” were discussed.³⁴⁵
- On July 24, the Tesla Board held a second telephonic meeting, that is not disclosed in the Proxy, to “hear from [Musk]” regarding the price for a revised offer and get his approval.³⁴⁶

³⁴¹ Ex.53; Ex.8 (McBean Tr.) 88:15-25, 90:4-15; Ex.53; Ex.6 (Gracias Tr.) 171:17-172:3; Ex.10 (K. Musk Tr.) 112:1-4.

³⁴² Ex.8 (McBean Tr.) 97:10-12, 97:10-16; Ex.59.

³⁴³ Ex.76 at EVR-TESLA_00224682; Ex.74.

³⁴⁴ Ex.54.

³⁴⁵ Ex.86; Ex.8 (McBean Tr.) 287:17-288:15.

³⁴⁶ Ex.88.

- Musk accelerated the timeline for the Tesla Board so they could “announce [the Acquisition] in short order.”³⁴⁷

Tesla stockholders were entitled to, but were not provided, full and fair disclosure concerning Musk’s role in the negotiation and evaluation process.³⁴⁸

D. EVERCORE’S FLAWED FINANCIAL ANALYSES AND ADVICE

When voting on a merger or acquisition, stockholders are “entitled to a fair summary of the substantive work performed by the investment bankers upon whose advice the recommendations of their board as to how to vote on a merger or tender rely.”³⁴⁹ Directors must disclose not just “the valuation methods” and the “ultimate values generated by those analyses,” but also the “key inputs.”³⁵⁰

Here, the Proxy omits several material facts regarding Evercore’s analyses and corresponding advice to the Tesla Board, which obscured to Tesla stockholders the impact of SolarCity’s liquidity situation on its true value.

³⁴⁷ Ex.73 at EVR-TESLA_00163111; Ex.75 at EVR-TESLA_00082473.

³⁴⁸ *Orchard*, 88 A.3d at 1 (“The potential materiality of Donahue’s relationships . . . becomes even more significant because of the leading role that Donahue played in the process.”); *see also In re Lear Corp. S’holder Litig.*, 929 A.2d 94 (Del. Ch. 2007) (explaining that stockholders would want to know “an important economic motivation of the negotiator singularly employed by a board to obtain the best price for stockholders”).

³⁴⁹ *Pure Res.*, 808 A.2d at 450.

³⁵⁰ *In re Netsmart Techs., Inc. S’holders Litig.*, 924 A.2d 171, 203-04 (Del. Ch. 2007); *Crescent/Mach I Partners, L.P. v. Turner*, 846 A.2d 963, 987 (Del. Ch. 2000).

1. Impact of Tax Equity

With respect to the financial projections that Evercore used for its valuations of SolarCity, the Proxy provides forecasts for years 2016 through 2020 for “Total Megawatts Inspected,” “Source of Cash,” “Use of Cash,” and “Net Generation (Use) of Cash.”³⁵¹ By disclosing only these line items, the Proxy concealed that SolarCity’s business model, even if the company somehow solved its near-term cash issues, was contingent upon the continuation of the Solar ITC. The following undisputed facts were omitted from the Proxy:

- For the Unrestricted Liquidity Case, 45.8% of SolarCity’s projected available cash through 2020 was attributable to “Tax Equity.”³⁵²
- For the Revised Sensitivity Case, 44.8% of SolarCity’s projected available cash through 2020 was attributable to “Tax Equity.”³⁵³
- The value from the terminal period for Evercore’s DCF using the Unrestricted Liquidity Case represented 84.4% of the total value for SolarCity.³⁵⁴
- The value from the terminal period for Evercore’s DCF using the Revised Sensitivity Case represented 91.4% of the total value for SolarCity.³⁵⁵

³⁵¹ Ex.137 (Proxy) at 102-03.

³⁵² Ex.94 at TESLA00001136.

³⁵³ *Id.* at TESLA00001137.

³⁵⁴ *Id.* at TESLA00001136.

³⁵⁵ *Id.* at TESLA00001137.

This information was material to Tesla stockholders because, at the time of the Acquisition, the Solar ITC for commercial systems and commercially-owned residential systems was set to decline to 26% of the total system costs in 2020, drop again in 2021 to 22%, and settle at 10% in 2022.³⁵⁶ As a result, Tesla stockholders lacked information that called into question SolarCity’s long-term ability to generate positive cash.³⁵⁷

2. Evercore’s Valuations

Evercore believed that SolarCity’s trading price did not reflect SolarCity’s true value because its liquidity concerns were not publicly disclosed. Nonetheless, the Proxy describes Evercore’s precedent premium paid analyses as one of several “material financial and comparative analyses that Evercore deemed appropriate for a transaction such as the Acquisition.”³⁵⁸ This is false. The undisputed facts demonstrate:

- Evercore did not consider any market-based analysis like the precedent premium paid analysis to be appropriate input for valuing the Acquisition.³⁵⁹

³⁵⁶ 26 U.S.C. § 48 (a)(6); Ex.80 at TESLA00000739.

³⁵⁷ See Ex.153 at ¶30.

³⁵⁸ Ex.137 (Proxy) at 77.

³⁵⁹ Ex.8 (McBean Tr.) 215:10-18 (“Q. An analysis based off of the market price of SolarCity’s stock wouldn’t reflect the true value of SolarCity because of the information that hadn’t been disclosed about SolarCity’s liquidity concerns, correct?”)

- Evercore expressly described its premiums paid analysis as only a “[r]eference statistic based off market data which does not reflect knowledge of nonpublic liquidity concerns.”³⁶⁰
- Evercore believed the premium paid analysis could not be used to value SolarCity.³⁶¹

This information would be considered material by a reasonable stockholder in deciding whether to approve a premium acquisition price for SolarCity.³⁶²

* * *

Accordingly, in light of the undisputed facts and the material disclosure deficiencies outlined above, Defendants’ ratification must fail.

CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully request that partial summary judgment be entered in their favor.

[Objection.] A. The information would affect the market value. But, again, it was a reference statistic. It wasn’t a valuation methodology.”).

³⁶⁰ Ex.79 (emphasis added); Ex.8 (McBean Tr.) 214:5-20 (“These, as the page says, were reference statistics. They weren’t our primary valuation methodologies. They’re public market statistics. So they didn’t have the benefit of all the liquidity information we had.”).

³⁶¹ The Proxy lists specific “factors” that were “not considered part of [Evercore’s] financial analyses in connection with rendering its advice,” including other market-based valuation metrics, but does not disclose that Evercore did not consider the precedent premiums paid analysis to be a reliable or material valuation analysis it relied upon. Ex.137 (Proxy) at 81-82.

³⁶² *Pure Res.*, 808 A.2d at 450.

Dated: August 26, 2019

Respectfully submitted,

GRANT & EISENHOFER P.A.

OF COUNSEL:

/s/ Christine M. Mackintosh

GRANT & EISENHOFER P.A.

Jay W. Eisenhofer (#2864)

Christine M. Mackintosh (#5085)

Kelly L. Tucker (#6382)

Vivek Upadhya (#6241)

Daniel L. Berger

123 Justison Street

485 Lexington Avenue

Wilmington, DE 19801

New York, NY 10017

Tel: (302) 622-7000

Tel: (646) 722-8500

Fax: (302) 622-7100

Fax: (646) 722-8501

**KESSLER TOPAZ MELTZER
& CHECK, LLP**

*Co-Lead Counsel for Co-Lead
Plaintiffs*

Lee D. Rudy

WORDS: 13,207

Eric L. Zagar

Robin Winchester

Justin O. Reliford

280 King of Prussia Road

Radnor, PA 19087

Tel: (610) 667-7706

Fax: (610) 667-7056

**ROBBINS GELLER RUDMAN
& DOWD LLP**

Randall J. Baron

David T. Wissbroecker

Maxwell R. Huffman

655 West Broadway, Suite 1900

San Diego, CA 92101

Tel: (619) 231-1058

Fax: (619) 231-7423

*Co-Lead Counsel for Co-Lead
Plaintiffs*

CERTIFICATE OF SERVICE

I, Kelly L. Tucker, hereby certify that on September 23, 2019, I caused a true and correct copy of the foregoing *UNSEALED Version of Plaintiffs' Opening Brief in Support of their Motion for Partial Summary Judgment* to be served upon the following counsel of record via File & ServeXpress:

David E. Ross, Esq.
Garrett B. Moritz, Esq.
Benjamin Z. Grossberg, Esq.
Ross Aronstam & Moritz LLP
100 S. West Street, Suite 400
Wilmington, DE 19801

Kevin R. Shannon, Esq.
Berton W. Ashman, Jr., Esq.
Jaclyn C. Levy, Esq.
Jay G. Stirling, Esq.
Potter Anderson & Corroon LLP
1313 N. Market Street
Hercules Plaza, 6th Floor
Wilmington, DE 19801

Julia B. Klein
Klein LLC
919 North Market St., Ste. 600
Wilmington, DE 19801

Rudolph Koch
Robert L. Burns
John M. O'Toole
Richards, Layton & Finger, P.A.
One Rodney Square
920 N. King Street
Wilmington, DE 19801

/s/ Kelly L. Tucker
Kelly L. Tucker (#6382)