



Legal Document

Delaware Court of Chancery
Case No. 2024-0631-

Employees' Retirement System of Rhode Island v. Elon Musk, et al

Document 1



View Document



View Docket



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

EMPLOYEES' RETIREMENT
SYSTEM OF RHODE ISLAND,

Plaintiff,

v.

ELON MUSK, KIMBAL MUSK, IRA
EHRENPREIS, JAMES MURDOCH,
ROBYN DENHOLM, KATHLEEN
WILSON-THOMPSON, JOE
GEBBIA, JB STRAUBEL, LARRY
ELLISON, and HIROMICHI (HIRO)
MIZUNO,

Defendants,

and

TESLA, INC.,

Nominal Defendant.

C.A. No. _____

VERIFIED STOCKHOLDER DERIVATIVE COMPLAINT

Plaintiff Employees' Retirement System of Rhode Island ("Plaintiff," "ERSRI" or "Rhode Island"), stockholder of Tesla, Inc. ("Tesla" or the "Company"), by and through the Office of the General Treasurer for the State of Rhode Island, brings this action derivatively on Tesla's behalf against the current or former directors identified below ("Defendants"). The statements and allegations in this Verified Complaint are based on the knowledge of Plaintiff as to itself in Section II.A below, and on information and belief, including the review of publicly available information, as to all other matters.

TABLE OF CONTENTS

I. NATURE OF THE ACTION	1
II. PARTIES	14
A. Plaintiff	14
B. Nominal Defendant.....	15
C. Individual Defendants.....	18
III. FACTUAL BACKGROUND	22
A. Musk’s active participation in and commitment to Tesla was critical to Tesla’s business.	22
B. Prior to Musk’s acquisition of Twitter, Tesla had an important business relationship with Twitter.	24
C. To gain controlling influence over Twitter, Musk needed to raise tens of billions of dollars, and his only means of doing so was to sell Tesla stock.....	26
D. On September 14, 2021, Musk adopted a Rule 10b5-1 plan to sell more than 10 million Tesla shares between November 8, 2021 and December 28, 2021.....	28
E. In November 2021, Musk and his brother violated their fiduciary duties to Tesla by selling over \$16 billion in Tesla shares for unlawful proceeds based on Tesla’s corporate information.....	29
1. On Saturday and Sunday November 6-7, 2021, Musk stated he would sell 10% of his Tesla shares based on the outcome of a Twitter poll.	30
2. Musk’s November 6 and 7, 2021 statements about his intentions to sell 10% of his Tesla stock were false and misleading.	33

3. Kimbal Musk sold 15% of his Tesla shares a day before Musk publicly stated he intended to sell 10% of his Tesla shares based on the outcome of a Twitter poll.	42
4. Musk’s own statements and actions after his acquisition of Twitter strongly support the conclusion that he developed his intentions to obtain controlling influence over Twitter before September 2021.	43
a. Musk acquired Twitter in part to reverse Twitter’s efforts in 2020 and 2021 to mitigate misinformation about the COVID-19 virus.	43
b. Musk acquired Twitter in part to reverse Twitter’s decision to ban Donald Trump based on his role in the January 6, 2021 Capitol Hill riot.	50
c. Musk acquired Twitter as part of his campaign against what he perceived and referred to as “wokeness” in politics and civil discourse in the United States, beginning in 2020.	53
5. Musk reaped unlawful profits from his Unscheduled November 2021 Stock Sales.	57
6. Musk reaped unlawful profits from his Prescheduled November and December 2021 Stock Sales.	58
7. By trading in advance of his brother’s misleading November 2021 tweets and the disclosure of his brother’s intention to acquire Twitter, Kimbal Musk earned unlawful profits from his November 5, 2021 Stock Sales.	59
F. In November 2021, the SEC subpoenaed Musk and Tesla seeking information about Musk’s misleading Twitter poll.	62
G. In December 2021, Tesla adopted a revised Code of Business Ethics that prohibited Musk from making certain new investments, accepting certain new employment, or creating other actual or perceived conflicts of interest.	63
1. The Code was binding on Musk and Tesla’s other directors.	64

2. The Code prohibited Musk from making certain types of investments, accepting certain types of outside employment, using his position at Tesla to promote a side business, or developing outside inventions that relate to Tesla’s products.	65
3. The Code requires Musk to disclose transactions that could create conflicts of interests to Tesla’s Audit Committee and to obtain a waiver from Tesla’s Board before entering into such transactions.	66
4. Tesla has obligations under SEC regulations to disclose waivers under its Code of Ethics.	67
H. Between January 31, 2022 and April 1, 2022, Musk breached his obligations under the Code of Ethics by spending \$2.6 billion to buy 9% of Twitter’s stock.	69
I. On April 14, 2022, Musk offered to buy all of Twitter’s outstanding equity for \$54.20 per share.	79
J. On April 25, 2022, Musk breached his obligations under the Code of Ethics by executing a binding merger agreement that required him to make a further investment of billions of dollars in Twitter.	83
K. Between April 26 and 28, 2022, Musk sold \$8.5 billion in Tesla stock, but he knew he would have to sell more to close the Twitter merger.	85
L. Between April 28 and July 8, 2022, Musk made several misleading statements that incorrectly suggested he would not need to sell more Tesla stock to finance the Twitter merger.	86
1. On April 28, 2022, Musk misleadingly stated that he had “[n]o further TSLA sales planned after today.”	86
2. In May and July 2022, Musk falsely suggested that the Twitter deal would not close due to Musk’s desire for more information about Twitter’s user base, even though he had already expressly waived his right to business due diligence.	91

M. Between August 5 and 9, 2022, Musk reaped additional unlawful proceeds from his sales of Tesla stock.	96
N. On October 27, 2022, Musk breached his obligations to Tesla by acquiring a controlling equity interest in Twitter.	97
O. Between November 2022 and December 2022, Musk reaped additional unlawful proceeds from his sales of Tesla stock.	100
P. Between October 27, 2022 and the present, Musk has continuously breached the Code of Ethics by serving as Twitter’s principal executive, which prevents him from excelling as Tesla’s CEO.	107
Q. Between October 27, 2022 and the present, Musk has repeatedly breached his fiduciary duties to Tesla, for his own and Twitter’s benefit.	110
1. Musk has repeatedly diverted Tesla employees so they can perform work for Twitter.	111
2. Since the announcement of the Twitter takeover, Musk has breached the Code of Ethics by using his position at Tesla to promote Twitter.	115
3. Musk has used his control over Tesla to retaliate against an advertiser who abandoned Twitter.	117
4. After Musk acquired Twitter, Tesla reversed its policy against paid advertising and began paying Twitter for advertising.	120
5. Musk usurped AI business opportunities that rightly belonged to Tesla and used them to benefit Twitter.	122
R. Musk’s misconduct is causing Tesla to lose sales and suffer significant reputational harm.	139
S. Tesla’s Directors have repeatedly breached their mandatory duty to enforce Tesla’s Code of Ethics against Musk.	151

1. The Code required Defendants to ensure that Tesla took appropriate deterrent actions in the event that Musk violated the Code.....	152
2. Defendants knew (or, in the alternative, ignored red flags) about Musk’s violations of the Code.....	153
a. Defendants knew about Musk’s acquisition of Twitter and his position as Twitter’s CEO.	153
b. Defendants were aware that Tesla entered into related party transactions with Twitter.....	156
c. Defendants knew Musk’s acquisition of Twitter was harming Tesla’s brand.	158
d. Defendants knew and ignored red flags about the ethical and fiduciary violations implicated by Musk’s behavior.....	158
e. Defendants were aware that Musk was steering artificial intelligence opportunities to X.AI rather than Tesla.....	161
3. Defendants failed to respond to the red flags detailed above and breached their duty to ensure that Tesla took appropriate deterrent actions in response to Musk’s violations of the Code.....	162
4. Defendants’ conscious disregard of red flags and the Code has caused Tesla harm.	163
T. Murdoch, Denholm, and Wilson-Thompson did not oversee Tesla’s and Musk’s compliance with the SEC consent decree in good faith.....	163
1. Musk routinely failed to comply with the Consent Decree and Tesla’s Senior Executives Communications Policy.....	164
a. Musk did not comply with Tesla’s Senior Executives Communications Policy before he made misleading statements about the disposition of his Tesla stock on November 6, 2021.....	168

b. Musk did not comply with Tesla’s Senior Executives Communications Policy before he made misleading statements about the disposition of his Tesla stock on November 7, 2021.	171
c. Musk did not comply with Tesla’s Senior Executives Communications Policy before he made misleading statements about the disposition of his Tesla stock on April 28, 2022.....	172
d. Musk did not comply with Tesla’s Senior Executives Communications Policy before he made misleading statements about the disposition of his Tesla stock on August 9, 2022.	173
2. Defendants did not implement good faith controls and reporting for Musk’s compliance with the mandatory preapproval process.	174
3. Defendants failed to respond in good faith to the numerous red flags evidencing Musk’s failure to comply with the Consent Decree and Tesla’s Senior Executive Communications Policy.	179
4. The Disclosure Controls Committee’s conscious disregard for their oversight duties under the Consent Decree and for red flags of Musk’s violations of the Decree caused Tesla harm.....	182
IV. DEMAND ON THE BOARD WOULD BE FUTILE	183
A. Musk lacks independence because he received a material benefit from the challenged conduct and has significant exposure to liability.	183
B. Musk dominates Tesla’s Board.	183
C. Kimbal Musk lacks independence based on his exposure to liability, his familial relationship with Musk, and his excessive compensation.	188
D. James Murdoch lacks independence based on his personal views about the Twitter transaction, his personal ties to Elon and Kimbal Musk, his exposure to liability, and his excessive compensation.	188

E. Ira Ehrenpreis lacks independence based on his personal and financial ties with Elon and Kimbal Musk, his exposure to liability, and his excessive compensation.	192
F. JB Straubel lacks independence based on his personal and financial ties with Elon Musk and his exposure to liability.	195
G. Joe Gebbia lacks independence based on his personal ties with Musk, and his exposure to liability.....	200
H. Robyn Denholm lacks independence based on her financial dependence on Musk and her exposure to liability.	202
I. Kathleen Wilson-Thompson lacks independence based on her financial dependence on Musk and her exposure to liability.	203
J. The Board’s adoption of Musk’s self-serving proposal to redomicile Tesla in Texas further demonstrates its lack of independence.	204
V. CLAIMS FOR RELIEF	207
A. Count I: Breach of Fiduciary Duty of Loyalty for Unlawful Stock Sales (Against Elon Musk and Kimbal Musk).....	207
1. Musk’s November - December 2021 Stock Sales.....	208
2. Kimbal Musk’s November 5, 2021 Stock Sale	211
3. Musk’s August 2022 Stock Sales.....	212
4. Musk’s November - December 2022 Stock Sales.....	215
B. Count II: Breach of Fiduciary Duty of Loyalty Claim for Usurpation of a Corporate Opportunity (Against Elon Musk).....	217
C. Count III: Breach of Duty of Loyalty by Self-Dealing and Misappropriation (Against Elon Musk).....	220
D. Count IV: Breach of Contractual Obligations Established by Tesla’s Code of Business Ethics (Against All Defendants)	222

E. Count V: Breach of Fiduciary Duty for Bad Faith Implementation and Oversight of Tesla’s Code of Business Ethics (Against All Defendants).....230

F. Count VI: Breach of Fiduciary Duty for Bad Faith Implementation and Oversight of Tesla’s and Musk’s SEC Consent Decree (Against Musk, Denholm, Murdoch, and Wilson-Thompson)233

PRAYER FOR RELIEF238

I. NATURE OF THE ACTION

1. Nominal Defendant Tesla, Inc. (“Tesla” or the “Company”) serves an important role in combatting the threat posed by climate change. It has pioneered this nation’s and the world’s transition from gas-guzzling vehicles to vehicles that run on electricity alone. Tesla has dominated the market share for fully electric vehicles in the U.S. for years, although in recent years its dominance is slipping. The Company has also driven significant innovation in artificial intelligence (“AI”) and robotics, with its industry-leading research and developments in Advanced Driver Assistance Systems (marketed as “Full Self-Driving” or “Autopilot”), machine learning, supercomputing, and humanoid robots.

2. As CEO, co-founder, and angel investor in Tesla, Defendant Elon Musk (“Musk”) deserves a lot of the credit for Tesla’s successes. He is the public face of Tesla. Some market analysts call him “synonymous with Tesla.” Musk’s brother and fellow Tesla director, Kimbal Musk (“Kimbal”) testified that “Tesla created Elon Musk’s persona and Elon Musk’s persona is attached to Tesla.”

3. For his service to Tesla and risks he bore with his early investment, Musk received significant rewards from the Company. Musk’s equity stake in Tesla has made him one of the wealthiest people in human history.

4. But neither Musk’s past success nor his importance to Tesla’s business gives him *carte blanche* to treat his fiduciary duties to Tesla as optional. Every

director and officer of a Delaware corporation, including Musk, owes fiduciary duties to the corporation and to its shareholders. These fiduciary duties include the duties of loyalty and care.

5. Musk also has obligations under Tesla's Code of Ethics to avoid conflicts of interest as Tesla's CEO. The types of conflicts of interest prohibited by the Code include:

- Outside employment – working for a competitor, supplier, or customer. Even outside employment with others may be a conflict if it prevents you from working with excellence at Tesla.
- Outside Business Interests – using your Tesla position to promote a side business or looking for opportunities that should otherwise go to Tesla first.
- Inventions – developing or helping to develop outside inventions that relate to existing or future Tesla products or your job at Tesla.
- Financial Investments – having a substantial interest in a competitor or investing in another company if you can influence Tesla's relationship with that company.

Under the Code, before a Tesla senior officer creates any of these conflicts of interest, the officer must first disclose the proposed action that will give rise to the conflict and obtain a waiver from Tesla's Board of Directors. *See infra* §III.G. The Code's express requirements are contractually binding on Musk. *See infra* §V (Count IV). Moreover, because the Code is also a key corporate governance document and noncompliance with the Code by senior officers triggers disclosure

obligations under securities regulations, Musk and the Directors had a separate fiduciary duty to oversee compliance with the Code in good faith and not to willfully violate the Code themselves. *See infra* §V (Count V).

6. Musk's fiduciary duties under Delaware law and his duties under Tesla's Code of Ethics independently and collectively ensure that Musk, as a fiduciary, is loyal to Tesla.

7. During the past three years, Musk has breached both his duty of loyalty and his obligations under Tesla's Code of Ethics, and repeatedly acted in his own and against Tesla's interests. The self-interest Musk placed above Tesla's interests is straightforward: Musk wanted to aggressively invest in and ultimately take over and control the social media company, Twitter, Inc. ("Twitter"). When Musk made this decision, both Tesla and Musk himself were dependent upon Twitter as their preferred platform for updating customers and investors with important news about Tesla's business. They still rely on Twitter (since rebranded by Musk as 'X')¹ for this purpose today.

8. When Musk set out to invest in and ultimately take over Twitter, Twitter was a publicly traded company with a market capitalization in the tens of

¹ This Complaint generally refers to the X Corp., Twitter, Inc., and the Twitter/X social media platform as "Twitter."

billions of dollars. To accomplish his aims, Musk needed to sell large volumes of his only sizable liquid asset: Tesla stock.

9. Musk did everything he could to conceal his intentions toward Twitter from shareholders and the public at large. His subterfuge was strategic: if the public understood he was acquiring massive amounts of Twitter stock to fuel a potential takeover bid, and selling his Tesla stock to do so, Tesla's stock price would fall, and Twitter's stock price would rise. This would drastically increase the cost of his Twitter stock purchases and lower the value of his Tesla shares.

10. In November 2021, Musk misled Tesla shareholders and the market by tweeting that he would sell 10% of his Tesla holdings if a Twitter poll he created resulted in a vote in favor of that outcome. The available evidence indicates Musk's plans were set, and they were not reliant on any poll. Instead, the evidence supports the conclusion that Musk had already decided to sell over \$16 billion in Tesla stock because he needed to: (1) pay more than \$11 billion in taxes on options on Tesla shares he was exercising, and (2) obtain cash quickly so he could begin making large purchases of Twitter stock on the open market. Musk's misleading statements to the contrary about his reasons for selling Tesla stock violated his duty of loyalty, which required all Tesla Directors to speak honestly and in good faith when making material public statements about Tesla's business, including statements about their own disposition of Tesla stock. These misleading statements allowed Musk to sell

Tesla shares at inflated prices that did not reflect (because the market remained unaware of): (1) Musk's need to sell many more Tesla shares in order to fund his activist investment and intentions toward Twitter and (2) the prospect that an eventual takeover of Twitter would detract from Musk's work at Tesla. Kimbal likewise breached his duty of loyalty by selling 15% of his own Tesla shares immediately prior to Musk's Twitter poll. Had the Musk brothers sold their Tesla shares at the price Tesla dropped to once the public knew of Musk's ultimate plan to acquire Twitter, they would have made \$2 billion less in the transactions. This misconduct by the Musk brothers violated their fiduciary duty of loyalty to Tesla. *See infra* §III.E, §V (Counts I, VI).

11. On January 31, 2022, with the newly obtained cash from his sales of Tesla stock, Musk took the next step in ultimately acquiring Twitter: buying large volumes of Twitter stock on the open market. He did this on virtually every trading day for over two months, until April 1, 2022. By that point, he had spent \$2.6 billion to become Twitter's largest shareholder, owning 9% of the company's equity. In his continued effort to conceal his bid to influence and ultimately take over Twitter, Musk did not obtain a waiver from Tesla's Board of Directors under the Code of Ethics, because that would have triggered Tesla's obligation to disclose Musk's plans on a public Form 8-K filed with the Securities and Exchange Commission ("SEC"). Both the failure to obtain a waiver and his 9% investment in Twitter

violated the prohibition in Tesla's Code of Ethics against "investing in another company if you can influence Tesla's relationship with that company." This misconduct breached Musk's duty of loyalty and his contractual obligations to Tesla. *See infra* §III.H; §V (Counts IV, V).

12. On April 14, 2022, less than two weeks after Musk belatedly disclosed his purchases of Twitter stock by filing a Schedule 13D with the SEC, Musk made an offer to buy all of Twitter's outstanding equity for \$54.20 per share. Closing on this offer would require a payment of more than \$35 billion to Twitter's shareholders. Musk then took the highly unusual step of waiving due diligence. Twitter accepted, and signed the merger agreement with Musk on April 25, 2022. Before making his offer or signing a binding merger agreement, Musk did not obtain a waiver from Tesla's Board of Directors, which again violated the Code of Ethics' prohibition against "investing in another company if you can influence Tesla's relationship with that company." This misconduct breached Musk's duty of loyalty and (again) his contractual obligations to Tesla. *See infra* §III.H, §V (Counts IV, V).

13. Between April 28, 2022 and August 5, 2022, Musk made several additional misleading public statements that were designed to sow doubt about whether the Twitter deal would close and whether Musk would sell additional Tesla stock as part of the Twitter deal. Musk knew these statements were misleading because (1) he did not have a good faith basis for resisting the merger after his

voluntary waiver of due diligence and (2) he needed to sell additional Tesla stock to fund his acquisition of Twitter. Between August 5 and 9, 2022, Musk sold another \$6.89 billion in Tesla shares. Again, Musk received unlawful profits because, prior to making these sales, he misled the market about his plans to sell further Tesla stock and to acquire Twitter. These misleading statements—which included several statements on Twitter and a sham termination letter that prompted litigation by Twitter to compel Musk to close the merger—artificially inflated Tesla’s stock price. This misconduct further violated Musk’s duty of loyalty to Tesla. *See infra* §§III.L-M; §V (Counts I, VI).

14. About two months later, Musk announced he would close the merger on the terms agreed on April 25. After raising some additional short-term debt, Musk closed on the merger on October 27, 2022 by paying more than \$17 billion in cash himself. Again, despite the conflict of interest forbidden by Tesla’s Code of Ethics (and again without a waiver from Tesla’s Board), he purchased a controlling share of Twitter’s stock. This misconduct further violated Musk’s duty of loyalty and contractual obligations to Tesla. *See infra* §III.N, §V (Counts IV, V).

15. In November and December 2022, Musk sold another \$7.55 billion of his Tesla stock. These sales violated his duty of loyalty for two reasons. First, Musk possessed material confidential information that Tesla’s fourth-quarter vehicle deliveries had fallen far below the target Tesla had set in its public projections. He

knew this because, among other things, he receives daily emails detailing Tesla's real-time sales. Because he sold his shares based on knowledge that Tesla's next earnings report would be disappointing, he was improperly trading on inside information. Second, as with his prior sales, Musk violated his duty of loyalty by deliberately making misleading public statements disclaiming his intention to sell more Tesla stock before his sales occurred. These statements were misleading and artificially inflated the price of Tesla's stock, because Musk knew that he would need to sell Tesla shares to fund the Twitter acquisition or to repay short-term debt he would need in order to acquire Twitter. If Musk had booked his November and December 2022 trades on the day after Tesla's negative earnings report (when the market knew the information that he did), his profits would have declined by more than \$2 billion. *See infra* §III.O, §V (Counts I, VI).

16. Since investing in Twitter in violation of the Code of Ethics, Musk has serially breached his duty of loyalty and Tesla's Code of Ethics in myriad ways. For example, he breached the Code by becoming Twitter's CEO, in spite of the Code's prohibition against accepting outside employment "if it prevents you from working with excellence at Tesla." The conflict of interest created by Musk's dual roles as Tesla's and Twitter's CEO immediately created unfair business dealings between Tesla and Twitter: on the same day he became Twitter's CEO, Musk diverted more than fifty Tesla employees from their work at Tesla and asked them to work for him

at Twitter instead. Work for Twitter by Tesla employees under these suspect arrangements has continued for two years. Musk has also taken other unlawful steps to benefit his investment in Twitter through his position at Tesla: he has used his official platform as Tesla's CEO and spokesman to promote Twitter's interests for free. He also caused Tesla to start paying Twitter for advertising; prior to Musk's Twitter takeover, Tesla relied solely on marketing through free channels. All these efforts to promote Twitter's interests as Tesla's CEO violated his contractual obligation to Tesla not to "us[e] your Tesla position to promote a side business" under the Code of Ethics. This misconduct violated Musk's duty of loyalty and contractual obligations to Tesla. *See infra* §§III.P, III.Q.1-4, §V (Counts IV, V).

17. In 2023, Musk usurped an important corporate opportunity from Tesla by starting a new AI company that works closely with Twitter, called X.AI. This opportunity rightly belonged to Tesla; Musk himself has stated that Tesla "should be thought of as an AI robotics company," not a car company. In fact, only five years earlier, in 2018, he had tried to merge OpenAI, X.AI's direct competitor, into Tesla. Now, instead of bringing the opportunity to Tesla, Musk made personal investments and offered a minority 25% stake in his new AI company to his co-investors in Twitter. This did not stop him, however, from promoting X.AI's prospects of leveraging Tesla's AI training data and its future business opportunities with Tesla. Further, Musk became X.AI's CEO, and used his position at Tesla to help X.AI hire

away many of Tesla's AI employees and to divert Tesla's supply of important AI microchips to Twitter (n/k/a "X" or "X Corp.") and X.AI. This year, Musk publicly stated: "I am uncomfortable growing Tesla to be a leader in AI & robotics without having ~25% voting control. . . . Unless that is the case, I would prefer to build products outside of Tesla." In other words, Musk demanded that Tesla repay him all the Tesla stock he just sold to buy Twitter, or else he will focus his attention on building AI at his new company, X.AI, which works closely with Twitter. This misconduct violated Musk's duty of loyalty to Tesla. *See infra* §III.Q.5, §V (Counts II, III, V).

18. Moreover, Musk's misconduct relating to X.AI breached several of his contractual duties under the Code of Ethics, including prohibitions against "working for a competitor," "looking for opportunities that should otherwise go to Tesla first," "developing or helping to develop outside inventions that relate to existing or future Tesla products or your job at Tesla," and "having a substantial interest in a competitor." *See infra* §V (Count IV).

19. Musk's pattern of breaching his obligations to Tesla has damaged Tesla's business. On November 5, 2021, before Musk's disloyal stock sales began, Tesla's stock price closed at \$407.36, near an all-time high. Since Musk's serial violations began, however, Tesla's stock price has declined. On June 7, 2024, Tesla's stock price closed at \$177.48, a 56% decline from November 5, 2021.

Further, due to the close linkage between Musk and Tesla, Musk’s controversial takeover and management of Twitter have stained Tesla’s business reputation. Several objective measures confirm this decline in reputation. So do Tesla’s sagging vehicle deliveries, which dropped 8.5% percent last quarter from the same quarter in 2023.

20. Tesla’s Board of Directors acknowledged this harm during a meeting on December 14, 2022—less than two months after Musk took over Twitter. According to a recent biography of Musk by Walter Isaacson: “At its meeting in Austin on December 14, [2022,] the Tesla board, usually very compliant, told Musk that the Twitter controversies were hurting the Tesla brand. . . . [B]oth Kimbal and board chair Robyn Denholm kept pressing him, saying his behavior was a factor.”

21. Despite the Board’s acknowledgment of the harm to Tesla from Musk’s Twitter controversies, Tesla’s Board of Directors has taken no action to stop Musk’s violations of his duties to Tesla because they are beholden to Musk and lack independence. The Directors refused to enforce Musk’s duties under Delaware law, the Code of Ethics, or even Musk’s and Tesla’s Consent Decree with the SEC. This failure of corporate oversight has occurred for the simple reason that the Tesla Board is stacked with Directors that lack independence. Two of the Directors—Musk and his brother Kimbal—are by definition conflicted in matters concerning Musk. As the Court of Chancery recently found as part of a post-trial opinion in *Tornetta v. Musk*,

two other Directors—Ira Ehrenpreis and James Murdoch—have been intertwined financially and/or personally with Musk for years, if not decades. Two additional Directors not addressed by *Tornetta*—Joe Gebbia and JB Straubel—have similar disabling financial and personal ties to Musk. The same post-trial decision by the Court of Chancery also found that Tesla Chair Robyn Denholm received excessive compensation from Tesla that compromised her independence. The last remaining Director (Kathleen Wilson-Thompson) is similarly situated to Denholm. Musk’s influence over shareholder votes imperils their excessive compensation.

22. The same ties to Musk that have prevented the Board from independently overseeing Musk’s fiduciary and contractual violations also render any demand that the Board sue Musk futile under Delaware law.

23. Demand is also excused because the Directors all face a substantial risk of liability for breaching their own fiduciary duty to Tesla. All of the Directors breached their duty of loyalty by failing to take any good faith action in response to numerous red flags arising from Musk’s continuing violations of his fiduciary duties and the Code of Ethics. The Directors also breached and disregarded in bad faith their own mandatory duties under the Code to respond with reasonably deterrent actions to known violations of the Code by Tesla’s CEO. *See infra* §III.S, §V (Count V). In addition, Defendants Denholm, Wilson-Thompson, and Murdoch have further liability for their breaches of the duty of loyalty in connection with their failures to

implement adequate reporting and controls for complying with an SEC Consent Decree that required Musk to obtain Tesla's preapproval on tweets relating to his disposition of Tesla stock. *See infra* §III.T, §V (Count VI). The risk of liability created by these breaches of the duty of loyalty is an independent ground for demand futility.

24. The response by Tesla's Board to the Court of Chancery's January 30, 2024 post-trial decision to vacate Musk's \$50 billion equity award confirms that the Board of Directors lacks independence from Musk. Instead of attempting to address the problems set forth in the Court's decision, the directors quickly acquiesced to Musk's demands for a shareholder proposal to reinstate his 2018 multi-billion dollar pay package, which the Court vacated due to Defendants' failure to prove the package was fair. The Directors also adopted post-hoc a unilateral proposal by Musk that Tesla reincorporate in Texas. Musk apparently hopes that reincorporation in Texas will make it more difficult for shareholders to seek relief against him on Tesla's behalf, based on the "universal demand" requirement that Tesla believes will apply in Texas. These matters will go to shareholder vote soon.

25. Because Defendants are unable to independently evaluate Tesla's meritorious claims against Musk and themselves, ERSRI respectfully seeks to represent Tesla in this lawsuit and asks this Court for relief on Tesla's behalf.

II. PARTIES

A. Plaintiff

26. Plaintiff Employees' Retirement System of Rhode Island ("Plaintiff" or "ERSRI") provides retirement, disability, and survivor benefits to approximately 60,000 state employees, public school teachers, judges, state police, participating municipal police and fire employees, and general employees of participating municipalities within Rhode Island. Five retirement plans fall under the ERSRI umbrella: State Employees, Public School Teachers, the Municipal Employees' Retirement System, the Judicial Retirement Plan, and the State Police Retirement Plan. These plans are collectively funded by investments beneficially owned by ERSRI and held in ERSRI's accounts. ERSRI is overseen by a 15-member Retirement Board, for which the Rhode Island General Treasurer (James A. Diossa) serves as Chair. ERSRI is, and at all relevant times (as least since January 31, 2021) was, a beneficial owner of shares of Tesla common stock. As of June 7, 2024, ERSRI was a beneficial owner of more than 140,000 shares of Tesla common stock. ERSRI has not sold its entire position since then. ERSRI intends to retain shares in Tesla throughout the duration of this litigation.

27. ERSRI brings this lawsuit derivatively on behalf of and for the benefit of Tesla to remedy Defendants' breaches of fiduciary duty and contract. Tesla is named as a Nominal Defendant solely in a derivative capacity. Plaintiff will

adequately and fairly represent the interests of the Company and its stockholders in this litigation.

B. Nominal Defendant

28. Nominal Defendant Tesla is headquartered in Texas and incorporated in Delaware. Tesla is a technology company that designs, develops, manufactures, and sells fully electric vehicles, solar energy generation systems and energy storage products. It also offers maintenance, installation, operation, charging, insurance, financial and other services related to its products.

29. Throughout its relatively short but impactful history, Tesla has been an innovator in advancing electric vehicle technology, considered by many (including government officials, shareholders, and consumers alike) to be an important component of society's transition away from an over-reliance on fossil fuels. In 2008, Tesla released its first car, the completely electric Roadster, which used lithium-ion cells to power its electric motor and could be recharged through a standard electrical outlet.² Just one year later, in 2009, the United States government provided Tesla with a \$465 million low-interest loan that allowed the Company to build a California factory and produce its next vehicle, the Model S.³ Shortly

² Barbara A. Schreiber & Erik Gregersen, *Tesla, Inc.*, ENCYCLOPEDIA BRITANNICA (June 1, 2024), <https://www.britannica.com/money/Tesla-Motors>.

³ Lindsay Riddell, *Tesla gets long-awaited government loan*, PACIFIC BUSINESS NEWS (June 24, 2009), <https://www.bizjournals.com/pacific/stories/2009/06/22/daily33.html>.

thereafter, the Company made an initial public offering in 2010 which raised hundreds of millions of dollars in additional funds.⁴ The continued growth of the Model S, as well as Tesla's Model X, Model 3, and Model Y vehicles, mirrored the growing demand in the United States for electric vehicles that were considered a key element in combatting carbon pollution and climate change.

30. In 2019 and 2020, after Tesla reported four straight profitable quarters, it joined the S&P 500, and by December 14, 2020, its market capitalization was more than that of the next nine largest automakers globally *combined*. By this time, barely more than a decade after its start, Tesla was the sixth-most valuable U.S. company, with more than \$600 billion in value.⁵ Within a year, on November 5, 2021, the trading day before Musk began the share sales at issue in this litigation, Tesla's market capitalization had doubled again, to more than \$1.2 trillion.⁶

⁴ Kristen Scholer & Lee Spears, *Tesla Posts Second-Biggest Rally for 2010 U.S. IPO*, BLOOMBERG (June 29, 2010), <https://www.bloomberg.com/news/articles/2010-06-29/tesla-motors-raises-226-million-in-first-ipo-of-u-s-carmaker-in-54-years>.

⁵ Michael Wayland & Lora Kolodny, *Tesla's market cap tops the 9 largest automakers combined — Experts disagree about if that can last*, CNBC (Dec. 14, 2020), <https://www.cnbc.com/2020/12/14/tesla-valuation-more-than-nine-largest-carmakers-combined-why.html>; Al Root, *Tesla Becomes Only the Sixth Company to Top \$600 Billion in Value*, BARRONS (Dec. 7, 2020), <https://www.barrons.com/articles/tesla-becomes-only-the-sixth-company-to-top-600-billion-in-value-51607377650>.

⁶ Tesla's closing stock price on November 5, 2021 was \$407.36 (after post-hoc application of a reverse stock split, as is common with stock price data). Multiplying this number by 3,186,000,000 outstanding shares yields a market capitalization of \$1.297 trillion.

31. For many years, Tesla has also increasingly focused on products and services based on AI, robotics, and automation. As Musk stated during a public event called Tesla’s AI Day in August 2021, Tesla is “much more than an electric car company. . . . [W]e have deep AI activity in hardware, on the inference level, on the training level. . . . We’re I think arguably the leaders in real-world AI, as it applies to the real world. . . . [Tesla’s Full-Self-Driving] is a particular application of AI, but I think there are more applications down the road that will make sense.”⁷ Musk has also stated, “Tesla’s real-world AI is underrated Imagine if Tesla and OpenAI had to swap tasks. They would have to make Self-Driving, and we would have to make large language-model chatbots. Who wins? We do.”⁸

32. Tesla’s current website confirms its continued commitment to AI, robotics, and automation. A Tesla webpage concerning AI and robotics job opportunities states: “We develop and deploy autonomy at scale in vehicles, robots and more. We believe that an approach based on advanced AI for vision and planning, supported by efficient use of inference hardware, is the only way to achieve a general solution for full self-driving, bi-pedal robotics and beyond.”⁹

⁷ Tesla, *Tesla AI Day 2021*, YOUTUBE (Aug. 19, 2021), <https://www.youtube.com/watch?v=j0z4FweCy4M>.

⁸ Walter Isaacson, ELON MUSK, at 605 (2023).

⁹ Tesla, AI & ROBOTICS, <https://www.tesla.com/AI>.

33. As recently as last month during its first-quarter earnings call, Musk stated that Tesla “should be thought of as an AI or robotics company. If you value Tesla as just like an auto company, you just have to – fundamentally, it’s just the wrong framework.”¹⁰

C. Individual Defendants

34. Defendant Elon Musk is (and was at all relevant times) Tesla’s Chief Executive Officer and “Technoking,”¹¹ as well as a member of Tesla’s Board. Musk has served in these or similar roles at Tesla since at least as early as 2008. In 2022, Musk testified before the Court of Chancery that the job of Tesla’s CEO and Technoking is to “have the power to direct operational decisions at Tesla.”¹²

35. Defendant Kimbal Musk is (and was at all relevant times) a member of Tesla’s Board. He is Elon Musk’s younger brother. He has served as a Tesla director since 2008. He also serves as a member of the board of directors of SpaceX, another of Musk’s companies. Kimbal beneficially owns more than 1.9 million shares of Tesla stock. The number of shares is worth more than \$200 million at current market

¹⁰ Tesla Q1 2024 Earnings Call Tr. (Apr. 23, 2024), <https://www.fool.com/earnings/call-transcripts/2024/04/23/tesla-tsla-q1-2024-earnings-call-transcript/>.

¹¹ Tesla Form 8-K (Mar. 15, 2021); Tom Huddleston, Jr., *Elon Musk: CEO is a ‘made-up title,’ so he’s Tesla’s ‘Technoking’ instead*, CNBC, (Dec. 7, 2021), <https://www.cnbc.com/2021/12/07/elon-musk-ceo-is-made-up-title-prefers-tesla-technoking.html>.

¹² Trial Tr. Vol. III, 601-02 (Musk Cross), *Tornetta v. Musk*, No. 2018-0408-KSJM (Del. Ch. Nov. 16, 2022).

prices. Kimbal has pledged 1.6 million shares as collateral for debt. The remaining beneficially owned shares are options exercisable within 60 days after March 31, 2024.¹³

36. Defendant Ira Ehrenpreis is (and was at all relevant times) a member of Tesla's Board. He has served as a Tesla director since 2007. Ehrenpreis is a long-time friend of Musk's. Ehrenpreis and/or his venture capital firm (DBL Partners) have invested more than \$55 million in Musk's other businesses, including SpaceX, The Boring Company, and Neuralink. Ehrenpreis owns 571,005 shares of Tesla stock, which at current market prices is worth over \$90 million. According to Tesla's 2024 Proxy Statement, Ehrenpreis also beneficially owns another 1.1 million shares of Tesla stock, through his interests in options that are exercisable within 60 days after March 31, 2024.¹⁴ That amount of shares is worth over \$150 million at current market prices.

37. Defendant James Murdoch is (and was at all relevant times) a member of Tesla's Board. He has served as a Tesla director since 2017. Throughout the relevant period, Murdoch has served on Tesla's Disclosure Controls Committee and

¹³ Tesla, Inc., Proxy Statement (2024) at 150, https://ir.tesla.com/_flysystem/s3/sec/000110465924048040/tm2326076d13_pre14a-gen.pdf.

¹⁴ Tesla, Inc., Proxy Statement (2024) at 150, https://ir.tesla.com/_flysystem/s3/sec/000110465924048040/tm2326076d13_pre14a-gen.pdf.

Tesla's Audit Committee. Murdoch is a long-time friend of Musk's. Murdoch's private investment company, Lupa Systems, has invested \$70 million in SpaceX, another of Musk's companies. According to Tesla's 2024 Proxy Statement, Murdoch also beneficially owns another 1.2 million shares of Tesla stock, through his interests in options that are exercisable within 60 days after March 31, 2024.¹⁵ That amount of shares is worth more than \$150 million at current market prices.

38. Defendant Robyn Denholm is (and was at all relevant times) a member of Tesla's Board. She has served as the Chair of the Tesla Board of Directors since 2018. Throughout the relevant period, Denholm has chaired Tesla's Disclosure Controls Committee and Tesla's Audit Committee. According to Tesla's 2024 Proxy Statement, Denholm beneficially owns 1.4 million shares of Tesla stock, through her interests in options that are exercisable within 60 days after March 31, 2024.¹⁶ 1.4 million shares is worth more than \$200 million at current market prices.

39. Defendant Kathleen Wilson-Thompson is (and was at all relevant times) a member of Tesla's Board. She has served as a Tesla director since 2018. During the relevant period, Wilson-Thompson was on the Tesla Disclosure Controls

¹⁵ Tesla, Inc., Proxy Statement (2024) at 150, https://ir.tesla.com/_flysystem/s3/sec/000110465924048040/tm2326076d13_pre14a-gen.pdf.

¹⁶ Tesla, Inc., Proxy Statement (2024) at 150, https://ir.tesla.com/_flysystem/s3/sec/000110465924048040/tm2326076d13_pre14a-gen.pdf.

Committee. According to Tesla's 2024 Proxy Statement, Wilson-Thompson beneficially owns more than 770,000 shares of Tesla stock, through her interests in options that are exercisable within 60 days after March 31, 2024.¹⁷ That number of shares is worth more than \$100 million at current market prices.

40. Defendant Joe Gebbia is a member of Tesla's Board. He has served as a Tesla director since September 2022. Gebbia is friends with Musk. He has served on the Tesla Audit Committee since shortly after joining the Tesla Board of Directors.

41. Defendant JB Straubel is a member of Tesla's Board. He has served as a Tesla director since May 2023. Straubel co-founded Tesla with Musk in his late twenties, and previously served as Tesla's Chief Technology Officer and Musk's right-hand man at Tesla for more than a decade. Straubel currently serves as CEO of Redwood Materials, a battery materials supplier and recycler that has commercial agreements with Tesla.

42. Defendant Larry Ellison was a member of Tesla's Board between 2018 and August 2022.

43. Defendant Hiromichi (Hiro) Mizuno was a member of Tesla's Board between April 2020 and May 2023.

¹⁷ Tesla, Inc., Proxy Statement (2024) at 150, https://ir.tesla.com/_flysystem/s3/sec/000110465924048040/tm2326076d13_pre14a-gen.pdf.

44. Defendants Elon Musk, Kimbal Musk, Ehrenpreis, Murdoch, Denholm, Wilson-Thompson, Gebbia, Straubel, Ellison, and Mizuno are referenced collectively in this Complaint as “Defendants,” “the Board,” or “the Directors.”

III. FACTUAL BACKGROUND

A. Musk’s active participation in and commitment to Tesla was critical to Tesla’s business.

45. From November 1, 2021 to the present (the “relevant period”) (and for years before then), Musk has been the public face of Tesla. As Kimbal Musk testified during a deposition that was admitted at trial before the Court of Chancery in 2022:

Question: Is the mere fact that Elon Musk is CEO of Tesla, completely aside from his participation in the business, but the mere fact his name is next to the CEO title, valuable to Tesla?

Answer: I am struggling to answer the question. I am trying to answer it truthfully and honestly. I – they’re so tied together that it’s hard for me to answer the question; *because Tesla created Elon Musk’s persona and Elon Musk’s persona is attached to Tesla*. So it’s, like, I’m struggling to answer the question.¹⁸

46. The Court of Chancery recently reached a similar conclusion after a trial in *Tornetta v. Musk*, finding: “Musk is Tesla’s public face, and he describes Tesla as ‘my company.’”¹⁹

¹⁸ Trial Tr. Vol. IV, 1085, *Tornetta v. Musk*, No. 2018-0408-KSJM (Del. Ch. Nov. 17, 2022). Unless otherwise specified, all emphases in this Complaint are supplied.

¹⁹ Post-Trial Opinion, 117, *Tornetta v. Musk*, No. 2018-0408-KSJM (Del. Ch. Jan. 30, 2024) (“*Tornetta* Opinion”).

47. Musk regularly leads earnings calls with investors and represents Tesla at industry conferences. He often makes important announcements about Tesla’s business.

48. Investors in Tesla and analysts who follow Tesla’s securities generally view Musk’s active participation in Tesla’s management as important to Tesla’s business prospects. Musk himself has admitted in trial testimony that many analysts hold this view, with some saying he is “synonymous with Tesla.”²⁰

49. Between 2021 and the present, Tesla’s Board of Directors—including all the individual Defendants—affirmed that Musk’s active participation in Tesla’s management was highly important to Tesla’s business. Tesla’s Form 10-K filings during the relevant time period—including those dated February 8, 2021; February 4, 2022; January 30, 2023; and January 26, 2024—all confirm this by stating, in sum or substance: “The loss of the services of any of our key employees or any significant portion of our workforce could disrupt our operations or delay the development, introduction and ramp of our products and services. In particular, we are highly dependent on the services of Elon Musk, our Chief Executive Officer. . . .”²¹

²⁰ Trial Tr. Vol. I, pp. 94-95, *In re Tesla Motors, Inc. S’holder Litig.*, No. 17711-VCS (Del. Ch. 2021).

²¹ Defendants Musk, Denholm, Ehrenpreis, Ellison, Murdoch, Kimbal Musk, Mizuno, and Wilson-Thompson each signed the Form 10-K dated February 8, 2021 and February 4, 2022. Defendants Musk, Denholm, Ehrenpreis, Murdoch, Kimbal Musk, Wilson-Thompson, Mizuno, and Gebbia each signed the Form 10-K dated January 30, 2023.
Footnote continued on next page

B. Prior to Musk’s acquisition of Twitter, Tesla had an important business relationship with Twitter.

50. Throughout the relevant period and for many years prior to then, Tesla has had an important business relationship with the company formerly known as Twitter.²²

51. Throughout its history and through most of the relevant period (at least until May 2023), Tesla spent no money on traditional forms of advertising.²³ Instead, Tesla maintained a Twitter account that it used to reveal information to investors, customers, and analysts.

52. Throughout the relevant period, Musk also maintained a personal Twitter account that he used to reveal information about Tesla to investors, customers, and analysts.

53. Maintaining these accounts with Twitter created contractual relationships between Musk and Twitter, and Tesla and Twitter. Both Musk and Tesla were obligated, for example, to abide by Twitter’s terms of service.

Defendants Musk, Denholm, Ehrenpreis, Murdoch, Kimbal Musk, Wilson-Thompson, Gebbia, and Straubel each signed the Form 10-K dated January 26, 2024.

²² After acquiring Twitter, Musk rebranded the company as ‘X’. See Jordan Valinsky, *Elon Musk rebrands Twitter as X*, CNN (July 24, 2023), <https://www.cnn.com/2023/07/24/tech/twitter-rebrands-x-elon-musk-hnk-intl/index.html>.

²³ Rebecca Bellan, *Tesla shareholders meeting: no succession plan, a co-founder returns and two EVs teased*, TECHCRUNCH (May 16, 2023), <https://techcrunch.com/2023/05/16/tesla-shareholders-meeting-no-succession-plan-a-co-founder-returns-and-two-evs-teased/> (noting that Tesla had previously not paid “for traditional advertising like other automakers.”).

54. Both Tesla’s and Musk’s accounts maintained millions—and in the case of Musk, tens of millions—of followers during the relevant period.

55. To make important announcements about Tesla during the relevant period, Musk often used his personal Twitter account instead of Tesla’s account. The influence and reach of Musk’s personal Twitter account is far greater than Tesla’s official Twitter account. Between 2021 and the present, Musk’s Twitter account has consistently had over 40 million followers, while Tesla’s has had less than half of that. As of this filing, Musk has more than 180 million followers and Tesla has roughly 23 million followers.²⁴

56. As a result, Tesla used Musk’s personal Twitter account as its primary form of outreach to customers and media outlets. In addition to its historical aversion to paid advertising, Tesla has not had a public relations department since 2020. When reporting on the dissolution of Tesla’s public relations department, a reporter who had covered Tesla full-time for five years remarked: “the only ‘official’ response that the press can get from the company is from Elon directly—mostly on Twitter.”²⁵

57. For these reasons, Twitter was particularly important to Tesla and Musk. Given Tesla’s historical decision never to advertise by buying placement or promotion through media companies and to eschew traditional forms of corporate

²⁴ Compare <https://x.com/elonmusk> with <https://x.com/Tesla>.

²⁵ Fred Lambert, *Tesla dissolves its PR department — a new first in the industry*, ELECTREK (Oct. 6, 2020), <https://electrek.co/2020/10/06/tesla-dissolves-pr-department/>.

public relations, Twitter was one of the single most important vehicles through which Tesla reached its stakeholders.

C. To gain controlling influence over Twitter, Musk needed to raise tens of billions of dollars, and his only means of doing so was to sell Tesla stock.

58. Throughout 2020, 2021, and up through October 27, 2022 (the date when Musk’s takeover of Twitter closed), Twitter was a publicly traded company with outstanding stock that was cumulatively worth tens of billions of dollars.

59. In January 2020, shortly before the outbreak of the COVID-19 pandemic in the United States, then-Twitter CEO and Founder Jack Dorsey asked Musk, *via* videochat at a Twitter company event, for direct feedback and joked with Musk “by the way, do you want to run Twitter?”²⁶ As detailed further herein, over the succeeding 28 months, in response to, *inter alia*, Twitter banning former President Trump’s Twitter account and Twitter’s COVID-19 misinformation policies, Musk’s interest in “running” Twitter became very real.

60. In November 2021, by which time (as detailed below in Section III.E), Musk had determined to heavily invest in Twitter with the aim of influencing and eventually acquiring it, he did not have the billions of dollars in cash necessary to do so. To finance an investment of that magnitude, Musk knew he needed to raise

²⁶ Taylor Locke, *Jack Dorsey asked Elon Musk how he would run Twitter—here’s what Musk said*, CNBC (Jan. 17, 2020), <https://www.cnbc.com/2020/01/17/elon-musk-tells-jack-dorsey-how-he-would-run-twitter.html>.

billions of dollars. Aside from Musk's holdings in Tesla stock, Musk's hundreds of billions of dollars in personal wealth is largely illiquid because it consists of stock in privately held companies that are not listed on national exchanges.

61. Musk confirmed his wealth was largely illiquid on November 6, 2021 by tweeting: "I do not take a cash salary or bonus from anywhere. I only have stock, thus the only way for me to pay taxes personally is to sell stock."²⁷ Musk tweeted this in discussing potential tax liabilities of approximately \$11 billion, but the same point applies to his effort to raise tens of billions of dollars in order to buy Twitter.²⁸

62. Upon information and belief, Musk's holdings of Tesla stock were the only asset held by Musk in 2021 or 2022 that could be liquidated to reliably and quickly raise the funds necessary to acquire a controlling block of Twitter stock. This is so because Tesla was the only publicly traded company in which Musk owned a sufficiently large stake. As of September 31, 2021, Musk held Tesla shares with a cumulative market price of more than \$200 billion.

²⁷ Elon Musk (@elonmusk), TWITTER (Nov. 6, 2021), <https://twitter.com/elonmusk/status/1457067398712942592>.

²⁸ In or around 2020, prior to making these statements about his lack of liquid cash, Musk sold "almost all physical possessions," according to his own tweet dated May 1, 2020. Elon Musk (@elonmusk) TWITTER (May 1, 2020), <https://twitter.com/elonmusk/status/1256239554148724737>. The houses he sold around this time were reportedly worth less than \$100 million. For this reason, Musk's physical assets could not fund a takeover of Twitter.

63. In contrast, the other companies in which Musk held more than a billion-dollar interest (SpaceX, The Boring Co., and Neuralink) were not listed on a public exchange. As a result, Musk could not quickly liquidate his interests in these companies, or reliably extract fair value through a sale.

D. On September 14, 2021, Musk adopted a Rule 10b5-1 plan to sell more than 10 million Tesla shares between November 8, 2021 and December 28, 2021.

64. On September 14, 2021, Musk adopted a Rule 10b5-1 plan whereby cumulative sales of 10,275,000 shares of his Tesla stock²⁹ would automatically take place on November 8, 15, 16, and 23 and December 2, 9, 13, 16, 21, 22, and 28 of 2021 (the “September 14, 2021 Rule 10b5-1 Plan”).

65. Musk’s sales pursuant to the September 14, 2021 Rule 10b5-1 Plan earned him \$10.6 billion dollars. Based on statements by Musk, these sales alone would have largely covered his tax obligations for 2021. Specifically, Musk tweeted on December 19, 2021: “For those wondering, I will pay over \$11 billion in taxes this year.”³⁰

²⁹ This sum reflects the number of shares prior to a 3-1 stock split.

³⁰ Elon Musk (@elonmusk), TWITTER (Dec. 19, 2021), <https://twitter.com/elonmusk/status/1472754632325795843>.

E. In November 2021, Musk and his brother violated their fiduciary duties to Tesla by selling over \$16 billion in Tesla shares for unlawful proceeds based on Tesla's corporate information.

66. In November 2021, Musk and Kimbal Musk violated their fiduciary duties to Tesla when they sold more than \$16 billion in Tesla stock. The market price for these sales was artificially inflated because his intention to sell tens of billions of dollars in Tesla stock to finance his planned investment in Twitter remained nonpublic.

67. The timing and circumstances of this sale strongly support that Musk already knew he was planning to finance his investment in Twitter through sales of Tesla stock when he and his brother Kimbal booked their trades. The truth about Musk's plans properly belonged to Tesla because Musk was serving as Tesla's CEO and knew about his own plans and because Musk made public statements about his reasons for disposing of Tesla stock, which triggered Tesla's duty to preapprove the accuracy of the statements under its Consent Decree with the SEC. *See infra* §III.T (summarizing Musk's obligation to obtain preapproval from Tesla's counsel for statements regarding disposition of his Tesla stock). In this context, he had affirmative duties to disclose the truth to Tesla; without complete information about the truth of his public statements about Musk's disposition of Tesla stock, Tesla could not comply with its obligations under the Consent Decree. Accordingly,

Musk's sales violated his duty of loyalty because he was trading on nonpublic corporate information that was material to the market price of Tesla's stock.

68. In addition, Musk separately violated his duty of loyalty by making public statements that attributed his large sales to the outcome of a Twitter poll. On information and belief, these statements were false and misleading because Musk's true intention was to sell his Tesla shares regardless of the outcome of his Twitter poll and to use a large percentage of the proceeds to invest in Twitter's stock. Making these statements violated Musk's fiduciary duty to Tesla because he sought to mislead Tesla's shareholders and the public generally concerning his intentions, knowing his undisclosed plans were material to investors in Tesla stock.

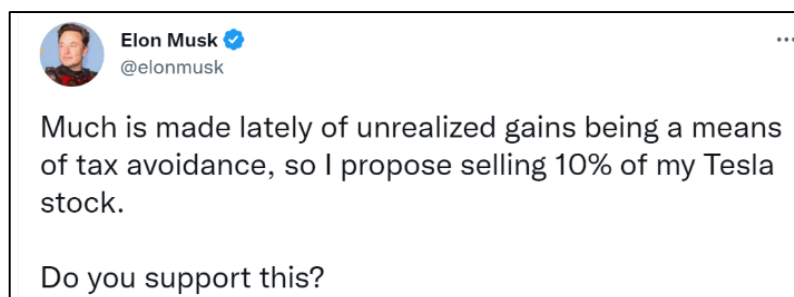
69. Kimbal Musk did not make any misleading statements himself, but he sold his shares a day before Musk's Twitter poll containing Musk's statements about his reasons for selling Tesla stock. The unusual nature and timing of Kimbal's sales tend to show that he was motivated by material nonpublic information concerning Musk's plan to sell a large tranche of Tesla stock. Accordingly, his sales also violated his duty of loyalty to Tesla.

- 1. On Saturday and Sunday November 6-7, 2021, Musk stated he would sell 10% of his Tesla shares based on the outcome of a Twitter poll.**

70. On November 1, 2021, Musk spoke with David Searle, Tesla's Deputy General Counsel and Acting Head of Legal, concerning a "public preannouncement

of his intent to sell Tesla stock.”³¹ Because this proposed announcement concerned Musk’s disposition of Tesla stock, Tesla had duties under a Consent Decree with the SEC and its Senior Executives Communications policy to implement mandatory controls whereby Tesla (at least through its counsel) preapproved this proposed announcement. *See infra* §III.T.

71. On Saturday, November 6, 2021, a few days before making these trades, Musk tweeted the following statements proposing to sell a large percentage of his Tesla stock in order to satisfy potential tax obligations:³²



The tweet polled readers “yes” or “no” in response to Musk’s question. In a follow-up tweet, Musk stated: “I will abide by the results of this poll, whichever way it goes.”³³ The result of the poll favored “yes.”

³¹ Exhibit C to Defendant Elon Musk’s Memorandum of Law in Support of His Motion To Quash & To Terminate Consent Decree, *SEC v. Musk*, 18-cv-08865 (S.D.N.Y. Mar. 8, 2022), ECF No. 71-3 (privilege log submitted by Musk describing phone call, hereafter “Privilege Log”).

³² Elon Musk (@elonmusk), TWITTER (Nov. 6, 2021, 12:17 PM), <https://twitter.com/elonmusk/status/1457064697782489088>.

³³ Elon Musk (@elonmusk), TWITTER (Nov. 6, 2021, 12:23 PM), <https://twitter.com/elonmusk/status/1457066048944066565>.

72. On Sunday, November 7, 2021, Musk made further statements on Twitter that indicated he would sell Tesla stock because of the result of the November 6, 2021 poll:³⁴



73. By stating Musk “was prepared to accept either outcome,” the November 7, 2021 tweet again communicated that Musk would not sell 10 percent of his Tesla stock if the poll had favored “no.”³⁵

74. In the days following the Twitter poll and the predictable “yes” vote it generated, between November 9 and 12, 2021, Musk sold \$5.8 billion worth of Tesla stock in transactions that were not scheduled pursuant to the September 14, 2021 Rule 10b5-1 Plan (or any other plan). This Complaint refers to these sales as Musk’s “Unscheduled November 2021 Stock Sales.”

³⁴ Elon Musk (@elonmusk), TWITTER (Nov. 7, 2021, 2:26 PM), <https://x.com/elonmusk/status/1457429209891155973>.

³⁵ Elon Musk (@elonmusk), TWITTER (Nov. 7, 2021), <https://twitter.com/elonmusk/status/1457428403754307586> and <https://twitter.com/elonmusk/status/1457429209891155973>.

75. Also following the Twitter poll, on November 8, 15, 16, and 23 and December 2, 9, 13, 16, 21, 22, and 28 of 2021, Musk sold an additional 10,275,000 shares³⁶ of Tesla stock for \$10.6 billion, cumulatively, pursuant to the schedule of his September 14, 2021 Rule 10b5-1 Plan. According to Form 4 filings by Musk for these transactions, the stated purpose for *these* sales—scheduled well before and independent of any “poll”—was to fund Musk’s tax obligations arising from Musk’s exercise of options to purchase Tesla shares that were set to expire in 2022.³⁷ The Form 4 filings also stated the sales were conducted pursuant to his September 14, 2021 Rule 10b5-1 Plan. This Complaint refers to these sales as Musk’s “Prescheduled November and December 2021 Stock Sales.”

2. Musk’s November 6 and 7, 2021 statements about his intentions to sell 10% of his Tesla stock were false and misleading.

76. Musk’s November 6 and 7, 2021 tweets about his intentions to sell 10% of his Tesla stock were false and misleading for two reasons:

- a. First, Musk knew that the outcome of the November 6, 2021 Twitter poll had no bearing on whether he actually sold his shares. Instead, on information and belief, the poll was designed, given the likelihood that

³⁶ This total reflects the number of shares prior to a stock split.

³⁷ For example, Musk’s Form 4 Filing for one of his November 8, 2021 trades states: “The shares of common stock were sold solely to satisfy the reporting person’s tax withholding obligations related to the exercise of stock options to purchase 2,154,572 shares as reported herein.”

Musk’s followers on Twitter would approve his proposed action and public officials’ statements at the time about billionaires and untaxed wealth,³⁸ to result in approval of what Musk already planned to do—*i.e.*, undertake an unusually large unscheduled sale of Tesla stock.

b. Second, approximately \$5 billion of Musk’s sales were *not* intended or needed to fund his tax liability or to make a political statement about proposals to tax unrealized gains—the pretenses Musk set forth in his November 6, 2021 tweets about his poll. Musk had already scheduled large Tesla stock sales to satisfy his tax obligations. Musk accordingly used the Twitter poll (and its predictable “yes” vote) as a cover to sell a large tranche of Tesla stock so as to accumulate cash—cash he soon used to aggressively and surreptitiously purchase large volumes of Twitter stock.

77. Contrary to Musk’s claims both before and after the completion of the poll that he would abide by the poll’s results either way, Musk knew he had approved the September 14, 2021 Rule 10b5-1 Plan which prescheduled most of his November and December 2021 stock sales to pay taxes associated with options that were set to expire in 2022. This supports the conclusion that, contrary to Musk’s statements,

³⁸ See, e.g., Andrew Ross Sorkin, et al., *The New Billionaire Tax in Democrats’ Sights*, THE NEW YORK TIMES (Oct. 25, 2021), <https://www.nytimes.com/2021/10/25/business/dealbook/democrats-capital-gains-tax.html>.

Musk already knew he would sell at least 6% of his Tesla shares pursuant to that plan, regardless of the outcome of his poll.

78. Moreover, contrary to Musk's statements on November 6 and 7, 2021, Musk did *not* sell 10% of his Tesla holdings in response to the poll. Instead, when he stopped selling Tesla shares in December 2021, he had sold 9.2% of his Tesla shares, or a total of 15,702,784 shares after the poll. These sales fell short of the more than 17 million Tesla shares Musk needed to sell to hit the 10% mark.³⁹ This shortfall on Musk's misleading commitment to honor the poll's results was material, because it amounted to approximately \$1 billion at prevailing market prices. Musk would not begin selling additional Tesla shares until after he offered to buy all of Twitter's outstanding shares in April 2022. *See* Section III.K *infra*. Musk's decision not to follow the outcome of the November 6, 2021 Twitter poll further shows his statements that he would do so were not true.

79. Significant evidence supports the conclusion that Musk ordered the Unscheduled November 2021 Stock Sales not out of a response to public sentiment about untaxed wealth or any Twitter poll, but instead to raise billions of dollars so

³⁹ Harry Robertson, *Elon Musk is now halfway to his Twitter target of selling 10% of his Tesla stock – after dumping another \$1.05 billion*, BUSINESS INSIDER (November 24, 2021), <https://markets.businessinsider.com/news/stocks/elon-musk-tesla-stock-sales-twitter-poll-target-taxes-options-2021-11>.

that he could influence and ultimately mount a takeover bid against Twitter by surreptitiously buying a large stake in Twitter on the open market.

a. It is not plausible that Musk would choose to sell billions of dollars of Tesla stock and dilute his interest in a Company he co-founded based on a Twitter poll. Moreover, Musk has admitted he can only “sell [Tesla] stock during certain periods” and that he “can’t sell stock during other periods” and “there are only brief windows where I can sell Tesla stock.”⁴⁰ These statements suggest he would not have left his unprecedented sale of billions of dollars in Tesla stock to the outcome of a Twitter poll, and that instead he planned the timing of that sale in advance.

b. The conclusion that Musk was raising funds for a specific known and rational purpose (and not in response to his Twitter poll) is further supported by the unusual size of Musk’s November and December 2021 Stock Sales. Prior to November 9, 2021, Musk had only sold Tesla stock three times in the preceding ten years. And Musk’s Unscheduled November 2021 Stock Sales for \$5.8 billion yielded more than three times the proceeds of all his previous Tesla stock sales *combined*.⁴¹

⁴⁰ James Clayton, *Interview with Elon Musk*, BBC NEWS (Apr. 11, 2023), <https://www.bbc.com/news/av/world-us-canada-65249139>.

⁴¹ Musk’s prior sales of Tesla shares were: (1) \$24 million shortly after Tesla went public; (2) a \$593 million sale in 2016; and (3) another sale on November 8, 2021 for \$1.1 billion. See Eliza Haverstock, *After Taking a Thanksgiving Break, Elon Musk Is Back to Selling*
Footnote continued on next page

c. Moreover, for more than 99% of the proceeds raised by Musk’s stock sales prior to November 2021—as well as the Prescheduled November and December 2021 Stock Sales—Musk filed forms with the SEC stating that the sales were for the sole purpose of funding tax liabilities associated with the exercise of options. By contrast, Musk’s Form 4 filings with the SEC for his Unscheduled November 2021 Stock Sales did not include any statement that Musk would use the proceeds to fund his tax liabilities. This further confirms the highly suspicious and unusual nature of the Unscheduled November 2021 Stock Sales.

d. Other evidence confirms that Musk’s Unscheduled November 2021 Stock Sales for \$5.8 billion were not for the purpose of paying his taxes. As explained above, Musk’s Scheduled November and December 2021 Stock Sales raised \$10.6 billion for the payment of taxes. On December 19, 2021, Musk tweeted: “For those wondering, I will pay over \$11 billion in taxes this year.”⁴² Thus, at the very least, Musk’s Unscheduled November 2021 Stock Sales yielded over \$4 billion more than he needed to pay his taxes.

Tesla Stock, FORBES (Dec. 3, 2021), <https://www.forbes.com/sites/elizahaverstock/2021/12/03/after-taking-a-thanksgiving-break-elon-musk-is-back-to-dumping-tesla-stock>; Musk’s Form 4 filings.

⁴² Elon Musk (@elonmusk), TWITTER (Dec. 19, 2021), <https://twitter.com/elonmusk/status/1472754632325795843>.

e. Further, there is a close proximity between Musk’s November and December 2021 Stock Sales and his purchases of more than \$2.6 billion in Twitter stock on the open market (beginning January 31, 2022) and his April 2022 offer to acquire all of Twitter’s stock. *See infra* §§III.H, III.I. The most plausible explanation for this proximity is that the purpose of Musk’s Unscheduled November 2021 Stock Sales was to raise the funds for Musk’s open market purchases of Twitter stock, and that Musk pre-planned and coordinated his sales to occur shortly before his Twitter investment. Musk lacked the funds to make those purchases without the Unscheduled November 2021 Stock Sales. Indeed, according to a recently unsealed complaint that relies in part on sworn SEC investigation testimony, “[b]oth Musk and [his personal business manager Jared] Birchall confirmed . . . that Musk used the money he generated from selling Tesla shares in late 2021 to fund his purchases of Twitter stock.”⁴³

f. The aggressiveness of Musk’s open market purchases of Twitter stock between January 31, 2022 and April 1, 2022 are best explained by a motivation to gain controlling influence over Twitter. During that time, Musk purchased tens (sometimes hundreds) of millions of dollars in Twitter stock

⁴³ First Am. Compl., *Oklahoma Firefighters Pension and Ret. Sys. v. Musk*, No. 22-cv-3026, ECF 99, ¶ 85 (S.D.N.Y. May 28, 2024).

nearly every trading day. In total, he spent \$2.6 billion in cash buying Twitter stock during this time. *See infra* §III.H. The market’s reaction to Musk’s revelation of these large purchases of Twitter stock confirms that market participants also attributed Musk’s purchases to an intention to takeover Twitter. When Musk disclosed his purchases, Twitter’s stock price rose 27%. This prompted Twitter CFO Ned Segal to tell Twitter director Egon Durban on April 4, 2022 (when Musk’s ownership of 9.2% of Twitter was first disclosed): “There’s already a takeover premium as of today.”⁴⁴

g. As this later reaction by market participants to Musk’s open market purchases of Twitter stock confirms, Musk had a compelling financial incentive to conceal the true reason for his Unscheduled November 2021 Stock Sales: if the public believed he intended to acquire Twitter, the price of Twitter’s stock would rise. As a sophisticated businessman, Musk knew this; it is common knowledge that public awareness of a potential buyer of a public company causes the price of the target company’s stock to rise. This phenomenon—commonly called a “takeover premium”—would make it more expensive for Musk to achieve his ultimate goal (as described more fully below) of influencing Twitter and changing its policies. *See infra* §III.E.4

⁴⁴ *See* First Am. Compl., *Oklahoma Firefighters Pension and Ret. Sys. v. Musk*, No. 22-cv-3026, ECF 99, ¶ 185 (S.D.N.Y. May 28, 2024) (relying on documents produced in discovery).

(collecting evidence of Musk's motive for investing in Twitter). By suggesting he would sell 10% of his holdings—then worth *more* than \$15 billion dollars—in order to satisfy the public's desire to see more wealth be fairly taxed, Musk created a ruse that he believed would explain to the public why he was suddenly raising these funds.

h. Musk also took several actions that further show that he did, in fact, seek to conceal his intention to invest in and influence Twitter through a potential takeover bid. Specifically: (1) he did not obtain a waiver from Tesla's Board that excused him from a prohibition in Tesla's Code of Ethics that prevented him from investing in Twitter, which would have required Tesla to disclose Musk's plans on a public Form 8-K filed with the SEC; (2) he spread his purchases of Twitter stock over more than 40 days using covert algorithmic trading methods developed by Morgan Stanley (*see infra* §III.H), a strategy that would minimize the likelihood of market analysts detecting a change in volume in open market purchases; and (3) he violated SEC disclosure rules by belatedly announcing his acquisition of 5% of Twitter's stock, even as he continued his regular purchases of Twitter stock. *See infra* §III.H.

i. Musk has also given testimony consistent with a motive to conceal his plans to invest in Twitter. Specifically, according to a recently

unsealed amended complaint against Musk filed by an investor in Twitter, Musk testified that he “wanted to avoid as long as possible” making his Twitter interest public.⁴⁵ He also testified that, “at whatever point [his] ownership of Twitter became public,” it “would definitely generate press” and “there was a good chance the price of Twitter might go up.”⁴⁶ Musk’s personal business manager Jared Birchall similarly testified that Musk “announcing that he is building a position in Twitter” “might cause the price to go up” and, if so, Musk having to buy “the rest of his position . . . at higher prices” was “definitely one of the potential outcomes.”⁴⁷ Although this testimony appears to have concerned Musk’s belated disclosure of his initial investments in Twitter on April 4, 2022 (*see infra* §III.H), the same concerns about the market’s reaction to Musk’s initial investments in Twitter apply to any earlier disclosure of Musk’s plans to ultimately acquire Twitter. Put differently, an early disclosure of Musk’s plan to acquire Twitter would have a similar effect of increasing Twitter’s stock price and causing Musk to pay more to acquire Twitter.

⁴⁵ *Id.* at ¶ 82 (relying on testimony from SEC investigation).

⁴⁶ *Id.* at ¶ 145 (relying on testimony from SEC investigation).

⁴⁷ *Id.* (relying on testimony from SEC investigation).

3. Kimbal Musk sold 15% of his Tesla shares a day before Musk publicly stated he intended to sell 10% of his Tesla shares based on the outcome of a Twitter poll.

80. On November 5, 2021, the day *before* Musk’s misleading Twitter poll and the trading day before Musk began selling his Tesla stock, Kimbal Musk suddenly sold 88,500 shares of Tesla common stock—or 15% of his Tesla holdings—for \$108.8 million dollars.⁴⁸ This unusual sale, taking place just days after Elon Musk revealed his intent to sell a large tranche of his own Tesla stock to Tesla’s Deputy General Counsel but before he went public with that intention, was not subject to a Rule 10b5-1 plan. As discussed further herein, the suspicious timing and circumstances of Kimbal’s unusual stock sale strongly support the inference that Kimbal knew of and traded on his material and nonpublic knowledge of Musk’s plan to imminently undertake billions of dollars in Tesla stock sales that were not previously disclosed to the public. Tesla’s share price fell immediately after Musk announced his poll, which the market viewed as materially negative news, demonstrating that Kimbal unlawfully profited on his earlier trade.

⁴⁸ Dave Michaels, *SEC Probes Trading by Elon Musk and Brother in Wake of Tesla CEO’s Sales*, WALL ST. JOURNAL (Feb. 24, 2022), <https://www.wsj.com/articles/sec-probes-trading-by-elon-musk-and-brother-in-wake-of-tesla-ceos-sales-11645730528>.

4. Musk’s own statements and actions after his acquisition of Twitter strongly support the conclusion that he developed his intentions to obtain controlling influence over Twitter before September 2021.

81. Events and circumstances leading up to his first large Tesla stock sale in 2021 strongly support the conclusion that prior to September 2021, when Musk pre-scheduled some of his stock sales pursuant to a Rule 10b5-1 plan, Musk had already formed the intention to invest in and to put himself in position to acquire Twitter. Specifically, Musk’s statements confirm that he acquired Twitter because he opposed: (1) Twitter’s introduction and implementation of COVID-19 misinformation policies in 2020 and 2021, (2) Twitter’s decision to ban President Donald Trump’s Twitter account in January 2021 in response to his role in the January 6, 2021 Capitol Hill riot, and (3) what he perceived and referred to as the “wokeness” in political and civil discourse in the United States. These catalysts for Musk’s takeover of Twitter all happened before September 2021.

a. Musk acquired Twitter in part to reverse Twitter’s efforts in 2020 and 2021 to mitigate misinformation about the COVID-19 virus.

82. In spring 2020, Twitter amended its content moderation policies to require Twitter employees to remove tweets containing a wide variety of misinformation about the COVID-19 virus, including, among other things:

a. “Denial[s] of global or local health authority recommendations to decrease someone’s likelihood of exposure to COVID-19 with the intent to

influence people into acting against recommended guidance, such as: ‘social distancing is not effective’, or actively encouraging people to not socially distance themselves in areas known to be impacted by COVID-19 where such measures have been recommended by the relevant authorities;”

b. “Specific claims around COVID-19 information that intends to manipulate people into certain behavior for the gain of a third party with a call to action within the claim, such as ‘coronavirus is a fraud and not real - go out and patronize your local bar!!’ or ‘the news about washing your hands is propaganda for soap companies, stop washing your hands’.”⁴⁹

83. Musk opposed these policies. In 2020 and afterwards, Musk himself criticized the U.S. government’s COVID-19 policies and guidance, as well as the public officials and press who did not share his views. For example:

a. On March 6, 2020, Musk tweeted: “The coronavirus panic is dumb.”⁵⁰

b. On March 8, 2020, Musk tweeted: “Virality of C19 is overstated due to conflating diagnosis date with contraction date & over-extrapolating

⁴⁹ Vijaya Gadde & Matt Derella, “An update on our continuity strategy during COVID-19,” TWITTER (Mar. 16, 2020, updated Mar. 18, 2020 and Apr. 1, 2020), https://blog.twitter.com/en_us/topics/company/2020/An-update-on-our-continuity-strategy-during-COVID-19.

⁵⁰ Elon Musk (@elonmusk), TWITTER (Mar. 6, 2020), <https://twitter.com/elonmusk/status/1236029449042198528>.

exponential growth, which is never what happens in reality. Keep extrapolating & virus will exceed mass of known universe!”⁵¹

c. On March 8, 2020, Musk tweeted: “Fatality rate also greatly overstated. Because there are so few test kits, those who die with respiratory symptoms are tested for C19, but those with minor symptoms are usually not. Prevalence of coronaviruses & other colds in general population is very high!”⁵²

d. On March 19, 2020, Musk tweeted: “Kids are essentially immune [from COVID-19], but elderly with existing conditions are vulnerable. Family gatherings with close contact between kids & grandparents probably most risk.”⁵³ A reporter with *Buzzfeed News* wrote an article criticizing Twitter’s decision not to take action against this post under its

⁵¹ Elon Musk (@elonmusk), TWITTER (Mar. 8, 2020), <https://twitter.com/elonmusk/status/1236557371310133248>.

⁵² Elon Musk (@elonmusk), TWITTER (Mar. 8, 2020), <https://twitter.com/elonmusk/status/1236558461824978944>.

⁵³ Elon Musk (@elonmusk), TWITTER (Mar. 19, 2020), <https://x.com/elonmusk/status/1240758710646878208>.

policies.⁵⁴ Musk was aware of the content of this article, because he tweeted in response, “Buzzfeed is a mind virus.”⁵⁵

e. On an April 2020 Tesla earnings calls, Musk stated regarding lockdowns ordered by government officials in response to COVID-19: “I would call it, forcibly imprisoning people in their homes against all their constitutional rights, that in my opinion, and breaking people’s freedoms in ways that are horrible and wrong and not why people came to America or built this country It’s an outrage.”⁵⁶

f. In May 2020, Musk ordered that a Tesla factory in California reopen in spite of local COVID restrictions requiring it to remain closed. On May 9, 2020, in reference to his dispute with Alameda County, Musk tweeted: “this is the final straw. Tesla will now move its HQ and future programs to Texas/Nevada immediately. If we even retain Fremont manufacturing activity at all, it will be dependen[t] on how Tesla is treated in the future. Tesla is the

⁵⁴ Ryan Mac, *Elon Musk Incorrectly Tweeted Children Are ‘Essentially Immune’ From The Coronavirus. Twitter Said That’s Okay*, BUZZFEED NEWS (Mar. 19, 2020), <https://www.buzzfeednews.com/article/ryanmac/elon-musk-tweeted-misinformation-about-the-coronavirus-but>.

⁵⁵ Elon Musk (@elonmusk), TWITTER (Mar. 27, 2020), <https://twitter.com/elonmusk/status/1243613853558231041>.

⁵⁶ Tesla Q1 2020 Earnings Call Tr. (Apr. 29, 2020), <https://seekingalpha.com/article/4341298-tesla-inc-tsla-ceo-elon-musk-on-q1-2020-results-earnings-call-transcript>.

last carmaker left in CA.”⁵⁷ Two days later, Musk tweeted: “Tesla is restarting production today against Alameda County rules. I will be on the line with everyone else. If anyone is arrested, I ask that it only be me.”⁵⁸ Tesla later fulfilled Musk’s threat to relocate Tesla’s headquarters to Texas.⁵⁹

84. Musk’s actions after taking over Twitter confirm that his opposition to COVID-19 misinformation policies motivated him to invest in Twitter. On or around November 23, 2022 (or less than a month after Musk took over Twitter), Twitter stopped enforcing its COVID-19 misinformation policies.⁶⁰

85. In December 2022, shortly after this change, Musk tweeted several attacks against Dr. Anthony Fauci, the director of the National Institute of Allergy and Infectious Diseases who was prominently associated with the U.S. government’s COVID-19 policies and a vocal advocate for social distancing and masks. For

⁵⁷ Elon Musk (@elonmusk), TWITTER (May 9, 2020), <https://twitter.com/elonmusk/status/1259162367285317633>.

⁵⁸ Elon Musk (@elonmusk), TWITTER (May 11, 2020), <https://twitter.com/elonmusk/status/1259945593805221891>.

⁵⁹ Dana Hull, *Tesla Makes It Official, Marking Headquarters Move to Texas*, BLOOMBERG (Dec. 21, 2021), <https://www.bloomberg.com/news/articles/2021-12-01/tesla-makes-it-official-completing-headquarters-move-to-texas>.

⁶⁰ Donie O’Sullivan, *Twitter is no longer enforcing its Covid misinformation policy*, CNN BUSINESS (Nov. 29, 2022), <https://www.cnn.com/2022/11/29/tech/twitter-covid-misinformation-policy/index.html>.

example, on December 11, 2022, Musk tweeted: “My pronouns are Prosecute/Fauci.”⁶¹

86. Also, in or around early December 2022, after acquiring Twitter, Musk released internal Twitter documents concerning its efforts to moderate COVID-19 misinformation in 2020 and 2021 to Canadian social scientist David Zweig. Musk’s intention in releasing these files was to highlight practices that he disfavored and that motivated his acquisition of Twitter. Consistent with Musk’s intention, Zweig then published a thread on Twitter called “THE TWITTER FILES: HOW TWITTER RIGGED THE COVID DEBATE,” which criticized Twitter’s content moderation efforts. Around the time he released these files to Zweig, Musk posted the following statements using his Twitter account confirming his opposition to the U.S. government’s COVID policies and his belief that Twitter had improperly censored differing views on the virus:

⁶¹ Elon Musk (@elonmusk), TWITTER (Dec. 11, 2022), <https://twitter.com/elonmusk/status/1601894132573605888>. Musk’s reference to “his pronouns” was intended to be a sarcastic jab at civil discourse concerning gender identity, which Musk perceived as problematically “woke.”



Musk’s actions to discredit Twitter’s efforts to moderate COVID misinformation in 2020 and 2021 immediately after acquiring Twitter shows he formed an intention to invest in and influence Twitter, ultimately taking it over, in response to those moderation efforts.

87. The above evidence shows Musk formed a desire to acquire an influential stake in Twitter’s common stock, and to pursue potential ownership of

Twitter, in part to reverse Twitter’s COVID-19 misinformation policies adopted in 2020 and early 2021, and that he developed that intention prior to September 2021.

b. Musk acquired Twitter in part to reverse Twitter’s decision to ban Donald Trump based on his role in the January 6, 2021 Capitol Hill riot.

88. On January 6, 2021, thousands of supporters of President Donald Trump rioted in Washington, DC and stormed the Capitol building where the Senate and House holds their legislative proceedings. Immediately prior to and during the riots, President Trump used his Twitter account to make statements widely seen as supporting participants in these riots.⁶² Twitter responded by banning President Trump from its platform on January 8, 2021.

89. Musk strongly disagreed with Twitter’s decision to ban President Trump. On January 11, 2021, Musk sent the following tweet expressing this view:

⁶² See, e.g., Andrew Restuccia & Siobhan Hughes, *Trump’s Tweet About Pence Seen as Critical Moment During Riot*, WALL ST. JOURNAL, July 21, 2022, <https://www.wsj.com/livecoverage/jan-6-hearing-today-trump/card/trump-s-tweet-about-pence-seen-as-critical-moment-during-riot-fmPxoFkeoTKxi0NqPLCL> (discussing President Trump’s tweet on January 6 that “Mike Pence didn’t have the courage to do what should have been done”).



This tweet was a clear statement of opposition to Twitter’s decision to ban President Trump from the platform.

90. Musk’s subsequent statements and actions concerning Twitter’s ban of former President Trump’s account confirms the ban motivated Musk’s eventual acquisition of Twitter.

a. During a May 2022 interview with the *Financial Times*, Musk acknowledged “I would reverse the permaban” of former President Trump if he was able to acquire Twitter. During that interview, he called the ban “not correct,” “a mistake,” “flat out stupid,” “a morally bad decision” and “foolish in the extreme.”⁶³

b. On November 20, 2022—less than a month after acquiring Twitter—Musk caused Twitter to reverse former President Trump’s ban from the platform.

c. In November 2022 or early December 2022, Musk released select internal Twitter documents to like-minded journalists which he dubbed the “Twitter Files.” Many Twitter documents released by Musk concerned the decision to suspend former President Trump’s Twitter account. Musk’s purpose in releasing the files was to bolster his arguments that his acquisition of Twitter was an appropriate response to the ban of former President Trump’s account. Consistent with Musk’s goals, the journalists who received the Twitter files posted threads on Twitter concerning the issue in mid-December 2022.⁶⁴

⁶³ *Transcript: FT Interview with Elon Musk*, FINANCIAL TIMES (May 12, 2022), <https://www.ft.com/content/697d8d32-6ef9-4b4c-835a-3e9dcbdb431a>.

⁶⁴ *See, e.g.,* Bari Weiss (@bariweiss), TWITTER (Dec. 12, 2022), <https://twitter.com/bariweiss/status/1602364197194432515>.

c. Musk acquired Twitter as part of his campaign against what he perceived and referred to as “wokeness” in politics and civil discourse in the United States, beginning in 2020.

91. Musk has also admitted that he acquired Twitter because he believed Twitter’s management and employees were too “woke,” and were infected with a “mind virus,” which he sometimes called the “woke mind virus.” Musk himself believed this “virus” took root in San Francisco, where Twitter was headquartered. Specifically, when asked why he acquired Twitter during an interview with podcaster Joe Rogan in 2023,⁶⁵ Musk responded:

Musk: I was worried about, that [Twitter] was having a corrosive effect on civilization. That it was just having a bad impact. And I think part of it is, that it’s where it was located, which is downtown San Francisco. And while I think San Francisco is a beautiful city and should really fight hard to, kind of, right the ship of San Francisco. If you walk around downtown San Francisco, right near X f/k/a Twitter headquarters, it’s a zombie apocalypse. I mean it’s rough

So, now you have to say, what philosophy led to that outcome? And that philosophy was being piped to Earth. So a philosophy that would be ordinarily quite niche and geographically constrained so that the fallout area would be limited. Whereas, effectively given an information weapon, an information technology weapon to propagate what is

⁶⁵ In Rogan, Musk had a sympathetic audience for his views on the COVID-19 virus, as Rogan’s podcast also served as a platform for discredited or unsupported COVID-19 claims such as “ivermectin alone,” which was used to treat against parasitic worms, was “capable of driving this pathogen to extinction” and that healthy 21-year olds did not need to get the COVID vaccine. Linda Geddes, *Joe Rogan’s Covid claims: what does the science actually say?* THE GUARDIAN . (Jan. 31, 2022), <https://www.theguardian.com/culture/2022/jan/31/joe-rogan-covid-claims-what-does-the-science-actually-say>. This led Spotify, which hosts Rogan’s podcast, to add a content advisory note on the podcast. *Id.*

essentially a mind virus to the rest of Earth. And the outcome of that mind virus is very clear if you walk around the streets of San Francisco. It is the end of civilization.

Rogan: And it's not just propagating the mind virus, but it's suppressing opposing viewpoints.

Musk: Yes. Well, in order for the virus to propagate, it must suppress opposing viewpoints.

Rogan: Because it doesn't stand up to scrutiny.

Musk: Correct. I mean, you've felt the virus. People have tried to cancel you so many times. . . . It's a death cult. . . . It's essentially the extinctionists. . . .⁶⁶

92. Similarly, on May 14, 2022, regarding his offer to take over Twitter, Musk tweeted: "Whoever thought owning the libs would be cheap never tried to acquire a social media company!"⁶⁷ "Owning the libs" is an idiom frequently used

⁶⁶ *The Joe Rogan Experience*, Episode 2054 (Oct. 31, 2023), <https://open.spotify.com/episode/7edwvm2c6leuzun4xtFYCJ>. With regard to his views about the "woke mind virus," Musk stated to his biographer Walter Isaacson, "This woke-mind virus resides primarily in the Democratic Party, even though most Dems don't agree with it." Walter Isaacson, *ELON MUSK*, at 420 (2023). He has also made several other similar statements expressly linking his decision to take over Twitter to his opposition to liberal politics. *See, e.g.*, James Clayton, *Interview with Elon Musk*, BBC NEWS (Apr. 11, 2023), <https://www.bbc.com/news/av/world-us-canada-65249139> ("But the point is that Twitter should be a town square that gives equal voice to the whole country, and ideally the whole world. It should not be a partisan politics, and moreover partisan politics that are in the very far left of the spectrum – San Francisco, Berkeley politics – normally is quite niche. But Twitter effectively acted as a megaphone for very niche regional politics and megaphoned that to the world."); *Transcript: FT interview with Elon Musk*, FINANCIAL TIMES (May 10, 2023), <https://www.ft.com/content/697d8d32-6ef9-4b4c-835a-3e9dcdbdb431a> ("Twitter needs to be much more even handed. It currently has a strong left bias").

⁶⁷ Elon Musk (@elonmusk), TWITTER (May 14, 2022), <https://twitter.com/elonmusk/status/1525549535786717184>.

to denote offending or defeating people who support liberal politicians in the United States, typically with the goal of promoting an opposing political viewpoint.⁶⁸

93. Musk’s statements before September 2021 demonstrate that he became increasingly fixated with voicing his opposition to perceived “wokeness” and liberal politics, a proclivity that has only increased following his acquisition of Twitter.

a. On March 13, 2021, Musk sarcastically tweeted: “Woketopia. Battle for the Moral High Ground in this new game!”⁶⁹ This confirms Musk’s disdain for “wokeness” began at least as early as March 2021.

b. Musk told his biographer Walter Isaacson that his “political evolution” in recent years was in part “a reaction to attacks on him by some Democrats.” Musk gave Isaacson three examples of these perceived attacks that predated September 2021: (1) a May 2020 tweet by California assemblywoman, Lorena Gonzalez, (2) criticism by Senator Elizabeth Warren

⁶⁸ In 2022, Musk also made several other statements that attributed his decision to acquire Twitter to what he perceived as its liberal bias. For example, on April 6, 2022, Musk texted reporter Gayle King that “Twitter should move to the center.” Exhibit H to Ltr. to The Hon. Kathaleen St. J. McCormick from Edward B. Micheletti, Esq., regarding Twitter, Inc.’s Motion for Sanctions against Defendants’ for discovery misconduct, *Twitter v. Musk*, 2022-0613-KSJM (Del. Ch. 2022) (“Musk Private Texts”), <https://s3.documentcloud.org/documents/23112929/elon-musk-text-exhibits-twitter-v-musk.pdf>, at 14. Similarly the following month, Musk tweeted: “Twitter obv[iously] has a strong left wing bias.” Elon Musk (@elonmusk), TWITTER (May 9, 2022), <https://twitter.com/elonmusk/status/1523653429410770945>.

⁶⁹ Elon Musk (@ElonMusk), TWITTER (Mar. 13, 2021), <https://twitter.com/elonmusk/status/1370880599641231360>.

starting in June 2021, and (3) the decision by President Biden’s administration in August 2021 not to invite Tesla to a White House event to celebrate electric vehicles.⁷⁰

c. Musk first began using the phrase “mind virus”—the phrase he used to later explain his reason for acquiring Twitter—in 2020 in reference to outlets and commentators with which he disagreed or which criticized him. For example, as explained above, on March 27, 2020, Musk tweeted in response to a *Buzzfeed* article criticizing Musk’s statements about COVID-19: “Buzzfeed is a mind virus.”⁷¹ Similarly, on July 7, 2020, Musk responded to a Twitter post criticizing the scholar Noam Chomsky by tweeting: “He is a mind virus for fools.”⁷² Similarly on December 19, 2021, Musk tweeted:

⁷⁰ See Walter Isaacson, *ELON MUSK*, at 420-21 (2023); Assemblywoman Lorena Gonzalez (@LorenaSGonzalez), TWITTER (May 9, 2020), <https://twitter.com/LorenaSGonzalez/status/1259287879177531392> (stating “F*ck Elon”); Senator Elizabeth Warren (@ewarren), TWITTER (Jun. 8, 2021), <https://twitter.com/ewarren/status/1402300208512483338> (“According to this report, Elon Musk didn’t pay any federal income taxes in 2018. Neither did Jeff Bezos in 2007. From 2014 to ‘18, the 25 richest Americans got \$401 billion richer—but only paid 3.4% of that in federal income taxes. We need a #WealthTax.”); Elon Musk (@elonmusk), TWITTER (Oct. 31, 201), <https://twitter.com/elonmusk/status/1454926841467256835> (stating “Biden is a [United Auto Workers] [sock emoji] puppet”).

⁷¹ Elon Musk (@elonmusk), TWITTER (Mar. 27, 2020), <https://twitter.com/elonmusk/status/1243613853558231041>.

⁷² Elon Musk (@elonmusk), TWITTER (July 4, 2020), <https://twitter.com/elonmusk/status/1279632998921498625>.

“traceroute woke_mind_virus.”⁷³ This refers to a networking command used by engineers to determine the path to the source server of information. Musk’s tweet is widely considered to be the first viral use of the phrase “woke mind virus” and the primary reason behind its adoption by opponents of perceived “wokeness.”⁷⁴

94. The above evidence confirms that Musk strongly opposed what he referred to as “wokeness” at Twitter and in the public sphere, and (along with the other facts and circumstances cited herein) strongly supports the inference that by September 2021 he had formed an intention to heavily invest in and influence Twitter, culminating in his takeover bid mere months later.

5. Musk reaped unlawful profits from his Unscheduled November 2021 Stock Sales.

95. If Musk had told the truth in his November 6 and 7, 2021 tweets—that he planned to sell billions of dollars of his Tesla stock, regardless of the outcome of his poll, to finance his purchase of Twitter stock in a run-up to taking over Twitter—Tesla’s stock price would have declined even more than it subsequently did in the wake of his poll, and he would have profited less from his Unscheduled Tesla Stock

⁷³ Elon Musk (@elonmusk), TWITTER (Dec. 18, 2021), <https://twitter.com/elonmusk/status/1472371245744373760>.

⁷⁴ See KNOW YOUR MEME, *Woke Mind Virus* (October 2023) (“The earliest known viral post about the ‘woke mind virus’ was one made by Elon Musk on X on December 19th, 2021.”), <https://knowyourmeme.com/memes/woke-mind-virus>.

Sales on November 9-12, 2021. This is borne out by Tesla's subsequent stock price movement when the market learned that Musk had made progress toward acquiring Twitter. For example, if Musk had booked the Unscheduled Tesla Stock Sales at the closing market price on April 26, 2022—when the market had priced in Musk's intended acquisition of Twitter (*see* Section III.J *infra*)—rather than in November 2021, Musk's proceeds from the sales would have decreased by **\$1 billion**.

96. Because Musk breached his fiduciary duty to Tesla by trading based on material nonpublic corporate information concerning his disposition of Tesla stock and making misleading statements on November 6 and 7, 2021, Musk sold his stock when Tesla's stock price was inflated. Tesla has a right to disgorge the unlawful profits Musk reaped from his misconduct.

6. Musk reaped unlawful profits from his Prescheduled November and December 2021 Stock Sales.

97. If Musk had told the truth in his November 6 and 7, 2021 tweets—that he planned to sell billions of dollars in Tesla stock to finance an effort to acquire a large stake in Twitter as preface to a potential takeover bid (irrespective of any poll)—Tesla's stock price would have declined prior to Musk's stock sales, and he therefore would also have profited less from his Prescheduled Tesla Stock Sales on November 8, 15, 16, and 23 and December 2, 9, 13, 16, 21, 22, and 28 of 2021. For example, if Musk had booked these sales at the closing market price on April 26, 2022—after the market had absorbed and incorporated Musk's impending

acquisition of Twitter into Tesla's valuation (*see* Section III.J *infra*)—Musk's proceeds from the sales would have decreased by ***\$1.6 billion***.

98. Because Musk breached his fiduciary duty to Tesla by trading based on material nonpublic corporate information concerning his disposition of Tesla stock and making misleading statements on November 6 and 7, 2021, Musk sold his stock when Tesla's stock price was inflated. Tesla has a right to disgorge the unlawful profits Musk reaped from his misconduct.

99. The fact that Musk used a Rule 10b5-1 plan to schedule the November 8, 15, 16, and 23 and December 2, 9, 13, 16, 21, 22, and 28, 2021 sales is not a defense because (1) he still knowingly made misleading statements about his reasons for disposing of large volumes of his Tesla stock prior to the sales and (2) Musk scheduled the Rule 10b5-1 plan after forming his intention to acquire Twitter, which was material, nonpublic information concerning the disposition of his Tesla stock that rightly belonged to Tesla.

7. By trading in advance of his brother's misleading November 2021 tweets and the disclosure of his brother's intention to acquire Twitter, Kimbal Musk earned unlawful profits from his November 5, 2021 Stock Sales.

100. The suspicious timing and size of Kimbal Musk's November 5, 2021 Tesla stock sale for \$108 million (or 15% of Kimbal's Tesla stock)—one day before his brother stated that he would sell 10% of his Tesla holdings based on the outcome

of a Twitter poll—is evidence that Kimbal Musk knew his brother imminently planned to sell large volumes of his Tesla stock.

101. Elon Musk had ample opportunity to tell his brother about these plans because he disclosed them to Tesla’s in-house counsel four days earlier on November 1, 2021. Musk has confirmed this by disclosing on a privilege log a “conversation regarding Mr. Musk’s public preannouncement of his intent to sell Tesla stock” between Musk and Tesla’s deputy general counsel on that day. The same log confirms Tesla’s CFO and another in-house Tesla lawyer learned about Musk’s planned preannouncement on the same day.⁷⁵

102. The unusual size and nature of Kimbal Musk’s November 5, 2021 sale also supports the conclusion that the Company’s nonpublic material information motivated his sale.

a. In 2020 and 2021, Kimbal had only sold Tesla stock on four prior occasions. All of these sales were much smaller than his November 5, 2021 sale. His April 1, 2021 Tesla stock sale raised \$8.1 million dollars, and involved 1% of his Tesla holdings. His February 9, 2021 sale stock sale raised \$26 million, and involved 5% of his Tesla holdings. His September 1, 2020 Tesla stock sale raised \$18 million, and involved 4% of his Tesla holdings. His June 1, 2020 stock sale raised \$6 million, and involved 5% of his Tesla

⁷⁵ Privilege Log, *SEC v. Musk*, No. 18-cv-8865 (S.D.N.Y. Mar. 8, 2022), ECF No. 71-3.

holdings. Kimbal's November 5, 2021 sale involved more shares of Tesla stock than all these prior sales from 2020 and 2021 combined (after adjusting for a reverse stock split).

b. In the last five years, Kimbal Musk has engaged in only two other sales that involved a similar number of Tesla shares, a sale on November 12, 2019 and a sale on April 3, 2023. Both these sales are distinguishable from the November 5, 2021 sale because he used Rule 10b5-1 plans and accordingly pre-scheduled them—something he did not do for the November 5, 2021 sale.

103. By trading in advance of the disclosure of Elon Musk's intention to sell an unprecedented percentage of his Tesla shares on November 6, 2021, Kimbal Musk earned unlawful profits, because the market price of Tesla common stock did not yet reflect the effects of this material information. For example, if Kimbal Musk had booked his November 5, 2022 sales on the next trading day—after the market had absorbed and incorporated material information concerning Musk's surprise announcement of an unprecedented sale of his Tesla stock, Kimbal Musk's proceeds from the sales would have decreased by ***\$5 million or 5%***. His proceeds would have dropped by ***\$31 million or 28%*** if he sold his shares at the closing price on April 26, 2022, when the market had processed Musk's merger agreement with Twitter.

104. Because Kimbal Musk’s decision to trade based on material nonpublic information about his brother Elon’s plans breached his fiduciary duties to Tesla, Tesla has a right to disgorgement of the unlawful profits Kimbal reaped from his stock sales.

F. In November 2021, the SEC subpoenaed Musk and Tesla seeking information about Musk’s misleading Twitter poll.

105. On or around November 16, 2021, less than two weeks after the Musk brothers sold \$6 billion in Tesla stock immediately before and after Musk’s misleading November 6, 2021 Twitter posts, the SEC served Tesla with an administrative subpoena. The subpoena sought, among other things, “[f]rom April 30, 2019 to the present, all Documents and Communications Concerning any pre-approval or review, before publication, of public statements or communications of Tesla executives by Tesla’s General Counsel or Securities Counsel, or any counsel acting in either capacity.”⁷⁶

106. On November 29, 2021, the SEC served a separate subpoena on Musk. The subpoena sought, among other things, all documents concerning the November 6, 2021 tweets described above, and documents relating to Musk’s efforts to submit those tweets for pre-approval.⁷⁷ Pursuant to that subpoena, Musk twice gave

⁷⁶ United States Securities and Exchange Commission’s Opp’n to Def. Elon Musk’s Motion To Quash and To Terminate Consent Decree, *SEC v. Musk*, 18-cv-08865, (S.D.N.Y. Mar. 22, 2022), ECF No. 78, at 4.

⁷⁷ *Id.* at 4-5.

testimony in July 2022 to the SEC⁷⁸ and in May 2024, after the SEC sued Musk to compel his testimony, Musk agreed to a stipulation requiring him to provide additional investigative testimony to the SEC not to exceed five hours of questioning.⁷⁹

107. Defendants Musk, Denholm, Ehrenpreis, Ellison, Murdoch, Kimbal Musk, Mizuno, and Wilson-Thompson contemporaneously learned of the SEC's November 16, 2021 subpoena to Tesla. All of these Defendants signed a Tesla Form 10-K filing that disclosed the subpoena on February 4, 2022.

G. In December 2021, Tesla adopted a revised Code of Business Ethics that prohibited Musk from making certain new investments, accepting certain new employment, or creating other actual or perceived conflicts of interest.

108. Codes of business ethics (sometimes called “codes of ethics”) are important corporate governance documents adopted by virtually all large issuers of securities that trade on public exchanges in the United States. Major exchanges like the New York Stock Exchange and NASDAQ have rules that require all listed companies to adopt such codes and disclose them on their public websites.⁸⁰ These

⁷⁸ Decl. of Robin Andrews ISO United States Securities and Exchange Commission's App. for an Order Compelling Compliance with an Administrative Subpoena, *SEC v. Musk*, 23-mc-80253 (N.D. Cal. Oct. 5, 2023), ECF No. 2, at 2.

⁷⁹ Stipulation and Order, *SEC v. Musk*, 23-mc-80253 (N.D. Cal. May 31, 2024), ECF No. 53, at 1.

⁸⁰ See NYSE Listed Company Manual Rule 303A.10, <https://nyse.wolterskluwer.cloud/listed-company-manual/09013e2c85c0074e>; NASDAQ Rule 5610, <https://listingcenter.nasdaq.com/rulebook/nasdaq/rules/nasdaq-5600-series>.

rules for major exchanges largely mirror the requirements of 17 C.F.R. § 229.406, a federal regulation adopted under section 406 of the Sarbanes-Oxley Act of 2002, which was codified as 15 U.S.C. § 7264.

109. In December 2021, Tesla adopted important revisions to its Code of Business Ethics that imposed contractual duties on Musk and the directors. This revised Code (“the Code of Ethics” or “the Code”), which is posted on the corporate governance page of Tesla’s website, is attached hereto as Exhibit 1.

1. The Code was binding on Musk and Tesla’s other directors.

110. The Code’s requirements are an unambiguously binding contract:

The above Code of Ethics applies to all directors and employees of Tesla. The CEO and all senior financial officers, including the CFO and principal accounting officer, are bound by the provisions set forth therein relating to ethical conduct, conflicts of interest, and compliance with law.

Ex. 1 at 16.

111. Tesla’s SEC filings further confirm that its Directors were legally bound by the Code. For example, Amendment 1 to Tesla’s 2021 Form 10-K states:

The Board sets high standards *for Tesla’s* workforce, *officers and directors*. Tesla is committed to establishing an operating framework that exercises appropriate oversight of responsibilities at all levels throughout the Company and managing its affairs in a manner consistent with rigorous principles of business ethics. Accordingly, Tesla has adopted a Code of Business Ethics, which it recently updated in December 2021, *which is applicable to Tesla and its subsidiaries’ directors, officers and personnel.*

112. Virtually identical language appears in Tesla’s 2022, 2023, and 2024 Proxy Statements.⁸¹

2. **The Code prohibited Musk from making certain types of investments, accepting certain types of outside employment, using his position at Tesla to promote a side business, or developing outside inventions that relate to Tesla’s products.**

113. The Code required Musk and the other Directors to “avoid conflicts of interest.”⁸² It defines a conflict of interest broadly; in relevant part, it states:

A conflict of interest may arise whenever your personal interests interfere, or appear to interfere, with Tesla’s interests. Here are some of the most common examples:

- Outside employment – working for a competitor, supplier, or customer. Even outside employment with others may be a conflict if it prevents you from working with excellence at Tesla.
- Outside Business Interests – using your Tesla position to promote a side business or looking for opportunities that should otherwise go to Tesla first.
- Inventions – developing or helping to develop outside inventions that relate to existing or future Tesla products or your job at Tesla.

⁸¹ Tesla Proxy Statement (Jun. 10, 2022), https://www.sec.gov/Archives/edgar/data/1318605/000156459022022992/tsla-pre14a_20220804.htm; Tesla Proxy Statement (Apr. 6, 2023), <https://www.sec.gov/Archives/edgar/data/1318605/000119312523094075/d451342ddef14a.htm>; Tesla Proxy Statement (Apr. 17, 2024), https://ir.tesla.com/_flysystem/s3/sec/000110465924048040/tm2326076d13_pre14a-gen.pdf.

⁸² Ex. 1 at 5.

- Financial Investments – having a substantial interest in a competitor or investing in another company if you can influence Tesla’s relationship with that company.⁸³
- 3. The Code requires Musk to disclose transactions that could create conflicts of interests to Tesla’s Audit Committee and to obtain a waiver from Tesla’s Board before entering into such transactions.**

114. The Code requires all employees to “seek advice immediately from your manager, HR Partner, or Compliance if you are presented with a situation like the ones above. . . . In some cases, even the appearance of a conflict of interest can be as damaging to Tesla’s business reputation as an actual one. . . . Disclosure is not optional.”⁸⁴ The Code explicitly states that the conflict-of-interest provisions are applicable to the CEO: “The CEO and all senior financial officers, including the CFO and principal accounting officer, are bound by the provisions set forth therein relating to ethical conduct, conflicts of interest and compliance with law.”⁸⁵ The Code separately confirms Musk has an obligation as CEO to disclose his own actual or apparent conflicts of interest to Tesla’s Audit Committee, stating:

The CEO and each senior financial officer shall promptly bring to the attention of the General Counsel or the Legal Department or the CEO and to the Audit Committee any information he or she may have concerning any violation of Tesla’s Code of Business Ethics, including any actual or apparent conflicts of interest between personal and professional relationships, involving any management or

⁸³ *Id.*

⁸⁴ *Id.* at 16.

⁸⁵ *Id.*

other employees who have a significant role in Tesla's financial reporting, disclosures or internal controls.⁸⁶

115. Although the Code acknowledges that “[i]n rare cases, it might be appropriate to waive a part of the Code,” waivers must be requested and granted pursuant to the Company's procedures. The Code establishes an unambiguous protocol for requesting waivers: “To request a waiver, contact [Tesla] Compliance in advance of the activity for which you want the waiver. When executive officers or directors seek waivers, only Tesla's Board of Directors may grant them.”⁸⁷

4. Tesla has obligations under SEC regulations to disclose waivers under its Code of Ethics.

116. The Sarbanes-Oxley Act of 2002, which was enacted in response to major accounting scandals, including the collapse of Enron and Worldcom, states the SEC “shall revise its regulations concerning matters requiring prompt disclosure on Form 8-K (or any successor thereto) to require the immediate disclosure, by means of the filing of such form, dissemination by the Internet or by other electronic means, by any issuer of any change in or waiver of the code of ethics for senior financial officers.”⁸⁸

⁸⁶ *Id.* The use of the conjunction “and” before “to the Audit Committee” unambiguously requires the CEO to disclose conflicts of interest to the Audit Committee. Whether the CEO may choose not to disclose conflicts of interest to the legal department or general counsel is an ambiguity the Court need not address.

⁸⁷ *Id.*

⁸⁸ 15 U.S. Code § 7264.

117. The SEC amended the instruction to the mandatory instructions to Form 8-K in response to the statutory mandate.⁸⁹

118. During the relevant period, Item 5.05 to Form 8-K's instructions stated:

If the registrant has granted a waiver, including an implicit waiver, from a provision of the code of ethics to an officer or person described in paragraph (a) of this Item 5.05, and the waiver relates to one or more of the elements of the code of ethics definition referred to in paragraph (a) of this Item 5.05, briefly describe the nature of the waiver, the name of the person to whom the waiver was granted, and the date of the waiver. . . .

(i) The term waiver means the approval by the registrant of a material departure from a provision of the code of ethics; and

(ii) The term implicit waiver means the registrant's failure to take action within a reasonable period of time regarding a material departure from a provision of the code of ethics that has been made known to an executive officer, as defined in Rule 3b-7 (17 CFR 240.3b-7) of the registrant.

119. Based on this unambiguous text, Tesla had obligations to disclose on a Form 8-K any material departure from its Code of Ethics, or any failure to take action within a reasonable period of time regarding a material departure that had been made known to an executive officer.

120. Tesla's Code of Ethics acknowledged these obligations by stating that any "waiver will be publicly disclosed as required by law."⁹⁰

⁸⁹ SEC Final Rule, *Additional Form 8-K Disclosure Requirements and Acceleration of Filing Date* (March 16, 2004), <https://www.sec.gov/rules/2004/03/additional-form-8-k-disclosure-requirements-and-acceleration-filing-date>.

⁹⁰ Ex. 1 at 16.

H. Between January 31, 2022 and April 1, 2022, Musk breached his obligations under the Code of Ethics by spending \$2.6 billion to buy 9% of Twitter's stock.

121. Approximately a month after Musk's final sale of Tesla stock in 2021 completed, Musk began using the proceeds of his Unscheduled November 2021 Tesla Stock Sales to quickly but surreptitiously purchase a substantial amount of Twitter stock.

122. To execute these investments in Twitter stock, Musk relied heavily on his personal business manager Jared Birchall.

123. Musk and Birchall also enlisted Morgan Stanley, a large financial services company that manages over \$75 billion of Musk's wealth, to further assist with Musk's investment in Twitter stock. Musk has been one of Morgan Stanley's clients for over 17 years. Before Musk hired Birchall as his personal business manager, Birchall was a senior vice president of banking at Morgan Stanley. One of Birchall's long-time friends is a director at Morgan Stanley who serves as the "lead on all things at MS [Morgan Stanley] related to [Musk]." ⁹¹

124. Under Musk's and Birchall's direction, Morgan Stanley developed a secret, algorithmic trading strategy to acquire Twitter securities prior to January 31,

⁹¹ First Am. Compl., *Oklahoma Firefighters Pension and Ret. Sys. v. Musk*, No. 22-cv-3026, ECF 99, ¶¶ 41, 99 (S.D.N.Y. May 28, 2024) (citing testimony of Birchall in SEC investigation and documents produced in discovery).

2022.⁹² This strategy was designed to purchase as large a block of Twitter stock as possible without alerting market analysts of unusual demand for Twitter stock or that a well-funded buyer was accumulating a large percentage of Twitter's equity.

125. Between January 31, 2022 and April 1, 2022, Musk surreptitiously bought shares of Twitter stock. In total, Musk bought 73,115,038 Twitter shares for \$2.6 billion. The dates, volumes, and prices of his purchases of Twitter stock during this time are set forth in the table below.

Date	Shares bought	Price	Total Daily Spend
1/31/2022	620,083	\$36.83	\$22,836,416.72
2/1/2022	542,496	\$37.55	\$20,370,182.30
2/2/2022	850,373	\$36.75	\$31,249,507.00
2/3/2022	3,649,957	\$34.39	\$125,525,671.19
2/4/2022	1,070,429	\$36.18	\$38,732,402.94
2/7/2022	4,839,507	\$36.52	\$176,714,598.11
2/8/2022	730,000	\$35.73	\$26,085,090.00
2/9/2022	638,283	\$36.89	\$23,543,706.74
2/10/2022	2,604,907	\$36.64	\$95,449,002.29
2/11/2022	1,291,432	\$36.52	\$47,166,970.94
2/14/2022	958,849	\$35.92	\$34,441,856.08
2/15/2022	371,075	\$36.51	\$13,548,319.33
2/16/2022	655,000	\$35.81	\$23,458,170.00
2/17/2022	731,581	\$35.89	\$26,257,173.67
2/18/2022	1,331,040	\$34.51	\$45,928,866.24
2/22/2022	1,256,751	\$33.23	\$41,763,092.48
2/23/2022	1,063,170	\$32.81	\$34,878,355.02
2/24/2022	838,793	\$33.77	\$28,321,845.65
2/25/2022	695,849	\$34.78	\$24,204,411.62
2/28/2022	1,025,518	\$35.32	\$36,221,295.76
3/1/2022	897,656	\$35.33	\$31,710,595.86

⁹² *Id.* at ¶¶ 87-89 (citing documents produced in discovery).

3/2/2022	992,785	\$34.58	\$34,325,541.38
3/3/2022	1,211,426	\$33.97	\$41,153,352.65
3/4/2022	1,016,259	\$33.38	\$33,918,660.38
3/7/2022	1,779,530	\$33.07	\$58,843,718.51
3/8/2022	2,228,858	\$33.77	\$75,266,305.80
3/9/2022	1,005,125	\$34.15	\$34,329,039.25
3/10/2022	1,228,833	\$33.93	\$41,696,761.36
3/11/2022	2,927,000	\$33.24	\$97,287,626.00
3/14/2022	2,770,284	\$33.08	\$91,646,535.29
3/15/2022	1,966,000	\$33.79	\$66,433,106.00
3/16/2022	2,978,376	\$34.99	\$104,219,332.99
3/17/2022	1,500,000	\$37.09	\$55,633,500.00
3/18/2022	2,858,340	\$38.25	\$109,337,221.68
3/21/2022	1,942,482	\$37.28	\$72,415,728.96
3/22/2022	2,476,000	\$38.54	\$95,429,992.00
3/23/2022	2,502,140	\$38.15	\$95,454,138.86
3/24/2022	1,926,764	\$38.68	\$74,517,597.70
3/25/2022	3,491,274	\$38.20	\$133,373,649.35
3/28/2022	2,603,779	\$38.77	\$100,953,719.39
3/29/2022	2,875,934	\$40.30	\$115,903,016.13
3/31/2022	2,000,000	\$38.82	\$77,636,000.00
4/1/2022	2,171,100	\$39.34	\$85,413,245.10

126. Musk used Morgan Stanley as his broker for these purchases. Between January 31 and April 1, 2022, Morgan Stanley sent Musk and Birchall daily (and often hourly) trading updates concerning: (i) Musk’s purchases, including the price, volume, and whether their purchases beat the market price; (ii) trading strategies to avoid public detection; (iii) Defendants’ disclosure obligations; and (iv) the “Money Saved” by hiding these trades from the market and thus maintaining the price of Twitter securities. Morgan Stanley sent Birchall over 200 daily and intraday trading reports concerning these purchases between January 31, 2022 and April 1, 2022.

Birchall then kept Musk closely in the loop on the execution of the scheme through at least weekly Friday meetings.⁹³

127. Communications from Birchall and Morgan Stanley that were produced in discovery in a lawsuit filed by a Twitter investor against Musk confirm that Musk and Birchall knew and intended for their covert trading strategy to mitigate the risk that the price of Twitter’s stock would increase as a result of a discovery by market participants that Musk was buying or would buy a large volume of Twitter stock.

a. On January 31, 2022, the first day that Musk began buying Twitter stock, the Morgan Stanley director enlisted by Birchall and Musk sent a message to the trader placing Twitter orders on Musk’s behalf: “ERM [Elon R. Musk] is nervous we are moving the stock price, though I see us as under VWAP⁹⁴ . . . he sees other stocks not moving as much though others are up over 3%.” In response to Musk’s concerns, the director instructed the trader to “pull back” and “[w]ork it reallllly slowlllly” to ensure that Defendants’ trades would escape detection by investors and other market participants.⁹⁵

b. On January 31, 2022, Birchall emailed the same Morgan Stanley director that “[i]t looks a lot like we’re pushing the stock . . . [t]he trader is

⁹³ *Id.* at. ¶¶ 12, 89, 98 (relying on Musk’s and Birchall’s testimony in SEC investigation).

⁹⁴ VWAP is the average price of a stock weighted by volume.

⁹⁵ *See* First Am. Compl., *Oklahoma Firefighters Pension and Ret. Sys. v. Musk*, No. 22-cv-3026, ECF 99, ¶ 92 (S.D.N.Y. May 28, 2024).

going to have to be very comfortable defending himself vs that accusation” (i.e., that the purchases that Morgan Stanley was making on Musk’s behalf were increasing the price of Twitter stock by raising the market demand for Twitter stock). In response, the director confirmed that Musk’s trades were “running on an algorithm that picks up 5% of the volume that passes through the market,” and “our execution helps tell the story as we are under the VWAP”—and thus would not be detected by the market.⁹⁶

c. On February 1, 2022, the same Morgan Stanley director informed Birchall that “ERM/MS [Musk/Morgan Stanley] are **not** moving the stock.”⁹⁷

d. On February 2, 2022, the Morgan Stanley director again told Birchall “it will take time but it should if you want to get under the radar and establish a position” in Twitter. Birchall responded “we should opportunistically ramp up if given the chance. . . . if there are some interesting premarket blocks [near] or at the close, we should look to take advantage.” The director warned Birchall, I’m somewhat reticent to do a large block trade outside of how we’re doing it because I don’t want to let that out or have

⁹⁶ *Id.* at ¶ 93.

⁹⁷ *Id.* at ¶ 100.

anyone sniff anything out.” He further stated a larger trade was only advisable “[i]f we keep it absofuckinglylutely Quiet.”⁹⁸

e. On February 2, 2022, the same Morgan Stanley director told Birchall that their strategy to accumulate Twitter stock “is very closed holed still and will remain so. No one knows what is going on and why but you and me. Not compliance not anyone.” Birchall responded by sending a “thumbs up” emoji.⁹⁹

f. On February 7, 2022, the same Morgan Stanley director reported to Birchall that Musk’s Morgan Stanley “[t]rader is not looking to push up nor support price. Has walked away at various times throughout day to allow for stock to move (it hasn’t) to show that our buying is not supporting nor pushing up the price — and is instead coming in to buy where the volume supports it and where we can come in below vwap.”¹⁰⁰

128. SEC rules required that Musk disclose his acquisition of 5% of Twitter’s stock on March 24, 2022, but Musk missed the deadline.¹⁰¹ Musk’s has given testimony that shows he knew about this requirement.

⁹⁸ *Id.* at ¶ 101.

⁹⁹ *Id.* at ¶ 108.

¹⁰⁰ *Id.* at ¶ 103.

¹⁰¹ *See* 17 C.F.R. § 240.13d-1(a) (“Any person who, after acquiring directly or indirectly the beneficial ownership of any equity security of a class which is specified in paragraph (i)(1) of this section, is directly or indirectly the beneficial owner of more than five percent
Footnote continued on next page”)

a. On July 12, 2022, Musk testified he was aware that the “5 percent mark [] means something . . . I was aware because when I see Tesla shareholders that [are] below 5 percent, I don’t know who they are, but once they’re above 5 percent, then usually I know who they are.” He also testified that, “[T]he first point at which one starts to notice investors is above the 5 percent number.” When asked, “before buying Twitter shares[,] [were you] aware from your personal experience at Tesla that there is some SEC reporting by investors in Tesla after they cross 5 percent ownership but not before?” and whether he was “generally aware that a 5 percent ownership of a public company meant something, there was some significance to it,” Musk confirmed, “Yeah,” and “Right.”¹⁰²

b. Similarly, in 2018, during an SEC deposition, Musk testified that he suggested Saudi Arabia’s sovereign wealth fund buy a significant stake in Tesla under 5% of its equity because “U.S. reporting requirements start at 5 percent.”¹⁰³

of the class shall, within five business days after the date of the acquisition, file with the Commission, a statement containing the information required by Schedule 13D (§ 240.13d-101).”).

¹⁰² See First Am. Compl., *Oklahoma Firefighters Pension and Ret. Sys. v. Musk*, No. 22-cv-3026, ECF 99, ¶ 74 (S.D.N.Y. May 28, 2024).

¹⁰³ *Id.* at ¶ 76.

129. Birchall received multiple warnings from Morgan Stanley about the obligation to disclose Musk’s acquisition of 5% of Twitter’s stock, including warnings on February 10, 2022; February 25, 2022; February 28, 2022; March 4, 2022; March 8, 2022; March 27, 2022; and March 28, 2022.¹⁰⁴

130. Musk’s failure to timely file a Schedule 13D—which he later filed 11 days late—shows he intended to conceal his intention to invest in and ultimately acquire Twitter.

131. On April 1, 2022, the day that Musk disclosed his acquisition of 9% Twitter’s stock, Twitter’s stock price closed **27% higher** than it had the prior day. This closing price reflected the market’s expectation that Musk was mounting a takeover bid.¹⁰⁵ Insiders at Twitter recognized this fact, as demonstrated by a private text message from Twitter CFO Ned Segal to Twitter director Egon Durban on April

¹⁰⁴ *Id.* at ¶¶ 113-22 (relying on documents produced in discovery).

¹⁰⁵ *Elon Musk just became Twitter’s largest shareholder*, ASSOCIATED PRESS, (Apr. 4, 2022), <https://www.npr.org/2022/04/04/1090789822/elon-musk-twitter-stock-largest-shareholder> (analyst noting that Musk’s acquisition “could ultimately lead to an active stake and a potential more aggressive ownership role of Twitter”); Mitchell Lawler, *Birds are singing as the Twitter share price soars 27% on Elon Musk’s investment*, THE MOTLEY FOOL (Apr. 5, 2022), <https://www.fool.com.au/2022/04/05/birds-are-singing-as-the-twitter-share-price-soars-27-on-elon-musk-investment/> (“[S]ome analysts have not ruled out the possibility of a buyout. Keep in mind that Elon Musk holds a net worth of approximately US\$270 billion. Meanwhile, based on the Twitter share price, the social media company has a market cap of US\$40 billion. This means the billionaire has the financial capability to make such a move.”).

4, 2022: “There’s already a takeover premium as of today.”¹⁰⁶ This takeover premium confirms that Musk had paid less for Twitter stock than he would have if his intentions to aggressively invest in and ultimately take over Twitter had been disclosed prior to the commencement of his investment.

132. Despite the passage of the updated Code of Ethics only a month prior to this spending spree, Musk did not obtain a waiver from the Board before making any of his investments in Twitter, as confirmed by Tesla never disclosing a waiver of the Code’s rules for Musk on a Form 8-K.¹⁰⁷ Accordingly, he breached the Code’s prohibition against “investing in another company if you can influence Tesla’s relationship with that company.”¹⁰⁸ As the CEO of Tesla, a member of Tesla’s Board, and its largest shareholder, Musk had the ability to influence Tesla’s relationship with Twitter. Musk’s subsequent actions to change Tesla’s relationship with Twitter confirm he had this ability. *See infra* §§III.Q.1, III.Q.2, III.Q.3, III.Q.4.

133. While he was buying Twitter stock between January 31, 2022 and April 1, 2022, Musk made several public statements that confirmed he opposed what he perceived to be Twitter’s liberal bias—without actually revealing his investments or

¹⁰⁶ *See* First Am. Compl., *Oklahoma Firefighters Pension and Ret. Sys. v. Musk*, No. 22-cv-3026, ECF 99, ¶ 185 (S.D.N.Y. May 28, 2024) (relying on documents produced in discovery).

¹⁰⁷ Musk’s decision to invest \$2.6 billion in Twitter was a material departure from the Code of Ethics because of Tesla’s important relationship with Twitter and because of Musk’s ability to influence that relationship as Tesla’s CEO and largest shareholder.

¹⁰⁸ Ex. 1 at 5.

his intentions to acquire an active stake in, and take over, Twitter. Such statements include:

a. A tweet on March 24, 2022 stating: “I’m worried about de facto bias in ‘the Twitter algorithm’ having a major effect on public discourse. How do we know what’s really happening?”¹⁰⁹

b. A Twitter poll tweet on March 24, 2022 stating: “Twitter algorithm should be open source.”¹¹⁰

c. A Twitter poll tweet on March 25, 2022 stating: “Free speech is essential to a functioning democracy. Do you believe Twitter rigorously adheres to this principle?”¹¹¹

d. Tweets on March 26, 2022 stating: “Given that Twitter serves as the de facto public town square, failing to adhere to free speech principles fundamentally undermines democracy. What should be done?” “Is a new platform needed.”¹¹²

¹⁰⁹ Elon Musk (@ElonMusk), TWITTER (Mar. 24, 2022), <https://twitter.com/elonmusk/status/1507037126654939140>.

¹¹⁰ Elon Musk (@ElonMusk), TWITTER (Mar. 24, 2022), <https://twitter.com/elonmusk/status/1507041396242407424>.

¹¹¹ Elon Musk (@ElonMusk), TWITTER (Mar. 25, 2022), <https://x.com/elonmusk/status/1507259709224632344>.

¹¹² Elon Musk (@ElonMusk), TWITTER (Mar. 26, 2022), <https://twitter.com/elonmusk/status/1507777261654605828> and <https://x.com/elonmusk/status/1507777913042571267>.

134. Musk’s private text messages, some of which became public record in subsequent litigation, further support the conclusion that Musk had already formed an intention to acquire Twitter based on his views about Twitter’s content moderation efforts. For example, on March 24, 2022, Musk’s ex-wife Talulah Jane Riley texted him: “Can you buy Twitter and then delete it, please!?! xx . . . Or can you buy Twitter and make it radically free-speech?”¹¹³ Musk liked the latter text and responded: “Maybe buy it and change it to properly support free speech xx.”¹¹⁴

135. On the same day, venture capitalist Joe Lonsdale texted Musk: “I loved your ‘Twitter algorithm should be open source’ tweet – I’m actually speaking to over 100 members of congress tomorrow at the GOP policy retreat and this is one of the ideas I’m pushing for reigning in crazy big tech. Now I can cite to you so I’ll sound less crazy myself :). Our public squares need to not have arbitrary sketchy censorship.” Musk responded, “Absolutely[.] What we have right now is hidden corruption!”¹¹⁵

I. On April 14, 2022, Musk offered to buy all of Twitter’s outstanding equity for \$54.20 per share.

136. Between March 26, 2022 and April 5, 2022, Musk discussed joining Twitter’s board of directors with several Twitter directors. But even during these

¹¹³ Musk Private Texts at 4.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

discussions, Musk made clear to Twitter’s directors that he was considering the option of making an offer to take Twitter private. For example, according to a recently unsealed amended complaint filed by a Twitter investor against Musk, on March 27, 2022, Musk told the chair of Twitter’s board of directors that “he was considering various options with respect to his ownership, including potentially joining the Twitter board” or “seeking to take Twitter private.”¹¹⁶

137. Although Twitter announced that Musk would join Twitter’s board of directors on April 5, 2022, Musk never took the opportunity to merely join the board seriously. The below evidence demonstrates this.

a. On March 27, 2022, while Musk was having these discussions with Twitter’s board of directors, billionaire and fellow Tesla Director Ellison texted Musk: “Elon, I’d like to chat with you in the next day or so... I do think we need another Twitter. [Thumbs up icon.]” The two men then spoke about the topic that day.¹¹⁷

b. Also while Musk was having these discussions with Twitter’s board of directors, he was also discussing buying Twitter with Sam Bankman-

¹¹⁶ See First Am. Compl., *Oklahoma Firefighters Pension and Ret. Sys. v. Musk*, No. 22-cv-3026, ECF 99, at ¶ 170 (S.D.N.Y. May 28, 2024) (relying on discovery materials).

¹¹⁷ Upon information and belief, Musk and Ellison likely discussed a plan to take over Twitter around this time. Musk spent four days at Ellison’s Hawaiian Island between April 8 and April 12, 2022, when Musk told Twitter management to expect a take private offer. Later in April, Ellison agreed to contribute \$1 billion toward Musk’s acquisition of Twitter.

Fried, the (now-imprisoned and formerly-billionaire) founder of cryptocurrency exchange FTX.¹¹⁸

c. A day after Twitter’s April 5, 2022 announcement, Musk texted his friend and fellow Tesla Director Ehrenpreis: “I didn’t even want to join the Twitter board!”¹¹⁹

138. Musk’s appointment to Twitter’s board of directors was set to become effective April 9, 2022. At 9:32 am that day, Musk tweeted: “Most of these ‘top’ accounts tweet rarely and post very little content. Is Twitter dying?”¹²⁰ The tweet contained a list of the top ten Twitter accounts by number of followers.

a. Shortly thereafter, Twitter’s then-CEO Parag Agrawal texted Musk: “You are free to tweet ‘is Twitter dying’ or anything else about Twitter – but it’s my responsibility to tell you that it’s not helping me make Twitter better in the current context”¹²¹

b. Musk responded within a minute: “What did you get done this week? I’m not joining the board. This is a waste of time.” “Will make an offer to take Twitter private.”¹²²

¹¹⁸ Musk Private Texts at 9.

¹¹⁹ *Id.* at 14.

¹²⁰ Elon Musk (@ElonMusk), TWITTER (Apr. 9, 2022), <https://twitter.com/elonmusk/status/1512785529712123906>.

¹²¹ Musk Private Texts at 17.

¹²² *Id.*

c. Shortly thereafter, Musk told the Chairman of Twitter’s board of directors “Please expect a take private offer[.] . . . Fixing twitter by chatting with [CEO] Parag [Agrawal] won’t work[.] Drastic action is needed[.] This is hard to do as a public company, as purging fake users will make the numbers look terrible, so restructuring should be done as a private company. This is [Twitter founder] Jack [Dorsey]’s opinion too.”¹²³

139. On April 13, 2022, Musk sent a letter to Twitter offering to buy all of its outstanding stock for \$54.20 per share. The letter stated:

I invested in Twitter as I believe in its potential to be the platform for free speech around the globe, and I believe free speech is a societal imperative for a functioning democracy.

However, since making my investment I now realize the company will neither thrive nor serve this societal imperative in its current form. Twitter needs to be transformed as a private company.

As a result, I am offering to buy 100% of Twitter for \$54.20 per share in cash, a 54% premium over the day before I began investing in Twitter and a 38% premium over the day before my investment was publicly announced. My offer is my best and final offer and if it is not accepted, I would need to reconsider my position as a shareholder.

Twitter has extraordinary potential. I will unlock it.¹²⁴

¹²³ *Id.* at 19.

¹²⁴ Amendment No. 2 to Musk’s Schedule 13D for Twitter (Apr. 14, 2022), https://www.sec.gov/Archives/edgar/data/1494730/000110465922045641/tm2212748d1_sc13da.htm.

140. An Amended Schedule 13D filed by Musk on April 14, 2022 clarified that Musk’s offer was conditioned on “confirmatory legal, business, regulatory, accounting and tax due diligence.”¹²⁵

141. Musk’s April 13, 2022 offer to purchase all of Twitter’s outstanding equity violated Tesla’s Code because, prior to making the offer, Musk did not obtain from Tesla’s Board a waiver of the Code’s Conflicts of Interest rule against “investing in another company if you can influence Tesla’s relationship with that company.”¹²⁶ Again, Musk’s failure to obtain a waiver before making the offer is confirmed by the fact that Tesla did not file a Form 8-K disclosing any waiver to Musk.¹²⁷

J. On April 25, 2022, Musk breached his obligations under the Code of Ethics by executing a binding merger agreement that required him to make a further investment of billions of dollars in Twitter.

142. On April 21, 2022, Musk filed the Third Amendment to his Form 13D Filing regarding Twitter. The Amendment confirmed that Musk’s April 13, 2022 offer was no longer conditioned on business due diligence by stating: “The Proposal was (and remains) non-binding and, once negotiated and agreed upon, would be

¹²⁵ *Id.*

¹²⁶ Ex. 1 at 5.

¹²⁷ Musk’s proposal to acquire all of Twitter was material information to the marketplace and to Tesla’s stockholders, as well as under the Code. As explained above, Tesla’s SEC filings describe the possibility that Musk’s other ventures would distract him from his work at Tesla as a material risk to Tesla’s business.

conditioned upon, among other things, the: (i) receipt of any required governmental approvals; (ii) confirmatory legal, regulatory, accounting and tax due diligence; and (iii) negotiation and execution of definitive agreements providing for the Proposed Transaction. At the time of delivery, the Proposal was also subject to the completion of financing and business due diligence, but it is no longer subject to financing as a result of the Reporting Person's receipt of the financing commitments described below *and is no longer subject to business due diligence.*"¹²⁸

143. At 2:50 p.m. ET on April 25, 2022, Twitter announced that it had accepted Musk's offer.¹²⁹ Tesla's closing stock price on the following day was \$292.14, a **12% decline** from the previous day's closing price. Analysts at the time attributed the decline, which wiped out more than \$100 billion in Tesla's market capitalization, to investors' concerns on "the amount Musk has committed to the Twitter purchase, and the fears that he'll become distracted from his role as Tesla's chief executive."¹³⁰

¹²⁸ Amendment No. 3 to Musk's Schedule 13D for Twitter (Apr. 21, 2022), https://www.sec.gov/Archives/edgar/data/1494730/000110465922048128/tm2213229d1_sc13da.htm.

¹²⁹ Press Release, Twitter, Elon Musk to Acquire Twitter (Apr. 25, 2022), <https://www.prnewswire.com/news-releases/elon-musk-to-acquire-twitter-301532245.html>.

¹³⁰ Faiz Siddiqui, *Tesla's value dropped Tuesday by more than double the cost of Twitter*, THE WASHINGTON POST (Apr. 26, 2022), <https://www.washingtonpost.com/technology/2022/04/26/elon-musk-tesla-twitter-stock/>.

144. Also on April 25, 2022, Twitter entered into a merger agreement with X Holdings I, Inc., an entity wholly owned by Musk; X Holdings II, Inc., a direct wholly owned subsidiary of X Holdings I, Inc.; and Musk. The agreement called for X Holdings II, Inc. to merge with Twitter surviving as a wholly owned subsidiary of X Holdings I, Inc. Through this process, each share of Twitter stock (other than certain excluded shares) would be converted into the right to receive \$54.20 per share.

145. Musk again violated Tesla's Code by entering into the merger agreement because, prior to executing the agreement, Musk did not obtain from Tesla's Board a waiver of the Code's conflicts-of-interest rule against "investing in another company if you can influence Tesla's relationship with that company."¹³¹ Tesla confirmed that Musk did not do so by never filing a Form 8-K disclosing any waiver to Musk for the transaction.

K. Between April 26 and 28, 2022, Musk sold \$8.5 billion in Tesla stock, but he knew he would have to sell more to close the Twitter merger.

146. On April 26 and 28, 2022, Musk sold approximately \$8.5 billion in Tesla common stock. These sales were not made pursuant to a Rule 10b5-1 plan. The purpose of these sales was to assist with closing the Twitter merger, but these sales alone were not enough to close Musk's commitments under the merger.

¹³¹ Ex. 1 at 5.

L. Between April 28 and July 8, 2022, Musk made several misleading statements that incorrectly suggested he would not need to sell more Tesla stock to finance the Twitter merger.

147. Between April 28 and July 8, 2022, Musk made misleading statements to sow doubt that he would sell more Tesla stock or voluntarily close on the merger agreement with Twitter. Musk deliberately misled shareholders and the public with these statements because he knew he would have to close on the Twitter merger agreement and sell more Tesla stock to do so. This misconduct violated Musk’s duty of loyalty to Tesla.

1. On April 28, 2022, Musk misleadingly stated that he had “[n]o further TSLA sales planned after today.”

148. Following his April 26 and 28 stock sales, Musk publicly stated he had “[n]o further TSLA shares planned after today.”



149. The evidence supports the conclusion that Musk knew this statement was misleading and made the statement to manipulate the market price for Tesla stock.

a. *First*, when he sent the Tweet, Musk lacked the funds necessary to close the Twitter transaction, and selling Tesla stock was his only practical means to do so. Under the then operative terms of Musk’s deal with Twitter, Musk was obligated to provide \$42.5 billion to Twitter and its shareholders.¹³² Even assuming Musk funded the purchase using the maximum debt he had arranged (\$25.5 billion),¹³³ Musk’s “equity commitment” still contractually obligated him to pay \$17 billion in cash to account for the remainder, an amount of cash he did not have on hand.¹³⁴ Instead, available evidence

¹³² Twitter’s Preliminary Proxy Statement dated May 16, 2022 states, “[t]he total amount of funds necessary to consummate the merger and related transactions, including payment of related fees and expenses, will be approximately \$46.5 billion,” which included payment to stockholders, payment of Twitter debt, and other miscellaneous expenses. Because Musk did not have to pay for his own equity (which was part of Twitter’s outstanding stock), the payout attributed to Musk’s stock in Twitter was removed by multiplying the merger price against his outstanding shares, and subtracting that value from the total.

¹³³ The original structure for Musk’s funding for Twitter consisted of a \$12.5 billion margin loan and \$13 billion in debt financing that Twitter would be obliged to repay. *See* Amendment No. 3 to Musk’s Form 13D for Twitter (Apr. 21, 2022). https://www.sec.gov/Archives/edgar/data/1494730/000110465922048128/tm2213229d1_sc13da.htm.

¹³⁴ Amendment No. 4 to Musk’s Schedule 13D for Twitter (Apr. 25, 2022), https://www.sec.gov/Archives/edgar/data/1494730/000110465922049844/tm2213189d8_sc13da.htm.

supports the conclusion that he only had approximately \$11.4 billion.¹³⁵ Thus, Musk needed to raise at least \$5.6 billion in additional cash. The only certain means of raising those funds was to sell more Tesla stock, his only significant liquid asset.

b. *Second*, Musk later admitted in August 2022 that further Tesla stock sales were, in fact, necessary to close the transaction. Specifically, after selling another \$6.89 billion in Tesla stock in August 2022, Musk stated he conducted these later sales “to avoid an emergency sale of Tesla stock” after an announcement that “Twitter [was] forc[ing] this deal to close”¹³⁶ This statement confirms Musk knew that his April 26 and 28 Tesla stock sales had not provided him with the necessary funds to close the Twitter deal. In other words, if Musk had the funds to close the Twitter merger in April 2022, he would not have needed to sell shares in August 2022 to avoid an “emergency sale” for the purpose of closing the Twitter deal.¹³⁷

¹³⁵ Musk had approximately \$3 billion left over from his November 2021 stock sales after making his open market Twitter purchases. See David Pendleton & Tom Maloney, *Musk Needs Massive Loan or Big Tesla Stock Sale to Buy Twitter*, BLOOMBERG (Apr. 14, 2022), <https://www.bloomberg.com/news/articles/2022-04-14/musk-needs-massive-loan-or-big-tesla-stock-sale-to-buy-twitter> (reporting that Musk had only \$3 billion in liquid assets in April 2022). He also raised \$8.4 billion in cash from Tesla stock sales between April 26 and 28, 2022.

¹³⁶ *Id.*

¹³⁷ Elon Musk (@ElonMusk), TWITTER (Aug. 9, 2022), <https://twitter.com/elonmusk/status/1557198421206769664>.

c. *Third*, Musk also later admitted in an April 2023 interview with the BBC: “I sold a lot of Tesla stock to close this deal,” and his Tesla stock sales were “desperately needed for Twitter.”¹³⁸ Because the August 2022 sales were the final Tesla sales conducted by Musk before closing the Twitter merger, this admission is a clear reference to the August 2022 sales.

d. *Fourth*, Musk had the motive to misleadingly deny an intent to sell further Tesla stock: just a few months prior, before the public even knew of his plans regarding Twitter, the price of Tesla’s stock dropped 4.8% in reaction to his announcement of his intention simply to sell 10% of his Tesla holdings. And, as Musk admitted during the aforementioned BBC interview, his sales of Tesla stock are “often taken as some lack of faith in Tesla. Matter of fact, the Tesla stock sales caused the Tesla stock declinment [sic], which is not good.”¹³⁹ Given his prior experience and express admission of the link between his own sales and declines in Tesla’s stock price, Musk knew that making misleading denials about his intention to sell Tesla stock would maintain Tesla stock at a higher price than if the market knew the truth.

e. *Fifth*, although Musk was attempting to raise some third-party equity financing for the Twitter acquisition in April 2022, his own actions

¹³⁸ James Clayton, *Interview with Elon Musk*, BBC NEWS (Apr. 11, 2023), <https://www.bbc.com/news/av/world-us-canada-65249139>.

¹³⁹ *Id.*

show that he did not intend to use any such third-party funds to reduce his own obligation to provide equity funding for the Twitter transaction. Instead, when Musk announced \$7.1 billion in equity investments from other investors on May 5, 2022, Musk reduced the principal on the margin loan for the Twitter acquisition to \$6.25 billion and increased the equity commitment from \$21 billion to \$27.5 billion. This change further confirmed that Musk had no real option to close the merger aside from further sales of Tesla stock.¹⁴⁰

f. *Sixth*, Musk did not intend to raise further equity investors in the Twitter deal after the initial \$7.1 billion equity investment. On April 20, 2022, when Defendant Ellison agreed to invest at least a billion dollars in the Twitter acquisition in a text message to Musk, Musk told him the “deal is oversubscribed” and that involving Ellison would require him to “reduce or kick out some participants”—meaning there was no further room for additional equity investors after Ellison joined in the deal.¹⁴¹ Musk’s decision to set a limit for the participation of outside equity investors was necessary to achieve his goal of exercising control over Twitter. Accordingly, Musk would be obligated to pay the remaining equity commitment.

¹⁴⁰ Amendment No. 6 to Musk’s Schedule 13D for Twitter (May 5, 2022), https://www.sec.gov/Archives/edgar/data/1494730/000110465922056055/tm2214608-1_sc13da.htm.

¹⁴¹ Musk Private Texts at 23.

g. *Seventh*, Musk later allowed the \$12.5 billion margin loan for the Twitter deal to expire, and further increased his equity commitment to \$33.5 billion.¹⁴² This change further confirmed that Musk preferred the option of selling more Tesla stock rather than funding the margin loan, which required posting of Tesla stock as collateral, and that he did not intend to use the maximum debt available to him under the original deal terms announced in April 2022. Given these preferences, selling more Tesla stock was his only real option.

2. In May and July 2022, Musk falsely suggested that the Twitter deal would not close due to Musk’s desire for more information about Twitter’s user base, even though he had already expressly waived his right to business due diligence.

150. Between May and July 2022, Musk began to falsely suggest that the Twitter deal would not close until Twitter provided further due diligence information about the company.

151. At 5:44 a.m. on May 13, 2022, Musk tweeted that the Twitter deal was “temporarily on hold pending details supporting calculation that spam/fake accounts [on Twitter] do indeed represent less than 5% of users.”

¹⁴² Amendment No. 7 to Musk’s Schedule 13D for Twitter (May 25, 2022), https://www.sec.gov/Archives/edgar/data/1494730/000110465922064655/tm2216931d1_sc13da.htm.



152. On May 13, 2022, the closing price of Tesla’s stock rose 5.7% relative to the prior day’s closing price. Commentators linked this rise to a belief by Tesla investors that Musk would not close the Twitter deal.¹⁴³

153. At 3:32 am on May 17, 2022, Musk similarly tweeted that “[t]his deal cannot move forward until” “Twitter’s CEO . . . show[s] proof” that less than five percent of Twitter’s users were spam accounts.

¹⁴³ Sara Fischer, *How one Elon Musk tweet showed Twitter’s impact on the stock market*, AXIOS (May 14, 2022), <https://www.axios.com/2022/05/14/elon-musk-tweet-twitter-tesla-stock-prices> (noting that Tesla shares increased by nearly 6% “on the possibility that Musk wouldn’t become a part-time CEO [of Tesla].”).



154. On May 17, 2022, Tesla's closing stock price rose 5% relative to the prior day's closing price.

155. On July 7, 2022, several news outlets reported that Musk's deal with Twitter was in jeopardy over the issue of fake accounts.¹⁴⁴ On this news, Tesla's stock price closed up 5.5% relative to the prior day's closing price.

¹⁴⁴ See, e.g., Kurt Wagner, *Musk's Dispute With Twitter Over Bots Continues to Dog Deal*, BLOOMBERG (July 7, 2022), <https://www.bloomberg.com/news/articles/2022-07-07/twitter-reiterates-that-spam-bots-are-well-under-5-of-users>.

156. On July 8, 2022, Musk filed a Schedule 13D disclosing that he had sent a letter to Twitter terminating the acquisition.¹⁴⁵ That day, Tesla’s closing stock price rose another 2.5% relative to the prior day’s closing price. Shortly thereafter, Twitter sued Musk in the Court of Chancery to enforce the terms of their deal.

157. For several weeks following Musk’s disclosure of his purported termination of the Twitter deal, Tesla’s stock price generally rose. Between July 11, 2022 and August 4, 2022, Tesla’s closing stock price rose by an average of 1.6% relative to the prior day’s closing.

158. Musk’s statements on May 7 and 13, 2022 were false and misleading because they represented to a reasonable investor that the Twitter deal was on hold—and would not close—until Twitter provided information supporting its bot calculations. Or, put another way, a reasonable investor could have plausibly understood that Twitter was obligated to provide Musk with the requested information for the deal to close. However, Musk’s statements were false and misleading because under the terms of the deal, Musk’s financial commitment were “no longer subject to business due diligence.”¹⁴⁶

¹⁴⁵ Amendment No. 9 to Musk’s Schedule D for Twitter (July 8, 2022), https://www.sec.gov/Archives/edgar/data/1494730/000110465922078413/tm2220599d1_sc13da.htm.

¹⁴⁶ Amendment No. 3 to Musk’s Schedule 13D for Twitter (Apr. 21, 2022), https://www.sec.gov/Archives/edgar/data/1494730/000110465922048128/tm2213229d1_sc13da.htm.

159. Musk’s termination letter to Twitter was similarly a sham because Musk knew he did not have a legal basis to avoid the Twitter merger and that Twitter would prevail in its lawsuit against him in the Court of Chancery. Musk later admitted as much during an interview with the BBC, stating that a court would ultimately require him to complete the Twitter purchase:

Interviewer: And so then you changed your mind again and decided to buy [Twitter]. Did you do that because—

Musk: Well, I kind of had to.

Interviewer: Right. *Did you do that because you thought that a court would make you do that?*

Musk: *Yes.*

Interviewer: Right.

Musk: *Yes. That is the reason.*

Interviewer: Right. *So you were still trying to get out of it and then you just were advised by lawyers, “Look, you’re going to have to buy this.”*

Musk: *Yes.*

...

Interviewer: *So you didn’t have an epiphany, you just thought, “I’m gonna have to buy this. I might as well bite the bullet.”*

Musk: *Yeah.*¹⁴⁷

¹⁴⁷ James Clayton, *Interview with Elon Musk*, BBC NEWS (Apr. 11, 2023), <https://www.bbc.com/news/av/world-us-canada-65249139>.

There is evidence that Musk received this advice well before his August 2022 Tesla Stock Sales. For example, on May 13, 2022, Musk’s personal lawyer Alex Spiro and his personal business manager Jared Birchall “desperately urged [Musk] to walk back [his] declaration” putting the “Twitter deal temporarily on hold.”¹⁴⁸

160. During the same BBC interview, Musk confirmed he never intended to abandon the Twitter merger entirely. When asked if he “didn’t actually want to purchase [Twitter],” Musk said, “Well not at that price.”¹⁴⁹

M. Between August 5 and 9, 2022, Musk reaped additional unlawful proceeds from his sales of Tesla stock.

161. Between August 5 and 9, 2022, Musk sold \$6.89 billion in Tesla shares, again without scheduling the sales pursuant to a Rule 10b5-1 trading plan. The average sale price for these transactions was \$289.70 per share.¹⁵⁰

162. On October 3, 2022, two weeks before trial was scheduled to occur in Twitter’s lawsuit against Musk to enforce the merger agreement, Musk’s attorneys sent Twitter a letter stating that he now would go forward with the April 25, 2022 merger agreement.

¹⁴⁸ Walter Isaacson, ELON MUSK, at 464 (2023).

¹⁴⁹ James Clayton, *Interview with Elon Musk*, BBC NEWS (Apr. 11, 2023), <https://www.bbc.com/news/av/world-us-canada-65249139>.

¹⁵⁰ The sale price has been adjusted to reflect a later 3-1 reverse stock split.

163. On October 6, 2022, the Court of Chancery ordered that the merger be executed by October 28, 2022 to avoid a trial.¹⁵¹

164. During the week of October 3, 2022, Tesla's stock price declined by 16% from the closing price on the last trading day from the prior week. Analysts attributed this decline in part to Musk's decision to go forward with the Twitter merger.¹⁵²

165. If Musk had booked his August 2022 Tesla share sales at market prices that reflected his intention to go forward with the Twitter transaction, his profits on the sales would have been substantially lower. The closing prices for Tesla stock on the four trading days between October 4 and October 7, 2022 all reflected a greater than 10% decline from the average sale price for the August 2022 sales.

N. On October 27, 2022, Musk breached his obligations to Tesla by acquiring a controlling equity interest in Twitter.

166. On October 27, 2022, the Twitter merger closed. Holders of Twitter common stock were, in aggregate, entitled to receive \$41,476,341,438. Musk, Twitter founder Jack Dorsey, and Saudi Arabian prince Al Waleed bin Talal Al Saud

¹⁵¹ Jonathan Vanian, *Musk must complete Twitter deal by Oct. 28 to avoid trial, judge rules*, CNBC (Oct. 6, 2022), <https://www.cnbc.com/2022/10/06/musk-seeks-to-stop-oct-17-trial-date-to-close-twitter-deal-on-original-terms.html>.

¹⁵² Esha Dey & Jeran Wittenstein, *Tesla's Week to Forget Was Anchor Weighing On S&P 500*, BLOOMBERG (Oct. 7, 2022), <https://www.bloomberg.com/news/articles/2022-10-07/tesla-s-week-to-forget-is-the-anchor-weighing-on-the-s-p-500> (“Deliveries miss, Musk's revived Twitter bid lead to 16% plunge”).

rolled over their shares which reduced the amount that Musk owed Twitter shareholders to \$34,641,372,336.¹⁵³ Musk planned to finance this amount through: (1) \$5.2 billion in funding from by outside investors;¹⁵⁴ (2) \$13 billion in debt financing;¹⁵⁵ and (3) \$16.44 billion in cash from Musk (which reflects the value owed to shareholders minus the first two components).

167. In addition to payments due to stockholders, the Twitter merger agreement required Musk to make additional payments of approximately \$5 billion to cover items like fees and expenses, payments on Twitter debt, and other miscellaneous expenses.¹⁵⁶

¹⁵³ Specifically, Dorsey and Al Saud rolled over 18,042,428 shares, and 34,948,975 shares of Twitter stock into X Holdings shares, worth a total of \$6,834,969,102. https://www.sec.gov/Archives/edgar/data/1418091/000110465922042863/tm2211757d1_sc13d.htm; <https://www.sec.gov/Archives/edgar/data/1418091/000106299322021247/0001062993-22-021247-index.html>; <https://www.sec.gov/Archives/edgar/data/1418091/000119312522274034/d393652dsc13d.htm>. Musk did not file a public document stating that he rolled over his 73,115,038 Twitter shares, but he did not have a real obligation to pay himself cash for his own shares. In that sense, his shares are properly treated as “rolled over” for the purposes of determining how much cash he needed to raise to close the merger.

¹⁵⁴ See Twitter, Inc., Amendment No. 6 to Schedule 13-D (May 5, 2022), https://www.sec.gov/Archives/edgar/data/1494730/000110465922056055/tm2214608-1_sc13da.htm.

¹⁵⁵ See Twitter, Inc., Amendment No. 7 to Schedule 13-D (May 25, 2022), https://www.sec.gov/Archives/edgar/data/1494730/000110465922064655/tm2216931d1_sc13da.htm.

¹⁵⁶ Twitter’s Preliminary Proxy Statement dated May 16, 2022 states “[t]he total amount of funds necessary to consummate the merger and related transactions, including payment of related fees and expenses, will be approximately \$46.5 billion,” which included payment to stockholders, payment of Twitter debt, and other miscellaneous expenses,
Footnote continued on next page

168. Accordingly, Musk needed to pay approximately \$21.44 billion to close the Twitter merger agreement. Calculations by *Bloomberg* estimated Musk had approximately \$3 billion in cash or somewhat liquid assets as of April 14, 2022.¹⁵⁷ In addition, Musk had raised \$15.39 billion from his April and August 2022 Tesla Stock Sales, bringing the total as of August 9, 2022 to \$18.39 billion. Musk then received a \$1 billion loan from SpaceX shortly before the close of the merger agreement.¹⁵⁸ The manner in which Musk raised the remaining \$2 billion to complete the Twitter acquisition is not clear, but it is possible he raised further short-term debt, as he had done with the loan from SpaceX.

169. Again, acquiring this controlling equity interest in Twitter violated the prohibition in Tesla's Code of Ethics against "investing in another company if you can influence Tesla's relationship with that company."¹⁵⁹ Musk did not obtain a waiver from the Board to do so, as confirmed by Tesla never disclosing a waiver to Musk on a Form 8-K.

<https://www.sec.gov/Archives/edgar/data/1418091/000119312522152250/d283119dprem14a.htm>. The \$5 billion figure is \$46.5 billion minus the \$41.5 billion owed to Twitter shareholders.

¹⁵⁷ See David Pendleton & Tom Maloney, *Musk Needs 'Massive Loan' or Big Tesla Stock Sale to Buy Twitter*, BLOOMBERG (Apr. 14, 2022), <https://www.bloomberg.com/news/articles/2022-04-14/musk-needs-massive-loan-or-big-tesla-stock-sale-to-buy-twitter>.

¹⁵⁸ Micah Maidenbergl & Tim Higgins, *Elon Musk Borrowed \$1 Billion From SpaceX in Same Month of Twitter Acquisition*, THE WALL STREET JOURNAL (Sept. 5, 2023), <https://www.wsj.com/business/elon-musk-spacex-loan-269a2168>.

¹⁵⁹ Ex. 1 at 5.

O. Between November 2022 and December 2022, Musk reaped additional unlawful proceeds from his sales of Tesla stock.

170. Less than two months after closing the Twitter merger closed, Musk again sold large volumes of Tesla stock in violation of his fiduciary duty of loyalty. Between November 6 and 8, 2022, after he had acquired Twitter, Musk sold another \$3.95 billion in Tesla shares. Then, between December 12 and 14, 2022, Musk sold still more Tesla shares for another \$3.6 billion. None of these sales were made pursuant to a Rule 10b5-1 plan. The evidence supports a conclusion that these trades were also done on the basis of material nonpublic information, and therefore at artificially inflated prices.

171. *First*, these sales followed another misleading public reassurance by Musk after his August sales that he was “done” selling his Tesla stock.¹⁶⁰

¹⁶⁰ Elon Musk (@elonmusk), TWITTER (Aug. 9, 2022, 7:53 PM), <https://twitter.com/elonmusk/status/1557198421206769664>.

Sawyer Merritt @SawyerMerritt · Aug 9, 2022
h/t @ajtourville

Sawyer Merritt @SawyerMerritt · Aug 9, 2022

BREAKING: Elon Musk has filed two Form 4s with the SEC tonight showing that he sold over 3 million \$TSLA shares worth a few billion on August 5th.

Filing 1: archive.fast-edgar.com/20220809/ARZDT...
Filing 2: streetinsider.com/SEC+Filings/Fo...

The screenshot shows a SEC Form 4 filing for Elon Musk. The filing is dated August 5, 2022, and reports the sale of 3,000,000 shares of Tesla (TSLA) common stock. The total value of the sale is reported as \$3,000,000,000. The filing is categorized as a 'Sale' and is filed pursuant to Section 10(b) of the Securities Exchange Act of 1934 or Section 10(b) of the Investment Company Act of 1940.

8 31 564

Sawyer Merritt @SawyerMerritt · Aug 9, 2022
@elonmusk are you done selling?

122 105 1.6K

Elon Musk @elonmusk

Yes.

In the (hopefully unlikely) event that Twitter forces this deal to close *and* some equity partners don't come through, it is important to avoid an emergency sale of Tesla stock.

10:53 PM · Aug 9, 2022

Musk's answer "Yes" to the question "are you done selling?" was misleading because Musk did not have enough funds to close the Tesla deal when he made this tweet, as demonstrated by his need to secure a \$1 billion loan from SpaceX shortly

before closing the deal. Musk reportedly repaid this loan in November 2022.¹⁶¹ The close proximity of these two actions is evidence that Musk's November 2022 Tesla stock sales were the source for his repayment of the SpaceX loan. Musk would have known he needed to conduct further Tesla stock sales to repay this loan.

172. *Second*, Musk made his November and December 2022 Tesla Stock Sales shortly before Tesla disclosed to investors on January 3, 2023 that the Company's fourth-quarter delivery numbers—specifically a growth of 40% in vehicle deliveries since last year—fell well short of the Company's forecast of 50% growth in deliveries relative to 2021.¹⁶² There is substantial evidence that Musk knew about weakening growth in demand for Tesla's vehicles prior to his November

¹⁶¹ Micah Maidenberg & Tim Higgins, *Elon Musk Borrowed \$1 Billion From SpaceX in Same Month of Twitter Acquisition*, THE WALL STREET JOURNAL (Sept. 5, 2023), <https://www.wsj.com/business/elon-musk-spacex-loan-269a2168>.

¹⁶² Specifically, Tesla delivered 405,278 vehicles in Q4 of 2022 and 1,313,851 vehicles for all of 2022. Press Release, Tesla, Tesla Vehicle Production & Deliveries and Date for Financial Results & Webcast for Fourth Quarter 2022 (Jan. 2, 2023), <https://ir.tesla.com/press-release/tesla-vehicle-production-deliveries-and-date-financial-results-webcast-fourth-quarter>. Tesla's target had been to deliver more than 1,404,258 vehicles for 2022, or 50% growth relative to the prior year. *See* Tesla Jan. 26, 2022 Earnings Call Tr. at 2 (Musk stating: "we do expect significant growth in 2022 over 2021, comfortably above 50% growth in 2022"); Joey Klender, *Tesla is banking on a major Q1 push to secure its biggest year yet*, TESLARATI (Jan. 29, 2023), <https://www.teslarati.com/tesla-q1-sales-push-2023-sales-production-goals/> (noting that Tesla's 50% increase goal meant it would need to deliver 1,404,258 vehicles in 2022). In October 2022, Tesla acknowledged it would miss this target, but suggested the deliveries for the year would be "just under 50% growth" relative to 2021. *See* Tesla Q3 2022 Earnings Call Tr. at 3, <https://www.fool.com/earnings/call-transcripts/2022/10/20/tesla-tsla-q3-2022-earnings-call-transcript/>. But missing the target growth by more than 90,000 vehicles was not "just under" the target.

and December 2022 Tesla Stock Sales. For example, according to Musk, he and other senior executives review “real-time” data on Tesla’s vehicle sales every single day:

BENJAMIN JOSEPH KALLO: In sort of pricing, but a lot of pundits talk about the pie and losing share or gaining share. But how do you guys look at pricing versus the fee these -- or the price [of the] vehicles? Or does that not come into the equation? Sorry to ask about pricing again.

ELON R. MUSK: No, it's really just like -- every day, we get a daily real-time update of how many cars were ordered yesterday, how many cars were produced yesterday. We must have -- if there's a company that's got more real-time data than Tesla -- I'm not sure there's any company on earth that has better real-time data than Tesla, except maybe SpaceX Starlink.

So -- because, like, we don't have to -- for the other car companies, they will make the cars, send them to the dealers, then the dealers will sell the cars. And then it takes quite a long time for them to get the data back to actually figure out how many cars were sold. Whereas we know how many cars were ordered yesterday throughout the world. So our fingers on the pulse is realtime and does not have latency, whereas the other car companies have a lot of latency in their data.

As does the government, the government has a lot of latency in the data. So we're just looking at it and saying, okay, what does it take to achieve a clearing price for our vehicle production? And then we'll make a pricing change, and we see what happens immediately and adjust course.

So we're adjusting course and we're thinking about it literally every day, 7 days a week. Every -- 7 days a week, I look at that e-mail and so does the rest of the team. And we try to make the least dumb decision that we can. And on balance, I think our decisions are pretty good. Sometimes they'll be

down, but on average, they're, I think, better than the rest of the industry.¹⁶³

These daily emails would have contemporaneously alerted Musk to the fact that Tesla was not going to reach its growth goal. Armed with this knowledge about the adverse business results Tesla would have to report next quarter, Musk would have known Tesla's stock price would decrease soon.

173. *Third*, on October 24, 2022, before the November and December 2022 Tesla Stock Sales, Tesla cut prices on Tesla vehicles in China on October 24, 2022. These price cuts suggest that Tesla management—including Musk—would have known flagging demand growth necessitated responsive price cuts.¹⁶⁴ This is confirmed by, for example, a brief filed in the Court of Chancery by Tesla's current and former Directors on October 25, 2022, which states: "Musk is intimately involved in all aspects of Tesla's operations, from its strategic direction to its product design."¹⁶⁵

174. *Fourth*, before the December 2022 Tesla Stock Sales, Tesla took further steps that show Tesla management—including Musk—knew about flagging demand growth and was approving changes designed to counteract that flagging demand

¹⁶³ Tesla Q1 2023 Earnings Call Tr. at 9.

¹⁶⁴ See Fred Lambert, *Tesla (TSLA) pulls demand levers in China, launches referral program and cuts prices*, ELECTREK (Oct. 24, 2022), <https://electrek.co/2022/10/24/tesla-pulls-demand-levers-china-launches-referral-program-cuts-prices/>.

¹⁶⁵ See Director Defendants' Pretrial Brief, p. 4, *Tornetta v. Musk*, No. 2018-0408-KSJM (Del. Ch. Oct. 25, 2022).

growth. For example, in early December 2022, Tesla offered discounts on U.S. vehicles and reduced output in Tesla’s Chinese factory.¹⁶⁶ Tesla likely would not have taken these actions without Musk’s approval and knowledge.¹⁶⁷

175. *Fifth*, like Musk’s other 2021 and 2022 trades, his November and December 2022 trades were highly unusual relative to his historical stock sales, both in terms of size and the decision to not to use a Rule 10b5-1 plan.

176. *Sixth*, although the Twitter merger had closed, the evidence supports the conclusion that Musk needed additional liquidity to pay down the \$13 billion debt that Twitter had taken out to close Musk’s acquisition. Specifically, on December 7, 2022—five days before Musk’s December sales began—*Bloomberg* and *Reuters* reported that Musk’s bankers were having discussions about “replacing

¹⁶⁶ See Joel Patel, *Tesla Now Has A 2022 Delivery Discount*, CARSDIRECT (Dec. 22, 2022), <https://www.carsdirect.com/deals-articles/tesla-now-has-a-2022-delivery-discount> (credits offered in U.S. starting around December 5, 2022, and increasing around December 22, 2022); *Tesla to Shorten Shanghai Factory Shifts, Delay New Hires*, BLOOMBERG (Dec. 8, 2022), <https://www.bloomberg.com/news/articles/2022-12-08/tesla-to-shorten-shanghai-factory-shifts-delay-new-staff-hires>; *Tesla Reduces China’s Shanghai Output in Latest Sign of Sluggish Demand*, BLOOMBERG (Dec. 4, 2022), <https://www.bloomberg.com/news/articles/2022-12-05/tesla-reduces-shanghai-output-in-latest-sign-of-sluggish-demand>.

¹⁶⁷ As explained above, during Tesla’s Q1 2023 Earnings Call, an analyst asked, “how do you guys look at pricing versus the fee these – or the price [of the] vehicles?” Musk responded by confirming his personal involvement in pricing decisions by stating: “every day, we get a daily real-time update of how many cars were ordered yesterday, how many cars were produced yesterday. . . . So we’re adjusting course and we’re thinking about it literally every day, 7 days a week. Every – 7 days a week, I look at that e-mail and so does the rest of the team. And we try to make the least dumb decision that we can.” Tesla Q1 2023 Tesla Earnings Call at 9.

... \$3 billion of unsecured debt on which Twitter pays an interest rate of 11.75%.”¹⁶⁸

Musk’s need to replace this distressed debt provided motive to sell his stock at an inflated price, shortly before the January 3, 2023 disclosure of bad news concerning demand for Tesla’s vehicles.

177. *Seventh*, on December 14, 2022, Musk stated in a meeting with Tesla’s Board of Directors, in response to concerns raised by other Directors that Musk’s Twitter controversies were hurting Tesla’s brand: “sales numbers were bad around the world.”¹⁶⁹ This reported statement by Musk confirms he knew about Tesla’s bad sales numbers. On the same day, Musk was conducting the last of his December 2022 Stock Sales based on this adverse, nonpublic corporate information.

178. Musk profited from trading on material nonpublic information concerning Tesla’s failure to meet its delivery targets and by misleading the market (again) as to his intentions to sell further Tesla stock. If Musk had booked his November and December 2022 Tesla Stock Sales at the closing price on January 3, 2023 (when the market price had absorbed the impact of Tesla’s failure to meet its

¹⁶⁸ See Sneha Bhowmik, *Musk’s bankers mull new Tesla margin loans to slash Twitter debt* - *Bloomberg News*, REUTERS (Dec. 7, 2022), <https://www.reuters.com/business/musks-bankers-mull-new-tesla-margin-loans-slash-twitter-debt-bloomberg-news-2022-12-08/>; Davide Scigliuzzo, Sonali Basak, Paula Seligson, *Elon Musk’s Bankers Consider Tesla Margin Loans to Cut Risky Twitter Debt*, BLOOMBERG (Dec. 7, 2022), <https://www.bloomberg.com/news/articles/2022-12-08/musk-bankers-mull-tesla-margin-loans-to-cut-risky-twitter-debt>.

¹⁶⁹ See Walter Isaacson, *ELON MUSK*, at 580 (2023).

delivery targets), Musk's proceeds from these sales would have been reduced by ***\$2.38 billion or 42%***.

P. Between October 27, 2022 and the present, Musk has continuously breached the Code of Ethics by serving as Twitter's principal executive, which prevents him from excelling as Tesla's CEO.

179. On October 27, 2022, Musk became Twitter's CEO. Within hours of acquiring Twitter, he fired Twitter's CEO, CFO and general counsel, and removed all incumbent directors.¹⁷⁰ He continued to serve as Twitter's CEO until at least June 2023, when his handpicked successor Linda Yaccarino took the formal role, after which Musk remained as Twitter's owner and principal executive and decision-maker.

180. In November and December 2022, Musk spent most of his time working for Twitter, instead of Tesla. He claims he slept at Twitter's office and vowed to continue to do so until he felt Twitter was "fixed."¹⁷¹ He also oversaw massive layoffs of half of Twitter's staff.¹⁷²

¹⁷⁰ Trial Tr., Vol. III, 614-15, *Tornetta v. Musk*.

¹⁷¹ A November 14, 2022 Tweet by Musk (which he later deleted) states: "I've been at Twitter SF HQ all night. Will be working & sleeping here until org is fixed." Elon Musk (@elonmusk), TWITTER (Nov. 14, 2022), <https://polititweet.org/tweet?account=44196397&tweet=1592159017270677504>.

¹⁷² Kate Conger, Ryan Mac, Mike Isaac, *Confusion and Frustration Reign as Elon Musk Cuts Half of Twitter's Staff*, THE NEW YORK TIMES (Nov. 4, 2022), <https://www.nytimes.com/2022/11/04/technology/elon-musk-twitter-layoffs.html>.

181. On November 14, 2022, Musk admitted during an interview: “My workload has recently increased quite a lot I have too much work on my plate, that is for sure.”¹⁷³ He also stated that he ran Tesla “with great difficulty.”¹⁷⁴ That same month, Musk testified in the Court of Chancery that he was spending the “lion’s share” of his time on Twitter.¹⁷⁵

182. Even after Yaccarino began serving as Twitter’s CEO in June 2023, Musk remained Twitter’s majority owner, its executive chair, and its chief technology officer.¹⁷⁶ In practice, Musk has continued to act as Twitter’s principal executive despite Yaccarino holding the CEO title. Yaccarino’s subservience to Musk is demonstrated by her response to Musk’s damaging behavior during an interview with Andrew Ross Sorkin. When asked about advertisers who had pulled business from Twitter in response to a perceived anti-Semitic tweet by Musk, Musk twice stated that those advertisers should “go fuck themselves.”¹⁷⁷ Although Twitter

¹⁷³ Adam Schreck, *Musk touches on Twitter criticism, workload at G-20 forum*, AP (Nov. 13, 2022), <https://www.yahoo.com/news/musk-touches-twitter-criticism-workload-055237792.html>.

¹⁷⁴ MOJO Story, *Elon Musk Addresses Business 20 Meet In Bali, Indonesia Ahead Of G20 Summit* (Nov. 14, 2022), <https://www.youtube.com/watch?v=oTiGLiynwgs>.

¹⁷⁵ Trial Tr. Vol. III, 662, *Tornetta v. Musk*.

¹⁷⁶ Elon Musk (@elonmusk), TWITTER (May 11, 2023, 3:44 PM), <https://twitter.com/elonmusk/status/1656747082571722753?s=20>.

¹⁷⁷ Corbin Bolies, *Elon Musk Tells Major Advertisers in Person: ‘Go F*ck Yourself’*, DAILY BEAST (Nov. 30, 2023), <https://www.thedailybeast.com/elon-musk-tells-advertisers-who-quit-x-twitter-to-go-fck-yourself>.

depends on advertising for revenue and its revenue has suffered greatly since Musk acquired it, Yaccarino issued a statement supporting Musk's behavior.¹⁷⁸

183. Shortly after the announcement of Yaccarino's hiring, Musk admitted to having great difficulty juggling his responsibilities at Twitter with his responsibilities at Tesla. According to him, he managed this by focusing "predominantly" on "one company on one day." Even so, he admitted "there's a great deal of context switching" between his different companies and that "switching context is quite painful."¹⁷⁹

184. In addition to taking on significant new responsibilities as Twitter's principal executive as a result of his Twitter acquisition, Musk dramatically increased his own use of Twitter following the acquisition. For example, one analysis of Musk's Twitter usage reported that his daily Twitter use more than doubled following his acquisition of Twitter with his number of tweets per day going

¹⁷⁸ Linda Yaccarino (@lindayaX), TWITTER (Nov. 29, 2023) <https://twitter.com/lindayaX/status/1730088124615631060> (Yaccarino tweeting: "Today @elonmusk gave a wide ranging and candid interview at @dealbook2023. He also offered an apology, an explanation and an explicit point of view about our position. X is enabling an information independence that's uncomfortable for some people. We're a platform that allows people to make their own decisions. And here's my perspective when it comes to advertising: X is standing at a unique and amazing intersection of Free Speech and Main Street — and the X community is powerful and is here to welcome you. To our partners who believe in our meaningful work -- Thank You.").

¹⁷⁹ Laura Kolodny, *Elon Musk says his days are 'long and complicated' splitting time between SpaceX, Tesla and Twitter*, CNBC (May 23, 2023), <https://www.cnbc.com/2023/05/23/elon-musk-splits-time-across-spacex-tesla-and-twitter-heres-how.html>.

from 12.6 before the acquisition to 29.3 tweets per day after the acquisition.¹⁸⁰ Musk's increased use of Twitter is another form of distraction from his duties to Tesla.

185. Given these detrimental effects of Musk's service as the principal executive of Twitter, he breached the Code by accepting "outside employment" that prevented him "from working with excellence at Tesla." Since accepting his new role at Twitter, demand for Tesla's vehicles has slumped despite the introduction of several price cuts and its reputation with consumers has suffered. *See infra* §III.R.

186. Again, Musk did not obtain a waiver from Tesla's Board prior to becoming Twitter's CEO and principal executive, as confirmed by Tesla never disclosing such a waiver.

Q. Between October 27, 2022 and the present, Musk has repeatedly breached his fiduciary duties to Tesla, for his own and Twitter's benefit.

187. The conflicts of interest created by Musk's acquisition of and employment by Twitter are not hypothetical. Since acquiring Twitter, Musk has repeatedly used his position at Tesla to commit Tesla to troubling business arrangements with Twitter, to poach Tesla's human resources, and to usurp business opportunities from Tesla. These various forms of unlawful self-dealing by Musk are described below.

¹⁸⁰ Stats with Sasa, *Elon Musk Probably Tweets Too Much* (Dec. 17, 2022), <https://www.statswithsasa.com/2022/12/17/elon-musk-tweets-too-much/>.

1. Musk has repeatedly diverted Tesla employees so they can perform work for Twitter.

188. Shortly after acquiring Twitter, Musk misused his authority as Tesla’s CEO by pulling more than 50 of Tesla’s employees—mostly software engineers working on Tesla’s advanced driver assistance system (ADAS) technology—in to perform work for Twitter that had no benefit to Tesla.¹⁸¹ This included many senior Tesla employees, including its director of software development Ashok Elluswamy, its director of Autopilot and TeslaBot engineering Milan Kovac, and its senior director of software engineering Maha Virduhagiri.¹⁸²

189. Musk testified before the Court of Chancery in November 2022: “Tesla needed the engineers” he enlisted for work at Twitter.¹⁸³ This acknowledgment is consistent with the importance of Tesla’s ADAS technology to its business. This technology is responsible for Tesla’s “self-driving” features that Musk has made the lynchpin of Tesla’s investment thesis for several years.

190. Musk did not consult Tesla’s directors before usurping Tesla’s human resources for Twitter’s benefit. As the Court of Chancery recently concluded after

¹⁸¹ See Lora Kolodny, *Elon Musk has pulled more than 50 Tesla employees into his Twitter takeover*, CNBC (Oct. 31, 2022), <https://www.cnbc.com/2022/10/31/elon-musk-has-pulled-more-than-50-tesla-engineers-into-twitter.html>.

¹⁸² *Id.* It also include three engineers from Tesla’s ADAS team—Ross Nordeen, Dhaval Shroff, and James Musk (Musk’s cousin). See Walter Isaacson, *ELON MUSK*, at 516-18 (2023).

¹⁸³ Trial Tr. Vol. III, 656, *Tornetta v. Musk*.

hearing trial testimony from Musk and Tesla director James Murdoch concerning Musk's usurpation of Tesla employees, "any monitoring by [Tesla's] Audit Committee, such as it was, took place *after the fact*."¹⁸⁴

191. Although Murdoch testified Tesla received some payment for its services, he did not explain how the payment could outweigh the costs to Tesla arising from the loss of services from the ADAS employees usurped by Tesla. When Musk usurped them for work at Twitter, the National Highway Traffic Safety Administration had been investigating the safety risks created by Tesla's ADAS technology for over a year, and the Department of Justice had recently launched a criminal investigation into Musk's and Tesla's misleading claims about the technology.¹⁸⁵ Musk's diversion of Tesla's human resources for Twitter reportedly caused Tesla's "[s]oftware updates [for its ADAS technology] that were otherwise issued every two weeks" to be "suddenly spaced out over periods of months."¹⁸⁶ And in February 2023, Tesla recalled more than 362,000 vehicles to make changes

¹⁸⁴ *Tornetta* Opinion, at 120.

¹⁸⁵ Mike Spector & Dan Levine, *Exclusive: Tesla faces U.S. criminal probe over self-driving claims*, REUTERS (Oct. 26, 2022), <https://www.reuters.com/legal/exclusive-tesla-faces-us-criminal-probe-over-self-driving-claims-sources-2022-10-26>.

¹⁸⁶ Faiz Siddiqui, *How Elon Musk knocked Tesla's 'Full Self-Driving' off course*, THE WASHINGTON POST (Mar. 19, 2023), <https://www.washingtonpost.com/technology/2023/03/19/elon-musk-tesla-driving/>.

to its ADAS software.¹⁸⁷ The Department of Justice’s investigation is ongoing and is reportedly now focused on whether Tesla and Musk committed mail and wire fraud by overstating the self-driving abilities of Tesla vehicles.¹⁸⁸

192. Despite Musk’s and Murdoch’s sworn testimony before the Court of Chancery in November 2022 that Musk’s use of Tesla’s employees for Twitter would be “short-term,”¹⁸⁹ Tesla’s reporting on related party transactions in 2023 and 2024 suggest that Tesla employees working at Twitter (n/k/a “X”) continued for well over a year. Specifically, Tesla reported:

- a. “Twitter is party to certain commercial and support agreements with Tesla. Under these agreements, Twitter incurred expenses of

¹⁸⁷ Lora Kolodny, *Tesla recalls 362,758 vehicles, says Full Self-Driving Beta software may cause crashes*, CNBC (Feb. 16, 2023), <https://www.cnbc.com/2023/02/16/tesla-recalls-362758-vehicles-says-full-self-driving-beta-software-may-cause-crashes.html>.

¹⁸⁸ See James Farrell, *Tesla Self-Driving DOJ Investigation Is Looking At Securities And Wire Fraud, Report Says*, FORBES (May 8, 2024), <https://www.forbes.com/sites/jamesfarrell/2024/05/08/tesla-self-driving-doj-investigation-is-looking-at-securities-and-wire-fraud-report-says>.

¹⁸⁹ Musk testified the work for Twitter by Tesla engineers “was just on a voluntary basis to spend a few hours evaluating the Twitter engineering team. . . . [L]ike I said, this was a voluntary basis after-hours, mostly short-term matter.” Trial Tr. Vol. III, 656, *Tornetta v. Musk*. Murdoch similarly testified: “It was a short-term deployment. It was asked on a volunteer basis, and, you know, so that’s – and we looked at that at the audit committee. I believe most of the work was done in the first five days or a week.” *Id.* at 870.

approximately \$1.0 million in the aggregate in 2022 and \$0.4 million in 2023 through February.”¹⁹⁰

b. “X is party to certain commercial, consulting and support agreements with Tesla. Under these agreements, X incurred expenses of approximately \$1 million in 2023 and approximately \$0.02 million through February 2024.”¹⁹¹

Given the description of these agreements between Twitter and Tesla, the expenses appear to relate to Twitter’s use of Tesla’s human resources. These disclosures tend to show work by Tesla employees for Twitter has continued for more than a year and a half.

193. Between 2022 and December 2023, Musk also caused Tesla’s AI Infra & AI Platform Engineering Manager Tim Zaman to work significant hours for Twitter. During this time, Zaman served as Twitter’s head of machine learning foundations and led a supercomputer build, according to his own LinkedIn profile.¹⁹²

194. In addition, Musk poached at least one Tesla ADAS engineer for a permanent position at Twitter: his cousin, James Musk, who reportedly transitioned

¹⁹⁰ Tesla, Inc., Proxy Statement (2023), 60, <https://www.sec.gov/Archives/edgar/data/1318605/000119312523094075/d451342ddef14a.htm>.

¹⁹¹ Tesla, Inc., Proxy Statement (2024), 147, https://ir.tesla.com/_flysystem/s3/sec/000110465924048040/tm2326076d13_pre14a-gen.pdf.

¹⁹² See Tim Zaman, LinkedIn Profile, www.linkedin.com/in/timzaman.

to a permanent role at Twitter in 2022.¹⁹³ Instead of keeping his cousin at work on Tesla's ADAS system, Musk reportedly assigned him to vanity projects associated with Musk's personal Twitter account. Specifically, Musk tasked his cousin with overseeing alterations to Twitter's algorithm that would ensure that Musk's tweets would be more popular than President Biden's. Musk reportedly felt this was necessary after President Biden's February 12, 2023 tweet during the Super Bowl garnered more engagement than Musk's own contemporaneous Super Bowl tweet.¹⁹⁴

195. Musk's diversion of human resources from Tesla to Twitter breached his fiduciary duties to Tesla because Tesla needed its employees for its own business.

2. Since the announcement of the Twitter takeover, Musk has breached the Code of Ethics by using his position at Tesla to promote Twitter.

196. Since investing in Twitter, Musk also violated the Code's express prohibitions by "using [his] Tesla position to promote a side business" in Twitter.¹⁹⁵

¹⁹³ Sam Tabahriti & Kali Hays, *Elon Musk has hired two of his cousins to work at Twitter*, BUSINESS INSIDER (Dec. 7, 2022) <https://www.businessinsider.com/elon-musk-has-hired-two-cousins-to-work-at-twitter-2022-12> ("James Musk and Andrew Musk – sons of the billionaire's uncle on his father's side – now appear to be full-time Twitter employees.").

¹⁹⁴ See Zoe Schiffer & Casey Newton, *Yes, Elon Musk created a special system for showing you all his tweets first*, PLATFORMER (Feb. 14, 2023), <https://www.platformer.news/yes-elon-musk-created-a-special-system/>; Tomas Mier, *Elon's Super Bowl Tweet Flopped, So He Had 80 Engineers Boost His Tweets*, ROLLING STONE (Feb. 14, 2023), <https://www.rollingstone.com/culture/culture-news/elon-musk-engineers-twitter-engagement-1234680113/>.

¹⁹⁵ Ex. 1 at 5.

197. For example, on May 10, 2022, shortly after Musk signed the merger agreement with Twitter, he appeared for an interview at *The Financial Times*' "Future of the Car" conference—an event ostensibly focused on Tesla's business. During this event, Musk first acknowledged his plans to purchase Twitter and publicly confirmed for the first time that he "would reverse the perma[nent]ban" of Donald Trump from Twitter when the Twitter transaction closed.¹⁹⁶ Predictably, Musk's decision to announce this bombshell during an automobile conference caused reporters to focus on Musk's plans for Twitter, and not Tesla.¹⁹⁷ Tesla's stock price dropped by \$22 (or 8%) on this news.

198. Similarly, during Tesla's Q4 2022 earnings call after his acquisition of Twitter, Musk stated:

I think Twitter is actually an incredibly powerful tool for driving demand for Tesla. And I would really encourage companies out there of all kinds, automotive or otherwise, to make more use of Twitter and to use their Twitter accounts in ways that are interesting and informative, entertaining, and it will help them drive sales just as it has with Tesla. So the net value of Twitter, apart from a few people are complaining, is gigantic, obviously.¹⁹⁸

¹⁹⁶ *Transcript: FT Interview with Elon Musk*, FINANCIAL TIMES (May 12, 2022), <https://www.ft.com/content/697d8d32-6ef9-4b4c-835a-3e9dcbdb431a>.

¹⁹⁷ *See, e.g.*, Brian Fung & Clare Duffy, *Elon Musk says he would reverse Twitter's Trump ban*, CNN BUSINESS (May 10, 2022), <https://www.cnn.com/2022/05/10/tech/elon-musk-twitter-trump-ban/index.html>.

¹⁹⁸ Tesla Q4 2022 Earnings Call Tr. at 5, <https://www.fool.com/earnings/call-transcripts/2023/01/26/tesla-tsla-q4-2022-earnings-call-transcript>.

This open invitation to Tesla’s direct competitors to copy Tesla’s marketing tactics during a Tesla earnings call violated the prohibition against “using your Tesla position to promote a side business” in a Tesla’s Code of Ethics.¹⁹⁹

3. Musk has used his control over Tesla to retaliate against an advertiser who abandoned Twitter.

199. On November 15, 2023, Musk responded that a tweet espousing the anti-Semitic conspiracy theory known as “white genocide,” which argues that Jewish people systematically plot to encourage immigration of “non-white” people to Western countries to eliminate the white race, was “the actual truth.”²⁰⁰

¹⁹⁹ Ex. 1 at 5.

²⁰⁰ Mike Wendling, *White House criticises Elon Musk over ‘hideous’ antisemitic lie*, BBC (Nov. 17, 2023), <https://www.bbc.com/news/world-us-canada-67446800>. This was the same conspiracy theory that motivated the man who killed eleven people at a Pittsburgh synagogue in 2018. *Id.*



Charles Weber @CWBOCA · Nov 15, 2023



To the cowards hiding behind the anonymity of the internet and posting "Hitler was right":

You got something you want to say? Why dont you say it to our faces...



2.8K 1.8K 5.8K 4.1M



The Artist Formerly Known as Eric @breakingbaht · Nov 15, 2023



Okay.

Jewish communities have been pushing the exact kind of dialectical hatred against whites that they claim to want people to stop using against them.

I'm deeply disinterested in giving the tiniest shit now about western Jewish populations coming to the disturbing

[Show more](#)

1K 3.6K 22K 1.9M



Elon Musk @elonmusk

Subscribe



You have said the actual truth

4:52 PM · Nov 15, 2023 · 8.3M Views

200. The full post that Musk called “the actual truth” read: “Okay. Jewish communities [sic] have been pushing the exact kind of dialectical hatred against whites that they claim to want people to stop using against them. I’m deeply disinterested in giving the tiniest shit now about western Jewish populations coming to the disturbing realization that those hordes of minorities that support [sic] flooding their country don’t exactly like them too much. You want truth said to your face, there it is.”

201. Shortly thereafter, many major advertisers, including Disney, announced that they were pulling advertising from Twitter.²⁰¹

202. In late November, Disney CEO Bob Iger specifically attributed the decision to stop advertising on Twitter to this particular tweet by Musk.²⁰² Iger’s decision and statements infuriated Musk. Musk then publicly criticized Iger repeatedly, including by tweeting he should “be fired immediately.”²⁰³

²⁰¹ Brian Steinberg, *Disney, Lionsgate, IBM and More Pull Ads From X After Elon Musk’s Antisemitic Remark*, VARIETY (Nov. 17, 2023), <https://variety.com/2023/tv/news/x-antisemitic-lionsgate-ibm-disney-1235798567/>.

²⁰² Jill Goldsmith, *Disney’s Bob Iger On Pulling Ads From X, Suing Ron DeSantis & Feeling “Somewhat Sobered” On Prospects In China*, DEADLINE (Nov. 29, 2023), <https://deadline.com/2023/11/bob-iger-disney-ads-x-ron-desantis-china-1235642738/> (Iger stated: “And by [Musk] taking the position that he took in quite a public manner, we just felt that the association with that position and Elon Musk and X was not necessarily a positive one for us.”).

²⁰³ Elon Musk (@elonmusk), TWITTER (Dec. 7, 2023), <https://twitter.com/elonmusk/status/1732786907971539235>.

203. In December 2023, Tesla removed Disney’s streaming service (called “Disney+”) from the streaming platform available on Tesla vehicles. The timing and unusual nature of this decision to make Tesla vehicles less attractive strongly suggests that Musk ordered the removal of Disney+ in response to Iger’s criticism of his tweet and Disney’s removal of advertisements from Twitter.²⁰⁴

204. Musk’s retaliatory action against Disney breached his fiduciary duty to Tesla because the action made Tesla’s vehicles less attractive, and exclusively benefitted Musk’s vanity and Twitter’s business by discouraging advertisers from abandoning Twitter. It was also harm to Tesla that directly resulted from Musk’s decision to create a conflict of interest by acquiring Twitter.

4. After Musk acquired Twitter, Tesla reversed its policy against paid advertising and began paying Twitter for advertising.

205. Since its inception, Tesla’s policy was not to pay for advertising. Instead, it relied on free media like posting to its or Musk’s Twitter accounts to reach customers. Indeed, in 2020, Tesla’s then Board of Directors recommended that shareholders vote against a shareholder proposal that Tesla begin paying for advertisements. The Board’s recommendation stated: “objective factors demonstrate the existing and growing public visibility and interest in Tesla and our products

²⁰⁴ Fred Lambert, *Tesla removes Disney+ from vehicles amid Elon Musk’s Twitter beef with Bob Iger*, ELECTREK (Dec. 18, 2023), <https://electrek.co/2023/12/18/tesla-removes-disney-cars-amid-elon-musks-beef-bob-iger/>.

without the need for paid advertising.”²⁰⁵ Tesla’s shareholders subsequently voted against this proposal, consistent with the Board’s recommendation.

206. In May 2023, during Tesla’s shareholder meeting, Musk stated: “Twitter is highly dependent on advertising, so, here I am, never used advertising really before, and now have a company that’s highly dependent on advertising. So, I guess I should say advertising is awesome, everyone should do it!” He then stated that Tesla could benefit from advertising by shedding light on features people may not know about. He concluded these remarks by announcing that Tesla would begin advertising: “We’ll try a little advertising and see how it goes.”²⁰⁶

207. In the first two months of 2024, Tesla paid Twitter approximately \$200,000 to purchase advertising on Twitter’s platform.²⁰⁷

208. In May 2024, Tesla reportedly also purchased advertising on Twitter to encourage Tesla shareholders to vote in favor of a shareholder proposal to reinstate Musk’s unprecedented equity award, which the Court of Chancery recently voided

²⁰⁵ Tesla, Inc., Proxy Statement (2020), 19, https://www.sec.gov/Archives/edgar/data/1318605/000156459020027321/tsla-def14a_20200707.htm.

²⁰⁶ 2023 Tesla Shareholder Meeting, <https://www.youtube.com/clip/Ugkx-jyssc-vuqQDDk6zc3pljtXMIpYMQmp9l>.

²⁰⁷ Tesla, Inc., Proxy Statement (2024), 147, https://ir.tesla.com/_flysystem/s3/sec/000110465924048040/tm2326076d13_pre14a-gen.pdf.

as the byproduct of a flawed approval process by a Board that lacked independence.²⁰⁸

209. Musk’s decision to change Tesla’s long-standing policy against paid advertising and to pay Twitter for advertising is a conflict of interest under Tesla’s Code, and is a violation of Musk’s fiduciary duties to Tesla because Musk’s financial interest as Twitter’s majority owner is improperly influencing his decision-making.

5. Musk usurped AI business opportunities that rightly belonged to Tesla and used them to benefit Twitter.

210. For several years, Musk has known and stated that one of Tesla’s key products is artificial intelligence. He views Tesla’s full-self driving technology and robo-taxi ambitions as real-world applications of AI technologies. Because AI technology presented an important business opportunity to Tesla, in 2018, Musk tried to convince OpenAI—one of the leading companies in AI research—to merge with Tesla, even though OpenAI’s research had not focused on self-driving features as an application of AI.²⁰⁹

²⁰⁸ Fred Lambert, *Tesla now spends ad money to influence shareholders approval of Elon Musk’s \$55B payday*, ELECTREK (May 13, 2024), <https://electrek.co/2024/05/13/tesla-spends-ad-money-influence-shareholders-approval-elon-musk-55b-payday/>.

²⁰⁹ See OpenAI, *OpenAI and Elon Musk* (Mar. 5, 2024), <https://openai.com/index/openai-elon-musk/> (publishing Feb. 1, 2018 email from Musk to OpenAI stating: “Tesla is the only path that could even hope to hold a candle to Google.”); *id.* (Jan. 31, 2018 email from Musk to OpenAI stating: “The most promising option I can think of, as I mentioned earlier, would be for OpenAI to attach to Tesla as its cash cow. . . . Using a rocket analogy, Tesla already built the ‘first stage’ of the rocket with the whole supply chain of Model 3 and its onboard computer and a persistent internet connection. The ‘second stage’ would be a full

Footnote continued on next page

211. Musk’s acquisition of Twitter put him in a conflict of interest with Tesla, under the Code, in part because it gave Musk a significant financial investment in another company with business interests in AI technology. By no later than January 2023 (or three months after Musk’s takeover of Twitter closed), Musk identified Twitter’s historical feed of more than 3 trillion tweets as a potential asset for sale in the developing market for training data upon which artificial intelligence and machine learning software depend.²¹⁰ In January 2023, Musk convened a series of late-night meetings in his Twitter conference room to work out ways to charge AI companies for Twitter’s historical feed, which Musk believed could be used to train AI. “It’s a monetization opportunity,” he told Twitter’s engineers.²¹¹

212. Musk also knew Tesla’s repository of video data from cameras on its cars as an asset with value for its AI training potential. Musk believed this data could help create AI for physical robots, not just text-generating chatbots like ChatGPT, the signature AI product introduced by OpenAI in November 2022.²¹²

213. In Musk’s view, “[t]he holy grail of artificial general intelligence was building machines that could operate like humans in physical spaces, such as

self driving solution based on large-scale neural network training, which OpenAI expertise could significantly help accelerate. With a functioning full self-driving solution in ~2-3 years we could sell a lot of cars/trucks.”).

²¹⁰ Walter Isaacson, ELON MUSK, at 602 (2023).

²¹¹ *Id.*

²¹² *Id.* at 603.

factories and offices and on the surface of Mars, not just wow us with disembodied chatting. Tesla and Twitter together could provide the data sets and the processing capability for both approaches: teaching machines to navigate in physical space and to answer questions in natural language.”²¹³

214. Although Musk recognized that this was a business opportunity for Tesla based on Tesla’s valuable assets, he seized this opportunity for himself by creating a new company called X.AI to pursue this “holy grail.” Tesla has not reported receiving any shares or other economic interest in this company. Meanwhile, Musk’s Twitter co-investors did receive that opportunity, and X.AI has been working closely with Twitter for Twitter’s benefit for approximately a year.

215. In March 2023, Musk and his business manager Jared Birchall incorporated X.AI in Nevada. Around the same time, Musk merged Twitter, Inc. into a company called “X Corp.” and Twitter, Inc. ceased existing as a legal entity.²¹⁴ The name “X.AI” evidences Musk’s intention to create artificial intelligence products that would integrate with, or otherwise assist, with X Corp. (f/k/a Twitter). Although at the time the Twitter application name had not yet changed its name to

²¹³ *Id.*

²¹⁴ *See* Defendant Twitter Inc.’s Corporate Disclosure Statement, and Certification of Interested Parties, *Loomer v. Meta Platforms, Inc.*, No. 3:22-cv-02646-LB, ECF No. 123 (N.D. Cal. Apr. 4, 2023)

X,²¹⁵ Musk had suggested he would change the name several months prior to March 2023.²¹⁶

216. At the time of X.AI's incorporation, Musk was the sole director of X.AI. Birchall was its secretary.²¹⁷

217. According to Isaacson's biography of Musk, Musk created X.AI for the express purpose of protecting his vision with Twitter: "Musk worried that . . . chatbots and AI systems, especially in the hand of Microsoft [(i.e., OpenAI)] and Google, could become politically indoctrinated, perhaps even infected by what he called the woke-mind virus. . . . And on a more immediate level, he worried that chatbots could be trained to flood Twitter with disinformation, biased reporting, and financial scams."²¹⁸

218. In May 2023, X.AI poached a Tesla program manager who worked on Tesla's ADAS technology named Ross Nordeen.²¹⁹ Nordeen's work at Tesla

²¹⁵ Jordan Valinsky, *Elon Musk rebrands Twitter as X*, CNN (July 24, 2023), <https://www.cnn.com/2023/07/24/tech/twitter-rebrands-x-elon-musk-hnk-intl/index.html>. For the sake of simplicity, this Complaint refers to Twitter and X, as Twitter, unless otherwise noted.

²¹⁶ See, e.g., Elon Musk (@elonmusk), TWITTER (Oct. 4, 2022), <https://twitter.com/elonmusk/status/1577428272056389633> ("Buying Twitter is an accelerant to creating X, the everything app").

²¹⁷ Berber Jin, *Elon Musk Creates New Artificial Intelligence Company X.AI*, THE WALL STREET JOURNAL (Apr. 14, 2023), <https://www.wsj.com/articles/elon-musks-new-artificial-intelligence-business-x-ai-incorporates-in-nevada-962c7c2f>.

²¹⁸ Walter Isaacson, ELON MUSK, at 601 (2023).

²¹⁹ See Nordeen's LinkedIn Profile, <https://www.linkedin.com/in/rjnordeen/>.

focused on supercomputing and machine learning. Nordeen was one of the more than 50 Tesla engineers that Musk had previously diverted from work at Tesla for work at Twitter in 2022.

219. On July 12, 2023, Musk announced the creation of X.AI via tweet.²²⁰

220. That day, X.AI's website became public and its home page featured an announcement that prominently leveraged an association with Tesla and publicized a commitment to work by X.AI with Tesla:

Today we announce the formation of xAI. . . . Our team is led by Elon Musk, CEO of *Tesla* and SpaceX. We have previously worked at DeepMind, OpenAI, Google Research, Microsoft Research, *Tesla*, and the University of Toronto. . . .

Relation to X Corp

*We are a separate company from X Corp, but will work closely with X (Twitter), Tesla, and other companies to make progress towards our mission.*²²¹

221. Two out of the twelve founding members of X.AI had worked on AI products for Tesla: Musk and Nordeen.

222. On July 14, 2023, Musk held an audio conference on Twitter through a feature called "Twitter spaces" that included the founding members of X.AI and several members of the public. During the conference, Musk again repeatedly

²²⁰ Elon Musk (@elonmusk), TWITTER (July 12, 2023) <https://twitter.com/elonmusk/status/1679164661869182976>.

²²¹ xAI, *Understand the Universe* (July 12, 2023) <https://web.archive.org/web/20230712155404/https://x.ai/>.

leveraged an association with Tesla. Notes to the meeting, which Musk and X.AI respectively called a “good summary”²²² and “great summary,”²²³ state:

[Musk] said that from his experience at Tesla, they have over complicated problems. “We are too dumb to realize how simple the answers really are,” he said. “We will probably find this out with AGI [(artificial general intelligence)] as well. Once AGI is solved, we will look back and think, why did we think it would be so hard.” . . .

xAI will work with Tesla in multiple ways and it will be of mutual benefit. Tesla’s self-driving capabilities will be enhanced because of xAI.²²⁴

According to a CNBC article summarizing the same audio conference, Musk “said that *xAI will need to develop technology that ‘understands the physical world and not just the Internet,’ and he thinks that Tesla’s driving data will help it on that front.*”²²⁵ These statements again confirmed that Musk was usurping a business opportunity in Tesla’s own data that properly belongs to Tesla. In the market for AI technology, AI developers have paid for access to training data belonging to other

²²² Elon Musk (@elonmusk), TWITTER (July 14, 2023), <https://twitter.com/elonmusk/status/1679996448132444160>.

²²³ xAI (@xai), Twitter (July 14, 2023), <https://twitter.com/xai/status/1680044214095339521>.

²²⁴ Ed Krassenstein (@EdKrassen) TWITTER (July 14, 2023), <https://twitter.com/EdKrassen/status/1679971231280365568>.

²²⁵ Lora Kolodny, *Elon Musk plans Tesla and Twitter collaborations with xAI, his new startup*, CNBC (July 14, 2023), <https://www.cnbc.com/2023/07/14/elon-musk-plans-tesla-twitter-collaborations-with-xai.html>.

companies,²²⁶ yet Musk’s proposal for X.AI to use Tesla’s valuable training data involved no commitment to pay Tesla for X.AI’s proposed access to Tesla’s data.

223. On July 24, 2023, less than two weeks after the creation of X.AI was announced, Musk rebranded the Twitter application as X.²²⁷ The close proximity of the announcement of X.AI and this rebranding further confirms that Musk was planning X.AI and Twitter to cooperate as joint venture partners. X.AI’s and Twitter’s close affiliation is confirmed by a report that: “XAI employees have at times been working out of the longtime Twitter headquarters building in downtown San Francisco, gathering on the floor above where many X employees work, according to people familiar with the operations.”²²⁸

224. In August 2023, X.AI poached another Tesla ADAS employee: Fabio Aguilera-Convers, a Senior Manager in Data Annotation.²²⁹

²²⁶ For example, Google paid Reddit \$60 million per year to access Reddit’s data for the purpose of training Google’s AI. See Anna Tong, Echo Wang and Martin Coulter, *Exclusive: Reddit in AI content licensing deal with Google*, REUTERS (Feb. 21, 2024), <https://www.reuters.com/technology/reddit-ai-content-licensing-deal-with-google-sources-say-2024-02-22/>.

²²⁷ Jordan Valinsky, *Elon Musk rebrands Twitter as X*, CNN (July 24, 2023), <https://www.cnn.com/2023/07/24/tech/twitter-rebrands-x-elon-musk-hnk-intl/index.html>.

²²⁸ Alexa Corse, *How Elon Musk Is Using His AI Startup to Help Turn Around X*, THE WALL STREET JOURNAL (Mar. 1, 2024), <https://www.wsj.com/tech/ai/elon-musks-x-leans-on-his-ai-startup-9038380d>.

²²⁹ See Fabio Aguilera-Convers, LinkedIn Profile, www.linkedin.com/in/fabio-aguilera-convers-345b6615a.

225. On November 3, 2023, Musk and X.AI publicly announced a new product called Grok, an AI chatbot that is integrated into Twitter. Musk tweeted: “As soon as it’s out of early beta, xAI’s Grok system will be available to all X Premium+ subscribers.”²³⁰ The next day, Musk tweeted: “Grok has real-time access to info via the X platform, which is a massive advantage over other models.”²³¹ This launch benefitted Twitter and not Tesla. The integration strategy was a means of encouraging more Twitter users to pay monthly subscription fees.

226. Also on November 3, 2023, Musk announced that Twitter was introducing a “‘See similar’ posts” feature powered by AI.²³² X.AI was responsible for developing the technology used by Twitter.²³³ This AI work benefitted Twitter, not Tesla.

227. On November 19, 2023, a little over two weeks after announcing these joint ventures between X.AI and Twitter, Musk tweeted: “X Corp [(f/k/a Twitter)]

²³⁰ Elon Musk (@elonmusk), TWITTER (Nov. 3, 2023), <https://twitter.com/elonmusk/status/1720645900471554146>.

²³¹ Elon Musk (@elonmusk), TWITTER (Nov. 3, 2023), <https://twitter.com/elonmusk/status/1720660977786433810>.

²³² Elon Musk (@elonmusk), TWITTER (Nov. 3, 2023), <https://twitter.com/elonmusk/status/1720314092269822242>.

²³³ Alexa Corse, *How Elon Musk Is Using His AI Startup to Help Turn Around X*, THE WALL STREET JOURNAL (Mar. 1, 2024), <https://www.wsj.com/tech/ai/elon-musks-x-leans-on-his-ai-startup-9038380d>.

investors will own 25% of xAI.”²³⁴ Musk has not provided Tesla or its shareholders with similar opportunities, which further evidences a material conflict of interest created by Musk’s Twitter acquisition.

228. In or around December 2023, Musk diverted Tesla’s supply of critical AI microchips made by Nvidia called H100 GPUs to Twitter and X.AI. According to a report from *CNBC*, an internal Nvidia memo December 2023 states: “Elon prioritizing X H100 GPU cluster deployment at X [(f/k/a Twitter)] versus Tesla by redirecting 12k of shipped H100 GPUs originally slated for Tesla to X instead. In exchange, original X orders of 12k H100 slated for Jan[uary] and June [2024] to be redirected to Tesla.” The same *CNBC* report states: “xAI uses some capacity in X [(f/k/a Twitter)] data centers to run some of its training and inference for the large language models behind its chatbot Grok.”²³⁵ Shortly after Musk diverted Tesla’s supply of these H100 microchips, Musk touted how “core” these same microchips are to Tesla’s “AI infrastructure” during the April 24, 2024 Tesla earnings call:

Regarding AI compute, over the past few months, we’ve been actively working on expanding Tesla’s core AI infrastructure. For a while we were training constrained in our progress.

We are, at this point, no longer training-constrained, and so we’re making rapid progress. We’ve installed and

²³⁴ Elon Musk (@elonmusk), TWITTER (Nov. 19, 2023), <https://twitter.com/elonmusk/status/1726177644671091192>.

²³⁵ Lora Kolodny, *Elon Musk ordered Nvidia to ship thousands of AI chips reserved for Tesla to X and xAI*, *CNBC* (June 4, 2024), <https://www.cnbc.com/2024/06/04/elon-musk-told-nvidia-to-ship-ai-chips-reserved-for-tesla-to-x-xai.html>.

commissioned, meaning they're actually working 35,000 H100 computers or GPUs. GPU is wrong word. They need a new word.

I always feel like a wince when I say GPU because it's not. GPU stand -- G stands for graphics, and it doesn't do graphics. But you know, roughly 35,000 H100S are active, and we expect that to be probably 85,000 or thereabouts by the end of this year and training, just for training. We are making sure that we're being as efficient as possible in our training.²³⁶

229. According to the same *CNBC* report, “by ordering Nvidia to let privately held X jump the line ahead of Tesla, Musk pushed back the automaker’s receipt of more than \$500 million in graphics processing units, or GPUs, by months, likely adding to delays in setting up the supercomputers Tesla says it needs to develop autonomous vehicles and humanoid robots.”²³⁷

230. In late 2023, when Musk diverted H100 GPUs to X.AI, tech companies were reportedly “desperate” for these microchips:

More than money, engineering talent, hype or even profits, tech companies this year are desperate for GPUs. The hunt for the essential component was kicked off last year when online chatbots like ChatGPT set off a wave of excitement over A.I., leading the entire tech industry to pile on and creating a shortage of the chips. In response, start-ups and their investors are now going to great lengths to get their hands on the tiny bits of silicon and the crucial “compute power” they provide.

²³⁶ Tesla Q1 2024 Earnings Call, <https://www.fool.com/earnings/call-transcripts/2024/04/23/tesla-tsla-q1-2024-earnings-call-transcript/>.

²³⁷ Lora Kolodny, *Elon Musk ordered Nvidia to ship thousands of AI chips reserved for Tesla to X and xAI*, *CNBC* (June 4, 2024), <https://www.cnbc.com/2024/06/04/elon-musk-told-nvidia-to-ship-ai-chips-reserved-for-tesla-to-x-xai.html>.

The dearth of A.I. chips has been exacerbated because Nvidia, a longtime provider of the chips, has a virtual lock on the market. Inundated with demand, the Silicon Valley company — which has surged to a \$1 trillion valuation — is expected to report record financial results next week.

Tech companies typically buy access to A.I. chips and their compute power through cloud computing services from the likes of Google, Microsoft and Amazon. That way, they do not have to build and operate their own data centers full of computer servers connected with specialized networking gear.

But the A.I. explosion has meant that there are long wait lists — stretching to almost a year in some cases — to access these chips at cloud computing companies, creating an unusual roadblock at a time when the tech industry sees nothing but opportunity and boundless growth for businesses building generative A.I., which can create its own images, text and video.

The largest tech firms can generally get their hands on GPUs more easily because of their size, deep pockets and market positions. That has left start-ups and researchers, which typically do not have the relationships or spending power, scrambling.

Their desperation is palpable. On social media, blog posts and conference panels, start-up founders and investors have started sharing highly technical tips for navigating the shortage. Some are gaming out how long they think it will take Nvidia's wait-list to clear. . . .

Some venture capital firms, including Index Ventures, are now using their connections to buy chips and then offering them to their portfolio companies. Entrepreneurs are rallying start-ups and research groups together to buy and share a cluster of GPUs. . . .

Before the shortage, George Sivulka, chief executive of Hebbia, an A.I. productivity software maker, simply asked his cloud provider for more “instances,” or virtual servers full of

GPUs, as the company expanded. Now, he said, his contacts at the cloud companies either don't respond to his requests or add him to a four-month wait list. He has resorted to using customers and other connections to help make his case to the cloud companies. And he's constantly on the lookout for more.

"It's almost like talking about drugs: 'I know a guy who has H100s,'" he said.²³⁸

231. Given the shortage of Nvidia H100 GPUs in the market, Tesla's priority access to thousands of them had economic value to Tesla—which Tesla could have exploited for its own profit—even if it did not use the microchips itself. Nonetheless, the conflict of interest created by Musk's financial investments in X and X.AI reportedly prompted Musk to forfeit Tesla's valuable right to these scarce microchips to X and X.AI for nothing.

232. On January 15, 2024, Musk began to publicly leverage his X.AI side venture as a purported basis for demanding that Tesla award him additional Tesla stock. Specifically, Musk tweeted in response to a post questioning why he needed additional compensation to incentivize him to work for Tesla, in light of his substantial stock holdings:

²³⁸ Erin Griffith, *The Desperate Hunt for the A.I. Boom's Most Indispensable Prize*, THE NEW YORK TIMES (Aug. 16, 2023), <https://www.nytimes.com/2023/08/16/technology/ai-gpu-chips-shortage.html>.



Musk knew this tweet would be received as a threat to Tesla and its shareholders that he was willing to disloyally undermine Tesla’s business if he did not receive further compensation from Tesla. Just twelve days earlier, Musk had stated: “Tesla is an AI/robotics company that appears to many to be a car company.”²³⁹

233. Musk’s tweet further demonstrates that he does not feel beholden to the terms of the Code. In his view, the question of whether AI and robotics programs should be built inside or outside Tesla depends on his voting control, not Tesla’s binding Code of Ethics that prescribes specific rules regarding conflicts of interest.

234. In March or early April 2024, X.AI poached four more Tesla employees focused on AI and ADAS technology: Ethan Knight, a Staff Machine Learning

²³⁹ Elon Musk (@elonmusk), TWITTER (Jan. 2, 2024), <https://twitter.com/elonmusk/status/1742423298217033776?lang=en>.

Scientist for Tesla's ADAS team; Shay Scerri, Tesla's Senior Project Manager in AI; William Tanassi-Dreyer, Tesla's Project Manager for Data Collection; and Ashley Callery, a Data Collection Operator for Tesla.²⁴⁰

235. On May 18, 2024, as a controversial shareholder vote on a reinstatement of Musk's pay package loomed, Musk posted another tweet that suggested he will only continue assisting with the development of Tesla's AI line of business if Tesla pays him the billions in equity that he wants.²⁴¹

²⁴⁰ See Becky Peterson, *Musk's xAI is Poaching Engineers From Tesla*, THE INFORMATION (Apr. 3, 2024), <https://www.theinformation.com/articles/musks-xai-is-poaching-engineers-from-tesla>; Scerri's LinkedIn Profile, <https://www.linkedin.com/in/shay-scerri>; Callery's LinkedIn Profile, <https://www.linkedin.com/in/ashleyncallery92/>.

²⁴¹ Teslaconomics (@Teslaconomics), TWITTER (May 18, 2024); Elon Musk (@elonmusk), TWITTER (May 18, 2024), <https://twitter.com/Teslaconomics/status/1791970668466315708>.



236. Musk’s launch of X.AI breached his fiduciary duties to Tesla by usurping a business opportunity that properly belonged (at least in part) to Tesla. Musk knew that Tesla operates in the same field of artificial intelligence as X.AI, as he views Tesla as an “AI or robotics company.”²⁴² Moreover, Musk’s vision for X.AI includes X.AI leveraging Tesla’s training data. Since its inception, both X.AI and Musk have publicly promoted X.AI’s connections to Tesla and its prospects of working with Tesla as competitive advantages. X.AI and Musk have also repeatedly

²⁴² Tesla (TSLA) Q 1 2024 Earning Call Transcript (Apr. 23, 2024), <https://www.fool.com/earnings/call-transcripts/2024/04/23/tesla-tsla-q1-2024-earnings-call-transcript/>.

poached Tesla employees to work for X.AI. Despite Tesla's significant contributions to X.AI, Musk allowed investors in Twitter and not Tesla to acquire an equity interest in X.AI.

237. The business opportunity usurped from Tesla by Musk has significant value. On May 26, 2024, X.AI announced that it had completed "Series B funding round of \$6 billion with participation from key investors including Valor Equity Partners, Vy Capital, Andreessen Horowitz, Sequoia Capital, Fidelity Management & Research Company, Prince Alwaleed Bin Talal and Kingdom Holding, amongst others."²⁴³ Vy Capital, Andreessen Horowitz, Sequoia Capital, and Fidelity Management & Research Company respectively invested \$700 million, \$400 million, \$800 million, and \$316,139,386 in X.AI. Each of these investors in X.AI were also part of Musk's third-party investors in his acquisition of Twitter. Moreover, as explained above, Prince Alwaleed Bin Talal agreed to "roll over" over \$1 billion in old Twitter equity and continue as an investor in the successor Twitter entity controlled by Musk.²⁴⁴ Valor Equity Partners, on the other hand, is run by Musk's friend and former Tesla director Antonio Gracias.

²⁴³ X.AI Blog Post, *Series B Funding Round* (May 26, 2024), <https://x.ai/blog/series-b>.

²⁴⁴ Twitter, Inc., Amendment No. 6 to Schedule 13D (May 5, 2022), https://www.sec.gov/Archives/edgar/data/1418091/000110465922056055/tm2214608-1_sc13da.htm.

238. Musk himself confirmed in a tweet on May 27, 2024 that X.AI’s “pre-money valuation was \$18B.”²⁴⁵ In other words, with the new investment of \$6 billion, X.AI was valued at \$24 billion.

239. Musk’s side venture in X.AI also violated Tesla’s Code because it is a conflict of interest for which he did not obtain a waiver from the Board. Specifically:

a. Musk’s employment as the CEO of X.AI violated the Code’s prohibition against “[o]utside employment” because X.AI is a competitor to Tesla in the AI field.²⁴⁶

b. Musk separately violated the Code by “using [his] Tesla position to promote a side business” and “looking for opportunities that should otherwise go to Tesla first.”²⁴⁷ The reasons for this violation are the same as those given in the preceding paragraph for usurpation of a business opportunity.

c. And because X.AI’s work expressly relates to Tesla’s own AI initiatives, Musk’s side venture at X.AI violated the Code’s prohibition

²⁴⁵ Elon Musk (@elonmusk), TWITTER (May 27, 2024), <https://x.com/elonmusk/status/1794976923317149914>.

²⁴⁶ Ex. 1 at 5. X.AI is also potentially a “supplier” within the meaning of the Code because Musk has stated that he intends for Tesla to rely on AI technology developed by X.AI. *See id.*

²⁴⁷ *Id.*

against “developing or helping to develop outside inventions that relate to existing or future Tesla products or your job at Tesla.”²⁴⁸

d. Finally, Musk’s ownership of a major equity stake in X.AI breached the Code’s prohibition against “investing in another company if you can influence Tesla’s relationship with that company.”²⁴⁹ As explained above, Musk and X.AI have expressly promoted plans to partner with Tesla as one of its competitive advantages. These plans are predicated on Musk using his influence at Tesla to accomplish them.

240. Despite the multiple breaches of the Code from Musk’s investment in and work for X.AI, Musk did not obtain any waiver relating to X.AI from the Board. If Tesla had given him any waiver, Tesla would have disclosed the waiver on a Form 8-K, and it has not done so.

R. Musk’s misconduct is causing Tesla to lose sales and suffer significant reputational harm.

241. Since taking over Twitter, Musk has managed and used Twitter with the express goal of furthering his campaign against the so-called “woke mind virus.” *See infra* §III.E.4.c. This creates a significant conflict of interest for Tesla because Musk’s mission at Twitter is alienating a large portion of Tesla’s customer base.

²⁴⁸ *Id.*

²⁴⁹ *Id.*

242. Shortly after taking over Twitter in 2022, Musk reinstated thousands of previously banned Twitter accounts—including extremist accounts belonging to white supremacists and neo-nazis—under a banner of “general amnesty.”²⁵⁰ Twitter’s reinstatements of extremists continues to this day, with Twitter’s reinstatement of conspiracy theorist Alex Jones and white nationalist Nick Fuentes in recent months.²⁵¹

243. At the same time, despite Musk’s claimed support for “free speech,” Twitter under Musk has banned or limited the reach of journalists disfavored by Musk²⁵² and begun restricting users from posting the word “cisgender” even as it

²⁵⁰ See Clare Duffy, *The mass unbanning of suspended Twitter users is underway*, CNN (Dec. 8, 2022), <https://www.cnn.com/2022/12/08/tech/twitter-unbanned-users-returning/index.html>; Travis Brown, *Elon Musk’s suspension reversals*, GITHUB (Oct. 31, 2023), <https://github.com/travisbrown/unsuspensions>; Elon Musk (@elonmusk), TWITTER (Nov. 23, 2022) <https://twitter.com/elonmusk/status/1595473875847942146>; Center for Countering Digital Hate, *Toxic Twitter* (Feb. 15, 2023), https://counterhate.com/wp-content/uploads/2023/02/Toxic-Twitter_FINAL.pdf.

²⁵¹ Mrinmay Dey and Jyoti Narayan, *Conspiracy theorist Alex Jones reinstated on X after Musk poll*, REUTERS (Dec. 10, 2023), <https://www.reuters.com/technology/musk-poll-shows-x-users-want-us-conspiracy-theorist-jones-account-back-2023-12-10/>; Rebecca Rommen, *Elon Musk allows white supremacist Nick Fuentes back on X - again*, BUSINESS INSIDER (May 4, 2024), <https://www.businessinsider.com/elon-musk-white-supremacist-nick-fuentes-back-on-x-again-2024-5>.

²⁵² See Oliver Darcy, *Elon Musk censors the press*, CNN (Dec. 16, 2022), <https://www.cnn.com/2022/12/16/tech/musk-censors-press/index.html>; Pete Syme, *Twitter appeared to limit the reach of investigative news site Bellingcat days after Elon Musk suggested its Texas mall shooter investigation was a ‘psyop’*, BUSINESS INSIDER (May 12, 2023), available <https://www.businessinsider.com/twitter-appears-limit-bellingcat-after-elon-musk-called-it-psyop-2023-5>; Mark Joyella, *Elon Musk Accused Of ‘Silencing His Critics’ As X Suspends Journalists*, FORBES (Jan. 9, 2024), <https://www.forbes.com/sites/markjoyella/2024/01/09/elon-musk-silencing-his-critics-as-journalists-are-suspended-by-x>.

rolled back protections for trans users.²⁵³ According to several watchdogs and analysts, hate speech against racial minorities, Jewish people, and gay and trans people has risen on Twitter under Musk’s management.²⁵⁴

244. Since acquiring Twitter, Musk’s personal usage of Twitter has become increasingly controversial. He has repeatedly attacked liberal politics in the United States as being infected with a so-called “woke mind virus,” and used his personal Twitter account as a soapbox for promoting his current political views. *See infra* §III.E.4.²⁵⁵ He has also endorsed anti-Semitic comments as “the actual truth.” *See infra* §III.Q.3.

²⁵³ *See* Christopher Wiggins, *X, formerly Twitter, restricts accounts that use the term ‘cisgender’*, *ADVOCATE* (May 20, 2024), <https://www.advocate.com/news/cisgender-restriction-x-twitter>; Angela Yang, *Twitter quietly changes its hateful conduct policy to remove standing protections for its transgender users*, *NBC NEWS* (Apr. 18, 2023), <https://www.nbcnews.com/tech/twitter-changes-hateful-conduct-policy-rcna80338>.

²⁵⁴ *See* Oliver Darcy, *Hate speech dramatically surges on Twitter following Elon Musk takeover, new research shows*, *CNN* (Dec. 2, 2022), <https://www.cnn.com/2022/12/02/tech/twitter-hate-speech/index.html>; Press Release, Amnesty International, *Hateful and Abusive Speech Towards LGBTQ+ Community Surging on Twitter Under Elon Musk* (Feb. 9, 2023), <https://www.amnestyusa.org/press-releases/hateful-and-abusive-speech-towards-lgbtq-community-surging-on-twitter-under-elon-musk/>; Christian Martinez, *One billionaire owner, twice the hate: Twitter hate speech has surged with Musk, study says*, *THE LOS ANGELES TIMES* (Apr. 27, 2023), <https://www.latimes.com/business/technology/story/2023-04-27/hate-speech-twitter-surged-since-elon-musk-takeover>; Carl Miller, David Weir, Shaun Ring, Oliver Marsh, Chris Inskip, Nestor Prieto Chavana, *Antisemitism on Twitter Before and After Elon Musk’s Acquisition*, *Institute for Strategic Dialogue and CASM Technology* (Mar. 20, 2023), <https://www.isdglobal.org/isd-publications/antisemitism-on-twitter-before-and-after-elon-musks-acquisition/>.

²⁵⁵ In May 2023, for example, Musk hosted the announcement of the presidential campaign of Ron DeSantis—a candidate who campaigned on an “anti-woke” platform—on Twitter.
Footnote continued on next page

245. Musk’s recent polemical statements on Twitter and controversial decisions as Twitter’s manager have caused Tesla, because of its association with Musk, significant reputational harm. This is particularly true because Tesla’s customer base historically has consisted predominantly of self-identified Democrats (including consumers who, among other things, agree that human-caused climate change is both real and problematic, and that it is therefore important to reduce society’s dependency on fossil fuels).²⁵⁶

246. Both the demand for Tesla’s vehicles and Tesla’s performance as a Company have declined significantly since Musk took over Twitter in the fourth quarter of 2022.

a. First, starting in early 2023 (a little over two months after Musk starting running Twitter), Tesla began drastically cutting prices for virtually all its vehicles in the U.S.²⁵⁷ These actions confirm an internal recognition

Bernd Debusmann Jr & James Clayton, *Ron DeSantis to launch 2024 presidential bid on Twitter*, BBC (May 23, 2023), <https://www.bbc.com/news/uk-65689744>. He has also used his platform on Twitter to repeatedly criticize President Biden for the past two years. Kate Conger & Ryan Mac, *Elon Musk Ramps Up Anti-Biden Posts on X*, THE NEW YORK TIMES (May 24, 2024), <https://www.nytimes.com/2024/05/24/technology/elon-musk-x-biden.html>. Musk recently tweeted: “There is either a red wave this November or America is doomed. Imagine four more years of this getting worse ...” Elon Musk (@elonmusk), TWITTER (Mar. 15, 2024), <https://x.com/elonmusk/status/1768819343628947703>.

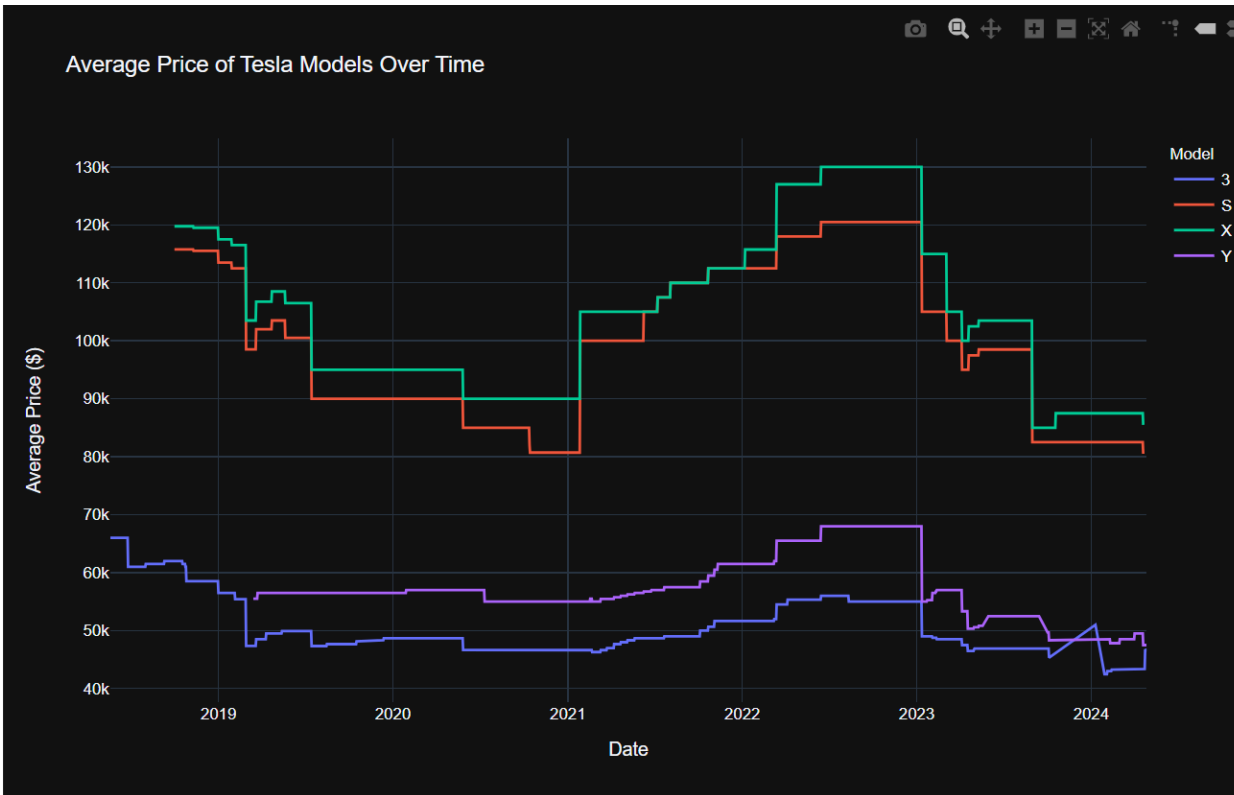
²⁵⁶ See discussion and citations, *infra*.

²⁵⁷ James Dow, *Amid demand concerns, Tesla cuts prices by up to \$13K in US*, ELECTRECK,(Jan. 12, 2023), <https://electrek.co/2023/01/12/amid-demand-concerns-tesla-cuts-prices-by-up-to-13k-in-us/> (January 11, 2023 price cut up to \$13,000 for Model Y); Maria Merano, *Tesla Model X and Model S get price reduction in the United States*, TESLARATI, *Footnote continued on next page*

within Tesla that demand for Tesla's vehicles is weakening. As the below chart demonstrates,²⁵⁸ the price cuts that occurred during this time are matched only by the price cuts that occurred during COVID lockdowns in 2020 and 2021.

(Mar. 5, 2023), <https://www.teslarati.com/tesla-model-x-tesla-model-s-price-reduction-america/> (Mar. 5, 2023, price cuts between \$5,000 to \$10,000 on Model S and Model X); Sawyer Merritt (@SawyerMerritt), TWITTER, (Apr. 6, 2023), <https://twitter.com/SawyerMerritt/status/1644185049992945665> (April 6, 2023, price cut of \$5,000 on Model S AWD, Model S Plaid, Model X AWD and Model X Plaid); Dan Mihalascu, *Tesla Cuts Prices On All US Models Again By Up To \$5,000*, INSIDEEVS, (Apr. 7, 2023), <https://insideevs.com/news/661285/tesla-cuts-prices-on-all-us-models-again/> (Apr. 7, 2023, price cut of \$5,000 on Model S and Model X base variant and \$2,000 on Model Y Long Range and Performance versions); Simon Alvaraz, *Tesla updates Model S and Model X: Price cuts, free paint, and no more Standard Range*, TESLARATI, (Aug. 31, 2023), <https://www.teslarati.com/tesla-model-s-model-x-price-cuts-free-paint-no-more-standard-range/> (August 31, 2023 price cut of \$13,500 on Model S Long Range, price cut of \$18,500 on the Model S Plaid and Model X Long Range). Tesla also offered other economic incentives, in addition to price cuts. See Fred Lambert, *Tesla boosts referral program to help sales, \$1,000 off, and 3 months of free Full Self-Driving*, ELECTRECK, (June 3, 2023), <https://electrek.co/2023/06/03/tesla-boosts-referral-program-help-sales/>; Fred Lambert, *Tesla adds cash discount on Model 3/Y through referral program to boost sales*, ELECTRECK, (July 7, 2023), <https://electrek.co/2023/07/07/tesla-adds-cash-discount-model-3-y-through-referral-program-boost-sales/>; Kristopher J. Brooks, *Tesla cuts prices around the globe amid slowing demand for its EVs*, CBS NEWS (Apr. 22, 2024), <https://www.cbsnews.com/news/tesla-price-cut-2024-elon-musk-ev/> (\$2,000 cut for Models S, X, and Y).

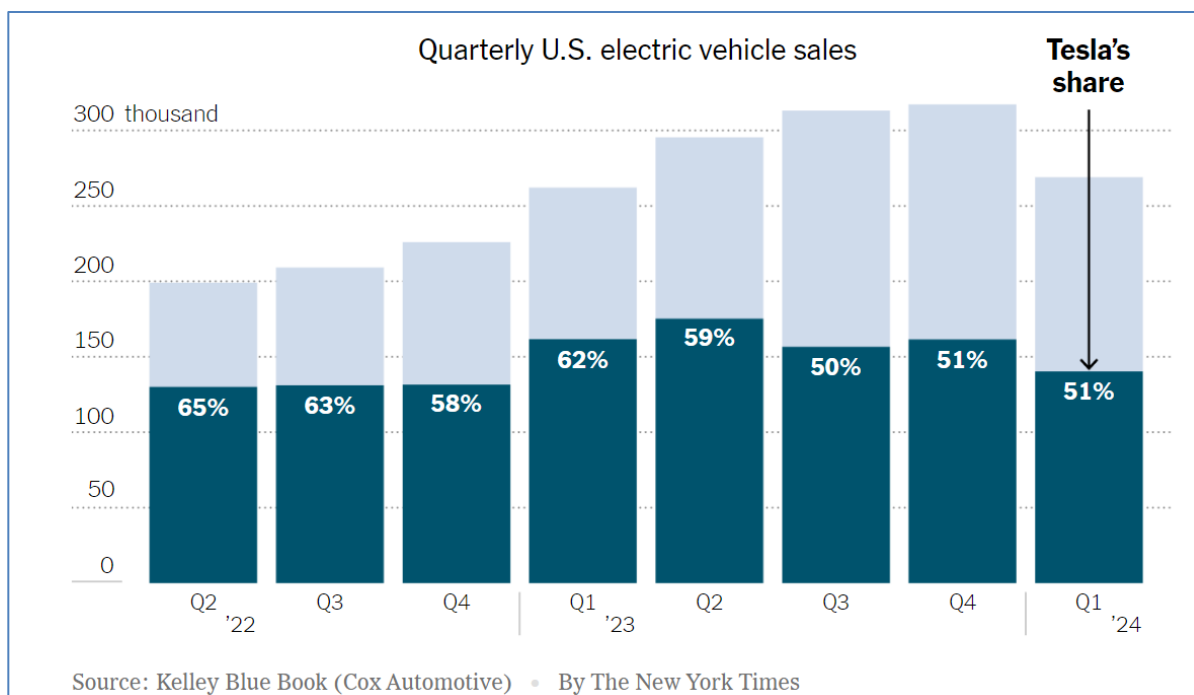
²⁵⁸ Analysis of Tesla Car Prices in the US, SKILLS.AI - AI Analytics Co-Pilot, April 27, 2024, <https://skills.ai/tesla-car-prices-analysis/>.



b. Second, even after cutting its prices, Tesla’s dominance in the electric vehicle market is weakening. Its share of the U.S. market dropped by 10% from 65% in 2022 to 55% in 2023, the first full year of Musk’s ownership of Twitter.²⁵⁹ And on a quarterly basis, Tesla’s share of E.V. vehicle sales has stalled at 50-51% of the market for the past three quarters after tumbling from close to 60% in prior quarters.²⁶⁰

²⁵⁹ *A Record 1.2 Million EVs Were Sold in the U.S. in 2023, According to Estimates from Kelley Blue Book*, COX AUTOMOTIVE (Jan. 9, 2024), <https://www.coxautoinc.com/market-insights/q4-2023-ev-sales/>.

²⁶⁰ J. Edward Moreno & Karl Russell, *E.V. Sales Are Slowing. Tesla’s Are Slumping*, THE NEW YORK TIMES (Apr. 15, 2024), <https://www.nytimes.com/2024/04/15/business/ev-car-sales-tesla.html>.

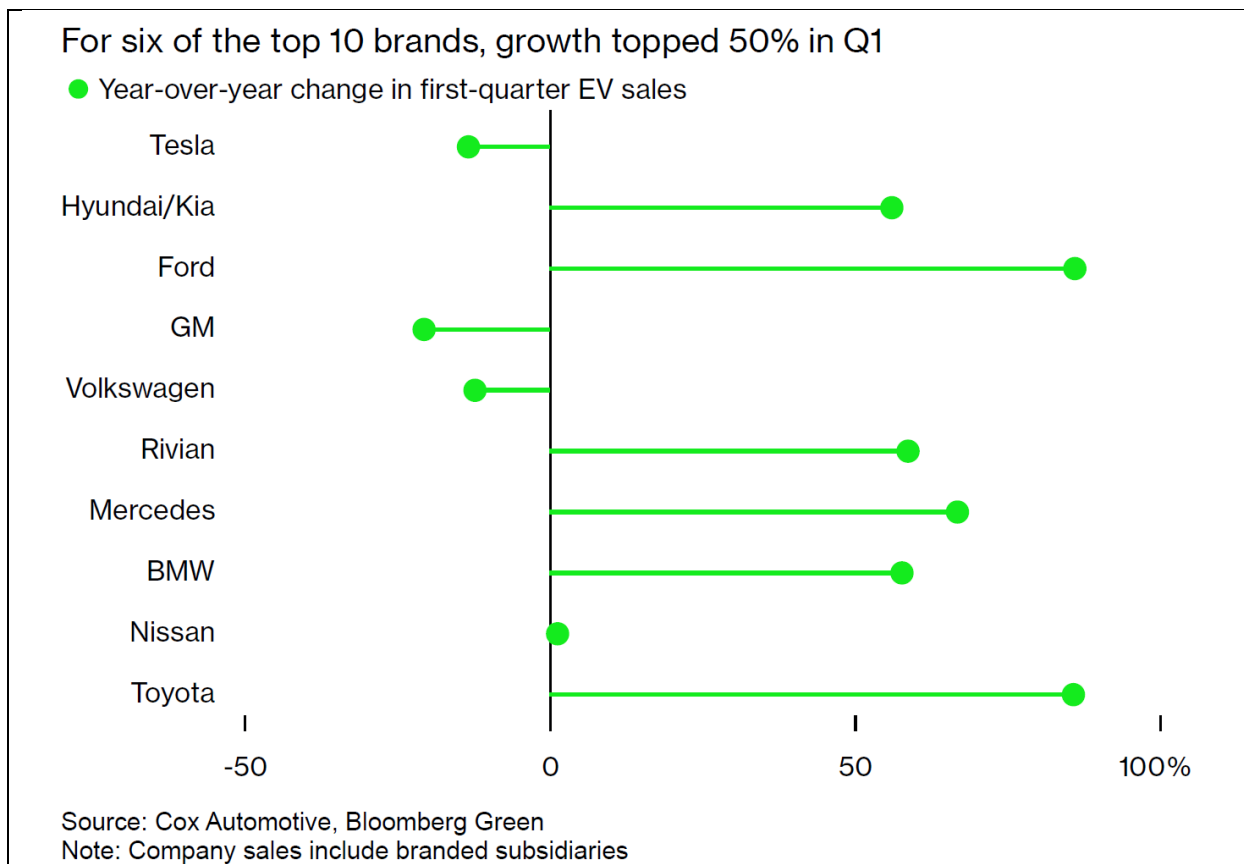


c. Third, Tesla’s sales for the first quarter of 2024 declined by 8.5% from the first quarter of last year.²⁶¹ In the U.S., Tesla sold 161,630 vehicles in the first quarter of 2023 and 140,187 vehicles in the first quarter of 2024, a 13.3% decline.²⁶² Tesla’s sales are dropping even though EV sales are growing or flat for most other electric vehicle manufacturers.²⁶³

²⁶¹ Jack Ewing & Neal Boudette, *Tesla’s Sales Drop, a Sign That Its Grip on the E.V. Market Is Slipping*, THE NEW YORK TIMES (Apr. 2, 2024), <https://www.nytimes.com/2024/04/02/business/tesla-auto-sales-first-quarter.html>.

²⁶² J. Edward Moreno and Karl Russell, *E.V. Sales Are Slowing. Tesla’s Are Slumping*, THE NEW YORK TIMES (Apr. 15, 2024), <https://www.nytimes.com/2024/04/15/business/ev-car-sales-tesla.html>.

²⁶³ Tom Randall, *The Slowdown in US Electric Vehicle Sales Looks More Like a Blip: EV sales are still booming for most automakers – even if Tesla is in a rut*, BLOOMBERG (May 28, 2024), <https://www.bloomberg.com/news/articles/2024-05-28/the-slowdown-in-us-electric-vehicle-sales-looks-more-like-a-blip?sref=BIWGmTdO>.



d. Fourth, Tesla reported earnings per share was \$3.12 for 2023, a 23% decline from 2022’s figure of \$4.07 per share.²⁶⁴

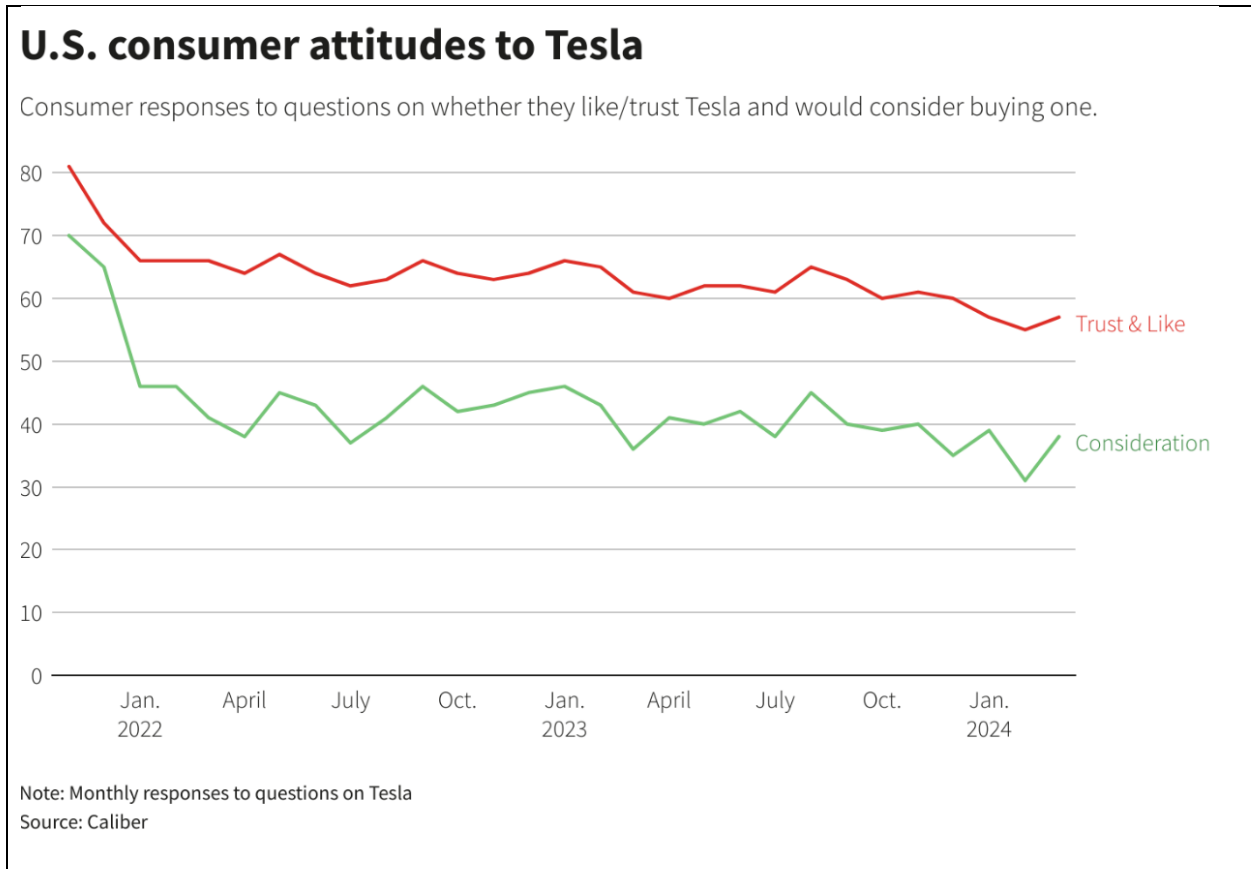
e. Fifth, Tesla’s reported earnings before interest, taxes, depreciation, and amortization (“EBITDA”) for 2023 declined 13% from the EBITDA it reported in 2022.²⁶⁵

247. Several third-party studies show a decline in favorability of the Tesla brand following Musk’s takeover of Twitter.

²⁶⁴ Derek Saul, *Tesla Stock Heads Toward 8-Month Low After 23% Annual Profit Decline*, FORBES (Jan. 25, 2024), <https://www.forbes.com/sites/dereksaul/2024/01/25/tesla-stock-heads-toward-8-month-low-after-23-annual-profit-decline/?sh=1f39b4dc2f5b>.

²⁶⁵ *Id.*

a. According to an April 1, 2024 *Reuters* article, market intelligence firm Caliber surveyed U.S. consumer attitudes toward Tesla that involved asking consumers whether they trust and like Tesla and whether they would consider buying a Tesla vehicle. The results showed significant declines in both metrics after Musk took over Twitter in October 2022.²⁶⁶



b. According to the same article, the likelihood of a consumer considering a purchase of a Tesla vehicle fell to 31% in February 2024, less

²⁶⁶ Hyunjoo Jin & Nick Carey, *Would-be Tesla buyers snub company as Musk's reputation dips*, REUTERS (Apr. 1, 2024), <https://www.reuters.com/business/autos-transportation/would-be-tesla-buyers-snub-company-musks-reputation-dips-2024-04-01/>.

than half its high of 70% in November 2021 when Caliber started tracking consumer interest in the brand.²⁶⁷

c. Similarly, as an April 20, 2024 *Wall Street Journal* article reported:

For years, the biggest cohort of [Tesla] buyers, politically speaking, has been Democrats. But when Elon Musk took a hard turn last fall, they didn't follow him.

The proportion of Democrats buying Tesla vehicles fell by more than 60%, according to car buyers surveyed in October and November by researcher Strategic Vision. . . .

Other surveys have captured a pullback in consumers' consideration of Tesla vehicles since Musk acquired the social-media platform in late 2022 and held court on contentious social issues.

But the mix of Democrats, who have been core constituents for the Tesla brand, had remained mostly steady—until last fall.

Among 2022 model-year buyers, Democrats made up 40% of Tesla customers and 39% in 2023, according to Strategic Vision's surveys. Things began to change in the 2024 model year survey, which began in October. The makeup of Democrats fell to 15% while Republicans jumped to 32% and independents swelled to 44%.

Those results show Tesla was losing sales among Democrats, Alexander Edwards, president of Strategic Vision, said of the fall findings.

In California, a solid-blue state, registrations of new Tesla vehicles fell almost 10% in the fourth quarter. That was a

²⁶⁷ *Id.*

stunning reversal from the third quarter when registrations rose 43%, and perhaps a sign of things to come nationally.

Tesla doesn't release U.S.-specific sales results. But Motor Intelligence estimates Tesla's U.S. sales growth turned negative this year. Model 3 sedan sales fell 44% in the period that ended in March compared with a year ago, according to the research firm. Model Y sport-utility vehicles rose just 1.4%.

EV ownership has long been politically divisive.

Early electric cars, with dramatically higher prices than comparable gas-powered ones, were cast by critics as playthings for the rich and coastal elites. For every five Democrats owning an EV, there have been two Republicans, according to Strategic Vision's survey last year.²⁶⁸

d. In May 2023, the annual Axios Harris poll on corporate reputation rankings showed similar negative ramifications for Tesla's reputation.²⁶⁹ Analysts with Axios reported:

²⁶⁸ Tim Higgins, *Elon Musk Lost Democrats on Tesla When He Needed Them Most*, THE WALL STREET JOURNAL (Apr. 20, 2024), <https://www.wsj.com/business/autos/elon-musk-turned-democrats-off-tesla-when-he-needed-them-most-176023af>.

²⁶⁹ The Axios Harris Poll 100 is a trusted ranking of the reputations of companies most on the minds of Americans, with a framework Harris has used since 1999. The 2023 survey was based on a survey of 16,310 Americans from a nationally representative sample conducted March 13–28, 2023. Americans are asked which two — in their opinion — stand out as having the best reputation today and which two have the worst. All nominations are compiled into an aggregate list to determine the “most visible” companies. Subsidiaries and brands are tallied within the parent company to create a total number of nominations for each company.

Respondents rated those 100 most visible companies on nine dimensions of reputation to calculate the company's Reputational Quotient, or RQ®, score for inclusion in the Axios Harris Poll 100. Another set of respondents answered a separate survey about contextual questions on topics related to brands and politics. That survey was conducted online within the U.S. by Harris Poll from May 12 to 14, 2023 among a nationally representative sample

Footnote continued on next page

Elon Musk's chaotic takeover of Twitter not only pushed the social media company's own ranking down but shook investors' faith in Tesla by making the public more aware of Musk's manic leadership style. . . .

Tesla saw one of the biggest reputation drops of the past year, from 11th in 2022 to 62nd place this year, with a 74.3 RQ (79.5 in 2022).²⁷⁰

e. The 2024 Axios Harris poll found Tesla's reputation continued to slide to 63rd place.²⁷¹

f. As a December 21, 2022 *New York Times* article reported:

Survey data indicate that Mr. Musk's behavior has hurt Tesla's brand among liberals, the group most likely to buy electric cars. Tesla's net favorability rating — the number of people who view the company positively minus those with a negative view — plummeted to 10 percentage points in November [2022] from 31 percentage points at the beginning of the year, according to Morning Consult, a research firm.²⁷²

248. According to Isaacson, Tesla's then Board of Directors acknowledged the reputational harm Musk was causing to Tesla.

of 2,019 U.S. adults. See Axios, *The 2023 Axios Harris Poll 100 reputation rankings* (May 23, 2023), <https://www.axios.com/2023/05/23/corporate-brands-reputation-america>.

²⁷⁰ Sara Fischer & Margaret Talev, *Axios Harris Poll 100: Year of the tarnished titans*, AXIOS (May 23, 2023), <https://www.axios.com/2023/05/23/ftx-tesla-reputation-rankings-2021>.

²⁷¹ Axios, *The 2024 Axios Harris Poll 100 reputation rankings* (May 22, 2024), <https://www.axios.com/2023/05/22/axios-harris-poll-company-reputation-ranking-data-source>.

²⁷² Jack Ewing, et al., *Elon Musk's Distraction Is Just One of Tesla's Problems*, THE NEW YORK TIMES (Dec. 21, 2022), <https://www.nytimes.com/2022/12/21/business/tesla-elon-musk.html>.

At its meeting in Austin on December 14[, 2022], the Tesla board, usually very compliant, told Musk that the Twitter controversies were hurting the Tesla brand. Musk pushed back, saying that sales numbers were bad around the world, even where people were not paying attention to the controversies, and it was due mainly to macroeconomic factors. But both Kimbal and board chair Robyn Denholm kept pressing him, saying his behavior was a factor. “The giant elephant in the room was that [Elon] was acting like a fucking idiot,” Kimbal says.²⁷³

249. Musk’s decision to acquire Twitter and his management, in violation of his duties to Tesla, contributed to Tesla’s suffering sales and its reputation. Recoverable damages to Tesla for these harms will be quantified at trial.

S. Tesla’s Directors have repeatedly breached their mandatory duty to enforce Tesla’s Code of Ethics against Musk.

250. The Code of Ethics required Tesla’s Directors to address Musk’s violations of the Code’s conflicts-of-interest rules. It says: “The Board of Directors *shall* determine, or designate appropriate persons to determine, appropriate actions to be taken in the event of violations of the Code of Business Ethics or of these additional procedures *by the CEO* and Tesla’s senior financial officers. Such actions *shall* be reasonably designed to deter wrongdoing and to promote accountability for adherence to the Code of Business Ethics and to these additional procedures”²⁷⁴

²⁷³ Walter Isaacson, ELON MUSK, at 580 (2023).

²⁷⁴ Ex. 1 at 16.

Nevertheless, Tesla's Directors did nothing to deter Musk's repeated violations. Their misconduct breached their contractual and fiduciary duties to Tesla.

1. The Code required Defendants to ensure that Tesla took appropriate deterrent actions in the event that Musk violated the Code.

251. The following mandatory procedures of the Code apply to Defendants:

The Board of Directors *shall* determine, or designate appropriate persons to determine, appropriate actions to be taken in the event of violations of the Code of Business Ethics or of these additional procedures *by the CEO* and Tesla's senior financial officers. Such actions *shall* be reasonably designed to deter wrongdoing and to promote accountability for adherence to the Code of Business Ethics and to these additional procedures, and *shall* include written notices to the individual involved that the Board has determined that there has been a violation, censure by the Board, demotion or re-assignment of the individual involved, suspension with or without pay or benefits (as determined by the Board) and termination of the individual's employment. In determining which action is appropriate in a particular case, the Board of Directors or such designee shall take into account all relevant information, including the nature and severity of the violation, whether the violation was a single occurrence or repeated occurrences, whether the violation appears to have been intentional or inadvertent, whether the individual in question had been advised prior to the violation as to the proper course of action and whether or not the individual in question had committed other violations in the past.²⁷⁵

252. The Code's use of the mandatory "shall" unambiguously confirms that Defendants cannot disregard known violations of the Code's conflicts rules by

²⁷⁵ Ex. 1 at 16.

Musk.²⁷⁶ Instead, the Board must take good faith steps to respond to a violation with a reasonably designed deterrent.

2. Defendants knew (or, in the alternative, ignored red flags) about Musk’s violations of the Code.

253. As set forth herein, Musk has repeatedly violated the Code since 2022. Tesla’s directors knew about these violations, but nonetheless failed to implement the express requirements of the Code in good faith by sanctioning Musk’s violations. In the alternative, the Board of Directors consciously disregarded red flags concerning Musk’s violations of the Code, in violation of their duty to oversee the Company’s compliance with the Code.

a. Defendants knew about Musk’s acquisition of Twitter and his position as Twitter’s CEO.

254. Tesla’s SEC filings, in addition to widespread press coverage, demonstrate that Defendants knew about Musk’s acquisition of Twitter and his role as Twitter’s CEO.

a. Defendants Musk, Kimbal Musk, Denholm, Murdoch, Ehrenpreis, Gebbia, Mizuno, and Wilson-Thompson were aware of Musk’s employment as Twitter’s CEO because they all signed Tesla’s Form 10-K dated January 30, 2023, which states: “Mr. Musk also currently serves as

²⁷⁶ The Code’s statement about Defendants’ discretion to “determin[e] *which* action is appropriate in a particular case” further confirms a lack of discretion to decide to take no action in response to known violation.

Chief Executive Officer and Chief Technical Officer of Space Exploration Technologies Corp., a developer and manufacturer of space launch vehicles, **Chief Executive Officer of Twitter, Inc.**, a social media company, and is involved in other emerging technology ventures.”²⁷⁷

b. Defendants Musk, Kimbal Musk, Denholm, Murdoch, Ehrenpreis, Gebbia, Straubel, and Wilson-Thompson were aware of Musk’s continued employment as Twitter’s Chairman and Chief Technical Officer because they all signed Tesla’s Form 10-K dated January 26, 2024, which states: “Mr. Musk also currently serves as Chief Executive Officer and Chief Technical Officer of Space Exploration Technologies Corp., a developer and manufacturer of space launch vehicles, **Chairman and Chief Technical Officer of X Corp.** [(f/k/a/ Twitter)], a social media company, and is involved in other emerging technology ventures.”²⁷⁸

255. Murdoch consciously disregarded the conflicts of interest created by Musk’s investment in Twitter, in violation of the Code. On April 26, 2022, the day after Twitter announced that it had accepted Musk’s offer, he texted Musk, “Thank

²⁷⁷ Tesla, Inc., Form 10-K (Jan. 30, 2023), at 20, <https://www.sec.gov/ix?doc=/Archives/edgar/data/0001318605/000095017023001409/tsla-20221231.htm>.

²⁷⁸ Tesla, Inc., Form 10-K (Jan. 26, 2024), at 21 <https://www.sec.gov/ix?doc=/Archives/edgar/data/1318605/000162828024002390/tsla-20231231.htm>.

you. I will link you up. Also will call when some of the dust settles. Hope all is ok.”²⁷⁹ Given the timing of this message and Musk’s production of the message as a responsive document in Twitter’s 2022 lawsuit that sought to compel Musk to close the merger, Murdoch was clearly thanking Musk for entering into a merger agreement with Twitter. Later that day, Murdoch’s wife texted Musk and Murdoch together to ask if Musk would bring former Twitter CEO Jack Dorsey back to Twitter.²⁸⁰ This exchange confirms Murdoch was contemporaneously aware of Musk’s takeover of Twitter.

256. Kimbal Musk consciously disregarded the conflicts of interest created by Musk’s investment in Twitter, in violation of the Code. On April 24, 2022, a day before Musk executed the merger agreement with Twitter, Musk asked Kimbal, “Do you want to participate in the twitter transaction?” Kimbal responded, “Let’s discuss tomorrow.”²⁸¹

257. Ehrenpreis consciously disregarded red flags about the conflicts of interest created by Musk’s acquisition of Twitter, in violation of the Code. On April 6, 2022, shortly after Musk disclosed his purchase of 9% of Twitter’s stock and Twitter announced its invitation for Musk to join its board, Ehrenpreis texted Musk,

²⁷⁹ Musk’s Private Texts, at 30.

²⁸⁰ *Id.*

²⁸¹ *Id.* at 26.

“If you plan on joining the Nom/Gov or Comp Committees, lmk [let me know] and I can give you some tips! Haha!” Musk responded, “Haha, I didn’t even want to join the Twitter board! They pushed really hard to have me join.”²⁸² This exchange demonstrates that Ehrenpreis was actively monitoring Musk’s investment in Twitter.

258. Ellison consciously disregarded the conflicts of interest created by Musk’s acquisition of Twitter, in violation of the Code. On April 20, 2022, Musk texted Ellison to see if he had any “interest in participating in the Twitter deal?” Ellison indicated that he did and said he would invest “a billion...or whatever you recommend.”²⁸³ At no point in publicly available communications did Ellison raise the Code or the conflict of interest. Instead, he invested in the Twitter deal himself.

b. Defendants were aware that Tesla entered into related party transactions with Twitter.

259. Defendants Musk, Kimbal Musk, Denholm, Murdoch, Ehrenpreis, Gebbia, Mizuno, and Wilson-Thompson were aware of new business dealings between Twitter and Tesla after Musk took over Twitter. They each signed the Tesla Form 10-K dated January 30, 2023 (about three months after the takeover closed), which states: “Tesla periodically does business with certain entities with which its

²⁸² *Id.* at 14.

²⁸³ *Id.* at 22-23.

CEO and directors are affiliated, such as SpaceX and Twitter, Inc., in accordance with our Related Person Transactions Policy.”²⁸⁴

260. Defendants Musk, Kimbal Musk, Denholm, Murdoch, Ehrenpreis, Gebbia, Straubel, and Wilson-Thompson were aware that new business dealings between Twitter and Musk which began after Musk took over Twitter were ongoing. They each signed the Tesla Form 10-K dated January 26, 2024, which states: “Tesla periodically does business with certain entities with which its CEO and directors are affiliated, such as SpaceX and X Corp., in accordance with our Related Person Transactions Policy.”²⁸⁵

261. There is additional evidence that Mizuno, Murdoch, and Denholm knew about Twitter’s business dealings with Tesla. These Defendants were members of Tesla’s Audit Committee in the fall of 2022. Murdoch testified that the Audit Committee discussed the transaction that led to Tesla engineers performing work for Twitter during that time and that the Committee was “monitoring” the issue.²⁸⁶

262. Murdoch’s testimony also supports the conclusion that Gebbia knew about Twitter’s use of Tesla’s employees after he joined Tesla’s Audit Committee.

²⁸⁴ Tesla, Inc., Form 10-K (Jan. 30, 2023), at 88, <https://www.sec.gov/ix?doc=/Archives/edgar/data/0001318605/000095017023001409/tsla-20221231.htm>.

²⁸⁵ Tesla, Inc., Form 10-K (Jan. 26, 2024), at 91, <https://www.sec.gov/ix?doc=/Archives/edgar/data/1318605/000162828024002390/tsla-20231231.htm>.

²⁸⁶ Trial Tr. Vol. III, 842-43, 869-71, *Tornetta v. Musk*.

c. Defendants knew Musk’s acquisition of Twitter was harming Tesla’s brand.

263. According to Isaacson, who often accompanied Musk in 2022, Tesla’s then Board of Directors acknowledged the reputational harm Musk was causing to Tesla. Specifically, during a December 14, 2022 meeting of Tesla’s Board, the Directors “told Musk that the Twitter controversies were hurting Tesla’s brand. . . . [B]oth Kimbal [Musk] and Robyn Denholm kept pressing him, saying his behavior was a factor.” The author quotes Kimbal Musk as stating: “The giant elephant in the room was that [Elon] was acting like a fucking idiot.”²⁸⁷

264. On December 14, 2022, Tesla’s directors included Defendants Musk, Kimbal Musk, Denholm, Gebbia, Ehrenpreis, Murdoch, Mizuno, and Wilson-Thompson. Upon information and belief and based on Isaacson’s biography of Musk, each of these Defendants knew and took the position that Musk’s acquisition and management of Twitter was negatively impacting Tesla from the discussion at the December 14, 2022 meeting.

d. Defendants knew and ignored red flags about the ethical and fiduciary violations implicated by Musk’s behavior.

265. On December 18, 2022, Senator Elizabeth Warren sent Tesla a letter stating in relevant part:

State and federal laws impose on the officers and directors of every company fiduciary duties to the company, its workers and its shareholders, and a requirement that they provide

²⁸⁷ Walter Isaacson, ELON MUSK, at 580 (2023).

disclosures about conflicts of interest and other actions by their executives that may impact these stakeholders. One key element of those duties is that every Board of Directors of a company with multiple shareholders – especially publicly traded companies – is responsible for ensuring that a controlling shareholder (especially one who is also a Chief Executive Officer, or CEO) does not treat the company as a private plaything.

I am writing regarding concerns that Tesla’s Board of Directors has failed to meet this legal duty with regard to the actions of Tesla’s Chief Executive Officer, Elon Musk, in the aftermath of his purchase of Twitter. I have a series of questions about how the Tesla Board is dealing with conflicts of interest, misappropriation of corporate assets, and other actions by Mr. Musk that appear not to be in the best interests of Tesla and its shareholders, so that I can assess whether current law is adequate in circumstances such as these.

In April 2022, Tesla’s CEO, Mr. Musk, announced his intention to purchase Twitter; he completed the deal in October and also became Twitter’s CEO. . . .

The basic structure of Mr. Musk’s deal to buy Twitter, and his actions since becoming CEO, raise a number of concerns. . . .

The first weeks of Mr. Musk’s Twitter ownership have raised questions about possible violations of securities or other laws, including whether Mr. Musk is funneling Tesla resources into Twitter, a potentially “improper diversion of resources that might impact Tesla’s sales and earnings” and could result in “delays in programs at Tesla.” According to press reports, in late October, Mr. Musk “pulled more than 50 of his trusted Tesla employees, mostly software engineers from the Autopilot team, into his Twitter takeover,” including key staff such as Tesla’s Chief Information Officer, Director of Software Development, Director of Software Engineering, Autopilot Project Manager, Senior Manager of DevOps and a senior manager of security intelligence. Reports noted that “[i]t is not immediately clear how Tesla employees are expected to split their schedules between the automaker and

Twitter” or whether and how they will be reimbursed for those efforts.

Although Mr. Musk reportedly indicated in court testimony that Tesla employees’ work for Twitter was “just a voluntary thing,” one anonymous employee indicated that “most would also feel it was impossible to turn down a direct request from Musk without later facing poor performance reviews or other consequences.”

This use of Tesla employees raises obvious questions about whether Mr. Musk is appropriating resources from a publicly traded firm, Tesla, to benefit his own private company, Twitter. . . .

Mr. Musk’s acquisition created unavoidable conflicts of interest. For example, Twitter relies on advertising revenue from automobile companies that are in direct competition with Tesla, including Audi, Chevrolet, Ford, GM, Jeep, and Volkswagen. As the owner of Twitter, Mr. Musk may decide to run the company to maximize badly-needed revenue, even if that includes great deals for Tesla’s competitors and potential injury to Tesla. . . .

Twitter’s desperation for revenue to cover its new debts could also create conflicts. When Tesla negotiates with Twitter for advertising space, Mr. Musk could decide that he is personally better served if Tesla overpays Twitter for advertising or pays up front to give Twitter access to much needed cash. . . .

Conflicts of interest emerge in other ways as well. For example, under Mr. Musk’s leadership, Twitter has welcomed hate speech and sharply increased use of racist language, while advancing a broader platform for Nazis, virulent sexism, and climate misinformation. That association between Tesla’s CEO and the actions of Twitter could have an impact on the Tesla brand and its ability to market its vehicles to its target audience. Mr. Musk and Tesla are inextricably intertwined, and while this close relationship has benefited the company in

the past, recent developments may have brought a series of negatives to the forefront.²⁸⁸

266. Upon information and belief, Denholm would have shared this letter with her fellow board members, given its importance. At the time, those board members included Defendants Musk, Kimbal Musk, Gebbia, Mizuno, Ehrenpreis, Murdoch, and Wilson-Thompson.

267. Senator Warren's December 2022 letter clearly notified all Defendants that Musk's conduct potentially violated the Code and his fiduciary duties.

e. Defendants were aware that Musk was steering artificial intelligence opportunities to X.AI rather than Tesla.

268. Defendants are each aware that Musk has founded, developed, and funded X.AI as an artificial intelligence venture rather than bringing those opportunities to Tesla.

269. Musk has tweeted about his X.AI venture and several Defendants follow Musk's twitter account as well as the X.AI twitter account.²⁸⁹ *See supra* §III.Q.5.

²⁸⁸ Ltr. from Senator Warren to Denholm (Dec. 18, 2022), <https://www.warren.senate.gov/imo/media/doc/2022.12.18%20Letter%20to%20Tesla%20Board%20on%20Musk%20Concerns.pdf> (footnotes and citations omitted).

²⁸⁹ Ehrenpreis follows X.AI on Twitter. Ira Ehrenpreis (@IraEhrenpreis), TWITTER, <https://x.com/IraEhrenpreis/following>. Denholm and Ellison follow Musk on Twitter. Robyn Denholm, (@robyndenholm), TWITTER, <https://x.com/robyndenholm/following>; Larry Ellison (@larryellison), TWITTER, <https://x.com/larryellison/following>.

270. Further, Tesla’s 2024 Proxy Statement notes that Musk is the CEO of X.AI in its biography section on Musk.²⁹⁰

271. Musk’s activities with X.AI have been widely reported as well meaning that Defendants were aware of these major actions taken by Musk. *See supra* §III.Q.5.

3. Defendants failed to respond to the red flags detailed above and breached their duty to ensure that Tesla took appropriate deterrent actions in response to Musk’s violations of the Code.

272. Defendants have not taken any concrete action in response to the red flags related to Musk investing in and taking over Twitter. Further, Defendants failed to adhere to the Code’s requirement to take actions to “deter wrongdoing” by Musk. The serial and ongoing nature of Musk’s violations of the Code demonstrates this failure, including his continued ownership of his investments in Twitter and X.AI, his continued employment as the principal officer of both companies, and his repeated poaching of Tesla employees.

273. Nor have Defendants issued any waiver under the Code of Ethics that would excuse Musk’s serial violations. If they had done so, Tesla would have filed a Form 8-K disclosing the waiver. *See supra* §III.G.4.

²⁹⁰ Tesla, Inc., Proxy Statement (2024), 9, https://ir.tesla.com/_flysystem/s3/sec/000110465924048040/tm2326076d13_pre14a-gen.pdf.

4. Defendants’ conscious disregard of red flags and the Code has caused Tesla harm.

274. The Directors’ failure to fulfil their contractual and fiduciary duties to Tesla by enforcing the Code against Musk has caused Tesla harm. Specifically, they could have taken any action to attempt to prevent Musk from creating new conflicts of interest for Tesla and causing the harms to Tesla described in Sections III.H – III.J, III.N, and III.P – III.R above.

T. Murdoch, Denholm, and Wilson-Thompson did not oversee Tesla’s and Musk’s compliance with the SEC consent decree in good faith.

275. After Elon Musk tweeted in August 2018 that he had secured funding to take Tesla private for \$420/share, the SEC sued him and Tesla.²⁹¹ Later that year, Tesla, Musk, and the SEC entered into a Consent Decree requiring Tesla’s Board to oversee Musk’s compliance with a preapproval process for any tweets regarding his disposition of Tesla stock, among other topics (the “Consent Decree”).²⁹² The Consent Decree fined Musk and Tesla \$20 million each and required that: (1) Musk step down as Tesla’s Chairman of the Board; (2) Tesla appoint two new independent directors to its board; (3) Tesla employ securities counsel who would preapprove each of Musk’s tweets with material information about Tesla, and (4) Musk submit

²⁹¹ Press Release, U.S. Securities and Exchange Commission, Elon Musk Settled SEC Fraud Charges; Tesla Charged With and Resolves Securities Law Charge (Sept. 29, 2018), <https://www.sec.gov/news/press-release/2018-226>.

²⁹² *Id.*

to the mandatory preapproval process for material tweets about Tesla. The original Consent Decree is attached hereto as Exhibit 2.

276. Defendants violated their duty of loyalty by failing to enact an information reporting system regarding this preapproval process in good faith. Defendants further violated their duty of loyalty by not responding in good faith to red flags that Musk was willfully disregarding his obligations to Tesla and under the Consent Decree. As a result of these failures, Musk was able to reap unlawful profits from sales of Tesla stock after making misleading tweets about his intentions to sell Tesla stock on November 6, 2021; November 7, 2021; April 28, 2022; and August 9, 2022.

1. Musk routinely failed to comply with the Consent Decree and Tesla’s Senior Executives Communications Policy.

277. In 2019, after Musk violated the Consent Decree by failing to seek preapproval for an inaccurate tweet he published regarding Tesla’s production of a vehicle, the SEC and Musk agreed to, and the U.S. District Court in the Southern District of New York entered, an amendment to the Consent Decree that specifically established the topics on which he needed to obtain preapproval.²⁹³ In relevant part, Musk agreed to obtain preapproval of “any written communication that contains

²⁹³ United States Securities and Exchange Commission’s Mot. and Mem. of Law in Support of an Order to Show Cause, *SEC v. Musk*, No. 18-cv-8865 (S.D.N.Y. Feb. 25, 2019), ECF No. 18.

information regarding . . . events regarding the Company’s securities (*including Musk’s acquisition or disposition of the Company’s securities*). . . .”²⁹⁴ This language unambiguously required Tesla to ensure Musk obtained preapproval from Tesla’s securities counsel for any tweet by Musk about his plans to sell (or not to sell) Tesla stock. The amendment is attached hereto as Exhibit 3.

278. Pursuant to the Consent Decree, the Board created a “Disclosure Controls Committee.” During the relevant period, this Committee consisted of Defendants Denholm, Murdoch, and Wilson-Thompson. The Disclosure Controls Committee’s Charter states that it “shall make regular reports to the full Board on the actions and recommendations of the Committee.”²⁹⁵

279. Pursuant to the Consent Decree, Tesla adopted a written “Senior Executives Communications Policy,” a publicly available version of which from 2018 is attached hereto as Exhibit 4.²⁹⁶ The Policy established the process Musk had to follow when making public statements about, among other things, the disposition of his Tesla stock. In relevant part, the Policy stated:

For any Written Communication which requires pre-approval pursuant to this Policy, the Authorized Executive will send a

²⁹⁴ Consent of Def. Elon Musk at 1-2, *SEC v. Musk*, No. 18-cv-8865 (S.D.N.Y. Apr. 26, 2019), ECF No. 46-1.

²⁹⁵ Disclosure Control Committee Charter, adopted Dec. 11, 2018, <https://digitalassets.tesla.com/tesla-contents/image/upload/Disclosure-Controls-Committee-Charter>.

²⁹⁶ Tesla, Inc. Senior Executives Communications Policy, *SEC v. Musk*, No. 18-cv-8865 (S.D.N.Y. Feb. 25, 2019), ECF No. 18-1.

draft to Tesla's General Counsel and Disclosure Counsel (or in the event of the General Counsel's unavailability, Tesla's Chief Financial Officer and Disclosure Counsel) for review and pre-approval. The draft Written Communication will be reviewed for (i) content (i.e., accuracy and suitability of subject matter for the intended form of communication), (ii) word choice and (iii) timing. The reviewers may consult with any other appropriate Tesla personnel, including the members of the Committee, or third parties, such as outside legal counsel, as necessary.

Reviewers of draft Written Communications will be given sufficient time to permit them to reasonably undertake the process required by this Policy. . . .

The Committee and Tesla's General Counsel and Disclosure Counsel will periodically review past Written Communications, provide guidance to the applicable Authorized Executive, and provide regular reports to the Committee. . . .

The Committee shall provide oversight over this Policy, and recommend to Tesla's Board of Directors any action to be taken in the event of any non-compliance with this Policy.²⁹⁷

280. Musk routinely disregarded the requirement that he receive preapproval from Tesla's securities counsel before sending tweets covered by the Consent Decree. Even when Musk sometimes sent draft tweets to Tesla's counsel for review (which he did not do for the at-issue tweets preceding his unlawful Tesla stock sales, as explained in the subsections below), his practice was not to wait to receive any preapproval. Instead, he testified:

²⁹⁷ *Id.* at 2.

Question: Is it the process that [Tesla's attorney] clears these [tweets]? He says, Mr. Musk, it's okay for you to go ahead and do this, or what happens after you submit the tweet?

Answer: I'll wait for some period of time and see if there's any response. And if not, I post the tweet.²⁹⁸

281. This practice violates the Consent Decree and Tesla's Senior Executives Communications Policy. As Denholm admitted, the Consent Decree requires preapproval:

Q. And it's correct, isn't it, that under the agreement with the SEC, there's certain types of tweets that need to be proactively reviewed and approved by an internal disclosure lawyer at the company. Correct?

A. Yes. For certain matters, yes.²⁹⁹

282. Musk has also given sworn testimony that confirms his incorrect understanding of the requirements of the Consent Decree.

Question: The process that you've described for reviewing tweets, would you -- would you describe, to the best of your ability, what you understand the internal process to be under this consent order?

Answer: If there is something that I think would have a material effect on the stock price or, you know, essentially something that has, you know, a major effect on earnings or revenue forecasts or things like that, that is -- that would fall under the most likely to review situation.³⁰⁰

²⁹⁸ Trial Tr. Vol. II, 384, *Tornetta v. Musk*. (excerpt of deposition testimony).

²⁹⁹ *Id.* at 381-82.

³⁰⁰ Trial Tr. Vol. II, 383, *Tornetta v. Musk*.

This testimony was incorrect because the 2019 amendments to the Consent Decree removed any materiality requirement from the determination of whether a tweet required preapproval and instead provided that any tweets about particular topics relating to Tesla required preapproval.³⁰¹

283. As detailed below, publicly available evidence supports the conclusion that, for each of the tweets where Musk made misleading statements about his intentions to sell Tesla stock, Musk did not comply with Tesla’s Senior Executives Communications Policy.

- a. **Musk did not comply with Tesla’s Senior Executives Communications Policy before he made misleading statements about the disposition of his Tesla stock on November 6, 2021.**

284. Musk made two misleading tweets on November 6, 2021 that were covered by the Consent Decree because they concerned his disposition of Tesla stock. The first one stated: “Much is made lately of unrealized gains being a means of tax avoidance, so I propose selling 10% of my Tesla stock. Do you support this.” The second one stated: “I will abide by the results of this poll, whichever way it

³⁰¹ Compare Ex. 2 (Final Judgment as to Musk, at ECF 14, §IV(b)) (requiring “pre-approval of any such written communications that contain, or reasonably could contain, information material to the Company or its shareholders”) with Ex. 3 (Amended Final Judgment as to Musk at ECF 47) (amending prior Final Judgment to require “pre-approval of an experienced securities lawyer employed by the Company (‘Securities Counsel’) of any written communication that contains information regarding any of the following topics”).

goes.” Musk posted these two tweets at 12:17 pm and 12:23 pm PT, respectively. These tweets were misleading for the reasons explained in Section III.E above.

285. Musk did not comply with Tesla’s Senior Executive Communications Policy before making these tweets because he did not “send a draft to Tesla’s General Counsel or Disclosure Counsel,” as required by the Policy.³⁰² Instead, he merely spoke on the phone with Tesla attorneys on November 1, 2021 with Tesla counsel, without sending a written draft. Musk admitted as much when testifying at trial before the Court of Chancery in November 2022:

Q. . . . And in November of ’21, you issued a tweet taking a poll on whether your followers supported your proposal to sell 10 percent of your Tesla stock; right?

A. Yes.

Q. And did you submit that tweet to anyone before making it?

A. I discussed that with Tesla counsel before making that -- putting that poll into place.³⁰³

286. Consistent with Musk’s response that he merely “discussed” his November 6, 2021 poll without submitting a draft of it, Tesla produced a privilege log in response to the SEC subpoena requests for “[a]ll Documents and Communications Concerning’ the 12:17 and 12:23 tweets” and “Documents related in any way to submission of the 12:17 tweet and/or the 12:23 tweet to Tesla’s

³⁰² *Id.*

³⁰³ Trial Tr. Vol. III, 621, *Tornetta v. Musk*.

General Counsel or Securities Counsel, or any counsel acting in either capacity, for preapproval or review before they were published.”³⁰⁴ Tesla argued this privilege log alone “address[ed]” the SEC’s requests relating to the November 6, 2021 tweets.³⁰⁵ The entire privilege log is reproduced below:³⁰⁶

Date	Type of Communication	Parties	Privilege Basis	Privilege Description
November 1, 2021, at approximately 7:01 a.m.	Phone conversation	Elon Musk, CEO, and David Searle, Tesla Deputy General Counsel and Acting Head of Legal	ACC	Conversation regarding Mr. Musk’s public preannouncement of his intent to sell Tesla stock.
November 1, 2021, at approximately 8:31 a.m.	Phone conversation	David Searle and Zach Kirkhorn, CFO	ACC	Conversation regarding Mr. Musk’s public preannouncement of his intent to sell Tesla stock.
November 1, 2021, at approximately 9:05 a.m.	Phone conversation	David Searle and Cassie Zhang, Managing	ACC	Conversation regarding Mr. Musk’s public preannouncement

³⁰⁴ Def. Elon Musk’s Mem. of Law in Support of His Mot. to Quash & to Terminate Consent Decree at 3-4, *SEC v. Musk*, No. 18-cv-8865 (S.D.N.Y. Mar. 8, 2022), ECF No. 71.

³⁰⁵ *Id.*

³⁰⁶ Privilege Log, *SEC v. Musk*, No. 18-cv-8865 (S.D.N.Y. Mar. 8, 2022), ECF No. 71-3.

		Counsel, Securities		of his intent to sell Tesla stock.
--	--	------------------------	--	---------------------------------------

287. There are no documents on the privilege log; it lists only phone calls. This demonstrates that Musk never sent a draft of his November 6, 2021 tweets to Tesla’s counsel. Accordingly, he failed to comply with Tesla’s Senior Executives Communications Policy.

b. Musk did not comply with Tesla’s Senior Executives Communications Policy before he made misleading statements about the disposition of his Tesla stock on November 7, 2021.

288. On Sunday, November 7, 2021—a day after the conclusion of the November 6, 2021 poll—a Twitter user sent a public question to Musk: “Did your poll go the way you wanted it to?”³⁰⁷ Musk responded three minutes later with his own public tweet: “I was prepared to accept either outcome.”³⁰⁸ This tweet concerned Musk’s disposition of Tesla stock because it addressed his reasons for disposing of the stock. As explained above, by linking his disposition of stock to the November 6, 2021 poll, Musk misled the market as to his true reasons for selling Tesla stock and his need to sell more stock to finance his investment in and ultimate takeover of Twitter. *See supra* §§III.E.1, III.E.2.

³⁰⁷ Emmett (@EMTSLA), TWITTER (Nov. 7, 2021), <https://x.com/EMTSLA/status/1457428626543046656>.

³⁰⁸ Elon Musk (@elonmusk), TWITTER (Nov. 7, 2021), <https://x.com/elonmusk/status/1457429209891155973>.

289. Given that Musk responded with his tweet within three minutes of receiving the question on a Sunday, it is apparent that Musk did not send a draft of this tweet about his disposition of Tesla stock to Tesla’s counsel for review and/or receive approval before sending the tweet. By not getting the requisite preapproval before sending the November 7, 2021 tweet, Musk breached Tesla’s Senior Executives Communications Policy.³⁰⁹

- c. **Musk did not comply with Tesla’s Senior Executives Communications Policy before he made misleading statements about the disposition of his Tesla stock on April 28, 2022.**

290. On April 28, 2022, at 6:23 p.m. PT, a Twitter user tweeted “Yup, @elonmusk has been selling archive.fast-edgar.com/20220428/ARZDT...”³¹⁰ The hyperlink to the SEC’s Edgar website redirected to Musk’s Form 4 Filings, which disclosed Musk’s aggressive sales of Tesla shares immediately after the execution of the Twitter merger agreement. By tagging the tweet “@elonmusk,” the tweet would have sent a notice to Musk’s account.

³⁰⁹ In the highly unlikely event Musk received the necessary preapproval within a three minute window on a Sunday, Musk still breached the Policy because he did not give “[r]eviewers of draft Written Communications . . . sufficient time to permit them to reasonably undertake the process,” as required by the Policy. It was not possible to confirm the accuracy of Musk’s statements within three minutes.

³¹⁰ Whole Mars Catalog (@WholeMarsCatalog), TWITTER (Apr. 28, 2022), <https://twitter.com/WholeMarsBlog/status/1519849720247513089>.

291. Two minutes later, on April 28, 2022, at 6:25 p.m. PT, Musk responded, “No further TSLA sales planned after today.”³¹¹ This tweet was misleading for the reasons explained in Section III.L.1 above.

292. Again, given that he responded to the user’s tweet in two minutes, it is apparent that Musk did not send a draft of this tweet about his disposition of Tesla stock to Tesla’s counsel for review and/or receive approval before sending the tweet. By not getting the requisite preapproval before sending the April 28, 2022 tweet, Musk breached Tesla’s Senior Executives Communications Policy.³¹²

d. Musk did not comply with Tesla’s Senior Executives Communications Policy before he made misleading statements about the disposition of his Tesla stock on August 9, 2022.

293. At 6:38 p.m. PT on August 9, 2022, a Twitter user sent a public question to Musk’s Twitter account: “@elonmusk are you done selling?” The post linked to SEC Form 4 Filings that showed Musk had sold Tesla shares for \$6.9 billion between August 5 and August 9, 2022.³¹³

³¹¹ Elon Musk (@elonmusk), TWITTER (Apr. 28, 2022), <https://twitter.com/elonmusk/status/1519850299757846530>.

³¹² In the highly unlikely event Musk received the necessary preapproval within a three-minute window, Musk still breached the Policy because he did not give “[r]eviewers of draft Written Communications . . . sufficient time to permit them to reasonably undertake the process,” as required by the Code. It was not possible to confirm the accuracy of Musk’s statements in less than three minutes.

³¹³ Sawyer Merritt (@SawyerMerritt), TWITTER (Aug. 9, 2022), <https://twitter.com/SawyerMerritt/status/1557179586198265856>.

294. Roughly an hour later, at 7:53 p.m. PT, Musk responded, “Yes. In the (hopefully unlikely) event that Twitter forces this deal to close *and* some equity partners don’t come through, it is important to avoid an emergency sale of Tesla stock.”³¹⁴ This tweet was misleading for reasons explained in Section III.O above.

295. Based on the speed of Musk’s response (Musk responded an hour and fifteen minutes after the question was posed) and the late hour at which Musk sent the tweet (especially on Central Time, where Tesla is headquartered), it is apparent that Musk did not send a draft of this tweet about his disposition of Tesla stock to Tesla’s counsel for review and/or receive approval before sending the tweet. By not getting the requisite preapproval before sending the August 9, 2022 tweet, Musk breached Tesla’s Senior Executives Communications Policy.³¹⁵

2. Defendants did not implement good faith controls and reporting for Musk’s compliance with the mandatory preapproval process.

296. The Board delegated authority to oversee compliance with the SEC Consent Decree to the Disclosure Controls Committee who, in turn, implemented

³¹⁴ Elon Musk (@elonmusk), TWITTER (Aug. 9, 2022), <https://twitter.com/elonmusk/status/1557198421206769664>.

³¹⁵ In the highly unlikely event Musk received the necessary preapproval within an hour after the close of business, Musk still breached the Policy because he did not give “[r]eviewers of draft Written Communications . . . sufficient time to permit them to reasonably undertake the process.” It was not possible to diligently confirm the accuracy of Musk’s statements in an hour and fifteen minutes, well after the close of normal business hours.

utterly deficient controls and reporting on Musk’s compliance with the Senior Executives Communications Policy and the Consent Decree.

297. As an initial matter, the Committee was unable to ensure Musk’s compliance with the Senior Executives Communications Policy and the Consent Decree, because it was insufficiently independent from Musk. *See infra* §§IV.B, IV.D, IV.H, IV.I.

298. Moreover, the preapproval process established by the Disclosure Controls Committee was also inherently flawed because it relied upon attorneys who reported to Musk for both preapproval and for reporting to the Disclosure Controls Committee about Musk’s compliance. For example, Tesla Deputy General Counsel David Searle—the attorney that Tesla purportedly relied upon for its “oversight” of the November 6, 2021 tweets—was one of Musk’s direct reports.³¹⁶ Because Searle directly reported to Musk and not the Disclosure Controls Committee, Searle was beholden to Musk.

299. In practice, Musk flouted the express requirements of the Senior Executives Communications Policy and the Consent Decree. As explained above, Musk routinely did not comply with Tesla’s Senior Executives Communications Policy. *See supra* §III.T.1. This failure stemmed from the utterly insufficient

³¹⁶ Laura Kolodny & Gabriel Cortes, *Elon Musk has more than 20 direct reports at Tesla — here are the ones we know about*, CNBC (Sept. 23, 2022), <https://www.cnbc.com/2022/09/23/elon-musk-direct-reports-at-tesla.html>.

“preapproval” process established by the Committee. During her trial testimony before the Court of Chancery in November 2022, Denholm described this process as follows:

Q. . . . Now, are you aware that Mr. Musk selects the tweets he thinks should be reviewed and then submits them to that internal disclosure lawyer?

A. Do you mean does he self-regulate under the policy?

Q. You bet. That’s exactly what I mean.

A. So he does self-regulate under the policy, yes.³¹⁷

Given this invitation by the directors to “self-regulate,” Musk believed he had the freedom to “decide a tweet might be one that is required to be reviewed under the settlement.”³¹⁸ But he did not have that freedom. Instead, if the tweet was regarding his disposition of Tesla stock or other topics listed in the amended Consent Decree, he had to submit a draft for preapproval and obtain preapproval before publishing the tweet. *See supra* §III.T.1.

300. The Committee’s reporting and audit function was so insufficient that Denholm claimed she was unaware that Musk routinely sends tweets that require

³¹⁷ Trial Tr. Vol. II, 382, *Tornetta v. Musk*.

³¹⁸ Trial Tr. Vol. III, 616, *Tornetta v. Musk*.

preapproval without first receiving a preapproval, even after being shown a video of his deposition testimony on that issue at trial in November 2022.³¹⁹

(A video clip [of Musk's deposition] was played as follows:)

Question: The process that you've described for reviewing tweets, would you -- would you describe, to the best of your ability, what you understand the internal process to be under this consent order?

Answer: If there is something that I think would have a material effect on the stock price or, you know, essentially something that has, you know, a major effect on earnings or revenue forecasts or things like that, that is -- that would fall under the most likely to review situation. . . .

Question: To your knowledge, has Mr. Berry had occasion to review tweets you've submitted -- let me ask it this way: Have you submitted tweets to Mr. Berry to review?

Answer: Yes.

. . .

Question: Has Mr. Berry made comments to you on those tweets as a result of his review of them?

Answer: Not that I can recall.

Question: Is it the process that he clears these? He says, Mr. Musk, it's okay for you to go ahead and do this, or what happens after you submit the tweet?

Answer: I'll wait for some period of time and see if there's any response. And if not, I post the tweet.

(End of video clip [and return to examination of Denholm].)

³¹⁹ *See id.* at 386 (“THE COURT: Were you aware that he waits for some unspecified period of time and then just sends it if he doesn't hear back? THE WITNESS: No, I was not aware of that.”).

BY ATTORNEY VARALLO:

Q. Ma'am, were you aware that that's the process that Mr. Musk used in, as you term it, "self-regulating" under the SEC consent decree?

A. So there are parts of that -- I do know that various GCs or SEC counsels, if you like, that has been appointed, reviews the tweet. I also know that there are discussions that happen even prior to a tweet being formulated that -- about a particular topic, to see if it is, you know, the subject of the -- of the agreement with the SEC. And so there are a few different processes that are followed.

Q. Ma'am, I appreciate your testimony, and perhaps when Mr. Chesler wants to ask you follow-up questions, you can give him additional content.

I asked you were you aware, yes or no. Can you answer that question, please.

A. Was I aware that Mr. Musk sent tweets that were reviewed by counsel? Is that what you're asking me?

Q. No, ma'am. I played you Mr. Musk's testimony explaining his view of how he proceeded under the disclosure settlement. Were you aware that that is the way he operates under that settlement?

A. I've not seen that -- that clip before.

Q. So you weren't aware that that's --

THE COURT: Let me interject here.

Ms. Denholm, this is a yes-or-no question.

THE WITNESS: But it's -- it's more nuanced than that. So I think it's -- it's yes, that I'm aware he sends tweets to the designated counsel to review. Yes, I am aware of that.

THE COURT: Were you aware that he waits for some unspecified period of time and then just sends it if he doesn't hear back?

THE WITNESS: No, I was not aware of that.³²⁰

301. Denholm's testimony confirms an utterly inadequate reporting system concerning Musk's noncompliance with the Consent Decree. The deposition testimony shown to Denholm at trial was, of course, available to Tesla well before the November 2022 trial and known to attorneys representing Tesla.³²¹ Any good faith reporting system would have ensured that members of the Disclosure Controls Committee were alerted to Musk's sworn deposition testimony that he was not following the requirement of obtaining preapproval of tweets covered by the Consent Decree when he gave that deposition testimony.

3. Defendants failed to respond in good faith to the numerous red flags evidencing Musk's failure to comply with the Consent Decree and Tesla's Senior Executive Communications Policy.

302. Defendants ignored numerous red flags that Musk was willfully disregarding the Consent Decree and Tesla's Senior Executives Communications Policy.

³²⁰ Trial Tr. Vol. II, 382 – 386, *Tornetta v. Musk*.

³²¹ Given the references in Musk's deposition testimony to Tesla attorney William Berry as Tesla's securities counsel, the date of the deposition testimony was likely between October 2020 and December 2021, the time frame of Berry's tenure at Tesla. *See* Bill Berry, LinkedIn Profile, <https://www.linkedin.com/in/bill-berry-1126ba4/>.

a. *First*, in February 2019, the SEC moved the United States District Court for the Southern District of New York for an Order to Show Cause. The motion argued Musk had violated the Consent Decree by not obtaining preapproval before sending a tweet about the production of Tesla vehicles. The directors must have learned of this motion in 2019, because the motion led to the 2019 amendments to the Consent Decree discussed above.

b. *Second*, as discussed above, in November 2021, the SEC served Musk and Tesla with subpoenas addressing, among other things, whether Musk obtained preapproval for his November 6, 2021 tweets.

c. *Third*, in response to the SEC's subpoena, in March 2022, Musk moved to quash the subpoena against him and to terminate the Consent Decree. In support of the motion, Musk submitted a declaration that asserted: "I was forced to sign the consent decree in 2018."³²²

d. *Fourth*, during an April 14, 2022 interview with Chris Anderson, Musk stated: "I was forced to concede to the SEC unlawfully. Those bastards."³²³

³²² Decl. of Elon Musk in Support of His Motion To Quash & To Terminate Consent Decree at ¶ 4, *SEC v. Musk*, No. 18-cv-08865 (S.D.N.Y. Mar. 8, 2022), ECF No. 72.

³²³ TED, Elon Musk talks Twitter, Tesla and how his brain works – live at TED2022 (Apr. 14, 2022), <https://www.youtube.com/watch?v=cdZZpaB2kDM>.

e. *Fifth*, Musk’s tweets, done without mandatory preapproval, were red flags evidencing his refusal to comply with the Senior Executives Communications Policy.

f. *Sixth*, Musk’s tweets about his rationale for selling Tesla shares were revealed to be false and Defendants nevertheless did not respond to this red flag evidencing Musk’s failure to comply with the Consent Decree.

303. Despite all these red flags and Musk’s repeated violations of the Consent Decree and Senior Executives Communications Policy, Denholm testified: “My view is that [Musk is] in compliance with the process that we’ve set up, and he does follow that process.”³²⁴

304. Based on Musk’s own statements, Defendants apparently did nothing to notify Musk that the Consent Decree and Senior Executives Communications Policy remained binding on Musk, even after his claims in spring 2022 that the Consent Decree was the product of duress. Defendants’ failure to take these good faith steps is evidenced by Musk’s testimony in November 2022 before the Court of Chancery: “The consent decree was made under duress An agreement made under duress is not valid as a foundation of law.”³²⁵

³²⁴ Trial Tr. Vol. II, 386-87, *Tornetta v. Musk*.

³²⁵ Trial Tr. Vol. III, 624, *Tornetta v. Musk*.

305. In *Tornetta v. Musk*, the Court of Chancery decided the Chair of the Disclosure Controls Committee, Denholm, displayed “a lack of understanding concerning how this committee worked,” including its basic responsibilities to oversee conflicts of interest.³²⁶ The Court also found: “Denholm’s approach to enforcement of the SEC Settlement, including unawareness of one of its key requirements, suggests a new lackadaisical approach to her oversight obligations.”³²⁷

4. The Disclosure Controls Committee’s conscious disregard for their oversight duties under the Consent Decree and for red flags of Musk’s violations of the Decree caused Tesla harm.

306. Tesla has been harmed by Defendants’ failure to implement controls or reporting for the Consent Decree in good faith or to respond at all to numerous red flags. Defendants’ breach of their fiduciary duties harmed the Company by forcing it to incur costs related to responding to additional SEC subpoenas and litigation with the SEC.

307. Defendants’ failure to implement controls or reporting for the Consent Decree in good faith also contributed to Musk’s unlawful profits from his own sales of Tesla stock.

³²⁶ *Tornetta* Opinion at 94.

³²⁷ *Id.* at 126, n.645. The Court used the word “new” to contrast Denholm’s current approach to an approach to corporate governance by Denholm at-issue in an earlier lawsuit concerning Tesla’s merger with SolarCity.

IV. DEMAND ON THE BOARD WOULD BE FUTILE

308. Plaintiff did not make a demand on the Board to institute this action against Defendants because, for the reasons detailed above and further set forth below, any such demand would be a futile and useless act.

309. The facts detailed in this Complaint demonstrate that all eight of Tesla's current Directors—Musk, Kimbal Musk, Murdoch, Ehrenpreis, Gebbia, Straubel, Denholm, and Wilson-Thompson—lack sufficient independence to consider Tesla's claims against Musk. Each is beholden to Musk based on his or her personal and financial ties with him and/or Musk's control over their excessive compensation. Moreover, the current Directors face a substantial risk of liability based on their own violations of fiduciary and contractual duties relating to Musk's false and misleading tweets and his violations of Tesla's Code as alleged herein.

A. Musk lacks independence because he received a material benefit from the challenged conduct and has significant exposure to liability.

310. Musk is conflicted as he is the primary wrongdoer and beneficiary of the alleged misconduct in this lawsuit.

311. Further, Musk's exposure to potentially billions of dollars in personal liability prevents him from independently assessing the proposed lawsuit.

B. Musk dominates Tesla's Board.

312. Musk's influence at Tesla and over the Tesla directors far exceeds that of a typical CEO or director. For years, he has been Tesla's largest shareholder and

the public face of the Company. *See supra* §III.A. His personal Twitter account is in many respects Tesla’s single most important outlet for reaching Tesla consumers and investors. And, as explained above, tweets from Musk’s personal account often cause large swings in Tesla’s stock price.³²⁸

313. Although Musk does not hold enough Tesla stock to single-handedly decide the outcome of a shareholder vote, he bluntly acknowledged his *de facto* control over Tesla’s other directors during a 2018 interview:

Interviewer: Did you handpick [Chair of Tesla’s Board of Director, Robyn Denholm]?

Elon Musk: Yes.

Interviewer: The impression was that she was put in to kind of watch over you.

Elon Musk: Yeah, I mean that’s not realistic. I mean I’m the largest--

Interviewer: Like a babysitter--

Elon Musk: Yeah. It-- it’s not realistic in the sense that I am the largest shareholder in the company. ***And I can just call for a shareholder vote and get anything done that I want.***³²⁹

³²⁸ See also Jauron Gunther Dam, *CEO’s tweets and firm stock returns: A case study of Elon Musk and Tesla* (2023),

<https://digitalcommons.georgiasouthern.edu/cgi/viewcontent.cgi?article=1950&context=honors-theses> (“When Elon Musk’s tweets are Tesla-related the abnormal returns increase, but more tweets per day reduce the absolute magnitude of returns.”).

³²⁹ Lesley Stahl, *Tesla CEO Elon Musk: The 60 Minutes Interview*, CBS NEWS (Dec. 9, 2018), <https://www.cbsnews.com/news/tesla-ceo-elon-musk-the-2018-60-minutes-interview/>.

314. A recent *The Wall Street Journal* article reveals similar evidence of Musk's outsized influence on Tesla's directors.

Denholm runs Tesla board meetings as informal, family-style occasions. ***Directors sometimes ask softball questions of Musk, such as future Tesla product colors, according to people familiar with the board.***

Musk, meanwhile, would sometimes arrive two hours late, or hours early, and then blame his staff for not getting him there at the appropriate time, according to one of the people. . . .

Similarly, ***Hironichi Mizuno***, a former chief investment officer of Japan's Government Pension Investment Fund, ***left the Tesla board in 2023 after three years in part because of the lack of ability he felt he had to work on improving the company's governance-related practices.*** At issue was the board's deference to Musk, who had different priorities for Tesla, according to people familiar with the board.

Mizuno found the board to operate more like a family company with fiefdoms, rather than a public company with stringent rules and regulations, even if it did usually perform well.³³⁰

315. The Court of Chancery's January 2024 post-trial opinion from *Tornetta v. Musk* concluded with respect to Tesla's then-relevant Board of Directors (a number of whom remain Directors today): "Musk wields considerable power in the boardroom by virtue of his high-status roles and managerial supremacy. Indeed, describing Musk's role at Tesla as 'high-status' would be a dramatic

³³⁰ Kirsten Grind, et al., *The Money and Drugs That Tie Elon Musk to Some Tesla Directors*, THE WALL ST. JOURNAL (Feb. 3, 2024), <https://www.wsj.com/tech/elon-musk-tesla-money-drugs-board-61af9ac4>.

understatement.”³³¹ The Court of Chancery explained that the “avalanche of evidence” that Tesla is highly dependent on Musk is “so overwhelming that it is burdensome to set it out in prose” and used three pages of bullet points to do so.³³²

316. The Court of Chancery found the following:

- “Tesla and Musk are intertwined, almost in a Mary Shelley (‘You are my creator . . .’) sort of way.”³³³
- “Tesla’s entire corporate strategy is Musk’s brainchild”³³⁴
- “Tesla is highly dependent on Musk, as it has made clear in public disclosures.”³³⁵
- “Musk has admitted that he has ‘the power to direct operational decisions at Tesla[.]’”³³⁶
- One former board member testified that Musk “could have sold the entire company if he wanted to.”³³⁷
- “All financial plans must be approved by Musk.”³³⁸
- “Musk makes the hiring, compensation, and firing decisions for high-level positions.”³³⁹

³³¹ *Tornetta* Opinion at 116.

³³² *Id.* at 117.

³³³ *Id.*

³³⁴ *Id.*

³³⁵ *Id.*

³³⁶ *Id.* (quoting Musk’s deposition).

³³⁷ *Id.* at 118 (citing Gracias’s testimony).

³³⁸ *Id.* at 118.

³³⁹ *Id.*

- “Musk operates under his own set of rules at Tesla. For example, due to his ‘special position of trust’ at Tesla, no one at Tesla could review his email account without permission except when legally required.”³⁴⁰
- “Musk has made up positions and titles for himself,” including “Technoking.” Ehrenpreis described this as “Elon being Elon” and Musk testified that the title was “intended as a joke” which the Court found to be a “problem in itself.”³⁴¹
- “Musk operates as if free of Board oversight, as shown by his treatment of the SEC Settlement. Musk’s ‘self-regulatory’ process for compliance and the Board’s desultory enforcement paint a vivid picture of their inability or unwillingness to rein in Musk. Even after the settlement, the Disclosure Committee did not review his tweets. At trial, Denholm was not sure whether the Disclosure Committee was fulfilling its obligations under the SEC Settlement.”³⁴²
- “Musk has ignored specific Board directives, such as unilaterally pausing Tesla’s acceptance of Bitcoin after the Board approved it.”³⁴³
- “Musk regularly uses Tesla resources to address projects at other companies he owns. For example, after Musk acquired Twitter, he asked approximately 50 Tesla engineers to ‘volunteer’ to help him evaluate Twitter’s engineering team. No one at the Board challenged this decision . . . Murdoch’s testimony [about the Audit Committee’s oversight] also showed that any monitoring by the Audit Committee, such as it was, took place after the fact.”³⁴⁴

³⁴⁰ *Id.*

³⁴¹ *Id.* at 118-19.

³⁴² *Id.* at 119.

³⁴³ *Id.*

³⁴⁴ *Id.* at 119-20.

C. Kimbal Musk lacks independence based on his exposure to liability, his familial relationship with Musk, and his excessive compensation.

317. Like Musk, Kimbal Musk received a material benefit from the challenged transactions in the form of the price inflation on his November 2021 Tesla stock sales. As a result, Kimbal is exposed to potentially millions of dollars in liability for those sales. He also is exposed to liability for the harms to Tesla caused by the directors' failures to enforce the Code of Business Ethics against Musk. Kimbal's exposure to liability presents a disqualifying conflict.

318. Kimbal also lacks independence because his brother is the primary wrongdoer and beneficiary of the alleged misconduct in the proposed lawsuit. Defendants did not contest this in the *Tornetta* trial.³⁴⁵

319. Kimbal also lacks independence based on his excessive compensation as a Tesla Director. The stock and stock options he received for his services are worth hundreds of millions of dollars.

D. James Murdoch lacks independence based on his personal views about the Twitter transaction, his personal ties to Elon and Kimbal Musk, his exposure to liability, and his excessive compensation.

320. Murdoch lacks independence because the record confirms that he personally supports Musk's acquisition of Twitter, apparently for political reasons. As explained above, the day after the announcement of the merger agreement, Murdoch reached out to Musk to personally thank him for the acquisition, even

³⁴⁵ *Id.* at 123, n.636.

though he had no financial stake in the deal. This evidence demonstrates his inability to independently assess the proposed lawsuit on behalf of Tesla.

321. Murdoch also lacks independence because he has close personal ties with Elon and Kimbal Musk, as evidenced by the following:

a. Murdoch originally met Musk in the late 1990s. They became friends in or around 2006, when Murdoch lived in Britain and purchased one of the first Tesla vehicles sold in Europe. Musk reached out to personally thank him.³⁴⁶ Between 2006 and 2017, Murdoch and Musk “would sometimes catch up over [their children’s] spring breaks or their school holidays and things like that.”³⁴⁷

b. Between 2016 and 2018, Murdoch and Musk, as well as their respective families, vacationed together in Israel and Mexico.³⁴⁸

c. In 2017, Murdoch, his wife, and his children visited Musk and his family in the Bahamas for a few days, where the group was joined by Kimbal Musk and an associate of the Musk brothers. Shortly after that trip, that associate approached Murdoch about joining the Board.³⁴⁹

³⁴⁶ Trial Tr. Vol. III, 817-18, *Tornetta v. Musk*.

³⁴⁷ *Id.* at 820-21.

³⁴⁸ *Id.* at 847-48.

³⁴⁹ *Id.* at 821-22.

d. Murdoch also attended Kimbal Musk's wedding in 2018 in Spain, and the men have had dinner together with their wives.³⁵⁰

e. Private texts that have been revealed through litigation show a friendly relationship between Musk and Murdoch. For example, in response to Musk's infamous "take private" Tweet, which prompted lawsuits by the SEC and Tesla investors against Tesla, Murdoch texted Musk, "Way to just light the torch paper!" Musk replied, "Everything's better with fire[.]"³⁵¹

f. Murdoch has invested tens of millions of dollars in SpaceX, one of Musk's privately held companies. Murdoch's private holding company, Lupa Systems, invested a total of approximately \$50 million in SpaceX over the course of 2019 and 2020, and Murdoch personally invested approximately \$20 million in SpaceX in 2019.³⁵²

g. In February 2023, Musk attended the Super Bowl with Murdoch's father and sister, Rupert and Elisabeth.³⁵³

³⁵⁰ *Id.* at 850-51.

³⁵¹ Defs.' Renewed Admin. Mot. To File Under Seal Documents in Support of the Parties' Mot. for Partial Summary Judgment Papers, *In re Tesla, Inc. Sec. Litig.*, No. 3:18-cv-04865-EMC (N.D. Cal. Apr. 22, 2022), ECF No. 403, <https://storage.courtlistener.com/recap/gov.uscourts.cand.330489/gov.uscourts.cand.330489.403.0.pdf>.

³⁵² Trial Tr. Vol. III, 849-50, *Tornetta v. Musk*.

³⁵³ William Earl, *Elon Musk Seen Sitting with Rupert Murdoch and Elisabeth Murdoch at Super Bowl*, VARIETY (Feb. 12, 2023), <https://variety.com/2023/biz/news/elon-musk-rupert-murdoch-super-bowl-elisabeth-1235520872/>.

h. In April 2024, Musk co-hosted a dinner that included Murdoch's father, Rupert Murdoch.³⁵⁴

322. In its post-trial opinion in *Tornetta v. Musk*, the Court of Chancery relied on some of these facts to hold it was “easy to conclude based on the nature of [Murdoch's] relationship[] with Musk that . . . Murdoch lacked independence from Musk.”³⁵⁵

323. Further, demand is futile with respect to Murdoch because he is exposed to liability under *Caremark*³⁵⁶ relating to his failure to oversee Musk's stock sales and misleading statements, as well as the claims arising from his failure to enforce the Code of Business Ethics with respect to Musk's Twitter acquisition or any of the related violations detailed above.

324. Murdoch also lacks independence based on his excessive compensation as a Tesla Director. The stock and stock options he received for his services are worth more than a hundred million dollars.

³⁵⁴ Emily Glazer, et al., *Inside Donald Trump and Elon Musk's Growing Alliance*, THE WALL STREET JOURNAL, May 29, 2024, <https://www.wsj.com/politics/donald-trump-elon-musk-alliance-d1fe43e3>.

³⁵⁵ *Tornetta* Opinion at 126-27.

³⁵⁶ *In re Caremark Inter'l Inc. Derivative Litig.*, 698 A.2d 959 (Del. Ch. 1996).

E. Ira Ehrenpreis lacks independence based on his personal and financial ties with Elon and Kimbal Musk, his exposure to liability, and his excessive compensation.

325. Like Murdoch, Ehrenpreis lacks independence because he has close personal and financial ties with Elon and Kimbal Musk, as demonstrated by the following evidence.

a. Ehrenpreis was an early investor in Tesla and began his tenure on its Board in 2007.³⁵⁷

b. Ehrenpreis testified that Musk had a significant influence on his professional life and that being a Tesla director had “been a real benefit in fundraising” for his venture capital firm, DBL Partners.³⁵⁸

c. Ehrenpreis was the first to put down a \$1,000 deposit on the Tesla Model 3 and therefore held the rights to the purchase the first vehicle, but subsequently gifted those rights to Musk.³⁵⁹

³⁵⁷ Trial Tr. Vol. I, 13-15, 66, 193-94, *Tornetta v. Musk*; Tesla, Inc., Form 10-K (2021), https://www.sec.gov/Archives/edgar/data/1318605/000156459021022604/tsla-10ka_20201231.htm.

³⁵⁸ *Tornetta* Opinion at 21; *see also* Trial Tr. Vol. I, 192, *Tornetta v. Musk*.

³⁵⁹ *Musk tweets pictures of first Model 3 to roll off the line*, REUTERS (July 10, 2017), <https://www.reuters.com/article/us-tesla-model-3-idUSKBN19V1YL/>; Trial Tr. Vol. I, 194-97, *Tornetta v. Musk*.

d. Musk considers Ehrenpreis a friend and the two have exchanged text messages and tweets with statements like “love you, man.”³⁶⁰

e. Ehrenpreis attended Kimbal Musk’s 2018 wedding and, during the *Tornetta* trial, Kimbal Musk described Ehrenpreis as a “casual friend.”³⁶¹

f. Antonio Gracias, a former Tesla director not named as a Defendant in this suit, testified that he, Ehrenpreis, and Elon Musk are in the same Silicon Valley social circles.³⁶²

g. As shown in the below chart, Ehrenpreis and/or DBL Partners has invested tens of millions of dollars in three of Musk’s privately held companies: SpaceX, The Boring Company, and Neuralink.³⁶³

Entity	Amount Invested	Date
SpaceX	\$45,000,000	2014 (at the latest) – 2021
The Boring Company	\$10,000,000	2016 – 2019
Neuralink	\$1,000,000	2016 – 2017

³⁶⁰ Matt McFarland, *Tesla’s close-knit leadership team goes under the spotlight in court*, CNN BUSINESS (Nov. 17, 2022), <https://www.cnn.com/2022/11/17/business/elon-musk-board-friends/index.html>; Trial Tr. Vol. I, 66, *Tornetta v. Musk*; Trial Tr. Vol. III, 682, *Tornetta v. Musk*.

³⁶¹ Trial Tr. Vol. I, 193, *Tornetta v. Musk*; Trial Tr. Vol. IV, 1078, *Tornetta v. Musk*.

³⁶² Trial Tr. Vol. III, 778-79, *Tornetta v. Musk*.

³⁶³ Yuliya Chernova, *Early Tesla Motors Investors Raise \$400 Million Impact VC Fund*, THE WALL ST. JOURNAL (June 23, 2015), <https://www.wsj.com/articles/BL-VCDB-17262>; Trial Tr. Vol. I, 192-93, *Tornetta v. Musk*; Plaintiff’s Post-Trial Brief at 21-23, *Tornetta v. Musk*, No. 2018-0408-KSJM (Del. Ch. Jan. 18, 2023), ECF 264.

h. Ehrenpreis also invested and served on the Board of Solar City, a company founded by Musk's cousins.³⁶⁴

i. When Tesla acquired Solar City in 2016, Ehrenpreis advised Musk on the buyout.³⁶⁵

j. Ehrenpreis has also personally invested in Kimbal Musk's company, the Kitchen Group.³⁶⁶

326. In its post-trial opinion in *Tornetta*, the Court of Chancery described Ehrenpreis' relationship with Musk as "weighty" and "[g]iven the critical role [Ehrenpreis] played as chair of the Compensation Committee...too weighty" to preserve independence.³⁶⁷

327. Further, demand is futile with respect to Ehrenpreis because he is exposed to liability under *Caremark* relating to his failure to enforce the Code of Business Ethics with respect to Musk's Twitter acquisition or any of the related violations detailed above.

³⁶⁴ Lora Kolodny, *Tesla and Musk hid facts about SolarCity deal and SpaceX involvement, shareholders claim in unsealed court docs*, CNBC (Sept. 23, 2019), <https://www.cnbc.com/2019/09/23/tesla-solarcity-claims-detailed-in-newly-unsealed-court-docs.html>.

³⁶⁵ Jef Feely & Scott Carpenter, *How Elon Musk Scored a \$55 Billion Pay Package That's Now Under Fire*, BLOOMBERG (Nov. 14, 2022), <https://www.bloomberg.com/news/articles/2022-11-14/how-musk-scored-a-55-billion-pay-package-that-s-now-under-fire?sref=BIWGmTdO>.

³⁶⁶ Trial Tr. Vol. I, 193, *Tornetta v. Musk*.

³⁶⁷ *Tornetta* Opinion at 125.

328. Ehrenpreis also lacks independence based on his excessive compensation as a Tesla Director. The stock and stock options he received for his services are worth more than a hundred million dollars.

F. JB Straubel lacks independence based on his personal and financial ties with Elon Musk and his exposure to liability.

329. Straubel lacks independence based on his personal and financial ties with Musk.

a. Straubel first met Musk in 2003, when Straubel was in his late twenties. At the time, Straubel was seeking funding for his work on lithium-ion batteries for automobiles. According to Isaacson, “no one was interested in funding [Straubel]. Until he met Elon Musk.” Musk provided Straubel with funding for his work.³⁶⁸

b. In 2004, Musk recruited Straubel as one of the five “founders” of Tesla.³⁶⁹

c. Straubel served as Tesla’s CTO from 2004 until 2019, after which he remained a “Senior Advisor” to the company.³⁷⁰ Media outlets regularly refer to Straubel as Musk’s “right-hand man.”

³⁶⁸ Walter Isaacson, ELON MUSK, at 125-26 (2023).

³⁶⁹ *Id.* at 130.

³⁷⁰ See Ashlee Vance, *Tesla loses a founder and some of its soul*, L.A. TIMES (July 26, 2019), https://enewspaper.latimes.com/infinity/article_share.aspx?guid=b8d726ca-ad22-4bb6-8bf0-cc7841b7c642; Kirsten Korosec, *Tesla shareholders elect former CTO, co-founder JB Straubel to board*, TECHCRUNCH (May 16, 2023), *Footnote continued on next page*

d. Straubel also served on the Board of SolarCity from August 2006 until Tesla acquired the Company in November 2016.³⁷¹ SolarCity was a solar panel company founded by Musk's cousins and Musk served on the Board of SolarCity.³⁷²

e. In 2017, before he left Tesla, Straubel founded Redwood Materials, a battery materials supplier and recycler.³⁷³ After Straubel left Tesla, Redwood began taking investments and, since that time, its major backers have included some of same early funders as Tesla and Musk's other

<https://techcrunch.com/2023/05/16/tesla-shareholders-elect-former-cto-co-founder-jb-straubel-to-board/>.

³⁷¹ Tesla, Inc., Proxy Statement (2024), 24, https://ir.tesla.com/_flysystem/s3/sec/000110465924048040/tm2326076d13_pre14a-gen.pdf.

³⁷² Isobel Asher Hamilton, *How Elon Musk transformed his cousins' solar panel company into Tesla Energy, which has faced lawsuits from angry shareholders and consumers*, BUSINESS INSIDER (Apr. 29, 2022), <https://www.businessinsider.com/solarcity-tesla-energy-beleaguered-history-elon-musk-2021-7>.

³⁷³ See Alejandro de la Garza, *JB Straubel Has a Fix for the Battery Problem*, TIME (May 19, 2022), <https://time.com/6176778/jb-straubel-battery-problem/>.

ventures, including Capricorn Investment Group, Valor Equity Partners, and Baillie Gifford.³⁷⁴ Straubel serves as Redwood's CEO.³⁷⁵

f. Redwood partners with Tesla, among other companies, to recycle batteries from electric vehicles.³⁷⁶ It is for this reason, among others, that Redwood's original facility was located very close to Tesla's Nevada battery factory, of which Straubel oversaw the creation.³⁷⁷ Given Tesla's large lead in the market share for electric vehicles in the U.S., Straubel's maintenance of a good relationship with Musk and Tesla is important for Redwood. According to Tesla's SEC filings, Tesla is party to an agreement with

³⁷⁴ Kirsten Korosec, *Redwood Materials raises \$700M to expand its battery recycling operation*, TECHCRUNCH (July 28, 2021), <https://techcrunch.com/2021/07/28/redwood-materials-raises-700m-to-expand-its-battery-recycling-operation/>; Mark Bergen, *Europe Needs a Climate Tech Plan to Compete With the US, an Early Tesla Investor Says*, FINANCIAL POST (Jan. 27, 2023), <https://financialpost.com/pmn/business-pmn/europe-needs-a-climate-tech-plan-to-compete-with-the-us-an-early-tesla-investor-says>; Becky Peterson, *Valor Equity Returns Show Limits of Musk Halo*, THE INFORMATION (Aug. 30, 2023), <https://www.theinformation.com/articles/valor-equity-returns-show-limits-of-musk-halo>; Sara Salinas, *Big Tesla backer doesn't oppose a Musk ouster: 'I don't think he needs to be CEO'*, CNBC (Mar. 5, 2019), <https://www.cnbc.com/2019/03/05/tesla-backer-says-musk-doesnt-need-to-be-ceo.html>.

³⁷⁵ *About*, Redwood Materials, <https://www.redwoodmaterials.com/about/>.

³⁷⁶ Andrew J. Hawkins, *Redwood Materials announces \$3.5 billion EV battery recycling plant in South Carolina*, THE VERGE (Dec. 14, 2022), <https://www.theverge.com/2022/12/14/23509031/redwood-materials-ev-battery-recycling-factory>.

³⁷⁷ See Simon Alvarez, *Tesla Giga Nevada to receive recycled battery materials from Redwood's closed-loop campus*, TESLARATI (Sept. 30, 2022), <https://www.teslarati.com/tesla-giga-nevada-recycled-battery-materials-from-redwood-no-waste-stream/>.

Redwood to supply certain scrap materials. Under the agreement, Redwood incurred expenses of \$0 in 2022 and approximately \$0.5 million in 2023 through February.³⁷⁸ The following year, Redwood incurred expenses of approximately \$11.5 million and approximately \$6 million through February 2024.³⁷⁹ Moreover, Redwood hired a longtime Tesla engineer in 2023 as its Chief Technology Officer.³⁸⁰ Redwood's business relationship with Tesla gives Musk continued influence over Straubel.

g. Straubel has reported that he left Tesla on good terms with Musk and that the two still talk often.³⁸¹

h. Musk has made similar comments since Straubel's departure. For example, he said in 2022 that he regrets not founding Tesla exclusively with Straubel.³⁸²

³⁷⁸ Tesla, Inc., Proxy Statement at 60 (2023), <https://www.sec.gov/Archives/edgar/data/1318605/000119312523094075/d451342ddef14a.htm>.

³⁷⁹ Tesla, Inc., Proxy Statement at 147 (2024), https://ir.tesla.com/_flysystem/s3/sec/000110465924048040/tm2326076d13_pre14a-gen.pdf.

³⁸⁰ Simon Alvarez, *Tesla exec joins battery recycling startup Redwood Materials*, TESLARATI (Aug. 23, 2023), <https://www.teslarati.com/tesla-exec-joins-battery-recycling-redwood-materials/>.

³⁸¹ See Alejandro de la Garza, *JB Straubel Has a Fix for the Battery Problem*, TIME (May 19, 2022), <https://time.com/6176778/jb-straubel-battery-problem/>.

³⁸² Fred Lambert, *Elon Musk says JB Straubel should have been Tesla's only other cofounder, dredging up the past*, ELECTREK (Apr. 14, 2022), <https://electrek.co/2022/04/14/elon-musk-starting-tesla-not-just-jb-straubel-worst-business-decision/>.

i. According to the Isaacson’s biography of Musk, which is apparently based in part on interviews with Musk and Straubel, “in the case of Straubel, Musk felt a personal affection as well as professional trust.” The book quotes Straubel as describing himself as one of Musk’s “friend[s].”³⁸³

j. In 2023, Musk personally invited Straubel to join Tesla’s Board.³⁸⁴

330. This evidence demonstrates that Straubel lacks sufficient independence to consider the potential lawsuit. When Straubel was nominated, several shareholder groups, including SOC Investment Group and Glass Lewis, opposed his nomination because he lacked independence. Indeed, SOC Investment Group specifically argued that Straubel was likely to improperly acquiesce to Musk based on their prior dealings.³⁸⁵

331. Further, demand is futile with respect to Straubel because he is exposed to liability under *Caremark* relating to his failure to enforce the Code of Business

³⁸³ Walter Isaacson, ELON MUSK, at 302 (2023).

³⁸⁴ *Id.* at 304.

³⁸⁵ Hyunjoo Jin, *Glass Lewis recommends Tesla investor vote against board nominee JB Straubel*, REUTERS (Apr. 27, 2023), <https://www.reuters.com/business/autos-transportation/glass-lewis-recommends-tesla-investor-vote-against-board-nominee-jb-straubel-2023-04-27/>; Letter from SOC Investment Group, et al. to Tesla Shareholders (Apr. 24, 2023), https://static1.squarespace.com/static/5d374de8aae9940001c8ed59/t/64467f2a779dcc104296e539/1682341674404/Group+2023+letter+to+Tesla+Shareholders_FINAL.pdf.

Ethics with respect to Musk’s usurpation of a business opportunity from Tesla by founding X.AI. These events occurred after Straubel joined the Board.

G. Joe Gebbia lacks independence based on his personal ties with Musk, and his exposure to liability.

332. Gebbia also has disabling personal ties with Musk.

a. Gebbia is reportedly a “friend” of Musk’s.³⁸⁶

b. In recent years, Gebbia has reportedly attended parties with Musk at the Austin Proper Hotel in Austin, Texas, where Musk was reportedly witnessed taking the illegal drug ketamine recreationally.³⁸⁷

c. Gebbia and Musk have playful dialogue together on social media and in their private communications.³⁸⁸ For example, after Musk tweeted that he had funding secured to take Tesla private in 2018, Gebbia texted Musk to call his statement a “baller move.” These familiar messages four years before Gebbia joined Tesla’s Board confirm a preexisting friendship.

d. According to Musk’s responses to interrogatories in *Twitter v. Musk*, Gebbia served as the liaison between Musk and First Republic Bank

³⁸⁶ Kirsten Grind, Emily Glazer, Rebecca Elliott & Coulter Jones, *The Money and Drugs That Tie Elon Musk to Some Tesla Directors*, THE WALL ST. JOURNAL (Feb. 3, 2024), <https://www.wsj.com/tech/elon-musk-tesla-money-drugs-board-61af9ac4>.

³⁸⁷ *Id.*

³⁸⁸ See Denny Jacob, *Tesla Adds Airbnb Co-Founder Joe Gebbia to Board of Directors*, THE WALL ST. JOURNAL (Sept. 28, 2022), <https://www.wsj.com/articles/tesla-adds-airbnb-co-founder-joe-gebbia-to-board-of-directors-11664400713> (“Mr. Gebbia and Tesla Chief Executive Elon Musk have had friendly exchanges in recent months on Twitter . . .”).

regarding Musk’s efforts to raise financing for his acquisition of Twitter.³⁸⁹

Although First Republic did not ultimately provide funding, Musk’s reliance on Gebbia further evidences a close relationship.

e. In March 2024, Gebbia stepped down from Tesla’s Compensation Committee citing his “personal relationship with Elon Musk, as well as a potential business transaction through Samara with him (which is currently on hold).”³⁹⁰ Samara—a company founded by Gebbia—makes and sells modular homes.³⁹¹ On June 3, 2024, *Reuters* reported that the “potential business transaction” referred to Musk and Gebbia discussing Musk “purchasing a home from his start-up.”³⁹²

333. Moreover, as explained above, Gebbia became a Director in September 2022, shortly before Musk acquired Twitter, became its CEO, and then serially

³⁸⁹ Defs.’ Fourth Supp. Responses & Objs. to Pltf.’s First Set of Interrogatories to Defs. at 43 (Musk’s Second Supp. Response to Twitter’s Interrogatory No. 2), attached as Ex. C in Redacted Version of Exhibits A-J to Letter to The Hon. Kathaleen St. Jude McCormick from Edward B. Micheletti, Esq., regarding Twitter, Inc.’s Motion for Sanctions against Defs. for discovery misconduct, *Twitter v. Musk*, No. 2022-0613-KSJM (Del. Ch. Sept. 29, 2022), ECF 1407.

³⁹⁰ Tesla, Inc., Proxy Statement (2024), at E-26, https://ir.tesla.com/_flysystem/s3/sec/000110465924048040/tm2326076d13_pre14a-gen.pdf.

³⁹¹ *Samara raises \$41 million to bring high quality ADUs to every backyard in California and beyond*, SAMARA.COM (Oct. 30, 2023), <https://www.samara.com/news/samara-raises-41-million-to-bring-high-quality-adus-to-every-backyard-in-california-and-beyond>.

³⁹² Rachael Levy, *Exclusive: Tesla director Gebbia says he discussed selling house to Musk*, REUTERS (June 3, 2024), <https://www.reuters.com/business/tesla-director-gebbia-says-he-discussed-selling-house-musk-2024-06-03/>.

violated Tesla's Code of Ethics through self-dealing arrangements between Tesla, Twitter, and X.AI. For these reasons, he is exposed to liability for claims relating to the directors' noncompliance with and bad faith oversight of Tesla's Code of Business Ethics.

H. Robyn Denholm lacks independence based on her financial dependence on Musk and her exposure to liability.

334. Denholm, chair of the Board, lacks independence because her compensation as a Tesla director is material to her, and Musk's influence over Tesla allowed him to affect that compensation. In its post-trial opinion in *Tornetta v. Musk*, the Court of Chancery found that between 2014, when Denholm assumed her role as a Board member, and 2017, Denholm's compensation from Tesla was valued at about \$17 million, an amount Denholm acknowledged was material to her.³⁹³ Denholm also received approximately \$280 million through sales in 2021 and 2022 of just some of the Tesla stock options earned from her service to Tesla, which she admitted was "life-changing."³⁹⁴ In 2024 alone, Denholm has received more than \$50 million from sales of the Tesla stock she received as compensation for her services as a Tesla director.³⁹⁵ This evidence supports a finding that Denholm was

³⁹³ *Tornetta* Opinion at 24.

³⁹⁴ *Id.* at 24-25.

³⁹⁵ Lora Kolodny, *Tesla Chairwoman Robyn Denholm has sold over \$50 million worth of stock in 2024*, CNBC (May 7, 2024), <https://www.cnbc.com/2024/05/07/tesla-chair-robyn-denholm-sold-over-50-million-in-stock-this-year.html>.

not sufficiently independent of Musk for the purposes of assessing this lawsuit. In *Tornetta v. Musk*, the Court of Chancery found Denholm’s compensation package a compromising factor making her insufficiently independent, particularly when her lack of knowledge about the requirements of the SEC Consent Decree suggested a “lackadaisical approach to her oversight obligations.”³⁹⁶

335. Further, demand is futile with respect to Denholm because she is exposed to liability under *Caremark* relating to her failure to oversee Musk’s stock sales and misleading statements, as well as the claims arising from her failure to enforce the Code of Business Ethics with respect to Musk’s Twitter acquisition or any of the related violations detailed above.

I. Kathleen Wilson-Thompson lacks independence based on her financial dependence on Musk and her exposure to liability.

336. Kathleen Wilson-Thompson lacks independence based on her excessive compensation as a Tesla director. *The Wall Street Journal* recently reported that Wilson-Thompson has made over \$50 million in profits on sold Tesla shares and retains between \$100 million and \$200 million in unexercised options.³⁹⁷ These awards by Tesla give Musk special influence over her, through his influence over Tesla.

³⁹⁶ *Tornetta* Opinion at 126, n.645.

³⁹⁷ Kirsten Grind, et al., *The Money and Drugs That Tie Elon Musk to Some Tesla Directors*, THE WALL ST. JOURNAL (Feb 3, 2024), <https://www.wsj.com/tech/elon-musk-tesla-money-drugs-board-61af9ac4>.

337. These profits, as well as her total amount of unexercised Tesla shares, total tens of millions of dollars, an overwhelming percentage of her net worth. This alone demonstrates her lack of independence.

338. Wilson-Thompson's role in approving recent a shareholder proposal that Musk had proposed unilaterally further confirms that she is beholden to Musk. *See supra* §IV.J.

339. Further, demand is futile with respect to Wilson-Thompson because she is exposed to liability under *Caremark* relating to her failure to oversee Musk's stock sales and misleading statements, as well as the claims arising from her failure to enforce the Code of Business Ethics with respect to Musk's Twitter acquisition or any of the related violations detailed above.

J. The Board's adoption of Musk's self-serving proposal to redomicile Tesla in Texas further demonstrates its lack of independence.

340. On January 30, 2024, the same day that the Court of Chancery entered the post-trial opinion in *Tornetta v. Musk* wherein the Court voided Musk's record-setting \$50 billion Tesla compensation plan, Musk posted a poll on Twitter asking, "Should Tesla change its state of incorporation to Texas, home of its physical headquarters"?³⁹⁸ Predictably, the result of this self-serving poll directed at Musk's

³⁹⁸ Elon Musk (@elonmusk), TWITTER (Jan. 30, 2024), <https://twitter.com/elonmusk/status/1752491924848820595>.

base of followers (and not Tesla’s shareholders), resulted in the “yes” vote favored by Musk.

341. After the poll concluded, Musk posted that “Tesla will move immediately to hold a shareholder vote to transfer state of incorporation to Texas.”³⁹⁹ Musk posted this declaration without first obtaining the Board’s agreement to his proposal. His decision to do so demonstrates that the Board’s agreement with his preferences was a foregone conclusion.

342. In February 2024, Tesla’s Board of Directors decided to create a Special Committee to provide a recommendation on Musk’s proposal that Tesla re-domicile in Texas. Initially the Special Committee consisted of Wilson-Thompson and Gebbia, but Gebbia stepped down before the Special Committee completed its process. According to Tesla’s 2024 Proxy Statement, Gebbia “explained that he was stepping down from the Special Committee out of an abundance of caution because of the potential for unfair attacks based on perceived conflicts of interest.”⁴⁰⁰ However, as detailed above, Wilson-Thompson also lacks independence from Musk.

343. On April 12, 2024, Wilson-Thompson issued a Report of the Special Committee of the Board of Directors of Tesla, Inc. which adopted Musk’s unilateral

³⁹⁹ Elon Musk (@elonmusk), TWITTER (Jan. 31, 2024), <https://twitter.com/elonmusk/status/1752922071229722990>.

⁴⁰⁰ Tesla, Inc., Proxy Statement (2024) at 19, https://ir.tesla.com/_flysystem/s3/sec/000110465924048040/tm2326076d13_pre14a-gen.pdf.

proposal by recommending that Tesla and its shareholders should vote at the upcoming 2024 annual meeting to reincorporate in Texas and ratify Musk’s 2018 compensation plan.⁴⁰¹

344. The Special Committee consisted of only one person—Wilson-Thompson—whom the report claims is independent of Musk. (This assertion is belied by the evidence, for the reasons explained above.)

345. Further, the Board’s attempt to observe corporate formalities regarding the Company’s redomiciling in Texas is unpersuasive. Only on February 4, 2024, after Musk posted his poll on moving to Texas and his subsequent post that Tesla will immediately hold a shareholder vote, did the Board even meet. The Special Committee report tries to downplay Musk’s post as a “reflexive reaction” to the *Tornetta* ruling. However, the Board’s subsequent actions to do precisely as Musk wished—hold a shareholder vote to consider moving to Texas—demonstrates that Musk was again dictating Tesla’s direction and controlling the outcome of the Board’s decisions.

⁴⁰¹ *Id.*

346. The *Financial Times* recently reported that the “entire board,” except for Kimbal Musk, has been “mobilised” to lobby investors to vote in favor of the shareholder vote.⁴⁰²

V. CLAIMS FOR RELIEF

A. Count I: Breach of Fiduciary Duty of Loyalty for Unlawful Stock Sales (Against Elon Musk and Kimbal Musk)

347. Plaintiff repeats and re-alleges each and every allegation above as if set forth in full herein.

348. A fiduciary’s conduct with respect to the sales of a corporation’s stock can breach the duty of loyalty in at least two nonexclusive ways.

a. First, a fiduciary breaches the duty of loyalty if the fiduciary sells the corporation’s stock because she was motivated, in whole or in part, by material⁴⁰³ nonpublic corporate information he possesses.

b. Second, a fiduciary’s stock sales breach the duty of loyalty if the fiduciary deliberately makes misleading statements to shareholders and/or the market, and then conducts sales while the market price is artificially inflated by the fiduciary’s misleading statements. When a fiduciary, including a corporate director or officer, communicates to stockholders through public

⁴⁰² Tabby Kinder & Stephen Morris, *Tesla’s chair on Elon Musk: ‘I might wake up to a tweet. I don’t wake up to a strategy shift*, FINANCIAL TIMES, May 17, 2024, <https://www.ft.com/content/aa5464fd-c7c5-4f38-a2df-374a07439d88>.

⁴⁰³ Corporate information is material if it would have assumed actual significance in the deliberations of a person deciding whether to buy or sell stock in the corporation.

statements, the fiduciary's duty of loyalty requires the fiduciary to communicate honestly and provide only true information, even if the fiduciary is not requesting stockholder action.

349. Violation of the duty of loyalty gives rise to claims for disgorgement of any benefits obtained from the violation. This remedy exists to eliminate the incentive to violate the duty of loyalty. As applied to disloyal stock sales, the corporation can recover unlawful profits that result from the disloyal sales.

350. At all relevant times, as CEO and a director of Tesla, Elon and Kimbal Musk were corporate fiduciaries.

351. As explained in more detail below, Elon and Kimbal Musk each engaged in disloyal stock sales, and Elon Musk communicated falsely with stockholders, in violation of their fiduciary duties.

1. Musk's November - December 2021 Stock Sales

352. As alleged in detail above, by September 2021, Musk had voiced his disagreement with Twitter's policies and direction as a business, and was determined to influence both. To that end, Musk decided to pursue potential ownership of Twitter by investing heavily in its stock and to fund those investments through sales of Tesla stock. This information was material to Tesla because Musk's pursuit of Twitter and subsequent role in significantly altering its business would distract Musk from his important role at Tesla and create conflicts of interest between Tesla and

Twitter. The information was also material because the changes Musk intended to make at Twitter were likely to generate controversy and negatively impact Tesla's business reputation.

353. On November 6 and 7, 2022, Musk breached his fiduciary duty by deliberately making false statements that attributed his forthcoming sales of over \$16 billion in Tesla stock to the outcome of a Twitter poll and satisfying tax obligations. Musk was, in fact, planning to conduct these sales regardless of the outcome of any poll, and to use a large portion of the proceeds to finance an attempted acquisition of Twitter.

354. Musk knew that the nonpublic corporate information concerning the plans of Tesla's CEO to acquire Twitter, and the stock sales it would require, were material. Musk also knew that once public markets became aware that he planned to sell billions of dollars of Tesla stock and invest heavily in Twitter, Tesla's stock price would likely drop.

355. Musk was motivated to conceal the material, nonpublic corporate information regarding his own intentions to sell billions in Tesla stock and to use the proceeds to acquire Twitter, and to sell Tesla stock before this information became public.

356. Musk profited in both his scheduled and unscheduled sales of Tesla stock in November and December 2021. Between November 9 and 12, 2021, Musk

sold \$5.8 billion in Tesla shares not pursuant to a Rule 10b5-1 plan. On November 8, 15, 16, and 23 and December 2, 9, 13, 16, 21, 22, and 28 of 2021, Musk sold \$10.6 billion in Tesla shares pursuant to a Rule 10b5-1 plan that Musk had adopted on September 14, 2021.⁴⁰⁴

357. Musk unlawfully profited from his misleading statements. If Musk had sold his shares after the market became aware that he intended to try to acquire Twitter, Musk's profits from the sales would have decreased by \$2.6 billion. This evidences the price inflation caused by Musk's misconduct.

358. The truth about Musk's reasons for his Tesla stock sales belonged to Tesla because he was Tesla's CEO and had duties to disclose his plans to the Board. Specifically, Tesla had obligations under the SEC Consent Decree to confirm the accuracy of Musk's November 6 and 7, 2021 statements about his disposition of Tesla stock. To do this, Musk needed preapproval from Tesla's counsel and needed to disclose information to Tesla's counsel regarding the truthfulness of Musk's statements. Thus, the reasons for Tesla's CEO selling stock were information that constituted material, nonpublic information of Tesla. By using his inside knowledge to sell his personal holdings of Tesla common stock at an inflated price, Musk used

⁴⁰⁴ This Rule 10b5-1 plan does not show that Musk lacked fraudulent intent because Musk had already formed an intention to invest in and influence Twitter before the adoption of the plan, and because Musk made false and misleading statements about his reasons for selling Tesla stock immediately before his prescheduled sales were scheduled to begin.

Tesla's material, nonpublic information for his own benefit, in breach of his duty of loyalty to Tesla and its stockholders.

359. As a result of his breach of the duty of loyalty, Musk is liable to Tesla.

360. As a remedy, Tesla is entitled to the imposition of a constructive trust on any profits Musk received from his breach of loyalty and an order disgorging those profits.

2. Kimbal Musk's November 5, 2021 Stock Sale

361. On November 5, 2021—shortly before his brother posted the false and misleading November 6 and 7, 2021 tweets and then began his unprecedented sale of more than \$16 billion in Tesla shares—Kimbal Musk sold 15% of his Tesla holdings without prescheduling the sales pursuant to a Rule 10b5-1 plan. The sales generated proceeds of \$108 million.

362. Kimbal Musk unlawfully profited by at least \$5 million, as explained in Section III.E.7 above.

363. The adverse material, nonpublic information regarding Musk's plans to sell billions of dollars' worth of Tesla stock belonged to Tesla. Upon information and belief, Kimbal Musk used his knowledge of Tesla's material, nonpublic information to sell his personal holdings of Tesla common stock at an inflated price in breach of his duty of loyalty to Tesla and its stockholders.

364. As a result of his breach of the duty of loyalty, Kimbal Musk is liable to Tesla.

365. As a remedy, Tesla is entitled to the imposition of a constructive trust on any profits Kimbal Musk received from his breach of the duty of loyalty and an order disgorging those profits.

3. Musk's August 2022 Stock Sales

366. After the Twitter merger agreement became final and Musk sold more Tesla stock in April 2022, Musk knew he still did not have the necessary funds to pay the Twitter merger price. Because the disclosure of the Twitter merger agreement caused Tesla's stock price to decline, Musk made false and misleading statements in breach of his fiduciary duties to reverse this trend and allow him to sell shares at higher prices.

367. The first false and misleading statement occurred on April 28, 2022, when Musk stated that he had no plans to sell any additional Tesla stock. This statement was false because Musk knew he still needed several billions dollars more to close on the Twitter acquisition and that Tesla stock was his only substantial liquid asset; in his own words, his Tesla stock sales were "desperately needed for Twitter."⁴⁰⁵ Moreover, after he reduced his margin on May 5, 2022 and allowed a

⁴⁰⁵ James Clayton, *Interview with Elon Musk*, BBC NEWS (Apr. 11, 2023), <https://www.bbc.com/news/av/world-us-canada-65249139>.

margin loan for the merger to expire on May 25, 2022, Musk needed to raise even more funds.

368. On May 13 and 17, 2022, Musk made further false and misleading statements that he would not proceed with the Twitter deal based on purported business due diligence that Musk had actually waived. Musk also sent a sham termination letter to Twitter on July 8, 2022, even though he had no good faith basis for terminating the agreement and his legal counsel and business advisor had “desperately urged” Musk against halting the Twitter deal since at least as early as May 2022.⁴⁰⁶ Upon information and belief, Musk had no choice—as he subsequently admitted—but to close the Twitter deal at all times, but his false and misleading statements affected Tesla’s stock price.

369. Musk’s undisclosed intention to use further Tesla stock sales to pay for his Twitter acquisition was material to Tesla and was Tesla corporate information.

370. Tesla’s stock price rose during the months that Musk misleadingly casted these doubts on the merger’s closure.

371. With Tesla stock price buoyed, between August 5 and 9, 2022, Musk again unlawfully profited from the additional sale of \$6.89 billion in sales of Tesla stock. If Musk had sold this stock at market prices that reflected his intention to go forward with the Twitter transaction, his profits on the sales would have been

⁴⁰⁶ Walter Isaacson, ELON MUSK, at 464 (2023).

substantially lower. The closing prices on the four trading days between October 4 and October 7, 2022 all reflected a greater than 10% decline from the average sale price for the August 2022 sales.

372. Musk knew the truth about his nonpublic intentions to sell more Tesla stock to close the Twitter merger was material to Tesla. The price of Tesla's stock dropped 4.8% in reaction to his announcement of his intention to sell 10% of his Tesla holdings. And, as Musk admitted during the aforementioned BBC interview, his sales of Tesla stock are "often taken as some lack of faith in Tesla. Matter of fact, the Tesla stock sales caused the Tesla stock declinment [sic], which is not good."⁴⁰⁷

373. Musk also knew the truth about his intention to close the Twitter merger was material to Tesla. The announcement of Musk's agreement to the Twitter merger had caused a 12% decline in Tesla's stock on April 25 and 26, 2022.

374. Motivated by the material, nonpublic corporate information regarding his plan to finance the Twitter acquisition through more sales of Tesla stock, Musk profited in his unannounced sale of Tesla stock in August 2022. This material, nonpublic corporate information belonged to Tesla, in light of Musk's duty to obtain preapproval from Tesla on the accuracy of his statement denying further plans to sell

⁴⁰⁷ James Clayton, *Interview with Elon Musk*, BBC NEWS (Apr. 11, 2023), <https://www.bbc.com/news/av/world-us-canada-65249139>.

Tesla stock and his duty to obtain a waiver under the Code of Ethics regarding his plans to takeover Twitter.

375. As a result of his breach of the duty of loyalty, Musk is liable to Tesla.

376. As a remedy, Tesla is entitled to the imposition of a constructive trust on any profits Musk received from his breach of the duty of loyalty and an order disgorging those profits.

4. Musk's November - December 2022 Stock Sales

377. After his August 2022 trades, Musk again breached his duty of loyalty on August 9, 2022 when he stated that he was done selling his Tesla stock and indicated that he had raised enough funds to avoid an “emergency sale” in the event the Twitter deal closed. This statement was deliberately misleading because Musk knew he still needed more liquidity. Upon information and belief, although Musk decided to use short-term debt—including, at the very least, a \$1 billion loan from SpaceX—to close the Twitter deal, he knew using short-term debt would not eliminate the near-term need to sell more Tesla stock. When the obligation to repay the short-term debt (plus interest) came due, Musk would *still* need to sell Tesla stock because that was his only liquid source of funds to repay the debt.

378. Upon information and belief, by November 2022, Musk also knew that Tesla would be disclosing its fourth-quarter delivery numbers after year-end, and that the results fell far short of Tesla's forecast.

379. Between November 6 and December 14, 2022, Musk again unlawfully profited from the additional unscheduled sale of \$7.55 billion of his Tesla stock. Shortly thereafter, on January 2, 2023, Tesla released the surprisingly bad update on Tesla's growth in vehicle deliveries. On this news, Tesla's stock price declined 8%.

380. Upon information and belief, Musk knew that the nonpublic corporate information concerning Tesla's fourth-quarter delivery results was adverse and material, and that once public markets became aware that Tesla was falling far short of its delivery forecast, Tesla's stock price would drop. Indeed, the value of Musk's proceeds would have been \$2.38 billion less (42% less) had the adverse corporate information been disclosed in advance of his stock sales.

381. Motivated by the material, nonpublic corporate information regarding his own stock sales and the falling demand for Tesla's vehicles, Musk profited in his unscheduled sale of Tesla stock in November and December 2022.

382. Musk unlawfully profited from his use of material, nonpublic corporation information proprietary to Tesla, reaping more than \$7.55 billion in proceeds from his unscheduled November and December 2022 Tesla stock sales at artificially inflated market prices.

383. The adverse material, nonpublic information regarding Tesla's deliveries belonged to Tesla. In using his knowledge of Tesla's undisclosed information to sell his personal holdings of Tesla common stock at an inflated price,

Musk used Tesla's proprietary information for his own benefit, in breach of his duty of loyalty to Tesla and its stockholders.

384. As a result of his breach of the duty of loyalty, Musk is liable to Tesla.

385. As a remedy, Tesla is entitled to the imposition of a constructive trust on any profits Musk received from his breach of the duty of loyalty and an order disgorging those profits.

B. Count II: Breach of Fiduciary Duty of Loyalty Claim for Usurpation of a Corporate Opportunity (Against Elon Musk)

386. Plaintiff repeats and re-alleges each and every allegation above as if set forth in full herein.

387. The duty of loyalty prevents a fiduciary from seizing a corporate opportunity that properly belongs to the corporation.

388. Musk seized a corporate opportunity from Tesla in violation of his duty of loyalty when he founded and invested in X.AI, an AI company.

389. X.AI presented an opportunity within Tesla's line of business:

a. Musk himself has repeatedly stated that Tesla is an AI company, at least in part.

b. Both Tesla and X.AI use developers with the same basic skill sets to create this software, as demonstrated by X.AI's repeated hiring of Tesla employees to perform these services for X.AI.

c. Both Tesla and X.AI use similar equipment to develop their AI technologies, as demonstrated by Musk's diversion of scarce AI microchips from Tesla to X.AI.

d. Musk previously tried to convince the CEO of OpenAI to merge with Tesla in 2018. Musk now identifies X.AI as a direct competitor to OpenAI.

390. Tesla had an interest or expectancy in X.AI:

a. In 2018, Musk himself had tried to merge OpenAI—a company Musk identifies as a direct competitor to X.AI—into Tesla. This past practice established an expectancy that Musk would later provide similar opportunities to Tesla, if they arose and for so long as he remained a fiduciary to Tesla.

b. When Musk invested in and founded X.AI, Tesla had been creating AI and training software for several years.

c. When he decided to found X.AI, Musk expressly conceived of one core purpose of X.AI as furthering Tesla's existing AI business.

391. Tesla was able to financially support X.AI and exploit the opportunity it presented. In 2018, Musk referred to Tesla as a “cash cow” capable of supporting OpenAI. Tesla's revenue, profits, and market capitalization have only increased since then. If anything, Tesla was better positioned in 2023 to serve as a cash cow for X.AI than it was for OpenAI in 2018.

392. Musk acted contrary to his fiduciary duties to Tesla by seizing the corporate opportunity presented by X.AI:

a. Musk has repeatedly hired away Tesla's valuable employees to work at X.AI.

b. Musk and X.AI have promoted X.AI's prospect of supplying software and services to Tesla as a competitive advantage. This creates an increased risk of self-dealing.

c. Starting in 2024, Musk has demanded that Tesla provide him with additional Tesla stock worth billions of dollars to ensure that he continues to focus on developing AI technology with Tesla. If Tesla does not provide what he demands, he has threatened to develop AI technology outside of Tesla. By this, Musk is referring to X.AI.

393. As a remedy for Musk's usurpation of a corporate opportunity properly belonging to Tesla, Tesla is entitled to the imposition of a constructive trust on any benefits Musk receives from X.AI. This would include, at a minimum, disgorgement of Musk's equity interest in X.AI. Musk and X.AI should also be ordered to pay fair market value to Tesla for know-how siphoned from Tesla, for any Tesla training data used by X.AI, and for hardware diverted from Tesla to X.AI.

C. Count III: Breach of Duty of Loyalty by Self-Dealing and Misappropriation (Against Elon Musk)

394. Plaintiff repeats and re-alleges each and every allegation above as if set forth in full herein.

395. A fiduciary breaches the duty of loyalty when he or she diverts or hires the corporation's employees to work for other organizations in which he or she has an interest, or engages in unfair self-dealing (directly or through an organization in which he or she has an interest).

396. Musk repeatedly breached these duties.

397. Since acquiring controlling equity interests in Twitter and X.AI, Musk has hired dozens of Tesla employees to work on a temporary or permanent basis for Twitter and X.AI. This has deprived Tesla of the benefits of these employees' services. As a result of the position he occupied at Tesla and his inside knowledge and access, Musk had special ability to target, approach, influence, and hire these employees that an outside competitor would not have had. In this manner, Musk used his position within Tesla to disadvantage and harm Tesla in competition for the labor of the employees he diverted. Each diversion of a Tesla employee from Tesla was therefore a disloyal act and form of self-dealing. That Tesla apparently entered into formal agreements with Twitter for repayment for diverted services only confirms that Musk caused Tesla to engage in self-dealing. Tesla does not have a general practice of lending its employees for payment to anyone in the market that

is interested and willing to pay. Instead, Tesla offers these arrangements exclusively to companies Musk controls.

398. Similarly, after acquiring Twitter, Musk has made many changes to Tesla's policies and practices that led to new benefits or favors flowing from Tesla to Twitter.

a. After Musk took over Twitter and became its principal executive, Tesla abandoned its long running policy against paying for advertising, even though Musk, the Board of Directors, and a shareholder vote had previously endorsed this policy. After the policy change, Tesla began paying Twitter for advertising. Tesla has even posted paid advertisements on Twitter to promote the reinstatement of Musk's multi-billion dollar pay package after the Court of Chancery voided it.

b. Musk also engaged in self-dealing by using Tesla's speaking platforms to promote Twitter instead of focusing on Tesla. Twitter paid nothing to Tesla for these promotional opportunities, and Tesla does not typically offer other companies an opportunity to have Tesla's CEO promote their goods, services, or business plans during Tesla earnings calls or automotive conferences.

c. Similarly, after acquiring Twitter, Musk used his position at Tesla to send a retaliatory message to advertisers who were abandoning

Twitter in response to Musk's controversial behavior and statements. Specifically, to retaliate against Disney and its CEO Bob Iger for the decision to pull advertising with Twitter, Musk caused Tesla to remove Disney's streaming service from Tesla's vehicles. This decision had no rational business justification for Tesla.

399. All these acts violated Musk's duty of loyalty, and to the extent they are legally valid, Musk must prove they are entirely fair to Tesla and its shareholders.

400. As a remedy for these breaches of the duty of loyalty, Tesla is entitled to a full accounting. Any consideration flowing to Musk or his other companies must be repaid to Tesla unless Musk proves the process and price leading to those services was entirely fair to Tesla and its stockholders.

401. For Musk's hiring of Tesla's employees for work at his other companies, Tesla is entitled to actual damages suffered and to disgorgement of the economic benefit of work performed by these employees for Musk's other companies.

D. Count IV: Breach of Contractual Obligations Established by Tesla's Code of Business Ethics (Against All Defendants)

402. Plaintiff repeats and re-alleges each and every allegation above as if set forth in full herein.

403. The elements of a breach of contract are: (1) the existence of a contract between the parties, (2) breach of an obligation imposed by the contract, and (3) damages resulting from the breach.

A. The Code of Ethics created contractual conditions

404. The plain language of the Code of Ethics expressly confirmed its binding contractual nature and its applicability to all Tesla directors and officers.

a. It “applies to all directors, officers, and employees of Tesla.” Ex. 1 at 4.

b. The Code of Ethics also states: “When executive officers or directors seek waivers, only Tesla’s Board of Directors may grant them, and the waiver will be publicly disclosed as required by law.” *Id.* at 16. This sentence expressly confirms that officers and directors were generally subject to the prohibitions in the Code of Ethics.

c. The Code of Ethics additionally confirms that Musk, as CEO, was contractually bound by the Code: “The above Code of Business Ethics applies to all directors and employees of Tesla. The CEO and all senior financial officers . . . are bound by the provisions set forth therein relating to ethical conduct, conflicts of interest and compliance with law.” *Id.* at 16.

B. Musk breached his obligations under the Code

405. The Code of Ethics prohibited conflicts of interest: “You must avoid conflicts of interest. A conflict of interest may arise whenever your personal interests interfere, or appear to interfere, with Tesla’s interests.”⁴⁰⁸ The definition in the Code for conflicts of interests includes:

- a. “Working for a competitor, supplier, or customer”;
- b. “[O]utside employment with others . . . if it prevents you from working with excellence at Tesla”;
- c. “[U]sing your Tesla position to promote a side business or looking for opportunities that should otherwise go to Tesla first”;
- d. “[D]eveloping or helping to develop outside inventions that relate to existing or future Tesla products or your job at Tesla”; and
- e. “[H]aving a substantial interest in a competitor or investing in another company if you can influence Tesla’s relationship with that company.”⁴⁰⁹

406. Musk breached his obligation to avoid all these conflicts of interest. Specifically, he breached the prohibition on “investing in another company if you can influence Tesla’s relationship with that company” when he:

⁴⁰⁸ Ex. 1 at 5.

⁴⁰⁹ See Ex. 1 at 5.

- a. Spent \$2.6 billion investing in Twitter stock between January 31, 2022 and April 1, 2022 despite his ability as Tesla’s CEO, Director, and largest shareholder to influence Tesla’s relationship with Twitter (*see supra* §III.H);
- b. Entered into a merger agreement with Twitter on April 25, 2022 that required him to provide the funds necessary to close the merger despite his ability to influence Tesla’s relationship with Twitter (*see supra* §III.J); and
- c. Closed on the Twitter merger and became Twitter’s controlling shareholder on October 27, 2022 despite his ability to influence Tesla’s relationship with Twitter (*see supra* §III.N).

Musk’s breach of this provision of the Code of Ethics has continued because Musk has continuously held his investment in Twitter.

407. Musk also breached the Code’s prohibition against “looking for opportunities that should otherwise go to Tesla first.” Musk looked for an opportunity in the AI field for himself and Twitter, even though this opportunity should have gone to Tesla first given Tesla’s longstanding focus on AI and Musk’s knowledge that AI was critical to Tesla’s future business prospects. This led him to found and invest in X.AI. *See supra* §III.Q.5.

408. Musk also breached the Code’s prohibition on “[h]aving a substantial interest in a competitor” in March 2023 when he founded and acquired a controlling

equity interest in X.AI. X.AI is a competitor to Tesla in the development of AI, in the labor market for AI developers, and in the market for purchasing scarce AI microchips. *See supra* §III.Q.5.

409. Musk also breached the Code’s prohibition on “working for a competitor” when he became X.AI’s CEO and sole director in March 2023, because Tesla competed with X.AI in the development of AI software and in the labor market for AI developers.⁴¹⁰ These violations have continued since March 2023 because Musk has remained CEO of X.AI. *See supra* §III.Q.5.

410. Musk also breached the Code’s prohibition against “outside employment with others . . . if it prevents you from working with excellence at Tesla” by serving as Twitter’s principal executive officer between October 27, 2022 and the present. Musk continuously acted as Twitter’s principal executive, which prevented him from working with excellence at Tesla. Musk’s inability to work with excellence at Tesla during this time is demonstrated by Musk’s statements about his extremely busy work schedule after he acquired Twitter and Tesla’s diminished performance since the acquisition. *See supra* §III.P.

411. Musk also breached the Code’s prohibition against “influenc[ing] Tesla’s relationship” with “another company” in which he has invested. Between

⁴¹⁰ In the alternative, Musk’s employment as X.AI’s CEO breached the Code’s prohibition on “working for a . . . supplier” in light of Musk’s and X.AI statements that Tesla would use X.AI’s products.

October 27, 2022 and the present, he has altered Tesla's relationship with Twitter repeatedly, including by continuously diverting Tesla's human resources to work at Twitter for nearly two years, changing Tesla's vehicles for the worse to retaliate against an advertiser that abandoned Twitter, altering Tesla's policy on advertising in Twitter's favor, and causing Tesla to pay Twitter for advertising. He also diverted Tesla's AI microchips and human resources to X.AI, his other privately held company. *See supra* §III.Q.

412. Musk also breached the Code's prohibition on "using your Tesla position to promote a side business." On May 10, 2022 and January 25, 2023, Musk used appearances on behalf of Tesla to promote his privately held company, Twitter. Also, since at least as early as July 2023 through the present, Musk used his position at Tesla to promote X.AI. Both Musk and X.AI have touted the prospects of working with Tesla and leveraging Tesla's data for AI training as competitive advantages for X.AI. *See supra* §III.Q.5.

413. Musk also breached the Code's prohibition on "developing or helping to develop outside inventions that relate to existing or future Tesla products or your job at Tesla" between January 2023 and the present by helping to develop AI inventions for X.AI and Twitter even though those products relate to existing and future products at Tesla and Musk's role at Tesla. *See supra* §III.Q.5.

C. Tesla’s Directors breached their obligations under the Code

414. The following mandatory procedures of the Code apply to Defendants:

The Board of Directors *shall* determine, or designate appropriate persons to determine, appropriate actions to be taken in the event of violations of the Code of Business Ethics or of these additional procedures *by the CEO* and Tesla’s senior financial officers. Such actions *shall* be reasonably designed to deter wrongdoing and to promote accountability for adherence to the Code of Business Ethics and to these additional procedures, and *shall* include written notices to the individual involved that the Board has determined that there has been a violation, censure by the Board, demotion or re-assignment of the individual involved, suspension with or without pay or benefits (as determined by the Board) and termination of the individual’s employment. In determining which action is appropriate in a particular case, the Board of Directors or such designee shall take into account all relevant information, including the nature and severity of the violation, whether the violation was a single occurrence or repeated occurrences, whether the violation appears to have been intentional or inadvertent, whether the individual in question had been advised prior to the violation as to the proper course of action and whether or not the individual in question had committed other violations in the past.

415. The use “shall” unambiguously confirms that Defendants cannot disregard known violations of the Code’s conflicts rules by Musk.⁴¹¹ Instead, the Board must take good faith steps to respond to a violation with a reasonably designed

⁴¹¹ The Code’s statement about Defendants’ discretion to “determin[e] *which* action is appropriate in a particular case” further confirms a lack of discretion to decide to take no action in response to known violation.

deterrent. The minimum deterrent available under the Code is a written notice of a violation.

416. The Directors all breached their obligations to respond to Musk’s serial and continuing violations of the Code’s conflicts of interest rules with “actions . . . reasonably designed to deter wrongdoing and to promote accountability for adherence to the Code.” Upon information and belief, the Directors have not taken action against Musk that has deterred Musk’s continuing violations in the slightest.

417. Because at least some of Musk’s serial violations occurred during all of the Defendants’ tenures as directors, each Director is liable for this failure.

D. Defendants’ breaches of the Code have damaged Tesla.

418. Defendants’ breaches of the Code of Ethics have damaged Tesla.

419. As a result of the breaches, Musk is working far less at Tesla than he was prior to launching his investments in and careers at Twitter and X.AI. The diminution of Musk’s attention to Tesla has caused Tesla to lose the benefits of his services, which Tesla’s Directors have claimed to be worth billions of dollars in value.

420. As a result of the breaches, Tesla has lost business opportunities that have significant economic value. X.AI, for example, is reportedly valued in the billions or tens of billions of dollars.

421. As a result of the breaches, Tesla has lost many valuable employees.

422. As a result of the breaches, Tesla’s business has suffered significant reputational harms and a major loss of sales. These damages were reasonably foreseeable.

423. As a remedy, Tesla seeks to recoup these monetary damages.

E. Count V: Breach of Fiduciary Duty for Bad Faith Implementation and Oversight of Tesla’s Code of Business Ethics (Against All Defendants)

424. Plaintiff repeats and re-alleges each and every allegation above as if set forth in full herein.

425. The duty of loyalty is also breached when a fiduciary does not act in good faith towards the corporation. This occurs when a fiduciary willfully violates a plain and unambiguous restriction on the fiduciary’s authority. The duty of good faith required Tesla’s CEO and Directors to implement and oversee a system to monitor compliance with the conflicts of interest rules in the Code of Ethics. Even if not a binding contract (which it was, for the reasons explained above), these rules largely mirror the core duties of loyalty under Delaware law. Moreover, SEC regulations required the Tesla to promptly disclose in a Form 8-K any “failure to take action within a reasonable period of time regarding a material departure from a provision of the code of ethics that has been made known to an executive officer.”⁴¹² In this context, the Board had obligations to monitor noncompliance with the Code.

⁴¹² See Item 5.05 of Instructions to Form 8-K, <https://www.sec.gov/files/form8-k.pdf>.

Further, as explained above, the Code sets forth mandatory duties for Tesla's Directors to take a reasonably deterrent action in response to violations of the Code, and Tesla's statements to shareholders in SEC filings and proxy statements assured shareholders that the Code applied to its Officers and Directors.

426. Defendants consciously breached their fiduciary duties and violated their corporate responsibilities in at least the following ways:

a. The non-Musk Defendants learned of several red flags that Musk was violating the prohibitions on conflicts of interest in the Code of Ethics through his investments in and employment by Twitter and X.AI, his siphoning of Tesla's human resources, the self-dealing arrangements he created between Tesla and Twitter, and his use of his position at Tesla to promote Twitter and X.AI.

b. Musk, of course, knew of his own misconduct in violation of the Code and his fiduciary duties. He willfully disregarded his obligations to obtain a waiver under the Code before engaging in this misconduct.

427. As a direct and proximate result of the Defendants' conscious failure to perform their fiduciary duties, Tesla has sustained significant damages both financially and to its corporate image and goodwill.

a. As a result of the breaches, Tesla has lost business opportunities that have significant economic value. X.AI, for example, is reportedly valued in the billions or tens of billions of dollars.

b. As a result of the breaches, Tesla has lost many valuable employees.

c. As a result of the breaches, Tesla's business has suffered significant reputational harms and a major loss of sales. These damages were reasonably foreseeable.

d. As a result of the breaches, Tesla has lost the benefit of Musk's attention and commitment to Tesla as Tesla's CEO. His time is now divided with Twitter and X.AI.

428. Musk has also obtained significant financial benefits as a result of his and the Directors' failure to implement an adequate reporting system and their disregard for red flags signaling material departures from the Code by Musk that had to be disclosed on Form 8-K filings. And, if Musk had obtained the necessary waivers, Tesla would have had to file Form 8-K's that disclosed Musk's plans to invest in and work for Twitter and X.AI (among other things) *before* Musk engaged in those activities. By willfully breaching his obligations, Musk was able to sell his Tesla stock at artificially inflated prices as described in Count I above. He was also

able to acquire 9% of Twitter at a substantial discount relative to the price he would have paid if his intention to invest in Twitter had been disclosed on a Form 8-K.

429. As a remedy for these breaches of fiduciary duty, Tesla is entitled to repayment of monetary damages for harm suffered by Tesla, as well as a constructive trust on unlawful profits from stock sales and disgorgement of those profits.

F. Count VI: Breach of Fiduciary Duty for Bad Faith Implementation and Oversight of Tesla's and Musk's SEC Consent Decree (Against Musk, Denholm, Murdoch, and Wilson-Thompson)

430. Plaintiff repeats and re-alleges each and every allegation above as if set forth in full herein.

431. As stated above, the duty of loyalty is also breached when a fiduciary does not act in good faith toward the corporation. This occurs when a fiduciary such as Musk willfully violates a plain and unambiguous restriction on the fiduciary's authority, such as the SEC Consent Decree. This duty of loyalty also required Tesla's CEO and Directors to implement and oversee a system to monitor compliance with the SEC Consent Decree. The Consent Decree and the Senior Executives Communications Policy that Tesla adopted to comply with the Consent Decree set forth mandatory duties for Tesla, Musk, and the Directors on the Disclosure Controls Committee (i.e., Murdoch, Denholm, and Wilson-Thompson).

432. Musk consciously breached his duty of loyalty because he acted with willful disregard to his express obligations under the Consent Decree and the Senior

Executives Communications Policy (the “Policy”). Musk routinely did not comply with his obligations to share a draft of communications covered by the Policy and wait for preapproval before publishing the communications. He did not alert the Directors to his noncompliant practices, as demonstrated by Denholm’s testimony that she was unaware of them. The willfulness of Musk’s noncompliance is demonstrated by his baseless statements that the Consent Decree was not enforceable or legally valid, and his comments that the San Francisco office of the SEC were “bastards.”

433. Murdoch, Denholm, and Wilson-Thompson consciously breached their fiduciary duties and violated their corporate responsibilities by ignoring many red flags that Musk was willfully disregarding the Consent Decree and Tesla’s Senior Executives Communications Policy.

a. *First*, in February 2019, the SEC argued Musk had violated the Consent Decree by not obtaining preapproval before sending a tweet about the production of Tesla vehicles.

b. *Second*, in November 2021, the SEC served Musk and Tesla with subpoenas addressing, among other things, whether Musk obtained preapproval for his November 6, 2021 tweets.

c. *Third*, in response to the SEC’s subpoena, in March 2022, Musk moved to quash the subpoena against him and to terminate the Consent

Decree. In support of the motion, Musk signed a declaration that asserted: “I was forced to sign the consent decree in 2018.”⁴¹³

d. *Fourth*, during an April 14, 2022 interview with Chris Anderson, Musk stated: “I was forced to concede to the SEC unlawfully. Those bastards.”⁴¹⁴

e. *Fifth*, Musk’s tweets, done without appropriate preapproval, were red flags evidencing his refusal to comply with the Senior Executives Communications Policy.

f. *Sixth*, Musk’s tweets about his rationale for selling Tesla shares were revealed to be false and Defendants nevertheless did not respond to this red flag evidencing Musk’s failure to comply with the Consent Decree.

434. Murdoch, Denholm, and Wilson-Thompson also consciously breached their fiduciary duties and violated their corporate responsibilities by failing to establish reliable reporting systems or controls for compliance with the Consent Decree. The following evidence demonstrates these failures.

a. The Committee itself was unable to ensure Musk’s compliance with the Senior Executives Communications Policy and the Consent Decree,

⁴¹³ Decl. of Elon Musk in Support of His Mot. To Quash & To Terminate Consent Decree at ¶ 4, *SEC v. Musk*, No. 18-cv-08865 (S.D.N.Y. Mar. 8, 2022), ECF No. 72.

⁴¹⁴ Interview by Chris Anderson, TED, with Elon Musk, in Vancouver, Can. (Apr. 14, 2022), <https://www.youtube.com/watch?v=cdZZpaB2kDM>.

because it was not insufficiently independent from Musk, for the reasons explained above.

b. The preapproval process established by the Disclosure Controls Committee was also inherently flawed because it relied upon attorneys who reported to Musk for both preapproval and for reporting to the Disclosure Controls Committee about Musk's compliance.

c. The Committee understood that Musk was permitted to "self-regulate under the policy" for compliance with the Consent Decree, as demonstrated by Denholm's trial testimony on that issue.⁴¹⁵ When Musk decided to send tweets pursuant to this self-regulation policy, he did not wait to receive preapproval,⁴¹⁶ which was a flagrant violation of the Decree.

d. In *Tornetta v. Musk*, the Court of Chancery decided the Chair of the Committee, Denholm, displayed "a lack of understanding concerning how this committee worked," including its basic responsibilities to oversee conflicts of interest.⁴¹⁷ The Court also found: "Denholm's approach to enforcement of the SEC Settlement, including unawareness of one of its key

⁴¹⁵ Trial Tr. Vol. II, 382, *Tornetta v. Musk*.

⁴¹⁶ *Id.* at 384.

⁴¹⁷ *Tornetta* Opinion at 94.

requirements, suggests a new lackadaisical approach to her oversight obligations.”⁴¹⁸

435. Tesla has been harmed as a direct and proximate result of Defendants’ failure to implement controls or reporting for the Consent Decree in good faith or to respond at all to numerous red flags in good faith. Defendants’ breach of their fiduciary duties harmed the Company by, *inter alia*, forcing it to incur costs related to the SEC serving additional subpoenas and additional litigation with the SEC.

436. Defendants’ failure to implement controls or reporting for the Consent Decree in good faith also contributed to Musk’s unlawful profits from his own Tesla stock sales in November and December 2021 and August, November and December 2022.

437. As a remedy for these breaches of fiduciary duty, Tesla is entitled to repayment of monetary damages for harm suffered by Tesla, as well as a constructive trust on unlawful profits from stock sales after misleading tweets subject to the Consent Decree and disgorgement of those profits.

⁴¹⁸ *Id.* at 126, n.645.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff requests judgment as follows:

- a. Declare that demand on the Board is futile;
- b. Declare Musk and Kimbal Musk breached their fiduciary duty of loyalty to Tesla and its stockholders by improperly trading in Tesla stock while motivated by material, nonpublic information belonging to Tesla and/or after deliberately making material misleading statements to shareholders and the public;
- c. Disgorgement of all wrongful proceeds obtained by Musk and Kimbal Musk through disloyal sales of Tesla stock;
- d. Declare Musk breached his fiduciary duty of loyalty to Tesla and its stockholders by engaging in unfair self-dealing, misappropriating Tesla assets for his own benefit, and usurping Tesla's corporate opportunities;
- e. Declare Musk violated Tesla's Code by, *inter alia*, investing in a competitor or supplier, investing in another company even though he could influence Tesla's relationship with that company, taking on outside employment that impeded his ability to perform with excellence with Tesla, working for a competitor of Tesla, misappropriating Tesla assets for his own benefit, usurping Tesla's corporate opportunities, assisting with outside

inventions that related to his role at Tesla, and using his role at Tesla to promote his side businesses;

f. Declare each of the Director Defendants breached their fiduciary duties to Tesla by acting with bad faith by placing their own interests in their relationships with Musk above the best interests of Tesla and its stockholders;

g. Declare each of the Director Defendants violated Tesla's Code by, *inter alia*, taking no action to enforce its terms to prevent (or otherwise waive) Musk's outside employment that impeded his ability to perform with excellence with Tesla, working for a competitor of Tesla, helping another company create inventions that related to his work at Tesla, misappropriating Tesla assets for his own benefit and usurping Tesla's corporate opportunities;

h. Declare each of the Director Defendants breached their fiduciary duties to Tesla and its stockholders by disregarding their express obligations under the Code and the Consent Decree and failing to oversee compliance with both documents in good faith;

i. Award monetary damages and an accounting for the profits resulting from Musk's disloyal and wrongful acts for his own benefit;

j. Disgorge corporate opportunities usurped by Musk from Tesla, including Musk's equity stake in X.AI;

k. Disgorge any unlawful benefits received by Musk as a result of his self-dealing, his misappropriation, the failures by Musk and the Board to act in good faith, or violations of the Code of Ethics;

l. Award damages or equivalent equitable relief to Tesla, including amounts improperly received by Defendants as a result of their breaches of fiduciary duties and violations of the Code and damages for injury to Tesla's brand and reputation, together with pre and post-judgment interest;

m. Awarding Plaintiff the costs and disbursements of this Action, including reasonable attorneys' and experts witness' fees; and

n. Granting such other and further equitable relief as this Court may deem just, proper and equitable, including any extraordinary equitable relief as permitted by law or equity to attach, impound, or otherwise restrict defendants' assets to assure Tesla an effective remedy.

PRICKETT, JONES & ELLIOTT, P.A.

By: /s/ Marcus E. Montejo

OF COUNSEL:

LIEFF CABRASER HEIMANN &
BERNSTEIN, LLP

Daniel P. Chiplock
John T. Nicolaou
Sean A. Petterson
250 Hudson Street, 8th Floor
New York, NY 10013-1413
(212) 355-9500

Richard M. Heimann
Katherine Lubin Benson
Bruce W. Leppa
275 Battery Street, 29th Floor
San Francisco, CA 94111-3339
(415) 956-1000

Bruce E. Jameson (#2931)
Marcus E. Montejo (#4890)
Kevin H. Davenport (#5327)
John G. Day (#6023)
Seth T. Ford (#7051)
1310 King Street
Wilmington, Delaware 19801
(302) 888-6500

Attorneys for Plaintiff

Dated: June 10, 2024