



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

IN RE TESLA MOTORS, INC.  
STOCKHOLDER LITIGATION

Consolidated  
C.A. No. 12711-VCS

**PLAINTIFFS' POST-TRIAL BRIEF**

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## **PRELIMINARY STATEMENT**

Trial proved key and irrefutable facts.

*First*, Musk\* was a conflicted fiduciary, standing on both sides of the Acquisition. He is required, as “the proponent[] of the challenged transaction, to prove...‘entire fairness.’”<sup>1</sup> Entire fairness also applies because: (1) a majority of the Board was not disinterested and/or independent; and (2) Musk controlled Tesla and the Acquisition.

*Second*, Musk’s claim that he was “fully recused” was false. Musk: (1) initiated the Acquisition with his cousin Lyndon Rive, without Board knowledge; (2) co-opted Tesla’s senior management, outside counsel, and financial advisors; (3) accelerated diligence and negotiations to sign the deal before SolarCity announced disastrous second quarter 2016 financial results and/or tripped its Liquidity Covenant; and (4) convinced skeptical stockholders to approve the bailout

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\*Unless otherwise set forth herein, capitalized terms have the same definitions as set forth in Plaintiffs’ Pre-Trial Brief (Trans. ID 64731625).

Plaintiffs use the following citations conventions:

Trial Transcript: TT[Page]:[Line]

Deposition Transcript: JX\_\_\_\_:[Page]:[Line]

Other Joint Exhibits: JX\_\_\_\_:[JX page, exhibit, or paragraph number]

<sup>1</sup> *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1993).

of SolarCity by lying about the Solar Roof. But for Musk, Tesla would not have bought SolarCity at all, let alone at a premium price.

*Third*, Musk hid critical information about SolarCity's value. Musk did not disclose that SolarCity was insolvent; could not pay its bills or employees on time without breaching debt covenants; could not raise equity and had no viable solution to a "liquidity crisis" that began in 2015. Since at least the first quarter of 2016, Musk knew, but failed to disclose, that SolarCity needed the Acquisition to survive.

*Fourth*, Musk harmed Tesla. Musk pushed the Acquisition when Tesla was debt-laden, selling equity to satisfy its own capital needs, facing "manufacturing hell" with Model X, and poised to "bet the company" on the Model 3 rollout. Tesla ultimately paid \$2.6 billion for an insolvent SolarCity and assumed SolarCity's \$3.4+ billion in debt. It injected \$300 million to maintain operations and paid off \$500 million in short-term debt. Musk then dismantled SolarCity's operations and joint-ventured with SolarCity competitors to install Tesla batteries. The Acquisition was wasteful.

Musk did not (and cannot) demonstrate that the Acquisition was entirely fair. There were no mechanisms (like a special committee) in place to protect Tesla from Musk's conflicts, and he did not refute the impact his undisclosed role had on both the process and the price. He did not rebut evidence demonstrating SolarCity's

insolvency, and his expert conceded that Evercore did not appropriately adjust SolarCity's financial projections to account for the SITC phaseout.

Musk's only fair price argument is that SolarCity's stock price justifies the premium Tesla paid. But Tesla's and SolarCity's advisors admitted that SolarCity's stock price did not reflect undisclosed material information. Acquisition leaks in March and Tesla's Initial Offer in June inflated SolarCity's stock price. And, even if SolarCity's stock price were a reliable indicator of value, Musk can only rationalize the Acquisition price by assuming \$800+ million in synergies—an amount unsupported by *any* contemporaneous evidence.

Given Musk's disloyalty, the Court has wide discretion to fashion an equitable remedy. The Court could award damages of between \$1.4 to \$2.4 billion, which range is derived from the price Tesla paid less SolarCity's (1) liquidation value, reflecting its insolvency and (2) going-concern value under a number of accepted valuation methodologies. The Court could also fashion an equitable remedy based on principles of restitution, unjust enrichment, rescission, and rescissory damages. The 2.4 million Tesla shares Musk received in the Acquisition are currently worth \$9.4 billion. The Court could require Musk to return some or all of the enormous gain he has realized as a result of receiving excessive Tesla shares either by returning the excess shares or paying Tesla the monetary value of those shares at the time of judgment.

## **STATEMENT OF FACTS**

### **I. SOLARCITY'S DEBT-FUELED GROWTH AND RAPID DECLINE**

#### **A. SOLARCITY RELIES ON DEBT TO GROW AGGRESSIVELY**

In 2006, Musk and his cousins founded SolarCity.<sup>2</sup> Musk provided the money and was Chairman and the largest stockholder, owning 21.9% of its outstanding shares at the time of the Acquisition.<sup>3</sup>

From inception, SolarCity embarked on a risky and aggressive business model. SolarCity marketed, sold, and installed rooftop solar energy systems to residential homeowners, principally through no-money-down transactions.<sup>4</sup> SolarCity fronted the majority of the installation costs, then refinanced those installations through complex asset-backed securitizations.<sup>5</sup>

SolarCity *never* generated positive cash flows and incurred massive operating losses every year.<sup>6</sup> During the five years preceding the Acquisition, SolarCity reported \$2.2 billion in net losses, which increased significantly year-over-year and culminated in \$820 million in net losses in 2016.<sup>7</sup>

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<sup>2</sup> PTO ¶¶131-32.

<sup>3</sup> TT1639:15-20; JX2121:184.

<sup>4</sup> TT900:3-9; 616:14-617:1.

<sup>5</sup> TT621:19-624:1.

<sup>6</sup> JX2442:30; JX0187:42; TT1026:14-1027:13; JX1185:8-9.

<sup>7</sup> JX2442:30; JX0187:42.

SolarCity, therefore, relied on debt markets to grow.<sup>8</sup> SolarCity aggressively monetized contracted-for customer payments and tax credits (SITCs) to generate cash from its installations.<sup>9</sup> SolarCity sold corporate bonds, termed “Solar Bonds,” principally to Musk and SpaceX.<sup>10</sup> By the time of Tesla’s Initial Offer, SolarCity owed \$375 million on its revolver, \$217 million in bonds, \$909 million in convertible debt, and an additional \$21 million in other recourse debt—much of which was due in 2017.<sup>11</sup>

SolarCity never developed a sustainable long-term growth plan to reduce its dependence on debt. In 2014, Musk asked Buss to join SolarCity as CFO to “clean up” material weaknesses in SolarCity’s financial accounting following a restatement.<sup>12</sup> Buss needed to “build some staff and some teams” to “help them just really manage the long-term growth.”<sup>13</sup> By 2016, Buss still believed SolarCity’s management was “horrible” and overly “optimistic” in creating projections.<sup>14</sup> As Bilicic testified, when Lazard was engaged on the Acquisition, SolarCity

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<sup>8</sup> JX0780:99; JX2840:Exs. 12, 15; JX0297:58, 76, 79.

<sup>9</sup> TT621:21-624:1.

<sup>10</sup> Solar Bonds were the only corporate bonds SpaceX purchased; those purchases violated SpaceX’s investment policy. TT170:6-171:11.

<sup>11</sup> JX1231:18.

<sup>12</sup> TT2384:11-2385:10.

<sup>13</sup> TT2384:11-24.

<sup>14</sup> JX1414:5.

management was unable to say, “at the beginning of the day, what the cash position of the company was, which is not even close to being best practices for a real company.”<sup>15</sup>

SolarCity attempted to vertically integrate by acquiring solar-cell manufacturer Silevo in September 2014.<sup>16</sup> The acquisition was a disaster. Silevo had no experience with high-volume manufacturing,<sup>17</sup> and SolarCity’s technological and manufacturing expertise was non-existent.<sup>18</sup> SolarCity contracted with the State of New York to manufacture solar panels at a to-be-built factory in Buffalo.<sup>19</sup> The contract required SolarCity to meet certain build-out, production, and employment milestones that would require significant (and unavailable) capital.<sup>20</sup> If SolarCity failed, it would face tens of millions of dollars in penalties.<sup>21</sup> By 2015, SolarCity was spending substantial amounts to build Silevo’s factories.<sup>22</sup>

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<sup>15</sup> TT429:9-430:14.

<sup>16</sup> JX0241:2.

<sup>17</sup> JX2780:112:13-24; *see also* JX1917.

<sup>18</sup> TT2304:5-11; TT1650:23-1651:14; JX1096; JX1708.

<sup>19</sup> JX0241:2.

<sup>20</sup> JX1587:54, 245, 277, 280.

<sup>21</sup> JX1587:54, 277, 280.

<sup>22</sup> JX1587:54, 277; JX0780:68-69, 146.

## **B. SOLARCITY'S TROUBLES ACCELERATE**

By mid-2015, SolarCity was overextended, with lower-than-expected installations, a “broken” sales department, massive capex outlays for Silevo, and debt maturities it could not repay.<sup>23</sup> By the fall, management believed it had a “major liquidity crisis.”<sup>24</sup> On September 20, 2015, SolarCity’s COO (Serra) informed the executive management team that SolarCity’s “total war chest” of available cash, which was \$1.1 billion in January 2015, would be only \$200 million by year-end.<sup>25</sup> Rive immediately instituted “weekly cash meetings.”<sup>26</sup>

On September 29, 2015, SolarCity’s Senior Vice President, Finance and Analysis informed superiors that the situation was worse than expected.<sup>27</sup> SolarCity needed to maintain an average monthly cash balance of approximately \$116 million to remain compliant with its revolving debt facility’s “Liquidity Covenant.”<sup>28</sup> Management projected that cash would drop to \$35 million by the week of

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<sup>23</sup> JX1414; TT2408:14-20.

<sup>24</sup> JX0491:1.

<sup>25</sup> JX0491:1.

<sup>26</sup> JX0503:1; JX0505; JX2777:38:15-39:7.

<sup>27</sup> JX0486:2-3.

<sup>28</sup> JX0486:2-3.

November 20.<sup>29</sup> A breach would trigger an incurable default on SolarCity’s revolver and cross-defaults on other debts.<sup>30</sup>

On October 15, 2015, Buss and Rive told SolarCity’s board, including Musk and Gracias, that SolarCity needed “\$180 to \$300m” in additional cash.<sup>31</sup> SolarCity management also reported that 2015 installations were expected to be “920MW versus budget of 1.05GW,” “reduc[ing] cash inflow.”<sup>32</sup>

On October 21, 2015, following a “weekly cash meeting,” SolarCity management confirmed that “updated forecast projects our December monthly average balance at ~\$91 million, which is \$24 million below our revolver covenant threshold of ~\$115 million.”<sup>33</sup>

SolarCity immediately sought cash through an equity or convertible bond offering—public or private.<sup>34</sup> SolarCity’s investment banks advised that neither was viable.<sup>35</sup> Goldman Sachs and Credit Suisse—both of which underwrote SolarCity’s IPO—advised SolarCity against conducting any type of seasoned equity offering

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<sup>29</sup> JX0486:2-3.

<sup>30</sup> JX2002:3; JX2799:83:13-84:16.

<sup>31</sup> JX0506:4.

<sup>32</sup> JX0506:3.

<sup>33</sup> JX0522:1.

<sup>34</sup> JX0514:2, 6.

<sup>35</sup> JX0527:8; JX0514:5; JX2791:172:23-173:3.



(“SEO”).<sup>36</sup> As Plaintiffs’ expert Murray Beach explained, “when [the advisors] say...they think that the company shouldn’t do a transaction, that’s a big vote of no.... [T]hey would love to do this transaction if they thought it could be done.”<sup>37</sup>

Meanwhile, private equity investors had no interest in acquiring SolarCity equity. They would consider only “very high coupon debt,” which would possibly violate SolarCity’s debt covenants.<sup>38</sup> In November 2015, SolarCity secured limited funding from Silver Lake, which required co-investment by Musk and Rive.<sup>39</sup> This cash was insufficient, as “conditions in the company’s performance and its balance sheet deteriorate[d] incredibly rapidly from the fourth quarter of 2015 through the second quarter of 2016.”<sup>40</sup>

In late 2015, macroeconomic headwinds exacerbated SolarCity’s liquidity problems. Changes in net metering laws threatened SolarCity’s ability to operate in certain markets.<sup>41</sup> SITCs were set to expire, and Congress had yet to extend them.<sup>42</sup>

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<sup>36</sup> TT1082:24-1083:8.

<sup>37</sup> TT1083:12-17.

<sup>38</sup> JX0514:5-6; JX2791:165:18-166:16.

<sup>39</sup> JX0585; JX0588:2.

<sup>40</sup> TT1084:7-1085:3; *see, e.g.*, JX0759:1.

<sup>41</sup> TT638:6-10.

<sup>42</sup> JX0596.

SunEdison, the “market leader” in large-scale renewable energy projects, was descending into bankruptcy.<sup>43</sup> SunEdison, like SolarCity, funded growth through debt and refinancing renewable energy projects.<sup>44</sup> By September 2015, SunEdison announced that it was laying off 1,000 employees. The market learned that SunEdison was “not sufficiently capitalized to sustain” its aggressive growth.<sup>45</sup> SunEdison filed for bankruptcy on April 20, 2016.<sup>46</sup>

SunEdison’s collapse created an issue “across the board” for solar companies.<sup>47</sup> Lenders increased scrutiny of issuers.<sup>48</sup> Asset-backed refinancing deals took longer to close.<sup>49</sup> Both developments were especially problematic for SolarCity because it had declining creditworthiness, was already operating close to its Liquidity Covenant, and needed hundreds of millions of dollars to pay its short-term debts and meet its Silevo commitments.

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<sup>43</sup> TT2453:20-2455:7.

<sup>44</sup> TT2698:8-19.

<sup>45</sup> TT2698:8-19; JX0928; JX0557.

<sup>46</sup> TT2453:20-2455:18; TT2698:8-15; JX3180.

<sup>47</sup> TT2453:20-2455:18.

<sup>48</sup> TT2453:20-2455:18; TT2697:15-2698:5.

<sup>49</sup> TT2697:15-2698:5.

### C. SOLARCITY SELLS ITS “GOLDEN EGGS”

By the end of 2015, SolarCity recognized that it could not continue business as usual.<sup>50</sup> Serra developed a “four-year” plan, presented to SolarCity executives in December.<sup>51</sup> In Serra’s view, SolarCity’s retained equity interest in cash flows from installed systems was a cache of “golden eggs,” and SolarCity was the “goose that lays golden eggs.”<sup>52</sup> He believed (wrongly) that SolarCity could “sell” its retained equity interest in existing, already financed, solar installations to build new installations.<sup>53</sup>

Serra’s plan could not (and did not) solve the liquidity crisis. As Plaintiffs’ expert Juergen Moessner explained, “the remaining equity interest that SolarCity held in the VIEs were not as valuable as perceived or claimed.”<sup>54</sup> SolarCity calculated a net present value of its retained equity interest at \$2.2 billion using a 6% discount rate and assuming 100% contract renewals.<sup>55</sup> Each of the three “cash equity” deals SolarCity conducted in 2016, however, had marginal interest rates between 11% and 12%, meaning SolarCity’s 6% discount rate was far too low, as

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<sup>50</sup> TT995:3-5.

<sup>51</sup> TT961:12-964:7.

<sup>52</sup> TT966:11-971:21.

<sup>53</sup> TT961:12-964:7.

<sup>54</sup> TT2686:11-17.

<sup>55</sup> TT2687:9-15.

reflected by a massive stock price drop when each was disclosed.<sup>56</sup> Further, the assumption that 100% of SolarCity’s customers would renew their contracts at the end of their 20-year terms was unreasonable in light of the declining costs of solar systems, system degradation, and increased consumer choice.<sup>57</sup>

More fundamentally, SolarCity did not have the cash it needed “to sustain the growth and produce new volume in line with their [four-year] plan.”<sup>58</sup> As Rive testified, by the first quarter of 2016, SolarCity’s Board decided to: shift focus to cash sales; begin layoffs; and “push out payables” to vendors.<sup>59</sup> These actions reduced “deployments” (*i.e.*, growth) and would ultimately preclude the volume necessary to achieve Serra’s impossible four-year plan.<sup>60</sup>

Meanwhile, SolarCity’s lenders were concerned about declining creditworthiness and insolvency risk.<sup>61</sup> In early 2016, the Office of the Comptroller of Currency—one of the primary regulators of SolarCity’s bank lenders—

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<sup>56</sup> TT2690:6-2692:15; TT2720:14-2722:15.

<sup>57</sup> TT2687:18-2688:9.

<sup>58</sup> TT2686:6-17.

<sup>59</sup> TT1681:17-1682:18.

<sup>60</sup> See TT640:2-14 (“[I]f you lack the capability to underwrite because you’re liquidity-constrained, then that slows your machinery, slows your operation, and your growth is significantly hampered. You simply can’t process the volume anymore.”).

<sup>61</sup> TT645:11-646:20; TT1309:10-1310:5, TT1687:3-1688:1.

downgraded SolarCity's credit rating.<sup>62</sup> In February 2016, Citibank decreased a tax equity fund commitment from \$100 million to \$20 million because of decreased interest in tax equity and "lender consent" issues.<sup>63</sup> In March 2016, U.S. Bank decreased a tax equity fund commitment from \$140 million to \$50 million due to SolarCity's credit issues.<sup>64</sup> On March 31, 2016, Credit Suisse closed a "back-leverage" transaction with SolarCity on onerous terms, citing concerns about SolarCity's ability to fulfill its deployment guidance.<sup>65</sup> In total, in the first quarter of 2016, SolarCity was able to secure only \$305 million of the \$940 million in tax equity financing it originally projected.<sup>66</sup>

SolarCity's stock price dropped precipitously in the first quarter of 2016, making an SEO even less likely to succeed:<sup>67</sup>

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<sup>62</sup> TT994:11-13.

<sup>63</sup> JX0818:1; TT1039:1-10.

<sup>64</sup> JX0904:3; TT1040:7-22.

<sup>65</sup> JX0939:1-2.

<sup>66</sup> TT1304:1-1306:1; *compare* JX0669:3 with JX0951:2.

<sup>67</sup> JX1231:72.



## II. MUSK USES HIS CONTROL TO BAIL OUT SOLARCITY

### A. MUSK STARTS THE ACQUISITION

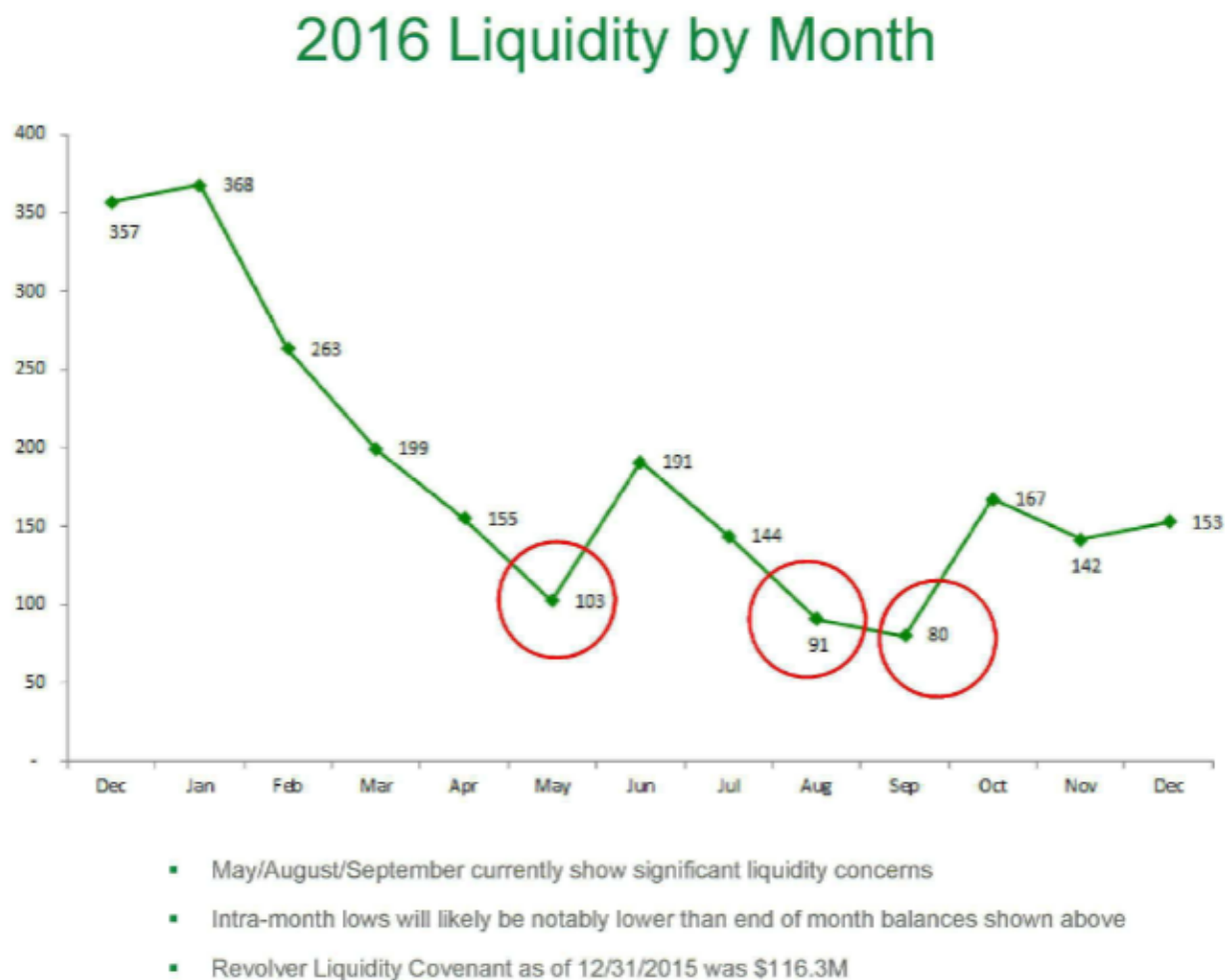
As Musk testified, “SolarCity needed to raise cash or be acquired, one of the two.”<sup>68</sup> With the former option not viable, Musk told Rive that Tesla would buy SolarCity.<sup>69</sup>

Musk knew about SolarCity’s rapidly deteriorating financial condition. During a February 2, 2016 SolarCity Board meeting, Musk received a presentation

<sup>68</sup> TT223:19-21; TT177:1-5 (“SolarCity either needs to go raise money independently or be acquired. And I thought that there was not much point in them going and raising money and diluting their shares when we should just acquire them.”).

<sup>69</sup> JX2789 at 274:4-13; JX1451; TT1756:11-22.

on SolarCity's "2016 Liquidity by Month."<sup>70</sup> This analysis "show[ed] significant liquidity concerns," including the likelihood of SolarCity violating its debt covenants.<sup>71</sup> SolarCity forecasted that its cash balances would drop below the Liquidity Covenant's threshold in May, August, and September 2016:<sup>72</sup>



<sup>70</sup> JX0738:12; TT160:20-161:6.

<sup>71</sup> JX0738:12.

<sup>72</sup> JX0738:12.

SolarCity's directors also discussed management's forecast of over \$200 million negative net cash flows for 2016, meaning that cash from operations could not solve its shortfalls.<sup>73</sup>

Two days later, Rive convened an emergency "cash planning" meeting with Musk and SolarCity management to discuss "how we are going to manage our cash needs."<sup>74</sup> Rive and Musk discussed taking extreme measures to conserve cash.<sup>75</sup> SolarCity started withholding vendor payments and ranking accounts payable to decide which it could pay.<sup>76</sup> Management developed "finance postpone guidelines" to suspend specific installations based on their cash impact, because installations were cash-flow negative.<sup>77</sup> ***Following this meeting, Musk called Rive and told him that Tesla would buy SolarCity.***<sup>78</sup>

The timing was bad for Tesla. The following month Tesla was set to unveil the Model 3, which Tesla described as the "biggest consumer product launch ever."<sup>79</sup> Musk testified the Model 3 was a "bet-the-company" product.<sup>80</sup> Musk told the

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<sup>73</sup> TT158:22-159:12; JX0738:10.

<sup>74</sup> TT1755:11-16; JX0777; TT162:23-163:12.

<sup>75</sup> TT1755:7-10; JX2777:71:14-21; JX0812; JX0794; JX1110:1-2.

<sup>76</sup> JX0882.

<sup>77</sup> JX0891:4.

<sup>78</sup> TT1755:21-24; JX1451.

<sup>79</sup> JX1049:4; JX0783:4.

<sup>80</sup> TT128:6-13; JX2789:93:3-6.



market that Tesla would reach its “500,000 total unit build plan” by 2018, which would require “additional capital.”<sup>81</sup> Tesla needed \$4 billion for “Model 3 capex,”<sup>82</sup> was forecasting that its cash balances would drop to a deficit in 2017,<sup>83</sup> and had to conduct its own SEO.<sup>84</sup>

On February 27, 2016, Musk called Tesla’s CFO Jason Wheeler and directed him to prepare a financial analysis of a SolarCity acquisition for a special Board meeting two days later.<sup>85</sup> There was only one agenda item at that meeting: buying SolarCity.<sup>86</sup> Before the meeting, Musk arranged for Wilson Sonsini Goodrich & Rosati—which had historically represented both companies—to waive conflicts and attend the Board meeting.<sup>87</sup>

Wheeler’s analysis showed that the Acquisition would be “highly dilutive” under “all cases.”<sup>88</sup> During the meeting, no director asked Musk why it was so

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<sup>81</sup> JX1049:4.

<sup>82</sup> JX1550:5.

<sup>83</sup> JX1550:6.

<sup>84</sup> JX1114.

<sup>85</sup> JX2793:30:8-31:7.

<sup>86</sup> JX0848; JX0849.

<sup>87</sup> JX0833.

<sup>88</sup> JX0844:1.

urgent that Tesla acquire SolarCity.<sup>89</sup> Contrary to the Proxy,<sup>90</sup> the Tesla Board did not reject Musk's proposal. Rather it told Musk that it was not a good time for Tesla, but nonetheless "authorized management to gather additional details and to further explore and analyze a transaction with SolarCity...."<sup>91</sup>

Despite the small number of people aware of Musk's sudden interest in acquiring SolarCity, beginning around March 2, 2016, investment websites and newspapers reported the potential transaction, causing SolarCity's stock price to rise nearly 25%, from \$18.01 on March 1 to \$22.49 on March 3.<sup>92</sup> Beach found that this increase was highly statistically significant, no other information could explain the increase except for the leaks, and SolarCity's stock price continued to be affected through June.<sup>93</sup>

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<sup>89</sup> TT2093:1-17.

<sup>90</sup> JX2121:67.

<sup>91</sup> JX0849:2; *see also* TT1700:16-18 ( "[Musk] then came back, call it March, saying... [t]he board asked to wait to do this, and to revisit it in May." ).

<sup>92</sup> PTO Ex.C; JX0870; JX3106; JX3107; JX3108; JX0868.

<sup>93</sup> JX2847:6-7; TT2715:8-2716:20.

On March 15, 2016, Musk again raised acquiring SolarCity.<sup>94</sup> The Board again asked Musk to focus on making cars, reiterating that “this is something that we should postpone to a later date.”<sup>95</sup> The Proxy did not disclose this meeting.<sup>96</sup>

Notwithstanding the Board’s direction, Musk, Gracias, and Maron interviewed potential deal counsel on March 25, 2016<sup>97</sup> and selected Wachtell Lipton to represent Tesla in negotiations with SolarCity.<sup>98</sup> Musk’s and Gracias’s involvement in selecting Tesla’s counsel was not disclosed in the Proxy.<sup>99</sup>

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

Following the first quarter of 2016, SolarCity’s liquidity crisis deepened and demand for its systems continued to decline. With \$32 million in net negative cash flow in the first quarter, SolarCity projected over \$139 million in additional negative cash flow for the second quarter and over \$103 million in total negative cash flow

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<sup>94</sup> JX0902.

<sup>95</sup> JX0902; TT261:22-263:3.

<sup>96</sup> JX2121:67.

<sup>97</sup> JX0922; TT263:23-264:16.

<sup>98</sup> TT265:7-12; JX3226:8.

<sup>99</sup> JX2121:67.

for fiscal year 2016.<sup>100</sup> By April, SolarCity management acknowledged that the company had “no room for error.”<sup>101</sup>

At an April 26, 2016 SolarCity board meeting, which Musk attended, Rive addressed “important/disturbing” issues concerning SolarCity’s outlook and financial viability.<sup>102</sup> Rive proffered lowered guidance: SolarCity expected installations of only 900 MW for 2016, 28% fewer than the 1,250 MW guidance he provided Musk just two months earlier.<sup>103</sup> Rive also warned that “May – August are at risk of tripping [the revolver] covenant,” and presented an “Updated 2016 Liquidity by Month” that showed intra-month cash balances dropping to \$73 million and remaining below the Liquidity Covenant through October 2016.<sup>104</sup>

SolarCity’s Form 10-Q for the first quarter of 2016 failed to disclose this information and falsely claimed that SolarCity would have sufficient cash to “meet cash requirements for the next 12 months.”<sup>105</sup> Further, management lowered

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<sup>100</sup> JX1008:16; TT1016:11-24.

<sup>101</sup> JX0982:1; TT1041:19-1042:1.

<sup>102</sup> JX1007; JX1010.

<sup>103</sup> JX1010:22.

<sup>104</sup> JX1010:17.

<sup>105</sup> JX1072:41.

guidance only to a range of 1,000-1,100 MW, rather than the 900-1000 MW range in management's "2016 Reforecast."<sup>106</sup>

Even without full information, SolarCity's stock price cratered, with an excess negative return of 17.4% relative to its peers.<sup>107</sup> In May 2016, with installations dropping, SolarCity management privately acknowledged that its sales division was "badly, badly broke[n]."<sup>108</sup> Internal bookings reports were "drenched in a sea [of] red," and "opportunity creation" was trending down.<sup>109</sup> SolarCity was fighting "turnover" and "morale" problems among its sales staff and was "exposed and vulnerable" to losing its top sales talent.<sup>110</sup> SolarCity was further struggling with its "cost of acquisition" and "sales efficiency" due to a bloated sales organization.<sup>111</sup>

Meanwhile, SolarCity was still not raising the cash it projected through its refinancing operations. In the first quarter of 2016, Bank of America, one of SolarCity's largest tax equity lenders, began "pushing for significantly more insight into [SolarCity's] corporate financial situation."<sup>112</sup> SolarCity was only able to close

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<sup>106</sup> JX1066:9; TT185:19-24.

<sup>107</sup> TT2721:4-8.

<sup>108</sup> JX2771:32:14-33:9; JX1387.

<sup>109</sup> JX1387:2.

<sup>110</sup> JX2771:37:2-38:10, 42:18-43:21; JX2792:65:3-7; JX1000.

<sup>111</sup> JX2771:32:19-33:9.

<sup>112</sup> JX1060:2.

two tax equity transactions during the second quarter, the largest, a reduced \$80 million commitment by Bank of America (“Cast3”). Together, the two funds brought in just \$95 million of the \$420 million of tax equity financing SolarCity originally projected.<sup>113</sup> According to Rive, Cast3 was “the worst fund in the market,” and SolarCity closed it only because of the “situation we were in at that time.”<sup>114</sup>

Even with Cast3, SolarCity reported only \$145.7 million in cash and cash equivalents as of June 30, 2016—less than \$30 million above the Liquidity Covenant.<sup>115</sup>

### **C. MUSK PUSHES THE TESLA BOARD TO OFFER A PREMIUM PRICE**

Musk and Rive again spoke privately about the Acquisition in May 2016.<sup>116</sup> SolarCity was moving May expenses into June, including payroll, accounts payable, and Silevo expenses, to remain afloat.<sup>117</sup> Rive wanted to proceed with the Acquisition immediately, but Musk had to “push[] it out to June.”<sup>118</sup> Musk, however, knew that SolarCity faced an immediate cash deficit and could not survive

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<sup>113</sup> TT1307:15-1308:20; JX1230.

<sup>114</sup> JX2105:4.

<sup>115</sup> JX1854:50.

<sup>116</sup> TT1778:4-13; JX1451.

<sup>117</sup> TT1791:1-1792:10.

<sup>118</sup> TT1785:7-1786:5; TT1700:20-1701:12.

through the acquisition process without a bridge loan, which Musk promised Rive Tesla would provide.<sup>119</sup>

On May 31, 2016, Musk again brought the SolarCity acquisition to his Board.<sup>120</sup> Despite the Proxy’s suggestion that the Board discussed “opportunities in the solar energy space” generally,<sup>121</sup> SolarCity was the only acquisition target Musk discussed. The Board authorized Musk and his management team to “engage an independent financial advisor on behalf of the Board and the Company.”<sup>122</sup> By the May 31, 2016 Board meeting, Musk already retained Wachtell to serve as legal counsel to buy—exclusively—SolarCity.<sup>123</sup>

Just over two weeks later, Musk called another special meeting of the Board. Prior to the meeting, he personally helped prepare an offer letter to SolarCity and a blog post announcing the offer,<sup>124</sup> and requested and received a draft presentation from Evercore to review and provide comment.<sup>125</sup>

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<sup>119</sup> TT1776:9-15; JX2789:275:7-13; JX1451.

<sup>120</sup> JX1131.

<sup>121</sup> JX2121:67.

<sup>122</sup> JX1131:2.

<sup>123</sup> JX3226:8.

<sup>124</sup> JX1228; JX1231:114-122; JX1224; TT279:23-280:6.

<sup>125</sup> JX1227.

At the meeting, Musk actively participated in the Board’s pricing and strategy discussions. He discussed Tesla’s specific offer price, negotiating tactics, and “walkaway price.”<sup>126</sup> Evercore recommended a \$25-\$27 per share offer.<sup>127</sup> Musk advocated for a \$28.50 offer, reflecting a 30% premium to SolarCity’s market price.<sup>128</sup> Musk explained that the price had to be “publicly defensible” *for SolarCity*.<sup>129</sup> Thus, contrary to the Proxy, the full Tesla Board, including Musk and Gracias, discussed and resolved to propose the specific exchange ratio of “0.122x to 0.131x” (\$26.50-\$28.50 per SolarCity share).<sup>130</sup>

Before the Initial Offer, Musk never told the Board that: SolarCity needed to “raise money or be acquired”;<sup>131</sup> he already told Rive that Tesla would acquire SolarCity and give it bridge financing;<sup>132</sup> or SolarCity was cash-strapped and at risk

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<sup>126</sup> JX1238:1; JX1239:5-6.

<sup>127</sup> JX1231:15 (Evercore accretion/dilution analysis showing that transaction was dilutive to Tesla at \$25-\$27 price range); JX1239:5 (notes from second Evercore deal team member: “Our thoughts – risk vs return: *if our offer is 25-27, upside is relatively limited.*”) (emphasis added); JX1238:2 (notes from Evercore deal team member: “*What range are we actually suggesting? \$25-27 under EVR’s suggested exchange ratio.*”)(emphasis added).

<sup>128</sup> TT1502:8-19.

<sup>129</sup> JX1238:2.

<sup>130</sup> Compare JX1228:3 and JX1238:2 with JX2121:68.

<sup>131</sup> TT2093:6-23; TT2103:15-2104:13; see JX1131, JX1228, JX1238, JX1239.

<sup>132</sup> TT2101:9-2102:8; TT2102:21-2103:5; TT2104:14-2105:6; TT2146:11-2147:22.



of tripping its Liquidity Covenant.<sup>133</sup> Rather, after the Board settled at a range Musk approved, Musk just left the room so that the remaining directors could “vote.”<sup>134</sup>

Immediately after the June 20 meeting, Tesla made the Initial Offer,<sup>135</sup> which was publicly disclosed after the markets closed on June 21, 2016.<sup>136</sup> Following the announcement, Tesla’s stock price plummeted by more than 10%, wiping out \$3.07 billion of value—greater than SolarCity’s *entire market capitalization*.<sup>137</sup>

On June 22, 2016, Musk hosted a teleconference with analysts to discuss the Initial Offer.<sup>138</sup> Knowing the true condition of SolarCity, he nonetheless stated:

[T]he board opinion is unanimous for both companies. So, I mean, *unless there’s something discovered that like that I have no idea about...*the independent board members would recommend in favor of completing a transaction somewhere in the price range that was mentioned....<sup>139</sup>

#### **D. SOLARCITY’S DOWNWARD SPIRAL**

Only three days after the Initial Offer, Bank of America further downgraded SolarCity’s risk rating, citing, among other things: SolarCity’s third consecutive quarter of “negative AB Cash Flow, beginning with Q3’15”; “[r]ecent delayed or

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<sup>133</sup> TT2102:9-15.

<sup>134</sup> JX1228:3-5; JX1238:2.

<sup>135</sup> JX1233.

<sup>136</sup> JX1251:34-36.

<sup>137</sup> JX1590:254; JX2834:¶¶33-34.

<sup>138</sup> JX1321.

<sup>139</sup> JX1321:6 (emphasis added).

missed closings of cash equity and tax equity transactions,” which “contributed to declining operational liquidity”; “[s]ignificant (\$30MM/quarter) cash outflow for Silevo manufacturing”; and SolarCity’s “consistent track record of missing plan due to the timing of contract monetization, overspending in SG&A, management turnover in the finance department, and difficulty in forecasting performance.”<sup>140</sup> One week later, SolarCity ended the second quarter with over \$216 million in negative cash flow.<sup>141</sup>

SolarCity’s filings for the second quarter of 2016 falsely blamed Tesla’s June 20, 2016 Initial Offer for “some delays in obtaining financing and entering into new financing arrangements” and its low cash balances.<sup>142</sup> Those “delays,” however, began before the Initial Offer and resulted directly from undisclosed lender concerns about SolarCity’s creditworthiness and liquidity.<sup>143</sup>

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<sup>140</sup> JX1355:2; TT1792:15-1793:15.

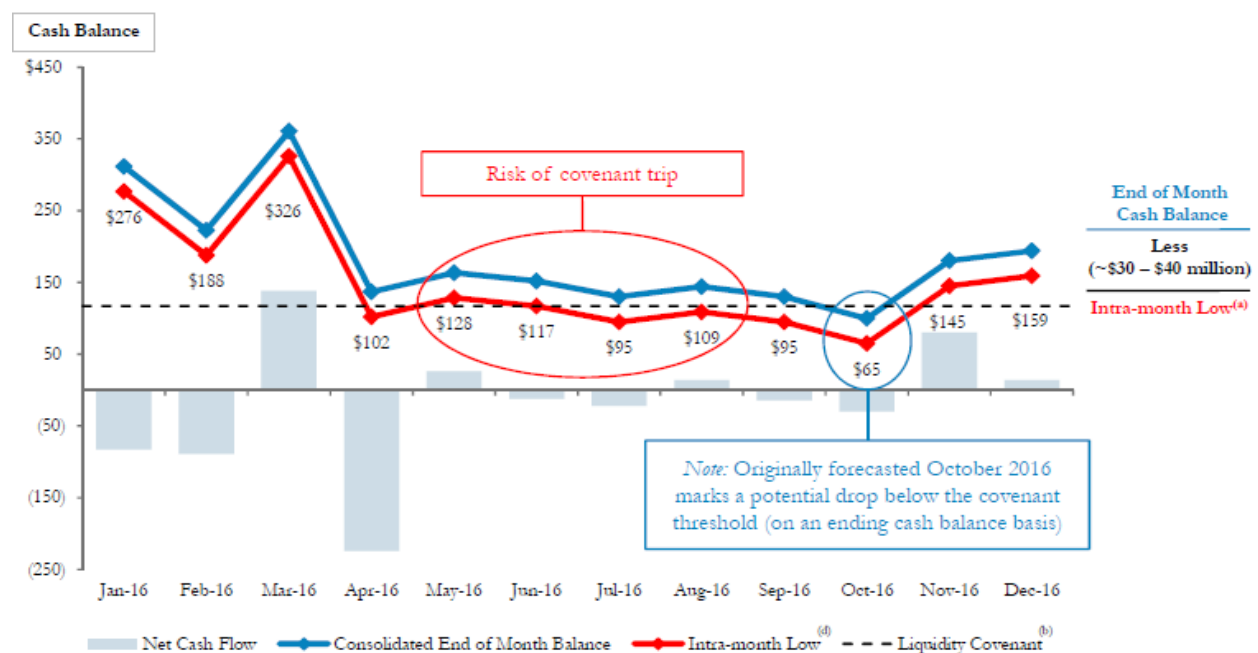
<sup>141</sup> TT1031:8-1032:4; JX1858:12.

<sup>142</sup> JX1858:2; JX1854:50, 57, 61.

<sup>143</sup> TT1510:16-21; JX1406; TT1510:22-1512:24 (Evercore did not “buy what SolarCity was saying about the offer constraining their ability to find financing”); TT1789:19-1792:10; TT422:14-423:10 (“I think the company had a liquidity problem that had almost nothing to do with the presence of the Tesla proposal.”).

On June 25, 2016, SolarCity’s “Special Committee” retained Lazard as a financial advisor.<sup>144</sup> Lazard quickly confirmed that SolarCity was “on the brink of a liquidity event.”<sup>145</sup>

On July 9, 2016, Lazard presented an analysis showing that SolarCity’s intra-month cash balances would dip well below the balance required by the Liquidity Covenant numerous times over the following months:<sup>146</sup>



Lazard expressly advised that SolarCity “was close to breaching a liquidity covenant under the Company’s revolving credit facility” and “would be operating

<sup>144</sup> JX1347:2; JX1350.

<sup>145</sup> JX1721:2.

<sup>146</sup> JX1445:6-8.

with little margin for error until October 2016.”<sup>147</sup> Lazard was “concerned about the company on a stand-alone basis going forward.”<sup>148</sup>

#### **E. MUSK DRIVES THE TRANSACTION TO SIGNING**

Musk continued to negotiate with SolarCity outside of the Board process.<sup>149</sup> Rive regularly provided Musk with “updates” on SolarCity’s worsening cash position and need for bridge financing.<sup>150</sup>

On July 9, 2016, Rive and Musk discussed SolarCity’s liquidity needs and the Acquisition.<sup>151</sup> Rive reminded Musk that SolarCity was “running crazy close” to its Liquidity Covenant, and he was “really afraid of the domino effect” that would result if SolarCity did not get cash soon.<sup>152</sup>

The next day, Rive emailed Musk the “cash forecast [he] gave the board in April” and again warned of the “domino effect” that SolarCity faced due to its liquidity issues.<sup>153</sup> Rive copied SolarCity’s in-house counsel to keep his exchange with Musk “privilege[d],” further asking Musk to speak over the phone regarding

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<sup>147</sup> JX1453:1.

<sup>148</sup> TT429:15-430:1.

<sup>149</sup> JX1451; JX1455.

<sup>150</sup> JX2789:272:21-23; JX2777:106:6-107:42.

<sup>151</sup> TT1794:2-10.

<sup>152</sup> JX1451; JX2777:107:5-11; JX2789:272:10-273:12.

<sup>153</sup> JX1455.

SolarCity's \$200 million bridge loan request.<sup>154</sup> The Proxy does not disclose these communications.<sup>155</sup>

Musk decided against Tesla providing a bridge loan and began exploring whether Tesla could buy Silevo assets as an alternate way to get SolarCity the cash it needed.<sup>156</sup> On or around July 14, Musk relayed these thoughts to Rive.<sup>157</sup> On the same date, Musk spoke with SolarCity Special Committee member Don Kendall.<sup>158</sup> Though the Proxy acknowledges that Kendall and Musk discussed certain aspects of the deal, including the go-shop period and break-up fee, it omits other significant discussion topics,<sup>159</sup> including:

- Tesla's potential acquisition of Silevo;
- SolarCity's "reverse due diligence on Tesla";
- SolarCity's "interim operating covenants"; and
- "[T]he offer price of the Tesla Proposal."<sup>160</sup>

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<sup>154</sup> JX1455; TT1796:10-16.

<sup>155</sup> JX2121:71-72.

<sup>156</sup> JX1497:2.

<sup>157</sup> TT1798:3-1799:12.

<sup>158</sup> JX1499.

<sup>159</sup> JX2121:73.

<sup>160</sup> JX1499.

## **F. MUSK PUSHES TO EXECUTE QUICKLY**

On July 13, 2016, Evercore discovered SolarCity's multiple potential breaches of its Liquidity Covenant.<sup>161</sup> Two days later, Evercore had a "very concerning" call with Lazard, where Lazard made it appear that it was unaware of the potential covenant breaches.<sup>162</sup>

McBean immediately telephoned Musk.<sup>163</sup> Musk "was surprised...that [Lazard] didn't know that [SolarCity] could potentially default on its revolver."<sup>164</sup> Musk did not appear surprised about the liquidity problems,<sup>165</sup> but he was "very concerned about the pace of diligence."<sup>166</sup>

Within an hour of that call, Musk set up daily calls with Tesla's advisors and management to expedite the process.<sup>167</sup> Musk did not tell his Board about these daily calls, and the Proxy omits them.<sup>168</sup>

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<sup>161</sup> JX1471; TT1513:18-1515:24.

<sup>162</sup> JX1512; TT1518:12-1519:2.

<sup>163</sup> JX1528; TT1520:18-1521:1.

<sup>164</sup> JX2796:238:3-12; 163:20-164:8; TT1521:2-5.

<sup>165</sup> JX2796:164:9-12, 238:14-17.

<sup>166</sup> TT1521:9-23.

<sup>167</sup> TT1521:2-1522: 21.

<sup>168</sup> TT1526:5-1527:19; TT1538:1-3; TT1529:7-13; JX2121:73.

The first “daily call” took place the following morning<sup>169</sup> and addressed “the status of every—of all the work streams.”<sup>170</sup> Musk and the deal team discussed Evercore’s “Financial Model” and “Valuation/Fairness opinion,” “Interim Bridge Financing” for SolarCity, and “Board review and approval” of the transaction.<sup>171</sup>

Musk then directed the team to get the deal signed immediately. Fewer than 30 minutes after the start of the first daily call, McBean emailed her team: “We are running out of time. Plan is to sign this week and fairness is on Monday.”<sup>172</sup> Musk’s accelerated timetable served only SolarCity’s interest. Evercore, nonetheless, did its best to make Musk’s timetable work.

Over the next 48 hours, Evercore created its own “downside” case projections. The bankers revised assumptions and inputs until they arrived at a DCF valuation that could justify a price within the Initial Offer range.<sup>173</sup> Even then, on July 18, 2016, Evercore’s Fairness Committee rejected that range.<sup>174</sup> Later that day, Evercore sent Wheeler the same downside case it shared with its Fairness

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<sup>169</sup> JX1526; TT1523:2-7.

<sup>170</sup> TT1527:24-1528:24.

<sup>171</sup> JX1526.

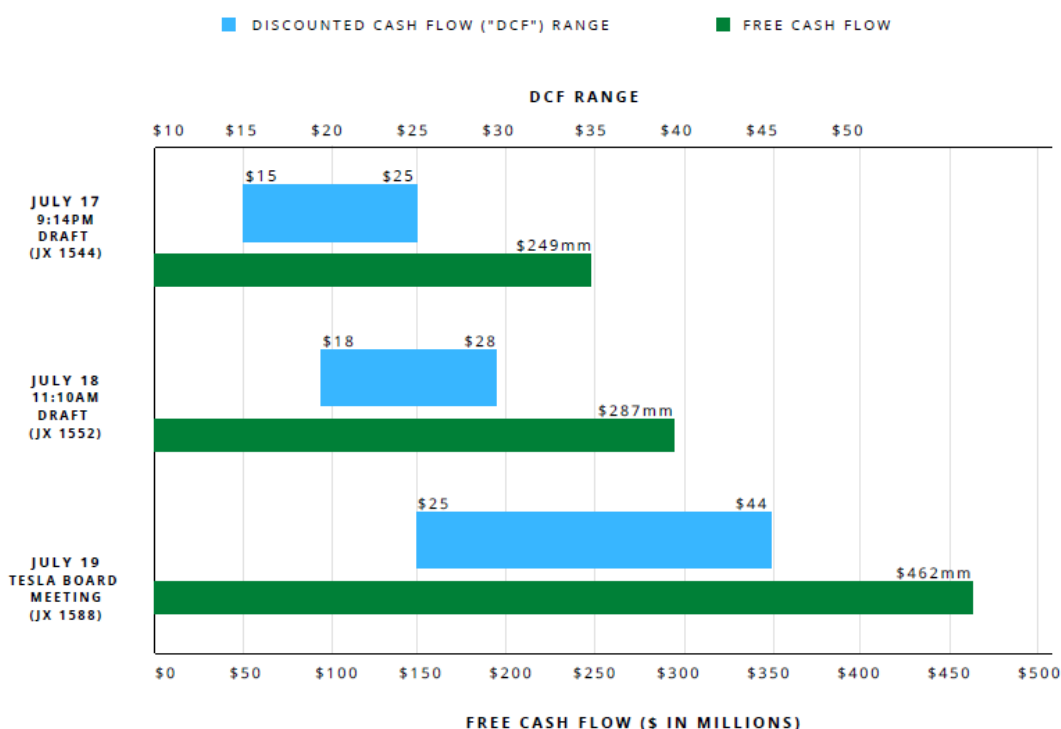
<sup>172</sup> JX1527:24; TT1534:12-1535:12.

<sup>173</sup> *Compare* JX1544:7, 10 (\$15-\$25 DCF valuation) *with* JX1552:6, 11 (\$18-\$28 DCF valuation).

<sup>174</sup> TT1561:4-16; JX1575.

Committee.<sup>175</sup> An hour later, Evercore called Musk for another “update.”<sup>176</sup> After talking with Musk, Evercore’s downside projections “doubled overnight.”<sup>177</sup> The net effect of Evercore’s changing assumptions moved the midpoint of Evercore’s DCF range from \$20 to \$34.50.<sup>178</sup>

#### EVOLUTION OF SCTY REVISED SENSITIVITY CASE: JULY 17-JULY 19



At the next Board meeting on July 19, Evercore disclosed SolarCity’s dire liquidity situation. Evercore explained that SolarCity would likely trip its Liquidity Covenant by July 30, 2016, triggering an incurable default across all of SolarCity’s

<sup>175</sup> JX1553; TT1561:19-1563:12.

<sup>176</sup> TT1563:14-1564:4.

<sup>177</sup> TT1565:20-1566:2.

<sup>178</sup> TT1572:3-16.



debt.<sup>179</sup> Evercore further warned that disclosure of an event of default would threaten SolarCity's ability to maintain solvency.<sup>180</sup> Evercore further detailed SolarCity's significant upcoming expenses in connection with Silevo.<sup>181</sup> Evercore observed that the Board was "particularly concerned" about the issues presented at that Board meeting.<sup>182</sup>

The day after his fellow directors learned SolarCity was likely insolvent, Musk self-published his Master Plan Part Deux, without seeking Board approval. He unilaterally went directly to stockholders to explain that his (and purportedly Tesla's) vision for the future could not be achieved without the acquisition of SolarCity.<sup>183</sup>

On July 21, before approaching the Board, Evercore had a private meeting with Musk to discuss its recommendation that Tesla lower its offer.<sup>184</sup> As McBean testified, "We have to update Elon before talking to the board."<sup>185</sup> Evercore

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<sup>179</sup> JX1588:28, 30; TT1573:6-1575:6.

<sup>180</sup> JX1588:28; TT1573:6-1575:6.

<sup>181</sup> JX1588:28; TT1579:19-1580:8.

<sup>182</sup> TT1576:13-1577:4.

<sup>183</sup> TT574:8-22; TT576:9-19; JX1606.

<sup>184</sup> JX1619.

<sup>185</sup> TT1592:20-24.

provided its “recommendation” to the Board the following day.<sup>186</sup> Evercore’s call with Musk was not disclosed to stockholders or the Board.<sup>187</sup>

On July 22, SolarCity informed Evercore that it would be delaying certain expenses for Silevo until the first quarter of 2017, making them Tesla’s responsibility and putting Tesla at risk of paying penalties.<sup>188</sup> Evercore did not revise its projections to account for this information.<sup>189</sup>

On July 24, the full Board met to discuss the transaction and the revised offer. Among other things, the Board discussed whether to make a revised offer before the release of SolarCity’s second quarter 2016 results and reduced installation guidance.<sup>190</sup> The Board was aware that the market would not react favorably to the results.<sup>191</sup> The Board was likewise aware that SolarCity had limited options for raising capital without a Tesla deal.<sup>192</sup> Musk, however, reiterated his belief in the

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<sup>186</sup> JX1655:2-3.

<sup>187</sup> TT2158:21-2159:5.

<sup>188</sup> TT1593:20-1595:2.

<sup>189</sup> *Compare* JX1588:41, 43 *with* JX1735:62, 64; *see* JX2796:291:9-293:7. Nor did Evercore revise its projections upon learning on July 28 that Silevo would have to shut down production of panels for 3-6 months to perform field validation after having used the wrong materials in its most recent batch. JX1708:1.

<sup>190</sup> TT1598:5-15.

<sup>191</sup> TT1598:16-1599:23.

<sup>192</sup> TT1599:1-1600:24.

“strategic rationale” of the transaction and suggested the Board should move forward with the deal.<sup>193</sup>

The Proxy falsely stated that the Board resolved to make a revised offer at that meeting. Rather, the Board convened a second, undisclosed telephonic meeting with Musk (without outside advisors) later that evening. As Denholm admitted, the Board called Musk to discuss if it “could [] be a better strategy to actually acquire just the Silevo assets as opposed to the entire company, if we couldn’t get to a negotiated agreement around the entire company, in order to fulfill Tesla’s mission.”<sup>194</sup> Musk said no; the Board proceeded with a revised offer of 0.105x per SolarCity share.<sup>195</sup> After all, Tesla’s acquisition of just Silevo would not save SolarCity.<sup>196</sup>

On July 30, the Board offered to pay 0.110 shares of Tesla stock for each share of SolarCity stock.<sup>197</sup> Tesla advised stockholders that this exchange ratio represented an equity value for SolarCity of approximately \$2.6 billion, or \$25.37 per share, based on the 5-day volume-weighted average price of Tesla stock.<sup>198</sup>

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<sup>193</sup> TT1603:20-1605:5.

<sup>194</sup> TT2163:23-2164:19.

<sup>195</sup> TT2162:23-2165:12.

<sup>196</sup> JX1497:2 (“they could buy Silevo but we still may need bridge financing until it closes”).

<sup>197</sup> JX1736:2-3.

<sup>198</sup> JX1762:163.

## **G. SOLARCITY NARROWLY AVOIDS DEFAULT BETWEEN SIGNING AND CLOSING**

By August 7, 2016, SolarCity had over \$86 million overdue in accounts payable, had delayed payroll for its own employees, was unable to cover its debts or operating expenses, and was incapable of finding financing independently of Musk.<sup>199</sup> SolarCity failed Goldman Sachs's and Morgan Stanley's credit approval, and Silver Lake, which insisted on a 44% effective interest rate for convertible bonds, could not syndicate the paper quickly enough.<sup>200</sup> By August 23, Musk and his cousins purchased \$100 million of 12-month 6.5% Solar Bonds.<sup>201</sup> This was the only "bridge" financing SolarCity could arrange.<sup>202</sup>

## **H. MUSK MANIPULATES THE STOCKHOLDER VOTE**

By mid-September 2016, the "[l]atest feedback from major investors [wa]s very negative on SolarCity."<sup>203</sup> Musk told Buss that three things were necessary to

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<sup>199</sup> JX1869:6; JX1850 ("We have tried every lever but we just cannot get the debt in time.... We are now at the last resort stage.").

<sup>200</sup> JX1885:3.

<sup>201</sup> JX1921:2. Musk and his cousins stepped in after SpaceX pulled out of a like-sized investment hours before SolarCity planned to disclose the offering. JX1897:1, 5-6.

<sup>202</sup> TT1809:18-1814:11 ("Q. So then at that point, you and Mr. Musk decided that the only option left was for you personally to put money into SolarCity; true? A. Correct.").

<sup>203</sup> JX2031.

change the tide, including that SolarCity would need to “solv[e] its liquidity crisis,” and stockholders would need a “joint product demo” of the Solar Roof.<sup>204</sup>

Musk could not solve SolarCity’s liquidity crisis before the stockholder vote. As Wheeler informed Musk on October 7, 2016, Tesla needed to provide a \$500 million “[c]apital infusion into SCTY to de-lever and de-risk the credit profile,”<sup>205</sup> and on June 20, 2016, SolarCity had “massive capex needs” that required “\$2B+ in financing every year for the foreseeable future.”<sup>206</sup>

Musk instead focused on selling his “integrated product” solution to stockholders.<sup>207</sup> Musk accelerated the “product launch” for the Solar Roof to occur before the stockholder vote.<sup>208</sup> SolarCity had no budget for this product, which was just conceptual in nature.<sup>209</sup> The tiles on display did not work, but were “for demonstration of the aesthetics.”<sup>210</sup> Days after the product launch, Musk tweeted: “first solar roof deployments will start next summer.”<sup>211</sup> Then, on November 17,

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<sup>204</sup> JX2038:1.

<sup>205</sup> JX2102:3.

<sup>206</sup> JX1237:2.

<sup>207</sup> TT343:2-9.

<sup>208</sup> TT343:2-9.

<sup>209</sup> JX2304:1 (“SCTY Finance has zero visibility on how much it is going to cost [to] make a solar roof, install it, R&D, where it will be manufactured...running blind here which may be a big risk?”).

<sup>210</sup> TT344:1-8.

<sup>211</sup> JX2241.

2016, at the shareholder vote, Musk assured investors: “[W]e expect to start doing the solar roofs in volume somewhere next year.”<sup>212</sup> At trial, Musk admitted that in 2016, Tesla did not have a viable plan to begin installing solar roofs in 2017, and that his assertions to the contrary were false.<sup>213</sup> Tesla’s public stockholders approved the Acquisition on the same day.

### **I. E&Y CONFIRMS THAT SOLARCITY WAS INSOLVENT**

After the Acquisition closed, SolarCity’s auditors determined that SolarCity was insolvent. In January 2017, E&Y discovered that SolarCity’s projections (prepared in August 2016)<sup>214</sup> did not include “two payments related to solar bonds—SpaceX as they were expecting a re-investment.”<sup>215</sup> SolarCity also excluded “payments of the corporate revolver which also will be due in FY17.”<sup>216</sup> E&Y

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<sup>212</sup> JX2303:9.

<sup>213</sup> TT339:20-340:23 (confirming that it would take three to four years to take a product idea like the Solar Roof from idea phase to volume production); TT346:3-13 (“Q. But this is more than optimistic. This is just plain out false. There is no way with an idea that is in existence at Q3 2016 that you would [] start doing solar roofs in volume by 2017; correct? A. Well, I think – it’s not out of the question, 18 months later, thereabouts, that we could start production of it, but not deployment. Q. And certainly not volume. A. I don’t know. Possibly. It’s not out of the question.”).

<sup>214</sup> JX2398:3.

<sup>215</sup> JX2398:1.

<sup>216</sup> JX2398:1.

concluded that SolarCity was “short of cash by \$169M of which if you take out SpaceX, they are barely at break even.”<sup>217</sup>

Thus, E&Y’s “going concern analysis” concluded “that as a standalone entity [SolarCity] will not have sufficient cash to meet its obligations as they come due.”<sup>218</sup> To avoid this formal finding of insolvency, Tesla signed an “Equity Confirmation Letter” on March 1, 2017, committing to pay down debt and make capital contributions to SolarCity for at least twelve months to support SolarCity’s ongoing operations.<sup>219</sup>

#### **J. TESLA SHUTS DOWN SOLARCITY’S OPERATIONS**

Facing significant production issues on the Model 3, Tesla’s own cash burn, and the difficulties of continuing SolarCity’s growth, Musk dismantled SolarCity. By the end of 2016, SolarCity terminated 4,163 employees,<sup>220</sup> including its installation workforce.<sup>221</sup> Musk further eliminated SolarCity’s main sales channels, including “big box” retailers and door-to-door sales.<sup>222</sup> Musk purportedly redeployed SolarCity’s remaining workforce to the Model 3.<sup>223</sup> Each of these

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<sup>217</sup> JX2398:1.

<sup>218</sup> JX2398:3.

<sup>219</sup> JX2447.

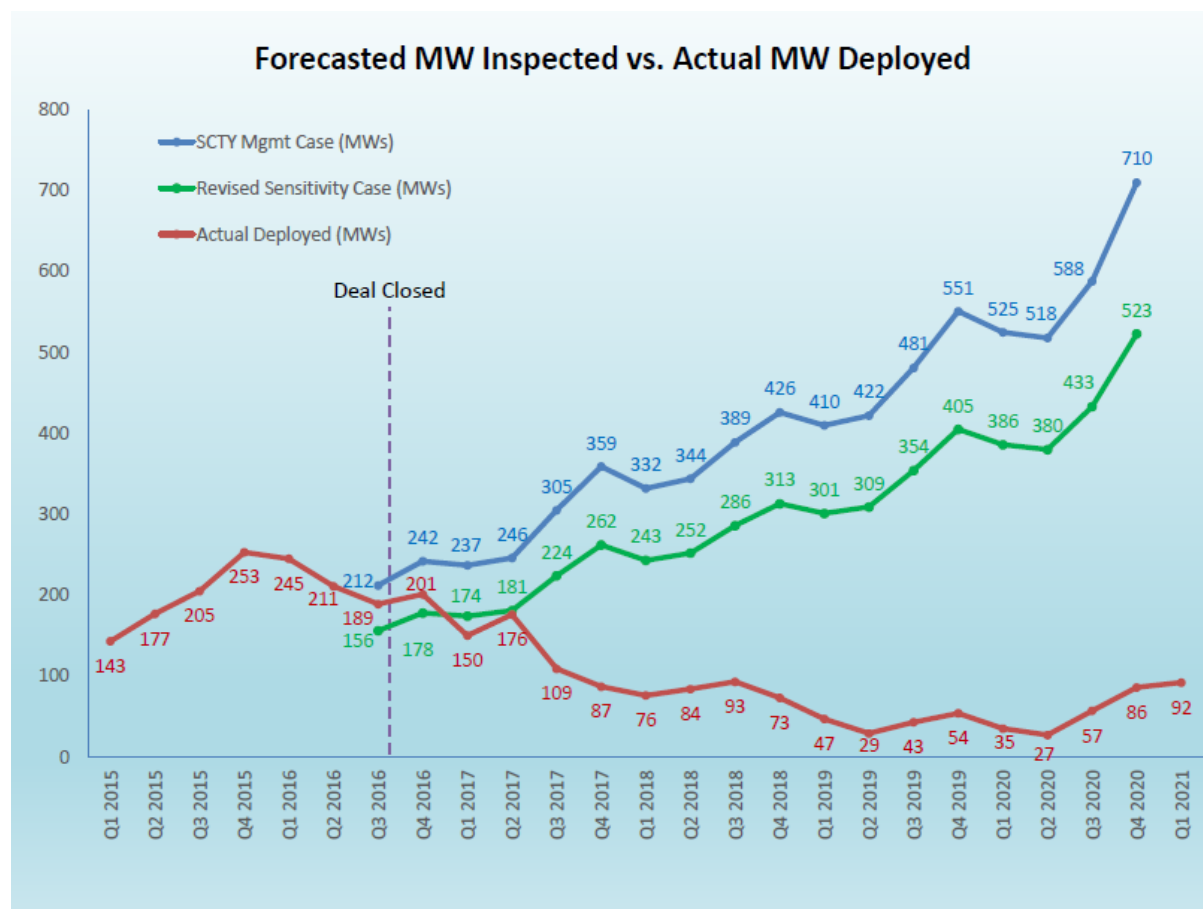
<sup>220</sup> JX2731:5.

<sup>221</sup> TT660:22-661:23.

<sup>222</sup> JX2838:328:25-329:7.

<sup>223</sup> TT35:21-36:10.

decisions further curtailed SolarCity's deployments and growth. Indeed, since the Acquisition closed, SolarCity's deployments have continued to plummet:



Musk also abandoned SolarCity's attempt at vertical integration. He negotiated a joint venture with Panasonic so that Panasonic, not Silevo, would manufacture Tesla's solar cells in Buffalo.<sup>224</sup> Tesla still does not produce any of the main components of a PV system, instead purchasing them from other

<sup>224</sup> JX2780:54:6-24; JX2147.



manufacturers.<sup>225</sup> Tesla also continues to rely on SolarCity's competitors to sell and install Tesla Powerwalls.<sup>226</sup>

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<sup>225</sup> TT661:24-662:20.

<sup>226</sup> TT660:19-21.

## ARGUMENT

### **I. MUSK BREACHED HIS FIDUCIARY DUTIES**

Musk's conduct, largely undisclosed to Tesla stockholders or his fellow directors, receives no protection under the business judgment rule and constitutes a breach of his fiduciary duties to Tesla.<sup>227</sup> Musk had a personal and individual interest in saving SolarCity. He elevated his personal concerns over Tesla's interests. He withheld critical information from the Board and stockholders about his reasons for the Acquisition and SolarCity's true financial condition.<sup>228</sup> His machinations ultimately caused Tesla to buy an insolvent company.

Among other things, Musk:

- Upon learning that SolarCity was going to violate its Liquidity Covenant, began merger negotiations with Rive, without Board knowledge or approval;<sup>229</sup>

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<sup>227</sup> See *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984)(holding the business judgment rule's "protections can only be claimed by disinterested directors.... From the standpoint of interest, this means that directors can neither appear on both sides of a transaction nor expect to derive any personal financial benefit from it in the sense of self-dealing, as opposed to a benefit which devolves upon the corporation or all stockholders generally.").

<sup>228</sup> See *Mills Acquisition Co. v. MacMillan, Inc.*, 559 A.2d 1261, 1283 (Del. 1998)("At a minimum, [the duty of candor] dictates that fiduciaries, corporate or otherwise, may not use superior information or knowledge to mislead others in the performance of their own fiduciary obligations.").

<sup>229</sup> *Supra* 14-15, nn.69-70.

- Ignored his Board’s repeated direction to focus on Tesla’s manufacturing and production problems to push the Acquisition on Tesla;<sup>230</sup>
- Interviewed and hired deal counsel for the Board, without Board knowledge or approval;<sup>231</sup>
- Pushed up the price of the Initial Offer so that it was publicly “defensible” to SolarCity stockholders, reminding everyone in the room, “I don’t negotiate”;<sup>232</sup>
- Engaged in undisclosed substantive negotiations with Rive and Kendall to ensure SolarCity would survive until closing;<sup>233</sup>
- Accelerated the process and “the pace of due diligence” to serve SolarCity’s timing needs and avoid a covenant breach;<sup>234</sup>
- Met with Evercore on numerous occasions, including on “daily calls” with his deal team, and on private calls, to discuss price recommendations;<sup>235</sup> and
- Lied repeatedly to shareholders (and this Court) about his role, the reason he had Tesla pursue the Acquisition, and the benefits of the Acquisition to Tesla.

In short, Musk was the but-for cause of a transaction that Tesla did not need and could not afford.

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<sup>230</sup> *Supra* 18-20, n.95.

<sup>231</sup> *Supra* nn.97-98.

<sup>232</sup> JX1238:2.

<sup>233</sup> *Supra* 28-29.

<sup>234</sup> *Supra* 31, n.166.

<sup>235</sup> *Supra* 31, n.171.

## II. ENTIRE FAIRNESS APPLIES

The burden is on Musk to prove entire fairness. Entire fairness applies when: (1) a corporate fiduciary stands on both sides of a transaction; (2) a majority of the board was not disinterested and independent; or (3) the transaction involved a conflicted controlling stockholder.<sup>236</sup> Here, each is true.<sup>237</sup>

### A. MUSK STOOD ON BOTH SIDES OF THE ACQUISITION

When “corporate fiduciaries stand on both sides of a challenged transaction, an instance where the directors’ loyalty has been called into question, the burden shifts to the fiduciaries to demonstrate the ‘entire fairness’ of the transaction.”<sup>238</sup> “There is no ‘safe harbor’ for such divided loyalties in Delaware.”<sup>239</sup> Accordingly, directors with a “conflict of interest relating to a proposed transaction should totally

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<sup>236</sup> *Macrophage Therapeutics, Inc. v. Goldberg*, 2021 WL 2582967, at \*13 (Del. Ch. June 23, 2021); *In re Trados Inc. S’holder Litig.*, 73 A.3d 17, 44-47 (Del. Ch. 2013).

<sup>237</sup> The Court asked the parties to address whether *Corwin* applies in the context of a conflicted controller, where the controller’s status as a stockholder is incidental to the Court’s finding of control. TT2930-2932:11. Respectfully, Plaintiffs believe that the Court need not reach this novel question. Because Plaintiffs have proved that the stockholder vote was uninformed, the stockholder vote cannot insulate Musk from liability even if *Corwin* applies.

<sup>238</sup> *Macrophage*, 2021 WL 2582967, at \*13.

<sup>239</sup> *Weinberger v. UOP, Inc.*, 457 A.2d 701, 710 (Del. 1983).

abstain from participating in the board’s consideration of that transaction.”<sup>240</sup>

Simply abstaining from votes is not enough.<sup>241</sup>

Musk stood on both sides of the Acquisition. He was the largest stockholder of both Tesla and SolarCity<sup>242</sup> and simultaneously served as Tesla’s CEO and both companies’ Chairman.<sup>243</sup> Musk, his cousins, and SpaceX collectively held \$278 million of SolarCity debt, which would have been a total loss if SolarCity failed.<sup>244</sup> As a SolarCity director, he could be subject to claims and potential liability. A failure of one of his “pyramid” of “visionary” companies would tarnish his reputation and raise questions about the viability of his other ventures.

Musk admitted that he was not “recused from all discussions” concerning the Acquisition and “had to voice [his] opinion, obviously.”<sup>245</sup> In the Tesla boardroom he negotiated for a higher Initial Offer than Evercore advised because it had to be

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<sup>240</sup> *In re Tri-Star Pictures, Inc. Litig.*, 1995 WL 106520, at \*3 (Del. Ch. Mar. 9, 1995).

<sup>241</sup> *See Frederick Hsu Living Tr. v. ODN Holding Corp.*, 2017 WL 1437308, at \*38 (Del. Ch. Apr. 24, 2017)(holding liability is appropriate “if the director was ‘closely involved with the challenged [transaction]...and the transaction was rendered unfair ‘based, in large part,’ on the director’s involvement”)(citing *Gesoff v. IIC Indus., Inc.*, 902 A.2d 1130, 1166 n.202 (Del. Ch. 2006)).

<sup>242</sup> JX2121:181, 184.

<sup>243</sup> PTO ¶¶33, 34, 36.

<sup>244</sup> JX2121:121.

<sup>245</sup> TT226:17-227:1; JX2789:283:22-284:4.

publicly “defensible” to SolarCity stockholders. He was also intimately involved in the entire process. Accordingly, Musk has the burden of proving entire fairness.

**B. THE TESLA BOARD WAS NOT DISINTERESTED AND INDEPENDENT**

Entire fairness applies also because “the [B]oard labor[ed] under actual conflicts of interest,” and “there were not enough independent and disinterested individuals among the directors making the challenged decision to comprise a [] majority.”<sup>246</sup> At least four of the Board’s seven members were interested in the transaction or otherwise not independent of Musk.<sup>247</sup>

Elon Musk, Kimbal Musk, and Gracias were unquestionably conflicted. Elon Musk and Gracias were directors of both Tesla and SolarCity, and both admitted to their conflicts in connection with the Acquisition.<sup>248</sup> Kimbal is Elon’s brother and serves on the Board to protect Elon’s interests.<sup>249</sup> He was also a SolarCity stockholder and had significant margin loans on his SolarCity shares.<sup>250</sup>

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<sup>246</sup> *Trados*, 73 A.3d at 44-47.

<sup>247</sup> See, e.g., *UFCW & Participating Food Indus. Empls. Tri-State Pension Fund v. Zuckerberg*, 250 A.3d 862, 890 (Del. Ch. 2020)(counting full board, including those who abstained from votes, to determine lack of disinterest for demand futility purposes); *Hsu*, 2017 WL 1437308, at \*27-30 (same).

<sup>248</sup> TT231:4-14; TT2837:6-14.

<sup>249</sup> TT:99-100. *Harbor Fin. Partners v. Huizenga*, 751 A.2d 879, 889 (Del. Ch. 1999); *Haseotes v. Bentas*, 2002 WL 31058540, at \*4-6 (Del. Ch. Sept. 3, 2002).

<sup>250</sup> JX2742:8-9, 17-18; JX0519.

Jurvetson was directly financially interested in SolarCity. He was a managing director of DFJ, SolarCity's third largest institutional stockholder—holding 4,827,000 shares.<sup>251</sup> Jurvetson had a personal financial interest in SolarCity that far exceeded his interest in Tesla.<sup>252</sup> Jurvetson's partner, John Fisher, was on the SolarCity Board and could be subject to claims and potential liability if SolarCity failed.<sup>253</sup> Jurvetson had a financial interest in every DFJ fund and would be adversely affected by SolarCity's collapse.<sup>254</sup> Jurvetson was also a SpaceX director and owned 7,008,576 shares of SpaceX stock.<sup>255</sup> As a holder of \$165 million of SolarCity debt, SpaceX would be adversely affected if SolarCity defaulted. Jurvetson would not cross Musk or let SolarCity fail.

Ehrenpreis was also interested in saving SolarCity. Ehrenpreis is co-founder and co-managing partner of DBL, a venture capital fund he started with Nancy Pfund, to pursue "impact investing."<sup>256</sup> DBL Equity Fund-BAEF II, L.P., held 928,977 shares of SolarCity common stock at the time of the Acquisition, making it

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<sup>251</sup> JX1234:16; JX2121:115. Jurvetson owned 50,314 shares of Tesla stock and held 29,277 stock options. JX2839:108.

<sup>252</sup> PTO ¶¶78, 83-84.

<sup>253</sup> TT2242:19-23; *Weinberger*, 457 A.2d at 710.

<sup>254</sup> TT103:12-104:10.

<sup>255</sup> JX2744:8-10.

<sup>256</sup> TT2257:8-21; JX2784:13:6-14. Ehrenpreis owned only 15,272 shares of Tesla stock and held 43,435 Tesla stock options. JX2839:108.

one of SolarCity’s ten largest investors.<sup>257</sup> Pfund served on the SolarCity Board and Special Committee and could be subject to claims and potential liability if SolarCity failed.<sup>258</sup> DBL also invested a total of \$166 million in SpaceX, and Ehrenpreis personally held 254,713 shares of SpaceX stock at the time of the Acquisition.<sup>259</sup> DBL’s promotional materials identify Tesla, SolarCity, and SpaceX as DBL portfolio companies, identify Musk and Lyndon Rive as “Advisors” to DBL, and assert that Musk’s companies demonstrate the value of DBL’s “impact investing” strategy.<sup>260</sup> Ehrenpreis appreciates that Musk has had a “significant influence on [his] professional career” and that his continued status as a Tesla director has been “a real benefit in fund-raising.”<sup>261</sup> He could not cross Musk or let SolarCity fail.

In addition to these five Tesla directors, Buss was not independent at the time the Board started to consider the SolarCity deal due to his ongoing professional relationship with SolarCity.<sup>262</sup> Buss has made generational wealth working with and for Musk, who personally recruited him to join the Board in 2009 and SolarCity in

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<sup>257</sup> JX2120:185.

<sup>258</sup> JX2121:68-69.

<sup>259</sup> JX2741:9; TT:2329:8-2330:6.

<sup>260</sup> JX0577:4 (“Over the last eleven years, the success of our portfolio companies and double bottom line assistance to our management teams has helped to put impact investing on the map.”).

<sup>261</sup> JX2784:10:10-13, 62:20-63:6.

<sup>262</sup> TT2424:11-2425:20.



2014.<sup>263</sup> At the time the Board was considering the Acquisition, approximately 45% of Buss’s wealth was attributable to his relationship with Musk and his companies.<sup>264</sup>

Because the Board did not have a majority of disinterested or independent directors, entire fairness applies.

### **C. MUSK WAS A CONFLICTED CONTROLLER**

A minority blockholder is a controlling stockholder when he possesses “a combination of potent voting power and management control such that the stockholder could be deemed to have effective control of the board without actually owning a majority of stock.”<sup>265</sup> “The requisite degree of control can be shown to exist generally or with regard to the particular transaction that is being challenged.”<sup>266</sup> Here, Plaintiffs proved both types of control.

Plaintiffs established Musk’s general control. He was and remains the driving force behind Tesla and the Board’s decision-making. Musk confirmed that he starts companies, including Tesla and SolarCity, to ensure his autonomy and authority, stating: “I have to have my own company; otherwise, somebody makes me do

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<sup>263</sup> TT108:3-14.

<sup>264</sup> TT2442:6-2443:2; JX3215:5. *In re BGC Partners, Inc. Derivative Litig.*, 2021 WL 4271788, at \*8 (Del. Ch. Sept. 20, 2021)(noting that where a director received a substantial portion of income from his directorship, it may impact his impartiality).

<sup>265</sup> *Corwin v. KKR Fin. Holdings*, 125 A.3d 304, 307 (Del. 2015).

<sup>266</sup> *Casanaro v. Bloodhound Techs., Inc.*, 65 A.3d 618, 659 (Del. Ch. 2013).

something I don't want to do.”<sup>267</sup> Musk was Tesla's CEO, Chairman, and largest stockholder at the time of the Acquisition.<sup>268</sup> The Board is filled with Musk's relatives, friends, and closest investors. A majority of Tesla's directors—individually or through their investment funds—have invested in each of Musk's “pyramid” of companies—Tesla, SolarCity, and SpaceX.<sup>269</sup> Musk authored Tesla's “Master Plan” in 2016 and “Master Plan, Part Deux,”<sup>270</sup> in the midst of Acquisition discussions, and is known as a “nano manager.”<sup>271</sup> Analysts recognize Musk's domination of Tesla, saying that he is “synonymous with Tesla,” and “Tesla's fate is closely linked to Musk's actions.”<sup>272</sup> Tesla's SEC filings state it is “highly dependent on the services of Elon Musk,” and that his departure would “disrupt” its operations and its business prospects.<sup>273</sup> He claims he does not want to be Tesla's CEO, but that Tesla “would die” without him.<sup>274</sup> And the Board has no succession

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<sup>267</sup> JX3159; TT71:14-72:5; TT73:6-18.

<sup>268</sup> JX2121:181.

<sup>269</sup> *Supra* 46-49.

<sup>270</sup> *Supra* 34; JX1618.

<sup>271</sup> JX3167:1.

<sup>272</sup> JX2231:9-10.

<sup>273</sup> TT77:11-78:17; JX2443 at 25.

<sup>274</sup> TT72:9-16.

plan for him.<sup>275</sup> In short, he controls Tesla generally through his “managerial supremacy.”<sup>276</sup>

Plaintiffs also proved Musk’s control over the Acquisition. Musk raised the Acquisition repeatedly to the Board despite its requests for him to focus on Tesla.<sup>277</sup> He instituted the process by negotiating privately with SolarCity’s CEO. He (with Gracias) hand-selected legal counsel, without Board approval. He co-opted Tesla’s management and financial advisors, without Board knowledge.<sup>278</sup> He reviewed and approved Evercore’s presentations before they went to the Board. On June 22, 2016, he secured an “Initial Offer” for himself and SolarCity, then told the market that it would take something unforeseen to him and the Tesla Board to derail their “unanimous” support for the transaction.<sup>279</sup>

Musk also controlled the negotiation process, including the “time table,” to ensure the Acquisition would be approved before SolarCity had to disclose another quarter of declining operating results and/or a breach of the Liquidity Covenant.<sup>280</sup> Musk had “daily check-in calls” with management and advisors, which no other

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<sup>275</sup> TT94:15-17.

<sup>276</sup> *In re Cysive, Inc. S’holder Litig.*, 836 A.2d 531, 552 (Del. Ch. 2003)( plaintiff pled control by “the company’s visionary founder, CEO and chairman”).

<sup>277</sup> *Supra* 18-19, 23.

<sup>278</sup> *Supra* 24, 30-36.

<sup>279</sup> *Supra* 25-26.

<sup>280</sup> *Supra* 35, nn.190-92, n.193, 42.

director attended, directed Evercore to create its own revised projections rather than wait for the “downside” case that was requested from SolarCity, and accelerated “the pace of due diligence” when SolarCity’s true financial condition began to be revealed.<sup>281</sup> Musk had undisclosed substantive negotiations with Rive and Kendall.<sup>282</sup> And when the Board learned that SolarCity would likely fail if it disclosed its quarterly results without a signed deal, Musk pushed them to sign, even though his feckless directors offered just to buy Silevo assets to serve Musk’s vision and published his Master Plan Part Deux on Tesla’s website. In short, Plaintiffs have proven that Musk “dominated and controlled” the transaction process.<sup>283</sup>

### **III. THE ACQUISITION WAS NOT ENTIRELY FAIR**

Musk had the burden to prove “that the transaction was the product of both fair dealing and fair price.” *Cinerama v. Technicolor*, 663 A.2d 1156, 1163 (Del. 1995). “Not even an honest belief that the transaction was entirely fair will be sufficient to establish entire fairness. Rather, the transaction must be objectively fair, independent of the [defendant’s] beliefs.” *Gesoff*, 902 A.2d at 1145. Musk did not meet his burden.

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<sup>281</sup> *Supra* n.167, 31-32.

<sup>282</sup> *Supra* 28-30.

<sup>283</sup> *In re Tesla Motors, Inc. S’holder Litig.*, 2018 WL 1560293, at \*13 (Del. Ch. Mar. 28, 2018).

## A. THERE WAS NO FAIR PROCESS

Fair process “focuses on the actual conduct of corporate fiduciaries in effecting a transaction, such as its initiation, structure, and negotiation.”<sup>284</sup> Fair process “embraces questions of when the transaction was timed, how it was initiated, structured, negotiated, disclosed to the directors, and how the approvals of the directors and the stockholders were obtained.”<sup>285</sup> One indicium of fair process is whether the terms of a merger were reached through a process that “involved procedural protections that would have tended to assure a fair result.”<sup>286</sup>

The Board failed to take any steps to prevent Musk from controlling the process.<sup>287</sup> It did not form a special committee or empower any “independent” director with authority to negotiate or reject the Acquisition. Musk picked Tesla’s legal advisor, co-opted its financial advisor, and engaged in negotiations with both the Board (*e.g.*, the range of the Initial Offer) and SolarCity. Musk withheld critical information from the Board before telling stockholders that the deal was almost certain and necessary for Tesla’s strategic vision. Worse yet, Denholm co-signed for Musk’s “fully recused” lie when talking to stockholders and proxy advisory firms

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<sup>284</sup> *Macrophage*, 2021 WL 2582967, at \*14.

<sup>285</sup> *Weinberger*, 457 A.2d at 711.

<sup>286</sup> *Sealy Mattress Co. of N.J. v. Sealy, Inc.*, 532 A.2d 1324, 1336-37 (Del. Ch. 1987).

<sup>287</sup> *See Kahn v. M&F Worldwide*, 88 A.3d 635, 642 (Del. 2014)(“*MFW*”)(endorsing a process designed to replicate the “characteristics of third-party, arm's-length mergers”).

at the time of the Acquisition, only to testify at trial that she was not surprised (or concerned) by his behind-the-scenes involvement.

Musk's material misrepresentations and omissions also rendered the process unfair (and defeat Musk's affirmative defense).

*First*, Musk concealed his true role in the process. Specifically, Musk and Tesla falsely assured stockholders that he was "fully recused," but failed to disclose that Musk:<sup>288</sup>

- Initiated merger discussions with his cousin (without Board approval) after learning that SolarCity could no longer pay its bills on time without tripping its Liquidity Covenant;<sup>289</sup>
- Had Tesla's general counsel (Maron) obtain a conflicts waiver from Wilson Sonsini (without Board approval);<sup>290</sup>
- Selected (with Gracias, but without Board involvement) Tesla's legal advisors Wachtell;<sup>291</sup>
- Discussed the potential acquisition of SolarCity with Evercore prior to Evercore's first Board presentation;<sup>292</sup>
- Participated in substantive price and strategy discussions at the Board's June 20, 2016 meeting, effectively negotiating Tesla's Initial Offer up to the \$26.50-\$28.50 range selected;<sup>293</sup>

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<sup>288</sup> *Supra* 1-2; JX1799:6; JX1800:6; JX1805:6.

<sup>289</sup> *Supra* 14-17.

<sup>290</sup> *Supra* n.87.

<sup>291</sup> *Supra* nn.97-98.

<sup>292</sup> *Supra* n.125.

<sup>293</sup> *Supra* 24-25.

- Repeatedly negotiated with Rive regarding the timing of the transaction and Tesla potentially providing bridge financing to SolarCity;<sup>294</sup>
- Proposed to both Rive and Kendall that Tesla acquire Silevo assets from SolarCity (without Board approval) instead of bridge financing;<sup>295</sup>
- Discussed the Initial Offer price and other substantive economic terms with Kendall (without Board approval);<sup>296</sup>
- Held daily calls with Tesla’s advisors and management to accelerate the transaction (without Board approval);<sup>297</sup>
- Set an aggressive timetable for Tesla management and advisors to complete diligence and execute transaction documents (without Board approval);<sup>298</sup>
- Discussed Evercore’s valuation analyses, projection revisions, and offer recommendations with Evercore before Evercore discussed these matters with the Board;<sup>299</sup>
- Participated in the Board’s substantive July 24, 2016 deliberations about the timing of a revised offer relative to SolarCity’s poor second quarter earnings and downward guidance revision announcement;<sup>300</sup> and
- Participated in a second, undisclosed, telephonic Board meeting on July 24, 2016, to discuss whether Tesla could just purchase the Silevo assets and achieve Musk’s vision—a proposal Musk rejected;<sup>301</sup>

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<sup>294</sup> *Supra* n.119; n.132; 28-29; n.202.

<sup>295</sup> *Supra* n.156-59.

<sup>296</sup> *Supra* nn.159-60.

<sup>297</sup> *Supra* nn.167-70.

<sup>298</sup> *Supra* n.172.

<sup>299</sup> *Supra* n.124-25; n.171; n.176-77; nn.184-87.

<sup>300</sup> *Supra* 35.

<sup>301</sup> *Supra* 35-36.

Tesla's stockholders were "entitled to a balanced and truthful recitation of events, not a sanitized version that is materially misleading."<sup>302</sup> Each of these omitted or misrepresented facts was necessary to understand the process through which the Board agreed to the Acquisition.

*Second*, Musk withheld material information regarding SolarCity's value, financial situation, and liquidity crisis. Trial confirmed the following facts, none of which appeared in the Proxy (or any SolarCity disclosure):

- Beginning in the first quarter of 2016, SolarCity's VIE lenders were increasingly concerned with SolarCity's creditworthiness and cutting their commitments to SolarCity;<sup>303</sup>
- SolarCity management forecast that in fiscal year 2016 it would lose over \$200 million in cash *after* financing activities;<sup>304</sup>
- SolarCity's lenders had repeatedly downgraded SolarCity's risk rating in 2016;<sup>305</sup>
- SolarCity was at serious risk of breaching the Liquidity Covenant throughout 2016;<sup>306</sup>
- SolarCity avoided breaching the Liquidity Covenant in 2016 only by curtailing deployments, delaying accounts payable, and withholding payroll

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<sup>302</sup> *In re Pure Res., Inc. S'holder Litig.*, 808 A.2d 421, 451 (Del. Ch. 2002); *Morrison*, 191 A.3d at 282-83.

<sup>303</sup> *Supra* nn.60-66.

<sup>304</sup> JX0738:10.

<sup>305</sup> *Supra* n.62.

<sup>306</sup> *Supra* nn.70-71.



for its employees (and took such drastic steps after Musk had to delay the Acquisition from May to June);<sup>307</sup>

- In mid-July, Evercore advised the Board that breaching the Liquidity Covenant would threaten SolarCity’s solvency and that SolarCity would likely breach the Covenant by July 30, 2016—*i.e.*, the day before the Board executed the merger agreement;<sup>308</sup>
- As of August 7, 2016, SolarCity owed more than \$86 million in overdue accounts payable;<sup>309</sup>
- Musk’s August 2016 Solar Bond purchase was the only available bridge financing for SolarCity because its banks and other lenders would not loan further funds;<sup>310</sup> and
- SolarCity was insolvent at the time of the Acquisition (contrary to its public disclosure that it had “sufficient cash to meet its obligations as they come due”), and as E&Y later confirmed.<sup>311</sup>

This information is material.<sup>312</sup> Given the numerous market suspicions that this transaction was a bailout, this information would “alter the total mix of information” available to stockholders deciding that question for themselves.<sup>313</sup>

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<sup>307</sup> *Supra* nn.58-60; nn.116-18.

<sup>308</sup> *Supra* nn.179-80; 33.

<sup>309</sup> *Supra* n.199.

<sup>310</sup> *Supra* nn.199-202.

<sup>311</sup> *Supra* 39-40.

<sup>312</sup> *See, e.g., In re Dell Techs., Inc. Class V S’holders Litig.*, 2020 WL 3096748 (Del. Ch. June 11, 2020)(holding “valuation information” needs to be “provided to stockholders”); *Albert v. Alex Brown Mgt Servs. Inc.*, 2005 WL 2130607, at \*2-3 (Aug. 26, 2005)(discussing materiality of omissions of liquidity issues).

<sup>313</sup> *See Appel v. Berkman*, 180 A.3d 1055, 1061 (Del. 2018); *Morrison*, 191 A.3d at 283; *Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, 944 (Del. 1985)(citing *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1985)).

*Third*, Musk made false statements and withheld material information about the Solar Roof. Musk told stockholders that SolarCity would produce Solar Roof tiles “in volume” by 2017—*i.e.*, in fewer than 13 months. Unbeknownst to shareholders:

- The Solar Roof was never a part of the Tesla Board’s value proposition for pursuing a transaction;
- SolarCity had yet to create a working or scalable prototype and had no budget to develop one;<sup>314</sup> and
- It would take 3-4 years after development of a working model to achieve “volume.”<sup>315</sup>

Musk admitted this information was material. Musk intended these statements to sway the stockholder vote.<sup>316</sup> Following the “product launch,” a reasonable stockholder would assume the Solar Roof was an important part of Tesla’s “value proposition” for pursuing the transaction with SolarCity. In truth, it was not, nor could it have been, given the state of the project.<sup>317</sup>

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<sup>314</sup> *Supra* nn.207-08; 38-39.

<sup>315</sup> TT340:12-23.

<sup>316</sup> *See* JX2038:1; JX2031.

<sup>317</sup> *In re Tesla*, 2020 WL 553902, at \*10 (asking, pre-trial: “perhaps more importantly, was the solar roof an important part of Tesla’s value proposition for the SolarCity acquisition?”).

Because material information was withheld from stockholders and the market, Musk cannot rely on the stockholder vote or SolarCity's stock price to cleanse his self-dealing and justify the price Tesla paid to acquire SolarCity.<sup>318</sup>

## **B. MUSK FAILED TO PROVE A FAIR PRICE**

At the conclusion of trial, the Court asked the parties to address what factors the Court can and cannot consider when evaluating fair price.<sup>319</sup> “Fair price ‘relates to the economic and financial considerations of the proposed merger, *including all relevant factors: assets, market value, earnings, future prospects, and any other elements that affect the intrinsic or inherent value of a company’s stock.*’” *Am. Mining Corp. v. Theriault*, 51 A.3d 1213, 1239 (Del. 2012) (quoting *Weinberger*, 457 A.2d at 711)(emphasis added). An unfair process “can infect price.” *Id.* at 34 n.27 (collecting cases). When the price is the product of an unfair process, the burden of proving fair terms will be exceptionally difficult unless reliable markets and dependable precedents provide compelling evidence of fairness. *Valeant Pharms. Int’l v. Jerney*, 921 A.2d 732, 748 (Del. Ch. 2007).

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<sup>318</sup> The Court queried about the effect of a finding of control if Musk’s “ownership is incidental” to the finding. TT2931:5-19. *Corwin* and *MFW* both note that in a controlled transaction, a shift to business judgment rule only occurs if there is strict compliance with *MFW*. Musk cannot prove that the shareholder vote was fully informed.

<sup>319</sup> TT2932:12-2933:12.

A finding of unfair price is appropriate where the acquired company was in financial distress that was not reflected in the “optimized” projections used to justify the transaction.<sup>320</sup> “[T]he market trading price [is] not an entirely reliable estimate of value” when “non-public information” about the company’s value and financial prospects is known to the controlling stockholder.<sup>321</sup> Unfair price is also established by evidence that:

- The price paid was “within the low end of the range of possible prices that might have been paid in negotiated arms-length deals,” but the evidence could not support that defendant’s “misconduct did not taint the price to [the company’s] disadvantage”;<sup>322</sup> and
- A DCF analysis, based on the company’s most contemporaneous financial projections, establishes a value inconsistent with the price paid.<sup>323</sup>

Here, Musk did not prove fair price because he did not rebut the strong evidence that: (1) SolarCity was insolvent; (2) SolarCity’s stock market price did not reflect non-public information and there were no cognizable synergies; and (3) Evercore’s fairness opinion was unreliable.

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<sup>320</sup> *In re Southern Peru Copper Corp. S’holder Deriv. Litig.*, 52 A.3d 761, 802-803 (Del. Ch. 2011), *aff’d sub nom.*, *Am. Mining Corp. v. Theriault*, 51 A.3d 1213 (Del. 2012).

<sup>321</sup> *In re Loral Space & Commc’ns Inc.*, 2008 WL 42937819, at \*27-32 (Del. Ch. Sept. 19, 2008).

<sup>322</sup> *HMG/Courtland Props., Inc. v. Gray*, 749 A.2d 94, 116-118 (Del. Ch. 1999)

<sup>323</sup> *In re Emerging Commc’ns., Inc. S’holder Litig.*, 2004 WL 1305745, at \*12-13 (Del. Ch. May 3, 2004).

## **1. Musk Did Not Prove that SolarCity Was Solvent With a Viable Business Model**

A corporation may be insolvent under Delaware law either when its liabilities exceed its assets (the balance sheet test), or when it is unable to pay its debts as they come due (the cash flow test).<sup>324</sup>

Musk admitted that Tesla was paying for a “high growth company.”<sup>325</sup> Instead, Tesla received an insolvent company with a flawed and unsustainable business plan. The unrebutted trial evidence proved balance sheet insolvency. After excluding non-recourse VIE-associated debt and securitized assets that could be used solely to pay VIE investors, SolarCity’s total liabilities (\$6.27 billion) exceeded its total assets (\$4.97 billion) by \$1.3 billion.<sup>326</sup>

The unrebutted trial evidence also proved balance cash flow insolvency. SolarCity’s current liabilities (payable within 12 months) were approximately \$1.1 billion, and current assets (available for use within 12 months) were \$684 million, which equals a net working capital deficit of \$416 million.<sup>327</sup> SolarCity’s net

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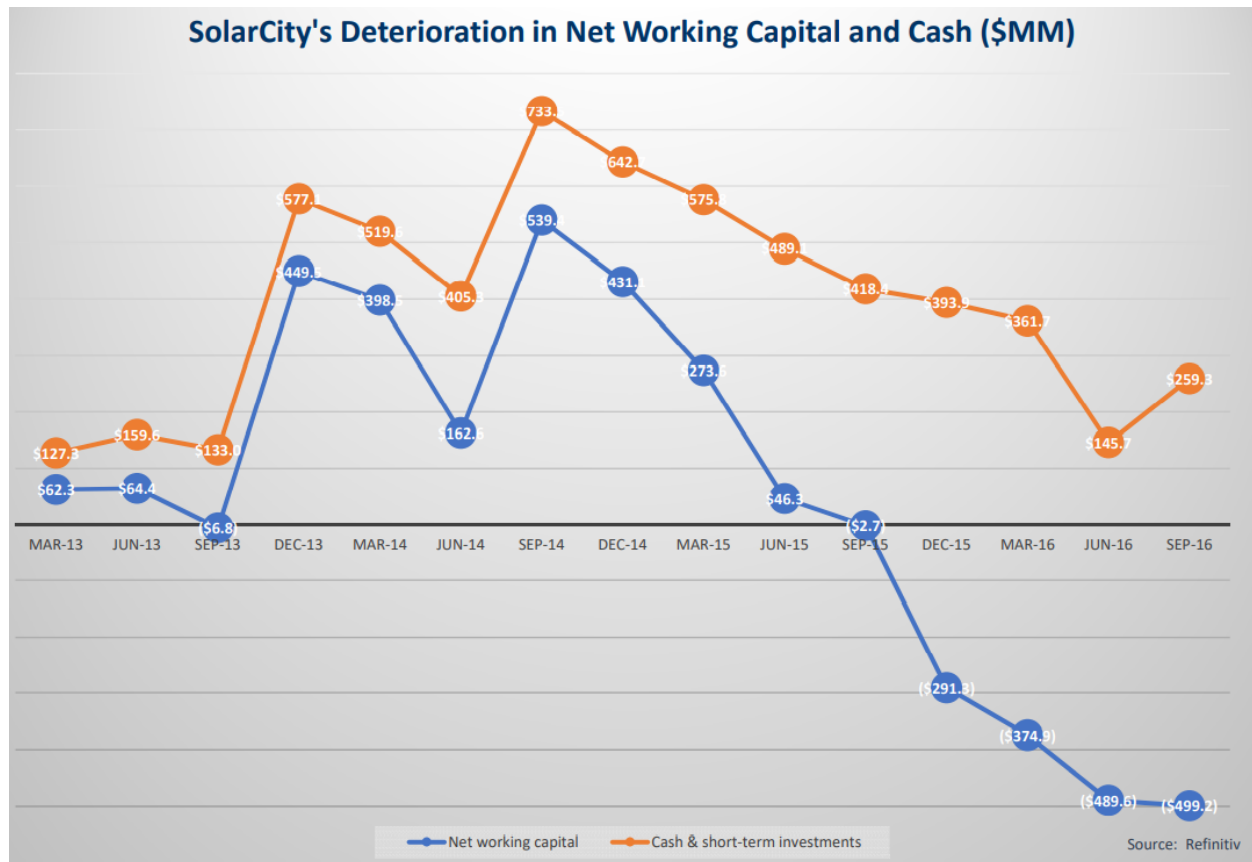
<sup>324</sup> *SV Inv. Partners, LLC v. ThoughtWorks, Inc.*, 7 A.3d 973, 987 (Del. Ch. 2010); *Quadrant Structured Products Co., Ltd. v. Vertin*, 115 A.3d 535, 556 (Del. Ch. 2015); *Odyssey Partners, L.P. v. Fleming Cos., Inc.*, 735 A.2d 386 (Del. Ch. 1999).

<sup>325</sup> JX2789:55.

<sup>326</sup> TT712:7-714:1; JX2268:4-5.

<sup>327</sup> JX2840:¶59.

working capital and cash position continuously and substantially eroded from 2014 through the Acquisition's closing:<sup>328</sup>



SolarCity's insolvency problems were identified by Lazard<sup>329</sup> before the Acquisition closed and by Tesla's auditors after closing. E&Y confirmed that SolarCity "as a standalone entity w[ould] not have sufficient cash to meet its obligations as they come due."<sup>330</sup> Tesla had to execute an "Equity Confirmation

<sup>328</sup> JX2840:Ex.39.

<sup>329</sup> JX2786:11.

<sup>330</sup> JX2398:3.

Letter,” agreeing to “make capital contributions to SolarCity” and pay off outstanding debt.<sup>331</sup>

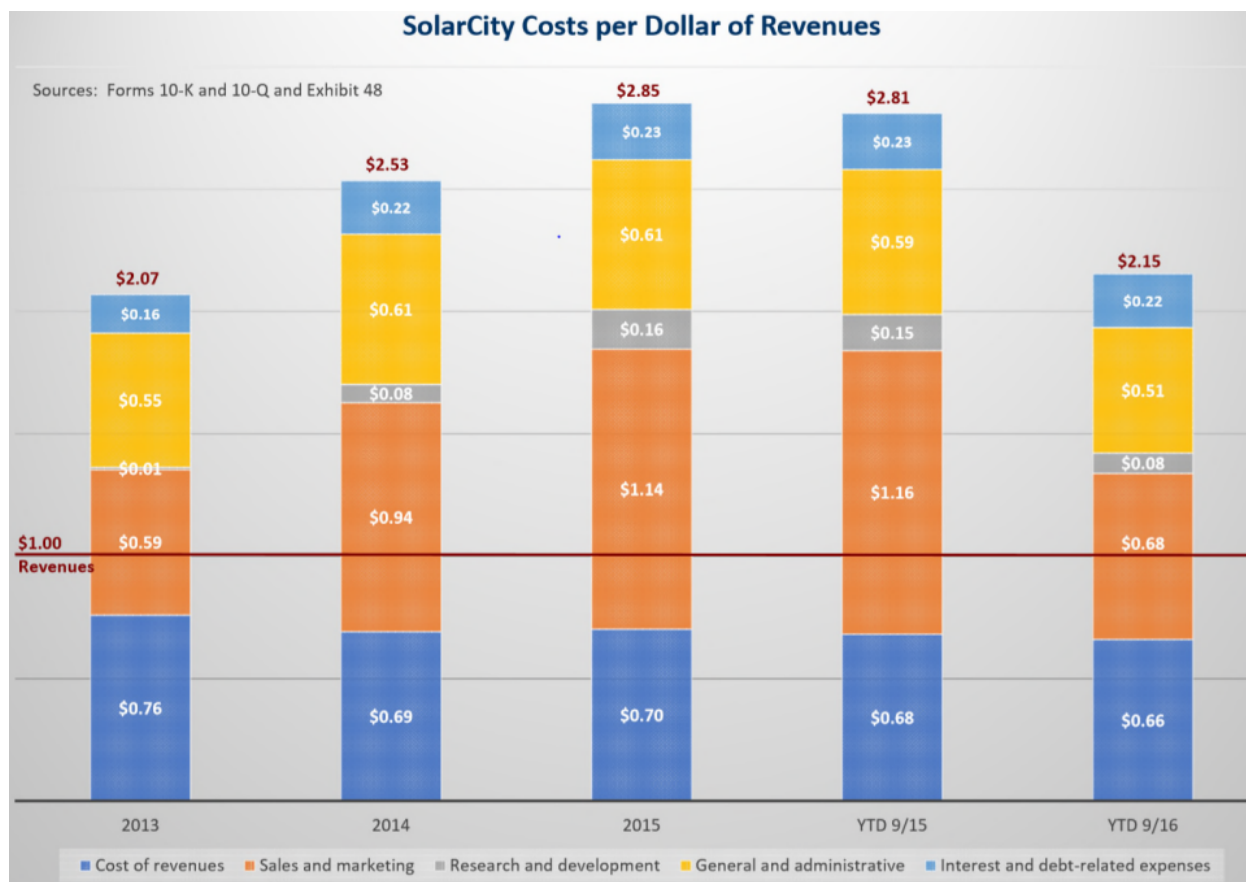
Musk also did not refute evidence that SolarCity’s cost structure was unsustainable. SolarCity historically spent more than \$2.00 in operating and equipment costs to generate \$1.00 in revenue.<sup>332</sup> By 2015, SolarCity spent more than \$1.00 in sales and marketing costs alone to produce \$1.00 in revenue.<sup>333</sup> SolarCity’s flawed cost structure is summarized below:

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<sup>331</sup> JX2447.

<sup>332</sup> JX2840:Ex.49.

<sup>333</sup> JX2840:Ex.49.



Musk’s expert confirmed SolarCity’s business model failure. Van Zijl’s analysis demonstrated that SolarCity’s “[c]ost per watt” for solar installations was historically greater than the “[a]sset financing” SolarCity raised to pay for installation projects.<sup>334</sup> Van Zijl testified that SolarCity was growing too fast and could not obtain the necessary “short-term borrowing” to make up for the shortfall.<sup>335</sup> To fix the business model, SolarCity would have had needed to “stopped their growth,” *i.e.*, stop deploying solar systems, and seek value for long-

<sup>334</sup> Defendant’s Demonstrative 2:11.

<sup>335</sup> TT1221:14-1222:8.



term residual returns in the short-term, without destroying equity value.<sup>336</sup> Moessner testified this “new” business plan was not viable and could not succeed.<sup>337</sup> Indeed, as SolarCity’s bankers perceived while the process was ongoing, SolarCity was unlikely to overcome its insolvency problem.<sup>338</sup> Bilicic testified:

[T]he feedback from the market when we talked to people is that they didn’t think this business was financeable.... People were worried about the language used by some of the people approached concerns about solvency, viability, and liquidity of the company and financing into a business that was not going to be viable for the long term.<sup>339</sup>

Musk did not dispute the insolvency tests used by Plaintiffs’ expert, which have been accepted in this Court.<sup>340</sup> He presented no expert to opine that the insolvency tests were inapplicable or that their objective application to SolarCity’s financial condition was flawed. Musk’s failure to prove solvency precludes a finding of fair price.

## **2. Musk Failed to Prove that SolarCity’s Market Price Was Fair Price**

Musk’s only arguments to justify the price paid were that SolarCity’s stock price represented fair value, and huge synergies supported the premium. Musk’s ‘stock price plus synergies’ theory fails.

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<sup>336</sup> TT1219:7-1220:22.

<sup>337</sup> *Supra* n.54.

<sup>338</sup> TT428:17-21.

<sup>339</sup> TT428:5-16.

<sup>340</sup> *Supra* n.319.

*First*, Plaintiffs proved that SolarCity was: facing a severe liquidity crisis and likely to breach its Liquidity Covenant; deferring accounts payable; delaying public disclosure of reduced guidance of megawatts deployed; and suffering from credit downgrades and a failed credit exam.<sup>341</sup> Musk did not prove the market was aware of this material information.

*Second*, Fischel's \$16.16 per share price (\$1.6 billion total SolarCity value) under his Stock Indexing Methodology, which this Court has rejected,<sup>342</sup> is still \$809 million **less** than the \$2.44 billion value of the shares Tesla paid in the Acquisition.<sup>343</sup> Musk's claim that this difference can be made up by synergies is: illogical on its face, as it would assume synergies added 50+% to SolarCity's value with Tesla paying the entire synergy value to SolarCity as a premium; unsupported by any

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<sup>341</sup> *Supra* n.28, n.72, n.76, nn.103-04, n.115, n.117, n.146, n.151, n.161, n.199.

<sup>342</sup> *Emerald Partners v. Berlin*, 2003 WL 21003437, \*35-\*36 (Del. Ch. Apr. 28, 2003)(describing Fischel's approach as "counterintuitive" and rejecting it as "not generally accepted as valid in the business/financial valuation community"); *Highfields Cap. LTD v. AXA Fin., Inc.*, 939 A.2d 34, 58 n.34 (Del. Ch. Aug. 17, 2007)(rejecting Fischel's approach as "highly speculative").

<sup>343</sup> This values the 11,124,497 shares Tesla issue in the Acquisition at \$219.61/share, which is Tesla's June 21, 2016 unaffected stock price. JX2847:¶27; JX2443:76; TT2619:22-2620:2. It does not include the \$183.4 million in stock based compensation ("SBC") that Tesla paid to replace SolarCity SBC or \$21.7 million in transaction expenses. Tesla reported the value of the 11,124,497 shares at \$2.06 billion based on its \$185.04 stock price on November 18, 2016 when the Acquisition closed. JX2443:76. The Court should value the Acquisition stock at Tesla's unaffected stock price because the stock price at closing was negatively affected by the Acquisition itself. JX2847:¶32; TT2619:22-2620:2.

market-based evidence;<sup>344</sup> and not based on any contemporaneous evidence or expert testimony that there were any cognizable synergies.<sup>345</sup>

### **3. Musk Failed to Prove Evercore's Valuation Justifies the Price**

Because a “financial advisor, eager for future business from the controller, [may] compromise[] its professional valuation standards to achieve the controller’s unfair objective,” this Court rarely relies on fairness opinions as proof of a fair transaction.<sup>346</sup> The record demonstrates that Evercore’s fairness opinion is not proof of fairness. Evercore’s actions “demonstrated that the firm sought to justify [SolarCity’s] price and collect its fee.”<sup>347</sup> It “played with its DCF methodology...[and] its valuation summary” with “[t]he unifying theme for these changes” of “making [the] asking price look better.”<sup>348</sup> Evercore’s fairness opinion was focused on finding a way to have the proposed Acquisition terms make sense, rather than aggressively testing whether the transaction was a good idea in the first place.<sup>349</sup> It produced “an increasingly non-real world set of analyses that obscured

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<sup>344</sup> TT2629:23-2631:10-16.

<sup>345</sup> The Court should not consider synergies at all because they are speculative and Defendant provided no evidence that Tesla has actually realized any synergies.

<sup>346</sup> *Gerber v. Enter. Prods. Hold., LLC*, 67 A.3d 400, 420 (Del. 2013).

<sup>347</sup> *In re El Paso Partners, L.P. Derivative Litig.*, 2015 WL 1815846, \*21-22 (Del. Ch. Apr. 20, 2015).

<sup>348</sup> *Id.*, at \*12-13.

<sup>349</sup> *Southern Peru*, 52 A.3d at 801.

the actual value of what [Tesla] was getting,...pushing [SolarCity's value] up, rather than down.”<sup>350</sup> Evercore “helped its client rationalize the one strategic option available within the controlled mindset” that pervaded the process.<sup>351</sup>

Evercore based its fairness opinion on two primary analyses (DCF and sum-of-the-parts analyses) that used manipulated and unreasonable inputs to increase the value of SolarCity to make the transaction appear fair. Evercore rushed to create the Sensitivity Case after a call with Musk on July 14, 2016, manipulated the projections repeatedly over the next several days, and increased its DCF range from \$15-\$25 to \$18-\$28 and then to \$25-44. The Sensitivity Case:

- included 25-30% annual increases in MW deployed, when SolarCity's performance was trending the opposite direction;<sup>352</sup>
- forecasted that SolarCity's cash flow would swing from negative \$226 million in 2016 to positive \$437 million in 2020—an unrealistic \$663 million jump in five years;<sup>353</sup>
- forecasted significant growth in a dying commercial sector that SolarCity expected to abandon;<sup>354</sup>
- forecasted a steep decline in installation and equipment cost and simultaneous increase in margins that were not supported by the record;

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<sup>350</sup> *Id.*

<sup>351</sup> *Id.*

<sup>352</sup> JX2840:¶152b.

<sup>353</sup> JX1745:24.

<sup>354</sup> JX2833:¶60.

- failed to account for the negative impact of SolarCity’s reduced creditworthiness;<sup>355</sup> and
- included \$1.835 billion (91.3% of total) of cash flows in the final projected year from the soon-to-expire ITC.<sup>356</sup>

#### IV. PLAINTIFFS PROVED SIGNIFICANT DAMAGES

When the Court finds that defendants “breached their fiduciary duties,” the “damages flowing from that breach are to be liberally calculated.”<sup>357</sup> “The Supreme Court has emphasized the capacious remedial discretion of this court to address inequity.”<sup>358</sup> “As long as there is a basis for an estimate of damages, and the plaintiff has suffered harm, ‘mathematical certainty is not required.’”<sup>359</sup>

The Court starts with its best understanding of the “fundamental” or “intrinsic” value of the acquired assets, then considers equitable adjustments

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<sup>355</sup> JX2833:¶64.

<sup>356</sup> JX1745:24. Leaving all \$1.835 billion in vanishing ITC cash flows in the terminal period was critical to Evercore’s DCF analysis because most of SolarCity’s value (91.3%) came from the terminal period. JX1745:24. Instead of acknowledging the mistake, at trial Evercore offered an incoherent “pitcher of water” analogy and admitted it assumed that SolarCity would somehow come up with \$1.835 billion of cash that it lost when the ITC expired. TT1473:8-74:1; TT1431:1-6 (McBean: “think of all the sources of cash as a pitcher of water, for example, and you’re taking different cups to fill that pitcher, and these components of the source of cash are those cups, we didn’t make any assumption about how much would come from any specific cup.”). Evercore’s pitcher does not hold water.

<sup>357</sup> *Thorpe v. CERBCO, Inc.*, 676 A.2d 436, 444 (Del. 1996).

<sup>358</sup> *McGovern v. Gen. Hold., Inc.*, 2006 WL 1468850, at \*24 (Del. Ch. May 18, 2006).

<sup>359</sup> *Southern Peru*, 52 A.3d at 814.

thereto.<sup>360</sup> However, while fair value is one possible remedy, the Court can fashion any form of appropriate equitable and monetary relief, including rescissory damages.<sup>361</sup>

Where a defendant's misconduct has caused "evidentiary uncertainty" in calculating damages, "such ambiguities are construed against the self-conflicted [defendant]," who is not entitled to complain that damages cannot be precisely measured.<sup>362</sup>

This Court has frequently used its broad remedial powers to craft a proper remedy for the harm done by a fiduciary wrongdoer. In *Bomarko*, the Court awarded damages of approximately five times the deal price, noting that the "law does not

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<sup>360</sup> See *Southern Peru*, 52 A.3d at 788 (awarding damages based on "the difference between this fair price and the market value of 67.2 million shares of Southern Peru stock as of the Merger date").

<sup>361</sup> *In re Orchard Enters, Inc. S'holder Litig.*, 88 A.3d 1, 40 (Del. Ch. 2014).

<sup>362</sup> *Auriga Cap. Corp. v. Gatz Props.*, 40 A.3d 839, 875 (Del. Ch. 2012); *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 379 (1927); *Stone v. Stant*, 2010 WL 2734144, at \*16 (Del. Ch. July 2, 2010).

require certainty in the award of damages where a wrong has been proven and injury established.”<sup>363</sup>

In *Southern Peru*, the Court considered the “standalone equity values” for the acquired business and awarded damages equal to the difference between “the price that the Special Committee *should* have paid” and the consideration actually paid in the transaction.<sup>364</sup> While acknowledging that valuation “inevitably involves some speculation,” the Court awarded over \$1.3 billion in compensatory damages.<sup>365</sup>

Here, Plaintiffs proved entitlement to an equitable remedy based on either: (1) compensatory damages equal to the price Tesla paid less SolarCity’s value, considering both liquidation and going-concern scenarios; or (2) an equitable remedy based on principles of restitution, unjust enrichment, rescission, and rescissory damages, taking into account the enormous post-closing gain Musk has realized from the Acquisition.

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<sup>363</sup> *Bomarko, Inc. v. Int’l Telecharge, Inc.*, 794 A.2d 1161, 1184 (Del. Ch. 1999). The Supreme Court upheld this decision, explaining that “unlike an appraisal action, assessing damages in this case unavoidably requires the court to make judgments concerning liability and other contingencies.... The Court of Chancery has greater discretion when fashioning an award of damages in an action for a breach of the duty of loyalty than it would when assessing fair value in an appraisal action.” *Int’l Telecharge, Inc. v. Bomarko, Inc.*, 766 A.2d 437, 440-41 (Del. 2000).

<sup>364</sup> 52 A.3d at 816.

<sup>365</sup> *Id.* at 817-18.

## A. COMPENSATORY DAMAGES

An “award of compensatory damages” remedies “proven, actual loss caused by the defendant’s wrongful conduct.”<sup>366</sup> Compensatory damages are equal to the difference between “fair or intrinsic value” of the target company and the price that was actually paid.<sup>367</sup> Awarding compensatory damages is a “flexible process, and significant discretion is given to the court in fashioning an appropriate remedy.”<sup>368</sup>

The appropriate “premise of value” for determining a fair price for an insolvent company is liquidation value.<sup>369</sup> Liquidation value is the “net amount that would be realized if the business is terminated and the assets are sold piecemeal.”<sup>370</sup>

Plaintiffs proved that Tesla paid far in excess of SolarCity’s liquidation value. Plaintiffs produced a liquidation analysis from a certified distressed business valuation expert who has valued hundreds of financially troubled and insolvent companies during his career.<sup>371</sup> That analysis showed SolarCity’s net liquidation value was a negative \$1.952 billion.<sup>372</sup> SolarCity’s equity value was therefore

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<sup>366</sup> *Strassburger v. Earley*, 752 A.2d 557, 579 (Del. Ch. 2000).

<sup>367</sup> *Id.*

<sup>368</sup> *Gesoff*, 902 A.2d at 1152 (awarding compensatory damages based on modified DCF analysis).

<sup>369</sup> *In re EBC I, Inc.*, 380 B.R. 348, 364 (D. Del. 2008).

<sup>370</sup> See Association for Insolvency & Restructuring Advisors, *Standards for Distressed Business Valuation*, ¶52(c) (2014); JX2840:24.

<sup>371</sup> JX2840:¶¶3-8.

<sup>372</sup> JX2840:Ex.53.



*worthless* as of the closing of the transaction.<sup>373</sup> Musk did not provide a liquidation analysis or refute Plaintiffs' methods.

Where a company is a solvent "going concern," the proper approach is to value it using traditional income and market methods.<sup>374</sup> Even if SolarCity were a going concern, traditional valuation methodologies prove substantial damages. Plaintiffs valued SolarCity using a cost approach, which assumes it was a going concern. Plaintiffs' expert provided two valuations, which are "highly relevant" for "financially troubled companies" because they do not rely on the "riskiness" of future operational cash flows as an element of value.<sup>375</sup> First, he performed an adjusted appraised net asset valuation "based on the appraised value of assets of the subject company, reduced by liabilities and other valuation provisions as of the valuation date."<sup>376</sup> Using values from KPMG's due diligence report, SolarCity's adjusted appraised net asset value was *\$10.23 per share*.<sup>377</sup> Next, Plaintiffs' expert performed a fair saleable asset valuation, adjusting appraised amounts to replicate the value SolarCity would receive in the "transactional arena" from a third-party

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<sup>373</sup> JX2840:¶108, Ex.53.

<sup>374</sup> *Weinberger*, 457 A.2d at 711-13.

<sup>375</sup> JX2840:¶128.

<sup>376</sup> JX2840:¶¶128-48.

<sup>377</sup> JX2840:Ex.75.

acquirer, “without applying any discounts for financial distress.”<sup>378</sup> This analysis yielded a fair value for SolarCity of ***\$1.59 per share***.<sup>379</sup> Again, Musk did not refute Plaintiffs’ inputs, assumptions, or methodologies.

Under the income approach, Plaintiffs submitted a DCF analysis using the SITC Phase Out Case prepared by Plaintiffs’ solar industry finance expert.<sup>380</sup> Plaintiffs’ DCF analysis resulted in a fair value for SolarCity of ***\$6.14 per share***.<sup>381</sup> Adjustments to Tesla’s Sensitivity Case reflect scheduled reductions in SITCs in place at the time of the transaction, and result in a “steady state” to SolarCity’s cash flows at the end of the forecast period. *Id.* Musk did not dispute Moessner’s adjustments and Fischel admitted that SITCs should not be included in the terminal period.<sup>382</sup>

Plaintiffs’ DCF analysis used a conservative cost of capital of 13.22% and generous perpetuity growth rate of 4.0%, matching Evercore’s assumptions.<sup>383</sup> Musk did not challenge the reasonableness of either DCF analysis input.

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<sup>378</sup> JX2840:¶129.

<sup>379</sup> JX2840:¶147.

<sup>380</sup> JX2840:¶152.

<sup>381</sup> JX2840:¶155.

<sup>382</sup> TT2636:3-11; TT2637:1-16.

<sup>383</sup> JX2840:¶153.

Plaintiffs also introduced a guideline public companies (“GPC”) analysis, which applied a multiple to SolarCity’s revenues.<sup>384</sup> This analysis used Sunrun and Vivint, which were two of the largest U.S. residential solar installers, as comparable companies.<sup>385</sup> When applying comparable revenue multiples, and deducting SolarCity’s liabilities, the analysis showed SolarCity’s equity was *worthless*. Musk did not show that Sunrun and Vivint were not comparable nor contest Plaintiffs’ methodology.

In sum, regardless of whether SolarCity was insolvent and valued on a liquidation basis, or was merely financially distressed and valued as a going concern, Plaintiffs have shown a “proven, actual loss caused by the defendant’s wrongful conduct.”<sup>386</sup> Thus, under a pure compensatory-appraisal measure of damages, Plaintiffs proved damages between \$1.41 and \$2.44 billion.<sup>387</sup>

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<sup>384</sup> JX2840:¶¶120-25.

<sup>385</sup> JX2840:¶¶122-27.

<sup>386</sup> *Strassburger*, 752 A.2d at 579.

<sup>387</sup> These estimates may understate Tesla’s damages because several analyses produce negative SolarCity values due to SolarCity’s debt, which Tesla assumed in the Acquisition.

<b>Methodology</b>	<b>SolarCity Value (Get)</b>	<b>Acquisition Consideration (Give)</b>	<b>Compensatory Damages<sup>388</sup></b>
<i>Net Liquidation Value</i>	\$0.00	\$24.16	\$2,443,000,000.00
<i>GPC Analysis Value</i>	\$0.00	\$24.16	\$2,443,000,000.00
<i>Fair Saleable Asset Value</i>	\$1.59	\$24.16	\$2,283,000,000.00
<i>DCF Analysis Value</i>	\$6.14	\$24.16	\$1,822,000,000.00
<i>Adj. Appraised Net Asset Value</i>	\$10.23	\$24.16	\$1,409,000,000.00

**B. TESLA IS ENTITLED TO ALTERNATIVE RESCISSORY AND  
RESTITUTIONAL RELIEF**

This Court’s power to fashion any form of equitable and monetary relief appropriate for a breach of fiduciary duty includes rescissory and restitutional relief.<sup>389</sup> Musk’s disclosure violations, self-dealing, and failure to satisfy entire fairness warrant consideration of rescissory and restitutional relief.<sup>390</sup> Compensatory damages would only compensate for Tesla’s out-of-pocket loss from

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<sup>388</sup> The compensatory damage calculation is based on the 101,131,791 SolarCity shares that received 0.110 Tesla shares in the Acquisition. JX2443:76. These estimates also do not include (1) the \$183.4 million in SBC that Tesla paid to replace SolarCity SBC or (2) the \$21.7 million in Acquisition expenses Tesla paid.

<sup>389</sup> D. Wolfe & M. Pittinger, *Corporate and Commercial Practice in the Delaware Court of Chancery*, § 16.04 (2d ed. 2020).

<sup>390</sup> *Lynch v. Vickers Energy Corp.*, 429 A.2d 497, 501 (Del. 1981); *Strassburger v. Early*, 752 A.2d 557, 581 (Del. Ch. 2000); *Basho Tech. Holdco B, LLC v. Georgetown Basho Invs., LLC*, 2018 WL 3326693, at \*50 (Del. Ch. July 6, 2018).

the issuance of the excess shares at the time of the Acquisition. Out-of-pocket damages measured by the fair values of Tesla and SolarCity stock at the time of transacting, however, are insufficient to address the unjust enrichment and improper gain Musk will realize from retention of his excess shares.<sup>391</sup> The essence of unjust enrichment is restitution.<sup>392</sup> Rescissory relief should include “post-transaction incremental value elements.”<sup>393</sup>

Rescission is the preferable remedy for a fiduciary’s improper acquisition of stock.<sup>394</sup> While rescission of the entire Acquisition is not feasible, a partial rescissory and restitutional remedy against Musk is possible with respect to his excess shares. *Id.* “The Court of Chancery has discretion in the fashioning of rescissory relief consistent with the equity of the circumstances and conduct of the parties.”<sup>395</sup> This Court can grant hybrid rescissory relief that includes both partial rescission and rescissory damages.<sup>396</sup> Rescission can also serve as restitution for

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<sup>391</sup> *Cinerama*, 663 A.2d at 1144-46; *Strassburger*, 752 A.2d at 580-81.

<sup>392</sup> *250 OK, Inc. v. Message Sys., Inc.*, 2021 WL 225874, at \*5 (Del. Ch. Jan. 22, 2021).

<sup>393</sup> *Strassburger*, 752 A.2d at 579.

<sup>394</sup> *Lynch*, 429 A.2d at 501.

<sup>395</sup> *Liberis v. Europe Cruises Corp.*, 702 A.2d 926 (Del. 1997); *Creative Res. Mfg. v. Advanced Bio-Delivery, LLC*, 2007 WL 286735, at \*10 (Del. Ch. Jan. 30, 2007)(same).

<sup>396</sup> *Liberis*, 702 A.2d at 926; *Strassburger*, 725 A.2d at 582.

unjust enrichment or as an equitable remedy for misrepresentation.<sup>397</sup> Unjust enrichment is a very broad and flexible equitable doctrine based on the principle that it is contrary to equity and good conscience for a defendant to retain an improperly received benefit.<sup>398</sup>

The Court can also award rescissory damages based on the change in value of wrongly acquired stock and require a disloyal fiduciary to make restitution for unjust enrichment and disgorge improper profits.<sup>399</sup> Moreover, strict imposition of penalties under Delaware law should be imposed to discourage disloyalty.<sup>400</sup>

Here, Musk's disloyal conduct caused Tesla to pay excessive shares for an insolvent company. Musk personally received 2,403,024 Tesla shares for his 21,845,674 SolarCity Shares. Those Tesla shares were reverse-split 5-for-1 in August 2020, so Musk now owns 12,015,120 Tesla shares as a result of the Acquisition. This is far more shares than he should have received if the Acquisition had been fair (the "Excess Shares"). Tesla also paid Musk (\$65m) and his cousins (\$35m) \$100 million in Q1 2017 for early repayment of the bridge loan they gave

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<sup>397</sup> *In re HealthSouth Corp. S'holders Litig.*, 845 A.2d 1096, 1110 (Del. Ch. 2003).

<sup>398</sup> *Schock v. Nash*, 732 A.2d 217, 232-33 (Del. 1999); *Urdan v. WR Cap. Partners, LLC*, 2019 WL 3891720, at \*29 (Del. Ch. Aug. 19, 2019).

<sup>399</sup> *Weinberger*, 457 A.2d at 714; *Cinerama*, 663 A.2d at 1134, 1144-46 (Del. Ch. 1994); *Strassburger*, 752 A.2d at 580-81; *Basho*, 2018 WL 3326693, at \*49-50.

<sup>400</sup> *Bomarko*, 794 A.2d at 1184.

SolarCity in August 2016.<sup>401</sup> Tesla also signed the Equity Confirmation Letter in 2017 that ensured SpaceX would be repaid its \$165 million of SolarCity debt by Tesla after E&Y concluded SolarCity lacked sufficient cash to pay these debts when they became due.<sup>402</sup> This debt would have been a loss without the Acquisition and its repayment by Tesla provided benefits to Musk, his family and his other enterprises.

The Court's discretion permits it to take into account that Musk received the Excess Shares, and thus he has greatly profited and been unjustly enriched. The equities and circumstances here suggest a simple and practical rescissory and restitutional remedy. The chart below reflects the Excess Shares Musk currently owns at their current value. Musk should either return the Excess Shares to the Company or pay rescissory damages based on the current market value of the Excess Shares.<sup>403</sup>

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<sup>401</sup> JX2121:121, 138.

<sup>402</sup> JX2447.

<sup>403</sup> *See Southern Peru*, 52 A.3d at 819 (offering defendant option to satisfy judgment in cash or by returning shares to company).

Methodology	SolarCity Value	Tesla Stock Price (6/21/16)	Exchange Ratio	Tesla Shares Musk Should Have (split-adjusted)	Tesla Shares Musk Actually Has (split-adjusted)	Excess Tesla Shares Musk Actually Has (split-adjusted)	Current Value of Excess Shares (at \$781.31/share)
Net Liquidation Value	\$0.00	\$219.61	0.000	0	<i>12,015,120</i>	<i>12,015,120</i>	\$9,388,000,000
GPC Analysis Value	\$0.00	\$219.61	0.000	0	<i>12,015,120</i>	<i>12,015,120</i>	\$9,388,000,000
Fair Saleable Asset Value	\$1.59	\$219.61	0.007	790,825	<i>12,015,120</i>	<i>11,224,295</i>	\$8,770,000,000
DCF Analysis Value	\$6.14	\$219.61	0.028	3,053,878	<i>12,015,120</i>	<i>8,961,242</i>	\$7,002,000,000
Adjusted Appraised Net Asset Value	\$10.23	\$219.61	0.047	5,088,139	<i>12,015,120</i>	<i>6,926,981</i>	\$5,412,000,000

## **CONCLUSION**

Plaintiffs request that judgment be entered in their favor and damages and/or other equitable relief be awarded based on the Court's predicate factual findings.



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