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Case No. 12711-

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

CITY OF RIVIERA BEACH POLICE PENSION FUND, Plaintiff, v. ELON MUSK, ANTONIO J. GRACIAS, ROBYN M. DENHOLM, KIMBAL MUSK, STEVE JURVETSON, IRA EHRENPREIS, BRAD W. BUSS, J.B. STRAUBEL, LYNDON RIVE, PETER RIVE, D SUBSIDIARY, INC., AND SOLARCITY, INC. Defendants, - and - TESLA MOTORS, INC. Nominal Defendant.	)	C.A. No.

VERIFIED DERIVATIVE COMPLAINT

Plaintiff City of Riviera Beach Police Pension Fund ("Plaintiff"), by and through its undersigned counsel, hereby makes the following allegations for its Verified Derivative Complaint (the "Complaint") on behalf of Tesla Motors, Inc. ("Tesla" or the "Company"), as the nominal defendant, against the Board of Directors of Tesla (defendants Elon Musk ("Elon Musk"), Antonio J. Gracias ("Gracias"), Robyn M. Denholm ("Denholm"), Kimbal Musk ("Kimbal Musk"), Steve Jurvetson ("Jurvetson"), Ira Ehrenpreis ("Ehrenpreis"), and Brad W. Buss ("Buss") (collectively, the "Tesla Board")), as well as Tesla Co-Founder, Chief

Technology Officer, and SolarCity, Inc. ("SolarCity") Board member J. B. Straubel ("Straubel"), Lyndon Rive (Co-Founder and Chief Executive Officer of SolarCity and Elon Musk's first cousin), Peter Rive (Co-Founder and Chief Technology Officer of Solar City and also Elon Musk's first cousin), D Subsidiary, Inc., which is a wholly owned subsidiary of Tesla formed for the purpose of effecting the merger, and SolarCity (together with the Tesla Board, the "Defendants"). Plaintiff bases its allegations on actual knowledge as to its own acts and on information and belief as to all other allegations after due investigation, including without limitation: (a) review and analysis of public filings made by Tesla and other entities with the Securities and Exchange Commission ("SEC"); (b) review and analysis of press releases and other publications disseminated by certain of the Defendants and other persons; and (c) review of other publicly available information concerning Tesla and other persons or entities.

NATURE AND SUMMARY OF THE ACTION

1. This is a shareholder derivative action arising out of an unlawful plan and scheme in which Defendant Elon Musk, Chief Executive Officer and Chairman of the Tesla Board and Chairman of the Board of SolarCity, together with the rest of the Tesla Board, in breach of their fiduciary duties to the Company and its stockholders, orchestrated Tesla's proposed bailout of SolarCity – a company run by Elon Musk's cousins, intertwined with Tesla in a complex web of

familial and business relationships, and in which he holds approximately $500 million of stock – at an excessive price and for pretextual business reasons. As alleged below, Elon Musk dominates the Tesla Board through his 18.4% stock ownership and his positions as the CEO and Chairman of the Board, and because a majority of the Tesla Board is intimately involved with other Musk companies, including SolarCity. This action challenges the conflicted Tesla Board's decision to bail out, and grossly overpay for, SolarCity.

2. With SolarCity in jeopardy, Elon Musk devised a plan to use another of his companies, Tesla, to bail it out. On June 20, 2016, Tesla announced that it had offered to acquire (the "Original Proposal") the outstanding shares of common stock of SolarCity in exchange for Tesla common shares at an exchange ratio of 0.122x to 0.131x shares of Tesla common stock for each share of SolarCity common stock. This proposal represented a value of $26.50 to $28.50 per share, or a premium of approximately 21% to 30% over the closing price of SolarCity's shares, based on June 20, 2016's closing price of SolarCity's shares and the 5-day volume weighted average price of Tesla shares.

3. The value of the deal at the time of the Original Proposal was approximately $2.8 billion – but when SolarCity's debt is taken into account, the real purchase price of SolarCity for Tesla shareholders is well above $5 billion.

4. The market immediately saw that the deal was a tremendous windfall for SolarCity and a negative for Tesla. Thus, SolarCity shares rose more than 15 percent after hours on the Original Proposal – while Tesla shares dropped as much as 10 percent, trading below $200 per share for the first time since March 2016.

5. With the help of Elon Musk, brothers Peter and Lyndon Rive – cousins of Elon Musk – founded SolarCity in 2006. Elon Musk has been SolarCity's Chairman of the Board since 2006. Indeed, the two companies are inextricably linked, and six of seven Tesla Board members are beholden to Elon Musk:

- Tesla Chairman of the Board (and CEO) Elon Musk is Chairman of the Board of SolarCity. Elon Musk owns 18.4% of Tesla and 22.1 % of SolarCity. Elon Musk is the single largest SolarCity shareholder, holding 22.1 million SolarCity shares, amounting to 21.9% of SolarCity stock, currently worth approximately $500 million. Elon Musk is also the Chief Executive Officer, Chairman of the Board, and Chief Technology Officer of another of his companies, SpaceX (defined below), on which board sit Kimbal Musk and Gracias. In addition, SpaceX holds approximately $165 million in SolarCity bonds, which will be worthless if SolarCity collapses.

- Tesla Board member Kimbal Musk is Elon Musk's brother and a director of SpaceX. Kimbal Musk owns 147,541 SolarCity shares, worth approximately $3 million.

- Tesla Board member Gracias is on both Tesla and SolarCity's boards and holds 211,021 SolarCity shares worth in excess of $4.4 million. Gracias is CEO, director, and majority stockholder of Valor Management Corporation ("Valor"), an investment firm which is an investor in SpaceX, and Gracias is a director of SpaceX. Valor is also an investor in SolarCity; thus, any acquisition of SolarCity by Tesla bails out Valor's SolarCity investment as well. Elon Musk and Kimbal Musk are investors

in funds advised by Valor. Yet, Tesla terms Gracias an "independent director".

● Tesla Board member Jurvetson owns 1,672,381 SolarCity shares, worth over $35 million. Jurvetson's firm, Draper Fisher Jurvetson ("DFJ"), owns over 2.7 million shares of SolarCity, worth in excess of $58 million, and DFJ Managing Director John H.N. Fisher sits on SolarCity's board. DFJ is a significant stockholder in SpaceX and Jurvetson is a director of SpaceX. DFJ is also a major stockholder in SolarCity; thus, any acquisition of SolarCity by Tesla bails out DFJ's SolarCity investment as well. Elon Musk is an investor in a DFJ venture fund.

● Tesla Board member Ehrenpreis is a manager of DBL Partners ("DBL"), another venture capital fund. Ehrenpreis and DBL are investors in SpaceX. A partner of Ehrenpreis is a director of SolarCity in which DBL is also an investor. Any bailout of SolarCity is also a bailout of DBL's SolarCity investment.

● Tesla Board member Buss is the former Chief Financial Officer for SolarCity. Buss owns 37,277 shares of SolarCity stock worth approximately $800,000 and any bailout for SolarCity will also save his own investment. Buss is co-owner of DBL.

● SolarCity's Chief Executive Officer Lyndon Rive and Chief Technology Officer Peter Rive are Musk's first cousins.

● J.B. Straubel is on SolarCity's Board and is Tesla's Co-Founder and Chief Technology Officer. Straubel owns 771,773 SolarCity shares worth approximately $16 million.

6. In total, Tesla directors own over $560,000,000 worth of SolarCity Stock. When Tesla director Jurvetson's firm, DFJ, and Tesla officer Straubel's SolarCity stock ownership is included, that figure grows to approximately $634,000,000.

7. All told, only one of Tesla's seven board members (Denholm) apparently lacks a conflict of interest.

8. In addition, Tesla Board members Elon Musk, Gracias and Straubel, as well as SolarCity Board members Fisher, Kendall, and Pfund, own SolarCity options which will convert to Tesla options. If Tesla did not bail out SolarCity, these options would likely be worthless.

9. Elon Musk and Gracias have recused themselves from voting on the deal as part of both Tesla and SolarCity's boards, but their recusals are window dressing as the conflicted web of business and familial ties is insuperable. Indeed, Elon Musk's influence on the Tesla Board – at least six out of seven of whom are beholden to him and/or conflicted in the deal – hopelessly taints the Tesla Board's vote. Moreover, Elon Musk was quoted on June 22, 2016 (two days after the Original Proposal was announced) as stating that the boards of Tesla and SolarCity are unanimously in favor of the deal – rendering approval by the Tesla Board a foregone conclusion.

10. Tesla is acquiring a gravely troubled company. Indeed, SolarCity has been suffering a downward trajectory for some time with few signs of recovery. SolarCity shares are down a whopping 57% this year after failing to hit earnings targets. SolarCity's future is bleak and, absent a Tesla takeover, it could be, in the words of zerohedge's Tyler Durden, the "next unfortunate bankruptcy in the [solar]

sector." *See* May 10, 2016 article entitled "Five Reasons Why The Pain For SolarCity Is Just Starting."[1] If SolarCity goes bankrupt, Elon Musk would lose his approximate $500 million (at current stock prices) SolarCity investment. In addition, if SolarCity were to fail and be forced into bankruptcy proceedings, a bankruptcy trustee could aggressively pursue direct claims for mismanagement against SolarCity directors, including Elon Musk and Gracias, who are also Tesla directors, and who would suffer significant reputational harms from being associated with a failed company that could affect the rest of their careers as corporate directors.

11. SolarCity is also highly leveraged. As reported on June 29, 2016 by Naman Shukla on Yahoo Finance in an article entitled, "Tesla Acquiring SolarCity Is a Disastrous Idea: "SolarCity's debt is so high that the company's interest expense is almost as large as its gross profits. "[2]

12. SolarCity's debt leapt by 1100% – from $342 million in 2012 to $4 billion since July 2015. As of March 31, 2016, SolarCity's balance sheet contained over $1.3 billion in long-term debt, over $200 million in solar bonds, nearly $900 million in convertible debt and nearly $625 million in solar asset-

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[1] *See* http://www.zerohedge.com/news/2016-05-10/five-reasons-why-pain-solarcity-just-starting.

[2] *See* http://finance.yahoo.com/news/tesla-acquiring-solarcity-disastrous-idea-195701470.html.

backed notes. This is offset by only $362 million in cash and $52 million in restricted cash.

13. Among others, a June 27, 2016 article entitled "Everyone is missing the point of the Tesla-SolarCity deal" by *Business Insider* writer Matthew DeBord noted that Tesla would be inheriting SolarCity's staggering debt if the deal went through:[3]

> Last week, Tesla announced that it was pursuing an acquisition of SolarCity, the troubled solar-panel leasing company that is run by Tesla CEO Elon Musk's cousin Lyndon Rive … SolarCity is a $3 billion bite for Tesla in an all-stock transaction that would add – brace yourself – over $3 billion in debt to Tesla's balance sheet.

14. Indeed, negative analyst commentary about the deal was overwhelming and almost unanimous. On June 22, 2016, *Forbes* writer Brian Solomon reported in an article entitled "Wall Street Hates Tesla's SolarCity Deal, But Still Loves Elon Musk" that "nearly every Wall Street analyst is some combination of confused and disappointed with the deal."[4] He notes that *Barclays* Brian Johnson wrote that "we believe the assumption of another $2.6bn of debt to fold in a solar company with limited synergies and uncertain growth/cash prospects only reinforces our negative view of TSLA." Solomon also cited *Oppenheimer's*

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[3] *See* http://www.businessinsider.com/totally-missing-point-of-tesla-solarcity-2016-6.

[4] *See* http://www.forbes.com/sites/ briansolomon/2016/06/22/wall-street-hates-teslas-solarcity-deal-but-still-loves-elon-musk/#47a82da64d2a.

Colin Rush ("[w]e believe investors are likely to view this transaction as a bailout for SCTY and a distraction to TSLA's own production hurdles[;])" *Morgan Stanley's* Paul Coster ("we are struggling to see brand, customer, channel, product or technology synergies,…"), and *Raymond James* analyst Pavel Molchanov ("Because Elon Musk is the largest shareholder of both Tesla and SolarCity, as well as CEO of Tesla and Chairman of SolarCity, it goes without saying that this proposal carries the potential for conflict of interest. To minimize that risk, Musk formally recused himself from board voting on both the Tesla side and the SolarCity side. But let's not be naïve: the proposed merger could not possibly be initiated or realized without his backing.").

15. Also on June 22, 2016, in an article entitled "Tesla Bear Ronnie Moas Has No Reason To Change His Sell Rating Just Yet," *Benzinga* commentator Jayson Derrick stated that "[t]his was a bail-out of a company that Musk owns 20 percent of. SolarCity was on life support 24 hours ago."[5] On June 28, 2016, *Investor's Business Daily* writer Brian Deagon quoted Argus Research in an article: "[T]he proposed transaction is ill-timed, shareholder-unfriendly and unnecessarily risky."[6]

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[5] *See* http://www.benzinga.com/analyst-ratings/analyst-color/16/06/8140955/tesla-bear-ronnie-moas-has-no-reason-to-change-his-sell.

[6] *See* http://www.investors.com/news/technology/tesla-cut-to-hold-due-to-ill-timed-solarcity-acquisition-worries.

16. Commentators also raised the issue of share dilution. Tesla shareholders saw their shares diluted in May 2016 when the Company raised $1.4 billion for its Model 3 car, Tesla's next big production model, styled as the affordable electric sports sedan to the average consumer. But the dilution that will result from a deal with SolarCity is worse because it is connected to saving SolarCity – not moving the Company's business forward. To that end, a June 21, 2016 article by Ben Levisohn in *Barron's* entitled "Wait, Tesla wants to Buy SolarCity!?!?!" reported:[7]

> Then there's the matter of share dilution. Everyone knew Tesla would have to sell more shares to raise money for the Model 3 build, so investors didn't flinch when that happened back in May. Now they're being diluted again–to the tune of nearly 12 million shares by my quick calculation…

17. On August 4, 2016, Barclays noted that such a capital raise could equal about $1.5 billion which would further dilute Tesla shareholders. Likewise, in an August 5, 2016 article entitled "Yes, Tesla Needs More Money … And It Just Doesn't Matter," Barron's writer Ben Levisohn stated that Elon Musk recently noted that, if the deal is successful, the combined company could do "a small equity raise…meaning low to mid single digit percentages

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[7] *See* http://blogs.barrons.com/stockstowatchtoday/2016/06/21/wait-tesla-wants-to-buy-solar-city.

18. On June 27, 2016, SolarCity announced that it had formed a special committee, composed of two of SolarCity's eight board members, Donald R. Kendall, Jr. and Nancy E. Pfund, chaired by Kendall, to examine the Original Proposal. Pfund is managing partner at the venture capital company DBL Investors, a related party to DBL Partners. DBL Investors was an early backer of both Tesla and SolarCity. Pfund's investment firm partner Ehrenpreis is on Tesla's board. Pfund also served as an observer on the Tesla Board before its initial public offering. Thus, only one (Kendall) of the two special committee members appears to have no relationship to Tesla and Elon Musk.

19. Importantly, in connection with this self-dealing transaction, Tesla formed no such special committee to safeguard the interests of Tesla and its shareholders. Moreover, even though Elon Musk recused himself from the vote on the deal, according to the Form S-4 (defined below), he was consulted numerous times during the negotiation of the deal regarding his views and expectations about SolarCity and the combined company. Given his conflicting interests in the deal, he should have completely stayed out of the process. *See*, *e.g.*, S-4 at pages 64-65.

20. This glaring failure was not lost on investors. The day after the Original Proposal was announced, on June 28, 2016, CtW Investment Group ("CtW"), which works with union-based pension funds and holds 200,000 shares of Tesla, demanded in a letter to Defendant Gracias that the Company, *inter alia*,

form its own independent committee. In total, CtW requested that Tesla implement five steps it said would remedy Tesla's "underlying governance deficiencies." CtW asked that Tesla add two permanent independent directors and separate the chairman and CEO roles, as well as for two independent directors to form a special committee to review the proposed SolarCity deal. "The fiercely negative reaction to the Proposal only highlights the flawed [corporate governance] process and underscores our continuing concern about governance at the company," CtW Executive Director Dieter Waizenegger wrote in the letter.

21. CtW summarized its letter by stating that Elon Musk "continues to dominate the [Tesla] board and sits at the heart of a complex web of relationships among board members and other companies controlled by him and/or family members…. Such conflicts and behavior put at risk the ability of those directors to engage in the independent judgment they must exercise as fiduciaries of outside stockholders."

22. Even after CtW publicly requested that Tesla form an independent committee to ensure that the Original Proposal was fair to Tesla and its shareholders, the Tesla Board did nothing.

23. On August 1, 2016, Tesla announced that it reached an agreement to acquire SolarCity (the "Merger Agreement"). Under the agreement, SolarCity stockholders will receive 0.110 Tesla common shares per SolarCity share (the

"Final Proposal"). Thus, the Final Proposal's terms were slightly better than the Original Proposal – offering SolarCity shareholder 0.110 Tesla shares per SolarCity share, rather than between 0.122 and 0.131x Tesla shares. This small reduction in offering price was clearly intended to assuage a market that was angry about every aspect of the deal. However, Tesla is still overpaying for SolarCity.

24. Under the agreement, SolarCity has a 45-day 'go shop' period to request other offers and the deal is subject to SEC review, but otherwise, the agreement will be brought to a shareholders vote after September 14, 2016. However, this go-shop is illusory due to Elon Musk's domination of Tesla and SolarCity.

25. The overwhelmingly negative market response continued unabated because a slight price reduction did not change the fact that the Tesla Board had agreed to bail out a failing, debt-laden company – and could articulate no legitimate business reason for doing so – that would only distract Tesla from its own business. For example, *UBS* wrote on August 1, 2016 that "[w]e continue to remain cautious on the deal given lack of compelling synergies…, and the fact this is an unneeded distraction for TSLA management which already faces challenges with the Model 3 launch and significant production targets." *UBS* also noted that "most [synergies] could seemingly be achieved through a [joint venture;]"; that Tesla provided no specific synergy estimates on the conference call discussing the

Original Proposal, and that Elon Musk did not even know how many Tesla customers used solar power.

26. Similarly, *The Street* reported on August 1, 2016 in an article entitled "*Tesla Motors' (TSLA) SolarCity Deal Makes No Sense*" that "Musk has sketched out this idea that Tesla is better when customers can get solar installation and battery installation in a very seamless way and tied together to their cars. What's unclear is why they can't do that right now, why SolarCity can't do that right now and what makes it better these two companies are together."[8]

27. On August 6, 2016, in an article entitled "*Elon Musk Says the Exact Opposite of What Analysts Say About the SolarCity-Tesla Merger*," Chris White of the *The Daily Caller* stated that "[i]nvestment analysts were not buying Musk's arguments":[9]

> Salome Gvaramia, the COO of tech company research group Devonshire Research Group, told the Daily Caller News Foundation that Musk's justification for the merger is badly flawed.
>
> "If the goal is to facilitate seamless collaboration between the two companies in order to increase production efficiency, reduce carbon footprint, etc." Gvaramia said, "it can be achieved on contractual basis between two independent entities."
>
> The merger itself, she added, makes it look like Tesla is propping up the beleaguered solar panel company.

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[8] *See* https://www.thestreet.com/story/13659543/1/tesla-motors-tsla-solarcity-deal-makes-no-sense-tech-writers-tell-cnbc.html.

[9] *See* http://dailycaller.com/2016/08/06/elon-musk-says-the-exact-opposite-of-what-analysts-say-about-the-solarcity-tesla-merger.

28. Moreover, Tesla is at a critical phase in its corporate development with its new Model 3 car on the horizon. Numerous analysts have opined that the Final Proposal will be an inevitable, and significant, distraction from Tesla's real business.

29. The decision of Tesla's Board to pursue the Final Proposal constituted a breach of their fiduciary duties to Tesla and its stockholders and, in particular, their duty of loyalty, by pursuing a course of action structured to bail out another Elon Musk company, SolarCity, to the detriment of the Company and its shareholders.

30. Musk owns 18.4% of Tesla and 22.1% of Solar City. Thus, to approve the Final Proposal, approximately 40.9% of Tesla shareholders must vote in favor of it. The entire fairness standard applies to the Final Proposal because Musk stands on both sides of the Final Proposal and dominates both companies.

31. In addition, the seven largest Tesla shareholders – excluding Elon Musk's 20% holdings – hold over two-thirds of Tesla's stock. One of these seven, Fidelity Investments ("Fidelity") – which owns 12,005,684 SolarCity shares (11.9%) worth approximately $252 million – has purportedly already thrown its support (Fidelity holds 8.2% of Tesla shares) behind Tesla acquiring a solar

company. *See Forbes*, Jay Somaney, "*Tesla's Elon Musk Usually Gets What He Wants*," Forbes, June 28, 2016.[10]

32. Three others of the seven largest Tesla holders also own substantial amounts of SolarCity stock. Vanguard Group, Inc., Bank of Montreal, and Blackrock, hold 5.2 million, 4.1 million, and 2.5 million shares of SolarCity, respectively, worth approximately $100 million, $84 million, and $51 million, respectively. Because these three entities (and Fidelity) stand to lose hundreds of millions of dollars if SolarCity goes bankrupt, they are incentivized to vote their Tesla shares in favor of the deal. That four of the largest Tesla investors stand to lose over half a billion dollars if SolarCity goes bankrupt substantially weakens the majority of the minority vote provision of the deal.[11]

33. In light of SolarCity's profound financial problems, staggering debt, and the lack of any compelling benefit to Tesla from an acquisition of SolarCity, the Final Proposal is also unfairly priced. SolarCity stock has been in free fall since December 2015 when it traded at a high of $57.26 per share. It currently trades in the low 20's. Accordingly, the price Tesla is offering SolarCity

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[10] In addition, SpaceX sold a 10% stake in its company to Fidelity and Google for $1 billion in May 2010, so Fidelity has had prior dealing with Musk companies. *See* http://www.forbes.com/ sites/jaysomaney/2016/06/28/teslas-elon-musk-usually-gets-what-he-wants/#1278e52f41f0.

[11] "Majority of the minority" here means a majority of the vote of the non-Musk affiliated shareholders.

shareholders is materially higher than any third party buyer would pay in a true arms-length transaction.

34. On July 11, 2016, Seeking Alpha contributor David Trainer summed it up:[12]

> Investors need to hold management accountable for intelligent capital allocation, or else they can expect companies to continue to destroy shareholder value without feeling any accountability to their investors. Given the analysis above, we think it's fair to ask both management teams how this deal is fair to their investors. The answer for SCTY investors appears easy. *On the other hand, TSLA investors must ask why they should accept such an overpayment for a profitless company*. (Emphasis added).

35. In addition, Straubel, Lyndon Rive, and Peter Rive's negotiation of and participation in the Final Proposal as, *inter alia*, SolarCity board members aided and abetted the other Defendants' breaches of fiduciary duty.

36. On or about August 31, 2016, Tesla filed a Form S-4 Registration Statement with the SEC (the "S-4") in connection with the deal. As set forth herein, the S-4 contains materially false and misleading information.

37. In this stockholder derivative action, Plaintiff seeks to "hold management accountable" for the waste of corporate assets suffered by Tesla in negotiating the Original and Final Proposals, and for the irreparable damage to Tesla if the Final Proposal is consummated. Plaintiff seeks to recover damages

and other relief on behalf of nominal defendant Tesla against the Tesla Board for breach of fiduciary duty and waste and against Straubel, Lyndon Rive, Peter Rive, D Subsidiary, Inc., and SolarCity for aiding and abetting the Tesla Board's breaches of fiduciary duty relating to the negotiations and decisions that led to the Final Proposal.

PARTIES

38. Plaintiff City of Riviera Beach Police Pension Fund holds shares of Tesla common stock and has owned shares of Tesla common stock throughout the entire relevant period.

39. Nominal Defendant Tesla is a Delaware corporation headquartered in Palo Alto, California. Tesla designs, develops, manufactures and sells high-performance fully electric vehicles and energy storage products.

40. Defendant Elon Musk has served as Tesla's Chief Executive Officer since October 2008 and as Chairman of its Board of Directors since April 2004. Elon Musk has also served as Chief Executive Officer, Chief Technology Officer and Chairman of Space Exploration Technologies Corporation, a company which is developing and launching advanced rockets for satellite and eventually human transportation ("SpaceX"), since May 2002, and as Chairman of SolarCity since July 2006. Elon Musk owns a large portion of the stock of SpaceX.

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[12] *See* http://seekingalpha.com/article/3987550-bailing-solarcity-costs-tesla-

41. Defendant Antonio J. Gracias has been a member of Tesla's Board of Directors since May 2007 and has served as the Company's "Lead Independent Director" since September 2010. Gracias is also a member of SolarCity's Board of Directors, as well as that of SpaceX.

42. Defendant Stephen T. Jurvetson has been a member of Tesla's Board of Directors since June 2009. Since 1995, Jurvetson has been a Managing Director of Draper Fisher Jurvetson, a venture capital firm.

43. Defendant Kimbal Musk has been a member of Tesla's Board of Directors since April 2004. Kimbal Musk is Elon Musk's brother.

44. Defendant Brad W. Buss has been a member of Tesla's Board of Directors since November 2009. From August 2014 until his retirement in February 2016, Buss served as the Chief Financial Officer of SolarCity.

45. Defendant Ira Ehrenpreis has been a member of Tesla's Board of Directors since May 2007. Since 2015, Ehrenpreis has also been a Managing Partner of the venture capital firm of DBL Partners, which was an early investor in Tesla. DBL currently owns SolarCity shares.

46. Defendant Robyn M. Denholm has been a member of Tesla's Board of Directors since August 2014.

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investors-7_4-billion.

47. Defendant J.B. Straubel is the Chief Technology Officer of Tesla, its Co-Founder, and a member of SolarCity's Board of Directors.

48. Defendant SolarCity is a provider of energy services headquartered in San Mateo, California. Among SolarCity's primary services, the company designs, finances and installs solar power systems.

49. Defendant Lyndon Rive is the Co-Founder, Chief Executive Officer, and a director of SolarCity. Lyndon Rive is the first cousin of Elon Musk.

50. Defendant Peter Rive is the Co-Founder, Chief Technology Officer, and a director of SolarCity. Peter Rive is the first cousin of Elon Musk.

51. Defendant D Subsidiary, Inc. is a wholly owned subsidiary of Tesla. D Subsidiary is a Delaware corporation that was formed on July 21, 2016 for the purpose of effecting the merger. Upon completion of the merger, D Subdidiary will be merged with and into SolarCity, with SolarCity surviving as a wholly owned subsidiary of Tesla.

52. Non-party John H. N. Fisher is a member of SolarCity's Board of Directors. Fisher is also a Managing Director of DFJ, of which Defendant Jurvetson is also a Managing Director.

53. Non-party Nancy E. Pfund is a member of SolarCity's board of directors. Pfund has previously served on the Tesla Board. Pfund is also the

Founder and Managing Partner of DBL Partners, of which Defendant Ehrenpreis is also a Managing Partner.

54. Non-party Donald R. Kendall, Jr. is a member of SolarCity's Board of Directors.

SUBSTANTIVE ALLEGATIONS

Background

55. Elon Musk is the Co-Founder and Chairman of the Board of SolarCity and the CEO and Chairman of the Board of Tesla. Elon Musk dominates these companies and is the ultimate authority over all of his many companies.

56. Elon Musk dominates his family of companies principally through his dynamism and cult following. Indeed, a *Yahoo Finance* article dated July 27, 2015, entitled "*How Elon Musk Controls Tesla Motors While Owning Only 27 Percent*" by John Voelcker stated that "Elon Musk [] has a huge personal following that eagerly hangs on his every word."[13] As detailed herein, the two Elon Musk companies at issue, Tesla and SolarCity, are thoroughly intertwined. This interrelated governance structure permits Elon Musk to dominate and exercise control over both Tesla and SolarCity.

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[13] *See* https://www.yahoo.com/news/elon-musk-controls-tesla-motors-while-owning-only-130000986.html.

Tesla

57. Tesla designs, develops, manufactures and sells high-performance fully electric vehicles and energy storage products. Tesla has established its own network of vehicle sales and service centers and Supercharger stations globally to accelerate the widespread adoption of electric vehicles.

58. Tesla currently produces and sells two fully electric vehicles, the Model S sedan and the Model X sport utility vehicle (SUV). Tesla commenced deliveries of Model S in June 2012 and as of December 31, 2015 Tesla had delivered over 107,000 new Model S vehicles worldwide. Tesla commenced customer deliveries of Model X in the third quarter of 2015. Tesla is currently ramping production and deliveries of Model X in the United States and plans to offer it in Europe and Asia in 2016.

59. Tesla has stated that its goal is to introduce the Model 3, a lower priced sedan designed for the mass market. The Company has stated that it intends to start production and deliveries in late 2017.

SolarCity

60. SolarCity states that its goal is to make clean energy available to homeowners, businesses, schools, non-profits and government organizations at a lower cost than they pay for energy generated by burning fossil fuels like coal, oil and natural gas. Since its founding in 2006 by Defendant Elon Musk and his

cousins, Defendants Lyndon and Peter Rive, SolarCity has installed solar energy systems for over 230,000 customers. SolarCity's long-term agreements with its customers generate recurring payments and create a portfolio of receivables that SolarCity leverages to further reduce the cost of making the switch to solar energy.

61. SolarCity has been failing for over a year. Indeed, SolarCity shares are down a whopping 57% this year after failing to hit earnings targets. In May 2016, SolarCity plummeted after disclosing a larger loss than expected and SolarCity management followed up with a dismal outlook for the future. After SolarCity announced its poor earnings, CNBC's Jim Cramer stated that "SolarCity needs to wake up and face reality, especially after it horrendous first quarter. This is a company that I regard in a first-class crisis that acts as if everything is fine."

62. Further, as alleged above, SolarCity is drowning in debt. Indeed, SolarCity's debt grew by an astounding 1100% – from $342 million in 2012 to $4 billion since July 2015. As of March 31, 2016, SolarCity's balance sheet contained over $1.3 billion in long-term debt, over $200 million in solar bonds, nearly $900 million in convertible debt and nearly $625 million in solar asset-backed notes. This is offset by only $362 million in cash and $52 million in restricted cash.

63. In addition, SolarCity is also propped up by government subsidies. Indeed, a 30% federal investment tax credit is set to fall to 10% for commercial

projects and zero for homeowners who pay cash for their solar panels at the end of 2016. While solar trade groups are lobbying Congress for a renewal, SolarCity is trying to figure out how to stop the impact of what has been an important driver for the solar market growth.

64. In sum, *Benzinga's* Jayson Derrick stated that SolarCity was "on life support 24 hours ago [before the Original Proposal]."

Musk Dilutes Tesla Shareholders One Month Before Announcing the Final Proposal

65. On May 18, 2016, Tesla offered $2.0 billion in additional shares. The Company itself sold 6,519,616 shares, while Musk sold 2,782,670 shares. The offering price was $215 a share, so Tesla raised roughly $1.4 billion, and the share count increased by 4.9% from the April 29 count of approximately 6.85 million shares.

66. Tesla also said, when announcing the May offering, that Musk's ownership percentage of the Company would increase. So, as Philip van Doorn wryly noted in a June 24, 2016 article entitled *"Tesla Shareholders Should Be Very Worried About Dilution Right Now,*" "one shareholder didn't suffer dilution".[14] Importantly, the Final Proposal will also dilute Tesla's stock.

[14] *See* http://www.marketwatch.com/story/tesla-shareholders-worried-about-dilution-should-be-very-wary-right-now-2016-06-22.

The Original Proposal Is Announced

67. On June 20, 2016, Tesla announced that the Tesla Board had sent a letter to Elon Musk cousin Lyndon Rive, the Chairman of SolarCity's Board, outlining the Original Proposal:

> We are pleased to submit to you and the SolarCity board of directors a proposal to acquire all of the outstanding shares of common stock of SolarCity in exchange for Tesla common shares. Subject to completing due diligence, we propose an exchange ratio of 0.122x to 0.131x shares of Tesla common stock for each share of SolarCity common stock. This proposal represents a value of $26.50 to $28.50 per share, or a premium of approximately 21% to 30% over the closing price of SolarCity's shares, based on today's closing price of SolarCity's shares and the 5-day volume weighted average price of Tesla shares. We believe that our proposal offers fair and compelling value for SolarCity and its stockholders, while also giving SolarCity's stockholders the opportunity to receive Tesla common stock at a premium exchange ratio and the opportunity to participate in the success of the combined company through their ongoing ownership of Tesla stock.

68. The letter also claimed, *inter alia*, that the Original Proposal had "substantial" possibilities for synergies:

> The board of directors of Tesla is excited at the prospect of a potential combination of SolarCity's business with Tesla. We believe that the possibilities for product, service and operational synergies would be substantial, and that a combination would allow our companies to build on our respective core competencies and remain at the forefront of delivering innovative approaches for sustainable transportation and energy. We believe that a combination would generate significant benefits for stockholders, customers and employees of both Tesla and SolarCity.

69. Importantly, although Tesla had retained a financial advisor, Evercore Group, LLC ("Evercore"), the S-4 does not explain how the exchange value range from the Original Proposal was formulated. Given that this was the Original Proposal (and negotiating position), more detail as to the formulation needs to be provided in the Form S-4.

70. The market immediately seized on the profound problems and conflicts of interest in the proposed deal. For example, on June 21, 2016, *Business Insider* writer Linette Lopez, in an article entitled "Elon Musk just kicked his shareholders in the teeth" stated:

> Elon Musk, the CEO of Tesla Motors, just hung an albatross around his shareholders' necks.
>
> Through Tesla, Musk has made an all-stock deal offer for embattled solar-energy firm SolarCity, which Musk cofounded…
>
> Now, in case you haven't been following the SolarCity story, it's the company that, a few minutes before this deal was announced, Goldman Sachs said was the 'worst positioned' for growth in its sector. It's a company that, aside from this M&A bump, has seen its stock collapse almost 60% since the start of the year and lowered guidance for the year down 16% during its last earnings call. It's also a company that is helmed by Elon Musk's cousin, Lyndon Rive. Go figure.

71. The market also realized the dilution issues threatening Tesla shareholders. A June 21, 2016 article in *Barron's* entitled "Wait, Tesla wants to Buy SolarCity!?!?!" reported:[15]

> Then there's the matter of share dilution. Everyone knew Tesla would have to sell more shares to raise money for the Model 3 build, so investors didn't flinch when that happened back in [the $1.4 billion offering in] May. Now they're being diluted again–to the tune of nearly 12 million shares by my quick calculation…

72. On June 22, 2016, commentator Jim Chanos summed up the blatant corporate governance issues in *a Business Insider* article entitled "Shameful: Short seller Jim Chanos rips into the Tesla-SolarCity deal:"[16]

> Short seller Jim Chanos of Kynikos Associates blasted Tesla Motors Inc.'s proposed acquisition of SolarCity Corp., describing it as a 'brazen' bailout and 'shameful example of corporate governance at its worst.'
>
> 'SolarCity, whose bonds were yielding 20 percent yesterday, is a company headed toward financial distress,' Chanos said in an emailed statement on Wednesday. 'It is burning hundreds of millions in cash every quarter, a burden that now Tesla shareholders will have to bear, at a total cost of over $8 billion.'
>
> Tesla Chief Executive Officer Elon Musk called the proposed $2.8 billion acquisition a 'no-brainer' when the deal was announced after Tuesday's market close. But shares of Tesla

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[15] *See* http://blogs.barrons.com/stockstowatchtoday/2016/06/21/wait-tesla-wants-to-buy-solar-city.

[16] *See* http://www.businessinsider.com/jim-chanos-rips-the-tesla-solarcity-deal-2016-6.

> were down about 9 percent on Wednesday, while SolarCity rose about 6 percent.
>
> Chanos, whose firm has been betting against Tesla and SolarCity shares, said the combined drop in the market value of the two companies was more than the equity value of the deal itself, which means that Tesla shareholders think SolarCity shares are essentially worthless.
>
> 'Finally,' he added, 'it is hard for me to believe that this deal was not being contemplated when Tesla, and Mr. Musk himself, sold shares just a few weeks ago.'

73. As discussed in the June 22, 2016 *Forbes* article by Brian Solomon, analysts discussed at length why the purported synergies did not bear scrutiny – and suggested that these synergies were nothing more than Elon Musk dressing up a SolarCity bailout as a benefit to Tesla. Indeed, analyst after analyst found the proposed deal to be insuperably conflicted and not in the best interest of Tesla shareholders:[17]

> ● Barclays June 22, 2016 report: "While no doubt the Tesla bulls will hail the combination as visionary, we believe the assumption of another $2.6bn of debt to fold in a solar company with limited synergies and uncertain growth/cash prospects only reinforces our negative view of TSLA… the combined entity is likely to magnify the losses and cash burn that both were seeing individually… We are skeptical of the benefits."
>
> ● Oppenheimer June 21, 2016 report: "We believe investors are likely to view this transaction as a bailout for SCTY and a distraction to TSLA's own production hurdles. Given what we view as significant operational

[17] *See* http://www.forbes.com/sites/ briansolomon/2016/06/22/wall-street-hates-teslas-solarcity-deal-but-still-loves-elon-musk/#47a82da64d2a.

and integration challenges over our forecast horizon, we believe stepping to the sidelines is warranted."

● UBS June 22, 2016 report: "We are cautious on the deal as synergies seem limited, it adds complexity, and most importantly it could potentially be an unneeded distraction for TSLA mgt… SolarCity and Tesla have worked together on a battery offering, and there may be some potential future synergies on the SG&A front, but we note Elon Musk was unaware of how many Tesla customers have solar – implying customer acquisition synergies may not be the primary focus."

● Deutsche Bank June 22, 2016 report: "Tesla shareholders have sought to invest in an innovative and disruptive vehicle/mobility company, whose business offers potential for exponential growth. And Tesla vehicle owners primarily buy the vehicle because it's one of the best, most advanced vehicles available. They are generally not looking for an end-to-end energy solution…. [W]e believe that Tesla Investors will generally view this development as a negative, as it could produce a distraction while management would benefit more by focusing on their impressive growth plans."

● PiperJaffray June 21, 2016 report: "[W]ith the Model 3, TSLA is already subjecting itself to one of the most ambitious (and probably one of the least achievable) production ramps in automotive history. Integrating SCTY wouldn't make this process any easier."

74. The June 22, 2016 *Forbes* article summed it up: "[N]early every Wall Street analyst is some combination of confused and disappointed with the deal."[18]

75. A June 22, 2016 *Barclays* report was also skeptical of the purported synergies:

Skeptical of TSLA benefits: In purchasing SCTY, TSLA is broadening its range as a vertically integrated clean energy company. It believes it could expand SCTY's addressable

[18] *See* http://www.forbes.com/sites/ briansolomon/2016/06/22/wall-street-hates-teslas-solarcity-deal-but-still-loves-elon-musk/#47a82da64d2a.

> market and vice-versa, with SCTY benefiting from TSLA design and access to high-traffic stores. We are skeptical of the benefits. Not only do solar panels on cars make little sense (they'd be largely cosmetic), we think powering TSLA recharges with SCTY panels will be tough given recharges occur at night.

76. A June 23, 2016 article in *Investor's Business Daily* 6/23 entitled, "Longtime Tesla Cheerleader Jonas On SolarCity Bid: 'No,' 'No,' 'No'" describes why the Original Proposal was unnecessary and would provide no benefit to Tesla:[19]

> "The 26% reduction in our price target is mostly driven by a higher risk premium we believe should be demanded by investors following the surprise proposal to acquire SolarCity," Jonas wrote in a research note.
>
> "While there may be any number of lucid arguments supporting the strategic rationale of a combination, we believe many of the benefits could have been achieved through arm's length/strategic partnership and without the risks inherent in exposing Tesla shareholders to the financial and capital markets risks faced by SolarCity."
>
> Jonas asked whether SolarCity would help Tesla in three key areas, answering 'no' each time.
>
> "Does buying SolarCity help Tesla make better cars? No. We do not believe so."
>
> "Does buying SCTY improve the pace of TSLA's cash burn? No."

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[19] *See* http://www.investors.com/news/technology/tesla-continues-to-get-hammered-on-solarcity-acquisition-offer.

> "Does buying SCTY improve Tesla's access to the capital markets to help fund the mission? No."

SolarCity Sets Up A Special Committee to Analyze the Proposed Deal; Tesla Does Not

77. On June 27, 2016, SolarCity issued a press release and announced that it had created a special committee to evaluate the Original Proposal on behalf of its shareholders:

> **SAN MATEO, Calif.**, June 27, 2016 – SolarCity Corp. (NASDAQ: SCTY), America's #1 solar power provider, today announced that SolarCity's Board of Directors has formed a special committee of independent directors to evaluate the June 20, 2016, proposal from Tesla Motors, Inc. (NASDAQ: TSLA)…to acquire all of the outstanding shares of SolarCity common stock.
>
> The Board has granted the special committee the exclusive authority to evaluate SolarCity's long-term business plan and stand-alone opportunities for value creation against a broad range of strategic alternatives.
>
> The special committee is composed of Donald R. Kendall, Jr. and Nancy E. Pfund. Mr. Kendall will serve as chair of the special committee. The special committee has retained Skadden, Arps, Slate, Meagher & Flom LLP as its legal counsel and Lazard as its financial advisor to assist in its review.

An Investor Group Immediately Questions Why Tesla Did Not Create Its Own Special Committee

78. The next day, on June 28, 2016, in a letter to Defendant Gracias, CtW lambasted the Tesla Board for its abysmal corporate governance – which CtW

claimed was epitomized by the Original Proposal – and took Tesla to task for not creating its own special committee:

> Antonio J. Gracias
> Lead Independent Director
> Tesla Motors, Inc.
> 3500 Deer Creek Road
> Palo Alto, CA 94304
> Attention: Corporate Secretary
>
> Dear Mr. Gracias: In the wake of the proposed acquisition of SolarCity, we are compelled to reiterate our longstanding concern about corporate governance at Tesla. The market's hostile reaction to the deal demonstrates Tesla's failure to establish a corporate governance structure that inspires confidence that the terms are being negotiated in the best interest of Tesla investors. This is particularly questionable when six out of our seven board members have ties to SolarCity. It is therefore critical that the Tesla board, before finalizing the deal, move immediately to remedy its underlying governance deficiencies by implementing the following proposals:
>
> • **Immediately recruit two genuinely independent directors to the board to form a "Special Transactions Committee" empowered to fully review the proposed SolarCity acquisition and recommend whether it should proceed as planned or if changes are necessary, up to and including terminating the offer**;
>
> • Permanently expand the size of the board to include two new independent directors on a permanent basis;
>
> • Separate the roles of board Chairman and Chief Executive Officer;
>
> • Declassify the board so that stockholders may have an annual say on the election of all directors; and
>
> • Amend the corporate governance guidelines of Tesla to state that immediate family members of any current board member or member of the senior executive team should not concurrently serve on the board of directors.

(Emphasis added).[20]

79. Tesla ignored CtW and did not create an independent committee to evaluate whether the Original Proposal was fair to Tesla shareholders.

The Market Continues to Criticize the Deal

80. The intractable conflicts and fundamental problems with the Original Proposal were so profound that market criticism never let up. Indeed, the more the market analyzed the deal, the more they found serious fault with it.

81. On June 29, 2016, Naman Shukla wrote an article in gurufocus entitled, "Tesla Acquiring SolarCity Is a Disastrous Idea".[21] That article provided:

> Both Tesla and SolarCity burn through millions of dollars in cash every quarter. Both the companies have been reporting massive losses for years, and I don't see how acquiring SolarCity would benefit Tesla in any way.
>
> Tesla recently unveiled the Model 3, and the car has already received 400,000 preorders. In order to manufacture cars in such a large capacity, Tesla will need a lot of funds. Moreover, Tesla has ambitious plans to grow its production capacity going forward. All in all, Tesla will need a lot of money to fund these projects, and acquiring SolarCity will be a big burden for the company.
>
> SolarCity is a highly leveraged company. In fact, SolarCity's debt is so high the company's interest expense is almost as much as its gross profits. There is no way that SolarCity's business model is sustainable in the long run. Hence, buying

[20] See http://ctwinvestmentgroup.com/wp-content/uploads/2016/06/Tesla-letter-2016_Final.pdf.
[21] *See* http://www.gurufocus.com/news/425125/tesla-acquiring-solarcity-is-a-disastrous-idea.

> SolarCity will have a huge negative impact on Tesla's cash flow, which in turn will delay its growth plans going forward.

82. Shukla also noted that the deal would further dilute Tesla shareholders – who were already diluted back in May 2016:

> If the deal goes through, Tesla will need to dilute more shares in order to fund both its production expansion and SolarCity's consistent losses.
>
> …The decision to acquire a company requires months of planning, and Tesla had to be planning this deal for at least a few months. Yet the company didn't disclose it when it diluted shares. Moreover, Musk himself bought SolarCity's shares when the stock dropped after its disastrous earnings. All in all, the deal will cause a lot of trouble for Tesla and its shareholders.

Id.

83. On July 1, 2016, *Benzinga* published an article entitled "Tesla Has Already Admitted That Its Merger With SolarCity Makes No Sense" by Spencer Israel.[22] That article noted that a Tesla executive had admitted earlier that a deal with SolarCity would make no sense:

> Gordon Johnson, one of the Street's biggest solar analysts, said [that] not only did SolarCity flat out deny that anything like this could happen, but Tesla has already admitted that the companies' best interests don't even line up.
>
> Here's Johnson:

[22] *See* http://www.benzinga.com/analyst-ratings/analyst-color/16/07/8177393/tesla-has-already-admitted-that-its-merger-with-solarcity.

> "We had spoken to SolarCity and asked them if something like this was possible. and they vehemently said 'No.' Look at the comments from September, where you had a Tesla executive...basically admitting that it doesn't make sense to combine Tesla and SolarCity. The key driver of SolarCity's business, or among the key drivers, is net metering policies.
>
> Essentially, what net metering does it allows you to take the excess power you generate that you're not using and essentially sell it back to the [power grid], effectively storing it in the grid. So you don't need battery storage [to do that]. And the whole benefit that Elon Musk has been talking about has been marrying the solar technology with the battery technology. And with net metering, that doesn't make any sense. His company has essentially admitted that a number of times."
>
> Johnson said the deal is simply a defensive move by Musk, who has to protect the premium associated with his name.

84. The market continued to call out Tesla for abandoning the interests of its shareholders. On July 12, 2016, *Forbes* published an article called "Bailing Out SolarCity Costs Tesla Investors $7.4 Billion."[23] David Trainer discussed in the article why any acquisition of SolarCity by Tesla would be financially deleterious for the Company:

> As noted when I put SolarCity in the Danger Zone in August 2015, the company's revenue growth masks soaring profit losses.
>
> From 2013-2015, SolarCity burned through -$6.5 billion in cumulative free cash flow. Over the last twelve months alone, SCTY's free cash flow is -$3.6 billion. SolarCity's revenue has

[23] *See* http://www.forbes.com/sites/greatspeculations/2016/07/12/bailing-out-solarcity-costs-tesla-investors-7-4-billion/#5d355ac430c8.

> grown from $164 million to $455 million over this same time,…
>
> SCTY's economic earnings have declined from -$191 million in 2012 to -$1.2 billion over the last twelve months. Much of the losses have been covered by debt, but I think that source of capital may be drying up. The firm's total debt, which includes off-balance sheet operating leases, has grown from $342 million in 2012 to $4 billion over the last twelve months.

The article summed it up: "This Deal Makes No Economic Sense for TSLA – A Big Transfer of Wealth to SCTY Investors."

85. The *Forbes* article also criticized Elon Musk for not disclosing any plan to acquire SolarCity in May when Tesla raised $1.4 billion in stock:

> We think it is more than a little unfortunate that Mr. Musk did not make his plans to buy SCTY more prominent during Tesla's recent [May 2016] $1.4 billion equity sale. Perhaps, investors would have been less interested in buying shares in a company that is not only losing money but also paying big premiums for other companies that are losing money.

Tesla Announces That It Reached A Deal With SolarCity

86. On August 1, 2016, Tesla filed its form 8-K and announced that it signed the Merger Agreement with SolarCity on July 31, 2016. The Merger Agreement provided that SolarCity stockholders would receive 0.110 Tesla common shares per SolarCity share, valuing SolarCity common stock at $25.37 per share based on the 5-day volume weighted average price of Tesla shares as of July 29, 2016. The value of this slightly improved offer did not change the profound problems with the Original Proposal. All it did was paint lipstick on a pig –

reducing the price Tesla would pay by a small amount in acquiring SolarCity but not changing one iota the fact that the deal was nothing more than a bailout of a failing, debt-laden Elon Musk company.

The Market Reiterates Concerns Over The Deal As Nothing More Than A Bailout, And Remains Skeptical of Purported Synergies

87. The fact that the Final Proposal contained slightly improved terms for Tesla did not move analysts. For example, *UBS* reiterated its fundamental questions about the purported synergies on August 1, 2016:

> **Synergies Remain Vague**
>
> The company provided limited financial quantification of the $150m cost synergies. Qualitatively, the synergies will come from lower customer acquisition costs by leveraging TSLA's retail footprint (foot traffic of 3m per year), savings from combined installation/service of solar & storage, savings from supply chain efficiencies (e.g. both companies source inverters), and leveraging TSLA's manufacturing expertise. Ultimately, TSLA envisions combining vehicle, charger, and storage delivery/installation in "a one truck and one trip" solution. Given investor caution around the SCTY deal, we are surprised by the lack of quantitative details on the solar/storage combo.

88. Similarly, an August 1, 2016 *Oppenheimer* report also reiterated questions about the purported synergies:

> ■ **Synergies update:** TSLA now expects to achieve direct cost synergies of $150M in the first full year post-closing. Pro forma, it also expects to improve the value proposition by cutting capital costs, among other items. With our expectation for the combined company needing ~$12.5B for CapEx through 2018, we expect this synergy to be the most difficult for the new entity to recognize.

89. An August 2, 2016 *Salon* article entitled "*Has Elon Musk lost his touch? Why Tesla's deal for SolarCity has some investors cringing"* provided as follows:[24]

> **Tesla's $2.6 billion purchase of the solar systems maker is raising eyebrows and even being called a bailout.**
>
> [W]hy are investors cringing? They fret that Musk is overreaching at a time when his electric car company needs to marshal its financial resources to meet its goal of selling a half-million electric cars per year by 2020—a tenfold increase over its 2015 sales. To the doubters, SolarCity is a money pit and a diversion.
>
> …"We expect a robust shareholder fight over this acquisition centered on corporate governance," Oppenheimer & Co. analyst Colin Rusch in a June 21 research note in the wake of the proposal.

90. Also on August 2, 2016, *The Street* noted that "industry leaders saw the proposal as a bailout for the target, for which Musk was a Co-Founder and chairman, as well as the largest shareholder."

91. *The Daily Caller* reiterated on August 6, 2016 in an article entitled "*Elon Musk Says the Exact Opposite of What Analysts Say About the Solarcity Tesla Merger*" that the Final Proposal was "badly flawed":[25]

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[24] *See* http://www.salon.com/2016/08/02/Has Elon Musk lost his touch? Why Tesla's deal for SolarCity has some investors cringing.

[25] *See* http://dailycaller.com/2016/08/06/elon-musk-says-the-exact-opposite-of-what-analysts-say-about-the-solarcity-tesla-merger.

> Salome Gvaramia, the COO of tech company research group Devonshire Research Group, told the Daily Caller News Foundation that Musk's justification for the merger is badly flawed.
>
> "If the goal is to facilitate seamless collaboration between the two companies in order to increase production efficiency, reduce carbon footprint, etc." Gvaramia said, "it can be achieved on contractual basis between two independent entities."
>
> The merger itself, she added, makes it look like Tesla is propping up the beleaguered solar panel company.

92. On August 23, 2016, Elon Musk (as well as Lyndon and Peter Rive) announced that they were purchasing $100 million of SolarCity bonds, further emphasizing that Elon Musk would go to any length to bail out the company. Elon Musk will be personally buying $65 million of bonds and Lyndon and Peter Riveare are each buying $17.5 million. "Musk is infusing even more of his money" stated Nathan Serota, an analyst at Bloomberg New Energy Finance. Serota added that "SolarCity is burning through a lot of cash and they need cash."

Evercore's Financial Analyses Are Flawed

93. In connection with the deal, Evercore issued an opinion that the transaction was fair to Tesla from a financial point of view (the "Fairness Opinion"). The Fairness Opinion, however, is materially flawed.

94. First, and most importantly, Tesla did not provide Evercore with an internal projected financial model, or any other projected financial or operating

data with respect to Tesla. Rather, Evercore was instructed by Tesla to utilize Goldman Sachs' equity research model for Tesla published on July 6, 2016 (the "GSER Forecasts"). Given the magnitude of the deal to Tesla, failing to provide a company's own financial forecasts to its financial advisor is unexplainable and leads to inaccurate financial modeling.

95. Importantly, while Tesla management purportedly discussed with Evercore how the GSER Forecasts compared to their expectations with respect to the future operating and financial performance of Tesla, these comparisons and expectations are not disclosed in the S-4. Shareholders are entitled to this critical information. Actual (instead of outside estimated) Tesla financial information was also essential here, because Evercore opined on the fairness of the exchange ratio based on, *inter alia*, its discounted cash flow and discounted equity value analyses for both SolarCity and Tesla. These were dependent on modeling of Tesla based on its future financial performance. For example, pursuant to Evercore's discounted cash flow analyses, this range is 0.124 to 0.699. However, using Tesla's actual internal financial modeling and projections would likely have yielded different ranges.

96. To make matters more confusing (and obscure the fact that Evercore was not given Tesla's actual financial projections), for purposes of its discounted cash flow analysis, Evercore also used Institutional Brokers' Estimate System

("IBES") estimates of Tesla's value. Apparently, based on the Goldman estimates, Evercore determined an implied per share equity value reference range for Tesla on a standalone basis of approximately (a) $200.83 to $311.66 using the EBITDA multiple method and (b) $88.36 to $302.21 using the perpetuity growth rate method. Using the IBES Forecasts and adjusting for debt outstanding as of March 31, 2016 and cash as of March 31, 2016, Evercore determined an implied per share equity value reference range for Tesla on a standalone basis of approximately (a) $295.44 to $459.93 using the EBITDA multiple method and (b) $132.92 to $451.02 using the perpetuity growth rate method. What remains undisclosed, however, is the valuation ranges based on Tesla's actual financial projections.

97. Likewise, in its discounted equity value analysis, Evercore also utilized IBES estimates for Tesla which estimated wildly disparate estimated net income for calendar year 2020 (as compared to Goldman). The differences in the Goldman and IBES estimates yielded materially different calculations of implied value per Tesla share ($121.70-$161.52 (using Goldman) and $199.41-$265.88 (using IBES)). Shareholders are entitled to the ranges based on Tesla's actual financial information.

98. Importantly, the failure to provide actual Tesla financial information to Evercore also undermines the sum-of-the-parts analysis which was also dependent on valuing Tesla properly.

99. In addition, Evercore supposedly reviewed certain estimates as to the amount and timing of certain potential synergies anticipated by the management of Tesla to result from the Merger (the "Estimated Synergies"). The actual quantification of these synergies is not provided past year one (purportedly $150 million), and the underlying financial information and modeling underlying the year one synergies are not provided in the S-4. Furthermore, the Estimated Synergies were not incorporated into Evercore's financial analyses.

100. Finally, notwithstanding SolarCity's precarious financial condition, Evercore did not evaluate the solvency or fair value of SolarCity. All of Evercore's analyses are merely theoretical if SolarCity cannot exist as a going-concern.

The S-4 Contains Materially False and Misleading Information

101. On August 31, 2016, Tesla filed the S-4. In addition to the nondisclosures referred to above with respect to the Evercore Fairness Opinion, the S-4 contains additional materially misleading statements and omissions of material fact.

102. For example, although Tesla had already retained Evercore, the S-4 fails to explain how the exchange value range from the Original Proposal was formulated.

103. Given the numerous conflicts of interest, the S-4 also omits why the Tesla Board failed to create an independent committee to review the deal.

104. The S-4 fails to disclose how the majority of the minority voting provision is rendered ineffective by large Tesla (non-Musk) shareholders who own large blocks of SolarCity stock.

105. The S-4 fails to disclose why Elon Musk was included in discussions about the deal with the Tesla Board after such time as it was decided that he would be excluded from the vote on the Final Proposal.

106. The S-4 fails to disclose why Tesla would not give its own internal projections and modeling to Evercore, its financial advisor, for purposes of the deal valuation and Fairness Opinion.

107. The S-4 fails to disclose what changes Tesla instructed Evercore to make to the Goldman estimates.

108. In various places in the S-4, the Tesla Board discusses generally SolarCity's financing needs and the capital needs of the combined company. No additional detail is given on these matters. Because of SolarCity's precarious financial position, these matters need to be quantified in the S-4.

109. While the S-4 touts the synergies from the Final Proposal, Tesla omits any calculation of how it reached the $150 million figure, does not provide synergies past year one, and does not provide the underlying financial information and modeling underlying the year one synergies. Indeed, analysts seized on this very problem in early August because these synergies were touted as a key rationale for the deal. The S-4 does not shed any additional light on this matter. The glaring lack of quantification of the synergies demonstrates their pretextual nature. In other words, Elon Musk is using these purported synergies as an excuse to bail out SolarCity.

DEMAND FUTILITY ALLEGATIONS

The Tesla Board Is Fraught With Insuperable Conflicts

110. The Tesla Board owed and continues to owe Tesla and its public stockholders fiduciary duties to act in the best interests of the Tesla and its stockholders.

111. The exacting standard of "entire fairness" that applies here involves a two part inquiry: (1) whether a corporate transaction is the result of a fair process; and (2) whether it results in a fair price. The initial burden of establishing a fair process and fair price rests with the directors defending the transaction. For the detailed reasons set forth above, it is clear that the Final Proposal constitutes

improper self-dealing and is not entirely fair to the Company – in terms of either price or process.

112. Because the Final Proposal is not entirely fair to the Company, the Final Proposal cannot be deemed a product of the valid exercise of business judgment and demand is excused as a matter of law.

113. The Tesla Board consists of seven individuals: Elon Musk, Gracias, Kimbal Musk, Jurvetson, Ehrenpreis, Buss, and Denholm. At least six of these seven suffered and continue to suffer from conflicts of interest and divided loyalties that preclude them from disinterested assessment of any shareholder demand to investigate or pursue the claims alleged herein:

- Tesla Chairman of the Board (and CEO) Elon Musk is Chairman of the Board of SolarCity. Elon Musk owns 18.4% of Tesla and 22.1% of SolarCity. Elon Musk is the single largest SolarCity shareholder, holding 22.1 million SolarCity shares, amounting to 21.9% of SolarCity stock, currently worth approximately $500 million. Elon Musk is also the Chief Executive Officer, Chairman of the Board, and Chief Technology Officer of another of his companies, SpaceX, on which board sit Kimbal Musk and Gracias. In addition, SpaceX holds approximately $165 million in SolarCity bonds, which will be worthless if SolarCity collapses.

- Tesla Board member Kimbal Musk is Elon Musk's brother and a director of SpaceX. Kimbal Musk owns 147,541 SolarCity shares, worth approximately $3 million.

- Tesla Board member Gracias is on both Tesla and SolarCity's boards and holds 211,021 SolarCity shares worth in excess of $4.4 million. Gracias is CEO, director, and majority stockholder of Valor Management Corporation ("Valor"), an investment firm which is an investor in SpaceX, and Gracias is a director of SpaceX. Valor is also an investor in SolarCity; thus, any acquisition of SolarCity by Tesla bails out Valor's

SolarCity investment as well. Elon Musk and Kimbal Musk are investors in funds advised by Valor. Yet, Tesla terms Gracias an "independent director".

● Tesla Board member Jurvetson owns 1,672,381 SolarCity shares, worth over $35 million. Jurvetson's firm, Draper Fisher Jurvetson ("DFJ"), owns over 2.7 million shares of SolarCity, worth in excess of $58 million, and DFJ Managing Director John H.N. Fisher sits on SolarCity's board. DFJ is a significant stockholder in SpaceX and Jurvetson is a director of SpaceX. DFJ is also a major stockholder in SolarCity; thus, any acquisition of SolarCity by Tesla bails out DFJ's SolarCity investment as well. Elon Musk is an investor in a DFJ venture fund.

● Tesla Board member Ehrenpreis is a manager of DBL Partners ("DBL"), another venture capital fund. Ehrenpreis and DBL are investors in SpaceX. A partner of Ehrenpreis is a director of SolarCity in which DBL is also an investor. Any bailout of SolarCity is also a bailout of DBL's SolarCity investment.

● Tesla Board member Buss is the former Chief Financial Officer for SolarCity. Buss owns 37,277 shares of SolarCity stock worth approximately $800,000 and any bailout for SolarCity will also save his own investment. Buss is co-owner of DBL.

● SolarCity's Chief Executive Officer Lyndon Rive and Chief Technology Officer Peter Rive are Musk's first cousins.

● J.B. Straubel is on SolarCity's Board and is Tesla's Co-Founder and Chief Technology Officer. Straubel owns 771,773 SolarCity shares worth approximately $16 million.

114. A majority of the Tesla Board is, thus, conflicted from independently assessing a transaction involving Tesla and SolarCity because they have monetary and reputational interests that are not aligned with the outside shareholders of Tesla, and because of their association with one another.

115. A majority of the Tesla Board is also conflicted because they stand on both sides of the deal and are therefore incapable of independently and disinterestedly considering a demand to commence and vigorously prosecute Plaintiff's claims relating to the Final Proposal.

116. Tesla Board members Elon Musk, Gracias, Ehrenpreis, and Jurvetson also stand to gain by the Final Proposal due to their (or their companies') SolarCity stock ownership. These directors have a direct and pecuniary interest in Tesla's acquisition of SolarCity. Thus, they are incapable of disinterestedly considering a demand.

117. Further, the Final Proposal is subject to the entire fairness standard of review. Because the challenged Final Proposal is not entirely fair to the Company in terms of both price and process, it is not a valid exercise of business judgment, and demand is excused as a matter of law.

118. Moreover, a majority of the Tesla Board faces a substantial likelihood of liability for orchestrating and stating (as Elon Musk has bragged) that they will approve the Final Proposal. As a result of the Tesla Board's bad faith in this regard, they face a substantial likelihood of personal liability and thus are unlikely to thoroughly investigate or prosecute the claims alleged herein. In addition, the Tesla Board's potential liability is not simply the product of this action, but also

from other potential securities actions arising from the marked drop in Tesla's share price upon announcement of the Original Proposal.

119. Because the majority of the Tesla Board have a direct and pecuniary interest in the Final Proposal, they are potentially liable for breaches of loyalty for which they might not be indemnified, and would therefore be subject to astronomical personal liability.

120. In sum, a majority of the Tesla Board suffers from conflicts of interest and divided loyalties that preclude them from exercising independent business judgment. Because, as alleged above, the majority of the Tesla Board stands on both sides of the Final Proposal, the Final Proposal is subject to the heightened scrutiny of entire fairness review and the business judgment rule is not applicable.

121. These conflicts have not been lost on the investing public. For example, a June 22, 2016 *Fortune* article by Jen Wieczener entitled "*Why Tesla and SolarCity have an Elon Musk Problem"* described why the recusal of Elon Musk and Gracias from the vote on the Final Proposal was meaningless:[26]

> But investors are questioning whether Musk's professions of ethics and objectivity are sincere, or just for show. Antonio Gracias, an investor who also sits on the boards of both companies, and SolarCity's Rive also recused themselves from the board votes. They and Musk, however, will still be in the room and participating in the board's discussions of the deal, Tesla specified during the call on Wednesday. And in case there was any doubt about whether the rest of the board members

[26] *See* http://fortune.com/2016/06/22/tesla-elon-musk-solarcity.

> might feel differently about the transaction, Musk cleared that up, telling analysts, "The board opinion is unanimous at both companies."

See also L.A. Times article by Russ Mitchell and James F. Peltz entitled "*Elon Musk's plan to buy SolarCity raises fears of shaky financial and unclear motives"* ("[e]ven if Musk recuses himself from voting on the deal, 'he has significant influence on the boards of both companies and they can't help but feel that influence[….][27] *See also* June 22, 2016 L.A. Times article by Michael Hiltzik entitled "Elon Musk's Tesla-SolarCity deal Makes a Lot of Sense – but only for Elon Musk") "[T]he notion that the boards can possibly judge this deal independently is a joke.").[28]

122. In other words, in addition to the fact that six of seven Tesla Board members are conflicted, all seven have already opined that they will vote in favor of the Final Proposal.

The Tesla Board Demonstrates Their Conflicts By Ignoring An Investor Group's Plea to Create A Special Committee To Protect Tesla's Interest

123. One week after the Original Proposal was announced, on June 28, 2016, CtW demanded in a letter to Defendant Gracias that the Company, *inter alia*, form its own independent committee to review whether the deal was fair to Tesla

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[27] *See* http://www.latimes.com/business/la-fi-hy-tesla-solarcity-20160623-snap-story.html.

[28] *See* http://www.latimes.com/business/hiltzik/la-fi-hiltzik-musk-tesla-solar-20160622-snap-story.html.

and its shareholders. In total, CtW requested that Tesla implement five steps it said would remedy Tesla's "underlying governance deficiencies." CtW asked that Tesla add two permanent independent directors and separate the chairman and CEO roles, as well as for two independent directors to form a special committee to review the proposed SolarCity deal. "The fiercely negative reaction to the Proposal only highlights the flawed (corporate governance) process and underscores our continuing concern about governance at the company," CtW Executive Director Dieter Waizenegger wrote in the letter.

124. The Tesla Board ignored CtW's request, making crystal clear that they will not secure a deal in Tesla's best interest.

The Price of the Proposal Is Unfair to Tesla As It Grossly Overvalues SolarCity

125. As alleged above, if the Final Proposal if consummated, it will saddle Tesla with billions of dollars in debt, provide no benefit to the Company, and distract Tesla from its own business, in particular the launch of its Model 3. Thus, the price to be paid SolarCity stockholders in connection with the Final Proposal is grossly excessive and unfair to Tesla and its stockholders and, if the Final Proposal is consummated, will further damage the Company financially.

DERIVATIVE ALLEGATIONS

126. Plaintiff incorporates by reference all preceding and subsequent paragraphs as though they were fully set forth herein.

127. The Board consists of the following seven individuals: Elon Musk, Antonio J. Gracias, Kimbal Musk, Steve Jurvetson, Ira Ehrenpreis, Brad W. Buss, and Robyn M. Denholm. Each of these seven defendants was a member of Tesla Board during the time of the misconduct, which began in earnest in the second quarter 2016 with Tesla's May 2016 equity offering and the likely start of the negotiations to acquire SolarCity, and run to the present. Each of these defendants owes the Company fiduciary duties in connection with their service as a director.

128. Plaintiff has not made demand on the Tesla Board to bring suit against Defendants and assert the claims set forth herein because pre-suit demand is futile and thus is excused as a matter of law.

129. First, the Final Proposal is plainly an interested transaction and, as alleged above, is not entirely fair to the Company – in terms of both price and process. Because the Final Proposal is not entirely fair to the Company, the Final Proposal cannot be deemed a product of the valid exercise of business judgment and demand is excused as a matter of law.

130. Second, an overwhelming majority (six out of seven) of the Tesla Board suffered and continues to suffer from conflicts of interest and divided loyalties that precluded them from exercising independent business judgment. Because they were interested, their actions with respect to the facts alleged herein

are subject to entire fairness review, and the business judgment rule is not applicable.

131. In sum, only one of Tesla's seven board members (Denholm) lacks any apparent conflict of interest.

132. Moreover, Elon Musk stated right after the Original Proposal that both the Tesla and SolarCity Boards are *unanimously* in favor of the Final Proposal.

133. Further, because of the intertwined corporate structures of Tesla and SolarCity, the Tesla Board knows full well that it is offering too much in a transparent attempt to save SolarCity from financial collapse.

134. Accordingly, demand on the Tesla Board is futile.

COUNT I
DERIVATIVE CLAIM FOR BREACH OF FIDUCIARY DUTY (AGAINST THE TESLA BOARD)

135. Plaintiff incorporates by reference all preceding and subsequent paragraphs as though they were fully set forth herein.

136. By virtue of their positions as directors of Tesla, the Tesla Board owes fiduciary duties of care and loyalty to Tesla and its stockholders. The Tesla Board did not exercise independence or due care in approving the Final Proposal, which was structured solely to bail out another Elon Musk company, SolarCity – at the unfair expense of Tesla and its public stockholders, whose shares will also be

diluted. The Tesla Board must, but cannot, show that the Final Proposal is entirely fair to Tesla and the public Tesla stockholders.

137. The Tesla Board breached their fiduciary duties by failing to fairly evaluate the Final Proposal and approving it at an excessive and inequitable price.

138. The Tesla Board also breached their fiduciary duties by disseminating materially false and misleading information about the Original Proposal and the Final Proposal in the S-4.

139. In contemplating, planning, and/or effecting the foregoing conduct, the Tesla Board did not act in good faith toward the Company and breached their fiduciary duties.

140. As a result of these actions of the Tesla Board, the Company will be further damaged if the Final Proposal is consummated.

141. The Tesla Board is liable to the Company as a result of the acts alleged herein.

142. Unless enjoined by this Court, the Tesla Board will continue to breach their fiduciary duties and violate Delaware law to the detriment of Tesla and its stockholders.

143. Plaintiff, on behalf of Tesla, has no adequate remedy at law.

COUNT II
DERIVATIVE CLAIM FOR BREACH OF FIDUCIARY DUTY OF LOYALTY (AGAINST THE TESLA BOARD)

144. Plaintiff incorporates by reference all preceding and subsequent paragraphs as though they were fully set forth herein.

145. By virtue of their positions as directors of Tesla, the Tesla Board owes fiduciary duties of care and loyalty to Tesla and its stockholders. The Tesla Board has violated their fiduciary duties of loyalty and entire fairness owed to Tesla and its public shareholders.

146. As alleged above, the Tesla Board has placed personal loyalty to Elon Musk over loyalty to Tesla and its best interest.

147. The Tesla Board's support and encouragement of the Final Proposal on the present terms is in breach of their fiduciary duties of loyalty and entire fairness owed to Tesla and the Tesla public shareholders, whose shares will also be diluted.

148. As a result of the actions of the Tesla Board, the Company will be further damaged.

149. Unless enjoined by this Court, the Tesla Board will continue to breach their fiduciary duties owed to the Company and its public stockholders, and may consummate the Final Proposal, harming Tesla and causing the Company to pay a

grossly excessive price pursuant to the Final Proposal and diluting the Tesla public stockholders, all to the irreparable harm of the Company and its stockholders.

150. Plaintiff, on behalf of Tesla, has no adequate remedy at law.

COUNT III
DERIVATIVE CLAIM FOR WASTE
(AGAINST THE TESLA BOARD)

151. Plaintiff incorporates by reference all preceding and subsequent paragraphs as though they were fully set forth herein.

152. As a result of the foregoing misconduct, Defendants are causing and will cause Tesla to waste valuable corporate assets. This waste includes the payment to SolarCity shareholders in connection with the deal and advisory and legal fees already expended in connection with the deal.

153. As a direct and proximate cause of the Tesla Board's corporate waste, Tesla has sustained and continues to sustain significant damages. As a result of the misconduct alleged herein, the Tesla Board is liable to the Company.

154. Unless enjoined by this Court, the Company may not be able to recover these assets.

155. Plaintiff, on behalf of Tesla, has no adequate remedy at law.

COUNT IV
AIDING AND ABETTING BREACH OF FIDUCIARY DUTIES AGAINST STRAUBEL, LYNDON RIVE, PETER RIVE, D SUBSIDIARY, AND SOLARCITY

156. Plaintiff incorporates by reference all preceding and subsequent paragraphs as though they were fully set forth herein.

157. As alleged herein, the Tesla Board has breached their fiduciary duties to Tesla and its stockholders.

158. Lyndon and Peter Rive (Elon Musk's cousins), as well as Straubel (Tesla's Co-Founder and Chief Technology Officer), sit on SolarCity's board and, thus, are well acquainted with the Final Proposal and the negotiations leading up to it.

159. By participating in, and approving of, the Final Proposal, these defendants, as well as SolarCity, have provided substantial assistance to, and aided and abetted, the Tesla Board in their breaches of fiduciary duty.

160. As a direct and proximate cause of these defendants' conduct, Tesla has sustained and continues to sustain significant damages.

161. Plaintiff, on behalf of Tesla, has no adequate remedy at law.

WHEREFORE, Plaintiff prays for judgment, as follows:

A. enjoining Defendants, temporarily and permanently, from taking any steps necessary to accomplish or implement the Final Proposal at a price that is not fair and equitable and under the terms presently proposed;

B. declaring that the Final Proposal is not entirely fair and is in breach of the fiduciary duties of the Tesla Board and, therefore, any agreement arising therefrom is unlawful and unenforceable;

C. to the extent that the Final Proposal complained of is consummated prior to the entry of final judgment, rescinding the transaction and/or awarding damages to the Company;

D. requiring Defendants to disclose all material information in connection with the Original and Final Proposals;

E. requiring the Defendants to conduct a fair process to evaluate the Company's value and any available value maximizing strategic alternatives including remaining as a separate public company;

F. enjoining, temporarily and permanently, any material transactions or changes to Tesla's business and assets unless and until a proper process is conducted to evaluate Tesla's strategic alternatives;

G. directing that Defendants account to the Company for all damages caused to it and account for all profits and any special benefits obtained by Defendants as a result of their unlawful conduct;

H. awarding the Company pre- and post-judgment interest at the statutory rate;

I. awarding to Plaintiff the costs and disbursements of this action, including a reasonable allowance for the fees and expenses of Plaintiff's attorneys and experts; and

J. granting such other and further relief as the Court deems appropriate.

ROSENTHAL, MONHAIT & GODDESS, P.A.

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