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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

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IN RE TESLA, INC. SECURITIES  
LITIGATION

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Case No. 3:18-cv-04865-EMC

**PLAINTIFF'S TRIAL BRIEF**

1 **I. INTRODUCTION.**

2 Plaintiff's theory of the case is straightforward. On August 7, 2018, at 12:48 p.m. EDT,  
3 Defendant Elon Musk, Chairman and Chief Executive Officer of Tesla, Inc., tweeted the  
4 following message to over 22 million followers: "Am considering taking Tesla private at \$420.  
5 Funding secured." Musk made additional, subsequent tweets about the potential transaction  
6 including: "Investor support is confirmed. Only reason why this is not certain is that it's  
7 contingent on a shareholder vote." As the Court has already found, these tweets were false and  
8 Musk was deliberately reckless about their falsity when he made those statements. Furthermore,  
9 those tweets were material to Tesla investors as shown by the stock price reaction following their  
10 publication as well as the intense investor, media, and analyst discussion and analysis that  
11 followed. While some market participants expressed skepticism about Musk's tweets, many also  
12 accepted them as accurate and truthful as seen by the increase in Tesla's stock price towards the  
13 announced deal price of \$420 as well as the movement in prices of Tesla stock options and bonds  
14 which also reflected an expectation of a going-private transaction at \$420 per share.

15 On August 13, 2018, Tesla published a blogpost by Musk titled "Update on Taking Tesla  
16 Private". This blogpost failed to disclose material information regarding the proposed going-  
17 private transaction especially regarding the level of investor support and the status of negotiations  
18 for funding between Musk and the Saudi Arabia Public Investment Fund. Like his August 7, 2018  
19 tweets, Musk was aware of the information he deliberately omitted from his blogpost. Analysts  
20 treated the blogpost as confirmation of the accuracy of Musk's August 7, 2018 tweets and Tesla's  
21 stock, option, and bond prices continued to reflect the probability of Tesla going private at \$420  
22 per share.

23 On August 16, 2018, *The New York Times* published a lengthy article based on an  
24 interview with Musk. The article discussed the circumstances of the August 7, 2018 tweets at  
25 length, including noting that funding had not been secured by August 7, 2018, as well as other  
26 previously-reported aspects of Tesla's business and Musk's circumstances. Following the  
27 publication of this article, the price of Tesla stock declined significantly. Even though Musk and  
28 Tesla were still exploring a possible going-private transaction, analysts began revising their price

1 targets to remove any impact from a possible going-private transaction and prices of Tesla stock  
2 options stopped reflecting any likelihood of a going-private transaction at \$420 per share. On  
3 August 24, 2018, Musk and Tesla announced they were no longer considering a going-private  
4 transaction. Tesla's stock price did not react significantly.

5 As a result of the turmoil in the prices for Tesla stock, options, and bonds caused by Musk  
6 and Tesla's statements, investors lost billions of dollars from August 7, 2018 to August 17, 2018.  
7 These damages include losses resulting from the effect on the prices of Tesla securities  
8 immediately following the August 7, 2018 tweets, that was then corrected from August 8, 2018  
9 to August 17, 2018 as the falsity of the tweets was realized by investors. The damages also include  
10 losses suffered by the impact on the prices of Tesla securities resulting from the direct  
11 consequences of Musk and Tesla's false statements such as increased litigation and regulatory  
12 risk, exposure of serious flaws in Tesla's corporate governance, etc., again realized over the  
13 course of the class period as the falsity of their representations was appreciated by the market.  
14 Absent Musk and Tesla's fraudulent statements, these losses would not have been suffered by  
15 Tesla investors.

16 Plaintiff alleges that Musk and Tesla violated Section 10(b) of the Securities Exchange  
17 Act, 15 U.S.C. § 78j(b), and SEC Rule 10b-5(b), 17 C.F.R. § 240.10b-5(b). Plaintiff further  
18 alleges that Tesla's Board of Directors are liable pursuant to Section 20(a) of the Securities  
19 Exchange Act, 15 U.S.C. § 78t(a), as "control persons" of Tesla.

## 20 **II. SUMMARY OF KEY EVIDENCE.**

21 The Court has already determined that Musk's August 7, 2018 tweets contain  
22 misrepresentations and were made by Musk with scienter. Key evidence on the remaining issues  
23 for the jury<sup>1</sup> is summarized below:

### 24 **A. Background.**

25 Tesla had previously identified Musk's twitter account as a duly authorized channel for  
26 corporate communications. Ex. 103. Following controversy in July 2018 regarding Musk's  
27 exchange of tweets with Vernon Unsworth, a British diver based in Thailand, that had led to a

28 <sup>1</sup> The remaining issues are set forth in the Joint Pretrial Statement (ECF No. 474) at 10-11.

1 decline in Tesla’s stock price, investors asked Musk to stop or reduce his tweeting. Exs. 39-40,  
2 140, 329. Despite awareness of this issue, Tesla’s Board of Directors put in place no controls over  
3 Musk’s tweets such as requiring prior review by Tesla management or counsel.

4 On July 31, 2018, Musk met with representatives of the Saudi PIF, including Yasir Al-  
5 Ramayyan. During this meeting, the idea of taking Tesla private was discussed although the  
6 specific price, amount of funding, or any other material term was not discussed nor agreed. Ex.80.  
7 On August 2, 2018, Musk made an informal proposal to the Tesla Board of Directors to take Tesla  
8 private at \$420 per share. Ex. 81. The Board met with Musk the following day. The Board told  
9 Musk that “a detailed proposal regarding a going private transaction had not yet been made and  
10 that one would be needed in order for the Board to properly analyze and evaluate it.” Ex. 83.  
11 Finally, the Board authorized Musk “to have initial, conceptual conversations with a few of the  
12 Company’s top shareholders to explore their interest and gauge their reaction to a private  
13 corporate structure.” *Id*

14 **B. August 7, 2018.**

15 On August 7, 2018, without receiving any further legal or financial advice or speaking  
16 with any investors, Musk published his initial tweet: “Am considering taking Tesla private at  
17 \$420. Funding secured.” Ex. 8. The tweet was published at 9:48 a.m. PDT or 12:48 p.m. EDT,  
18 during the trading day. Following this tweet, Tesla’s stock price reacted instantaneously,  
19 increasing \$8.18 (from \$356.85 to \$365.03) on volume of over 800,000 shares in the minute  
20 immediately afterwards. Ex. 375 at 37-38. It continued to trade heavily with the price increasing  
21 further to \$367.25 on volume of over 10 million shares before NASDAQ halted trading at 2:08  
22 p.m. *Id*. An hour after the trading halt was in effect, at 3:11 p.m., Deepak Ahuja, Tesla’s Chief  
23 Financial Officer, emailed Musk informing him that “[w]e are getting a lot of enquiries from  
24 investors, SEC and media to better understand the comment ‘funding secured’.” Ex. 337. During  
25 the trading halt, Michael Santoli, a commentator on CNBC, also commented on Musk’s tweet  
26 stating that “having secured funding, to me, is the big number right there.” Ex. 521. Bradley  
27 Erickson, an analyst at KeyBanc Capital Markets, emailed Viecha asking for him to “clarify”  
28 whether “financing is secured.” Viecha responded by confirming that “the first Tweet clearly

1 stated that ‘financing is secured [sic].’ Yes, there is a firm offer.” Ex. 150. Toni Sacconaghi, an  
2 analyst at AllianceBernstein, emailed Viecha on August 7, 2018 for “questions/clarifications on  
3 today’s news and blog post.” Viecha stated in response that “apart from what has been tweeted  
4 and what was written in a blog post, we can’t add anything else. I only wanted to stress that Elon’s  
5 first tweet, which mentioned ‘financing secured’ [sic] is correct” and that “financing is secured  
6 regardless of other assumptions.” Ex. 151.

7 Immediately following the 12:48 p.m. tweet, Ahuja had offered to draft an email to Tesla  
8 employees on behalf of Musk. Ex. 121. At 3:16 p.m., Musk sent the email drafted by Ahuja as  
9 well as other members of Tesla management to Tesla employees explaining his reasons why Tesla  
10 would be better off as a private company. Ex. 12. At 3:36 p.m., Musk tweeted a link to his email  
11 stating: “Investor support is confirmed. Only reason why this is not certain is that it’s contingent  
12 on a shareholder vote.” Ex. 13. However, investors still focused on the question of “funding  
13 secured.” On the afternoon of August 7, 2018, Nii Owuraka Koney, a Managing Director at Tesla  
14 investor Jennison Associates wanted clarification from Viecha on the meaning of “funding  
15 secured” even after reading Musk’s email which, Koney noted, said nothing about funding. Ex.  
16 58. Koney concluded that Twitter “is hardly the right place to confirm the funding is secure.”

17 Tesla stock resumed trading at approximately 3:45 p.m. It ultimately closed at \$379.57  
18 per share on additional heavy volume of over 6 million shares. Ex. 375 at 39.

19 Financial analysts issued reports during the afternoon and evening of August 7, 2018 and  
20 the morning of August 8, 2018 discussing Musk’s tweets. For example, Morningstar thought that  
21 “execution [of a deal] is more likely than not” and speculated that “funding comes mostly from  
22 tech investors.” Ex. 931. RBC Capital Markets stated that “Elon’s tone and messaging regarding  
23 a potential transaction lead us to believe that there could be significant outside funding lined up.”  
24 Ex. 934. Evercore stated that Tesla’s stock price was reflecting the belief that funding was secured  
25 and the transaction will be completed. Ex. 33. JP Morgan increased its price target for Tesla  
26 following Musk’s tweets stating: “as lacking as the statements are in any details regarding who is  
27 expected to provide the required amount of financing and on what terms, they are nonetheless  
28 declarative statements from the CEO of a public company which we feel should be considered

1 seriously. Either funding is secured or it is not secured, and Tesla’s CEO says funding is secured.”

2 Ex. 15.

3 Testimony will further demonstrate the materiality of Musk’s tweets on August 7, 2018.  
4 Plaintiff Glen Littleton and class member Tim Fries will testify about the importance of the  
5 tweets, especially the statement “Funding secured” and how it immediately affected their  
6 investing decisions for Tesla securities. Musk will testify that he intended his tweet “Am  
7 considering taking Tesla private at \$420. Funding secured.” to contain “the most important  
8 points” about the going-private transaction and that he expected Tesla’s stock price to increase  
9 after it was published. Joseph Fath, at T. Rowe Price, another significant Tesla investor, and  
10 Koney will testify (via deposition) about their reaction to Musk’s August 7, 2018 tweets and Ryan  
11 Brinkman, J.P. Morgan’s analyst, will testify (also via deposition) regarding his reaction to the  
12 tweets and what caused him to revise his price target in response.

13 On August 8, 2018, members of the Tesla Board issued a press release disclosing that  
14 Musk had “opened a discussion with the board about taking the company private.” Ex. 26. The  
15 Board stated that its discussions with Musk had “addressed the funding for this to occur” and it  
16 was “taking the appropriate next steps to evaluate this.” *Id.* CNBC noted that the press release  
17 “lend[ed] some legitimacy” to Musk’s August 7, 2018 tweets. The Board press release did not  
18 disclose that “a detailed proposal regarding a going private transaction had not yet been made and  
19 that one would be needed in order for the Board to properly analyze and evaluate it” as  
20 communicated by the Board to Musk on August 3, 2018. Ex. 83. Meanwhile, Antonia Gracias,  
21 Tesla’s Lead Independent Director, spoke with Musk and directed him to stop tweeting about the  
22 proposed transaction without the Board’s prior approval. Musk complied.

### 23 **C. Musk Seeks Funding and Investor Support.**

24 From August 8, 2018 to August 23, 2018, Musk, with the assistance of Silver Lake  
25 Partners, Goldman Sachs, and Morgan Stanley, began the process of determining the amount of  
26 funding required, identifying potential sources for that funding, and measuring investor support.  
27 Egon Durban of Silver Lake (in person) and Dan Dees of Goldman Sachs (via deposition) will  
28 testify as to the efforts they made during this period. Both Durban and Dees met with Musk on

1 August 10, 2018 to discuss the process. Both emphasized how early and preliminary the process  
2 was. Dees provided Musk with a presentation which showed that Goldman Sachs projected  
3 approximately 40% of Tesla investors would roll over their investment into a private Tesla. Ex.  
4 254. Viecha and Aaron Chew, who also worked for Tesla’s Investor Relations, will testify that  
5 they had numerous discussions with Tesla investors from August 8 to August 10, 2018 and many  
6 Tesla investors were opposed to going private or would be unable to participate in a private Tesla  
7 due to restrictions on the terms of their investment funds. Exs, 79, 90, 113-20, 147, 155-58. Fath  
8 and Koney will also testify over the inability or reluctance to continue their investment in a private  
9 Tesla. Exs. 44-47.

10 Over the weekend of August 10 to 12, 2018, Musk exchanged text messages with Al-  
11 Ramayyan. On August 10, 2018, Al-Rumayyan sent Musk a text message stating, “We would  
12 like to explore investing in Tesla subject to being able to create a Tesla production hub in the  
13 Kingdom of Saudi Arabia that serves MENA, Europe, Asia and Africa, with the right incentives  
14 on all fronts (subsidies on energy and land, tax exemptions, support in obtaining financing, etc.).  
15 Therefore, as discussed, we would like our teams to start working together in a confidential  
16 manner to explore a potential transaction.” Ex. 121. Al-Rumayyan then described the July 31,  
17 2018 meeting: “We would like to explore investing in Tesla subject to being able to create a Tesla  
18 production hub in the Kingdom of Saudi Arabia .... Therefore, as discussed, we would like our  
19 teams to start working together in a confidential manner to explore a potential transaction” and  
20 “the agreement as was minuted by my people is to wait for the information to be sent be [sic] you  
21 within a week, on how we will move forward together.” *Id.* On August 12, 2018, Al-Rumayyan  
22 followed up with Musk about the transaction, texting him: “Let’s see the numbers and get our  
23 people to meet and discuss. We cannot approve something that we don’t have sufficient  
24 information on. We’ve agreed that you will send the financial information and the way going  
25 forward within a week and no thing [sic] happened since.” *Id.* Musk never provided the Saudi PIF  
26 with the deliverables he agreed to at the end of the July 31, 2018 meeting. Instead, disappointed  
27 with the Saudi PIF’s public statements regarding the transaction, Musk told Al-Rumayyan that  
28 he was no longer interested in taking Tesla private with the Saudi PIF, saying “I’m sorry, but we

1 cannot work together,” “Sorry. It’s over,” and “[p]lease extend an offer to the Crown Prince that  
2 I would like to apologize personally and explain why Tesla will not [sic] with PIF in this  
3 transaction.” *Id.*

4 **D. August 13, 2018 Blogpost.**

5 On the morning of August 13, 2018, Tesla published a blogpost by Musk that had also  
6 been written on his behalf by Tesla management. Ex. 53. Specifically, the blogpost provided some  
7 additional detail regarding the history of discussions between Musk and the PIF and concluding:  
8 “I left the July 31st meeting with no question that a deal with the Saudi sovereign fund could be  
9 closed, and that it was just a matter of getting the process moving. This is why I referred to  
10 “funding secured” in the August 7th announcement.” *Id.* It omitted any reference to the  
11 disagreements between Musk and Al-Rumayyan or Musk’s failure to provide information to the  
12 Saudi PIF as reflected in the text messages exchanged just the day earlier. Ex. 121. The blogpost  
13 also stated that “My best estimate right now is that approximately two-thirds of shares owned by  
14 all current investors would roll over into a private Tesla.” The blogpost omitted that Goldman  
15 Sachs estimated a much lower percentage of Tesla investors would roll into a private Tesla and  
16 many investors had expressed reluctance or inability to participate in a private Tesla to Viecha  
17 and Chew.

18 Al-Rumayyan wrote to Musk on August 13, 2018 stating that he was “personally  
19 surprised” by the statements Musk made in the blog post, which Al-Rumayyan referred to as “an  
20 ill-advised blog with loose information.” Ex. 121. The blog post, however, led a Morgan Stanley  
21 managing director to conclude that it was “impossible” that PIF was not funding the going-private  
22 transaction. Ex. 279. A Jennison Associates analyst told a colleague after reading the blog post,  
23 “The offer at \$420 is real...”, and advised purchasing Tesla shares. Ex. 68. Other analysts also  
24 continued to be misled following the blogpost. CFRA wrote: “the blog also explains how the deal  
25 could be more likely than we previously thought” and Morningstar stated that Musk’s August 7,  
26 2018 tweet that “investor support is confirmed” meant “Musk believes he has enough votes to go  
27 private” and “his estimate of about 66% of shareholders not tendering [from the August 13, 2018  
28 blogpost] is not far off from our own assumption of 60%.” Ex. 429. Morningstar concluded: “our



1 impression of his words is that he thinks it can happen, and we agree.” *Id.* Analysts, including  
2 Brinkman at J.P. Morgan, continued to maintain or increase their price targets for Tesla’s stock,  
3 relying on the August 7, 2018 tweets. Ex. 17.

4 **E. *New York Times* Articles and End of Class Period.**

5 On the morning of August 16, 2018, *The New York Times* published a lengthy article titled  
6 “A Question for Tesla’s Board: What Was Elon Musk’s Mental State?” Ex. 426. The article  
7 discussed at length Musk’s potential mental state on August 7, 2018, especially in the context of  
8 the extreme stress experienced recently in his work at Tesla, his lack of sleep, and whether he  
9 may be bipolar. *Id.* Tesla’s stock price showed little reaction to this reporting, dropping from  
10 \$338.69 to \$335.45. Ex. 375 at 86. On the evening of August 16, 2018, the *New York Times*  
11 published an even longer article regarding Tesla, Musk, and the potential going-private  
12 transaction. Ex. 171. The article was based on an interview with Musk where he confirmed  
13 previously rumored details of the circumstances surrounding the August 7, 2018 tweets such as  
14 the initial tweet being sent while driving to the airport, that it was not reviewed by the Tesla board  
15 before being published, and the \$420 price was an arbitrary choice. *Id.* The article also commented  
16 with regard to the tweets: “What Mr. Musk meant by ‘funding secured’ has become an important  
17 question. Those two words helped propel Tesla’s shares higher. But that funding, it turned out,  
18 was far from secure.” *Id.* The article also repeated in less detail some of the issues regarding  
19 Musk’s stress at work and anxiety over his mental health that had appeared in the earlier article  
20 published on April 16, 2018. *Id.*

21 The market immediately reacted to the new reporting from the *New York Times*. Tesla’s  
22 stock price declined \$29.95 on August 17, 2018 to \$305.50 on volume of 19 million shares. Ex.  
23 375 at 86-94. J.P. Morgan responded to the *New York Times* article by reducing its price target  
24 back to its August 6, 2018 level. Ex. 23; J.P. Morgan wrote: “our interpretation of subsequent  
25 events leads us to believe that funding was not secured for a going private transaction, nor was  
26 there any formal proposal.” *Id.* JP Morgan also noted that Tesla and Musk still appeared to be  
27 exploring a going-private transaction but the “process appears much less developed than we had  
28 earlier presumed (more along the lines of high level intention).” Brinkman will testify that it was

1 the information from the *New York Times* interview with Musk that caused him to revise his price  
2 target because it completely undermined Musk’s August 7, 2018 statements.

3 **F. The Going-Private Transaction is Cancelled.**

4 On August 23, 2018, the Board held an in-person meeting. Ex. 101. Silver Lake Partners  
5 and Goldman Sachs attended and discussed the availability of funding for a going private  
6 transaction. *Id.* Their discussion materials demonstrate that neither the price per share nor the  
7 amount of capital required had been determined; each was indicated by “[\*]”. Ex. 201. At the  
8 meeting, Silver Lake Partners and Goldman Sachs outlined a process to obtain the necessary  
9 funding for the going private transaction. Ex. 101. Musk also discussed with the Board  
10 “information he had learned in recent weeks following his announcement, including but not  
11 limited to, the negative views of many of the Company’s current stockholders regarding the  
12 prospect of the Company going private, the difficulties the Company’s current stockholders  
13 would have in continuing to own Tesla’s stock if the Company went private . . . .” *Id.* Musk then  
14 informed the Board “that he was withdrawing his offer to try and take [Tesla] private.” *Id.* This  
15 decision was announced on August 24, 2018. Ex. 139. Tesla’s stock price declined just \$3.55  
16 (from \$322.87 to \$319.27) following the news that Musk was no longer considering taking Tesla  
17 private at \$420 per share. Ex. 375 at 94-98. Without funding secured or investor support  
18 confirmed, this information was simply not material to investors.

19 **G. Expert Testimony.**

20 Plaintiff will offer testimony from four experts. Professor Joshua Mitts of Columbia  
21 University will testify regarding the impact of Musk tweets on Tesla’s stock price before August  
22 7, 2018 as well as the short interest in Tesla stock in August 2018. Professor Guhan Subramanian  
23 of Harvard University will testify regarding the Musk’s proposal to take Tesla private as  
24 communicated to the Board on August 2, 2018, the Board’s response, and the process followed  
25 up to August 23, 2018 especially with regard to public disclosures regarding the proposed  
26 transaction. Professor Steven Heston of the University of Maryland will testify regarding option  
27 pricing, the movements in Tesla stock options following the Musk tweets on August 7, 2018, and  
28 the appropriate method for measuring the impact of the Musk tweets on Tesla stock option prices.

1 Finally, Dr. Michael Hartzmark will testify regarding the efficiency of the market for Tesla  
2 securities, the impact of the Musk tweets and other disclosures on those prices, and the appropriate  
3 quantum of price inflation and other effects on the prices for Tesla securities during the Class  
4 Period.

#### 5 **H. Damages.**

6 The testimony of Professor Heston and Dr. Hartzmark will show that their financial  
7 analysis corroborates the narrative that can be taken from analyst and media reaction to Musk's  
8 August 7, 2018 tweets: that they had an immediate impact on the prices of Tesla securities that  
9 gradually diminished following August 7, 2018 as rumors spread about the lack of funding, SEC  
10 investigations were announced, and, importantly, Musk and Tesla failed to provide additional  
11 details or documentation about the transaction. The market then finally stopped relying on the  
12 truth of the August 7, 2018 tweets on August 17, 2018, following *The New York Times* article.  
13 This can be seen quantitatively in the implied volatility derived from Tesla long term stock  
14 options. Implied volatility measures the anticipated distribution of future prices for Tesla stock  
15 over the term of the option. A smaller implied volatility indicates a tighter spread of future prices.  
16 When a transaction is announced at a specific price, such as \$420 per share, one would expect the  
17 spread of future prices to tighten and implied volatility to diminish. This is exactly what is  
18 observed in the implied volatility derived from prices for Tesla stock options on August 7, 2018.  
19 The implied volatility dramatically drops from 50.52% to 32.57%. It then increases slightly to  
20 38.54% by August 16, 2018, indicating increased skepticism about the going-private transaction  
21 but still well below its pre-tweet level. Ex. 375 at 130-32. On August 17, 2018, however,  
22 following *The New York Times* article, it bounces back to 48.65%, virtually identical to its level  
23 on August 7, 2018 immediately before Musk's tweets. Similarly, Tesla's stock price was  
24 relatively stable following August 17, 2018. This strongly indicates that by August 17, 2018, the  
25 market no longer considered a take-private transaction to be likely even though Musk was still  
26 considering a going-private transaction at this time.

27 Dr. Hartzmark will also testify as to the causal relationship between Musk's and Tesla's  
28 fraudulent statements and the damages sustained by Plaintiff and other Class members. Dr.

1 Hartzmark will explain his calculations of the amount of inflation in the price of Tesla’s stock  
2 and impact on the price of other securities on each day of the Class Period, which the jury can  
3 then adopt in whole or in part when awarding damages using Plaintiff’s proposed verdict form.  
4 Dr. Hartzmark will explain how he measured the immediate increase in Tesla’s stock price  
5 following the August 7, 2018 tweets and how that declined to zero by August 17, 2018. He will  
6 also explain how a company’s stock price is further negatively affected by fraud committed by  
7 its management as a result of increased litigation and regulatory risk, loss of confidence in  
8 management, and realization of ineffective internal controls. This negative impact can be seen in  
9 the movement of Tesla’s stock price from August 7 to August 17, 2018 where its stock price  
10 ultimately declines below its pre-tweet level.

11 Dr. Hartzmark does not address Defendants’ expert’s damages analysis or calculation for  
12 stock or options or any other Tesla security because Defendants’ expert has not offered any such  
13 analysis or calculation.

### 14 **III. LEGAL ISSUES.**

#### 15 **A. Materiality.**

16 In its summary judgment order, the Court held “based on the evidence presented, there is  
17 no genuine dispute that the [the statements “Am considering taking Tesla private at \$420.  
18 Funding secured.” and “Investor support is confirmed. Only reason why this is not certain is that  
19 it’s contingent on a shareholder vote.”] were false and that Mr. Musk recklessly made those  
20 representations.” The Court has concluded that the materiality of those statements is still an issue  
21 for the jury. “[M]ateriality depends on the significance the reasonable investor would place on  
22 the withheld or misrepresented information. *Basic Inc. v. Levinson*, 485 U.S. 224, 240 (1988). A  
23 statement is “material” when there is a “substantial likelihood that a reasonable shareholder would  
24 consider it important.” *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976) (“Put  
25 another way, there must be a substantial likelihood that the disclosure of the omitted fact would  
26 have been viewed by the reasonable investor as having significantly altered the ‘total mix’ of  
27 information made available.”). This is an objective test, assessing the significance of a piece of  
28 information to a “reasonable investor.” *Id.* at 445; *accord Amgen Inc. v. Connecticut Ret. Plans*

1 & *Tr. Funds*, 568 U.S. 455, 467 (2013) (noting materiality is an objective test); *S.E.C. v. Reyes*,  
2 491 F. Supp. 2d 906, 910 (N.D. Cal. 2007) (“The law assesses the materiality of a  
3 misrepresentation at the time it is made, not after intervening events or remedial action have  
4 rendered it harmless.”).

5 The issue of materiality does not require the jury to re-examine the falsity of the  
6 misrepresentations subject to the Court’s summary judgment order or Musk’s scienter when he  
7 made them. As the Supreme Court in *Basic* noted, falsity, materiality, and scienter, are three  
8 different questions: “This case required resolution of several common questions of law and fact  
9 concerning *the falsity or misleading nature of the three public statements* made by Basic, *the*  
10 *presence or absence of scienter*, and *the materiality of the misrepresentations*, if any.” *Basic*,  
11 485 U.S. at 242 (Emphasis added).

12 Given the evidentiary record here, the jury should not hesitate in determining that Musk’s  
13 August 7, 2018 tweets were “material” to investors and that the August 13, 2018 blogpost omitted  
14 material information.

### 15 **B. Loss Causation.**

16 In the Ninth Circuit, “loss causation is simply a variant of proximate cause, the ultimate  
17 issue is whether the defendant’s misstatement, as opposed to some other fact, foreseeably caused  
18 the plaintiff’s loss.” *Mineworkers’ Pension Scheme v. First Solar Inc.*, 881 F.3d 750, 753 (9th  
19 Cir. 2018); *see also Dura*, 544 U.S. at 342 (Loss causation is simply “a causal connection between  
20 the material misrepresentation and the loss.”). A market reaction to a partial or total corrective  
21 disclosure is just one of the “infinite variety” of “context-dependent” ways that a plaintiff may  
22 establish loss causation. *Lloyd v. CVB Fin. Corp.*, 811 F.3d 1200, 1210 (9th Cir. 2016). Other  
23 ways include “materialization of the risk”, *see In re Daou Sys., Inc. Sec. Litig.*, 411 F.3d 1006,  
24 1026-27 (9th Cir. 2005), and “leakage”, *see Lloyd*, 811 F.3d at 1210.

25 A corrective disclosure can come from any source and does not have to be an admission  
26 of fraud by a defendant. *In re BofI Holding, Inc. Sec. Litig.*, 977 F.3d 781, 790 (9th Cir. 2020).  
27 Further, a corrective disclosure may be based on information that is already publicly available  
28 where it presents “new information to the market that is not yet reflected in the company’s stock

1 price”. *Bofi*, 977 F.3d at 795. This may be the result of analysis of previously available technical  
2 information or the republication of existing public information with increased credibility or  
3 significance. *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1058 (9th Cir. 2008) (stock price  
4 decline was caused by FDA warning letter published three months earlier when “the public failed  
5 to appreciate its significance”). Finally, the corrective disclosure or disclosures do not have to be  
6 the *sole* reason for an investment’s decline in value. “[A]s long as the misrepresentation is one  
7 substantial cause of the investment’s decline in value, other contributing forces will not bar  
8 recovery under the loss causation requirement.” *Daou*, 411 F.3d at 1025; *see also Ambassador*  
9 *Hotel Co. v. Wei-Chuan Inv.*, 189 F.3d 1017, 1027-28 (9th Cir. 1999) (“misrepresentation or  
10 omission must relate to that which caused the investment to lose value.”).

11 Musk’s tweets on August 7, 2018, prompted an immediate rise in the price of Tesla’s stock  
12 and also affected the prices of other Tesla securities. The stock price declined during the course  
13 of the Class Period as further information was revealed about the going-private transaction and  
14 the circumstances of the August 7, 2018 tweets was disclosed by Musk, Tesla, and financial media  
15 and analysts. In addition, harm was realized by Tesla investors through the commencement and  
16 disclosure of government investigations into the August 7, 2018 tweets by, amongst others, the  
17 SEC. The stock price remained artificially inflated through the August 13, 2018, blog post and  
18 the price impact of the false and misleading statements by Musk and Tesla did not fully dissipate  
19 from the prices of Tesla stock and other securities until August 17, 2018, following publication  
20 of *The New York Times* article.

### 21 C. Damages.

22 The typical calculation of actual damages under Section 10(b) and Section 20(a) is the  
23 out-of-pocket calculation, which is “is the difference between the fair value of all that the  
24 [plaintiff] [paid] and the fair value of what he would have [paid] had there been no fraudulent  
25 conduct.”<sup>2</sup> *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 155 (1972). This is not limited  
26 to the increase, if any, observed in a stock price immediately following a misleading statement,  
27 *see Goldman Sachs Grp. Inc. v. Ark. Teacher Ret. Sys.*, \_\_\_ U.S. \_\_\_, 141 S.Ct. 1951, 1961 (2021);

28 <sup>2</sup> The inverse is true for sales of securities at price deflated by a defendant’s fraud.

1 *Glickenhous & Co. v. Household Int'l, Inc.*, 787 F.3d 408, 415 (7th Cir. 2015), and may include  
2 out-of-pocket losses realized from stock price declines attributable to regulatory and other  
3 litigation risk, reputational harm, and other collateral concerns that would not have materialized  
4 without the actionable fraud. *See Waggoner v. Barclays PLC*, 875 F.3d 79, 106 (2d Cir. 2017)  
5 (plaintiffs may recover losses caused by “concern[s] with lack of management honesty and  
6 control” and holding that “the regulatory action and any ensuing fines were a part of the alleged  
7 harm the Plaintiffs suffered, and the failure to disaggregate the action and fines did not preclude  
8 class certification.”); *Baker v. SeaWorld Entm't, Inc.*, 423 F. Supp. 3d 878, 908-09 (S.D. Cal.  
9 2019) (loss recoverable where stock price dropped because of harm to “corporate brand and  
10 corporate reputation,” which “constitutes a structural change in value and demand for the  
11 company’s products or services”); *In re Vivendi Universal, S.A. Sec. Litig.*, 634 F. Supp. 2d 352,  
12 371–72 (S.D.N.Y. 2009)(losses from stock price declines following credit ratings downgrades  
13 and attributed to concerns about management were recoverable as a result of misrepresentations  
14 regarding corporation’s liquidity). Consequential damages one-step removed from stock price  
15 declines, such as borrowing costs may also be recoverable in appropriate cases where it is proven  
16 “with reasonable certainty to have resulted from the fraud”. *Ambassador Hotel*, 189 F.3d at 1030.

17 Plaintiff's proposed methodology for the calculation of the amount of damages incurred  
18 by purchasers and sellers of Tesla stock and other securities has been set forth in the expert reports  
19 of his expert: Dr. Michael Hartzmark, and is entirely consistent with Ninth Circuit and other  
20 authority discussed above. Based on Plaintiff’s presentation at trial, the jury will be able to easily  
21 “make reasonable estimates based on evidence they credited” and award damages in the amount  
22 being sought by Plaintiff. *Gruber v. Gilbertson*, No. 16-CV-9727 (JSR), 2022 WL 4232834, at  
23 \*12 (S.D.N.Y. Sept. 14, 2022); *see also Randall v. Loftsgaarden*, 478 U.S. 647, 664-65 (1986)  
24 (“Congress' aim in enacting the 1934 Act was not confined solely to compensating defrauded  
25 investors. . . . This deterrent purpose is ill served by a too rigid insistence on limiting plaintiffs to  
26 recovery of their ‘net economic loss.’” (internal citations omitted)); *Harmsen v. Smith*, 693 F.2d  
27 932, 945 (9th Cir. 1982) (“Although damages need not be proved to a mathematical certainty,  
28 ‘sufficient facts must be introduced so that a court can arrive at an intelligent estimate without

1 speculation or conjecture.”); *Garvin v. Greenbank*, 856 F.2d 1392, 1401 (9th Cir. 1988)  
2 (“Damages need not be proven to a mathematical certainty.”).

3 **D. Tesla Liability.**

4 The maker of a statement is “the person or entity with ultimate authority over the  
5 statement”. *Janus Capital Grp., Inc. v. First Derivative Traders*, 564 U.S. 135, 142 (2011). Here,  
6 while all the alleged misleading statements were by or nominally by Musk, they can be attributed  
7 to Tesla for the purposes of Section 10(b). The statements were immediately identified as having  
8 been made by Tesla’s CEO. The initial tweet stating “funding secured” was confirmed and  
9 essentially adopted by Tesla through the comments of Viecha, its Director of Investor Relations.  
10 The final tweet on August 7, 2018 stating that “investor support is confirmed” linked to an email  
11 from Musk that had been written for him by Tesla management and the August 13, 2018 blogpost  
12 was also drafted by Tesla management. Further, in general a corporation is responsible for the  
13 acts of its officers performed within the scope of their authority and Musk’s statements on August  
14 7, 2018 and in the August 13, 2018 were seen as being made in the scope of his authority. Thus,  
15 there is evidence supporting liability for Tesla for the misleading statements in this case.

16 **E. Control Person Liability.**

17 Section 20(a) of the Securities Exchange Act, 15 U.S.C. § 78t(a), imposes liability on  
18 “every person who, directly or indirectly, controls any person liable” under Rule 10b-5. “Control  
19 person liability exists irrespective of the control person's scienter.” *Hefler v. Wells Fargo & Co.*,  
20 No. 16-cv-05479-JST, 2018 U.S. Dist. LEXIS 31874, at \*45 (N.D. Cal. Feb. 27, 2018) (internal  
21 quotations omitted); *see also Hollinger v. Titan Capital Corp.*, 914 F.2d 1564, 1575 (9th Cir.  
22 1990) (“[W]e hold that a plaintiff is not required to show 'culpable participation' to establish that  
23 a broker-dealer was a controlling person . . . . The statute does not place such a burden on the  
24 plaintiff.”). Thus, given the Board’s ability and, indeed, responsibility to control Tesla and its  
25 public communications, the individual defendants (except for Musk) are liable control-persons.

26 Plaintiff looks forward to addressing any issues related to the above at the upcoming Final  
27 Pretrial Conference on October 25, 2022, if the Court should have any questions.

28 Dated: October 4, 2022

Respectfully submitted,



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