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15 UNITED STATES DISTRICT COURT

16 NORTHERN DISTRICT OF CALIFORNIA

17
18 IN RE TESLA, INC. SECURITIES
19 LITIGATION

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

20 **REPLY MEMORANDUM IN SUPPORT OF**
21 **DEFENDANTS' MOTION TO TRANSFER**
22 **VENUE**

23 Date: January 13, 2023

Time: 9:00 AM

24 Location: Courtroom 5, 17th Floor

Judge: Hon. Edward Chen

1 Defendants’ constitutional rights, this trial should be transferred or, in the alternative, continued to
2 allow the passions and bias against Mr. Musk evident in the jury pool to subside.¹

3 **ARGUMENT**

4 **I. THE JUROR QUESTIONNAIRES DEMONSTRATE THE REAL AND SEVERE**
5 **PREJUDICE DEFENDANTS FACE IN THIS VENUE.**

6 1. Nearly Two-Thirds Of Potential Jurors Openly Admit Their Bias Against
7 Mr. Musk.

8 At the outset, the prejudice that Mr. Musk will face in a trial in this District at this time boils
9 down to a matter of simple math. One-hundred and sixteen—nearly two-thirds—of the potential
10 jurors in this case harbor bias or ill-will toward Mr. Musk and only twenty-six—a mere fourteen
11 percent—view him positively. (Lifrak Decl. Ex. A.) Voir dire cannot remedy the risk of bias—
12 these numbers make clear that an impartial juror cannot feasibly be impaneled from this juror pool.

13 A closer examination of the questionnaires reveals something even more concerning. Mr.
14 Musk is not just prejudiced by the binary question of whether a juror likes or dislikes him, but by
15 the passion of the negative feelings toward him. The jurors holding negative opinions were not shy
16 and expressed their feelings clearly:

- 17 • [REDACTED] (*Id.* – Potential Juror 122]].
- 18 • [REDACTED] (*Id.* – Potential Juror 118]].
- 19 • [REDACTED] (*Id.* – Potential Juror 92]].

20 Many potential referred to Mr. Musk as an “[REDACTED]
21 [REDACTED]
22 [REDACTED] (*Id.* – Potential Jurors 20, 72, 76, 91, 92, 153, 170, 171, 177, 188).

23 Others describe his actions and character as “[REDACTED]
24 [REDACTED]
25 [REDACTED] (*Id.* – Potential Jurors 14, 38, 54, 88, 193). In other words, the jury

26 _____
27 ¹ In acknowledging the merit of Defendants’ concerns over juror bias, Plaintiff offers to
28 remedy the issue by agreeing to a non-jury trial. *See* Dkt. 550 n. 5. But Defendants brought this
motion to protect their right to a fair jury trial and not to waive it. Plaintiff’s suggestion is a non-
starter.

1 questionnaires reveal not only that a vast majority of potential jurors hold ill-will toward Mr. Musk
 2 but that they are not afraid to declare it proudly and vividly to the Court. The open prejudice toward
 3 Mr. Musk is likely reinforcing—jurors who dislike Mr. Musk personally are likely to raise those
 4 opinions in deliberation and encourage similar responses from others—and will create a negative
 5 feedback loop in the jury room that will render it nearly impossible for Mr. Musk to receive a fair
 6 hearing.² *Hayes v. Ayers*, 632 F.3d 500, 508 (9th Cir. 2011) (explaining “actual bias infect[s] the
 7 jury”); *Davis v. Woodford*, 384 F.3d 628, 643 (9th Cir. 2004) (explaining a jury panel is biased when
 8 just one juror is biased).

9 Given the volume and severity of negative responses to Mr. Musk in the juror questionnaires,
 10 this Court must infer that the publicity surrounding Mr. Musk has been “so pervasive and
 11 inflammatory that the jurors cannot be believed when they assert that they can be impartial” on voir
 12 dire. *See United States v. Croft*, 124 F.3d 1109, 1115 (9th Cir. 1997).

13 2. The Prospective Jurors Hold Fixed Negative Bias Toward Mr. Musk’s
 14 Conduct On Twitter—A Central Issue In This Case

15 The completed juror questionnaires provide direct evidence that the prejudicial news
 16 coverage of Mr. Musk has created issues of bias that will prevent Defendants from obtaining a fair
 17 trial in the Northern District of California as scheduled. The jury pool holds two beliefs about Mr.
 18 Musk that are particularly relevant in this case. First, as a result of the biased media coverage of
 19 Mr. Musk, the jury pool believes that Mr. Musk is untrustworthy. The jury’s perception of Mr.
 20 Musk’s trustworthiness will impact the weight they give to his testimony as well as their judgment
 21 on whether Mr. Musk made a materially false statement with the requisite intent. As Potential Juror
 22 153 explained, their belief that Mr. Musk is [REDACTED]

23 [REDACTED] (Lifrak Decl. Ex. A – Potential Juror 153)]. Some potential jurors even expressed a
 24

25 ² Moreover, it is not clear that the negative feelings toward Mr. Musk is limited to the one-
 26 hundred sixteen jurors who openly declared their bias. More than forty of the remaining jurors do
 27 not state any opinion on Mr. Musk (including some who claim they do not know who he is), but the
 28 failure to publicly disclose an opinion of Mr. Musk is not necessarily proof that the juror holds none.
See A Proposal to Properly Address Implicit Bias in the Jury, 31 *Hastings Women's L.J.* 79, 83
 (“Implicit bias may be seen in the jury deliberation process because jurors may harbor stereotypes
 and not realize they are employing them towards witnesses and defendants.”).

1 belief that Mr. Musk [REDACTED]
 2 (*Id.* – Potential Jurors 177, 12 ([REDACTED]
 3 [REDACTED])). Second,
 4 the jury pool disapproves of Mr. Musk’s conduct on Twitter—a particularly pernicious bias in light
 5 of the fact that the jury will be asked to evaluate wrongdoing and allocate damages resulting from a
 6 series of Mr. Musk’s Tweets. Some potential jurors have even drawn explicit connections between
 7 Mr. Musk’s use of Twitter and stock prices. *See e.g.*, (*Id.* – Potential Juror 5 ([REDACTED]
 8 [REDACTED])). Others have made blanket
 9 statements that Mr. Musk should stop tweeting completely. *See e.g.*, (*Id.* – Potential Juror 1 (“[REDACTED]
 10 [REDACTED]”), Potential Juror 159 ([REDACTED])). These juror
 11 responses make clear that the jury pool has “such fixed opinions” on Mr. Musk’s character and
 12 Twitter use “that they [can]not judge impartially.” *See Williams*, 817 F.Supp. at 1474.

13 3. Potential Jurors Point To Recent Events As The Cause Of Their Negative
 14 Sentiments.

15 At the very least, the questionnaires support a continuance of the trial to allow passions to
 16 cool as a critical mass of jurors answered that recent events involving Mr. Musk have played major
 17 role in shaping their prejudicial bias. Jurors express personal distaste for Mr. Musk in connection
 18 with recent reductions at one of his companies, calling him a [REDACTED] and explaining that [REDACTED]
 19 [REDACTED] (Lifrak Decl. Ex. A–
 20 Potential Jurors 22, 38, 62, 93]]. Others dislike the policies he has implemented at Twitter. *See*
 21 *e.g.*, (*Id.* Potential Juror 79 (“[REDACTED]
 22 [REDACTED]”), Potential Juror 125 ([REDACTED]
 23 [REDACTED]
 24 [REDACTED], Potential Juror 146 (“[REDACTED]
 25 [REDACTED]”). These responses directly
 26 contradict Plaintiff’s assertion that “the potential for bias arising out of Musk’s management of
 27 Twitter is non-existent.” Dkt. 550 at 8.
 28

1 In fact, a handful of potential jurors claim that their opinion of Mr. Musk was neutral until
 2 recent events. *See e.g.*, (Lifrak Decl. Ex.A Potential Juror 14 (“ [REDACTED]
 3 [REDACTED]), Potential Juror 38 (“ [REDACTED]
 4 [REDACTED]), Potential Juror 62 (“ [REDACTED]
 5 [REDACTED], Potential Juror 79 (“ [REDACTED]
 6 [REDACTED]), Potential Juror 174 (“ [REDACTED]
 7 [REDACTED]), Potential Juror 175 (“ [REDACTED]
 8 [REDACTED]), Potential Juror 174 (“ [REDACTED]
 9 [REDACTED]), Potential Juror 175 (“ [REDACTED]
 10 [REDACTED]
 11 [REDACTED]
 12 [REDACTED]). As Plaintiff points out, only a few potential jurors know
 13 a Twitter employee (Dkt. 550 at 8), meaning the volume of negative sentiments is a result of the
 14 jury pool’s “expos[ure] to excessive and adverse pretrial publicity.” *See Los Angeles Memorial*
 15 *Coliseum Com v. Nat. Football League*, 89 F.R.D. 497, 502 (C.D. Cal. 1981).

16 **II. TRANSFER TO THE WESTERN DISTRICT OF TEXAS IS PROPER**
 17 **REGARDLESS OF A PAST STATE OF AFFAIRS.**

18 This case may be transferred to the Western District of Texas because Tesla is now
 19 headquartered and Mr. Musk resides in Texas. Plaintiff distorts general caselaw to claim Section
 20 1404 only allows transfer to a venue that it could have been brought at the time the “case was first
 21 brought.” Dkt. 550 at 5. None of the cases Plaintiff cites contemplate a situation where a defendant
 22 moved its domicile after proceedings were commenced. Dkt. 550 at 5. Cases evaluating a motion
 23 to change venue when a company has moved its headquarters make clear that Section 1404 asks
 24 whether the requirements for filing suit in that jurisdiction are met at the time of transfer. *See e.g.*,
 25 *Green Aire for Air Conditioning W.L.L. v. Salem*, No. 1:18-cv-00873-NONE-SKO, 2020 WL
 26 4734909 (E.D. Cal. Aug. 14, 2020) (granting motion to transfer to venue to venue where company
 27 moved headquarters after plaintiff filed suit); *Sonrai Memory v. Oracle Corp.*, No. 6:21-CV-00116-
 28 ADA, 2022 WL 315023 (W.D. Tex. Feb. 2, 2022) (granting Oracle’s motion to transfer venue to

1 Austin after moving its headquarters there). This conclusion makes logical sense—a court should
2 not be able to transfer a case to a jurisdiction in which the transferee court does not presently have
3 personal jurisdiction over the defendants. *See* 28 U.S.C. § 1404(a); *Ponomarenko v. Shapiro*, 287
4 F.Supp. 3d 816, 834 (N.D. Cal. 2018). Thus, this case may properly be transferred to the Western
5 District of Texas where Plaintiff’s do not dispute there is personal jurisdiction and venue.

6 **III. A BRIEF CONTINUANCE IS REASONABLE TO GUARANTEE A FAIR TRIAL.**

7 Given the recent news coverage of Mr. Musk that has created actual bias within the jury
8 pool, a continuance is necessary without a change in venue to allow negative sentiments in the Bay
9 Area to dissipate. Plaintiff wrongly states the legal standard for a continuance, instead describing
10 the “four salient factors that appellate courts have considered when reviewing” the “broad discretion
11 of the district court” to grant a continuance. *See* Dkt. 550 at 11; *United States v. Flynt*, 756 F.2d
12 1352, 1358-59 (9th Cir. 1985). Since a final pretrial conference order has been entered in this case
13 (Dkt. 508), the proper standard is the “manifest injustice” standard Defendants offered in the motion.
14 *See* Dkt. 537 at 11; *Trendsetta USA, Inc. v. Swisher Int’l, Inc.*, No. SACV 14-1664 JVS (DFMx),
15 2020 WL 1224288, at *7-8 (C.D. Cal. Jan. 21, 2020).

16 Regardless, a continuance is still warranted under Plaintiff’s four-factor test. First,
17 Defendants have been diligent in pursuing a remedy to the recent influx of negative news coverage
18 of Mr. Musk. *See Flynt*, 756 F.2d at 1358-59. Plaintiff agrees that the relevant news coverage
19 occurred recently (beginning in November 2022), such that this issue is new to the case and did not
20 arise in the prior four years this case has been pending. Dkt. 550 at 11. Second, a continuance will
21 remedy the issues of bias by allowing sufficient time for news coverage of the Twitter acquisition
22 to subside. *See id.* Third, a short continuance will create minimal inconvenience for the court and
23 other parties. *See id.* The jury, witnesses, and parties have not yet been required to appear in person
24 in San Francisco. Though Plaintiff’s attorneys “have already traveled to San Francisco,” an
25 unnecessary flight is hardly sufficient justification to deprive Defendants of the opportunity for a
26 fair trial. Finally, the juror questionnaires make clear that Defendants face certain harm in the form
27 of a biased jury if a continuance is denied. *See id.* Though some scheduling inconvenience to
28

1 Plaintiffs and the Court will necessarily result, a continuance is warranted to prevent injustice. *See*
2 *Trendsetta USA, Inc.*, WL 1224288 at *7-8.

3 **CONCLUSION**

4 For the foregoing reasons, Defendants respectfully request that the Court transfer this action
5 from the Northern District of California or, in the alternative, grant a brief trial continuance.

6 DATED: January 12, 2023 Respectfully submitted,

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