UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
STATION PLACE
100 F STREET, NE
WASHINGTON, DC 20549-2465

Office of FOIA Services

June 1, 2021

Mr. Dave Michaels
The Wall Street Journal
1025 Connecticut Ave, NW
8th Floor
Washington, DC 20036

Re: Freedom of Information Act (FOIA), 5 U.S.C. § 552
Request No. **21-01009-FOIA**

Dear Mr. Michaels:

This letter responds to your request, dated and received in this office on February 19, 2021, for "any correspondence between the Securities and Exchange Commission's San Francisco office and Tesla Inc., Elon Musk or counsel for them during the period June 2020 through September 2020." You also indicated that you were looking for "correspondence related to the SEC's enforcement of the undertakings in the final judgment with defendant Elon Musk as first agreed to on Sept. 28, 2018, and amended on May 1, 2019."

Reference is made to our letters dated February 23, 2021 and March 2, 2021, in which we addressed your request for a fee waiver. In your request, you also asked for expedited processing, which we inadvertently did not address in our February 23, 2021 or March 2, 2021 letters, and we apologize for the oversight. Given the passage of time that request is moot.

Enclosed you will find 23 pages of records that may be responsive to your request. They are being released to you with the exception of SEC staff and third-party names and contact information. This information is being withheld under 5 U.S.C. § 552(b)(6) and (7)(C). Under Exemption 6, the release of this information would constitute a clearly unwarranted invasion of personal privacy. Under Exemption 7(C), the release of the information could reasonably be expected to constitute an unwarranted invasion of personal privacy.

I am the deciding official with regard to this adverse determination. You have the right to appeal my decision to the SEC's General Counsel under 5 U.S.C. § 552(a)(6), 17 CFR § 200.80(f)(1). The appeal must be received within ninety (90) calendar days of the date of this adverse decision. Your appeal must be in writing, clearly marked "Freedom of Information Act Appeal," and should identify the requested records. The appeal may include facts and authorities you consider appropriate.

You may file your appeal by completing the online Appeal form located at https://www.sec.gov/forms/request_appeal, or mail your appeal to the Office of FOIA Services of the Securities and Exchange Commission located at Station Place, 100 F Street NE, Mail Stop 2465, Washington, D.C. 20549, or deliver it to Room 1120 at that address.

If you have any questions, please contact Tina Churchman of my staff at churchmant@sec.gov or (202) 551-8330. You may also contact me at foiapa@sec.gov or (202) 551-7900. You may also contact the SEC’s FOIA Public Service Center at foiapa@sec.gov or (202) 551-7900. For more information about the FOIA Public Service Center and other options available to you please see the attached addendum.

Sincerely,

L Katilius

Lizzette Katilius
FOIA Branch Chief

Enclosures

ADDENDUM

For further assistance you can contact a SEC FOIA Public Liaison by calling (202) 551-7900 or visiting https://www.sec.gov/oso/help/foia-contact.html.

SEC FOIA Public Liaisons are supervisory staff within the Office of FOIA Services. They can assist FOIA requesters with general questions or concerns about the SEC's FOIA process or about the processing of their specific request.

In addition, you may also contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA dispute resolution services it offers. OGIS can be reached at 1-877-684-6448 or via e-mail at ogis@nara.gov. Information concerning services offered by OGIS can be found at their website at Archives.gov. Note that contacting the FOIA Public Liaison or OGIS does not stop the 90-day appeal clock and is not a substitute for filing an administrative appeal.

RECEIVED
FEB 19, 2021
OFFICE OF FOIA
SERVICE

From: Michaels, Dave
To: foiapa
Subject: Foia request from Wall Street Journal
Date: Friday, February 19, 2021 3:13:10 PM

February 19, 2021

FEE WAIVER
REQUESTED

FOIA Officer
Securities and Exchange Commission
100 F. Street, NE
Mail Stop 2736
Washington, DC 20549
(202) 551-7900
via foiapa@sec.gov

FOIA REQUEST

Fee waiver requested

Dear FOIA Officer:

Pursuant to the federal Freedom of Information Act, 5 U.S.C. § 552, I request access to and a copy of the following records:

Any correspondence between the Securities and Exchange Commission's San Francisco office and Tesla Inc., Elon Musk or counsel for them during the period June 2020 through September 2020. This request seeks correspondence related to the SEC's enforcement of the undertakings in the final judgment with defendant Elon Musk as first agreed to on Sept. 28, 2018, and amended on May 1, 2019.

Please note this request seeks correspondence regardless of form, whether by written letter or email or other electronic message.

Please waive any applicable fees because I am a member of the news media and do not seek these records for commercial use. Rather, I gather and disseminate information of current interest to the public. This information also should be made available free of charge because it does not involve a complicated search of agency records.

I certify that my statements concerning the need for expedited processing are true and correct to the best of my knowledge and belief. In accordance with the provisions of 5 U.S.C. §552(a)(6)(E), please advise me within 10 calendar days whether the agency has granted my request for expedited processing.

If my request is denied in whole or part, I ask that you justify your decision by reference to specific exemptions of the act. I, of course, reserve the right to appeal your decision to withhold any information or to deny a waiver of fees.

I would appreciate your communicating with me by email or telephone, rather than by mail.

I look forward to your determination regarding my request within 20 business days, as the statute requires.

Thank you for your assistance.

Sincerely,

Dave Michaels

Reporter
The Wall Street Journal
1025 Connecticut Ave NW 8th Floor
Washington, DC 20036
Desk 202-862-1364

--
Dave Michaels
The Wall Street Journal
Desk 202-862-1364
Mobile 202-680-9911
Past articles: https://www.wsj.com/news/author/dave-michaels

From: Buchholz, Steven
Sent: 3 Jun 2020 19:03:39 +0000
To: 'jhueston@hueston.com'
Cc: 'alexspiro@quinnemanuel.com'
Subject: SEC v. Musk, 18-cv-08865-AJN (SDNY)
Attachments: 2020-06-03 Letter to Musk.pdf, 2019-08-02 SEC Letter to Tesla.pdf, 2019-08-12 SEC Letter to Tesla.pdf, 2020-05-01 SEC Letter to Tesla.pdf, 2020-05-08 SEC Letter to Tesla.pdf, 2020-05-20 SEC Letter to Tesla.pdf

Mr. Hueston, please see the attached letter and enclosures regarding the above-referenced matter.
Steven Buchholz
Assistant Regional Director, San Francisco Regional Office
Division of Enforcement
U.S. Securities and Exchange Commission
(b)(6);(b)(7)(C)

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION

DIVISION OF ENFORCEMENT

June 3, 2020

Via email to jhueston@hueston.com

Elon Musk
c/o John Hueston, Esq.
Hueston Hennigan LLP

Re: *SEC v. Elon Musk*, 18-cv-08865-AJN

Dear Mr. Musk:

We write to provide you with copies of the SEC's correspondence with Tesla. We assume that you received this correspondence in your role as CEO of the company, but we want to make sure that you are aware of our concerns regarding two written communications you published on Twitter that appear to violate the amended Final Judgment in *SEC v. Musk,* 18-cv-08865-AJN, Dkt. No. 47, at 1-2 (Apr. 30, 2019).

The SEC has repeatedly contacted Tesla to express concern regarding these two tweets. On July 29, 2019, without seeking or receiving pre-approval, you published a tweet that stated: "Spooling up production line rapidly. Hoping to manufacture ~1000 solar roofs/week by end of this year." (the "July 29 tweet"). On May 1, 2020, without seeking or receiving pre-approval, you published a tweet that stated: "Tesla stock price is too high imo." (the "May 1 tweet"). As set forth in more detail in our several letters to Tesla (attached hereto for your convenience), it is the SEC's position that you violated the Amended Final Judgment entered against you in this action by, among other things, failing to seek and obtain pre-approval for the July 29 tweet and the May 1 tweet. It is also our position that Tesla has failed to implement the mandatory procedures and controls required by the Amended Final Judgment in the related action against the company. *SEC v. Tesla, Inc.*, 18-cv-08947-AJN, Dkt. No. 17, at 1-2 (Apr. 30, 2019). Going forward, we urge you to comply with the plain terms of the Amended Final Judgment, which were tailored to prevent further investor harm and to forestall the need for court proceedings.

Sincerely,

/s/ Steven Buchholz

Steven Buchholz
Assistant Regional Director
U.S. Securities & Exchange Commission
44 Montgomery Street, Suite 2800
San Francisco, California 94104

CC: Alex Spiro, Esq., Quinn Emanuel Urquhart & Sullivan, LLP, counsel for Tesla, Inc. (via email to alexspiro@quinnemanuel.com)

Encls: SEC letters to Tesla dated August 2, 2019; August 12, 2019; May 1, 2020; May 8, 2020; and May 20, 2020

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION

DIVISION OF ENFORCEMENT

August 2, 2019

Via Email (jchang@tesla.com)

Tesla, Inc.
c/o Jonathan Chang, Esq.
3500 Deer Creek Road
Palo Alto, CA 94304

Re: *SEC v. Tesla,* 1:18-cv-8947-AJN (S.D.N.Y.)

Dear Mr. Chang:

On the afternoon of July 31, 2019, members of the SEC staff contacted you to schedule a call with the Company for the purpose of discussing a recent tweet by Elon Musk. The relevant tweet, which was published at about 5:54 PM on July 29, 2019, read: "Spooling up production line rapidly. Hoping to manufacture ~1000 solar roofs/week by end of this year." ("the July 29 tweet"). You and I also spoke later in the day on July 31, 2019 where I told you that we wanted to discuss with the Company whether or not Mr. Musk's July 29 tweet was pre-approved.

As you know, under the Final Judgment entered in *SEC v. Tesla* (as amended), the Company is required – separate from Mr. Musk's obligations – to comply with undertakings related to, among other things, the pre-approval of certain communications planned to be published by Elon Musk, Tesla's Chief Executive Officer. 1:18-cv-8947-AJN (S.D.N.Y.), Dkt. Nos. 14 and 17.

Specifically, among other things, the Final Judgment (as amended) requires the Company to comply with undertakings to "implement mandatory procedures and controls . . . requiring pre-approval by Securities Counsel of any written communication that contains information regarding" a list of several defined topics, including (1) "production numbers or sales or delivery numbers (whether actual, forecasted, or projected) that have not been previously published via pre-approved written communications issued by the Company ("Official Company Guidance") or deviate from previously published Official Company Guidance" and (2) "projection, forecast, or estimate numbers regarding the Company's business that have not been previously published in Official Company Guidance or deviate from previously published Official Company Guidance." 1:18-cv-8947-AJN (S.D.N.Y.), Dkt. No. 17, at 1-2.

The Final Judgment also called for the creation of a committee to oversee, in relevant part: (1) the implementation of the terms of the Final Judgment and (2) controls and processes governing the Company's and its senior executives' disclosures and/or public statements that relate to the Company. *Id.*, Dkt. No. 14, at 14.

On August 1, 2019, you called me to request more time to respond to our request for information about the July 29 tweet. In making the request, you represented that you had been in touch with the members of the Disclosure Controls Committee, the committee created pursuant to the Final Judgment, and that the Committee was undertaking an internal review of the circumstances surrounding the July 29 tweet. You also represented that the Company would be in a better position to respond to the staff near the beginning of the week of August 5, 2019.

Please contact Steve Buchholz, at the Commission's San Francisco Regional Office, to let him know what times work for the Company on August 5 or 6 to discuss the July 29 tweet. We anticipate discussing, and also request that the Company address in writing, the questions listed below.

<u>Request for Information Regarding July 29 Tweet</u>

We ask that the Company respond in writing, on a voluntary basis, to the questions set forth below.

We also request that the Company preserve all communications and other documents relating to the July 29 tweet.

1. Did Mr. Musk submit the July 29 tweet to the Company for pre-approval before publication?

2. If Mr. Musk did not submit the July 29 tweet for pre-approval, has the Company determined that Mr. Musk violated Tesla's mandatory policies, procedures, and controls regarding pre-approval? If the Company has determined that Mr. Musk did not violate Tesla's mandatory policies, procedures, and controls regarding pre-approval, please explain the Company's basis for that determination.

3. If the Company has determined that Mr. Musk did violate Tesla's mandatory policies, procedures, and controls regarding pre-approval, what actions has the Company taken to date and what actions does the Company plan to take?

Please send responsive information and documents to:

U.S. Securities and Exchange Commission
Attn: Steven D. Buchholz
Assistant Regional Director, Division of Enforcement
U.S. Securities and Exchange Commission
44 Montgomery Street, Suite 2800
San Francisco, CA 94104
BuchholzS@sec.gov

Finally, during our July 31, 2019 phone call, you indicated that Mr. Musk would like to address the staff directly with regard to the July 29 tweet. If Mr. Musk still would like to speak with the staff, please provide us with some available times for the call. Depending on whether Mr. Musk's personal counsel participates in the call, we may need written confirmation from counsel of record for Mr. Musk in *SEC v. Musk*, 18-cv-08865-AJN (S.D.N.Y.), that we have permission to speak with him directly.

Sincerely,

/s/ Erin E. Schneider

Erin E. Schneider
Regional Director
U.S. Securities & Exchange Commission
44 Montgomery Street, Suite 2800
San Francisco, California 94104

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION

DIVISION OF ENFORCEMENT

August 12, 2019

Via Email (jchang@tesla.com)

Tesla, Inc.
c/o Jonathan Chang, Esq.
3500 Deer Creek Road
Palo Alto, CA 94304

Re: *SEC v. Tesla*, 1:18-cv-8947-AJN (S.D.N.Y.)

Dear Mr. Chang:

Thank you for the information you provided in response to our letter dated August 2, 2019 regarding Mr. Musk's July 29, 2019 tweet, "Spooling up production line rapidly. Hoping to manufacture ~1000 solar roofs/week by end of this year." ("the July 29 tweet").

With regard to the determination by the Disclosure Controls Committee ("the Committee") that the July 29 tweet did not require pre-approval under the mandatory procedures and controls required by the terms of the Final Judgment (as amended), we disagree. The defined topics set forth in the Court's Judgment for which pre-approval of written communications is required include "production numbers or sales or delivery numbers (whether actual, forecasted, or projected)" that have not been previously published via Official Company Guidance, and "projection, forecast, or estimate numbers regarding the Company's business" that have not been previously published in Official Company Guidance. 1:18-cv-8947-AJN (S.D.N.Y.), Dkt. No. 17, at 1-2. Mr. Musk's statement in the July 29 tweet "Hoping to manufacture ~1000 solar roofs/week by end of this year" was a projection, forecast, or estimate regarding the Company's business or production, under any reasonable interpretation of those terms, and this information had not been previously published in Official Company Guidance or any other publicly available documents.

The Final Judgment does not exempt "aspirational" statements from the categories of communications that require pre-approval. Nor does it contain any reference to the materiality of the communications that are subject to the pre-approval requirement. We disagree with your statement that "the specific topics requiring pre-approval were intended to be a proxy to materiality," to the extent that it would substitute Mr. Musk's subjective opinions on materiality for the mandatory procedures and controls that the Company was required to adopt and implement under the terms of the Final Judgment.[1]

In connection with Mr. Musk's February 19, 2019 tweet about Tesla's projected 2019 automobile production, we previously communicated to the Company our concern that at that time Mr. Musk had not submitted for pre-approval a single one of his Twitter communications about the Company. For the Company's procedures and controls to be mandatory, and to comport with the requirements of the Court's Judgment for the protection of Tesla's investors, Mr. Musk and other Tesla executives must submit for pre-approval all written communications containing information regarding the subjects identified in the Final Judgment, regardless of the medium they intend to use to disseminate the communications. In light of Mr. Musk's failure to submit the July 29 tweet for pre-approval, and the Committee's determination that pre-approval was not required, we continue to have significant concerns about whether the Company is in compliance with the Court's Judgment.

Sincerely,

/s/ Steven Buchholz

Steven Buchholz
Assistant Regional Director
U.S. Securities & Exchange Commission
44 Montgomery Street, Suite 2800
San Francisco, California 94104

[1] Not only do we disagree that materiality is an appropriate criteria for determining whether communications are subject to the pre-approval requirement under the Final Judgment (as amended), we also disagree with your conclusion that the information conveyed in the July 29 tweet was not material.

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION

DIVISION OF ENFORCEMENT

May 1, 2020

Via Email to apprescott@tesla.com

Tesla, Inc.
c/o Alan Prescott, Esq., Acting General Counsel
3500 Deer Creek Road
Palo Alto, CA 94304

Re: *SEC v. Tesla*, 1:18-cv-8947-AJN; *SEC v. Musk,* 1:18-cv-8865-AJN

Dear Mr. Prescott:

In connection with the final judgments entered in the above-captioned matters, the staff requests that Tesla, Inc. ("Tesla") voluntarily provide the information and documents set forth below by 5:00 pm ET on May 4, 2020:

- Please confirm whether the written communication published by Elon Musk on Twitter at 11:11 am ET on May 1, 2020, that stated, "Tesla stock price is too high imo," ("the 11:11 tweet") was reviewed by Tesla's Securities Counsel, as required by Section IV of the Final Judgment as to Defendant Tesla, Inc. dated October 16, 2018, and the Amended Final Judgment as to Defendant Tesla, Inc. dated April 30, 2019. If so, please describe the process by which the 11:11 tweet was reviewed.

- Please provide all documents concerning or related to the 11:11 tweet, including, but not limited to, any review and/or pre-approval of the 11:11 tweet by Tesla's Acting General Counsel and/or Securities Counsel.

Please send responsive information and documents to:

U.S. Securities and Exchange Commission
Attn: Steven Buchholz
Assistant Regional Director, Division of Enforcement
44 Montgomery Street, 28th Floor
San Francisco, CA 94104
buchholzs@sec.gov

If you have any questions or would like to discuss this matter, you may call me at (b)(6);(b)(7)(C).

Sincerely,

/s/ Steven Buchholz

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION

DIVISION OF ENFORCEMENT

May 8, 2020

Via email to aprescott@tesla.com
and yhuh@tesla.com

Tesla, Inc.
c/o Alan Prescott, Esq., Acting General Counsel
Yun Huh, Esq., Securities Counsel/Disclosure Counsel
3500 Deer Creek Road
Palo Alto, CA 94304

Re: *SEC v. Tesla, Inc.,* 1:18-cv-8947-AJN

Dear Mr. Prescott and Mr. Huh:

The SEC staff continues to have serious concerns regarding Tesla's ongoing failure to diligently comply with the Court's order in this matter. As you know, to resolve this matter, the Court ordered Tesla to implement mandatory procedures and controls governing Elon Musk's covered communications. By consistently declining to enforce these procedures and controls despite repeated violations by Mr. Musk, Tesla has abdicated the duties required of it by the Court's order.

As set forth in more detail below, we propose a prompt, detailed, and constructive dialogue with the company to remedy the issues set forth in this letter so that they do not recur. The goal of this process would be to craft a substantive solution to Tesla's non-compliance to date that will prevent similar issues in the future and avoid the need to resort to the judicial process.

Background of this Action

As you know, on August 7, 2018, Mr. Musk tweeted to his then 22 million Twitter followers that he could take Tesla private at $420 per share, that funding for the transaction had been secured, and that the only remaining uncertainty was a shareholder vote. The SEC's complaint alleged that, in truth, Mr. Musk had not discussed specific deal terms with any potential financing partners and that he knew the potential transaction was uncertain and subject to numerous contingencies. Mr. Musk's tweets caused Tesla's stock price to jump by over six percent on August 7 and resulted in significant market disruption.

Two days after filing its complaint against Mr. Musk, the SEC filed a complaint against Tesla and reached settlement agreements with both Tesla and Mr. Musk. The Court subsequently ordered Tesla to implement mandatory procedures to oversee Musk's Tesla-related written communications and to pre-approve any such written communications that contain, or reasonably could contain, information material to the company or its shareholders. Final Judgment as to Defendant Tesla, Inc., 1:18-cv-8947-AJN (Oct. 16, 2018), Dkt. No. 14, at 15 ("Final Judgment").

In its complaint, the SEC alleged that for a period of almost five years, Tesla failed to maintain disclosure controls and procedures concerning Mr. Musk's dissemination of company-related information. This culminated in Mr. Musk's publication of the August 7, 2018 tweets, which were not reviewed by anyone else at Tesla prior to publication and caused significant investor harm. Accordingly, the mandatory oversight and pre-approval requirements were specifically tailored to prevent future violations of the type alleged by the SEC against Tesla and Mr. Musk: they were central features of the parties' settlement agreement, designed to prevent future investor harm. To comply with the Final Judgment, Tesla subsequently adopted its Executive Communications Policy, which mirrored the language of the Court's order.

February 19, 2019 Tweet and Amended Final Judgment

On February 19, 2019, Mr. Musk tweeted, "Tesla made 0 cars in 2011, but will make around 500k in 2019." ("the February 19 tweet"). Mr. Musk did not seek or receive pre-approval prior to publishing this tweet, which was material, inaccurate, and disseminated to over 24 million people. The SEC conveyed its concerns to Tesla regarding Mr. Musk's violation, but the company declined to take any action.

Having not received Tesla's cooperation in addressing the issue, the SEC filed a motion to find Mr. Musk in contempt. *SEC v. Musk*, 18-cv-8865-AJN, Dkt. No. 18. While the SEC did not move to find Tesla in contempt, we noted in our reply that we were also concerned about Tesla's compliance with the Court's order. *Id.*, Dkt. No. 30, at note 2. Despite Mr. Musk's refusal to seek pre-approval for the February 19 tweet (or any other tweet as of that time), and despite the fact that the tweet contained material and inaccurate information about Tesla's business, Tesla (though employing shifting justifications) maintained that Mr. Musk's decision to publish the February 19 tweet was "reasonable and appropriate." *Id.*, Dkt. Nos. 18-4 and 27-8, at 2.

In response to the SEC's contempt motion against Mr. Musk, the Court ordered the parties to meet and confer. After conferring with Mr. Musk in good faith, the SEC agreed to and the Court entered amended final judgments as to Mr. Musk and Tesla. The Amended Final Judgment as to Defendant Tesla, Inc. ("Amended Final Judgment"), requires in relevant part that Tesla "implement mandatory procedures and controls (i) providing oversight of all of Elon Musk's communications regarding the Company ... and (ii) requiring pre-approval by Securities Counsel of any written communication that contains information regarding" a list of enumerated topics. 18-cv-8947-AJN (April 30, 2019), Dkt. No. 17, at 1-2.

In agreeing to the entry of the Amended Final Judgment, the SEC staff reasonably expected that the enumerated topics would enable Tesla to diligently enforce its mandatory policies in the event of future violative tweets by Mr. Musk, consistent with the parties' settlement in this matter. Instead, Tesla has continued to neglect its responsibilities under the Court's order.

<u>July 29, 2019 Tweet</u>

On July 29, 2019, less than three months after the entry of the Amended Final Judgment, Mr. Musk published without review or pre-approval a tweet that stated: "Spooling up production line rapidly. Hoping to manufacture ~1000 solar roofs/week by end of this year." ("the July 29 tweet"). On July 31, 2019, members of the SEC staff contacted Jonathan Chang, Tesla's then-General Counsel and Securities Counsel, and had two calls.

In the calls, the staff sought to meet and confer with Mr. Chang regarding the July 29 tweet. Mr. Chang was initially unable to provide information regarding whether the tweet had been pre-approved and requested more time. While waiting for a response, the staff sent a letter to Tesla on August 2, 2019. In the letter, the staff reminded Tesla of its obligations under the Amended Final Judgment to implement mandatory procedures and controls requiring pre-approval of written communications on topics including (1) previously-unpublished "production numbers or sales or delivery numbers (whether actual, forecasted, or projected)" and (2) previously-unpublished "projection, forecast, or estimate numbers regarding the Company's business." Amended Final Judgment, at 1-2.

On August 7, 2019, Tesla sent a letter to the staff confirming that the July 29 tweet was not pre-approved. Similar to its failure to appropriately respond to the February 19 tweet, Tesla asserted that its Disclosure Controls Committee had determined the July 29 tweet was not required to be pre-approved because "the intent and message of the Tweet was wholly aspirational" and was not material. Tesla noted that it had obtained Mr. Musk's voluntary agreement to submit similar "aspirational" tweets for pre-approval in the future, an outcome wholly inconsistent with the requirement that Tesla implement "mandatory" procedures and controls. For a second time, rather than acknowledge Mr. Musk's clear violation of its Court-ordered policy, Tesla again contorted itself to conform its position to that of Mr. Musk.

On August 12, 2019, the staff sent a letter to Tesla in response. The staff disagreed with Tesla's determination that the July 29 tweet did not require pre-approval, observing it was a "projection, forecast, or estimate regarding the Company's business or production, under any reasonable interpretation of those terms." We also made clear that the Amended Final Judgment contains no carve out for "aspirational" statements, and further disagreed with the remaining rationales offered by the company. We concluded our letter by expressing our continued significant concerns about Tesla's compliance with the Court's order in light of Mr. Musk's repeated failures to seek pre-approval of covered communications and the company's repeated failures to give its policies mandatory effect.

<u>May 1, 2020 Tweet</u>

At 11:11 am ET on May 1, 2020, Mr. Musk published a tweet to his now 33 million Twitter followers that stated: "Tesla stock price is too high imo" ("the May 1 tweet"). The May 1 tweet caused considerable confusion in the market, including as to its genuineness, and caused Tesla's stock price to decline significantly, resulting in investor harm. Later in the day on May 1, the staff sent Tesla a letter requesting information and documents concerning any review and/or pre-approval of the May 1 tweet, as required by the Amended Final Judgment.

On May 4, 2020, Tesla responded with a letter to the staff stating that the May 1 tweet "was not reviewed by Tesla's Acting General Counsel or Disclosure/SEC Counsel and there are no related documents to provide." You also stated: "Mr. Musk's tweet about the stock price was an amorphous personal opinion, with no reference or relationship at all to any particular aspect of Tesla's business or finances, made during generally declining industry and stock market conditions. This tweet was not information regarding 'the Company's financial condition, statements or results, including earnings or guidance,' 'projection, forecast, or estimate numbers regarding the Company's business,' or any other category of Specified Information."

On May 6, 2020, you participated in a call with the staff to discuss the May 1 tweet. On the call, you stated that Tesla's Disclosure Controls Committee held a meeting after learning of the May 1 tweet and concluded in a unanimous vote that the tweet did not require pre-approval, did not violate any company policies, and was not an inappropriate disclosure. It is our understanding that Tesla has not taken and does not intend to take any disciplinary or remedial action as to Mr. Musk, or to amend its relevant policies in any way.

As set forth in more detail below, we disagree with Tesla's conclusions regarding the May 1 tweet in multiple respects. As we have previously communicated regarding the February 19 and July 29 tweets, we have significant concerns that the Company has not diligently attempted to comply with its obligations in this matter. Rather than implement the mandatory procedures and controls required by the Court's order, Tesla has instead repeatedly elected to engage in post-hoc explanations of Mr. Musk's failures to seek pre-approval of his covered tweets.

<u>Pre-Approval of the May 1 Tweet Was Required</u>

Musk's written communication that Tesla's stock price was "too high" contained information regarding the Company's financial condition, and therefore required pre-approval. Tesla's stock price is inextricably linked to its financial condition. As Tesla's CEO and largest shareholder, Mr. Musk has more insight into

Tesla's financial condition than any other individual. His opinion, drawing from those insights, that Tesla's stock price was "too high" was unambiguously negative information regarding that topic. The market reacted accordingly after the May 1 tweet, and Tesla's stock price declined significantly.

Contrary to Tesla's apparent conclusion, a written communication need not bear on "any particular aspect of Tesla's business or finances" to require pre-approval under the Amended Final Judgment. As the broad language of the order makes clear, a written communication must be pre-approved if it "contains information regarding ... the Company's financial condition." The May 1 tweet contained such information and was required to be reviewed and pre-approved prior to publication.

We also disagree with Tesla's assertion that the May 1 tweet was exempt from the requirements of the Amended Final Judgment because it was a "personal opinion." As we made clear in our communications regarding the July 29 tweet, the Amended Final Judgment contains no exemption for "aspirational" or opinion statements. If a written communication falls within one of the enumerated categories – as the May 1 tweet did – it must be reviewed and pre-approved regardless of whether it contains opinion language.

In the face of Mr. Musk's repeated refusals to submit his covered written communications on Twitter to Tesla for pre-approval, we are very concerned by Tesla's repeated determinations that there have been no policy violations because of purported carve-outs that find no support in the language of the Amended Final Judgment. Tesla's repeated failures to respond to clear violations of the pre-approval requirement indicate that it has in fact failed to implement mandatory procedures and controls, as required by the Court's order.

<u>External Communications Policy and Disclosure Controls and Procedures</u>

On our May 6 call, you stated that the Disclosure Controls Committee concluded Mr. Musk did not violate any company policy by publishing the May 1 tweet. We note that Tesla's External Communications Policy (as revised on December 11, 2018 in connection with Tesla's obligations under the settlement and excerpted below) prohibits insiders from commenting on the company's stock price:

> **STOCK PRICE**
> No Insider shall comment on how the Company's stock price will change over time, on whether people should buy or sell the Company's stock or whether he or she believes that the stock reacted or will react to a particular event (*e.g.*, product or service offering, business transaction, a Company press release, etc.).

As set forth in more detail below, we request that you voluntarily provide certain documents and information regarding Tesla's analysis to date (if any) of this provision.

Separately, as you know, on December 11, 2018, Tesla implemented mandatory revisions to its Disclosure Controls and Procedures as required by the Final Judgment in this matter. The revised Disclosure Controls and Procedures state that their purpose, in relevant part, is to "prevent inappropriate disclosures by the Company or its personnel in any format regarding financial and non-financial information that may be material to the Company or its stockholders."

It is our understanding that the Disclosure Controls Committee has concluded that the May 1 tweet was not an inappropriate disclosure. We are also troubled by this conclusion. The May 1 tweet, which was published during trading hours, caused significant market confusion and turmoil. There was speculation that Mr. Musk's Twitter account had been hacked, news outlets contacted Mr. Musk to ask if the tweet was genuine, and Tesla's stock price declined materially on significantly increased volume, resulting in investor harm. These facts, combined with the other failures cited throughout this letter, suggest that the company has not diligently attempted to comply with its obligations under the Amended Final Judgment.

Request to Promptly Meet and Confer

As set forth throughout this letter, the staff has serious, continuing concerns regarding Tesla's compliance with the Amended Final Judgment. We request that you contact us to meet and confer in detail regarding the foregoing issues and provide the documents and information set forth below no later than Tuesday, May 12, 2020. Our goal is to arrive at a solution that will protect investors, ensure that Tesla and Mr. Musk comply in the future with their legal obligations, and avoid the need to resort to the judicial process.

Requests for Documents and Information

- Please produce the minutes and all associated documents concerning all Disclosure Controls Committee meetings relating (in whole or in part) to the February 19 tweet, the July 29 tweet, and/or the May 1 tweet.

- Please confirm whether the Disclosure Controls Committee specifically considered the "Stock Price" provision of the External Communications Policy before concluding that Mr. Musk did not violate any company policy by publishing the May 1 tweet. If it did consider this provision, please explain the basis for its conclusion that Mr. Musk did not violate the policy. We also request that you voluntarily produce any written materials embodying Tesla's analysis to date (if any) of this provision.

Please send responsive information and documents to the undersigned.

Sincerely,

/s/ Steven Buchholz

Steven Buchholz
Assistant Regional Director
U.S. Securities & Exchange Commission
44 Montgomery Street, Suite 2800
San Francisco, California 94104
buchholzs@sec.gov

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION

DIVISION OF ENFORCEMENT

May 20, 2020

<u>Via email to alexspiro@quinnemanuel.com and michaelliftik@quinnemanuel.com</u>

Tesla, Inc.
c/o Alex Spiro, Esq. and Michael Liftik, Esq.
Quinn Emanuel Urquhart & Sullivan LLP

Re: *SEC v. Tesla, Inc.*, 1:18-cv-8947-AJN

Dear Mr. Spiro and Mr. Liftik:

In our May 8, 2020 letter to Tesla in this matter, we requested a detailed meet and confer call to discuss the SEC staff's continuing serious concerns regarding the company's compliance with the Court's order in this matter. We also requested that Tesla voluntarily provide the SEC with certain corporate records. To date, Tesla has not engaged in a substantive meet and confer with the staff and has produced none of the requested documents.

After our request to meet and confer, as counsel for Tesla, you participated in a call with the SEC staff on May 15, 2020. During that call, you did not provide any requested information to the staff, and you declined to commit to providing the requested information and documents at any point. You did not share any information regarding Tesla's analysis (if any) of the "Stock Price" provision of its External Communications Policy in connection with the company's determination that Mr. Musk's May 1 tweet had violated no company policies. As you know, the SEC contends that Mr. Musk's May 1 tweet that Tesla's stock price was "too high" contained information regarding the company's financial condition and therefore required pre-approval. While you made references to Mr. Musk's First Amendment rights (which have no bearing on Tesla's obligations here) and the already-refuted claim that the Court's order contains a carve-out for Mr. Musk's opinions about Tesla's business, you did not articulate any reasoned disagreement with the staff's positions or provide any information to address the staff's concerns.

This continued inaction heightens the staff's concerns that Tesla is neglecting its obligations under the Court's order and has failed to implement mandatory procedures and controls for oversight and pre-approval of Mr. Musk's tweets. We are ready to engage in a detailed meet and confer process with the company to arrive at an extra-judicial solution that will protect investors going forward. We again request that you meet and confer in detail regarding the issues identified in our May 8, 2020 letter, a copy of which is attached, and we request that the meet and confer take place no later than Friday, May 22. We also reiterate our request that Tesla voluntarily produce the documents and information specified in our May 8 letter.

Sincerely,

/s/ Steven Buchholz

Steven Buchholz
Assistant Regional Director
U.S. Securities & Exchange Commission
44 Montgomery Street, Suite 2800
San Francisco, California 94104
buchholzs@sec.gov

Encl: SEC staff's May 8, 2020 letter to Tesla, Inc.

CC: All independent directors of Tesla, Inc., care of (b)(6);(b)(7)(C) Chair of the Board, Audit Committee, and Disclosure Controls Committee (via email to (b)(6);(b)(7)(C))

From: Buchholz, Steven
To: "alexspiro@quinnemanuel.com"; "michaelliftik@quinnemanuel.com"
Cc: "(b)(6);(b)(7)(C)
Subject: SEC v. Tesla, Inc., 1:18-cv-8947-AJN (SDNY)
Date: Wednesday, June 03, 2020 2:30:00 PM
Attachments: 2020-06-03 SEC Letter to Tesla.pdf

Mr. Spiro and Mr. Liftik, please see the attached letter regarding the above-referenced matter.

Steven Buchholz
Assistant Regional Director, San Francisco Regional Office
Division of Enforcement
U.S. Securities and Exchange Commission
(b)(6);(b)(7)(C)

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION

DIVISION OF ENFORCEMENT

June 3, 2020

<u>Via email to alexspiro@quinnemanuel.com and michaelliftik@quinnemanuel.com</u>

Tesla, Inc.
c/o Alex Spiro, Esq. and Michael Liftik, Esq.
Quinn Emanuel Urquhart & Sullivan LLP

Re: *SEC v. Tesla, Inc.,* 18-cv-08947-AJN

Dear Mr. Spiro and Mr. Liftik:

Soon after Elon Musk's May 1, 2020 tweet (the "May 1 tweet") – which caused Tesla's stock price to decline, harming investors – we approached Tesla in the spirit of the Court's directive that the parties meet and confer in good faith to attempt to work out disputes. Our outreach was also consistent with our past conversations with Tesla's former General Counsel and experienced securities counsel Jonathan Chang, who expressed his desire to find extra-judicial solutions to any future disagreements in this matter.

Despite our repeated outreach, you have declined to engage in a substantive dialogue regarding the May 1 tweet or to provide any requested documents. In focusing on Mr. Musk's First Amendment rights, your response misses the point: in contacting the company, our goal was to reach an extra-judicial solution so that Tesla – not the SEC – would act to address violations of the mandatory procedures and controls required by the Court's order in this matter.

While we understand that the company may disagree with our position that the May 1 tweet required pre-approval because it contained information regarding Tesla's financial condition, the Order Amending the Final Judgment as to Tesla provides another means for the company to take steps to protect the interests of shareholders. 18-cv-08947-AJN-GWG (Apr. 30, 2019), Dkt. No. 17 (the "Amended Final Judgment"). Specifically, the company can require pre-approval for "such other topics as the Company or the majority of the independent members of its Board of Directors may request, if it or they believe pre-approval of communications regarding such additional topics would protect the interests of the Company's shareholders." Amended Final Judgment, at 2. Given the harm to investors after the May 1 tweet, we expected that Tesla's independent directors would at a minimum consider revising the company's

Senior Executives Communications Policy to explicitly require pre-approval of future tweets like the May 1 tweet.

We also expected the Disclosure Controls Committee to have analyzed whether the May 1 tweet violated Tesla's External Communications Policy. We also anticipated that, consistent with our past discussions, Tesla would voluntarily produce corporate records relevant to the SEC's concerns to assist in our discussions. After your May 22 letter, it is clear that the company is unwilling to participate in any productive dialogue with the staff, or to provide any documents.

The issue here is not whether public company CEOs remark about their companies' stock price regularly without the SEC raising issues. It is about Tesla's failure to abide by the terms of the Court's order to implement mandatory procedures and controls over Mr. Musk's communications.

When Tesla certified its compliance with the original Final Judgment in this matter, it represented that its requisite mandatory controls and procedures were contained in three documents: the Senior Executives Communications Policy (attached hereto as Exhibit A), the External Communications Policy (attached as Exhibit B), and the Disclosure Controls and Procedures (attached as Exhibit C).[1] As set forth in more detail in our May 8 letter and summarized below, by failing to implement these mandatory procedures and controls, Tesla has failed to comply with the Court's Order.

It is clear that the May 1 tweet violated the "Stock Price" provision of the External Communications Policy, which provides:

> **STOCK PRICE**
> No Insider shall comment on how the Company's stock price will change over time, on whether people should buy or sell the Company's stock or whether he or she believes that the stock reacted or will react to a particular event (*e.g.*, product or service offering, business transaction, a Company press release, etc.).

To date (including on our May 15 call and in your May 22 letter), Tesla has provided no information relating to any consideration of this provision. We can only infer that the Disclosure Controls Committee did not evaluate whether the May 1 tweet violated the External Communications Policy. By failing to implement the External Communications Policy – which Tesla certified was part of the mandatory procedures and controls required to oversee Mr. Musk's communications – Tesla has failed to comply with the Court's order.

In amending its Disclosure Controls and Procedures as required by the Final Judgment, Tesla adopted mandatory language that the controls and procedures are to

---

[1] Although you have represented that Tesla has concluded the May 1 tweet did not violate any of these policies, your letters so far have addressed only the Senior Executives Communications Policy.

"prevent inappropriate disclosures by the Company or its personnel in any format regarding financial and non-financial information that may be material to the Company or its stockholders." Exhibit C, at 1. Despite the significant impact to Tesla's share price and the apparent shareholder harm that resulted from the May 1 tweet, we understand the Disclosure Controls Committee has concluded Mr. Musk's statement was not inappropriate. Tesla's conclusion that Mr. Musk's violative May 1 tweet was appropriate – despite further shareholder harm – is another instance of the company's failure to comply with its legal obligations in this matter.

Since the entry of the Amended Final Judgment, Tesla has violated the Court's order on two occasions, by failing to implement mandatory procedures and controls as to Mr. Musk's violative tweets on July 29, 2019 and May 1, 2020. Moreover, by refusing to engage substantively with the SEC regarding these violations, Tesla has acted inconsistently with the Court's guidance in this matter. As you know, Tesla has publicly encouraged investors to follow Mr. Musk's Twitter account as a source of material information about the company. Thus, when Mr. Musk speaks about Tesla, he speaks for the company – an important context for analyzing the problematic nature of the May 1 tweet. Accordingly, we urge the company to reconsider its positions in this matter by acting to implement and enforce Disclosure Controls and Procedures, as adopted pursuant to the Court's order in this matter, to prevent further shareholder harm.

Sincerely,

/s/ Steven Buchholz

Steven Buchholz
Assistant Regional Director
U.S. Securities & Exchange Commission
44 Montgomery Street, Suite 2800
San Francisco, California 94104
buchholzs@sec.gov

CC: All independent directors of Tesla, Inc., care of (b)(6);(b)(7)(C) Chair of the Board, Audit Committee, and Disclosure Controls Committee (via email to (b)(6);(b)(7)(C))