

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN RE TESLA, INC. SECURITIES
LITIGATION.

Case No. [18-cv-04865-EMC](#)

**ORDER DENYING PLAINTIFF'S
MOTION TO CONVERT OR,
ALTERNATIVELY, TO STRIKE;
GRANTING DEFENDANTS' REQUEST
FOR JUDICIAL NOTICE; AND
DENYING DEFENDANTS' MOTION
TO DISMISS**

Docket Nos. 227, 233

This consolidated class action lawsuit arises from Elon Musk's Twitter and blog post(s) in which he openly discussed funding for a transaction to take Tesla, Inc. ("Tesla") from a publicly-traded company to a private company. Lead Plaintiff Glen Littleton is a shareholder—and seeks to represent a class of shareholders—who purchased or sold Tesla securities during the relevant time period. Plaintiff alleges that Mr. Musk's social-media posts contained false statements, which led to a trading frenzy that artificially drove up the value of Tesla's shares. Mr. Musk, Tesla, and Tesla directors¹ (collectively, "Defendants") are the named defendants in this lawsuit. Pending before the Court is Defendants' motion to dismiss the Consolidated Complaint. Docket No. 227 ("Mot."). Plaintiff opposes the motion to dismiss, but he also moves to convert Defendants' motion to a motion for summary judgment or, in the alternative, to strike the motion or portions thereof. Docket No. 233 ("MTC").

¹ Brad W. Buss. Robyn Denholm. Ira Ehrenpreis. Antonio J. Gracias. James Murdoch. Kimbal

I. PROCEDURAL BACKGROUND

This action is a consolidation of nine lawsuits.² The Court granted Glen Littleton's motion to serve as Lead Plaintiff under 15 U.S.C. § 78u-4(3)(B)(ii). Docket No. 152. Mr. Littleton subsequently filed the Consolidated Complaint on behalf of himself and those similarly situated. Docket No. 184 ("Compl."). The Consolidated Complaint alleges Mr. Musk and Tesla violated Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78j, and SEC Rule 10b-5, 17 C.F.R. 240.10b-5. *Id.* ¶ 1. It further alleges that Tesla's Board of Directors violated Section 20(a) of the Securities Exchange Act, 15 U.S.C. § 78t. *Id.* This action seeks to represent a class of shareholders who purchased and/or sold Tesla stock from August 7, 2018 to August 17, 2018 (the "Class Period"). *Id.*

II. FACTUAL BACKGROUND

The Court must assume all factual allegations³ in the Consolidated Complaint as true, liberally construe them, and draw all reasonable inferences in Plaintiff's favor. *In re Xytronyx Sec. Litig.*, 1992 WL 427475, at *2 (S.D. Cal. Oct. 14, 1992) (citing *Plaine v. McCabe*, 797 F.2d 713, 723 (9th Cir.1986)). As discussed below, however, the pleadings are subject to the requirements of PLSRA and Federal Rule of Civil Procedure 9(b). The Consolidated Complaint alleges the following:

A. Tesla's Vehicle Production

Mr. Musk is the co-founder, former Chairman of the Board, and current Chief Executive Officer of Tesla, which "designs, develops, manufactures, and sells electronic vehicles." Compl. ¶¶ 2, 38. Tesla produces the Model S, the Model X, and the Model 3. *Id.* In 2012 and 2015, the

² Case Nos. 18-cv-04865-EMC; 18-cv-04876-EMC; 18-cv-04912-EMC; 18-cv-04939-EMC; 18-cv-04948-EMC; 18-cv-05258-EMC; 18-cv-05463-EMC; 18-cv-05470-EMC; and 18-cv-05899-EMC.

³ Some of the factual allegations derive from sources subject to judicial notice, such as the SEC Complaint filed on September 27, 2018. Defendants consented to the settlements and entries of judgments. This Court finds Plaintiff's reliance on allegations contained in the SEC Complaint permissible. *See Evanston Police Pension Fund v. McKesson Corp.*, 411 F. Supp. 3d 580, 593 (N.D. Cal. 2019) (citing *In re VeriFone Holdings, Inc. Sec. Litig.*, 704 F.3d 694, 706–07 (9th Cir. 2012) [relying on allegations in an SEC complaint incorporated into the plaintiff's pleadings]; *In re Musical Instruments and Equip. Antitrust Litig.*, 798 F.3d 1186, 1199 (9th Cir. 2015) [relying

Model S and Model X experienced production issues, so investors closely followed Tesla's 2017 rollout of the Model 3, which was anticipated to be built in large quantities due to it being a mass-market sedan. *Id.* ¶¶ 38, 39. From October 2017 through January 2018, Tesla experienced production problems for its Model 3 because of issues related to manufacturing lithium-ion battery cells. *Id.* ¶¶ 40, 44.

These production difficulties led numerous short-selling investors to target Tesla. *Id.* ¶ 45. As one example pled in the Consolidated Complaint, Stanphyl Capital pursued a significant short-term investment in Tesla; a CNBC report subsequently quoted this investor making the following statement:

While I've no doubt that Tesla will eventually work out its Model 3 vehicle production problems, the base model will cost Tesla at least mid-\$40,000s to build. The company will never deliver more than a token few for less than the current 400,000 a year. And even at those higher prices Tesla will never come anywhere close to its promised [profitability].

Id. (alteration in original). At the end of January 2018, Tesla's short interests were 30 million shares, which amounted to 18% of the company's outstanding shares. *Id.* ¶ 46.

On April 3, 2018, Tesla revealed in a press release that instead of producing 2,500 Model 3 vehicles per week as promised, it was producing slightly more than 2,000. *Id.* ¶ 47. Based on this shortcoming, the Wall Street Journal published an article describing Mr. Musk's reputation for setting "ambitious deadlines that he fail[ed] to meet on time." *Id.* The same day, Tesla's short interest grew to 32 million shares, representing 19% of its outstanding shares. *Id.* ¶ 48. A week later, on April 11, 2018, a CNBC article entitled "*Tesla is the biggest short in the US stock market*" reported that Tesla had \$10.7 billion in short shares, which was more than 25% of Tesla's available stock. *Id.* ¶ 49.

B. Mr. Musk's Public Animosity Towards Short-Selling Investors

According to the Consolidated Complaint, Mr. Musk publicly displayed his animosity to those who were short-selling Tesla stock. *Id.* ¶ 50. On May 2, 2018, Mr. Musk responded to analysts' questions about Tesla's first-quarter earnings by responding "Boring, bonehead

1 Twitter, Mr. Musk defended his answers by posting “two sell-side analyst who were trying to
2 justify their Tesla short thesis.” *Id.* He further tweeted the following: “Oh and uh short burn of
3 the century comin [sic] soon. Flamethrowers should arrive just in time.” And immediately after,
4 he posted “Looks like sooner than expected. The sheer magnitude of short carnage will be unreal.
5 If you’re short, I suggest tiptoeing quietly to the exit” *Id.* ¶ 52.

6 On May 7, 2018, Mr. Musk bought \$9.85 million worth of Tesla shares to force a burst of
7 the short-covering, which caused Tesla’s stock price to increase from \$297.50 to \$302.77. *Id.* ¶
8 53. Mr. Musk did this again on June 12, 2018 to maintain Tesla’s stock price while Tesla laid off
9 46,000 employees (roughly 9% of the workforce). *Id.* ¶ 54. A few days later, Mr. Musk tweeted
10 that “[the shorts] have about three weeks before their short position explodes.” *Id.* ¶ 55 (alteration
11 in original). By the end of July 2018, Tesla’s short-stock interest was 35 million shares (20% of
12 outstanding stock). *Id.* ¶ 62.

13 C. Mr. Musk’s Meeting with Saudi Arabia’s Public Investment Fund

14 On July 31, 2018, Mr. Musk met with representatives from the Public Investment Fund
15 (“PIF”), which expressed interest in taking Tesla private, if Tesla agreed to build a production
16 facility in the Middle East. *Id.* ¶ 63. No decision resulted from this meeting. *Id.* ¶ 64. On August
17 2, 2018, Mr. Musk sent an e-mail to Tesla’s Board of Directors, CFO, and General Counsel with a
18 subject line reading “Offer to Take Tesla Private at \$420” in which he explained the move would
19 avoid the “constant defamatory attacks by the short-selling community” and requested the “matter
20 be put to a shareholder vote at the earliest opportunity” because the “offer expires in 30 days.” *Id.*
21 ¶ 69.

22 In response to Mr. Musk’s e-mail, the Board held a conference call on August 3, 2018,
23 during which Mr. Musk revealed that PIF was interested in funding a transaction for Tesla to go
24 private, conditioned on Tesla building a production facility in the Middle East. *Id.* ¶ 72.

25 According to Paragraph 72 of the Consolidated Complaint, “On August 3, 2018, in response to
26 Musk’s email, the Board held a telephonic meeting at which time Musk informed the board that
27 the Public Investment Fund was interested in funding a going-private transaction and that the fund
28

was interested in having Tesla build a production facility in the Middle East.”⁴ Some Board members considered the condition of having a Middle East production facility to be a “non-starter,” and others described it as “really difficult for small investors” to retain shareholders. *Id.* However, the Board authorized Mr. Musk to contact investors to gauge their interest in participating in such a transaction. *Id.* On August 6, 2018, Mr. Musk spoke with a private equity fund partner who described the structure of Tesla’s contemplated move as “unprecedented” in his experience because Mr. Musk desired the number of shareholders in a private Tesla to be less than 300, but Tesla had over 800 institutional investors at the time. *Id.* ¶ 73.

D. Mr. Musk’s August 7, 2018 Tweet And Subsequent Tweets/E-mails/Blog Posts

On August 7, 2018,⁵ Mr. Musk posted the following message on his Twitter account: “Am considering taking Tesla private at \$420. **Funding secured.**” *Id.* ¶ 74 (emphasis added).

According to the Consolidated Complaint, this tweet resulted in the following exchange of text messages:

- Martin Viecha, Tesla’s Senior Director of Investor Relations, sent a text message to Mr. Musk asking, “Was this text legit?”
- A Tesla investor texted Sam Teller (Tesla’s Director, Office of the CEO) asking, “What’s Elon’s tweet about? Can’t make any sense of it. Would be incredibly disappointing for shareholders that have stuck it out for so long.”
- A reporter also texted Mr. Teller saying, “Quite a tweet! (Is it a joke?).”

Id. ¶¶ 74–76. Further, Mr. Musk responded to comments related to his tweet and posted new tweets:

- A Twitter user asked, “At what price?” and Mr. Musk responded “420.”
- Mr. Musk tweeted, “I don’t have a controlling vote now & wouldn’t expect any shareholder to have one if we go private. I won’t be selling in either scenario.”

⁴ However, Plaintiff does not attribute how he knows this detail. Instead, Plaintiff relies on the SEC Complaint, which discusses this Middle East facility as a condition for funding.

⁵ Unless otherwise stated, all alleged messages and tweets in Subsection D occurred on August 7.

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