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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN RE TESLA, INC. SECURITIES
LITIGATION

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

**PLAINTIFF'S MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF MOTION FOR
TEMPORARY RESTRAINING ORDER**

MEMORANDUM OF POINTS AND AUTHORITIES**I. INTRODUCTION**

On August 7, 2018, Defendant Elon Musk published two notorious tweets on his Twitter account: “Am considering taking Tesla private at \$420. Funding secured.” and “Investor support is confirmed. Only reason why this is not certain is that it’s contingent on a shareholder vote.” As this Court has determined in its recent order granting Plaintiff’s motion for partial summary judgment, these statements by Musk were false and misleading and that Musk made these false statements recklessly and with full awareness of the facts that he misrepresented in his tweets. *See* Order Granting in Part and Denying In Part Plaintiff Littleton’s Motion for Partial Summary Judgment at 23-29 (ECF No. 387). The Court determined that no reasonable juror could conclude otherwise. Over three years earlier, the United States Securities & Exchange Commission reached the same conclusion. It filed a complaint alleging that Musk violated its Rule 10b-5 by publishing his tweets on August 7, 2018 because the tweets were false and misleading and “premised on a long series of baseless assumptions and were contrary to facts that Musk knew.” *See SEC v. Musk* Complaint, case No. 1:18-cv-08865 (S.D.N.Y.) (McCall Decl. Ex. A). Musk settled with the SEC agreeing, *inter alia*, not to make any “public statement denying, directly or indirectly, any allegation in the complaint or creating the impression that the complaint is without factual basis.” *See id.* Consent of Defendant Elon Musk (McCall Decl. Ex. B).

Despite the findings by this Court, the SEC, and his own written consent, Musk has engaged in a high-profile public campaign to present a contradictory and false narrative regarding his August 7, 2018 tweets. Musk telegraphed this in his deposition in this proceeding taken on November 5, 2021 where he stated his intent to use the upcoming trial in this case as an opportunity to “clear the record” and explain how he was coerced into the “terrible SEC settlement” even though he purportedly and counterfactually did nothing wrong. *See* E. Musk 11/5/21 Dep. at pp. 120:17-122:12 (McCall Decl. Ex. C). Next Musk filed on March 8, 2022 a motion to terminate the SEC settlement accompanied by a declaration in which Musk, in flagrant violation of his consent, proclaimed under penalty of perjury that the allegations in the SEC Complaint were false and the SEC coerced him into settling. *See* Declaration of Elon Musk dated March 7, 2022 (McCall Decl.

1 Ex. D). Yesterday, on April 14, 2022, Mr. Musk added to this. Four days after receiving the Court's
2 order entering judgment against Musk on the question of the falsity of his August 7, 2018 tweets,
3 Musk once again attempted to advance his self-serving narrative regarding his tweets. In a TED
4 Talk in Vancouver while discussing his recent proposal to take Twitter, Inc. private, an interview
5 which has now been streamed *hundreds of thousands* of times and reported in *dozens* of publications
6 in just the past 24 hours alone, Musk insisted "funding was actually secured. I want to be clear
7 about that. In fact, this may be a good opportunity to clarify that. Funding was indeed secured"
8 before going on to refer to the SEC as "bastards" and claiming that he settled with the agency only
9 because they had a "gun to [his] child's head" and was "forced to admit that [he] lied . . . to save
10 Tesla's life and that's the only reason." See 4/14/22 Musk Transcript (McCall Ex. E).

11 The gratuitous and apparently premeditated nature of Musk's comments and his flagrant
12 disregard of the opinions of the SEC, this Court, and his own written consent, strongly suggest that
13 Musk is likely to continue making similar statements up to trial. Such statements are potentially
14 highly prejudicial to Plaintiff. Despite the Court's explicit and unambiguous grant of summary
15 judgment in Plaintiff's favor on the issues of falsity and scienter, Musk's comments risk confusing
16 potential jurors with the false narrative that he did not knowingly make misrepresentations with his
17 August 7, 2018 tweets. Such confusion could taint any further determinations that the jury may
18 need to make, such as the liability of Tesla, Inc. and its board or the amount of damages owed by
19 Musk and the other Defendants. Accordingly, Musk should be restrained from making any further
20 public comments about his interpretation and opinions of the allegations in this case until after trial.
21 His present statements on that issue, an unsubtle attempt to absolve himself in the court of public
22 opinion, will only have a prejudicial influence on a jury who may entertain Mr. Musk's claims of
23 veracity despite what the evidence has shown.

24 A fair trial is among the Constitution's most significant guarantees. "Few, if any interests
25 under the Constitution are more fundamental than the right to a fair trial by 'impartial' jurors, and
26 an outcome affected by extrajudicial statements would violate that fundamental right." *Gentile v.*
27 *State Bar*, 501 U.S. 1030, 1075 (1991). This Court has the responsibility of ensuring that media
28 coverage does not affect the fairness of the proceeding. *Sheppard v. Maxwell*, 384 U.S. 333, 362-

63 (1966) (“[T]he cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences.”); *Levine v. United States Dist. Court for the Central Dist. of Cal.*, 764 F.2d 590, 596 (9th Cir. 1985). The government and public have a fundamental interest in ensuring the integrity of the judicial process. *Levine*, 764 F.2d at 596. “[T]he circus-like environment that surrounds highly publicized trials threatens the integrity of the judicial system.” *Levine*, 764 F.2d at 598; see *Sheppard*, 384 U.S. at 342–49.

In light of the highly prejudicial pretrial media blitz seemingly underway by Musk, and in order to ensure a fair and impartial trial with a jury untainted by inflammatory and distracting media quotes seeking to sway public opinion, Plaintiff requests that the Court issue a narrowly drawn restraining order precluding Musk from speaking with the press and/or media about the case and its underlying facts until the end of trial. As officers of the Court, the lawyers will then be able to focus their full attention on performing their duties with respect to the courtroom proceedings only. Because there are no restrictions on the media’s First Amendment rights, the media can fully perform their duties of apprising the public without any assistance from Musk. *See, e.g., Levine*, 764 F.2d at 597–99; *cf. Farr v. Pitchess*, 522 F.2d 464, 468–69 (9th Cir. 1975) (encouraging use of such orders).

Such a limited and narrowly drawn order—following substantial evidence of inflammatory and improper statements by Musk threatening Plaintiff’s constitutional right to a fair trial—will strike the proper balance between: (1) ensuring the parties’ right to a fair trial without the distractions of media inquiries; (2) minimizing the risk of improperly influencing prospective and actual jurors; and (3) not interfering with the media’s function to accurately and fairly report the proceedings and keep the public apprised. Given Mr. Musk’s demonstrated proclivity towards publicity, a fair trial is unlikely without such an order in this case.

II. FACTUAL AND PROCEDURAL BACKGROUND.

Following his Tweets on August 7, 2018, the SEC immediately began an investigation into the circumstances of their publication. After an investigation which included taking testimony from Musk and other witnesses, the SEC filed a complaint against Musk on September 27, 2018 in the

United States District Court for the Southern District of New York. (McCall Ex. A). The SEC alleged in its complaint that Musk’s August 7, 2018 statements, including his statements that “Am considering taking Tesla private at \$420. Funding secured.” And “Investor support is confirmed. Only reason why this is not certain is that it’s contingent on a shareholder vote.”, were false and misleading. *Id.* ¶¶ 61-67. The SEC further alleged that Musk acted knowingly or recklessly when he made his statements on August 7, 2018 as he knew they “were premised on a long series of baseless assumptions and were contrary to facts that [he] knew”. *Id.* ¶ 68. The SEC also alleged that Musk’s August 7, 2018 statements caused market chaos and harmed Tesla investors. *Id.* at ¶¶ 75-77. The SEC alleged that Musk 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.

The next day, Musk signed a consent to entry of final judgment on the claims he knowingly or recklessly violated Section 10(b) and Rule 10b-5. He agreed to pay a penalty of \$20 million and resign as Chairman of Tesla. *See* McCall Ex. B. As part of his consent to entry of judgment, Musk agreed to comply with 17 C.F.R. § 202.5(e). Specifically, Musk undertook that he:

(i) will not take any action or make or permit to be made any public statement denying, directly or indirectly, any allegation in the complaint or creating the impression that the complaint is without factual basis; (ii) will not make or permit to be made any public statement to the effect that Defendant does not admit the allegations of the complaint, or that this Consent contains no admission of the allegations, without also stating that Defendant does not deny the allegations....¹

Id. p.5. Judgment was duly entered on October 16, 2018.

In this proceeding, Plaintiff’s Consolidated Complaint was filed on January 16, 2019. (ECF No. 184). By order dated April 15, 2020, the Court denied Defendants’ motion to dismiss the complaint. (ECF No. 251). Discovery commenced. On November 5, 2021, Plaintiff took the deposition of Musk. In the middle of his testimony, Musk took the opportunity to volunteer that he was “quite excited” to “clear the record” in this proceeding, stating in pertinent part:

¹ Although Musk’s consent permits him to take legal or factual positions in other proceedings, this right does not include proceedings to which the SEC is a party. *Id.*

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