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17 UNITED STATES DISTRICT COURT

18 NORTHERN DISTRICT OF CALIFORNIA

19
20
21 IN RE TESLA, INC. SECURITIES
LITIGATION

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

22 **DEFENDANTS' MOTION FOR LEAVE**
23 **TO SEEK RECONSIDERATION OF THE**
24 **COURT'S PARTIAL GRANT OF**
25 **SUMMARY JUDGMENT**

26 Date: N/A

27 Time: N/A

Location: Courtroom 5, 17th Floor

Judge: Hon. Edward Chen

1 **NOTICE OF MOTION**

2 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

3 **PLEASE TAKE NOTICE THAT** Defendants Tesla, Inc., Elon R. Musk, Brad W. Buss,
4 Robyn Denholm, Ira Ehrenpreis, Antonio J. Gracias, James Murdoch, Kimbal Musk, and Linda
5 Johnson Rice (collectively, “Defendants”) will, and hereby do, move for leave, pursuant to Civ. L.R.
6 7-9, to file a Motion for Reconsideration of this Court’s Order dated April 1, 2022, and issued to the
7 parties on April 10, 2022, granting in part the Plaintiff’s motion for partial summary judgment (the
8 “Order”).

9 This motion will be based on this Notice of Motion and Motion for Leave to File a Motion for
10 Reconsideration of the Court’s Order, the Memorandum of Points and Authorities and proposed order
11 attached hereto, the files and records in this matter, and any oral argument that the Court may hear.

12 **RELIEF REQUESTED**

13 Pursuant to Civ. L.R. 7-9(a), Defendants respectfully request leave of Court to file a Motion
14 for Reconsideration of the Court’s April 1 Order.

15 **STATEMENT OF ISSUES TO BE DECIDED**

16 Whether the Court should grant leave to file a Motion for Reconsideration of the Court’s
17 Order, ECF 387, which granted the Plaintiff’s motion for summary judgment on falsity and scienter
18 while correctly denying summary judgment on reliance, because the failure to apply the same standard
19 for materiality across all three elements is clear legal error and because the Court overlooked material
20 facts in evidence that would allow a reasonable jury to find for Defendants on falsity and scienter.

21
22 DATED: April 22, 2022

Respectfully submitted,

23 QUINN EMANUEL URQUHART & SULLIVAN, LLP

24
25 By: /s/ Kathleen M. Sullivan

Kathleen M. Sullivan

26 *Attorneys for Tesla, Inc., Elon Musk, Brad W. Buss,*
27 *Robyn Denholm, Ira Ehrenpreis, Antonio J. Gracias,*
James Murdoch, Kimbal Musk, And Linda Johnson Rice

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15
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17
18
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21
22
23
24
25
26
27
28

TABLE OF CONTENTS

Page

INTRODUCTION..... 1

BACKGROUND.....2

LEGAL STANDARD5

ARGUMENT6

I. THE COURT SHOULD RECONSIDER OR CLARIFY ITS ORDER GRANTING SUMMARY JUDGMENT ON FALSITY AND SCIENTER BECAUSE IT IS CLEARLY ERRONEOUS IN LIGHT OF FACTUAL DISPUTES ON MATERIALITY7

 A. The Court Should Reconsider Its Order Because The Materiality Standard Is The Same For Falsity, Scienter, And Reliance8

 B. Alternatively, The Court Should Clarify That Materiality Remains At Issue For The Jury On All Elements 11

II. THE COURT SHOULD RECONSIDER ITS GRANT OF SUMMARY JUDGMENT ON FALSITY AND SCIENTER BECAUSE IT OVERLOOKS MATERIAL FACTS ON WHICH A REASONABLE JURY COULD FIND FOR DEFENDANTS..... 12

CONCLUSION 16

TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page

Cases

Amgen Inc. v. Conn. Ret. Plans & Trust Funds,
568 U.S. 455 (2013) 7, 8, 9, 11

Basic Inc. v. Levinson,
485 U.S. 224 (1988) 6

Bordallo v. Reyes,
763 F.2d 1098 (9th Cir. 1985)..... 11

Dura Pharma, Inc. v. Broudo,
544 U.S. 336 (2005) 3, 6

Ernst & Ernst v. Hochfelder,
425 U.S. 185 (1976) 7, 11

Gebhart v. SEC,
595 F.3d 1034 (9th Cir. 2010)..... 7

Goldman Sachs Grp., Inc. v. Ark. Tchr. Ret. Sys.,
141 S. Ct. 1951 (2021) 7, 11

Halliburton Co. v. Erica P. John Fund, Inc.,
573 U.S. 258 (2014) 7, 11

Hollinger v. Titan Cap. Corp.,
914 F.2d 1564 (9th Cir. 1990)..... 14

In re Alphabet, Inc. Sec. Litig.,
1 F.4th 687 (9th Cir. 2021)..... 6

In re Apple Comput. Sec. Litig.,
886 F.2d 1109 (9th Cir. 1989)..... 1, 14

Matrixx Initiatives, Inc. v. Siracusano,
563 U.S. 27 (2011) 6, 7, 9, 11

Oran v. Stafford,
226 F.3d 275 (3d Cir. 2000)..... 8

Phillips v. LCI Int’l, Inc.,
190 F.3d 609 (4th Cir. 1999)..... 10

Retail Wholesale & Dep’t Store Union Local 338 Ret. Fund v. Hewlett-Packard Co.,
845 F.3d 1268 (9th Cir. 2017)..... 6, 9, 10, 11

San Leandro Emergency Med. Grp. Profit Sharing Plan v. Philip Morris Cos., Inc.,
75 F.3d 801 (2d Cir. 1996)..... 10

School Dist. No. 1J, Multnomah Cnty. v. ACandS, Inc.,
5 F.3d 1255 (9th Cir. 1993)..... 5, 6

Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.,
552 U. S. 148 (2008) 6

1 *W. Coast Stock Transfer, Inc. v. Terra Tech Corp.*,
2 No. SACV 181-213 (JVS), 2019 WL 1878348 (C.D. Cal. Feb. 14, 2019)..... 5, 7

3 *Wahl v. Am. Sec. Ins. Co.*,
4 No. C 08-0555 RS, 2010 WL 2867130 (N.D. Cal. July 20, 2010) 11

5 *Webb v. Solarcity Corp.*,
6 884 F.3d 844 (9th Cir. 2018)..... 14

7 *Worthy v. City of Berkeley*,
8 No. 20-CV-05558-EMC, 2021 WL 5758887 (N.D. Cal. Dec. 3, 2021) 5, 12

Statutes

8 28 U.S.C. § 1292(b) 2

Rules

9

10 17 C.F.R. § 240.10b-5(b)..... 6

11 Local Civil Rule 7-9 2, 5, 12

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **INTRODUCTION**

3 Defendants respectfully request leave of Court to file a Motion for Reconsideration of the
4 Court's Order (ECF 387) partially granting summary judgment on the elements of falsity and scienter
5 as to three August 7, 2018 statements by Elon Musk, the CEO of Tesla, Inc. ("Tesla"). Depriving a
6 defendant of a jury trial on the elements of falsity and scienter in a Section 10(b) securities fraud case
7 is an extraordinarily grave and rare step. Defendants are unaware of any case in which a court has
8 similarly taken these issues out of the jury's hands where the statements were at best ambiguous and
9 were issued in the word-constrained and informal context of posts on Twitter. As the Ninth Circuit
10 has long held, "[m]ateriality and scienter are both fact-specific issues which should ordinarily be left
11 to the trier of fact." *In re Apple Comput. Sec. Litig.*, 886 F.2d 1109, 1113 (9th Cir. 1989).

12 Here the Court got it half right in ruling that the jury must be allowed decide the issue of
13 reliance. (ECF 387 at 30-32.) As the Court noted, there is sharply conflicting evidence as to whether
14 the alleged misrepresentations did or did not "actually affect the market price." (*Id.* at 32.) For
15 example, as the Court noted, while there is some evidence that "Tesla's stock price went up after the
16 tweets, analysts issued reports commenting on the tweets, and Tesla's investors reached out to Tesla
17 after the tweets," there is also "evidence that, after the 8/13/2018 blog post, which served as a partial
18 corrective disclosure, there was no decline or at least not a significant decline in stock price; thus,
19 arguably, the reaction to the tweets on 8/7/2018 was a response to Mr. Musk contemplating taking
20 Tesla private and not to statements that, *e.g.*, funding was secured or investor support confirmed."
21 (*Id.*) In light of this conflicting evidence, the Court rightly ruled that summary judgment on reliance
22 was precluded. While the Court did not expressly decide the issue of materiality for reliance purposes
23 (*id.*), it necessarily sent that issue too to the jury because price impact and materiality are inextricably
24 intertwined in Section 10(b) cases like this one.

25 But the Court got it half wrong in taking the elements of falsity and scienter away from the
26 jury (*id.* at 23-29), and that clear legal error warrants reconsideration. That is because all three
27 elements—falsity, scienter, and reliance—require materiality, and the standard of materiality is
28 identical for all three elements. If the evidence fails to show as a matter of law that the statements

1 were material to investors so as to move the market price and thus evince reliance, then the evidence
2 cannot show as a matter of law that the statements were materially false or that Mr. Musk acted with
3 the requisite scienter as to the truth of a material fact. Thus the Court’s reliance ruling contradicts its
4 falsity and scienter ruling and warrants reconsideration. Reconsideration is also warranted for the
5 independent reason that the Court overlooked critical record evidence demonstrating the existence of
6 at least a triable issue of fact on falsity and scienter. The proper consideration of that overlooked
7 evidence would show that summary judgment was not warranted on either element.

8 For all these reasons and as explained further below, the jury should be permitted to decide the
9 issues of falsity and scienter as well as reliance. Defendants therefore respectfully request that the
10 Court grant Defendants leave pursuant to Local Rule 7-9 to file their Motion for Reconsideration of
11 the Court’s Order. If the Court denies such leave, then Defendants respectfully request that the Court
12 grant Defendants’ concurrently filed Motion for Certification of its Order for interlocutory appeal
13 pursuant to 28 U.S.C. § 1292(b).

14 **BACKGROUND**

15 The relevant facts are as follows: On July 31, 2018, Mr. Musk met with the managing director
16 of Saudi Arabia’s Public Investment Fund (PIF) to discuss a deal to take Tesla private—a meeting that
17 followed years of lobbying and discussions about such a transaction. As the meeting concluded, the
18 managing director told Musk “[w]e want to do this,” and an eyewitness described the discussion as a
19 “handshake agreement to have the Saudis finance a private transaction for Tesla.” (ECF 365-1 (Ex. B
20 at 155:20-156:2); ECF 365-1 (Ex. P at 161:7-162:1).) Mr. Musk then proposed to Tesla’s board of
21 directors a take-private transaction for \$420 per share, which reflected a premium over Tesla’s stock
22 price for such a deal. (ECF 352-32 (Ex. 81); ECF 365-1 (Ex. B at 192:10-14).) Mr. Musk later
23 explained to the Tesla board of directors that the PIF “was willing to fund the entire going-private
24 transaction.” (ECF 352-32 (Ex. 83); ECF 365-1 (Ex. B at 206:6-23).)

25 On August 7, Mr. Musk published a tweet that stated: “Am considering taking Tesla private at
26 \$420. Funding secured.” (ECF 352-15 (Ex. 8).) Later the same day, Musk wrote a blog post
27 explaining that he was “considering taking Tesla private at a price of \$420/share” but cautioning that
28 “a final decision has not yet been made,” that he was hoping “to structure [it] so that all shareholders

1 have a choice,” and that any proposal “would ultimately be finalized through a vote of our
2 shareholders.” (ECF 352-19 (Ex. 12).) He tweeted a link to the blog post with a cover note stating:
3 “Investor support is confirmed. Only reason why this is not certain is that it’s contingent on
4 shareholder vote.” (ECF 352-20 (Ex. 13).)

5 The price of Tesla stock rose on August 7 after Mr. Musk’s tweets and blog post. (ECF 291-1
6 at ¶¶ 71-76.) Six days later, on August 13, Mr. Musk published a more detailed blog post explaining
7 that a funding agreement was not yet finalized and describing a series of additional steps necessary to
8 close any deal, including consulting with advisors and legal counsel about the structure of the deal,
9 obtaining consent from a special committee of Tesla’s board, and securing any necessary regulatory
10 approvals. (ECF 352-22 (Ex. 16).) In response to that more detailed explanation, the price of Tesla
11 stock barely moved; in fact, controlling for market and industry effects, it rose slightly. (ECF 365-1
12 (Ex. I).)

13 Despite the fact that investors greeted the more detailed August 13 disclosure with a shrug,
14 Plaintiff Glen Littleton filed a class action complaint against Defendants claiming that Mr. Musk’s
15 August 7 tweets and certain other statements were “material misrepresentations” in violation of
16 Section 10(b) of the Securities and Exchange Act and SEC Rule 10b-5 because they allegedly
17 deceived investors about the level of certainty of a take-private deal. (ECF 184.) Mr. Littleton moved
18 for partial summary judgment with respect to the two August 7 tweets and another statement not
19 relevant here. (ECF 352.) He sought judgment on three of the six elements of a Section 10(b) claim,
20 *see Dura Pharma, Inc. v. Broudo*, 544 U.S. 336, 341 (2005) (identifying six elements): “(1) material
21 misrepresentations or omissions; (2) scienter; and (3) reliance upon the misrepresentations or
22 omissions.” (ECF 352 at 1.) Mr. Littleton’s theory was that “Funding secured” in the first tweet
23 necessarily signified a binding commitment to provide funding (*id.* at 17, 20); that “Investor support is
24 confirmed” in the second tweet referred to support from existing shareholders, rather than the new
25 investors who would facilitate a take-private deal (*id.* at 21); and that the second tweet should be
26 interpreted in isolation from the more detailed blog post to which it linked (*id.* at 22).

27 The Court granted Plaintiff’s summary judgment motion in part as to the elements of falsity
28 and scienter. (ECF 387 at 21-30.) The Court disagreed with Plaintiff’s interpretation of all three

1 contested statements in the two tweets. The Court found that Mr. Littleton’s proposed reading of
2 “Funding secured” in the first tweet as meaning a binding commitment was “too narrow a reading”
3 (*id.* at 24) and that “there is some softness to the term ‘secured’” (*id.* at 25). The Court likewise
4 disagreed with Mr. Littleton’s reading of “Investor support is confirmed” in the second tweet as
5 referring to “shareholder support,” noting that “shareholders” are separately mentioned in the same
6 tweet. (*Id.* at 26.) And, contrary to Mr. Littleton’s insistence on reading the statement in the second
7 tweet—“Only reason why this is not certain is that it’s contingent on a shareholder vote”—in isolation
8 from the blog post to which that tweet linked, the Court reasoned that the linked blog post, which it
9 quoted at length, was properly part of the “full context” in which the second tweet must be read. (*Id.*
10 at 27-28.)

11 Despite interpreting the tweets very differently from Plaintiff, the Court nevertheless granted
12 partial summary judgment to Plaintiff on the elements of falsity and scienter. On the element of
13 falsity, the Court ruled that “Funding secured” must “mean (1) at least a verbal commitment (2) based
14 on a discussion of at least some details about what funding would entail” (*id.* at 25), and concluded
15 that, under that interpretation, the statement was false as a matter of law (*id.* at 26). The Court also
16 ruled that the statement “Investor support is confirmed” was false and misleading as a matter of law
17 “given the preliminary nature of the discussions between the PIF and Tesla.” (*Id.* at 26-27.) And the
18 Court ruled that the statement “Only reason why this is not certain is that it’s contingent on a
19 shareholder vote” was also misleading as a matter of law, even when read in the “full context” of the
20 linked blog post, because there were “a number of contingencies that had to be addressed before the
21 matter could reach a shareholder vote.” (*Id.* at 28-29.)

22 On the element of scienter, the Court concluded as a matter of law that the requisite mental
23 state was established because “Mr. Musk recklessly tweeted to the public that funding was secured”
24 while he “knew all of the facts relating to Tesla’s interaction with the PIF.” (*Id.* at 26.) The Court
25 likewise found scienter as a matter of law as to the “Investor support is confirmed” and “Only reason
26 why this is not certain is that it’s contingent on a shareholder vote” statements for the same reason (*id.*
27 at 27, 29), noting that “the scienter analysis follows the falsity analysis” (*id.* at 29).

28 In contrast to its falsity and scienter rulings, the Court denied Plaintiff’s motion for summary

1 judgment on the reliance element. (*Id.* at 30-32.) The Court noted that Mr. Littleton is relying on the
2 fraud-on-the-market doctrine to establish reliance, which creates “a rebuttable presumption of reliance
3 where ‘(1) the alleged misrepresentations were publicly known, (2) they were material, (3) the stock
4 traded in an efficient market, and (4) the plaintiff traded the stock between when the
5 misrepresentations were made and when the truth was revealed.’” (*Id.* at 31 (citations omitted).) The
6 Court reasoned that, even if the Court “assumes that the three statements at issue were material,” there
7 remained “a question of fact precluding summary judgment because, as Defendants have noted, there
8 is evidence suggesting that the misrepresentations did not actually affect the market price.” (*Id.* at 32.)
9 As the Court further noted, “Specifically, there is evidence that, after the 8/13/2018 blog post, which
10 served as a partial corrective disclosure, there was no decline or at least not a significant decline in
11 stock price; thus, arguably, the reaction to the tweets on 8/7/2018 was a response to Mr. Musk
12 contemplating taking Tesla private and not to statements that, *e.g.*, funding was secured or investor
13 support confirmed.” (*Id.*) The Court accordingly concluded that Defendants would be permitted to
14 rebut the presumption of reliance at trial. (*Id.*)

15 **LEGAL STANDARD**

16 Motions for reconsideration are governed by Local Civil Rule 7-9(a), which provides that any
17 party can request “leave to file a motion for reconsideration of any interlocutory order made by that
18 Judge on any ground set forth in Civil L.R. 7-9 (b).” A court may grant a motion for reconsideration
19 of an interlocutory order pursuant to N.D. Cal. Local Rule 7-9 if, with reasonable diligence, the
20 movant, *inter alia*, shows that “a material difference in fact or law exists from that which was
21 presented to the Court before entry of the interlocutory order for which reconsideration is sought” or
22 identifies “a manifest failure by the Court to consider material facts or dispositive legal arguments
23 which were presented to the Court before the interlocutory order.” *Worthy v. City of Berkeley*, No. 20-
24 CV-05558-EMC, 2021 WL 5758887, at *1 (N.D. Cal. Dec. 3, 2021) (quoting L.R. 7-9(b)).
25 “Reconsideration is also appropriate if the court committed clear error or the initial decision was
26 ‘manifestly unjust.’” *W. Coast Stock Transfer, Inc. v. Terra Tech Corp.*, No. SACV 181-213 (JVS),
27 2019 WL 1878348, at *2 (C.D. Cal. Feb. 14, 2019) (quoting *School Dist. No. 1J, Multnomah Cnty. v.*
28 *AcandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993)).

1 **ARGUMENT**

2 The Supreme Court has held that a private right of action under Section 10(b) and Rule
3 10(b)(5) has six elements: (i) misrepresentation or omission of a material fact; (ii) scienter; (iii) a
4 connection with a purchase or sale of a security; (iv) reliance; (v) economic loss; and (vi) loss
5 causation. *Dura Pharma*, 544 U.S. at 341; *see Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27,
6 37-38 (2011); *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U. S. 148, 157 (2008).
7 Three of those elements are at issue on Plaintiff’s partial summary judgment motion here: falsity,
8 scienter, and reliance. Crucially, each of these three elements hinges on the requirement that the
9 misrepresentation or omission be *material* to investors.

10 *First*, the element of falsity can be satisfied only by “a *material* misrepresentation (or
11 omission),” *Dura Pharma*, 544 U.S. at 341 (emphasis added), and thus a plaintiff must show that “the
12 defendant made a statement that was ‘*misleading as to a material fact*,’” *Matrixx Initiatives*, 563 U.S.
13 at 38 (quoting *Basic Inc. v. Levinson*, 485 U.S. 224, 238 (1988)) (emphasis in original). Indeed, the
14 very text of Rule 10b-5 makes it unlawful only to “make any untrue statement of a *material* fact or to
15 omit to state a *material* fact necessary in order to make the statements made, in the light of the
16 circumstances under which they were made, not misleading.” 17 C.F.R. § 240.10b-5(b) (emphases
17 added). The Supreme Court has long “held that this materiality requirement is satisfied when there is
18 a substantial likelihood that the disclosure of the omitted fact would have been viewed by the
19 reasonable investor as having significantly altered the total mix of information made available.”
20 *Matrixx Initiatives*, 563 U.S. at 38 (internal quotations omitted); *see also Retail Wholesale & Dep’t*
21 *Store Union Local 338 Ret. Fund v. Hewlett-Packard Co.*, 845 F.3d 1268, 1275 (9th Cir. 2017) (“A
22 statement is misleading if it would give a reasonable investor the impression of a state of affairs that
23 differs in a material way from the one that actually exists.”) (alteration and quotations omitted).

24 *Second*, materiality is likewise essential to the element of scienter, which requires a Section
25 10(b) plaintiff to show that the defendant deliberately (or, under Ninth Circuit law, recklessly) made a
26 misrepresentation or omission of a *material* fact. *See, e.g., In re Alphabet, Inc. Sec. Litig.*, 1 F.4th
27 687, 701 (9th Cir. 2021) (scienter satisfied by “a reckless omission of *material* facts”) (emphasis
28

1 added).¹ That follows from the basic definition of scienter in this context: an “intent to deceive,
 2 manipulate, or defraud.” *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 (1976). An intent to make a
 3 non-material false statement—a statement that would not be viewed as significantly altering the mix
 4 of information for investors—does not establish an intent to deceive, manipulate, or defraud investors.

5 *Third*, in a securities class action like this one, materiality is an essential predicate of the fraud-
 6 on-the-market theory under which a plaintiff is entitled to a rebuttable presumption of reliance. *See*
 7 *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 568 U.S. 455, 466-67 (2013); *Halliburton Co. v. Erica*
 8 *P. John Fund, Inc.*, 573 U.S. 258, 278 (2014). The requirement to show materiality for purposes of
 9 invoking the fraud-on-the-market presumption is “directed at price impact—whether the alleged
 10 misrepresentations affected the market price in the first place.” *Id.* (internal quotations omitted). The
 11 concepts of price impact and materiality are, thus, “overlapping” and “the evidence relevant to one
 12 will almost always be relevant to the other.” *Goldman Sachs Grp., Inc. v. Ark. Tchr. Ret. Sys.*, 141 S.
 13 Ct. 1951, 1961 n.2 (2021).

14 **I. THE COURT SHOULD RECONSIDER OR CLARIFY ITS ORDER GRANTING**
 15 **SUMMARY JUDGMENT ON FALSITY AND SCIENTER BECAUSE IT IS**
 16 **CLEARLY ERRONEOUS IN LIGHT OF FACTUAL DISPUTES ON MATERIALITY**

17 The Court correctly found that reliance is not established as a matter of law because the facts
 18 remain disputed on whether the challenged statements moved Tesla’s market price. While the Court
 19 “assume[d]” materiality without deciding whether it was established (ECF 387 at 32), the above
 20 controlling precedent makes clear that, if there is no price impact as a matter of law, there is also no
 21 materiality as a matter of law for reliance purposes. And if there is no materiality as a matter of law
 22 for reliance purposes, the above controlling precedent makes equally clear that there is no materiality
 23 as a matter of law for purposes of falsity or scienter. The Court’s summary judgment ruling on falsity
 24 and scienter was thus “clear error” that was not evident before the order issued, warranting the Court’s
 25 reconsideration. *W. Coast Stock Transfer*, 2019 WL 1878348, at *2.

26 ¹ While the Ninth Circuit allows proof of recklessness to satisfy the scienter requirement under
 27 Section 10(b), *see Gebhart v. SEC*, 595 F.3d 1034, 1040 (9th Cir. 2010), the Supreme Court has not
 28 approved such an approach, *see Matrixx Initiatives*, 563 U.S. at 48 (reserving the question whether
 recklessness suffices). Defendants reserve the right to challenge in an appropriate forum any ultimate
 finding based on recklessness.

1 A. **The Court Should Reconsider Its Order Because The Materiality Standard Is**
2 **The Same For Falsity, Scienter, And Reliance**

3 **Reliance.** In denying summary judgment on the reliance element of the Section 10(b) claim,
4 the Court correctly ruled that there is “[a]t the very least” a “question of fact” for the jury to decide on
5 whether the three allegedly false statements had any impact on the price of Tesla’s stock. (ECF 387 at
6 32.) Specifically, in assuming without deciding that the statements were material, the Court noted that
7 “there is evidence to support materiality because Tesla’s stock price went up after the tweets, analysts
8 issued reports commenting on the tweets, and Tesla’s investors reached out to Tesla after the tweets.”
9 (*Id.*) On the other hand, in ruling that “there is a question of fact precluding summary judgment” on
10 reliance, the Court noted that “there is evidence suggesting that the misrepresentations did not actually
11 affect the market price,” including “evidence that, after the 8/13/2018 blog post, which served as a
12 partial corrective disclosure, there was no decline or at least not a significant decline in stock price.”
13 (*Id.*) As the Court noted, this countervailing evidence “arguably” showed that “the reaction to the
14 tweets on 8/7/2018 was a response to Mr. Musk contemplating taking Tesla private and not to
15 statements that, *e.g.*, funding was secured or investor support confirmed.” (*Id.*)

16 The factual dispute the Court properly identified as to whether the statements had any price
17 impact, however, necessarily compels the conclusion that there is a factual dispute as to materiality as
18 well. That is because, for purposes of the reliance element in a fraud-on-the-market-presumption case
19 like this one, materiality and price impact are inextricably intertwined. As the Supreme Court has
20 observed, it is “uncontroversial” that, in such a case, the “definition” of “immaterial
21 misrepresentations and omissions” means misrepresentations and omissions that do “not affect . . .
22 stock price[s] in an efficient market.” *Amgen*, 568 U.S. at 464 (quotations omitted); *see Oran v.*
23 *Stafford*, 226 F.3d 275, 282 (3d Cir. 2000) (Alito, J.) (“[I]f a company’s disclosure of information has
24 no effect on stock prices, ‘it follows that the information disclosed . . . was *immaterial* as a matter of
25 law.’”) (emphasis added). Thus, even though the Court “assume[d]” materiality while finding price
26 impact in dispute, the governing law makes it legally impossible to have materiality as a matter of law
27 if price impact remains in factual dispute. Because the Court correctly found price impact to be in
28 factual dispute, its Order effectively precludes any finding of materiality as a matter of law.

1 **Falsity.** In the absence of materiality as a matter of law for purposes of reliance, it is likewise
2 legally impossible to find materiality as a matter of law for purposes of falsity. That is because the
3 materiality standard for a “material misrepresentation or omission” is identical to the materiality
4 standard for reliance. Specifically, the Supreme Court held in *Amgen* that proving a material
5 misrepresentation or omission under the falsity element requires the very same proof as is needed to
6 invoke the fraud-on-the-market presumption under the reliance element. *See Amgen*, 568 U.S. at 459-
7 60, 467. It was on that basis that the Court held that materiality need not be proved at the class-
8 certification stage: because a failure of proof on materiality will defeat the Section 10(b) claim on the
9 merits under the element of falsity, there is no risk that a failure to prove materiality as a prerequisite
10 to the fraud-on-the-market theory under the reliance element would cause individual reliance issues to
11 predominate at trial. *Id.* Under *Amgen*, it thus is not legally possible to conclude that materiality is an
12 open jury question for purposes of reliance and the fraud-on-the-market theory while at the same time
13 granting summary judgment on the element of “material misrepresentation or omission.” The two
14 standards of materiality are the same. Indeed, if this Court fails to reconsider its grant of summary
15 judgment on “material misrepresentation or omission” while allowing reliance to go to the jury, it
16 would risk exactly the outcome that the Supreme Court held in *Amgen* was legally precluded: that the
17 jury finds that the statements were not material, defeating the fraud-on-the-market presumption, and
18 so is required to decide reliance on an individualized rather than class-wide basis. *See Amgen*, 458
19 U.S. at 473-74.

20 Put another way, a reasonable jury could not find the alleged misrepresentations to be *material*
21 for purpose of the “material misrepresentation or omission” element if it also finds that those same
22 statements were *immaterial* for purposes of reliance; the two elements rise and fall together. Because
23 the August 13 disclosures of contingencies concerning the deal did not cause the price of Tesla stock
24 to fall, a reasonable jury could find that the August 7 statements were not materially false because the
25 disclosure of the same “truth” at the time the statements were made would not have “been viewed by
26 the reasonable investor as having significantly altered the ‘total mix’ of information made available,”
27 *Matrixx Initiatives*, 563 U.S. at 38, or would not have “give[n] a reasonable investor the impression of
28 a state of affairs that differs in a material way from the one that actually exists,” *Retail Wholesale*, 845

1 F.3d at 1275. The Court accordingly should grant Defendant’s motion for leave to file a Motion for
2 Reconsideration on the element of falsity.

3 **Scienter.** As to the scienter element, the above-described settled precedent similarly requires a
4 defendant to have acted deliberately (or, in the Ninth Circuit, recklessly) as to a *materially* false
5 statement. And just as with falsity, it is legally impossible to find materiality for scienter as a matter
6 of law if disputes of fact preclude a finding of materiality for reliance as a matter of law. Specifically,
7 if the allegedly false statements did not actually affect Tesla’s stock price, which the Court ruled is an
8 inference the current evidence might well support, then a jury could reasonably conclude that the
9 statements were not material for reliance purposes and also reasonably conclude that the statements
10 were not materially false and that Mr. Musk was not deliberate or reckless as to their material falsity.
11 Again, the materiality standard is identical for falsity and scienter as well as for reliance. *See Phillips*
12 *v. LCI Int’l, Inc.*, 190 F.3d 609, 621 (4th Cir. 1999) (complaint that “fails adequately to allege that
13 defendants’ statements were [materially] false . . . obviously fails to allege facts constituting
14 circumstantial evidence of reckless or conscious misbehavior on the part of defendants in making
15 statements.”) (alterations in original); *San Leandro Emergency Med. Grp. Profit Sharing Plan v.*
16 *Philip Morris Cos., Inc.*, 75 F.3d 801, 813 (2d Cir. 1996) (same). The fact that a reasonable jury
17 might well conclude that there was no materiality for purposes of reliance—for example, because the
18 market price did not move in response to the August 13 “partial corrective” disclosure, and thus any
19 market reaction to the August 7 tweets “was a response to Mr. Musk contemplating taking Tesla
20 private” and not to the “Funding secured” or “Investor support confirmed” statements (ECF 387 at
21 32)—thus means that a reasonable jury might also well conclude there was no materiality for purposes
22 of falsity or scienter.

23 Put another way, because the Court correctly found that there were triable issues of fact with
24 respect to price impact and thus necessarily left materiality for reliance purposes to the jury, it should
25 also have left falsity and scienter to the jury because a jury could reasonably find that the statements
26 did not contained *materially* misleading information and that Mr. Musk did not deliberately or
27 recklessly tweet such information. If there is sufficient evidence for a jury to reasonably conclude that
28 investors did not consider the allegedly false statements material, then there is also sufficient evidence

1 for the jury to reasonably conclude that Mr. Musk, a sophisticated businessman attuned to the
2 perceptions of the market, reasonably believed that investors would not consider those statements to
3 “alter[] the ‘total mix’ of information” for investors, *Matrixx Initiatives*, 563 U.S. at 38, or “give a
4 reasonable investor the impression of a state of affairs that differs in a material way from the one that
5 actually exists,” *Retail Wholesale*, 845 F.3d at 1275. If so, Mr. Musk lacked the requisite intent to
6 “deceive, manipulate, or defraud investors,” *Ernst & Ernst*, 425 U.S. at 193, because he did not
7 deliberately (or, in the Ninth Circuit, recklessly) disregard the truth of anything that would in fact
8 matter to them, as materiality requires.

9 For all these reasons, Defendants respectfully submit that the Court should grant them leave to
10 file a Motion for Reconsideration of the Court’s Order with respect to falsity and scienter. The
11 Court’s analysis of price impact in denying summary judgment on reliance was correct. Under the
12 Supreme Court’s decisions in *Halliburton* and *Goldman*, that ruling necessarily means that the jury
13 will determine materiality for reliance purposes because price impact and materiality are inextricably
14 intertwined in a fraud-on-the-market-presumption case. And under the Supreme Court’s holding in
15 *Amgen* and related precedent, that conclusion in turn requires that the jury should also decide whether
16 the statements were material for purposes of falsity and scienter. Reconsideration is necessary to
17 correct the Order’s clear legal error on these points.

18 **B. Alternatively, The Court Should Clarify That Materiality Remains At Issue**
19 **For The Jury On All Elements**

20 In the event that the Court rejects the legal arguments for reconsideration set forth above and
21 declines to grant leave to seek reconsideration of its grant of partial summary judgment with respect to
22 falsity and scienter, Defendants respectfully request that the Court at a minimum clarify the Order. A
23 party may request clarification ““for the guidance of the parties,”” and “[a] court may clarify its order
24 for any reason.”” *Wahl v. Am. Sec. Ins. Co.*, No. C 08-0555 RS, 2010 WL 2867130, at *3 (N.D. Cal.
25 July 20, 2010) (quoting *Bordallo v. Reyes*, 763 F.2d 1098, 1102 (9th Cir. 1985)). Here, the Court
26 assumed without reaching materiality for purposes of reliance (ECF 387 at 32), and did not explicitly
27 address materiality with respect to the falsity or scienter elements. Accordingly, for the “guidance of
28 the parties” and to promote the efficient administration of this case, the Court should make clear that

1 the materiality of the August 7 tweets remains an issue for the jury to decide as to all three elements:
 2 falsity, scienter, and reliance. Such a ruling would streamline future proceedings by making clear that
 3 Defendants are free to argue at trial that the challenged statements were not *materially* false or
 4 misleading, were not made with the requisite scienter as to their *material* falsity, and were not
 5 *material* so as to cause investor reliance that moved the market price.

6 **II. THE COURT SHOULD RECONSIDER ITS GRANT OF SUMMARY JUDGMENT**
 7 **ON FALSITY AND SCIENTER BECAUSE IT OVERLOOKS MATERIAL FACTS**
 8 **ON WHICH A REASONABLE JURY COULD FIND FOR DEFENDANTS**

8 Reconsideration is warranted where a party identifies “a manifest failure by the Court to
 9 consider material facts ... which were presented to the Court before the interlocutory order.” *Worthy*,
 10 2021 WL 5758887, at *1 (quoting L.R. 7-9(b)). Defendants respectfully submit, as a second and
 11 independent ground to grant leave to file their Motion for Reconsideration, that the Court overlooked
 12 record evidence that is nowhere discussed in the Court’s order and that places significant facts in
 13 dispute that preclude summary judgment for Plaintiff on falsity and scienter.

14 **“Funding Secure” And “Investor Support Is Confirmed.”** The Court concluded that both
 15 “Funding secured” and “Investor support is confirmed” referred to a “fairly concrete and reasonably
 16 certain” funding commitment and that any reasonable juror would find the statements misleading
 17 because the discussions were “preliminary” and there was no “verbal commitment . . . based on at
 18 least some details about what funding would entail.” (ECF 387 at 24-25, 26-27.) The Court’s order,
 19 however, overlooks contrary evidence from which a reasonable juror might have found in favor of
 20 Defendants on whether the statements were materially false or made with scienter even under the
 21 Court’s definitions of “secured” and “confirmed.”

22 *First*, the Court overlooked evidence that, after investing billions of dollars to acquire 5% of
 23 Tesla, the PIF stated that funding for a take-private deal of the entire company was “not a problem,”
 24 and the investment was a “strategic priority” for Saudi Arabia (ECF 365-1 (Ex. C at 206:17-207:8);
 25 ECF 365-1 (Ex. P at 161:7-162:1); ECF 365-1 (Ex. E at 92:7-93:14)), evidence that would permit a
 26 reasonable jury to conclude that the parties knew “what funding would entail.”

27 *Second*, the Court overlooked Mr. Teller’s testimony that he understood there was a
 28 “handshake agreement to have the Saudis finance a private transaction for Tesla” (ECF 365-1 (Ex. P

1 at 161:7-162:1)), and evidence that Mr. Musk had entered into significant business transactions based
2 on a handshake (ECF 365-1 (Ex. E at 121:18-124:13)), evidence that would permit a reasonable jury
3 to conclude that a “verbal commitment” existed.²

4 *Third*, the court overlooked Mr. Al-Rumayyan’s statement to Mr. Musk as the meeting ended,
5 “Let us know how you want to do this. We want to do this” (ECF 365-1 (Ex. B at 155:23-156:1)),
6 evidence that confirms Mr. Musk’s understanding following the meeting that “the funding was secure
7 for this deal” because the PIF was committed to any reasonable proposal he presented (ECF 365-1
8 (Ex. B at 146:1-13)), and that would permit a reasonable jury to conclude that a “verbal commitment”
9 existed.

10 *Fourth*, the Court overlooked Mr. Musk’s communications with Mr. Al-Rumayyan following
11 the August 7 tweet, which stated “You said you were definitely interested in taking Tesla private,” and
12 “You also made it clear that you were the decision-maker, moreover backed strongly by the Crown
13 Prince, who regards this as strategically important at a national level” (ECF 352-46 (Ex. 121 at 10)),
14 evidence that would permit a reasonable jury to conclude that a “verbal commitment” existed.

15 *Fifth*, the Court overlooked Mr. Musk’s statements to his own CFO Mr. Ahuja that he
16 understood Mr. Al-Rumayyan to have verbally committed to financing the transaction (ECF 365-1
17 (Ex. E at 248:4-249:17)) and to his own Board that the PIF was willing to fund the transaction (ECF
18 365-1 (Ex. B at 206:4-23)), evidence that would permit a reasonable a jury to conclude that a “verbal
19 commitment” existed because Mr. Musk told his own CFO and Board that same thing he told
20 investors about that commitment.

21 *Sixth*, the Court overlooked evidence that the PIF made oral agreements in other transactions,
22 for example committing \$45 billion to SoftBank’s technology fund after a 45-minute conversation and
23 buying a \$3.5 billion stake in Uber within weeks of meeting its CEO (ECF 365-1 (Ex. A at 5-6)),
24 evidence that would permit a reasonable jury to conclude that, given the customary business practices
25 of the deal participants here, the meeting between the PIF and Mr. Musk likewise concluded with a
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27 ² In addition, the sell-side analyst Defendants cited said “funding secured” could mean a “verbal
28 commitment,” but that it “*could be less.*” (ECF 365-1 (Ex. 33) (emphasis added).)

1 “verbal commitment.”

2 *Seventh*, the Court overlooked Mr. Littleton’s own sworn admissions that he understood
3 “Funding secured” to mean simply that Mr. Musk “would arrange to make it happen” (ECF 386 at 3)
4 and that Mr. Musk’s August 13 blog post was consistent with “Funding secured” such that it was
5 confirmatory rather than corrective of the August 7 statement (*id.* at 145:16-146:2). Such testimony
6 would allow a reasonable jury to conclude that a “verbal commitment” existed at the end of the
7 meeting notwithstanding the regulatory and funding details that remained to be worked out, and thus
8 to conclude that Mr. Musk’s statements on August 7 did not give a reasonable investor the impression
9 of a state of affairs materially different from the one that actually existed.³

10 Reconsideration is warranted for the additional reason that to overlook the above-summarized
11 evidence would misapprehend the Ninth Circuit’s demanding legal standard for scienter. Defendants
12 are unaware of any case granting summary judgment on the issue of scienter—an element virtually
13 always reserved for the jury, see *In re Apple Comput.*, 886 F.2d at 1113—where there is (as here)
14 substantial contemporaneous evidence that the defendant reasonably believed his statements to be true
15 and not materially misleading to the reasonable investor. Scienter in the Ninth Circuit requires at the
16 very least “deliberate recklessness,” or in other words “a danger of misleading buyers or sellers that is
17 either known to the defendant or is so obvious that the actor must have been aware of it.” *Webb v.*
18 *Solarcity Corp.*, 884 F.3d 844, 851 (9th Cir. 2018); see also *Hollinger v. Titan Cap. Corp.*, 914 F.2d
19 1564, 1570 (9th Cir. 1990). But the above-summarized overlooked evidence would permit a
20 reasonable jury to conclude that Mr. Musk reasonably believed his statements to be true at the time
21 and not materially misleading to reasonable investors. For example, Mr. Musk told his own CFO and
22 Board, just as he told investors, that the PIF had committed to financing a take-private deal.
23 Moreover, Mr. Littleton admitted that the August 13 blog post confirmed rather than corrected the
24 state of affairs implied by the August 7 tweet. Had the Court properly considered all this overlooked

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26 ³ Mr. Littleton’s understanding accords with the uncontroverted evidence that no negative stock
27 reaction followed Mr. Musk’s August 13 blog post in which he explained why he thought funding was
28 secured, the status of support from the PIF, and the status of the take-private proposal process. (ECF
365 at 12, 23-24.) For this reason, the Court also should reconsider its rejection (ECF 387 at 1 n.1) of
Defendants’ motion to supplement the record with Mr. Littleton’s testimony.

1 evidence, it would have necessarily left the issue of scienter to the jury under the Ninth Circuit's
2 standard.

3 **The “Only Reason Why This Is Not Certain Is That It’s Contingent On A Shareholder**
4 **Vote.”** The Court found this phrase misleading as a matter of law because certain other steps would
5 have to be completed before closing any take-private deal but Mr. Musk omitted “any contingencies
6 other than the ‘finaliz[ation] through a vote of our shareholders.’” (ECF 387 at 27-28.) A reasonable
7 juror, however, could draw a different inference from the summary judgment evidence that the Court
8 overlooked.

9 *First*, the Court did not discuss the linked blog post’s disclosure that “a final decision has not
10 yet been made” as to whether Mr. Musk would ultimately elect to pursue the deal (ECF 352-19 (Ex.
11 12))—itself a key “contingency” that would permit a reasonable jury to conclude that Mr. Musk had
12 not misled (or intended to mislead) investors to believe that a shareholder vote was the only hurdle to
13 a deal.

14 *Second*, the Court did not address Mr. Musk’s statement in the linked blog post that he “would
15 *like to structure* this so that all shareholders have a choice” (ECF 352-19 (Ex. 12) (emphasis added)),
16 evidence that would permit a reasonable jury to conclude that the statement did not mislead (and was
17 not intended to mislead) investors to believe that the precise structure of the potential deal had been
18 determined.

19 *Third*, the Court did not address the absence of any stock price reaction following the August
20 13 blog post, which disclosed the specific additional contingencies (implied in the August 7 blog post)
21 that affected the conclusion of the deal, including board approval, the retention of advisors, and
22 regulatory approvals. (ECF 365 at 17-18.) The lack of any stock price reaction in response to these
23 disclosures would permit a reasonable jury to conclude that Mr. Musk had not misled (or intended to
24 mislead) investors to believe that a shareholder vote was the only hurdle to a deal.

25 For all these reasons, the Court should grant Defendants leave to file a Motion for
26 Reconsideration requesting the Court to consider the above-described overlooked evidence and
27 modify its Order accordingly.

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CONCLUSION

For any and all of the above reasons, the Court should grant leave to Defendants to file a Motion for Reconsideration of the partial summary judgment Order.

DATED: April 22, 2022

Respectfully submitted,

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By: /s/ Kathleen M. Sullivan

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