



Home » Content » Featured » The KLJ Blog » Securities Fraud or Elon being Elon? The Forty Million Dollar Tweet

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On August 7, 2018 Elon Musk tweeted "Am considering taking Tesla private at \$420. Funding secured."^[2] At the time of this tweet, Tesla stock was trading at \$356.67.^[3] Following the tweet, investors immediately sought clarification, wondering if the tweet was legit.^[4] One might wonder why investors would consider relying on Twitter for material information about Tesla. But in 2013, Tesla filed an 8-K with the Securities Exchange Commission ("SEC") indicating that it intended to use Musk's personal Twitter account as a means of announcing material information.^[5] As a result, Musk's tweet could provide important information that has a significant impact on the market. Tesla's stock closed at \$379.57 that day, up 6% from the time of Musk's initial tweet.^[6] On August 24, 2018, in a walk back of the statements in the tweet, Musk announced he had abandoned the plan to take Tesla private.^[7] One month later on September 27, 2018, the SEC filed a complaint against Elon Musk for securities fraud.^[8]

In order to state a claim for securities fraud, the SEC must allege Musk "made misstatements or omissions of material fact; (2) with scienter; (3) in connection with the purchase or sale of securities; (4) upon which plaintiffs relied; and (5) that plaintiffs' reliance was the proximate cause of their injury."^[9] The SEC alleged Musk's original tweet, along with others, created a false and misleading impression that the only thing preventing Musk from taking Tesla private at \$420 a share was a shareholder vote.^[10] Because Musk knew that no terms for a deal to take Tesla private had been established, nor had the Board of Directors approved such a deal, the SEC argued that Musk "knew or was reckless in not knowing his August 7 statements were false and misleading."^[11] The SEC alleged that these tweets caused ensuing market chaos as the share price rose to \$379.57 on August 7, before falling to \$319.44 after Musk announced he had abandoned his plan to take Tesla private.^[12] This chaos thus injured stockholders who purchased Tesla stock after the August 7 statements, but before the accurate information was made known on August 13.^[13]

Two days after the SEC filed its complaint, Elon Musk and Tesla reached a settlement agreement with the SEC.^[14] As part of the settlement agreement, Musk must step down as chairman for three years, he and Tesla must pay \$20 million fines each, and Musk will be able to remain the chief executive of Tesla.^[15] In addition, Tesla must appoint two independent directors and take steps to monitor Musk's Twitter.^[16] While Musk did not admit or deny any allegations as part of the settlement^[17], Musk's tweet clearly carried consequences. Even if Musk did not intend to mislead investors with his short tweet, Musk's statements demonstrate that opinions may not always be so easily distinguishable from factual assertions. Hopefully this experience serves as a powerful lesson to Musk in his future communications as the chief executive of Tesla.

^[1] Staff Editor, *Kentucky Law Journal*, Volume 107; J.D. Candidate, The University of Kentucky College of Law (2020); B.S., University of Kentucky (2017).

^[2] Elon Musk (@elonmusk), TWITTER, (Aug. 7, 2018, 11:48 AM), <https://twitter.com/elonmusk/status/1026872652290379776>.

^[3] Complaint at 20, United States Securities and Exchange Commission v. Elon Musk, No. 1:18-cv-8865 (Sept. 27, 2018).

^[4] *Id.* at 13.

^[5] *Id.* at 4.

^[6] *Id.* at 12.

^[7] *Id.* at 15–16.

^[8] Dave Michaels, Susan Pulliam, Tim Higgins & Michael Rapoport, *SEC Sues Elon Musk for Fraud, Seeks Removal From Tesla*, WALL STREET J., <https://www.wsj.com/articles/elon-musk-sued-by-the-sec-for-securities-fraud-1538079650> (last updated Sept. 27, 2018, 10:37 PM EST).

^[9] *Lentell v. Merrill Lynch & Co.*, 396 F.3d 161, 172 (2d. Cir. 2005) (quoting *In re IBM Securities Litigation*, 163 F.3d 102, 106 (2d Cir. 1998)); see Ron Joshua Havas et al., *Securities Fraud*, 54 AM. CRIM. L. REV. 1787, 1790–1791 (2017).

^[10] Complaint, *supra* note 3, at 16.

^[11] *Id.* at 19–20.



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[12] *Id.* at 20–21.

[13] *Id.*

[14] Matthew Goldstein, *Elon Musk Steps Down as Chairman in Deal With S.E.C. Over Tweet About Tesla*, N.Y. TIMES, (Sept. 29, 2018), <https://www.nytimes.com/2018/09/29/business/tesla-musk-sec-settlement.html>.

[15] *Id.*

[16] *Id.*

[17] *Press Release, Elon Musk Settles SEC Charges; Tesla Charged With and Resolves Securities Law Charge*, SEC. EXCH. COMM'N, (Sept. 29, 2018), <https://www.sec.gov/news/press-release/2018-226>.

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