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Litigators of the Week: The Cravath Team Defending Elon Musk from Shareholder Claims Over the Tesla-SolarCity Deal

By Ross Todd
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Delaware Vice Chancellor Joseph Slights wasn't exactly glowing last week in his assessment of the process by which Elon Musk's Tesla came to purchase SolarCity, a company founded by his cousins where he served as the chairman and largest shareholder.

In fact, "far from perfect" were the vice chancellor's words in a 131-page decision weighing shareholder derivate claims against Musk. "Elon was more involved in the process than a conflicted fiduciary should be. And conflicts among other Tesla Board members were not completely neutralized," Slights wrote.

What really matters, though, is that Slights ultimately sided with Musk on all claims finding SolarCity was "at a minimum, worth what Tesla paid for it" and that the deal was a boon to Tesla's state goal of expanding beyond electric vehicles into the broader clean energy industry. The decision, which came after an 11-day trial held in July and August 2021 and additional oral argument in January 2022, has landed Litigator of the Week honors for Musk's trial team led by **Evan Chesler**, **Daniel Slifkin** and **Vanessa Lavely** of **Cravath, Swaine & Moore**.

Litigation Daily: What was at stake here?

Daniel Slifkin: At a high level, this case was about defending why Tesla is unique and how the 2016 acquisition of SolarCity, the clear solar power leader at that time, helped Tesla become a first-of-its-kind, vertically integrated clean energy and technology company. At trial, plaintiffs stuck to their refrain that the deal was a "bailout" of an insolvent company, and they sought to recover up to $13 billion. In ruling for the defense on all counts, the court squarely rejected that theory and found that "SolarCity brought substantial value to Tesla."

The case also raised important board governance questions. At trial, we demonstrated that Elon Musk did not and could not control the acquisition, the Tesla Board or the Tesla stockholders. We also argued that he is undisputedly a highly engaged, exceedingly successful CEO who has generated extraordinary value for Tesla's stockholders and that such corporate leadership should be encouraged. In addition, we demonstrated that plaintiffs' conflict theories were meritless. But the court ultimately avoided these legal and factual "rocks and shoals" by finding that the SolarCity deal passed even the "highest degree of scrutiny recognized in [Delaware] law."

Courtesy photos

L-R: Evan R. Chesler, Daniel Slifkin and Vanessa A. Lavely of Cravath, Swaine & Moore

How did this assignment come to the firm?

Evan Chesler: In early 2019, after the Court's denial of the Tesla Board's motion to dismiss, I received a call from Tesla's then head of litigation. She said that the Board had a very important case in Delaware that was almost certainly going to trial and needed a battle-tested trial team to handle it. Based on several inquiries to her counterparts at other companies, she asked if we could explore the possibility of Cravath taking the lead on the case going forward. We welcomed the opportunity to work with the Tesla Board in helping them defend the SolarCity acquisition at trial.

Who all was on your team and how did you divide the trial work?

Vanessa Lavely: Our trial team was led by Cravath partners Evan Chesler, Daniel Slifkin, **Helam Gebremariam**, and me.

The team also included various talented Cravath associates, paralegals, and support staff, each of whom was critical to our success. We were joined by a great group of Delaware counsel from **Ross Aronstam & Moritz** (RAM), including partner **Garrett Moritz** and counsel **Ben Grossberg**.

From the beginning of the case through post-trial arguments, we took a collaborative approach; we expected everyone to participate in the development and execution of case strategy. At Cravath, we prepare from the outset as if every litigation matter will go to trial. As Evan mentioned, we knew this case had a very high likelihood of going to trial. We therefore were laser-focused on our trial strategy throughout discovery, whether defending fact witness depositions or developing expert opinions.

There was a lot of overlap in the key issues, and since we wanted most witnesses to testify about more than one issue, it did not make sense to keep the issues siloed. Each trial witness was assigned to one partner, but there was extensive behind-the-scenes work across the team and with the client to get the examination ready. For example, for Tesla Board Chair Robyn Denholm (who led due diligence and negotiations with SolarCity, and was found by the Court to be "an extraordinarily credible witness"), Evan handled the direct examination at trial; Helam (initially as senior associate and then as partner) handled much of the outline prep and strategy; and RAM handled mock cross-examination. We used a similar team approach for other witnesses as well.

For post-trial work, our strong associate team took the lead on preparing the briefs. For the arguments, Evan handled fair price; Daniel handled fair process; and I handled alleged control and conflict issues.

The rest of the Tesla board member defendants previously agreed to a $60 million settlement funded by insurance. Why did Elon Musk continue to fight this matter and take it to trial?

Chesler: To start, the rest of the Tesla Board settled entirely with insurance money, which largely went to the company. In the settlement, the Tesla Board denied all wrongdoing and agreed (enthusiastically) to testify at trial to defend the SolarCity deal. Each of the directors testified live at trial that he or she voted for the acquisition based on its merits and considered only the best interests of Tesla and its stockholders in making that decision. The court found that testimony to be credible.

Like the other directors, Elon felt very strongly that this was a meritless lawsuit. And he wanted his day in court to defend the transaction, which, as he explained at trial, was the culmination of a long-planned strategy to make Tesla into a sustainable energy company. And the court found that "there can be no doubt that the combination with SolarCity has allowed Tesla to become what it has for years told the market and its stockholders it strives to be—an agent of change that will 'accelerate the world's transition to sustainable energy' by 'help[ing] to expedite the move from a mine-and-burn hydrocarbon economy towards a solar electric economy.'"

What were your key trial themes and how did you highlight them?

Slifkin: One of our key themes was that Tesla is not just a car company; Elon has always envisioned it as an integrated clean energy company—with energy generation, storage, and use. That was critical to explaining the deal's rationale. So, we had to start the story not with the deal in 2016, but with Tesla's Master Plan from 2006, which articulated Tesla's long-term mission. We also had to explain Tesla's investment in storage technology, its Gigafactories, and the launch of Tesla Energy as essential precursors to the deal. The evidence at trial overwhelmingly demonstrated that the acquisition made strategic sense for Tesla.

Lavely: In addition to explaining the rationale for the deal, we also presented extensive evidence showing that both the deal price and process were entirely fair. Given that the paramount consideration in Delaware law is whether the price was a fair one, we focused heavily on evidence showing that SolarCity was a uniquely valuable company. To do so, we relied on several fact witnesses, including the founders of SolarCity and its CFO at the time of the deal, as well as expert testimony. As Daniel noted, the court squarely rejected plaintiffs' theory that SolarCity was insolvent, finding that the insolvency theory "undermined the credibility of [plaintiffs'] fair price case completely." The court concluded that the deal price was "entirely" fair in the truest sense of the word.

We also highlighted the process strengths, including that the Board pursued the deal only when the time was right for the company; that there was rigorous due diligence, led by Robyn Denholm and the Evercore team, which the Board used to drive down the deal price; that the Board pushed back on Elon's wishes in several instances; and that a vast majority of Tesla stockholders approved the deal. We presented these points through the testimony of the Tesla directors and the lead Evercore banker.

Your client spent a day and a half on the stand. What did your witness preparation look like?

Chesler: The preparation of every witness for trial is a combination of universal practices and those that are unique to each witness. So, in that sense, preparing Elon to testify was not really different from my experience with many other witnesses over many years of trying cases. Elon's intelligence and commitment to the effort made it a great experience. Elon has a deep understanding of both the big picture and the details of Tesla's business, so he was more than prepared for the questions he got on the stand.

There was a lot of argument over which party bore the burden of proof and what standard of review to apply. Ultimately the court found that you have proven the purchase price was "entirely fair" under the standard most favorable to plaintiffs. In retrospect, was all the energy put into arguing the burden of proof and standard of review worthwhile?

Slifkin: Absolutely. First, in our adversarial system it is essential that the advocates for the parties present the court with both sides of the coin where genuinely contested issues of fact or law exist. It's our job to present the very best record possible for trial and any possible appeal. Second, trials have to be viewed holistically. You can't know that you would have won the war even if you had avoided certain battles. Everything you do can feed into the credibility of your client's case. We prepared and presented our case so that we would prevail regardless of which legal path the court followed to reach its conclusion. The court ultimately determined that it was not necessary to wade into the "provocative questions" and "legal enigmas" raised by the parties because the "compelling trial evidence" demonstrated that the acquisition was entirely fair.

What are the takeaways from this decision for board members faced with potential conflicts — or claims of conflicts? And what are the corporate governance lessons here?

Lavely: Without wading into legal advice, I'll note a couple high-level takeaways and lessons from this decision. Whenever possible, boards should proceed with deals in a way that maximizes the chance of getting, as the court put it, "the coveted deference afforded by the business judgment rule." The court observes that various areas of Delaware law that bear on conflict and control issues are "in flux" and offers guidance for how to proceed in the face of such uncertainty.

Boards also should structure deals so that they are defensible under any standard of review. As the court noted, defense verdicts after an entire fairness review are not "commonplace." But even if the process for a given deal is not perfect (which it need not be under Delaware law), the deal can still satisfy the entire fairness standard. Based on the trial evidence, we strongly believed that the SolarCity deal would clear even the highest degree of scrutiny. We are gratified that the court agreed.

What will you remember most about this matter?

Chesler: I have been trying cases for 40 years so it is hard to say that any single moment or event is unlike anything I've seen before. What I will remember most is the challenge of preparing to go to trial three times because of the COVID pandemic, and the dedication and perseverance of my Cravath colleagues. It was truly an honor to share this experience with them and to watch my partner, Helam Gebremariam, examine her first trial witness (as a partner) with such competence and confidence.

Slifkin: After trial, we learned that Vice Chancellor Slights would be retiring from the bench after many years of public service. So, this will have been our last opportunity to try a case before a judge who approached the parties and counsel with the utmost grace and good humor. That was a real privilege.

Lavely: I echo Evan's and Daniel's comments. I could speak at length about the invaluable contributions of every member of our trial team. There's nothing quite like the bonds that are formed while in the trenches preparing for trial. I have been fortunate to be part of many trial teams during my time at Cravath, and I am always amazed by the talent of my colleagues. This team was no exception; and folks went above and beyond to anticipate and address the many challenges presented by COVID delays.

In addition, I expect that I speak for all of us when I say that we will remember the incredible opportunity to work with such an innovative and visionary client. Tesla, led by Elon and the rest of the Board, did the real work here. The SolarCity deal was the culmination of a decade of planning. Our trial victory would not have been possible without that vision and the various witnesses who credibly explained it to the court. And as trial lawyers, we are always supportive and excited when a client wants to take a case across the finish line.

CRAVATH, SWAINE & MOORE LLP