



UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

DIVISION OF
CORPORATION FINANCE

October 16, 2018

Darren K. DeStefano
Cooley LLP
One Freedom Square
11951 Freedom Drive
Reston, VA 20190-5640

Re: ***SEC v. Elon Musk*, Civil Action No. 1:18-cv-08865 (S.D.N.Y., Sept. 27, 2018) - Waiver of disqualification pursuant to Rule 506(d)(2)(ii) of Regulation D**

Dear Mr. DeStefano:

This letter responds to your letter dated September 28, 2018 (“Waiver Letter”), written on behalf of Space Exploration Technologies Corp. (“SpaceX”) and constituting an application for a waiver of disqualification under Rule 506(d)(2)(ii) of Regulation D under the Securities Act of 1933 (“Securities Act”). In the Waiver Letter, you requested relief from any disqualification that will arise as to SpaceX under Rule 506 of Regulation D under the Securities Act as a result of the entry of a final judgment on October 16, 2018 in the United States District Court for the Southern District of New York relating to the complaint filed by the Commission on September 27, 2018 against Elon Musk (the “Musk Judgment”) in *SEC v. Elon Musk*, (Civil Action No. 1:18-cv-08865).

Based on the facts and representations in the Waiver Letter and assuming Elon Musk (“Musk”) fully complies with the Musk Judgment, we have determined that SpaceX has made a showing of good cause under Rule 506(d)(2)(ii) of Regulation D that it is not necessary under the circumstances to deny it reliance on Rule 506 of Regulation D by reason of the entry of the Musk Judgment. Accordingly, the relief requested in the Waiver Letter regarding any disqualification that may arise as to SpaceX under Rule 506 of Regulation D by reason of the entry of the Musk Judgment is granted on the condition that Elon Musk fully complies with the terms of the Musk Judgment. Any different facts from those represented or Musk’s failure to comply with the terms of the Musk Judgment would require us to revisit our determination that good cause has been shown and could constitute grounds to revoke or further condition the waiver to SpaceX. The Commission reserves the right, in its sole discretion, to revoke or further condition the waiver under those circumstances.

For the Commission, by the Division of Corporation Finance, pursuant to delegated authority.

Sincerely,

/s/

Elizabeth M. Murphy
Associate Director
Division of Corporation Finance



Darren K. DeStefano
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Via Email and Courier

September 28, 2018

Timothy B. Henseler, Esq.
Chief, Office of Enforcement Liaison
Division of Corporation Finance
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549

Re: In the Matter of Tesla Motors, Inc.

Dear Mr. Henseler:

We write on behalf of Space Exploration Technologies Corp. ("**SpaceX**"), in connection with the settlement and entry of final judgment as to Mr. Elon Musk (the "**Musk Judgment**") relating to *In the Matter of Tesla Motors, Inc.* As discussed in more detail below, SpaceX understands that the entry of the Musk Judgment, enjoining him from future violations of Section 10(b) of the Securities Exchange Act of 1934 (the "**Exchange Act**") and Rule 10b-5 promulgated thereunder, would disqualify SpaceX from relying on exemptions from registration under Rule 506 of Regulation D, promulgated under the Securities Act of 1933 (the "**Securities Act**"), absent a waiver from the Commission. On behalf of SpaceX, we hereby respectfully request a waiver of any disqualification of SpaceX from these Rule 506 exemptions that will result from the entry of the Musk Judgment. We respectfully submit that relief from disqualification is appropriate in this case for the reasons stated below.

BACKGROUND

We understand that the staff of the Division of Enforcement (the "**Staff**") has engaged in settlement discussions with Tesla, Inc. ("**Tesla**") in connection with the above-captioned matter. As a result of these discussions, we understand that Tesla submitted the Consent of Defendant Tesla, Inc. (the "**Tesla Consent**") and that Mr. Musk submitted the Consent of Defendant Musk (the "**Musk Consent**"), which the Staff presented to the United States District Court for the Southern District of New York in connection with a complaint (the "**Complaint**") against Tesla related to the investigation captioned above.

The Complaint alleges that on August 7, 2018, Mr. Musk made a series of statements via Twitter regarding his consideration of taking Tesla private, and that Mr. Musk made these statements recklessly because he did not have an adequate basis for his statements. The Complaint also alleges that Tesla did not have sufficient disclosure controls or procedures in place to assess whether the information Mr. Musk disseminated via his Twitter account was accurate, complete, or required to be disclosed in reports Tesla files pursuant to the Exchange Act within the time periods specified in the Commission's rules and forms.

In the Tesla Consent, solely for the purpose of proceedings brought by or on behalf of the Commission or to which the Commission is a party, Tesla consented to the entry of a final judgment permanently restraining and enjoining it from violations of Rule 13a-15, promulgated under Section 13A of the Exchange Act [17 C.F.R. § 240.13a-15], without admitting or denying the assertions contained therein (other than those relating to the jurisdiction of the Commission, which are admitted).



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Pursuant to the Musk Consent, solely for the purpose of proceedings brought by or on behalf of the Commission or to which the Commission is a party, Mr. Musk consented to the entry of a final judgment permanently restraining and enjoining him from violations of Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)] and Rule 10b-5 promulgated thereunder [17 C.F.R. § 240.10b-5], without admitting or denying the assertions contained therein (other than those relating to the jurisdiction of the Commission, which are admitted). The entry of the Musk Judgment renders Mr. Musk disqualified under Rule 506(d)(1)(ii)(A) [CFR 230.506(d)(1)(ii)(A)] from relying on exemptions from registration under Rule 506 of Regulation D, and also a covered person under Rule 506(d)(1) [CFR 230.506(d)(1)]¹ which will, by extension, disqualify SpaceX from relying on these Regulation D exemptions.

DISCUSSION

SpaceX has never needed to seek, nor has it ever sought, a Regulation D waiver. SpaceX understands that, absent a waiver, the entry of the Musk Judgment will disqualify SpaceX and certain other issuers from relying on certain exemptions under Rule 506 of Regulation D, promulgated under the Securities Act. The Commission may waive these Regulation D disqualifications with respect to SpaceX upon a showing of good cause that it is not necessary under the circumstances that the exemptions be denied.

Based on the factors set forth by the Division of Corporation Finance for considering waiver requests² and the facts and circumstances set forth below, SpaceX requests that the Commission waive any disqualifying effects that the Musk Judgment will have on SpaceX under Regulation D.

1. The Alleged Misconduct Did Not Involve the Offer and Sale of Securities

The conduct set forth in the Complaint does not relate to the offer or sale of securities as neither Tesla nor Mr. Musk issued or sold any securities during August 2018.

2. SpaceX is Not Subject to the Higher Burden to Show Good Cause in This Case

The Division of Corporation Finance's statement on waivers states that it will "consider whether the conduct involved a criminal conviction or scienter-based violation, as opposed to a civil or administrative non-scienter based violation. Where there is a criminal conviction or a scienter-based violation involving the offer and sale of securities, the burden on the party seeking the waiver to show good cause that a waiver is justified would be significantly greater."³ Notwithstanding the fact that the Complaint alleges scienter-based violations with respect to Mr. Musk, because the misconduct did not involve the offer or sale of securities, SpaceX is not subject to the higher burden to show good cause in this case. Further, the Complaint relates only to civil causes of action. The Staff has charged Tesla only with a non scienter-based violation under Rule 13a-15, and no criminal charges were filed against Tesla or any of its directors, officers, or other employees. As mentioned above, neither Tesla nor Mr. Musk admits nor denies the allegations in the Complaint (other than those relating to the jurisdiction of the Commission, which are admitted).

3. Responsibility for the Conduct: The Alleged Misconduct Did Not Involve SpaceX

¹ Mr. Musk is a "covered person" under Rule 506(d)(1) because (1) as Chairman and CEO, he is an executive officer of SpaceX and (2) he is the beneficial owner of 20% or more of SpaceX's outstanding voting equity securities.

² See Division of Corporation Finance, Waivers of Disqualification under Regulation A and Rules 505 and 506 of Regulation D (Mar. 13, 2015).

³ *Id.*



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With respect to who was responsible for the misconduct, the Division of Corporation Finance has stated that it would consider, among other factors, whether (1) “the misconduct reflects more broadly on the entity as a whole” or (2) “the tone at the top of the party seeking the waiver condoned, encouraged or did not address the misconduct, or actions or omissions by the party seeking the waiver, or any of its affiliates, obstructed the regulatory or law enforcement investigation.”⁴

The misconduct at issue does not relate to SpaceX. Rather, we believe the misconduct involved statements made by Mr. Musk in his personal capacity as a potential bidder regarding a separate company, and not on behalf of SpaceX or with respect to SpaceX equity. As discussed below, notwithstanding that the misconduct at issue related to Mr. Musk, SpaceX has robust procedures in place to ensure compliance with the applicable requirements of Regulation D, and as a result, we do not believe that the misconduct at issue reflects broadly on SpaceX.

4. Duration of the Conduct

The Complaint limits the duration of the conduct to August 2018.

5. SpaceX's Processes and Procedures to Ensure Compliance with Regulation D

As mentioned above, the misconduct at issue did not involve SpaceX. As a result, SpaceX has not taken any remedial actions in response. However, as discussed below, SpaceX has successfully raised more than \$2 billion in securities offerings pursuant to Regulation D. In connection with these offerings SpaceX has complied with the applicable requirements of Regulation D and has in place appropriate and customary processes and procedures to ensure compliance with Regulation D. In this regard, SpaceX has utilized sophisticated corporate and securities counsel to guide it with respect to legal and regulatory compliance in connection with past Regulation D financings and intends to continue to do so for any future Regulation D offerings. In connection with past offerings, SpaceX has taken customary and appropriate steps to ensure compliance with the applicable requirements of Regulation D, including without limitation the restrictions relating to the use of general solicitation and general advertising and applicable disclosure requirements, and SpaceX intends to continue to do so in any future Regulation D offerings. Mr. Musk has historically played a limited role in SpaceX's Regulation D offerings, and has not participated in the diligence efforts regarding the accredited investor status of investors in those offerings. We expect that his roles in any future Regulation D offerings would be similarly limited.

6. Failure to Grant Waiver Relief May Cause Hardship to SpaceX and Its Shareholders

If SpaceX is disqualified from relying on the exemptions under Regulation D, it could have a potential and material adverse impact on third parties, namely innocent SpaceX stakeholders. SpaceX has issued over \$2 billion of securities under Regulation D and intends to rely on Regulation D for further issuances of securities in the future.

SpaceX is a fast-growing technology and manufacturing company focused on manufacturing launch vehicles and spacecraft and selling related services. The design and manufacture of launch vehicles and spacecraft is extremely capital intensive. SpaceX needs sufficient capital to fund its ongoing operations and future expansions, for example: development of its BFR launch vehicle and Crew Dragon spacecraft, continuing research and development projects, and making investments in tooling and manufacturing. SpaceX may need to raise capital for these operations and expansions, primarily through private securities offerings and/or the use of stock as consideration for strategic acquisitions, in reliance on Regulation D. If

⁴ *Id.*



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SpaceX cannot raise additional funds through such means in reliance on Regulation D, SpaceX's operations and prospects would be negatively affected.

SpaceX has almost exclusively relied on Regulation D for its financing activities to date. Since its formation in 2002, SpaceX has successfully raised more than \$2 billion in eleven separate Regulation D offerings, as indicated in Forms D filed with the Commission and available on EDGAR, with the most recent such offering effected in April 2018. In the future, SpaceX expects that it is likely it will require continued reliance on Regulation D to issue securities for financing and other strategic purposes. As SpaceX's needs and operational plans change quickly, the flexibility and expediency afforded by Regulation D, including the preemptive effects on state securities laws, is valuable in allowing SpaceX to obtain capital to quickly grow its business. Furthermore, the availability of a safe harbor from registration allows SpaceX to take quick and decisive action for the benefit of its shareholders.

Additionally, the Complaint does not allege that SpaceX, its officers or directors, or its shareholders received any benefit from the alleged misconduct described therein. Although Mr. Musk is a director, executive officer and the majority stockholder of SpaceX, declining to issue a waiver could harm innocent shareholders of SpaceX who did not benefit from the alleged misconduct, which is not consistent with the SEC's mission to protect shareholders.

CONCLUSION

For the reasons stated above, SpaceX respectfully requests that the Commission (or the Division of Corporation Finance pursuant to delegated authority) waive, effective as of the date of entry of the Musk Judgment, any disqualification under Regulation D with regard to SpaceX arising as a result of such entry.

Please contact the undersigned at (703) 456-8034 or Brian F. Leaf at (703) 456-8053 if you have any questions.

Please acknowledge receipt of this letter by file-stamping the enclosed copy of this letter and returning it to the undersigned in the envelope provided. If you have any questions or comments regarding the enclosed, please telephone me at the number listed above.

Sincerely,

COOLEY LLP

Darren K. DeStefano

cc: Michael Sagan, Space Exploration Technologies Corp.
Brian F. Leaf, Cooley LLP

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