



**IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE**

JEFFREY R. WIGGIN, derivatively on  
behalf of SOLARCITY CORPORATION,

Plaintiff,

ELON MUSK, LYNDON R. RIVE, PETER  
J. RIVE, JEFFREY B. STRAUBEL, JOHN  
H.N. FISHER, NANCY E. PFUND,  
ANTONIO J. GRACIAS, and DONALD R.  
KENDALL, JR.,

Defendants,

-and-

SOLARCITY CORPORATION, a Delaware  
corporation,

Nominal Defendant.

Civil Action No. \_\_\_\_\_

**VERIFIED SHAREHOLDER DERIVATIVE COMPLAINT  
FOR BREACH OF FIDUCIARY DUTY, WASTE OF  
CORPORATE ASSETS, AND UNJUST ENRICHMENT**

Plaintiff, Jeffrey R. Wiggin (“Plaintiff”), by his attorneys, submits this Verified Shareholder Derivative Complaint for Breach of Fiduciary Duty, Waste of Corporate Assets, and Unjust Enrichment against the defendants named herein.

**NATURE AND SUMMARY OF THE ACTION**

1. This is a shareholder derivative action brought by Plaintiff on behalf of nominal defendant SolarCity Corporation (“SolarCity” or the “Company”).

Plaintiff brings this action, *inter alia*, to halt defendants' illegal self-dealing and breaches of fiduciary duty.

2. In particular, SolarCity's Board of Directors (the "Board") has adopted a compensation plan which grossly overcompensates its non-employee members in relation to companies of comparable market capitalization and size and it fails to take into account of any relevant metrics, such as revenue and profit, in setting its compensation. The non-employee members of the Board stand to be paid far more than twice the compensation of their peers and thus the Board effected gross overcompensation of its members in relation to directors of companies of comparable market capitalization and size.

3. Plaintiff brings this action to recoup the excessive compensation the Director Defendants (as defined herein) awarded themselves and impose meaningful corporate governance reforms that will both restrict the Board's ability to award itself egregious compensation and to align elements of compensation, including stock option grants, with the success and long-term interests of the Company.

### **THE PARTIES**

4. Plaintiff was a shareholder of SolarCity during the time of the wrongdoing complained of, has continuously been a shareholder since that time, and is a current SolarCity shareholder. Plaintiff currently holds 40 shares.

5. Nominal Defendant SolarCity is a Delaware corporation with its corporate headquarters located at 3055 Clearview Way, San Mateo, California 94402. SolarCity is a renewable energy company. The Company offers residential, corporate and government customers solar energy systems for purchase or to purchase the energy that its solar energy systems produce through various contractual arrangements, and it offers other services and products, such as energy storage systems. The Company was founded in 2006 and its initial public offering took place in December 2012.

6. Defendant Elon Musk (“Musk”) has served as the Chairman of the Board since July 2006.

7. Defendant Lyndon R. Rive (“L.R. Rive”) is one of the Company’s founders. He has served as its Chief Executive Officer and has been a member of the Board since July 2006.

8. Defendant Peter J. Rive (“P.J. Rive”) is one of the Company’s founders. He has served as its Chief Technology Officer and has been a member of the Board since July 2006.<sup>1</sup>

9. Defendant Jeffrey B. Straubel (“Straubel”) has served as a director since August 2006.

10. Defendant John H. N. Fisher (“Fisher”) has served as a director since

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<sup>1</sup> Defendants L.R. Rive and P.J. Rive are brothers and each is a cousin of defendant Musk.

August 2007. Fisher is a member of the Audit Committee and of the Nominating and Corporate Governance Committee and serves as Chair of the Compensation Committee.

11. Defendant Nancy E. Pfund (“Pfund”) has served as a director since August 2007. Pfund is a member of the Audit Committee and of the Compensation Committee and serves as Chair of the Nominating and Corporate Governance Committee.

12. Defendant Antonio J. Gracias (“Gracias”) has served as a director since February 2012.

13. Defendant Donald R. Kendall, Jr. (“Kendall”) has served as a director since September 2012. Kendall serves as Chair of the Audit Committee.

14. The defendants identified herein are referred to collectively as the “Director Defendants.”

### **THE BOARD AWARDS ITSELF EXCESSIVE COMPENSATION**

15. The Director Defendants grant themselves excessive compensation in breach of their fiduciary duties. Effective June 2015, the Board pays its non-employee members who serve a full term on average approximately \$463,778 per director per year. This level of compensation significantly exceeds the median total director compensation for 2014 of \$281,667 for a Fortune 50 company,<sup>2</sup> of

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<sup>2</sup> See Meridian Compensation Partners, LLC press release, May 29, 2015.

\$255,011 for an S&P 500 company,<sup>3</sup> and the median total director compensation for 2014 of \$250,000 for a sample of large cap companies.<sup>4</sup>

16. SolarCity, however, is *not* a Fortune 50 company nor an S&P 500 constituent. In fact, SolarCity is a current constituent of the Russell Midcap Index and the Russell Small Cap Completeness Index.<sup>5</sup>

17. Notwithstanding, SolarCity's average total director compensation greatly exceeds the median total director compensation of \$189,500 for 2014 for a sample of companies with a market capitalization of between \$1 billion and \$5 billion.<sup>6</sup> As such, the non-employee Director Defendants' compensation is unwarranted and grossly excessive in comparison to other companies of similar size.

18. In SolarCity's Schedule 14A, filed April 21, 2015, with the United States Securities and Exchange Commission (the "Schedule 14A"), it was revealed that the Company had adopted a revised director compensation plan (the "Compensation Plan") to be effective, automatically and without any further

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<sup>3</sup> See Spencer Stuart's Board Index 2014. The average (rather than median) total compensation of S&P 500 directors for 2014 was \$263,748.

<sup>4</sup> See Frederic W. Cook & Co., Inc.'s 2014 Director Compensation Report.

<sup>5</sup> The Russell Midcap Index is a U.S. equity index produced annually by Frank Russell Company trading as Russell Investments.

<sup>6</sup> See n.4.

approval by shareholders, as of the date of the upcoming annual shareholder meeting, *i.e.*, June 2, 2015. The Compensation Plan appears to be a revision of the director compensation plan which was implemented in September 2012 (the “2012 Plan”).

19. Under the 2012 Plan, which also was not approved by shareholders, non-employee directors received equity awards and annual cash retainers. Each individual who joined the Board as a non-employee director received an initial stock option grant to purchase 30,000 shares at the time of initial election or appointment and additional triennial option grants for the purchase of 15,000 shares, as well as an annual cash retainer of \$15,000, subject to continued service on the Board. A stock option granted vested as to 1/4th of the shares on the first anniversary of the grant and 1/48th of the total shares subject to the stock option vested and would become exercisable each month thereafter until the stock option would be fully vested on the fourth anniversary of the grant. Director Defendant Kendall was one of the recipients of initial stock option grants to purchase 30,000 shares upon joining the Board.<sup>7</sup>

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<sup>7</sup> Additional recipients included Bennet Van De Bunt (“Van De Bunt”), who served as a member of the Board from November 2013 until his resignation in July 2015, and Jonathan K. Shulkin (“Shulkin”), who served as a member of the Board from March 2014 until June 2015. Shulkin had indicated his intention not to seek re-election to the Board at this year’s Annual Meeting. As a result, 21,250 shares subject to the stock option were to be cancelled and returned to the Company’s equity incentive plan, and 8,750 shares subject to the stock option would remain

20. Under the Compensation Plan, upon initial election or appointment, non-employee directors will be awarded a non-statutory stock option award to purchase 33,333 shares, vesting monthly over four years, with a one-year cliff. In addition, all non-employee directors will participate in the Compensation Plan whereby they will be awarded with a non-statutory stock option award to purchase 30,000 shares and an annual cash retainer in the amount of \$20,000, paid quarterly. The stock option award vests monthly over three years, and is refreshed by additional awards on the same terms after an earlier award is fully vested.

21. Non-employee directors who serve on committees of the Board receive additional equity awards and cash retainers as follows:

(a) Audit Committee chair (Director Defendant Kendall) and members (Director Defendants Fisher and Pfund) received and are being paid 10,000 shares and \$15,000, and 3,500 shares and \$5,000, respectively;

(b) Compensation Committee chair (Director Defendant Fisher) and member (Director Defendant Pfund) received and are being paid 5,000 shares and \$5,000, and 3,000 shares and \$3,000, respectively; and,

(c) Nominating and Corporate Governance Committee chair (Director Defendant Pfund) and member (Director Defendant Fisher) received and are being paid 3,000 shares and \$3,000, and 1,000 shares and \$1,000,

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available for exercise.

respectively.<sup>8</sup>

22. As with the initial stock option award, each share award vests monthly over three years, refreshed by additional awards on the same terms after an earlier award is fully vested. Annual cash retainers are paid quarterly.

23. The Compensation Plan in its current form will cause, or has caused, the Company to incur an accounting cost for these equity awards of approximately \$9.2 million and, from the effective date, result in the non-employee directors being compensated at an extraordinarily high level – averaging approximately \$463,778 each, for *every year* over the next *three years*.

24. The two figures indicated above (¶23) are based on the fair value of the stock options to-be granted to purchase an aggregate 242,000 shares on the grant date of June 2, 2015. The “fair value” is determined using the Black-Scholes option valuation model and applying the straight-line method of expense attribution (notably, using the identical assumptions the Company used for its estimates of the fair values of stock options granted in 2014).<sup>9</sup>

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<sup>8</sup> Following Van De Bunt’s resignation, the Nominating and Corporate Governance Committee of the Board recommended that defendant Kendall be appointed to the Compensation Committee of the Board. Van De Bunt was at the time of his resignation a member of the Compensation Committee. It was anticipated that the Board will act upon the recommendation of the Nominating Committee at the next Board meeting.

<sup>9</sup> Assumptions consist of: (a) estimation of the fair value of the stock options to-be granted to purchase an aggregate 242,000 shares on the grant date of June 2,

25. The compensation that the non-employee directors have been awarded and will intend to continue to be awarding themselves under the Compensation Plan they adopted greatly exceeds that of the Company's peers, standing at a level well more than twice that which is appropriate, as of this year and for years to come.

26. The regulatory filing detailing the Compensation Plan offers neither an explanation nor a justification for the revised Board compensation.

27. Under the Compensation Plan, as adopted by the Board directors and presently effective *without having been approved by shareholders*, the Defendant Directors were and will be granted share awards automatically and without any consideration and each such were and are unjustified and wholly inappropriate.

28. The Board's present level of compensation is and will be harmful to both the Company and its shareholders as it wastes valuable and limited corporate

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2015; (b) using the Black-Scholes option valuation model and applying the straight-line method of expense attribution, with the same assumptions the Company used for its estimates of the fair values of stock options granted in 2014; (c) assuming the Board will consist entirely of the seven non-employee directors, consisting of, as there were on the date of the 2015 Annual Meeting, four continuing directors and three nominees (who have been re-elected to the Board on that date), for the full period from the effective date of the Compensation Plan until the aggregate awards are fully vested on the three-year anniversary of the effective date of the Compensation Plan, notwithstanding any number of directors on the Board who are employed by the Company; (d) that each non-employee director will serve on the same committees throughout that period; and, (e) inclusion of annual cash retainers, where appropriate.

assets. Since 2012, the Company has accumulated more than \$200 million in negative net income. Analysts expect the losses to continue, this year and in 2016.<sup>10</sup> The Compensation Plan lacks any modicum of alignment with the long-term interests of the Company.

### **DERIVATIVE AND DEMAND REFUSED ALLEGATIONS**

29. Plaintiff brings this action derivatively in the right and for the benefit of SolarCity to redress injuries suffered, and to be suffered, by the Company as a direct result of breaches of fiduciary duty, waste of corporate assets, and unjust enrichment, as well as the aiding and abetting thereof, by the Director Defendants.

30. SolarCity is named as a nominal defendant solely in a derivative capacity. This is not a collusive action to confer jurisdiction on this Court that it would not otherwise have.

31. Plaintiff will adequately and fairly represent the interests of SolarCity in enforcing and prosecuting its rights.

32. Plaintiff was a shareholder of SolarCity at the time of the wrongdoing complained of, has continuously been a shareholder since that time, and is a current SolarCity shareholder.

33. The current Board of SolarCity consists of the following eight individuals: Director Defendants Musk, L.R. Rive, P.J. Rive, Straubel, Fisher,

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<sup>10</sup> See SolarCity's Financials, Thomson Reuters' Reuters.com Markets.

Pfund, Gracias, and Kendall.

34. Plaintiff had made a demand on the present Board to institute this action which has been constructively denied.

35. On May 26, 2015, following the filing of the Schedule 14A and in advance of the Company's June 2, 2015 Annual Meeting, Plaintiff, by his attorneys, made a demand on the Board concerning the Compensation Plan, that the Board, within 30 days of the demand, take action or will take action regarding the excessive levels of compensation the non-employee directors had agreed to award themselves.

36. On June 30, 2015, 35 days after the demand was made, SolarCity responded in writing, confirming receipt of the demand and that "[t]his [letter] is to inform you that SolarCity is reviewing the issues your letter addresses, and preparing a response. Once we have finalized our response, we will promptly communicate it to you. We anticipate responding to you by the end of July."

37. As of the date of submission of this Verified Shareholder Derivative Complaint for Breach of Fiduciary Duty, Waste of Corporate Assets, and Unjust Enrichment, Plaintiff has received no further communication from the Company since its correspondence on June 30, 2015. Indeed, more than three months have passed since Plaintiff made his demand to which Plaintiff has received no substantive response at all.

38. The Company's constructive and wrongful refusal of demand is not unexpected. In fact, based on the within allegations, it is reasonable to conclude that each of the Director Defendants lack disinterest and independence and/or that the challenged compensation awards are not the product of a valid exercise of business judgment. Accordingly, even in the absence of demand, the effort can be deemed futile based upon, *inter alia*:

(a) the Board has ignored demand and/or has been unreasonably dilatory in responding to demand;

(b) the non-employee Director Defendants stand on both sides of the challenged compensation awards having approved the compensation and being past and/or future beneficiaries of the challenged compensation;

(c) all six non-employee Director Defendants received and/or stand to receive the challenged compensation, and thus derived and/or stand to derive substantial personal financial benefit from the transactions at issue; and

(d) each of the Director Defendants has wasted the Company's assets by accepting (or agreeing to accept) the improper compensation detailed herein as no disinterested director would take advantage of the opportunity to award compensation far beyond the Company's peers and in utter disregard of the Company's financial performance and market value.

39. The Director Defendants lack disinterest and, having the burden of

proving the entire fairness of their compensation, there is more than a reasonable doubt that the Board could impartially consider a demand on themselves.

40. Accordingly, even if demand was not already deemed refused and/or futile by the Board's lack of response and the unreasonable delay since demand was made, demand would have been excused in light of the Director Defendants' conflicts of interest, cause of waste, and manifest lack of independence.

### **FIRST CAUSE OF ACTION**

#### **Against the Director Defendants for Breach of Fiduciary Duty of Loyalty**

41. Plaintiff incorporates by reference and realleges each and every allegation contained above, as though fully set forth herein.

42. The Director Defendants, and each of them, violated their fiduciary duty of loyalty by awarding or receiving excessive and improper compensation at the expense of the Company.

43. As a direct and proximate result of the Director Defendants' breaches of their fiduciary obligations, SolarCity has sustained and will continue to sustain significant damages, as alleged herein.

44. As a result of the misconduct alleged herein, these defendants are liable to the Company.

45. Plaintiff, on behalf of SolarCity, has no adequate remedy at law.

## **SECOND CAUSE OF ACTION**

### **Against the Director Defendants for Breach of Fiduciary Duty of Good Faith**

46. Plaintiff incorporates by reference and realleges each and every allegation contained above, as though fully set forth herein.

47. The Director Defendants have improperly and in bath faith refused to consider the demand Plaintiff made and thus, by their wrongful acts and omissions, determined that no pursuit of the demanded actions has been or will be taken, in breach of their fiduciary duty of good faith owed to SolarCity.

48. As a direct and proximate result of the Director Defendants' breaches of their fiduciary obligations, SolarCity has sustained and will continue to sustain significant damages, as alleged herein.

49. As a result of the misconduct alleged herein, these defendants are liable to the Company.

50. Plaintiff, on behalf of SolarCity, has no adequate remedy at law.

## **THIRD CAUSE OF ACTION**

### **Against the Director Defendants for Waste of Corporate Assets**

51. Plaintiff incorporates by reference and realleges each and every allegation contained above, as though fully set forth herein.

52. As a result of the Director Defendants' self-dealing, the Company has wasted its valuable assets by paying the Director Defendants excessive

compensation.

53. As a result of the waste of corporate assets, the Director Defendants are liable to the Company.

54. Plaintiff, on behalf of SolarCity, has no adequate remedy at law.

#### **FOURTH CAUSE OF ACTION**

##### **Against the Director Defendants for Unjust Enrichment**

55. Plaintiff incorporates by reference and realleges each and every allegation contained above, as though fully set forth herein.

56. By their wrongful acts and omissions, the Director Defendants were unjustly enriched at the expense of and to the detriment of SolarCity. The Director Defendants were unjustly enriched or stand to be unjustly enriched as a result of the compensation they received or stand to receive while breaching fiduciary duties owed to SolarCity.

57. Plaintiff, as a shareholder and representative of SolarCity, seeks restitution from these defendants, and each of them, and seeks an order of this Court disgorging all profits, benefits, and other compensation obtained by these defendants, and each of them, from their wrongful conduct and fiduciary breaches.

58. Plaintiff, on behalf of SolarCity, has no adequate remedy at law.

## **PRAYER FOR RELIEF**

WHEREFORE, Plaintiff, on behalf of SolarCity, demands judgment as follows:

A. Against all of the Director Defendants and in favor of the Company for the amount of damages sustained by the Company as a result of the Director Defendants' breaches of fiduciary duties, waste of corporate assets, and unjust enrichment;

B. Directing SolarCity to take all necessary actions to reform and improve its corporate governance and internal procedures to comply with applicable laws and to protect SolarCity and its shareholders from a repeat of the damaging events described herein. In particular, the Board must take all necessary steps to bring its non-employee director compensation in line with that of the Company's peers using reasonable and accepted metrics as well as market and performance considerations and enumerate into account an appropriate sample of companies for purposes of its own compensation and enumerate the Company's objectives and market conditions it incorporates into its compensation plan and then present the same such changes to the shareholders for a vote;

C. Extraordinary equitable and injunctive relief as permitted by law, equity, and state statutory provisions sued hereunder, including attaching, impounding or otherwise restricting the proceeds of defendants' trading activities

or their other assets so as to assure that Plaintiff on behalf of SolarCity has an effective remedy;

D. Awarding to SolarCity restitution from Director Defendants, and each of them, and ordering disgorgement of all profits, benefits, and other compensation obtained by the Director Defendants;

E. Awarding to Plaintiff the costs and disbursements of the action, including reasonable attorneys' fees, accountants' and experts' fees, costs, and expenses; and

F. Granting such other and further relief as the Court deems just and proper.

Dated: September 18, 2015

**RIGRODSKY & LONG, P.A.**

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