

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

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

THOMAS LAMONTAGNE,
Plaintiff,
v.
TESLA, INC., et al.,
Defendants.

Case No. [23-cv-00869-AMO](#)

**ORDER GRANTING MOTION TO
DISMISS**

Re: Dkt. No. 62

This is a securities action case about Tesla's self-driving car technology. The matter is fully briefed and suitable for decision without oral argument. *See Civil L.R. 7-1(b).* Having read the parties' papers and carefully considered their arguments and the relevant legal authority, the Court hereby **GRANTS** the motion to dismiss for the following reasons.

BACKGROUND¹

Lead Plaintiffs Oakland County Voluntary Employees' Beneficiary Association and Oakland County Employees' Retirement System (collectively, "Plaintiffs") bring a putative class action alleging Private Securities Litigation Act ("PSLRA") violations by Tesla, Inc., and Elon Musk (collectively, "Defendants"). ECF 57 (First Amended Complaint or "FAC"). They assert that Defendants made 29 false or misleading statements about the development timeline of its autonomous driving technology, the safety of the technology, and its capabilities.

By the start of the Class Period (February 19, 2019 to February 16, 2023), Tesla included a

¹ The Court accepts Plaintiffs' allegations in the complaint as true and construes the pleadings in the light most favorable to Plaintiffs. *See Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008) (citation omitted).

1 software package in its vehicles called “Autopilot,” which it described as providing substantial
2 self-driving capabilities, including providing “highway autonomy.” FAC ¶ 63. Musk described
3 Autopilot as being safer than human driving. FAC ¶ 63. Tesla also sold a software upgrade called
4 “Full Self Driving” or “FSD” which enhanced the self-driving capabilities of the car. FAC ¶ 64.
5 As part of the FSD software upgrade, Tesla offered a feature called “Smart Summon” which
6 permitted users to direct the car to drive itself to them across very short distances. FAC ¶ 66.
7 Tesla’s software required drivers to occasionally touch the steering wheel, which Musk described
8 as a mere technicality. FAC ¶ 67.

9 Defendants asserted that Tesla would run a network of “robotaxis” that would allow
10 drivers to use a phone application (similar to Uber) to enable third parties to summon their car and
11 drive them to a destination, allowing drivers to receive passive income while they were not
12 personally using their car. FAC ¶ 75. Tesla equated robotaxis with Level 4-5 autonomy,
13 describing them as “FSD without supervision.” FAC ¶ 76.²

14 During the Class Period, Defendants represented that Tesla was very close to releasing safe
15 and functional Level 4-5 self-driving technology that would drive safer than humans (e.g., Tesla
16 will be “feature complete – full self-driving – this year”). FAC ¶¶ 82-83. However, Tesla’s
17 system is currently unsafe for use without human supervision, and its technology is not yet better
18 than humans. FAC ¶¶ 186, 188. Further, the National Transportation Safety Board has criticized
19 Tesla for its dangerous marketing which encourages drivers to not pay as close attention as is
20 necessary for the technology. FAC ¶¶ 190-91. Reports have found that Tesla’s autonomous
21 driving technology has led to “far more” crashes than previously reported. FAC ¶¶ 204-05. The
22 Full Self-Driving software has critical safety defects (e.g., it ignores “Do Not Enter” signs, speeds
23 in school zones, runs over children crossing the road, swerves into oncoming traffic).

24

25 ² The Society for Automotive Engineers has established five levels of vehicle autonomy.
26 FAC ¶ 61. Levels 1-2 refer to systems where a human is driving the vehicle but technology can
27 assist with certain aspects; Level 3 refers to systems where a human can sometimes hand over
28 control of driving tasks but must always be ready to “intervene”; Levels 4-5 refer to systems
where the human is not responsible for driving the car while systems are engaged, with Level 4
only providing the functionality in limited conditions (e.g., restricted geographical location or
specific conditions such as not during rain). FAC ¶ 61.

1 FAC ¶¶ 208-09. Tesla does not report the number of “disengagements” (i.e., human interventions)
2 needed while its vehicles operate. FAC ¶ 211. The self-reported data from Tesla users shows that
3 there is a disengagement of the Tesla’s autonomous driving technology once every 16 miles,
4 which is worse than its competitors in the autonomous driving market (1,000 times worse than
5 Waymo and 5,800 times worse than Cruise). FAC ¶ 212.

6 Throughout the Class Period, Tesla continuously assured investors that it was certain to
7 release full self-driving technology at Level 4-5 autonomy very soon, including by the end of
8 2020. FAC ¶ 220. When suit was filed, over 3 years and 8 months had passed since the 2020
9 deadline and Tesla had not yet released even a Level 3 autonomous driving system. FAC ¶ 221.

10 Plaintiffs bring three causes of action: (1) violation of Section 10(b) of the Securities and
11 Exchange Act and Rule 10b-5(b) against Tesla and Musk; (2) violation of Section 10(b) of the
12 Securities and Exchange Act and Rule 10b-5(a) and (c) against Tesla and Musk; and (3) Violation
13 of Section 20(a) of the Securities and Exchange Act against Musk. Defendants move to dismiss
14 the First Amended Complaint in its entirety. FAC ¶¶ 467-474, 475-483, 484-490.

15 **LEGAL STANDARD**

16 Federal Rule of Civil Procedure 8(a) requires that a complaint contain “a short and plain
17 statement of the claim showing that the pleader is entitled to relief.” A defendant may move to
18 dismiss a complaint for failing to state a claim upon which relief can be granted under Federal
19 Rule of Civil Procedure 12(b)(6). “Dismissal under Rule 12(b)(6) is appropriate only where the
20 complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory.”
21 *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). To survive a Rule
22 12(b)(6) motion, a plaintiff must plead “enough facts to state a claim to relief that is plausible on
23 its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible
24 when a plaintiff pleads “factual content that allows the court to draw the reasonable inference that
25 the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

26 In reviewing the plausibility of a complaint, courts “accept factual allegations in the
27 complaint as true and construe the pleadings in the light most favorable to the nonmoving party.”
28 *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). Nonetheless,

1 Courts do not “accept as true allegations that are merely conclusory, unwarranted deductions of
2 fact, or unreasonable inferences.” *In re Gilead Scis. Secs. Litig.*, 536 F.3d 1049, 1055 (9th Cir.
3 2008).

4 Securities fraud cases have heightened pleading requirements as the complaint must satisfy
5 both the pleading requirements of Federal Rule of Civil Procedure 9(b) and the PSLRA. *In re*
6 *VeriFone Holdings, Inc. Sec. Litig.*, 704 F.3d 694, 701 (9th Cir. 2012). Pursuant to Rule 9(b),
7 claims alleging fraud must “state with particularity the circumstances constituting fraud...” Fed.
8 R. Civ. P. 9(b). The PSLRA mandates that “the complaint shall specify each statement alleged to
9 have been misleading, [and] the reason or reasons why the statement is misleading...[.]” 15
10 U.S.C. § 78u-4(b)(1)(B). The PSLRA further requires that the complaint “state with particularity
11 facts giving rise to a strong inference that the defendant acted with the required state of
12 mind.” *Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 314 (2007) (quoting
13 15 U.S.C. § 78u-4(b)(2)(A)). This means a plaintiff must allege that “the defendant[] made false
14 or misleading statements either intentionally or with deliberate recklessness.” *In re VeriFone*
15 *Holdings*, 704 F.3d at 701 (quoting *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 991
16 (9th Cir. 2009)).

17 DISCUSSION

18 I. REQUEST FOR JUDICIAL NOTICE

19 While the scope of review on a motion to dismiss is generally limited to the contents of the
20 complaint, courts may take judicial notice of facts that are “not subject to reasonable dispute.”
21 Fed. R. Evid. 201(b). Courts may consider documents incorporated into the complaint by
22 reference, *Tellabs*, 551 U.S. at 322, and take judicial notice of matters of public record, *Lee v. City*
23 *of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001), and publicly available financial documents
24 such as SEC filings, *Metzler Inv. GMBH v. Corinthian Colls., Inc.*, 540 F.3d 1049, 1064 n.7 (9th
25 Cir. 2008). Courts may not assume the truth of an incorporated document “if such assumptions
26 only serve to dispute facts in a well-pleaded complaint.” *Khoja v. Orexigen Therapeutics, Inc.*,
27 899 F.3d 988, 1003 (9th Cir. 2018).

28 Defendants seek judicial notice of 20 exhibits (Exs. A-T). ECF 63 (“RJN”). Defendants

1 assert that Exhibits A through H and J through T³ are incorporated by reference. *Id.* at 2; *see*
2 *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006). Plaintiffs' FAC is premised on earnings call
3 transcripts (Ex. C, H, J-S), *see* FAC ¶¶ 321, 329, 333, 347; and Tesla's Forms 10-K (Exs. B, D-G),
4 *see* FAC ¶¶ 372-75. The FAC also relies on a Southern District of New York order (Ex. T) that
5 purportedly enjoins Tesla from invoking the PSLRA safe harbor, *see* FAC ¶ 459, and references
6 Tesla's website and its disclosures (Ex. A), *see* FAC ¶ 187. Because the FAC alleges
7 misstatements based on Tesla's website and the Southern District of New York order, they are
8 incorporated by reference despite not being attached to the complaint. *See U.S. v. Ritchie*, 342
9 F.3d 903, 908 (9th Cir. 2003) ("Even if a document is not attached to a complaint, it may be
10 incorporated by reference into a complaint if the plaintiff refers extensively to the document or the
11 document forms the basis of the plaintiff's claim.").

12 The Court also takes judicial notice of the contents of Exhibits B and D through G as they
13 are Forms 10-K filed with the SEC. *See In re Yahoo! Inc. Customer Data Sec. Breach Litig.*, 2017
14 WL 3727318, at *10 (N.D. Cal. Aug. 30, 2017) (holding that SEC filings referenced in the
15 complaint "are proper subjects of judicial notice"). The Court takes judicial notice of Exhibits C,
16 H, and J through S as they are earnings call transcripts. *See Sneed v. AcelRx Pharm., Inc.*, 2022
17 WL 4544721, at *3 (N.D. Cal. Sept. 28, 2022) (finding "transcripts of earnings calls . . . are proper
18 subjects of judicial notice"). The Court further takes judicial notice of Exhibit I, which reflects
19 Tesla's stock price on the first and last days of the Class Period. *See, e.g., Metzler*, 540 F.3d at
20 1064 n.7 (holding that district court properly took notice of stock price). Exhibit A, which is an
21 excerpt of content from Tesla's website as displayed during the Class Period, is the proper subject
22 of judicial notice. *See Threshold Enterprises Ltd. v. Pressed Juicery, Inc.*, 445 F. Supp. 3d 139,

23
24 ³ Ex. A (Tesla Autopilot Support Page); Ex. B (Tesla 2019 Form 10-K); Ex. C (Oct. 21, 2020
25 Earnings Call Transcript); Ex. D (Tesla 2018 Form 10-K); Ex. E (Tesla 2020 Form 10-K); Ex. F
26 (Tesla 2021 Form 10-K); Ex. G (Tesla 2022 Form 10-K); Ex. H (Apr. 20, 2022 Earnings Call
27 Transcript); Ex. J (Apr. 24, 2019 Earnings Call Transcript); Ex. K (Jul. 24, 2019 Earnings Call
28 Transcript); Ex. L (Oct. 23, 2019 Earnings Call Transcript); Ex. M (Apr. 29, 2020 Earnings Call
Transcript); Ex. N (Jul. 22, 2020 Earnings Call Transcript); Ex. O (Jan. 27, 2021 Earnings Call
Transcript); Ex. P (Jan. 26, 2022 Earnings Call Transcript); Ex. Q (Oct. 19, 2022 Earnings Call
Transcript); Ex. R (Jan 29, 2020 Earnings Call Transcript); Ex. S (Apr. 26, 2021 Earnings Call
Transcript); Ex. T (Oct. 16, 2018 Tesla Order).

1 146 (N.D. Cal. 2020) (finding that “websites and their contents may be judicially noticed”).
2 Finally, the Court takes judicial notice of Exhibit T, the Southern District of New York order, as
3 the Court may take judicial notice of court filings, *see Reyn’s Pasta Bella, LLC v. Visa USA, Inc.*,
4 442 F.3d 741, 746 n.6 (9th Cir. 2006).⁴

5 **II. SECTION 10(B) CLAIM**

6 Section 10(b) of the Securities Exchange Act makes it unlawful for any person to “use or
7 employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive
8 device or contrivance in contravention of such rules and regulations as the Commission may
9 prescribe as necessary or appropriate in the public interest or for the protection of
10 investors.” 15 U.S.C. § 78j(b). To state a claim under section 10(b) and Rule 10b-5, a plaintiff
11 must show: “(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a
12 connection between the misrepresentation or omission and the purchase or sale of a security; (4)
13 reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation.”

14 *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 267 (2014) (citations omitted); *see In*
15 *re NVIDIA Corp. Sec. Litig.*, 768 F.3d 1046, 1051-52 (9th Cir. 2014). “Rule 9(b) applies to all
16 elements of a securities fraud action, including loss causation.” *Oregon Pub. Emps. Ret. Fund v.*
17 *Apollo Grp. Inc.*, 774 F.3d 598, 605 (9th Cir. 2014). “Even where a plaintiff has properly pleaded
18 all six elements of a Section 10(b) violation, the allegedly false or misleading statement may still
19 be shielded from liability by the ‘safe harbor’ provision of the PSLRA.” *In re Quality Sys., Inc.*
20 *Sec. Litig.*, 865 F.3d 1130, 1141 (9th Cir. 2017).

21 Plaintiffs allege that Elon Musk and Tesla made 29 false and misleading statements in
22 violation of Section 10(b) of the Exchange Act and Rule 10b-5(b). Defendants move to dismiss
23 the FAC in its entirety. They argue that the statements are not actionable because (1) they are
24 forward-looking statements protected by the PSLRA safe harbor; and (2) they are statements of
25 corporate puffery; and (3) Plaintiffs have not adequately pleaded facts to support the elements of a

26
27
28

⁴ Plaintiffs do not object to the Court taking judicial notice of each of these documents.

1 Section 10(b) claim.⁵ As statements protected under the safe harbor are nonactionable, the Court
2 considers that argument first. *See, e.g., Weston v. DocuSign, Inc.*, 669 F. Supp. 3d 849, 873 (N.D.
3 Cal. 2023) (“*DocuSign*”) (considering safe harbor before addressing whether statements are
4 otherwise actionable). Similarly, the Court considers whether the statements are corporate puffery
5 before considering whether the claims are sufficiently pled.

6 **A. PSLRA Safe Harbor**

7 The PSLRA “safe harbor” rule protects certain “forward-looking” statements from
8 liability. 15 U.S.C. § 78u-5(c). The safe-harbor provision is “designed to protect companies and
9 their officials when they merely fall short of their optimistic projections.” *Wochos v. Tesla, Inc.*,
10 985 F.3d 1180, 1189 (9th Cir. 2021) (citation and quotations omitted). Plaintiffs argue that Tesla
11 is statutorily prohibited from invoking the safe harbor doctrine. The Court addresses this
12 argument before turning to the elements of the PSLRA safe harbor.

13 **1. Statutory Exclusion from Safe Harbor**

14 The PSLRA Safe Harbor does not protect statements made by an issuer of securities within
15 three years after it has been the subject of an order barring future violations of an antifraud
16 provision of the securities laws. 15 U.S.C. § 78u-5(b). Plaintiffs argue that this exclusion applies
17 to Tesla because a settlement in an SEC action bars Tesla from violating Rule 13a-15. ECF 66
18 (“Opp.”) at 21 (citing FAC ¶¶ 457, 459); *United States Securities & Exchange Commission v.*
19 *Tesla, Inc.*, 1:18-cv-8947-LJL (S.D.N.Y Oct. 16, 2018), ECF No. 14.⁶ Plaintiffs contend that Rule
20 13a-15 is an antifraud provision within the meaning of Section 15 U.S.C. § 78u-5(b), as it is aimed
21 at preventing fraud. Opp. at 21. Defendants dispute that Rule 13a-15 is an antifraud provision, as
22 it is a controls and procedures provision and does not contain a scienter requirement. Mot. at 14
23 (citing *Carvelli v. Ocwen Fin. Corp.*, 934 F.3d 1307, 1325 (11th Cir. 2019) (holding that Rule
24 12b-20 is not an “antifraud provision” because, among other reasons, it does not contain a scienter

25 _____
26 ⁵ In the motion, Defendants categorize the statements into three types: Timeline, Safety, and
27 Capability. Because Plaintiffs adopt this categorization in their response, the Court does as well.
28

⁶ Plaintiffs do not dispute that the Musk can avail himself of safe harbor as he is not an “issuer” of
a security. *See* Opp. at 21-22.

1 requirement, and fraud provisions by their nature involve intentional wrongdoing). Plaintiffs
2 provide no caselaw of any kind considering whether Rule 13a-15 is an antifraud provision. The
3 Court therefore examines the rule and the conduct it regulates.

4 Rule 13a-15 dictates that issuers of securities must maintain “disclosure controls and
5 procedures” and evaluate their effectiveness every fiscal quarter. 17 C.F.R. § 240.13a-15(a)-(b).
6 The Rule defines “disclosure controls and procedures” to mean controls and procedures “designed
7 to ensure that information required to be disclosed by the issuer . . . is recorded, processed,
8 summarized and reported” in a timely manner. *Id.* § 240.13a-15(e). The issuer must also evaluate
9 “internal control over financial reporting” every fiscal year, which requires the issuer to provide
10 “reasonable assurance regarding the reliability of financial reporting and the preparation of
11 financial statements[.]” *Id.* §§ 240.13a-15(c)-(d), (f). The Court does not read this rule to be an
12 antifraud provision as fraud involves intentional wrongdoing. *See* Prosser & Keeton on Torts 728
13 (5th ed. 1984) (“[Fraud] entail[s] [a]n intention to induce the [victim] to act or to refrain from
14 action in reliance on the misrepresentation.”). In promulgating Rule 13a-15, the SEC did not
15 discuss any fraud or state of mind requirements for the rule. It explained that “[p]roposed Rule
16 13a-15 would require a company to maintain sufficient procedures to collect, process and disclose
17 the information required in its periodic and current reports filed with the Commission.” *In Re*
18 *Certification of Disclosure in Companies’ Q. & Ann. Reps.*, SEC Release No. 46079 (June 14,
19 2002); *see also S.E.C. v. Goldfield Deep Mines Co. of Nevada*, 758 F.2d 459, 462 (9th Cir. 1985)
20 (differentiating between “registration provisions of the Exchange Act,” including Sections 12(g),
21 13(b)(2), and Rule 12b-20, recordkeeping provisions of the Securities Act, such as Section
22 13(b)(2) and “antifraud provisions of the Securities Act, § 17(a), § 10(b)”).⁷ Rule 13a-15 does not
23 make any reference to the speaker’s state of mind. Therefore, the Court cannot find that Rule 13a-
24 15 is an antifraud provision and Plaintiffs have not shown that Tesla is prohibited from availing
25
26

27 ⁷ Plaintiffs argue that Rule 13a-15 was implemented pursuant to “existing antifraud” rules such as
28 Section 10(b). Opp. at 19 (quoting SEC Release No. 46079, at *2). However, this misquotes the
SEC Release, which refers broadly to “existing antifraud and disclosure rules.” SEC Release No.
46079, at *2.

1 itself of the PSLRA safe harbor. The Court thus turns to whether the safe harbor applies to the
2 challenged statements.

3 **2. Forward-Looking Statements**

4 In determining whether the PSLRA safe harbor applies, the threshold question is whether
5 any of the statements at issue are forward-looking. Relevant here, the provision applies to (1)
6 forward-looking statements that are identified as such and are “accompanied by meaningful
7 cautionary statements identifying important factors that could cause actual results to differ
8 materially,” or (2) forward-looking statements that were not made with “actual knowledge” by the
9 speaker “that the statement was false or misleading.” 15 U.S.C. § 78u-5(c); *see Weston Fam.
P'ship LLLP v. Twitter, Inc.*, 29 F.4th 611, 620 (9th Cir. 2022). The statute defines forward-
10 looking statements as “any statement regarding (1) financial projections, (2) plans and objectives
11 of management for future operations, (3) future economic performance, or (4) the assumptions
12 ‘underlying or related to’ any of these issues.” *No. 84 Emp.-Teamster Joint Council Pension Tr.
Fund v. Am. W. Holding Corp.*, 320 F.3d 920, 936 (9th Cir. 2003) (citing 15 U.S.C. § 78u-5(i)).
13 “Whether a statement is forward-looking and protected by the PSLRA’s safe harbor ‘turns on
14 particular language’ and therefore requires an individualized analysis of each statement.”
15 *DocuSign*, 669 F. Supp. 3d at 874 (citation omitted).

16 Defendants argue that 18 Timeline Statements⁸ expressing predictions for when Tesla’s
17 “Full Self Driving Capability” or “FSDC” would reach certain benchmarks are forward looking
18 statements protected by the PSLRA safe harbor. Mot. at 12-13; *see, e.g.*, FAC ¶¶ 313-14
19 (predicting “feature complete for full self-driving” this year); FAC ¶ 327 (“we expect to be feature
20 complete with autonomy by the end of this year . . . I think probably sometime next year, you’ll be
21 able to have the car be autonomous without supervision”); FAC ¶ 331 (Tesla “appears to be on
22 track” for fully functional FSD by the end of the year); FAC ¶¶ 343, 349, 351, 357 (expressing
23
24
25
26

27 ⁸ Statements 1-3, 5-6, 8-12, 14-16, 18-20, 23, 29. *See* FAC ¶¶ 313, 315, 317, 321, 323, 327, 329,
28 331, 333, 335, 339, 341, 343, 347, 349, 351, 357, 369. The Court refers to the statement numbers
in Plaintiffs’ Appendix A at ECF 66-1.

1 confidence that Tesla will achieve full autonomy the following year).

2 Plaintiffs contend that the Timeline Statements are not forward-looking because they omit
3 present facts rendering them misleading. Opp. at 19. For example, Plaintiffs argue that Musk's
4 statements that "I think we will be feature complete full self driving this year" and "I would say
5 that I'm certain of that. That is not a question mark" (FAC ¶ 314) are misleading "by omitting that
6 Tesla was nowhere near releasing Level 4-5 ADT and not even intending to develop that
7 technology over the near term." *Id.* However, Plaintiffs misunderstand the caselaw. Statements
8 of the "assumptions underlying or relating to" the "plans and objectives of management for future
9 operations" are forward-looking statements. *Wochos*, 985 F.3d at 1191-92 (holding that
10 statements that Tesla is "on track" to produce a certain number of vehicles per week were
11 "unquestionably" forward-looking statements). To establish that a challenged statement contains
12 non-forward-looking assertions, a plaintiff must allege that the statement "goes beyond the
13 articulation of 'plans,' 'objectives,' and 'assumptions' and instead contains an express or implied
14 'concrete' assertion containing a specific 'current or past fact.' " *Id.* at 1191 (quoting *Quality Sys.*,
15 865 F.3d at 1142, 1144). Plaintiffs have failed to allege that these challenged statements contain
16 such "concrete" assertions of "current or past fact." *See id.*⁹

17 The statements here set forth a projected timeline for achieving autonomous driving
18 technology, much like statements of a "projected launch date for [a company's] products" and thus
19 are plainly forward-looking statements of Tesla's plans and objectives. *See In re Intel Corp. Sec.*
20 *Litig.*, 2023 WL 2767779, at *11 (N.D. Cal. Mar. 31, 2023), *aff'd*, 2024 WL 1693340 (9th Cir.
21 Apr. 19, 2024).

22 Defendants also argue that two Safety Statements are forward-looking:

- 23 • "We'll probably roll it out later this year. But we'll be able to do traffic lights, stop, turns,
24 troughs, everything pretty much. And then it will be a long march of 9s, essentially, how
many 9s of reliability are okay. So it's definitely way better than human . . ." FAC ¶ 341

27 ⁹ Plaintiffs also argue that because the statements were framed as guarantees rather than
28 projections, they misrepresent the current condition of Tesla's business. Opp. at 20. They cite
only an out of circuit case from 25 years ago that is not persuasive.

1 (Statement 15) (Jul. 22, 2020 Musk on Earnings Call).¹⁰

- 2
- 3
- “Tesla Full Self-Driving will work at a safety level well above that of the average driver this year, of that I am confident. Can’t speak for regulators though.” FAC ¶ 353 (Statement 21) (Jan. 1, 2021 Musk Tweet).

4

5 Plaintiffs argue that the statement “it’s definitely way better than human” (Statement 15) is not forward-looking because it is a “mixed” statement that represents a present fact. Opp. at 19.

6 Where a defendant makes a mixed statement containing a non-forward-looking statement as well

7 as a forward-looking statement, the non-forward-looking statement is not protected by the safe

8 harbor. *In re Quality Sys.*, 865 F.3d at 1141-42. However, where the statement, “examined as a

9 whole,” challenges “future expectations and performance,” the statement is properly classified as

10 forward-looking. *Police Ret. Sys. of St. Louis v. Intuitive Surgical, Inc.*, 759 F.3d 1051, 1059 (9th

11 Cir. 2014) (“*Intuitive Surgical*”). Here, the statement discusses rolling out “4D”¹¹ later in the year,

12 what Tesla will “be able to do,” and that reliability is “going to be the real work.” FAC ¶ 341.

13 Thus, examined as a whole, the statement is best understood as discussing the “future expectations

14 and performance” possible in the future roll-out. *See Intuitive Surgical*, 759 F.3d at 1059

15 (statement that defendant was not “hear[ing] anything that causes us any significant concern . . .

16 no change from last quarter, I guess . . .” was properly understood as “expectations of the future

17 impact of the external economic environment on [defendant]”). Statement 15 (FAC ¶ 341) is thus

18 forward-looking. *See In re Splunk Inc. Sec. Litig.*, 592 F. Supp. 3d 919, 936 (N.D. Cal. 2022)

19 (citing *Wochos*, 985 F.3d at 1190) (“for a challenged statement to be deemed ‘mixed,’ the non-

20 forward-looking aspects must be ‘separable’ from the forward-looking aspects”). Plaintiffs do not

21 dispute that Statement 21 (FAC ¶ 353) is forward-looking. As the Court has concluded that the

22 above statements are forward-looking, the Court next considers whether Defendants have alleged

23 that they were accompanied with meaningfully cautionary language or Plaintiffs have failed to

24 allege knowledge of falsity.

25

26

27

¹⁰ Defendants describe this statement as both a Timeline and a Safety Statement.

28

¹¹ The parties do not define “4D.”

1 **3. Prong One of the Safe Harbor: Meaningfully Cautionary Language**

2 Defendants argue that the forward-looking statements are protected under the first prong of
3 the PSLRA safe harbor because they provided meaningful cautionary language warning investors
4 that predictions in their forward-looking statements were subject to certain risks. Mot. at 13-14.
5 Forward-looking statements are protected under the first prong of the safe harbor if they were
6 “accompanied by meaningful cautionary statements identifying important factors that could cause
7 actual results to differ materially.” 15 U.S.C. § 78u-5(c)(1)(A)(i). “To be adequate under the
8 cautionary-language prong, the caution must ‘discredit the [allegedly misleading statements] so
9 obviously that the risk of real deception drops to nil.’ ” *In re QuantumScape Sec. Class Action*
10 *Litig.*, 580 F. Supp. 3d 714, 737 (N.D. Cal. 2022) (quoting *Virginia Bankshares, Inc. v. Sandberg*,
11 501 U.S. 1083, 1097 (1991)). These factors must be “substantive company-specific warnings
12 based on a realistic description of the risks applicable to the particular circumstances.” *Rodriguez*
13 *v. Gigamon Inc.*, 325 F. Supp. 3d 1041, 1052 (N.D. Cal. 2018) (citations omitted). But the
14 cautionary language “does not need to warn of the ‘exact risk’ that transpires.” *Bodri v. GoPro*,
15 *Inc.*, 252 F. Supp. 3d 912, 931 (N.D. Cal. 2017).

16 The forward-looking statements in Statements 5, 9-12, 15, 18, 23, 26, and 29 (FAC ¶¶ 321,
17 329, 331, 333, 335, 341, 347, 357, 363, and 369) were made during Tesla earnings calls. At the
18 beginning of each call, Defendants cautioned that “[d]uring this call, we will discuss our business
19 outlook and make forward-looking statements. These comments are based on our predictions and
20 expectations as of today. Actual events or results could differ materially due to a number of risks
21 and uncertainties, including those mentioned in our most recent filings with the SEC.” ECF 62-13
22 (Ex. J) (Apr. 24, 2019 Earnings Call) at 2.¹² The SEC filings discussed hardware for Autopilot
23 and FSD features and stated that “[t]here is no guarantee that we will be able to successfully and
24 timely introduce and scale any such new processes or features” and that Tesla may experience

25
26 ¹² Ex. K (July 24, 2019 Earnings Call) at 2 (same); Ex. L (Oct. 23, 2019 Earnings Call) at 2
27 (same); Ex. M (Apr. 29, 2020 Earnings Call) at 2 (same); Ex. N (July 22, 2020 Earnings Call) at 2
28 (same); Ex. C (Oct. 21, 2020 Earnings Call) at 2 (same); Ex. O (Jan. 27, 2021 Earnings Call)
(same); Ex. P (Jan. 26, 2022 Earnings Call) at 2 (same); Ex. Q (Oct. 19, 2022 Earnings Call) at 2
(same).

1 “delays or other complications in launching and/or ramping production of . . . future features and
2 services such as new Autopilot or FSD features and the autonomous Tesla ride-hailing network.”
3 ECF 62-5 (Ex. B) (Dec. 31, 2019 Form 10-K) at 5. Defendants also cautioned that “certain
4 features of our vehicles such as new Autopilot or FSD features [may] take longer than expected to
5 become enabled . . . [.]” *Id.* at 11.

6 Plaintiffs contend that the cautionary language was inadequate as Defendants failed to
7 disclose risks known to them – namely, that Tesla was not close to developing FSDC. Opp. at 20-
8 21. “Risk disclosures that speak entirely of as-yet-unrealized risks and contingencies and do not
9 alert the reader that some of these risks may already have come to fruition can mislead reasonable
10 investors.” *In re Alphabet, Inc. Sec. Litig.*, 1 F.4th 687, 703 (9th Cir. 2021) (citation and quotation
11 marks omitted); *see also Glazer Cap. Mgmt., L.P. v. Forescout Techs., Inc.*, 63 F.4th 747, 781 (9th
12 Cir. 2023) (applying this to the context of the safe-harbor provision and finding that “cautionary
13 language is not ‘meaningful’ if it discusses as a mere possibility a risk that has already
14 materialized.”). In November and December of 2020, Tesla’s Assistant General Counsel told that
15 California DMV that Tesla’s City Streets software was ordinary “Level 2” driving assistance and
16 that Tesla was not expecting any “significant enhancements” or “changes” to the software to
17 render it Levels 3-5. FAC ¶ 227-31. The letter also stated that the development of Levels 3-5
18 will follow Tesla’s “iterative process” and will not be released until the company has “fully
19 validated them.” FAC ¶ 230. In 2021, Tesla’s Director of Autopilot Software told the DMV that
20 Musk’s tweet about reaching Level 5 capacity by the end of the year “does not match engineering
21 reality.” FAC ¶ 232.

22 Defendants argue that these allegations do not show that Tesla’s statements were false or
23 misleading because the DMV letter refers to a specific technology – the City Streets software –
24 and does not indicate that Tesla’s goals of completing FSD by the end of the year were not
25 plausible. Mot. at 17-18. Further, the 2021 DMV memo indicates that Tesla “couldn’t say if the
26 rate of improvement would make it to L5 [Level 5] by the end of the year” and that Musk was
27 “extrapolating on the rates of improvement when speaking about L5 capabilities.” FAC ¶ 232.
28 The Court agrees with Defendants that Plaintiffs have failed to point to allegations showing that

1 the risk that the FSD technology could not be achieved by the projected timeline had “already
2 come to fruition.” *See In re Alphabet*, 1 F.4th at 703; *cf. Khoja*, 899 F.3d at 1016 (holding that a
3 company’s warning in its Form 10-Q that share prices “might” be affected by announcements of
4 study results that “may” be inconsistent with interim study results was misleading because the
5 company “allegedly knew already that the ‘new data’ revealed exactly that”); *DocuSign*, 669 F.
6 Supp. 3d at 879 (finding that defendant’s disclosures that risks related to the pandemic “could” or
7 “may” impact the business were insufficient where defendant was aware that the “pandemic-
8 generated demand was unsustainable” and knew of “plummeting usage rates . . . and disappointing
9 sales as customers returned to in-person work and refused to renew” their contracts).

10 Moreover, courts have recognized that language similar to Defendants’ is sufficiently
11 cautionary. *See, e.g., Intuitive Surgical*, 759 F.3d at 1059-60 (finding sufficient cautionary
12 language in disclaimer that “[a]ctual results may differ materially from those expressed or implied,
13 as a result of certain risks and uncertainties. These risks and uncertainties are described in detail
14 in the company’s [SEC] filings. Prospective investors are cautioned not to place undue reliance
15 on such forward-looking statements”); *In re Cutera Sec. Litig.*, 610 F.3d 1103, 1112 (9th Cir.
16 2010) (finding that the following language adequately cautioned investors: “these prepared
17 remarks contain forward-looking statements concerning future financial performance and
18 guidance . . . management may make additional forward-looking statements in response to
19 questions, and . . . factors like Cutera’s ability to continue increasing sales performance worldwide
20 could cause variance in the results.”). The cautionary language in the SEC filings mentions
21 potential delays and complications in developing the technology and explains that certain features
22 such as autopilot and FSD may take longer than expected. This precisely addresses the alleged
23 misrepresentations. Indeed, “[t]he PSLRA safe harbor demands only that companies warn of risks
24 that might cause actual results to differ from forward-looking predictions . . . [.]” *In re Intel Corp.*,
25 2023 WL 2767779, at *14 (citing 15 U.S.C. § 78u-5(c)(1)(A)). As Defendants have done that
26 with respect to Statements 5, 9-12, 15, 18, 23, 26, and 29, the Court finds that those statements are
27 protected under the PSLRA safe harbor.

28

1 **4. Prong Two of the Safe Harbor: Knowledge of Falsity**

2 This leaves seven statements (Statements 1-3, 14, and 19-21 (FAC ¶¶ 313, 315, 317, 339,
3 349, 351, 353)), which Defendants contend are protected under the second prong of the PSLRA
4 safe harbor because Plaintiffs have not alleged that the speaker knew that the statements were false
5 or misleading.¹³ “Even if a forward-looking statement is not accompanied by adequate cautionary
6 language, it is protected by PSLRA’s safe harbor if the speaker did not have ‘actual knowledge’
7 that the statement was false or misleading.” *In re Quality Sys.*, 865 F.3d at 1149; *see Cutera*, 610
8 F.3d at 1112-13 (explaining that “actual knowledge” and “cautionary language” safe harbor
9 prongs are disjunctive). Plaintiffs argue that for the same reasons they have sufficiently alleged
10 scienter, they have alleged knowledge of the statements’ falsity. Opp. at 20. As discussed in the
11 scienter section below, Plaintiffs have not alleged that Musk had knowledge that his statements
12 were false. Thus, the remaining forward-looking statements, Statements 1-3, 14, and 19-21, are
13 protected under the second prong of the safe harbor.

14 **B. Corporate Puffery**

15 Defendants next argue that several Timeline and Safety Statements, Statements 7, 9-11, 13,
16 16, 18, and 26 (FAC ¶¶ 325, 329, 331, 333, 337, 343, 347, 363), are nonactionable statements of
17 corporate puffery and optimism. Mot. at 15, 19. In the Ninth Circuit, “vague, generalized
18 assertions of corporate optimism or statements of ‘mere puffing’ are not actionable material
19 misrepresentations under federal securities laws” because no reasonable investor would rely on
20 such statements. *City of Royal Oak Ret. Sys. v. Juniper Networks, Inc.*, 880 F. Supp. 2d 1045,
21 1063 (N.D. Cal. 2012) (citations omitted); *see In re Nimble Storage, Inc. Sec. Litig.*, 252 F. Supp.
22 3d 848, 854 n.8 (N.D. Cal. 2017), *aff’d*, 756 F. App’x 779 (9th Cir. 2019) (“[A]lleged optimistic

23
24 ¹³ Defendants also contend that Statements 1-3, 14, and 19-21 (FAC ¶¶ 313, 315, 317, 339, 349,
25 351, 353), which were not identified as forward-looking or accompanied by forward-looking
26 language, are protected under the “bespeaks caution” doctrine. Mot. at 14-15. The Court cannot
27 agree, as dismissing the pleadings under the bespeaks caution doctrine requires showing that
28 “reasonable minds could not disagree that the challenged statements were not misleading.” *In re Atossa Genetics Inc Sec. Litig.*, 868 F.3d 784, 798 (9th Cir. 2017) (citation omitted). However,
the Court need not address whether this doctrine applies, as that Plaintiffs have not adequately
alleged knowledge of falsity.

1 statements indicating that a company is ‘on track’ to meet a certain goal are, without more,
2 actionable puffery.”). This is because “[w]hen valuing corporations, . . . investors do not rely on
3 vague statements of optimism like ‘good,’ ‘well-regarded,’ or other feel good monikers.” *In re*
4 *Cutera*, 610 F.3d at 1111. However, even “general statements of optimism, when taken in
5 context,” may be misleading “when those statements address specific aspects of a company’s
6 operation that the speaker knows to be performing poorly.” *In re Quality Sys.*, 865 F.3d at 1143
7 (citation omitted).

8 Defendants argue that the Timeline Statements that FSDC technology “appear[ed] to be on
9 track,” would be available “aspirationally by the end of the year,” and Tesla was “aiming to
10 release [it] this year,” Statements 10, 11, and 18 (FAC ¶¶ 331, 333, 347), were nonactionable
11 statements of corporate puffery and optimism. Mot. at 15. Plaintiffs contend that the statements
12 provided a “concrete description” of the state of Tesla’s technology in a way that misled investors.
13 Opp. at 18 (citing *In re Okta, Inc. Sec. Litig.*, 2023 WL 2749193, at *13 (N.D. Cal. Mar. 31,
14 2023)). These statements about Tesla’s aims and aspirations to develop Tesla’s technology by the
15 end of the year and Musk’s confidence in the development timeline are too vague for an investor
16 to rely on them. *See Nimble Storage*, 252 F. Supp. 3d at 854 n.8. Thus, in addition to being
17 protected under the PSLRA safe harbor, Statements 10, 11, and 18 are nonactionable puffery.¹⁴

18 Defendants also assert that several Safety Statements are corporate puffery. For example,
19 statements that safety is “paramount” (FAC ¶ 325), Tesla cars are “absurdly safe” (*id.*), autopilot
20 is “superhuman” (FAC ¶ 337), and “we want to get to as close to perfection as possible”
21 (FAC ¶ 363). Mot. at 19. Plaintiffs respond that “super” in “superhuman” is not puffery because
22 it represents that ADT is safer than human and “absurdly safe” conveys greater-than-human
23 safety. Opp. at 12. However, these vague statements of corporate optimism are not objectively
24 verifiable. *See In re Cutera*, 610 F.3d at 1111; *see, e.g., Bodri*, 252 F. Supp. 3d at 924 (statement
25
26

26¹⁴ Defendants also point to Statements 9 and 16 (FAC ¶¶ 329, 343) in a footnote. Mot. at 15 n.9.
27 The Court does not address arguments relegated to footnotes. *See Est. of Saunders v. Comm'r*,
28 745 F.3d 953, 962 n.8 (9th Cir. 2014) (“Arguments raised only in footnotes . . . are generally
deemed waived.”).

1 that the company was “enjoying terrific momentum” which was a “testament to the strength of the
2 GoPro brand” was corporate optimism even though plaintiffs alleged that sales were weak and
3 within days GoPro had cancelled orders). Accordingly, Statement 13 (FAC ¶ 337) is not
4 actionable. Similarly, in Statement 26 (FAC ¶ 363), Tesla states that it wants to get “as close to
5 perfection as possible” and that being safer than a human is a low standard. FAC ¶ 363. As
6 Statement 26 is not objectively verifiable, it is mere puffery. However, Statement 7 (FAC ¶ 325)
7 cannot be dismissed as mere puffery. While describing safety as “paramount” is not objectively
8 verifiable, the rest of the statement explains that safety “bears out in the statistics,” describes the
9 “objective numbers” of the low probability of injury, and states “it’s really hard to have a serious
10 injury in a Tesla, . . . it’s quite rare.” FAC ¶ 325. Such a statement is more than simply corporate
11 optimism and addresses a “specific aspect[] of [Tesla’s] operation.” *See In re Quality Sys.*, 865
12 F.3d at 1143. It thus cannot be dismissed on this basis. Similarly, Statement 27 (FAC ¶ 365) (that
13 deploying the technology is “clearly safer than not deploying it”) is not mere corporate optimism
14 as it can be objectively verified.¹⁵

15 To recap, Statements 10, 11, 13, 18, and 26 (FAC ¶¶ 331, 333, 337, 347, and 363)
16 constitute nonactionable puffery and the Court dismisses the claims based on those statements.
17 However, the Court does not find that Statements 7, 9, 16, 21, and 27 (FAC ¶¶ 325, 329, 343, 353,
18 365) are corporate puffery.

19 **C. Elements of Section 10(b) Claim**

20 Having assessed which statements are sheltered by the PSLRA safe harbor or are non-
21 actionable statements of corporate puffery, the Court turns to Defendants’ challenge of the
22 sufficiency of Plaintiff’s pleadings for each element of the Section 10(b) claim. The Court
23 examines whether Plaintiffs have adequately the elements of Section 10(b) for the remaining 11
24 statements, Statements 4, 6, 7, 8, 16, 17, 22, 24, 25, 27, and 28.

25
26

¹⁵ Defendants also argue in a footnote that the statement that Full-Self Driving “will work at a
27 safety level well above that of the average driver this year” is a forward-looking statement. Mot.
28 at 19 n.12 (quoting FAC ¶ 353). The Court does not address arguments made in footnotes. *See Est. of Saunders*, 745 F.3d at 962 n.8.

1 To state a claim under section 10(b) and Rule 10b-5, a plaintiff must show: “(1) a material
2 misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the
3 misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the
4 misrepresentation or omission; (5) economic loss; and (6) loss causation.” *Halliburton*, 573 U.S.
5 at 267 (citations omitted). “Rule 9(b) applies to all elements of a securities fraud action, including
6 loss causation.” *Oregon Pub. Emps. Ret. Fund*, 774 F.3d at 605.

7 **1. False or Misleading**

8 Defendants argue that the remaining 11 statements regarding the safety of autopilot and
9 FSDC features (“Safety Statements”) and the capabilities of FSDC technology (“Capability
10 Statements”) are not actionable because Plaintiffs have not alleged that they are false or
11 misleading.¹⁶ For a statement to be actionable under the PSLRA it must be false or misleading as
12 well as material. “Under Rule 10b-5, . . . a fraudulent omission is a failure to ‘state a material fact
13 necessary in order to make the statements made, in the light of the circumstances under which they
14 were made, not misleading.’” *Wochos*, 985 F.3d at 1188 (quoting 17 C.F.R. § 240.10b-5(b)). A
15 statement is misleading “if it would give a reasonable investor the ‘impression of a state of affairs
16 that differs in a material way from the one that actually exists.’” *Berson v. Applied Signal Tech., Inc.*,
17 527 F.3d 982, 985 (9th Cir. 2008) (quoting *Brody v. Transitional Hosps. Corp.*, 280 F.3d
18 997, 1006 (9th Cir. 2002)). An omitted fact is material if there is a “substantial likelihood that the
19 disclosure of the omitted fact would have been viewed by the reasonable investor as having
20 significantly altered the ‘total mix’ of information made available.” *TSC Indus., Inc. v. Northway, Inc.*,
21 426 U.S. 438, 449 (1976). “The inquiry into materiality is ‘fact-specific.’” *In re Alphabet*, 1
22 F. 4th at 700 (quoting *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 43 (2011)). As such,
23 “resolving materiality as a matter of law is generally appropriate ‘only if the adequacy of the
24 disclosure or the materiality of the statement is so obvious that reasonable minds could not
25 differ.’” *Id.* (citation omitted).

26 The Court considers whether Plaintiffs have alleged that the statements are false or
27

28 ¹⁶ The Court does not address Defendants’ arguments for dismissing the Timeline Statements here as the Court has already dismissed the claims based on these statements. *Supra* Section A.

1 misleading, analyzing the Safety Statements and Capability Statements in turn.

2 **a. Safety Statements**

3 Defendants argue that several Safety Statements (Statements 4, 7, 13, 15, 21, 24, and 26-
4 28, FAC ¶¶ 319, 325, 337, 341, 353, 359, 363, 365, 367)¹⁷ were not false or misleading. Mot. at
5 18-20.

- 6 • “[W]e publish accidents per mile every quarter, and ***what we see right now is that***
7 ***autopilot is about twice as safe as a normal driver on average.*** And we expect that to
8 increase quite a bit over time.” Statement 4 (FAC ¶ 319) (Apr. 22, 2019 Musk at Tesla
Autonomy Investor Day) (emphasis in original).
- 9 • “***I think safety especially, I think we -- it is paramount for us -- it's like the absolute***
10 ***primary thing is to maximize the safety of the car. So it's like -- and this bears out in the***
11 ***statistics. So it's really hard to have a serious injury in a Tesla, like it's not – it's quite***
12 ***rare.*** And when you do look at objective numbers like the NHTSA probability of injury,
13 which is you could get on the Internet, the Teslas have the lowest probability of injury of
any car tested. So like if it was possible to have a sixth star, we would have a sixth star. ***It's***
14 ***like -- literally it's absurdly safe.***” Statement 7 (FAC ¶ 325) (Jun. 11, 2019 Musk at
Annual Meeting).
- 15 • “Essentially, passive Autopilot (car intervenes only when crash probability is high) cuts
16 crashes in half. ***Active Autopilot (car is driving itself) cuts crashes in half again.*** Doesn't
mean there are no crashes, but, on balance, Autopilot is unequivocally safer.” Statement 24
17 (FAC ¶ 359) (Apr. 17, 2021 Musk Tweet); *see also* Statement 26 (FAC ¶ 363).
- 18 • “[W]ith respect to autopilot . . . we see steady improvements all along the way. And you
19 know, sometimes there's this dichotomy of, you know, should you wait until the car is like,
I don't know, three times safer than a person before deploying any technology. But I think
20 that's that's [sic] actually morally wrong at the point at which we believe that that adding
autonomy reduces injury and death, I think you have a moral obligation to deploy it, even
though you're going to get sued and blamed by a lot of people, because the people whose
21 lives you saved don't know that their lives are saved. . . . And it's not going to be perfect.
But what matters it is, is that it is very clearly safer than not deploying it.” Statement 27
22 (FAC ¶ 365) (Sept. 30, 2020 Musk at Tesla Autonomy Investor Day).
- 23 • “***So the safety that we're seeing when the car is in FSD mode is actually significantly***
24 ***greater than the safety we're seeing when it is not,*** which is a key threshold for going to a
wide Beta.” Statement 28 (FAC ¶ 367) (Oct. 19, 2022 Musk on Earnings Call).

25 Plaintiffs allege that the high rate of driver interventions demonstrates that Tesla's ADT

26
27 ¹⁷ Defendants also raise this argument for Statements 13, 15, 21, and 26. The Court does not
28 engage the argument because it has already concluded the claims based on these statements should
be dismissed. *Supra* Sections II A(3) and B.

1 was not safer than humans, as humans had to take control to avoid crashes. Opp. at 11 (citing
2 FAC ¶ 212). In addition, Plaintiffs reference research showing thousands of deficiencies in
3 Tesla's ADT where it fails to safely complete basic driving tasks, FAC ¶ 210, and note that Tesla
4 has more incidents, more severe crashes, and certain types of crashes (such as accelerating on an
5 exit-ramp) than previously reported. FAC ¶¶ 204-05, 217-19.¹⁸ Plaintiffs allege that Musk's
6 recent statements indicate that ADT is not yet safer than humans (e.g., Musk would be "shocked if
7 we do not achieve full self-driving safer than a human this year," and after the Class Period that "I
8 think we'll be better than human by the end of this year," FAC ¶ 188). Plaintiffs allege that
9 various articles show that Autopilot and self-driving technology led to crashes in Teslas.
10 FAC ¶¶ 191-203. For example, a June 10, 2023, Washington Post article (from after the Class
11 Period) indicates that Tesla's autopilot had "far more" crashes than previously reported and that a
12 NHTSA Senior Safety Advisor commented that "Tesla is having more severe – and fatal – crashes
13 than people in a normal data set." FAC ¶ 204.

14 Defendants argue that articles from after the Class Period about general safety issues do
15 not show that the Safety Statements were false when made. Mot. at 20. In order to satisfy the
16 PSLRA's "exacting requirements for pleading 'falsity,'" a plaintiff must plead "specific facts"
17 indicating why a statement is false. *Metzler*, 540 F.3d at 1070. Plaintiffs allege that there were
18 safety issues with the technology, "people looked away from the road 18% more often" with
19 autopilot, FAC ¶ 197, and autopilot features caused at least ten car accidents during an unspecified
20 period, FAC ¶¶ 204-05. However, Plaintiffs fail to provide "contemporaneous reports or data"
21 showing that the statement was false or misleading when made. *Nursing Home Pension Fund*
22 *Local 144 v. Oracle Corp.*, 380 F.3d 1226, 1230 (9th Cir. 2004). Even if this data existed at the
23 time the statements were made, the fact that there were safety issues with the technology does not
24 suggest that it was false or misleading to assert that the technology was safer than regular human
25 driving. See *Xiaojiao Lu v. Align Tech., Inc.*, 417 F. Supp. 3d 1266, 1275 (N.D. Cal. 2019)

26
27 ¹⁸ Plaintiffs also detail the large gap between Tesla's current autonomous driving technology and
28 what is required to achieve a Level 4-5 system. FAC ¶¶ 260-302.

1 (dismissing claims where plaintiff “fail[ed] to connect the statements with factual allegations that
2 show how the statements were false or misleading when made”). For example, Plaintiffs allege
3 that the NTSB found that Tesla’s autopilot was a “probable cause” of a deadly March 2018 crash
4 and an August 2019 crash. FAC ¶ 206. However, such findings do not contradict statements that
5 Autopilot cut crashes in half or that using it was safer than not using it.¹⁹ Accordingly, Plaintiffs
6 have not alleged that the Safety Statements were false or misleading, and the Court dismisses with
7 leave to amend the claims based on Statements 4, 7, 13, 15, 21, 24, 26, 27, and 28 (FAC ¶¶ 319,
8 325, 337, 341, 353, 359, 363, 365, 367).

9 **b. Capability Statements**

10 Defendants next argue that Plaintiffs have not alleged that the Capability Statements about
11 the FSDC technology, Statements 6, 16, 17, 18, 20, 22, 23, 25, and 29 (FAC ¶¶ 323, 343, 345,
12 347, 351, 355, 357, 361, 369), were false or misleading. Mot. at 20-21. Musk stated that the Full
13 Self-Driving software is “almost getting to a point where I can go from my house to work with no
14 interventions” (FAC ¶ 343), “[t]he latest build is capable of zero intervention drives” (FAC ¶ 345),
15 the “car should still be able to drive, just like a person. That is the system that we are developing
16 and aiming to release this year” (FAC ¶ 347), Musk drives the alpha build of the latest fully self-
17 driving software and “many times I can go through a very complicated series of intersections and
18 narrow roads, without ever touching any of the controls” (FAC ¶ 351), it is “very common for me
19 to have no interventions on drives that I do, including drives to a place that I’ve never been to”
20 (FAC ¶ 355), and “I think we’ll also have an update next year to be able to show regulators that
21 the car is safer, much safer than the average human” (FAC ¶ 369); *see also* FAC ¶¶ 323, 357, 361.
22 Plaintiffs allege that these statements are materially misleading because numerous safety issues
23 demonstrate that Tesla did not possess Level 4-5 autonomy, Tesla disclosed to regulators that it
24 remained “firmly” at Level 2, the confidential witness²⁰ allegations show that Tesla’s ADT had

25
26 ¹⁹ Indeed, Statement 24 states that Autopilot “cuts crashes in half” but that “[d]oesn’t mean there
27 are no crashes” Statement 24 (FAC ¶ 359).

28 ²⁰ Confidential witnesses are identified in the FAC as CW-1, CW-2, CW-3, and CW-4.
 FAC ¶ 235 n.8.

1 not reached Level 4-5 autonomy, and Tesla faced functionality and dependability problems. Opp
2 at 13 (citing FAC ¶¶ 222-34, 236-47, 260-84). However, “the reasons Plaintiffs offer as to why
3 the statements are false or misleading bear no connection” to the substance of the Capability
4 Statements, and do not allege that the software was not capable of no intervention drives. *See Jui-*
5 *Yang Hong v. Extreme Networks, Inc.*, 2017 WL 1508991, at *15 (N.D. Cal. Apr. 27, 2017). The
6 only factual allegations that are connected to the Capability Statements are CW-2’s statements that
7 it was “absolutely” known within the autopilot department that Musk’s statements about the
8 viability of autopilot and FSD technologies were “exaggerations.” FAC ¶¶ 243-44. However,
9 such allegations are too vague to show that Musk’s statements were false or misleading. *See*
10 *Intuitive Surgical*, 759 F.3d at 1063. Accordingly, the Court dismisses the claims based on the
11 Capability Statements.

12 **2. Strong Inference of Scienter**

13 Defendants also challenge the sufficiency of Plaintiffs’ allegations with respect to scienter.
14 Scienter is the intent to deceive, manipulate or defraud. *Tellabs*, 551 U.S. at 319. To establish
15 scienter, the complaint must “state with particularity facts giving rise to a strong inference that the
16 defendant acted with the required state of mind.” 15 U.S.C. § 78u-4(b)(2)(A). The required state
17 of mind is “a mental state that not only covers ‘intent to deceive, manipulate, or defraud,’ but also
18 ‘deliberate recklessness.’ ” *Schueneman v. Arena Pharms., Inc.*, 840 F.3d 698, 705 (9th Cir.
19 2016) (internal citations omitted). Deliberate recklessness is “‘an *extreme* departure from the
20 standards of ordinary care,’ which ‘presents a danger of misleading buyers or sellers that is either
21 known to the defendant or is so *obvious* that the actor must have been aware of it.’ ” *In re*
22 *Alphabet*, 1 F. 4th at 701 (emphasis in original) (quoting *Nguyen v. Endologix, Inc.*, 962 F.3d 405,
23 414 (9th Cir. 2020)).

24 The “strong inference” required by the PSLRA “must be more than merely ‘reasonable’ or
25 ‘permissible’—it must be cogent and compelling, thus strong in light of other explanations.”
26 *Tellabs*, 551 U.S. at 324. “Facts showing mere recklessness or a motive to commit fraud and
27 opportunity to do so provide some reasonable inference of intent, but are not sufficient to establish
28 a strong inference of deliberate recklessness.” *In re VeriFone Holdings*, 704 F.3d at 701. “A

1 court must compare the malicious and innocent inferences cognizable from the facts pled in the
2 complaint, and only allow the complaint to survive a motion to dismiss if the malicious inference
3 is at least as compelling as any opposing innocent inference.” *Zucco Partners*, 552 F.3d at 991
4 (9th Cir. 2009); *see Nguyen*, 962 F.3d at 415 (9th Cir. 2020). In evaluating whether a complaint
5 satisfies the “strong inference” requirement, courts must consider the allegations and other
6 relevant material “holistically,” not “scrutinized in isolation.” *In re VeriFone Holdings*, 704 F.3d
7 at 701-02 (citing *Tellabs*, 551 U.S. at 323, 326). If no individual allegation is sufficient, the court
8 “conducts a ‘holistic’ review to determine whether the allegations combine to give rise to a strong
9 inference of scienter.” *Glazer*, 63 F.4th at 766 (citation omitted). Because scienter is a subjective
10 inquiry, “the ultimate question is whether the defendant knew his or her statements were false, or
11 was consciously reckless as to their truth or falsity.” *Gebhart v. S.E.C.*, 595 F.3d 1034, 1042 (9th
12 Cir. 2010).

13 Plaintiffs allege scienter based on: (1) confidential witness accounts; (2) Musk’s access to
14 data about Tesla’s Autonomous Driving Technology; (3) the core operations doctrine; (4) Musk’s
15 motives to inflate the stock price; and (5) Musk’s history of fraud. The Court addresses each
16 below. At their core, the allegations do not allege a strong inference of scienter because they fail
17 to show that Defendants knew the statements were false, or indeed that there existed
18 contemporaneous data about the capability and safety of the technology at the time the statements
19 were made.

20 **a. Confidential Witness Accounts**

21 Plaintiffs allege that confidential witness statements raise a strong inference of scienter.
22 “Where the plaintiff relies upon statements by confidential witnesses, the complaint must also pass
23 two additional hurdles.” *In re Quality Sys.*, 865 F.3d at 1144. “First, the confidential witnesses
24 whose statements are introduced to establish scienter must be described with sufficient
25 particularity to establish their reliability and personal knowledge.” *Zucco Partners*, 552 F.3d at
26 995. “Second, those statements which are reported by confidential witnesses with sufficient
27 reliability and personal knowledge must themselves be indicative of scienter.” *Id.* Defendants
28 argue that none of the confidential witnesses offer sufficiently specific testimony to raise a strong

1 inference of scienter. Mot. at 24-26. The Court addresses the confidential witness allegations, and
2 whether they support an inference of scienter.

3 CW-1 only worked for Tesla for six months, and thus did not have “personal knowledge”
4 about the FSDC technology for the majority of the Class Period. FAC ¶ 236. CW-1 alleges that
5 “accident and safety data was reviewed by Tesla” and full-self driving was in beta and faced errors
6 such as phantom braking. FAC ¶¶ 237, 240-41. While these allegations show that Tesla faced
7 issues in its development of the technology, they are not “indicative of scienter,” *see Zucco*
8 *Partners*, 552 F.3d at 995, as they do not show that Defendants knew their statements about auto
9 safety were false or misleading, *see Gebhart*, 595 F.3d at 1042.

10 CW-2 alleges that it was “absolutely” known within Tesla’s “autopilot department” that
11 Musk’s statements about the viability of FSD and autopilot were “exaggerations,” and “everyone”
12 knew the vehicles were not close to being full self-driving. FAC ¶ 244. CW-2 does not explain
13 how he knew such information. Indeed, CW-2 does not explain how or why “everyone” knew
14 that the technology was not close to full self-driving. Such “unreliable hearsay and . . . conclusory
15 assertions of scienter” are too lacking in factual allegations to support an inference of scienter.
16 *See Zucco Partners*, 552 F.3d at 996.

17 CW-3 states that there were issues with the FSDC prototypes that needed to be worked out,
18 and Musk received regular reports and updates regarding the engineering team’s work.
19 FAC ¶¶ 248-53. Defendants argue that there is no detail about what the reports reflected, who
20 attended the meetings, when they occurred, or what was said. Mot. at 25. The Court agrees that
21 without more specificity, it cannot find that Musk’s receipt of unspecified reports and updates
22 from the engineering team are indicative of a strong inference of scienter. *See In re Silicon*
23 *Storage Tech., Inc.*, 2006 WL 648683, at *11-12 (N.D. Cal. Mar. 10, 2006) (no scienter where
24 plaintiffs failed to cite specific report, mention date or contents of report, or allege sources of
25 information on report); *Intuitive Surgical*, 759 F.3d at 1063 (witness statements lacked foundation
26 where they did “not detail the actual contents of the reports the executives purportedly references
27 or had access to”). CW-3 also stated that “if there was a major regression regarding safety,
28 operations, or driver comfort,” it would have been reported to certain individuals who reported to

1 Musk. FAC ¶ 255. However, CW-3 does not allege that any such regression occurred.
2 “[N]egative characterizations of reports relied on by insiders, without specific reference to the
3 contents of those reports, are insufficient to meet the heightened pleading requirements of the
4 PSLRA.” *Intuitive Surgical*, 759 F.3d at 1062-63 (rejecting “impressions of witnesses who lacked
5 direct access to the executives”) (quoting *Lipton v. Pathogenesis Corp.*, 284 F.3d 1027, 1036 (9th
6 Cir. 2002)). Accordingly, these vague allegations do not support scienter.

7 **b. Musk’s Access to Information**

8 Plaintiffs next argue that Musk’s access to information about Tesla’s autonomous driving
9 technology establishes a strong inference of scienter. Opp. at 24-25; see FAC ¶¶ 252, 256, 405-
10 06, 419. While “detail-oriented management style” supports scienter, *Nursing Home Pension*
11 *Fund*, 380 F.3d at 1234 (statements that “I love getting involved in every detail of the business”
12 and that executive monitored portions of the global database supported scienter), Plaintiffs fail to
13 connect Musk’s hands-on management with any information that he allegedly learned rendering
14 his statements false or misleading. For example, Plaintiffs allege that Tesla employees declined to
15 test the ADT because they did not want to be “test dummies” and that Tesla had access to video
16 feeds from its vehicles which it used to track problems (FAC ¶¶ 241, 248-56, 414, 416).
17 However, there is no indication that Musk viewed these videos or that they rendered his
18 statements false or misleading.

19 Plaintiffs also repeatedly reference the DMV letter that Tesla was not developing City
20 Streets above a Level 2 autonomy and that Musk’s Level 5 tweet did not match engineering reality
21 (but that Tesla could not say whether it was possible by the end of the year). These allegations are
22 not enough to rise to the level of a strong inference of scienter because Plaintiffs have not alleged
23 that statements about City Streets technology applied to all of Tesla’s ADT, and Tesla was
24 equivocal in whether it could achieve Level 5 autonomy by the end of the year. FAC ¶¶ 28-29.
25 See *Wochos*, 985 F.3d at 1194 (statements from former Tesla employees who told Musk that they
26 believed Tesla’s goal of producing 5,000 Model 3s per week by the end of 2017 was impossible
27 did not show that Tesla or Musk “shared,” “adopted,” or “accepted those employees’ views that

1 the goal was impossible”).²¹ In addition, as discussed above, allegations that “everyone” knew
2 about problems with the technology and that its viability was an “exaggeration” (FAC ¶¶ 243-44,
3 415) are not “particularized allegations” showing that Musk knew that Tesla could not achieve its
4 goals in the timeline it projected. *See City of Dearborn Heights Act 345 Police & Fire Ret. Syst. v.*
5 *Align Tech.*, 856 F.3d 605, 620 (9th Cir. 2017). Accordingly, Plaintiffs have not raised a strong
6 inference of scienter.

7 **c. Core Business**

8 Plaintiffs also contend that Tesla’s autonomous driving technology was core to its
9 business, raising a strong inference of scienter. The “core operations” doctrine allows the
10 knowledge of certain facts that are critical to a business’s “core operations” to be attributed to a
11 company’s key officers. *Webb v. Solarcity Corp.*, 884 F.3d 844, 854 (9th Cir. 2018). “Proof
12 under this theory is not easy. A plaintiff must produce either specific admissions by one or more
13 corporate executives of detailed involvement in the minutia of a company’s operations, such as
14 data monitoring . . . or witness accounts demonstrating that executives had actual involvement in
15 creating false reports.” *Intuitive Surgical*, 759 F.3d at 1062. “[C]orporate management’s general
16 awareness of the day-to-day workings of the company’s business does not establish scienter—at
17 least absent some additional allegation of specific information conveyed to management and
18 related to the fraud.” *Metzler*, 540 F.3d at 1068. Musk’s admitted importance of the self-driving
19 technology (describing self-driving technology as the “difference between Tesla being worth a lot
20 of money or basically worth zero,” FAC ¶ 56) coupled with Musk’s involvement in the minutiae
21 of Tesla’s ADT supports an inference of Musk’s awareness of relevant facts. *See S. Ferry LP, No.*
22 *v. Killinger*, 542 F.3d 776, 785 (9th Cir. 2008). As with the previous scienter arguments,
23 however, Plaintiffs do not show what information showed that Musk knew that his predictions
24 about the timeline of FSD development, its capabilities, or its safety were false or misleading.

25 **d. Motive Allegations from Stock Sales**

26 _____
27 ²¹ Plaintiffs also point to an expert analysis showing that Tesla still faces many obstacles to
28 releasing Level 4-5 ADT. Opp. at 9 (citing FAC ¶¶ 260-302). However, Plaintiffs do not indicate
that such information was learned by Tesla or Musk at the time the statements were made.

1 Plaintiffs also highlight Musk’s financial motives to mislead investors. Although
2 “evidence of a personal profit motive on the part of officers and directors . . . is insufficient to
3 raise a strong inference of scienter,” *Glazer Cap. Mgmt., LP v. Magistri*, 549 F.3d 736, 748 (9th
4 Cir. 2008), “personal financial gain may weigh heavily in favor of scienter.” *Tellabs*, 551 U.S. at
5 325. “[S]tock sales by corporate insiders [are] suspicious only when [they are] dramatically out of
6 line with prior trading practices at times calculated to maximize the personal benefit from
7 undisclosed inside information.” *Dearborn Heights*, 856 F.3d at 621 (internal quotation marks
8 and citation omitted). When analyzing insider trading, courts look to “(1) the amount and
9 percentage of shares sold by insiders; (2) the timing of the sales; and (3) whether the sales were
10 consistent with the insider’s prior trading history.” *Id.* (citations omitted).

11 Here, Plaintiffs allege that during the Class Period, Musk sold over 141 million Tesla
12 shares, collecting nearly \$34 billion in profit. FAC ¶¶ 33, 425-26. These sales were 239% greater
13 in volume, and 6,345% greater in value, than Musk’s trading over the same timespan prior to the
14 Class Period. FAC ¶¶ 430-31. The average price of his sales was 70% higher than the Class
15 Period average, and Musk sold 44.8% of the stock he had available for sale. FAC ¶¶ 429, 432-33.
16 The fact that Musk sold a substantial number (141 million) and percentage (44.8%) of shares, and
17 that the sales were not consistent with prior trading history, supports an inference of scienter. *See*
18 *Dearborn Heights*, 856 F.3d at 621; *cf. Intuitive Surgical*, 759 F.3d 1063-64 (significant profits
19 did not raise inference of scienter because the complaint did not contain allegations regarding the
20 defendants’ prior trading history).

21 However, as Defendants emphasize, the stock sales (over a four-year period) were not
22 linked to any purported misstatement or corrective disclosure, and the timing of sales undermines
23 any inference of scienter. Mot. at 28-29. For example, Plaintiffs do not allege that Musk sold any
24 stocks until more than two years after the first alleged misstatement, and he sold his first stocks
25 after the two alleged corrective disclosures. *See* ECF 57-1, FAC ¶¶ 313, 315 (first alleged
26 misstatements in February of 2019 and first alleged stock sale in November of 2021). This timing
27 does not support an inference of scienter. *See Hoang, et al., v. Contextlogic, Inc., et al.*, 2023 WL
28 6536162, at *26 (N.D. Cal. March 10, 2023) (“[s]ales after corrective disclosures do not support

1 an inference of scienter.”). Plaintiffs do not respond to this argument apart from reiterating that
2 the sales were “suspiciously timed” because the average price of the sales over the four-year Class
3 Period was 70% higher than the Class Period average. Opp. at 29 (citing FAC ¶¶ 432-33). Given
4 the timing of the sales, any inference of scienter from the higher sale of stocks is not a strong
5 inference and Plaintiffs have failed to carry their burden. *See In re Hansen Natural Corp. Sec.*
6 *Litig.*, 527 F. Supp. 2d 1142, 1160 (C.D. Cal. 2007) (“Because Plaintiff has failed to meet his
7 burden of demonstrating that the stock sales are related to the alleged misstatements, he has failed
8 to demonstrate a strong inference of scienter based upon” the sales).

9 **e. History of Fraud**

10 Plaintiffs also allege that Musk has a history of making misrepresentations to investors
11 with scienter, and that staged videos from 2014 and 2016 support an inference of Musk’s scienter.
12 A summary judgment order in a different case held that Musk’s 2018 tweet about securing funding
13 for Tesla was misleading and made with scienter. FAC ¶ 423 (citing *In re Tesla, Inc., Sec. Litig.*,
14 No. 3:18-cv-04865-EMC (N.D. Cal. Apr. 1, 2022), ECF No. 387). A 2016 video shows a Tesla
15 driving itself while a driver sat with their hands on their lap and the video stated that the person in
16 the driver’s seat “is only there for legal reasons. He is not doing anything. The car is driving
17 itself.” FAC ¶ 69. In January 2023, it came to light that Musk was directly involved in creating
18 the 2016 video, which was staged using 3D mapping on a predetermined route. FAC ¶ 69.
19 Plaintiffs offer no authority to explain why such allegations are relevant here or why a video from
20 before the Class Period is relevant. Thus, the summary judgment order and videos cannot support
21 a strong inference of scienter.

22 **f. Holistic Review**

23 Finally, the Court holistically reviews the scienter allegations, as required by *Tellabs*, 551
24 U.S. at 322-23. Plaintiffs’ allegations show that Tesla’s vehicles face numerous limitations that
25 they need to overcome to achieve full self-driving and that Defendants were generally aware that
26 various issues existed. FAC ¶¶ 260-84. However, the FAC lacks allegations describing with
27 particularity the documents to which Musk had access or the documents he received indicating
28 that the software was not capable of no-intervention drives, that full self-driving was not possible

1 within the projected timeframe, or that autopilot was not safer than humans.

2 In *Nguyen v. Endologix, Inc.*, 962 F.3d 405 (9th Cir. 2020), the Ninth Circuit held that
3 plaintiffs' theory that defendants promised FDA approval that they knew would not be possible
4 because of migration problems "does not make a whole lot of sense," and relies on the
5 "supposition that defendants would rather keep the stock price high for a time and then face the
6 inevitable fallout" when the migration problem was revealed. *Id.* at 415. The Court reasoned that
7 if defendants had "sought to profit from this scheme in the interim, such as by selling off their
8 stock or selling the company at a premium, the theory might have more legs," but there were no
9 such factual allegations. *Id.* Here, Plaintiffs' profit motive theory makes little sense given that
10 there are no allegations that Musk sold significant amounts of stock right after a purported
11 misstatement, and in fact the allegations show that he sold stock months after corrective
12 disclosures. Moreover, like in *Nguyen*, Plaintiffs' theory that Defendants knew that the software
13 was not safe, not capable of what they alleged, and would not be achieved in the projected
14 timeframe would have inevitably been revealed when Defendants missed their development
15 timeline. Accordingly, the Court finds that Plaintiffs have failed to allege a strong inference of
16 scienter and the Court dismisses the Section 10(b) claim.²²

17 **III. SECTION 11 CLAIM UNDER ITEMS 105 AND 303**

18 Plaintiffs also bring a claim under Section 11 for failure to comply with Items 303 and 105.
19 Defendants moves to dismiss this claim. Item 303 requires disclosure of any known material
20 "trends or uncertainties," 17 C.F.R. § 229.303 ("Item 303"). Item 105 requires affirmative
21 disclosure of the "material factors" that made investment "risky," 17 C.F.R. § 229.105 ("Item
22 105"). See *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1296-97 (9th Cir. 1998) (an Item 303
23 violation automatically states a claim for a Section 11 violation); *Sundaram v. Freshworks Inc.*,
24 2023 WL 6390622, at *7 (N.D. Cal. Sept. 28, 2023) (citing cases) (treating violations of Items 105
25 and 303 as a violation of Section 11).

26
27

²² Because the Court finds that the Section 10(b) claims fail for lack of scienter, it does not address
28 the parties' arguments regarding loss causation.

1 “To state a Section 11 claim for failing to adhere to Item 303, Plaintiffs must plausibly
2 allege: (1) the existence of a trend or uncertainty; (2) known to management; (3) that is reasonably
3 likely to have a material effect on the registrant’s financial condition or results of operation.”
4 *Sundaram*, 2023 WL 6390622, at *7 (citing *Steckman*, 143 F.3d at 1296-97); *see* 17 C.F.R. §
5 229.303(b)(2)(ii) (requiring disclosure of any “known trends or uncertainties that have had or that
6 are reasonably likely to have a material favorable or unfavorable impact on net sales or revenues
7 or income from continuing operations”). Plaintiffs allege that a 2023 article claimed that Tesla’s
8 Autopilot was involved in more crashes than previously reported and allege that Teslas were
9 involved in a handful of crashes over a four-year period. FAC ¶¶ 204-05. However, Plaintiffs fail
10 to allege that the safety issues represented a pattern or “trend” requiring disclosure as opposed to
11 isolated incidents. *See In re Restoration Robotics, Inc. Sec. Litig.*, 417 F. Supp. 3d 1242, 1263
12 (N.D. Cal. 2019) (“A trend under Item 303 requires an ‘observed pattern that accurately reflects
13 persistent conditions of the particular registrant’s business environment.’ ”) (citation omitted).
14 Accordingly, Plaintiffs’ Item 303 claim fails.

15 Defendants argue that Plaintiffs’ Item 105 claim fails for the same reason the Item 303
16 claim fails – that Tesla adequately disclosed the risks it faced. Mot. at 22. Item 105 requires a
17 “discussion of the material factors that make an investment in the registrant or offering speculative
18 or risky.” 17 C.F.R. § 229.105(a). A company’s risk disclosures may be misleading where the
19 “risk factors” reported have already materialized. *See Bos. Ret. Sys. v. Uber Techs., Inc.*, 2020
20 WL 4569846, at *6 (N.D. Cal. Aug. 7, 2020) (company’s financial affairs were materially
21 different than what it represented in its Registration Statement).

22 Here, the Form 10-K disclosures explain that Tesla vehicles “have been involved and we
23 expect in the future will be involved in accidents resulting in death or personal injury, and such
24 accidents where Autopilot or FSD features are engaged are the subject of significant public
25 attention. We have experienced and we expect to continue to face claims arising from or related to
26 misuse or claimed failures of such new technologies that we are pioneering.” ECF 62-8 (Ex. E) at
27 9. Plaintiffs argue that the “boilerplate” risk disclosures about the possibility of crashes and
28 regulatory action did not apprise investors of risks. Opp. at 22. However, this language warned

1 investors of the risks Tesla faced, and this type of language has been found in similar cases to
2 constitute sufficient disclosure. *See Golubowski v. Robinhood Mkts.*, 2023 WL 1927616 at *8
3 (N.D. Cal. Feb. 10, 2023); *see also Sundaram*, 2023 WL 6390622, at *9 (risk disclosures
4 sufficiently warned that the company may experience deterioration in revenue growth, listing
5 potential risks such as the COVID-19 pandemic, level of product demand, errors in forecasting
6 product demand, and a reduction in customer renewal rates). Plaintiffs have not alleged facts that
7 plausibly demonstrate that Tesla’s car safety was materially different from what was represented
8 in its risk disclosures. Accordingly, Plaintiffs have not plausibly alleged an Item 105 violation.

9 **IV. RULE 10B-5(A), (C) CLAIM AND SECTION 20(A)**

10 Plaintiffs also allege a scheme or course of conduct liability against Defendants under Rule
11 10-5(a) and (c). FAC ¶¶ 475-83; *see* 17 C.F.R. § 240.10b-5(a), (c) (declaring it unlawful “[t]o
12 employ any device, scheme, or artifice to defraud” or “[t]o engage in any act, practice, or course
13 of business which operates or would operate as a fraud or deceit upon any person, in connection
14 with the purchase or sale of any security”). Defendants state that they are not liable for any such
15 violation as the theory rests on the same facts and purported misstatements as the Rule 10b-5(b)
16 claim and fails for the same reasons. Mot. at 11 n.3. A scheme liability claim can depend on
17 misstatements that also violate Rule 10b-5(b). *See Lorenzo v. Sec. & Exch. Comm’n*, 587 U.S. 71,
18 80 (2019) (explaining that subsection (b) and subsections (a) and (c) of Rule 10b-5 do not govern
19 “mutually exclusive[] spheres of conduct”).

20 Here, Plaintiffs do not adequately allege a violation of subsections (a) and (c) under either
21 the *Lorenzo* dissemination of fraud theory or a scheme liability theory. Under *Lorenzo*, Plaintiffs
22 must allege that Defendants disseminated “false or misleading information to prospective
23 investors with the intent to defraud.” 587 U.S. at 79. For the same reasons discussed above,
24 Plaintiffs have not adequately alleged any false or misleading statements or scienter, and thus may
25 not proceed under that theory. *See Sneed v. AcelRx Pharms., Inc.*, 2022 WL 4544721, at *6 (N.D.
26 Cal. Sept. 28, 2022). Under scheme liability, which Plaintiffs seem to be pursuing, *see* FAC ¶ 477
27 (“Defendants engaged in a fraudulent scheme, practice, or course of business . . .”), Plaintiffs
28 argue that they are focusing on Defendants’ “course of business” in which they persuaded

1 investors that Tesla was close to releasing fully autonomous cars based on the collective totality of
2 the false and misleading statements. Opp. at 23; FAC ¶¶ 72-74. However, Plaintiffs fail to allege
3 sufficient facts showing that Defendants engaged in such a fraudulent scheme to mislead investors.
4 *See Kang v. PayPal Holdings, Inc.*, 620 F. Supp. 3d 884, 902 (N.D. Cal. 2022). Accordingly, the
5 Court dismisses this claim with leave to amend.

6 **V. SECTION 20(A) CLAIM**

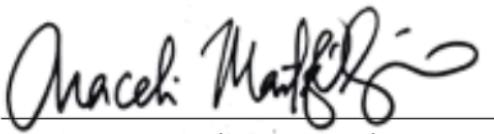
7 Plaintiffs bring a claim for a violation of Section 20(a) of the Exchange Act against Musk.
8 FAC ¶¶ 484-490. A Section 20(a) claim requires an underlying violation of securities law. *In re*
9 *Rigel Pharms., Inc. Sec. Litig.*, 697 F.3d 869, 886 (9th Cir. 2012). Because Plaintiffs failed to
10 adequately plead a violation under Section 10(b), the Section 20(a) claim also fails. *See id.*²³

11 **CONCLUSION**

12 For the foregoing reasons, the Court **GRANTS** Defendants' motion to dismiss with leave
13 to amend. Any amended complaint must be filed by **October 30, 2024**. No additional parties or
14 claims may be added without leave of Court or stipulation of Defendants.

15
16 **IT IS SO ORDERED.**

17 Dated: September 30, 2024

18
19
20 
21 ARACELI MARTÍNEZ-OLGUÍN
22 United States District Judge
23
24
25
26
27
28

²³ Defendants only raise the arguments about Section 20(a) in a footnote. Mot. at 11 n.3. The Court does typically not address arguments relegated to footnotes. *See Est. of Saunders*, 745 F.3d at 962 n.8.