

1
2
3
4 PIOTR JASZCZYSZYN,
5 Plaintiff,
6 v.
7 SUNPOWER CORPORATION, et al.,
8 Defendants.

9 Case No. 22-cv-00956-AMO
10
11

12
13 **ORDER GRANTING DEFENDANTS'**
14 **MOTION TO DISMISS**
15
16 Re: Dkt. No. 63
17
18

19 This is a putative securities class action involving allegations that Defendant SunPower
20 Corporation and its executives misled investors about the implications of failing components of
21 the company's commercial line of products. Defendants' motion to dismiss was heard before this
22 Court on October 26, 2023. Having read the papers filed by the parties and carefully considered
23 their arguments therein and those made at the hearing, as well as the relevant legal authority, the
24 Court hereby **GRANTS** the motion to dismiss, for the following reasons.
25
26

27 **I. BACKGROUND¹**
28

29 SunPower Corporation ("SunPower" or the "Company") is a solar energy company that
30 provides solar generation, storage, and other solutions to its customers. First Am. Compl. ¶¶ 4-5
31 ("FAC," ECF 55). Peter Faricy ("Faricy") was the Company's Chief Executive Officer ("CEO"),
32 President, and Chairman of the Company's Board of Directors during the period of August 3,
33 2021, through January 20, 2022, inclusive ("Class Period"). FAC ¶ 2. Manavendra S. Sial

34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50
51
52
53
54
55
56
57
58
59
60
61
62
63
64
65
66
67
68
69
70
71
72
73
74
75
76
77
78
79
80
81
82
83
84
85
86
87
88
89
90
91
92
93
94
95
96
97
98
99
100
101
102
103
104
105
106
107
108
109
110
111
112
113
114
115
116
117
118
119
120
121
122
123
124
125
126
127
128
129
130
131
132
133
134
135
136
137
138
139
140
141
142
143
144
145
146
147
148
149
150
151
152
153
154
155
156
157
158
159
160
161
162
163
164
165
166
167
168
169
170
171
172
173
174
175
176
177
178
179
180
181
182
183
184
185
186
187
188
189
190
191
192
193
194
195
196
197
198
199
200
201
202
203
204
205
206
207
208
209
210
211
212
213
214
215
216
217
218
219
220
221
222
223
224
225
226
227
228
229
230
231
232
233
234
235
236
237
238
239
240
241
242
243
244
245
246
247
248
249
250
251
252
253
254
255
256
257
258
259
260
261
262
263
264
265
266
267
268
269
270
271
272
273
274
275
276
277
278
279
280
281
282
283
284
285
286
287
288
289
290
291
292
293
294
295
296
297
298
299
300
301
302
303
304
305
306
307
308
309
310
311
312
313
314
315
316
317
318
319
320
321
322
323
324
325
326
327
328
329
330
331
332
333
334
335
336
337
338
339
340
341
342
343
344
345
346
347
348
349
350
351
352
353
354
355
356
357
358
359
360
361
362
363
364
365
366
367
368
369
370
371
372
373
374
375
376
377
378
379
380
381
382
383
384
385
386
387
388
389
390
391
392
393
394
395
396
397
398
399
400
401
402
403
404
405
406
407
408
409
410
411
412
413
414
415
416
417
418
419
420
421
422
423
424
425
426
427
428
429
430
431
432
433
434
435
436
437
438
439
440
441
442
443
444
445
446
447
448
449
450
451
452
453
454
455
456
457
458
459
460
461
462
463
464
465
466
467
468
469
470
471
472
473
474
475
476
477
478
479
480
481
482
483
484
485
486
487
488
489
490
491
492
493
494
495
496
497
498
499
500
501
502
503
504
505
506
507
508
509
510
511
512
513
514
515
516
517
518
519
520
521
522
523
524
525
526
527
528
529
530
531
532
533
534
535
536
537
538
539
540
541
542
543
544
545
546
547
548
549
550
551
552
553
554
555
556
557
558
559
5510
5511
5512
5513
5514
5515
5516
5517
5518
5519
5520
5521
5522
5523
5524
5525
5526
5527
5528
5529
5530
5531
5532
5533
5534
5535
5536
5537
5538
5539
5540
5541
5542
5543
5544
5545
5546
5547
5548
5549
55410
55411
55412
55413
55414
55415
55416
55417
55418
55419
55420
55421
55422
55423
55424
55425
55426
55427
55428
55429
55430
55431
55432
55433
55434
55435
55436
55437
55438
55439
55440
55441
55442
55443
55444
55445
55446
55447
55448
55449
55450
55451
55452
55453
55454
55455
55456
55457
55458
55459
55460
55461
55462
55463
55464
55465
55466
55467
55468
55469
55470
55471
55472
55473
55474
55475
55476
55477
55478
55479
55480
55481
55482
55483
55484
55485
55486
55487
55488
55489
55490
55491
55492
55493
55494
55495
55496
55497
55498
55499
554100
554101
554102
554103
554104
554105
554106
554107
554108
554109
554110
554111
554112
554113
554114
554115
554116
554117
554118
554119
554120
554121
554122
554123
554124
554125
554126
554127
554128
554129
554130
554131
554132
554133
554134
554135
554136
554137
554138
554139
554140
554141
554142
554143
554144
554145
554146
554147
554148
554149
554150
554151
554152
554153
554154
554155
554156
554157
554158
554159
554160
554161
554162
554163
554164
554165
554166
554167
554168
554169
554170
554171
554172
554173
554174
554175
554176
554177
554178
554179
554180
554181
554182
554183
554184
554185
554186
554187
554188
554189
554190
554191
554192
554193
554194
554195
554196
554197
554198
554199
554200
554201
554202
554203
554204
554205
554206
554207
554208
554209
554210
554211
554212
554213
554214
554215
554216
554217
554218
554219
554220
554221
554222
554223
554224
554225
554226
554227
554228
554229
554230
554231
554232
554233
554234
554235
554236
554237
554238
554239
554240
554241
554242
554243
554244
554245
554246
554247
554248
554249
554250
554251
554252
554253
554254
554255
554256
554257
554258
554259
554260
554261
554262
554263
554264
554265
554266
554267
554268
554269
554270
554271
554272
554273
554274
554275
554276
554277
554278
554279
554280
554281
554282
554283
554284
554285
554286
554287
554288
554289
554290
554291
554292
554293
554294
554295
554296
554297
554298
554299
5542910
5542911
5542912
5542913
5542914
5542915
5542916
5542917
5542918
5542919
5542920
5542921
5542922
5542923
5542924
5542925
5542926
5542927
5542928
5542929
55429210
55429211
55429212
55429213
55429214
55429215
55429216
55429217
55429218
55429219
55429220
55429221
55429222
55429223
55429224
55429225
55429226
55429227
55429228
55429229
55429230
55429231
55429232
55429233
55429234
55429235
55429236
55429237
55429238
55429239
55429240
55429241
55429242
55429243
55429244
55429245
55429246
55429247
55429248
55429249
55429250
55429251
55429252
55429253
55429254
55429255
55429256
55429257
55429258
55429259
55429260
55429261
55429262
55429263
55429264
55429265
55429266
55429267
55429268
55429269
55429270
55429271
55429272
55429273
55429274
55429275
55429276
55429277
55429278
55429279
55429280
55429281
55429282
55429283
55429284
55429285
55429286
55429287
55429288
55429289
55429290
55429291
55429292
55429293
55429294
55429295
55429296
55429297
55429298
55429299
554292100
554292101
554292102
554292103
554292104
554292105
554292106
554292107
554292108
554292109
554292110
554292111
554292112
554292113
554292114
554292115
554292116
554292117
554292118
554292119
554292120
554292121
554292122
554292123
554292124
554292125
554292126
554292127
554292128
554292129
554292130
554292131
554292132
554292133
554292134
554292135
554292136
554292137
554292138
554292139
554292140
554292141
554292142
554292143
554292144
554292145
554292146
554292147
554292148
554292149
554292150
554292151
554292152
554292153
554292154
554292155
554292156
554292157
554292158
554292159
554292160
554292161
554292162
554292163
554292164
554292165
554292166
554292167
554292168
554292169
554292170
554292171
554292172
554292173
554292174
554292175
554292176
554292177
554292178
554292179
554292180
554292181
554292182
554292183
554292184
554292185
554292186
554292187
554292188
554292189
554292190
554292191
554292192
554292193
554292194
554292195
554292196
554292197
554292198
554292199
554292200
554292201
554292202
554292203
554292204
554292205
554292206
554292207
554292208
554292209
554292210
554292211
554292212
554292213
554292214
554292215
554292216
554292217
554292218
554292219
554292220
554292221
554292222
554292223
554292224
554292225
554292226
554292227
554292228
554292229
554292230
554292231
554292232
554292233
554292234
554292235
554292236
554292237
554292238
554292239
554292240
554292241
554292242
554292243
554292244
554292245
554292246
554292247
554292248
554292249
554292250
554292251
554292252
554292253
554292254
554292255
554292256
554292257
554292258
554292259
554292260
554292261
554292262
554292263
554292264
554292265
554292266
554292267
554292268
554292269
554292270
554292271
554292272
554292273
554292274
554292275
554292276
554292277
554292278
554292279
554292280
554292281
554292282
554292283
554292284
554292285
554292286
554292287
554292288
554292289
554292290
554292291
554292292
554292293
554292294
554292295
554292296
554292297
554292298
554292299
554292300
554292301
554292302
554292303
554292304
554292305
554292306
554292307
554292308
554292309
554292310
554292311
554292312
554292313
554292314
554292315
554292316
554292317
554292318
554292319
554292320
554292321
554292322
554292323
554292324
554292325
554292326
554292327
554292328
554292329
554292330
554292331
554292332
554292333
554292334
554292335
554292336
554292337
554292338
554292339
554292340
554292341
554292342
554292343
554292344
554292345
554292346
554292347
554292348
554292349
554292350
554292351
554292352
554292353
554292354
554292355
554292356
554292357
554292358
554292359
554292360
554292361
554292362
554292363
554292364
554292365
554292366
554292367
554292368
554292369
554292370
554292371
554292372
554292373
554292374
554292375
554292376
554292377
554292378
554292379
554292380
554292381
554292382
554292383
554292384
554292385
554292386
554292387
554292388
554292389
554292390
554292391
554292392
554292393
554292394
554292395
554292396
554292397
554292398
554292399
554292400
554292401
554292402
554292403
554292404
554292405
554292406
554292407
554292408
554292409
554292410
554292411
554292412
554292413
554292414
554292415
554292416
554292417
554292418
554292419
554292420
554292421
554292422
554292423
554292424
554292425
554292426
554292427
554292428
554292429
554292430
554292431
554292432
554292433
554292434
554292435
554292436
554292437
554292438
554292439
554292440
554292441
554292442
554292443
554292444
554292445
554292446
554292447
554292448
554292449
554292450
554292451
554292452
554292453
554292454
554292455
554292456
554292457
554292458
554292459
554292460
554292461
554292462
554292463
554292464
554292465
554292466
554292467
554292468
554292469
554292470
554292471
554292472
554292473
554292474
554292475
554292476
554292477
554292478
554292479
554292480
554292481
554292482
554292483
554292484
554292485
554292486
554292487
554292488
554292489
554292490
554292491
554292492
554292493
554292494
554292495
554292496
554292497
554292498
554292499
554292500
554292501
554292502
554292503
554292504
554292505
554292506
554292507
554292508
55429250

1 (“Sial”) was the Company’s former Chief Financial Officer (“CFO”) and Executive Vice President
2 during the class period. FAC ¶ 2.

3 In 2021, SunPower had a commercial business divided between two segments: (a) the
4 Commercial and Industrial Solutions segment (“CIS” or “C&I,” also referred to as “heavy”) sold
5 products to larger commercial clients; and (b) the “Light Commercial Value-Added Reseller”
6 (“CVAR”) business, a sub-segment of the Company’s residential segment, sold products to
7 smaller clients. FAC ¶ 6. In combination, the two segments contributed over 23% of SunPower’s
8 revenues. FAC ¶ 6. The warranties SunPower provided for the third-party products and
9 components used in its solar power systems were considered to be a unique feature distinguishing
10 the Company from its competitors. FAC ¶ 6.

11 In April 2021, SunPower hired Faricy as CEO with a mandate to review and restructure the
12 business. Faricy told investors that his focus “over the next 100 days” was conducting a “deep
13 [dive]” of the residential, commercial, and industrial businesses. FAC ¶ 8.

14 The Class Period in this putative class action starts on August 3, 2021, when Defendants
15 announced the Company’s 2Q21 financial results. FAC ¶ 39. In the August 3, 2021 press release
16 announcing those financial results, Defendants made three alleged false statements, including:
17 [1] ““Our solid second quarter results reflect continued execution in both our residential and
18 commercial businesses,”” and “[2] we remain on track to achieve our 2021 financial outlook and
19 [3] are well positioned to drive growth and profitability in 2022 and beyond.”” FAC ¶ 39. Faricy
20 and Sial also hosted an earnings call, during which Sial said,

21 I think the business is significantly better year-on-year, both from a
22 top line perspective as well as a margin point of view. And then
23 more importantly, we expect the CIS business to be profitable in the
back half of the year, which you recall is a significant turnaround
from the last couple of years.

24 FAC ¶ 40.

25 On August 4, 2021, SunPower filed its Form 10-Q for 2Q21. FAC ¶ 44. That report
26 provided risk warnings cautioning investors that product defects may occur or harm SunPower’s
27 business, such as “potential future product or component failures could cause us to incur

1 substantial expense to repair or replace defective products or components.” FAC ¶¶ 44-46; *see*
2 *also* FAC ¶ 11.

3 On October 5, 2021, Defendants held an unscheduled investor call to announce a new
4 acquisition and to announce that they were cutting financial guidance due to poor performance in
5 the CIS segment and looking to sell the CIS business “by the end of the calendar year.” FAC ¶ 52.

6 On November 3, 2021, Defendants hosted SunPower’s 3Q21 earnings call. Steamfitters
7 Local 449 Pension & Retirement Security Funds (“Plaintiff”) alleges Faricy falsely reassured
8 investors and omitted information, stating:

9 Over the past few years, you’ve been with us through several major
10 restructuring events and strategic changes. I’m pleased to report we
have found our footing. With a streamlined company and our
11 healthiest balance sheet in years, we are now going on offense to
grow our business across a vast, mostly untapped residential TAM.

12 FAC ¶ 59. The next day, SunPower filed its quarterly report on Form 10-Q for 3Q21. That
13 quarterly report repeated the same risk warning statements as those provided in August. FAC
14 ¶¶ 62-64; *see also* FAC ¶ 14.

15 On December 7, 2021, SunPower published to its website the latest edition of its Safety
16 and Installation Instructions manual, including a new warning that cracking might occur in
17 connectors. FAC ¶ 69.

18 On January 20, 2022, SunPower issued a press release on Form 8-K announcing that the
19 Company would miss its financial guidance due to “cracking” problems with products across its
20 commercial businesses. FAC ¶ 71. The press release announced SunPower was taking \$31
21 million in charges to replace connectors experiencing the cracking problems across its commercial
22 businesses. FAC ¶ 71. Following these disclosures, SunPower’s stock price declined from a close
23 of \$19.02 per share on January 20, 2022, to \$15.80 per share on January 21, 2022, a 16.9% drop,
24 on more than 11.4 million shares trading volume, as compared to only 2.8 million shares traded on
25 January 20, 2022. FAC ¶ 76. Prior to this point, the Company’s stock price traded at prices as
26 high as \$34.61 per share. FAC ¶ 85. SunPower disclosed on February 16, 2022, that it would also
27 “exit the light commercial business” at the cost of another \$15 million to the Company. FAC
28 ¶ 79. SunPower disclosed on August 31, 2022, that Sial was leaving the Company. FAC ¶ 81.

II. REQUEST FOR JUDICIAL NOTICE

Defendants filed a request for judicial notice in support of their motion to dismiss. ECF 64; *see also* Roberts Decl. (ECF 65). In general, review of a complaint under Rule 12(b)(6) is limited to the pleading, and the court may not consider extra-pleading materials without converting the motion into a motion for summary judgment. *See Fed. R. Civ. P.* 12(b)(6); 12(d). There are two exceptions to this general rule: the court may consider materials that are judicially noticeable under Federal Rule of Evidence 201, and the court may consider materials that fall within the incorporation-by-reference doctrine. *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 998 (9th Cir. 2018).

Federal Rule of Evidence 201 permits judicial notice of “a fact that is not subject to reasonable dispute” because it is “generally known” or “can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” A court may take notice of “undisputed matters of public record,” but not of “disputed facts stated in public records.” *Lee v. City of Los Angeles*, 250 F.3d 668, 690 (9th Cir. 2001) (emphasis in original).

The doctrine of incorporation by reference permits a court to treat an extrinsic document as if it were part of the complaint if the pleading “refers extensively to the document” or if “the document forms the basis” of a claim. *Khoja*, 899 F.3d at 1002. Incorporation can be proper “when assessing the sufficiency of a claim requires that the document at issue be reviewed,” but is not warranted when “the document merely creates a defense to the well-pled allegations.” *Id.* Incorporation by reference “is designed to prevent artful pleading by plaintiffs” but should not be used as a “tool for defendants to short-circuit the resolution of a well-pleaded claim.” *Id.* at 1003.

The first category of exhibits submitted in support of Defendants’ Motion, numbers 1, 7-10, are SEC filings that Defendants aver should be considered in their full context. The second category of exhibits, numbers 2-6, are other documents referenced in the complaint and which Defendants contend should be considered incorporated by reference.

Plaintiff’s FAC incorporates by reference Exhibits 1-10 because Plaintiff explicitly refers to excerpts of these exhibits to support its claims. *See, e.g.*, FAC ¶ 39 (citing August 3, 2021 press release); Roberts Decl. Ex. 1 (reproducing same). Exhibits 1-10, further, are all publicly available

1 documents representing information disclosed to the market and thus are subject to judicial notice.
2 *See In re Restoration Robotics, Inc. Sec. Litig.*, 417 F. Supp. 3d 1242, 1253 (N.D. Cal. 2019).
3 Plaintiff concedes that the Court may take judicial notice of the Exhibits. *See* RJN Opp. at 1-2
4 (ECF 68 at 2-3). Plaintiff argues, however, that pursuant to *Khoja*, Defendants cannot use judicial
5 notice or incorporation by reference on a motion to dismiss to create factual disputes with
6 Plaintiffs' allegations. *Id.* at 4-5 (ECF 68 at 5-6). But nothing in *Khoja* prevents this Court from
7 analyzing an alleged false statement in context. *See Khoja*, 899 F.3d at 1002 ("[T]he policy
8 concern underlying [incorporation by reference]" is to "[p]revent[] plaintiffs from surviving a
9 Rule 12(b)(6) motion by deliberately omitting references to documents upon which their claims
10 are based" (citation and quotation marks omitted)). The materials submitted for judicial notice by
11 Defendants here provide additional context surrounding the statements made by Faricy and Sial.
12 Such context matters in the Court's assessment of how a reasonable investor would consider the
13 allegedly false statements. *See Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension*
14 *Fund*, 575 U.S. 175, 190-91, 194 (2015) ("reasonable investor" interprets statements "fairly and in
15 context"); *Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 323-24 (2007) ("[t]he strength
16 of an inference cannot be decided in a vacuum"). Thus, the Court declines Plaintiff's invitation to
17 reject the materials submitted by Defendants in support of their motion to dismiss.

18 In support of their Reply Brief on the Motion to Dismiss, Defendants submitted an
19 additional request seeking judicial notice of Exhibits 11-14, third-party analyst reports extensively
20 referenced and quoted in the Amended Complaint, but which Defendants omitted from their first
21 request for judicial notice. ECF 77 at 2. Defendants request that the Court take notice of these
22 analyst reports because Plaintiff's Opposition to Defendants' Motion to Dismiss (ECF 67) makes
23 clear that these documents form the basis of Plaintiff's securities fraud claims. Plaintiff cites
24 repeatedly to the reports, quoting from them to allege falsity. *See, e.g.*, MTD Opp. at 6, 15, 17,
25 19, 20, 22, 24, 25 (multiple citations to the exhibits quoted in ¶¶ 72-75 of the Complaint). Plaintiff
26 did not file a response to this second request for judicial notice. Although these materials are less
27 helpful than those included in the initial request, the same reasoning applies to them – they will be
28

1 considered by the Court because Plaintiff expressly relies on them in its pleading, and the portions
2 cited by Plaintiff should be read in context.

3 In sum, the Court **GRANTS** Defendants' requests for judicial notice and incorporation by
4 reference, and the Court will consider the materials in its assessment of the Motion to Dismiss for
5 the limited purpose of determining what was disclosed to the market.

6 III. LEGAL STANDARD

7 Under Federal Rule of Civil Procedure 12(b)(6), a district court must dismiss a complaint
8 if it fails to state a claim upon which relief can be granted. To survive a Rule 12(b)(6) motion, the
9 plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl.*
10 *Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible when the plaintiff
11 pleads facts that allow the court to "draw the reasonable inference that the defendant is liable for
12 the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). There
13 must be "more than a sheer possibility that a defendant has acted unlawfully." *Id.* While courts
14 do not require "heightened fact pleading of specifics," a plaintiff must allege facts sufficient to
15 "raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555, 570.

16 A complaint alleging a violation of Section 10(b) of the Securities Exchange Act "must
17 meet both the heightened pleading requirements for fraud" under Federal Rule of Civil Procedure
18 9(b) and the "exacting pleading requirements" of the PSLRA. *In re Quality Sys., Inc. Sec. Litig.*,
19 865 F.3d 1130, 1140 (9th Cir. 2017) (citations omitted). Rule 9(b) additionally requires that the
20 circumstances constituting any alleged fraud be pled "specific[ally] enough to give defendants
21 notice of the particular misconduct . . . so that they can defend against the charge and not just deny
22 that they have done anything wrong." *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir.
23 2009) (citation omitted). Claims of fraud must be accompanied by the "who, what, when, where,
24 and how" of the misconduct alleged. *Id.* Under Rule 9(b) and the PSLRA, a complaint must
25 "state with particularity the circumstances constituting fraud or mistake" and "state with
26 particularity facts giving rise to a strong inference that the defendant acted with the required state
27 of mind" in making the false or misleading statements. Fed. R. Civ. P. 9(b); 15 U.S.C. § 78u-
28 4(b)(2)(A).

1 **IV. DISCUSSION**

2 Section 10(b) of the Securities Exchange Act makes it unlawful for any person to “use or
3 employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive
4 device or contrivance in contravention of such rules and regulations as the Commission may
5 prescribe as necessary or appropriate in the public interest or for the protection of investors.” 15
6 U.S.C. § 78j(b). To state a claim under Section 10(b) of the Securities Exchange Act, a plaintiff
7 must plead: ““(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a
8 connection between the misrepresentation or omission and the purchase or sale of a security;
9 (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation.””
10 *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 37-38 (2011) (citation omitted).

11 Defendants challenge the sufficiency of Plaintiff’s allegations with respect to only the first
12 two elements of a Section 10(b) claim: (1) the falsity of SunPower’s statements and (2) whether
13 they were made with scienter. The “more exacting pleading requirements” of the PSLRA require
14 that the complaint plead both falsity and scienter with particularity, and Defendants argue that the
15 pleading here falls short of that standard. *See Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d
16 981, 990 (9th Cir. 2009); *see also* 15 U.S.C. § 78u4(b)(1). The Court takes up the two elements in
17 turn.

18 **A. Material Misrepresentation or Omission**

19 The first issue is whether Plaintiffs sufficiently allege a material misrepresentation or
20 omission. The parties debate the sufficiency of the allegations on the three fronts discussed
21 below: (1) whether Defendants’ statements were made with knowledge of their falsity, (2) whether
22 the challenged statements constitute actionable puffery, and (3) whether the challenged
23 statements are forward-looking and protected by the PSLRA’s safe harbor.

24 **1. Knowledge of Falsity When Statements Made**

25 “For a statement to be false or misleading, it must ‘directly contradict what the defendant
26 knew at that time’ or ‘omit[] material information.’” *Weston Fam. P’ship LLLP v. Twitter, Inc.*,
27 29 F.4th 611, 619 (9th Cir. 2022) (quoting *Khoja*, 899 F.3d at 1008-09). For a true statement to be
28 false by omission, it must “affirmatively create an impression of a state of affairs that differs in a

1 material way from the one that actually exists.” *Police Ret. Sys. of St. Louis v. Intuitive Surgical, Inc.*, 759 F.3d 1051, 1061 (9th Cir. 2014) (internal quotations omitted). An omission is material
2 “when there is a substantial likelihood that the disclosure of the omitted fact would have been
3 viewed by the reasonable investor as having significantly altered the total mix of information
4 available.” *Matrixx*, 563 U.S. at 38 (quotation marks and citation omitted). Statements that are
5 “literally true” may still be misleading due to “their context and manner of presentation.” *Miller v. Thane Int’l, Inc.*, 519 F.3d 879, 886 (9th Cir. 2008). Courts “apply the objective standard of a
6 ‘reasonable investor’ to determine whether a statement is misleading.” *Alphabet*, 1 F.4th at 699.
7 While it is generally true that vague statements are not actionable, “even ‘general statements of
8 optimism, when taken in context, may form the basis for a securities fraud claim’ when those
9 statements address specific aspects of a company’s operation that the speaker knows to be
10 performing poorly.” *Quality Sys.*, 865 F.3d at 1143 (citation omitted).

11 Here, Plaintiff alleges that Defendants’ statements regarding SunPower’s then-current
12 status in meeting its earlier guidance were false and misleading because each statement concealed
13 dangerous product defects and the risk of related costs. Plaintiff charges that Defendants falsely
14 misrepresented or omitted the prior existing, material facts that connectors across their commercial
15 business had developed a “cracking” problem. Plaintiff’s challenge relies on the following
16 statements in the pleading:

- 17
- 18 • “The failure of a supplier to supply . . . components in a timely manner, or to supply
19 raw materials or components that meet our quality, quantity, and cost requirements,
20 **could** impair our ability to manufacture our products or could increase our cost of
21 production”; and “**If** we cannot obtain substitute materials or components on a timely
22 basis or on acceptable terms, we could be prevented from delivering our products to
23 our customers within required time frames.” (FAC ¶ 44; August 4, 2021 2Q21 Form
24 10-Q, p. 55) (Statement 5);²
 - 25 • “**If** we have quality issues with our solar and related products, our sales **could** decrease
26 and our relationships with our customers and our reputation **may** be harmed”; and
“[D]efects **could** cause us to incur significant warranty, non-warranty, and re-
engineering costs, which may not be covered by manufacturer warranties, and could
significantly affect our customer relations and business reputation. **If** we deliver
products with errors or defects, or if there is a perception that such products contain
errors or defects, our credibility and the market acceptance and sales of our products

27

28 ² Plaintiff bolds and italicizes portions of Defendants’ quoted statements in the FAC to highlight
the purportedly false representations. The Court reproduces Plaintiff’s formatting in this Order.

could be harmed. In addition, some of our arrangements with customers include termination or put rights for non-performance. In certain limited cases, we **could** incur liquidated damages or even be required to buy back a customer's system at fair value on specified future dates if certain minimum performance thresholds are not met." (FAC ¶ 45; August 4, 2021 2Q21 Form 10-Q) (Statement 6);

- "While we generally pass through to our customers the manufacturer warranties we receive from our suppliers, in some circumstances, we **may** be responsible for repairing or replacing defective parts during our warranty period, often including those covered by manufacturers' warranties, or incur other non-warranty costs. **If** a manufacturer disputes or otherwise fails to honor its warranty obligations, we may be required to incur substantial costs before we are compensated, if at all, by the manufacturer"; "Increases in the defect rate of SunPower or third-party products, including components, **could** cause us to increase the amount of warranty reserves and have a corresponding material, negative impact on our results of operations. Further, **potential future** product or component failures **could** cause us to incur substantial expense to repair or replace defective products or components, and we have agreed in some circumstances to indemnify our customers and our distributors against liability from some defects in our solar products. A successful indemnification claim against us could require us to make significant damage payments"; "Repair and replacement costs, as well as successful indemnification claims, **could** materially and negatively impact our financial condition, cash flows, and results of operations"; and "In addition, quality issues **can** have various other ramifications, including delays in the recognition of revenue, loss of revenue, loss of future sales opportunities, increased costs associated with repairing or replacing products, and a negative impact on our goodwill and reputation, any of which **could** adversely affect our business, results of operations, cash flows, and financial condition." (FAC ¶ 46; August 4, 2021 2Q21 Form 10-Q) (Statement 7);
- "The failure of a supplier to supply . . . components that meet our quality, quantity, and cost requirements, **could** impair our ability to manufacture our products or could increase our cost of production"; and "**If** we cannot obtain substitute materials or components on a timely basis or on acceptable terms, we **could** be prevented from delivering our products to our customers within required time frames." (FAC ¶ 62; November 4, 2021 3Q21 Form 10-Q, p. 56) (Statement 9);
- "**If** we have quality issues with our solar and related products, our sales **could** decrease and our relationships with our customers and our reputation **may** be harmed"; and "[D]efects **could** cause us to incur significant warranty, non-warranty, and re-engineering costs, which may not be covered by manufacturer warranties, and could significantly affect our customer relations and business reputation. If we deliver products with errors or defects, or if there is a perception that such products contain errors or defects, our credibility and the market acceptance and sales of our products could be harmed. In addition, some of our arrangements with customers include termination or put rights for non-performance. In certain limited cases, we could incur liquidated damages or even be required to buy back a customer's system at fair value on specified future dates if certain minimum performance thresholds are not met." (FAC ¶ 63; November 4, 2021 3Q21 Form 10-Q) (Statement 10); and
- "While we generally pass through to our customers the manufacturer warranties we receive from our suppliers, in some circumstances, we **may** be responsible for repairing or replacing defective parts during our warranty period, often including those covered by manufacturers' warranties, or incur other non-warranty costs. **If** a manufacturer disputes or otherwise fails to honor its warranty obligations, we may be required to incur substantial costs before we are compensated, if at all, by the manufacturer"; "Increases in the defect rate of SunPower or third-party products, including

components, **could** cause us to increase the amount of warranty reserves and have a corresponding material, negative impact on our results of operations. Further, **potential future** product or component failures **could** cause us to incur substantial expense to repair or replace defective products or components, and we have agreed in some circumstances to indemnify our customers and our distributors against liability from some defects in our solar products. A successful indemnification claim against us could require us to make significant damage payments”; “Repair and replacement costs, as well as successful indemnification claims, **could** materially and negatively impact our financial condition, cash flows, and results of operations”; and “In addition, quality issues **can** have various other ramifications, including delays in the recognition of revenue, loss of revenue, loss of future sales opportunities, increased costs associated with repairing or replacing products, and a negative impact on our goodwill and reputation, any of which could adversely affect our business, results of operations, cash flows, and financial condition.” (FAC ¶ 64; November 4, 2021 3Q21 Form 10-Q) (Statement 11).

Plaintiff charges that these statements omitted: the development of cracking in connectors in the Company’s commercial systems; the need to spend \$27 million replacing those connectors; and the related, negative financial impact on the Company. *See* FAC ¶¶ 50, 67.

Plaintiff submitted a statement of recent decision in which the Ninth Circuit found that corporate statements of hypothetical risks were actionably false where they contradicted contemporaneous knowledge that the risks had already materialized, but Plaintiff here fails to establish contemporaneous knowledge that the risks warned of had come to fruition. *Cf. In re Facebook, Inc. Sec. Litig.*, 84 F.4th 844, 858-60 (9th Cir.), opinion amended and superseded on denial of reh’g, 87 F.4th 934 (9th Cir. 2023) (as amended, at 87 F.4th at 948-51). Plaintiff relies on the inference that Defendants knew of the cracking defects and associated impacts at the time they made the warnings, an inference that does not find support in the pleading. Plaintiff at no point alleges Defendants’ knowledge of the defect – much less Defendants’ understanding of how the defect would financially impact the company – at any time prior to the January 2022 announcement of the breadth of the cracking issue and the analyst reports discussing that announcement.

Nowhere does the FAC allege facts suggesting that the cracking issue had existed since 2019, that anyone at SunPower had knowledge of the cracking issue since 2019, or that the Company had proactively decided to replace all the potentially affected connectors – and thus knew that it would have to incur millions of dollars in costs – since 2019. Plaintiff asks the Court to infer that the reports of product defects were “found in ‘nearly all [commercial] systems since

1 2019,”” but that appears to be a misreading of SunPower’s press release as well as the financial
2 analysts’ reports. FAC ¶ 75. The Company’s announcement regarding its proactive replacement
3 of the failing third-party connectors does not represent that the “cracking issue” had been known
4 by Defendants “since 2019”; rather, the statements and reports give the impression that
5 Defendants only recently learned of the product defect and that the product defect existed in the
6 products manufactured since 2019. FAC ¶ 71 (“the company has identified a cracking issue that
7 developed over time” (emphasis omitted)).

8 Indeed, the analyst reports quoted and relied upon by Plaintiff in the FAC contradict
9 Plaintiff’s theory of Defendants’ knowledge. For instance, Truist Securities wrote,

10 SPWR has identified a cracking issue in certain connectors within
11 third party commercial equipment supplied to the company. . . As
12 the company is pursuing the sale of its CIS business, we wouldn’t be
13 surprised if such findings were revealed in a due diligence process,
14 though we note SPWR specifically indicated the issue was identified
15 in a product quality assessment.

16 FAC ¶ 72. Cowen Equity Research similarly wrote,

17 The company noted that a third party connector that was installed at
18 the factory has developed cracking issue. . . Our sense is this issue
19 needs to be resolved before the intended sale of the C&I division
20 occurs and likely came up in due diligence.

21 FAC ¶ 73. These analyst reports suggest Defendants discovered the cracking defect in the course
22 of SunPower’s due diligence review of the CIS segment for sale, sometime after the Company’s
23 October 5, 2021 announcement that it was considering such a sale. FAC ¶¶ 72-73. This suggests
24 that SunPower did not know of the product defect until just before it announced its proactive
25 replacement of all such connectors.

26 In addition to the analyst reports, Plaintiff avers that additional conduct demonstrated
27 Defendants’ knowledge earlier than represented. For example, because Defendants’ October 5,
28 2021 conference call lowered guidance for 4Q21 due to poor performance in the CIS segment
(FAC ¶ 52), Plaintiff avers that supports that Defendants knew something was wrong in the
commercial segment by October 5, 2021, before the November 3, 2021 statements. But
Defendants’ announcements do not show knowledge of the product defect, and the factual
allegations support a contrary narrative – that Defendants did not understand the problems with

1 the commercial business until they completed their due diligence review in preparation of its sale.
2 Plaintiff fails to allege knowledge that the Company was going to face a multi-million-dollar
3 charge for defective connectors. Moreover, while not strictly necessary, Plaintiff fails to allege
4 corroboration of contemporaneous knowledge. The Complaint alleges no confidential witness
5 accounts, contradictory internal reports, red flags, or post-class-period admissions demonstrating
6 Defendants' knowledge earlier than made public.

7 The failure to allege falsity infects all of the statements challenged by Plaintiff. Plaintiff
8 claims Statements 5-7 and 9-11, risk factor statements that warned of potential costs related to
9 product defects, were false or misleading because they disguised risks that had knowingly
10 materialized as mere uncertainties. But that argument is again premised on the factually
11 unsupported assertion that the cracking issue had already materialized and come to Defendants'
12 attention by August 4 and November 4, 2021. That argument fails.

13 In sum, while Plaintiff argues that all of the statements were knowingly false when made,
14 Plaintiff fails to identify how and when Defendants became aware of the connector defects or the
15 gravity of those defects. *Cf. Facebook, Inc. Sec. Litig.*, 84 F.4th at 948-51. Plaintiff's failure to
16 allege falsity is fatal to its claims, and they must be dismissed on this basis. Nonetheless, to
17 provide Plaintiff with sufficient guidance in amending its pleading, the Court takes up Defendant's
18 assertions that several of the challenged statements are actionable as puffery and/or forward-
19 looking, as well as the sufficiency of Plaintiff's scienter allegations.

20 **2. Inactionable Puffery**

21 Generalized statements of corporate optimism, such as business being "healthy," may be
22 considered puffery and are not actionable. *Police Ret. Sys. of St. Louis v. Intuitive Surgical*, 759
23 F.3d 1051, 1060 (9th Cir. 2014); *see, e.g., In re Nimble Storage, Inc. Sec. Litig.*, 252 F. Supp. 3d
24 848, 854 n.8 (N.D. Cal. 2017) ("[A]lleged optimistic statements indicating that a company is 'on
25 track' to meet a certain goal are, without more, inactionable puffery."). "A statement is
26 considered puffery if the claim is extremely unlikely to induce consumer reliance." *Newcal
27 Indus., Inc. v. Ikon Off. Sol.*, 513 F.3d 1038, 1053 (9th Cir. 2008). The difference between puffery
28 and a statement of fact "rests in the specificity or generality of the claim." *Id.* A statement that is

1 “quantifiable” may be actionable, while a “general, subjective claim” is not. *Id.* However, “even
2 general statements of optimism, when taken in context, may form a basis for a securities fraud
3 claim when those statements address specific aspects of a company’s operation that the speaker
4 knows to be performing poorly.” *In re Quality Sys.*, 865 F.3d at 1143 (internal quotation marks
5 omitted).

6 Defendants argue that these statements constitute feel-good corporate puffery:

- 7 • **“Our solid second quarter results reflect continued execution in both our residential**
8 **and commercial businesses . . .”** (FAC ¶ 39; August 3, 2021 Press Release) (Statement
1);³
- 9 • **“[W]e remain on track to achieve our 2021 financial outlook and are well positioned**
10 **to drive growth and profitability in 2022 and beyond.”** (FAC ¶ 39; August 3, 2021
Press Release) (Statement 2);
- 11 • “Yes. . . . On the CIS side of the house, while the business has tailwinds, the business
12 has got a mix of projects, and we are seeing some of those projects move into 2022”;
and “So from a CIS perspective, I think the second quarter margins are reflective of the
inherent lumpiness in the business. We knew that going into the second quarter.
Having said that, **I think the business is significantly better year-on-year, both from a**
13 **top line perspective as well as a margin point of view. And then more importantly, we**
14 **expect the CIS business to be profitable in the back half of the year, which you recall**
15 **is a significant turnaround from the last couple of years.** So that’s the CIS business.”
(FAC ¶ 40; August 3, 2021 2Q21 Earnings Call, p. 9) (Statement 4);
- 16 • “Over the past few years, you’ve been with us through several major restructuring
17 events and strategic changes. I’m pleased to report we have found our footing. **With a**
18 **streamlined company and our healthiest balance sheet in years, we are now going on**
offense to grow our business across a vast, mostly untapped residential TAM.” (FAC
¶ 59; November 3, 2021 3Q21 Earnings Call, p. 6-7) (Statement 8).

19 Plaintiff counters that these challenged positive statements falsely represented then-existing
20 negative conditions. Not so. These statements, particularly those including phrases such as “on
21 track” and “well positioned,” express the positive outlook of corporate optimism that is unlikely to
22 induce consumer reliance. Though Plaintiff advances that these statements convey a false
23 impression of the health of the CIS business, Plaintiff fails to show Defendants’ then-present
24 knowledge of falsity, i.e., that the CIS business would be hampered by component defects. *See*
25 Section IV(A)(1), above.

26
27
28 ³ For ease of reference, the Court relies on the enumeration of the challenged statements presented
in Defendants’ chart at Roberts Declaration, Exhibit A. ECF 65-1.

1 Statement 8 is particularly difficult to recognize as false because, rather than ignoring or
2 minimizing the difficulties arising from the CIS business, it expresses hopefulness. Plaintiff avers
3 the statement “we have found our footing. With a streamlined company and our healthiest balance
4 sheet in years, we are now going on offense” (FAC ¶ 59, Statement 8), was a false reassurance
5 and/or material omission that SunPower’s business was not then hamstrung by problems in its
6 soon-to-be-sold CIS segment. “[S]treamlined company,” read in context, refers to the anticipated
7 sale of the CIS division that had been announced a month prior, and rather than providing false
8 reassurances, SunPower earlier addressed numerous issues with CIS including delayed projects
9 and the business’s “inherent lumpiness.” FAC ¶¶ 40-41, 52, 57. Overall, Statements 1, 2, 4, and 8
10 constitute actionable corporate puffery that cannot sustain Plaintiff’s Section 10(b) claim.

11 **3. Forward-Looking Statements and the Safe Harbor**

12 Forward-looking statements are not actionable as a matter of law if they are identified as
13 such and accompanied by “meaningful cautionary statements identifying important facts that
14 could cause actual results to differ materially from those in the forward[-]looking statement.”
15 U.S.C. § 78u-5(c)(1)(A)(i). “A forward-looking statement is any statement regarding
16 (1) financial projections, (2) plans and objectives of management for future operations, (3) future
17 economic performance, or (4) the assumptions underlying or related to any of these issues.” *No.*
18 *84 Emp’r Teamster Joint Council Pension Trust Fund v. Am. W. Holding Corp.*, 320 F.3d 920,
19 936 (9th Cir. 2003). “[I]f a forward-looking statement is identified as such and accompanied by
20 meaningful cautionary statements, then the state of mind of the individual making the statement is
21 irrelevant, and the statement is not actionable regardless of the plaintiff’s showing of scienter.” *In*
22 *re Cutera Sec. Litig.*, 610 F.3d 1103, 1112 (9th Cir. 2010). However, “[t]he safe harbor cannot
23 protect cautionary statements made with superior knowledge that some of the potential perils
24 identified have in fact been realized.” *Washtenaw Cnty. Emps. Ret. v. Celera Corp.*, 5:10-cv-
25 02604 EJD, 2012 WL 3835078, at *4 (N.D. Cal. Sept. 4, 2012) (citing *In re Convergent Techs.*
26 *Sec. Litig.*, 948 F.2d 507, 515 (9th Cir. 1991)).

27 Moreover, “[r]isk disclosures that ‘speak[] entirely of as-yet-unrealized risks and
28 contingencies’ and do not ‘alert[] the reader that some of these risks may already have come to

1 fruition’ can mislead reasonable investors.” *In re Alphabet, Inc. Sec. Litig.*, 1 F.4th 687, 703 (9th
2 Cir. 2021), cert. denied sub nom. *Alphabet Inc. v. Rhode Island*, 142 S. Ct. 1227 (2022); *see also*
3 *Siracusano v. Matrixx Initiatives, Inc.*, 585 F.3d 1167, 1181 (9th Cir. 2009) (statement that warned
4 of “the risks of product liability claims in the abstract” was misleading in light of failure to
5 disclose that the risk had already come to fruition).

6 Defendants argue that these statements are forward-looking statements protected by the
7 PSLRA’s safe harbor provision:

- 8 • “[W]e remain on track to achieve our 2021 financial outlook and are well positioned
9 to drive growth and profitability in 2022 and beyond.” (FAC ¶ 39; August 3, 2021
Press Release) (Statement 2);
- 10 • “For FY21, Defendants provided GAAP revenue guidance of \$1.41 to \$1.49 billion,
11 net income guidance of \$40 to \$60 million, and reported ‘Adjusted EBITDA guidance
remains unchanged at \$110 to \$130 million inclusive.’” (FAC ¶ 39; August 3, 2021
Press Release) (Statement 3);
- 12 • “Yes. . . . On the CIS side of the house, while the business has tailwinds, the business
13 has got a mix of projects, and we are seeing some of those projects move into 2022”;
14 and “So from a CIS perspective, I think the second quarter margins are reflective of the
inherent lumpiness in the business. We knew that going into the second quarter.
15 Having said that, *I think the business is significantly better year-on-year, both from a*
top line perspective as well as a margin point of view. And then more importantly, we
expect the CIS business to be profitable in the back half of the year, which you recall
is a significant turnaround from the last couple of years. So that’s the CIS business.”
(FAC ¶ 40; August 3, 2021 2Q21 Earnings Call, p. 9) (Statement 4); and
- 16 • “Over the past few years, you’ve been with us through several major restructuring
17 events and strategic changes. I’m pleased to report we have found our footing. *With a*
streamlined company and our healthiest balance sheet in years, we are now going on
offense to grow our business across a vast, mostly untapped residential TAM.” (FAC
18 ¶ 59; November 3, 2021 3Q21 Earnings Call, p. 6-7) (Statement 8).

21 The Court agrees. Statement 2, about the Company being “on track” and “well positioned” to
22 meet financial guidance, FAC ¶ 39, is forward-looking, as “an unadorned statement that a
23 company is ‘on track’ to achieve an announced objective, or a simple statement that a company
24 knows of no issues that would make a goal impossible to achieve, are merely alternate ways of
25 declaring or reaffirming the objective itself.” *Wochos v. Tesla, Inc.*, 985 F.3d 1180, 1192 (9th Cir.
26 2021). Statement 3 is SunPower’s actual financial guidance (FAC ¶ 39), and it is thus
27 “classically” forward-looking. *Intuitive Surgical*, 759 F.3d at 1058. Statements 4 and 8, about
28 “expect[ing] the CIS business to be profitable in the back half of the year” (FAC ¶¶ 10, 40

1 (Statement 4)), and “now going on offense to grow our business” (FAC ¶¶ 13, 59 (Statement 8)),
2 are also forward-looking because they refer to the future performance of the business. *See*
3 *Intuitive Surgical*, 759 F.3d at 1059 (“statements related to future expectations and performance”
4 are generally forward-looking).

5 Defendants identified Statements 2, 3, 4, and 8 as forward-looking and provided cautionary
6 language in support. At the beginning of each earnings call, SunPower cautioned investors that
7 the call would contain “forward-looking” statements and encouraged investors to refer to the risks
8 “described in the safe harbor slide of today’s presentation, today’s press release, our 2020 10-K
9 and quarterly reports on Form 10-Q.” Roberts Decl., Ex. 2 (Aug. 3, 2021 Earnings Call) at 4
10 (ECF 65-3 at 5); *see also* Ex. 5 (Aug. 3, 2021 Investor Slides) at 2 (ECF 65-6 at 3) (defining
11 forward-looking statement to include “expectations regarding . . . future performance” and
12 “strategic plans and expectations for the results thereof,” including a list of risk factors, and
13 referring investors to the Company’s SEC filings for additional information); Ex. 4 (Nov. 3, 2021
14 Earnings Call) at 4 (ECF 65-5 at 6) (containing similar warnings); Ex. 6 (Nov. 3, 2021 Investor
15 Slides) at 2 (ECF 65-7 at 3) (containing similar warnings).

16 The cautionary language provided by SunPower in its SEC filings was extensive and
17 particularly addressed potential defect-related product issues akin to the issues that were realized
18 and announced by SunPower in January 2022. SunPower cautioned, among other things, that “the
19 failure of a supplier to supply . . . components that meet [its] quality, quantity and cost
20 requirements, could impair [its] ability to manufacture [its] products or could increase [its] cost of
21 production.” FAC ¶¶ 11, 14 (recounting excerpts of cautionary language from the “risk factor”
22 section of Company’s SEC filings). SunPower further cautioned that it might “be responsible for
23 repairing or replacing defective parts,” that “defect[s] could cause [the Company] to incur
24 significant . . . costs,” that expenses could be “substantial,” that the Company might not receive
25 compensation from its suppliers despite manufacturers’ warranties, that such costs “could
26 materially and negatively impact our financial condition, cash flows, and results of operations”
27 and that its “credibility and the market acceptance and sales of [its] products could be harmed.”
28 FAC ¶¶ 11, 14, 44-46, 62-64; *see also* Roberts Decl. Ex. 8 (Feb. 22, 2021 10-K) at 31-39 (ECF

1 65-9 at 23-31) (discussing important factors); Ex. 9 (Aug. 4, 2021 10-Q) at 54-55 (ECF 65-10 at
2 7-8) (incorporating 10-K risk factors and providing additional factors); Ex. 10 (Nov. 4, 2021 10-
3 Q) at 55-57 (ECF 65-11 at 7-9) (same). Statements 2, 3, 4, and 8 are therefore protected under the
4 first prong of the safe harbor because they were accompanied by cautionary language.

5 Plaintiff argues that the safe harbor does apply to these statements because the cautionary
6 language that accompanied the statements was not meaningful. The cautionary language here
7 consists of risk warnings published shortly before and after Defendants' announcement that they
8 were reviewing SunPower's commercial business for sale, and the warnings were phrased entirely
9 as contingencies. *See* FAC ¶¶ 52-56. Plaintiff avers that the warnings were no longer
10 hypotheticals but instead existing realities, rendering the risk statements falsehoods. Defendants
11 purported to warn, for example: "defects could cause us to incur significant . . . costs"; "we may
12 be responsible for repairing or replacing defective parts"; and "potential future product or
13 component failures could cause us to incur substantial expense to repair or replace defective
14 products or components." *See* FAC ¶¶ 11, 14, 44-46, 62-64. Plaintiff argues that these risk
15 warnings are actionable because they warned of contingencies that Defendants knew had already
16 come to fruition. That is, by August 4, 2021, and November 4, 2021, cracking in connectors in
17 SunPower's commercial solar systems and the risk of related costs had materialized because
18 defects "developed over time" in "nearly all" of SunPower's commercial solar systems "since
19 2019." *See* FAC ¶¶ 71, 75. But as discussed above (Section IV(A)(1)), Plaintiff's theory
20 regarding Defendants' knowledge of the cracked connectors is not borne out through its
21 allegations in the Amended Complaint, and Plaintiff fails to establish knowing falsity. In sum,
22 Defendants' forward-looking statements are accompanied by meaningful cautionary statements
23 and fall within the PSLRA's safe harbor. Statements 2, 3, 4, and 8 are forward-looking statements
24 protected by the PSLRA's safe harbor provision, and they are not actionable.

25 **B. Strong Inference of Scienter**

26 The PSLRA requires plaintiffs to "state with particularity facts giving rise to a strong
27 inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u-4(b)(2)(A).
28 This "is a mental state that not only covers intent to deceive, manipulate, or defraud, but also

1 deliberate recklessness.” *Quality Sys.*, 865 F.3d at 1144 (citation and quotations omitted). “The
2 inference that the defendant acted with scienter need not be irrefutable, i.e., of the ‘smoking gun’
3 genre, or even the ‘most plausible of competing inferences.’” *Tellabs*, 551 U.S. at 324 (citation
4 omitted). However, a strong inference of scienter “must be more than merely plausible or
5 reasonable – it must be cogent and at least as compelling as any opposing inference of non-
6 fraudulent intent.” *Tellabs*, 551 U.S. at 314.

7 The arguments regarding scienter fall into four categories, discussed below: (1) whether
8 Plaintiff adequately alleges scienter based on Defendants’ knowledge or access to material
9 information concerning the risk of cracking in the commercial solar systems, (2) whether the core
10 operations doctrine supports an inference of scienter based on Defendants’ knowledge of their
11 business, (3) whether the timing of the statements support an inference of scienter, and (4) whether
12 a holistic view of the allegations supports an inference of scienter.

13 **1. Knowledge or access to material information concerning the risk of
14 cracking in SunPower’s commercial solar systems**

15 To plead scienter, a complaint may plead a “combination” of facts, none of which need to
16 be from confidential witnesses, internal reports, or other specific sources. *See Alphabet*, 1 F.4th at
17 707 (collecting authority for proposition “[a]llegations of suspicious stock sales or information
18 from confidential witnesses are not needed”). However, the PSLRA demands “particular
19 allegations which strongly imply Defendants’ *contemporaneous* knowledge that the statement was
20 false when made.” *Berson*, 527 F.3d at 989 (emphasis in original).

21 Here, Plaintiff fails to allege facts that suggest contemporaneous knowledge that
22 contradicted Defendants’ public statements. Plaintiff contends that because Faricy took a “deep
23 dive” into the commercial business when hired as CEO (FAC ¶ 8), it is fair to reason that he knew
24 of the cracking issues, how widespread the cracking issues were, or how they would impact the
25 business. But general allegations of an internal review are insufficient where Plaintiff provides no
26 detail about what Faricy’s review revealed. *See In re Eargo, Inc. Sec. Litig.*, 656 F. Supp. 3d 928,
27 948 (N.D. Cal. 2023) (“vague” allegations about “internal review” insufficient to establish scienter
28 where plaintiff provided no details about what review showed). Plaintiff’s general allegations

1 implying that Faricy knew of the widespread cracking defect based on his April 2019 review of
2 the residential and commercial businesses do not even strongly imply that Faricy knew of the
3 product defect before the Company’s August and November statements regarding the scope of the
4 component defect. Thus, Plaintiff’s allegations are insufficient.

5 Plaintiff’s allegations additionally fail for the misinterpretation discussed above. Plaintiff
6 highlights that the cracking connectors impacted the products manufactured “since 2019,” and it
7 misattributes that date to also mean that Defendants knew of the cracking of the components
8 “since 2019.” That is not a fair reading of the statements.

9 Plaintiff has not sufficiently pleaded facts from which one can infer contemporaneous
10 knowledge of the product defects and fails to establish a strong inference of scienter on this basis.

11 **2. Core Operations**

12 Plaintiff alleges that SunPower’s commercial business – including both the CIS (the
13 Company’s second-largest business segment) and CVAR components – was a key component of
14 the company’s financial health as it generated more than 23% of the Company’s revenue. FAC
15 ¶¶ 6-7, 52. From this, Plaintiff reasons that Defendants knew of the risks related to widespread
16 component failure. While the “core operations” doctrine allows the knowledge of certain facts
17 that are critical to a business’s “core operations” to be attributed to a company’s key officers,
18 *Webb v. SolarCity Corp.*, 884 F.3d 844, 854 (9th Cir. 2018), “corporate management’s general
19 awareness of the day-to-day workings of the company’s business does not establish scienter – at
20 least absent some additional allegation of specific information conveyed to management and
21 related to the fraud.” *Metzler Inv. GMBH*, 540 F.3d at 1068. On the other hand, when plaintiffs
22 can advance “specific allegations that defendants actually did monitor the data that were the
23 subject of the allegedly false statements . . . is sufficient under the PSLRA.” *S. Ferry LP, No. 2 v.*
24 *Killinger*, 542 F.3d 776, 785 (9th Cir. 2008). The Ninth Circuit established that

25 allegations regarding management’s role in a company may be
26 relevant and help to satisfy the PSLRA scienter requirement in three
27 circumstances. First, the allegations may be used in any form along
28 with other allegations that, when read together, raise an inference of
scienter that is cogent and compelling, thus strong in light of other
explanations. . . Second, such allegations may independently satisfy
the PSLRA where they are particular and suggest that defendants

had actual access to the disputed information. . . Finally, such allegations may conceivably satisfy the PSLRA standard in a more bare form, without accompanying particularized allegations, in rare circumstances where the nature of the relevant fact is of such prominence that it would be absurd to suggest that management was without knowledge of the matter.

Id. at 785-86 (citations omitted).

Defendants argue that none of the three forms of the core operations doctrine applies because Plaintiff fails to allege that Faricy or Sial had “actual access” to any information concerning the cracking problem. Plaintiff fails to advance specific allegations that Defendants monitored information or reports regarding the connector defects that were the subject of the allegedly false statements. Plaintiff’s nearest approximation to showing Defendants’ access to particular information about the CIS segment is the allegation regarding Faricy’s April 2021 statement that he would conduct a “deep [dive]” of the residential, commercial, and industrial businesses in his first 100 days at the company. FAC ¶ 8. Such allegations do not amount to a “cogent or compelling” inference of scienter, nor do they suffice to “suggest that defendants had actual access to the disputed information.” *See S. Ferry*, 542 F.3d at 785-86. The allegations additionally fail for the same failure to allege knowledge of the component defect discussed above. *See* Section IV(B)(1). Thus, Plaintiff is not entitled to the core operations inference of scienter.

3. Temporal proximity of Defendants’ statements and corrective disclosures and the scope of the cracked connectors

Plaintiff argues that the long-term and constant nature of component defects and Defendants’ personal attention to the commercial business and the tight temporal proximity of the alleged statements and the revelations that the concealed risks had materialized, together, strongly bolsters the inference of scienter. Close temporal proximity between allegedly false statements and the disclosure of information contradicting those statements may bolster an inference of scienter. *Reese*, 747 F.3d at 574-75. However, timing alone, absent a showing of knowing falsity, is insufficient to support scienter. *See Fecht v. Price Co.*, 70 F.3d 1078, 1083-84 (9th Cir. 1995); *Robert v. OSI Sys., Inc.*, No. CV 13-9174-MWF VBKX, 2015 WL 1985562, at *11 (C.D. Cal.

1 Feb. 27, 2015) (emphasizing that an inference of scienter was premised on holistic view, not
2 merely on timing of statements).

3 It was only five and one-half months and two and one-half months, respectively, after the
4 statements that SunPower announced that: (a) it was missing its 4Q21 and FY21 guidance; (b) it
5 was taking a \$27 million charge in the already-ended 4Q21; and (c) cracking and the risk of
6 cracking had developed in third-party connector components requiring SunPower to recall and
7 replace those components. FAC ¶¶ 71, 86; *see also* FAC ¶¶ 72-75. Plaintiff does not allege when
8 the Company made the proactive decision to take the \$27 million charge to replace the cracking
9 connectors, and in failing to establish that the decision was made prior to Defendants' challenged
10 statements, Plaintiff fails to allege scienter based on the timing of the statements. For these
11 reasons, the temporal proximity of the statements also fails to support a strong inference of
12 scienter.

13 **4. Holistic Picture of Scienter**

14 Plaintiff advances that it is plausible to infer Defendants "conceal[ed] bad news in the hope
15 that it w[ould] be overtaken by good news" or otherwise made a "reckless[] gamble." Opp. Br. at
16 24 (ECF 67 at 31) (quoting *Makor Issues & Rts., Ltd. v. Tellabs Inc.*, 513 F.3d 702, 710 (7th Cir.
17 2008)). To evaluate scienter, "the court's job is not to scrutinize each allegation in isolation but to
18 assess all the allegations holistically." *Tellabs*, 551 U.S. at 326. The court "must consider
19 plausible, nonculpable explanations for the defendant's conduct, as well as inferences favoring the
20 plaintiff." *Id.* at 324. The inference of scienter "need not be irrefutable," but "must be more than
21 merely reasonable or permissible – it must be cogent and compelling, thus strong in light of other
22 explanations." *Id.* The question is: "When the allegations are accepted as true and taken
23 collectively, would a reasonable person deem the inference of scienter at least as strong as any
24 opposing inference?" *Id.* at 326.

25 An inference of scienter based on Defendants' withholding of bad news fundamentally
26 fails for the same reason that Plaintiff's other theories fail: Plaintiff fails to establish that
27 Defendants knew of the "bad news," the component defect, at any point prior to their November
28 2021 statements. The FAC alleges, in essence, that Defendants should have disclosed the cracking

1 issue sooner than they did, but the FAC does not provide any facts suggesting exactly when the
2 issue arose or when Defendants had knowledge of it.

3 Further, Plaintiffs do not allege facts showing that any Defendants sold stocks during the
4 Class Period, and the absence of such insider trading “supports an inference of no scienter.” *See*
5 *In re Rigel Pharm., Inc. Sec. Litig.*, 697 F.3d 869, 884 (9th Cir. 2012) (“[B]ecause none of the
6 defendants sold stock during the period between the allegedly fraudulent statements and the
7 subsequent public disclosure . . . , the value of the stock and stock options does not support an
8 inference of scienter. . . . In fact, it supports the opposite inference.”); *accord, e.g., In re Solarcity*
9 *Corp. Sec. Litig.*, 274 F. Supp. 3d 972, 1011 (N.D. Cal. 2017).

10 In conclusion, after reviewing the First Amended Complaint, Plaintiffs have not pleaded
11 particularized facts showing a strong inference of scienter with respect to any of the challenged
12 statements.

13 **C. Sufficiency of Pleading Section 20(a) Claim**

14 Plaintiff also alleges a Section 20(a) claim against Faricy and Sial. FAC ¶¶ 108-109.
15 Section 20(a) provides a right of action against any person “who, directly or indirectly, controls
16 any person liable under any provision of this chapter or of any rule or regulation thereunder.” 15
17 U.S.C. § 78t(a). The Section 20(a) claim fails because it cannot stand absent a primary violation.
18 *Lipton v. Pathogenesis Corp.*, 284 F.3d 1027, 1035 n.15 (9th Cir. 2002). The Court therefore
19 dismisses this cause of action as well.

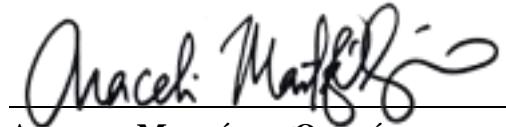
20 **V. CONCLUSION**

21 For the foregoing reasons, the Court **GRANTS** Defendants’ motion to dismiss with leave
22 to amend. Any amended complaint must be filed by August 15, 2024. No additional parties or
23 claims may be added without leave of Court or stipulation of Defendants.

24 **IT IS SO ORDERED.**

25 Dated: July 17, 2024

26
27
28



ARACELI MARTÍNEZ-OLGUÍN
United States District Judge