UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

JING WANG and WAI-LEUNG CHAN, ***Plaintiffs*,** **- against -** **TESLA, INC.,** ***Defendant*.**	**Civ. Action No. 1:20-cv-03040**

PLAINTIFFS MEMORANDUM IN OPPOSITION TO TESLA INC.'S RULE 12(b)(6) MOTION FOR PARTIAL DISMISSAL OF PLAINTIFFS' FIRST AMENDED COMPLAINT AND TO STRIKE

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INTRODUCTION

Plaintiffs Jing Wang and Wai-Leung Chan seek to recover the damages they suffered when the automated systems on their Tesla Model X failed to perform as expressly represented and warranted to them, resulting in a horrific three-car collision on the Long Island Expressway that rendered the Tesla a total loss and left Mr. Chan, though physically uninjured, emotionally distraught. Tesla now asks the Court to dismiss the Sixth Count of Plaintiffs' First Amended Complaint [ECF No. 18] (the "FAC"),[1] which seeks recovery for Tesla's fraud and fraudulent misrepresentation, by attempting both to rewrite and ignore Plaintiffs' allegations about Tesla's specific false statements as well as the applicable law. Tesla should not be permitted to do so. Tesla also should not be permitted to avoid Plaintiffs' well-pleaded claim for punitive and exemplary damages, or to avoid factual allegations in the FAC through a misplaced Rule 12(f) request to strike. Plaintiffs respectfully request that the Court deny Tesla's Motion for Partial Dismissal of Plaintiffs' First Amended Complaint and to Strike (the "Motion"),[2] and permit Plaintiffs to proceed with discovery on all of their claims and causes of action.

PLAINTIFFS' ALLEGATIONS

On December 13, 2017, Plaintiff Chan was driving his Tesla Model X in congested rush-hour traffic on the Long Island Expressway using the vehicle's Traffic-Aware Cruise Control and Autosteer functions (together, "Autopilot"), when the Tesla failed to recognize another vehicle merging into traffic and, instead of engaging the brakes, dangerously accelerated toward the merging vehicle. FAC ¶¶ 37-41. Although Mr. Chan was alert and ready to assume control of the

[1] Tesla has answered the other six counts. ECF No. 19.

[2] Pursuant to the Court's "Bundling Rule" (Indiv. R. IV.B), the Motion, this Response in Opposition, and Tesla's Reply will be "bundled" and filed with the Court once briefing is complete. Page references to Tesla's "Motion" in this brief are references to the Memorandum of Law in Support that Tesla served with its Notice of Motion.

Tesla, he was unable to do so in the approximate one second available to him as the Tesla lurched toward the merging vehicle, and was forced instead to swerve into an adjacent lane of traffic where he collided with two other vehicles. *Id.* ¶¶ 39, 41-42. Both the Tesla and the two other involved vehicles were severely damaged, with the Tesla being declared a total loss. *Id.* ¶ 43. Footage of the collision is available online at https://www.youtube.com/watch?v=GJJOHauhto0&t=1s. FAC ¶ 47.

Just months earlier, as they explored whether to purchase a Tesla through extensive online research and multiple visits to Tesla showrooms, Plaintiffs had been expressly led to believe that Autosteer and various other automated features of the Tesla Model X would perform and not fail under exactly the circumstances Plaintiff Chan experienced on the day of the collision. FAC ¶¶ 23-36. Indeed, as alleged over no less than thirteen paragraphs of the FAC, Plaintiffs were largely induced to purchase the vehicle through Tesla's statements, both to Plaintiffs and to the public, about the intended performance and functionality of Autopilot in high traffic scenarios. *Id.* Many of these statements were included on Tesla's website, which Plaintiff Chan visited on a near weekly basis as his interest in purchasing a Tesla peaked throughout 2015 and into 2016. *Id.* ¶ 23. For example, as alleged in the FAC, Tesla's website boasts that its Autopilot feature will assume "the burdensome parts of driving"[3]—*i.e.*, certain operational and decision-making tasks normally required of the operator of the vehicle. *Id.* ¶ 9. These representations led Plaintiff Chan to believe that a Tesla vehicle would ease the burden and stress of his daily commute in notoriously heavy Long Island traffic. *Id.* ¶ 24.

Plaintiff Chan's beliefs were reinforced on two separate visits to Tesla showrooms in Long Island in 2015 and 2016. *Id.* ¶¶ 25-29. During these visits, he explained his particular needs to

[3] TESLA MOTORS, Autopilot, last visited Mar. 26, 2020, https://www.tesla.com/autopilot.

Tesla's representatives, who not only did not warn him that Tesla's Autopilot feature is unreliable under exactly the circumstances in which he intended to use it, but directly and expressly assured him that the Autopilot feature would uniquely address his needs. *Id.* ¶¶ 26-31. Most egregiously, during his second showroom visit, one of Tesla's representatives directly told Plaintiff Chan that he could take the Tesla into the expressway's HOV lane, engage Autopilot, *and then close his eyes and "relax." Id.* ¶ 29. The same agent also encouraged Plaintiff Chan to test drive the vehicle on the congested expressway with Autopilot engaged, where she promised it would perform without any caveats or exceptions. *Id.* ¶ 30-31.

As Plaintiff Chan unfortunately learned through his own traumatic experience, and as evidenced by multiple similar occurrences involving the failure of Tesla's systems during highway driving, Tesla's representations and statements to Plaintiff Chan and the general public about the utility of its Autopilot feature were (and in some cases remain to this day) materially false. Even worse, upon information and belief, Tesla makes these false statements knowingly and recklessly with the intent that consumers like Plaintiffs will rely on them in purchasing Tesla vehicles so that Tesla can continue to collect critical on-road information to improve its own products and its bottom line. *Id.* ¶ 52; *see also, e.g.*, *id.* ¶ 13 ("Tesla pushed its Autopilot into commerce with full knowledge of these defects in order to keep its fleet of vehicles operating on the roadway, enabling its fleet of Teslas to capture very valuable data from as many roadway miles as possible to tune its machine learning programs as quickly as possible"); ¶ 15 ("Tesla knows that reasonable drivers will not, and more significantly, perhaps cannot safely use Autopilot"); ¶ 16 ("Tesla misplaces responsibility in the hands of its drivers to safely conduct a takeover response and control a Tesla when the Autopilot malfunctions"); ¶ 49 ("Tesla relies on statements in its owner's manual (which is 206 pages long), reminding drivers to remain alert and never rely on Autopilot to steer or

decelerate the vehicle, even though Tesla knows that this is an unreasonable and in some cases impossible expectation of its customers, and is inconsistent with other representations Tesla makes about the capabilities of its vehicles.").

These are the allegations of Plaintiffs' First Amended Complaint, which the Court must accept as true at this stage, and which render Plaintiffs' claims for Fraud/Fraudulent Misrepresentation and for recovery of punitive damages sufficiently well-pleaded to survive Tesla's attempt at dismissal. Tesla may purport to dispute the allegations, and even seek to strike certain of them, but Plaintiffs intend to prove their case and are entitled to conduct discovery and do so.

ARGUMENT

I. Tesla's Motion for Partial Dismissal Should Be Denied.

A. 12(b)(6) Standard.

Under the familiar standard for deciding a motion to dismiss under Rule 12(b)(6), of the Federal Rules of Civil Procedure, a court must "accept all allegations in the complaint as true and draw all inferences in the non-moving party's favor." *LaFaro v. New York Cardiothoracic Group, PLLC*, 570 F.3d 471, 475 (2d Cir. 2009). To survive a motion to dismiss, a complaint must only "contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Tesla does not dispute that this is the applicable standard (Mot. at 4), and Plaintiffs more than adequately plead a plausible claim of fraud based on the allegations in the FAC.

B. Plaintiffs Have Pleaded Fraud with the Requisite Particularity.

Tesla first argues that Plaintiffs' fraud claim lacks sufficient particularity as required by Rule 9(b) of the Federal Rules of Civil Procedure. Tesla acknowledges that Plaintiffs plead all the

elements of a fraud claim under New York law (Mot. at 7),[4] but then attempts to dismiss Plaintiffs' pleading as "rote" and "perfunctory." But it is Tesla who approaches the pleadings in a rote and perfunctory manner, apparently hoping to obtain dismissal solely through a talismanic recitation of Rule 9(b)'s particularly requirement and conclusory argument—and it is Tesla's efforts that fail to satisfy the standard for dismissal.

Tesla in some cases diminishes and in other cases completely ignores the well-pleaded and particularized factual allegations about Tesla's multiple material misrepresentations that induced Plaintiffs to purchase a Tesla vehicle, giving rise to their claim for fraud, including without limitation the following:

- Tesla misrepresents or omits material facts about the safety of its vehicles in statements posted to its website, which Plaintiff Chan visited weekly during 2015 and 2016 as he considered purchasing a Tesla vehicle; for example, Tesla has falsely proclaimed on its website that the Model X is the "safest SUV ever." *See, e.g.*, FAC ¶¶ 6, 23.

- Tesla also mispresents on its website material facts about the capability of its vehicle's automated features, including that Autopilot is designed and intended to assume certain operational and decision-making tasks normally required of the operator of the vehicle—"the burdensome parts of driving"—despite its knowledge of multiple Autopilot malfunctions. Plaintiffs were specifically and "heavily influenced" by such statements in deciding to purchase a Tesla and to use the Autopilot function. *Id.* ¶¶ 9-10, 24, 99, 103, 105.

- Tesla's manuals and publications misleading counsel drivers that they can and must be ready to assume control of the vehicle from Autopilot, despite knowing that this "fallback plan" is unreliable and unsafe due to human factors limitations. *Id.* ¶¶ 15-17, 49, 101.

- Tesla's sales representatives routinely misrepresent and overstate the capabilities of Autopilot and the required level of operator involvement, promising as they did to Plaintiff Chan that the customer can simply "relax"

[4] The parties agree that, to assert a fraud claim under New York law, a plaintiff must plead: (1) a material misrepresentation or omission of fact; (2) which was false and known to be false by defendant; (3) made for the purpose of inducing the plaintiff's reliance; (4) justifiable reliance by the plaintiff; and (5) injury. *See, e.g.*, Mot. at 5 and cited references.

while relying on Autopilot in the most stressful of driving conditions. *See, e.g.*, *id.* ¶¶ 17, 29, 97-99, 101.

- Tesla, through authorized agents at the Syosset and Manhasset showrooms, misrepresented to Plaintiff Chan that the Model X was uniquely suited to his particular driving needs through both their affirmative statements and failures to warn Plaintiff Chan otherwise. *See, e.g.*, *id.* ¶¶ 26-31.

- Tesla, through an authorized agent at the Manhasset showroom, expressly and falsely represented to Plaintiff Chan that he could put the car in Autopilot in the HOV lane of the Long Island Expressway and close his eyes and relax. *Id.* ¶ 29.

- Tesla, through an authorized agent at the Manhasset showroom, expressly and falsely represented to Plaintiff Chan that the vehicle's Autopilot system would perform in congested expressway traffic, and Plaintiff Chan relied on these representations in purchasing the vehicle and using the Autopilot function. *Id.* ¶¶ 29-30, 108-115.

Neither the Federal Rules nor the applicable law permit Tesla to rewrite Plaintiffs' complaint and ignore its allegations to avoid a claim for fraud; both Tesla and this Court must accept the allegations as pleaded. As pleaded, Plaintiffs have identified the fraudulent statements on which they based their fraud claim, including by identifying the speakers (Tesla and its authorized representatives, including a specific representative named "Megan"); time period (2015 and 2016); place (Tesla's website and its showrooms); and nature of the statements. These allegations are sufficient, and sufficiently specific, to support a fraud claim under New York law.

As Tesla's own authority makes clear, to satisfy Rule 9(b), "Plaintiffs are not required to recite the precise statement which the specific individual in the defendant corporation made on a particular date. In addition, the fact that some of plaintiff's allegations are based on information and belief also does not defeat the fraud claims." *Official Publ'ns, Inc. v. Kable News Co., Inc.*, 775 F. Supp. 631, 637 (S.D.N.Y. 1991); *see also, e.g.*, *United States ex rel. Chorches for Bankr. Estate of Fabula v. Am. Med. Response, Inc.*, 865 F.3d 71, 88 (2d Cir. 2017) (explaining that Rule 9(b) "demands specificity, but . . . it does not elevate the standard of certainty that a pleading must attain beyond the ordinary level of plausibility. Nor does it forbid pleading upon information and

belief where . . . the circumstances justify pleading on that basis."); *Protter v. Nathan's Famous Sys., Inc.*, 904 F. Supp. 101, 106 (E.D.N.Y. 1995) (rejecting argument that complaint failed to set forth the time, place, and manner of alleged misrepresentations, where two paragraphs of the complaint made "specific references to alleged misrepresentations made by defendants . . . during January 1993 in order to induce the plaintiffs to purchase the [defendant's] franchises.").

Indeed, to the extent it contains any applicable analysis, nearly all of Tesla's cited authority on this point supports Plaintiffs' rather than Telsa's position. For example, in *Carmona v. Spanish Broad. Sys., Inc.*, on which Tesla heavily relies, the court *denied* a motion to dismiss a fraud claim where, as here, the "complaint's 'operative facts' section lays out the dates on which the alleged misrepresentations took place, where they took place, and the manner in which they took place." 2009 WL 890054, *5 (S.D.N.Y. Mar. 30, 2009). And while Tesla complains that Plaintiffs' fraud count here merely "refer[s] generally back to" the fraudulent misrepresentations described in the 47-paragraph "Facts" section of the FAC (Mot. at 7), this exact same argument was rejected by the *Carmona* Court as "unavailing, indeed silly." *Id.* This Court should likewise reject Tesla's arguments and deny its Motion.

C. New York Law Permits a "Fraud by Omission" Claim Where, as Here, One Party Has "Superior Knowledge."

Tesla also attempts to recast Plaintiffs' fraud claim as exclusively "premised on Tesla's alleged failure to do or say certain things, namely an alleged failure to advise," so as to argue in the alternative that the claim must be dismissed because New York law does not recognize a claim for fraud by omission in the absence of a fiduciary relationship between the parties. Mot. at 7-8. To be certain, Plaintiffs do allege that Tesla egregiously failed to warn or instruct them about the limitations of Autopilot, among other things. But as even a cursory reading of the FAC shows, and as made clear above, Plaintiffs' fraud claim is premised on more than Tesla's failure to warn

or instruct; it also is premised on the many affirmative and false statements Tesla made to Plaintiffs through various media, including the website and Tesla's authorized representatives. For this reason alone, Tesla's alternative argument seeking dismissal of Plaintiffs' fraud claim must fail.

Even if Tesla was correct in its framing of Plaintiffs' fraud claim (it is not), Tesla's argument still must fail because it also is incorrect in its representation of the applicable law. Again, as Tesla's own authorities acknowledge, New York courts "have recognized the existence of an alternative basis for allowing fraud claims to proceed based on omissions, even in arm's length transactions in the absence of a fiduciary or confidential relationship, 'where one party's superior knowledge of essential facts renders a transaction without disclosure inherently unfair' . . . ." *Connaughton v. Chipotle Mex. Grill, Inc.*, 135 A.D. 3d 535, 544 (1st Dep't 2016) (Saxe, J., *dissenting in part*) (*citing PT Bank Cent. Asia, N.Y. Branch v. ABN AMRO Bank N.V.*, 301 A.D. 2d 373, 378 (1st Dep't 2003) *and Swersky v. Dreyer & Traub*, 219 A.D.2d 321 (1st Dep't 1996). Under this "special facts doctrine," a defendant with superior knowledge in a sales transaction *must* disclose information essential to the transaction, and the defendant's failure to do so renders the transaction inherently unfair, giving rise to a claim for fraud. *See, e.g.*, *Greenman-Pedersen, Inc. v. Berryman & Heniger, Inc.*, 14 N.Y.S.3d 20, 21-22 (1st Dep't 2015).

Here, there is no question that Tesla, as the manufacturer and sole distributor of Tesla vehicles, has superior and peculiar knowledge regarding the performance and capability of the automated features it designs and incorporates into those vehicles. Accordingly, Tesla has a duty to disclose even in an arms-length transaction, and it cannot avoid Plaintiffs' allegations of fraud by omission here (notably, by omitting discussion of the special facts doctrine under New York law).

D. Plaintiffs Properly Seek Punitive and Exemplary Damages.

Like its arguments with respect to Plaintiffs' fraud count, Tesla seeks to dismiss Plaintiffs' claim for punitive and exemplary damages based on a mere recitation of the applicable law and a conclusory statement that Plaintiffs do not meet the pleading standard. Mot. at 9-10. Again, Tesla cannot prevail by simply ignoring Plaintiffs' well-pleaded allegations, which more than adequately state a claim for punitive and exemplary damages.

As a preliminary matter, Tesla appears to argue that Plaintiffs' request for punitive and exemplary damages should be dismissed because the FAC "contains no cause of action or claim that even alleges these words." Mot. at 9. This argument has no place under New York law, however, as "New York law does not recognize an independent cause of action for punitive damages." *Gershman v. Ahmad*, 67 N.Y.S.3d 663, 665 (2d Dep't 2017). Instead, a request for punitive and exemplary damages is properly included, as it was here, in the prayer for relief. *Id.* (finding that "the plaintiff's request for punitive damages in the ad damnum clause of the complaint was proper").[5]

Not only is Plaintiffs' request for punitive and exemplary damages properly pleaded under New York law, it is fully supported by the factual allegations of the FAC, including but not limited (as Tesla attempts to do) to the allegations that contain the words "reckless" and "conscious disregard." For example, Plaintiffs allege that:

- "Tesla pushed its Autopilot into commerce with full knowledge of [its] defects in order to keep its fleet of vehicles operating on the roadway, enabling its fleet of Teslas to capture very valuable data from as many roadway miles as possible to tune its machine learning programs as quickly as possible." FAC ¶ 13.

[5] Tesla also appears to ignore that Plaintiffs specifically request punitive damages in connection with the individual counts on which such damages are warranted. *See, e.g.*, FAC ¶¶ 82, 94, 106, 116. This is far more than a "fleeting reference." Mot. at 10.

- "In essence, Tesla is using its customers as "guinea pigs," without their knowledge or consent, to test its Autopilot software, thereby providing Tesla with critical information to improve its products at the risk to consumers and other members of the public." *Id.*

- "Rather than providing transparent disclosures, Tesla tells its customers and regulators that when Autopilot fails, the driver is the fallback option to resume control of the vehicle" even though Tesla knows and has been warned by the NTSB that the "malfunctioning and defective Autopilot system does not allow for [the] margin of time" required for a human driver to take over. *Id.* ¶ 15; *see also id.* ¶ 49.

- "Tesla's sales representatives routinely misrepresent and overstate the capabilities of Autopilot and the required level of operator involvement, promising that the customer can simply "relax" while relying on Autopilot in the most stressful of driving conditions." *Id.* ¶ 17; *see also id.* ¶ 29.

- "Tesla's practice of selling or leasing vehicles with Autopilot, without properly warning about and/or disclosing the defects and limitations in that system prior to the time of sale or lease to consumers, and in some cases affirmatively or by omission misrepresenting the capabilities of the system, as alleged herein, violates generally accepted ethical principles of business conduct." *Id.* ¶ 51.

- "Tesla's practices are wantonly reckless and grossly negligent, and put both the safety of consumers and the general public at risk, as Tesla continues to push its vehicles to market without proper testing, warning, or instruction, which upon information and belief is being done to provide Tesla with critical on-road information to improve its own products and its bottom line." *Id.* ¶ 52.

Each of these allegations, which again must be taken as true for purposes of the Court's present analysis, directly and specifically identifies "conduct that may be characterized as 'gross' and 'morally reprehensible,' and of 'such wanton dishonesty as to imply a criminal indifference to civil obligations." *New York Univ. v. Cont'l Ins. Co.*, 87 N.Y.2d 308, 315-16 (1995). In short, Plaintiffs have asserted and intend to prove that Tesla has acted recklessly and reprehensibly, putting its own profit and product development interests above the safety of its customers and the general public who drive alongside Tesla vehicles. Thus, Plaintiffs have more than adequately pleaded a claim for punitive and exemplary damages sufficient to survive Tesla's motion to dismiss. *E.g.*, *Dumesnil v. Proctor & Schwartz Inc.*, 199 A.D.2d 869, 870 (1993) (allowing

amendment to include a claim for punitive damages where plaintiff alleged defendant failed to properly safeguard its product, despite knowledge of dangers, and noting that "punitive damages may be awarded when a defendant's conduct is so reckless or wantonly negligent as to be the equivalent of a conscious disregard of the rights of others.").

II. Tesla Has No Basis to Strike Plaintiffs' Factual Allegations.

Tesla also asks this Court to "strike" six specific factual allegations in the FAC on the basis that Tesla deems them to be "irrelevant" to Plaintiffs' claims. But Tesla again misses the mark on both the facts and the law. Each of the six allegations has direct bearing on Plaintiffs' claims, and Rule 12(f) does not permit Tesla to simply eliminate factual allegations that it prefers to avoid or, perhaps more transparently, avoid discovery about. *See, e.g.*, Mot. at 11 (reference to discovery regarding the allegations).

Tesla wants to avoid these six allegations so much that it does not even repeat them in its Motion; they are, with their accompanying citations, as follows:

> 14. Tesla tries to distance itself from potential liabilities by initially referring to the Model X operating software as being in a "beta-testing phase." After Germany's Federal Office for Motor Vehicles refused to approve Autopilot for use on German roads, Tesla explained that the word "beta" is not used in the standard sense of the word but was used to make sure Tesla drivers do not get too comfortable with its autopilot system.[6]
>
> 15. Rather than providing transparent disclosures, Tesla tells its customers and regulators that when Autopilot fails, the driver is the fallback option to resume control of the vehicle.[7] This fallback plan is unreliable and unsafe. Not only has Tesla been warned by the NTSB that drivers of their

[6] Fred Lambert, "European Authority says 'no safety concerns' with Tesla's Autopilot after 'beta' scare" Electrek, July 14, 2016, https://electrek.co/2016/07/14/european-authority-tesla-autopilot-after-beta-scare/.

[7] Tesla instructs its drivers to maintain their hands on the wheel and apply a significant level of resistance to assure the vehicle's system that the driver is properly engaged. Steering wheel torque, which is a fundamental premise for Tesla to measure engagement by the driver, and an essential element of Tesla's safety paradigm, is not a proper way to control for distraction and ensure driver engagement. U.S. Department of Transportation, National Highway Traffic Safety Administration, DOT HS 812 182, "Human Factors Evaluation of Level 2 and Level 3 Automated Driving Concepts," at page 1. August 2015.

automobiles may become overly reliant on the Autopilot technology,[8] but Tesla also knows or should know, based on scientific and engineering publications, that drivers have a limited ability to execute a "take over response" when Autopilot does not measure up. Indeed, the "takeover response" time for humans varies greatly depending on the circumstances: the type of stimuli, the type of control necessary, and the driving situation. Even the most attentive drivers need a certain amount of time to perform a takeover response. The malfunctioning and defective Autopilot system does not allow for that margin of time, nor does it provide a sufficient warning to enable the driver to properly respond. In other words, Tesla knows that reasonable drivers will not, and more significantly, perhaps cannot safely use Autopilot.[9]

* * *

18. The NTSB has investigated several Tesla-related fatalities. For example, in Mountain View, California, a Tesla's Autopilot malfunctioned, and the vehicle accelerated into a cement median at a merge point of two intersecting highways, killing the driver.[10] The NTSB investigation resulted in a report published on March 23, 2020 which stated, in part:

> Probable Cause - The National Transportation Safety Board determines that the probable cause of the Mountain View, California, crash was the Tesla Autopilot system steering the sport utility vehicle into a highway gore area due to system limitations, and the driver's lack of response due to distraction likely from a cell phone game application and overreliance on the Autopilot partial driving automation system. Contributing to the crash was the Tesla vehicle's ineffective monitoring of driver engagement, which facilitated the driver's complacency and inattentiveness.

19. Furthermore, the NTSB's report noted the following:

    a. The Tesla Autopilot system did not provide an effective means of monitoring the driver's level of engagement with the driving task;

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[8] NATIONAL TRANSPORTATION SAFETY BOARD (NTSB), Accident Report NTSB/HAR-20/01 PB2020-100112, "Collision Between a Sport Utility Vehicle Operating With Partial Driving Automation and a Crash Attenuator." Mountain View, California. March 23, 2018., BLOOMBERG NEWS, Tesla Crash in Florida Sparks Transport Safety Board Probe, last visited Mar. 26, 2020, https://www.bloomberg.com/news/articles/2019-03-02/tesla-crash-in-florida-sparks-transport-safety-board-probe.

[9] [FAC] 7.

[10] *See* [FAC] n. 10.

b. Because monitoring of driver-applied steering wheel torque is an ineffective surrogate measure of driver engagement, performance standards should be developed pertaining to an effective method of ensuring driver engagement; and

c. In order for driving automation systems to be safely deployed in a high-speed operating environment, collision avoidance systems must be able to effectively detect and respond to potential hazards, including roadside traffic safety hardware, and be able to execute forward collision avoidance at high speeds.

20. The NTSB ultimately recommended that Tesla incorporate system safeguards that limit the use of automated vehicle control systems to those conditions for which they were designed, or the operational design domain ("ODD").[11]

21. Prior to the Mountain View, California accident, in March 2019, in Delray Beach, Florida, a 2018 Tesla Model 3 struck a semi-trailer truck when the truck entered the highway without stopping.[12] At the time of the crash, the Tesla's Autopilot system was active, and the Tesla was traveling at 68 mph in a 55-mph posted speed limit area. The Autopilot system and collision avoidance systems did not classify the crossing truck as a hazard, did not attempt to slow the vehicle, and did not provide a warning to the driver of the approaching crossing truck. Further, the driver did not take evasive action in response to the crossing truck.

FAC ¶¶ 14-15, 18-21.

Tesla's request to strike these allegations pursuant to Rule 12(f) should be rejected. This District Court has been clear that "motions to strike 'are not favored and will not be granted unless it is clear that the allegations in question can have no possible bearing on the subject matter of the litigation.'" *Lynch v. Southampton Animal Shelter Found. Inc.*, 278 F.R.D. 55, 63 (E.D.N.Y. 2011) (internal citations omitted). In particular, a "Rule 12(f) motion to strike matter as impertinent or

[11] Five automobile manufacturers responded to this recommendation with steps they were taking to address the issue. Tesla, however, has not responded. Tesla has stated that it does not believe such restrictions are applicable to the Autopilot system as long as the driver remains attentive.

[12] This accident is nearly identical to a preceding accident in Williston, Florida, where a Tesla Model S failed to recognize a commercial truck stopped perpendicular to the path of the Tesla operating in Autopilot, resulting in a fatal crash.

immaterial, 'will be denied, unless it can be shown that no evidence in support of the allegation would be admissible.'" *Id.*; *see also AdvanceMe, Inc. v. Lenders Int'l*, 2011 WL 6425488, at *2 (S.D.N.Y. Dec. 19, 2011) ("Matters should be stricken on the basis of impertinence only where the allegation bears no possible relation whatsoever to the subject matter of the litigation.") Thus, in this Court, "to prevail on a Rule 12(f) motion to strike, the movant must show '(1) no evidence in support of the allegations would be admissible; (2) the allegations have no bearing on the relevant issues; and (3) permitting the allegations to stand would result in prejudice to the movant.'" *Lynch*, 278 F.R.D. at 63 (*citing Roe v. City of New York,* 151 F.Supp.2d 495, 510 (S.D.N.Y.2001)).

Tesla does not and cannot satisfy this very high burden to strike the cited allegations from Plaintiffs' First Amended Complaint, either through its attempts to narrowly reframe Plaintiffs' case or to conclusively dismiss the allegations as "irrelevant." To the contrary, each of the cited allegations directly bears on Plaintiffs' claims that Tesla's automated features (including Autopilot) do not operate as expressly and implicitly represented to consumers, and that Tesla knows that its representations about those features are materially inaccurate and misleading. For example, evidence of similar incidents is directly relevant to show that the incident involving Plaintiffs' vehicle was not isolated and that the Autopilot feature does not operate, in fact, as expressly or impliedly warranted to Plaintiffs and other consumers. Evidence of similar incidents also is relevant with respect to punitive damages. *Randi A.J. v. Long Island Surgi-Ctr.*, 46 A.D.3d 74, 85–86 (2007) ("Whether the injury-producing conduct was an isolated event or only the latest incident in a continuing pattern of similarly reckless behavior was an important factor to be weighed by the trier of fact in determining whether an award of punitive damages was warranted."). Likewise, each of the allegations that Tesla improperly seeks to strike directly bears

on Tesla's knowledge of Autopilot's limitations, and the potential for its representations to mislead consumers. This is true regardless of timing; at the very least, Plaintiffs should be permitted to explore the extent of similarity between incidents and the timing and extent of Tesla's relevant knowledge, among other things, in discovery.

CONCLUSION

For the foregoing reasons, and in the interests of justice, Plaintiffs respectfully request that the Court deny, in full, Tesla's Motion for Partial Dismissal of Plaintiffs' First Amended Complaint and to Strike certain paragraphs of the complaint.

Dated: New York, New York
October 12, 2020

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