

**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

FIRST AMENDED COMPLAINT

Plaintiffs Wai-Leung Chan and Jing Wang, by and through undersigned counsel, bring this First Amended Complaint against Tesla, Inc., to recover damages they suffered as a result of a car accident caused by Tesla's defective Autopilot system.

PARTIES

1. Plaintiffs Wai-Leung Chan and Jing Wang are individuals who reside in Little Neck, NY 11362.

2. Defendant, Tesla, Inc., f/k/a Tesla Motors ("Defendant" or "Tesla"), is a corporation organized under the laws of the state of Delaware and having its principal place of business in Palo Alto, California.

JURISDICTION AND VENUE

3. This Court has subject matter jurisdiction over this matter pursuant to 28 U.S.C. § 1332 based on the diversity of citizenship. In this case, the Plaintiffs are citizens of the State of New York, and the Defendant is a corporation based in the State of California.

4. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b)(2).

FACTS

The Vehicle

5. The Model X is an all-electric sport utility vehicle designed, manufactured, and sold by Tesla.

6. Tesla publicly touts the Model X as “the **safest**, quickest, and most capable sport utility vehicle in history.”¹ In fact, Tesla proclaims the Model X to be “the safest SUV ever.”²

7. The Model X is equipped with Tesla’s Autopilot³ feature, which enables the car to steer, accelerate and brake automatically within its lane. More specifically, Autopilot has an “Autosteer” feature, which gives the Model X assisted steering, with cruise control that matches speed to traffic, as well as a Traffic-Aware Cruise Control feature that allows the Model X to accelerate and decelerate to maintain a preset following distance behind the nearest vehicle. Moreover, Autopilot has a Lane Change feature which allows the Model X to automatically change lanes while driving on the highway. Autopilot uses cameras, ultrasonic sensors, and radar to “[d]etect nearby cars, prevent potential collisions and assist with parking.”⁴

8. According to Tesla, the Model X’s Autopilot technology provides a stress-free driving experience—with advanced safety and convenience features designed to assist you with

¹ TESLA MOTORS, Model X, last visited Mar. 26, 2020, <https://www.tesla.com/modelx/drive> (emphasis supplied).

² *Id.*

³ As described by the National Transportation Safety Board (“NTSB”), Autopilot is Tesla’s advanced driver assistance systems (“ADAS”) that control vehicle speed and lane positioning by automating braking, steering, and torque to the drive motors. The major subsystems associated with the operation of Autopilot are Traffic-Aware Cruise Control (TACC) and Autosteer. TACC is an adaptive cruise control system that provides longitudinal control (acceleration and deceleration) and Autosteer is a lane-keeping assist system that provides lateral control (steering) of the vehicle inside the lane. 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.

⁴ TESLA MOTORS, Model S Owner’s Manual. About Driver Assistance, at page 65.

the burdensome parts of driving. Tesla claims that Autopilot continuously monitors the Model X's surroundings and autonomously changes the vehicle's speed and direction to maintain safe distances from surrounding objects.⁵ In fact, Tesla's CEO, Elon Musk, has declared that Autopilot was "probably better than humans at this point in highway driving."⁶

9. Autopilot is designed, manufactured, and marketed to assume certain operational and decision-making tasks normally required of the operator of the vehicle—"the burdensome parts of driving,"⁷ as acknowledged by Tesla. For example, Tesla markets its automobiles with Autopilot to be used in dense traffic situations on highways with multiple lanes. However, Tesla does not disclose that in those circumstances, like freeway driving in dense traffic, Autopilot sometimes does not work, because at times, Autopilot simply does not recognize other cars and roadway hazards.

10. In fact, even in less complicated driving situations, Autopilot fails to recognize and warn drivers of traffic patterns that involve merging, such as where lane changes take place, traffic exits and enters the highway, and traffic merges as lanes consolidate. Simply put, Autopilot malfunctions for a variety of reasons, including the intermittent failure to recognize a roadway hazard, a roadway interpretation, or a novel traffic pattern. Sometimes, Autopilot just malfunctions without warning.

11. Nonetheless, Tesla fails to adequately disclose in its promotional material, and to its customers and regulators, that Autopilot struggles in certain circumstances to safely identify

⁵ TESLA MOTORS, Model X Owner's Manual. About Driver Assistance, at page 65.

⁶ Quote of Elon Musk as reported in The Washington Post, January 11, 2016

⁷ TESLA MOTORS, Autopilot, last visited Mar. 26, 2020, <https://www.tesla.com/autopilot>.

and respond to certain situations where vehicles and other objects commonly found in highway driving are undetected and present safety risks.

12. Upon information and belief, Tesla intentionally builds its vehicles and programs its software to ignore slow moving and stationary objects.

13. Upon information and belief, 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. 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.

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.⁸

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.⁹ This fallback plan is unreliable and unsafe. Not only has Tesla been warned by the NTSB

⁸ 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/>.

⁹ 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.

that drivers of their automobiles may become overly reliant on the Autopilot technology,¹⁰ 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.¹¹

16. Instead, by counseling its customers that they must be ready to assume control, Tesla creates a false premise that a human can always safely take control of a Tesla vehicle that is managing the driving task or performing in an unexpected manner. Tesla misplaces responsibility in the hands of its drivers to safely conduct a takeover response and control a Tesla when the Autopilot malfunctions. When those drivers ultimately are unable to correct the Autopilot error, Tesla tries to lay the blame for accidents resulting from any of these situations at the feet of its customers.

17. Even worse, and compounding this false sense of security, Tesla fails entirely to instruct its customers on the proper use of Autopilot and Tesla’s other purportedly “automated”

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.

¹⁰ 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>.

¹¹ Ibid, 7.

systems, forcing customers to learn the systems by themselves through Tesla's on-line manual and "trial and error," and further fails to adequately and appropriately warn customers about the limitations of those systems. Indeed, upon information and belief, and as occurred in this case as explained with greater particularity below, 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. These representations and promises are patently false and misleading.

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.¹² 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;
- 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

¹² See *supra* n. 10.

- 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”).¹³

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.¹⁴ 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.

22. The Tesla Model X, as designed and by virtue of Tesla’s failure to warn and/or insufficient warnings, is not reasonably safe.

The Purchase of Plaintiffs’ Vehicle

23. In or about 2015, Plaintiff Chan became interested in purchasing a Tesla vehicle. As his interest in Tesla peaked, Chan became an almost weekly visitor to Tesla’s website, where

¹³ 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.

¹⁴ 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.

he recalls reading about the many touted advances and capabilities of what he viewed as the first readily available electronic car.

24. An engineer by training and profession, Chan was taken with Tesla's speed and sleek styling, but mostly with its promises of cutting-edge automotive technology, including its Autopilot feature. Indeed, Autopilot was a particularly intriguing selling point for Chan, and it heavily influenced his interest in (and ultimately his decision to purchase) a Tesla vehicle, as Chan hoped it might ease the burden and stress of his daily commute in Long Island's notorious bumper-to-bumper traffic.

25. Chan searched Tesla's website and made an appointment at Tesla's showroom in Syosset, New York, to speak with Tesla's representatives directly and to test drive a Model S, which was the only model available at that time.

26. During his visit to the Syosset showroom and his discussions with Tesla's representatives there, Chan explained his particular interest in Tesla's Autopilot features given the requirements of his daily commute on the Long Island Expressway. Tesla's representatives did not advise Chan of the hidden dangers of operating a Tesla vehicle equipped with Autopilot in those situations.

27. Chan also test drove a Model S accompanied by a Tesla representative from the Syosset showroom, who did not offer to demonstrate the Autopilot feature for Chan during the test drive. Nor did that representative (or any other representative of Tesla) warn Chan in connection with the test drive that sometimes and under certain circumstances the Tesla Autopilot feature is unreliable.

28. Chan did not purchase a Model S after his first test drive, but continued to explore the possibility of purchasing a Tesla and continued to visit Tesla's website routinely. In late 2015

or early 2016, Chan learned from the website that a new model—the Model X—was available for preorder. Chan also learned that a new Tesla showroom had opened in Manhasset, New York. Based on his research on the Tesla website and his experience at the Syosset showroom, and with the belief that a Tesla vehicle was uniquely suited to his transportation needs, Chan put down a deposit to reserve a Model X and made an appointment to test drive the new model at the Manhasset showroom.

29. During his visit to the Manhasset showroom, as he did in Syosset, Chan explained to Tesla’s representatives that he was looking for a vehicle to make his daily drives in heavy Long Island traffic more manageable. He engaged extensively with one agent in particular—a woman named “Megan”—telling her about his four to five daily trips along the congested Long Island Expressway. In response, Chan recalls the agent made a big deal about Tesla’s Autopilot feature, assuring him that it would help him out in traffic—even going so far as to tell him that he could take the Tesla into the HOV lane (where Teslas are permitted to drive with single passengers) and then close his eyes and “relax.”

30. The Tesla agent also accompanied Chan on a roughly twenty-minute test drive in the Model X. After driving in “local” Manhasset traffic, where she advised him against using the Autopilot feature, the Tesla agent encouraged Chan to get on the expressway where she said the feature would perform better. Unlike her caution about local traffic, the agent provided no warnings or caveats about Autopilot’s performance in highway traffic, including its response to slowed or merging vehicles. Chan also does not recall any other warnings or caveats about other features’ performance.

31. Chan’s Model X test drive took place on a weekday with its typical heavy traffic patterns, and he recalls that the Autopilot performed “fantastically” for the brief time he had it

engaged on the expressway. Chan was even more convinced by his experience in Manhasset and the representations made by agents there that the Tesla Model X was uniquely suited for his commuting needs.

32. Title to the Tesla Model X was placed in the name of Chan's spouse, Plaintiff Wang, but Chan is the only person to have operated the Tesla Model X. Chan was authorized by Wang to drive the Tesla Model X.

33. In or about September 2016, Chan took delivery of the Tesla Model X at Tesla's showroom in Brooklyn, New York. Chan recalls that the showroom was extremely busy as Tesla representatives tried to keep up with customer appointments for new Tesla pick-ups, which were scheduled only fifteen to twenty minutes apart, leaving little to no time for the Tesla representatives to provide any instruction on proper operation and use of Tesla's many technologically advanced features—in other words, despite the novel, cutting-edge nature of the vehicle it was delivering, Tesla did not even provide a traditional delivery experience with the personalized set up and instruction that automotive consumers have come to expect.

34. Indeed, when Chan took delivery of the new Model X, he received no instruction or training on the Autopilot system or any other feature of the vehicle. He received no warnings or physical manuals or other materials regarding the operation and functionality of the Autopilot system, other than directions to access the on-board user manual. And, like the representatives at Syosset and Manhasset, the Tesla representatives at the Brooklyn showroom did not warn Chan that the Model X's Autopilot features are inactive or unreliable in certain circumstances.

35. Each of the Tesla representatives with whom Chan interacted in deciding to purchase and in taking delivery of the Model X failed to adequately warn Chan or Plaintiff Wang of the Model X's limitations and defects, or to instruct him on proper operation and use of the

Model X. Furthermore, none of Tesla's written materials (which Chan was not given but had to access on his own) provided adequate warnings or instruction.

36. At no time did Plaintiffs modify the Tesla Model X in any way that might void applicable warranties or cause the Tesla Model X to operate outside its design parameters.

The Malfunction and Accident

37. On December 13, 2017, at or about 4:40 PM Eastern Time, Chan was driving the Tesla Model X (hereinafter, the "Vehicle") eastbound in the far-right lane of the Long Island Expressway (U.S. 495) near Exit 26 and 185th Street. Chan was using the Vehicle as it was intended to be used, and as he had been led to believe it was particularly suited to be used by Tesla's promotional materials and representatives' statements. In fact, Chan was driving in what may be the most common environment for any Tesla sold in metropolitan New York or any other major metropolitan area—dense, slow traffic.

38. At the time of the accident, the Vehicle's Traffic-Aware Cruise Control and Autosteer functions were engaged, with the following distance set at "3."

39. At all-times relevant, Chan remained alert and prepared to resume control of the Vehicle.

40. The Vehicle was following a white tractor-trailer in dense traffic, when, from an entrance ramp to the right, a white Audi began to merge in between the tractor trailer and the Vehicle. At first, as the merging Audi entered the lane between the tractor-trailer and by the Vehicle, the Vehicle decelerated. Unbeknownst to Chan, the Vehicle decelerated because the tractor-trailer he had been following slowed for traffic, not because the Audi had started to enter into Chan's lane of travel.

41. As the Audi was in its merge maneuver, the Vehicle moved forward suddenly and accelerated on a collision course with the Audi. To Chan's surprise, the Vehicle did not recognize

that the Audi had merged into the lane of travel that the Vehicle occupied or that the Audi was even present at all. The Vehicle failed to react or warn Chan of the impending collision and failed to deploy its Automatic Emergency Braking.

42. By the time it became clear that the Vehicle had set itself on a collision course with the Audi, Chan had approximately one second to react. Chan intervened as quickly as he could and steered to the left to avoid a collision with the Audi. As a result, Chan instead collided with two other vehicles in the adjoining center and left lane before coming to a stop. The Vehicle again failed to recognize a potential collision with the two adjacent vehicles and failed to deploy the Automatic Emergency Braking.

43. The collision severely damaged the Vehicle and also damaged the two other vehicles. The Vehicle was deemed a total loss.

44. Plaintiff Chan used the Vehicle for its intended purpose and in a manner consistent with that of a reasonable, similarly situated driver.

45. Plaintiff Chan used the Vehicle consistently with representations made by Tesla's representatives as to its fitness for that use.

46. Plaintiff Chan was unable, even by the exercise of reasonable care, to avoid the accident.

47. The footage of Plaintiffs' accident is available online at <https://www.youtube.com/watch?v=GJJOHauhto0&t=1s>.

Tesla's Excuses

48. Tesla refuses to take responsibility for the accident. Interestingly, Tesla has previously acknowledged that Autopilot occasionally fails to identify or appropriately respond to white obstacles and slow-moving vehicles.¹⁵

49. Tesla insists that the Vehicle acted appropriately and that Traffic-Aware Cruise Control and Autosteer “disengaged as designed” when the Vehicle decelerated below the systems’ minimum operating speed. Furthermore, 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.

50. Tesla also relied on the fact that the Model X owner’s manual discloses that the vehicle’s “Forward Collision Warning and Automatic Emergency Braking functions do not operate at speeds under 4 mph and 5 mph, respectively.” But the Model X does not adequately or timely warn the driver when Autopilot functions are disengaged or about to disengage, and Tesla knows in any event that its expectations of human response time are unreasonable or impossible.

51. 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.

¹⁵ TESLA MOTORS. A Tragic Loss. Last accessed March 26, 2019. <https://www.tesla.com/blog/tragic-loss>.

52. Indeed, 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.

FIRST CAUSE OF ACTION
Breach of Express Warranty

53. Plaintiffs repeat and incorporate each and every allegation contained in the preceding paragraphs as though fully set forth herein.

54. Defendant expressly and deliberately represents the Model X as a safe, technologically sophisticated vehicle that is opening the door to fully self-driving vehicles of the future.

55. Defendant expressly and deliberately represents the Tesla Model X’s Enhanced Autopilot features as being capable of assisting users with the “burdensome parts of driving” by actively assuming certain decision-making responsibilities and autonomously altering the speed and direction of the vehicle.

56. Defendant makes these representations—and allows prospective buyers to act under mistaken beliefs about the capabilities of the Model X—to induce prospective buyers to choose the Model X over other, less sophisticated competitors.

57. Under Uniform Commercial Code section 2-313, as well as other statutes and common law, these representations constitute express warranties.

58. In fact, however, in the most burdensome of traffic conditions, Autopilot simply does not work.

59. By failing to adequately disclose these limitations, Defendant has breached an express warranty regarding the Tesla Model X's capabilities to safely and independently navigate the dense urban environments in which the vehicle is marketed and sold.

60. This express warranty favorably influenced Plaintiffs' decision to buy the Tesla Model X.

61. And this express warranty influenced Plaintiff Chan's use of the Autopilot functions while driving the Tesla Model X.

62. Plaintiff Chan used the Tesla Model X for its intended purpose and in a manner consistent with that of a reasonable, similarly situated driver.

63. Defendant breached its express warranties because the Tesla Model X failed to perform in the manner Defendant led Plaintiff Chan to believe it would through its promotional materials and the express statements of its representatives.

64. Defendant's breach of its express warranty was a direct and proximate cause of Plaintiff Chan's accident, resulting in damages to Plaintiffs in amounts to be determined at trial but in no event less than \$100,000.

SECOND CAUSE OF ACTION
Breach of Implied Warranty of Merchantability

65. Plaintiffs repeat and incorporate each and every allegation contained in the preceding paragraphs as though fully set forth herein.

66. Defendant has an implied duty to produce and market vehicles that are reasonably fit for the ordinary purposes for which such vehicles are used.

67. Defendant produced, marketed, and sold the Model X to operate in, among other circumstances, densely trafficked urban environments.

68. Defendant represented, and allowed prospective buyers to act on the understanding that, the Model X's Autopilot functions would operate safely in such an environment.

69. Under Uniform Commercial Code sections 2-314 and 2-315, as well as other statutes and common law, these representations constitute implied warranties that the Tesla Model X was fit for the ordinary purpose for which such vehicles are used.

70. Defendant breached these implied warranties, however, because the Tesla Model X's Autopilot functions in fact operated unreliably and unsafely.

71. Defendant breach of these implied warranties was a direct and proximate cause of Plaintiff Chan's accident, resulting in damages to Plaintiffs in amounts to be determined at trial but in no event less than \$100,000.

THIRD CAUSE OF ACTION
Breach of the Implied Warranty of Fitness for a Particular Purpose

72. Plaintiffs repeat and incorporate each and every allegation contained in the preceding paragraphs as though fully set forth herein.

73. Plaintiff Chan had a particular purpose in purchasing a Tesla—i.e., to ease the burden of his daily commute on the Long Island Expressway and other densely-trafficked roads—and communicated that purpose to the various Tesla representatives with whom he engaged in deciding to purchase and in purchasing the Vehicle.

74. Plaintiff Chan reasonably relied on the skill and judgment of the Tesla agents who represented to him that the Tesla Model X and specifically its Autopilot function were uniquely and well suited to his particular purpose and needs.

75. Under Uniform Commercial Code sections 2-314 and 2-315, as well as other statutes and common law, these representations constitute implied warranties that the Tesla Model X was fit for Chan's particular purpose in purchasing the Vehicle.

76. Defendant breached these implied warranties, however, because the Tesla Model X's Autopilot functions were not, in fact, suitable for Chan's particular purpose.

77. Defendant's breach of these implied warranties was a direct and proximate cause of Plaintiff Chan's accident, resulting in damages to Plaintiffs in amounts to be determined at trial but in no event less than \$100,000.

**FOURTH CAUSE OF ACTION
Failure to Warn/Inadequacy of Warnings**

78. Plaintiffs repeat and incorporate each and every allegation contained in the preceding paragraphs as though fully set forth herein.

79. Tesla has duty to consumers to exercise ordinary and reasonable care in the manufacture, design, and sale of its vehicles.

80. In this case, Tesla breached its duty of care to Plaintiffs by failing to warn of known and foreseeable risks associated with the Model X, including the known and foreseeable risk that Autopilot would fail to function as represented in dense traffic, and the known and foreseeable risk that drivers would not be able to react in time to correct for such a failure.

81. Tesla's failure to warn and/or its inadequate warnings were a direct and proximate cause of Plaintiff Chan's accident, resulting in damages to Plaintiffs in amounts to be determined at trial but in no event less than \$100,000.

82. Tesla's failure to warn and/or its inadequate warnings were further reckless, and done in conscious disregard for the rights and safety of consumers and the general public, thus warranting punitive damages.

**FIFTH CAUSE OF ACTION
Deceptive and Misleading Business Practices and False Advertising**

83. Plaintiffs repeat and incorporate each and every allegation contained in the preceding paragraphs as though fully set forth herein.

84. Pursuant to New York General Business Law (“GBL”) §§ 349 and 350, Plaintiffs bring this action against Defendant for its repeatedly fraudulent and deceptive practices and false and fraudulent advertising in the sale of its vehicles.

85. Defendant engages in consumer-related activities that affect consumers at large.

86. Defendant engaged in consumer-related activities is the dissemination of advertising through various mediums, including through its website, which Plaintiff Chan frequently accessed in deciding to purchase the Vehicle.

87. The disseminated advertising contained information that is deceptive in material aspects, and had the purpose of influencing consumers like Plaintiff Chan to purchase a Tesla vehicle.

88. The disseminated deceptive advertising further caused Plaintiff Chan’s reliance on Tesla’s automated features, including its Autopilot technology.

89. Tesla’s Autopilot technology did not function as represented and advertised.

90. A reasonable person who knew of this potential for causing injury would have concluded that the Tesla Model X should not have been sold with these defectively designed Autopilot features and/or subject to false and misleading statements regarding the features’ proper use and capabilities. Tesla placed the needs of its business interest ahead of the interest of its customers and those who could be injured or suffer damages as a result of these unsafe Tesla vehicles.

91. Tesla needed to sell these unsafe vehicles and put these vehicles on the road way so that they could generate and capture data all the while touting them as the safest on the road. This was dishonest and placed its customers and the public at risk all in violation of New York law.

92. Plaintiff Chan's incident occurred as a result of Tesla's failed Autopilot technology, but the marketing and sale of the Model X was founded on Tesla's purposeful misleading business practices designed to sell cars, get more Teslas on the road, gather more data, use that data to enhance Tesla's products, and position itself in the marketplace.

93. Defendant's violations of GBL §§ 349 and 350 caused Plaintiff Chan's accident, resulting in damages to Plaintiffs in amounts to be determined at trial but in no event less than \$100,000.

94. Defendant's violations of GBL §§ 349 and 350 entitle Plaintiffs to treble damages, other statutory penalties, and punitive damages.

SIXTH CAUSE OF ACTION
Common Law Fraud/Fraudulent Misrepresentation

95. Plaintiffs repeat and incorporate each and every allegation contained in the preceding paragraphs as though fully set forth herein.

96. Pursuant to a claim for fraud under New York common law, Plaintiffs bring this action against Defendant, who repeatedly made fraudulent misrepresentations of fact and engaged in fraudulent and deceptive practices toward Plaintiffs.

97. As alleged herein, Defendant intentionally made false representations of material fact regarding its vehicles, including that its Autopilot function is safe and ready to be used in common traffic situations and specifically in heavy highway traffic.

98. The Autopilot function is not safe nor ready to be used in heavy traffic situations.

99. Defendant's statements about its Autopilot function detailed above, which were disseminated to the general public and also made directly to Plaintiffs via Defendant's website and through its showroom agents, were likely to deceive a reasonable consumer and did deceive Plaintiffs into purchasing a Tesla vehicle.

100. Defendant knew or in the exercise of reasonable care should have known that the Autopilot function is not safe nor ready to be used in heavy traffic.

101. Tesla sells its vehicles on the basis that if its vehicles fail to perform, the driver is responsible, even though Tesla knows it is impossible for a human being to reasonably appreciate that a failure is occurring, or comprehend how the driver should take control.

102. Defendant intended that consumers like Plaintiffs rely on the false and misleading statements about the Autopilot function.

103. Plaintiff Chan specifically relied on Defendant's fraudulent misrepresentations in utilizing the Autopilot technology in his daily commute through heavy highway traffic.

104. Plaintiff Chan's incident occurred as a direct and proximate result of Tesla's misrepresentations about that technology and its ultimate failure to perform as represented. The sale of that technology under false pretenses constitutes fraud.

105. Defendant's fraudulent practices and misrepresentations formed the basis of Plaintiffs' buying decision and directly led to the Tesla causing Plaintiff Chan's accident, resulting in damages to Plaintiffs in amounts to be determined at trial but in no event less than \$100,000.

106. Defendant's fraudulent practices and misrepresentations also entitle Plaintiffs to an award of punitive damages.

SEVENTH CAUSE OF ACTION
Negligence/Negligent Misrepresentation

107. Plaintiffs repeat and incorporate each and every allegation contained in the preceding paragraphs as though fully set forth herein.

108. As alleged herein, Defendant negligently made material misrepresentations of fact regarding its vehicles, including that the Autopilot function is safe and ready to be used in common traffic situations and specifically in heavy highway traffic.

109. The Autopilot function is not safe nor ready to be used in heavy traffic situations.

110. Defendant knew, or in the exercise of reasonable care should have known, that the Model X Autopilot features were not reasonably safe. Tesla intentionally designed those features to operate as they do, and Tesla marketed those features to induce potential customers to buy the Model X.

111. Defendant's misrepresentations about its vehicles including its misrepresentations about Autopilot were furnished for the purpose of influencing Plaintiffs' and other members of the public's purchasing choices.

112. Defendant intended that consumers rely on the misleading misrepresentations detailed above, and Plaintiffs did in fact reasonably rely on Defendant's representations and omissions, and the representations and omissions of Defendant's agents, when they purchased and operated the Tesla Model X.

113. In making statements that it knew or should have known Plaintiffs would rely on in making purchasing decisions, Defendant had a duty to take reasonable care in ensuring that those statements were correct.

114. Defendant breached this duty of care to Plaintiffs in making incorrect and misleading statements about the use and capabilities of its vehicles, as detailed above.

115. Defendant's negligence caused Plaintiff Chan's accident, resulting in damages to Plaintiffs in amounts to be determined at trial but in no event less than \$100,000.

116. Tesla's negligence was further reckless, and done in conscious disregard for the rights and safety of consumers and the general public, thus warranting punitive damages.

WHEREFORE, Plaintiffs demand judgment against Defendant as follows:

A. An award of damages, against Defendant, in an amount to be determined at trial, including but not limited to the value of the damage to the Vehicle, and in no event less than \$100,000;

B. Treble, punitive and exemplary damages; and

C. Such other and further relief as the Court deems just and proper, including counsel fees, costs of court, and pre-judgment interest.

Dated: New York, New York
August 31, 2020

NELSON LAW, LLC

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JURY DEMAND

Plaintiffs demand a trial by jury of all claims so triable as a matter of right.

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of August 2020 a true and correct copy of the foregoing was electronically filed with the Court's CM/ECF system and was thus served automatically upon all counsel of record in this matter.

s/ Stephanie E. Niehaus
One of the Attorneys for Plaintiffs

Selected excerpts from Plaintiff, Chan's deposition taken virtually on November 30, 2020.

DAMAGES

Q. You mentioned that you had full coverage with Progressive Insurance on the Model X; is that correct?

A. Yes.

Q. And did Progressive deny your claim or did they pay your claim in full?

A They paid my claim in full, yes.

Q. And so that I understand what that means, what does that mean -- I just want to make sure that we're speaking the same language, so to speak, if you will. When you say they paid your claim in full, does that mean that they fully repaired your vehicle or that they gave you money to buy a replacement vehicle?

A Well, they told me the car is like -- it's not -- it's like a total loss, you know, so they give me just the residual value of the car.

Q. How much did they pay you for the residual value of the car?

A I think around \$100,000.

Q. When you bought the car, did you finance the car by obtaining a loan?

A No. I paid in cash.

Q. All right. So were you paid by Progressive for any other losses, expenses, damages? Let me just give you one example. Maybe you had to rent a car for a period of time. Did they pay for the car rental? Or maybe you missed a day of work. Did they pay for that? Those are just examples of what I'm asking you about.

A I don't recall, I mean, probably not. Probably not.

Q. Well, let me ask you this: Did you in fact have to rent a car for any period of time after the December 13, 2017, incident?

A No.

Q. Did you miss any work after that incident because of the damage to your car?

A No

Q. Did you have any other property damage or any loss to property, other than the car itself, as a result of that incident?

A No.

Q. You didn't sustain any personal injury; correct?

A Well, actually, I have little personal -- I hurt my hand a little bit, but, again, you know, I recovered, you know, within a few weeks, but, you know, it's a little uncomfortable, you know, for this few weeks, but I never report to my insurance company that I have -- you know, I hurt my hands because I don't -- you know, maybe I forgot, you know, at the time. I was so shaken but later on, you know, I discovered that, you know, my knuckles little bit bruised here. My hand -- I did not move my hand very good for -- for the first three, four weeks.

Q Did you go to the hospital on the day of the incident after the --

A No

Q Did you go to the hospital the next day?

A No.

Q Have you sought any medical care at all for what you just described to your hand?

A No.

Q Have you taken any medication, either prescribed or over the counter, for what you just described in your hand?

A No.

Q You said something about being worried a minute ago; correct?

A I think so, yes. Did I say worried? Maybe -

Q Or concerned or --

A Yeah, you mean -- right after the accident, I feel a little shaken, frightened

Q. Well, are you -- are you claiming that you sustained a psychological or an emotional injury as a result of this incident?

A. Yes. Psychologically, I'm like -- like, I still remember, you know, after the -- at the first six months -- first six months after the incident happened, I -- when I drive, I always worried, be careful when I, you know, when I press the gas pedal. I mean, the -- because I always, you know, suspicious that, you know, the car is going to run off by itself, uncontrollable, you know. Like I always very cautious that my foot is always ready to brake. Before this, I never -- you know, I never will imagine something like this, so psychologically, I'm just hesitant to drive sometimes, you know, like, you know -- you know, this is, like, something -- if you drive something that is suddenly out of control, then, you know, you have a -- your life is in danger and only after was more than a year, then I can overcome this kind of psychological -- I don't know what it called, you know. Like then I'm back to normal, but in the first six to 12 months, the way I drive is like I'm always worried, cautious, you know.

Q. After -- since the accident have you consulted with or treated with either a psychiatrist?

A. No.

Q. Or a counselor of any sort -

A. No.

Q -- concerning your worries or you described?

A. No.

Q. You didn't seek out any kind of medication to help you with your concerns; correct?

A. No.

Q. Did you stop working because of this issue?

A. No

Q. And you, of course -- you kept driving; correct?

A. Yeah, only if it's necessary, you know, for the six to 12 months, you know.

Q. Have you had to pay any money out of your own pocket to cover any expenses, damage or loss after the incident that occurred in December that we're talking about, December 2017, with your Model X?

A. I don't know. I have to check my records. You mean -- again, I'm not that sure. I've got to check my records.

Q. As far as you can tell, as you're sitting here right now under oath, do you have any recollection of having to pull \$1 out of your pocket to pay for any expense, damage or loss?

A. I think -- right after the accident, I have to call the tow truck, you know, who towed the car, you know, from the highway, you know, to, you know, the repair shop and I think I have to pay the towing guy like 3, 400 bucks.

Q. Can you think of anything else that you've had to pay for as a result of the incident that occurred in December of 2017 with your Model X?

A. Not right now. Now, I only can think of -- only can think of, you know, the towing charges right now.

WEBSITE

Q. Is it your testimony that in any of the information that you read on Tesla's website that based on that you believe that the 2016 Model X would be fully self-driving?

A: Yes.

Q. -- while operating in autopilot mode?

A. Yes. While in autopilot mode, you know, the car is self-driving, and that's what, on the website, they tell you, you know, it's autopilot, you know. They have a lot of sophisticated technology built into the vehicle so that, you know, it's basically-- its automatic; its autopilot; its self-drive.

Q. Is it your testimony that based on what you were reading, that you were just alluding to, that if you had autopilot engaged, you would have no responsibilities as a driver of the vehicle? The vehicle would just drive itself?

A: I believe -- I believe under the Tesla website, from what I remember, that we still have to pay attention to the traffic, you know. You still have to use your hand on the steering wheel, you know. You have to, you know -- just in case something happened, you still have to take control of the car.

Q. Would you agree with me, sir, that based on what you read on Tesla's website in this time frame, even while you had

autopilot engaged, you were still fully responsible for driving the vehicle and taking charge of the vehicle when necessary?

A. Yes. I believe the website have -- I believe -- I remember maybe, you know, there it is a -- a caution on the website that, you know, the owner need to take control of the car if something happens, you know. Some emergency happened that, you know, the driver have to be aware, you know; they have to take control. That's all I remember.

Q. You were not confused by that information that you read on Tesla's website, were you, sir?

A. I'm really confused because it's a little contradiction, because at one -- at one time, you know, they saying that it's a really sophisticated technology; it self-driving, but on the other hand, you know, they tell you that, you know, that, you know, it's a -- I remember, it's a beta mode or something, you know, that sometimes you may need to take control, so, again, you know, I was a little confused, actually, at that time, but, you know, I say -- on one hand they say it's a perfect system. On the other hand, that, you know, you need to be a little cautious, but, you know, I take it anyway, but -- because, you know, I just want to try it, you know.

Q. You say you were a little confused at that time. Did you tell Meghan or anyone else from Tesla that you were confused about the messages that you were receiving about autopilot?

A. No, I did not

Q. Did you ever send an email to Tesla in California and say, "Hey, Tesla, I'm a little confused, the person, Meghan, at the dealership told me one thing but I read something different on your website. Please explain"? Did you do that, sir?

A. Again, you know, I just assuming I read something, okay, about a beta mode -- I'm not sure at that time, that it is on the website, but, again, you know, I read somewhere, you know, it's a beta mode. Maybe I get this information afterwards, after I took the delivery. Like the timing, I don't know, so let me rephrase that, okay, that I read on the website that the Tesla, yes, have published their new technology, self-driving, fully autonomous. That's what my

impression is. But later on I learned it's only a beta mode. Again, it may happen after I took delivery, maybe -- now I remember. Maybe I only know about this beta mode in the manual, so -- again, the timing may be -- maybe is off because it was so many years ago, four, five years ago, so I don't remember the beta mode or the -- that it cautions you to take control.

TEST DRIVE

Q. Is it your testimony that some individual that you dealt with, that you communicated with at Tesla told you that the 2016 Model X was fully self-driving?

A. Yes.

Q. Please give me the name of that person.

A. I think its Meghan.

Q. I see reference in the email under Exhibit 3 to Meghan Mack, M-a-c-k.

A. Yes, I believe --

Q. Is that the Meghan you're referring to?

A. Yes.

Q. All right. And when do you think Ms. Mack told you that the Model X that you bought was or would be fully self-driving?

A. Well, at the time of test-driving, you know, she told me that, you know, this car is like -- it self-drive, you know. All you have to do is like put in autopilot mode and the car can stop and the car can, you know, can keep, you know, a distance in front of the car and the car can steer, you know, left and right for you. So I believe her, that, you know, that the car is fully self-drive. That's what she told me, that.

Q. And it's your testimony that when you were talking to Meghan, either before the test drive or during the test drive, she told you that you could close your eyes and relax while you had autopilot activated?

A. No, at the time -- at the time of test-driving, at the time of test-driving, when, you know, when we turn on the autopilot, you know, when we test the autopilot, she's kind of saying that, "hey, you know what, Joe? You can relax and on the HOV lane and close eyes and then you'll be home,

you know." You know, that's, you know, that's what she said.

Q. So you're saying that she told you that you could close your eyes while autopilot was activated?

A. And relax, actually -- and relax, close your eyes and relax. That's what she said.

Q. Did she tell you about any of the limitations that existed with autopilot?

A. No.

Q. Did she tell you that you were still responsible for driving the vehicle?

A. No.

Q. Even though she didn't tell you those things, was it still your understanding during the test drive that as an operator of the vehicle it was still your responsibility to drive the vehicle safely?

A. Well, I know that I'm still responsible to drive, you know, the car in any conditions, you know. That's driver's responsibility, but, again, you know, from what I'm -- from what Meghan told me at that time, from what I understand from the website at that time, that the car is fully autonomous and fully self-drive. That's actually what the website said, self-drive. That's what Meghan said, self-drive, you know; it should be all in, because I still remember it should be all in because I can drive, you know, HOV lane by myself, use the autopilot mode, and you home, you know, with your eyes closed and relax. So I was under, you know, from all the information I obtained at that time, that the car is self-drive; fully self-drive.

Q. Who else was present with you, if anyone, during that test-drive?

A. Who else besides -- at the test-drive, I think is only -- I think is only I and Meghan.

Q. Did you make a recording of that conversation?

A. No.

Q. Did you make any notes about that conversation afterwards or during the conversation?

A. No.

Q. Did you have any Questions about autopilot either during the test drive or after?

A. Any questions? Let me see, Yeah, I asked her, you know, are you sure that works, and she said, yeah, it will work, you know, so I was little hesitant, but then I turn on the autopilot and it works at the time, and, you know, the car really stops and go and steers and drive, you know, so I said, oh, great, you know, that works, you know.

Q. After you looked at the Tesla website and saw information about autopilot, did you ask Meghan or anyone else at the Tesla stores that you were visiting any questions about how autopilot worked?

A. No. Repeat the question. I don't -- I don't understand the timing.

Q. In between the date that you went to the website, saw information about autopilot, and the date you took delivery of the Model X in September of 2016, did you have any conversations with Meghan or anyone else at Tesla about autopilot and how it worked?

A. Yes. The answer is no, I did not talk to anybody regarding the autopilot, you know -- you know, before I took delivery.

Q. Did you send --

A. Wait, wait. Before I took delivery, I did, because, you know, we talked about autopilot when I have a test drive with Meghan, and that's -- you know, if that's what you mean by talk about, then, yes, you know, I talk about autopilot with Meghan. I did, you know, before I took delivery.

Q. You took delivery of the vehicle in September of 2016 at a store in Brooklyn; correct?

A. Yes.

Q. Did anyone from tesla at that store provide you with any information about the vehicle at all before you left the store with it?

A. They only showed me how to charge the car, and that's it.

Q. Did you ask them any questions about how to use the car or any feature of the car?

A. They told me to look at the manuals in the computer.

OWNER'S MANUAL

Q. And how soon after taking delivery of the vehicle in September of 2016 did you access the owner's manual?

A. Right away. I mean, after I get home, I sit in the car and I look at the manuals.

Q. What do you remember reading?

A. I remember reading all the features, like how to adjust the seat, the phone control. I mean, everything is new. I mean, this car is so modern, so I have to learn, you know, from scratch, you know, even the signal light and everything, you know.

Q. What do you remember reading about autopilot?

A. Autopilot, just tell you like how to engage it, you know, like pulling the lever on the left-hand side once or twice; I don't remember. Maybe twice, or maybe one time. And that's it and also they have to set a vehicle distance, like how many distance you want to keep from the car in front of you, you know, stuff like that.

Q. When you access the owner's manual through the touchscreen, what I'd like you to do is I'd like you to read this entire page or any portion of the traffic-aware cruise control -- I can scroll, you know, wherever you'd like, but what I'd like to draw your attention to right now is the -- the information that's identified by the red triangles with the exclamation points in them that start out "Warning," so I'd like you to read those to yourself, please.

Q. Have you read those three warning statements?

A. Yes.

Q. All right. Let's just start with the first one. Do you remember reading this information when you accessed the owner's manual through the touchscreen shortly after taking delivery of your Model X?

A. Yes.

Q. Did you have any questions or confusion about what was being communicated to you through that first warning statement when you read it back in September of 2016?

A. Can you repeat your question?

Q. Did you have any question or confusion about what was being communicated to you by Tesla through that warning statement when you read it in September of 2016?

MS. NIEHAUS: Objection.

THE WITNESS: Yes, I was little confused because, you know, under website and also under maintenance and introduction on the car, the car is fully autonomous, but when I read this, I say, "You know what? I still have to - you know -- you know, I still have to be aware of the traffic situation, you know."

Q. Well, you certainly must have called Meghan back immediately and said, "Hey, Meghan. What's going on?"

MS. NIEHAUS: Objection. Argumentative.

Q. -- "you told me one thing and I just read something else."

WITNESS: No, I didn't do that, I didn't do that. I did not call .

Q. You didn't drive the car back and say, "I want my money back because you told me one thing but the owner's manual told me something different"? You didn't do that either, did you, sir?

A. No.

Q. Mr. Chan, the owner's manual that you had access to through the car and that you actually read shortly after taking delivery of the car in September of 2016 conveyed to you that it was your responsibility to stay alert, drive safely and be in control of the vehicle at all times; correct?

A. Yes

Q. And to never depend on traffic-aware cruise control to adequately slow down the Model X; correct?

A. Yes.

Q. Another thing that you read back then while in your car September 2016, is that you shouldn't use traffic-aware cruise control on city streets or on roads where traffic conditions were constantly changing; correct?

A. If that's what appears in the manual, then, yes.

Q. -- you were told back in 2016 when you read the manual through the vehicle that traffic aware cruise control cannot detect all objects and may not brake/decelerate for stationary vehicles, especially in situations when you are traveling or driving over 50 miles an hour; correct?

A. Yes.

Q. Well, you were told everything that is identified here on the screen, or shown on the screen in these three warning statements that are identified by the red triangles with the exclamation points through them; correct?

A. Yeah. Yes, appears to me that, yes, there's the warning sign on the manual, yes.

Q. And after reading this information that we can see here, after you read it through the touchscreen of the car in September of 2016, you never contacted Tesla and asked any questions about what you read; correct?

A. No.

Q. Are you aware of -- are you aware of any other Tesla Model X owner or operator who claims to have had an experience like you claim you had in December of 2018 -- I'm sorry. -- December 2017? Sorry

A. Do I know any Tesla owners that have the same situation? No.

Q. So the incident that you have described in your Complaint, you don't know anyone else who claims to have experienced a similar incident in another Tesla Model X; correct?

A. I Google it, actually, and that's a handful of cases but it's similar but it's not -- it's not exactly the same, so -- but I do not know any owners that have happened to them.

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK**

JING WANG and WAI-LEUNG CHAN,

Plaintiffs,

- against -

TESLA, INC.,

Defendants.

Civ. Action No. 1:20-cv-3040

NOTICE OF MOTION TO DISMISS

PLEASE TAKE NOTICE that upon the Memorandum of Law dated September 21, 2020, the exhibits annexed thereto, and all other papers and proceedings in this action, Defendant, Tesla, Inc., by their undersigned counsel, shall move before the United States District Court for the Eastern District of New York for an Order to dismiss certain causes of action of Plaintiffs, Jing Wang and Wai-Leung Chan’s (“Plaintiffs”) Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) for Partial Dismissal of Plaintiffs’ First Amended Complaint and to strike certain Paragraphs of the Plaintiffs’ Amended Complaint pursuant to Rule 12(f). Tesla respectfully requests the dismissal of those portions of Plaintiff’s Amended Complaint with Prejudice.

PLEASE TAKE FURTHER NOTICE that pursuant to the Court’s September 2, 2020 Docket Text Order, Plaintiffs are directed to serve opposition by October 12, 2020.

PLEASE TAKE FURTHER NOTICE that pursuant to the Court’s September 2, 2020 Docket Text Order, the moving Defendant is directed to serve its reply and file the fully briefed motion by October 26, 2020.

PLEASE TAKE FURTHER NOTICE that oral argument is requested if the motion is opposed.

Dated: New York, New York
September 21, 2020

Peter J. Fazio

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TO: All Parties VIA ECF

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of September, 2020, the foregoing Notice of Motion to Dismiss Certain Portions of Plaintiffs' First Amended Complaint was electronically emailed upon the following:

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By: /s/ PETER J. FAZIO
Peter J. Fazio

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK**

JING WANG and WAI-LEUNG CHAN,

Plaintiffs,

- against -

TESLA, INC.,

Defendants.

Civ. Action No. 1:20-cv-3040

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

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Cushing v. Seemann,
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Fink v. Time Warner Cable,
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In re Fannie Mae 2008 Sec. Litig.,
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Lama Holding Co. v. Smith Barney, Inc.,
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Landesbank Baden-Wuerttemberg v. Goldman, Sachs & Co.,
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Martian Entm’t, LLC v. Harris,
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Martin v. Grp. Health Inc.,
2 A.D.3d 414 (N.Y. App. Div. 2003)9

Nooger v. Jay-Dee Fast Delivery,
251 A.D.2d 307 (N.Y. App. Div. 1998)9

Official Publications, Inc. v. Kable News Co., Inc.,
775 F. Supp. 631 (S.D.N.Y. 1991)5

Outside Connection, Inc. v. DiGennaro,
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Rocanova v. Equitable Life Assur. Soc. of U.S.,
83 N.Y.2d 603 (1994)9

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Defendant, Tesla, Inc. (“Tesla”), by its attorneys, Aaronson Rappaport Feinstein & Deutsch, LLP, submits its Memorandum of Law in Support of Rule 12(b)(6) Motion for Partial Dismissal of Plaintiffs’ First Amended Complaint and to Strike as follows:

INTRODUCTION

Plaintiffs purchased a 2016 Tesla Model X with the Autopilot suite of driver assistance features, which Plaintiff Chan claims he regularly used for his daily commute until the subject vehicle was damaged during a collision while Autopilot was engaged. In their First Amended Complaint, Plaintiffs generally allege that Tesla’s Autopilot technology is defective and the subject vehicle is not reasonably safe.

This Motion seeks dismissal of Plaintiff’s fraud claim, which broadly asserts that Tesla made fraudulent misrepresentations about the safety of the Autopilot functions in its vehicles. Tesla filed its Answer to Plaintiffs’ First Amended Complaint on the remaining six counts concurrent with this Motion. Through this Motion, Tesla is also requesting that paragraphs 14, 15, 18, 19, 20 and 21 of the “Fact” section of the First Amended Complaint are stricken because those allegations are immaterial and impertinent to the claims raised by the First Amended Complaint.

Plaintiffs allege in count six of their First Amended Complaint that Tesla engaged in fraudulent business practices by making misleading statements or omissions about the Autopilot features during the marketing or sale of the subject vehicle, and that Plaintiffs relied to their detriment on those statements or omissions in making their purchase. However, Plaintiffs’ fraud claim fails as a matter of law.

After having the opportunity to amend their Complaint and cure any deficiencies, Plaintiffs still have not satisfied the particularity standards of Fed. R. Civ. P. 9(b) for alleging circumstances constituting fraud. Plaintiffs fail to identify Tesla’s alleged misrepresentations or omissions with

the requisite level of specificity, relying instead on vague generalities regarding the sources, timing and content of information that Plaintiffs allegedly relied on in purchasing the subject vehicle. Plaintiffs also fail to state all the elements of a common law fraud claim based on a failure to disclose or omission, including as a threshold matter that there is a fiduciary relationship between the parties. In this case, the parties merely engaged in an arm's length business transaction, and under New York law, no fiduciary relationship existed. Therefore, even if Plaintiffs otherwise stated the elements of fraud (which they have not), they are unable to satisfy the standards required here. Accordingly, count six of Plaintiffs' First Amended Complaint should be dismissed.

FACTUAL BACKGROUND

Plaintiffs allege that in 2015, Plaintiff Chan placed an online order for a Tesla Model X and took delivery in September 2016, though the purchase was made in his wife Plaintiff Wang's name (the "subject vehicle"). (First Amended Compl. ("FAC") ¶¶ 28-30). Prior to placing the order for the subject vehicle, Plaintiff Chan allegedly made frequent visits to Tesla's website to educate himself about Tesla's vehicles and automotive technology, including but not limited to the Autopilot feature. (FAC ¶¶ 23, 24, 25, 28). Plaintiff Chan also allegedly visited Tesla's Syosset and Manhasset showrooms, where he test drove a Tesla Model S and Model X. (FAC ¶¶ 25, 28). Chan drove with the Autopilot feature on during his test drive of the Tesla Model X. (FAC ¶ 30, 31).

Plaintiff Chan contends that during each of these showroom visits, he spoke with unnamed and unidentified Tesla employees and explained he was interested in the Tesla Autopilot feature given his daily commute in dense traffic on the Long Island Expressway. (FAC ¶¶ 26, 29). Plaintiffs claim that, during the first test drive, these unnamed and unidentified Tesla employees failed to "warn" Plaintiff Chan "that sometimes and under certain circumstances, the Tesla

Autopilot feature is unreliable.” (FAC ¶¶ 27). Plaintiff Chan also contends that during the second test drive, a Tesla employee only identified as “Megan” “made a big deal about Tesla’s Autopilot feature” and “provided no warnings or caveats about Autopilot’s performance in highway traffic...” (FAC ¶¶ 29, 30). Plaintiffs further allege that when Plaintiff Chan took delivery of the subject vehicle at Tesla’s Brooklyn facility in September 2016, the unnamed and unidentified employees at that facility did not provide specific training on the Autopilot system, provide Plaintiff Chan with materials on the Autopilot system or “warn” him that Autopilot could be “inactive or unreliable in certain circumstances.” (FAC ¶¶ 33, 34).

On December 13, 2017, Plaintiff Chan was allegedly driving the subject vehicle in dense, slow traffic on the Long Island Expressly with the Traffic-Aware Cruise Control and Autosteer functions engaged. (FAC ¶¶ 37, 38). Plaintiffs’ First Amended Complaint references portions of the owner’s manual—which is accessible through the vehicle’s electronic center touchscreen—relating to the vehicle’s driver assistance technology, but Plaintiffs failed to include reference to any of the numerous instructions, notes and warnings about proper use of that technology and the responsibilities of the driver while Autopilot driver assistance features are activated. (FAC ¶ 8). For example, Plaintiffs omit the manual’s discussion of various limitations of these features and specifically warns drivers as follows: “Never depend on these components to keep you safe. It is the driver’s responsibility to stay alert, drive safely, and be in control of the vehicle at all times.” (See Exhibit. A, Tesla Model X Owner’s Manual). This is merely one example of numerous statements in the owner’s manual that warn and remind a driver of his “... responsibility to stay alert, drive safely, and be in control of the vehicle at all times.” Plaintiffs do not deny having received the manual, only that they did not receive a physical copy of it. (FAC ¶ 35). And, Plaintiffs’ only acknowledgment of these warnings published in the manual relating to driver

responsibility and Autopilot's system limitations is found under Plaintiffs' discussion of "Tesla's Excuses." (FAC ¶¶ 48-50).

In their First Amended Complaint, Plaintiffs assert seven causes of action including a claim for "common law fraud/fraudulent misrepresentation." With respect to the fraud claim, Plaintiffs allege that Tesla made fraudulent misrepresentations "that its Autopilot function is safe and ready to be used in common traffic situations and specifically in heavy highway traffic," and that Plaintiffs relied on non-specific marketing by showroom representatives and Tesla's website when they purchased the subject vehicle such that Tesla should have warned them about Autopilot's features. (FAC ¶ 97-105). Plaintiffs seek damages in excess of \$100,000, as well as treble, punitive and exemplary damages.

ARGUMENT

I. Rule 12(b)(6) Legal Standard

"To survive a motion to dismiss, a complaint must 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) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim lacks "facial plausibility" unless "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* This standard demands "more than the sheer possibility that a defendant has acted unlawfully." *Id.* Rather, plausibility depends on "the full factual picture presented by the complaint, the particular cause of action and its elements, and the existence of alternative explanations so obvious that they render plaintiff's inferences unreasonable." *Fink v. Time Warner Cable*, 714 F.3d 739, 741 (2d Cir. 2013). A pleading "consisting only of 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Ashcroft*, 556 U.S. at 678 (citations omitted).

Dismissal with prejudice on a Rule 12(b)(6) motion is appropriate when granting leave to amend would be futile, *i.e.*, when repleading will not cure the defect. *See Cuoco v. Moritsugu*, 222 F.3d 99, 112 (2d Cir. 2000) (“The problem with Cuoco’s causes of action is substantive; better pleading will not cure it. Repleading would thus be futile. Such a futile request to replead should be denied.”). Here, the Court should dismiss the “sixth cause of action” in Plaintiffs’ First Amended Complaint that attempts to raise a fraud claim that claim fails to state a “facially plausible” claim for Fraud.

A. Plaintiffs’ First Amended Complaint Fails to State a Claim for Fraud

Plaintiffs’ sixth cause of action seeks to recover for alleged “common law fraud/fraudulent misrepresentation” about the safety of the Autopilot function during the marketing or sale of the subject vehicle.

To state a claim for common law fraud, Plaintiffs must show: (1) a misrepresentation or a material omission of fact; (2) which was false and known to be false by defendant; (3) made for the purpose of inducing the other party to rely upon it; (4) justifiable reliance of the other party on the misrepresentation or material omission; (5) and injury. *Lama Holding Co. v. Smith Barney, Inc.*, 668 N.E.2d 1370, 1373 (N.Y. 1996); *Connaughton v. Chipotle Mexican Grill, Inc.*, 23 N.Y.2d 213, 218 (1968)(N.Y. Sup. Ct. 2016). Further, to satisfy the particularity standards of Fed. R. Civ. P. 9(b), Plaintiffs must establish: (1) precisely what statements or omissions were made; (2) the time, place and person responsible for each such statement or omission; (3) the content of such statements or omissions and their effect on plaintiff; and (4) what the defendants gained from the fraud. *Official Publications, Inc. v. Kable News Co., Inc.*, 775 F. Supp. 631, 636-37 (S.D.N.Y. 1991); *Carmona v. Spanish Broadcasting System, Inc.*, 2009 WL 890054, at *4 (S.D.N.Y. March 30, 2009).

1. Plaintiffs fail to plead fraud with particularity as required by Fed. R. Civ. P. 9(b)

To state a claim for fraud, not only must a plaintiff plead all of the requisite elements of a common law fraud claim, but they must also meet the above-referenced higher standards of pleading with specificity required by Fed. R. Civ. P. 9(b). *Official Publications*, 775 F. Supp. At 636-37; *Carmona*, 2009 WL 890054, at *4.

Here, in their second attempt to plead a fraud claim,¹ Plaintiff's allegations are vague and non-specific with respect to Tesla's allegedly fraudulent statements or omissions, and are insufficient as a matter of law. Plaintiffs generally refer to Plaintiff Chan's review of the Tesla website, suggesting that he visited the site on a frequent basis prior to purchasing the subject vehicle. (FAC ¶¶ 23, 25, 28). But Plaintiffs do not explain what false and fraudulent content Plaintiff Chan viewed on Tesla's website; when he accessed the content; the specific effect of the content on Plaintiff Chan; and what Tesla gained from the allegedly false and fraudulent content. The same is true for Plaintiff Chan's visits to the two Tesla showrooms. He allegedly engaged with certain unnamed and unidentified Tesla employees, as well as one employee named "Megan," but Plaintiffs fail to provide any specific details about Plaintiff Chan's interactions beyond their claim that about the employee's overarching failure to provide "warnings or caveats" about Autopilot's features. (FAC ¶¶ 26, 27, 30). Such speculative and conclusory allegations warrant dismissal as they do not satisfy the standards for pleading a fraud claim under New York law. *Official Publications*, 775 F. Supp. At 636-37; *Carmona*, 2009 WL 890054 at *4. *See also, e.g., Landesbank Baden-Wuerttemberg v. Goldman, Sachs & Co.*, 821 F. Supp. 2d 616 (S.D.N.Y 2011) (dismissing fraud claim where the plaintiff relied on "perfunctory allegations" that contained

¹ As the Court will no doubt recall, in response to Plaintiffs' initial Complaint that also contained a Fraud claim, Tesla filed a Rule 12(b)(6) Motion to dismiss that claim for reasons that are similar to Tesla's reasons here.

insufficient detail and noting that “[b]road reference to raw data’ is not sufficient to plead that defendants knowingly made false statements.”); *Cadle Co. v. Rochfort Enterprises (Bahamas) Ltd.*, No. 02 CIV. 9348 (LAK), 2003 WL 1702262 (S.D.N.Y. Mar. 31, 2003) (dismissing complaint because it “simply fails to set out the circumstances with particularity, much less a factual basis for inferring actual intent to defraud.”)

Not only do Plaintiffs fail to meet the heightened standards of Rule 9(b), but Plaintiffs’ fraud claim contains nothing more than rote allegations regarding the elements of a fraud claim, referring generally back to the undefined “fraudulent misrepresentations” that Plaintiffs allegedly “described above.” (FAC ¶¶ 96-99). Plaintiffs do not – and cannot – provide factual support to show all of the required elements for a fraud claim under New York law, namely: (1) a misrepresentation or a material omission of fact; (2) which was false and known to be false by defendant; (3) made for the purpose of inducing the other party to rely upon it; (4) justifiable reliance of the other party on the misrepresentation or material omission; (5) and injury. *Lama Holding Co.*, 668 N.E.2d at 1373. Fraud claims of this nature cannot withstand a motion to dismiss. *See, e.g., Carmona*, 2009 WL 890054 at *5 (“[P]laintiffs do not provide a single factual allegation to support those conclusory assertions. Accordingly, plaintiffs’ fraud claim against SBS is insufficient.”); *SNS Bank, N.V. v. Citibank, N.A.*, 7 A.D.3d 352, 356 (N.Y. App. Div. 2004) (“[T]he amended complaint contains no factual (as opposed to conclusory) allegations that defendants acted with intent to defraud.”).

2. *Plaintiffs’ fraud by omission claim fails because the parties had no fiduciary relationship*

Even if Plaintiffs stated their claim with sufficient particularity, detail and factual support under New York law and Fed. R. Civ. P. 9(b), Plaintiffs’ fraud claim would still fail because in

circumstances where, as here, the alleged fraud is based on an omission, there must be a fiduciary relationship between the parties.

“It is well settled that in order to allege a fraud based on a failure to disclose or omission, the plaintiff must allege a confidential or fiduciary relationship giving rise to a duty to speak.” *Martian Entm’t, LLC v. Harris*, 824 N.Y.S.2d 769, 769 (N.Y. Sup. Ct. 2006). *See also SNS Bank, N.V.*, 7 A.D.3d at 356 (“[A]n omission does not constitute fraud unless there is a fiduciary relationship between the parties.”).

Here, Plaintiffs’ fraud allegations are premised on Tesla’s alleged failure to do or say certain things, namely an alleged failure to advise, warn or demonstrate with respect to the Autopilot functions on the subject vehicle. While Plaintiffs vaguely assert that Tesla employees made certain statements about Autopilot’s performance or functionality, as stated above, they do not do so with sufficient particularity and fail to demonstrate any fraudulent intent or falsity. The overall tenor of Plaintiffs’ First Amended Complaint is Tesla’s alleged omissions, as further evidenced by Plaintiffs’ failure to warn and negligence claims.

In that regard, Plaintiffs and Tesla had no fiduciary or special relationship. They were engaged in an arm’s length business transaction and had no confidential relationship prior to the transaction giving rise to the alleged wrong. As such, under New York law, there can be no fraud in these circumstances. *See SNS Bank, N.V.*, 7 A.D.3d at 355–56 (“Plaintiff’s claims for breach of fiduciary duty against Citibank and the Citibank employees who were members of the administrative committee were properly dismissed because the parties merely had an arm’s length business relationship.”).

Accordingly, Plaintiffs have failed to state a claim for fraud, and count six of Plaintiffs’ First Amended Complaint should be dismissed.

B. Plaintiffs Have Failed to State a Legally Cognizable Claim for Punitive or Exemplary Damages

The prayer for relief in Plaintiffs’ First Amended Complaint requests “punitive” and “exemplary” damages. However, Plaintiffs’ First Amended Complaint contains no cause of action or claim that even alleges these words let alone the allegations required to state a legally cognizable claim that would allow such extreme damages.² In order to recover punitive damages under New York law, Plaintiffs must demonstrate that the wrong complained of rose to a level of “such wanton dishonesty as to imply a criminal indifference to civil obligations.” *Martin v. Grp. Health Inc.*, 2 A.D.3d 414 (N.Y. App. Div. 2003); *Rocanova v. Equitable Life Assur. Soc. of U.S.*, 83 N.Y.2d 603 (1994) (quoting *Walker v. Sheldon*, 10 N.Y.2d 401 (1961)). Punitive damages are recoverable in all actions based upon tortious acts that involve ingredients of malice, fraud, oppression, insult, wanton or reckless disregard of one’s rights, or other circumstances of aggravation. *See Walker*, 10 N.Y.2d 401; *Cushing v. Seemann*, 247 A.D.2d 891 (N.Y. App. Div. 1998); *Collins v. Willcox*, 600 N.Y.S.2d 884 (N.Y. Sup. Ct. 1992); *Witherwax v. Transcare, Inc.*, 801 N.Y.S.2d 782, (N.Y. Sup. Ct. 2005). *See also Outside Connection, Inc. v. DiGennaro*, 795 N.Y.S.2d 669 (N.Y. App. Div. 1995) (“[P]laintiffs failed to establish that the defendants’ alleged conduct was so gross, wanton, or willful, or of such high moral culpability, as to warrant an award of punitive damages.”). Furthermore, punitive damages are available “for the purpose of vindicating a public right only where the actions of the alleged tortfeasor constitute gross recklessness or intentional, wanton or malicious conduct aimed at the public generally or are activated by evil or reprehensible motives.” *Nooger v. Jay-Dee Fast Delivery*, 251 A.D.2d 307 (N.Y. App. Div. 1998); *Boykin v. Mora*, 274 A.D.2d 441 (N.Y. App. Div. 2000).

² Tesla acknowledges that Plaintiffs’ First Amended Complaint, which spans 116 paragraphs over 7 causes action, does contain the words “reckless and grossly negligent” (¶ 52) and “reckless and conscious disregard” (¶¶ 82 & 116) but no other allegations and certainly no cause of action specific to Punitive or Exemplary damages.

Although Plaintiffs are not required to “prove” their case at the pleading stage, they are at a minimum required to articulate their allegations supporting this claim and despite including three fleeting references to “reckless and grossly negligent” and “reckless and conscious disregard” they completely failed to allege any legally sufficient basis for either punitive or exemplary damages. The prayer for relief requesting those extreme damages can and should be dismissed as a matter of law.

II. Rule 12(f) Legal Standard

A court may strike from any pleading “an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act: (1) on its own; or (2) on motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading.” Fed. R. Civ. P. 12(f). In bringing a Rule 12(f) motion to strike, “a party must demonstrate that ‘(1) no evidence in support of the allegations would be admissible; (2) that the allegations have no bearing on the issues in the case; and (3) that to permit the allegations to stand would result in prejudice to the movant.’” *In re Fannie Mae 2008 Sec. Litig.*, 891 F.Supp.2d 458, 471 (S.D.N.Y. 2012) (citing *S.E.C. v. Lee*, 720 F.Supp.2d 305, 340–341 (S.D.N.Y. 2010)).

A. First Amended Complaint Paragraphs 14, 15, 18, 19, 20 and 21 Are Immaterial and Impertinent to Plaintiffs’ claims And Should be Stricken

The vehicle and alleged incident at the center of Plaintiffs’ First Amended Complaint is a 2016 Tesla Model X that was allegedly involved in a collision in New York State in 2017. However, paragraphs 14, 15, 18, 19, 20 and 21 of the “Fact” section of Plaintiffs’ First Amended Complaint are allegations with no “facts” about the subject vehicle or the alleged incident. Instead, the allegations in those paragraphs have no connection or relevance to: (i) Plaintiffs purchase of the subject vehicle; (ii) the instructions or warnings Plaintiffs were allegedly given or not given

about the subject vehicle at or after purchase; (iii) the subject vehicle itself; or (iv) the alleged collision. Rather, most of these paragraphs (15 and 18-21) are allegations about an incident that occurred over two years *after* Plaintiffs' purchase of the subject vehicle and over a year after the collision involving the subject vehicle. There is no possible relevance between an incident that occurred *after* the purchase date of the subject vehicle, *after* the date of the alleged incident and under circumstances that Plaintiffs' do not even attempt to allege as similar to the circumstances of their alleged incident. In short, the allegations on paragraphs 14, 15, 18, 19, 20 and 21 of the First Amended Complaint are not "Facts" related to subject vehicle, Plaintiffs' alleged incident or the claims in the First Amended Complaint specific to these Plaintiffs making them immaterial, impertinent and bearing no possible relation to the controversy before the Court.

Additionally, these immaterial and inadmissible allegations will result in prejudice to Tesla if permitted to remain as "allegations" in Plaintiffs' First Amended Complaint. Plaintiffs have included this irrelevant "information" in the First Amended Complaint to create an inappropriate and unfair narrative, which Plaintiffs will undoubtedly use as a basis to seek discovery in this matter that has no relevance or connection to the actual narrow claims in this First Amended Complaint about a vehicle, a purchase transaction and alleged collision incident. Thus, these paragraphs can and should be stricken from the First Amended Complaint.

CONCLUSION

For the foregoing reasons, Tesla requests that this Honorable Court grant its motion and: (i) dismiss count six of Plaintiffs' First Amended Complaint with prejudice; (ii) dismiss Plaintiffs' prayer for punitive and exemplary damages with prejudice; (iii) strike paragraphs 14, 15, 18, 19, 20 and 21 from the First Amended Complaint with prejudice; and (iv) further award Tesla any and all additional relief the Court may deem just and proper.

Dated: New York, New York
September 21, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of September, 2020, the foregoing Memorandum of Law in Support of Tesla's Motion to Dismiss Certain Portions of Plaintiffs' First Amended Complaint was electronically emailed upon the following:

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**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 misrepresents 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 misleadingly 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. Chorchos 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 Tesla’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;

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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I hereby certify that on October 12, 2020, I caused a true and correct copy of the foregoing document to be served upon the following by Electronic Mail:

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

JING WANG and WAI-LEUNG CHAN,

Plaintiffs,

-against-

TESLA, INC.,

Defendant.

**MEMORANDUM & ORDER
20-CV-3040 (NGG) (SJB)**

NICHOLAS G. GARAUFIS, United States District Judge.

Plaintiff Wai-Leung Chan was involved in a car accident while driving a vehicle he purchased from Defendant Tesla, Inc. (“Tesla”) under the name of his spouse, Plaintiff Jing Wang. Plaintiffs brought this action for breach of express and implied warranties, failure to warn, deceptive and misleading business practices and false advertising, common law fraud, and negligent misrepresentation against Tesla. (Am. Compl. (Dkt. 18).) Before the court is Defendant’s Motion to Dismiss Plaintiffs’ fraud claim and Plaintiffs’ prayer for punitive and exemplary damages pursuant to Fed. R. Civ. P. 12(b)(6), and Defendant’s Motion to Strike several paragraphs of the Amended Complaint pursuant to Fed. R. Civ. P. 12(f). (Tesla Mot. to Dismiss (“Tesla Mot.”) (Dkt. 24-1); Pls.’ Mem. in Opp. to Def.’s Mot. to Dismiss (“Opp.”) (Dkt. 24-3); Tesla Reply to Opp. (“Tesla Reply to Opp.”) (Dkt. 24-4).)

For the reasons set forth herein, Defendant’s Motion for Partial Dismissal and Motion to Strike is granted in part and denied in part. The court grants dismissal of Plaintiffs’ fraud claim, but denies Defendant’s motion to dismiss Plaintiffs’ prayer for punitive and exemplary damages and Defendant’s motion to strike portions of Plaintiffs’ Amended Complaint.

I. BACKGROUND

In or around 2015, Plaintiff Chan became interested in purchasing a Tesla vehicle for his daily commutes through Long Island traffic. (Am. Compl. ¶¶ 23-24.) He was especially intrigued by Tesla’s Autopilot feature, which, according to Tesla, is designed to help drivers navigate “the burdensome parts of driving.” (*Id.* ¶¶ 9, 24.) Tesla vehicles equipped with Autopilot technology assist drivers in a number of ways: the cars can steer, accelerate, and brake automatically; they can match their speed to surrounding traffic; they are able to accelerate and decelerate to maintain a specified distance behind the nearest vehicle; they can change lanes on the highway; and they can detect nearby cars to prevent accidents. (*Id.* ¶ 7.) Tesla touts one of its vehicles equipped with Autopilot, the Model X, as “the safest, quickest, and most capable sport utility vehicle in history” and “the safest SUV ever.” (*Id.* ¶ 6.)

Prior to his purchase of a Tesla vehicle, Plaintiff Chan states that he visited Tesla’s website almost weekly to learn about Tesla vehicles’ capabilities. (*Id.* ¶ 23.) Based on his research on the company’s website, Chan believed that a Tesla vehicle would be uniquely suited to his transportation needs. (*Id.* ¶ 28.) Plaintiff Chan visited showrooms in Syosset, New York and Manhasset, New York to test drive the Model S and Model X vehicles, respectively. (*Id.* ¶¶ 25-30.) During Plaintiff’s visit to the Manhasset showroom, an agent assured him that the Autopilot feature would be well-suited to his commutes and that “he could take the Tesla into the HOV lane . . . and then close his eyes and ‘relax.’” (*Id.* ¶ 29).

Relying on what he learned from Tesla’s website and from his showroom visits, Chan purchased a Model X, which he claimed in Tesla’s Brooklyn, New York showroom in September 2016. (*Id.*

¶¶ 32-33.) Plaintiffs allege that neither Tesla nor its representatives ever warned Plaintiffs about the limitations of Model X and the Autopilot feature or provided proper instructions on operating Model X and the Autopilot feature, either through Tesla’s website or during Plaintiff Chan’s visits to Tesla’s showrooms. (*Id.* ¶¶ 33-35.)

On December 13, 2017, Plaintiff Chan got into an accident while driving the Model X on the Long Island Expressway through dense traffic. (*Id.* ¶¶ 37-38.) Plaintiffs contend that as a white Audi merged in between Chan’s car and a tractor-trailer in front of him, the Autopilot feature failed to react, warn Chan of an impending collision, or operate its “Automatic Emergency Breaking” function. (*Id.* ¶¶ 40-41.) With just one second to react, Plaintiff Chan steered to the left, attempting to avoid a collision, and he instead collided with two other cars. (*Id.* ¶ 42.) The Autopilot feature did not recognize this impending collision, either, and it again failed to engage its “Automatic Emergency Breaking” function. (*Id.*) Plaintiff Chan claims he operated the vehicle in a reasonable manner and was alert the entire time. (*Id.* ¶¶ 39, 44.) The collision caused severe damage to Plaintiffs’ Model X, which was deemed a total loss, and damage to two other vehicles; there is no allegation that it caused bodily injury. (*Id.* ¶ 43.)

II. LEGAL STANDARD

A. Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6)

To survive a Rule 12(b)(6) motion, “a complaint must 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) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).¹ A complaint must contain facts that do more than

¹ When quoting cases, and unless otherwise noted, all citations and quotation marks are omitted, and all alterations are adopted.

present a “sheer possibility that a defendant has acted unlawfully.” *Iqbal*, 556 U.S. at 678. To decide Defendants’ motions to dismiss, the court “will accept all factual allegations in the [c]omplaint as true and draw all reasonable inferences in [Plaintiffs’] favor.” *L-7 Designs, Inc. v. Old Navy, LLC*, 647 F.3d 419, 429 (2d Cir. 2011). However, the court will “identify[] pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth.” *Iqbal*, 556 U.S. at 679. The court must then evaluate the “well-pleaded factual allegations” and “determine whether they plausibly give rise to an entitlement to relief.” *Id.* This plausibility analysis “does not impose a probability requirement at the pleading stage,” but requires the complaint to provide “enough fact to raise a reasonable expectation that discovery will reveal evidence of illegality.” *Arista Records, LLC v. Doe 3*, 604 F.3d 110, 120 (2d Cir. 2010) (quoting *Twombly*, 550 U.S. at 556).

B. Motion to Strike Pursuant to Fed. R. Civ. P. 12(f)

Motions to strike “are not favored and will not be granted unless . . . 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). “Rule 12(f) motion[s] to strike matter as impertinent or immaterial, will be denied, unless it can be shown that no evidence in support of the allegation would be admissible.” *Id.* By the same token, matters should be struck due to impertinence only where “the allegation bears no possible relation whatsoever to the subject matter of the litigation.” *AdvanceMe, Inc. v. Lenders Int’l*, No. 11-CV-3624(VB), 2011 WL 6425488, at *2 (S.D.N.Y. Dec. 19, 2011). To prevail on a Fed. R. Civ. P. 12(f) motion to strike, the movant must establish that: “(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)).²

III. DISCUSSION

Tesla moves to dismiss on two grounds. First, Tesla argues that Plaintiffs fail to state a claim for fraud under Fed. R. Civ. P. 12(b)(6). (Tesla Mot. at 5.) Second, Tesla argues that Plaintiffs' Amended Complaint does not state a cognizable claim that permits punitive or exemplary damages. (*Id.* at 9.) Tesla also moves to strike several paragraphs from Plaintiffs' Amended Complaint as immaterial and impertinent to Plaintiffs' claims. (*Id.* at 10.)

A. Motion to Dismiss Plaintiffs' Fraud Claim

In the sixth cause of action raised in their Amended Complaint, Plaintiffs allege that Tesla has "intentionally made false representations of material fact regarding its vehicles, including that its Autopilot function is safe and ready to be used in common traffic situations and specifically in heavy highway traffic." (Am. Compl. ¶ 97.) They argue that the statements Tesla has made directly to Plaintiffs and to the public, through Tesla's website and showroom agents, "were likely to deceive a reasonable consumer and did deceive Plaintiffs into purchasing a Tesla vehicle." (*Id.* ¶ 99.) Furthermore, according to Plaintiffs, these misrepresentations about the Model X and its ultimate failure to perform as represented are the direct and proximate cause of Chan's accident. (*Id.* ¶ 104.)

To state a claim for fraud, Plaintiffs must establish "a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other

² Because the relevant claims in this action arise under state law, the court applies New York substantive law in deciding the motion to strike.

party on the misrepresentation or material omission, and injury.” *Lama Holding Co. v. Smith Barney Inc.*, 668 N.E. 2d 1370, 1373 (N.Y. 1996). Additionally, Fed. R. Civ. P. 9(b) requires that, “[i]n alleging fraud . . . , a party must state with particularity the circumstances constituting fraud[.]” In order to satisfy this particularity standard, a complaint alleging fraud must ordinarily: “(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent.” *United States ex rel. Ladas v. Exelis, Inc.*, 824 F. 3d 16, 25 (2d Cir. 2016). Fed. R. Civ. P. 9(b) “is designed to provide a defendant with fair notice of a plaintiff’s claim, to safeguard a defendant’s reputation from improvident charges of wrongdoing, and to protect a defendant against the institution of a strike suit.” *O’Brien v. Nat’l Prop. Analysts Partners*, 936 F.2d 674, 676 (2d Cir. 1991).

Tesla argues that Plaintiffs have failed to state a claim for fraud, as they have not pleaded all the requisite elements of a common law fraud claim. Tesla also argues that Plaintiffs have made only vague allegations that fail to satisfy the particularity standard of Federal Rule of Civil Procedure 9(b). Moreover, Tesla contends that even if Plaintiffs did make out a claim for fraud and meet the particularity standard, their claim still fails because the alleged fraud is predicated on an omission and there is no fiduciary relationship between the two parties.

Plaintiffs allege that they justifiably relied on misrepresentations about the Autopilot technology made on Tesla’s website. (Am. Compl ¶ 99.) Their Amended Complaint cites specific statements touting the safety and efficacy of the Model X and Autopilot Technology that appeared on Tesla’s website at the time Plaintiffs drafted their complaint, including that the Model X is the “safest, quickest, and most capable sport utility vehicle in history” and “the safest SUV ever” and that the Autopilot feature assumes “the

burdensome parts of driving.” (*Id.* ¶¶ 6, 8.) However, the Amended Complaint does not allege that Plaintiffs viewed and relied upon these specific statements on Tesla’s website in 2015 or 2016, when they made the decision to purchase a Model X. Indeed, it is not clear from the complaint what representations on Tesla’s website Chan read and allegedly relied upon prior to Plaintiffs’ purchase of the Model X. Because Plaintiffs do not identify the specific representations on Tesla’s website that they relied upon, their fraud allegations regarding Tesla’s website fall short of Rule 9(b)’s particularity requirement.³

Plaintiffs also allege that they were misled by statements made by Tesla representatives in the Manhasset and Syosset showrooms, including “routine[] misrepresent[at]ions[] and overstate[m]ents[] [of] the capabilities of Autopilot and the required operator involvement,” such as representations that the Model X was uniquely suited to Plaintiff Chan’s needs, that it would perform well in traffic, and that Chan could close his eyes and relax after putting the car in Autopilot. (Am. Compl. ¶¶ 17, 26-27, 29-31.) Plaintiffs argue that their allegations are sufficiently specific to support a fraud claim, as they have identified the fraudulent statements on which they base their claim, identified the speakers, designated the time period and place, and described the nature of the statements. (Opp. at 6.) However, aside from the alleged statement by a Manhasset showroom agent that Chan could “close his eyes and relax” when utilizing

³ Plaintiffs state that their fraud allegations are adequate because pleading on “information and belief” is allowed in certain instances. (Opp. at 6.) However, where pleading is allowed on information and belief, “a complaint must adduce specific facts supporting a strong inference of fraud or it will not satisfy even a relaxed pleading standard.” *Wexner v. First Manhattan Co.*, 902 F.2d 169, 172 (2d. Cir. 1990). Here, Plaintiffs’ Amended Complaint suggests in vague terms that Plaintiffs were misled by their review of Tesla’s website. They have not alleged with any particularity, either with knowledge or upon information and belief, what representations they relied upon.

the Autopilot technology, Plaintiffs do not allege specific misrepresentations that were made during Chan's visits to the showrooms. That statement, by itself, does not meet the elements of a fraud claim. Plaintiffs have failed to present facts that "give rise to a strong inference of fraudulent intent." See *S.Q.K.F.C., Inc. v. Bell Atlantic TriCon Leasing Corp.*, 84 F.3d 629, 634 (2d Cir. 1996). To demonstrate a strong inference of fraudulent intent, plaintiffs must allege "facts indicating that the defendant[] had both motive and opportunity to commit fraud or facts that amount to strong circumstantial evidence of conscious misbehavior or recklessness." *Carmona v. Spanish Broad. Sys., Inc.*, No. 08-cv-4475 (LAK), 2009 WL 890054, at *5 (S.D.N.Y. Mar. 30, 2009). The facts alleged in Plaintiffs' Amended Complaint fail to give rise to an inference of that nature.

Plaintiffs also allege that Tesla committed fraud by failing to adequately disclose the defects or limitations of the Autopilot technology. To allege fraud based on a failure to disclose under New York law, one party must have "information that the other party is entitled to know because of a fiduciary or other similar relation of trust and confidence between them." *United States v. Szur*, 289 F.3d 200, 211 (2d Cir. 2002). A fiduciary relationship "may exist where one party reposes confidence in another and reasonably relies on the other's superior expertise or knowledge, but an arms-length business relationship does not give rise to a fiduciary obligation." *In re Refco Sec. Litig.*, 759 F. Supp. 2d 301, 323 (S.D.N.Y. 2010). "When parties deal at arms length in a commercial transaction, no relation of confidence or trust sufficient to find the existence of a fiduciary relationship will arise absent extraordinary circumstances." *In re Mid-Island Hosp., Inc.*, 276 F.3d 123, 130 (2d Cir. 2002).

"However, there may be a relationship of trust and confidence sufficient to give rise to a duty to disclose under the 'special facts doctrine.'" *Travelers Indem. Co. of Illinois v. CDL Hotels USA, Inc.*,

322 F. Supp. 2d 482, 499 (S.D.N.Y. 2004). “Under [the special facts doctrine], a duty to disclose arises where one party’s superior knowledge of essential facts renders a transaction without disclosure inherently unfair.” *Woods v. Maytag Co.*, 2010 WL 4314313, at *10 (E.D.N.Y. Nov. 2, 2010) (quoting *P.T. Bank Cent. Asia v. ABN AMRO Bank N.V.*, 301 A.D.2d 373, 378 (1st Dep’t 2003)). To state a claim under the special facts doctrine, a plaintiff must allege that: “(1) one party has superior knowledge of certain information; (2) that information is not readily available to the other party; and (3) the first party knows that the second party is acting on the basis of mistaken knowledge.” *Banque Arabe et Internationale D’Investissement v. Maryland Nat. Bank*, 57 F.3d 146, 155 (2d. Cir. 1995).

Because Plaintiffs and Tesla were engaged in an arm’s-length transaction, Tesla had an affirmative duty to disclose only if the special facts doctrine applied. Plaintiffs argue that Tesla’s superior knowledge of essential facts regarding the Autopilot technology’s limitations and defects established a duty to disclose. (Opp. at 8.) Plaintiffs, however, have not alleged with any specificity what alleged defects were concealed from them, nor have they adequately alleged that information regarding the limitations of the technology was unavailable to them via Tesla’s website, the Model X owner’s manual, or other publicly available sources. Accordingly, the facts alleged do not give rise to a claim that Tesla committed fraud by failing to affirmatively disclose “special facts” that were known to Tesla and unknowable by Plaintiffs.

B. Motion to Dismiss Prayer for Punitive and Exemplary Damages

Under New York law, a plaintiff may recover an award for punitive damages on a tort claim where the defendant’s actions rise to the level of “gross, wanton, or willful fraud or other morally culpable conduct.” *Action S.A. v. Marc Rich & Co., Inc.*, 951 F.2d

504, 509 (2d Cir. 1991). Notably, the trend among courts applying New York law seems to be to deny attempts to dismiss prayers for punitive damages at the motion to dismiss stage because it is “not even clear that there is a requirement that a complaint seeking punitive damages must plead specific facts that would support an award of such damages.” *Amusement Indus., Inc. v. Stern*, 693 F. Supp. 2d 301, 318 n.5 (S.D.N.Y. 2010). “A motion to dismiss is addressed to a ‘claim’ – not to a form of damages.” *Id.* Additionally, “there is no separate cause of action in New York for punitive damages.” *Martin v. Dickson*, 100 F. App’x 14, 16 (2d Cir. 2004). “[W]hether there is sufficiently egregious conduct to support an award of punitive damages is an evidentiary matter that cannot be decided on a motion to dismiss.” *New York Islanders Hockey Club, LLP v. Comerica Bank—Texas*, 71 F. Supp. 2d 108, 120-21 (E.D.N.Y. 1999). As such, “[b]ecause punitive damages are a form of damages, not an independent cause of action, a motion to dismiss a prayer for relief in the form of punitive damages is procedurally premature.” *Hunter v. Palisades Acquisition XVI, LLC*, 16 Civ. 8779 (ER), 2017 WL 5513636, at *9 (S.D.N.Y. Nov. 16, 2017).

In the instant case, Plaintiffs’ Complaint demands punitive and exemplary damages on underlying causes of action. *See Amusement Indus., Inc.*, 693 F. Supp. at 318 n.5 (S.D.N.Y. 2010). Accordingly, the court denies Tesla’s motion to dismiss Plaintiffs’ prayer for punitive damages as procedurally premature. *See Hunter*, 2017 WL 5513636, at *9.

C. Motion to Strike Portions of Plaintiffs’ First Amended Complaint

Tesla also moves to strike six paragraphs of Plaintiffs’ First Amended Complaint, which allege facts concerning the safety of Tesla’s vehicles, including a 2019 car accident involving a different Tesla model and a 2020 report by the National

Transportation Safety Board. Specifically, Plaintiffs allege in the relevant paragraphs that:

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.

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. This fallback plan is unreliable and unsafe. Not only has Tesla been warned by the NTSB that drivers of their automobiles may become overly reliant on the Autopilot technology, 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. . . .

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. 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 did not provide an effective means of monitoring the driver's level of engagement with the driving task;
- 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”).

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. 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.

(Am. Compl. ¶¶ 14-15, 18-21)

Tesla argues that these paragraphs should be struck from the Amended Complaint because they do not directly pertain to, and therefore bear no relevance to, the vehicle that Plaintiffs purchased or the accident in which that vehicle was involved. (Mem. at 10-11.) Plaintiffs argue, in response, that these factual allegations “directly bear[] on Plaintiff’s claims that Tesla’s automated features (including Autopilot) do not operate as expressly and implicitly represented to consumers.” (Opp. at 14.)

While the challenged factual allegations are at most tangentially relevant to Plaintiffs’ legal claims, they do relate to the subject matter of the litigation: alleged defects with Tesla’s Autopilot technology and the extent to which Tesla knew of and disclosed those alleged defects. In addition, evidence of similar accidents may be relevant to illustrate that the incident was not an isolated occurrence. *See Randi A.J. v. Long Is. Surgi-Ctr.*, 46 A.D.3d 74,

85-86 (2d Dep't 2007). Thus, Tesla cannot meet the high standard for success on a Rule 12(f) motion to strike. *See AdvanceMe, Inc.*, No. 11 CV 3624 (VB), 2011 WL 6425488, at *2; *see also Lynch*, 278 F.R.D. at 63. Tesla's motion to strike paragraphs 14, 15, 18, 19, 20, and 21 of Plaintiffs' Amended Complaint is denied.

IV. CONCLUSION

For the reasons set forth above, Tesla's Partial Motion to Dismiss is GRANTED IN PART, with respect to Plaintiffs' fraud claim, and DENIED IN PART, with respect to Plaintiffs' prayer for punitive and exemplary damages. Tesla's Motion to Strike certain factual allegations from Plaintiffs' Amended Complaint is DENIED.

SO ORDERED.

Dated: Brooklyn, New York
July 16, 2021

/s/ Nicholas G. Garaufis
NICHOLAS G. GARAUFIS
United States District Judge