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United States District Court
Northern District of California

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN RE TESLA, INC. SECURITIES
LITIGATION.

Case No. [18-cv-04865-EMC](#)

FILED UNDER SEAL

**ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFF
LITTLETON’S MOTION FOR
PARTIAL SUMMARY JUDGMENT**

Docket No. 352

Plaintiff Glen Littleton has filed a securities class action against Defendants Tesla, Inc.; Elon Musk (Tesla’s CEO and former Chairman); and Tesla’s Board of Directors based on events that took place in August 2018. Mr. Littleton alleges that Mr. Musk made false representations, most notably in tweets, about taking Tesla from a public to a private company.

Currently pending before the Court is Mr. Littleton’s motion for partial summary judgment. He seeks a ruling that four representations made during the relevant period were false and with the requisite mental state (*i.e.*, scienter). He also seeks a ruling that there was reliance on the representations. Having considered the parties’ briefs and accompanying submissions, as well as the oral argument of counsel, the Court hereby **GRANTS** in part and **DENIES** in part Mr. Littleton’s motion.¹

¹ On April 1, 2022, Defendants filed a motion to supplement the record, asking the Court to consider deposition testimony of Mr. Littleton that had not been taken at the time of the hearing on the motion for partial summary judgment. *See* Docket No. 386 (motion). The Court **DENIES** the motion. If Defendants believed that Mr. Littleton’s testimony was critical for the summary judgment, then they should have asked for an extension of time to oppose the motion. They did not. In any event, the Court has considered the content of Defendants’ motion and it does not

1 **I. FACTUAL & PROCEDURAL BACKGROUND**

2 The following is a timeline of the relevant events.

3 **1/2017.** After Saudi Arabia’s sovereign wealth fund – commonly referred to as the Saudi
 4 Public Investment Fund (“PIF”) – reached out to Tesla, Mr. Musk met with Yasir Al-Rumayyan, a
 5 PIF representative. “The planned substance [of the meeting] was not discussed in advance.”
 6 Teller SEC Depo. at 130. However, it appears that Mr. Musk agreed to meet with the Saudi PIF
 7 so that they could “discuss the possibility of [the PIF] working with [Tesla] to take Tesla private.”
 8 Teller SEC Depo. at 130 (adding that this was his understanding based on a conversation between
 9 Mr. Musk and Sam Altman (who co-founded OpenAI with Mr. Musk) “where Elon expressed a
 10 desire to take Tesla private [a]nd Sam said these could be great partners to do that or one of the
 11 few funds in the world that would have the ability to do so”); *see also* Teller Depo. at 68-70, 75-
 12 76, 80-81 (indicating the same).

13 **5/2017.** A dinner meeting was held involving the Saudi PIF and Tesla. Mr. Al-Rumayyan
 14 of the Saudi PIF attended. He brought with him Masa Son of SoftBank, a company that the PIF
 15 had partnered with/invested in. On the Tesla side, attendees included Mr. Musk and Deepak
 16 Ahuja, Tesla’s CFO. Larry Ellison also attended. *See* Ahuja SEC Depo. at 63-64; Teller Depo. at
 17 70.

18 According to Mr. Ahuja, at the meeting, Mr. Al-Rumayyan and Mr. Son expressed interest
 19 in making “a large potential investment in Tesla in any form that Elon would desire. And that
 20 included taking Tesla private as one of the options,” which indicated

21 confidence that they have sufficient funding to take Tesla all the
 22 way private.

23 So it was clear that the conversation here was in – you know, it
 24 could be [\$]30 to \$60 billion range of financing for going private
 transaction, depending on how it’s structured.^[2] But the numbers
 were large, and it was clear it was serious and well thought through

25 _____
 26 affect the Court’s analysis herein.

27 ² Implicitly, structure considerations would take into account the fact that, if the PIF were to take a
 28 large percentage of ownership in Tesla, then there would be regulatory issues since the PIF is a
 foreign entity. *See* Musk SEC Depo. at 132; *see also* Musk Depo. at 101 (indicating that above
 20% ownership would require U.S. government approval).

1 before their comment.

2

3 I can't recall for sure if those specific numbers were mentioned, but
4 my recollection is, as I was sitting there, if I was understanding their
5 comments correctly, they were definitely talking about those kind of
6 numbers. They obviously are extremely sophisticated. They knew
7 what the valuation of Tesla was. And if they are offering to take
8 Tesla private, they clearly understood those implications.

9

10 They talked at length about taking Tesla private, and Elon being –
11 keeping his share [25%], and they had the capacity to do the rest of
12 the deal. That would clearly indicate those sums of money.

13 Ahuja Depo. at 31, 51-53.

14 Mr. Ahuja also testified that, subsequently, he had a conversation with Mr. Musk, where
15 Mr. Musk indicated that he was not comfortable about entering into a relationship with Mr. Son
16 specifically. This seemed to be because Mr. Son was making investments in, or contemplating
17 making investments in, companies that “would be likely in conflict with the mission of Tesla, and
18 that would create some unexpected or unintended conflicts which [Mr. Musk] was not comfortable
19 with.”³ Ahuja Depo. at 34. Mr. Musk appeared to have had a negative opinion of Mr. Son for
20 other reasons as well. *See* Teller SEC Depo. at 160-61 (testifying that “Elon goes a lot on gut
21 feel” and “just felt like [Mr. Son] did not get it”; adding that Mr. Musk was “annoyed about [Mr.
22 Son] continuing to press on this – I believe it was a factory in India [a]nd Elon like didn't
23 understand why [Mr.] Son would even care about that”). According to Mr. Musk, at that point in
24 time, he believed Mr. Al-Rumayyan had “delegated [the] responsibility [of taking Tesla private] to
25 [Mr. Son].” Musk SEC Depo. at 278; *see also* Teller SEC Depo. at 153 (testifying that Mr. Musk
26 “had turned more skeptical about the possibility of working with the Saudis at this point, and
27 working with Yasir” because “he understood, or his takeaway from the dinner at the Tesla factory
28 . . . was basically that these guys [Mr. Al-Rumayyan and Mr. Son] were kind of attached at the hip
for purposes of a go private”).

³ *See, e.g.*, Ahuja Depo. at 35 (mentioning “investments in other autonomous car companies and other electric car companies, in Uber, which Elon looked at also as a long-term serious competitor in the world and space of autonomous driving”).

1 **11/2017.** It appears that nothing of note with the Saudi PIF happened for the remainder of
2 2017. However, Mr. Musk continued to entertain thoughts of taking Tesla private, as indicated in
3 a *Rolling Stone* article. *See* Batter Decl., Ex. D (on ECF Page 113, noting that Mr. Musk stated,
4 “I wish we could be private with Tesla” and “It actually makes us less efficient to be a public
5 company”).

6 **4/2018.** It appears the Saudi PIF was again exploring taking a large stake in Tesla. Mr.
7 Musk indicated to Mr. Al-Rumayyan that, if the PIF wished to demonstrate interest in investment
8 in Tesla, “since Tesla’s a publicly traded company, they should simply buy stock in Tesla, as a
9 publicly traded company.” Musk Depo. at 91; *see also* Musk Depo. at 93 (testifying that that is
10 what another company, Tencent did – *i.e.*, invest up to the 5% level⁴ – and that he cited that
11 example to the Saudi PIF); Teller SEC Depo. at 155 (testifying that Mr. Musk said, in effect, to
12 the PIF, “why don’t you show us you’re serious and, like, buy some stock?”). The Saudi PIF
13 agreed that it “would go ahead and do it.” Musk Depo. at 93.

14 **7/31/2018.** Mr. Musk met with representatives of the Saudi PIF, including Mr. Al-
15 Rumayyan. Mr. Musk’s “Chief of Staff,” Mr. Teller, also attended the meeting. The meeting
16 lasted somewhere between 30-60 minutes. *See* Musk Depo. at 99; Teller Depo. at 163. Mr. Ahuja
17 attended for the last 10 minutes of the meeting.⁵ *See* Ahuja Depo. at 82.

18 During the meeting, there was a discussion (as before) about taking Tesla private. *See*
19 Musk Depo. at 99. (Mr. Teller contacted Mr. Ahuja to get him to join the meeting after the
20 conversation became more serious about taking Tesla private – *i.e.*, not just a passive investment.
21 *See* Teller Depo. at 140.) The Saudi PIF informed Mr. Musk that it had purchased about 5% of
22 Tesla’s stock.⁶ *See* Ex. 79 (text from Mr. Teller); Musk Depo. at 99. According to Mr. Musk,

23 [t]hey informed me that they had followed through with taking a 5
24

25 ⁴ It seems Mr. Musk suggested 5% because “U.S. reporting requirements start at 5 percent.” Musk
SEC Depo. at 155.

26 ⁵ Mr. Al Mogren of the Saudi PIF took notes during the meeting. *See* Ex. 80 (notes/minutes).

27 ⁶ With this purchase, the PIF seems to have become one of Tesla’s largest shareholders, along
28 with shareholders such as Mr. Musk himself, Fidelity, Baillie Gifford, T. Rowe Price, and
Tencent. *See* McCall Reply Decl., Ex. R (Morningstar Digest article).

1 percent stake in Tesla, and I was, like, Well, this is great.

2 So based on a verbal discussion and a verbal agreement and no
3 discussion of price, they went – they moved forward and took a 5
4 percent stake in Tesla. So what that meant was that you could trust
5 their word. And so – and no – no written agreement was necessary,
6 and no discussion of price was necessary. And that if they said they
7 would do something, that they would.

8 Musk Depo. at 99-100.

9 In addition to the above, Mr. Al-Rumayyan “clarified” for Mr. Musk that he would not
10 delegate any take-private of Tesla to Mr. Son of SoftBank. Musk SEC Depo. at 277; *see also*
11 Musk Depo. at 115. According to Mr. Musk, when he asked Mr. Al-Rumayyan whether there
12 were other decisionmakers who would need to be involved, Mr. Al-Rumayyan said “no” and
13 stated that he was the decisionmaker. *See* Musk SEC Depo. at 115.

14 According to Mr. Musk, these two facts – *i.e.*, the purchase of about 5% of Tesla stock and
15 the removal of Mr. Son from the picture – were particularly important to him. *See* Musk SEC
16 Depo. at 146, 279.

17 However, the total amount of funding needed to take Tesla private was not discussed. Nor
18 was the price to be paid for Tesla stock if the company were to be taken private. *See* Musk Depo.
19 at 109-10; Teller Depo. at 164; Ahuja Depo. at 82, 84, 100-01. In addition, there was no
20 discussion about what percent ownership would be taken by the Saudi PIF if Tesla were to be
21 taken private. *See* Musk Depo. at 112. According to Mr. Ahuja, the Saudi PIF conveyed to Mr.
22 Musk that the PIF “was fundamentally keen on hearing from Elon directly the structure that he
23 would have in mind that he would like to do for a going-private transaction and what percentage
24 of that he would think would be needed or the financial calculations to take it private.” Ahuja
25 Depo. at 97-98; *see also* Ex. 80 (notes/minutes written by Mr. Al Mogren of the Saudi PIF)
(writing that Mr. Al-Rumayyan said, “I would like to listen to your plan Elon and what are the
26 financial calculations to take it private in the next week and if I did not receive anything I will call
27 you”).

28 **8/2/2018.** Several days after meeting with the Saudi PIF, Mr. Musk wrote an email to the
Board, Mr. Ahuja, and Todd Maron (Tesla’s General Counsel), titled “Offer to Take Tesla Private
at \$420.” *See* Ex. 81 (email). In the email, Mr. Musk stated, *inter alia*, that “[i]t is my firm belief

1 that Tesla can operate more effectively as a private company for the next several years” and that,
2 “[u]nless another bidder comes forward with a better offer, I would ask that this matter be put to a
3 shareholder vote at the earliest opportunity. This offer expires in 30 days.” Ex. 81.

4 After receiving the email, the Board (excluding Mr. Musk and his brother) held a special
5 meeting. See Ex. 82 (minutes). Also present at the meeting were, *inter alia*, Mr. Ahuja, Mr.
6 Maron, and lawyers from the Wachtell law firm. The Board discussed Mr. Musk’s email about
7 taking Tesla private and the interest of the Saudi Arabia PIF “in helping Mr. Musk take the
8 Company private.” Ex. 82.

9 Mr. Ahuja noted that, based on the statements made by the PIF to
10 Mr. Musk during the meeting, Mr. Musk believed that the PIF was
11 willing to fund the entire transaction. Mr. Ahuja explained,
12 however, that Mr. Musk believed Tencent and other large Tesla
shareholders would also participate in any going private transaction,
but that Mr. Musk had not yet spoken with them.

13 Ex. 82. The Board ultimately directed Mr. Maron to schedule another meeting “in which Mr.
14 Musk would provide additional details regarding his proposal and explain to the Board his
15 thinking on a possible going private transaction.” Ex. 82.

16 **8/3/2018.** The next day, the Board (including Mr. Musk and his brother) held a special
17 meeting at which, *inter alia*, Mr. Ahuja and Mr. Maron were also present. See Ex. 83 (minutes).
18 Mr. Musk explained “his thinking regarding privatization of the Company.” Ex. 83. “Mr. Musk
19 stated that it was not his intention to provide shareholder control in a private Company to any
20 single entity, but rather to have ownership in the Company be dispersed over a broad base of
21 shareholders, including many of the Company’s current shareholders.” Ex. 83. Mr. Musk also
22 “explained the basis for his price of \$420 per share, indicating that this price was about a 20%
23 premium over the current price of the stock, which had just undergone a recent run up after the
24 Company’s Q2 earnings call.” Ex. 83. With respect to funding, Mr. Musk noted that the PIF
25 indicated

26 it was willing to fund the entire going-private transaction. [He]
27 explained that given the PIF’s interest, there is more than enough
28 capital available to take the Company private, including to buy out
the entire Company if needed, including both the equity and the
debt. He also expressed confidence that a large number of existing

1 shareholders would remain as investors and thus not need to be
 2 bought out, and that there would be significant demand from
 3 existing and new investors, which may include the UAE sovereign
 4 wealth fund, the Norwegian sovereign wealth fund, Silver Lake,
 Fidelity, Baillie Gifford, Tencent and T. Rowe Price, such that the
 Company would be able to choose between investors and allocate
 ownership among them.

5 Ex. 83. Regarding advisors, Mr. Musk stated that he would be interviewing a lawyer at the
 6 Wachtell law firm and that he had not yet engaged a financial advisor. *See* Ex. 83. The Board
 7 “noted that a detailed proposal regarding a going private transaction had not yet been made and
 8 that one would be needed in order for the Board to properly analyze and evaluate it”; but, “[a]s an
 9 initial step,” Mr. Musk was authorized “to have initial, conceptual conversations with a few of the
 10 Company’s top shareholders, to explore their interest and gauge their reaction to a private
 11 corporate structure.” Ex. 83. The Board noted “the importance of not selectively disclosing
 12 material non-public information.” Ex. 83; *see also* Musk Depo. at 165 (testifying that he came to
 13 the conclusion that it was not possible to have a conversation with some investors but not others
 14 without creating a selective disclosure problem); Musk SEC Depo. at 100 (indicating the same).

15 **8/4-8/50218.** Mr. Musk had a conversation over the weekend with Michael Dell of Dell
 16 Computer. Mr. Musk asked him about his experience taking Dell Computer private. *See* Musk
 17 Depo. at 167. Mr. Dell advised Mr. Musk to talk to Steve Rosenblum of the Wachtell law firm,
 18 which Mr. Musk did that same weekend. *See* Musk SEC Tr. at 175-76.

19 **8/6/2018.** Mr. Musk spoke with Egon Durban of Silver Lake Partners (a financial advisor)
 20 to discuss the possibility of taking Tesla private. *See* Ex. 175 (Mr. Durban’s handwritten notes).

21 **8/7/2018.** At 9:48 a.m., Mr. Musk tweeted: “**Am considering taking Tesla private at**
 22 **\$420. Funding secured.**”⁷ Ex. 8 (tweet) (emphasis added). About an hour later, he tweeted: “I
 23 don’t have a controlling vote now [over the company] & wouldn’t expect any shareholder to have
 24 one if we go private. I won’t be selling in either scenario.” Ex. 9 (tweet). Then, at 11:00 a.m., he
 25 tweeted: “My hope is *all* current investors remain with Tesla even if we’re private. Would
 26

27 _____
 28 ⁷ According to Mr. Musk, he intended to do a disclosure in the evening but, that morning, the
 Financial Times reported an investment in Tesla by the PIF. *See* Musk SEC Depo. at 219-20; *see*
 also Musk Depo. at 173 (testifying that it was important to get ahead of the Financial Times).

1 create special purpose fund enabling anyone to stay with Tesla. Already do this with Fidelity's
 2 SpaceX investment." Ex. 10 (tweet). At 11:13 a.m., he tweeted: "Shareholders could either to sell
 3 [sic] at 420 or hold shares & go private." Ex. 11 (tweet). About twenty minutes later, he tweeted:
 4 "Def no forced sales. Hope all shareholders remain. Will be way smoother & less disruptive as a
 5 private company. Ends negative propaganda from shorts." Ex. 11.

6 Shortly after Mr. Musk's first tweet, Mr. Ahuja texted Mr. Musk as follows: "Elon, am
 7 sure you have thought about a broader communication on your rationale and structure to
 8 employees and potential investors. Would it help if Sarah, Todd and I draft a blog post or
 9 employee email for you?" Ex. 121 (text message); *see also* Mot. at 11 (noting that Sarah O'Brien
 10 was the head of Tesla Global Communications). An email to employees was then drafted and sent
 11 to employees, and further was posted on Tesla's website as a blog post regarding "Taking Tesla
 12 Private." Ex. 12 (website). The email/blog post stated, *inter alia*, as follows.

13 Earlier today, I announced that I'm considering taking Tesla private
 14 at a price of \$420/share. I wanted to let you know my rationale for
 15 this, and why I think this is the best path forward.

16 First, a final decision has not yet been made, but the reason for
 17 doing this is all about creating the environment for Tesla to operate
 18 best. As a public company, we are subject to wild swings in our
 19 stock price that can be a major distraction for everyone working at
 20 Tesla, all of whom are shareholders. Being public also subjects us
 21 to the quarterly earnings cycle that puts enormous pressure on Tesla
 22 to make decisions that may be right for a given quarter, but not
 23 necessarily right for the long-term. Finally, as the most shorted
 24 stock in the history of the stock market, being public means that
 25 there are large numbers of people who have the incentive to attack
 26 the company.

27

28 Here's what I envision being private would mean for all
 shareholders, including all of our employees.

First, I would like to structure this so that all shareholders have a
 choice. Either they can stay investors in a private Tesla or they can
 be bought out at \$420 per share, which is a 20% premium over the
 stock price following our Q2 earnings call (which had already
 increased by 16%). My hope is for all shareholders to remain, but if
 they prefer to be bought out, then this would enable that to happen at
 a nice premium.

. . . .

1 Finally, this has nothing to do with accumulating control for myself.
 2 I own about 20% of the company now, and I don't envision that
 being substantially different after any deal is completed.

3 Basically, I'm trying to accomplish an outcome where Tesla can
 4 operate at its best, free from as much distraction and short-term
 thinking as possible, and where there is as little change for all our
 investors, including all of our employees, as possible.

5 This proposal to go private would ultimately be finalized through a
 6 vote of our shareholders. . . .

7 Ex. 12.

8 At 12:36 p.m., Mr. Musk sent out another tweet: **“Investor support is confirmed. Only**
 9 **reason why this is not certain is that it's contingent on a shareholder vote.”** Ex. 13 (tweet)
 10 (emphasis added). At the bottom of the tweet, there was a link to the above blog post on “Taking
 11 Tesla Private.”

12 There was an immediate reaction to Mr. Musk's tweets and the blog post. For example, on
 13 the same day that the tweets and blog post were sent out, several of Tesla's shareholders reached
 14 out to Martin Viecha, Tesla's Director of Investor Relations. Mr. Viecha essentially conveyed to
 15 these shareholders that there was a “firm offer.”

- 16 • See Ex. 58 (email exchange with Owuraka Koney of Jennison, dated 8/7/2018) (in
 17 response to post-blog post question about funding, Mr. Viecha stating, “The very
 18 first tweet simply mentioned ‘Funding secured’ which means that this is a firm
 19 offer”; when asked whether “[f]irm offer means there is a commitment letter or is
 20 this a verbal agreement?,” stating, “I actually don't know, but I would assume that
 21 given we went full-on public with this, the offer is as firm as it gets”).
- 22 • See Ex. 146 (email exchange with Itay Michaeli of Citibank, dated 8/7/2018) (in
 23 response to comment that “the employee letter didn't make it clear whether there's
 24 an actual transaction on the table (with secured financing) or if this is more of a
 25 strategic announcement to consider pursuing such transaction,” Mr. Viecha stating,
 26 “the very first Tweet mentioned a firm offer”).
- 27 • See Ex. 150 (email exchange with Bradley Erickson of KeyBanc, dated 8/7/2018)
 28 (in response to comment that “he said financing is secured but in the letter he

1 doesn't address this," Mr. Viecha stating, "I can only say that the first Tweet
2 clearly stated that 'financing is secured.' Yes, there is a firm offer").

- 3 • See Ex. 151 (email exchange with Toni Sacconaghi of Bernstein Research, dated
4 8/7/2018) (Mr. Viecha stating, "apart from what has been tweeted and what was
5 written in a blog post, we can't add anything else. [¶] I only wanted to stress that
6 Elon's first tweet, which mentioned 'financing secured' is correct"; Mr.
7 Sacconaghi then stating, "What does 'financing secured' actually mean? Are you
8 assuming TSLA will need \$60B+ in financing, or assuming that many
9 shareholders don't take the offer and Tesla needs less. Big difference. 'Financing
10 secured' implies the former"; Mr. Viecha responding: "It means that financing is
11 secured regardless of other assumptions").

12 During a deposition, an employee of T. Rowe Price (one of Tesla's significant
13 shareholders) stated that he assumed "funding secured" meant "[Mr. Musk] had secured sources or
14 financial sources to fund a go-private transaction" – "[t]o have locked and loaded and no question
15 at all a hundred percent that you have funding ready to go and you're prepared to move forward
16 with this transaction." Fath Depo. at 28-29.

17 Analysts also began to react to the tweets and blog post. See, e.g., McCall Reply Decl.,
18 Ex. S (RTC Capital Markets article) (stating that "Elon's tone and messaging regarding a potential
19 transaction lead us to believe that there could be significant outside funding lined up"; adding that
20 there was "an unconfirmed FT article from today indicat[ing] that Saudi Arabia's sovereign fund
21 took a 3-5% stake on the public markets"); McCall Reply Decl., Ex. U (Bank of America/Merrill
22 Lynch article) (noting that "the proposal/transaction is far from finalized, and would require a
23 shareholder vote," plus, "no theoretical transaction method, funding plan, or structure was
24 outlined, and there is still some skepticism over whether such a transaction would ultimately (or
25 even could) be executed"; however, "we view today's announcement as having substance given
26 what appears to be at least three potential sources of capital (existing shareholders, Saudi
27 Sovereign Wealth Fund, Chinese government and investment funds)" and "[f]urther credence was
28 added with potential details in Musk's subsequent tweets regarding the setup of 'special purpose

1 fund' for existing investors to remain involved, commentary that no single shareholder would
2 have control, and that he would remain on as CEO”).

3 **8/8/2018.** The day after the tweets and blog post, the Tesla Board issue a press release
4 stating as follows:

5 Last week, Elon opened a discussion with the board about taking the
6 company private. This included discussion as to how being private
7 could better serve Tesla's long-term interests, and also addressed the
8 funding for this to occur. The board has met several times over the
9 last week and is taking the appropriate next steps to evaluate this.

10 Ex. 26 (press release).

11 The same day, Ryan Brinkman, an analyst with J.P. Morgan, issued a report on Tesla. *See*
12 Ex. 15 (report). In the report, Mr. Brinkman stated, *inter alia*:

13 On Tuesday during the market, Tesla CEO Elon Musk announced
14 via Twitter that he is considering pursuing a path (no final decision
15 has been made) which would take the company private at a price of
16 \$420 per share. This was followed up by further statements that
17 “funding has been secured” and “investor support confirmed.” As
18 surprising to us as these developments are, and as lacking as the
19 statements are in any details regarding who is expected to provide
20 the required amount of financing and on what terms, they are
21 nevertheless declarative statements from the CEO of a public
22 company which we feel should be considered seriously. Either
23 funding is secured or it is not secured, and Tesla's CEO says
24 funding is secured. Therefore, we are incorporating into our
25 valuation the real possibility the equity will be taken out at \$420 per
26 share. Separate from the Twitter statements, the company also made
27 public a letter Mr. Musk had written to Tesla employees in which he
28 states, “If the process ends the way I expect it will, a private Tesla
would ultimately be an enormous opportunity for all of us.” To us,
this suggests more than mere consideration – Mr. Musk expects
Tesla will go private. We are not as certain, and so assign only a
50% probability to such a scenario in our updated valuation. We
continue to believe Tesla's valuation based on fundamentals alone . .
. is worth no more than \$195 (our previous price target). But
introducing a new 50% weighting of \$420 suggests a large upward
revision to our price target is warranted, and we newly value Tesla
at \$308 per share (i.e., 50/50 blend of \$195 and \$420).

Ex. 15.

An analyst of a different company, Evercore, also issued a report on Tesla. The Evercore
analyst's comments included the following:

Could this happen? It is important to note that, as of today, no
details have been provided with regards to what “Funding secured”
means, who is providing that funding and what any potential

1 funding structure might look like. Our view is that “Funding
2 secured” should be interpreted as a strong verbal commitment, with
3 funds available and parties willing to execute quickly. However, it
could be less than this. It may also be that initial legal documents,
term sheets, letters of intent have been signed.

4 Ex. 33 (report) (bold in original).

5 **8/10/2018.** Mr. Musk met with Mr. Durban of Silver Lake Partners. *See* Ex. 179 (Silver
6 Lake presentation materials).

7 That same day, it appears that news was being reported about Tesla and the Saudi PIF.
8 Mr. Musk conveyed his displeasure to Mr. Al-Rumayyan of the Saudi PIF, indicating that he felt
9 the news did not accurately represent the PIF’s interest in Tesla. *See* Ex. 121 (Mr. Musk texting,
10 “It is extremely important that you confirm that you are in discussions with me regarding the take
11 private transaction”); Musk Depo. at 226 (testifying that “I think there was some press or
12 statement about – from the – the Saudi PIF that they were less committed to the – to supporting a
13 take-private then, was my understanding”). Mr. Al-Rumayyan responded:

14 Elon, As you know, PIF purchased a passive stake in shares of Tesla
15 on the market in April 2018 as part of our investment strategy to
16 diversify away from oil and increase our investment in emerging
17 technologies, including electronic vehicles. PIF remains interested
18 in potential investment opportunities that are consistent with its
19 investment strategy and the EV space is one of interest. We would
20 like to explore investing in Tesla subject to being able to create a
Tesla production hub in the Kingdom of Saudi Arabia that serves
MENA, Europe, Asia and Africa with the right incentives on all
fronts (subsidies on energy and land, tax exemptions, support in
obtaining financing, etc.). Therefore, as discussed, we would like
our teams to start working together in a confidential manner to
explore a potential transaction.

21 Ex. 121.

22 At some point, Mr. Musk had a conversation with Mr. Al-Rumayyan in which the latter
23 indicated that there were approvals he needed to obtain regarding investment in Tesla (*i.e.*, he was
24 not the one and only decisionmaker). According to Mr. Teller, however, Mr. Al-Rumayyan was
25 still unequivocal about the PIF’s desire to invest. *See* Teller SEC Depo. at 296-98; Teller Depo. at
26 241-42.

27 **8/11/2018.** Mr. Musk informed the Board (as well as Mr. Maron and Mr. Ahuja) that he
28 had formally engaged Mr. Durban of Silver Lake Partners “to lead the Tesla go-private

1 transaction,” as well as Mr. Rosenblum of the Wachtell law firm (“who was lead counsel on the
2 Dell deal”). Ex. 94 (email) (adding that Goldman Sachs was also supportive).

3 **8/12/2018.** Mr. Musk again conveyed displeasure to Mr. Al-Rumayyan of the Saudi PIF
4 based on what appears to be news reporting. *See, e.g.*, Ex. 121 (Mr. Musk texting, “What the hell
5 is going on here? This is false”). In responding, Mr. Al-Rumayyan noted, *inter alia*: “Just wanted
6 to check-in and see when your team would be able to start sending us information and perhaps
7 have a kickoff call with our International Investments Team.” Ex. 121. Mr. Al-Rumayyan later
8 texted:

9 Let’s see the numbers and get our people to meet and discuss. We
10 cannot approve something that we don’t have sufficient information
11 on. We’ve agreed that you will send the financial information and
12 the way going forward within a week and no thing [sic] happened
13 since. The last thing I want to do is the “through [sic] you under the
14 bus[.]” I am your friend. So, please don’t treat me like an enemy.
15 I’m willing to fly to you or we can meet somewhere in Europe and
16 discuss . . . constructive next steps.

17 Ex. 121 (also referring to “[d]etails on how we can take the company private[;] [t]hat’s what we
18 agreed on[;] [w]hat is the required percentage and so on[;] [w]hat are required regulatory
19 thresholds for taking it private”).

20 After additional exchange, Mr. Musk texted: “There are many other investment funds who
21 want to be part of this deal. We do not need your fund to get this done. I will not work with an
22 organization who’s [sic] public statement to the media do[es] not match their private statements to
23 me and my team.” Ex. 121. He continued: “In light of these actions and nothing meaningful done
24 to correct them, Tesla will be moving forward with Silver Lake, Goldman and other investors to
25 take Tesla private.” Ex. 121.

26 It appears that, in spite of Mr. Musk’s comment above, Mr. Musk and Mr. Al-Rumayyan
27 resolved their dispute later that day. *See* Ex. 121 (Mr. Al-Rumayyan texting, “I will ask Shihana
28 to call Sam so they can work on PIF statement” and Mr. Musk responding, “Thank you. This
means a great deal”).

8/13/2018. An update was posted on the Tesla website (as a blog post): “Update on
Taking Tesla Private.” In the update, Mr. Musk stated, *inter alia*, as follows:

1 As I announced last Tuesday, I'm considering taking Tesla private
2 because I believe it could be good for our shareholders, enable Tesla
3 to operate at its best, and advance our mission of accelerating the
4 transition to sustainable energy. As I continue to consider this, I
5 want to answer some of the questions that have been asked since last
6 Tuesday.

7 **What has happened so far?**

8 On August 2nd, I notified the Tesla board that, in my personal
9 capacity, I wanted to take Tesla private at \$420 per share. This was
10 a 20% premium over the ~\$350 then current share price (which
11 already reflected a ~16% increase in the price since just prior to
12 announcing Q2 earnings on August 1st). My proposal was based on
13 using a structure where any existing shareholder who wished to
14 remain as a shareholder in a private Tesla could do so, with the \$420
15 per share buyout used only for shareholders that preferred that
16 option.

17 After an initial meeting of the board's outside directors to discuss
18 my proposal (I did not participate, nor did Kimbal [Mr. Musk's
19 brother and also a Board member], a full board meeting was held.
20 During that meeting, I told the board about the funding discussions
21 that had taken place (more on that below) and I explained why this
22 could be in Tesla's long-term interest.

23 At the end of that meeting, it was agreed that as a next step, I would
24 reach out to some of Tesla's largest shareholders. Our largest
25 investors have been extremely supportive of Tesla over the years,
26 and understanding whether they had the ability and desire to remain
27 as shareholders in a private Tesla is of critical importance to me.
28 They are the ones who believed in Tesla when no one else did and
they are the ones who most believe in our future. I told the board
that I would report back after I had these discussions.

29 **Why did I make a public announcement?**

30 The only way I could have meaningful discussions with our largest
31 shareholders was to be completely forthcoming with them about my
32 desire to take the company private. However, it wouldn't be right to
33 share information about going private with just our largest investors
34 without sharing the same information with all investors at the same
35 time. As a result, it was clear to me that the right thing to do was
36 announce my intentions publicly. To be clear, when I made the
37 public announcement, just as with this blog post and all other
38 discussions I have had on this topic, I am speaking for myself as a
potential bidder for Tesla.

39 **Why did I say "funding secured"?**

40 Going back almost two years, the Saudi Arabian sovereign wealth
41 fund has approached me multiple times about taking Tesla private.
42 They first met with me at the beginning of 2017 to express this
43 interest because of the important need to diversify away from oil.
44 They then held several additional meetings with me over the next
45 year to reiterate this interest and to try to move forward with a going
46 private transaction. Obviously, the Saudi sovereign fund has more
47 than enough capital needed to execute on such a transaction.

1 During the [July 31] meeting, the Managing Director of the
2 fund expressed regret that I had not moved forward previously on a
3 going private transaction with them, and he strongly expressed his
4 support for funding a going private transaction for Tesla at this time.
5 I understood from him that no other decision makers were needed
6 and that they were eager to proceed.

7 I left the July 31st meeting with no question that a deal with the
8 Saudi sovereign fund could be closed, and that it was just a matter of
9 getting the process moving. This is why I referred to “funding
10 secured” in the August 7th announcement.

11 Following the August 7th announcement, I have continued to
12 communicate with the Managing Director of the Saudi fund. He has
13 expressed support for proceeding subject to financial and other due
14 diligence and their internal review process for obtaining approvals.
15 He has also asked for additional details on how the company would
16 be taken private, including any required percentages and any
17 regulatory requirements.

18 Another critical point to emphasize is that before anyone is asked to
19 decide on going private, full details of the plan will be provided,
20 including the proposed nature and source of the funding to be used.
21 However, it would be premature to do so now. I continue to have
22 discussions with the Saudi fund, and I also am having discussions
23 with a number of other investors, which is something that I always
24 planned to do since I would like for Tesla to continue to have a
25 broad investor base. It is appropriate to complete those discussions
26 before presenting a detailed proposal to an independent board
27 committee.

28

What are the next steps?

As I mentioned earlier, I made the announcement last Tuesday
because I felt it was the right and fair thing to do so that all investors
had the same information at the same time. I will now continue to
talk with investors, and I have engaged advisors to investigate a
range of potential structures and options. Among other things, this
will allow me to obtain a more precise understanding of how many
of Tesla’s existing public shareholders would remain shareholders if
we became private.

If and when a final proposal is presented, an appropriate evaluation
process will be undertaken by a special committee of Tesla’s board,
which I understand is already in the process of being set up, together
with the legal counsel it has selected. If the board process results in
an approved plan, any required regulatory approvals will need to be
obtained and the plan will be presented to Tesla shareholders for a
vote.

Ex. 16 (website) (bold in original); *see also* Batter Decl., Ex. K (tweet) (“I’m excited to work with
Silver Lake and Goldman Sachs as financial advisors, plus Wachtell . . . and Munger . . . as legal

1 advisors, on the proposal to take Tesla private.”).

2 Apparently responding to the website posting, Mr. Al-Rumayyan texted Mr. Musk as
3 follows:

4 Elon, I am personally surprised. You have signed an NDA and
5 while we are waiting for you and your team to provide us with
6 information to move forward, you post an ill-advised blog with
7 loose information. Anyway, we hope that you and your team work
8 on gathering the information as soon as possible and send that to us
9 to move forward.

10 Ex. 121. Mr. Musk texted back, *inter alia*, that he had engaged Silver Lake Partners and Goldman
11 Sachs and “[w]e will have documents ready in about a week.” Ex. 121.

12 **8/14/2018.** An analyst commented on the blog post described above as follows: “Tesla
13 CEO Elon Musk issued a blog post Aug. 13 that states he is still gauging shareholder interest in
14 Tesla going private at \$420 a share, but our impression of his words is that he thinks it can happen,
15 and we agree.” McCall Reply Decl., Ex. R (Morningstar Digest article).

16 We are maintaining our fair value estimate. We have changed our
17 thinking since our Aug. 7 note and will not be raising our fair value
18 estimate to the deal price. We normally would increase our
19 valuation to a probability-weighted average of the offered price and
20 our intrinsic value. However, Tesla’s possible buyout is abnormal
21 in that equityholders have the option to remain equityholders in a
22 private Tesla, or at least own a special-purpose vehicle that would in
23 turn own private Tesla, so we view this deal as similar to a tender
24 offer.

25 McCall Reply Decl., Ex. R.

26 **8/16/2018.** The New York Times published an article on Mr. Musk and Tesla, titled “Elon
27 Musk Details ‘Excruciating Personal Toll of Tesla Turmoil.’” *See* Ex. 19 (article). The article
28 stated, *inter alia*, that

 funding, it turned out, was far from secure.

 Mr. Musk has said he was referring to a potential investment by
Saudi Arabia’s government investment fund. Mr. Musk had
extensive talks with representatives of the \$250 billion fund about
possibly financing a transaction to take Tesla private – maybe even
in a manner that would have resulted in the Saudis’ owning most of
the company. One of those sessions took place on July 31 at the
Tesla factory in the Bay Area, according to a person familiar with
the meeting. But the Saudi fund had not committed to provide any
cash, two people briefed on the discussions said.

1 Ex. 19.

2 **8/20/2018.** Mr. Brinkman, the J.P. Morgan analyst, issued another report on Tesla. *See*
3 Apton Decl., Ex. 23 (report). In the report, he stated that J.P Morgan was “reverting to valuing
4 Tesla shares on the basis of fundamentals alone” Ex. 23. He took note of the August 13
5 posting by Mr. Musk on the Tesla website which discussed, *inter alia*, the July 31 meeting with
6 the Saudi Arabian sovereign wealth fund. “*Our interpretation of subsequent events leads us to*
7 *believe that funding was not secured for a going private transaction, nor was there any formal*
8 *proposal.*” Ex. 23 (emphasis in original).

9 The revelation the Saudi firm is subsequently asking Tesla for
10 details of how the company would be taken private suggests to us
11 that any deal is potentially far from even being formally proposed,
12 which is different from our understanding on August 8 which was
13 based on Mr. Musk’s statement on Twitter that, “Only reason why
14 this is not certain is that it’s contingent on a shareholder vote.”

13 Ex. 23. Mr. Brinkman also stated: “Tesla does appear to be exploring a going private transaction,
14 but we now believe that such a process appears to be much less developed than we had earlier
15 presumed (more along the lines of high level intention), suggesting formal incorporation into our
16 valuation analysis seems premature at this time.” Ex. 23 (emphasis in original).

17 When Mr. Musk tweeted on August 7 that, “Only reason why this is
18 not certain is that it’s contingent on a shareholder vote,” we had
19 presumed that a formal proposal had been received from another
20 party, that funding had been secured for that formal proposal, and
21 that the Board was at least informally supportive of the formal
22 proposal. Given our updated interpretation that none of these three
23 presumptions are [sic] currently the case, we feel it is appropriate at
24 this time to remove the 50% weighting

22 Ex. 23.

23 **8/23/2018.** The Board held a special meeting. The potential going-private transaction was
24 discussed. *See* Ex. 101 (minutes). Mr. Musk stated that “there was more than enough funding for
25 any proposed transaction and that he had asked his financial advisors to join the meeting to review
26 with the Board the various potential financing sources available.” Ex. 101. But he also shared
27 that many of Tesla’s current stockholders had a negative view

28 regarding the prospect of the Company going private, [there were]

1 difficulties the Company’s current stockholders would have in
 2 continuing to own Tesla’s stock if the Company went private [*e.g.*,
 3 internal compliance would not permit ownership], [and there were]
 4 procedural difficulties of any going private transaction, including the
 extended length of time such a transaction would require, [which]
 may distract and negatively impact the Company’s focus on its core
 business.

5 Ex. 101. Mr. Musk’s financial advisors, Mr. Durban from Silver Lake Partners and Mr. Dees
 6 from Goldman Sachs, joined the meeting; they discussed “financing sources for a potential going
 7 private transaction.” Ex. 101; *see also* Ex. 201 (Silver Lake presentation materials). “The
 8 financial advisors emphasized to the Board that, although their work was preliminary, the funding
 9 was available from a variety of sources.” Ex. 101. “Some of the specific funding sources
 10 identified . . . included the UAE and Saudi Arabia sovereign wealth funds; Ron Baron’s funds;
 11 Google (Alphabet); Tencent and/or other Chinese investors; and Silver Lake.” Ex. 101. The
 12 advisors, as well as Mr. Musk, informed the Board that “both large institutions and small investors
 13 strongly preferred seeing the Company remain a public company because, among other reasons, of
 14 investment restrictions that prevented or limited certain large institutional stockholders from
 15 owning shares in a private company.” Ex. 101. Ultimately, the advisors expressed the “belie[f]
 16 that the Company would be better continuing as a public company.” Ex. 101. Mr. Musk then
 17 informed the Board that, based on the information before him, “he now had concluded that it was
 18 no longer in the best interests of the Company and its stockholders to take the Company private.
 19 Accordingly, Mr. Musk informed the Board that he was withdrawing his offer to try and take the
 20 Company private.” Ex. 101. The Board voted to continue Tesla as a public company. *See* Ex.
 21 101.

22 II. DISCUSSION

23 A. Requests to Seal

24 Several requests to seal have been filed in conjunction with the summary judgment
 25 briefing.

- 26 • Docket No. 351 (related to the opening brief and supporting exhibits);
- 27 • Docket No. 364 (related to the opposition brief and supporting exhibits);
- 28 • Docket No. 367 (related to the opposition brief and supporting exhibits); and

- Docket No. 369 (related to the reply brief and supporting exhibits).

The confidential information at issue belongs to Tesla or third parties (including Silver Lake, Goldman Sachs, and Tesla's investors). Mr. Littleton expressly states that he objects to sealing and does not believe that the documents are deserving of confidential treatment, although he does not go into any detail. *See, e.g.*, Docket No. 364 (Mot. at 1).

Declarations supporting the filing under seal have been submitted by Tesla, Silver Lake, and Goldman Sachs. *See* Docket No. 361 (Tesla); Docket No. 362 (Mr. Durban/Silver Lake); Docket No. 364-1 (Tesla); Docket No. 367-1 (Tesla); Docket No. 373 (Mr. Durban/Silver Lake); Docket No. 374 (Tesla); Docket No. 375-1 (Goldman Sachs).

In evaluating the requests to file under seal, the Court must bear in mind the standard established by the Ninth Circuit in *Kamakana v. City & County of Honolulu*, 447 F.3d 1172 (9th Cir. 2006).

Unless a particular court record is one "traditionally kept secret," a "strong presumption in favor of access" is the starting point. A party seeking to seal a judicial record then bears the burden of overcoming this strong presumption by meeting the "compelling reasons" standard. That is, the party must "articulate[] compelling reasons supported by specific factual findings" that outweigh the general history of access and the public policies favoring disclosure, such as the "public interest in understanding the judicial process." In turn, the court must "conscientiously balance[] the competing interests" of the public and the party who seeks to keep certain judicial records secret. After considering these interests, if the court decides to seal certain judicial records, it must "base its decision on a compelling reason and articulate the factual basis for its ruling, without relying on hypothesis or conjecture."

Id. at 1178-79.

The Court finds that Silver Lake and Goldman Sachs have satisfied the compelling reasons standard for their requests to file under seal. Both companies are third parties to this litigation; more important, their requests to seal are sufficiently narrowly tailored.

However, the Court does not reach the same conclusion for Tesla's requests to seal. While there may be compelling reasons to keep certain information confidential (*e.g.*, related to the interests of Tesla's investors), Tesla has, for the most part, painted with a broad brush in making its requests to file under seal. The information at issue may not be information that Tesla would

1 ordinarily share with the public, but it is far from clear that Tesla would suffer any harm as a result
2 of disclosure, especially as the proposed transaction never came to fruition and is well in the past.
3 Tesla has not suggested that disclosure of the bulk of the information would, *e.g.*, hinder its ability
4 to obtain financing, to court new investors, or to preserve its relationships with existing investors.
5 Furthermore, it is notable that Mr. Musk himself made public comments about why he made
6 statements that, *e.g.*, “funding [was] secured.” Having provided a public explanation, he as well
7 as Tesla can hardly complain if additional underlying facts are also disclosed. Finally, even Tesla
8 implicitly recognizes that its sealing requests are problematic. In the supporting declarations,
9 Nathaniel Smith of Tesla repeatedly states: “In Tesla’s view, sealing the materials for a brief
10 period of time – until trial – balances the public’s right to access with Tesla’s ability to preserve
11 the sensitive and confidential nature of its information.” Docket No. 361 (Smith Decl. ¶ 11);
12 Docket No. 364-1 (Smith Decl. ¶ 12); Docket No. 367-1 (Smith Decl. ¶ 7); Docket No. 374 (Smith
13 Decl. ¶ 10).

14 Accordingly, the Court grants Silver Lake and Goldman Sachs’s requests to file under seal
15 but denies Tesla’s. Tesla’s requests to seal are denied without prejudice – *i.e.*, the Court shall give
16 Tesla an opportunity to file a narrowly tailored request for sealing. Tesla shall file a new request
17 to seal within two weeks of the date of this order. So as to potentially avoid disputes, the Court
18 orders the parties to meet and confer to see if they can reach agreement on sealing. If agreement is
19 reached, the parties may submit (in lieu of a new motion to seal by Tesla) a stipulation on sealing
20 within two weeks of the date of this order.

21 B. Legal Standard

22 Federal Rule of Civil Procedure 56 provides that a “court shall grant summary judgment
23 [to a moving party] if the movant shows that there is no genuine dispute as to any material fact and
24 the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). An issue of fact is
25 genuine only if there is sufficient evidence for a reasonable jury to find for the nonmoving party.
26 *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). “The mere existence of a
27 scintilla of evidence . . . will be insufficient; there must be evidence on which the jury could
28 reasonably find for the [nonmoving party].” *Id.* at 252. At the summary judgment stage, evidence

1 must be viewed in the light most favorable to the nonmoving party and all justifiable inferences
2 are to be drawn in the nonmovant's favor. *See id.* at 255.

3 Where a plaintiff moves for summary judgment on claims that it has brought (*i.e.*, for
4 which it has the burden of proof), it “must prove each element essential of the claims . . . by
5 undisputed facts.” *Cabo Distrib. Co. v. Brady*, 821 F. Supp. 601, 607 (N.D. Cal. 1992); *see also*
6 *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986) (stating that, “if the movant bears
7 the burden of proof on an issue, either because he is the plaintiff or as a defendant he is asserting
8 an affirmative defense, he must establish beyond peradventure all of the essential elements of the
9 claim or defense to warrant judgment in his favor”) (emphasis omitted).

10 In the instant case, Mr. Littleton has brought two causes of action: (1) a claim for violation
11 of § 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 against Tesla and Mr. Musk and
12 (2) a claim for violation of § 20(a) against the Tesla Board. The main cause of action is the §
13 10(b)/Rule 10b-5 claim. To succeed on that claim, Mr. Littleton must prove (1) a
14 misrepresentation or omission of a material fact; (2) scienter; (3) causation; (4) reliance; and (5)
15 damages. *See Livid Holdings Ltd. v. Salomon Smith Barney, Inc.*, 403 F.3d 1050, 1055 (9th Cir.
16 2005) (stating that these are the elements of a Rule 10b-5 claim). In the pending motion, Mr.
17 Littleton moves for partial summary judgment on the following issues: (1) falsity (with respect to
18 four statements); (2) scienter (with respect to the same); and (3) reliance.

19 C. Falsity and Scienter

20 For the § 10(b)/Rule 10b-5 claim, Mr. Littleton must first show there is no genuine dispute
21 of material fact that a false or misleading statement was made or that there was a misleading
22 omission. *See Brody v. Transitional Hosps. Corp.*, 280 F.3d 997, 1006 (9th Cir. 2002). A false
23 statement is one that is not true. Even if a statement is literally true, it can still be misleading. *See*
24 *id.* “[A] statement is misleading if it would give a reasonable investor the impression of a state of
25 affairs that differs in a material way from the one that actually exists.” *Retail Wholesale & Dep't*
26 *Store Union Local 338 Ret. Fund v. Hewlett-Packard Co.*, 845 F.3d 1268, 1275 (9th Cir. 2017)
27 (internal quotation marks omitted; adding that, “to be misleading, a statement must be ‘capable of
28 objective verification’”). An omission can also be misleading – but “[o]ften, a statement will not

1 mislead even if it is incomplete or does not include all relevant facts.” *Brody*, 280 F.3d at 1006.
2 “Silence, absent a duty to disclose, is not misleading under Rule 10b-5.”⁸ *Basic Inc. v. Levinson*,
3 485 U.S. 224, 239 n.17 (1988).

4 In addition to falsity, Mr. Little must also show there is no genuine dispute regarding
5 scienter. “Scienter may be established . . . by showing that the defendants knew their statements
6 were false, or by showing that defendants were reckless as to the truth or falsity of their
7 statements.” *Gebhart v. SEC*, 595 F.3d 1034, 1041 (9th Cir. 2010); *see also SEC v. Platforms*
8 *Wireless Int’l Corp.*, 617 F.3d 1072, 1093 (9th Cir. 2010) (noting that there can be either
9 “deliberate recklessness” or “conscious recklessness”). Scienter is “a subjective inquiry”; that
10 is, “[i]t turns on the defendant’s actual state of mind.” *Gebhart*, 595 F.3d at 1042. However, “the
11 objective unreasonableness of a defendant’s conduct may give rise to an inference of scienter,”
12 and, therefore, evidence of “extreme departure from ordinary standards of care” may be
13 considered. *Id.* at 1041-42. Evidence as to whether the defendant “appreciate[d] the gravity of the
14 risk of misleading others” may also be considered,” but

15 a defendant ordinarily will not be able to defeat summary judgment
16 by the mere denial of subjective knowledge of the risk that a
17 statement could be misleading. Summary judgment requires a
18 statement that is materially misleading such that no reasonable jury
19 could conclude otherwise. *See Anderson v. Liberty Lobby, Inc.*, 477
20 U.S. 242, 248-50 (1986). Moreover, the statement must present a
21 danger of misleading buyers or sellers “that is either known to the
22 defendant or is so obvious that the actor must have been aware of
23 it.” *Hollinger*, 914 F.2d at 1569. When the defendant is aware of
24 the facts that made the statement misleading, “he cannot ignore the
25 facts and plead ignorance of the risk.” *Makor Issues & Rights, Ltd.*
26 *v. Tellabs Inc.*, 513 F.3d 702, 704 (7th Cir. 2008); *see also Vucinich*
27 *v. Paine, Webber, Jackson & Curtis, Inc.*, 739 F.2d 1434, 1436 (9th
28 Cir. 1984) (“Summary judgment is generally inappropriate when

23 ⁸ A duty to disclose does not arise just because information is material. *See Matrixx Initiatives,*
24 *Inc. v. Siracusano*, 563 U.S. 27, 44-45 (2011) (stating that “§ 10(b) and Rule 10b-5(b) do not
25 create an affirmative duty to disclose any and all material information”); *see also In re Time*
26 *Warner Inc. Sec. Litig.*, 9 F.3d 259, 267 (2d Cir. 1993) (stating that “a corporation is not required
27 to disclose a fact merely because a reasonable investor would very much like to know that fact”).

28 “A duty to affirmatively disclose may arise when there is insider trading, a statute
requiring disclosure, or . . . an inaccurate, incomplete or misleading prior disclosure.” *City of*
Monroe Emps. Ret. Sys. v. Bridgestone Corp., 399 F.3d 651, 669 (6th Cir. 2005); *see also Time*
Warner, 9 F.3d at 268 (stating that “one circumstance creating a duty to disclose arises when
disclosure is necessary to make prior statements not misleading”).

1 mental state is an issue, *unless no reasonable inference supports the*
 2 *adverse party's claim.*" (emphasis added)). Stated another way, if no
 3 reasonable person could deny that the statement was materially
 4 misleading, a defendant with knowledge of the relevant facts cannot
 manufacture a genuine issue of material fact merely by denying (or
 intentionally disregarding) what any reasonable person would have
 known.

5 *Platforms Wireless*, 617 F.3d at 1094.

6 According to Mr. Littleton, there is no genuine dispute that the following four
 7 representations, all made by Mr. Musk, were false or misleading and made with the requisite
 8 scienter:

- 9 • "Am considering taking Tesla private at \$420. Funding secured." This was the
 10 first tweet sent by Mr. Musk on 8/7/2018.
- 11 • "Investor support is confirmed." This was another tweet sent by Mr. Musk on
 12 8/7/2018.
- 13 • "Only reason why this is not certain is that it's contingent on a shareholder vote."
 14 This statement was part of the same tweet immediately above.
- 15 • "I have continued to communicate with the Managing Director of the Saudi fund.
 16 He has expressed support for proceeding subject to financial and other due
 17 diligence and their internal review process for obtaining approvals. He has also
 18 asked for additional details on how the company would be taken private, including
 19 any required percentages and any regulatory requirements." This was part of the
 20 8/13/2018 blog post on Tesla's website. Mr. Littleton contends that this statement
 21 was misleading because it omitted the fact that there had been conflict between Mr.
 22 Musk and Mr. Al-Rumayyan.

23 1. "Am considering taking Tesla private at \$420. Funding secured."

24 There is no real dispute here that the focus should be on the second part of the tweet, *i.e.*,
 25 "Funding secured." With respect to this phrase, Mr. Littleton does not claim that the Saudi PIF
 26 did not have sufficient funds to take Tesla private. Rather, Mr. Littleton claims that the statement
 27 "Funding secured" was false or, at the very least, misleading because the PIF had not, in fact, put
 28 up the money to take Tesla private, nor had it made any kind of legal or binding commitment to

1 provide any money.

2 To the extent Mr. Littleton suggests that “Funding secured” would necessarily be
3 interpreted as there being a legal or binding commitment, *see* Mot. at 17, 20 (noting, *e.g.*, that the
4 financial advisor Mr. Durban (of Silver Lake) has used the term “secured” to mean binding legal
5 contracts committing capital), that is too narrow a reading. However, as the Court has previously
6 noted, the use of the term “secured” does suggest that funding was not something amorphous or
7 speculative but rather fairly concrete and reasonably certain. *See In re Tesla Sec. Litig.*, 477 F.
8 Supp. 3d 903, 924 (N.D. Cal. 2020) (in prior order, stating that, “[b]ecause Mr. Musk, the CEO of
9 Tesla, included the highly-specific price of \$420 at which shares would be bought for the going-
10 private transaction, and because his tweet followed with ‘funding secured,’ a reasonable investor
11 would have interpreted it as something more than a speculative amorphous opinion about future
12 possibilities[;] [i]nstead, it can be read as implying a more concrete state of affair”). This is
13 consistent with the dictionary definition of the term “secure” – *e.g.*, “to put beyond hazard of
14 losing or of not receiving: GUARANTEE.” <https://www.merriam-webster.com/dictionary/secure>
15 (last visited 3/31/2022).

16 Based on the evidence of record, the Court finds that no reasonable jury could find the
17 statement “Funding secured” accurate and not misleading. The evidence of record shows that
18 there was nothing concrete about funding coming from the PIF; rather, discussions between Tesla
19 and the PIF were clearly at the preliminary stage. There had been no discussion about what the
20 purchase price would be for a share of stock. Nor had there been any discussion about what
21 percentage of the company the PIF would own or the total amount of money the PIF would
22 contribute. Moreover, both at the conclusion of the 7/30/2018 meeting between Tesla and the PIF
23 *and* thereafter, the PIF asked Tesla to provide information so that the PIF could make an
24 assessment. For example, Mr. Ahuja admitted that, at the end of the 7/30/2018 meeting, the PIF
25 told Mr. Musk that it “was fundamentally keen on hearing from Elon directly the structure that he
26 would have in mind that he would like to do for a going-private transaction and what percentage
27 of that he would think would be needed or the financial calculations to take it private.” Ahuja
28 Depo. at 97-98; *see also* Ex. 80 (notes/minutes written by Mr. Al Mogren of the Saudi PIF)

1 (writing that Mr. Al-Rumayyan said, “I would like to listen to your plan Elon and what are the
2 financial calculations to take it private in the next week and if I did not receive anything I will call
3 you”).

4 Defendants protest that “Funding secured” is too ambiguous in meaning and therefore the
5 matter should not be decided at summary judgment but rather should be left for the jury to resolve.
6 As indicated above, the Court acknowledges that there is some softness to the term “secured.” But
7 even accepting that there is some room for disagreement as to precisely how secure something
8 must be before the term may be appropriately used, the term is not so elastic as to escape any real
9 meaning. No reasonable jury could find “Funding secured” accurate and not misleading even
10 under a liberal understanding of the term “secured.” Notably, even the evidence on which
11 Defendants rely suggests that the public understood the phrase “Funding secured” to mean (1) at
12 least a verbal commitment (2) based on a discussion of at least some details about what funding
13 would entail. For example, the Evercore report issued the day after the tweet stated as follows.

14 **Could this happen?** It is important to note that, as of today, no
15 details have been provided with regards to what “Funding secured”
16 means, who is providing that funding and what any potential
17 funding structure might look like. Our view is that “Funding
18 secured” should be interpreted as a strong verbal commitment, with
19 funds available and parties willing to execute quickly. However, it
20 could be less than this. It may also be that initial legal documents,
21 term sheets, letters of intent have been signed.

22 Ex. 33 (Evercore report) (bold in original). Notably, although the report acknowledged that details
23 about the funding had not been provided publicly, it assumed that there had been some discussion
24 of details. Mr. Littleton’s evidence indicates the same. *See, e.g.*, McCall Reply Decl., Ex. U
25 (Bank of America/Merrill Lynch article) (noting that “no theoretical transaction method, funding
26 plan, or structure was outlined,” but “we view today’s announcement as having substance given
27 what appears to be at least three potential sources of capital (existing shareholders, Saudi
28 Sovereign Wealth Fund, Chinese government and investment funds)” and “[f]urther credence was
added with potential details in Musk’s subsequent tweets regarding the setup of ‘special purpose
fund’ for existing investors to remain involved, commentary that no single shareholder would
have control, and that he would remain on as CEO”); Ex. 15 (J.P. Morgan report) (stating that, “as

1 lacking as the statements are in any details regarding who is expected to provide the required
2 amount of financing and on what terms, they are nevertheless declarative statements from the
3 CEO of a public company which we feel should be considered seriously”).

4 Accordingly, the Court concludes that Mr. Littleton is entitled to partial summary
5 judgment with respect to the falsity of the phrase “Funding secured.” The Court now turns to the
6 issue of scienter. The question is whether there is a genuine dispute of fact as to whether Mr.
7 Musk made this statement knowing it was false or with recklessness as to the falsity of the
8 statement. The Court concludes that a reasonable jury could reach only one conclusion – *i.e.*, that
9 Mr. Musk recklessly tweeted to the public that funding was secured. There is no dispute that, at
10 the time of the tweet, Mr. Musk knew all of the facts relating to Tesla’s interaction with the PIF.
11 He was part of the 7/31/2018 meeting between the PIF and Tesla. And when a “defendant is
12 aware of the facts that made the statement misleading, ‘he cannot ignore the facts and plead
13 ignorance of the risk’” of misleading others. *Platforms Wireless*, 617 F.3d at 1094. The Court
14 therefore affords no weight to Mr. Musk’s statement in his blog post of 8/13/2018 that he used the
15 phrase “Funding secured” because he “left the July 31st meeting with no question that a deal with
16 the Saudi sovereign fund could be closed, and that it was just a matter of getting the process
17 moving.” Ex. 16 (website).

18 2. “Investor support is confirmed.”

19 As an initial matter, the Court notes that the full tweet stated as follows: “Investor support
20 is confirmed. Only reason why this is not certain is that it’s contingent on a shareholder vote.”
21 Mr. Littleton has broken the tweet into two separate challenges. The second sentence is discussed
22 below.

23 The second sentence, however, has bearing on the first sentence. It reflects that Mr. Musk
24 was making a distinction between “investor” and “shareholder”; in other words, “investor”
25 referred to the person or entity wanting to invest in Tesla whereas “shareholder” referred to
26 already existing investors.⁹ So understood, the statement “Investor support is confirmed” is false

27

28 ⁹ Even if a reasonable jury could understand “investor support” to mean already existing investors,
Defendants would fare no better. The record is clear that Mr. Musk did not reach out to existing

1 and misleading for essentially the same reasons as stated above. That is, no reasonable could
2 conclude that support from the Saudi PIF was confirmed given the preliminary nature of the
3 discussions between the PIF and Tesla. In addition, a reasonable jury could reach only one
4 conclusion regarding scienter: that Mr. Musk made his statement recklessly. As noted above, Mr.
5 Musk was in fully aware of the facts given his participation in the 7/31/2018 meeting with the PIF.

6 3. “Only reason why this is not certain is that it’s contingent on a shareholder vote.”

7 For the third statement (from the same tweet immediately above dated 8/7/2018), the Court
8 must first take into account the full context. *See McMahan & Co. v. Warehouse Entm't*, 900 F.2d
9 576, 579 (2d Cir. 1990) (indicating that statements should not be taken in isolation; asking
10 “whether defendants’ representations, taken together and in context, would have mislead a
11 reasonable investor”); *cf. In re Convergent Techs. Sec. Lit.*, 948 F.2d 507, 512 (9th Cir. 1991)
12 (noting that “[s]ome statements, although literally accurate, can become, through their context
13 and manner of presentation, devices which mislead investors”). A copy of the tweet is below.



23 Ex. 13.

24 The above indicates that “this” refers to “Taking Tesla Private.” There is also a link to the
25 8/7/2018 blog post where Mr. Musk commented, *inter alia*, as follows:

26 Earlier today, I announced that I’m considering taking Tesla private

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28 shareholders to get their views on taking the company private until after the above tweet was sent out.

United States District Court
Northern District of California

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at a price of \$420/share. I wanted to let you know my rationale for this, and why I think this is the best path forward.

First, a final decision has not yet been made, but the reason for doing this is all about creating the environment for Tesla to operate best. As a public company, we are subject to wild swings in our stock price that can be a major distraction for everyone working at Tesla, all of whom are shareholders. Being public also subjects us to the quarterly earnings cycle that puts enormous pressure on Tesla to make decisions that may be right for a given quarter, but not necessarily right for the long-term. Finally, as the most shorted stock in the history of the stock market, being public means that there are large numbers of people who have the incentive to attack the company.

....

Here’s what I envision being private would mean for all shareholders, including all of our employees.

First, I would like to structure this so that all shareholders have a choice. Either they can stay investors in a private Tesla or they can be bought out at \$420 per share, which is a 20% premium over the stock price following our Q2 earnings call (which had already increased by 16%). My hope is for all shareholders to remain, but if they prefer to be bought out, then this would enable that to happen at a nice premium.

....

Finally, this has nothing to do with accumulating control for myself. I own about 20% of the company now, and I don’t envision that being substantially different after any deal is completed.

Basically, I’m trying to accomplish an outcome where Tesla can operate at its best, free from as much distraction and short-term thinking as possible, and where there is as little change for all our investors, including all of our employees, as possible.

This proposal to go private would ultimately be finalized through a vote of our shareholders. . . .

Ex. 12 (website).

Defendants argue that the blog post above raises at least a question of fact as to how a reasonable person would view the statement “Only reason why this is not certain is that it’s contingent on a shareholder vote.” The Court is not persuaded. While the blog post makes clear that a final decision on taking Tesla private had not been made, it did not specify any contingencies other than the “finaliz[ation] through a vote of our shareholders.” Ex. 12. Thus, a reasonable investor could *only* conclude that the sole contingency left for taking Tesla private was

1 a shareholder vote. The post used the word “only,” implying that the only contingency was a
2 shareholder vote, not, *e.g.*, uncertainty of investor support.

3 Accordingly, the Court finds that no reasonable jury could find the statement accurate and
4 not misleading as there were, in fact, a number of contingencies that had to be addressed before
5 the matter could reach a shareholder vote, including but not limited to the laundry list of items
6 identified by Mr. Littleton: to wit, a determination of the terms and structure to take Tesla private
7 and investor agreement therewith, the hiring of financial and legal advisors, a formal proposal for
8 the Board to review, a negotiation with independent directors, the preparation of legal and
9 financial analysis and documentation, the signing of an agreement, the hiring of proxy advisors,
10 and the filing of regulatory approvals. To the extent Defendants contend Mr. Musk’s blog post of
11 8/13/2018 provided information about contingencies, that argument is beside the point – at least
12 for purposes of the summary judgment motion. At this juncture, Mr. Littleton is simply asserting
13 that the statement at issue was false at the time it was made. *See Reply* at 12.

14 Finally, as above, the scienter analysis follows the falsity analysis. No reasonable jury
15 could find that Mr. Musk did not act recklessly given his clear knowledge of the discussions that
16 took place at the 7/31/2018 meeting.

17 4. “I have continued to communicate with the Managing Director of the Saudi fund.
18 He has expressed support for proceeding subject to financial and other due
19 diligence and their internal review process for obtaining approvals. He has also
20 asked for additional details on how the company would be taken private, including
21 any required percentages and any regulatory requirements.”

22 The final statement comes from Mr. Musk’s blog post of 8/13/2018. Here, Mr. Littleton
23 contends falsity (as well as scienter) because, “[w]hile Musk wrote about his conversations with
24 the Saudi PIF at length, he did not disclose that over the previous weekend he had sought to end
25 all negotiations with the Saudi PIF.” *Mot.* at 23. In other words, “[t]he August 13, 2018 blogpost
26 deliberately omitted the conflict between Musk and Al-Rumayyan to give a misleading impression
27 of an orderly and planned process for taking Tesla private.” *Reply* at 13.

28 The Court denies summary judgment on this statement. As noted above, “a statement is

1 misleading if it would give a reasonable investor the impression of a state of affairs that differs in
 2 a material way from the one that actually exists.” *Retail*, 845 F.3d at 1275 (internal quotation
 3 marks omitted). Here, there was clearly some friction between Mr. Musk and Mr. Al-Rumayyan.
 4 *See, e.g.*, Ex. 121 (Mr. Musk texting, *inter alia*, as follows: “There are many other investment
 5 funds who want to be part of this deal. We do not need your fund to get this done. I will not work
 6 with an organization who’s [sic] public statement to the media do[es] not match their private
 7 statements to me and my team”; also texting: “In light of these actions and nothing meaningful
 8 done to correct them, Tesla will be moving forward with Silver Lake, Goldman and other
 9 investors to take Tesla private”). However, it appears that that same day the two resolved their
 10 dispute. *See* Ex. 121 (Mr. Al-Rumayyan texting, “I will ask Shihana to call Sam so they can work
 11 on PIF statement” and Mr. Musk responding, “Thank you. This means a great deal”). Thus, a
 12 reasonable jury could well find that the blog post did not give an impression of a state of affairs
 13 that was materially different from the one that actually existed.

14 D. Reliance

15 Finally, Mr. Littleton argues that he is entitled to summary judgment on the element of
 16 reliance. Because the Court is denying summary judgment on the fourth statement, it considers
 17 only reliance on the first three statements at issue.

18 The reliance element “ensures that there is a proper connection
 19 between a defendant’s misrepresentation and a plaintiff’s injury.”
 20 “The traditional (and most direct) way a plaintiff can demonstrate
 21 reliance is by showing that he was aware of a company’s statement
 and engaged in a relevant transaction – e.g., purchasing common
 stock – based on that specific misrepresentation.”

22 . . . [H]owever, [the Supreme Court has] recognized that requiring
 23 such direct proof of reliance “would place an unnecessarily
 unrealistic evidentiary burden on the Rule 10b-5 plaintiff who has
 traded on an impersonal market.” . . .

24 [The Court] also noted that “[r]equiring proof of individualized
 25 reliance” from every securities fraud plaintiff “effectively would . . .
 26 prevent[] [plaintiffs] from proceeding with a class action” in Rule
 10b-5 suits.

27 *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 267-68 (2014). Thus, the Supreme
 28 Court has held that, instead of having direct proof of individualized reliance on a

1 misrepresentation, a plaintiff can establish a rebuttable presumption of reliance based on the fraud-
2 on-the-market doctrine. Under the doctrine, there is a rebuttable presumption of reliance where
3 “(1) the alleged misrepresentations were publicly known, (2) they were material, (3) the stock
4 traded in an efficient market, and (4) the plaintiff traded the stock between when the
5 misrepresentations were made and when the truth was revealed.” *Id.* at 268. The doctrine

6 “is based on the hypothesis that, in an open and developed securities
7 market, the price of a company's stock is determined by the
8 available material information regarding the company and its
9 business. . . . Misleading statements will therefore defraud
purchasers of stock even if the purchasers do not directly rely on the
misstatements.”

10 *Basic*, 485 U.S. at 241-42; *see also In re Allstate Corp. Secs. Litig.*, 966 F.3d 595, 600, 605 (7th
11 Cir. 2020) (noting that, under the doctrine, “plaintiffs may prove that the given securities traded in
12 efficient markets in which prices reflect all publicly available information, including
13 misrepresentations, and all investors were thus entitled to rely on that public information and
14 pricing”; in other words, “if the securities in question trade on an efficient market, then the market
15 itself provides the causal connection between a misrepresentation and the price of the stock”).

16 The presumption of reliance can be rebutted by

17 “[a]ny showing that severs the link between the alleged
18 misrepresentation and either the price received (or paid) by the
19 plaintiff, or his decision to trade at a fair market price.” So for
20 example, if a defendant could show that the alleged
misrepresentation did not, for whatever reason, actually affect the
market price [*i.e.*, no price impact], . . . then the presumption of
reliance would not apply.

21 *Halliburton*, 573 U.S. at 269. Price impact, therefore, may be relevant to the issue of reliance
22 (also known as transaction causation) and not just loss causation (which is a separate element of a
23 10b-5 claim). *See Allstate*, 966 F.3d at 609.

24 In *Basic*, where there were alleged misrepresentations about the possibility of a merger, the
25 Supreme Court provided two examples of how defendants could show that the alleged
26 misrepresentation had no price impact.

27 [First], if petitioners could show that the "market makers" were
28 privy to the truth about the merger discussions here with
Combustion, and thus that the market price would not have been

1 affected by their misrepresentations, the causal connection could be
 2 broken: the basis for finding that the fraud had been transmitted
 3 through market price would be gone. Similarly, if, despite
 4 petitioners' allegedly fraudulent attempt to manipulate market price,
 news of the merger discussions credibly entered the market and
 dissipated the effects of the misstatements, those who traded Basic
 shares after the corrective statements would have no direct or
 indirect connection with the fraud.

5 *Basic*, 485 U.S. at 248-49.

6 In the instant case, Mr. Littleton is relying on the fraud-on-the-market doctrine to establish
 7 reliance. Defendants argue that summary judgment on this theory is not appropriate because there
 8 is a genuine dispute with respect to whether the statements at issue were material. They also note
 9 that any presumed reliance could be rebutted and contend that, here, there is a question of fact as
 10 to whether the alleged misrepresentation actually affected the stock price.

11 For purposes of the pending motion, the Court assumes that the three statements at issue
 12 were material, *i.e.*, because a reasonable investor would have viewed the statements as having
 13 significantly altered the total mix of information made available. *See Halliburton*, 573 U.S. at
 14 278; *Basic*, 485 U.S. at 232. Certainly, there is evidence to support materiality because Tesla's
 15 stock price went up after the tweets, analysts issued reports commenting on the tweets, and Tesla's
 16 investors reached out to Tesla after the tweets.

17 But even if there were materiality, that would only give Mr. Littleton the benefit of a
 18 presumption of reliance; Defendants are still entitled to rebut the presumption. At the very least,
 19 there is a question of fact precluding summary judgment because, as Defendants have noted, there
 20 is evidence suggesting that the misrepresentations did not actually affect the market price.
 21 Specifically, there is evidence that, after the 8/13/2018 blog post, which served as a partial
 22 corrective disclosure, there was no decline or at least not a significant decline in stock price; thus,
 23 arguably, the reaction to the tweets on 8/7/2018 was a response to Mr. Musk contemplating taking
 24 Tesla private and not to statements that, *e.g.*, funding was secured or investor support confirmed.

25 **III. CONCLUSION**

26 For the foregoing reasons, the Court grants in part and denies in part Mr. Littleton's motion
 27 for partial summary judgment. The Court holds that, based on the evidence presented, there is no
 28 genuine dispute that the first three representations at issue were false and that Mr. Musk recklessly

1 made those representations. To that extent, the motion is granted. In all other respects, the motion
2 for partial summary judgment is denied.

3 At this juncture, the Court provisionally files the entirety of this order under seal. The
4 parties are directed to meet and confer to determine which specific portions of the order are in
5 need of sealing. The parties shall submit a stipulation on sealing within two weeks of the date of
6 this order.

7 This order disposes of Docket No. 352.

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9 **IT IS SO ORDERED.**

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11 Dated: April 1, 2022

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EDWARD M. CHEN
United States District Judge

United States District Court
Northern District of California