

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SHANE MULDERIG AND RONY DEVORAH, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

AMYRIS, INC., JOHN G. MELO, KATHLEEN VALIASEK,

Defendants.

Case No.: 19-CV-1765 YGR

ORDER DENYING MOTION OF DEFENDANTS TO DISMISS AMENDED CLASS ACTION COMPLAINT

United States District Court
Northern District of California

Defendants Amyris, Inc., John G. Melo, and Kathleen Valiasek move this Court for an order dismissing plaintiffs’ claims for violation of Section 10(b) and Section 20(a) of the Exchange Act, 15 U.S.C. §§ 78j(b) and 78t(a)), as alleged in plaintiffs’ first Amended Class Action Complaint (Dkt. No. 43, “FAC”). Having carefully considered the papers submitted and the pleadings in this action, and the matters judicially noticeable, and for the reasons set forth below, the Court **DENIES** the Motion to Dismiss.

Plaintiffs contend that Amyris’s financial statements overstated estimations of future royalty payments based on projected and estimated product sales, in violation of Generally Accepted Accounting Principles (“GAAP”)¹. Violations of GAAP are presumed to be misleading. *See SEC*

¹ As alleged in the complaint, “GAAP are those principles recognized by the accounting profession as the conventions, rules, and procedures necessary to define accepted accounting practice at a particular time. Those principles are the official standards adopted by the American Institute of Certified Public Accountants (“AICPA”), a private professional association, through three successor groups it established: the Committee on Accounting Procedure, the Accounting Principles Board, and the Financial Accounting Standards Board (“FASB”). On July 1, 2009, the FASB approved the Accounting Standards Codification (“ASC” or the “Codification”) as the single source of authoritative U.S. accounting and reporting standards, other than guidance issued by the [Securities and Exchange Commission “SEC”].”

1 Regulation S-X, 17 C.F.R. § 210.4-01. Plaintiffs have alleged facts sufficient to show that
 2 defendants' alleged GAAP violations here were significant and material. *See In re Daou Systems,*
 3 *Inc.*, 411 F.3d 1006, 1016-17 (9th Circ. 2005). In addition, the statements defendants contend were
 4 forward-looking growth and revenue projections were accompanied by and premised upon false
 5 representations of current revenue, making them ineligible for the PSLRA's safe harbor.
 6 Moreover, defendants made false or misleading statements concerning material weaknesses in its
 7 internal controls. With respect to all these allegations, plaintiffs have alleged sufficient facts that,
 8 when viewed holistically, give rise to a strong inference of scienter. Further, these allegations
 9 support plaintiffs' claims of control person liability pursuant to Section 20(a).²

10 **I. SUMMARY OF ALLEGATIONS³**

11 **A. Background Prior to Class Period**

12 Amyris is an industrial biotechnology company that manufactures and sells products in the
 13 health and wellness, "clean beauty," flavor, and fragrance markets. Beginning in 2014, Amryris
 14 commercialized and licensed "farnesene," a type of hydrocarbon molecule that it manufactured
 15 using its engineered microbes. Defendant John Melo was the Chief Executive Officer and director
 16 of Amyris beginning in January 2007, and president of the company beginning in 2008, through the
 17 relevant alleged Class Period.⁴ Melo had worked previously at Ernst & Young, an accounting firm.
 18 Defendant Kathleen Valiasek became the Chief Financial Officer in January 2017 until June 2019.
 19 Valiasek holds a degree in accounting from the University of Massachusetts, Amherst.

20 In 2017, as stated in the Company's Annual 10-K Report for the fiscal year ended
 21 December 31, 2017, Amyris disclosed a material weakness in its internal control over financial
 22 reporting related to "a lack of sufficient resources . . . to be able to adequately identify, record, and
 23 disclose non-routine transactions." (FAC ¶¶ 5, 47.) The disclosure stated that the company "lacked
 24 a sufficient number of trained resources with assigned responsibility and accountability over the

25 ² Plaintiffs filed a "Notice of Pendency of Other Action" on September 21, 2020. (Dkt. No.
 26 59.) Defendants filed their objection to the Notice. (Dkt. No. 60.) As the contents of those
 27 documents are not before the Court properly in the context of this motion, the Court has not
 considered them in reaching the decision herein.

28 ³ The allegations of the operative FAC are assumed to be true for purposes of this motion.

⁴ The alleged Class Period runs from March 15, 2018 to April 11, 2019. (FAC ¶ 1.)

1 design and operation of internal controls related to complex, significant non-routine transactions as
2 well as routine transactions and financial statement presentation and disclosure,” and did not “have
3 an effective risk assessment process to identify and analyze necessary changes in significant
4 accounting policies and practices that were responsive to: (i) changes in business operations
5 resulting from complex significant non-routine transactions, (ii) implementation of new accounting
6 standards and related disclosures, and (iii) completeness and adequacy of required disclosures.”

7 (FAC ¶ 47.)

8 The statement for the year ended December 31, 2017, indicated these material weaknesses
9 resulted in “material misstatements” in financial statements, and created “a reasonable possibility
10 that a material misstatement of our annual or interim consolidated financial statements that would
11 not be prevented or detected on a timely basis.” (*Id.*) Amyris further represented that it was
12 addressing the material weaknesses with a remediation plan, including increased staffing in key
13 accounting positions, “documenting and augmenting” accounting policies, and training staff on new
14 and existing accounting issues. (*Id.*) The 2017 Form 10-K reported total liabilities of
15 \$346.1 million and net loss attributable to the Company’s common stockholders of \$93.3 million.

16 (FAC ¶ 46.)

17 On December 28, 2017, Amyris finalized the sale of its Amyris Brasil farnesene
18 manufacturing facility to Koninklijke DSM N.V. (“DSM”). Under that agreement, Amyris licensed
19 the use of farnesene in the Vitamin E, lubricant, and flavor and fragrance markets to DSM for a fee
20 of \$27.5 million and assigned to DSM a farnesene supply agreement Amyris had with Nenter &
21 Co. (“the Agreement”). (FAC ¶ 23.)⁵ The Agreement required DSM to pay to Amyris a portion of
22 the profits realized by Nenter and paid to DSM. (*Id.*)

23 **B. Allegations Regarding the Class Period**

24 Beginning in March 2018, Amyris informed investors that it was now reporting revenue
25 based upon new GAAP accounting standards issued by the Financial Accounting Standards

26 _____
27 ⁵ According to its 10-Q for the first quarter of 2018, the Agreement included a payment of
28 \$27.5 million in license fees, a nonrefundable royalty of \$15.0 million to be paid at closing, plus a
promise of future royalty payments for 2018 and 2019 valued at \$17.8 million. (Celio Decl., Ex. A
at 9.)

1 Board—Accounting Standard Codification (“ASC”) Topic 606, Revenue from Contracts with
2 Customers (“ASC 606”)—which for Amyris went into effect as of January 1, 2018. In fact,
3 Amyris’s reported royalty revenue was not made consistent with ASC 606 but was based upon
4 estimations of *future* payments that in turn relied on projected and estimated Nenter product sales.
5 (FAC ¶ 30.) Thus, Amyris represented that it had recognized royalty payments that were estimate
6 of sales by DSM’s client, Nenter, and any payments Amyris would receive under the Agreement
7 were dependent on Nenter’s profits at a later date. (*Id.*) Some detail about ACS 606 is necessary to
8 put the allegations into context.

9 ***I. ASC 606***

10 ASC 606 regarding Revenue from Contracts with Customers, issued May 2014, went into
11 effect for nonpublic entities as of annual reporting periods beginning after December 15, 2017.
12 (ASC 606 at 9.) As a general matter, ASC 606 allows a business to recognize revenue once it has
13 fulfilled all of its performance obligations under a contract, rather than upon receipt of payment.
14 (FAC ¶ 24.) So, for example, a business may recognize revenue when it delivers a good sold for a
15 fixed price if delivery of the goods is the business’s final performance obligation under the
16 contract. In such a scenario, the amount of revenue is certain since there is a fixed price for the
17 goods.

18 When the consideration to be paid by the customer is variable, ASC 606 puts restraints on
19 how revenue from the contract can be recognized:

20 An entity shall include in the transaction price some or all of an amount of
21 variable consideration estimated . . . *only to the extent that it is probable that a*
22 *significant reversal* in the amount of cumulative revenue recognized *will not*
occur when the uncertainty associated with the variable consideration is
subsequently resolved.

23 (FAC ¶ 28, citing ASC 606-10-32-11, emphasis in FAC.)⁶ In the case of a licensing agreement, as
24 Amyris had with DSM here, ASC 606 more specifically provides that sales-based royalties

25
26 ⁶ ASC 606-10-32-12 provides additional guidance on this constraint:
27 In assessing whether it is probable that a significant reversal in the amount of
28 cumulative revenue recognized will not occur once the uncertainty related to the
variable consideration is subsequently resolved, an entity shall consider both the
likelihood and the magnitude of the revenue reversal. Factors that could increase
the likelihood or the magnitude of a revenue reversal include, but are not limited
to, any of the following:

1 received in exchange for a license of intellectual property should be recognized as revenue *only*
2 under the following conditions:

3 [A]n entity should recognize revenue for a sales-based or usage-based royalty
4 promised in exchange for a license of intellectual property *only when (or as)*
5 the later of the following events occurs:

- 6 a. The subsequent sale or usage occurs.
- 7 b. The performance obligation to which some or all of the sales-based or usage-
8 based royalty has been allocated has been satisfied (or partially satisfied).

9 (*Id.* ¶ 30; ASC 606-10-55-65, emphasis supplied.) This sales-based royalty exception “applies
10 when the royalty relates only to a license of intellectual property or when a license of intellectual
11 property is the predominant item to which the royalty relates.” (FAC ¶ 27 citing ASC 606-10-55-
12 65A.) When revenue is sales-based but the license of intellectual property is not the only or
13 predominant item to which the royalty relates, “the guidance on variable consideration . . . applies
14 to the sales-based or usage-based royalty.” (*Id.* citing ASC 606-10-55-65B)⁷

15 As plaintiffs allege, the provisions of ASC 606 applicable to sales-based royalties differ
16 from the general principles of ASC 606:

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- 18 a. The amount of consideration is highly susceptible to factors outside the
19 entity’s influence. Those factors may include volatility in a market, the
20 judgment or actions of third parties, weather conditions, and a high risk of
21 obsolescence of the promised good or service.
 - 22 b. The uncertainty about the amount of consideration is not expected to be
23 resolved for a long period of time.
 - 24 c. The entity’s experience (or other evidence) with similar types of
25 contracts is limited, or that experience (or other evidence) has limited
26 predictive value.
 - 27 d. The entity has a practice of either offering a broad range of price
28 concessions or changing the payment terms and conditions of similar
contracts in similar circumstances.
 - e. The contract has a larger number and broad range of possible
consideration amounts.

(FAC ¶ 29.)

⁷ The Court takes judicial notice of FASB ACCOUNTING STANDARDS UPDATE, REVENUE FROM CONTRACTS WITH CUSTOMERS (TOPIC 606) available at <https://www.fasb.org/cs/ContentServer?c=Page&cid=1176156316498&d=&pagename=FASB%2FPage%2FSectionPage> (last visited September 29, 2020). ASC 606 further states that “[a]n entity should disclose sufficient information to enable users of financial statements to understand the nature, amount, timing, and uncertainty of revenue and cash flows arising from contracts with customers.” (ASC 606 at p.6.)

Royalties are [a] form of variable consideration. However, ASC 606 contains an exception to the principle requiring an estimate of variable consideration for a sales-based royalty for a license of Intellectual Property (IP). This is because estimating future royalties is quite difficult and would likely result in significant adjustments to the amount of revenue recognized due to changes in circumstances not related to the entity's performance.

(FAC ¶ 30 at n. 2, quoting article from BDO USA, LLP found at [Id.\) "Under this sales- or usage-based royalty exception, an entity *would not estimate* the variable consideration from sales- or usage-based royalties. . . . \[but\] would wait until the subsequent sale or usage occurs to determine the amount of revenue to recognize." \(*Id.* ¶ 26, n.1 \[quoting Deloitte & Touche guidance\].\)](https://www.bdo.com/insights/industries/technology/life-sciences-spring-2017/when-it-comesto-new-revenue-recognition-model,-as.)

2. *Amyris's Reporting of Sales-Based Royalty Revenues*

In a March 15, 2018 press release titled "Amyris Reports Another Strong Quarter with Solid Operating Performance and 2017 Revenue of \$143.3 Million up 113% over 2016," Amyris represented that it had "started 2018 with continued strong growth in revenues" and each of its markets was "delivering strong, profitable growth." (*Id.* ¶ 42.) In a call with analysts that same date, Melo explained that the royalty revenue from the Agreement "has become very material faster than we expected, and we will now be reported -- reporting separately and labeling these as license and royalties. When you see this line in our GAAP results, this is mostly value share and represents the revenue we receive from partners." (*Id.*) Melo told analysts that they should "[t]hink of royalties as 100% gross margin" and that 2018 is "starting off very well with very strong gross operating performance and revenue that will be around double the first quarter of 2017." (*Id.* ¶ 44.)

Two months later, on May 14, 2018, the company issued a press release stating that it had \$23 million in revenue for the first quarter of 2018 compared to \$13 million in the first quarter of 2017. (*Id.* ¶ 50.) The press release represented that "[o]ur product related royalty revenue . . . delivered \$11.4 million of 100% gross margin related revenue." (*Id.*) In an investor call that day, Melo stated that "Our royalty payments, which we used to call value share from products delivered

1 was \$11.4 million in the first quarter versus \$225,000 for the same period last year.” (*Id.* ¶ 51.)
2 Melo was asked in the call “Is the \$11.4 million, all of it royalties for the quarter? Or are there any
3 license fees in it, too?” Melo replied, “all of it is royalty or what we used to call value
4 share . . . there is no license [fee] revenue in the quarter.” (*Id.* ¶ 53.) Amyris’s quarterly SEC Form
5 10-Q similarly reported royalty revenue of \$11.4 million. (*Id.* ¶ 56.)

6 Plaintiffs allege that all these statements referred to the royalties as amounts the company
7 had recognized as revenue consistent with ASC 606, *i.e.* “when Nenter is selling into the market.”
8 (*Id.* ¶ 54.) In fact, the claimed revenues were based upon estimated, *projected* Nenter sales that had
9 not yet occurred. (*Id.* ¶ 54 [“it was not the case that Amyris waited to have actual sales information
10 before recognizing royalty revenue under the DSM and Nenter agreement since Amyris was instead
11 recognizing DSM/Nenter royalty revenue based on Defendants’ inflated estimates of royalty
12 payments based on projected Nenter sales”]; *see also id.* ¶¶ 25, 30, 32.) Defendants would later
13 admit that those estimates were in error, and that it had “no visibility” on Nenter sales on which to
14 base those recognized royalties. (*Id.* ¶ 54.)

15 Defendants similarly reported on August 6, 2018 that Amyris had “delivered much better
16 revenue in the first half of 2018” and that “Q2 2018 GAAP revenue was \$24.8 million compared to
17 \$25.7 million for the second quarter of 2017.” (*Id.* ¶ 62, quoting Melo and Valiasek, respectively.)
18 Defendants attributed that revenue growth to “strong demand” for its products rather than estimated
19 future sales and payments. (*Id.* ¶ 63.) While describing these royalty revenues as “delivered” by
20 the end of the second quarter, and reporting in its 10-Q for the second quarter of 2018 royalty
21 revenue of \$6.88 million, Amyris had only received a total of about \$2.6 million in royalty
22 payments by that time. (*Id.*)

23 In November of 2018, defendants indicated that its financial results were not as good as
24 expected and that third quarter GAAP revenue was down compared to the third quarter of 2017.
25 (*Id.* ¶ 67.) In its press release, the company attributed that result to “volatility” in the Vitamin E
26 market. In a November 13, 2018 analyst call, Melo admitted that the company had “expected
27 around \$15 million of royalty revenue in the third quarter and realized 0” and that it had “no
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1 visibility on the actual royalty as it is calculated on the selling price of their contracts that have
2 been at a significant discount to market prices.” (*Id.* ¶ 68.)

3 However, in these November 2018 statements, Melo did not concede that defendants had
4 had no visibility in *prior quarters* either. To the contrary, Melo asserted that:

5 [w]e have realized about \$20 million in royalty payments during the first half of
6 this year. We continue to believe and expect around \$40 million of annual royalty
7 payments in the short to midterm and after we get through the significant current
8 market volatility.

9 (*Id.* ¶ 68.) Valiasek reiterated the narrative that “the biggest negative hit for Q3 2018 revenue was
10 due to Vitamin E royalties not coming in for the quarter.” (*Id.*) Valiasek also noted the poor third
11 quarter results also arose from “a much smaller amount of fragrance partner royalty revenue that
12 was earned but could not be recognized in Q3 due to ASC 606 requirements.” (*Id.*) The
13 company’s third quarter 10-Q reported license and royalty revenue of \$18.46 million for the nine
14 months ended September 30, 2018. (*Id.* ¶ 70.) The company did not disclose that its higher
15 revenue reports in prior quarters had not materialized. (*Id.*) However, by the end of the third
16 quarter, Amyris had only received \$4.37 million in royalty revenue. (*Id.*)

17 In March 2019, defendants reported results for the fourth quarter of 2018, recognizing just
18 \$1.2 million in royalty revenue for the quarter. (*Id.* ¶ 72.) In a March 18, 2019 analyst call, Melo
19 stated that:

20 we acknowledge that our financial results are not acceptable, and we want to
21 avoid this in the future by better assessing what our realistic revenue assumptions
22 versus those that are simply potentially possible and may have elements we
23 cannot control.

24 (*Id.* ¶ 73.) Less than a month later, the company announced that, due to accounting errors, it would
25 have to restate several quarterly and annual financial reports. (*Id.* ¶ 76.) Amyris revealed that it
26 had been operating with undisclosed material weaknesses in financial controls and that “a material
27 error was made related to the estimates for recognizing revenue for royalty payments.” (*Id.*) As of
28 April 11, 2019, the company conceded that it anticipated restatements to report a reduction in
revenue, and an increase in net loss, for the [2018 SEC filings] as follows:

approximately \$4 million and \$4 million, respectively, for the fiscal quarter ended
March 31, 2018; approximately \$8 million and \$8 million, respectively, for the
fiscal quarter ended June 30, 2018; approximately \$1 million and \$7 million,

1 respectively, for the fiscal quarter ended September 30, 2018; approximately \$12
2 million and \$11 million, respectively, for the six months ended June 30, 2018; and
3 approximately \$13 million and \$18 million, respectively, for the nine months
4 ended September 30, 2018.

5 (*Id.*) Defendants admitted that they previously had reported the significantly increased royalty
6 revenues despite having very “limited” information at their disposal and despite “the amount of
7 consideration [being] highly susceptible to factors outside the entity’s influence,” including
8 “volatility in a market” and “the judgment or actions of third parties.” (*Id.* ¶ 32.)

9 As a result of these revelations, the price of Amyris’s stock fell precipitously. (*Id.* ¶¶ 75,
10 77.) After uncovering further errors in auditing subsequent to the April 2019 revelations, “Amyris
11 [still] ha[d] yet to restate its 2017 Form 10-K, its 2018 Forms 10-Q, or issue its 2018 Form 10-K or
12 any 2019 financial results” as of the date of the filing of the complaint herein. (*Id.* ¶ 82.)

13 **3. Confidential Witness Statements**

14 The complaint alleges statements by two confidential witnesses, CW1 and CW2. (*Id.* ¶¶ 34-
15 41.) CW1 served in Amyris’s finance department from January to October of 2018, assisting in
16 accounting and financial operations. CW1 states that there was a Vice President of Technical
17 Accounting who was primarily responsible for determining royalty revenues under the Agreement
18 and reported directly to Valiasek. CW2 served in Amyris’s accounting department from January to
19 August of 2018, assisting with operational accounting. CW2 also reported that the Vice President
20 of Technical Accounting worked closely with Valiasek, who was very involved in overseeing the
21 process of revenue recognition and financial reporting. (*Id.* ¶ 38.) Valiasek and Melo reviewed
22 revenue numbers at least monthly, if not weekly. (*Id.* ¶ 39.) Further, Valiasek had no choice but to
23 be involved in day-to-day accounting operations because the turnover rate was so high in the
24 accounting department—of the nine or ten employees in the accounting department, eight were
25 temporary hires. (*Id.* ¶ 40.) Amyris’s Chief Accounting Officer stayed with the company for just
26 six months and was not replaced immediately. (*Id.*) CW1 confirmed that there was considerable
27 turnover in the accounting department during their 10-month tenure at Amyris. (*Id.* ¶ 36.) The
28 turnover and lack of long-tenured employees made operations difficult, particularly because
Amyris was in over \$162 million in debt and had complex repayment plans that required constant
monitoring. (*Id.* ¶ 41.)

1 **4. Additional False and/or Misleading Statements**

2 In connection with each of the alleged misrepresentations of revenue, plaintiffs further
3 allege that Melo and Valiasek made false and misleading statements about the sustainability of
4 these revenues and what investors could expect going forward (*e.g.*, *Id.* ¶ 53 [“This is a strong
5 indication of the underlying performance of our products in their respective end markets and the
6 sustainability of our differentiated and advantaged business model;” “expect some choppiness, but
7 full year strong flows. No change;” “we have the most profitable product portfolio in our industry
8 with an anticipated gross margin of around 70% for the year. And we blew through that in the first
9 quarter”]; ¶ 62 [“We expect to deliver with our prior stated target revenue range of \$185 million to
10 \$195 million;” “we expect . . . to deliver . . . gross profit in excess of \$100 million in the second
11 half;” “we anticipate that our quarterly revenues in Q3 and Q4 will be at some of the highest
12 quarterly levels we’ve experienced”].)

13 Plaintiffs also allege that defendants made false and misleading statements about the
14 company’s internal controls over financial reporting, representing that Amyris was curing its
15 previously disclosed internal control weaknesses over financial reporting from fiscal year 2017 to
16 prevent material misstatements. (*Id.* ¶ 49.) Amyris continued to represent that it was remediating
17 the previously reported internal controls issues and had no changes in its internal controls over
18 financial reporting in its quarterly statements for 2018. (*Id.* ¶¶ 56, 64, 70.) Defendants failed to
19 disclose that it actually was not increasing accounting resources, staffing, and training at the time of
20 their statements but instead was: experiencing near constant turnover; staffed predominately by
21 inexperienced temporary employees in both regular staff and senior management positions; and
22 struggling to function effectively. (*Id.* ¶¶ 34-41, 49.)

23 Melo and Valiasek, in their roles as CEO and CFO, signed off on Sarbanes-Oxley (SOX)⁸
24 certifications in Amyris’s 10-Qs and annual report, attesting to the accuracy of the reports, the
25 disclosure of any weakness or change in the company’s internal controls over financial reporting,
26 and corrective actions the company was taking regarding its prior failures. (*Id.* ¶¶ 48, 49, 56, 64,
27 65.) Defendants failed to disclose that the Company was in the process of preparing financial

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⁸ Sarbanes-Oxley Act of 2002 (“SOX”), 15 U.S.C. § 7262.

1 statements for 2018 that included, for the first time, royalty revenues based on complex and
2 uncertain estimates that would further strain Amyris’s internal control over financial reporting, as
3 they would later be required to admit. (*Id.* ¶ 49.)

4 **II. APPLICABLE STANDARD**

5 Under the PSLRA’s heightened pleading standard, a plaintiff claiming fraud must allege
6 with particularity facts demonstrating: “(1) a material misrepresentation or omission of fact, (2)
7 scienter, (3) a connection with the purchase or sale of a security, (4) transaction and loss causation,
8 and (5) economic loss.” *In re Gilead Sciences Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008)
9 (internal quotation marks omitted); *see also* 15 U.S.C. § 78u-4(b); Fed. R. Civ. P. 9(b); *see Tellabs,*
10 *Inc. v. Makor Issues & Rights, Ltd*, 551 U.S. 308, 323(2007). The Supreme Court has held that
11 “literal accuracy is not enough: An issuer must as well desist from misleading investors by saying
12 one thing and holding back another.” *Omnicare, Inc. v. Laborers Dist. Council Const. Indus.*
13 *Pension Fund*, 575 U.S. 175, 192 (2015). Indeed, a statement is actionably false or misleading if it
14 would give a reasonable investor “an impression of a state of affairs that differs in a material way
15 from the one that actually exists.” *Brody v. Transitional Hospital Corp.*, 280 F.3d 997, 1006 (9th
16 Cir. 2002).

17 When plaintiff alleges an omission, the omission is only material if “a *reasonable* investor
18 would have viewed the non[-]disclosed information as having *significantly* altered the total mix of
19 information made available.” *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 44 (2011)
20 (emphasis in original). Section 10(b) and Rule 10b-5(b) “do not create an affirmative duty to
21 disclose any and all material information,” but instead a duty to include all facts necessary to render
22 a statement accurate and not misleading, once a company elects to disclose that material
23 information. *Id.* at 44-45, 47; 17 C.F.R. § 240.10b-5(b). Material information must be disclosed if
24 its omission would “affirmatively create an impression of a state of affairs that differs in a material
25 way from the one that actually exists.” *Brody*, 280 F.3d at 1006. “[O]nce defendants cho[ose] to
26 tout’ positive information to the market, ‘they [are] bound to do so in a manner that wouldn’t
27 mislead investors,’ including disclosing adverse information that cuts against the positive
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1 information.” *Schueneman v. Arena Pharm., Inc.*, 840 F.3d 698, 706 (9th Cir. 2016) (quoting
2 *Berson v. Applied Signal Tech. Inc.*, 527 F.3d 982, 987 (9th Cir. 2008).)

3 The PSLRA requires plaintiffs to allege facts to establish a strong inference of scienter.
4 *Tellabs*, 551 U.S. at 324. Scienter includes knowledge of the falsity as well as “deliberate or
5 conscious recklessness.” *No. 84 Employer-Teamster Joint Council Pension Tr. Fund v. Am. W.*
6 *Holding Corp.*, 320 F.3d 920, 937 (9th Cir. 2003) (“*America West*”). Scienter may be established
7 “by alleging facts demonstrating an ‘intent to deceive, manipulate, or defraud’ or ‘deliberate
8 recklessness.’” *Webb v. Solarcity Corp.*, 884 F.3d 844, 851 (quoting *In re Quality Sys., Inc. Sec.*
9 *Litig.*, 865 F.3d 1130, 1144 (9th Cir. 2017) (“*Quality Systems*”). A “‘strong inference’ is an
10 inference that is ‘cogent and at least as compelling as any opposing inference one could draw from
11 the facts alleged.’” *Webb*, 884 F.3d at 850 (citation omitted). The inference “must be more than
12 merely ‘reasonable’ or ‘permissible’—it must be cogent and compelling, thus strong in light of
13 other explanations.” *Tellabs*, 551 U.S. 308 at 323, 324 (scienter claims “need not be . . . the most
14 plausible” but “must be cogent and compelling”).

15 When deciding whether a strong inference of scienter is pled, courts must consider the
16 “totality of plaintiffs’ allegations.” *Daou*, 411 F.3d at 1022. “[T]he ultimate question is whether
17 the defendant knew his or her statements were false, or was consciously reckless as to their truth or
18 falsity.” *Gebhart v. SEC*, 595 F.3d 1034, 1042 (9th Cir. 2010). It is not necessary for a complaint
19 to establish a strong inference that defendants actually knew contradicting facts since “[r]ecklessly
20 turning a ‘blind eye’ to impropriety is equally culpable conduct under Rule 10(b)-5.” *In re*
21 *Verifone Holdings, Inc. Sec. Litig.*, 704 F.3d 694, 708 (9th Cir. 2012). “Deliberate recklessness is
22 an *extreme* departure from the standards of ordinary care[,] which presents a danger of misleading
23 buyers or sellers that is either known to the defendant or is so *obvious* that the actor must have been
24 aware of it.” *Webb*, 884 F.3d at 851 (quoting *City of Dearborn Heights Act 345 Police & Fire Ret.*
25 *Sys. v. Align Tech., Inc.*, 856 F.3d 605, 619 (9th Cir. 2017)).

26 Allegations must be taken holistically under *Matrixx* 563 U.S. at 48. The Court must
27 “consider *all* reasonable inferences to be drawn from the allegations, including inferences
28 unfavorable to the plaintiffs” *Gompper v. VISX, Inc.*, 298 F.3d 893, 897 (9th Cir. 2002) (emphasis

1 in original). Any securities fraud claim that relies on statements from a confidential witness to
2 establish scienter must overcome “two hurdles.” *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d
3 981, 995 (9th Cir. 2009), *as amended* (Feb. 10, 2009). First, a complaint must describe the
4 confidential witness “with sufficient particularity to establish [that witness’s] reliability and
5 personal knowledge;” and second, the statements supplied by that confidential witness must
6 “themselves be indicative of scienter.” *Id.* (citing *Daou*, 411 F.3d at 1015-16).

7 **III. ANALYSIS**

8 **A. False/Misleading Statements**

9 Plaintiffs allege that defendants made false and misleading statements or material omissions
10 in its disclosures to investors in three ways. First, defendants misrepresented its revenues which
11 “affirmatively create[d] an impression of a state of affairs that differ[ed] in a material way from the
12 one that actually exist[ed].” *Brody*, 280 F.3d at 1006. In press releases, investor calls, and in its
13 SEC filings, defendants discussed Amyris’s record financial results and growth in revenues. (FAC
14 ¶¶ 42, 44, 51, 59, 61-62, 67-68.) When asked about the impact of ASC 606, defendants represented
15 that its application had no material impact on the financial results other than simplifying Amyris’s
16 financial reporting. (*Id.* ¶¶ 44, 53). Instead, defendants credited the “dramatic growth” in revenue
17 to factors in the market and success with its products. (*Id.* ¶¶ 44, 51, 62, 67.) Second, defendants
18 offered predictions of future revenue and growth that relied on these false statements of royalty
19 revenue in assuring shareholders that the revenue growth was real and sustainable. (*Id.* ¶¶ 51, 59,
20 62). Third, defendants made false and misleading statements regarding its internal controls,
21 attesting that there were no undisclosed deficiencies in the Company’s internal control over
22 financial reporting. (*Id.* ¶¶ 47-49, 55-58, 64-65, 70-71). The Court considers each category of
23 alleged misrepresentations in turn.

24 **1. Alleged Misrepresentations of Revenue**

25 Plaintiffs contend that Amyris reported revenues in a manner inconsistent with the GAAP
26 standards stated in ASC 606 and misleading to investors. Under the Agreement at issue here,
27 Amyris licensed farnesene to DSM, who supplied the ingredient to Nenter. Nenter then used the
28 farnesene to produce Vitamin E products to sell to consumers. Amyris and DSM shared royalties

1 on Nenter’s profits from these product sales. Thus, the amount of payment Amyris would receive
2 was dependent on Nenter’s subsequent sales profits. (*Id.* ¶ 25.) Plaintiffs allege defendants
3 reported as revenue estimates of sales-based royalties Amyris expected to receive, and those
4 estimates were based upon *predictions of future sales* by Nenter rather than sales that had actually
5 occurred.

6 ASC 606-10-55-65 is directed specifically to sales-based royalty recognition and warns that
7 an entity should recognize such variable consideration “*only when . . . [t]he subsequent sale . . .*
8 *occurs, [or] [t]he performance obligation . . . has been satisfied.*” (*Id.* ¶ 30, emphasis supplied.)
9 As to all kinds of variable consideration in contracts, ASC 606-10-32-12 explicitly warns that an
10 entity must consider all the factors that could increase the likelihood an estimate will need to be
11 reversed, such as market volatility or limited experience or information with predictive value. (*Id.*
12 ¶ 29.) ASC-606-10-32-11 expressly cautions that an entity should *only* include estimates of
13 variable consideration “to the extent it is probable that a significant reversal in the [estimated]
14 amount . . . will *not* occur[.]” (*Id.* ¶¶ 28, emphasis supplied.) Further, ASC 606 cautions that an
15 entity must “*disclose sufficient information to enable users of financial statements to understand*
16 *the nature, amount, timing, and uncertainty of revenue*” it is reporting. (ASC 606 at p. 6,
17 emphasis supplied.)

18 Here, plaintiffs allege that defendants were recognizing royalties before sales occurred and
19 were not disclosing to investors the “nature, timing, and uncertainty” of the revenues they were
20 reporting. By failing to comply with the restrictions in ASC 606, defendants used these predictions
21 as the basis for reporting significant growth in revenue as compared to 2017 instead of the alleged
22 true state of affairs, a stark decline.⁹ (FAC ¶¶ 26-31, 54, 60, 66.) In speaking about the change to
23 Amyris’s reporting of royalty revenues, defendants were required to disclose these material facts to
24 make their statements not misleading. *Berson*, 527 F.3d at 987 (“[O]nce defendants chose to tout
25 the company’s backlog, they were bound to do so in a manner that wouldn’t mislead investors as to
26 what that backlog consisted of.”). Defendants used language indicating that the revenue results
27

28 ⁹ For example, Amyris reported revenue growth of 19% in in the first quarter, rather than a
27% decline. (FAC at ¶¶ 31, 88.)

1 they were reporting were certain, not mere puffery or predictions. *See In re Atossa Genetics Inc*
 2 *Sec. Litig.*, 868 F.3d 784, 801 (9th Cir. 2017) (finding defendant’s “use of the past tense: ‘achieved’
 3 [and] ‘obtained’” implied “that he spoke of events that had already happened, *i.e.*, that FDA
 4 clearance risk had already been achieved.”). For example:

- 5 • In a March 15, 2018 conference call Melo stated: “2018 is starting off very well with very
 6 strong gross operating performance and revenue that will be around double the first quarter
 of 2017.” (FAC ¶ 44.)
- 7 • In a May 4, 2018 press release, Amyris reported revenue of \$23 million for the first quarter
 8 of 2018, compared with \$13 million in the first quarter of 2017, including over \$11 million
 9 in royalty revenues for the first quarter of 2018, explaining, “[o]ur product related royalty
 revenue (previously referred to as value share) delivered \$11.4 million of 100% gross
 margin related revenue.” (FAC ¶ 50).
- 10 • In a May 14, 2018 investor call, Melo reiterated the press release, stating that “[w]e
 11 exceeded our guidance for the year of about 70% gross margin and delivered strong revenue
 growth. We delivered activity in the first quarter that would have represented an additional
 12 \$1 million in revenue.” (FAC ¶ 51.) When asked about the reported \$11.4 million in
 13 royalty revenue for the first quarter, Melo stated “[j]ust about all of it is royalty.” (FAC
 ¶ 53.) These revenue figures were repeated in Amyris’s 10-Q filing, which both Melo and
 Valiasek certified. (FAC ¶ 56.)
- 14 • Reporting its second quarter, Amyris’s August 6, 2018 press release disclosed total revenue
 15 of \$24.8 million. (FAC ¶ 61.) In a conference call that same day, Valiasek stated: “Now let
 me review our second quarter 2018 results. Q2 2018 GAAP revenue was \$24.8 million
 16 compared to \$25.7 million for the second quarter of 2017. As a reminder, this reflects . . .
 Vitamin E royalties and collaboration revenue. Adjusting out the low-margin revenues
 17 from 2017, our growth is 15% on an absolute basis.” (FAC ¶ 62.) Melo stated “[w]e
 delivered much better revenue for the first half of 2018.” (*Id.*) The 10-Q issued August 14,
 18 2018, certified by Melo and Valiasek announced \$23.19 million revenue with license and
 royalty revenue comprising of \$6.88 million of that total. (FAC ¶ 64.)

19 As of November 13, 2018, although Melo and Valiasek were stating that they had not “realized”
 20 the \$15 million in third quarter royalty revenue they had expected, they did not revise the figures
 21 they had announced previously for the first two quarters, instead underscoring that:

- 22 • We ***have realized*** about \$20 million in royalty payments during the first half of this year.
 23 We continue to believe and expect around \$40 million of annual royalty payments in the
 short to midterm and after we get through the significant current market volatility. (FAC
 24 ¶ 68 [Valiasek], emphasis supplied.)
- 25 • “. . . so far, this year, ***we’ve realized*** about \$20 million, and again, at target.” (*Id.* [Melo],
 26 emphasis supplied.)

27 Defendants argue that their SEC filings fully explained to investors the change in
 28 accounting rules and its effect on revenue reporting. For example, defendants disclosed that the

royalty revenue they reported for the first quarter of 2018 would have been \$0 under the old accounting rule, which defendants reiterated in the comparative charts they provided in their SEC filings, like the one below:

Three Months Ended March 31, 2018 (In thousands)	As Reported	Adjustments	Amounts Without the Adoption of ASC 606
Renewable products	\$ 5,195	\$ —	\$ 5,195
Licenses and royalties	11,437	(11,437)	—
Grants and collaborations	6,366	444	6,810
Total revenue from all customers	<u>\$ 22,998</u>	<u>\$ (10,993)</u>	<u>\$ 12,005</u>

(Declaration of Michael D. Celio (“Celio Dec.”), Dkt. No. 45, at Exh. A [Form 10-Q filed 5-18-2018], p. 14/42.)¹⁰

In this section of the 10Q, Amyris included what it represented was a comparison between the amount of license and royalty revenue it would have recognized under the prior accounting rule versus under new rule ASC 606. However, the 10Q’s accompanying description of the effect of the new rule stated creates the impression that Amyris was only recognizing royalty revenue when Nenter made actual sales of products:

The most significant change in accounting policy is the Company now estimates royalty revenues from licenses of the Company’s intellectual property and recognizes estimated royalty revenues at a point in time when the Company sells its renewable products to its customers (if the sales -based royalty exception does not apply) **or when the licensee sells its products to its customer** (if the sales -based royalty exception does apply). Also, the transaction price for royalty revenues is reduced for variable incentive payments that may be payable by the Company to customers.

(Celio, Exh. B [Form 10-Q filed 8/14/2018] at 15/55, emphasis supplied; *see also* Exh. A at 16/42.)

As the complaint alleges, the revenues reported for these periods were *not* based on the actual “licensee [sales of] its products to its customer” as the explanation in the 10Q indicates they were. Instead, the reported revenues were based on *estimates* of what Amyris’s licensee, Nenter, *might sell* in the future. (*See, e.g.*, FAC ¶¶ 25, 30-32, 43, 45.) Thus, while the table shows that there

¹⁰ The Form 10-Q filed at the end of the second quarter contained a similar disclosure, noting that without ASC 606, the company would only have reported \$2.577 million in revenue. (Celio Dec., Ex. B, Form 10-Q filed 8/14/2018, at p. 15/55.) Rule ASC 606 required companies to include this kind of comparison in their Forms 10-Q. (*See* ASC 606-10-65-1(i)(1).)

1 would have been zero license and royalty revenue for the first quarter under the old accounting rule
2 as compared to the \$11,437,000 Amyris reported, the 10Q does not reveal that the reported
3 revenues under the new rule were *estimates based on estimates, not based on actual sales*.
4 Consequently, the complaint plausibly alleges that defendants both failed to disclose the uncertainty
5 of the royalty revenues they reported and affirmatively misstated the manner in which they were
6 calculated.

7 Defendants' alleged misleading statements here are similar to the alleged misstatements the
8 Ninth Circuit found actionable in *Daou*. There, plaintiffs alleged that a computer networking
9 company had made misleading statements regarding its revenues in violation of GAAP. *Daou*, 411
10 F.3d at 1017. The company argued it had disclosed its accounting methods in its financial
11 statements, so investors could not have been misled. The Ninth Circuit held that disclosure of the
12 Company's methods was nevertheless insufficient to prevent its revenue statements from being
13 misleading. The Ninth Circuit held:

14 What defendants' disclosure—that revenue was sometimes being recognized
15 before the customer was billed—does not reveal is that defendants were
16 recognizing revenue *before it was even earned*. An investor would read
17 defendants' disclosure of revenues "recognized" as meaning that the excess
18 revenues recognized were at the very least earned. As plaintiffs allege, that
19 statement was misleading because defendants were allegedly recognizing
20 revenue, before it was earned in violation of GAAP.

21 *Id.* at 1019 (emphasis in original). Thus, the Ninth Circuit reversed dismissal of the complaint,
22 holding that the allegations that the company had recognized revenue inconsistent with GAAP,
23 along with "at least some specific allegations of how the adjustments [to revenue] affected the
24 company's financial statement and whether they were material in light of the company's overall
25 financial position" sufficiently alleged materially misleading statements. *Daou*, 411 F.3d at 1018.

26 As in *Daou*, defendants' explanation of how ASC 606 required sales-based royalties to be
27 recognized did not align with what defendants actually were recognizing in their statements. The
28 fact that defendants explained how ASC 606 was supposed to be applied and how that differed
from the prior accounting rule could not correct the misrepresentations caused by defendants'
alleged revenue recognition inconsistent with that rule. Contrary to defendants' assurances that the

1 change in financial reporting was little more than a change in “labeling” that was
2 “simplifying . . . how we report our results” with no more than a “de minimus impact” on what was
3 being reported, they did not clarify or simplify but rather exacerbated the problem. (FAC ¶¶ 44
4 [Melo], 53 [Valiasek].)

5 Defendants further argue that they disclosed in their 10Qs that their estimates were made
6 using the “most likely outcome method.” (*See* Celio Decl., Exh. A at 13/42.) For example, the 10Q
7 for the first quarter of 2018 stated:

8 When the Company’s intellectual property license is the only performance
9 obligation . . . the Company applies the sales-based royalty exception and revenue
10 is estimated and recognized at a point in time when the licensee’s product sales
11 occur. Estimates of sales-based royalty revenues are made using the most likely
12 outcome method, which is the single amount in a range of possible amounts
13 derived from the licensee’s historical sales volumes and sales prices of its
14 products and recent commodity market pricing data and trends.

15 (*Id.*)¹¹ Based on this language in the disclosures, defendants contend their estimates were made
16 using an accepted accounting model, not mere “blind predictions,” and the risks of that method
17 were disclosed to investors.

18 Defendants do not persuade. Like the tables comparing the effects of the new accounting
19 rule, the context of that statement in the 10Qs was the further assurance that Amyris “applies the
20 sales-based royalty exception and revenue is estimated and ***recognized at a point in time when the***
21 ***licensee’s product sales occur.***” (Celio Decl., Exh. A at 13/42, emphasis supplied.) Defendants
22 are alleged to have recognized revenue (and represented it to investors as “received” or “realized”)
23 *before* the sales occurred, *i.e.*, based on “projected and estimated Nenter product sales.” (FAC ¶¶
24 25, 30, 31, 32, 43 [“revenues were entirely estimated”], 45, 52, 54 [recognizing DSM/Nenter
25 royalty revenue based on estimates of projected sales], 59, 60 [attributing revenue to “products
26 sold” in first quarter]; 68, 69 [limiting revenue drop to third quarter market volatility which
27 reiterating revenues for first and second quarter as “realized”]). Thus, a statement in the 10Q about
28

¹¹ The language in the 10Q tracks the general requirements of ASC 606 that apply to variable consideration, specifically ASC 606-10-32-8 which provides two methods by which entities can estimate variable consideration, the “expected value” method and the “most likely amount” method. That choice of estimation method language does not appear in the sales-based licensing exception.

1 the company’s estimation method does not neutralize its alleged false statements in recognizing
 2 royalty revenue *prior* to the licensee’s sale. Rather, it is quite plausible that a jury would find the
 3 statements merely obfuscated what ASC 606 required and Amyris was purporting to do—
 4 recognizing revenue when sales occur, not before. (*See* FAC ¶ 26, n.1 [sales-based royalty
 5 exception requires entity not to estimate variable consideration, but to wait until subsequent sales or
 6 usage of IP occurs before recognizing revenue]; ¶ 30 n.2 [sales-based royalty exception is “an
 7 exception to the principle of requiring an estimate” of variable consideration].)

8 2. Amyris’s Statements Touting Sustainability of Financial Results

9 Plaintiffs also allege defendants made false and misleading statements touting the
 10 sustainability of their reported revenue growth. Plaintiffs contend that, at a minimum, defendants’
 11 statements were false and misleading because they did not disclose the defendants lacked necessary
 12 information to estimate the royalty revenues Amyris actually would receive.

13 Defendants argue that the plaintiffs have identified nothing more than forward-looking
 14 statements protected by the PSLRA’s safe harbor, 15 U.S.C. § 78u-5(c)(1). The PSLRA’s safe
 15 harbor provision states that a defendant is not liable for a “forward-looking statement” if:

- 16 • the statement is identified as a forward-looking statement and accompanied by meaningful
 17 cautionary statements identifying important factors that could cause actual results to differ
 materially (15 U.S.C. § 78u-5(c)(1)(A)(i)); and
- 18 • plaintiff fails to prove that the forward-looking statement was made with “actual knowledge
 19 by [the speaker] that the statement was false or misleading” or, if the alleged statement was
 20 made by a business entity, that the statement was “made or approved by [an executive
 officer] with actual knowledge the statement was false or misleading.”

21 15 U.S.C. § 78u-5(c)(1)(B)(i), (ii). For the reasons stated below, the Court finds that the statements
 22 at issue do not qualify as forward-looking and, even if they could, were not accompanied by
 23 sufficient cautionary statements to qualify for the PSLRA’s safe harbor.

24 a. More than forward-looking

25 Defendants argue that misstatements plaintiffs target in the FAC “are classic growth and
 26 revenue projections, which are forward-looking on their face.” *Police Ret. Sys. of St. Louis v.*
 27 *Intuitive Surgical, Inc.*, 759 F.3d 1051, 1058 (9th Cir. 2014); *Cutera*, 610 F.3d at 1111 (“earnings
 28 projection[s]” are “by definition [] forward-looking statement[s].”). To the extent that plaintiffs try

1 to parse these forward-looking statements to focus on phrases that are phrased in the present tense,
2 this is a futile exercise “because, examined as a whole, the challenged statements related to future
3 expectations and performance.” *Police Ret. Sys.*, 759 F.3d at 1059 (holding that statements
4 regarding future expenditures projects were, in context, entirely forward-looking). The Court
5 disagrees.

6 First, the Court notes that even “general statements of optimism” may be actionable if they
7 are related to aspects of the company’s operations that the speakers “kno[w] to be performing
8 poorly.” *Quality Systems*, 865 F.3d at 1143.¹² Here, however, the forward-looking aspects of
9 defendants’ statements are accompanied by and premised on the alleged false representations of
10 Amyris’s *current* revenues—*i.e.* non-forward-looking statements. For example, during the same
11 call in which Melo is alleged to have falsely represented that Amyris had recognized \$23M in
12 revenue for the first quarter, including \$11.4M in farnesene royalty revenue inconsistent with
13 GAAP, Melo coupled that false revenue statement with the following announcements:

14 We exceeded our guidance for the year of about 70% gross margin and delivered
15 strong revenue growth. We delivered activity in the first quarter that would have
16 represented an additional \$1 million in revenue. This would have been mostly
17 100% gross margin revenue that is expected to be accounted for in the second
18 quarter due to timing. This is what we consider growing sustainably, and we have
19 very good visibility on continuing at this rate or better for the next several years.
20 * * *

21 I think what we said in the last call is that we would generate around \$50 million
22 to \$60 million of value share for the year, and that is the royalty line. And that’s
23 what you should expect. It won’t be perfectly linear for the year, so you’ll see
24 some choppiness. But again, for the full year, \$50 million to \$60 million, I’d
25 expect some choppiness, but full year strong flows. No change.

(FAC ¶¶ 51, 53.)

26 Similarly, shortly after reporting the misstated first quarter royalty revenue, in May of 2018,
27 Amyris hosted a presentation in which it told investors:

28 MELO: We see the growth ahead at about 71%, and we see a margin in the health
and wellness space of about 83%. So great gross margin business. And it’s a great
gross margin business because a core part of that business in the near to medium

¹² For example, the statement that a company “anticipates a continuation of its accelerated expansion schedule,” while knowing that the expansion is already failing, is materially misleading. *Id.* (citing *Fecht v. Price Co.*, 70 F.3d 1078, 1081 (9th Cir. 1995)); *see also* *Warshaw v. Xoma Corp.*, 74 F.3d 955, 959 (9th Cir. 1996) (statements that “everything [was] going fine” with FDA approval was misleading when clinical studies actually failed to produce results that could lead to FDA approval).

1 term is actually 100% margin payments, or we used to call value share, we now
call it royalty, from DSM for some of our [farnesene] vitamin technology.

2 VALIASEK: So again, what are [we] seeing? Sustainable growth. This is how we
get to EBDITDA [i.e., earnings before interest, taxes, depreciation, and
3 amortization] positive in 2018 and the outer years, Okay. 83% non-GAAP gross
margin versus last year same quarter, negative 4%.
4 ***

5 But if you take out of our run rate from Q1 2018, that \$6 million where it's almost
at the exact same run rate we were at for Q4 2017. So a lot of investors and
6 analysts are saying to me, Okay, well the information that you're giving me,
we're doing the math, we've said our EBITDA¹³ will be \$10 million positive. If
7 we do the math, you're going to be even more than that. But what we wanted to
do consistently is be conservative, make sure that we meet our numbers.
8 Here's our revenue growth. It's again, year over year amazing. We're expecting
to do 185 to 195 in 2018. Again, gross margin at least 70% for 2018. And you'll
9 see the same thing in 2019.

10 (FAC ¶ 59.) Melo also stated in that presentation that Amyris had “the most profitable product
portfolio in our industry with an *anticipated gross margin of around 70%* for the year. And we
11 *blew through that in the first quarter*, as you know, based on the mix of products *that we sold in the*
12 *first quarter.*” (FAC ¶59, emphasis supplied.) In so doing, Melo provided a specific prediction of
13 annual revenue growth (down to the percentage), while using misstated revenues for the first
14 quarter to indicate that prediction had already been met.¹⁴

15 Similarly, the same day Amyris issued its August 6, 2018 press release reporting misstated
16 revenues of \$24.8M for the second quarter of 2018, Melo also stated:

17 We delivered much better revenue in the first half of 2018, much stronger gross
18 margin, lower cost and continued our improvement in net income. Our strategy of
delivering strong, profitable growth is working, *and we expect a very strong*
19 *second half to build on the momentum of the first half.*

20 We expect to deliver with our prior stated target revenue range of \$185 million to
\$195 million and to achieve a full year positive EBITDA of around \$10
21 million. . . . In aggregate, we expect these activities and our base business to
22 deliver between \$135 million and \$145 million of revenue and gross profit in
excess of \$100 million in the second half.

23 (FAC ¶ 62, emphasis supplied.) Valiasek underscored the growth projections Melo described,
24 stating: “This pipeline of business is sizable. In fact, we anticipate that our quarterly revenues in
25

26 ¹³ EBITDA stands for earnings before interest, taxes, depreciation, and amortization.

27 ¹⁴ The Court further notes that defendants’ statements of recognized and projected revenues
28 went beyond mere “feel good monikers” of performance or “mildly optimistic” assessments. *Cf.*
Oregon Pub. Employees Ret. Fund v. Apollo Grp. Inc., 774 F.3d 598, 606 (9th Cir. 2014) (citing *In*
re Cutera Sec. Litig., 610 F.3d 1103, 1111 (9th Cir. 2010)).

1 Q3 and Q4 will be at some of the highest quarterly levels we've experienced since executing the
2 fuels business and at much improved profitability.” (*Id.*)

3 The allegations here are similar to those examined by the Ninth Circuit in *Quality Systems*.
4 The court in *Quality Systems* considered statements in which defendants predicted a “revenue range
5 of growth of 21% to 24% for the year and an EPS growth of 29% to 33% for the year” while
6 “characterizing these predictions as ‘quite conservative’ given QSI’s ‘large’ pipeline” that was
7 ‘growing.’” *Quality Systems*, 865 F.3d at 1147. The court held that these statements were not
8 protected but were “non-forward[-]looking statements about the state of QSI’s sales pipeline.” *Id.* at
9 1148; *see also Am. West*, 320 F.3d at 937 (statements about the effects of past facts are not
10 “forward-looking”). The Ninth Circuit held that these statements “went beyond ‘feel good’
11 optimistic statements. . . . [and] did not just describe the pipeline in subjective or emotive
12 terms. . . . [but] provided a concrete description of the past and present state of the pipeline.” *Id.* at
13 1144. Moreover, defendants in *Quality Systems* were alleged to have actual knowledge that their
14 statements of present facts were false and misleading. *Id.* at 1149. Thus, forward-looking
15 statements *premised on* those false statements about present facts also were made with knowledge
16 of their falsity and were not covered by the PSLRA’s Safe Harbor. *Id.*¹⁵

17 Here, as in *Quality Systems*, defendants’ enthusiastic, specific financial forecasts were
18 intertwined with its misstatements of current revenues and the revenue pipeline. Defendants failed
19 to disclose the material facts undermining those projections. Defendants made materially false or
20 misleading statements about the reliability and sustainability of the Company’s present reported
21 revenues. Defendants’ alleged statements therefore misrepresented or omitted material past or
22 present facts, such that the PSLRA’s safe harbor does not apply.

23
24 ¹⁵ Other district courts in the Ninth Circuit prior to *Quality Systems* found that “the
25 PSLRA’s safe harbor does not apply” to challenged statements that omit or misrepresent the
26 present facts underpinning those statements. *Mallen v. Alphatec Holdings, Inc.*, 861 F.Supp.2d
27 1111, 1118, 1126 (S.D. Cal. 2012) *aff’d sub nom. Fresno Cty. Employees’ Ret. Ass’n v. Alphatec*
28 *Holdings, Inc.*, 607 F. App’x 694 (9th Cir. 2015) (finding statement that “we anticipate that our
revenues throughout the balance of 2010 will continue to grow” not protected by the safe harbor);
see also, In re Celera Corp. Sec. Litig., 2013 WL 4726097 (N.D. Cal. Sept. 3, 2013) (“the failure to
alert investors to the reimbursement problem was not forward-looking; rather, it was an omission of
a historical fact”); *In re Nuvelo, Inc. Sec. Litig.*, 668 F.Supp.2d 1217, 1230 (N.D. Cal. 2009)
(statements about drug’s path to approval were actionable as they “concealed or downplayed
known *present* risks related to regulatory approval”).

1 *b. Meaningful Cautionary Statements*

2 Defendants further contend they provided meaningful cautionary statements in connection
3 with all the statements they contend are forward-looking. Defendants cite to standard cautionary
4 statements in their press releases¹⁶ and transcripts of earnings calls.¹⁷ In addition, they contend that
5 cautionary language was offered in the May 22, 2018 presentation, in which Melo stated:

6 I am going to share information with you that is forward-looking. I wish I could
7 guarantee that it's all going to happen without question. The reality is there are
8 risks in what we do. But I wouldn't be sharing it with you if I didn't believe it
and if we didn't have it well underpinned and expected for it to happen.

9 (Celio Decl. Exh. I [May 22, 2018 presentation] at p. 2.)

10 ¹⁶ The press releases all included the same standard language:

11 *Forward -Looking Statements*

12 This release contains forward-looking statements, and any statements other than
13 statements of historical fact could be deemed to be forward -looking statements.
14 These forward -looking statements include, among other things, statements
15 regarding future events, such as expected 2018 revenue and EBITDA, anticipated
16 2018 business performance, expected market opportunities for our products and
17 anticipated future revenue composition, that involve risks and uncertainties. These
18 statements are based on management's current expectations and actual results and
19 future events may differ materially due to risks and uncertainties, including risks
20 related to Amyris's liquidity and ability to fund operating and capital expenses,
21 potential delays or failures in development, production and commercialization of
22 products, risks related to Amyris's reliance on third parties, and other risks
23 detailed from time to time in filings Amyris makes with the Securities and
24 Exchange Commission, including Annual Reports on Form 10-K, Quarterly
25 Reports on Form 10-Q and Current Reports on Form 8-K. Amyris disclaims any
26 obligation to update information contained in these forward -looking statements
27 whether as a result of new information, future events, or otherwise.

19 (Celio Decl., Exh. C at 2/6; *see also* Exhs. D, E.)

20 ¹⁷ The earnings call presentations all began with a standard disclaimer at their start, read by
21 Peter DeNardo, Director of Investor Relations and Corporate Communications:

22 During this call, we will make forward-looking statements about events and
23 circumstances that have not yet occurred, including projections of Amyris'
24 operating activities and their anticipated financial impact on our business and
25 financial results for 2018 and beyond. These statements are based on
26 management's current expectations, and actual results and future events may
27 differ materially due to risks and uncertainties, including those detailed from time
28 to time in the filings Amyris makes with its Securities and Exchange
Commission, including Annual Reports on Form 10-K, quarterly reports on Form
10-Q and current reports on Form 8-K. Amyris disclaims any obligation to update
information contained in these forward -looking statements, whether as a result of
new information, future events or otherwise. Please refer to the Amyris SEC
filings for detailed discussion of the relevant risks and uncertainties.

28 (Celio Decl. Exh. F at 1; *see also* Exh. G at 1, Exh. H at 1.)

1 That defendants included these cautionary statements in their disclosures does not change
2 the analysis here. Adequate cautionary language under the PSLRA must identify “important
3 factors that could cause actual results to differ materially from those in the forward-looking
4 statement.” *See* 15 U.S.C. § 78u-5(c)(1)(A)(i). “Where a forward-looking statement is
5 accompanied by a non-forward-looking factual statement that supports the forward-looking
6 statement, cautionary language must be understood in the light of the non-forward-looking
7 statement.” *Quality Systems*, 865 F.3d at 1146–47. “For cautionary language accompanying a
8 forward-looking portion of a mixed statement to be adequate under the PSLRA, that language must
9 accurately convey appropriate, meaningful information about not only the forward-looking
10 statement but also the non-forward-looking statement.” *Id.* at 1148. “Where, as here, forward-
11 looking statements are accompanied by non-forward-looking statements about current or past facts,
12 that the non-forward-looking statements are, or may be, untrue is clearly an ‘important factor’ of
13 which investors should be made aware.” *Id.* “If the non-forward-looking statement is materially
14 false or misleading, *it is likely that no cautionary language—short of an outright admission of the*
15 *false or misleading nature of the non-forward-looking statement—would be ‘sufficiently*
16 *meaningful’ to qualify the statement for the safe harbor.”* *Id.* at 1146-47 (emphasis supplied); *see*
17 *also Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1097 (1991) (“not every mixture with
18 the true will neutralize the deceptive. . . . [t]he point of a proxy statement, after all, should be to
19 inform, not to challenge the reader’s critical wits.”) (internal citations omitted).

20 The cautionary language offered by defendants here does not meaningfully address the risks
21 inherent in Amyris’s projections of future revenues. Those projections were all accompanied by
22 statements of royalty revenue defendants had recognized improperly, and as to which they later
23 admitted they had “no visibility.” (FAC ¶ 68.) Like the “materially false or misleading non-
24 forward-looking statements about the state of QSI’s sales pipeline” in *Quality Systems*, “virtually
25 no cautionary language short of an outright admission” would be sufficient to qualify the forward-
26 looking portions of the statements alleged here. *Quality Systems*, 865 F.3d at 1146.

27
28

1 In sum, the statements alleged here do not qualify as forward-looking statements under the
2 PSLRA’s safe harbor.¹⁸

3 **3. Amyris’s Disclosures About Material Weaknesses in Internal Controls**

4 Finally, plaintiffs allege that Amyris was operating with material weaknesses in its internal
5 controls over financial reporting that it failed to disclose truthfully to investors. “A material
6 weakness is a deficiency, or combination of control deficiencies, in internal control over financial
7 reporting, such that there is a reasonable possibility that a material misstatement of our annual or
8 interim financial statements will not be prevented or detected on a timely basis.” 17 C.F.R. §
9 240.13a-15. “[A] statement of opinion is actionably misleading if it “omits material facts” that
10 “conflict with what a reasonable investor would take from the statement itself[.]” *Omnicare*, 575
11 U.S. 175, 188 (“[A]n investor . . . expects such an assertion to rest on some meaningful legal
12 inquiry—rather than, say, on mere intuition, however sincere.”).

13 Prior to the relevant period here, Amyris disclosed significant material weaknesses in its
14 internal controls over financial reporting for fiscal year 2017, including that it “lacked a sufficient
15 number of trained resources” with responsibility over financial presentation and disclosure, and
16 “did not have an effective risk assessment process to identify and analyze necessary changes in
17 significant accounting policies.” (FAC ¶¶ 46, 47.) Amyris disclosed that those material weaknesses
18 “resulted in material misstatements” regarding revenue for fiscal year 2017, and that they “create[d]
19 a reasonable possibility that a material misstatement of our annual or interim consolidated financial
20 statements that would not be prevented or detected on a timely basis.” (*Id.* ¶ 47.) At the same time,
21 Amyris reported that it was addressing those material weaknesses with a remediation plan including
22 increasing accounting resources, staffing, and training. (*Id.* ¶¶ 48, 49.)

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25 ¹⁸ Further, even assuming any of the statements alleged could be viewed as purely forward-
26 looking, plaintiffs have sufficiently alleged that defendants had actual knowledge their statements
27 were materially false or misleading, as set forth herein in section B. This, too, would bar reliance
28 on the safe harbor. *See Quality Systems*, 865 F.3d at 1149 (“As described above, Defendants had
actual knowledge that their non-forward-looking statements were false and misleading. *Their
forward-looking statements were premised on those non-forward-looking statements. It necessarily
follows that they also had actual knowledge that their forward-looking statements were false or
misleading.*”) (emphasis supplied).

1 Amyris continued to represent in its SEC filings that it was remediating the previously
2 reported internal controls issues. (*Id.* ¶¶ 56, 64, 70.) Further, on May 18, 2018, August 14, 2018,
3 and November 15, 2018, Defendants asserted in the Forms 10-Q1, Q2, Q3 that: “There were no
4 changes in our internal control over financial reporting during [the most recently completed fiscal
5 quarter] that have materially affected, or are reasonably likely to materially affect, our internal
6 control over financial reporting.” (*Id.*)

7 Contrary to those representations, Amyris’s accounting department was not increasing and
8 improving but in fact was experiencing near constant turnover; was staffed predominately by
9 inexperienced temporary employees in both regular staff and senior management positions; and
10 was struggling to function. (*Id.* ¶¶ 34-41, 49.) Thus, far from remediating the prior internal control
11 weaknesses and experiencing no new issues, plaintiffs allege that Amyris’s internal controls were
12 deteriorating further and new failures were occurring as the result of the Company’s adoption of
13 ASC 606, none of which was disclosed to investors. (*Id.* ¶ 49.) Defendants failed to disclose that
14 the Company was in the process of preparing financial statements for 2018 that included royalty
15 revenues based uncertain estimates that would further strain Amyris’s internal control over
16 financial reporting, as they would later be required to admit. (*Id.*) Defendants’ representations left
17 investors with the false or misleading impression that Amyris was curing its prior internal controls
18 weaknesses and no new concerns needed to be disclosed in prevent that statement from being false
19 or misleading.

20 Further, Melo and Valiasek, in their roles as CEO and CFO, signed off on the SOX
21 certifications in Amyris’s 10-Qs and annual report, attesting to the accuracy of the reports, the
22 disclosure of any weakness or change in the company’s internal controls over financial reporting,
23 and the corrective actions the company was taking regarding its prior failures. (*Id.* ¶¶ 48, 49, 56,
24 64, 65.) However, both Melo and Valiasek were aware of pre-existing material weaknesses as well
25 additional, then-existing material weaknesses in Amyris’s internal control over financial
26 reporting—namely that it lacked the necessary information to account effectively for the royalty
27 revenues it was reporting (*id.* ¶ 68) and that its accounting department was struggling to function
28 due to constant turnover (*id.* ¶¶ 34-41). As Amyris would later admit, these undisclosed material

1 weaknesses again significantly increased the likelihood that their reported financial statements were
2 unreliable. (*Id.* ¶ 76.)

3 Accordingly, Amyris’s statements, as certified by Melo and Valiasek, representing to
4 investors and the SEC that there were no changes “reasonably likely to materially affect” Amyris’s
5 internal control over financial reporting satisfy the pleading standard with respect to being
6 objectively false, misleading, and undisclosed throughout the Class Period.

7 **B. Scier**

8 The Court further finds that the allegations herein, taken in their totality, sufficiently allege
9 a strong inference of scier as required under the PSLRA. “Scier may be established . . . by
10 showing that the defendants knew their statements were false, or by showing that defendants were
11 reckless as to the truth or falsity of their statements.” *Gebhart*, 595 F.3d at 1041. Although
12 scier is an inquiry into the defendant’s subjective state of mind, “the objective unreasonableness
13 of a defendant’s conduct may give rise to an inference of scier.” *Id.* at 1041-42. Thus, “an
14 extreme departure from the standards of ordinary care . . . which presents a danger of misleading
15 buyers or sellers that is either known to the defendant or is so obvious that the actor must have been
16 aware of it” can supply evidence of scier. *Id.* (quoting *Hollinger v. Titan Capital Corp.*, 914
17 F.2d 1564, 1569 (9th Cir. 1990) (en banc)). “To determine whether a ‘strong’ inference has been
18 pleaded, ‘the reviewing court must ask: When the allegations are accepted as true and taken
19 collectively, would a reasonable person deem the inference of scier at least as strong as any
20 opposing inference?’” *Webb*, 884 F.3d at 850 (quoting *Tellabs*, 551 U.S. at 326.)

21 Here, plaintiffs allege significant GAAP violations resulting in millions of dollars in
22 overstated royalty revenue based on nothing more than projections of future sales. They allege
23 facts, including confidential witness statements to show that defendants had access to and would
24 have known information contradicting the statements they were making to investors. They allege
25 defendants had accounting knowledge and occupied key roles in the company’s decision-making
26 such that knowledge of the falsity of their statements can be imputed. In addition, defendants had
27 responsibility for internal financial controls that they had already conceded were weak and at risk
28 of reporting material misrepresentation yet continued to certify that remedial efforts were

1 underway. What is more, plaintiffs plausibly allege that defendants had reason to misrepresent the
2 company's royalty revenues during the relevant time period due to the company's dire financial
3 condition and the individual defendants' potential to profit from inflated revenue reports in bonuses
4 and stock sales. The Court considers each category of scienter allegations in turn.

5 1. GAAP Violations

6 First, the alleged GAAP violations here were significant and repeated throughout the class
7 period. To support a strong inference of scienter based on alleged GAAP violations, a complaint
8 must describe them with sufficient particularity "so that 'a court can discern whether the alleged
9 GAAP violations were minor or technical in nature, or whether they constituted widespread and
10 significant inflation of revenue.'" *Daou Sys.*, 411 F.3d at 1016–17 (quoting *In re McKesson*, 126
11 F.Supp.2d at 1273); *see also S.E.C. v. Todd*, 642 F.3d 1207, 1218–19 (9th Cir. 2011) (sufficient
12 evidence of scienter where recording sale as revenue violated GAAP and CFO understood that it
13 was inconsistent with GAAP at the time it was recorded); *McKesson*, 126 F.Supp.2d at 1273
14 ("[W]hen significant GAAP violations are described with particularity in the complaint, they may
15 provide powerful indirect evidence of scienter. After all, books do not cook themselves."); *Sec. &*
16 *Exch. Comm'n v. Bardman*, 216 F.Supp.3d 1041, 1052–53 (N.D. Cal. 2016) (finding allegations
17 sufficient to support strong inference of scienter where complaint alleged "that GAAP requires a
18 company to record a 'lower of cost or market' (LCM) charge if the value of inventory is less than
19 its market value," that [defendants] knew of this rule, and that they failed to write-down inventory
20 value when they should have."); *Thomas v. Magnachip Semiconductor Corp.*, 167 F.Supp.3d 1029,
21 1042 (N.D. Cal. 2016) ("[a]ccounting errors that prove to have a significant impact on core
22 business operations-*i.e.* cash, revenue, profits, liquidity . . . sometimes give rise to a compelling
23 inference of scienter," quoting *In re Medicis Pharm. Corp. Sec. Litig.*, No. CV-08-1821-PHX-
24 GMS, 2010 WL 3154863, at *5 (D. Ariz. Aug. 9, 2010)). "If the GAAP violations are minor or
25 technical, there is less implication that senior management was aware of the misstatement[, but i]f
26 the GAAP violations involve substantial clients or significant inflation of revenue, 'a strong
27 inference arises that senior management intentionally misstated earnings.'" *In re Capstone Turbine*
28 *Corp. Sec. Litig.*, No. 15-CV-8914-DMG-RAOX, 2018 WL 836274, at *6 (C.D. Cal. Feb. 9, 2018)

1 (quoting *McKesson*, 126 F.Supp.2d at 1273). Thus, “plaintiff must show with particularity how the
2 adjustments affected the company’s financial statements and whether they were material in light of
3 the company’s overall financial position.” *Daou*, 411 F.3d at 1018.

4 Defendants argue that mere publication of inaccurate revenue figures does not establish
5 scienter.¹⁹ Defendants contend that they made good-faith royalty revenue estimates, using a brand-
6 new accounting rule that ultimately turned out to be wrong and were no more than negligent.
7 Based upon the allegations here, the Court disagrees.

8 Plaintiffs’ allegations describe a substantial misstatement of revenue that ultimately had a
9 devastating impact on a company already in serious trouble before the accounting violations
10 occurred. They establish the sort of widespread and significant inflation of revenue that would
11 support a finding of scienter. Further, Valiasek stated that a portion of the poor third quarter results
12 arose from “a much smaller amount of fragrance partner royalty revenue that was earned **but could**
13 **not be recognized in Q3 due to ASC 606 requirements.**” (FAC ¶ 68, emphasis supplied.) This
14 acknowledgment by Valiasek—that ASC 606 restricted recognition of royalty revenue even if the
15 company considered it “earned”—strongly indicates that Valiasek understood that ASC 606
16 precluded recognition of royalty revenues based solely on projected sales, but nevertheless
17 continued to report farnesene royalty revenues based on projected sales, contrary to ASC 606. *Cf.*
18 *Todd*, 642 F.3d at 1218–19 (sufficient evidence of scienter where CFO and controller knew “the
19 auditors wouldn’t go for” recognizing sale as revenue but did so anyway, in violation of GAAP);
20 *see also Lloyd v. CVB Fin. Corp.*, 811 F.3d 1200, 1207 (9th Cir. 2016) (in order to allege strong
21 inference of scienter based on failure to follow GAAP must allege, for example, “that a company’s
22 CFO was aware that the practice was improper”).

23 //

24 //

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26 ¹⁹ Defendants’ citation to *DSAM Global Value Fund v. Altris Software, Inc.*, 288 F.3d 385,
27 390 (9th Cir. 2002) on this point is distinguishable. There, the court found the allegations that an
28 *outside* accounting and auditing firm hired by the company failed to follow GAAP and catch the
company’s improper revenue recognition did not compel an inference of intentional or reckless
conduct as opposed to mere carelessness. Here, the allegation is that the company’s key executives
disregarded GAAP and had access to information contradicting revenue recognition statements they
themselves made.

2. Access to Contradictory Information

Second, defendants Melo and Valiasek had access to information contradicting their statements, supporting an inference that they knew those statements to be false. “[P]articulated allegations that defendants had ‘actual access to the disputed information’ may raise a strong inference of scienter. *Dearborn Heights*, 856 F.3d at 620. Further, “[a]llegations regarding management’s role in a corporate structure and the importance of the corporate information about which management made false or misleading statements may also create a strong inference of scienter when made in conjunction with detailed and specific allegations about management’s exposure to factual information within the company.” *Id.* (quoting *South Ferry LP, No. 2 v. Killinger*, 542 F.3d 776, 785 (9th Cir. 2008)).

Here, the statements of the confidential witnesses (CW’s) confirm both Melo and Valiasek, in addition to being top executives in the company with access to the financial information by virtue of those positions, were themselves reviewing the revenue numbers monthly or weekly. (FAC ¶¶ 38, 39.) Both met frequently with the top accounting personnel and received regular reports on the company’s financial information. (*Id.* ¶ 39.) Valiasek was not only controlled and managed accounting and financial reporting but was personally involved in day-to-day accounting operations due to high turnover in a small department. (*Id.* ¶¶ 38-40.)²⁰ Valiasek was actively engaged in the process of revenue recognition and financial reporting. (*Id.* ¶ 40.) And Valiasek was aware that the accounting department was struggling to operate effectively due to high turnover and lack of experienced employees. (*Id.*) She would have been aware that temporary employees were filling key roles, such as SEC reporting and accounting. (*Id.*) CW2 stated that Valiasek “worked closely with the technical accounting, especially with [the VP of Technical Accounting],” who was primarily responsible for handling the revenue from Amyris’s royalty agreement with DSM. (*Id.* ¶ 38.)

²⁰ CWs here are alleged to have served in the company’s accounting and financial operations department during the relevant period. CW1 worked in accounting and financial operations. (FAC ¶ 34.) CW2 worked in the accounting department, primarily in operational accounting. (*Id.* ¶ 37.) Both were in positions to possess knowledge of the information they provided. (*Id.* ¶¶ 34-41.)

3. Accounting Knowledge and Involvement in Core Operations

1 Third, both Melo and Valiasek had significant accounting knowledge and training and were
2 in positions of control over Amyris’s core operations. By virtue of their specific knowledge of and
3 access to the financial information here, as well as their knowledge of the company’s precarious
4 financial state and failure of internal controls, Melo and Valiasek can be inferred to have known
5 that the reported revenues were not based on actual sales.
6

7 “The core operations doctrine—the theory that facts critical to a business’s core
8 operations . . . are known to a company’s key officers—can be one relevant part of a complaint that
9 raises a strong inference of scienter.” *Azar v. Yelp, Inc.*, No. 18-CV-00400-EMC, 2018 WL
10 6182756, at *20 (N.D. Cal. Nov. 27, 2018) (citing *South Ferry*, 542 F.3d at 784) (internal citations
11 omitted). Scienter can be inferred even in the absence of more particularized allegations “where
12 the nature of the relevant fact is of such prominence that it would be ‘absurd’ to suggest that
13 management was without knowledge of the matter.” *Reese v. Malone*, 747 F.3d 557, 576 (9th Cir.
14 2014), *overruled on other grounds by Dearborn Heights*, 856 F.3d 605. For example, in *Berson*,
15 the Ninth Circuit found a strong inference that officers “directly responsible for [the company’s]
16 day-to-day operations” would not have known about stop work orders affecting tens of millions of
17 dollars of the company’s work. *Berson*, 527 F.3d at 988. Similarly, in *Reese*, the court held that
18 scienter could be imputed to a corporate officer since the statements were specific and reflective of
19 her access to disputed information. *Reese*, 747 F.3d at 576 (finding it “absurd to believe” that head
20 of operations, an experienced chemical engineer, was without knowledge of the contradictory
21 information when she made alleged false statements regarding oil spill).

22 Here, the company was in serious debt and faced a continuing deficit in internal controls
23 over financial reporting. Melo and Valiasek had certified that the failures in internal controls
24 created a significant likelihood of additional material misstatements to investors. Even when they
25 conceded, in their November 2018 statements, that \$15 million in expected third quarter revenues
26 had not materialized, and that they had “no visibility on the actual royalty” from Nenter, both Melo
27 and Valiasek continued to assure investors that the first two quarters, made with the same faulty
28 recognition in violation of GAAP, were “realized” revenues. (FAC ¶ 68.) That Melo and Valiasek

1 would not have known that the millions of dollars in revenues had not been realized, despite their
2 constant monitoring of the company’s debts and the revenues, and their duties to active remediation
3 plan on the financial controls issues, rises to the level of the “absurd” that the Ninth Circuit found
4 in *Berson and Reese*.

5 **4. Failure of Internal Controls**

6 Fourth, defendants’ alleged failure to maintain an effective control environment, and their
7 attestations to the contrary, supports a strong inference of scienter. Both Defendants were required
8 to oversee and manage financial reporting and the effectiveness of Amyris’s internal controls. Both
9 attested in their certifications under the Sarbanes–Oxley Act that their financial reporting was
10 accurate, that they had “[d]esigned such internal control over financial reporting, or caused such
11 internal control over financial reporting to be designed under our supervision, to provide reasonable
12 assurance regarding the reliability of financial reporting and the preparation of financial
13 statements”, and that there were no undisclosed material errors or changes. On (FAC ¶¶ 57, 65,
14 71.) Months later, defendants later confirmed that *during the Class Period*, they had “no visibility
15 on the actual royalty” amounts (*id.* ¶ 68), that “a material error was [being] made related to the
16 estimates for recognizing revenue for royalty payments . . . under [ASC] 606” for the 2018
17 quarterly financial statements (*id.* ¶ 76), that they “did not design and operate effective controls
18 over . . . complex, significant non-routine transactions related to licenses and royalty revenue
19 recognition” (Murphy Dec., Exh. A, at p. 13).²¹ These allegations, added to the others here, support
20 an inference that defendants were aware of matters relevant to their certifications or recklessly
21 failed to make themselves aware. *See Howard v. Everex Sys., Inc.*, 228 F.3d 1057, 1061 (9th Cir.
22 2000) (“when a corporate officer signs a document on behalf of the corporation, that signature will
23 be rendered meaningless unless the officer believes that the statements in the document are true.”);
24 *see Thomas*, 167 F.Supp.3d at 1043 (allegations that defendants signed SOX certifications attesting

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26
27 ²¹ Plaintiffs also allege facts that they contend establish a motivation to mislead, including
28 stock sales and bonuses tied to performance. Because the Court finds that the allegations discussed
above are sufficient to establish a strong inference of scienter, it need not reach the merits of the
parties’ arguments as to the sufficiency of these additional allegations.

1 to accuracy of quarterly statements and that management was “not maintaining an effective control
2 environment” supported scienter).²²

3 **5. Motivation to Misstate Revenues**

4 Finally, plaintiffs allege that defendants were motivated to misrepresent recognized
5 revenues both for the sake of the company and for their personal gain. “A strong correlation
6 between financial results and stock options or cash bonuses for individual defendants may
7 occasionally be compelling enough to support an inference of scienter.” *Zucco Partners*, 552 F.3d
8 at 1004 (scienter can be shown depending on “how intimately the bonuses were tied to the
9 company’s financials” including comparisons with prior years’ bonuses and correlation between
10 bonuses and performance).

11 Plaintiffs allege that defendants used Amyris’s artificially inflated stock to provide needed
12 financing to continue operations during a period when the company was struggling with significant
13 debt and had “substantial doubt about its ability to continue as a going concern.” (FAC ¶ 91
14 [quoting 2017 Form 10-K]; ¶ 41 (CW2 statement that company’s debts and repayment schedules
15 were significant concern).) Plaintiffs allege that, on August 21, 2018, defendants conducted a
16 secondary offering, selling millions of shares of stock to come up with \$46 million in desperately
17 needed cash. (*Id.* ¶ 91.) This secondary offering occurred a little over two weeks after its August 6
18 press release and earnings call touting its \$24.8 million dollars in revenue for the second quarter of
19 2018, and just one week after Amryris filed its August 14 10-Q, as certified by Melo and Valiasek,
20 announcing \$6.88 million in royalty revenue and \$23.19 million in revenue for the period ending
21 June 30, 2018. (*Id.* ¶¶ 61, 64.) Plaintiffs’ allegations support an inference that defendants made
22 their revenue statements with fraudulent intent. *See WPP Luxembourg Gamma Three Sarl v. Spot*
23 *Runner, Inc.*, 655 F.3d 1039, 1052 (9th Cir. 2011), *abrogated on other grounds by Lorenzo v. Sec.*
24

25 ²² The Ninth Circuit has held that “boilerplate language in a corporation’s 10-K form or
26 required certifications under Sarbanes-Oxley section 302” will not create a strong inference of
27 scienter on their own or save otherwise insufficient scienter allegations. *Zucco Partners*, 552 F.3d
28 at 1003. However, specific allegations related to those certifications may be part of a totality
giving rise to a compelling inference of scienter. *See Thomas*, 167 F.Supp.3d at 1043 (allegations
of SOX certifications can be one “part of a broader picture from which a court may, at the initial
pleading stage, infer a compelling claim of scienter. This is squarely in line with applicable case
law.”) (citing *America West*, 320 F.3d at 944–45).

1 & *Exch. Comm'n*, 139 S. Ct. 1094 (2019) (allegation that company “needed continued infusion of
2 investment capital” supported finding of scienter as against founders of company); *see also In re*
3 *Portal Software, Inc. Sec. Litig.*, No. C-03-5138 VRW, 2005 WL 1910923, at *12 (N.D. Cal. Aug.
4 10, 2005) (though insufficient standing alone, allegation of motivation to inflate stock price “in
5 order to conduct a successful secondary public offering and obtain much-needed operating capital”
6 was “motive evidence . . . stronger than the generic ‘desire to raise capital’ which can be attributed
7 to every company”); *Howard*, 228 F.3d at 1064-65 (executives’ recognition of inadequate cash
8 flow and need for additional funding created potential for motivation to inflate sales and otherwise
9 misrepresent financials, supporting scienter).

10 Plaintiffs further allege that Melo and Valiasek stood to profit personally from their alleged
11 revenue misrepresentations. Amyris’s 2017 bonus structure was based upon reported revenue
12 (weighted 40%), technical milestone dollars (weighted 30%), production costs (weighted 15%) and
13 cash operating expenditures (weighted 15%). (FAC ¶ 92.) For 2018, Amyris’s executive bonus
14 structure was changed to make bonuses dependent only on reported revenues (50%) and gross
15 margins based primarily on royalty revenues (50%) with 12.5% of the bonus allocated for each
16 quarter and 50% allocated for the annual period. (*Id.* ¶ 92.) This change in the 2018 bonus
17 structure incentivized defendants to report overall revenues and particularly royalty revenues that
18 were inflated. These allegations stated the kind of “strong correlation” the Ninth Circuit has found
19 to support an inference of scienter. *See America West*, 320 F.3d at 944 (finding scienter adequately
20 alleged where complaint alleged executives were “motivated to inflate America West’s financial
21 results and stock prices because their eligibility for stock options and executive bonuses were based
22 principally on the company’s financial performance”); *In re Maxwell Techs., Inc. Sec. Litig.*, 18
23 F.Supp.3d 1023, 1044 (S.D. Cal. 2014) (“The existence of performance-based compensation
24 provides motive for the individual defendants to order or ignore misconduct that would increase
25 revenues. The Court considers this in its holistic review.”); *cf. Zucco Partners*, 552 F.3d at 1004
26 (allegation that bonuses were merely “based in part” on financial performance, not directly
27 correlated with it, insufficient to meet heightened pleading requirements).

28

1 Plaintiffs further allege that Melo profited in terms of stock sales during the class period,
 2 having sold 27,550 shares of personally held Amyris stock on July 16 and October 15, 2018, when
 3 Amyris stock traded at or near all-time highs of \$6.61 per share and \$7.50 per share, respectively,
 4 for proceeds of \$186,655.55. (FAC ¶ 93.) Plaintiffs allege that Melo’s sales were unusual since his
 5 *only* other sale within the prior five years was on January 16, 2018, for proceeds of \$83,172. (*Id.*,
 6 emphasis as alleged.) A defendant’s stock sales may be probative of scienter when coupled with a
 7 “‘meaningful trading history’ for purposes of comparison to the stock sales within the class period.”
 8 *Zucco Partners*, 552 F.3d at 1005. “Scienter can be established even if the officers who made the
 9 misleading statements did not sell stock during the class period.” *America West*, 320 F.3d at 944.
 10 However, here, the allegations of Melo’s sales during the class period and the significant uptick
 11 compared with his prior sales history are supportive of scienter.²³

12 6. Totality of the Allegations

13 When deciding whether a strong inference of scienter is pled, courts must consider the
 14 “totality of plaintiffs’ allegations.” *Daou*, 411 F.3d at 1022. “[T]he ultimate question is whether
 15 the defendant knew his or her statements were false, or was consciously reckless as to their truth or
 16 falsity.” *Gebhart*, 595 F.3d at 1042. Here, based upon the foregoing, the Court finds that the
 17 totality of the allegations supports a strong inference of scienter.

18 C. Section 20(a) Liability

19 Under the controlling Ninth Circuit test, to establish control person liability, a plaintiff must
 20 establish two elements: (1) a primary violation of federal securities laws; and (2) defendants
 21 exercised actual power or control over the primary violator. *Howard*, 228 F.3d at 1065. Based
 22 upon the foregoing, plaintiffs have alleged primary violations as well as the exercise of control over
 23 Amyris by defendants Melo and Valiasek. The motion to dismiss this claim fails.

24
 25 ²³ Defendants argue that plaintiffs have not alleged the percentage of shares sold such that
 26 the allegation is not probative of scienter. To the contrary, the Ninth Circuit has held that the
 27 percentage of total stock is not dispositive as to whether stock sales are indicative of scienter.
 28 *Nursing Home Pension Fund, Local 144 v. Oracle Corp.*, 380 F.3d 1226, 1232 (9th Cir. 2004)
 (explaining that stock trades are indicative of scienter in insider trading case when they are
 “‘dramatically out of line with prior trading practices at times calculated to maximize the personal
 benefit” and finding sale representing just 2.1 percent of holdings suspicious given timing and
 trading history).

1 **IV. CONCLUSION**

2 Based upon the foregoing, and considering the totality of the allegations, the Court finds
3 that the allegations sufficiently state the claims and the motion to dismiss is **DENIED**.

4 Defendants shall file their answer to the FAC within 21 days of this Order.

5 This terminates Docket No. 45.

6 **IT IS SO ORDERED.**

7 Date: October 5, 2020



8 **YVONNE GONZALEZ ROGERS**
9 **UNITED STATES DISTRICT COURT JUDGE**

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United States District Court
Northern District of California