

1 BORIS FELDMAN, State Bar No. 128838
 boris.feldman@freshfields.com
 2 DORU GAVRIL, State Bar No. 282309
 doru.gavril@freshfields.com
 3 JENNIFER LOEB, State Bar No. 266235
 jennifer.loeb@freshfields.com
 4 ELISE LOPEZ, State Bar No. 324199
 elise.lopez@freshfields.com
 5 OLIVIA ROSEN, State Bar No. 340120
 olivia.rosen@freshfields.com
 6 FRESHFIELDS BRUCKHAUS DERINGER US LLP
 855 Main Street
 7 Redwood City, CA 94063
 Telephone: (650) 618-9250

8
 9 *Attorneys for Defendants Rivian Automotive, Inc.,*
 10 *Robert J. Scaringe, Claire McDonough, Jeffrey R.*
 11 *Baker, Karen Boone, Sanford Schwartz, Rose*
 12 *Marcario, Peter Krawiec, Jay Flatley, and*
 13 *Pamela Thomas-Graham*

12 UNITED STATES DISTRICT COURT
 13 FOR THE CENTRAL DISTRICT OF CALIFORNIA
 14 WESTERN DIVISION

15 CHARLES LARRY CREWS, JR.,
 16 Individually and on Behalf of All Others
 Similarly Situated,

17 Plaintiff,

18 v.

19
 20 RIVIAN AUTOMOTIVE, INC., et al.,
 21 Defendants.

Case No.: 2:22-cv-01524-JLS-E

**RIVIAN DEFENDANTS’ NOTICE
 OF MOTION, MOTION TO
 DISMISS, AND MEMORANDUM OF
 POINTS AND AUTHORITIES IN
 SUPPORT OF MOTION TO
 DISMISS PLAINTIFFS’ AMENDED
 CONSOLIDATED COMPLAINT**

Hearing

Date: May 5, 2023
 Time: 10:30 a.m.
 Judge: Hon. Josephine L. Staton
 Ctrm: 8A, 8th Floor

NOTICE OF MOTION AND MOTION TO DISMISS

TO PLAINTIFFS AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT on May 5, 2023 at 10:30 AM at the U.S. District Court for the Central District of California, located at the First Street United States Courthouse, 350 West 1st St., Los Angeles, CA 90012, Courtroom 8A, 8th Floor, Defendants Rivian Automotive, Inc. (“Rivian” or the “Company”), Robert J. Scaringe, Claire McDonough, Jeffrey R. Baker, Karen Boone, Sanford Schwartz, Rose Marcario, Peter Krawiec, Jay Flatley, and Pamela Thomas-Graham (collectively, the “Rivian Defendants”) will and hereby do move to dismiss Plaintiffs’ Amended Consolidated Complaint for Violations of the Federal Securities Laws (the “Third Complaint”) (ECF 150) pursuant to Federal Rule of Civil Procedure 12(b)(6). This motion is accompanied by a brief setting forth the points and authorities on which Rivian Defendants rely.

Rivian Defendants’ counsel met and conferred with Plaintiffs’ counsel regarding this motion in accordance with Local Rule 7-3 on March 8, 2023. The parties were unable to reach agreement to resolve this dispositive motion.

For the reasons set forth in the accompanying brief, this Court should dismiss the Third Complaint with prejudice and grant any such further relief to which Rivian Defendants are justly entitled.

Dated: March 16, 2023

Respectfully submitted,

FRESHFIELDS BRUCKHAUS DERINGER US LLP

By: /s/ Boris Feldman

Boris Feldman

Attorneys for Defendants Rivian Automotive, Inc., Robert J. Scaringe, Claire McDonough, Jeffrey R. Baker, Karen Boone, Sanford Schwartz, Rose Marcario, Peter Krawiec, Jay Flatley, and Pamela Thomas-Graham

TABLE OF CONTENTS

1

2 INTRODUCTION 1

3 ARGUMENT 2

4 I. TWO NEW FORMER EMPLOYEES FAIL TO BOLSTER PLAINTIFFS’

5 DEFICIENT ALLEGATIONS 2

6 A. FE-4 Falls Short of the Ninth Circuit Requirements in *Zucco*..... 2

7 B. Similarly Deficient, FE-5’s Allegations Are Also Temporally Irrelevant .. 5

8 C. Plaintiffs Reprise Some Former-Employee Allegations from the Second

9 Complaint, But Curiously Omit Others 6

10 II. PLAINTIFFS DOUBLE DOWN ON A DEFICIENT FALSITY THEORY ... 7

11 A. Recycled Allegations regarding BOM Exceeding Retail Prices Fail 7

12 1. Companies Are Not Required to Disclose Product Costs 8

13 2. Rivian Did Not “Tout” Vehicle Pricing 9

14 3. The BOM Figures Alleged Are Not a Reliable Indicator of Production

15 Costs at Scale 11

16 4. No “Truth Bomb” Regarding Pricing 13

17 B. Plaintiffs’ Attempt to Resurrect Gross Profit Allegations Also Fails 13

18 C. Allegations about December 16, 2021 Earnings Call Fail Again 15

19 III. PLAINTIFFS’ ADDITIONAL ALLEGATIONS FAIL TO RAISE A

20 COMPELLING INFERENCE OF SCIENTER 16

21 A. Additional Scienter Allegations Attributed to FEs 4 and 5 Are Unreliable

22 and Irrelevant 16

23 1. Plaintiffs’ Irrelevant Allegations about the Bill of Materials 16

24 2. Sourcing Components at Lower Prices 18

25 3. The Purported “Impossibility” of Changing Suppliers 19

26 B. Plaintiffs’ Remaining Allegations Repeat the Same Deficient Theories .. 21

27 1. Gate Review Meetings 21

28 2. Core Operations 21

3. Executive Focus 22

IV. THE ADDITIONAL ALLEGATIONS FAIL TO SALVAGE PLAINTIFFS’

SECURITIES ACT CLAIMS 23

A. Plaintiffs’ Securities Act Claims Sound in Fraud 24

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

B. No Showing that Defendants’ Bona Fide Beliefs Regarding Profitability
Were Falsely Held 24

CONCLUSION 25

TABLE OF AUTHORITIES

Page(s)

Cases

In re Alteryx Sec. Litig.,
2021 U.S. Dist. LEXIS 193324 (C.D. Cal. June 17, 2021) 20

In re Am. Apparel, Inc. S’holder Litig.,
855 F. Supp. 2d 1043 (C.D. Cal. 2012) 19

Ardolino v. Mannkind Corp.,
2016 U.S. Dist. LEXIS 189690 (C.D. Cal. Aug. 23, 2016) 13, 25

Browning v. Amyris, Inc.,
2014 U.S. Dist. LEXIS 39549 (N.D. Cal. Mar. 24, 2014) 2, 3, 4, 17

In re Canandaigua Sec. Litig.,
944 F. Supp. 1202 (S.D.N.Y. 1996) 9

City of Dearborn Heights Act 345 Police & Fire Ret. Sys. v. Align Tech., Inc.,
856 F.3d 605 (9th Cir. 2017) 14, 23

City of Sunrise Firefighters’ Pension Fund v. Oracle Corp.,
2019 U.S. Dist. LEXIS 216801 (N.D. Cal. Dec. 17, 2019) 6, 12

In re Downey Sec. Litig.,
2009 U.S. Dist. LEXIS 83443 (C.D. Cal. Aug. 21, 2009) *passim*

In re Eargo, Inc. Sec. Litig.,
2023 U.S. Dist. LEXIS 24984 (N.D. Cal. Feb. 14, 2023) 10, 24, 25

In re Eventbrite, Inc. Sec. Litig.,
2020 U.S. Dist. LEXIS 74651 (N.D. Cal. Apr. 28, 2020) 10

Ferraro Fam. Found., Inc. v. Corcept Therapeutics Inc.,
501 F. Supp. 3d 735 (N.D. Cal. 2020) 17

Ferreira v. Funko Inc.,
2021 U.S. Dist. LEXIS 59102 (C.D. Cal. Feb. 25, 2021) *passim*

Hunt v. Bloom Energy Corp.,
2021 U.S. Dist. LEXIS 187321 (N.D. Cal. Sept. 29, 2021) 14

In re Invision Techs., Inc. Sec. Litig.,
2006 U.S. Dist. LEXIS 76458 (N.D. Cal. Aug. 31, 2006) 20

	Page(s)
1	
2 <i>Iron Workers Local 580 Joint Funds v. Nvidia Corp.,</i>	
3 522 F. Supp. 3d 660 (N.D. Cal. Mar. 2, 2021)	16, 17
4 <i>Kipling v. Flex Ltd.,</i>	
5 2020 U.S. Dist. LEXIS 232631 (N.D. Cal. Dec. 10, 2020)	4, 7
6 <i>Macomb Cnty. Emps. ' Ret. Sys. v. Align Tech., Inc. ,</i>	
7 39 F.4th 1092 (9th Cir. 2022)	9
8 <i>McGovney v. Aerohive Networks, Inc.,</i>	
9 367 F. Supp. 3d 1038 (N.D. Cal. 2019)	3
10 <i>Meltzer Inv. GMBH v. Corinthian Colls., Inc.,</i>	
11 540 F.3d 1049 (9th Cir. 2008)	13, 16
12 <i>In re Noah Educ. Holdings, Ltd. Sec. Litig.,</i>	
13 2010 U.S. Dist. LEXIS 34459 (S.D.N.Y. Mar. 31, 2010)	9
14 <i>Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund,</i>	
15 575 U.S. 175 (2015)	24, 25
16 <i>Pittleman v. Impac Mortg. Holdings, Inc.,</i>	
17 2009 U.S. Dist. LEXIS 18213 (C.D. Cal. Mar. 9, 2009)	18
18 <i>In re Pivotal Sec. Litig.,</i>	
19 2020 U.S. Dist. LEXIS 128696 (N.D. Cal. July 21, 2020)	10, 14
20 <i>Plumley v. Sempra Energy,</i>	
21 847 Fed. App'x. 426 (9th Cir. 2021)	19
22 <i>Prodanova v. H.C. Wainwright & Co., LLC,</i>	
23 2019 U.S. Dist. LEXIS 167101 (C.D. Cal. July 2, 2019)	19
24 <i>Rubke v. Capitol Bancorp,</i>	
25 551 F.3d 1156 (9th Cir. 2009)	24
26 <i>Sayve v. Forescount Techs. Inc.,</i>	
27 2021 U.S. Dist. LEXIS 193207 (N.D. Cal. Oct. 6, 2021)	19
28 <i>Shi v. Amphio Phrams.,</i>	
2020 U.S. Dist. LEXIS 158778 (C.D. Cal. June 19, 2020)	17
<i>In re Skechers USA, Inc. Sec. Litig.,</i>	
444 F. Supp. 3d 498 (S.D.N.Y. 2020)	12

	Page(s)
1	
2 <i>Steamfitters Local 449 Pension Plan v. Molina Healthcare,</i>	
3 2018 U.S. Dist. LEXIS 217852 (C.D. Cal. Dec. 13, 2018)	16
4 <i>In re Syntex Corp. Sec. Litig.,</i>	
5 95 F.3d 922 (9th Cir. 1996)	11
6 <i>Tai Jan Bao v. SolarCity Corp.,</i>	
7 2016 U.S. Dist. LEXIS 105179 (N.D. Cal. Aug. 9, 2016)	8
8 <i>In re Talis Biomedical Corp. Sec. Litig.,</i>	
9 2022 U.S. Dist. LEXIS 222835 (N.D. Cal. Dec. 9, 2022)	15
10 <i>Tellabs, Inc. v. Major Issues & Rights, Ltd.,</i>	
11 551 U.S. 308 (2007)	16
12 <i>Turocy v. El Pollo Loco Holdings, Inc.,</i>	
13 2017 U.S. Dist. LEXIS 135390 (C.D. Cal. Mar. 20, 2017)	23
14 <i>In re Vantive Corp. Sec. Litig.,</i>	
15 283 F.3d 1079 (9th Cir. 2002)	17
16 <i>In re Verisign, Inc., Deriv. Litig.,</i>	
17 531 F. Supp. 2d 1173 (N.D. Cal. 2007)	21
18 <i>In re Versant Object Tech. Corp.,</i>	
19 2001 U.S. Dist. LEXIS 25009 (N.D. Cal. Dec. 4, 2001)	11
20 <i>Waterford Twp. Police & Fire Ret. Sys. v. Mattel, Inc.,</i>	
21 321 F. Supp. 3d 1133 (C.D. Cal. 2018)	3, 5, 6
22 <i>Webb v. SolarCity Corp.,</i>	
23 884 F.3d 844 (9th Cir. 2018)	8
24 <i>In re Wet Seal, Inc. Sec. Litig.,</i>	
25 518 F. Supp. 2d 1148 (C.D. Cal. 2007)	18
26 <i>Zucco Partners, LLC v. Digimarc Corp.,</i>	
27 2009 U.S. App. LEXIS 583 (9th Cir. Jan. 12, 2009)	19
28 <i>Zucco Partners, LLC v. Digimarc Corp.,</i>	
552 F.3d 981 (9th Cir. 2009)	2, 7

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Other Authorities

Julia Piper, *A Q&A With Rivian, the Amazon-Backed Electric Truck Startup*, Greentech Media (Feb. 20, 2019), <https://www.greentechmedia.com/articles/read/rivian-amazon-backed-electric-truck-startup>22

1 **TABLE OF ABBREVIATIONS**

2

Abbreviation	Meaning
¶ or Third Complaint	Amended Consolidated Complaint, dated March 2, 2023 (ECF No. 150)
Order	Order Granting: (1) Rivian Defendants' Motion to Dismiss; and (2) Underwriter Defendants' Motion to Dismiss, dated February 16, 2023 (ECF No. 149)
Prosp.	Rivian's Prospectus Rule 424(b)(4), filed with the SEC on November 12, 2021 (ECF No. 135-5)
Second Complaint ¶	Consolidated Complaint, dated July 22, 2022 (ECF No. 125)
FE(s)	Former Employee(s)

3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **INTRODUCTION**

2 Over the first year of serial production, Rivian had a remarkable performance. It
3 produced nearly 25,000 vehicles—compared to fewer than 1,000 in 2021. It moved
4 forward with plans to build its second factory in Atlanta. Reviewers describe Rivian
5 cars “like no other truck we’ve ever driven. Effortlessly powerful, incredibly
6 comfortable, and supremely capable both on- and off-road.” ¶ 108.

7 Yet, in the Third Complaint filed in this case, Plaintiffs double down on the
8 same flawed theories the Court has already rejected. Order at 37. This motion
9 addresses only Plaintiffs’ incremental allegations. They fail for four reasons:

- 10 ● **Unreliable Former Employees.** A closer look shows that these individuals
11 were junior employees, with limited responsibilities and a narrow view of
12 Company performance. Contrary to Plaintiffs’ claim that Rivian was “stuck”
13 with a costly Bill of Materials (or “BOM”), the new FEs confirm that Rivian
14 was actively at work reducing costs as production scaled up. *Infra* Section I.
- 15 ● **Repeating the Same Falsity Allegations.** Plaintiffs again claim that Rivian
16 could not be profitable because, before production even started, the R1 BOM
17 exceeded price. The Court already rejected this premise as a matter of law.
18 Order at 23, 34. The Court correctly held that projected costs at a time when
19 Rivian had produced only 12 vehicles are not indicative of serial production
20 costs. *Id.* at 34-35. Rivian never promised profitability, and explicitly warned
21 that it might never be profitable. *Id.* at 22-23. *Infra* Section II.
- 22 ● **No Incremental Scienter Allegations.** Plaintiffs’ new FEs add nothing with
23 respect to scienter. They claim no interaction with any of the Defendants, and
24 any inferences Plaintiffs try to coax out of the FEs do not rise to plausibility,
25 much less to a compelling inference of scienter pleaded with particularized facts,
26 as required by the PSLRA. *Infra* Section III.
- 27 ● **Equally Flawed Section 11 Claim.** Plaintiffs’ Securities Act claims again
28 sound in fraud, and at most, show that some junior employees, at a moment in

1 time before production even started, may have disagreed with management’s
2 opinion regarding pricing decisions. Supreme Court precedent makes clear that
3 such allegations fail to state a claim. *Infra* Section IV.

4 When dismissing their prior complaint, the Court issued clear directions to
5 Plaintiffs to “correct[] the deficiencies identified herein in a manner consistent with all
6 Rule 11 obligations.” Order at 37. But, “in disregard of the Court’s . . . Order,”
7 Plaintiffs “simply re-allege[] many of the very allegations that the Court found
8 inadequate under the PSLRA.” *In re Downey Sec. Litig.*, 2009 U.S. Dist. LEXIS
9 83443, at *35-36 (C.D. Cal. Aug. 21, 2009). This demonstrates the futility of
10 Plaintiffs’ amendment and shows that dismissal with prejudice is appropriate.

11 **ARGUMENT**

12 **I. TWO NEW FORMER EMPLOYEES FAIL TO BOLSTER PLAINTIFFS’**
13 **DEFICIENT ALLEGATIONS**

14 The Third Complaint lacks any of the allegations that the Ninth Circuit requires
15 to credit anonymous former employees. *Zucco Partners, LLC v. Digimarc Corp.*, 552
16 F.3d 981, 995 (9th Cir. 2009) (requiring “sufficient detail about a confidential witness’
17 position within the defendant company to provide a basis for attributing the facts
18 reported by that witness to the witness’ personal knowledge”). Because the Third
19 Complaint’s incremental allegations rise and fall with the accounts of these FEs, it may
20 be dismissed on this basis alone. *Browning v. Amyris, Inc.*, 2014 U.S. Dist. LEXIS
21 39549, at *64 (N.D. Cal. Mar. 24, 2014) (dismissal appropriate where there was “scant
22 other evidence” besides statements by an insufficiently identified witness “for
23 believing that the defendants’ statements were false”).

24 **A. FE-4 Falls Short of the Ninth Circuit Requirements in *Zucco***

25 **No Alleged Interaction with Defendants.** Critically, the Third Complaint fails
26 to allege *any* interactions between FE-4 and Defendants. FE-4 is not a reliable source
27 of information about Defendants’ knowledge for two reasons.

28 First, without contact with Defendants, there are no allegations about how they

1 could have learned of FE-4's impressions. *Waterford Twp. Police & Fire Ret. Sys. v.*
2 *Mattel, Inc.*, 321 F. Supp. 3d 1133, 1154 (C.D. Cal. 2018) (“[S]ince Plaintiff does not
3 allege that FE2 had any meaningful contact with Defendants, the allegations related to
4 FE2 do not support an inference that Defendants had any knowledge of the same
5 inventory reports to which FE2 had access.”).

6 Second, having alleged no contact with Defendants, FE-4 cannot make any
7 reliable statement about their states of mind. *Ferreira v. Funko Inc.*, 2021 U.S. Dist.
8 LEXIS 59102, at *91 (C.D. Cal. Feb. 25, 2021) (“The CAC fails to allege [the
9 confidential witnesses] had direct contact with any of the Defendants, let alone that
10 they could opine competently and with personal knowledge as to what any of the
11 Defendants knew”). The Court should not credit FE-4's speculation.

12 **No Allegations Regarding Responsibilities.** Putting aside the lack of any
13 exposure to Defendants, Plaintiffs fail to allege that FE-4 is a credible witness.
14 Critically, Plaintiffs provide no details regarding FE-4's responsibilities. FE-4 is
15 described only as a “member of Rivian's Cost Engineering Group” who “attended
16 meetings wherein the cost of the bill of materials was discussed.” ¶ 41. A
17 “descri[ption of] what the [FE's] **group** does, but not what the [FE] does or what his
18 responsibilities at [the company] are” is “insufficient to explain how the [FE] has
19 personal knowledge of the allegations he makes.” *Amyris*, 2014 U.S. Dist. LEXIS
20 39549, at *65 (emphasis added); *see also McGovney v. Aerohive Networks, Inc.*, 367 F.
21 Supp. 3d 1038, 1062 (N.D. Cal. 2019) (“[FE] statements . . . lack reliability because
22 Plaintiffs have not provided enough information about the [FEs'] responsibilities”).
23 The “Cost Engineering Group” as a whole did not even have responsibility for
24 calculating the cost of the entire vehicle; the battery (an essential component of an EV)
25 was not within its purview. ¶ 116.

26 In *Amyris*, plaintiffs similarly relied on a confidential witness's account that the
27 biochemical company's publicly disclosed production volume targets far exceeded its
28 senior scientists' internal estimates (2014 U.S. Dist. LEXIS 39549, at *8-9) and were

1 “beyond what existing technology could make.” *Id.* at *14. But the court held that
2 plaintiffs, in only describing the group of which the confidential witness was a
3 member, had pleaded insufficient detail to establish that the confidential witness
4 himself was in a position to speak credibly on the relevant issues. *Id.* at *65. As in
5 *Amyris*, the lack of specificity regarding FE-4’s responsibilities undermines his
6 allegations. Considering that FE-4’s group was not even responsible for costing the
7 entire vehicle, his credibility is even further undermined. *Kipling v. Flex Ltd.*, 2020
8 U.S. Dist. LEXIS 232631, at *33-34 (N.D. Cal. Dec. 10, 2020) (confidential witnesses
9 “unreliable because they never even worked on” project at center of false statements).

10 **No Allegations Regarding Seniority.** The Third Complaint also fails to plead
11 with specificity FE-4’s seniority, such that the Court might assess the extent of
12 expertise and access to information underlying FE-4’s allegations. The Third
13 Complaint only refers to FE-4 as one of an unspecified number of “Lead Cost
14 Engineers.” ¶ 117. It does not identify whether this was a junior role (it was); if FE-4
15 had any reports (he did not); or if he was entrusted with managerial duties that would
16 give him a broader perspective (he was not). Similarly, in *Amyris* the confidential
17 witness was referred to only as a “senior scientist.” 2014 U.S. Dist. LEXIS 39549, at
18 *6. The *Amyris* court declined to credit such allegations. *Id.*

19 As a result, Plaintiffs do not plead FE-4’s role with sufficient particularity to
20 establish his authority on the BOM or its effect on Rivian’s potential profitability. In
21 *Funko*, plaintiffs relied on confidential witnesses to allege that the company misled
22 investors as to the amount of its excess inventory and likely effect on profit. 2021 U.S.
23 Dist. LEXIS 59102, at *10-11. The court dismissed the complaint because, among
24 other things, “[t]he [amended complaint] alleges facts showing [the relevant
25 confidential witnesses] each had a narrow scope of responsibilities and contains no
26 allegations that through their positions either understood or were familiar with Funko’s
27 global operations and had a complete understanding of Funko’s inventory holdings in
28 relation to its business operations.” *Id.* at *91.

1 **No Access to Relevant Information.** FE-4 bases his allegations on a “database
 2 known as ‘Project X’” where the Cost Engineering Group (and not FE-4 in particular)
 3 allegedly tracked costs of some materials. ¶¶ 116, 193. The completeness of data
 4 contained in “Project X” is questionable, as both FE-4 and FE-5 convey that “the cost
 5 of the battery,” a key component of R1s, “was excluded from Project X *at some point*
 6 *prior to the IPO.*” ¶¶ 193, 285 (emphasis added). Moreover, it is unclear what FE-4
 7 means by “Project X”: the BOM for the first 12 cars Rivian produced in Q3 2021 or
 8 some other period and quantity? In *Mattel*, the court held that, “[w]hile FE3 may have
 9 had access to the ‘systems that managed Mattel’s inventory and manufacturing,’
 10 Plaintiff ha[d] not pled sufficient facts to permit the inference that FE3 had personal
 11 knowledge of Mattel’s retail inventory levels *during the Class Period*, let alone that he
 12 communicated such knowledge to Defendants.” 321 F. Supp. 3d at 1154 (emphasis
 13 added); *see also Downey*, 2009 U.S. Dist. LEXIS 83443, at *31 (dismissing with
 14 prejudice; confidential witness allegations “still lack ‘sufficient particularity to support
 15 the probability that a person in the position occupied by the source would possess the
 16 information alleged’”).

17 Taken together, the allegations credited to FE-4 lack any basis for suggesting,
 18 much less pleading with factual particularity, any basis for securities fraud.

19 **B. Similarly Deficient, FE-5’s Allegations Are Also Temporally Irrelevant**

20 As with FE-4, the allegations attributed to FE-5 fail for multiple reasons.

21 **Same Lack of Allegations Regarding Responsibilities, Seniority, and Access.**

22 The Third Complaint’s allegations with respect to FE-5’s qualifications are identically
 23 deficient. Like FE-4, FE-5 does not allege interaction with a single Defendant. *See* ¶¶
 24 42, 113-18, 193, 196, 276-81. Like FE-4, FE-5 is only described as a “Lead Cost
 25 Engineer[]” (¶ 117) who was a “member of Rivian’s Cost Engineering Group” (¶ 42)
 26 and had access to the same incomplete sources of information as FE-4 (¶ 116). These
 27 allegations fail for the reasons discussed above.

28 **Allegations Do Not Relate to the Relevant Time Period.** Even if FE-5 were a

1 credible witness, his allegations are temporally irrelevant. “[Confidential witness]
 2 accounts must be ‘contemporaneous’ with the alleged misstatements This is
 3 crucial because [the] ‘statement or omission must be shown to have been false or
 4 misleading *when made.*’” *City of Sunrise Firefighters’ Pension Fund v. Oracle Corp.*,
 5 2019 U.S. Dist. LEXIS 216801, at *41 (N.D. Cal. Dec. 17, 2019).

6 Here, FE-5 alleges that, in 2019 (two years before the IPO and serial production)
 7 the “purchasing department” (of which FE-5 was not a member) determined Rivian’s
 8 materials cost estimates to be unrealistically low. ¶¶ 113-14. That same year, FE-5
 9 alleges presence at a meeting wherein FE-5 “presented information indicating that the
 10 [cost] consultant’s estimates were too low.” ¶ 115. FE-5 also alleges that by 2020, the
 11 BOM estimate exceeded \$100,000. ¶ 117. The closest Plaintiffs come to alleging a
 12 date remotely near the Class Period is FE-5’s allegation that “by September 2021” the
 13 BOM was between \$110,000 and \$115,000. ¶ 118. Putting aside that this conflicts
 14 with FE-4’s BOM amount (*id.*), these allegations date two months before the
 15 Company’s IPO (and the Class Period), as well as *months ahead of serial production*.

16 In falling well outside the Class Period, FE-5’s allegations do not bear at all on
 17 the falsity of the challenged statements or the scienter of the Defendants *at the time of*
 18 *the IPO*. See *Mattel*, 321 F. Supp. 3d at 1154 (“Despite FE1’s access to pertinent
 19 information . . . Plaintiff’s allegations indicate FE1 left Mattel in October
 20 2016—before the Class Period . . . Accordingly, FE1 could not have personal
 21 knowledge of the retail inventory levels at the time Defendants’ allegedly false
 22 statements were made.”). As in *Mattel*, FE-5’s lack of alleged knowledge with respect
 23 to the Class Period forecloses the relevance of FE-5’s allegations.

24 **C. Plaintiffs Reprise Some Former-Employee Allegations from the Second**
 25 **Complaint, But Curiously Omit Others**

26 More telling than the FE allegations Plaintiffs added to the Third Complaint are
 27 the ones *they chose to abandon*.

28 **Plaintiffs Drop FE-1’s Allegations Altogether.** The reason is simple: his

1 allegations *undercut* Plaintiffs’ theory that Rivian would never be profitable. FE-1, a
2 former “finance” employee, alleged that Rivian’s internal projections *did* project
3 profitability. Second Complaint ¶ 79. This runs counter to Plaintiffs’ theory that
4 Rivian would never achieve profitability; no longer helpful, it is tossed aside.

5 **Plaintiffs Discard FE-3’s Allegations That Disprove Their Theory.** The
6 Third Complaint also cites FE-3’s prior allegations selectively, discarding those that
7 contradict Plaintiffs’ theory regarding profitability or conflict with the new FEs’. The
8 Third Complaint drops FE-3’s allegation that “at the time of the IPO” the BOM was
9 \$90,000, as it diverges from (and is lower than) the estimate provided by the new FEs
10 and calls into question the accuracy of *any* of these figures given their lack of
11 corroboration. *Compare* Second Complaint ¶ 84, *with* ¶ 118. As the Ninth Circuit
12 held, in answering the question of whether “the witnesses in question have personal
13 knowledge of the events they report . . . [courts] look to ‘the level of detail provided by
14 the confidential sources [and] the *corroborative* nature of the other facts alleged
15 (including from other sources).” *Zucco*, 552 F.3d at 995 (emphasis added). Similarly,
16 the Third Complaint drops FE-3’s recollection that “at the time of the IPO” Rivian
17 internally forecasted reaching profitability, albeit not on some unspecified timeline that
18 Plaintiffs would like. Second Complaint ¶ 38.

19 Courts frequently reject plaintiffs’ attempts to rely on contradictory confidential
20 witnesses. *Kipling*, 2020 U.S. Dist. LEXIS 232631, at *46 (no falsity where “some
21 [confidential witness] allegations support the *veracity* of Statements 2 and 3”);
22 *Downey*, 2009 U.S. Dist. Lexis 83443, at *19 (dismissing complaint; the confidential
23 witness statements “in addition to suffering from foundational issues, often contradict
24 one another”). The same is appropriate here.

25 **II. PLAINTIFFS DOUBLE DOWN ON A DEFICIENT FALSITY THEORY**

26 **A. Recycled Allegations regarding BOM Exceeding Retail Prices Fail**

27 Even setting aside the contradictions and gaps in the accounts of Plaintiffs’ new
28 FEs, the rephrased allegations about the Bill of Materials simply double down on the

1 same theory that is deficient as a matter of law. *See Tai Jan Bao v. SolarCity Corp.*,
 2 2016 U.S. Dist. LEXIS 105179, at *19 (N.D. Cal. Aug. 9, 2016) (dismissing third
 3 amended complaint that added one confidential witness and, “[i]n large part, [] rel[ie]d
 4 on the same body of allegations that the Court previously found to be insufficient”),
 5 *aff’d sub nom. Webb v. SolarCity Corp.*, 884 F.3d 844 (9th Cir. 2018).

6 The Third Complaint again alleges that BOM exceeded initial R1 pricing.
 7 *Compare* Second Complaint ¶ 84 (“even the least expensive R1 model had a bill of
 8 materials that exceeded a customer’s purchase price at the time of the IPO”), *with* ¶¶
 9 118, 281 (“by the time of the November 2021 IPO, the cost of the R1S and R1T bill of
 10 materials was well in excess of the retail prices of those vehicles”).

11 On this basis, Plaintiffs reiterate their theory that not disclosing this alleged
 12 disparity between initial cost of materials and sale price “rendered false and misleading
 13 [Rivian’s] [risk] disclosures regarding . . . materials costs [and] rais[ing] prices” in its
 14 Prospectus and Q3 2021 10-Q (¶¶ 158, 170-71), its explanation of Q3 2021 negative
 15 gross profit (¶¶ 164-65), and its beliefs regarding achieving profitability. ¶¶ 159-63.

16 These allegations fail, again, for four reasons. First, Rivian is not obligated to
 17 disclose its BOM. Second, Rivian did not “tout” its pre-March 2022 pricing, nor
 18 promise that it would not change. Third, because the BOM figures alleged are all from
 19 before the IPO or Rivian’s *first month of production*, they are not indicative of Rivian’s
 20 ability to achieve profitability at scale. Last, the March 2022 price increase was not
 21 the “truth bomb” Plaintiffs allege but a reality necessitated by a precipitous rise in
 22 materials costs that Plaintiffs still fail to acknowledge.

23 **1. Companies Are Not Required to Disclose Product Costs**

24 Rivian, or any company, for that matter, is not obligated to disclose its materials
 25 costs. The Court has already made this clear: “If Plaintiffs’ contention is that Rivian
 26 should have disclosed specifically that the Bill of Materials cost for each R1 unit
 27 exceeded its purchase price leading up to the IPO, disclosure at that level of specificity
 28 was not necessary under either Item 105 or Item 303.” Order at 34. Other federal

1 courts echo the same conclusion. *See also In re Noah Educ. Holdings, Ltd. Sec. Litig.*,
2 2010 U.S. Dist. LEXIS 34459, at *19-20 (S.D.N.Y. Mar. 31, 2010).

3 In *Noah*, the “Plaintiff allege[d] that the Registration Statement ‘failed to
4 disclose that, at the time of [its] IPO, [Noah] was experiencing a significant increase in
5 raw material costs for certain components of the Company’s [key product]’” and that
6 this information was “material” to investors. *Id.* at *4. But the court concluded that
7 Noah had no affirmative obligation to disclose its materials costs:

8 The cost of raw materials is only one step removed from Noah’s reported cost of
9 revenue, a prominent financial metric. . . . Plaintiff’s theory of liability would
10 appear to be little more than ***an end-run around the carefully delineated SEC
regulations*** that specify what financial data must be disclosed in offering
documents.

11 *Id.* at *20 (emphasis added). So too here. Rivian disclosed the GAAP financial
12 metrics that the law requires, and it was not required to do more.

13 2. Rivian Did Not “Tout” Vehicle Pricing

14 Because Rivian has no affirmative obligation to disclose its cost of materials, or
15 its pricing strategy (*see* Order at 32-33), Plaintiffs re-assert their theory that
16 Defendants made material misstatements by omission. ¶ 126 (alleging “fail[ure] to
17 disclose . . . increases in the cost of the bill of materials [and purported] resol[ution] to
18 increase R1T and R1S retail prices”). But as we previously noted, “[d]isclosure is
19 required . . . only when necessary ‘to make . . . statements made, in the light of the
20 circumstances under which they were made, not misleading,’” and Plaintiffs fail to
21 identify any such statements. ECF No. 141 at 2-3 (quoting *Macomb Cnty. Emps.’ Ret.*
22 *Sys. v. Align Tech., Inc.*, 39 F.4th 1092, 1100 (9th Cir. 2022)).

23 **Rivian’s Prospectus Did Not Discuss Pricing.** First, as the Court already
24 noted, because “the Prospectus does not address pricing for the R1 ***anywhere***[,] that
25 the R1’s bill of materials cost exceeded its purchase price at the time of the IPO was
26 not a material fact that needed to be disclosed[.]” Order at 34-35 (emphasis added);
27 *see also In re Canandaigua Sec. Litig.*, 944 F. Supp. 1202, 1208 (S.D.N.Y. 1996)
28 (dismissing 10(b) claim where company “made no statement that indicate[d] either a

1 utilization or disavowal of any potential price discounting scheme”). On the contrary,
2 as Plaintiffs admit, Rivian disclosed that prices could change. ¶ 126. Rivian “did
3 disclose the exact risks that Plaintiffs argue were not.” *In re Eventbrite, Inc. Sec.*
4 *Litig.*, 2020 U.S. Dist. LEXIS 74651, at *45 (N.D. Cal. Apr. 28, 2020).

5 **Bona Fide Risk Factors Cannot Be Transformed into Misrepresentations.**

6 Aware that there is no direct mention of pricing in the Registration Statement,
7 Plaintiffs attempt to convert Rivian’s risk factors into misstatements regarding pricing.
8 *See* ¶ 124 (warning that business could suffer if “customers do not perceive” R1s as
9 “high value” and “cost competitive”); ¶ 125 (warning of the potential to “increase the
10 announced or expected prices of our vehicles in response to increased costs”); *see also*
11 ¶¶ 137, 170. But “[t]he Ninth Circuit has held that ‘risk factors’ are not actionable
12 without further factual allegations indicating that the risks had already ‘come to
13 fruition.’” *In re Eargo, Inc. Sec. Litig.*, 2023 U.S. Dist. LEXIS 24984, at *31 (N.D.
14 Cal. Feb. 14, 2023) (finding no “well-pleaded facts” that “would make Eargo’s risk
15 disclosures inaccurate”); *see also In re Pivotal Sec. Litig.*, 2020 U.S. Dist. LEXIS
16 128696, at *19 (N.D. Cal. July 21, 2020) (same). For example, in *Pivotal*, the court
17 rejected plaintiffs’ argument that disclosures around the company’s elongated sales
18 cycle “fram[ed] risks as hypotheticals rather than current and past realities,” because a
19 single confidential witness allegation referencing the sales cycle “failed to . . . indicate
20 that there was anything inconsistent with the challenged disclosure[.]” 2020 U.S. Dist.
21 LEXIS 128696, at *19. Here, as Defendants have explained in great detail (ECF No.
22 135 at 3-4), the world changed at lightning speed from November to December 2021,
23 and the Third Complaint “does not provide anything beyond conclusory assertions that
24 the risks [to increase prices] ‘had already materialized.’” *Pivotal*, 2020 U.S. Dist.
25 LEXIS 128696, at *20.

26 **Pre-IPO Third-Party Statements Not Attributable to Defendants.** Finding

27 nothing in Rivian’s Prospectus addressing R1 pricing, Plaintiffs now resort to quoting
28 extensively from pre-IPO press coverage and analyst reports (*see* ¶¶ 47-87), to argue

1 that “Rivian[] [caused its] value proposition to consumers and investors [to] center[]
 2 on its ability to deliver ‘world-beating specs’ at ‘a very reasonable price tag’” (i.e., its
 3 pre-March 2022 pricing). ¶ 131. Crucially, none of the news articles or analyst reports
 4 quote statements *by Defendants* touting pricing. *In re Syntex Corp. Sec. Litig.*, 95 F.3d
 5 922, 934 (9th Cir. 1996) (dismissing complaint where “Defendants never endorsed or
 6 adopted the statements of analysts”); *In re Versant Object Tech. Corp.*, 2001 U.S. Dist.
 7 LEXIS 25009, at *23 (N.D. Cal. Dec. 4, 2001) (same).

8 In *Syntex*, plaintiffs attempted to attribute analysts’ financial projections to
 9 defendants, but the Ninth Circuit affirmed dismissal, holding that “these statements
 10 were the culmination of a one-way flow of information, from Syntex representatives to
 11 analysts and from the analysts to their customers[;] Syntex did not adopt or entangle
 12 itself in the analyst’ statements.” 95 F.3d at 934. Similarly, Plaintiffs are unable to
 13 point to any statements by Rivian Defendants touting pricing. In fact, in answer to a
 14 question whether price would be a “speed bump” for the Company, rather than “tout”
 15 its pricing, Dr. Scaringe explained that “we’ve strategically positioned ourselves to go
 16 after the aspirational side of this market” and emphasized that “[the R1] is a very
 17 high-performance [vehicle] and very technically advanced[.]” ¶ 83.

18 **3. The BOM Figures Alleged Are Not a Reliable Indicator of** 19 **Production Costs at Scale**

20 Putting aside that Rivian had no obligation to disclose its BOM in the
 21 Prospectus or the BOM’s effect on Rivian’s pricing strategy, the figures alleged in the
 22 Third Complaint do not support Plaintiffs’ assertion that “Rivian needed to
 23 significantly increase R1 prices if it had any hopes of generating positive gross profits
 24 on its R1S and R1T vehicles.” ¶ 121. Plaintiffs allege three BOM figures: a 2018
 25 consultant provided estimate of \$70,000, a 2020 Cost Engineering Group employee
 26 estimate “exceed[ing] \$100,000”, and a range of \$110-118,000 that was purportedly
 27 “locked in” by the start of production in September 2021. ¶¶ 113, 117-18. All of these
 28 figures precede the IPO. Furthermore, none support the proposition, much less with

1 particularity, that Rivian would never achieve profitability when producing at scale.
2 “This is crucial because [the] ‘statement or omission must be shown to have been false
3 or misleading *when made*.’” *Oracle*, 2019 U.S. Dist. LEXIS 216801, at *41; *see also*
4 *Funko*, 2021 U.S. Dist. LEXIS 59102 at *90-91 (dismissing complaint where
5 allegations were from well before the class period). Further, both the principle of
6 economies of scale and Plaintiffs’ own FEs refute the assertion that Rivian could not
7 reduce BOM after September 2021.

8 **Economies of Scale.** First, “[t]he doctrine of economies of scale supports the
9 conclusion that [D]efendants could have plausibly expected to [reduce BOM] by
10 achieving greater [production scale].” *In re Skechers USA, Inc. Sec. Litig.*, 444 F.
11 Supp. 3d 498, 526 n.16 (S.D.N.Y. 2020) (dismissing and holding that statements about
12 an anticipated decline in future expenses were not actionable). As Defendants
13 highlighted in their first motion to dismiss, Rivian produced only a dozen vehicles in
14 Q3 2021. ECF 135 at 6. Indeed, Plaintiffs acknowledged in a paragraph struck from
15 their Third Complaint that Rivian had produced very few vehicles for public customers
16 at the time of the IPO. *See* Second Complaint ¶ 3. Yet Plaintiffs do not explain how
17 Rivian’s BOM for its first 12 cars would be as high as its BOM for the 150,000
18 vehicles it projected it would be able to produce annually when its Normal, Illinois
19 plant was operating at full capacity. *Prosp.* at 42.

20 **FEs Explained How the BOM Could Decrease.** Tellingly, despite FE-4 and
21 FE-5 both purportedly having been employed at Rivian until late 2022, in a group
22 created for the sole purpose of reducing costs, the Third Complaint does not offer any
23 insight into the BOM after September 2021. Might Plaintiffs have left out the
24 inconvenient truth that the BOM *has* in fact gone down? FE-4 alleged that Rivian
25 “may have gained some ability to *negotiate* its material costs downward once its
26 production volumes doubled,” though the Third Complaint does not specify what
27 production volume figure FE-4 references (the dozen vehicles produced in Q3 2021?).
28 ¶ 120. Further, “both FE-4 and FE-5 explained that once production began, it was”

1 possible, albeit “difficult[,] to *change suppliers*.” ¶ 196 (emphasis added). Last, FE-3
 2 alleges that Rivian could reduce BOM by “sourc[ing] and implement[ing] *less*
 3 *expensive components* into its vehicles[.]” ¶ 121 (emphasis added). Despite
 4 Plaintiffs’ efforts to obscure the truth, the multiple ways of reducing BOM are apparent
 5 from the Third Complaint itself. Plaintiffs fail to plead that Rivian’s BOM necessitated
 6 a price increase for the Company to achieve profitability on any timeline. *See Ardolino*
 7 *v. Mannkind Corp.*, 2016 U.S. Dist. LEXIS 189690, at *16 (C.D. Cal. Aug. 23, 2016)
 8 (dismissing with prejudice for failure to “plead[] particularized facts showing that the
 9 challenged statements are false or misleading”).

10 **4. No “Truth Bomb” Regarding Pricing**

11 Last, Plaintiffs fail to plead how Rivian’s March 1, 2022 announcement of a
 12 price increase to its R1 vehicles was a “truth bomb” and not a reality necessitated by
 13 inflationary pressures caused by war and tripling commodity prices that ensued after
 14 Rivian’s IPO. ECF No. 135 at 3-4; Order at 13, 25. The Third Complaint’s own
 15 sources convey that the market expected a price increase. *See, e.g.*, ¶ 146 (“As
 16 explained by Vice: [p]rice increases are obviously a fact of life these days, especially
 17 with the car market, a key driver of inflation.”); ¶ 153 (citing JP Morgan report noting
 18 that price increases to future reservations “should offset currently foreseeable
 19 inflationary cost pressures”). *See Meltzer Inv. GMBH v. Corinthian Colls., Inc.*, 540
 20 F.3d 1049, 1070 (9th Cir. 2008) (“A litany of alleged false statements, unaccompanied
 21 by the pleading of specific facts indicating why those statements were false, does not
 22 meet this standard.”).

23 **B. Plaintiffs’ Attempt to Resurrect Gross Profit Allegations Also Fails**

24 Plaintiffs try again to allege that Rivian’s belief, as stated in the Prospectus, that
 25 it could increase its gross margin and generate a gross profit as the Company scaled
 26 production was materially false and misleading, because Rivian’s undisclosed BOM
 27 exceeded the R1s’ prices. ¶¶ 159-63. These allegations fail for two reasons. First,
 28 Plaintiffs are unable to plead that Rivian’s opinion was not genuinely held. Second,

1 Rivian *disclosed* that it might never be profitable and that it expected continued lack of
2 profitability even as it scaled. Prosp. at 57.

3 **Plaintiffs Fail to Allege Rivian’s Opinion Was Not Genuinely Held (or**
4 **Wrong).** The challenged disclosures are classic opinion statements. *See* ¶ 160 (“[W]e
5 believe that we will be able to increase our gross margin in the long term and generate
6 positive gross profit[.]”); ¶ 159 (“We expect to operate at a negative gross profit per
7 vehicle[.]”). Such statements are not actionable unless Plaintiffs “allege both that
8 ‘[Rivian] did not hold the belief [it] professed’ and that the belief is objectively
9 untrue.” *City of Dearborn Heights Act 345 Police & Fire Ret. Sys. v. Align Tech., Inc.*,
10 856 F.3d 605, 616 (9th Cir. 2017); *see also* *Hunt v. Bloom Energy Corp.*, 2021 U.S.
11 Dist. LEXIS 187321, at *14-16 (N.D. Cal. Sept. 29, 2021) (estimates involving
12 “exercise of judgment” are inactionable opinions); *Pivotal*, 2020 U.S. Dist. LEXIS
13 128696, at *40-41 (statements related to company’s financial projections were
14 inactionable opinions). Plaintiffs fail to allege objective falsity of the statements.
15 First, BOM had nothing to do with Rivian’s “[near term] negative gross profit per
16 vehicle,” because as explained in Defendant’s first motion to dismiss (ECF No. 135 at
17 6), the dominating cost for the few vehicles manufactured by the time of the IPO *was*
18 “fixed costs . . . spread across a smaller product base[.]” ¶ 159. And, as explained at
19 length above, Plaintiffs fail to allege that the BOM could not be reduced. *Supra* 12-13.
20 Second, Plaintiffs also fail in the subjective prong: that Defendants did not genuinely
21 believe that they could achieve that goal. *Infra* Section III (reviewing allegations of
22 Defendants’ state of mind).

23 **Rivian Warned It Was Not and Might Never Be Profitable.** As the Court
24 noted when dismissing the prior complaint, Rivian *explicitly* disclosed that it was not
25 profitable and may *never* be profitable. Order at 22. In the very portion of the
26 Prospectus quoted by Plaintiffs, Rivian disclosed that “[t]his dynamic will cause our
27 **gross profit losses to increase** on a dollar basis **even as our revenue increases from**
28 **ramping production volumes** over the short to medium term.” ¶ 159.

1 **C. Allegations about December 16, 2021 Earnings Call Fail Again**

2 Plaintiffs challenge the same statements from the December 16, 2021 earnings
3 call as they did in the Second Complaint. *Compare* Second Complaint ¶¶ 131-34,
4 *with* ¶¶ 164-69. We address each below.

5 **“Near term . . . negative drag on gross profit.”** Plaintiffs allege that Ms.
6 McDonough’s statement in the earnings call explaining Q3 2021 negative gross profit
7 was materially misleading in mentioning one factor (“high fixed cost . . . amortized
8 over a small but growing number of vehicles”) and omitting another; that BOM was
9 purportedly in excess of the R1 retail price. ¶ 164. As the Court has explained, Rivian
10 was not obligated to report its BOM. Order at 34. Further, like the analogous
11 statements challenged in the Prospectus explaining Q3 2021 performance, these
12 statements were correct. *See supra* 14.

13 **Inflationary Pressure and Pricing.** Plaintiffs again challenge Ms. McDonough
14 and Dr. Scaringe’s statements at the earnings call explaining that inflationary pressures
15 were a factor driving pricing considerations. ¶¶ 10, 138, 166. First, as the Court held,
16 there was nothing misleading about their explanation. Order at 25. Second, Plaintiffs’
17 straw man argument that these statements were materially misleading because a “price
18 increase was necessary for Rivian to become profitable” fails, because neither Dr.
19 Scaringe nor Ms. McDonough even mentioned profitability as a driving factor for
20 pricing considerations. ¶ 168. Moreover, Rivian’s concurrently filed 10-Q disclosed
21 that it did not expect to be profitable for the foreseeable future. *In re Talis Biomedical*
22 *Corp. Sec. Litig.*, 2022 U.S. Dist. LEXIS 222835, at *45 (N.D. Cal. Dec. 9, 2022)
23 (“The Registration Statement did not say that the Talis One platform was currently low
24 cost and manufactured at scale, and to the contrary, the Registration Statement
25 contained lengthy disclosures about the manufacturing risks.”).

26 None of Plaintiffs’ rephrased allegations can survive a motion to dismiss: they
27 double down on the same deficient theory of liability as their prior complaint.

28

1 **III. PLAINTIFFS’ ADDITIONAL ALLEGATIONS FAIL TO RAISE A**
 2 **COMPELLING INFERENCE OF SCIENTER**

3 The Court may also dismiss the Third Complaint for the independent reason that
 4 it fails to plead scienter. Plaintiffs’ additional allegations—which they attribute to two
 5 anonymous junior employees—fail to provide particularized facts giving rise to a
 6 “strong inference” that any Defendant “acted with an intent to deceive, manipulate, or
 7 defraud.” *Corinthian Colls.*, 540 F.3d at 1054; ECF No. 135 at 14. The rest of the
 8 Third Complaint simply repeats the same allegations as before.

9 **A. Additional Scienter Allegations Attributed to FEs 4 and 5 Are**
 10 **Unreliable and Irrelevant**

11 Aware that the scienter allegations from their Second Complaint do not meet the
 12 PSLRA’s heightened pleading standard, Plaintiffs introduce additional scienter
 13 allegations attributed to two additional former employees. *Supra* Section I. Those
 14 allegations cannot be credited because those employees did not have the seniority,
 15 roles, and access required under Ninth Circuit law. *Id.* In any event, even when
 16 considering Plaintiffs’ “new” allegations, they fail to raise an inference of scienter that
 17 is “cogent and at least as compelling as any opposing inference of nonfraudulent
 18 intent.” *Tellabs, Inc. v. Major Issues & Rights, Ltd.*, 551 U.S. 308, 314 (2007).

19 **1. Plaintiffs’ Irrelevant Allegations about the Bill of Materials**

20 Plaintiffs allege that Defendants “knew or were deliberately reckless in not
 21 knowing that the cost of the bill of the materials exceeded the R1T and R1S retail
 22 prices because of their access to Project X.” ¶ 193. The law is clear that “[m]ere
 23 access to information is insufficient to adequately allege scienter.” *Steamfitters Local*
 24 *449 Pension Plan v. Molina Healthcare*, 2018 U.S. Dist. LEXIS 217852, at *7 (C.D.
 25 Cal. Dec. 13, 2018) (dismissing complaint); *see also Iron Workers Local 580 Joint*
 26 *Funds v. Nvidia Corp.*, 522 F. Supp. 3d 660, 674-75 (N.D. Cal. Mar. 2, 2021) (same).

27 In *Nvidia*, the court rejected plaintiffs’ argument that defendants knowingly
 28 made false statements that Nvidia was insulated from cryptocurrency volatility, despite

1 alleging defendants’ “access to copious sales and technical usage data showing the
2 dramatic surge in cryptocurrency-related sales during the Class Period[,]” including **at**
3 **least five different reports**. 522 F. Supp. 3d at 674. The court held that plaintiffs
4 “fail[ed] to raise a strong inference of scienter, largely because Plaintiffs d[id] not
5 adequately tie the specific contents of any of these data sources to particular statements
6 so as to plausibly show that the Defendant who made each specified statement
7 knowingly or recklessly spoke falsely.” *Id.* at 674-75; *Amyris*, 2014 U.S. Dist. LEXIS
8 39549, at *14-15, 56 (claim that defendants “grabbed and used” projections
9 insufficient to plead scienter absent ““detailed and specific allegations’ sufficient to
10 show that [defendants] had actual knowledge that Amyris could not possibly meet its
11 projected volumes”). Plaintiffs’ allegations are far flimsier than in *Nvidia* and *Amyris*.
12 Plaintiffs do not allege what data were tracked as part of “Project X,” in what form the
13 data existed, how the data were displayed, how they changed over time, and what the
14 totality of data showed. *See Amyris*, 2014 U.S. Dist. LEXIS 39549, at *57
15 (“[P]laintiffs make no allegations about what data or information is in the database
16 Amyris scientists supposedly keep[.]”).

17 Even more important, Plaintiffs never allege that Defendants **actually accessed**
18 the data purportedly tracked within Project X. *See Nvidia*, 522 F. Supp. 3d at 678;
19 *Ferraro Fam. Found., Inc. v. Corcept Therapeutics Inc.*, 501 F. Supp. 3d 735, 768
20 (N.D. Cal. 2020) (dismissing where confidential witness never alleged that defendants
21 “actually accessed any sales or performance data” evidencing off-label marketing
22 scheme). Nor does the Third Complaint plead “contemporaneous facts in sufficient
23 detail and in a manner that would create a strong inference” that, at the time of the
24 IPO, Defendants *knew* or *believed* that Rivian’s costs of manufacturing its vehicles was
25 irretrievably stuck above the cars’ retail price. *In re Vantive Corp. Sec. Litig.*, 283 F.3d
26 1079, 1083 (9th Cir. 2002) (affirming dismissal); *see also Shi v. Amphio Pharms.*, 2020
27 U.S. Dist. LEXIS 158778, at *18 (C.D. Cal. June 19, 2020) (plaintiffs failed to plead
28 “existence of contemporaneous information . . . that contradicted or undermined

1 Defendants’ public statements at the time Defendants made those statements”).
2 *Projected costs years before* Rivian even began serial production cannot speak to
3 Defendants’ knowledge of long term profitability.

4 **2. Sourcing Components at Lower Prices**

5 Plaintiffs next allege that “Rivian attempted to re-source components at lower
6 prices[,] but those efforts went nowhere.” ¶ 195. That is the kind of conclusory
7 statement that courts have repeatedly rejected. *See Pittleman v. Impac Mortg.*
8 *Holdings, Inc.*, 2009 U.S. Dist. LEXIS 18213, at *8-9 (C.D. Cal. Mar. 9, 2009)
9 (confidential witness allegations that company “had so many bad loans” and there
10 were “disagreements . . . on a regular basis” were “vague statements insufficient to
11 support a finding of scienter”); *In re Wet Seal, Inc. Sec. Litig.*, 518 F. Supp. 2d 1148,
12 1176 (C.D. Cal. 2007) (allegation that company’s new clothing line had “disastrous
13 reviews” was “conclusory” and “fail[ed] to support scienter” to misrepresent
14 company’s financial outlook). Perhaps because this allegation actually contradicts
15 Plaintiffs’ liability theory, Plaintiffs do not plead when these efforts to resource
16 components occurred, who was involved, their scale, and their ultimate success.

17 Plaintiffs concede, according to their own anonymous witnesses, that Rivian did
18 seek to lower costs, had a department dedicated to it, and a strategy for achieving
19 profitability over time. *See* ¶¶ 116, 120-21, 196. Indeed, Plaintiffs themselves
20 acknowledge that the Cost Engineering Group had identified areas of reductions, and
21 actually reduced costs, for the R1s’ interior. ¶ 197. That Plaintiffs’ alleged “former
22 employees” left the Company a few months into the execution of this strategy says
23 nothing about its success, much less about Defendants’ state of mind. As important,
24 that state of mind is irrelevant given that Rivian never promised profitability and even
25 warned that the Company may never “achieve or be able to maintain profitability in
26 the future.” *Prosp.* at 57.

27 Take for example, the only—flimsy—allegation Plaintiffs make with respect to
28 Dr. Scaringe: Plaintiffs claim his desire to use real wood in the interior of Rivian’s

1 vehicles (¶ 195), somehow shows that he intended to commit securities fraud by
2 misleading the market about Rivian’s profitability. This is absurd. Why would Dr.
3 Scaringe, who owns a significant portion of Rivian, want to cripple his own company?
4 The far more compelling inference is that he is committed to designing a well-made
5 product, of which Rivian, its workers, its customers, and its investors can all be proud.
6 *See Zucco Partners, LLC v. Digimarc Corp.*, 2009 U.S. App. LEXIS 583, at *63-64
7 (9th Cir. Jan. 12, 2009) (plaintiffs’ scienter allegations “not as cogent or compelling as
8 a plausible alternative inference[;] there was no specific intent to fabricate the
9 accounting misstatements at issue here”); *In re Am. Apparel, Inc. S’holder Litig.*, 855
10 F. Supp. 2d 1043, 1084 (C.D. Cal. 2012) (same).

11 Plaintiffs’ Third Complaint does nothing more than reprise the prior assertions
12 of Defendants’ “hands-on manage[ment]” style, which Defendants addressed in their
13 first motion to dismiss. *See* ECF No. 135 at 19 n.6; *see also Sayve v. Forescount*
14 *Techs. Inc.*, 2021 U.S. Dist. LEXIS 193207, at *29 (N.D. Cal. Oct. 6, 2021) (claim that
15 defendant was a “micromanager” did not plead scienter). As the Ninth Circuit has
16 held, “[w]ithout more specific and particularized allegations of knowledge or
17 deliberate recklessness,” these claims instead “speak to precisely the ‘routine corporate
18 objectives such as the desire to obtain good financing and expand’ that we have
19 rejected in the past.” *Plumley v. Sempra Energy*, 847 Fed. App’x. 426, 429 (9th Cir.
20 2021) (affirming dismissal); *see also Prodanova v. H.C. Wainwright & Co., LLC*, 2019
21 U.S. Dist. LEXIS 167101, at *16 (C.D. Cal. July 2, 2019) (desire to maximize stock
22 price insufficient to plead scienter).

23 **3. The Purported “Impossibility” of Changing Suppliers**

24 Plaintiffs also claim that, “once production began, it was difficult to change
25 suppliers.” ¶ 196. These allegations fail for three reasons.

26 First, these allegations are irrelevant: Plaintiffs do not allege that changing
27 suppliers was required for long-term profitability—which Rivian never promised.
28 *Supra* 14. Showing the irrelevance of these allegations, the FEs speak only to costs

1 during the “the September 2021 timeframe,” before the IPO, and before commodities
2 prices skyrocketed and Rivian had even started production. ECF No. 135 at 3-4.

3 Second, the allegations are vague: what does “difficult” even mean? They come
4 nowhere close to “specific, contemporaneous facts creating a strong inference of
5 scienter” and, in fact, are purely conclusory. *In re Invision Techs., Inc. Sec. Litig.*,
6 2006 U.S. Dist. LEXIS 76458, at *23 (N.D. Cal. Aug. 31, 2006) (“Plaintiffs cannot
7 meet this burden simply by referencing the conclusory statements of others”); *In re*
8 *Alteryx Sec. Litig.*, 2021 U.S. Dist. LEXIS 193324, at *9-10 (C.D. Cal. June 17, 2021)
9 (rejecting “threadbare, conclusory allegations of a duplicitous intent”).

10 Third, Plaintiffs never allege that it was *impossible* to change suppliers, just that
11 it was “*difficult*.” That is the kind of subjective estimation that two junior employees
12 are poorly placed to make, especially given that FE-4 and FE-5’s duties did not involve
13 actually changing such suppliers. Their perception that other Rivian employees’
14 responsibilities were “difficult” says nothing about the ultimate issue of Company
15 profitability. *Funko*, 2021 U.S. Dist. LEXIS 59102, at *94 (“allegations seem more
16 reasonably interpreted as [FEs’] disagreement with [Rivian’s] management” than
17 creating a strong inference of scienter); *Downey*, 2009 U.S. Dist. LEXIS 83443, at *35
18 (“the second-guessing of management decisions by [FEs] does not provide a basis for
19 securities fraud.”). The Company actually disclosed in its IPO Prospectus that it did
20 *not* have long-term contracts with all of its suppliers, making it easier to change
21 suppliers, not harder. Prosp. at 48 (“We do not have long-term agreements with all of
22 our semiconductor chip manufacturers and suppliers.”); *id.* at 58 (risks include “our
23 ability to negotiate and execute definitive agreements, and maintain arrangements on
24 reasonable terms, with our various suppliers”).

25 In sum, Plaintiffs’ new allegations fail. Their “assertions of scienter [remain]
26 entirely conclusory . . . contain[ing] no specific allegations of contemporaneous
27 [information] supporting the assertions of scienter— not a single fact showing what
28 each defendant knew, when he/she knew it, or how he/she acquired that knowledge.”

1 *In re Verisign, Inc., Deriv. Litig.*, 531 F. Supp. 2d 1173, 1207 (N.D. Cal. 2007).

2 **B. Plaintiffs’ Remaining Allegations Repeat the Same Deficient Theories**

3 Plaintiffs also fail to bolster meaningfully the remaining scienter allegations.
4 For efficiency’s sake, Defendants incorporate the arguments from their prior motion to
5 dismiss that address those allegations that the Third Complaint simply copy and
6 pasted. *See* ECF No. 135 at 17-18 (allegations cribbed from dismissed employment
7 lawsuit say nothing of Defendants’ state of mind regarding pricing). Below, we
8 address only those allegations that appear facially different.

9 **1. Gate Review Meetings**

10 An argument central to Plaintiffs’ theory is that Defendants attended periodic
11 “Gate Review” meetings associated with unspecified “milestone[s]” or “gate[s]” to
12 launch the R1 wherein they “received report[s] that showed the cost increases of the
13 R1 vehicles.” ¶ 194. Plaintiffs now also allege that there were “nine ‘gates’ in total”
14 required internally for Rivian to “successfully launch its vehicles.” *See id.* That detail
15 changes nothing: Plaintiffs still fail to allege that any FE ever actually attended the
16 Gate Review meetings such that they might know the substance of each meeting, who
17 attended, and how the substance of the discussion would have evidenced Defendants’
18 purported intention to commit fraud or knowledge they were doing so. *See* ECF No.
19 135 at 16; *Downey*, 2009 U.S. Dist. LEXIS 83443, at *32 (FE statements “based on
20 hearsay, rumor, or speculation” are “deficient”).

21 **2. Core Operations**

22 Plaintiffs again attempt to impute a fraudulent state of mind to Defendants solely
23 because “the production, pricing, and sale” of the R1 vehicles is Rivian’s purported
24 “core business operation.” ¶ 201. Defendants already deconstructed the foundation of
25 Plaintiffs’ theory: Ms. McDonough’s mere access to forecasts, including a “Revenue
26 and Margins Report,” does not support the scienter inference, and nor does alleged
27 knowledge of the R1 BOM contradict her public statements. *See* ECF No. 135 at
28 17-18. Plaintiffs now proclaim it “implausible and absurd” that Defendants were

1 unaware of the R1 vehicles’ cost-to-price deficit in November 2021, having
 2 “repeatedly touted the R1T’s and R1S’s value proposition” from 2017 through 2019. ¶
 3 201. Their reasoning is flawed. First, as explained *supra* 5-6, allegations from 2-3
 4 years before the IPO say nothing of Defendants’ knowledge at the time of the IPO.
 5 Second, the idea that a Company would *not*, in its early days, “advertis[e] its
 6 top-of-the-line all-terrain features, world-class interiors, and very reasonable price tag”
 7 defies common sense. ¶ 201. Knowledge that, at the beginning of production,
 8 production costs would exceed retail prices does not mean that any Defendant knew
 9 that profitability was impossible. Again, Rivian never promised profitability. *Supra*
 10 14. None of these allegations make Rivian’s executives liable for securities fraud.

11 3. Executive Focus

12 Plaintiffs next contend that the Court should find a “compelling” inference that
 13 Dr. Scaringe knowingly violated the federal securities laws by virtue of the fact that he
 14 was “intimately involved” with “all aspects of the R1T and R1S, including the
 15 vehicles’ components, features, and pricing.” ¶ 202. If Plaintiffs were correct, then
 16 any CEO who cares deeply about their company would possess scienter. That is not
 17 the law. *See supra* 19 (allegations of an officer’s hands-on management do “not
 18 support a strong inference of scienter”). Dr. Scaringe’s stated intention in a February
 19 2019 Q&A to “ma[ke] sure that we’ve architected the vehicle for that premium
 20 [pricing] positioning” fails to suggest scienter for the same reasons. ¶ 202.

21 First, Plaintiffs take Dr. Scaringe’s words out of context. He was clarifying that
 22 Rivian sought to price the R1s comparably to their market competitors, to reflect that
 23 they are “very high-performance [vehicles] and very technically advanced in terms of
 24 self-driving, in terms of connectivity architecture, in terms of battery size.”¹ Plaintiffs’
 25 own complaint is replete with citations from industry experts touting these very
 26 features of the R1. *See, e.g.*, ¶¶ 54-56; 69-73. Second, Dr. Scaringe’s remarks cut

27 _____
 28 ¹ Julia Piper, *A Q&A With Rivian, the Amazon-Backed Electric Truck Startup*,
 Greentech Media (Feb. 20, 2019), [https://www.greentechmedia.com/articles/read/
 rivian-amazon-backed-electric-truck-startup](https://www.greentechmedia.com/articles/read/rivian-amazon-backed-electric-truck-startup).

1 against Plaintiffs’ theory: at the same Q&A, he explained his decision not to promote
 2 the vehicles until they were “truly ready,” so as to avoid “making statements that
 3 [were] hot air.” ¶ 202. Moreover, Dr. Scaringe’s remarks—years before production
 4 started—are irrelevant to his state of mind at the time of the IPO. *Funko*, 2021 U.S.
 5 Dist. LEXIS 59102, at *89-91 (confidential witness allegation that defendants
 6 discussed excess inventory at meetings prior to start of class period insufficient to
 7 plead scienter).

8 Unable to plead any actual allegations of Defendants’ culpable state of mind,
 9 Plaintiffs make the last-ditch argument that Defendants demonstrated scienter by
 10 disclosing the vehicles’ retail price to investors at its IPO roadshow. ¶ 203. Again, it
 11 defies belief that any company *would not* disclose the price of its products—at least if
 12 it had any hope of actually ever selling them. *Supra* 22.²

13 In short, what may appear at first blush to be “new” allegations because of the
 14 changed wording of the Third Complaint, reveal themselves to be the same deficient
 15 conclusory assertions that failed to plead scienter in Plaintiffs’ Second Complaint.

16 **IV. THE ADDITIONAL ALLEGATIONS FAIL TO SALVAGE PLAINTIFFS’** 17 **SECURITIES ACT CLAIMS**

18 As in the Second Complaint, Plaintiffs again hedge their deficient securities
 19 fraud claims by pleading that the exact same statements also violated Section 11 of the
 20 Securities Act of 1933, which does not require them to plead scienter. ¶¶ 318-31.
 21 Plaintiffs’ claims under Section 11 fail because they: (1) sound in fraud yet fail to
 22

23 ² Plaintiffs also assert that the “temporal proximity between the Exchange Act
 24 Defendants’ alleged misstatements and subsequent disclosures . . . bolsters the strong
 25 inference” of scienter. ¶ 204. Defendants previously explained that the world changed
 26 quickly and materially in the one month between November and December 2021. ECF
 27 No. 135 at 3-4. In any event, ““temporal proximity of an allegedly fraudulent
 28 statement or omission and a later disclosure’ is insufficient on its own to establish
 scienter[.]” *See Align Tech.*, 856 F.3d at 622 (affirming dismissal); *see also Turocy v.*
El Pollo Loco Holdings, Inc., 2017 U.S. Dist. LEXIS 135390, at *35 (C.D. Cal. Mar.
 20, 2017) (dismissing complaint). Because Plaintiffs’ other scienter allegations are
 deficient, the temporal proximity argument fails.

1 plead falsity with particularity, and (2) consist of opinion statements that Plaintiffs
2 have not proven to be either objectively or subjectively false.

3 **A. Plaintiffs’ Securities Act Claims Sound in Fraud**

4 “[P]laintiffs are required to allege their claims with increased particularity under
5 [FRCP] 9(b) if their complaint ‘sounds in fraud.’” *Rubke v. Capitol Bancorp*, 551 F.3d
6 1156, 1161 (9th Cir. 2009). As the Ninth Circuit held, “[w]here . . . a complaint
7 employs *the exact same factual allegations* to allege violations of section 11 as it uses
8 to allege fraudulent conduct under section 10(b) of the Exchange Act, we can assume
9 that it sounds in fraud.” *Id.* (emphasis added). In pleading carbon copies of the
10 misstatements they challenge under 10(b), Plaintiffs fail to satisfy this increased
11 requirement of particularity. Moreover, Plaintiffs’ own language contradicts their bare
12 disclaimer that their “Securities Act claims are not based on any knowing or
13 deliberately reckless misconduct on the part of the Securities Act Defendants [and]
14 [t]hus . . . do not sound in fraud[.]” ¶ 266. For example, Plaintiffs allege that “Senior
15 Executives *Knew* That the Cost of the R1 Platform’s Bill of Materials Was Rising[.]”
16 ¶ 285 (emphasis added); *see also* ¶¶ 285-88.

17 **B. No Showing that Defendants’ Bona Fide Beliefs Regarding Profitability** 18 **Were Falsely Held**

19 Rivian’s Prospectus clearly indicates opinion statements: “we *expect* to operate a
20 negative gross profit per vehicle...” and “we *believe* that we will be able to increase
21 our gross margin in the long term.” ¶¶ 296-97 (emphasis added). Thus, in addition to
22 alleging that such opinions were objectively wrong, “[Plaintiffs] must identify
23 particular (and material) facts going to the basis for [Rivian’s] opinion . . . whose
24 omission makes the opinion statement at issue misleading to a reasonable person
25 reading the statement fairly and in context.” *Omnicare, Inc. v. Laborers Dist. Council*
26 *Constr. Indus. Pension Fund*, 575 U.S. 175, 194 (2015); *see also Eargo*, 2023 U.S.
27 Dist. LEXIS 24984, at *21-22 (holding that plaintiffs’ Section 11 claim “f[ell] short of
28 meeting the *Omnicare* requirements[, because] [t]he Complaint contains no allegations

1 of subjective falsity”). Plaintiffs have failed to do so.

2 Pleading that an anonymous former employee of unspecified rank believed that
3 Rivian could not decrease its BOM does not show objective falsity. Justice Kagan
4 offers an instructive example on this point in *Omnicare*: nondisclosure of the fact “that
5 a single junior attorney expressed doubts about a practice’s legality, when six of his
6 more senior colleagues gave a stamp of approval . . . would not make the [senior
7 colleagues’] opinion misleading, *even if the minority position ultimately proved*
8 *correct*[.]” *Omnicare*, 575 U.S. at 190 (emphasis added); *see also Eargo*, 2023 U.S.
9 Dist. LEXIS 24984, at *22 (“A statement of opinion, moreover, ‘is not necessarily
10 misleading when an issuer knows, but fails to disclose, some fact cutting the other
11 way[;] opinions generally ‘rest on a weighing of competing facts.’”).³ Additionally,
12 Rivian expressly disclaimed profitability at the time of its IPO and “for the foreseeable
13 future.” *Prosp.* at 57. So while Plaintiffs fail to show that BOM could not decrease in
14 the future (*see supra* 12-13), whether or not the BOM exceeded R1 retail price at the
15 time of the IPO is in fact irrelevant.

16 **CONCLUSION**

17 Defendants respectfully request that the Court dismiss this action with prejudice.

18
19 Dated: March 16, 2023

FRESHFIELDS BRUCKHAUS DERINGER US LLP

20 By: /s/ Boris Feldman
Boris Feldman

21 *Attorneys for the Rivian Defendants*
22
23
24

25 ³ Because Plaintiffs do not add new allegations regarding Items 105 and 303, these
26 claims should be dismissed again for the reasons noted in the Court’s Order. Order at
27 34-35. Because Plaintiffs fail to plead primary violations of Sections 11 and 10(b),
28 their secondary claims under Sections 15 of the Securities Act and 20(a) of the
Exchange Act also fail. *Mannkind*, 2016 U.S. Dist. LEXIS 189690, at *20 (“[W]here a
complaint does not plead a primary violation of § 10(b), the control person claim under
§ 20(a) ‘may be dismissed summarily.’”).