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15 **UNITED STATES DISTRICT COURT**
16 **CENTRAL DISTRICT OF CALIFORNIA**
17 **WESTERN DIVISION**

18 CHARLES LARRY CREWS, JR.,
19 Individually and on Behalf of All
20 Others Similarly Situated,

21 Plaintiffs,

22 v.

23 RIVIAN AUTOMOTIVE, INC., et al.,

24 Defendants.

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

**UNDERWRITER DEFENDANTS’
NOTICE OF MOTION AND
MOTION TO DISMISS AMENDED
CONSOLIDATED COMPLAINT;
JOINDER TO RIVIAN
DEFENDANTS’ MOTION TO
DISMISS; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

Hearing

Date: May 5, 2023

Time: 10:30 a.m.

Judge: Hon. Josephine L. Staton

Ctrm: 8A, 8th Floor

1 **NOTICE OF MOTION AND MOTION TO DISMISS AND JOINDER**

2 **TO THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:**

3 **PLEASE TAKE NOTICE** that on May 5, 2023, at 10:30 a.m., or at such later
4 date and time as the Court may order, Defendants Morgan Stanley & Co. LLC,
5 Goldman Sachs & Co., LLC, J.P. Morgan Securities LLC, Barclays Capital Inc.,
6 Deutsche Bank Securities Inc., Allen & Company LLC, BofA Securities, Inc.,
7 Mizuho Securities USA LLC, Wells Fargo Securities, LLC, Nomura Securities
8 International, Inc., Piper Sandler & Co., RBC Capital Markets, LLC, Robert W.
9 Baird & Co. Inc., Wedbush Securities Inc., Academy Securities, Inc., Blaylock Van,
10 LLC, Cabrera Capital Markets LLC, C.L. King & Associates, Inc., Loop Capital
11 Markets LLC, Samuel A. Ramirez & Co., Inc., Siebert Williams Shank & Co., LLC,
12 and Tigress Financial Partners LLC (collectively, the “Underwriters” or
13 “Underwriter Defendants”), will move the Court pursuant to Federal Rules of Civil
14 Procedure (“Rule”) 12(b)(6) for an order dismissing the claims asserted against the
15 Underwriters in the Amended Consolidated Complaint for Violations of the Federal
16 Securities Laws (the “Amended Complaint” or “Am. Compl.”) filed by Plaintiffs
17 Sjunde AP-Fonden and James Stephen Muhl (“Plaintiffs”).

18 As explained in the Memorandum of Points and Authorities below, the claims
19 asserted against the Underwriters in the Amended Complaint should be dismissed in
20 their entirety because the Complaint fails to state a claim under Section 11 of the
21 Securities Act of 1933 (“Securities Act”), 15 U.S.C. § 77k (“Section 11”), and under
22 Section 12(a)(2) of the Securities Act, 15 U.S.C. § 77l(a)(2) (“Section 12(a)(2)”).

23 The Underwriters also join and incorporate the arguments set forth in the
24 separate motion to dismiss the Amended Consolidated Complaint filed by
25 Defendants Rivian Automotive, Inc. (“Rivian”), Robert J. Scaringe, Claire
26 McDonough, Jeffrey R. Baker, Karen Boone, Sanford Schwartz, Rose Marcario,
27 Peter Krawiec, Jay Flatley, and Pamela Thomas-Graham (the “Rivian Defendants’
28 Motion to Dismiss the Amended Complaint”).

1 The Underwriters’ Motion to Dismiss the Amended Complaint is based on this
2 Notice of Motion and Motion to Dismiss and Joinder; the Memorandum of Points
3 and Authorities below; the Rivian Defendants’ Motion to Dismiss the Amended
4 Complaint; the Declaration of Elise Lopez in Support of the Rivian Defendants’ prior
5 Motion to Dismiss (ECF 135-1, “Lopez Decl.”) and the exhibits thereto; all other
6 papers and pleadings on file in this action; and such further argument that is presented
7 to the Court at or before the hearing.

8 This motion is made following the conference of counsel pursuant to Local
9 Civil Rule 7-3, which took place on March 8, 2023.

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Dated: March 16, 2023

Respectfully submitted,
ORRICK, HERRINGTON & SUTCLIFFE LLP

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1 **I. INTRODUCTION**

2 In dismissing Plaintiffs’ first consolidated complaint (“Complaint” or
3 “Compl.”) in its entirety, this Court correctly found that Plaintiffs’ Securities Act
4 claims against the Underwriter Defendants—which are limited to the four corners of
5 the registration statement (the “Registration Statement”) for Rivian’s initial public
6 offering (“IPO”)—were fatally defective on multiple grounds, including that
7 “Plaintiff’s theory of falsity . . . is implausible.” Order Granting Defendants’ Motions
8 to Dismiss, ECF 149 (“MTD Order”) at 23. Yet, Plaintiffs’ Amended Complaint
9 continues to rely on the same theory of falsity and does nothing to address the
10 fundamental infirmities that compelled dismissal of the Securities Act claims.
11 Plaintiffs have made no substantive changes other than tacking on irrelevant factual
12 allegations and purporting to uncover new alleged misstatements. Plaintiffs’ decision
13 to challenge statements that were never once suggested as false or misleading in their
14 prior 80-page Complaint underscores Plaintiffs’ strategy of manufacturing falsity by
15 hindsight. If Plaintiffs were truly misled by these new statements, they presumably
16 would have included them as alleged misstatements in the prior Complaint. In any
17 event, these new alleged misstatements are just as inactionable as the earlier ones and
18 cannot serve as a predicate for Securities Acts claims against the Underwriter for the
19 same reasons.

20 Like the dismissed Complaint, the Amended Complaint claims that Rivian
21 violated Sections 11 and 12(a)(2) of the Securities Act by failing to disclose that
22 (1) the bill of materials for its vehicles purportedly exceeded the purchase price at
23 the time of the IPO, and (2) Rivian supposedly planned to raise prices post-IPO. But
24 the Court already found, in no uncertain terms, that Rivian ***was not required to***
25 ***disclose this information in the Registration Statement.*** Disclosure of the precise
26 cost of the bill of materials at the time of the IPO—when an extremely limited
27 number of vehicles had been produced—demanded a level of specificity not required
28 under the Securities Act. And Plaintiffs had failed to allege plausibly that Rivian had

1 actually decided pre-IPO that it would raise prices (and in any event, sensitive and
2 strategic pricing considerations need not be announced in registration materials). The
3 same is true of the Amended Complaint.

4 Although the Amended Complaint now challenges two new statements (and
5 one that this Court already squarely rejected), these three alleged misstatements never
6 created an impression that (1) Rivian could become profitable solely by ramping
7 production, (2) Rivian's raw material costs had remained constant over time and were
8 less than the purchase price, or (3) Rivian had committed to maintaining the same
9 pricing structure in the future. These statements do "not present a false picture of
10 Rivian's profitability prospects and the cause behind negative margins," particularly
11 given the Registration Statement's extensive disclosures that "clearly indicated that
12 Rivian did not expect to be profitable for the foreseeable future and warned that
13 Rivian might never achieve positive margins." MTD Order at 23. And Plaintiffs'
14 claims under Items 105 and 303 of Securities Exchange Commission ("SEC")
15 Regulation S-K are virtually indistinguishable from those asserted in the prior
16 Complaint and should be dismissed again on the same grounds.

17 For these reasons and those set forth in the Rivian Defendants' Motion to
18 Dismiss the Amended Complaint, the claims asserted against the Underwriters
19 should be dismissed, this time with prejudice.

20 **II. ARGUMENT**

21 To survive a Rule 12(b)(6) motion, "a complaint must contain sufficient
22 factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The Court need not accept conclusory
23 allegations, unreasonable inferences or unwarranted deductions of fact, or allegations
24 that contradict documents referred to in the complaint or matters subject to judicial
25 notice. *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010).

27 In dismissing the Complaint, the Court correctly concluded that it is ultimately
28 irrelevant "whether Rule 8(a) or Rule 9(b) applies" to Plaintiffs' claims against the

1 Underwriter Defendants because the claims fail under Rule 8(a)'s lower
 2 "plausibility" standard in any event. MTD Order at 28. The same is true for the
 3 Amended Complaint, necessitating dismissal of the Securities Act claims.¹

4 **A. Plaintiffs Fail To State A Section 11 Claim.**

5 Plaintiffs' Section 11 claim points to three purported misstatements in the
 6 Registration Statement. But like the prior Complaint, the Amended Complaint does
 7 not allege plausibly that any of these statements were materially false or misleading
 8 at the time of the IPO.

9 **1. The First Challenged Statement Is Not False Or Misleading.**

10 The first alleged misstatement is based is the following risk disclosure about
 11 the impact of increasing costs and/or prices on Rivian's business:

12 *Substantial increases in the prices for such components, materials and*
 13 *equipment would increase our operating costs and could reduce our*
 14 *margins if we cannot recoup the increased costs. Any attempts to*
 15 *increase the announced or expected prices of our vehicles in response*
 16 *to increased costs could be viewed negatively by our potential*
 17 *customers and could adversely affect our business, prospects, financial*
 18 *condition, results of operations, and cash flows.*

19 Am. Compl. ¶ 294 (emphasis in original) (the "First Challenged Statement"). Despite
 20 not having identified this statement as being false or misleading in their prior
 21 Complaint, Plaintiffs now claim this risk disclosure was materially false and
 22 misleading because "by the time of the IPO, the cost of the R1S and R1T bill of
 23 materials had, in fact, increased and significantly exceeded their retail prices." *Id.*
 24 ¶ 295. Plaintiffs also claim that the First Challenged Statement was misleading

25 ¹ The Underwriter Defendants also continue to maintain that the heightened pleading
 26 requirements of Rule 9(b) apply because the Securities Act claims sound in fraud.
 27 *See In re Stac Elecs. Sec. Litig.*, 89 F.3d 1399, 1404-05 (9th Cir. 1996). As a matter
 28 of law, where, as here, the "complaint employs the exact same factual allegations to
 allege violations of section 11 as it uses to allege fraudulent conduct under section
 10(b) of the Exchange Act, we can assume that it sounds in fraud." *Rubke v. Capitol
 Bancorp Ltd.*, 551 F.3d 1156, 1161 (9th Cir. 2009); *compare, e.g.*, Am. Compl. ¶¶
 157-60, with Am. Compl. ¶¶ 294-97.

1 because it allegedly omitted “that Rivian had already made the decision to increase
2 retail prices of the R1T and R1S in advance of the IPO.” *Id.*

3 Plaintiffs are wrong again. Even setting aside that this statement did not make
4 any promises about Rivian’s future pricing plans, Plaintiffs’ allegation that Rivian
5 had already decided to increase prices has been flatly rejected by this Court. This
6 Court explained that Plaintiffs’ allegations “d[id] not support an inference of a firm
7 ‘plan’ to increase prices—rather, they indicate[d] that this was a sensitive strategy
8 decision.” MTD Order at 32. Moreover, the Court concluded that “when broaching
9 the subject of potential price increases, Rivian did not need to ... disclose its ...
10 pricing strategy,” *id.* at 25, because “the Court is reluctant to interpret securities laws
11 and regulations as requiring disclosure of a prospective pricing strategy or
12 challenging pricing decisions that a company is currently facing,” *id.* at 32-33.

13 Yet, even in the face of these rulings, Plaintiffs try to get by with more of the
14 same. The allegations in the Amended Complaint regarding Rivian’s purported
15 decision to increase prices are substantively indistinguishable from those in the
16 dismissed Complaint. *Compare, e.g.,* Compl. ¶¶ 94-95, *with* Am. Compl. ¶¶ 287-88.
17 The linchpin of Plaintiffs’ theory remains their allegation that Rivian had decided to
18 increase prices because Rivian’s Chief Growth Officer eventually “agreed that
19 [Rivian] would need to raise the vehicle prices after the IPO.” Am. Compl. ¶ 287.
20 But the Court already found that this same statement did not support a firm plan to
21 increase prices and instead simply demonstrated that Rivian management knew that
22 “prices would need to increase eventually.” MTD Order at 32. And Plaintiffs have
23 not alleged any new facts to bolster their case that Rivian had definitively decided
24 before the IPO to increase prices. Accordingly, the Court’s prior order disposes of
25 Plaintiffs’ contention that the First Challenged Statement was actionably misleading
26 because it omitted that Rivian had already decided to increase prices.

27 Plaintiffs also argue that the First Challenged Statement is misleading because
28 it somehow concealed information about production costs. The First Challenged

1 Statement plainly did no such thing. Instead, it explicitly *disclosed* that “substantial
 2 [price] increases” in “components, material, and equipment” could have a negative
 3 impact on Rivian’s business. Am. Compl. ¶ 294. Nonetheless, Plaintiffs claim that
 4 the Registration Statement should also have disclosed more specifically “the cost of
 5 the R1S and R1T bill of materials.” *Id.* But the Court already concluded that Rivian
 6 was not required to disclose the relative cost of the bill of materials at the time of the
 7 IPO. *See* MTD Order at 34-35. The securities laws do not require “complete
 8 disclosure of all material information whenever a company speaks on a particular
 9 topic.” *Weston Family P’ship LLP v. Twitter, Inc.*, 29 F.4th 611, 615 (9th Cir. 2022).
 10 “No matter how detailed and accurate disclosure statements are, there are likely to be
 11 additional details that could have been disclosed but were not.” *Brody v. Transitional*
 12 *Hosp. Corp.*, 280 F.3d 997, 1006 (9th Cir. 2002).²

13 Instead, for an omission to be actionable, it “must be misleading.” *Id.* And a
 14 statement is misleading only if it “*affirmatively* create[s] an impression of a state of
 15 affairs that differs in a material way from the one that actually exists.” *Id.* (emphasis
 16 added). Here, the First Challenged Statement did not remotely suggest—much less
 17 affirmatively create an impression—that the cost of the R1S and R1T bill of materials
 18 had remained the same over time, or at a low level. Nor did the First Challenged
 19 Statement suggest anything about whether Rivian “had already made the decision to

20
 21 ² Plaintiffs’ new allegations about the cost of the bill of materials at the time of the
 22 IPO—which directly contradict the allegations in the dismissed Complaint—are
 23 irrelevant. Whether the bill of materials was \$90K (as alleged in the dismissed
 24 Complaint, Compl. ¶¶ 84-85) or \$110-118K (as alleged now, Am. Compl. ¶ 118),
 25 Rivian had no duty to disclose this information. Instead, the only import of these
 26 new allegations is that they call into question the reliability of the statements of the
 27 former employees. *See, e.g., Sgarlata v. PayPal Holdings, Inc.*, 409 F. Supp. 3d 846,
 28 858 (N.D. Cal. 2019) (dismissing securities complaint: “[Former Employee 1’s]
 statement is made more problematic by the fact that the amended statement is
 inconsistent with FE1’s prior statement. ... This discrepancy raises credibility
 concerns about FE1.”), *aff’d*, 831 F. App’x 366 (9th Cir. 2020); *see also Harbridge*
v. Schwarzenegger, 2012 WL 13252724, at *7 (C.D. Cal. Jan. 4, 2012) (“[w]here
 allegations in an amended complaint contradict those in a prior complaint, a district
 court ... may ... strike the changed allegations as ‘false and sham.’”).

1 increase retail prices of the R1T and R1S.” Am. Compl. ¶ 295. It simply warned
2 that “[s]ubstantial increases in the prices for components, materials and equipment”
3 could “reduce [Rivian’s] margins” and “increase the announced or expected prices
4 of [Rivian’s] vehicles.” *Id.* ¶ 294. This statement was entirely consistent with high
5 or increasing prices for at least some “components, materials and equipment”—
6 including those that make up the R1S and R1T bill of materials. *Id.* It was also
7 consistent with the possibility that Rivian might have had internal plans to increase
8 prices at some point. And “[s]tatements are not misleading where they are ‘not
9 necessarily inconsistent with the underlying [allegedly] true facts.’” *Kairalla v.*
10 *Advanced Med. Optics, Inc.*, 2008 WL 2879087, at *3 (C.D. Cal. June 6, 2008)
11 (quoting *In re Vantive Corp. Sec. Litig.*, 283 F.3d 1079, 1087 n.7 (9th Cir. 2002)).

12 Finally, Plaintiffs continue to ignore that whether a statement is misleading
13 “always depends on the context, which includes all its surrounding text, including
14 hedges, disclaimers, and apparently conflicting information.” *City of Dearborn*
15 *Heights Act 345 Police & Fire Ret. Sys. v. Align Tech., Inc.*, 856 F.3d 605, 615 (9th
16 Cir. 2017) (internal quotation marks omitted). Here, as this Court already recognized,
17 *see* MTD Order at 22, the Registration Statement contained numerous disclosures
18 making clear that Rivian had been experiencing and would continue to experience
19 negative gross profit, and that various factors—including a rising cost of goods sold
20 (“COGS”)—could negatively impact the company’s ability to generate positive gross
21 margins. *See infra* at 9-10. The Registration Statement also stated multiple times
22 that Rivian had “a history of losses and expect[ed] to incur significant expenses and
23 continuing losses for the foreseeable future.” ECF 135-5 (Lopez Decl., Ex. 4 at 48,
24 57, 109). The Registration Statement even made clear that Rivian “[could not] assure
25 [investors] that [it would] ever achieve or be able to maintain profitability in the
26 future.” *Id.* at 57. Given these and other similar disclosures, no reasonable investor
27 could find anything false or misleading about the First Challenged Statement.
28

1 2. **The Second Challenged Statement Is Not False Or**
2 **Misleading, And Is Also Legally Inactionable.**

3 Plaintiffs also challenge the following statement in the Registration Statement:

4 Our decision to deeply vertically integrate our ecosystem has required
5 substantial upfront investments in capabilities, technologies, and
6 services that are often outsourced by other manufacturers. For
7 example, we are making investments in vehicle technology,
8 manufacturing capacity, and charging infrastructure, and these
9 expenses will appear in our cost of revenue. *We expect to operate at a*
10 *negative gross profit per vehicle for the near term as our fixed costs*
11 *from investments in vehicle technology, manufacturing capacity, and*
12 *charging infrastructure are spread across a smaller product base*
13 *until we launch additional vehicles and ramp production. This*
14 *dynamic will cause our gross profit losses to increase on a dollar basis*
15 *even as our revenue increases from ramping production volumes over*
16 *the short to medium term.*

17 Am. Compl. ¶ 296 (emphasis in original) (the “Second Challenged Statement”). The
18 Amended Complaint alleges that this statement was materially false and misleading
19 because it indicated that one driver of Rivian’s negative gross profits per vehicle was
20 that its “fixed costs ... are spread across a smaller product base,” *id.*, but omitted to
21 mention that there was another driver of its negative gross profits per vehicle: “the
22 fact that the cost of the R1S and R1T bill of materials alone exceeded their retail
23 prices,” *id.* ¶ 298. The Amended Complaint also urges that the Second Challenged
24 Statement concealed the fact that Rivian “still would have operated at a negative
25 gross profit per vehicle” regardless of Rivian’s high fixed costs. *Id.*

26 The Second Challenged Statement is identical to one of the alleged
27 misstatements in the dismissed Complaint. *Compare* Compl. ¶ 254, *with* Am. Compl.
28 ¶ 296; *see also* MTD Order a 22-23. And Plaintiffs’ theory of falsity also remains
the same across the two complaints. *Compare, e.g.,* Compl. ¶ 255 (arguing that
Rivian omitted to mention that its negative profits “were due to the fact that Rivian’s
COGS for R1s was significantly higher than the purchase price”), *with, e.g.,* Am.
Compl. ¶ 298 (arguing that Rivian omitted to mention that its negative gross profits
were in part due to “the fact that the cost of the R1S and R1T bill of materials alone
exceeded their retail prices”). This Court already dismissed those allegations for

1 good reason. At bottom, the alleged misstatement “does not present a false picture
2 of Rivian’s profitability prospects and the causes behind [its] negative margins.”
3 MTD Order at 23.

4 The gravamen of Plaintiffs’ argument is that Rivian should not have disclosed
5 that high fixed costs resulted in negative gross profits without also disclosing other
6 reasons for its negative gross profits. But the Second Challenged Statement nowhere
7 suggests that the only reason—or even the most significant reason—for Rivian’s
8 negative gross profits per vehicle was that Rivian had to spread large upfront fixed
9 costs across a small number of vehicles. This Court already held that Plaintiff’s
10 “theory of falsity is implausible” as to this statement because it “does not create a
11 false impression that Rivian could become profitable by simply ramping up R1
12 production volumes” to share fixed costs across more vehicles. *Id.* Instead, this
13 statement itself “explicitly identifies **both** launching additional [cheaper] vehicles
14 **and** ramping up production as key to overcoming negative margins.” *Id.*³

15 Plaintiffs’ arguments suffer from another fatal flaw: The immediate
16 “surrounding text” and “context” makes clear that the Second Challenged
17 Statement’s focus was **not** on the drivers of Rivian’s gross profits. *Dearborn*
18 *Heights*, 856 F.3d at 615. Rather, the Second Challenged Statement principally
19 addressed Rivian’s high fixed costs and how those “investments ... w[ould] appear
20 in [Rivian’s] cost of revenue.” Am. Compl. ¶ 296. The Second Challenged
21 Statement explained that Rivian’s high fixed costs would continue to have a negative
22 effect on its gross profits per vehicle—and indeed were so high that they would cause
23

24 ³ The Second Challenged Statement was entirely accurate, moreover: Whatever the
25 retail price of the vehicles as compared to the costs of production, Rivian would
26 continue to operate at a negative gross profit per vehicle until it could launch
27 additional cheaper vehicle models, ramp production, and spread its large upfront
28 fixed costs across a larger product base. The Second Challenged Statement thus did
not in any way “affirmatively create an impression of a state of affairs that differ[ed]
in a material way from the one that actually exist[ed]” at the time of the IPO. *Brody*,
280 F.3d at 1006.

1 “gross profits losses to increase on a dollar basis *even as*” Rivian “ramp[ed]
2 production volumes.” *Id.* (emphasis added). In other words, the Second Challenged
3 Statement addressed high fixed costs and how they might affect negative gross
4 profits, *not* all potential causes of negative gross profits. Viewing the Second
5 Challenged Statement in proper context, it is clear that providing a laundry list of
6 every factor influencing Rivian’s gross profits, as Plaintiffs now demand, would have
7 been entirely out of place.

8 Beyond all this, the Second Challenged Statement is a *forward-looking*
9 prediction or statement of expectation. *See* Am. Compl. ¶ 296 (“We *expect* to operate
10 at a negative gross profit per vehicle for the near term.” (emphasis added)). And as
11 courts have held, “[n]o reasonable investor would rely on” “loose prediction[s]”
12 about future growth that are “anything but definite” as to the “time for their
13 achievement.” *Raab v. Gen. Physics Corp.*, 4 F.3d 286, 290 (4th Cir. 1993).
14 Certainly here, Rivian’s “expect[ation]” that it would “operate at a negative gross
15 profit per vehicle for the near term,” Am. Compl. ¶ 296 (emphasis omitted), could
16 not reasonably be understood as making any guarantee about any and all causes of
17 negative gross profits in the future.

18 Finally, the Second Challenged Statement is also inactionable under the
19 “bespeaks caution” doctrine. That doctrine “provides a mechanism by which a court
20 can rule as a matter of law ... that defendants’ forward-looking representations
21 contained enough cautionary language or risk disclosure to protect the defendant
22 against claims of securities fraud.” *In re Worlds of Wonder Sec. Litig.*, 35 F.3d 1407,
23 1413 (9th Cir. 1994) (internal quotation marks omitted); *see also In re Stac Elecs.*
24 *Sec. Litig.*, 89 F.3d 1399, 1408 n.5 (9th Cir. 1996) (applying doctrine to Section 11).
25 As the Court noted in dismissing the identical challenged misstatement in the original
26 Complaint, “the Prospectus clearly indicated that Rivian did not expect to be
27 profitable for the foreseeable future and warned that Rivian might never achieve
28 positive margins.” MTD Order at 23. For example, the Registration Statement made

1 clear that Rivian was subject to “cost increases or disruptions in supply of raw
 2 materials or other components used in [its] vehicles,” which could adversely impact
 3 both its COGS and its margins. *See* ECF 135-5 (Lopez Decl., Ex. 4 at 48, 61). And
 4 the Second Challenged Statement itself explicitly warned that certain “dynamic[s]
 5 w[ould] cause [Rivian’s] gross profit losses to increase on a dollar basis even as [its]
 6 revenue increases from ramping production volumes over the short to medium term.”
 7 *Id.* at 124.

8 The Registration Statement further explained that Rivian:

9 incur[s] significant costs related to procuring raw materials required to
 10 manufacture and assemble [its] vehicles. ***The prices for these raw
 11 materials fluctuate depending on factors beyond [Rivian’s] control***
 12 including market conditions and global demand for these materials and
 could adversely affect [the company’s] business, prospects, financial
 condition, results of operations, and cash flows. . . .

13 Furthermore, currency fluctuations, tariffs or shortages in petroleum
 14 and other economic or political conditions may result in significant
 15 increases in freight charges and raw material costs. Substantial
 increases in the prices for [Rivian’s] raw materials or components
 would increase [the company’s] operating costs and could reduce [its]
 margins.

16 *Id.* at 61-62 (emphasis added). And the Registration Statement cautioned that Rivian:

17 expect[s] to make additional capital expenditures and incur substantial
 18 costs . . . including . . . raw material procurement costs ***[Rivian]
 19 will need to manage costs effectively to sell [its] products at [its]
 20 expected margins . . . [and] [if [the company is] unable to cost
 21 efficiently design, manufacture, market, sell and distribute and
 22 service [its] vehicles and provide [its] services, [its] business,
 23 prospects, financial condition, results of operations, and cash flows
 24 would be materially and adversely affected.***

25 *Id.* at 61 (emphasis added). And as discussed above, Rivian warned on multiple
 26 occasions that it had “***a history of losses and expect[ed] to incur significant expenses
 27 and continuing losses for the foreseeable future.***” *See id.* at 48, 57, 109. Given the
 28 Registration Statement’s ample cautionary language directly warning of the allegedly
 concealed risks, the Second Challenged Statement is inactionable as a matter of law.
See In re Infonet Servs. Corp. Sec. Litig., 310 F. Supp. 2d 1080, 1100 (C.D. Cal.
 2003) (dismissing Section 11 claim based on bespeaks caution doctrine).

1 3. **The Third Challenged Statement Is Not False Or Misleading,**
2 **And Is Also Legally Inactionable.**

3 The third and final alleged misstatement Plaintiffs point to as support for their
4 Section 11 claim is the following newly identified statement:

5 ***Over the long term, we believe that we will be able to increase our***
6 ***gross margin in the long term and generate positive gross profit as***
7 ***production utilization increases and we leverage our investments.***

8 Am. Compl. ¶ 297 (emphasis in original) (the “Third Challenged Statement”). The
9 Amended Complaint alleges that this statement was materially false or misleading
10 because Rivian’s high bill of materials “ensured that, regardless of how much Rivian
11 increased R1 production utilization and/or leveraged its investments, it would
12 continue operating at a negative gross profit per vehicle unless and until it
13 implemented a substantial price increase or a significant reduction in costs for the R1
14 Platform.” *Id.* ¶ 300. Plaintiffs’ argument regarding this statement largely echoes its
15 argument regarding the Second Challenged Statement and fails just the same.

16 To start, the phrase “long term” is incapable of concrete measurement or
17 objective verification. Courts, including this Court in dismissing the prior
18 Complaint, have specifically held that phrases such as “long term” or “for a long
19 time” are too vague to be actionable. *See, e.g.*, MTD Order at 23 (concluding that
20 the phrase “near term” “lack[s] ... any objective standard”); *Lowthorp v. Mesa Air*
21 *Grp. Inc.*, 2021 WL 3089118, at *7 (D. Ariz. July 22, 2021) (dismissing Section 11
22 claim and holding that “generic descriptions, like ‘long-term’ or ‘stable,’” are legally
23 inactionable); *In re Int’l Bus. Mach. Corp. Sec. Litig.*, 163 F.3d 102, 108 (2d Cir.
24 1998) (concluding that statement “for quite a foreseeable time” was “too indefinite
25 to be actionable under the securities laws”). No “reasonable reader” would rely on
26 this type of “vague and capacious term,” MTD Order at 23, to conclude that Rivian
27 had guaranteed that it would generate a positive gross profit in any specific time
28 frame. For that reason alone, the Third Challenged Statement fails as a matter of law.

 Even setting that aside, there is nothing materially false or misleading about

1 the statement’s representations regarding Rivian’s profitability. Nowhere did the
2 Third Challenged Statement say that Rivian’s “production utilization” and
3 “leverag[ing] [of] investments” were the *only* factors affecting whether Rivian would
4 be able to become profitable in the future. In fact, the sentence immediately
5 following the Third Challenged Statement makes explicitly clear that Rivian’s efforts
6 to leverage its investments *included* finding a way to manufacture new vehicle
7 models more cost effectively. Specifically, Rivian stated that it believed its
8 leveraging efforts would be successful because “[its] integrated ecosystem is highly
9 scalable, allowing [it] to ramp vehicle volumes quickly, *create new vehicle models*
10 *that leverage our historical investments, and offer vehicles that address a wider*
11 *range of use cases and price points.*” ECF 135-5 (Lopez Decl., Ex. 4 at 125). In
12 short, the Third Challenged Statement is entirely consistent with the proposition that
13 cost reduction would be crucial to Rivian’s gross profits. *See Kairalla*, 2008 WL
14 2879087, at *3 (“Statements are not misleading where they are ‘not necessarily
15 inconsistent with the underlying [allegedly] true facts.’” (citation omitted)). It is also
16 consistent with Plaintiffs’ own allegations that Rivian sought to decrease costs by
17 “successfully sourc[ing] and implement[ing] less expensive components into its
18 vehicles, including a cheaper dual motor in its base vehicles.” Am. Compl. ¶ 284.

19 Finally, just like the Second Challenged Statement, the Third Challenged
20 Statement is a forward-looking prediction about what Rivian “*believe[s]* that [it] *will*
21 *be able to*” do with its profit margins in the future. Am. Compl. ¶ 297 (emphasis
22 added). The Third Challenged Statement thus is inactionable as a matter of law
23 because it is protected by the bespeaks caution doctrine. *See supra* 9-10.

24 **4. The Registration Statement Did Not Violate Regulation S-K.**

25 Plaintiffs again attempt to plead a Section 11 claim by alleging that the
26 Registration Statement violated Items 105 and 303 of SEC Regulation S-K by
27 omitting certain purported facts. *See* Am. Compl. ¶¶ 303-12. But Plaintiffs merely
28 rehash their previous allegations regarding Items 105 and 303. *See* Compl. ¶¶ 256-

1 65. This Court properly dismissed those allegations, *see* MTD Order at 29-35, and
2 that decision controls.⁴

3 As to both Items, Plaintiffs assert that the Registration Statement was required,
4 but failed, to disclose “(i) [that] the bill of materials for the R1T and R1S vastly
5 exceeded their retail prices as of the date of the IPO; (ii) Rivian’s decision to increase
6 R1T and R1S prices; (iii) [that] absent a significant reduction in material costs and/or
7 a material price increase[] on current and future R1 pre-orders, Rivian could not
8 become profitable and would continue to lose money on each R1 sale.” Am. Compl.
9 ¶ 305 (Item 105); *see also id.* ¶ 311 (substantially similar allegations regarding Item
10 303). Though phrased in slightly different terms, these allegations are essentially the
11 same as Plaintiff’s Items 105 and 303 allegations in the dismissed Complaint. *See*
12 Compl. ¶¶ 258, 264 (alleging that Rivian was required, but failed, to disclose: “(i)
13 [that] Rivian’s COGS for R1s had consistently increased from 2018 to 2021, which
14 in turn lead to increasingly negative R1 gross profit margins; ... (iii) Rivian’s need
15 to increase R1 pricing; and (vi) [sic] that absent price increases on current and future
16 R1 pre-orders, Rivian would lose money on each pre-ordered R1 unit sold to
17 customers for several years”). And the Amended Complaint’s allegations fail for all
18 the same reasons.

19 As to the first alleged omission, the Court soundly rejected Plaintiffs’
20 argument that there was a known trend at the time of the IPO regarding increasing
21 costs. *See* MTD Order at 33-34. A trend requires an “observed pattern that
22 accurately reflects *persistent* conditions of the particular registrant’s business
23 environment.” *In re Restoration Robotics, Inc. Sec. Litig.*, 417 F. Supp. 3d 1242,
24 1263 (N.D. Cal. 2019) (citations omitted, emphasis added). As the Court explained

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26 ⁴ Item 105 requires disclosure “of the material factors that make an investment ...
27 speculative or risky,” 17 C.F.R. § 229.105(a), while Item 303 requires disclosure of
28 known trends or uncertainties that are likely to have a material impact on net sales,
revenues or income, including known events that are reasonably likely to materially
change the relationship between costs and revenues, *id.* § 229.303(a)(3)(ii).

1 in dismissing the Complaint, “there were no known, actual margins for the R1 until
2 approximately two months before the IPO.” MTD Order at 34. That is because, at
3 the time of the IPO, Rivian had only been manufacturing and selling vehicles for two
4 months. ECF 135-5 (Lopez Decl., Ex. 4 at 142). “[A]s a matter of law, a pattern of
5 two months does not a trend make for purposes of Item 303(a)(3)(ii).” *In re Omega*
6 *Healthcare Inv’rs., Inc. Sec. Litig.*, 563 F. Supp. 3d 259, 276 (S.D.N.Y. 2021)
7 (internal quotation marks omitted).

8 The Court further recognized that “[w]hat Plaintiffs allege had been
9 deteriorating for years before the IPO were Rivian’s internal estimates and
10 projections for the R1’s margins,” which cannot qualify as a “persistent condition.”
11 MTD Order at 34. The same conclusion follows for the Amended Complaint, which
12 likewise alleges that costs had increased as compared to “cost estimates” prepared by
13 third-party consultants and subsequent internal efforts to “buil[d] out” an
14 understanding of actual costs. Am. Compl. ¶¶ 276-80. Plaintiffs themselves allege
15 that the actual bill of materials cost was not solidified until September 2021, *i.e.*, two
16 months before the IPO and when Rivian began manufacturing and delivering a small
17 number of vehicles. *Id.* ¶ 281. Since that two-month period did not constitute a trend
18 for purposes of the dismissed Complaint, the same goes for the Amended Complaint.

19 Turning to the second alleged omission, regarding Rivian’s purported decision
20 to increase prices, the Court held in no uncertain terms that “the Prospectus did not
21 need to disclose that Rivian would increase R1 prices in the near term pursuant to
22 Item 103 or Item 303.” MTD Order at 33. The Court concluded that the allegations
23 in the Complaint “d[id] not support an inference of a firm ‘plan’ to increase prices,”
24 *id.* at 32, and that—in any event—Rivian was not required to disclose its “prospective
25 pricing strategy,” *id.* at 32-33; *see supra* at 4. That conclusion was correct and finds
26 ample support in the case law. *See* MTD Order at 33 (citing cases).

27 As for the third alleged omission, Plaintiffs seem to argue that Items 105 and
28 303 required Rivian to disclose that it might need to increase its vehicle prices or

1 reduce its costs in the *future* to become profitable. But such alleged omissions are
2 plainly not actionable. “Regulation S-K [] governs the disclosure of known historic
3 trends, but does not provide a basis of liability where a corporation fails to ‘disclose’
4 the future.” *Terenzini v. GoodRx Holdings, Inc.*, 2022 WL 2189592, at *4 (C.D. Cal.
5 June 9, 2022) (citations omitted). Moreover, even though such disclosures were not
6 required, Rivian did in fact disclose that it might need to increase prices and/or reduce
7 costs to become profitable in the future. *See supra* at 10.

8 Indeed, as described above, the Registration Statement provided ample and
9 detailed risk disclosures on a host of topics relating to Rivian’s production costs,
10 profits, and margins. Those extensive risk disclosures alone foreclose Plaintiffs’
11 Items 105 and 303 allegations. *See, e.g., In re Pivotal Sec. Litig.*, 2020 WL 4193384,
12 at *8 (N.D. Cal. July 21, 2020).

13 **B. Plaintiff Muhl Fails To State A Section 12(a)(2) Claim.**

14 Plaintiff Muhl’s separate claim under Section 12(a)(2) against the
15 Underwriters is based on the same three alleged misstatements on which Plaintiffs’
16 Section 11 claim is based. *See Am. Compl.* ¶¶ 332-38. Because “[t]he ‘misstatement
17 or omission’ requirement under Section 12(a)(2) is materially identical to that under
18 Section 11,” *In re Velti PLC Sec. Litig.*, 2015 WL 5736589, at *31 (N.D. Cal. Oct. 1,
19 2015), the Amended Complaint’s “Section 11 and Section 12(a)(2) [claims] stand or
20 fall together,” MTD Order at 35. Accordingly, the Section 12(a) claim fails for the
21 same reasons that the Section 11 claim fails. *Id.*

22 **III. CONCLUSION**

23 For these reasons, the claims asserted in the Amended Complaint against the
24 Underwriters should be dismissed in their entirety, with prejudice. Because this is
25 Plaintiffs’ *third* attempt to state a claim against the Underwriters, it is evident that
26 any further amendment to the complaint would likely prove futile, and thus dismissal
27 with prejudice is the appropriate course.

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Dated: March 16, 2023

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for the Underwriter Defendants, certifies that this brief contains 5,338 words, which [choose one]:

X complies with the word limit of L.R. 11-6.1

___ complies with the word limit set by court order dated _____

Dated: March 16, 2023

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