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**UNITED STATES DISTRICT COURT**

**FOR THE CENTRAL DISTRICT OF CALIFORNIA**

**WESTERN DIVISION**

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

Plaintiffs,

v.

RIVIAN AUTOMOTIVE, INC., et al.,

Defendants.

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

**CLASS ACTION**

**PLAINTIFFS' OMNIBUS MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO THE RIVIAN DEFENDANTS' AND UNDERWRITER DEFENDANTS' MOTIONS TO DISMISS**

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

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Lead Plaintiff Sjunde AP-Fonden and Additional Plaintiff James Stephen Muhl ("Plaintiffs") hereby submit this Omnibus Memorandum of Points and Authorities in Opposition to the Rivian Defendants' and Underwriter Defendants' Motions to Dismiss Plaintiffs' Amended Consolidated Complaint ("AC").[1]

## I. PRELIMINARY STATEMENT

The core premise of Rivian's historic $13 billion IPO in November 2021 was that this nascent EV manufacturer, which had little revenues and billions in losses, could scale up production and profitably deliver two quad-motor vehicles to consumers with high-end amenities and a 300-mile range ***for about $70,000***. At its $78 per share IPO price, Rivian was valued by its underwriters, which included JP Morgan, Morgan Stanley, and Goldman Sachs, at $66.5 billion. The Underwriters' fees exceeded $190 million, excluding a lucrative greenshoe of over 22 million shares, which the underwriters sold into the immediate post-IPO market after Rivian's shares popped to over $120 per share.

Rivian's combination of vehicle pricing and high-end features were the key attributes that brought widespread accolades in the automotive and financial press, and which drove pre-production demand for its vehicles to over 55,000 pre-orders by the IPO. The IPO roadshow materials prominently marketed the vehicles' pricing and features to investors. Yet, as the AC alleges based on information obtained from well-placed former employees, Rivian's management knew at the time of the IPO that the much touted retail pricing for its vehicles was not sustainable. The total cost of the parts necessary to build each R1 vehicle (the Bill of Materials or "BOM") vastly exceeded its advertised retail price, and had grown significantly in the three years since Rivian publicly announced R1 pricing in 2018. Indeed, by the time of the IPO, the R1 BOM cost exceeded its retail prices by ***at least $40,000***, and these costs were locked in.

[1] Unless otherwise noted, all capitalized terms have the same meaning ascribed to them in the AC, all emphasis is added, and all internal citations and quotations and all original emphasis and alterations have been omitted. "¶" refers to paragraphs in the AC.

The root cause of the upside-down pricing was poor intelligence that Rivian's management received in 2018 when its third-party cost consultant estimated the R1 BOM cost to be approximately $70,000. When Rivian began sourcing R1 components a year later, these estimates turned out to be wildly understated. After Rivian's then-CFO convened a special meeting in December 2019 to address the escalating R1 BOM costs, Rivian fired its consultant and attempted to reduce the BOM costs, but to no avail. By the time of the IPO, R1 BOM costs were locked in at approximately $110,000 per vehicle and internally, Rivian's management had determined that they needed to raise prices and/or remove features on the R1 as a result. Critically, Rivian's management determined to not do so until after the IPO, in an obvious and calculated effort to not derail the IPO.

The crux of this case is whether the Defendants had a duty to disclose to investors that the BOM cost for each R1 vehicle at the time of the IPO was significantly in excess of its retail price and that Rivian had determined to raise R1 prices after the IPO. The AC plausibly alleges with particularity that Defendants were required to disclose this information, both as a consequence of their affirmative disclosure obligations under Regulation S-K and in order to render several statements made in the IPO registration statement, as well as Defendants' subsequent public statements, not materially misleading. In particular, Rivian told investors that its path to profitability was dependent upon scaling up its manufacturing to spread its fixed costs over a larger number of vehicles, but it failed to disclose that rising BOM costs foreclosed the possibility of profitability absent significant changes to the R1's features and/or pricing. For IPO investors, investing $13 billion in a company that could become profitable by scaling production volumes presents one set of risks, while investing in a company that sells $110,000 worth of car parts to consumers for just $70,000 presents a wildly different and far more severe set of risks. It is these severe risks that were hidden from investors.

While Defendants want this Court to believe that the AC does not cure the prior complaint's pleading deficiencies, several important facts amplify and clarify Plaintiffs' claims. *First*, the AC pleads facts demonstrating that the market viewed the R1's

combination of high-end features and reasonable pricing—a combination that, unbeknownst to investors, had to be compromised for Rivian to become profitable—as highly material to Rivian's overall valuation. *Second*, two former employees (FE-4 and FE-5), who led Rivian's Cost Engineering Group, have come forward since the filing of the prior complaint and explained why Rivian's BOM cost was so fundamentally at odds with its highly touted pricing, i.e., an error by Rivian's third-party pricing consultants, which Rivian had relied upon in setting R1 prices. These former employees also explained that Scaringe himself was directly involved in efforts to address the cost issue, at the same time he was publicly maintaining the mirage that Rivian could deliver to the market all the R1's promised features for around $70,000.

Defendants attempt to minimize or ignore these new particularized allegations in favor of a counter-narrative found nowhere in the AC. They lodge unfounded and meritless attacks on the credibility and reliability of Rivian's former employees, and they mischaracterize the AC as alleging that Rivian should have disclosed its future pricing strategies and the future profit margins on its vehicles. But Plaintiffs' theory is not based on Defendants' lack of clairvoyance about future pricing or profits. Instead, it is based on the undisclosed, upside-down cost structure that existed at the time of the IPO, was known to Defendants, and threatened Rivian's entire business strategy, and which Defendants were thus required to disclose to investors under the federal securities laws.

Defendants also claim they are shielded from liability because Rivian disclosed that it may never become profitable and that increasing costs ***could*** impact its business. To be sure, Rivian's boilerplate risk disclosures, at best, warned of a potential risk that future increases in material costs could imperil its business and cause it to raise prices, and thereby impact demand. None of Defendants' risk disclosures alerted investors to the fact that this material risk had already transpired.

In the end, investors paid dearly for Defendants' disclosure violations. Less than four months after its blockbuster IPO, on March 1, 2021, Rivian announced a 17% to 20% price hike on all its vehicles, including its 70,000+ confirmed R1 pre-orders. Existing customers

called it a "bait and switch," and many immediately cancelled their orders. Rivian's stock price cratered. Facing reputational disaster, Rivian quickly reversed course on its decision to apply its price hikes to existing pre-orders, but the damage was done and its impact on Rivian's financial condition was severe. Following these disclosures, Rivian's market capitalization fell to less than half of its IPO valuation, causing billions in shareholder losses. This action seeks to recover those losses.

## II. STATEMENT OF FACTS

### A. Rivian's Transformation From Startup to Publicly Traded Company

Founded over a decade ago by Defendant Scaringe, Rivian manufactures EVs and accessories. ¶30. After years of keeping a low-profile, Rivian generated public attention in January 2017 when it purchased a manufacturing plant in Normal, Illinois. ¶¶45-46.

In December 2017, Rivian announced plans to introduce its two flagship EVs—the R1T, a five-passenger truck, and the R1S, a seven-passenger SUV. ¶47. A year later, Rivian debuted the R1T and R1S (collectively, "R1") at the 2018 LA Auto Show, announced base model prices of $69,000 and $72,500 for the R1T and R1S, respectively, and began accepting pre-orders. ¶¶61, 65. The base model of each vehicle included a quad-motor and a battery pack with a roughly 300-mile range. *Id.* After Tesla introduced its own fully-electric pickup truck in 2019, Rivian decreased the base prices for the R1T and R1S to $67,500 and $70,000, respectively. ¶¶85, 87.

Rivian and Scaringe touted their ability to deliver, with the R1, "truly world-class" interiors comparable to "those from Audi and Lincoln as well as Bentley and Lamborghini," along with off-road capabilities that were "unlike anything you have ever seen!!" ¶¶63, 66.[2] Consumers and industry commentators were enamored with the "no-nonsense nature of the [R1] vehicles and the world-beating specs, coupled with a very reasonable price tag." ¶73;

[2] They also assured the market that the R1 Platform would deliver on their lofty promises, stating unequivocally that their statements about the R1 were not "hot air" but rather "statements of fact." ¶82.

*see also* ¶72 (describing the R1T as "something of a bargain…given its modern, aggressive interior and exterior design").

**B. Rivian Discovers That R1 Pricing Was Based on Understated Cost Estimates**

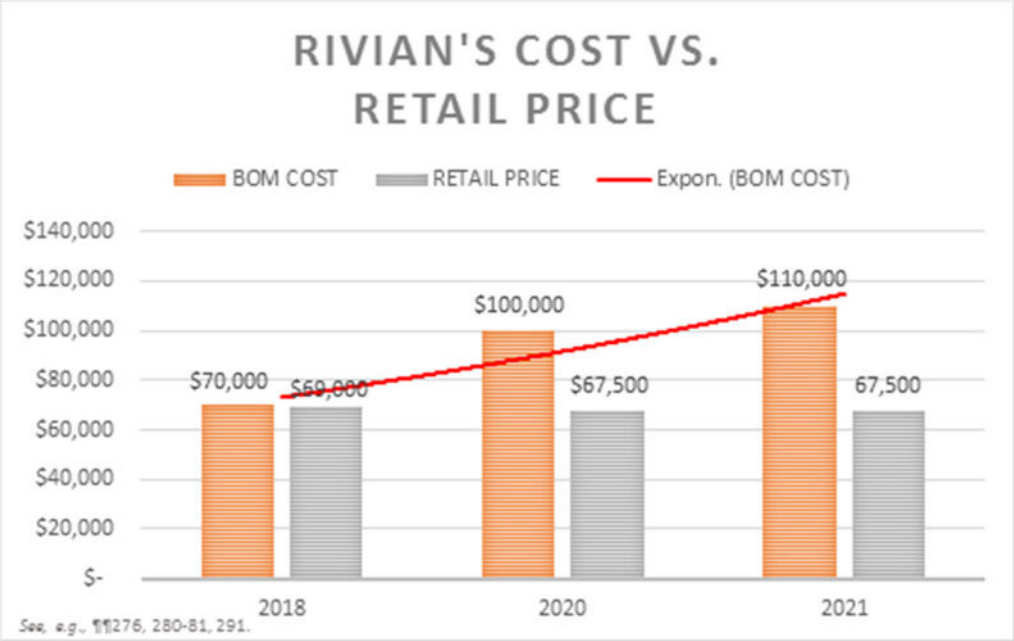
Rivian based its original 2018 R1 pricing on cost estimates provided by a third-party consultant, which estimated that R1 BOM costs would be approximately $70,000. ¶113. By 2019, however, as Rivian began to source R1 parts from suppliers, it discovered that its consultant had vastly understated Rivian's materials costs. ¶114. Suppliers walked away from the negotiating table, told Rivian employees their cost estimates were "not realistic" and "not even in the ballpark," and scolded them for their inability to accurately estimate material costs. *Id.*

In December 2019, Rivian's then-CFO convened a meeting with Rivian employees, including FE-5, and the consultant to assess the validity of the consultant's BOM cost estimates. ¶115. Rivian fired the consultant shortly thereafter and placed its internal Cost Engineering Group (of which FE-4 and FE-5 were members) in charge of costing every component of the R1 except the battery. ¶116.

Over the next two years, as the Cost Engineering Group sourced the remaining R1 components, Rivian's costs soared. ¶¶117-18. By September 2021, when Rivian began manufacturing its first R1 vehicles, all R1 materials had been sourced and Rivian's costs were locked in with suppliers. ¶118. By that time, the total R1 BOM cost had ballooned to at least ***$110,000***—nearly 60% higher than base R1 retail prices. *Id.* These costs were recorded in an internal Rivian database known as "Project X," which was accessible by Scaringe and other senior executives. ¶¶116, 193. Rivian's rising material costs were also disclosed to McDonough and other senior executives in "Revenue and Margins Reports" and during periodic Gate Review meetings. ¶¶40, 118, 194.

Rivian's rising material costs significantly altered its near-term and long-term financial outlook. For example, based on its 2018 cost assumptions, Rivian expected to generate enough revenue from each R1 sale to cover nearly all of its material costs. ¶113. By September 2021, however, Rivian had locked in prices that guaranteed it would lose

***at least $40,000*** on each R1 vehicle sold ***on materials costs alone***—without regard to its massive fixed costs. ¶¶118-21.




Moreover, Rivian could not solve this problem by increasing production volumes. ¶¶119-20, 120, 283. Unlike fixed costs, which decline on a per vehicle basis as production volumes increase, BOM costs are not spread across Rivian's production base—they are incurred equally across every vehicle sold. ¶¶112, 120. Thus, because the BOM cost alone vastly exceeded the retail price of R1 vehicles, Rivian would continue to record negative gross profits on each R1 sale even after production volumes increased. ¶¶119-21.

Further, even if Rivian could have negotiated *some* reduction in its material costs as its production volumes increased, it had ***no ability*** to negotiate those costs downward by even $20,000 (let alone $40,000) without significantly altering its vehicles. ¶¶120, 283. Thus, by September 2021, Defendants knew that Rivian would continue incurring significant losses on every R1 sold until it increased production volumes ***and***: (i) sourced and implemented cheaper components into its vehicles; and/or (ii) increased prices. ¶¶118-21.

Consequently, Rivian's Cost Engineering Group scrambled to reduce Rivian's BOM costs, including by sourcing less expensive materials, but Scaringe largely rejected their

proposals. ¶195. At the same time, former Vice President of Sales and Marketing Laura Schwab "started to raise the alarm" to Rivian's leadership that the R1s "were underpriced, and each sale would result in a loss [sic] the company." ¶¶37, 197. Schwab criticized Rivian's "misleading and inaccurate messaging" around several aspects—including pricing—and "voiced her concerns about [Rivian] making false commitments to customers and investors in multiple meetings with the company's senior leadership." ¶198. According to Schwab, Jiten Behl, Rivian's Chief Growth Officer, eventually "***agreed that [Rivian] would need to raise the vehicle prices after the IPO***." *Id.*

**C. Rivian Raises Billions of Dollars From Investors**

In August 2021, almost two years after firing its cost consultant and as R1 BOM costs were ballooning, Rivian announced its intent to go public in an IPO underwritten by some of the world's largest investment banks, including Morgan Stanley, Goldman Sachs, and J.P. Morgan. ¶¶93, 258. To promote investment in the IPO, Rivian and the Underwriters sponsored a "roadshow" in early November 2021, which included a presentation touting the R1's best-in-class features and retail prices. ¶103.

In early November 2021, Rivian filed with the SEC an amended S-1 on Form S-1/A and a prospectus on Form 424(B)(4) (collectively, the "S-1"), which offered 153,000,000 shares of common stock to investors at a price of $78.00 per share. ¶¶94-95. Rivian told investors that they should rely exclusively on the S1's disclosures when deciding whether to invest in Rivian. ¶132.

The S-1 touted the R1's impressive specifications, including its "quad motor" and the backlog of "approximately 55,400" pre-orders, ¶¶96-100, and it acknowledged that the R1's high-end features and competitive pricing were material to consumers and investors, ¶124 (stating that Rivian's financial condition would suffer "customers do not perceive our vehicles and services to be ***of sufficiently high value and quality, cost competitive and appealing in aesthetics or performance***"). Yet nowhere did it disclose that: (i) R1 prices were set based on stale and inaccurate BOM cost estimates; (ii) R1 BOM costs had swelled by ***nearly 60%*** since R1 prices were set and were at least ***$40,000*** higher than R1 retail

prices; (iii) absent significant changes to the R1's features and/or a significant increase in prices, Rivian was guaranteed to lose tens of thousands of dollars on each R1 sale, including its 55,400 R1 pre-orders. ¶¶295, 298-302, 304-05, 311.

Instead of making these disclosures, the S-1 warned investors about the financial harm that Rivian might suffer ***if*** its material costs increased. ¶126. Thus, the S-1 characterized issues that had already transpired by the time of the IPO as "risks." ¶295. In addition, the S-1 attributed Rivian's near-term "negative gross profit per vehicle" to its high "fixed costs from investments in vehicle technology, manufacturing capacity, and charging infrastructure" without also disclosing that Rivian was generating—and would continue to generate—negative gross profits per vehicle of at least $40,000 on material costs alone. ¶¶296, 298-99. Moreover, the S-1 indicated that Rivian expected to "generate ***positive*** gross profit" by increasing production volumes when, in reality, that was an impossibility. ¶300. Even if Rivian operated at full production capacity, it could not generate a positive gross profit per vehicle unless and until it significantly reduced R1 BOM costs and/or increased R1 retail prices. ¶¶127-31.

Through its IPO and defective S-1, Rivian raised more than ***$13.7 billion*** from investors. ¶¶63, 68, 102, 201. For their efforts, the Underwriter Defendants received more than ***$195 million in fees and commissions***, excluding their profits on a greenshoe of 22 million shares. ¶272.

**D. Defendants Continue to Conceal the Truth From Investors After the IPO**

During the December 16, 2021 earnings call to discuss Rivian's 3Q21 financial results, McDonough stated that "[i]n the near term, we expect that this dynamic of high fixed cost associated with operating and running our large scale, highly vertically integrated plan amortized over a small but growing number of vehicles…will continue to have a negative drag on gross profit." ¶164. This statement was materially false and misleading because, yet again, Defendants chose to disclose one factor that was creating "a negative drag on gross profit"—"high fixed cost[s]" being spread over "a small but growing number

of vehicles"—without disclosing the other significant factor—that the R1's BOM costs exceeded its retail prices by at least $40,000. ¶165.

Defendants also misled investors when discussing the possibility of a future price increase. ¶¶166-69. Both McDonough and Scaringe characterized the possibility of a price increase as a new development caused by recent inflationary pressures. ¶¶166-67. This was misleading, as described above, given Rivian's pre-IPO pricing pressures and commitment to increase R1 prices. ¶¶122-23, 168.

In addition, Scaringe attributed the potential price increase to "the very strong demand" for the R1 Platform, stating that "the backdrop of inflation" and "the very strong demand" for the R1 "has caused us to look at our pricing." ¶167. This too was misleading as it conveyed to the market that Rivian was evaluating a price increase to capitalize on heightened demand for R1 vehicles when, in truth, Rivian already decided prior to the IPO that price increases were necessary given the R1's upside down pricing structure. ¶¶168-69.

**E. The Relevant Truth Is Revealed**

On March 1, 2022, Rivian did what it had resolved to do prior to the IPO: it announced price increases of roughly ***17%*** and ***20%*** on virtually all R1T and R1S models. ¶¶142, 175-76. Rivian applied the price increases not only to new sales, but also to the more than 70,000 confirmed R1 pre-orders as of that date, unless those customers, who previously thought they were getting a quad-motor and a large battery pack, agreed to accept a dual-motor and a smaller battery. *Id.* Rivian's stock price cratered ***more than 20%***. ¶148.

On March 3, 2022, facing intense consumer backlash, Rivian reversed its decision to apply its price hikes to customers who ordered R1 vehicles before March 1, 2022. ¶149. But analysts seized on the future financial impact of this disclosure, concluding that foregoing the price increase on existing orders would cost Rivian an additional $800 million to $1.4 billion in revenues in 2022-2023. ¶¶149, 151. Thereafter, on March 10, 2022, Rivian disclosed disappointing projected adjusted EBITDA for fiscal year 2022 of negative $4.75 billion, which Rivian attributed to its intention to "minimize price increases to

customers in the near term." ¶152. In response to this news, Rivian's stock price fell almost 8% to close at $38.05 on March 11, 2022. ¶155. It fell even further the next trading day, closing on March 14, 2022 at $35.83—less than half of its IPO price. *Id*.

## III. ARGUMENT

In resolving a motion to dismiss, the Court must consider the complaint in its entirety and accept all facts as true. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). "[S]o long as the plaintiff alleges facts to support a theory that is not facially implausible, the court's skepticism is best reserved for later stages of the proceedings[.]" *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1057 (9th Cir. 2008). The PSLRA "in no way turns FRCP 12 into a trial-type, papers-only proceeding." *In re LDK Solar Sec. Litig.*, 584 F. Supp. 2d 1230, 1260 (N.D. Cal. 2008).

### A. The AC Plausibly Alleges Securities Act Violations

#### 1. Legal Standard

"The primary purpose of the Securities Act is to protect investors by requiring publication of material information thought necessary to allow them to make informed investment decisions concerning public offerings of securities in interstate commerce." *Pinter v. Dahl*, 486 U.S. 622, 638 (1988). Section 11 imposes "a stringent standard of liability" for untrue statements of material fact and omissions in offering documents. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 381-82 (1983); *see also Miller v. Thane Int'l, Inc.*, 519 F.3d 879, 886 (9th Cir. 2008) ("Section 12(a)(2) is a virtually absolute liability provision[.]").

A claim under Section 11 "need only [allege] a material misstatement or omission" in the registration statement. *Hildes v. Arthur Andersen LLP*, 734 F.3d 854, 856, 859 (9th Cir. 2013) (quoting *Herman & MacLean*, 459 U.S. at 382); *In re Snap Inc. Sec. Litig.*, 2018 WL 2972528, at *8 (C.D. Cal. June 7, 2018). Likewise, a Section 12(a)(2) claim need only allege an untrue statement of material fact or omission in a prospectus made in relation to an offer or sale of a security. *See Miller*, 519 F.3d at 885-86. Neither claim requires a plaintiff to plead or prove scienter, loss causation, or reliance. *See id.* at 886;

*Hildes*, 734 F.3d at 859-61 (collecting cases); *In re Charles Schwab Corp. Sec. Litig.*, 257 F.R.D. 534, 548 (N.D. Cal. 2009). "Section 11 imposes strict liability on issuers and signatories." *NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co.*, 693 F.3d 145, 156 (2d Cir. 2012). For all other parties who can be sued under these Sections, liability may be imposed for negligence. *See id.*; *Charles Schwab*, 257 F.R.D. at 548 ("As with Section 11, fraud is not an element of a Section 12(a)(2) claim.").

Claims brought under the Securities Act are governed by Rule 8(a), which requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *Bos. Ret. Sys. v. Uber Techs., Inc.*, 2020 WL 4569846, at *3 (N.D. Cal. Aug. 7, 2020); *see also Johnson v. Riverside Healthcare Sys., LP*, 534 F.3d 1116, 1122 (9th Cir. 2008) (Rule 8(a) does not impose "onerous burden" on plaintiffs). If, however, Securities Act claims "sound in fraud," then the heightened pleading requirements of Rule 9(b) and the PSLRA's particularity pleading requirement apply.

Here, Defendants are wrong to argue that the Securities Act claims sound in fraud. This Court has already found that Plaintiffs' claims against the Underwriter and Director Defendants sound in negligence and, therefore, "are evaluated under Rule 8(a)." ECF No. 149 ("Order") at 28.[3] Moreover, the Exchange Act Defendants' argument should be rejected because the AC carefully segregates Plaintiffs' negligence-based Securities Act claims from the fraud-based Exchange Act claims. *Compare* AC Parts IV-X, *with id.* Parts XI-XV; *see* ¶264 ("The Securities Act claims are based on the fact that the S-1 contained untrue statements of material fact and omitted material facts[.]"); *see also* ¶¶262, 265-66. This suffices to "adequately distinguish" Plaintiffs' negligence-based claims "from [their] fraud claims." *Charles Schwab*, 257 F.R.D. at 546 (applying Rule 8(a)); *see also In re*

[3] Thus, the Court should again reject the Underwriter Defendants' arguments that "the heightened pleading requirements of Rule 9(b) apply." UB 3 n.1; *see Charles Schwab*, 257 F.R.D. at 546 ("No published Ninth Circuit decision has been found, however, applying Rule 9(b)'s particularity requirement to a Section 11 claim where, as here, the underlying conduct was not also alleged to have constituted fraud.").

*Suprema Specialties, Inc. Sec. Litig.*, 438 F.3d 256, 273 (3d Cir. 2006) ("Plaintiff carefully segregated its allegations of negligence...this manner of pleading makes for a clear conceptual separation in the complaint between claims sounding in negligence and those sounding in fraud."); *In re Countrywide Fin. Corp. Sec. Litig.*, 588 F. Supp. 2d 1132, 1163 (C.D. Cal. 2008) (similar).

That Plaintiffs have pleaded Defendants' knowledge of trends requiring disclosure under Item 303 does not elevate such claims to alleged fraud. *See Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1297 (9th Cir. 1998) ("The first element [of Item 303 claim] is the showing of a *known* adverse trend."). "[T]hat a fact was known and not disclosed does not mean, as a matter of law, that the circumstances of the resulting omission sound in fraud." *In re Orion Sec. Litig.*, 2009 WL 2601952, at *1 (S.D.N.Y. Aug. 20, 2009); *see also In re Violin Memory Sec. Litig.*, 2014 WL 5525946, at *8 (N.D. Cal. Oct. 31, 2014) (declining to infer allegations of fraud where there was no allegation that defendants "knowingly" or "intentionally" concealed information). The Ninth Circuit recently reinforced this distinction in *Glazer Capital Mgmt., L.P. v. Forescout Techs., Inc.*, 63 F.4th 747, 766 (9th Cir. 2023) ("*Forescout*") (noting that while "some facts might be used to support both an inference of scienter and an inference of falsity, our decisions issued after *Tellabs* have consistently refrained from co-mingling the inquiries").

In any event, even if the Court applies Rule 9(b) to Plaintiffs' Securities Act claims, Plaintiffs have satisfied the "particularity requirement and the *reasonable inference* standard of plausibility set out in *Twombly* and *Iqbal*." *Forescout*, 63 F.4th at 766; *see also infra* Section A.2.[4]

[4] In fact, even if the Court finds that the Securities Act claims sounds in fraud and that certain allegations do not satisfy Rule 9(b), Plaintiffs can still state a claim for relief. *See Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1105 (9th Cir. 2003) ("[I]f particular averments of fraud are insufficiently pled under Rule 9(b), a district court should 'disregard' those averments" and "examine the allegations that remain to determine whether they state a claim.").

**2. Defendants Violated Sections 11 and 12(a)(2)**

Plaintiffs adequately allege that Defendants violated Sections 11 and 12(a)(2) by failing to disclose Rivian's upside-down pricing structure in the S-1, which was so severe that Rivian had already decided pre-IPO to increase prices. Defendants claim that they had no duty to disclose these facts to investors, but, as discussed below, they are wrong for two reasons. *First*, Defendants had a duty to disclose such facts under Regulation S-K. *See infra* Section III.2.a. *Second*, the Ninth Circuit has repeatedly held that once individuals choose to speak on a particular topic, "they are bound to do so in a manner that wouldn't mislead investors, including disclosing adverse information." *Schueneman v. Arena*, 840 F.3d 698, 705-06 (9th Cir. 2016); *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 1010 (9th Cir. 2018). As discussed below, because Defendants affirmatively spoke about the drivers of Rivian's negative gross profits and the potential for price increases in the S-1, they were required to disclose, among other things, that R1 BOM costs materially exceeded its retail prices, which ensured that Rivian would generate negative gross profits on the R1 unless and until it significantly reduced BOM costs and/or increased prices. *See infra* Section III.2.b. This undisclosed fact presented a significantly different risk to investors than those the S-1 disclosed, as a need to raise prices or reduce features implicated both the R1's profitability and future demand, and thus threatened the IPO's value.

**a. Defendants Violated Regulation S-K**

"There is liability under [S]ection 11 if a registrant omits to state a material fact required to be stated" by Items 105 and 303 Regulation S-K." *Steckman*, 143 F.3d at 1296; *see also Snap*, 2018 WL 2972528, at *8 (sustaining Section 11 claims based on Items 303 and 105 violations). An omitted fact is material if it "would have been viewed by the reasonable investor as having significantly altered the total mix of information made available for the purpose of decisionmaking by stockholders concerning their investments."

*Retail Wholesale & Dep't Store Union Loc. 338 Ret. Fund v. Hewlett-Packard Co.*, 845 F.3d 1268, 1274 (9th Cir. 2017).[5]

**Defendants Violated Item 303**. Item 303 mandates that an issuer disclose any trend or uncertainty that is known by management and reasonably likely to have a material effect on the company's financial condition or operations. *See* 17 C.F.R. §229.303(a); *see also* Management's Discussion & Analysis of Financial Condition, Securities Act Release No. 6835, at 22429 (May 18, 1989), Fed. Sec. L. Rep. (CCH) ¶72,436. This includes "events that are reasonably likely to cause ***a material change in the relationship between costs and revenues*** (such as known or reasonably likely ***future increases in costs of*** labor or ***materials or price increases*** or inventory adjustments)" and "descriptions and amounts of matters that have had a material impact on reported operations, as well as matters that are reasonably likely based on management's assessment to have a material impact on future operations." 17 C.F.R. §229.303(a) & (b)(2)(ii). Compliance with Item 303 is intended to "give investors an opportunity to look at the registrant **through the eyes of management** by providing a historical and prospective analysis of the registrant's financial condition and results of operations, with a particular emphasis on the registrant's prospects for the future." Securities Act Release No. 6835 at 22436.

Here, Plaintiffs plausibly allege the existence of an undisclosed trend—namely, that the negative delta between R1 BOM costs and retail prices materially increased between 2018 and 2021, and exceeded R1 retail prices by ***at least $40,000*** by the time of the IPO. ¶¶273-86. The AC further alleges that this trend was reasonably likely to "have a material…unfavorable impact" on Rivian's financial condition given that, absent a material retail price increase and/or significant reductions in material costs, Rivian would lose at least $40,000 on each R1 sale. ¶¶275, 281-84. Plaintiffs likewise allege that Defendants knew about the trend and its reasonably likely material impact on Rivian's financial

[5] Because the materiality inquiry "is fact-specific" and "requires delicate assessments of the inferences a reasonable shareholder would draw from [the] facts," materiality assessments are reserved for the jury. *In re Alphabet, Inc. Sec. Litig.*, 1 F.4th 687, 700 (9th Cir. 2021).

condition, as evidenced by, among other things, Rivian's decision to fire its cost consultant over BOM cost increases in 2019, and its unsuccessful pre-IPO efforts to reduce BOM costs. ¶¶276-79, 282-88. Plaintiffs further allege that Defendants knew that any efforts to offset the impact of this adverse trend were reasonably likely to negatively impact demand, as evidenced by their decision to wait until after the IPO to increase prices. ¶¶282-88. Lastly, given that Rivian's IPO valuation was premised largely on demand for R1 vehicles, the importance of the R1's combination of features and pricing to consumers, and the importance of R1 sales to Rivian's financial condition, the AC adequately alleges that this undisclosed trend was material to investors. *See Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 47 (2011) (finding "information indicating a significant risk to [defendant's] leading revenue-generating product" material to investors).

Courts have sustained Item 303 claims based on similar allegations. *See, e.g.*, *In re SureBeam Corp. Sec. Litig.*, 2005 WL 5036360, at *8-10 (S.D. Cal. Jan. 3, 2005) (sustaining Item 303 claim where complaint identified events transpiring before the IPO that indicated omitted trend undermined accuracy of revenue statements); *Lako v. LoanDepot, Inc.*, 2023 WL 444151, *11 (C.D. Cal. Jan. 24, 2023) (Staton, J.) (finding Item 303 violation where undisclosed loan practices "were unsustainable given the increased scrutiny [defendant] *would* face as a public company" and "their imminent cessation *would cause a decrease in future revenues*").[6]

Defendants do not deny the existence of these undisclosed facts. Instead, Defendants claim they had no duty to disclose them to investors, but their arguments seek to re-litigate the sufficiency of the allegations of the prior complaint, not the AC. For example, the AC does not allege that Defendants had to disclose Rivian's "internal estimates and projections for the R1's margins," nor does it contend that Defendants failed to disclose "future" trends

[6] This Court's *Lako* holding is consistent with the SEC's requirement that Defendants "provide an analysis that encompasses short term results as well as ***future*** prospects." SEC MD&A Final Rule, 86 Fed. Reg. 2080, 2089 (Jan. 11, 2021). Thus, Defendants' mischaracterization of Plaintiffs' allegations and their obligations under Item 303 as "a failure to disclose the future," ECF No. 153 ("UB") 14-15, should be rejected.

concerning Rivian's COGS or gross profit margins. UB 13-14. Rather, Plaintiffs assert that Defendants had to disclose the growing negative delta, which ***existed*** at the time of the IPO, between the R1's locked-in BOM costs and publicly-announced retail pricing, upon which the demand for R1 vehicles was predicated. *Compare* Order at 34 & UB 14, *with* ¶¶304-05. Similarly, the AC does not allege that Rivian had to disclose that it "might need" to increase prices in the future, *see* UB 14, but rather that it had "***already*** decided" to increase prices in response to these escalating BOM costs. *See, e.g.*, ¶168.

Defendants' remaining arguments are unavailing. *First*, Defendants are wrong to suggest that, as a matter of law, companies have no obligation to disclose information about their material costs or pricing strategies. RB 9. As noted above, Item 303 ***expressly*** requires companies to make disclosures related to "***known or reasonably likely future increases in costs of…materials or price increases***." 17 C.F.R. §229.303(b)(2)(ii).[7] *Second*, Defendants claim that there was no "persistent" trend to disclose because "the actual bill of materials cost was not solidified until September 2021." UB 14. But this argument cannot be squared with the AC's well-pleaded allegations that management internally recognized that R1 BOM costs exceeded its retail prices ***as early as 2019***—after Rivian had publicly announced R1 pricing and began taking pre-orders. ¶¶276-79. Indeed, the AC plausibly alleges that the negative delta between the R1 BOM cost and retail prices existed long before the IPO, and ***worsened*** as Rivian locked in pricing with its suppliers. ¶¶279-85; *see Panther Partners Inc. v. Jianpu Tech. Inc.*, 2020 WL 5757628, at *9 (S.D.N.Y. Sept. 27, 2020) (sustaining

[7] The court in *In re Noah Educ. Holdings, Ltd. Sec. Litig.*, 2010 WL 13272709 (S.D.N.Y. Mar. 31, 2010), did not hold that companies have no duty to disclose material costs. ECF No. 152 ("RB") 9. It simply held that companies have a duty to disclose trends, not "isolated occurrences," and it found that "Noah experienced an increase in the cost of raw materials only during July and August of 2007" and that "nothing in the Consolidated Complaint creates a plausible inference that this was a trend rather than an isolated event." *Noah*, 2010 WL 13272709, at *6. Here, R1 BOM costs had risen consistently over a three year period, constituted an "extreme deviation" from 2018 BOM costs (over 50% higher), and were so high that they caused Rivian to terminate its cost consultant and decide to increase R1 prices. *Id.* at *7 (acknowledging that disclosure may be required if undisclosed facts constitute "an extreme deviation from past performance").

Item 303 claim where significant portion of the trend occurred prior to the IPO). Moreover, that Rivian fired its cost consultant, attempted to reduce BOM costs, and decided to increase the R1 pricing before the IPO confirms that this trend was both known to management and sufficiently persistent to trigger an Item 303 disclosure obligation. *See In re LendingClub Sec. Litig.*, 254 F. Supp. 3d 1107, 1116 (N.D. Cal. 2017).[8]

*Third*, the Court should reject Defendants' contention that Rivian's BOM costs increased after, not before, the IPO. RB 10. In ruling on Defendants' Motions, the Court must accept as true the AC's well-pled allegations that Rivian's BOM costs consistently increased in the years prior to the IPO. *See Alphabet*, 1 F.4th at 679 ("When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief."); *Jaeger v. Zillow Grp. Inc.*, 2022 WL 17486297, at *6 n.10 (W.D. Wash. Dec. 7, 2022) (rejecting argument that "attempts to contradict the [complaint's] allegations"). Indeed, not a single allegation in the AC supports Defendants' contradictory inference. Instead, it rests entirely on extraneous materials cited in their first motion to dismiss, which this Court has refused to consider. RB 10 (citing ECF 135 at 3-4); *see* Order at 17 ("[J]udicial notice of the content of most of the documents not referenced in the Consolidated Complaint would be inappropriate[.]").

**Defendants Failed to Comply with Item 105**. Item 105 requires issuers to disclose, under the caption "Risk Factors," "a discussion of the material factors that make an investment in the registrant or offering speculative or risky." 17 C.F.R. §229.105(a) (formerly Item 503(c)). "The risk factor section is intended to provide investors with a clear and concise summary of the material risks to an investment in the issuer's securities." Securities Offering Reform, 70 Fed. Reg. 44721, 44786 (Aug. 3, 2005). This should include

[8] Defendants' cases are inapposite. In *In re Omega Healthcare Inv'rs Sec. Litig.*, 563 F. Supp. 3d 259, 276 (S.D.N.Y. 2021), the court rejected the plaintiffs' argument that two missed rent payments constituted a disclosable trend. Similarly, the plaintiffs in *In re Restoration Robotics, Inc. Sec. Litig.*, 417 F. Supp. 3d 1242, 1263 (N.D. Cal. 2019), alleged that the practice of "warehousing" was "common," but pled "only one specific instance" of it.

a discussion of how "the risk factor could adversely [a]ffect the registrant's present or future business expectations." *Silverstrand Invs. v. AMAG Pharm., Inc.*, 707 F.3d 95, 103 (1st Cir. 2013).

The AC alleges that Defendants violated Item 105 by omitting adverse facts that made Rivian's IPO risky, including: (i) the delta between R1 BOM costs and retail prices; and (ii) Rivian's pre-IPO decision to increase retail prices, which would negatively impact R1 demand. Nothing more is required. *See In re Lyft Inc. Sec. Litig.*, 484 F. Supp. 3d 758, 769 n.4 (N.D. Cal. 2020) (finding Item 105 violation adequately pled where plaintiff alleged undisclosed risk of brand damage from increased assaults on passengers); *see also In re Honest Co. Sec. Litig.*, 615 F. Supp. 3d 1149, 1154-55 (C.D. Cal. July 18, 2022) (finding Item 105 violation alleged where plaintiff "adequately tether[ed]" customers' efficacy and safety concerns with undisclosed facts regarding diaper product); *Panther Partners*, 2020 WL 5757628, at *7 ("The same facts underlying an Item 303 violation may also support an Item 503 [now Item 105] violation" and "a court's rationale for determining the former may also support the same determination of the latter.").

**b. The S-1 Contained Untrue Statements of Material Fact**

Plaintiffs also allege that Defendants violated the Securities Act by including untrue statements of material fact in the S-1. *See* 15 U.S.C. §77k(a). Specifically, the S-1 represented that Rivian expected to generate "negative gross profit[s] per vehicle for the near term" because its "fixed costs" were being "spread across a smaller product base." ¶¶126, 159, 296. The S-1 further represented that, "[o]ver the long term," Rivian believed it could "generate positive gross profit as production utilization increase[d] and [it] leverage[d] [its] investments." ¶¶127, 160, 297.

Plaintiffs plausibly allege that these statements were materially misleading. As the Ninth Circuit has recently confirmed, given Defendants' decision to address the causes of Rivian's expected "negative gross profit per vehicle," it was materially misleading for the S-1 to attribute those negative gross profits to Rivian's high fixed costs and low production volumes without also disclosing the other significant driver of those negative profits—the

negative delta between R1 BOM costs and retail prices. ¶298; *Forescout*, 63 F.4th at 770 (finding it misleading to attribute missed revenue guidance "on conditions in the EMEA region" without disclosing that another "significant cause of the missed revenue guidance was the misclassification of illusory deals").

Similarly, contrary to the S-1's representation that Rivian could "generate positive gross profit" by scaling production and leveraging investments, the undisclosed negative delta between the R1's locked-in BOM costs and retail pricing ***foreclosed*** it from generating positive gross profits—***regardless*** of its production volumes and fixed costs—unless and until it significantly reduced BOM costs or increased prices.[9] This is enough to state a claim. *See, e.g.*, *In re Braskem S.A. Sec. Litig.*, 246 F. Supp. 3d 731, 759 (S.D.N.Y. 2017) (misleading to disclose "variety of factors" affecting raw material prices ***without disclosing other factor that ensured Braskem would pay below-market prices regardless of "whatever result the listed factors might otherwise yield***"); *Forescout*, 63 F.4th at 771 (statement misleading where it "did not fairly align with the information in [defendants'] possession").

Defendants' arguments fail. As an initial matter, they are wrong to suggest that the "focus" of these affirmative misstatements was "Rivian's high fixed costs" and "not the drivers of Rivian's gross profits." UB 9. In fact, the statements appeared in the S-1 section titled, ***Improvement in Margin*** *and Capture of Lifetime Revenue*. ECF 135-5 at 124-25. Thus, to investors, these statements laid out Rivian's pathway to profitability—one which, unbeknownst to them, did not exist at the time of the IPO given the R1's upside-down pricing structure.

Defendants next claim that the S-1 was not misleading because it did not state that high fixed costs and product utilization were "the only factors" affecting Rivian's profitability. UB 8, 12. They are wrong. In addressing the causes of Rivian's near-term negative gross profits and its potential for generating long-term positive gross profits, it is

[9] For this reason alone, Defendants' assertion that the "BOM had nothing to do with Rivian's near term negative gross profit per vehicle," RB 14, is wrong.

beyond dispute that the ***only*** factors the S-1 identifies are high fixed costs, low production volumes, and product utilization. ¶296. Yet even if they were correct, having chosen to speak about the factors impacting Rivian's gross profits, Defendants assumed a duty to speak fully and truthfully on that topic—including a duty to disclose the one factor that guaranteed Rivian would operate at a negative gross profit over the near- and long-term. *Forescout*, 63 F.4th at 770; *Braskem*, 246 F. Supp. 3d at 759; *see also In re Virtus Inv. Partners, Inc.*, 195 F. Supp. 3d 528, 537 (S.D.N.Y. 2016) (misleading to disclose one "key driver of [company's] high levels of sales and net flows" without disclosing others).[10]

Further, Defendants contend that their statements were simply "loose prediction[s]" about the future and not "guarantee[s]" about future profits. UB 9. They are wrong. Their statements contained factual (and misleadingly incomplete) representations about the factors that impacted Rivian's gross profits per vehicle. In any event, their argument simply underscores why the S-1 is actionable—it was misleading for Defendants to offer predictions about profitability without disclosing the one fact that ***guaranteed*** its profits would be negative.[11]

[10] Defendants are wrong to suggest that they are absolved of liability because "long term is incapable of concrete measurement" and, as a result, their statement was not a "guarantee[] that [Rivian] would generate a positive gross profit in any specific time frame." UB 11. For one thing, Item 303 defines "short-term" and "long-term." *See* 17 C.F.R. § 229.303(b)(1). Further, based on the state of affairs that existed at the time of the IPO, the R1 could not ever become profitable on any time horizon. Thus, Defendants' statement was misleading regardless of how investors interpreted "long term."

[11] Equally unavailing is Defendants' contention that the S-1 was not misleading because it did not reference pricing. RB 9. Rivian's risk disclosures specifically addressed the "announced or expected prices of our vehicles," ¶125, and pricing was a necessary component of Rivian's representations about its "gross profit per vehicle," ¶126.

Finally, to the extent Defendants contend that the negative delta between the BOM costs and the retail pricing was not material to investors, this argument fails.[12] As noted above, the R1's high-end features and "reasonable price tag" were highly material aspects of Rivian's value proposition to investors. ¶¶51-87.[13] Moreover, the financial impact of this undisclosed trend was undoubtedly material to investors. Given the $40,000 delta between BOM costs and retail prices, Rivian stood to lose over $2 billion on material costs alone on its 55,000+ pre-orders as of the date of the IPO. These facts would have significantly altered the total mix of information available to investors. *See Matrixx*, 563 U.S. at 47 (finding "information indicating a significant risk to [defendant's] leading revenue-generating product" material to investors). The fact that Defendants displayed pricing and the specifications prominently in their IPO roadshow materials to investors underscores the significance of this information to Rivian's value, ¶103, as does the resoundingly negative market reaction to Rivian's price increase in March 2022, ¶¶146-53; *Reese v. Malone*, 747 F.3d 557, 570 (9th Cir. 2014) ("Facts demonstrating public interest in the withheld information support its materiality."), *overruled on other grounds by City of Dearborn Heights Act 345 Police & Fire Ret. Sys. v. Align Tech, Inc.*, 856 F.3d 605 (9th Cir. 2017) ("*Align*").

**c. The S-1's Risk Disclosures Do Not Absolve Defendants of Liability and Were Themselves Misleading**

Defendants claim that the S-1's risk disclosures concerning Rivian's "costs, profits, and margins" foreclose Plaintiffs' claims under Items 105 and 303, rendered the S-1's

[12] For the avoidance of doubt, Plaintiffs do not contend that Defendants' affirmative statements or Regulation S-K required Defendants to disclose the exact dollar cost of its BOM. *See* RB 15. Indeed, Defendants may have complied with their obligations under the federal securities laws by informing investors that Rivian had, in fact, experienced significant pre-IPO increases in BOM costs, that those costs materially exceeded R1 retail prices, that Rivian would continue generating negative gross profits per vehicle until it reduced R1 costs and/or increased R1 prices, and that Rivian intended to increase R1 retail prices after the IPO.

[13] Plaintiffs do not, as Defendants suggest, seek to attribute these third-party statements to Rivian, RB 10-11, but rather cite them to demonstrate materiality.

affirmative representations not materially misleading, and are sufficient to invoke the bespeaks caution doctrine. UB 9-10, 12, 15. They are wrong on each count.

*First*, the risk disclosures identified by Defendants do not cure their Regulation S-K violations—or their affirmative misstatements—because those disclosures "amount[] to only a boilerplate listing of generic risks" and "do[] not mention the specific risk[s] to which [Defendants] had been alerted." *Forescout*, 63 F.4th at 780. Statements that Rivian may never be profitable or that its high fixed costs could cause "gross profit losses to increase" over the short to medium term "even as [its] revenue increases from ramping production volumes," RB at 14, conveyed no substantive information to investors about the negative delta between R1 BOM costs and retail prices, which ensured Rivian would generate negative gross profits regardless of fixed costs or production volumes. As a result, Defendants' risk disclosures do not forgive their material omissions as a matter of law. UB 7-9; *see also Credit Suisse First Bos. Corp. v. ARM Fin. Grp., Inc.*, 2001 WL 300733, at *8 (S.D.N.Y. Mar. 28, 2001) ("[W]arnings of specific risks like those in the [defendants'] Prospectus do not shelter defendants from liability if they fail to disclose hard facts critical to appreciating the magnitude of the risks described); *SureBeam*, 2005 WL 5036360, at *13 (rejecting argument that company was absolved of liability based on generic warning that it was "a start up company" with "no proven track record, no customer base, and no assets").

*Second*, for largely the same reasons, Defendants are wrong to suggest that the S-1's risk disclosures are sufficient to invoke the bespeaks caution doctrine. UB 9-10.[14] For one thing, the bespeaks caution doctrine does not apply because the S-1 omitted facts that ***existed*** at the time of the IPO, including the negative delta between R1 BOM costs and retail prices and Rivian's decision to increase R1 prices. ¶¶295, 298-302; *see Livid Holdings Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d 940, 948 (9th Cir. 2005) (bespeaks caution doctrine does not apply to historical and present facts) (citing *In re Worlds of Wonder Sec. Litig.*, 814 F. Supp. 850, 858 (N.D. Cal. 1993)); *see also Honest*, 615 F. Supp. 3d at 1155-

[14] The PSLRA Safe Harbor for forward-looking statements does not apply to statements "made in connection with an initial public offering." 15 U.S.C. § 78u-5(b).

56 (bespeaks caution doctrine inapplicable where plaintiffs contend risk disclosures cast then-existing material events and adverse trends as "potential risks").[15]

Yet even if the Court finds that any aspect of Defendants' statements are forward looking, Defendants have failed to make a "stringent showing" that "sufficient cautionary language or risk disclosure[s]" existed such that "reasonable minds could not disagree that the challenged statements were not misleading." *Livid*, 416 F.3d at 947; *In re Atossa Genetics Inc. Sec. Litig.*, 868 F.3d 784, 798 (9th Cir. 2017); *Uber*, 2020 WL 4569846, at *8. To be sufficient, cautionary language must be "specifically tailored to the issuer's business and to the forward-looking statements," must include "more than a recitation of mere generalized risks applicable to any business venture," and "must discredit the alleged misrepresentations to such an extent that the risk of real deception drops to nil." *In re Immune Response Sec. Litig.*, 375 F. Supp. 2d 983, 1033 (S.D. Cal. 2005).

As discussed above, the S-1's boilerplate warnings that Rivian ***might*** lose money over the near term and ***might*** never be profitable, RB 14, 18, do not "relate directly" to the rising R1 BOM costs, which ensured that the R1 ***would never*** become profitable absent reductions in material costs or price increases. *Atossa*, 868 F.3d at 798 ("To meet this standard, the language bespeaking caution must relate directly to that to which plaintiffs claim to have been misled."). Instead, the S-1's generalized risk warnings could apply to virtually ***any*** business venture. *Immune Response*, 375 F. Supp. 2d at 1033. Thus, they were not meaningful. *See Zaghian v. Farrell*, 675 F. App'x 718, 720 (9th Cir. 2017) ("[C]autionary language [] must have consisted of non-boilerplate warnings that were tailored to the forward-looking statements.").

*Third*, the AC plausibly alleges that the risks of which Defendants warned had already materialized by the IPO. The S-1 did not, as Defendants suggest, warn investors

[15] Indeed, courts have found the bespeaks caution doctrine to be inapplicable where, as here, the short time period between the S-1 and the adverse disclosures indicates that the allegedly-omitted facts existed at the time the statements were made. *See Shankar v. Zymergen Inc.*, 2022 WL 17259057, at *2 (N.D. Cal. Nov. 29, 2022).

that Rivian "might need to increase prices and/or reduce costs to become profitable in the future." UB 15. Rather, the S-1 stated that ***if*** Rivian were to experience "[s]ubstantial increases in the prices for [vehicle] components, materials and equipment" in the future, ***then*** it ***may*** need to increase prices, and those efforts "***could***" negatively impact its financial condition. ¶294. Yet, by the time of the IPO, Rivian's R1 BOM costs had ***already*** significantly increased since retail pricing was announced, and Rivian had ***already*** determined that it needed to raise prices following the IPO.[16] For this additional reason, the S-1's cautionary language was not meaningful. *Forescout*, 63 F.4th at 781 ("[C]autionary language is not meaningful if it discusses as a mere possibility a risk that has already materialized."); *id.* at 779 ("Defendants cannot rely on boilerplate language describing hypothetical risks to avoid liability for the failure to disclose that the company already had information suggesting the merger might not ensue.").

In fact, because the risks warned of had already transpired prior to the IPO, the AC plausibly alleges that Defendants' risk disclosures concerning the possibility of future BOM cost increases was ***itself*** an actionable misstatement. ¶¶157-58, 170-71, 294-95. As the Ninth Circuit recently confirmed in *Forescout*, "risk disclosures can be misleading to investors when they speak entirely of as-yet-unrealized risks and contingencies and do not alert the reader that some of the[] risks may already have come to fruition." 63 F.4th at 781; *see also Lyft*, 484 F. Supp. 3d at 769-70 (risk factor misleading where "warned-of risks" had already materialized); *Berson v. Applied Signal Tech., Inc.*, 527 F.3d 982, 986 (9th Cir. 2008) (statement that "speaks entirely of as-yet-unrealized risks and contingencies" does

[16] Thus, Plaintiffs are not alleging that Defendants "fail[ed] to disclose the future," or that Defendants should have disclosed their "pricing strategy." UB 4, 15; Order at 15. Rather, Plaintiffs claim Defendants failed to disclose then-existing facts that were reasonably likely to have a material impact on Rivian's future financial condition—including the escalation of Rivian's BOM costs and its resulting decision to increase R1 retail prices.

nothing to "alert[] the reader that some of these risks may already have come to fruition").[17] Here, the S-1's characterization of increases in BOM costs and prices as "risks that 'could' or 'may' occur [was] misleading to a reasonable investor" because, by the time of the IPO, Rivian "knew that those risks had materialized." *Alphabet*, 1 F.4th at 704; *see also Berson*, 527 F.3d at 987 (stating something "might" occur is "quite different" from stating it has "in fact" occurred because "[o]ne indicates a risk, the other a certainty" and "investors would treat the two differently").[18]

Defendants' efforts to argue that the risks disclosed in the S-1 materialized after the IPO fail for the reasons discussed above at Section III.A.2.a-b. Equally unavailing is Defendants' argument that the S-1 risk disclosure could not have "concealed information about production costs" because it disclosed that increases in production costs "could have a negative impact on Rivian's business." UB 4-5. As discussed above, the fact that Defendants disclosed the potential negative impact that "could" result from BOM cost increases at a time when BOM costs had already increased is precisely what rendered their statement materially misleading. Their arguments should be rejected.

**d. Defendants' "Opinion" Arguments Fail**

Defendants argue that the S-1's misstatements concerning Rivian's near-term negative gross profits and long-term positive gross profits constitute inactionable opinions. RB 14 (citing ¶¶159-60). They are wrong. As an initial matter, statements that "express[] certainty about a thing" or occurrence and, thus, are not "opinions." *Omnicare, Inc. v.*

[17] Defendants' authorities are in accord. *See In re Pivotal Sec. Litig.*, 2020 WL 4193384, at *8 (N.D. Cal. July 21, 2020) (UB 15) (acknowledging that risk factors are actionable misstatements where plaintiff alleges facts "indicating that the risks had already come to fruition"); *In re Eargo, Inc. Sec. Litig.*, 2023 WL 1997918, at *10 (N.D. Cal. Feb. 14, 2023) (RB 10) (acknowledging that risk disclosures are actionable if accompanied by "factual allegations indicating that the risks had already come to fruition").

[18] Thus, Defendants are wrong to claim that this statement did not "create an impression" that the R1 BOM costs "had remained the same over time, or at a low level." UB 5. By disclosing R1 BOM cost increases as a "risk" rather than a "certainty," they created the misleading impression that such increases had not yet occurred. *Berson*, 527 F.3d at 987-98.

*Laborers Dist. Council Constr. Indus. Pension* Fund, 575 U.S. 175, 176 (2015) ("[A] statement of opinion conveys only an uncertain view as to that thing.").

Yet, even if these statements contain opinions, they are actionable. Opinion statements are actionable if either: (i) "the speaker did not hold the belief she professed" and that the belief is objectively untrue; (ii) an embedded fact contained within an opinion statement was untrue; ***or*** (iii) the statement omitted "facts going to the basis for the issuer's opinion" which rendered the statement misleading. *Align*, 856 F.3d at 615-16. Plaintiffs need only satisfy one *Align* prong for an opinion statement to be actionable. *Id.*

Here, Defendants contend only that Plaintiffs have failed to satisfy the first *Align* prong. RB 14. They are wrong. Defendants' statements were objectively false—and Defendants could not have subjectively believed them—because they knew that Rivian's BOM costs exceeded its retail prices, and that fact ***guaranteed*** that Rivian would generate negative gross profits on each R1 sale. *See Hufnagle v. Rino Int'l Corp.*, 2013 WL 3976833, at *6 n.7 (C.D. Cal. Aug. 1, 2013) ("Because Plaintiffs have adequately pled scienter, their subjective falsity allegations also suffice."); *In re Leapfrog Enter., Inc. Sec. Litig.*, 2017 WL 4877451, at *1 (N.D. Cal. Aug. 10, 2017) (similar).

More importantly, Defendants ***do not dispute*** that their statements are actionable under the second and/or third *Align* prongs. Nor could they. Defendants' misstatements contain embedded (and misleadingly incomplete) representations concerning the drivers of Rivian's gross profits. *See Align*, 856 F.3d at 615. Likewise, Defendants' misrepresentations omitted material facts "going to the basis" of the purported opinions which rendered those statements misleading, including the negative delta between R1 BOM costs and retail prices which guaranteed negative gross profits regardless of fixed costs and production. *See id.*; *see also Forescout*, 63 F.4th at 771 (opinion statements actionable where they "did not fairly align with the information in [defendants'] possession"); *Omnicare*, 575 U.S. at 192 ("[L]iteral accuracy is not enough: An issuer must as well desist from misleading investors by saying one thing and holding back another.").

**e. Rivian's "Economies of Scale" Argument Is Meritless**

Unable to refute the AC's well-pled allegations of falsity, Defendants resort to speculating about the possibility that Rivian could have reduced its BOM costs post-IPO through economies of scale or by changing suppliers. RB 11-12. Their arguments raise factual questions that cannot be resolved on a motion to dismiss. *Snap*, 2018 WL 2972528, at *7 ("[T]his only demonstrates that a factual dispute exists which cannot be resolved at the pleading stage."); *LDK Solar*, 584 F. Supp. 2d at 1260 ("[T]he PLSRA in no way turns FRCP 12 into a trial-type, papers-only proceeding, much less one in which defendants get the benefit of every conceivable doubt, including credibility calls.").

Further, Defendants' theoretical musings cannot be considered because they are directly contradicted by the AC's well-pled allegations that: (i) any cost savings Rivian could have achieved through scaled production were in the range of just 5%; (ii) Rivian could not reduce its BOM costs ***by over 50%*** without implementing drastic design changes (which Scaringe himself rejected); and (iii) Rivian could not easily change suppliers after production began. ¶¶120-21, 196, 283-84;[19] *see Khoja*, 899 F.3d at 999 ("If defendants are permitted to present their own version of the facts at the pleading stage…it becomes near impossible for even the most aggrieved plaintiff to demonstrate a sufficiently 'plausible' claim for relief."); *Johnson v. Knapp*, 2009 WL 764521, at *4 (C.D. Cal. Mar. 16, 2009) (on a motion to dismiss "the Court ignores Defendants' version of the facts and relies, instead, on Plaintiff's version contained in the Complaint and any inferences that can be drawn from it").[20]

[19] Defendants' attempt to discredit FE-4 and FE-5's statements in this regard fails, as the AC alleges that they were members of the Cost Engineering Group responsible for sourcing materials with suppliers. *See, e.g.*, ¶¶41-42, 276-81, 283, 285.

[20] Further, Defendants' conjecture cannot be squared with Rivian's attempts to source cheaper parts for its R1 vehicles and its pre-IPO decision to raise prices—measures it would not have taken if it planned to significantly reduce BOM costs by scaling production and changing suppliers.

In any event, given that the S-1 is designed to allow investors to see Rivian "through the eyes of management," even if Defendants had a view that they could overcome the expanding delta between the locked-in BOM costs and the R1 retail prices at some point in the future, it does not excuse their failure to reveal the ***existence*** of this delta and the risks to overcoming it so that investors could independently assess those risks and make an informed investment decision. Securities Act Release No. 6835 at 22436.

Finally, Defendants are wrong to claim that the AC "does not offer any insight into the BOM after September 2021." RB 12. The AC alleges that the R1 BOM costs were "locked in with suppliers" ***by*** September 2021 and were "well in excess of" R1 retail prices "by the time of the November 2021 IPO." ¶118. Moreover, Defendants admit their irrelevant and inappropriate question—"Might Plaintiffs have left out the inconvenient truth that the BOM *has* in fact gone down?," RB at 13—finds no support in the AC, and, in any event, it is entirely irreconcilable with their own argument that BOM prices ***increased*** after September 2021.[21]

**B. The AC Plausibly Alleges Exchange Act Violations**

**1. Legal Standard**

To state a Section 10(b) claim, Plaintiffs must allege a material misrepresentation or omission, scienter, reliance, causation, and damages. *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 341-42 (2005). Here, the Exchange Act Defendants only challenge the adequacy of Plaintiffs' falsity and scienter allegations.

When pleading falsity and scienter under Section 10(b), Plaintiffs must satisfy Rule 9(b). To allege falsity, Plaintiffs need only "specify each statement alleged to have been misleading," "the reason or reasons why the statement is misleading," 15 U.S.C. §78u-4(b)(1)(B), and "sufficient factual matter, accepted as true, to state a claim…that is plausible

[21] Because Plaintiffs have pled a primary Section 11 violation, their Section 15 claim should be sustained. In addition, because Defendants only challenge Plaintiffs' 12(a)(2) claims on the grounds that there is no actionable misstatement or omission in the S-1, UB 15, their argument fails and that claim should also be sustained.

on its face," *Forescout*, 63 F.4th at 763. As the Ninth Circuit recently confirmed, the "strong inference standard of plausibility" only applies to scienter allegations; falsity allegations need only satisfy a reasonable inference standard of plausibility. *Id.* at 766.

**2. Defendants Made Material Misrepresentations During the Class Period**

**a. The S-1 Misrepresented Material Facts**

As explained above in Sections III.A.2.b-e, the S-1 contained statements concerning the drivers of Rivian's gross profits and the possibility of future cost and price increases. In accordance with Rule 9(b) and the PSLRA, the AC alleges with particularity that those statements were rendered materially false and misleading by virtue of their failure to disclose the negative delta between R1 BOM costs and retail pricing, which led Rivian executives to decide to increase R1 prices prior to the IPO. *Id.* Nothing more is required.

**b. Defendants' Post-IPO Statements Are Actionable**

During Rivian's 3Q21 conference call on December 16, 2021, McDonough stated that Rivian "expect[ed]" "high fixed cost[s]" to "continue to have a negative drag on gross profit" while these costs are "amortized over a small but growing [production volume]." ¶164. This statement was materially false and misleading for the reasons discussed above in Section III.A.2.b. While Defendants claim that this statement is not actionable because it was "correct," RB 15, "the disclosure required by the securities laws is measured not by literal truth, but by the ability of the material to accurately inform rather than mislead prospective buyers," *In re Convergent Techs. Sec. Litig.*, 948 F.2d 507, 512 (9th Cir. 1991). Here, it was misleading for McDonough to disclose certain factors that were creating "a negative drag on gross profit" while omitting the one factor that guaranteed Rivian would generate negative gross profits regardless of fixed costs and production volumes. ¶165; *see also supra* Section III.A.2.b; *Braskem*, 246 F. Supp. 3d at 759.

During the same call, McDonough and Scaringe described the possibility of a price increase as a new development caused by recent inflationary pressures and "the very strong demand" for R1 vehicles. ¶¶166-67. These statements misled investors into believing that Rivian was considering a price increase because of post-IPO developments and increased

demand when, in truth, Rivian had already determined to raise prices ***prior to*** the IPO to address its escalating BOM costs. ¶139. They also misleadingly characterized price increases as a mere possibility when Rivian had already decided to increase prices months earlier. *Berson*, 527 F.3d at 987-98.[22]

Defendants contend that these statements were not misleading because they did ***not*** mention "profitability as a driving factor for pricing considerations." RB 15. But, again, that is why their statements are actionable—they failed to disclose the true driver of Rivian's pricing reevaluation and instead attributed it to other, post-IPO factors. *See Forescout*, 63 F.4th at 770 ("[I]f a significant cause of the missed revenue guidance was the misclassification of illusory deals, it was misleading to blame the revenue miss entirely on EMEA conditions (even if EMEA conditions were also a factor in the financial performance).").

**3. The AC Raises a Strong Inference of Scienter**

Scienter is "a mental state that not only covers intent to deceive, manipulate, or defraud...but also deliberate recklessness." *Schueneman*, 840 F.3d at 705. Deliberate recklessness refers to "a highly unreasonable omission" that "presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it." *In re Verifone Holdings, Inc. Sec. Litig.*, 704 F.3d 694, 703 (9th Cir. 2012). Scienter allegations must be "considered holistically"—not in isolation—"and in the light most favorable to Plaintiffs." *In re Plantronics, Inc. Sec. Litig.*, 2022 WL 3653333, at *18 (N.D. Cal. Aug. 17, 2022); *see also Forescout*, 63 F.4th at 763, 766. A scienter inference is strong if it is "cogent and at least as compelling as any opposing inference one could draw from the facts alleged." *Tellabs*, 551 U.S. at 324.

[22] In addition, the 3Q21 Form 10-Q repeated the S-1's risk disclosure concerning the possible negative consequences that could occur ***if*** Rivian's costs and retail prices increased. ¶¶170-71. These statements were materially false and misleading for the reasons discussed above at Section III.A.2.b-c.

Here, the AC raises a cogent and compelling inference that the Exchange Act Defendants intended to defraud Rivian investors—or, at a minimum, acted with deliberate recklessness as to whether their statements would mislead investors.

**a. The Exchange Act Defendants' Knowledge of and Access to Contradictory Information Supports an Inference of Scienter**

"[P]articularized allegations" that a defendant was aware of or "had actual access to the disputed information raise a strong inference of scienter." *In re Quality Sys., Inc. Sec. Litig.*, 865 F.3d 1130, 1145 (9th Cir. 2017). Here, Plaintiffs have alleged that Rivian's senior executives, including Scaringe and McDonough: (i) were heavily involved in all aspects of the R1 design and pricing; (ii) developed and had access to an internal database (Project X) designed to monitor R1 BOM costs; (iii) received internal reports addressing R1 BOM costs;[23] and (iv) attended meetings where rising R1 BOM costs were discussed, including Gate Review[24] meetings. ¶¶40, 113-18, 123, 192-200. The AC further alleges that Rivian's then-CFO convened a meeting in December 2019 to specifically address R1 BOM cost increases, that Rivian terminated its cost consultant over escalating R1 BOM costs following that meeting, that Scaringe himself was personally involved in efforts to reduce R1 BOM costs, and that senior Rivian executives, including Schwab and Behl, were

[23] Unlike Defendants' cases, Plaintiffs have specifically alleged that these data sources reflected rising R1 BOM costs. ¶¶40, 116, 118, 193; *see Iron Workers Local 580 Joint Funds v. NVIDIA Corp.*, 522 F. Supp. 3d 660, 674-75 (N.D. Cal. 2021) ("Plaintiffs do not adequately tie the specific contents of any of these data sources to particular statements[.]"); *Browning v. Amyris, Inc.*, 2014 WL 1285175, at *16 (N.D. Cal. Mar. 24, 2014) (noting failure to allege "what data or information [] in the database…should have apprised the defendants of the allegedly false or misleading nature of their statements").

[24] Defendants ask the Court to disregard the AC's Gate Review allegations because it does not allege that FE-2 personally attended those meetings. RB 21. But the AC alleges that FE-2 was in a position to know what was discussed at those meetings given that FE-2 was responsible for vehicle quality and FE-2's boss—Rod Copes—attended them. ¶¶39, 194; *Okla. Police Pension & Ret. Sys. v. LifeLock, Inc.*, 780 F. App'x 480, 484 n.5 (9th Cir. 2019) (crediting FE allegations based on hearsay where "they form a plausible and coherent narrative" and where FE was in a position to be knowledgeable about what transpired).

personally involved in pre-IPO discussions concerning the need to increase R1 prices, but deliberately avoided doing so until after the IPO. *Id.*

Viewed holistically, these allegations raise a compelling inference that Rivian and its senior executives, including Scaringe and McDonough, were aware of the R1's rising BOM costs and upside-down cost structure, but did not disclose them to investors "in order to avoid or delay the impacts disclosure could have on [the IPO]."*Alphabet*, 1 F.4th at 706-07; *see also S. Ferry LP, # 2 v. Killinger*, 542 F.3d 776, 786 (9th Cir. 2008) ("[A]llegations may independently satisfy the PSLRA where they are particular and suggest that defendants had actual access to the disputed information[.]"); *Nursing Home Pension Fund, Local 144 v. Oracle Corp.*, 380 F.3d 1226, 1230 (9th Cir. 2004) (possession of contradictory "[c]ontemporaneous reports or data" is "most direct way" to allege scienter).

Moreover, the competing inference—that the senior executives of a company "whose existence depends on" the profitable production and sale of the flagship R1 vehicle were kept in the dark about the fact that the vehicle's parts cost $40,000 more than its retail price—is not even plausible, let alone more compelling than the inference of fraud. *Alphabet*, 1 F.4th at 706; *see also Makor Issues & Rights, Ltd. v. Tellabs Inc.*, 513 F.3d 702, 711 (7th Cir. 2008) (finding it "exceedingly unlikely…that no member of the company's senior management who was involved in authorizing or making public statements [did not know about issue with flagship product]").

For this reason, the Exchange Act Defendants do not seriously dispute their knowledge of these facts. Instead, they attack a strawman—criticizing the AC for failing to demonstrate that they knew "profitability was impossible" and that R1 BOM costs were "irremediably stuck above the cars' retail price." RB 17, 22. But no such showing is required. As noted above, Plaintiffs need only demonstrate that the Exchange Act Defendants were aware of, or were deliberately reckless in disregarding, material facts that contradicted their public statements to investors—including that the R1's locked-in BOM costs vastly exceeded its retail prices. In fact, Defendants' decision to address the causes of Rivian's negative gross profits, and to disclose the one cause nearly ***all*** startup companies

face (high fixed costs coupled with low production volumes)—while concealing the Rivian-specific cause that called its entire business model into question—is itself strongly indicative of scienter. *Reese*, 747 F.3d at 572 ("[T]he inference that [defendant] did not have access to the [relevant] data is directly contradicted by the fact that she specifically addressed it in her statement.").

Further, despite attacking the AC's allegations about Rivian's efforts to reduce BOM prices as "conclusory," the Exchange Act Defendants acknowledge that such efforts did occur, and that the AC pleads specific instances of Scaringe's involvement in (and rejection of) them. *See* RB 18-19. These concessions strengthen the inference that Scaringe was well aware of Rivian's need to reduce R1 BOM costs, but refused to implement any remedial measures that could jeopardize Rivian's IPO. By contrast, the competing inference offered by Defendants—that Scaringe was "committed to designing a well-made product," RB 19—has no bearing on the scienter analysis. Scaringe's purported desire to build a well-made car says nothing about whether he knowingly or recklessly misled investors about Rivian's inability to do so profitably.

Similarly, as discussed above, the AC does not support—and, in fact, directly contradicts—Defendants' speculation that Rivian might have been able to change suppliers or cut costs after the IPO. RB 19-20; *see supra* Section III.A.2.e & n.20; *Tellabs*, 551 U.S. at 314 (requiring competing inferences to be "rationally drawn ***from the facts alleged***"). In any event, what matters for purposes of scienter is Defendants' knowledge or reckless disregard of the undisclosed facts and trends at the time the alleged misstatements were made, not unsupported speculation about whether circumstances could have changed in Rivian's favor at some unspecified point in time after those statements were made.

Finally, Defendants claim that Plaintiffs' scienter allegations fail because "access to information is insufficient to adequately allege scienter." RB 16. However, the Ninth Circuit has recently held that a defendant's "access to information" does, in fact, "bolster" the inference of scienter. *Forescout*, 63 F.4th at 773. Here, there can be no question that the inference of scienter is bolstered by Scaringe's personal involvement in efforts to reduce

R1 BOM costs, and senior Rivian executives' access to the Project X database, regular receipt of Revenue and Margin Reports, and regular attendance at Gate Review meetings where Rivian's rising BOM costs were discussed. *Id.*

**b. The Core Operations Inference Supports an Inference of Scienter**

"[I]t may be inferred that facts critical to a business's core operations or important transactions are known to key company officers[.]" *S. Ferry*, 542 F.3d at 786; *Reese*, 747 F.3d at 575 ("[W]e can impute scienter based on the inference that key officers have knowledge of the "core operations" of the company."). Here, the AC alleges—and the Exchange Act Defendants do not dispute—that the production, pricing, and sale of its flagship R1 vehicles was Rivian's core operation and the cornerstone of its business during the Class Period. ¶201; RB 21-22. The core operations inference thus strengthens the inference of scienter. *See, e.g.*, *Roberti v. OSI Sys., Inc.*, 2015 WL 1985562, at *13 (C.D. Cal. Feb. 27, 2015) (holding that it would be "absurd" to suggest that defendants "were not aware of issues relating to" company's "largest and most profitable division"); *Jaeger*, 2022 WL 17486297, at *9 (absurd to suggest defendant lacked knowledge of company's "primary stock sentiment driver").

**c. Scaringe's Public Statements Support an Inference of Scienter**

Scaringe's public statements strengthen inference of the Exchange Act Defendants' scienter. Scaringe spent over a decade honing Rivian's market strategy and repeatedly spoke about the R1's design, high-end features, and pricing, including in a roadshow presentation to potential IPO investors. *See, e.g.*, ¶¶8, 43-45, 57-59, 82-86, 103, 203. These facts strengthen the inference that he would have been "among the first to know" about Rivian's rising BOM costs and decision to increase prices. *Reese*, 747 F.3d at 572.

Moreover, Scaringe specifically confirmed, in his public statements to investors, that the R1 pricing was "something that [they] certainly considered and talk about quite a bit as a management team." ¶¶167, 202. He also specifically discussed R1 pricing relative to its high-end features. ¶167 (stating that R1 was "aggressively priced" given its features). These statements further support an inference of the Exchange Act Defendants' scienter. *See In re*

*Daou Sys.*, 411 F.3d 1006, 1022 (9th Cir. 2005) ("[S]pecific admissions from top executives that they are involved in every detail of the company and that they monitored portions of the company's database are factors in favor of inferring scienter[.]"); *Reese*, 747 F.3d at 572 (inference of scienter bolstered by defendant's statements "specifically addressing" allegedly misstated facts); *see also Roberti*, 2015 WL 1985562, at *12.

Defendants claim that these statements cannot support scienter because they were made "years before production started." RB 23. They are wrong. For one thing, Scaringe's statement about management "talk[ing] about [pricing] quite a bit" was made ***on December 16, 2021***—the same day Scaringe and McDonough made additional false statements about R1 pricing. ¶¶164-67. In any event, when viewed holistically with the AC's allegations, including allegations that he personally reviewed proposed R1 design changes during the Class Period, Scaringe's statements evidencing his personal involvement in all aspects of R1 production and pricing strengthen the inference of his scienter.[25]

**d. The AC's FE Allegations Should Be Fully Credited**

Recognizing that the allegations attributed to FE-4 and FE-5 are sufficient to state a claim, Defendants seek to attack the credibility of their accounts. *See* RB 3-6.[26] Their arguments should be rejected.

The AC establishes the FEs' reliability and personal knowledge by detailing "each former employee's job title and group at [Rivian], responsibilities, period of employment, and experience." *Jaeger*, 2022 WL 17486297, at *2 n.5; ¶¶39-42, 115-17. It also describes the responsibilities and reporting lines for the Cost Engineering Group in which FE-4 and FE-5 worked, including that it was in charge of costing the entire vehicle (other than batteries) and that it reported to Steven Gawronski (Rivian's former head of purchasing). ¶¶41-42, 116. In addition, the AC demonstrates that the FEs had access to the relevant

[25] Defendants' attempt to dispute that the "temporal proximity" between the alleged misstatements and corrective disclosure should be rejected because it relies on facts cited nowhere in the AC. *See* RB 23 n.2 (citing ECF No. 135 at 3-4).

[26] Defendants do not challenge the allegations attributable to FE-2 and FE-3.

information attributed to them. For example, the AC alleges that FE-4 and FE-5 were personally involved in costing the R1 vehicles and had access to Project X, and it states that FE-5 personally attended the December 2019 meeting between Rivian's then-CFO and its cost consultant concerning rising R1 BOM costs. ¶¶115, 193.[27] It also explains that FE-4 and FE-5 had personal knowledge of the battery costs both before and after those costs were removed from Project X. ¶193.[28]

These allegations "support the probability that a person in the position occupied by the source would possess the information alleged." *Forescout*, 63 F.4th at 767; *see also Quality Sys.*, 865 F.3d at 1145; *Daou*, 411 F.3d at 1016 (crediting FE allegations where "[p]laintiffs number each witness and describe his or her job description and responsibilities…[and] [i]n some instances, plaintiffs provide the witnesses' exact title and to which [executive] the witness reported."); *Robb v. Fitbit Inc.*, 216 F. Supp. 3d 1017, 1032 (N.D. Cal. 2016) (crediting allegations of FEs who "held positions that exposed them directly to data"); *Mulligan v. Impax Labs., Inc.*, 36 F. Supp. 3d 942, 962 (N.D. Cal. 2014) (finding descriptions of former employees were stated with sufficient particularity where plaintiffs used their actual titles and to whom each reported).[29]

In addition, the FEs independently corroborate one another and collectively tell a "plausible and coherent narrative." *Lifelock*, 780 F. App'x at 484 n.5; *see also Forescout*, 63 F.4th at 772 (crediting FE allegations where there was "consistency between the [FE's] statements" and where FEs told "a reasonably plausible story about [the company's] state

[27] Despite Defendants' attempt to feign confusion about Project X, RB 5, the AC clearly alleges that Project X was a database used by Rivian to track R1 BOM costs, ¶116.

[28] Yet even if FE-4 and FE-5 lacked knowledge of R1 battery costs, it would in no way detract from their claims because ***even without the battery costs***, the R1 BOM ***still*** exceeded R1T and R1S retail prices. ¶193.

[29] *Amyris, Ferreira v. Funko Inc.*, 2021 WL 880400 (C.D. Cal. Feb. 25, 2021), and *Waterford Twp. Police & Fire Ret. Sys. v. Mattel, Inc.*, 321 F. Supp. 3d 1133 (C.D. Cal. 2018), RB 3-5, are easily distinguished. *See* RB 3-5. Unlike the witnesses in those cases, here the FEs are described with particularity and had responsibilities that provided them with reliable personal knowledge supporting their accounts. *See, e.g.*, ¶¶42, 118, 196.

of affairs"). Indeed, FE-3, FE-4, and FE-5 each independently described a significant negative delta between R1 BOM costs and retail price. ¶¶118, 281. Their accounts are also consistent with Schwab's, further establishing their reliability. ¶197; *see In re Countrywide Fin. Corp. Derivative Litig.*, 554 F. Supp. 2d 1044, 1058-59 (C.D. Cal. 2008) (scienter pled where "numerous confidential witnesses...span[ning] different levels of the Company hierarchy...remain consistent across different time periods...[and] tell what is essentially the same story"); *In re Extreme Networks, Inc. Sec. Litig.*, 2018 WL 1411129, at *27 (N.D. Cal. Mar. 21, 2018) (FE corroboration supports reliability).

Each of Defendants' arguments fail. For example, Defendants claim that FE-5's allegations are irrelevant because September 2021 was "two months before the Company's IPO." RB 6. This argument is baseless. FE-5 stated that Rivian's BOM costs ***were locked-in*** as of September 2021, meaning that they did not change between September 2021 and the November 2021 IPO. ¶¶118, 196. In any event, "[i]nformation from before the class period is relevant because it can confirm what a defendant should have known during the class period." *Webb v. SolarCity Corp.*, 884 F.3d 844, 851 n.1 (9th Cir. 2018); *see also In re Toyota Motor Corp. Sec. Litig.*, 2012 WL 3791716, at *4 (C.D. Cal. Mar. 12, 2012) ("[C]ommon sense dictates that facts relevant to scienter will ordinarily date from before any alleged misrepresentations[.]"); *In re Wireless Facilities, Inc. Sec. Litig.*, 2007 WL 9667131, at *8 (S.D. Cal. May 7, 2007) (pre-class period knowledge is "not lost when the class period began").

Defendants also fail in their attempt to exploit inconsequential differences in the FE allegations, including slight differences in FE statements regarding the precise R1 BOM cost. Indeed, each FE independently stated that, by the time of the IPO, the R1 BOM cost significantly exceeded its retail prices. ¶118. Whether the precise BOM cost was $115,000 or $118,000 is irrelevant when R1 retail prices were between $67,500 and $70,000.

In addition, in an attempt to divert the Court's attention away from FE-4's and FE-5's damning allegations, Defendants complain about Plaintiffs' decision to no longer rely on FE-1. RB 6-7. This argument should be rejected out of hand. Defendants' Motions

concern the adequacy of the allegations contained in the operative AC. *See Align*, 856 F.3d at 612 (the court "must accept the plaintiffs' allegations as true and construe them in the light most favorable to plaintiffs"). Allegations not included in the operative AC are irrelevant. Further, FE-1's allegations addressed Rivian's trend of declining profit margins and its extended inflection point, which concern a theory of liability that the Court previously dismissed and that Plaintiffs are not pursuing in the AC.

Lastly, Defendants claim that the FEs' allegations should be disregarded because they were not in a position to understand the global impact of the R1 BOM on Rivian's potential profitability. RB at 4. This exact argument was recently rejected by the Ninth Circuit. *See Forescout*, 63 F.4th at 771 (the adequacy of the complaint "does not depend on each CW possessing inside knowledge about corporate-level trends; Plaintiffs need only provide a basis for each CW's knowledge about the specific statements he made").

**4. The R1 Price Increase Revealed the Relevant Truth**

Relying again on extraneous materials that this Court has refused to consider, Order 16-17, Defendants claim that the March 1, 2022 price hike was "a reality necessitated by inflationary pressures caused by war and tripling commodity prices that ensued after Rivian's IPO." RB 13 (citing ECF No. 135 at 3-4).[30] Their argument cannot be considered at this stage of the case. *Johnson*, 2009 WL 764521, at *4 (on a motion to dismiss "the Court ignores Defendants' version of the facts and relies, instead, on Plaintiff's version contained in the Complaint and any inferences that can be drawn from it"). The impact of post-IPO inflation on R1 pricing, if any, is a factual issue to be explored in discovery.[31]

[30] Defendants' reference to J.P. Morgan's coverage of the revised EBITDA guidance released on March 10, 2022, RB 13 (citing ¶153), does not support their argument. That report was published ***after*** the March 2022 corrective disclosures, and thus cannot speak to what was foreseeable at the time of the alleged misstatements.

[31] Because Plaintiffs have pled a primary Section 10(b) violation, Defendants' Section 20(a) arguments fail.

## IV. CONCLUSION

For the foregoing reasons, the Rivian Motion and Underwriter Motion should be denied in their entirety. To the extent the Court perceives any deficiencies in the AC, Plaintiffs respectfully request leave to replead. *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000).

Dated: April 14, 2023

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

The undersigned, counsel of record for Lead Plaintiff Sjunde AP-Fonden and Additional Plaintiff James Stephen Muhl, certifies that this brief contains 13,706 words, which [choose one]:

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

__X__ complies with the word limit set by court order dated April 3, 2023 (ECF No. 156).

Dated: April 14, 2023

*/s/ Sharan Nirmul*
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