

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

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

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

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

17 Plaintiff,

18 v.

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

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

**RIVIAN DEFENDANTS’ REPLY IN
 SUPPORT OF MOTION TO
 DISMISS PLAINTIFFS’ AMENDED
 CONSOLIDATED COMPLAINT**

Hearing

Date: May 5, 2023

Time: 10:30 a.m.

Judge: Hon. Josephine L. Staton

Ctrm: 8A, 8th Floor

TABLE OF CONTENTS

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

INTRODUCTION..... 1

ARGUMENT..... 2

I. PLAINTIFFS MISREPRESENT THE APPLICABLE STANDARDS..... 2

II. PLAINTIFFS FAIL TO ALLEGE FALSITY UNDER ANY STANDARD..... 3

 A. As a Matter of Law, Rivian Had No Duty to Disclose Internal Strategy
 for Profitability..... 3

 B. Plaintiffs Fail to Allege Particularized Facts Establishing the Allegedly
 Omitted Information..... 7

 1. No Pre-IPO Decision to Raise Prices by 20%..... 7

 2. No “Growing Negative Delta” between BOM and Price..... 8

 3. No “Already Materialized” Risks at the Time of IPO..... 9

 4. No Price “Touting” at IPO Roadshows..... 10

 5. No “Locked-In” BOM..... 10

III. PLAINTIFFS’ SCIENTER ALLEGATIONS FAIL TO PLEAD ANY
DEFENDANT’S ACTUAL STATE OF MIND..... 11

 A. Access to Information about the BOM Does Not Plead Scienter..... 12

 B. No Scienter Based on Core Operations Theory..... 14

 C. No Scienter Based on Dr. Scaringe’s Public Statements..... 15

 D. Former Employee Allegations Are Deficient..... 15

IV. PLAINTIFFS DO NOT CURE DEFICIENT SECTION 11 CLAIMS..... 19

CONCLUSION..... 20

TABLE OF AUTHORITIES

Page(s)

Cases

1
2
3
4 *In re Alphabet Sec. Litig.*,
5 1 F.4th 687 (9th Cir. June 16, 2021) 12, 13
6 *In re AnaptysBio, Inc. Secs. Litig.*,
7 2021 U.S. Dist. LEXIS 178938 (S.D. Cal. Sep. 20, 2021) *passim*
8 *In re Apple Comput., Inc.*,
9 127 Fed. App’x 296 (9th Cir. 2005) 12
10 *Backman v. Polaroid Corp.*,
11 910 F.2d 10 (1st Cir. 1990) 7
12 *Bell Atl. Corp. v. Twombly*,
13 550 U.S. 544 (2007) 20
14 *Berson v. Applied Signal Tech., Inc.*,
15 527 F.3d 982 (9th Cir. 2008) 10
16 *Blackmoss Invs. Inc. v. Aca Cap. Holdings, Inc.*,
17 2010 U.S. Dist. LEXIS 2899 (S.D.N.Y. Jan. 12, 2010) 9
18 *In re Braskem S.A. Sec. Litig.*,
19 246 F. Supp. 3d 731 (S.D.N.Y. 2017) 5
20 *Brody v. Transitional Hosps. Corp.*,
21 280 F.3d 997 (9th Cir. 2002) 6
22 *Browning v. Amyris*,
23 2014 U.S. Dist. LEXIS 39549 (N.D. Cal. Mar. 24, 2014) 13, 14
24 *In re Cadence Design Sys., Sec. Litig.*,
25 654 F. Supp. 2d 1037 (N.D. Cal. 2009) 17
26 *Curry v. Yelp Inc.*,
27 2015 U.S. Dist. LEXIS 159001 (N.D. Cal. Nov. 24, 2015) 7
28 *Denny v. Canaan Inc.*,
2023 U.S. Dist. LEXIS 52088 (S.D.N.Y. Mar. 27, 2023) 18

1

2 *In re Daou Sys. Inc.*,

3 411 F.3d 1006 (9th 2005) 15

4 *In re Downey Secs. Litig.*,

5 2009 U.S. Dist. Lexis 83443 (C.D. Cal. Aug. 21, 2009) 17

6 *In re Eargo, Inc. Sec. Litig.*,

7 2023 U.S. Dist. LEXIS 24984 (N.D. Cal. Feb. 14, 2023) 9

8 *In re Eventbrite, Inc. Sec. Litig.*,

9 2020 U.S. Dist. LEXIS 74651 (N.D. Cal. Apr. 28, 2020) 19

10 *Ferreira v. Funko Inc.*,

11 2021 U.S. Dist. LEXIS 59102 (C.D. Cal. Feb. 25, 2021) 16

12 *In re Finjan Holdings, Inc. Sec. Litig.*,

13 58 F.4th 1048 (9th Cir. 2023) 3

14 *Glazer Cap. Mgmt., L.P. v. Forescout Techs., Inc.*,

15 2023 U.S. App. LEXIS 6285 (9th Cir. Mar. 16, 2023) 2, 5, 16

16 *Heliotrope Gen., Inc. v. Ford Motor Co.*,

17 189 F.3d 971 (9th Cir. 1999) 8

18 *Hershewe v. Joyy Inc.*,

19 2021 U.S. Dist. LEXIS 251310 (C.D. Cal. Nov. 5, 2021) 10

20 *In re Honest Co. Secs. Litig.*,

21 2022 U.S. Dist. LEXIS 131000 (C.D. Cal. July 18, 2022) 8

22 *Huang v. Avalanche Biotechnologies, Inc.*,

23 2016 U.S. Dist. LEXIS 152891 (N.D. Cal. Nov. 3, 2016) 6

24 *Integra Med Analytics LLC v. Providence Health & Servs.*,

25 854 Fed. App’x 840 (9th Cir. 2021) 20

26 *Iron Workers Loc. 580 Joint Funds v. Nvidia Corp.*,

27 522 F. Supp. 3d 660 (N.D. Cal. 2021) 12, 13

28 *Jackson v. Fischer*,

2015 U.S. Dist. LEXIS 32128 (N.D. Cal. Mar. 13, 2015) 15

Jaeger v. Zillow,

2022 U.S. Dist. LEXIS 220839 (W.D. Wash. Dec. 7, 2022) 14

	Page(s)
1	
2 <i>Jasin v. Vivus, Inc.</i> ,	
3 2016 U.S. Dist. LEXIS 52388 (N.D. Cal. Apr. 19, 2016)	5
4 <i>Lako v. Loandepot, Inc.</i> ,	
5 2023 U.S. Dist. LEXIS 13086 (C.D. Cal. Jan. 24, 2023)	9
6 <i>Lapiner v. Camtek, Ltd.</i> ,	
7 2011 U.S. Dist. LEXIS 9985 (N.D. Cal. Feb. 2, 2011)	6
8 <i>In re LendingClub Sec. Litig.</i> ,	
9 254 F. Supp. 3d 1107 (N.D. Cal. 2017)	8
10 <i>In re Lyft Inc. Secs. Litig.</i> ,	
11 484 F. Supp. 3d 758 (N.D. Cal. 2020)	8
12 <i>Matrixx Initiatives, Inc. v. Siracusano</i> ,	
13 563 U.S. 27 (2011)	5
14 <i>McCasland v. FormFactor Inc.</i> ,	
15 2008 U.S. Dist. LEXIS 60544 (N.D. Cal. July 25, 2008)	15
16 <i>Mulligan v. Impax Labs., Inc.</i> ,	
17 36 F. Supp. 3d 942 (N.D. Cal. 2014)	16
18 <i>N.Y. State Teachers’ Ret. Sys. v. Fremont Gen. Corp.</i> ,	
19 2009 U.S. Dist. LEXIS 94241 (C.D. Cal. Sept. 25, 2009)	18
20 <i>NetApp, Inc. v. Nimble Storage, Inc.</i> ,	
21 2015 U.S. Dist. LEXIS 11406 (N.D. Cal. Jan. 29, 2015)	17
22 <i>Nguyen v. Endologix, Inc.</i> ,	
23 962 F.3d 405 (9th Cir. 2020)	2, 3
24 <i>In re Noah Educ. Holdings, Ltd. Sec. Litig.</i> ,	
25 2010 U.S. Dist. LEXIS 34459 (S.D.N.Y. Mar. 31, 2010)	8, 9
26 <i>Nursing Home Pension Fund, Loc. 144 v. Oracle Corp.</i> ,	
27 380 F.3d 1226 (9th Cir. 2004)	12, 13
28 <i>In re Orion Sec. Litig.</i> ,	
2009 U.S. Dist. LEXIS 81171 (S.D.N.Y. Aug. 20, 2009)	19
<i>Panther v. Jianpu Tech., Inc.</i> ,	
2020 U.S. Dist. LEXIS 177272 (S.D.N.Y. Sep. 27, 2020)	8

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

<i>Police Ret. Sys. v. Intuitive Surgical, Inc.</i> , 759 F.3d 1051 (9th Cir. 2014)	14
<i>In re Progenity, Inc. Sec. Litig.</i> , 2023 U.S. Dist. LEXIS 7860 (S.D. Cal. Jan. 13, 2023)	6
<i>Reed v. Amira Nature Foods Ltd.</i> , 2016 U.S. Dist. LEXIS 203549 (C.D. Cal. July 18, 2016)	19
<i>Reese v. Malone</i> , 747 F.3d 557 (9th Cir. 2014)	14
<i>Rhodes v. Omega Rsch., Inc.</i> , 38 F. Supp. 2d 1353 (S.D. Fla. 1999)	10
<i>In re Rigel Pharms., Inc. Secs. Litig.</i> , 697 F.3d 869 (9th Cir. 2012)	<i>passim</i>
<i>Robb v. Fitbit Inc.</i> , 216 F. Supp. 3d 1017 (N.D. Cal. 2016)	16
<i>Roberti v. OSI Sys., Inc.</i> , 2015 U.S. Dist. LEXIS 24761 (C.D. Cal. Feb. 27, 2015)	14
<i>Shi v. Amphio Phrams.</i> , 2020 U.S. Dist. LEXIS 158778 (C.D. Cal. June 19, 2020)	12, 18
<i>In re Silicon Graphics Sec. Litig.</i> , 183 F.3d 970 (9th Cir. 1999).....	11
<i>Steamfitters Loc. 449 Pension Plan v. Molina Healthcare</i> , 2018 U.S. Dist. LEXIS 217852 (C.D. Cal. Dec. 13, 2018).....	12
<i>In re Surebeam Corp. Sec. Litig.</i> , 2004 U.S. Dist. LEXIS 26951 (S.D. Cal. Dec. 30, 2004).....	9
<i>Tellabs, Inc. v. Makor Issues & Rights, Ltd.</i> , 551 U.S. 308 (2007).....	<i>passim</i>
<i>In re Toyota Motor Corp. Sec. Litig.</i> , 2012 U.S. Dist. LEXIS 124438 (C.D. Cal. Mar. 12, 2012).....	18
<i>Vess v. Ciba-Geigy Corp. USA</i> , 317 F.3d 1097 (9th Cir. 2003).....	20

	Page(s)
1	
2 <i>In re Violin Memory Sec. Litig.</i> ,	
3 2014 U.S. Dist. LEXIS 155428 (N.D. Cal. Oct. 31, 2014).....	19
4 <i>In re Virtus Inv. Partners, Inc.</i> ,	
5 195 F. Supp. 3d 528 (S.D.N.Y. 2016).....	5
6 <i>Waterford Township Police & Fire Ret. Sys. v. Mattel, Inc.</i> ,	
7 321 F. Supp. 3d 1133 (C.D. Cal. May 24, 2018)	16
8 <i>Webb v. SolarCity</i> ,	
9 884 F.3d 844 (9th Cir. 2018)	14, 18
10 <i>Welgus v. TriNet Grp., Inc.</i> ,	
11 2017 U.S. Dist. LEXIS 207777 (N.D. Cal. Dec. 18, 2017)	7
12 <i>Weston Family P’ship LLLP v. Twitter, Inc.</i> ,	
13 29 F.4th 611 (9th Cir. 2022)	1, 3, 4
14 <i>In re Wireless Facilities, Inc. Secs. Litig.</i> ,	
15 2007 U.S. Dist. LEXIS 104435 (S.D. Cal. May 7, 2007)	18
16 <i>Wong v. Arlo Techs., Inc.</i> ,	
17 2019 U.S. Dist. LEXIS 226546	19
18 <i>In re Yahoo! Inc. Sec. Litig.</i> ,	
19 2012 U.S. Dist. LEXIS 113036 (N.D. Cal. Aug. 10, 2012)	4
20 <i>Zucco Partners, LLC v. Digimarc Corp.</i> ,	
21 552 F.3d 981 (9th Cir. 2008)	11
22	
23	
24	
25	
26	
27	
28	

1 **TABLE OF ABBREVIATIONS**

2

Abbreviation	Meaning
¶ or Third Complaint	Plaintiffs' Amended Consolidated Complaint, dated March 2, 2023 (ECF No. 150)
CW(s)	Confidential Witness(es)
FE(s)	Former Employee(s)
MTD	Rivian Defendants' Motion to Dismiss Plaintiffs' Amended Consolidated Complaint, dated March 16, 2023 (ECF No. 152)
Opp. or Opposition	Plaintiffs' Omnibus Opposition to Rivian Defendants' and Underwriter Defendants' Motions to Dismiss, dated April 14, 2023 (ECF No. 157)
Order	Order Granting: (1) Rivian Defendants' Motion to Dismiss; and (2) Underwriter Defendants' Motion to Dismiss, dated February 16, 2023 (ECF No. 149)
Prosp.	Rivian's Prospectus Rule 424(b)(4), filed with the SEC on November 12, 2021 (ECF No. 135-5)
Second Complaint ¶	Plaintiffs' Consolidated Complaint, dated July 22, 2022 (ECF No. 125)

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

INTRODUCTION

1
2 For all its intricacy, Plaintiffs’ Opposition cannot mask a simple fact: It is based
3 on a faulty legal premise. Plaintiffs argue that Rivian was required to disclose the
4 BOM at the start of production—*which it had never discussed*—because it had
5 discussed *other* factors that might affect profitability in the future. ¶ 165.

6 But these truths are not in dispute:

- 7 ● The Prospectus stated that Rivian was not profitable. Prosp. at 57 (“We
8 have incurred net losses since our inception”);
- 9 ● Rivian never promised that it would be profitable. In fact, it warned
10 investors that it may *never* be profitable. *Id.* (“We do not expect to be
11 profitable for the foreseeable future . . . and we cannot assure you that we
12 will ever achieve or be able to maintain profitability in the future.”);
- 13 ● Rivian never stated an expected timeline for profitability;
- 14 ● Rivian never promised that it would be profitable for each vehicle
15 produced. *See* ¶ 119 (claiming that “Rivian would record a negative profit
16 margin on each R1S and R1T vehicle sold”). The Company’s strategy
17 included launching a second wave of R1 vehicles, an R2 series of
18 vehicles, and generating revenue through services. Prosp. at 61, 124.

19 As the Court explained in its Order dismissing the Second Complaint, the
20 “[s]ecurities laws . . . do not require . . . complete disclosure of all material information
21 whenever a company speaks on a particular topic.” Order at 25 (quoting *Weston*
22 *Family P’ship LLLP v. Twitter, Inc.*, 29 F.4th 611, 615 (9th Cir. 2022) (affirming
23 dismissal)). Plaintiffs’ litany of allegedly omitted information makes no difference if
24 none of it is required to be disclosed. It also falls short of factual particularity or even
25 mere plausibility. *See* Section II.B.

26 Plaintiffs are fully aware their Third Complaint—like its dismissed
27 predecessor—fails to plead fraud. Trying to dilute the fraud standard to mere
28 plausibility runs against decades of Supreme Court and Ninth Circuit law. “[A]n

1 inference of scienter must be more than merely plausible.” *Tellabs, Inc. v. Makor*
 2 *Issues & Rights, Ltd.*, 551 U.S. 308, 314 (2007). Plaintiffs’ scienter allegations are not
 3 close to the requirement that they be more “compelling” than the innocent alternative.
 4 See Section III. The explanation for the events that led to Rivian’s March 2022 price
 5 increase is simple. Rampant cost increases for essential raw materials, rising inflation,
 6 and unexpected global disruptions of supply chains affected all car manufacturers, not
 7 just Rivian. See ECF No. 135 at 3-4.

8 This is a lawsuit searching for a viable claim. It should be dismissed.

9 ARGUMENT

10 I. PLAINTIFFS MISREPRESENT THE APPLICABLE STANDARDS

11 Plaintiffs attempt to water down the standard for pleading fraud to mere
 12 “plausibility.” Opp. at 12 (invoking *Glazer Cap. Mgmt., L.P. v. Forescout Techs., Inc.*,
 13 2023 U.S. App. LEXIS 6285, at *32 (9th Cir. Mar. 16, 2023)).

14 Contrary to Plaintiffs’ characterization, the Ninth Circuit did not overturn
 15 decades of precedent in *Forescout* by creating a new, more permissive standard for
 16 pleading securities fraud. Nor could it. Doing so would conflict with the Supreme
 17 Court’s controlling authority, and with the Ninth Circuit’s own precedent. In *Tellabs*,
 18 the Supreme Court explicitly instructed:

19 It ***does not suffice that a reasonable factfinder plausibly could infer*** from the
 20 complaint’s allegations the requisite state of mind. . . . To qualify as ‘strong’
 21 within the intendment of [the PSLRA], we hold, an inference of scienter must be
 22 ***more than merely plausible*** or reasonable—it must be cogent and at least as
 compelling as any opposing inference of nonfraudulent intent.

23 *Tellabs*, 551 U.S. at 314. The Ninth Circuit recently reiterated that “[s]ecurities fraud
 24 complaints are subject to heightened pleading requirements. . . . The PSLRA’s ‘strong
 25 inference’ requirement has teeth. It is an ‘exacting’ pleading obligation that ‘present[s]
 26 no small hurdle for the securities fraud plaintiff.’” *Nguyen v. Endologix, Inc.*, 962 F.3d
 27 405, 414 (9th Cir. 2020) (cleaned up) (affirming dismissal). These protections were
 28 put in place for a reason: “Given the substantial costs that securities fraud litigation can

1 impose, the ‘strong inference’ standard reflects Congress’s attempt to halt early on
2 securities litigation that lacks merit or is even abusive[.]” *Id.*

3 The standard for pleading securities fraud remains the same as it has been for
4 decades, and as this Court applied it when dismissing Plaintiffs’ Second Complaint.
5 “[U]nder the PSLRA’s particularity requirements and Federal Rule of Civil Procedure
6 9(b), allegations of ‘fraud must be accompanied by the who, what, when, where, and
7 how of the misconduct charged.’” *Twitter*, 29 F.4th at 619 (affirming dismissal). “The
8 complaint must specify such facts as the times, dates, places, benefits received, and
9 other details of the alleged fraudulent activity.” *In re Finjan Holdings, Inc. Sec. Litig.*,
10 58 F.4th 1048, 1057 (9th Cir. 2023).

11 The Third Complaint includes no such particularized facts, and instead would
12 require the Court to blind itself to reality. But the comparative inquiry required by
13 *Tellabs* requires courts to consider facts subject to judicial notice: “courts must
14 consider the complaint in its entirety, as well as other sources courts ordinarily
15 examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents
16 incorporated into the complaint by reference, and matters of which a court may take
17 judicial notice.” 551 U.S. at 322.

18 As discussed below, Plaintiffs fail to meet their pleading burden.

19 **II. PLAINTIFFS FAIL TO ALLEGE FALSITY UNDER ANY STANDARD**

20 Plaintiffs’ falsity allegations fail for two independent reasons. First, even if the
21 alleged facts were true, Rivian had no legal duty to disclose them. Second, Plaintiffs
22 do not plead with the requisite particularity that the allegedly omitted “facts” are
23 anything more than a creature of their imagination.

24 **A. As a Matter of Law, Rivian Had No Duty to Disclose Internal** 25 **Strategy for Profitability**

26 “Securities laws . . . do not require real-time business updates or complete
27 disclosure of all material information whenever a company speaks on a particular
28 topic. To the contrary, a company can speak selectively about its business so long as

1 its statements do not paint a misleading picture.” *Twitter*, 29 F.4th at 615. “[A]
 2 statement is not actionable just because it is incomplete.” *Id.* at 619. For an omission
 3 to be actionable, the omitted information must materially contradict an affirmative
 4 statement. *In re Rigel Pharms., Inc. Secs. Litig.*, 697 F.3d 869, 881 n.10 (9th Cir.
 5 2012) (affirming dismissal); *Twitter*, 29 F.4th at 619-20.

6 Applying this well-settled law, the Court held that “[w]hen broaching the subject
 7 of potential price increases, Rivian did not need to address all relevant considerations
 8 or disclose its internal profitability projections and pricing strategy.” Order at 25.

9 Despite having lost on this issue already, Plaintiffs try to resurrect the same
 10 argument in their Third Complaint. They claim that Rivian was required to disclose
 11 the imaginary “key fact” “that absent a material increase in R1 retail prices and/or a
 12 significant reduction in material costs, no amount of scaling would make Rivian
 13 profitable.” ¶ 7. The Opposition states that “[t]he crux of this case is whether the
 14 Defendants had a duty to disclose to investors that the BOM cost for each R1 vehicle
 15 at the time of the IPO was significantly in excess of its retail price.” Opp. at 2.

16 Plaintiffs are wrong as a matter of law: Rivian never promised profitability.
 17 *Supra* 1. Plaintiffs do not plead otherwise. Rather, they claim that Rivian had to
 18 disclose the R1 BOM at the inception of production. ¶¶ 298, 165 (“misleading for
 19 Defendants to disclose one factor that was causing ‘a negative drag on gross profit’
 20 over the near term without also disclosing the other significant factor . . . that the cost
 21 of the R1S and R1T bill of materials alone exceeded their retail prices”).¹

22 ***The BOM is not a metric Rivian discussed or touted.*** In *Twitter*, the Ninth
 23 Circuit dismissed a similar claim, finding that “an ordinary investor would not read
 24 Twitter’s Help Center blog post as saying that Twitter had remediated . . . software
 25 issues.” *Id.*; accord *In re Yahoo! Inc. Sec. Litig.*, 2012 U.S. Dist. LEXIS 113036, at

26 ¹ Plaintiffs claim that “[a]s set forth in its public filings, Rivian used the concept of
 27 ‘gross profit per vehicle’ to assess the profitability—or lack thereof—of the R1
 28 Platform.” ¶ 273. That is not true. The Prospectus uses that term exactly *once*, in
 connection with economies of scale and generating revenue from services. Prosp. at
 124. It did not use the term to assess the profitability of its R1 vehicles.

1 *31 (N.D. Cal. Aug. 10, 2012) (omitting valuation of privately held companies was
2 inactionable because “the statement itself sa[id] nothing about the value).

3 Plaintiffs are wrong—as a matter of securities law—that Rivian must disclose
4 additional factors affecting gross profits, merely because it discussed some factors.²
5 The Ninth Circuit rejected exactly this theory in *Rigel*, where plaintiffs claimed that
6 “once a company chooses to disclose any safety information, it must disclose all
7 material information regarding safety.” 697 F.3d at 880 n.8. The Court held that “a
8 company is not required to disclose every safety-related result from a clinical trial,
9 *even if* the company *discloses some safety-related results* and *even if* investors would
10 consider the *omitted information significant*.” *Id.* That is particularly so where, as
11 here, the Prospectus did not claim to address *all* factors affecting gross profits. *Id.* at
12 880-81 (“The press release did not state that it was including all incidents in which a
13 patient experienced an increase in blood pressure during the course of the trial.”).

14 *Rigel* is not an isolated case. Courts have dismissed similar actions:

- 15 ● In *In re AnaptysBio, Inc. Securities Litigation*, 2021 U.S. Dist. LEXIS
16 178938, at *16 (S.D. Cal. Sep. 20, 2021) the court held a defendant did
17 not have to address every therapy used by patients when he was speaking
18 about a specific therapy;
- 19 ● In *Jasin v. Vivus, Inc.*, 2016 U.S. Dist. LEXIS 52388, at *56 (N.D. Cal.
20 Apr. 19, 2016), the company was not required to disclose every regulatory
21 concern because “none of the allegedly omitted issues were inconsistent

22 ² Plaintiffs’ authorities illustrate the kind of facts Plaintiffs are unable to plead. *See In*
23 *re Braskem S.A. Sec. Litig.*, 246 F. Supp. 3d 731, 741-42 (S.D.N.Y. 2017) (defendants
24 touted favorable raw material prices they obtained through bribery of foreign officials);
25 *In re Virtus Inv. Partners, Inc.*, 195 F. Supp. 3d 528, 536 (S.D.N.Y. 2016) (company
26 attributed revenue increase to one factor, when in fact the revenue was growing
27 because of a different factor, for which the company was under investigation by the
28 SEC); *Forescout*, 2023 U.S. App. LEXIS 6285, at *54-55 (defendants blamed
performance on slipped deals they claimed were certain, when employees indicated
management had referred to the deals internally as uncertain); *Matrixx Initiatives, Inc.*
v. Siracusano, 563 U.S. 27, 47 (2011) (company claimed side effect reports were
“unfounded” when it had internal evidence of the side effect’s occurrence).

1 with Defendant’s disclosures”;

- 2 ● In *Huang v. Avalanche Biotechnologies, Inc.*, 2016 U.S. Dist. LEXIS
3 152891, at *24 (N.D. Cal. Nov. 3, 2016), the court required no additional
4 disclosures because “[d]efendants never claimed that the safety data was
5 all the safety results, current safety results, final safety results, or even
6 promising results”;
- 7 ● In *Lapiner v. Camtek, Ltd.*, 2011 U.S. Dist. LEXIS 9985, at *17-18 (N.D.
8 Cal. Feb. 2, 2011), no additional disclosures were necessary where “the
9 applicable accounting rules did not require [the company] to separately
10 report each source of its cash flow.”

11 The same is true for Section 11 claims. *See In re Progenity, Inc. Sec. Litig.*,
12 2023 U.S. Dist. LEXIS 7860, at *35 n.10 (S.D. Cal. Jan. 13, 2023) (dismissing action).
13 In *Progenity*, plaintiffs claimed the company should have disclosed that
14 newly-announced products had lower average selling prices, which in turn would
15 lower revenue in future quarters. The court disagreed, noting that the challenged
16 statements were specific and limited to the products’ announcement and a discussion
17 of *one* factor that could reduce revenue. The Court emphasized that “a statement often
18 ‘will not mislead even if it is incomplete or does not include all relevant facts.’” *Id.* at
19 *35 (quoting *Brody v. Transitional Hosps. Corp.*, 280 F.3d 997, 1006 (9th Cir. 2002).

20 Equally deficient is Plaintiffs’ claim that Rivian failed to disclose an already
21 materialized risk: that the cost of materials could increase. ¶ 295. In *Progenity*, the
22 court dismissed the exact same claim noting defendants’ “actual statements made did
23 not state or imply anything regarding the fiscal impact of the changes” in price. 2023
24 U.S. Dist. LEXIS 7860, at *35. By contrast, “[i]f Defendants had suggested that this
25 fluctuation in test volumes would not impact Progenity’s ASP or revenue, the
26 statements at issue may well have been misleading.” *Id.* Here too, this would have
27 been a different case had Rivian promised profitability on a certain timeline, discussed
28 the BOM affirmatively, or claimed that material cost increases would have no impact.

1 But it did not, so this action should be dismissed as a matter of law. The
 2 securities laws do not mean that “by revealing one fact about a product, one must
 3 reveal all others that, too, would be interesting, market-wise[.]” *Backman v. Polaroid*
 4 *Corp.*, 910 F.2d 10, 16 (1st Cir. 1990) (reversing and remanding for dismissal). Rivian
 5 had no duty to disclose any of the information Plaintiffs allege, *even if Plaintiffs had*
 6 *sufficiently alleged* such information existed. This itself is dispositive and an
 7 independent reason for dismissal.

8 **B. Plaintiffs Fail to Allege Particularized Facts Establishing the**
 9 **Allegedly Omitted Information**

10 Plaintiffs also fail to allege with particularity that the “facts” they fault Rivian
 11 for omitting were even true. The Third Complaint “merely repackages the same
 12 information the Court previously rejected as being insufficient to demonstrate falsity.”
 13 *Curry v. Yelp Inc.*, 2015 U.S. Dist. LEXIS 159001, at *22-23 (N.D. Cal. Nov. 24, 2015)
 14 (dismissing with prejudice where new allegations “d[id] not affect the Court’s previous
 15 analysis”). Each of Plaintiffs’ categories of omissions fails.

16 **1. No Pre-IPO Decision to Raise Prices by 20%**

17 Despite claiming that it comprises the “crux” of their case, Plaintiffs do not offer
 18 a single new fact to support their assertion that “Rivian had determined to raise R1
 19 prices after the IPO.” Opp. at 2; *see also id.* at 9, 13, 16. They only return to the same
 20 allegation copped from Laura Schwab’s employment lawsuit, which the Court already
 21 deemed insufficient. *See* Opp. at 6. Just as “[t]he [same] allegations in the
 22 Consolidated Complaint do not support an inference of a firm ‘plan’ to increase
 23 prices,” they fall short when re-asserted in the Third Complaint. Order at 32; *see also*
 24 *Welgus v. TriNet Grp., Inc.*, 2017 U.S. Dist. LEXIS 207777, at *53 (N.D. Cal. Dec. 18,
 25 2017) (dismissing case; “without any new allegations in the SAC to consider, the Court
 26 does not disturb its prior conclusion that falsity has not been pled”).³

27 _____
 28 ³ The same is true of recycled allegations that Ms. McDonough and Dr. Scaringe’s
 December 2021 statements concerning inflationary pressures and pricing
 considerations materially misled investors. Opp. at 29-30.

1 **2. No “Growing Negative Delta” between BOM and Price**

2 Plaintiff’s Third Complaint, like its predecessor, alleges a trend of pre-IPO rising
3 BOM. Opp. at 14 (citing ¶¶ 273-86). But Item 303 requires only that “an issuer of
4 securities . . . ‘[d]escribe any *known* trends or uncertainties[.]’” *In re Noah Educ.*
5 *Holdings, Ltd. Sec. Litig.*, 2010 U.S. Dist. LEXIS 34459, at *17 (S.D.N.Y. Mar. 31,
6 2010). Moreover, companies “ha[ve] no duty to disclose internal . . . projections
7 regarding the[ir] expected . . . costs[.]”. *Heliotrope Gen., Inc. v. Ford Motor Co.*, 189
8 F.3d 971, 980 (9th Cir. 1999). This is especially true when the company is
9 pre-operational.

10 Plaintiffs miss the point in attempting to analogize their case to others that
11 concerned actual historical and known trends. Their claim is deficient, not because
12 they allege *pre-IPO* trends, but rather because they allege *pre-operational internal*
13 *estimates* that were not actually experienced. In the cases Plaintiffs cite, the allegedly
14 omitted trends pertained to actual operational data:

- 15 ● In *Panther v. Jianpu Technology, Inc.*, 2020 U.S. Dist. LEXIS 177272, at
16 *23-24 (S.D.N.Y. Sep. 27, 2020), the court held that “Plaintiff ha[d] pled
17 sufficient facts to demonstrate that *a significant portion of the financial*
18 *services providers* operating on Jianpu’s platform were violating the
19 Interim Measures prior to the IPO”;
- 20 ● In *In re LendingClub Securities Litigation*, 254 F. Supp. 3d 1107, 1116
21 (N.D. Cal. 2017), “two snafus indicate[d] that LendingClub’s internal
22 controls allowed inaccurate *financial reporting years* before the IPO”;
- 23 ● In *In re Lyft Inc. Sec. Litig.*, 484 F. Supp. 3d 758, 769 n.4 (N.D. Cal.
24 2020), Lyft had a significant operating history at the time of its IPO,
25 allowing it to observe a trend of “abundant and increasing” “sexual
26 assault complaints against [its] drivers” which caused its “historical
27 ‘cultivation of an image of a Company built on . . . safety’” to be at risk;
- 28 ● In *In re Honest Co. Securities Litigation*, 2022 U.S. Dist. LEXIS 131000,

1 at *6-7 (C.D. Cal. July 18, 2022), Honest customers had been
 2 “experiencing chemical irritations and rashes” when using their diapers
 3 prior to the company’s IPO, causing statements “emphasiz[ing] safety,
 4 sustainability, efficacy and design profile” of their diapers to be materially
 5 misleading by omission.⁴

6 To the extent that Plaintiffs are arguing that the BOM in September-November
 7 2021 amounted to a trend, this theory also fails. Courts have repeatedly held that “[a]s
 8 a matter of law, a two-month period of time does not establish a ‘trend’ for purposes of
 9 the disclosures required by Item 303.” *Blackmoss Invs. Inc. v. Aca Cap. Holdings,*
 10 *Inc.*, 2010 U.S. Dist. LEXIS 2899, at *27 (S.D.N.Y. Jan. 12, 2010) (dismissing with
 11 prejudice); *see also Noah*, 2010 U.S. Dist. LEXIS 34459, at *18 (“allegations . . . that
 12 Noah experienced an increase in the cost of raw materials” for a two month period
 13 before its IPO were insufficient to allege that the company was “experiencing a trend
 14 of rising costs in raw materials before the IPO”).

15 3. No “Already Materialized” Risks at the Time of IPO

16 Plaintiffs assert that Rivian’s risk factors were materially misleading because
 17 they spoke of “already materialized” risks. This argument is tautological. Opp. at
 18 23-24. “The Ninth Circuit has held that ‘risk factors’ are not actionable without further
 19 factual allegations indicating that the risks had already ‘come to fruition.’” *In re*
 20 *Eargo, Inc. Sec. Litig.*, 2023 U.S. Dist. LEXIS 24984, at *31 (N.D. Cal. Feb. 14,
 21 2023). Plaintiffs have failed to allege the materialization of these risks. *See supra* 7-9,
 22 8-9 (discussing lack of observable trend in rising BOM at time of IPO or firm plan to

23
 24 ⁴ The other cases Plaintiffs cite are also completely factually inapposite. In *In re*
 25 *Surebeam Corporation Securities Litigation*, the alleged omissions were not trends at
 26 all, but a practice of improper revenue recognition and the loss of financing for a key
 27 business venture that together rendered the company’s reported financials misleading.
 28 2004 U.S. Dist. LEXIS 26951, at *32, 39-40 (S.D. Cal. Dec. 30, 2004). As the Court
 knows because it presided over it, *Lako v. Loandepot, Inc.* concerned the nondisclosure
 of historical business practices (not trends) sufficiently alleged to be legally
 noncompliant and thus by definition unsustainable. 2023 U.S. Dist. LEXIS 13086, at
 *3 (C.D. Cal. Jan. 24, 2023).

1 raise prices after the IPO in response to BOM at time of IPO).⁵ What the risk factors
 2 did do was identify a risk that ultimately *did* come to fruition: a precipitous rise in
 3 inflationary pressures, necessitating a price increase. This is not an “alternative”
 4 theory of the facts, as Plaintiffs disparage it, but rather the explanation offered by the
 5 Company at the time, which Plaintiffs refuse to address.

6 4. No Price “Touting” at IPO Roadshows

7 Plaintiffs claim that Rivian “touted” pricing, but only point to the same
 8 allegations from the Second Complaint: that then-current pricing for R1s was included
 9 in a roadshow slide deck. *Compare* ¶ 103, *with* Second Complaint ¶ 71. Including two
 10 bullet points stating current pricing for the R1S and R1T, respectively, in a roadshow
 11 slidedeck does not constitute “touting” pricing. For this reason, the Court declined
 12 even to address the Second Complaint allegation that Rivian had included R1 pricing
 13 in its roadshow deck. *See also Rhodes v. Omega Rsch., Inc.*, 38 F. Supp. 2d 1353,
 14 1365 (S.D. Fla. 1999) (dismissing complaint “[b]ecause section 11 gives rise to
 15 liability for false or misleading statements *in ‘any part of the registration statement,*
 16 *when such part became effective,’* . . . roadshow statements . . . are not generally
 17 within the purview of section 11.”).

18 5. No “Locked-In” BOM

19 Despite repeating the refrain that BOM was “locked-in” throughout the
 20 Opposition (Opp. at 16, 19, 28, 32, 37), the “linchpin of Plaintiffs’ entire complaint . . .
 21 [is] not allege[ed with] particularized and legally sufficient facts[.]” *Hershewe v. Joyy*
 22 *Inc.*, 2021 U.S. Dist. LEXIS 251310, at *9-10 (C.D. Cal. Nov. 5, 2021). Locked-in for
 23 how long? For what quantity of vehicles: the 12 produced by the time of the IPO? For
 24 all components or just some? This “locked-in” characterization is meaningless without
 25 these details, because Rivian unequivocally disclaimed profitability at the time of the
 26

27 ⁵ *Berson* is inapplicable: “stop work” orders were classified as “backlog” “misle[ading]
 28 [investors] into believing that Applied Signal was likely to perform work that, in
 reality, *had been halted and was likely to be lost forever.*” *Berson v. Applied Signal*
Tech., Inc., 527 F.3d 982, 984 (9th Cir. 2008).

1 IPO and “for the foreseeable future.” *Prosp.* at 57. Unless Plaintiffs claim that BOM
2 was “locked-in” indefinitely, this alleged fact is insufficient to allege falsity.

3 Weakest of all is Plaintiffs’ claim that Rivian could not reduce the BOM by
4 changing suppliers: they only allege that this was not “easily” done (*Opp.* at 27) and
5 would be “difficult,” again, based on one former employee’s alleged opinion. ¶ 196.⁶

6 **III. PLAINTIFFS’ SCIENTER ALLEGATIONS FAIL TO PLEAD ANY** 7 **DEFENDANT’S ACTUAL STATE OF MIND**

8 The Opposition backpedals from the Third Complaint’s allegation that
9 Rivian *planned* to defraud investors to a theory of recklessness. *Opp.* at 30.
10 Recklessness requires “a form of intentional or knowing misconduct.” *Zucco*
11 *Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 991 (9th Cir. 2008). Plaintiffs
12 must “state specific facts indicating no less than a degree of recklessness that
13 strongly suggests actual intent.” *In re Silicon Graphics Sec. Litig.*, 183 F.3d 970,
14 979 (9th Cir. 1999) (affirming dismissal). Plaintiffs cannot circumvent their
15 burden; their Third Complaint is based on purposeful fraud. ¶ 122 (Rivian
16 “deliberately delayed” increasing prices).

17 Plaintiffs plead no particularized facts raising a scienter inference that is
18 “cogent and at least as compelling as any opposing inference of nonfraudulent
19 intent.” *Tellabs*, 551 U.S. at 314. “[S]ince Plaintiffs seek to hold ‘individuals and
20 a company liable on a securities fraud theory,’ they ‘must allege scienter with
21 respect to each of the individual defendants.’” *AnaptysBio*, 2021 U.S. Dist. LEXIS
22 178938, at *23.

23 **A. Access to Information about the BOM Does Not Plead Scienter**

24 Plaintiffs claim that Defendants “were aware of the R1’s rising BOM costs

25
26 ⁶Plaintiffs’ allegation regarding Ms. McDonough’s December 2021 earnings call
27 explanation of Q3 ‘21 performance fails for the same reason it did before. *Order* at 24.
28 The statement speaks to “high fixed cost” causing “a negative drag on gross profit”
given the “small but growing number of vehicles” at that time. ¶ 164. As explained
above, Plaintiffs fail to plead facts supporting their assumption that BOM would never
decrease as production scaled. *See supra* 10-11.

1 and upside-down cost structure” prior to the IPO. Opp. at 32. But Plaintiffs must
2 plead the “existence of contemporaneous information . . . that contradicted or
3 undermined Defendants’ public statements at the time Defendants made those
4 statements.” *Shi v. Amphio Phrams.*, 2020 U.S. Dist. LEXIS 158778, at *18 (C.D.
5 Cal. June 19, 2020); *see also AnaptysBio*, 2021 U.S. Dist. LEXIS 178938, at
6 *32-33 (defendant’s “heav[y] involve[ment] in clinical trials d[id] not mean that he
7 knew information that was inconsistent with the public statements that he made”).
8 Plaintiffs nowhere allege that any Defendants **actually accessed** information that
9 the BOM would forever impede Rivian’s profitability. *See* MTD at 17. (Indeed,
10 that is logically and factually false. *See supra* Section II.B.5.) “Mere access to
11 contradictory information is insufficient to allege the deliberate recklessness
12 required.” *In re Apple Comput., Inc.*, 127 Fed. App’x 296, 301 (9th Cir. 2005)
13 (affirming dismissal); *Steamfitters Loc. 449 Pension Plan v. Molina Healthcare*,
14 2018 U.S. Dist. LEXIS 217852, at *7 (C.D. Cal. Dec. 13, 2018) (same).

15 Plaintiffs’ primary authority is *Nursing Home Pension Fund, Local 144 v.*
16 *Oracle Corp.*, 380 F.3d 1226, 1230 (9th Cir. 2004). As the Ninth Circuit later
17 explained in *Nvidia, Oracle* involved an extreme set of facts:

18 The plaintiffs there **directly tied the statements at issue**—forecasts about
19 Oracle’s third-quarter financial performance—to **specific, identifiable**
20 **underlying information known to the defendants** that suggested
21 knowledge that their statements were untrue when made. [*Oracle*] thus
22 found a strong inference of scienter based on an overall record which
included “specific allegations regarding large portions of Oracle’s sales
data,” suspicious stock sales, improper revenue accounting records, and the
fact that the CEO was directly and heavily involved in many of the deals
whose disappearance accounted for the eventual third-quarter shortfall.

23 *Iron Workers Loc. 580 Joint Funds v. Nvidia Corp.*, 522 F. Supp. 3d 660, 667 (N.D.
24 Cal. 2021). Similarly, in *In re Alphabet Securities Litigation*, plaintiffs alleged that
25 an internal memo to the CEO had been leaked by the Wall Street Journal. 1 F.4th
26 687, 697 (9th Cir. June 16, 2021). No such facts are present here.

27 In addition to the many details alleged in *Oracle* and *Alphabet*, those cases
28 involved established corporate data and processes. Here, the BOM at the time of

1 the IPO concerned a production process in its earliest stage. Such data would be
2 much less significant than the data in Plaintiffs' cases. *See Oracle*, 380 F.3d at
3 1231-33 (sales data, revenue accounting); *Alphabet*, 1 F.4th at 697 (alleged bugs
4 impacting product launched seven years earlier).

5 **Project X and Revenue & Margins (“R&M”) Reports.** Plaintiffs'
6 conclusory allegations of BOM data being purportedly tracked in Project X and
7 R&M reports are much closer to *Nvidia* and *Amyris*. MTD at 16-17. Plaintiffs
8 claim that, “[u]nlike Defendants' cases, Plaintiffs specifically have alleged that
9 these data sources reflected rising R1 BOM costs.” Opp. at 31 n.23. But those
10 were mere estimates; not actual costs. A closer look at Plaintiffs' citations reveals
11 the opposite of a complaint “adequately t[ying] the specific contents of any of
12 these data sources to particular statements.” *Nvidia*, 522 F. Supp. 3d at 674-75;
13 *see, e.g.*, ¶ 40 (“forecasting information was loaded” in R&M reports); ¶ 193
14 (Defendants “had access to Project X”). None of these concerned the actual cost of
15 a vehicle's serial production. Plaintiffs were required to plead “detailed and
16 specific allegations sufficient to show that [Defendants] had *actual knowledge*”
17 their statements were false. *Browning v. Amyris*, 2014 U.S. Dist. LEXIS 39549, at
18 *14-15, 56 (N.D. Cal. Mar. 24, 2014) (dismissing complaint).

19 **Meetings about the BOM.** Plaintiffs' allegations regarding “Gate
20 Reviews” and a purported December 2019 meeting attended by Ms. McDonough's
21 predecessor suffer from the same deficiencies. Opp. at 31. No Defendant is
22 alleged to have attended the December 2019 meeting (¶ 115), and no FE is alleged
23 to have attended Gate Reviews. ¶ 286; MTD at 21. Plaintiffs' reliance on FE-2's
24 speculation about Gate Review Meetings highlights the absence of particularized
25 allegations. Opp. at 31 n.24. But even if Defendants and FEs had attended those
26 meetings, discussing the BOM before beginning serial production is “certainly not
27 as strong as the inference that Defendants had a non-fraudulent intent.” *Rigel*, 697
28 F.3d at 885. “[R]outine corporate objectives such as the desire to obtain good

1 financing and expand are not, without more, sufficient to allege scienter.” *Id.* at
2 884. “Every company that goes public wants to maximize its apparent profitability
3 prior to its IPO.” *Webb v. SolarCity*, 884 F.3d 844, 856 (9th Cir. 2018) (dismissing
4 complaint). That goal does not make executives liable for fraud.

5 **B. No Scienter Based on Core Operations Theory**

6 Plaintiffs seek to impute scienter to Defendants based solely on the R1’s
7 importance to Rivian. Opp. at 34. Of course it is important. But Plaintiffs plead no
8 facts that the BOM for 12 vehicles would reflect serial production costs. MTD at 12;
9 *AnaptysBio*, 2021 U.S. Dist. LEXIS 178938, at *40 (“merely emphasizing the
10 importance of [product] to the Company does not show that the core operations theory
11 applies”). To proclaim that Rivian would never be profitable and Defendants knew it
12 because of the R1’s importance is textbook conclusory pleading. “[A]dopting this
13 standard would eviscerate the core-operations test and turn it into an automatic
14 presumption of comprehensive knowledge on the part of management.” *Amyris*, 2014
15 U.S. Dist. LEXIS 39549, at *55 (no scienter despite that “success or failure of the
16 entire company hinged on” its main product). The Ninth Circuit rejects the core
17 operations inference where, as here, “[m]issing are allegations linking specific reports
18 and their contents to the executives, not to mention the link between the witnesses and
19 the executives.” *Police Ret. Sys. v. Intuitive Surgical, Inc.*, 759 F.3d 1051, 1063 (9th
20 Cir. 2014) (affirming dismissal); *see also SolarCity*, 884 F.3d at 857 (same; plaintiffs
21 alleged “only generalized access to reports” documenting accounting error, but not
22 “actual access” to the accounting formula.). Plaintiffs’ cases involve these exact types
23 of particularized facts—all of which are missing here.⁷

24 ⁷ *See Jaeger v. Zillow*, 2022 U.S. Dist. LEXIS 220839, at *21 (W.D. Wash. Dec. 7,
25 2022) (FE attended meetings with defendant where he directly contradicted alleged
26 false statements); *Roberti v. OSI Sys., Inc.*, 2015 U.S. Dist. LEXIS 24761, at *5-7
27 (C.D. Cal. Feb. 27, 2015) (company disclosed to regulator that it would miss deadline
28 to update software, yet told investors it was on track to do so); *Reese v. Malone*, 747
F.3d 557, 572 (9th Cir. 2014) (plaintiffs alleged that, two weeks after oil spill,
defendant understated risk of another spill despite knowing that corrosion levels were
the “highest ... in BP’s own internal classification”).

1 **C. No Scierter Based on Dr. Scaringe’s Public Statements**

2 Plaintiffs assert that statements made by Dr. Scaringe, *beginning over a decade*
 3 *ago*, indicate his intent to commit securities fraud in November 2021. Opp. at 33-34.
 4 But Plaintiffs nowhere explain how, by merely speaking to the R1’s core features, Dr.
 5 Scaringe acted differently from any other founder promoting an early-stage
 6 company— let alone how that constitutes fraudulent intent. *See* MTD at 22; *see*
 7 *Jackson v. Fischer*, 2015 U.S. Dist. LEXIS 32128, at *49 (N.D. Cal. Mar. 13, 2015)
 8 (crediting argument that “generic allegations” related to obtaining financing and
 9 developing products “could be applied to any startup company”). That Dr. Scaringe
 10 acknowledged price considerations in December 2021 *supports* Defendants’ “opposing
 11 inference of nonfraudulent intent”—namely, that the price increase was necessitated by
 12 later events, not by the BOM before production had started. *Tellabs*, 551 U.S. at 314.⁸

13 **D. Former Employee Allegations Are Deficient**

14 **Plaintiffs Misrepresent the FEs and Their Allegations.** Plaintiffs’ scierter
 15 theory hinges on purported allegations from Rivian former employees, particularly FEs
 16 4 and 5. Plaintiffs misrepresent both the FEs *and* their supposed statements in critical
 17 ways. FEs 4 and 5 were just two members of the Cost Engineering Group; they did
 18 not lead it. *Id.*; ¶¶ 41-42. They reported to a manager and themselves had no direct
 19 reports. MTD at 4. None of the FEs had contact with any Defendant. *Id.* at 2-3. The
 20 closest contact Plaintiffs allege is that FE-5 attended one meeting with Rivian’s *former*
 21 CFO *years* before the IPO. ¶ 115. That is far from sufficient to establish FE-5’s
 22 personal knowledge of Defendants’ scierter. MTD at 3; *see also McCasland v.*
 23 *FormFactor Inc.*, 2008 U.S. Dist. LEXIS 60544, at *26-27 (N.D. Cal. July 25, 2008)
 24 (dismissing complaint; no CW “provided any defendant with information, or . . . heard
 25 or read any statement by any defendant, that contradicted or even cast doubt on a

26 _____
 27 ⁸ Plaintiffs’ authorities are factually inapposite. In *In re Daou Systems Inc.*, plaintiffs
 28 alleged particularized facts that defendant executives were “personally direct[ing] the
 violations of Daou’s stated accounting policy and GAAP in order to artificially inflate
 revenues[.]” 411 F.3d 1006, 1023 (9th Cir. 2005).

1 public statement made during the class period”).

2 Plaintiffs’ reliance on *Forescout* is misguided. Opp. at 36. There, **twenty**
 3 CWs described a state of affairs directly **opposite from** defendants’ public
 4 statements. See *Forescout*, 2023 U.S. App. LEXIS 6285, at *34. Their allegations
 5 directly implicated defendants: “Many of the [CWs] described conversations that
 6 they themselves heard ... or practices to which they themselves were subjected.”
 7 *Id.* at *45. The CWs stated that defendants described the slipped deals differently
 8 internally than in public. *Id.* at *48-49. Moreover, the CWs in *Forescout* had
 9 access to company-wide aggregate sales data, not just a fragment of information.
 10 *Id.* at *47. Most important, the FEs “alleged with particularity that [defendants]
 11 accessed internal reports” tracking deals and the sales pipeline. *Id.* at *51.⁹

12 Here, by contrast, two junior employees commented on innocuous events
 13 **predating** the IPO. ¶¶ 113-14. Their allegations concerned one data point in
 14 Rivian’s path to profitability. No FEs asserted expertise in procurement,
 15 engineering, or finance—all of which impact Rivian’s profitability. The FEs’
 16 allegations therefore parallel those in *Waterford Township Police and Fire*
 17 *Retirement System v. Mattel, Inc.*: The Court “did not permit the inference that FE3
 18 had personal knowledge of Mattel’s retail inventory levels during the class period,
 19 let alone that he communicated such knowledge to Defendants,” because he only
 20 had access to “systems that managed Mattel’s inventory and manufacturing.” 321
 21 F. Supp. 3d 1133, 1154 (C.D. Cal. May 24, 2018); see also MTD at 5. At best, the
 22 FEs’ statements about the BOM’s impact on long-term profitability were their own
 23 opinions. *Ferreira v. Funko Inc.*, 2021 U.S. Dist. LEXIS 59102, at *94 (C.D. Cal.

24
 25 ⁹ Plaintiffs’ other authorities are equally unavailing. In *Robb v. Fitbit Inc.*, 216 F. Supp.
 26 3d 1017, 1032 (N.D. Cal. 2016), the Court credited allegations of CWs who reported
 27 directly to the COO, thus “indicating scienter by Fitbit executives.” In *Mulligan v.*
 28 *Impax Laboratories, Inc.*, 36 F. Supp. 3d 942, 962 (N.D. Cal. 2014), the Court credited
 the accounts of thirteen CWs because, among other reasons, they “provided **consistent**
 accounts of the conditions, practices, and procedures of Impax within their respective
 spheres.”

1 Feb. 25, 2021) (“allegations seem more reasonably interpreted as [FEs’]
2 disagreement with [company’s] management than creating a strong inference of
3 scienter”); *AnaptysBio*, 2021 U.S. Dist. LEXIS 178938, at *33 (“[I]nternal
4 disagreements about what [defendant] should say in his public comments do not
5 establish scienter unless ... Plaintiffs can show that [defendant] had specific
6 information about the fraud”).

7 **FEs Do Not Corroborate Each Other.** Plaintiffs assert that the “FEs
8 independently corroborate one another and collectively tell a plausible and
9 coherent narrative.” Opp. at 36. Not so. Defendants’ Motion to Dismiss
10 identified the many inconsistencies among the FEs’ allegations (and Plaintiffs’
11 attempts to hide them), including that: (1) the Third Complaint drops FE-3’s
12 allegation that “at the time of the IPO” the BOM was \$90,000; (2) the Third
13 Complaint drops FE-1s’ allegations altogether;¹⁰ and (3) FEs 3, 4 and 5 disagreed
14 on the BOM. See MTD at 6-7. That FEs 4 and 5 identified different BOMs is
15 especially notable, as they worked on the same small team and both purportedly
16 based their knowledge on data from Project X and R&M Reports. ¶¶ 118, 193.
17 “In addition to suffering from foundational issues, [the FEs’ statements] often
18 contradict one another,” and should be discounted as a result. *In re Downey Secs.*
19 *Litig.*, 2009 U.S. Dist. Lexis 83443, at *19 (C.D. Cal. Aug. 21, 2009) (dismissing
20 complaint). But even if the Third Complaint *had* been “liberally peppered” with
21 “asserted corroboration” by the FEs, their allegations taken together would still fail
22 to plead fraud. *In re Cadence Design Sys., Sec. Litig.*, 654 F. Supp. 2d 1037,
23 1046-1048 (N.D. Cal. 2009) (dismissing complaint; corroborating allegations fail
24 to “specifically tie[] any Defendant to the accounting determinations at issue”).

25 _____
26 ¹⁰ Plaintiffs have no answer for why they dropped FE-1 from the Third Complaint
27 (Opp. at 38), so complain that Defendants can only respond to that Complaint. But
28 “[w]hen a court grants a party leave to amend a complaint on a motion to dismiss, ‘the
amended complaint may only allege other facts consistent with the challenged
pleading.’” *NetApp, Inc. v. Nimble Storage, Inc.*, 2015 U.S. Dist. LEXIS 11406, at *15
(N.D. Cal. Jan. 29, 2015).

1 **FEs’ Allegations Are From the Wrong Time Period.** Plaintiffs maintain
2 that the BOM was “locked in” in September 2021 because they cannot plead
3 “contemporaneous information ... that contradicted or undermined Defendants’
4 public statements at the time Defendants made those statements.” *Amphio*
5 *Phrams.*, 2020 U.S. Dist. LEXIS 158778, at *18. But the term “locked in” is
6 conclusory. *See supra* 10-11. That Rivian had a department dedicated to driving
7 prices down, through renegotiation with suppliers and specification changes (§
8 116) shows the opposite: Defendants believed the BOM was not “locked in.” *N.Y.*
9 *State Teachers’ Ret. Sys. v. Fremont Gen. Corp.*, 2009 U.S. Dist. LEXIS 94241, at
10 *46 (C.D. Cal. Sept. 25, 2009) (“public disclosure of the company’s problems and
11 its efforts to address those problems” negated scienter); *Denny v. Canaan Inc.*,
12 2023 U.S. Dist. LEXIS 52088, at *44-45 (S.D.N.Y. Mar. 27, 2023) (dismissing
13 action; the fact that “sales prices were locked in” said “nothing” of defendants’
14 foreknowledge of market events that would have required price flexibility).

15 The decision relied on by Plaintiffs, *SolarCity*, actually undercuts their
16 assertion. 884 F.3d at 851 n.1. There, the Ninth Circuit affirmed dismissal, finding
17 that plaintiffs’ scienter allegations, “consisting of [11] CW statements,
18 Defendants-Appellees’ motive, the magnitude and duration of the GAAP
19 violations, the Sarbanes-Oxley certifications, and the core operations inference”
20 altogether presented “a narrative of fraud [] simply not as plausible as a
21 nonfraudulent alternative.” *Id.* at 855-58. Conversely, Plaintiffs’ two other cases
22 are distinguishable because the CWs spoke to matters that were *knowable* before
23 the class period. *In re Toyota Motor Corp. Sec. Litig.*, 2012 U.S. Dist. LEXIS
24 124438, at *30, 37 (C.D. Cal. Mar. 12, 2012) (pre-class period discovery relevant
25 to whether Toyota executives knew of vehicle acceleration problems); *In re*
26 *Wireless Facilities, Inc. Secs. Litig.*, 2007 U.S. Dist. LEXIS 104435, at *30 (S.D.
27 Cal. May 7, 2007) (CW statements predating class period relevant where
28 “defendants d[id] not dispute ... statements were false before the class period”).

1 Here, Plaintiffs cannot escape the reality that BOM *before production started*
2 necessarily did not drive Rivian’s profitability.

3 **IV. PLAINTIFFS DO NOT CURE DEFICIENT SECTION 11 CLAIMS**

4 As in their dismissed Second Complaint, Plaintiffs’ Section 11 argument merely
5 repeats their Section 10(b) claims while disclaiming fraud. *See* MTD 23-24
6 (highlighting these deficiencies). “But, ‘it is the conduct pled that matters—not
7 necessarily the words with which plaintiff[s] artfully seek to allege [their] claims.’”
8 *See Wong v. Arlo Techs., Inc.*, 2019 U.S. Dist. LEXIS 226546, at *16-17 (dismissing
9 complaint; claim sounds in fraud despite plaintiff’s disclaimer because Sections 10(b)
10 and 11 allegations rely on same course of conduct); *see also Reed v. Amira Nature*
11 *Foods Ltd.*, 2016 U.S. Dist. LEXIS 203549, at *38-40 (C.D. Cal. July 18, 2016) (same;
12 both claims “rely on ... allegations that defendants overstated revenue for international
13 sales of basmati rice”); *In re Eventbrite, Inc. Sec. Litig.*, 2020 U.S. Dist. LEXIS 74651,
14 at *43-44 (N.D. Cal. Apr. 28, 2020) (same; “Plaintiffs’ entire Complaint is built around
15 the idea” that defendants knew platform integration between company and target was
16 failing prior to acquisition).

17 The Ninth Circuit has “held that a plaintiff’s nominal efforts to disclaim
18 allegations of fraud with respect to its section 11 claims are unconvincing where the
19 gravamen of the complaint is fraud and no effort is made to show any other basis for
20 the claims.” *Rigel*, 697 F.3d at 885-86. Plaintiffs’ cases do not support their position.
21 They only claimed violations under the Securities Act of 1933, and made no securities
22 fraud claims. In *Orion*, the court held that “[t]here [we]re . . . *no allegations* in the
23 [complaint] that *any Defendant* acted with a fraudulent motive, or for the purpose of
24 concealing the allegedly omitted information” regarding its shifted sales focus to new
25 product lines. *In re Orion Sec. Litig.*, 2009 U.S. Dist. LEXIS 81171, at *6 (S.D.N.Y.
26 Aug. 20, 2009). Similarly, in *Violin*, plaintiffs “d[id] not advance a claim that sounds
27 in fraud or a unified course of fraudulent conduct.” *In re Violin Memory Sec. Litig.*,
28 2014 U.S. Dist. LEXIS 155428, at *24 (N.D. Cal. Oct. 31, 2014).

1 Plausibility does not save Plaintiffs’ Section 11 claims. As the Ninth Circuit has
 2 emphasized, “[a]n allegation merely consistent with a defendant’s liability . . . ‘stops
 3 short of the line between possibility and plausibility[.]’” *Integra Med Analytics LLC v.*
 4 *Providence Health & Servs.*, 854 Fed. App’x 840, 844 (9th Cir. 2021) (quoting *Bell*
 5 *Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)). In *Integra*, the Ninth Circuit
 6 reversed denial of a motion to dismiss and remanded with instructions to grant the
 7 motion where plaintiff’s allegations that doctors had lied about underlying conditions
 8 were possible, but not plausible because an alternative innocent explanation existed.
 9 854 Fed. App’x at 841-42.¹¹

10 **CONCLUSION**

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

12
13 Dated: April 21, 2023

FRESHFIELDS BRUCKHAUS DERINGER US LLP

14 By: /s/ Boris Feldman
Boris Feldman

15 *Attorneys for Rivian Defendants*
16
17
18
19
20
21
22
23
24
25
26

27 ¹¹ Plaintiffs’ reliance on *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1107 (9th Cir.
28 2003) (Opp. at 12 n.4) is misplaced: not only was the case decided before *Twombly*
established the plausibility standard, but it concluded that allegations that sounded in
fraud, when stripped from the complaint, left no actionable claim.

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

CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for Rivian Defendants, certifies that this brief contains 6,902 words, which complies with the word limit of L.R. 11-6.1.

Dated: April 21, 2023

FRESHFIELDS BRUCKHAUS DERINGER US LLP

By: /s/ Boris Feldman
Boris Feldman
Attorneys for the Rivian Defendants