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

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

21 Plaintiffs,

22 v.

23 RIVIAN AUTOMOTIVE, INC., et al.,

24 Defendants.

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

**THE UNDERWRITER
DEFENDANTS' REPLY
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION TO DISMISS AMENDED
CONSOLIDATED COMPLAINT**

Hearing

Date: May 5, 2023

Time: 10:30 a.m.

Judge: Hon. Josephine L. Staton

Ctrm: 8A, 8th Floor

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1 **I. INTRODUCTION**

2 As the Underwriter Defendants explained in their motion to dismiss,
3 Plaintiffs' Amended Complaint asserts the same core theory of falsity as the
4 consolidated complaint that this Court already dismissed. The Underwriters
5 pointed to the dispositive language from this Court's prior order that defeats
6 Plaintiffs' continued assertions that Rivian was required to disclose in the offering
7 documents that the bill of materials for its vehicles purportedly exceeded the
8 purchase price at the time of the IPO, or that Rivian supposedly planned to raise
9 prices post-IPO. This Court already held that (1) Rivian had no duty to disclose
10 this information; (2) Plaintiffs had not plausibly alleged that Rivian had any firm
11 plan to increase prices post-IPO; and (3) in any event, the offering documents never
12 gave the impression that Rivian would turn a profit once production volumes
13 increased, particularly given their extensive disclosures making clear that Rivian
14 did not expect to achieve profitability for the foreseeable future, and might *never* be
15 profitable.

16 Plaintiffs' apparent strategy in the face of these fatal arguments: to ignore
17 them. Their Opposition fails to engage with the language of this Court's prior
18 Order, and largely does not respond to the arguments raised in the motions to
19 dismiss. Instead, the Opposition rehashes many of the same arguments that this
20 Court already rejected, or points to irrelevant factual details provided in the
21 Amended Complaint that cannot cure Plaintiffs' pleading deficiencies. Indeed,
22 Plaintiffs' Opposition only further underscores that the three alleged misstatements
23 did not create any false impressions regarding Rivian's profitability, raw material
24 costs, or pricing, and therefore cannot serve as the predicate for Plaintiffs'
25 Securities Act claims. And Plaintiffs' efforts to shift the Court's focus to the
26 purported Regulation S-K violations fails because Plaintiffs' Item 105 and 303
27 allegations are also disposed of under the terms of this Court's prior order.

28 The Amended Complaint should be dismissed, and this time, with prejudice.

1 **II. ARGUMENT**

2 **A. Plaintiffs' Opposition Fails To Rescue Their Securities Act Claims.**

3 **1. The Offering Materials Did Not Violate Regulation S-K.**

4 Plaintiffs spend the bulk of their Opposition attempting to refocus their case
5 on alleged violations of Items 105 and 303 of SEC Regulation S-K, relegating their
6 arguments about the three alleged misstatements in the Offering Materials to a
7 sideshow. *See* Opp. at 13-18; Am. Compl. ¶¶ 303-12. But as the Underwriter
8 Defendants explained in the motion to dismiss, the Regulation S-K allegations in the
9 Amended Complaint simply recycle the previous Regulation S-K allegations in the
10 Complaint, which this Court properly dismissed. *See* UW MTD at 12-15; MTD
11 Order at 29-35. Plaintiffs identify nothing new in the Amended Complaint with
12 respect to Regulation S-K, necessitating dismissal.

13 **Item 303.** Plaintiffs argue that the Amended Complaint plausibly alleges an
14 Item 303 violation, in the form of a failure to disclose “the existence of an undisclosed
15 trend—namely, that the negative delta between R1 BOM costs and retail prices
16 materially increased between 2018 and 2021, and exceeded R1 retail prices by at
17 least \$40,000 by the time of the IPO.” Opp. at 14 (emphasis omitted). But that just
18 paraphrases the allegations in the Amended Complaint, which in turn paraphrases the
19 allegations in the prior Complaint. *Compare* Am. Compl. ¶ 311 (Item 303
20 allegations); *with* Compl. ¶ 311 (substantively indistinguishable Item 303
21 allegations); *see also* Underwriters’ MTD at 12-15. At bottom, their Item 303
22 allegations remain premised on an alleged undisclosed trend of rising costs of
23 production in the years leading up to the IPO. The Court already dismissed those
24 allegations and for good reason.

25 Plaintiffs’ efforts to recharacterize the allegedly omitted trend as an increasing
26 “negative delta” between costs and retail prices does nothing to change the fact that
27 the omitted trend is still of increasing costs. And as the Underwriter Defendants
28 already explained, the Court soundly rejected Plaintiffs’ argument that there was a

1 known trend at the time of the IPO regarding increasing costs. *See* MTD Order at
2 33-34. A trend requires an “observed pattern that accurately reflects *persistent*
3 *conditions* of the particular registrant’s business environment.” *Id.* (quoting *In re*
4 *Restoration Robotics, Inc. Sec. Litig.*, 417 F. Supp. 3d 1242, 1263 (N.D. Cal. 2019)
5 (citations omitted, emphasis added)). The Court explained that “[w]hat Plaintiffs
6 allege had been deteriorating for years before the IPO were Rivian’s internal
7 estimates and projections for the R1’s margins,” which cannot qualify as a “persistent
8 condition.” *Id.* at 34. Those “internal estimates” described by the Court and alleged
9 in the original Complaint, *id.*, are the exact same “cost estimates” from “2018”
10 onwards that form the basis of the Amended Complaint’s alleged three-year trend of
11 increasing costs, *e.g.*, Am. Compl. ¶¶ 276-78, and that Plaintiffs now argue is the
12 undisclosed trend “between 2018 and 2021,” Opp. at 14 (citing Am. Compl. ¶¶ 273-
13 87). Accordingly, Plaintiffs’ Item 303 argument is disposed of under the terms of
14 this Court’s prior order.

15 Plaintiffs’ various efforts to escape from that holding all fail. Indeed,
16 Plaintiffs’ Opposition never even bothers to confront the language of this Court’s
17 prior order, instead pointing to inapposite cases that do not remotely explain why a
18 trend premised on internal cost projections would be sufficient to sustain an Item 303
19 claim. *See* Opp. at 14-16. And Plaintiffs’ argument that the Amended Complaint
20 includes factual allegations demonstrating that the allegedly omitted trend was
21 material to investors is beside the point. *See* Opp. at 14-15. The Court did not dismiss
22 the Item 303 allegations because the alleged undisclosed trend was immaterial; it
23 dismissed the Item 303 allegations because there was no Item 303 trend that needed
24 to be disclosed in the first place. Materiality (which Plaintiffs have not plausibly
25 alleged in any event) cannot rescue their Item 303 claim. Likewise, Plaintiffs’
26 argument (Opp. at 15-16) that the Amended Complaint did not specifically allege
27 that Defendants were required to disclose “internal estimates and projection for the
28 R1s margins” or “future trends” is irrelevant. It cannot alter that the entire basis for

1 Plaintiffs’ purported trend of increasing costs from 2018-2021 is increases in
2 Rivian’s *internal estimates* for what the costs of production were *expected to be*
3 when Rivian started producing cars, which indisputably did not occur until
4 September 2021. That is the same core Item 303 theory that Plaintiffs have pressed
5 all along, and that this Court already rejected.

6 All Plaintiffs are left with is a two-month period before the IPO, when
7 Plaintiffs themselves acknowledge that the bill of materials cost was actually
8 finalized. Am. Compl. ¶ 281. Indeed, this Court already held that “there were no
9 known, actual margins for the R1 until approximately two months before the IPO.”
10 MTD Order at 34. Even setting aside the fact that Plaintiffs have not alleged any
11 increasing costs during this two-month period, as would be required to allege any
12 pattern or trend, “as a matter of law, a pattern of two months does not a trend make
13 for purposes of Item 303(a)(3)(ii).” *In re Omega Healthcare Inv’rs., Inc. Sec. Litig.*,
14 563 F. Supp. 3d 259, 276 (S.D.N.Y. 2021) (internal quotation marks omitted).
15 Plaintiffs wisely have not even attempted to justify this two-month-long period as
16 being sufficient to establish a trend for purposes of Item 303.

17 **Item 105.** Plaintiffs fare no better in arguing that the Amended Complaint
18 plausibly alleges an Item 105 violation. The gist of that argument is that the
19 Defendants omitted to disclose two “risk factors” required by Item 105 to be
20 disclosed: “(i) the delta between R1 BOM costs and retail prices; and (ii) Rivian’s
21 pre-IPO decision to increase retail prices, which would negatively impact R1
22 demand.” Opp. at 18. But again, this argument reiterates theories that have already
23 been dismissed by this Court.

24 As to the first alleged Item 105 risk factor, the “delta” between costs and prices
25 is the same alleged increase in costs of production in which Plaintiffs ground their
26 Item 303 trend (and indeed, in which Plaintiffs ground much of their entire case). It
27 is also part of the same Item 105 theory pressed by Plaintiffs in the previously
28 dismissed Complaint. *Compare* Am. Compl. ¶ 305 (alleging an Item 105 violation

1 because the Registration Statement was required, but failed, to disclose, among other
2 things, that “the bill of materials for the R1T and R1S vastly exceeded their retail
3 prices as of the date of the IPO”), *with* Compl. ¶ 258 (alleging an Item 105 violation
4 because the Registration Statement was required, but failed, to disclose, among other
5 things, that “Rivian’s COGS for R1s had consistently increased from 2018 to 2021,
6 which in turn lead to increasingly negative R1 gross profit margins”). For the reasons
7 explained above, in the Underwriter Defendants’ motion to dismiss, and by this Court
8 in dismissing the same core allegations in the Complaint, the alleged increase in costs
9 of production does not plausibly give rise to an Item 105 violation.

10 The same goes for the second alleged Item 105 risk factor, Rivian’s purported
11 pre-IPO decision to raise prices post-IPO. Plaintiffs alleged the same Item 105 theory
12 in the Complaint. *Compare* Am. Compl. ¶ 305 (alleging an Item 105 violation
13 because the Registration Statement was required, but failed, to disclose, among other
14 things, “Rivian’s decision to increase R1T and R1S prices”), *with* Compl. ¶¶ 258,
15 264 (alleging an Item 105 violation because the Registration Statement was required,
16 but failed, to disclose, among other things, “Rivian’s need to increase R1 pricing”).
17 As the Underwriter Defendants explained (UW MTD at 14), the Court already
18 unambiguously held that “the Prospectus did not need to disclose that Rivian would
19 increase R1 prices in the near term pursuant to Item 105,” MTD Order at 33. As the
20 Court elaborated, Plaintiffs did not allege any facts to “support an inference of a firm
21 ‘plan’ to increase prices,” and Rivian was not required to disclose its “prospective
22 pricing strategy” in any event. MTD Order at 32-33. Plaintiffs identify no new
23 allegations in the Amended Complaint to overcome those adjudged pleading
24 deficiencies, and instead simply ignore the dispositive language in this Court’s prior
25 order rejecting this theory.

26 **2. The Challenged Statements Do Not State a Section 11 Claim.**

27 Setting aside the Regulation S-K allegations, the Amended Complaint
28 identifies three alleged misstatements in the Offering Materials forming the basis of

1 Plaintiffs’ Section 11 claim. Am. Compl. ¶¶ 294, 296, 297. Plaintiffs’ Opposition
2 avoids focusing on the language of the specific alleged misstatements, in a seeming
3 attempt to avoid their obvious deficiencies. Indeed, Plaintiffs studiously avoid
4 quoting the alleged misstatements in full, instead choosing to piece together isolated
5 snippets from them and infusing those excerpts into Plaintiffs’ own narrative. In
6 Plaintiffs’ telling, the alleged misstatements are reduced to “represent[at]ions that
7 Rivian expected to generate ‘negative gross profit[s] per vehicle for the near term’
8 because its ‘fixed costs’ were being ‘spread across a smaller product base’” and “that,
9 ‘[o]ver the long term,’ Rivian believed it could ‘generate positive gross profit as
10 production utilization increase[d] and [it] leverage[d] [its] investments.’” Opp. at 18
11 (quoting Am. Compl. ¶¶ 126, 127, 159, 160, 296, 297). But no amount of cherry
12 picking or linguistic contortions can conceal the fact that the three alleged
13 misstatements in the Amended Complaint suffer from the same deficiencies as—and
14 indeed are even weaker than—the alleged misstatements in the Complaint.

15 Since Plaintiffs avoid addressing the particular alleged misstatements in any
16 detail, it is worth a brief recap of each statement and its fatal flaws:

17 ***The First Challenged Statement.*** This statement (Am. Compl. ¶ 294)
18 addresses the impact of increasing costs and/or prices on Rivian’s business. As the
19 Underwriters explained (UW MTD at 3-6), it is neither false nor misleading because
20 (1) this Court already rejected Plaintiffs’ theory that Rivian had already decided, pre-
21 IPO, that it would raise prices, *see supra*, Section II.A.1; (2) this Court likewise
22 already concluded that Rivian was not required to disclose further information about
23 its raw material costs at the time of the IPO, *see* MTD Order at 34-35; and (3) this
24 statement did not create any affirmative impression that Rivian’s raw material costs
25 had *not* increased at the time of the IPO, particularly given Rivian’s extensive risk
26 disclosures about increasing costs and lack of profitability for the foreseeable future,
27 *see* UW MTD at 5-6.

28 ***The Second Challenged Statement.*** This statement (Am. Compl. ¶ 296)

1 described Rivian’s expectation that it would continue to operate at a negative gross
2 profit in the near term given high fixed costs, “until we launch additional vehicles
3 and ramp production,” and that gross profit losses were expected “to increase on a
4 dollar basis” even as Rivian ramped up production “over the short to medium term.”
5 This statement is *identical* to a statement this Court already dismissed, and Plaintiff’s
6 theory of falsity is identical too. *See* UW MTD at 7-10. Any claim based on this
7 statement should be dismissed again since, as this Court already held, it “does not
8 present a false picture of Rivian’s profitability prospects and the causes behind [its]
9 negative margins.” MTD Order at 23. Plaintiffs’ “theory of falsity is implausible”
10 as to this statement because it nowhere suggests that “Rivian could become profitable
11 by simply ramping up R1 production volumes.” *Id.* Indeed, this statement explicitly
12 warned that losses would *increase* over the medium term, even as production
13 expanded.

14 ***The Third Challenged Statement.*** This statement (Am. Compl. ¶ 297)
15 described Rivian’s expectation that it would be able to increase its gross margin in
16 the “long term” as Rivian’s “production utilization increases and we leverage our
17 investments.” This vague statement likewise did not create any false impression or
18 guarantee that Rivian would turn a profit once production volumes increased,
19 particularly given that the *very next sentence* identified creating new vehicle models
20 and vehicles at different price points as being integral to Rivian’s efforts to
21 “leverage” its investments. UW MTD at 11-12.

22 Given Plaintiffs’ strategy of lumping all three statements together, Plaintiffs
23 largely do not address the Underwriter Defendants’ dispositive arguments tied to the
24 actual language of the purported misstatements. Instead, Plaintiffs’ Opposition
25 focuses on the notion that these statements impermissibly disclosed high fixed costs
26 as *one* factor contributing to Rivian’s negative gross profits, but failed to disclose *all*
27 *other* contributing factors. *See* Opp. at 19-20. Citing only the Second Challenged
28 Statement, Plaintiffs contend that “it is beyond dispute that the only factors the

1 [statement] identifies are high fixed costs, low production volumes, and product
2 utilization.” Opp. at 19-20 (citing Am. Compl. ¶ 296). But as discussed above,
3 Plaintiffs blatantly ignore that this Court *already held that this precise statement was*
4 *inactionable*. Compare Compl. ¶ 254, with Am. Compl. ¶ 296; see also MTD Order
5 at 22-23. In doing so, this Court held unambiguously that the Second Challenged
6 Statement “does not create a false impression that Rivian could become profitable by
7 simply ramping up R1 production volumes” to share the high fixed costs across more
8 vehicles—meaning that this statement did not give the impression that high fixed
9 costs were the *only* reason for Rivian’s negative gross profits. MTD Order at 23.
10 Indeed, this Court acknowledged that the statement itself “explicitly identifies both
11 launching additional [cheaper] vehicles and ramping up production as key to
12 overcoming negative margins.” *Id.* Plaintiffs, yet again, have no answer to the
13 language in this Court’s prior order that directly conflicts with their theory of liability.

14 Plaintiffs then argue that, even if the Second Challenged Statement does not
15 suggest that high fixed costs were the exclusive reason for Rivian’s negative gross
16 profits, “Defendants assumed a duty to speak fully and truthfully” as to all the reasons
17 impacting Rivian’s profitability. Opp. at 20. That is clearly wrong, for the reasons
18 the Underwriter Defendants explained in their motion to dismiss. See UW MTD at
19 5-6. The securities laws *do not require* “complete disclosure of all material
20 information whenever a company speaks on a particular topic.” *Weston Family*
21 *P’ship LLP v. Twitter, Inc.*, 29 F.4th 611, 615 (9th Cir. 2022); see also MTD Order
22 at 25. That is why the Court previously concluded that Rivian was not required to
23 disclose the relative cost of the bill of materials as compared to the purchase price at
24 the time of the IPO. See MTD Order at 34-35. That demanded a level of specificity
25 not required by the Securities Act. *Id.* And the same conclusion follows for the
26 Amended Complaint.

27 Of course, Plaintiffs fail to state a Section 11 claim for other reasons as well:
28 most importantly, because the alleged forward-looking misstatements are protected

1 by the bespeaks-caution doctrine. Plaintiffs argue that the bespeaks causation
2 doctrine does not apply because Rivian’s numerous risk disclosures amounted to, in
3 Plaintiffs’ view, nothing more than a “boilerplate listing of generic risks.” Opp. at
4 22 (citation omitted). According to Plaintiffs, Rivian provided only “boilerplate
5 warnings that Rivian might lose money over the near term and might never be
6 profitable,” and these warnings failed to disclose that “the R1 would never become
7 profitable absent reductions in material costs or price increases.” Opp. at 23.

8 Unfortunately for Plaintiffs, this Court already held that “the Prospectus
9 clearly indicated that Rivian did not expect to be profitable for the foreseeable future
10 and warned that Rivian might never achieve positive margins.” MTD Order at 23.
11 Plaintiffs do not engage with this Court’s prior order on this point, and instead point
12 to inapposite cases where courts found that the language at issue was so generalized
13 that it could have applied to any business. Opp. at 23. Those cases have no bearing
14 on the outcome here. For example, here, the Registration Statement’s risk disclosures
15 were the opposite of boilerplate, making clear that Rivian was subject to “cost
16 increases or disruptions in supply of raw materials or other components used in [its]
17 vehicles,” which could adversely impact both its raw material costs and its margins.
18 See ECF 135-5 (Lopez Decl., Ex. 4 at 48, 61). And the Second Challenged Statement
19 itself explicitly warned that certain “dynamic[s] w[ould] cause [Rivian’s] gross profit
20 losses to increase on a dollar basis even as [its] revenue increases from ramping
21 production volumes over the short to medium term.” *Id.* at 124. As if that all were
22 not enough, Rivian warned on multiple occasions that it had “a history of losses and
23 expect[ed] to incur significant expenses and continuing losses for the foreseeable
24 future.” See *id.* at 48, 57, 109. The Court was therefore correct to conclude that these
25 risk disclosures—and many others—plainly gave ample warning to investors about
26 the risks that Rivian faced in achieving profitability, and that those hurdles might
27 never be overcome.

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III. CONCLUSION

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

Dated: April 21, 2023

Respectfully submitted,
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