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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,

Plaintiff,

v.

RIVIAN AUTOMOTIVE, INC., et al.,

Defendants.

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

RIVIAN DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Hearing
Date: May 10, 2024
Time: 10:30 a.m.
Judge: Hon. Josephine L. Staton
Ctrm: 8A, 8th Floor

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TABLE OF ABBREVIATIONS

Abbreviation	Meaning
¶ or AC	Amended Consolidated Complaint, dated March 2, 2023 (ECF 150)
AP-7	Sjunde AP-Fonden, Proposed Class Representative
BOM	Bill of materials
FASB	Fair Accounting Standards Board
FE	Former employee(s)
KTMC	Kessler Topaz Meltzer & Check, Proposed Class Counsel
Order	Order Granting: (1) Rivian Defendants' Motion to Dismiss; and (2) Underwriter Defendants' Motion to Dismiss, dated February 16, 2023 (ECF 149)
Nye	Expert Report of Zachary Nye, Ph.D, dated December 1, 2023 (ECF 218-3)
Prosp.	Rivian's Prospectus Rule 424(b)(4), filed with the SEC on November 12, 2021 (ECF 135-5)
R1	R1T and R1S
Smith	Expert Report of Lawrence Smith, CPA, dated February 29, 2024 (Ex.15)
Tabak	Expert Report of David I. Tabak, Ph.D, dated February 27, 2024 (Ex.14)

INTRODUCTION

Certification of securities class actions is not a perfunctory step. The Supreme Court recently clarified that class treatment is only appropriate in securities cases where a market mechanism makes class issues predominate. *Goldman Sachs Grp., Inc. v. Arkansas Tchr. Ret. Sys.*, 594 U.S. 113, 127 (2021). "[A]t class certification, courts should be open to *all* probative evidence on that question—qualitative as well as quantitative—aided by a good deal of common sense." *Id.* at 122. This Opposition is therefore rich in technical economic and accounting evidence.

Plaintiffs assert a simplistic—and flawed—theory: in late 2021, Rivian made claims about its future profitability that were revealed to be misleading in March 2022, resulting in stock price drops that caused losses to the proposed class. AC ¶¶6–7, 13. That did not happen. More importantly for class certification, however, Plaintiffs' theory unravels once asserted on a class-wide basis.

The market and economic evidence shows that individual issues predominate on multiple elements of Plaintiffs' claims. Defendants submit extensive evidence from market analysts, depositions, and experts: Dr. David Tabak, an economist who analyzed market reaction to Rivian's disclosures, and Mr. Lawrence Smith, a CPA and former member of FASB, which sets accounting standards in the United States. The evidence is overwhelming:

1. Dr. Tabak shows that the market for Rivian securities was not efficient until December 2021. *Infra* at 6–9. Plaintiffs' expert fails to prove otherwise. No class member could have relied on the market before that time. Reliance will need to be proven on a case-by-case basis.
2. Plaintiffs argue that Rivian concealed that it cost more to make an early R1 than the sales price. But Mr. Smith shows that Rivian's ample inventory accounting disclosures made clear as early as November 2021 that an R1 sold for less than its production cost, and the company lost and expected to continue to lose money on every car produced. *Infra* at 10–12. Mr. Smith's analysis is amplified

by the fact that, during his tenure, FASB promulgated the accounting standard at issue. In December 2021, the Company further disclosed that, since its inventory consisted of raw materials, that loss was due to the cost of raw materials exceeding their value once put in a car. Plaintiffs have consistently misread or ignored these disclosures. Dr. Tabak shows that market analysts folded these data into their models and reacted immediately after Rivian's earnings call. *Infra* at 12–14. Rivian's stock could not have been impacted by this information in March 2022 because the market had already incorporated it into the price.

3. The March 1, 2022 price decline cannot be a corrective disclosure because the information disclosed—retail price increases—did not contradict the challenged statements, which indicated that Rivian was not profitable and might never be. In *Goldman*, the Second Circuit reversed certification of a class precisely because of a mismatch between the purported corrective disclosures and the challenged statements. *Ark. Teacher Ret. Sys. v. Goldman Sachs Grp., Inc.*, 77 F.4th 74, 81 (2d Cir. 2023). Dr. Tabak shows that no market analyst subscribed to Plaintiffs' theory that, absent the price increases, Rivian would never be profitable. *Infra* at 14–15. Tellingly, the FEs on whom Plaintiffs relied testified they disagreed with or had no basis to believe Plaintiffs' assertion. *Infra* at 15.
4. Dr. Tabak proves that the March 10, 2022 price decline was not even statistically significant. *Infra* at 17. Plaintiff's expert concurs. Dr. Tabak further shows that no new corrective information entered the market on that date.

This castle of cards cannot bear the weight of class proceedings. In addition to their flawed legal theories and factual misrepresentations, Plaintiffs' depositions revealed a shocking abdication of duties to counsel and ignorance of the case. AP-7, a Swedish pension fund, did not know that it held Rivian stock until solicited by counsel, never reviewed the operative complaint, and thought its counsel's mischaracterization of FE statements was not important. Class certification should be denied.

BACKGROUND

Rivian Produced Its First Vehicles Just Before the IPO. Rivian produced its first few dozen R1 consumer vehicles in September 2021. Two months later, Rivian went public via IPO at a predetermined price of $78/share. Ex.1 at 17; Tabak ¶13. In its Prospectus, Rivian disclosed that it "d[id] not expect to be profitable for the foreseeable future" and it "[could] not assure you that we will ever achieve or be able to maintain profitability in the future." Ex.1 at 36. Rivian cautioned that "inflationary pressures" could necessitate vehicle "price increases" (*id*. at 115), warning that "[a]ny attempts to increase the announced or expected prices of our vehicles in response to increased costs could be viewed negatively by our potential customers and could adversely affect our business[.]" *Id.* at 43.

Post-IPO Quiet Period Means No Analyst Coverage. A post-IPO mandatory "quiet period" meant that industry analysts could not publish reports expressing "any information, opinion, or recommendation" on the newly public company. 17 C.F.R. § 242.101(b)(1). This ended on December 5, 2021, when analysts could (and did) publicly analyze Rivian's performance and potential. *See* Nye Ex.5B.

Rivian Warns of Inflation and Possible Price Increases. By December 2021, rising inflation was hitting the automotive industry. ECF 135 at 9. At Rivian's December 16, 2021 earnings call, CFO Claire McDonough warned that, "given the inflationary market backdrop, we [] continue to evaluat[e] the pricing for our vehicle[s]." AC ¶138. This was not news to analysts: on December 5, 2021, Piper Sandler published its model for Rivian, assuming a $15,000-$20,000 retail price increase between 2021–2022. Tabak ¶54. Barclays and Deutsche Bank, among others, incorporated a price increase into their models after the announcement and filing of Rivian's Form 10-Q on December 17, 2021. *Id.* ¶¶56–59.

Inflation Accelerates. Inflation's rapid rise continued: lithium prices skyrocketed by 333%, nickel by 175%, and cobalt by 147% between October 2021 and March 2022. ECF 135 at 9. Inflation hammered the automotive industry. *Id.* at ¶¶3–4.

Rivian Increases Prices. On March 1, 2022, "inflationary pressure, increasing component costs, and unprecedented supply chain shortages and delays for parts" drove Rivian to announce price increases of $12,000–14,000.[1] These increases applied to *all* vehicle pre-orders, including existing pre-orders. *Id.* Although analysts expected price increases, customer reactions were a surprise. On Reddit, 50% of respondents to a 4,700-person poll claimed they would cancel their pre-orders.[2] The unscientific poll was not restricted to pre-order customers. This reaction did not translate into a drop in pre-orders, which grew by an *additional* 7,000 between March–May 2022. *Compare* Ex.2 at 297 *with* Ex.3 at 341.

Plaintiffs Immediately File Suit. On March 3, 2022, Rivian announced that price increases would apply only to *new* pre-orders. Nevertheless, plaintiffs immediately brought a Section 11 claim, later adding a Section 10(b) claim. ECF 1, 125. Following two rounds of motions to dismiss, this Court permitted the lawsuit to proceed based on new allegations attributed to FE-4 and FE-5. ECF 170 at 18–19, 21.

FEs Debunk Plaintiffs' Allegations. Defendants have now deposed the FEs, all of whom either contradicted or demonstrated a lack of personal knowledge about Plaintiffs' allegations. The FEs testified that: they felt "coerced" by Plaintiffs (Ex.4 at 461:11–462:16), had "no clue" whether certain facts attributed to them were true (*id.* at 458:2–4), and statements attributed to them were simply "not correct" (Ex.5 at 477:16–478:14, 481:20–483:7). Despite the gap between their allegations and reality, Plaintiffs moved to certify the putative class. ECF 218.

Rivian Today. Since 2021, Rivian has produced 82,584 vehicles. Ex.16 at 909. It recently projected a "modest gross profit in the fourth quarter of 2024." Ex.17 at 998.

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[1] Kirsten Korosec, *Rivian raises price on R1T electric truck, R1S SUV ahead of new dual-motor versions*, TechCrunch (March 1, 2022), https://techcrunch.com/2022/03/01/rivian-raises-price-on-r1t-electric-truck-r1s-suv-ahead-of-new-dual-motor-version/.

[2] Damonator5000, r/Rivian on Reddit (March 1, 2022), https://www.reddit.com/r/Rivian/comments/t4mqab/with_news_of_todays_price_increases_on_the_r1t/.

ARGUMENT

"Before certifying a class, the [Court] must conduct a rigorous analysis to determine whether the party seeking certification has met the prerequisites of Rule 23." *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 588 (9th Cir. 2012). Plaintiffs "must actually prove—not simply plead—that their proposed class satisfies each requirement of Rule 23[.]" *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 275 (2014). Plaintiffs have failed to prove two essential elements of Rule 23: predominance and adequacy. If either fails—and both do—class certification cannot proceed.

Plaintiffs fail to satisfy Rule 23(b)(3)'s requirement that "questions of law or fact common to class members predominate over any questions affecting only individual members." "Rule 23(b)(3)'s predominance criterion is even more demanding than Rule 23(a)." *Comcast Corp. v. Behrend*, 569 U.S. 27, 34 (2013).

Section 10(b) claims require reliance on the alleged misrepresentation or omission. *Goldman*, 594 U.S. at 118. Typically, reliance is an individualized inquiry incapable of class treatment. *Id.* at 119. In securities class actions, the Supreme Court established a presumption that class members relied on information entering the market, provided the market is efficient, i.e., it incorporates new information rapidly in the stock price. *Id.* at 117. Plaintiffs' class fails this test:

I. If the market is not efficient, reliance does not predominate. Plaintiffs could not have relied on the integrity—i.e., completeness and accuracy—of information if the market does not fold all new information quickly into the price. *Infra* at 6–9.

II. Market efficiency is a two-edged sword. Plaintiffs may claim that the alleged falsehood entered the market, inflating the price. But Defendants may show that corrective information entered the market before Plaintiffs claim or that the alleged corrective information did not match the alleged falsehoods, i.e., the price reaction for which Plaintiffs seek to recover was unrelated to the purported misrepresentations. *Infra* at 9–18.

Both deficiencies exist here. The second defeats both Sections 10(b) and 11 classes. While Section 11 does not require Plaintiffs to prove reliance, it allows Defendants to show that (1) the putative class members knew the alleged truth when they bought stock or (2) the alleged price reaction was not due to the purported falsehood. 15 U.S.C. §77k(a) & (e).

I. PLAINTIFFS FAIL TO ESTABLISH PREDOMINANCE BECAUSE THE CLASS COULD NOT RELY ON AN EFFICIENT MARKET[3]

A. Rivian's IPO Did Not Take Place in an Efficient Market

Plaintiffs "face[] a heavy burden to plausibly allege that there was an efficient market for newly issued [securities]." *In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prod. Liab. Litig.*, 2018 U.S. Dist. LEXIS 34873, at *361–62 (N.D. Cal. Mar. 2, 2018). Simply put, "the market for IPO shares is not efficient." *In re IPO Sec. Litig.*, 471 F.3d 24, 42 (2d Cir. 2006); *Freeman v. Laventhol & Horwath*, 915 F.2d 193, 199 (6th Cir. 1990) ("[A] primary market for newly issued [securities] is not efficient[.]"). Courts examine multiple factors to determine whether a market is efficient. *See Cammer v. Bloom*, 711 F. Supp. 1264, 1286–87 (D.N.J. 1989). These factors show that the fraud-on-the-market "presumption can not logically apply when plaintiffs allege fraud in connection with an IPO, because . . . there is no well-developed market in offered securities." *Berwecky v. Bear, Stearns & Co.*, 197 F.R.D. 65, 68 n.5 (S.D.N.Y. 2000).

Plaintiffs nevertheless begin their Class Period on the day of Rivian's IPO, November 10, 2021. AC ¶1. Their expert, Dr. Nye, opines that the "market for Rivian stock was efficient throughout the Class Period." Nye ¶17. But Dr. Nye admits he has no opinion as to whether Rivian's IPO price was set in an efficient market. *See* Ex.6 at

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[3] Plaintiffs also do not demonstrate that "damages are susceptible of measurement across the entire class," and that "a model purporting to serve as evidence of damages in [a] class action" can "measure only those damages attributable to [their] theory." *Comcast*, 569 U.S. at 35. They loosely describe only "the general economic framework" for calculating per-share damages. Nye ¶60. Courts reject such "promise[s] of a model to come." *Ward v. Apple Inc.*, 784 F. App'x 539, 541 (9th Cir. 2019).

505:13–23; 512:4–9; Tabak ¶9. In fact, "***none*** of his tests [for market efficiency] included the IPO," and he "provide[s] no evidence that Rivian's IPO investors purchased their shares in an efficient market." Tabak ¶10. Rather, the *Cammer* factors indicate that the IPO market for Rivian securities was not efficient.

No Analysts Covered Rivian's IPO. No analyst published reports about Rivian before or on Rivian's IPO date. *See* Nye Ex.5B; Ex.6 at 513:23–514:2. This is "just one example of why an efficient market, necessary for the *Basic* presumption to apply, cannot be established with an IPO[.]" *IPO*, 471 F.3d at 42–43. During the quiet period, "analysts cannot report concerning securities in an IPO, . . . thereby precluding the contemporaneous significant number of reports by securities analysts' that are a characteristic of an efficient market." *Id.* at 43.

Market-Makers and Arbitrageurs Have No Role in an IPO. An IPO price is fixed before the IPO. Tabak ¶13. Therefore, "new information does not get incorporated into that price, and . . . there is no way for the market to change the IPO price." *Id.* ¶15. This leaves no role for market-makers and arbitrageurs. *Id.*; *see also* Ex.6 at 508:13–509:2. Although Dr. Nye explains how market-makers and arbitrageurs *could* affect price, he provides no evidence that they *did* impact price during or shortly following the IPO. *See* Nye ¶¶36, 38; *cf. Volkswagen*, 2018 U.S. Dist. LEXIS 34873, at *361 (dismissing reliance allegations with "limited detail on how prices were set, and whether the offering prices were subject to change based upon market information").

Rivian Was Ineligible to File a Form S-3 During the Class Period. Rivian was ineligible to file a Form S-3 throughout the Class Period because it had not been subject to SEC reporting requirements for at least twelve months. Tabak ¶16. It would not become eligible until a year and a half *after* the IPO. Ex.6 at 514:22–515:25.

There Was No Price Response to News During the IPO. Dr. Nye did not perform an event study assessing the impact of news on Rivian's IPO price. *Id.* 516:1–6. Any study would have shown no price response, because "there was only a

single, fixed IPO price." Tabak ¶17. Regardless, Dr. Nye concedes that IPOs are "underpriced on average, and [] there is considerable volatility in initial returns." Nye ¶74 n.114.

Rivian's IPO did not occur in an efficient market, and Dr. Nye does not show when the market became efficient. Thus, Rivian stock purchasers before the market became efficient cannot be certified as a class. *In re SCOR Holding (Switz.) AG Litig.*, 537 F. Supp. 2d 556, 579 (S.D.N.Y. 2008).

B. The Market Became Efficient After the Quiet Period

The question then becomes *when* the market for Rivian's securities became efficient. Plaintiffs provide no evidence for this assessment. "[T]he purpose underlying the existence of the quiet period, along with the [decision in] *In re IPO*, combine to establish at least a rebuttable presumption that a market for securities issued by a company not previously subject to the reporting requirements of the securities laws is not efficient during the quiet period." *SCOR*, 537 F. Supp. 2d at 575.

As in *SCOR*, Plaintiffs offer no evidence that the market had become efficient before the quiet period ended. *Id.* at 577. It is insufficient for Plaintiffs to point to two contemporaneous publications (one containing no analysis, *see* Ex.7), particularly where "it is apparent . . . that a significant number of reports by securities analysts were not issued until" after the quiet period. *SCOR*, 537 F. Supp. 2d at 578 (finding one report insufficient); *see* Nye Ex.5B (78 of 80 reports were published *after* the quiet period). Nor have Plaintiffs "offered evidence that [Rivian] had the ability to file an S-3, that there were market makers for [Rivian] stock, or that the market had reacted to new information" during the quiet period. *SCOR* at 578. Additionally, the "abnormally high" trading volume during the quiet period (*see* Nye Ex.3A) suggests that "investors [were] likely in the process of becoming informed and assimilat[ing] available information, and thus it is difficult to find . . . that the market already reflected all available material information regarding the company and its business during that time." *SCOR* at 578.

Plaintiffs adduce no evidence to rebut the presumption that the market for Rivian securities was inefficient until after the quiet period. The *Basic* presumption thus does not apply for any purchasers of Rivian shares before December 5, 2021, and the Class Period may not begin before that date.

II. THE ALLEGED MISSTATEMENTS HAD NO IMPACT ON RIVIAN'S STOCK PRICE

The proposed Class is also not viable because the alleged misstatements had no impact on Rivian's stock price. "[D]efendants may rebut the *Basic* presumption at class certification by showing that an alleged misrepresentation did not actually affect the market price of the stock. If a misrepresentation had no price impact, then *Basic*'s fundamental premise completely collapses, rendering class certification inappropriate." *Goldman*, 594 U.S. at 119. Defendants may make "[a]ny showing that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff[.]" *Basic Inc. v. Levinson*, 485 U.S. 224, 248 (1988). If so, the "presumption[] . . . give[s] way to [the] direct evidence showing that the alleged misrepresentation did not actually affect the stock's market price." *In re Finisar Corp. Sec. Litig.*, 2017 U.S. Dist. LEXIS 201150, at *15–16 (N.D. Cal. Dec. 5, 2017).

"In assessing price impact at class certification, courts should be open to *all* probative evidence on that question—qualitative as well as quantitative—aided by a good deal of common sense." *Goldman*, 594 U.S. at 122. "That is so regardless whether the evidence is also relevant to a merits question like materiality," because "a court has an obligation before certifying a class to determine that Rule 23 is satisfied, even when that requires inquiry into the merits." *Id.* At class certification, "[t]he district court's task is [] to assess all the evidence of price impact—direct and indirect—and determine whether it is more likely than not that the alleged misrepresentation had a price impact." *Id.* at 126–27.

Here, Plaintiffs assert an "inflation-maintenance theory," which posits that "price impact is the amount of price inflation maintained by an alleged misrepresentation[.]" *Id.* at 123. Plaintiffs claim the alleged misrepresentations hid

information that (once revealed) negatively impacted Rivian's stock price. AC ¶¶174–75, 178. This theory—and the *Basic* presumption—is rebutted because (1) by March 1, 2022, the supposedly hidden information had been known to the market for months, (2) the alleged misrepresentations do not match the purported corrective disclosures, and (3) certain alleged corrective disclosures were not associated with any statistically significant stock price drop.

A. The March 1, 2022 Pricing Announcement Was Not a Corrective Disclosure: the Market Already Knew that Rivian Lost Money on Every R1

Plaintiffs posit that on March 1, 2022, Rivian shareholders learned for the first time that Rivian needed to increase the R1 price to ever become profitable. AC ¶13. But Rivian disclosed in its November 2021 Prospectus and December 2021 Form 10-Q and earnings call that (1) it produced every R1 at a loss, (2) it would do so for the foreseeable future, and (3) spreading fixed costs over more vehicles alone would not lead to gross profitability.

1. The Market Had Known About the Purported Corrective Disclosures for Months

Drs. Tabak and Nye agree Rivian's stock was trading in an efficient market by December 16, 2021. Tabak ¶71; Nye ¶17. "A corollary of the efficient market hypothesis is that disclosure of . . . information already known by the market[] will not cause a change in the stock price." *Meyer v. Greene*, 710 F.3d 1189, 1197 (11th Cir. 2013). "It follows that '[c]orrective disclosures must present facts to the market that are new[.]'" *Id.* at 1197–98. Defendants' experts, and "a good dose of common sense" (*Goldman*, 594 U.S. at 122), arrive at the same conclusion: by March 2022, Rivian's stock price could not have still been inflated by information known to the market for months.

Rivian Disclosed that It Lost Money on Every R1. GAAP requires companies to report their inventory value as the "lower of cost or net realizable value" ("LCNRV"). Smith ¶19. "[D]uring [a] period in which net realizable value falls below the cost basis," a company must recognize a loss with respect to its inventory. *Id.*

Rivian recognized such losses in its SEC disclosures and "disclose[d] sufficient information to establish that, during the Alleged Class Period, the costs of materials for its vehicles exceeded the estimated selling prices[.]" *Id.* ¶24.

Rivian disclosed pre-IPO that "much of our current inventory has a lower net realizable value than its cost" and "in the near term[,] [] we will continue to have significant LCNRV-related charges until such time as we have reached more significant production levels." Ex.1 at 104. Rivian "expect[ed] to record a lower of cost or net realizable value adjustment to write-down the value of certain inventory to the amount we anticipate receiving upon vehicle sale." *Id.* at 26; *see also* Smith ¶26.

Rivian added to these disclosures on December 16 and 17, 2021:

- Rivian's Q3-2021 Form 10-Q showed that "the cost of its then-current inventory balance was attributable almost exclusively to raw materials . . . also commonly referred to as BOM costs[.]" Smith ¶25.
- Rivian "recorded an LCNRV adjustment of $31 million for the three and nine months ended September 30, 2021 to write-down the value of certain inventory to the amount we anticipate receiving upon vehicle sale (after considering future costs necessary to ready the inventory for sale)." *Id.* ¶27.
- Rivian disclosed that "[w]e expect LCNRV charges to negatively impact upcoming quarters in the near-term," on a continuing basis. *Id.* ¶29.

By (1) disclosing that its inventory had a lower net realizable value than cost, (2) taking LCNRV write-downs on its inventory balance (composed almost exclusively of BOM costs), and (3) telling investors to expect such charges in the near term, Rivian disclosed that, for the foreseeable future, it would lose money on every R1 made and that that loss was due to BOM costs exceeding the value of those raw materials once put in a finished car. *That is precisely what Plaintiffs claim Rivian concealed until March 2022*. *See* AC ¶119.

Rivian Disclosed that It Could Not Rely Only on Spreading Fixed Costs to Achieve Profitability. Rivian disclosed that because of BOM costs, it would operate at

negative gross profit per vehicle *even if* it were able to spread fixed costs over more vehicles. At the Q3-2021 earnings call, Ms. McDonough underscored that a "dynamic of high fixed cost" would "continue to have a negative drag on gross profit," but added:

> [W]e recorded a lower cost for net realizable value, LCNRV adjustment to write-down the value of certain inventory, the amount we anticipate receiving upon vehicle sale after considering future costs necessary to ready the vehicle for sale. *This expense negatively impacts gross profit in the third quarter and we expect it to also impact upcoming quarters in the near future*. We immediately record the LCNRV adjustment which *adds to* the concentration of fixed cost we recognized as part of our cost of goods sold.

Ex.8 at 530. This statement communicated Rivian's need to address fixed *and* R1 BOM costs to reach gross profitability. Smith ¶45. The alleged March 2022 corrective disclosure that, unless BOM costs shrank, "Rivian would record a negative profit margin on each . . . vehicle sold regardless of production volumes" (AC ¶119) had been known to the market for months.

2. Analysts Understood and Reacted to These Disclosures

Securities laws and the FASB expect investors and analysts reading financial statements to "have a reasonable knowledge of business and economic activities" and "review and analyze the information diligently." Smith ¶36; *see City of Royal Oak Ret. Sys. v. Juniper Networks, Inc.*, 2013 U.S. Dist. LEXIS 70531, at *28–29 (N.D. Cal. May 17, 2013) (no misrepresentation because "disclosures compl[ied] with FASB guidelines" and company had no "obligation to spell out" accounting practices). Rivian's "disclosures did in fact [] provide a user possessing a reasonable knowledge of business and economic activities with sufficient information to understand that the costs of its raw materials were in excess of the amount it expected to recover from the sale of vehicles[.]" Smith ¶36.

A contemporaneous analyst report underscores this: on December 17, 2021,

Wells Fargo reacted to Rivian's inventory write-down, adjusting its earnings per share estimate and increasing its LCNRV adjustment by $100 million to reflect LCNRV adjustment to inventory. Tabak ¶66. Importantly, "Wells Fargo ***had already included*** a LCNRV adjustment (of $300 million for 4Q21) before Rivian's earnings call. Thus, the market was already aware that Rivian's variable costs of production exceeded the expected net selling price." *Id*. ¶67. This shows that the market knew exactly what Plaintiffs allege was hidden until March 2022, specifically that:

- Rivian "would have operated at a negative gross profit per vehicle ***even if*** its 'high fixed costs' had been amortized over a large number of vehicles produced." AC ¶165. Indeed, Wells Fargo's reaction showed that it "knew—and told the market—that Rivian's gross margins would become more negative as a larger number of vehicles was produced." Tabak ¶68.
- "Rivian's gross profit losses would also increase on a dollar basis with every vehicle sold—over the near- ***and*** long-term[.]" AC ¶129. But "[t]he economic substance of this allegation—that Rivian's variable costs exceeded the selling price of its vehicles—is, in fact, what Rivian disclosed and what Wells Fargo recognized when it increased its LCNRV adjustment[.]" Tabak ¶70.

Because, as both parties' experts agree, Rivian's market was efficient by mid-December 2021, "the market would have incorporated what Rivian said directly as well as through the Wells Fargo analyst report." *Id*. ¶71. No analyst disputed Rivian's LCNRV statements or Wells Fargo's analysis. *Id.*

Other analyst reports similarly "understood that, of all the factors contributing to negative gross margins . . . materials costs, or BOM costs, had the most significant impact on future profitability." Smith ¶42. Even before December 16, 2021, "RBC anticipated that 'BoM reduction' or decreases in the cost of materials, would improve Rivian's then negative margins by 34%, while improvements related to labor and overhead were anticipated to collectively improve margins by only 24%." *Id*. ¶44. Deutsche Bank also recognized the BOM cost's impact on gross profitability,

"ascribing 28% of anticipated margin improvement to BOM Reduction[.]" *Id*.

Based on the disclosures in Rivian's Prospectus and its Q3 2021 10-Q as well as these analyst publications, "users of [Rivian's] financial statements were clearly aware that high materials costs were weighing on Rivian's margins, and Rivian would need to lower these costs in order to become profitable." *Id*. ¶46.

3. The March 1, 2022 Price Increases Did Not Surprise Analysts

Analysts Blamed Industry-Wide Factors. Analysts were unsurprised by the price increases to new orders, attributing them to inflation: Morgan Stanley "strongly suspect[ed] the drivers for Rivian's price hike are industry wide," and Mizuno treated the increases as an industry phenomenon, referencing "TSLA, which ALSO increased prices[.]" Tabak ¶¶49–50. As Dr. Nye admits, analysts are "usually pretty explicit as to their reactions." Ex.6 at 518:22–24. "[T]he lack of analyst reaction to the overall price increase is strong evidence that that news was not a surprise." Tabak ¶47.

Analysts Forecast Price Increases Months Prior. Analysts had been predicting price increases for months. Immediately after the quiet period, Piper Sandler forecast that Rivian would increase prices by $15,000–$20,000 before the end of 2022. *Id*. ¶54. Less than two weeks later, Barclays noted a "potential price increase," stating that "it wouldn't surprise us to see Rivian implement a price increase to further boost unit economics." *Id*. ¶56. Deutsche Bank also reported that Rivian "is evaluating how to best implement price increases given inflationary environment, competitive positioning, and to manage waiting times," and Wedbush forecast that the average retail price for R1s would increase about $10,000 from 2021 to 2022. *Id*. ¶¶57–58. On January 3, 2022, Wolfe Research wrote: "we believe that RIVN's price adjustments will be larger than initially contemplated in our model." *Id*. ¶59. Barclays opined on March 8, 2022, that "[w]e believe this planned price increase was baked into investor expectations[.]" *Id*. ¶51. Analysts also noted price increases across the automotive sector. *See* Tabak ¶¶50, 75.

B. The March 1, 2022 Announcement Does Not Match the Alleged Misrepresentations

The Court should also reject class certification as a matter of law because the purported corrective disclosures *have nothing to do with the alleged misrepresentations*. The Second Circuit in *Goldman* held that the Supreme Court requires "a searching price impact analysis . . . where (1) there is a considerable gap in front-end-back-end genericness, . . . (2) the corrective disclosure does not directly refer . . . to the alleged misstatement, and (3) the plaintiff claims. . . that a company's generic risk-disclosure was misleading by omission." *Goldman*, 77 F.4th at 102.

Here, Plaintiffs claim that the March 1, 2022 price increase revealed that Rivian would never be profitable without increasing prices. AC ¶6. Two fatal problems exist with Plaintiffs' *Goldman* theory.

First, although Rivian announced price increases on March 1, 2022, this does not mean they were required for profitability. Companies routinely increase prices. Rivian could have done so for many business reasons: to accelerate profitability, capitalize on tremendous demand for R1s, or respond to post-IPO raw materials inflation and supply-chain constraints. Plaintiffs offer no evidence that profitability required price increases. No analyst embraced that theory. Tabak ¶¶39–42. The FEs, whose purported statements anchor Plaintiffs' claim, either testified to the contrary or lacked personal knowledge of Rivian's profitability. *See, e.g.*, Ex.10 at 565:14–20 ("Q. [I]ncreasing price wasn't the only way to achieve profitability? THE WITNESS: I agree with that statement[.]"); Ex.9 at 554:25–555:3 ("Q. Did you mean that Rivian could never be profitable? A. I wasn't intending to make such a broad statement."); Ex.5 at 474:16–23 ("Q. Why don't you know when Rivian was forecasting to be profitable? A. That was not . . . part of my job."). Thus, there is no evidence of a connection between the March 2022 price reaction and the alleged revelation.

Second, the challenged statements' generality does not match the specific price increase. The latter thus cannot correct the former. "[C]ourts are [] directed to compare, at the class certification stage, the relative genericness of a misrepresentation

with its corrective disclosure[.]" *Goldman*, 77 F.4th at 81. *Goldman* is analogous: the alleged misleading statements there included "[b]usiness principles" and a risk factor regarding "extensive procedures and controls" to "identify and address conflicts of interest[.]" *Id.* at 82. The "corrective disclosures" included legal actions, including an SEC enforcement action for concealing conflicts. *Id.* at 83–84. The Second Circuit ultimately held that a class should not and could not be certified when the purported corrective disclosure does not match the alleged misstatements. *Id.* at 81.

Likewise, here, the alleged corrective disclosures and the statements they purport to correct are mismatched. The challenged statements warned that Rivian may never achieve profitability and had always operated at a loss. *See* App'x A. The purported corrective disclosures were (1) price increases to *existing pre-orders* and (2) the backlash by *existing pre-order customers* against those retroactive price increases.[4] "[C]ommon sense" shows that any market reaction was due to these specific disclosures, not unrelated generic warnings given months prior. *In re Apache Corp. Sec. Litig.*, 2024 U.S. Dist. LEXIS 23001, at *40–41 (S.D. Tex. Feb. 9, 2024) (finding mismatch where investors "expected" production deferral because "any decline in stock price was due to uncertainty about low gas prices generally, not [production deferrals] specifically"). Plaintiffs confirm this, citing only reports that "many customers who pre-ordered [R1s] were enraged and indicated that they had or were planning to cancel their pre-orders because of the price increases," and none that *potential* customers were similarly "enraged." AC ¶¶146–47; *see* Tabak ¶¶77–79. Plaintiffs also point to RivianOwnersForum.com posts "express[ing] [] outrage" to changes in *existing* reservations, not *potential* pre-orders. AC ¶147. Analysts, too, underscored that new information entering the market solely concerned *existing* pre-orders: "[w]hile price increases were expected and previously communicated by the company, we were under the impression that pre-orders before a certain date would

[4] Price increases to *new* pre-orders could not have been a corrective disclosure because the market anticipated this for months. *See supra* at 14–15.

be grandfathered in." Tabak ¶48.

Post-*Goldman*, courts must ask, "what happens when the match between the contents of the price-propping misrepresentation and the truth-revealing corrective disclosure is tenuous?" *Goldman*, 77 F.4th at 80. Here, Rivian's generic warnings of potential future price increases, inflationary pressures, and risks to profitability said nothing about the *specific* risk of retroactive price increases to existing pre-orders. As a matter of law under *Goldman*, the March 1, 2022 announcement and resulting customer reactions were not corrective disclosures.

There is no evidence that the March 2022 price increases had been decided at the time of the IPO. Regardless, Rivian never promised profitability, much less on a specific timeline. Disclosures about hypothetical price increases would not have corrected any of Rivian's existing disclosures. Still, no misapprehension existed in the market to correct. Tabak ¶80. Revealing Rivian's potential pricing strategy would not only be a terrible business decision, but is not required under the securities laws. Order at 32. "[T]here is considerable evidence of a complete lack of price impact on Rivian's stock from the allegations in this matter." Tabak ¶3. That alone is sufficient to deny class certification.

C. The March 10, 2022 Earnings Announcement Was Not a Corrective Disclosure

The March 11, 2022 Stock Drop Was Not Statistically Significant. Plaintiffs showed no price impact evidence for Rivian's March 10, 2022 earnings announcement because there was no statistically significant stock price drop the next trading day. Tabak ¶30; Nye ¶54 n.84. Absent this, Plaintiffs cannot prove price impact and, in turn, the *Basic* presumption does not apply. *In re Intuitive Surgical Sec. Litig.*, 2016 U.S. Dist. LEXIS 178148, at *45 (N.D. Cal. Dec. 22, 2016) (no price impact where there was no "statistically significant price impact at the 95% confidence level"); *In re Novatel Wireless Sec. Litig.*, 830 F. Supp. 2d 996, 1019 (S.D. Cal. 2011) ("decline in stock price caused by the revelation of that truth must be statistically significant").

No Corrective Information Was Revealed. Nor is there evidence that any other

information disclosed on March 10, 2022 constituted a corrective disclosure. Analysts discussed "recouping inflationary costs," indicating a continued belief that the price increases were based on inflationary pressures. Tabak ¶36. Analysts also mentioned "higher input costs and higher investment expenses," but did not imply these costs exceeded what the market already knew. *Id*. ¶37. Similarly, discussions of the "backlash" against Rivian's price increases were not corrective disclosures. *Supra* 15–17; Tabak ¶38. Finally, analysts focused on Rivian's reduced production guidance, not price. *Id*. ¶¶40–41. Any proposed Class Period thus may not proceed past March 1, 2022.

III. CLASS REPRESENTATIVES AND COUNSEL ARE INADEQUATE

Class certification should also be denied because Proposed Class Counsel and Representatives will not "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). This is "perhaps the most significant of the prerequisites to a determination of class certification," because it protects absent class members' due process rights. *Woods v. Google LLC*, 2018 U.S. Dist. LEXIS 143879, at *11 (N.D. Cal. Aug. 23, 2018). Here, KTMC has engaged in—and Plaintiffs have blinded themselves to—tactics that undermine the "integrity of the class action." *Id*. at *11.

A. KTMC Engaged in Troubling Investigative Tactics

Representatives are inadequate where their "credibility is questioned on issues directly relevant to the litigation or there are ***confirmed examples of dishonesty***." *Physicians Healthsource, Inc. v. Masimo Corp.*, 2019 U.S. Dist. LEXIS 228607, at *33–34 (C.D. Cal. Nov. 21, 2019). In *Masimo*, plaintiffs' counsel was inadequate because it engaged in misconduct that went "to the heart of the litigation" and failed to "ma[ke] any efforts to correct or prevent such misconduct." *Id.* at *36. Here:

- KTMC continues to pursue its flawed theory after the FEs disavowed allegations attributed to them. *See, e.g.*, Ex.5 at 482:20–483:5, 483:10–484:13, 484:14–485:8; Ex.10 at 575:14–20.

- FE-1 testified that he felt "mischaracterized" by Plaintiffs. Ex.10 at 570:24–572:14. FE-4 testified that he felt "coerced." Ex.4 at 461:11–462:16.
- KTMC did not permit FEs to review allegations attributed to them until *after* the complaints were filed. *See, e.g.,* Ex.10 at 570:6–16; Ex.11 at 586:10–20; Ex.9 at 550:24–551:18; Ex.4 at 455:3–12; Ex.5 at 488:14–489:12.
- FE testimony indicates that KTMC drove these investigative tactics. *See, e.g.*, Ex.11 at 589:7–24; Ex.10 at 568:9–19, 572:10–14.

KTMC's misconduct goes to the ***very merits*** and "heart of the litigation." *Masimo*, 2019 U.S. Dist. LEXIS 228607, at *36. This is more than an issue "of law[,]" but of "basic decency." *In re Millennial Media, Inc. Sec. Litig.*, 2015 U.S. Dist. LEXIS 69534, at *43 (S.D.N.Y May 29, 2015) ("The Court, the public, and above all such witnesses have the right to expect better of counsel.").

B. Longstanding Ties Between AP-7 and KTMC Present a Conflict

"Close relationships between the class representative and counsel . . . can create a conflict that renders the class representative inadequate to protect the interests of the class." *Woods*, 2018 U.S. Dist. LEXIS 143879, at *4. This is not the first time that KTMC has had a conflicted relationship with plaintiffs. In *Woods*, Judge Davila denied class certification because the plaintiff, whose law firm had been KTMC's and another firm's co-counsel at least sixteen times, ***"has had and continue[d] to have a lucrative business relationship with"*** KTMC. *Id.* at *17. KTMC "[could not] adequately represent the class[] as long as [plaintiff] remain[ed] at the helm" due to plaintiff's interest in securing large attorney's fees "to maintain [the] positive working relationship" between the firms. *Id.* at *13, 19, 23 ("At least with respect to class counsel, even ***the appearance of divided loyalties or potential conflicts*** can be disqualifying."). KTMC and AP-7's relationship is equally problematic:

- KTMC or its predecessors have represented AP-7 in all of its securities class actions, including at least 23 such actions dating back to 2006. As of February

2024, KTMC represents AP-7 in ***nine active cases***. Ex.12 at 606:17–24, 607:11–608:2.

- AP-7 has participated in at least two international conferences on KTMC's invitation. *See id*. at 614:6–618:8.

These facts reflect a deep-rooted, ongoing conflict between KTMC and AP-7, disqualifying both parties.

C. AP-7 Failed to Oversee This Case

AP-7 Ignored Case Developments. AP-7 has entrusted this litigation entirely to KTMC and is inadequate to serve as a class representative because "it is clear from the record that [] counsel, and not plaintiff, is the driving force behind this action." *Bodner v. Oreck Direct, Ltd. Liab. Co.*, 2007 U.S. Dist. LEXIS 30408, at *5–6 (N.D. Cal. Apr. 25, 2007). The *Oreck* plaintiff was inadequate because he had not read the complaint before the lawsuit was filed and "virtually all of [his] knowledge regarding this matter [came] from his attorneys." *Id.* at 3; *Stephens v. Nordstrom, Inc.*, 2018 U.S. Dist. LEXIS 223164, at *14–15 (C.D. Cal. Dec. 26, 2018) (class counsel inadequate where complaint contained allegations that plaintiff later contradicted). Similarly, AP-7's deposition revealed:

- Although Per Oloffson, AP-7's corporate representative, is responsible for overseeing this case (Ex.12 at 611:1–4, 621:9–13), he had not reviewed the AC. *See, e.g.*, *id*. at 646:5–21 ("We haven't gone through this."); *id*. at 648:8–11 ("I haven't gone through this document before.").
- AP-7 did not know that it invested in Rivian securities until KTMC informed AP-7 about this lawsuit. *Id*. at 624:19–625:9.
- AP-7 had no idea that Mr. Muhl or the FEs were deposed until early 2024, nor had AP-7 reviewed any deposition transcripts. *See id*. at 628:1–7, 636:22–25, 643:9–17, 653:10–18, 656:10–16, 660:13–19.

- AP-7 incorrectly thought that KTMC allowed the FEs to review the complaints before they were filed and did not know that FE-1 was dropped from the AC. *Id*. at 629:25–630:1–5, 631:8–632:24.

AP-7 Expresses No Concern Regarding Veracity. AP-7 disregards this case's merits and its duties to the court. *AP-7 stated it was not important that FE-1 felt mischaracterized.* Ex.12 at 639:18–23 ("If it would have been important I think our counsel would have highlighted that this was something extraordinary or whatever."). AP-7 was unfazed to learn that FE-2 struggles to understand this case's merits. *See id*. at 649:23–652:21. AP-7's blind faith in KTMC shows it cannot be entrusted to represent a class in the United States.[5]

CONCLUSION

Defendants respectfully request that the Court deny Plaintiffs' motion for class certification and dismiss this action with prejudice.

Dated: February 29, 2024 FRESHFIELDS BRUCKHAUS DERINGER US LLP

By: /s/ *Boris Feldman*
Boris Feldman

Attorneys for the Rivian Defendants

[5] Mr. Muhl seeks appointment as an "additional" representative. ECF 218 at 1. Although he "bears the burden of showing [he] is an adequate representative" (*Labou v. Cellco P'ship*, 2014 U.S. Dist. LEXIS 26974, at *17 (E.D. Cal. Mar. 3, 2014)), his declaration "contains little more than formulaic, boiler-plate assertions" of purported adequacy (*In re Kosmos Energy Ltd. Sec. Litig.*, 299 F.R.D. 133, 146 (N.D. Tex. 2014)). He "has taken absolutely no interest in monitoring the progress of this case." *Simon v. Ashworth, Inc.*, 2007 U.S. Dist. LEXIS 96131, at *6 (C.D. Cal. 2007). He has never communicated with AP-7, took no steps to verify the complaints' accuracy, and was unaware FE-1 was removed from the AC. Ex.13 at 671:4–10, 674:2–10, 677:21–678:4. Mr. Muhl is inadequate to serve as Class Representative.

CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for Rivian Defendants, certifies that this brief contains 6,988 words, which complies with the word limit of L.R. 11-6.1.

Dated: February 29, 2024 FRESHFIELDS BRUCKHAUS DERINGER US LLP

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