IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

In re UNDER ARMOUR SECURITIES LITIGATION	)	Civil No. RDB-17-388
This Document Relates To: ALL ACTIONS.	)	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' CONSOLIDATED THIRD AMENDED COMPLAINT

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PRELIMINARY STATEMENT

Plaintiffs have twice attempted to plead their core claim that Defendants concealed that Under Armour, Inc. ("Under Armour" or the "Company") faced problems selling apparel products in 2015 and 2016 because consumer demand for those products was allegedly declining. And this Court has twice dismissed that theory, holding that Plaintiffs had not sufficiently pled the requisite strong inference that the Company or Kevin Plank, the Company's former CEO and current Brand Chief and Executive Chairman, intended to defraud investors. *See In re Under Armour Sec. Litig.*, 342 F. Supp. 3d 658 (D. Md. 2018) ("*UA I*"); *In re Under Armour Sec. Litig.*, 409 F. Supp. 3d 446 (D. Md. 2019) ("*UA II*"). In their third amended complaint (the "TAC"), Plaintiffs add a new theory: that Defendants engaged in an undisclosed, improper channel stuffing scheme to "mask" purported declines in consumer demand. However, Plaintiffs do not support this new theory with adequately detailed facts, and, therefore, the TAC fails to cure the deficiencies of Plaintiffs' prior complaints.

The primary support for Plaintiffs' latest theory comes from a November 14, 2019 article in *The Wall Street Journal* (the "11/14/19 WSJ Article"), which purported to describe, based on statements from unnamed former executives, the Company's alleged efforts to boost sales revenues by making sales to customers earlier than originally planned—*i.e.*, by pull in sales. However, pull in sales "are not the nefariously manipulative scheme" that Plaintiffs claim; rather, they "are actual sales which are treated no differently than any other sale" for accounting and disclosure purposes. *In re Cypress Semiconductor Sec. Litig.*, 891 F. Supp. 1369, 1381 (N.D. Cal. 1995), *aff'd*, 113 F.3d 1240 (9th Cir. 1997). Indeed, Plaintiffs' own pleading confirms that pull in sales are "generally permitted under accounting rules" and "common in the retail industry." Pls.' Ex. A at 1-2.

Plaintiffs try to transform these benign and common sales into an improper channel

stuffing scheme, but they fail to adequately plead such a scheme for several reasons:

- The TAC provides no data regarding customer inventory levels, let alone information regarding past or expected customer inventory levels required to show that sales channels were "stuffed." This undermines any inference that Defendants believed the goods the Company was selling would never be sold to consumers and would be returned. *See In re Harley Davidson, Inc. Sec. Litig.*, 660 F. Supp. 2d 969, 986-87 (E.D. Wis. 2009).

- Plaintiffs cobble together unsourced, sparsely detailed allegations that the Company improperly recognized revenues from contingent sales pursuant to buyback agreements. But Plaintiffs have not pled the requisite "corroborating details" to support these claims, such as "[s]pecific transactions, specific shipments, specific customers, specific times, or specific dollar amounts," or the "approximate amount by which revenues and earnings were overstated." *Waterford Twp. Police v. Mattel, Inc.*, 321 F. Supp. 3d 1133, 1147 (C.D. Cal. 2018), *aff'd sub nom. Castro v. Mattel, Inc.*, 794 F. App'x 669 (9th Cir. 2020).

- Allegations that the Company violated GAAP by manipulating its reserves for discounts and returns and improperly delaying writing down obsolete inventory similarly lack sufficient detail. Furthermore, "[t]here are no documents, meetings, or individuals cited to back up" these claims, and Plaintiffs ignore that, at all times, the Company's financial statements were certified by outside, independent auditors. *In re PEC Sols. Sec. Litig.*, 2004 WL 1854202, at *12 (E.D. Va. May 25, 2004), *aff'd*, 418 F.3d 379 (4th Cir. 2005).

Because Plaintiffs have not pled an improper channel stuffing scheme, their allegations regarding this scheme cannot cure their prior failure to plead scienter. And, while Plaintiffs claim the alleged pull in sales show Defendants' awareness of declining demand, courts routinely hold that such allegations "are insufficient to sustain the state of mind requirement in a securities fraud claim because there may be a number of legitimate reasons for attempting to achieve sales earlier than in the normal course." *In re Trex Co. Sec. Litig.*, 212 F. Supp. 2d 596, 608 (W.D. Va. 2002). In any event, Plaintiffs fail to provide adequate detail regarding the Company's pull in sales (such as dollar amounts or percentages of overall sales) to suggest that Defendants knew or should have known that demand was declining, particularly given the Company's tremendous growth during the 2015-16 period.

Plaintiffs' other new attempts to plead scienter fare no better. Plaintiffs cite Mr. Plank's January 2020 transition from CEO to Brand Chief and Executive Chairman. However, Mr.

Plank remains a top executive, and his title change almost four years after the alleged misconduct adds nothing. They also rely on Mr. Plank's receipt of a Wells Notice from the U.S. Securities and Exchange Commission ("SEC") in July 2020, but an SEC investigation that has not resulted in charges or any finding of wrongdoing "is too speculative to add much, if anything, to an inference of scienter." *Cozzarelli v. Inspire Pharm. Inc.*, 549 F.3d 618, 628 n.2 (4th Cir. 2008).

This Court provided Plaintiffs an opportunity to plead facts showing that Under Armour "engaged in questionable accounting practices to inflate its revenue," including by "pulling in sales from future quarters and shipping goods to retailers even when Under Armour knew the goods would likely never be sold to consumers and would be returned." *In re Under Armour Sec. Litig.*, 2020 WL 363411, at *7 (D. Md. Jan. 22, 2020) ("*UA III*"). The Court reasoned that such facts, if adequately pled, would "support the conclusion that [Defendants] knew that demand for their products was waning, resorted to risky sales tactics to keep the numbers intact, and intentionally misrepresented the level of demand for their products." *Id.* But the Court also explained that Plaintiffs still had to meet their pleading burden in their new complaint. ECF No. 136 at 80. They have not met that burden. Plaintiffs have not substantiated allegations of "risky sales tactics" or "questionable accounting practices" with detailed facts, nor have they shown that Defendants believed that goods "would never be sold to consumers and would be returned." Furthermore, Plaintiffs have not adequately alleged that Defendants' supposed awareness of the pull in sales "strongly impl[ies] . . . contemporaneous knowledge" that any statement regarding demand or the Company's results "was false when made." *UA I*, 342 F. Supp. 3d at 691. For these reasons, the TAC should be dismissed.

FACTUAL BACKGROUND

The Court's familiarity with this action is presumed. *See generally UA I*, 342 F. Supp. 3d

at 666-69; *UA II*, 409 F. Supp. 3d at 449-52 & n.3; *UA III*, 2020 WL 363411, at *2-3 & n.2.[1]

Defendants. Under Armour is a leading developer, marketer, and distributor of performance apparel, footwear, and accessories. 2/23/17 10-K at 27. It was founded in Maryland in 1996 by Kevin Plank, the Company's controlling stockholder. TAC ¶ 31. Mr. Plank served as CEO and Chairman of the Board of Directors through the end of 2019, when he transitioned into his current roles as Brand Chief and Executive Chairman. TAC ¶ 31.

Historical Growth & Long-Term Guidance. Leading up to the Class Period, the Company achieved tremendous success, including 21 consecutive quarters with greater than 20% net revenue growth. *See* 2015 Investor Day Tr. at 7.[2] On September 16, 2015 (the first day of the Class Period), Under Armour held an "Investor Day," where Company executives expressed their vision for the Company's future. That day, Mr. Plank announced long-term financial goals: $7.5 billion in net revenues and $800 million in operating income ("OI") by 2018. *Id.* at 13.

Class Period Financial Performance. The Company's strong historical financial performance and growth continued well into the Class Period. During 3Q15, the Company achieved net revenues of approximately $1.204 billion, reflecting a year-over year ("YoY") increase of about $266 million (28%) over the prior year's period. 10/22/15 8-K, Ex. 99.1 at 1, 4. In 4Q15, the Company achieved net revenues of about $1.171 billion, a YoY increase of about $276 million (31%) over 4Q14. 1/28/16 8-K, Ex. 99.1 at 1, 5. For the 2015 year, the Company achieved net revenues of $3.963 billion, reflecting 28% growth over the 2014 year. *Id.*

[1] The Factual Background is drawn from documents that are properly considered on this motion. *See Tellabs Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) (court "must consider" complaint as well as "other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice"). Unless otherwise noted, emphasis is added and internal citations are omitted throughout.

[2] Under Armour uses the calendar year for its fiscal year; fiscal quarters correspond to the three month periods ending March 31, June 30, September 30, and December 31.

In the first half of 2016, the Company reported YoY increases in net revenues of about $243 million (30%) in 1Q16 (*see* 4/21/16 8-K, Ex. 99.1 at 1, 5), and about $217 million (28%) in 2Q16 (*see* 7/26/16 8-K, Ex. 99.1 at 1, 5). The Company achieved these results despite the fact that one of its largest customers, The Sports Authority ("TSA"), filed a Chapter 11 bankruptcy proceeding in March 2016 (during 1Q16) and received judicial approval to liquidate its remaining assets two months later (during 2Q16). *See* 5/31/16 8-K, Ex. 99.1 at 1.

During 3Q16, the Company reported net revenues of $1.472 billion, an increase of approximately $268 million (22%) over 3Q15, but also disclosed that during that period it had begun to see headwinds in the North American wholesale market that would continue impacting the Company moving forward. 10/25/16 8-K, Ex. 99.1 at 1, 4; 10/25/16 Call Tr. at 8. While it reiterated long term net revenue guidance, the Company lowered long term OI guidance to annual growth in the mid-teens percent (compared to prior projections of growth above 20%). *Id.* The CFO at the time, Lawrence Molloy, stated that "North America apparel growth is slowing across the industry" and that "the growth rate going forward will be less than expected from our Investor Day in 2015" for that category. *Id.* Mr. Plank explained that the international and footwear businesses were growing faster than planned, enabling the Company to "remain confident in reaching [its] 2018 net revenue target," but pressuring gross margins. *Id.* at 5.

Under Armour announced its 4Q16 and FY16 results on January 31, 2017. Although the Company's 2016 net revenues of approximately $4.828 billion reflected 22% growth over 2015, 4Q16 net revenues grew only 12% over 4Q15, causing the Company to miss 2016 projections by approximately 2% ($97 million). 1/31/17 8-K, Ex. 99.1 at 1-2, 5. In a call with analysts that day, Mr. Plank attributed the Company's 4Q16 results to "slower traffic," which "caused significant promotional activities earlier, deeper and broader than expected," and "higher

demand for more lifestyle silhouettes," which "caused [the Company] to be out of balance with [its] assortment." 1/31/17 Call Tr. at 2. He also noted "lower channel recapture of bankruptcy volume [than] expected as pricing came down in the points of distribution." *Id.*

For the remainder of the Class Period, the Company's revenues continued to grow, but at lower rates: approximately $4.976 billion in 2017 (3% YoY growth) (2/13/18 8-K, Ex. 99.1 at 2, 6), approximately $5.193 billion in 2018 (4% YoY growth) (2/12/19 8-K, Ex. 99.1 at 2, 5), and approximately $5.267 billion in 2019 (1% YoY growth) (2/11/20 8-K, Ex 99.1 at 1, 5).

Securities Litigation and Investigations. This action was filed in February 2017 following the Company's disclosure of its 2016 results. On November 3, 2019, while this case was on appeal following the dismissal of the second amended complaint ("SAC") (ECF No. 78), *The Wall Street Journal* ("WSJ") published an article reporting that the SEC and the U.S. Department of Justice ("DOJ") were "investigating [Under Armour]'s accounting practices in a probe examining whether the [Company] shifted sales from quarter to quarter to appear healthier." Pls.' Ex. B at 1. The Company confirmed the investigations and affirmed that it "firmly believes that its accounting practices and disclosures were appropriate." *Id.* at 2.

Relying on these disclosures, as well as the 11/14/19 WSJ Article, the lead plaintiff in this action moved for relief from judgment and for an opportunity to file a new complaint. ECF No. 106. This Court granted that motion, ruling that, in light of the "newly discovered evidence," Plaintiffs should have the opportunity to file a third amended complaint. *UA III*, 2020 WL 363411, at *6-8. It also explained that it would assess the sufficiency of that complaint on a motion to dismiss by Defendants and determine whether the complaint "should be dismissed or whether it survives that hurdle and then proceeds to discovery." ECF No. 136 at 80.

On July 27, 2020, the Company disclosed that the Company, Mr. Plank, and non-party

David Bergman (the current CFO) received Wells Notices on July 22, 2020. TAC ¶ 374.

On October 14, 2020, Plaintiffs filed the TAC, alleging claims under the Securities Exchange Act of 1934 ("Exchange Act") against the Company and Mr. Plank, and expanding the putative class period initially pled in the amended complaint ("CAC") and SAC by 33 months, such that the putative class period now spans over four years (from September 16, 2015 through November 1, 2019 (the "Class Period")).

ARGUMENT

To state a claim under Section 10(b) of the Exchange Act and SEC Rule 10b-5, a plaintiff must allege "(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation." *Yates v. Mun. Mortg. & Equity, LLC*, 744 F.3d 874, 884 (4th Cir. 2014). Such claims are subject not only to the requirements of Rule 9(b), which require plaintiffs to "state with particularity the circumstances constituting fraud," but also the "[e]xacting pleading requirements" of the Private Securities Litigation Reform Act of 1995 ("PSLRA"). *Tellabs*, 551 U.S. at 314, 323-24.

I. THE TAC FAILS TO ADEQUATELY ALLEGE AN ILLEGITIMATE CHANNEL STUFFING SCHEME

The TAC is premised on the theory that Defendants engaged in an allegedly fraudulent channel stuffing scheme during 2015 and 2016, in which the Company supposedly "resorted to a slew of improper and/or concealed sales and accounting practices" to mask a purported slowdown in the Company's apparel sales. TAC ¶¶ 8-16. As part of this alleged scheme, Defendants allegedly issued false and misleading financial results that overstated the Company's revenues and inventory levels in violation of GAAP and failed to disclose the allegedly improper sales and accounting practices. *E.g.*, TAC ¶¶ 8-16, 324-69. However, the TAC's core

premise—that Defendants engaged in improper channel stuffing—is not supported by detailed factual allegations. In fact, none of the sales and accounting practices challenged in the TAC constitute channel stuffing, violate GAAP, or are otherwise improper.

A. Plaintiffs' "Channel Stuffing" Allegations Fail

Courts have long held that "[t]here is nothing inherently improper in pressing for sales to be made earlier than in the normal course." *In re Cytyc Corp. Sec. Litig.*, 2005 WL 3801468, at *27 (D. Mass. Mar. 2, 2005); *see also In re The Hain Celestial Grp. Inc. Sec. Litig.*, 2019 WL 1429560, at *14 (E.D.N.Y. Mar. 29, 2019) ("*Hain I*"); *Trex*, 454 F. Supp. 2d at 578-79. Accordingly, courts distinguish between legitimate sales practices intended to incentivize customers to accept goods and improper channel stuffing. While the Fourth Circuit has not defined improper channel stuffing, other courts have observed:

> [c]hannel stuffing becomes a form of fraud only when it is used . . . to book revenues on the basis of goods shipped but not really sold because the buyer can return them. They are in effect sales on consignment, and such sales cannot be booked as revenue. Neither condition of revenue recognition has been fulfilled—ownership and its attendant risks have not been transferred, and since the goods might not even be sold, there can be no certainty of getting paid.

Hain I, 2019 WL 1429560, at *14; *see also Tellabs*, 551 U.S. at 325 (distinguishing the "illegitimate kind" of channel stuffing, such as "writing orders for products customers had not requested," from the "legitimate kind," such as "offering . . . discounts as an incentive to buy").

Because channel stuffing is not improper on its own, "[c]ourts require significant specificity when a plaintiff bases a claim on allegations of channel stuffing or other misleading revenue recognition." *Trex*, 454 F. Supp. 2d at 578; *see also In re Spectrum Brands, Inc. Sec. Litig.*, 461 F. Supp. 2d 1297, 1309 (N.D. Ga. 2006) (same). "Plaintiffs must plead with particularity facts sufficient to allege not only that the alleged channel-stuffing occurred, but also that it was not legitimate." *W. Palm Beach Firefighters' Pension Fund v. Conagra Brands, Inc.*,

2020 WL 6118605, at *9 (N.D. Ill. Oct. 15, 2020). Generalized allegations that defendants employed improper sales tactics or prematurely recognized revenue will not suffice; rather, plaintiffs are required to plead "sufficient corroborating details about the scheme," such as "[s]pecific transactions, specific shipments, specific customers, specific times, or specific dollar amounts," as well as the "approximate amount by which revenues and earnings were overstated." *Mattel*, 321 F. Supp. 3d at 1147; *see also Hain I*, 2019 WL 1429560, at *16 ("Where sham transactions are alleged, specific facts about each one of these transactions are required."). The TAC does not come close to meeting this standard.

1. No Well-Pled Allegations that Sales Channel Was "Stuffed"

Although Plaintiffs' case now hinges entirely on their channel stuffing claim, the TAC is missing a crucial element of such a claim: detailed facts indicating that the Company's wholesale sales channel was, in fact, "stuffed." Plaintiffs do not plead any facts whatsoever showing what customer inventory levels actually were during the Class Period. Nor do they "set forth statistics to place the allegations of 'excess [] inventory' in context," such as "comparisons to historical inventory levels [or] 'normal' inventory levels," as is required to plead channel stuffing. *Harley Davidson*, 660 F. Supp. 2d at 986 (plaintiffs' allegations regarding dealer inventory levels failed absent information showing that those levels were outside normal or projected levels); *see also Conagra*, 2020 WL 6118605, at *9 ("Nor do Plaintiffs allege any facts suggesting that Pinnacle's customers experienced an excess of inventory, let alone information contextualizing their sales and inventory levels"). Conclusory allegations that the Company "stuff[ed] customers with products" (TAC ¶ 61; *see also* TAC ¶¶ 59, 73) and that "[e]xcess inventory was also a problem at the Company's retail customers" (TAC ¶ 71) do not suffice to show that the Company was borrowing revenue from future periods or that Defendants knew the Company's goods would not be sold to consumers and were likely to be returned. *See Conagra*, 2020 WL 6118605, at *9

(rejecting allegations of excess customer inventory because plaintiffs did not plead "any nonconclusory allegations to show that [] promotions created an inventory backlog"); *City of Omaha Police & Fire Ret. Sys. v. Timberland Co.*, 2013 WL 1314426, at *13 (D.N.H. Mar. 28, 2013) ("general allegation" of channel stuffing failed because complaint lacked specific "factual allegation[s]" that "customer inventories were unusually high").

2. The Allegations Based on the 11/14/19 WSJ Article Fail

Many of the allegedly improper sales practices challenged in the TAC are based on reporting in the 11/14/19 WSJ Article and statements from unnamed former Under Armour "executives" cited therein. *E.g.*, TAC ¶¶ 52-62 (citing the 11/14/19 WSJ Article 17 times). Rather than point to any specific improper transactions, however, both the TAC and the article generally describe these sales practices as follows: (a) "pulling forward orders from the month after the quarter to ship within the quarter in order to meet aggressive sales goals or close the gap"; (b) incentivizing customers to accept products early by "adjusting contract terms" and "offering discounts"; (c) "shipping products earlier than planned"; (d) "shipping products in the final days of the quarter"; (e) "shipping new inventory intended for the Company's own factory stores to off-price seller T.J.X. Co. ["TJX"] so that Under Armour could immediately book the goods as revenue"; and (f) "continuing to ship products to [TSA], and booking sales for those goods when shipped, even after it became clear that [TSA] was headed to bankruptcy and collectability of the revenue was not probable." TAC ¶¶ 11, 52-62; *see also* Pls.' Ex. A. But Plaintiffs' generalized allegations based on the 11/14/19 WSJ Article are not sufficient to plead any improper sales, much less an illegitimate channel stuffing scheme.

Allegations that the Company "pull[ed] forward orders from the month after the quarter to ship within the quarter in order to meet aggressive sales goals or close the gap," "ship[ped] products earlier than planned," or "ship[ped] products in the final days of the quarter" (TAC

¶¶ 11, 53-55, 58; Pls.' Ex. A) merely describe legitimate pull in sales—not fraud. "Pull in" sales refer to "existing orders shipped in the current quarter rather than in a later quarter as originally scheduled." *Cypress*, 891 F. Supp. at 1380. Plaintiffs repeatedly assert that "pulling in . . . sales into earlier quarters" is improper channel stuffing (*e.g.*, TAC ¶¶ 324, 53), but they are wrong. *See Timberland*, 2013 WL 1314426, at *9 n.3 ("pull-in sales are not a channel stuffing tactic"). Pull in sales, like those alleged in the TAC, "do not result in the improper recognition of revenue under [GAAP]," but rather "are actual sales which are treated no differently than any other sale." *Cypress*, 891 F. Supp. at 1380; *see also Cytyc*, 2005 WL 3801468, at *17 (same).

Consistent with this authority, the 11/14/19 WSJ Article itself stated that "[a]nalysts and accounting experts agree" that the practices described in the article (and thus the TAC) are "generally permitted under accounting rules." Pls.' Ex. A at 2. The article also cited a Harvard Business School professor, who explained that "[t]here is no rule prohibiting manufacturers from urging customers to accept early sales to meet quarterly expectations." *Id.* at 3. Thus, Plaintiffs' mischaracterization of these sales as improper channel stuffing is at odds with their own pleading. *See In re Bristol-Myers Squibb Sec. Litig.*, 312 F. Supp. 2d 549, 566 (S.D.N.Y. 2004) ("a court need not feel constrained to accept as truth conflicting pleadings . . . that are contradicted either by statements in the Complaint itself or by documents upon which [the] pleadings rely") ("*BMS*").

Seeking to suggest something suspicious about the Company's legitimate pull in sales, Plaintiffs point to a statement in the 11/14/19 WSJ Article, attributed to an unidentified former logistics executive, that "shipping plans in the final days of the quarter sometimes contradicted the dates on the boxes." TAC ¶ 54, Pls.' Ex. A at 3. But these allegations do not describe anything improper. Even if boxes were shipped earlier than initially planned, nothing in the

TAC or the 11/14/19 WSJ Article indicates that the Company shipped them without authorization from the customer. *See Gavish v. Revlon, Inc.*, 2004 WL 2210269, at *13 (S.D.N.Y. Sept. 30, 2004) ("[S]hipping a shipment early is entirely different than shipping an unordered shipment."). To the contrary, as one former sales executive cited in the 11/14/19 WSJ Article explained, the Company "always got [customer] approval" for pull in sales, and the executive "never witnessed anything where [the Company] would just ship something unbeknownst to a customer." Pls.' Ex. A at 3.

Plaintiffs' allegation that Defendants offered discounts or extended payment terms to incentivize customers to accept products early so that the Company could meet earnings targets (TAC ¶¶ 53, 61-62) is likewise deficient. *See Hain I*, 2019 WL 1429560, at *17 (allegations that defendants "offered incentives to distributors to take extra product" were insufficient to establish improper channel stuffing scheme); *see also Greebel v. FP Software, Inc.*, 194 F.3d 185, 189, 202-03 (1st Cir.1999) (affirming dismissal of claims based on "weak" allegations of "discounted sales" used to incentivize customers to accept products earlier); *Gavish*, 2004 WL 2210269, at *3, *13 (allegations that defendants offered discounts and other promotions at the end of a quarter to hit sales targets did not support channel stuffing claims). In *BMS*, for example, the Southern District of New York dismissed channel stuffing claims based on allegations that "sales incentives were offered to wholesalers generally towards the end of the quarter to incentivize [] wholesalers to purchase products in an amount sufficient to meet [] quarterly sales projections." 312 F. Supp. 2d at 564, 566-67. Noting that such practices were "common," the court ruled that "[o]ffering incentives to meet goals, aggressive or not, is not suspect when . . . real products were shipped to real customers who then paid with real money." *Id.* at 566-67

The same reasoning applies here. As was the case in *BMS*, the sales practices described

in the 11/14/19 WSJ Article and challenged in the TAC are "common in the [Company's] industry." Pls.' Ex. A at 1. And, as in *BMS*, here "real products were shipped to real customers," who accepted the early shipments and "paid with real money." *BMS*, 312 F. Supp. 2d at 566-67. Thus, Plaintiffs' allegations regarding the Company's use of discounting and other incentives fail. *See id.*; *see also Cytyc*, 2005 WL 3801468, at *17-18 (because "discounting did not prevent transactions from being completed," channel stuffing allegations failed).

Plaintiffs' other allegations based on the 11/14/19 WSJ Article fare no better. For example, based on the reporting in the 11/14/19 WSJ Article that "[a]fter it was clear [TSA] was in trouble, Under Armour continued shipping products to the retailer [and] booking sales for those goods," Plaintiffs speculate that the Company may have improperly booked those revenues because the Company "knew" TSA "might not be able to pay for the products." TAC ¶ 60; *see also* Pls.' Ex. A at 4.[3] But the 11/14/19 WSJ Article does not say anything about TSA failing to pay Under Armour or the Company failing to account for any known risk of non-payment when recognizing revenue from sales to TSA, and there is no factual support for this conjecture in the TAC. And the Company disclosed that it substantially increased its allowance for doubtful accounts in 2Q16 when it became clear that TSA would liquidate instead of restructuring or selling itself, as had been anticipated prior to that time. *See* 8/3/16 10-Q at 6 ("During [2Q16], the Company became aware of the liquidation of [TSA's] business rather than a restructuring or sale, which had previously been anticipated. Due to this liquidation, the Company recorded an allowance of $21.4 million during [2Q16].").

[3] Neither TSA's financial problems nor the Company's decision to continue selling product to TSA was hidden from investors. To the contrary, in February 2016, the Company informed investors of TSA's financial problems and the potential adverse impacts on the Company going forward, and even disclosed its total outstanding receivables from sales to TSA. *See* 2/22/16 10-K at 37. And, when TSA subsequently filed for bankruptcy protection, the Company affirmed that it would continue selling to TSA during the bankruptcy proceedings. *See* 3/4/16 8-K.

Finally, the allegation that the Company shipped to TJX inventory originally intended for its factory stores so that it could "immediately book the products as revenue instead of having to wait for a customer to buy them at its own stores" (TAC ¶ 59; Pls.' Ex. A at 4) adds nothing. As noted above, "[t]here is nothing inherently improper in pressing for sales to be made earlier than in the normal course" (*Cytyc*, 2005 WL 3801468, at *27), and there are no allegations that Under Armour improperly or prematurely recorded revenues from sales to TJX. Indeed, Plaintiffs themselves state that Under Armour was careful to avoid shipping enough product to TJX to trigger a requirement to specifically disclose those sales (TAC ¶ 59), thus acknowledging that Under Armour complied with its disclosure obligations relating to those sales.[4]

3. Plaintiffs' GAAP Allegations Fail

Recognizing that their allegations based on the 11/14/19 WSJ Article merely describe legitimate sales practices, Plaintiffs try to gin up a channel stuffing claim with unsourced, conclusory claims of GAAP violations, including (i) improperly recognizing revenue from supposed "contingent sales"; (ii) inflating revenues by "understating reserves for product returns, allowances, markdowns and discounts"; and (iii) improperly delaying write downs for obsolete inventory. TAC ¶¶ 343-69. These allegations fail for two primary reasons.

First, there are no factual sources cited in the TAC—zero—that identify a single contingent sale or a single dollar of revenue or income that was improperly recognized. Despite noting (as have the prior complaints) that Plaintiffs' counsel conducted interviews with "factual sources," including "individuals formerly employed by the Company and its retail partners" (TAC ¶ 3), Plaintiffs' allegations of GAAP violations do not rely on or even reference any of

[4] Plaintiffs speculate that the Company wanted to avoid disclosing sales to TJX because it would have purportedly revealed that "Under Armour has loss [sic] its premium brand status and its ASPs were falling." TAC ¶ 59. But they concede that the products sold to TJX were originally intended for the Company's "Factory House" stores (TAC ¶ 59), which were used by the Company to "sell excess or undesirable inventory at reduced prices" (TAC ¶ 38 n.8).

these unidentified sources. Nor do Plaintiffs cite any internal documents supporting their claims. Because Plaintiffs' allegations are "untied to any source," they "lack sufficient particularly" to plead any GAAP violations. *Harley Davidson*, 660 F. Supp. 2d at 989; *see also PEC Sols.*, 2004 WL 1854202, at *12 (allegations of GAAP violations were insufficiently pled where "[t]here [we]re no documents, meetings, or individuals cited to back up Plaintiffs' claims").

Second, there has not been any restatement of the Company's financial statements, and Plaintiffs do not challenge the opinions of the Company's independent auditor, who concluded that the Company's financial statements "present[ed] fairly, in all material respects, the financial position of [the Company] . . . in conformity with" GAAP. *E.g.*, 2/23/17 10-K at 47; 2/22/16 10-K at 43 (same). Courts in the Fourth Circuit and around the country frequently reject claims based on alleged GAAP violations under these circumstances. *See Iron Workers Local 16 Pension Fund v. Hilb Rogal & Hobbs Co.*, 432 F. Supp. 2d 571, 588 (E.D. Va. 2006) (dismissing allegations of GAAP violations where there was no restatement and plaintiffs failed to challenge independent auditor's opinion); *see also Turner v. magicJack VocalTec, Ltd.*, 2014 WL 406917, at *9 (S.D.N.Y. Feb. 3, 2014) (dismissing GAAP allegations where "there ha[d] been no restatement, [and] [the company]'s auditor issued opinions that the financial statements were prepared in accordance with GAAP"); *see also PEC Sols.*, 2004 WL 1854202, at *12 (similar).

In any event, Plaintiffs have not pled the alleged GAAP violations in sufficient detail.

a. *Allegations Regarding Contingent Sales Are Insufficiently Pled*

The TAC repeatedly claims that the Company allegedly improperly recognized revenue from "contingent sales pursuant to buyback agreements." *E.g.*, TAC ¶¶ 11, 63-65, 328-51.[5] However, Plaintiffs only offer the following threadbare allegations in support of these claims:

[5] *See also* ¶¶ 61, 73, 148, 159(d), 160, 168(d), 169, 178, 191(d) & (g), 196, 208(c)-(g), 219, 222, 228, 244(c)-(g), 245, 248(a)-(b), 250, 264(c)-(g), 265, 283(c), 291, 306.

- The Company allegedly "used a buyback program" under which it "guaranteed that Under Armour would buy back a certain amount of [] merchandise that did not sell." TAC ¶ 63. Buyback agreements were supposedly "regular . . . and increased in late 2015 and 2016," and the Company purportedly had to "buy back a lot of product." TAC ¶ 63.

- Under Armour supposedly told Dick's and other unidentified customers that "they could return products later, after Under Armour had booked the sales." TAC ¶ 65. Dick's (but not other customers) was allegedly "willing to accept more products from Under Armour than Dick's thought they needed because Under Armour promised Dick's they could return any of the products Dick's did not sell." TAC ¶ 65.

- At some time "[i]n early 2016," Under Armour purportedly "convinced Dick's to order shoes that Dick's did not want" by agreeing to "take back any unsold product[,]" and "Dick's ended up returning 80% or more of the deal later in 2016." TAC ¶ 64.

Plaintiffs already asserted these exact same allegations in the SAC as evidence of declining "brand heat" (*compare* SAC ¶¶ 41, 77, 111 *with* TAC ¶¶ 63-65), and the Court rejected them as insufficient to plead fraud. *See UA II*, 409 F. Supp. 3d at 459-63. Now repackaged as an improper revenue recognition scheme, these allegations fail again for many of the same reasons.

Plaintiffs' generalized allegations that the Company supposedly told Dick's and other unnamed customers that "they could return products later" (TAC ¶ 65) or that the Company would "buy back a certain amount of [] merchandise that did not sell" (TAC ¶ 63) lack the requisite "corroborating details to meet the heightened pleading standard of the PSLRA." *In re ICN Pharms., Inc., Sec. Litig.*, 299 F. Supp. 2d 1055, 1062 (C.D. Cal. 2004) (dismissing channel stuffing allegations); *see also Mattel*, 321 F. Supp. 3d at 1147. These allegations fail to identify specific shipments, transaction dates, product types, product quantities, or the amount of revenue recognized from the alleged contingent sales. *See In re The Hain Celestial Grp. Inc. Sec. Litig.*, 2020 WL 1676762, at *11-12 (E.D.N.Y. Apr. 6, 2020) ("*Hain II*") (dismissing allegations that the corporation "had an agreement with its customers that if the customers could not sell excess inventory, they could return the unsold inventory" and that a specific customer had a "right of return" because the complaint lacked details regarding "specific transactions," "specific

shipments," "specific times" and "specific dollar amounts"), *appeal docketed*, No. 20-1517 (2d Cir. May 5, 2020); *see also In re Coca-Cola Enters., Inc. Sec. Litig.*, 510 F. Supp. 2d 1187, 1197 (N.D. Ga. 2007) (similar); *ICN*, 299 F. Supp. 2d at 1062.[6] They are also missing facts "from which to infer even a broad approximation of the amount of sales affected by" alleged channel stuffing. *Timberland*, 2013 WL 1314426, at *13; *see also Cytyc*, 2005 WL 3801468, at *19 ("[T]he Complaint provides few particulars about . . . the relationship between the amount of unordered product shipped and the company's total revenues.").

The reference to a one-off transaction in "early 2016" where the Company allegedly sold an unspecified amount of shoes to Dick's with a right of return (TAC ¶ 64) does not fix this deficient theory. This allegation, too, lacks corroborating details such as the transaction date, quantity of shoes, and—most crucially—the amount of revenue recognized. *Coca-Cola*, 510 F. Supp. 2d at 1198 ("The crucial element missing from all of these pleadings is any indication of the amount of revenue that was improperly recognized."); *see also Hain II*, 2020 WL 1676762, at *11. In any event, allegations about a lone transaction in 2016 are inadequate to plead a widespread channel stuffing scheme, especially in a year that the Company reported more than $4.8 billion in net revenues. *See Coca-Cola*, 510 F. Supp. 2d at 1197-99 (single allegedly improper transaction in year defendant sold two billion cases of soda "failed to plead channel stuffing allegations with the requisite particularity"); *Spectrum*, 461 F. Supp. 2d at 1310-11.

Furthermore, vague allegations that "Under Armour had to buy back a lot of product" (TAC ¶ 63) and accepted "a massive amount" or "truckloads" of returns (TAC ¶¶ 11, 64) are

[6] Plaintiffs' claim that the Company may have improperly recognized revenue from sales to TSA because the Company might have known that TSA would return products in light of its financial problems (TAC ¶ 60) fails for much the same reasons: the TAC does not plead any contingent transactions with TSA or suggest that TSA ever had an absolute right of return. *See Hain II*, 2020 WL 1676762, at *11; *Coca-Cola*, 510 F. Supp. 2d at 1197.

also insufficient to suggest any unusual return activity. These conclusory assertions not only lack corroborating details (*see Hain I*, 2019 WL 1429560, at *15 (witness statements that did "not detail the amount of returns" or "what percent of sales these returns accounted for" were insufficient to plead channel stuffing)), but also fail to tie the supposedly large returns to any particular transactions allegedly involving a right of return (*see Spectrum*, 461 F. Supp. 2d at 1308 (plaintiffs did not sufficiently allege channel stuffing where they failed to "allege by more than implication that any specific improper returns actually occurred")).

Plaintiffs also point to a purported increase in the Company's "days sales outstanding" ("DSO") during the Class Period. TAC ¶ 349-50. According to Plaintiffs, DSO "represents the average number of days it takes a company to collect its receivables." TAC ¶ 349 n.112. Plaintiffs claim that the Company's DSO increased from "28 days in [4Q14] to nearly 51 days in 1Q17" (including an 18% increase in 2016), which increase they attribute to Under Armour "not collecting on its accounts receivable because customers did not have to pay for merchandise unless (if ever) it was sold." TAC ¶ 349.

This allegation says nothing about contingent sales or channel stuffing. That it allegedly took longer on average for Under Armour to collect cash from its customers (TAC ¶¶ 81, 286, 349-50) does not, as Plaintiffs claim, indicate that customers did not have to pay for their orders or that the Company failed to collect that cash (let alone had reason to doubt that it would). Rather, Plaintiffs improperly ask the Court to assume that the DSO increase was attributable to alleged contingent sales. *See Coca-Cola*, 510 F. Supp. 2d at 1198-99 (granting motion to dismiss channel stuffing allegations that "invite speculation and conjecture rather than providing any specific examples"); *see also Spectrum*, 461 F. Supp. 2d at 1311 (refusing to "speculate and make deductions of fact regarding the alleged channel-stuffing to fill in the gaps of the

circumstances of the alleged fraud described by the vague allegations of the Complaint").

b. *The Company's Reserve Accounting Was Proper*

Plaintiffs' assertion that the Company improperly "inflated . . . revenues and earnings" between 3Q15 and 3Q16 by "failing to properly reduce revenue for estimated customer returns, allowances, markdowns, and discounts given to customers" (TAC ¶ 352; *see also* TAC ¶¶ 351-60) also is not pled with sufficient detail.

Plaintiffs concede that the Company's policy during the Class Period was to "record reductions to revenue for estimated customer returns, allowances, markdowns and discounts," using estimates based on "historical rates of customer returns and allowances as well as the specific identification of outstanding returns, markdowns and allowances that have not yet been received." TAC ¶ 356. Although Plaintiffs allege that the Company violated this policy and GAAP (TAC ¶ 360), they do not identify a single instance in which the Company failed to reserve for known or expected discounts, allowances, or returns. *See Greebel*, 194 F.3d at 205 (rejecting allegations of improper reserve accounting where plaintiffs "merely ma[d]e an allegation that [defendants] failed to adequately reserve and materially overstated [defendant]'s revenues"). Rather, Plaintiffs merely rehash their conclusory allegations of contingent sales, "massive" returns, "unprecedented" and "deep[] discounts," and "flooded" channels, and simply assume that the Company must have failed to properly estimate its reserve. TAC ¶¶ 357-60. This idle speculation is insufficient to convert the TAC's generalized allegations into adequately pled GAAP violations. *See Gavish*, 2004 WL 2210269, at *14 (allegations of "extremely high levels of returns" in "late 1998 and 1999," including a "large return" from a specific customer in October 1998, "[did] not raise a sufficient inference that Revlon's overall reserves for returns were recklessly inadequate"); *see also Spectrum*, 461 F. Supp. 2d at 1311-12.

Plaintiffs also allege that an increase in the Company's reserves in 2017 shows that the

2016 reserves were improperly understated. TAC ¶ 360. But pointing to a subsequent change to the reserves is not adequate to allege that the reserves were improper at the time. *In re CIT Grp., Inc. Sec. Litig.*, 349 F. Supp. 2d 685, 690-91 (S.D.N.Y. 2004) ("That defendants later decided to revise the amount of loan loss reserves that it deemed adequate provides absolutely no reasonable basis for concluding that defendants did not think reserves were adequate at the time"); *see also Local 38 Int'l Bhd. of Elec. Workers Pension Fund v. Am. Express Co.*, 724 F. Supp. 2d 447, 463 (S.D.N.Y. 2010) (similar). Indeed, as this Court has ruled, "[m]ere allegations of 'fraud by hindsight' will not satisfy" Plaintiffs' pleading burden. *UA I*, 342 F. Supp. 3d at 680; *Hillson Partners Ltd. P'ship v. Adage, Inc.*, 42 F.3d 204, 209 (4th Cir. 1994) (same).[7]

c. *The Company's Inventory Accounting Was Proper*

Finally, Plaintiffs claim that the Company "accumulated material amounts of excess and obsolete [] inventory, which it failed to write down during 2016." TAC ¶ 361. As Plaintiffs acknowledge, under GAAP, inventory is "measured at the lower of cost and net realizable value," and a write down is required "[w]hen evidence exists that the net realizable value of inventory is lower that its cost." TAC ¶ 362; *see also* FASB ASC 330-10-35-1B. Plaintiffs' theory is that a write-down was required in 2016 because the Company at that time was experiencing a "massive amount of excess inventory that could not be sold without providing incentives such as heavy discounts." TAC ¶ 364. However, they never allege, specifically or otherwise, the size of the alleged discounts or how widespread they were, let alone whether these discounts were sufficient to reduce the value of Under Armour's inventory below cost so as to trigger the requirement to write down inventory. *See* FASB ASC 330-10-35-1B.

[7] Relying on the 2017 reserve levels, Plaintiffs speculate that the Company "overstate[d] net sales, net income, and EPS" for 3Q16 by "as much as over 2%, 17%, and 18%, respectively." TAC ¶ 360. However, Plaintiffs concede (TAC ¶ 360 n.123) that this allegation is based on their assumptions—not facts—regarding not only what the reserve rate was in 3Q16, but also what the rate allegedly should have been during that period. *See Spectrum*, 461 F. Supp. 2d at 1311.

Plaintiffs also claim that inventory write-downs in the second half of 2017 and in 2018 indicate that inventory write downs should have occurred in 2016. TAC ¶ 369. However, given the "many subjective judgments [that go into] inventory valuation," Plaintiffs "cannot plead a GAAP violation merely by claiming that a write-off for obsolete inventory that was taken in one quarter should have been taken in an earlier quarter." *In re Crocs, Inc. Sec. Litig.*, 774 F. Supp. 2d 1122, 1143, 1150 (D. Colo. 2011), *aff'd sub nom. Sanchez v. Crocs, Inc.*, 667 F. App'x 710 (10th Cir. 2016); *see also Timberland*, 2013 WL 1314426, at *8 (similar); *Morgan v. AXT, Inc.*, 2005 WL 2347125, at *14 (N.D. Cal. Sept. 23, 2005) (similar). These allegations are merely another improper attempt to plead "fraud by hindsight." *UA I*, 342 F. Supp. 3d at 680; *see also Bartesch v. Cook*, 941 F. Supp. 2d 501, 510 (D. Del. 2013) (rejecting as "fraud by hindsight" allegations that asset write down should have occurred earlier).

B. Defendants Had No Duty to Disclose Legitimate "Pull In" Sales

Plaintiffs assert that virtually all of the statements challenged in the TAC were misleading because Defendants allegedly "failed to disclose" the Company's supposedly improper sales practices. *E.g.*, TAC ¶¶ 152, 159(c)-(e).[8] However, this theory is based on a flawed, insufficiently pled predicate: that the Company was engaged in illegitimate channel stuffing. *See PEC Sols.*, 2004 WL 1854202, at *6 ("Defendants cannot be held liable for failing to disclose facts that did not exist"). As for the Company's legitimate pull in sales, the TAC fails to plead any facts that would suggest Defendants were under an obligation to separately disclose those sales or the revenue attributable to them.

Courts consistently have held that, absent well-pled allegations of improper revenue recognition or other GAAP violations, there is no legal requirement to disclose that a portion of a

[8] *See also* TAC ¶¶ 160, 168, 178, 191, 194, 196, 208, 214, 219, 222, 228, 244, 245, 248, 250, 264, 265, 283, 291, 306, 310, 315-16.

company's revenue was generated from pull in sales. *See Hain II*, 2020 WL 1676762, at *12, *14 (dismissing claims based on alleged failure to disclose pull in sales scheme to mask declining demand); *Cytyc*, 2005 WL 3801468, at *17 & n.47 (same); *see also Iron Workers*, 432 F. Supp. 2d at 582 (duty to disclose arises only "when silence would make other statements misleading or false"). Plaintiffs' various attempts to plead that the Company was required to disclose its use of accurately recorded pull in sales are thus insufficient as a matter of law.

First, Plaintiffs claim that Defendants' non-disclosure of pull in sales "materially distorted the Company's results of operations" because the Company used the pull in sales to "meet sales growth and earnings targets." TAC ¶¶ 329-31.[9] Not so. Pull in sales "are actual sales which are treated no differently than any other sale" for accounting and disclosure purposes. *Cypress*, 891 F. Supp. at 1380-81 (rejecting claim that failure to disclose "pull-in" sales made public filings misleading); *see also Timberland*, 2013 WL 1314426, at *9, *18 (alleged failure to disclose pull in sales was not actionable because the transactions were "real sales to real customers"). The Company's accurate financial disclosures were not rendered misleading because Defendants did not separately disclose the timing of the Company's sales or its use of pull in sales. *See In re DXC Tech. Co. Sec. Litig.*, 2020 WL 3456129, at *6-9 (E.D. Va. June 2, 2020) (statements about revenue projections and historical performance were not rendered false or misleading by lack of disclosure regarding how those results were obtained), *appeal docketed*, No. 20-1718 (4th Cir. Jul. 2, 2020); *see also Iron Workers*, 432 F. Supp. 2d at

[9] *In re Sunbeam Corp.* (TAC ¶ 330) is inapposite. There (unlike here), Sunbeam was found to have illegally falsified its financial results and engaged in numerous practices violating GAAP as part of an improper channel stuffing scheme, including by (i) recording revenue from transactions "lacking economic substance," such as consignment sales and bill and hold transactions; (ii) creating "cookie jar" reserves to overstate income in later periods; and (iii) improperly recording supplier rebates as income. *Sunbeam Corp.*, Exchange Act Release No. 44305, 2001 WL 616627, at *4, *6-7, *13 (May 15, 2001).

582-83 (corporations have no duty to disaggregate revenue sources beyond what is required by GAAP); *In re Sanofi Sec. Litig.*, 155 F. Supp. 3d 386, 404-05 (S.D.N.Y. 2016) ("a violation of federal securities laws cannot be premised upon a company's disclosure of accurate historical data"). That the Company allegedly offered discounts and extended payment terms to incentivize customers to accept merchandise earlier (*e.g.*, TAC ¶¶ 11, 359) does not change this analysis. *See Cytyc*, 2005 WL 3801468, at *17 & n.47 (dismissing claim based on non-disclosure of accelerated sales allegedly generated by discounts because the "facts fail to indicate that the discounts resulted in revenue not being realized, as reported"); *see also Trex*, 212 F. Supp. 2d at 601, 611-12 (similar).

Second, Plaintiffs' theory that pull in sales must be disclosed where those sales are expected to materially impact the company's future financial performance (TAC ¶¶ 333, 339-42) is similarly deficient. *See Boca Raton Firefighters & Police Pension Fund v. Bahash*, 506 F. App'x 32, 38 (2d Cir. 2012) ("[Plaintiff] argues that McGraw-Hill's statements about its earnings were actionable, even though literally true, because they did not acknowledge the long-term unsustainability of its business model. This argument is easily rejected."). Corporations are under no duty to separately disclose the individual sales practices used to generate accurately recorded revenue, even if those sales activities allegedly impact future periods. *See Ash v. Powersecure Int'l, Inc.*, 2015 WL 5444741, at *3, *9 (E.D.N.C. Sept. 15, 2015) (dismissing allegations that a company had a duty to disclose that reported revenues were "unsustainable" where there was no allegation that the reported financials were inaccurate or violated GAAP); *see also Iron Workers*, 432 F. Supp. 2d at 585-86 (dismissing claims based on alleged failure "to disclose that [] revenues were unlikely to be sustained or might be discontinued").

The Eastern District of New York expressly rejected this theory earlier this year in *Hain*

II. There, the plaintiffs challenged statements touting "strong demand" for Hain Celestial Group's ("Hain") products and attributing sales results to "organic factors" such as "strong brand contribution," "expanded distribution," and "momentum for [Hain's] organic and natural products." 2020 WL 1676762, at *6. According to the plaintiffs, these statements were misleading because the defendants failed to disclose that Hain had actually "generated its sales in reliance on [] allegedly undisclosed, unsustainable pull-in sales practices" and by offering rights of return to incentivize customers to accept products early, which, the plaintiffs argued, suggested that Hain could not expect its financial performance to continue into the future. *Id.* at *6-7, *12. The court dismissed the complaint, ruling that the defendants were under "no generalized obligation to disclose wholly legal sales incentives simply because the [plaintiffs] allege those incentives to be unsustainable." *Id.* at *12-13 ("[A] company has no duty to disparage its own competitive position in the market where it has provided accurate hard data" regarding its performance). The court also rejected plaintiffs' argument that the defendants were required to disclose Hain's use of pull in sales because they had "put the source of Hain's revenue at issue," concluding that there was no duty to disclose pull in sales activities where there was "no misconduct and the statements at issue 'attributed [the company's] growth to broad trends and corporate strengths.'" *Id.* at *13-14.

The same logic applies here. As in *Hain II*, statements attributing the Company's results to the "strength of [its] brand" (TAC ¶ 199), the Company's "momentum" (TAC ¶ 219), and "increased demand" for its products (*e.g.*, TAC ¶ 219; *see also* TAC ¶¶ 153, 161, 179, 197-200) did not impose a duty to separately identify the "legal sales incentives" (*i.e.*, discounts and payment term extensions) or pull in sales alleged in the TAC. *Hain II*, 2020 WL 1676762, at *12, *14. And, as in *Hain II*, the assertion that pull ins should have been disclosed because they

could have had a negative impact on the Company's results in future periods fails as a matter of law. *Id.* at *12; *see also Cypress*, 891 F. Supp. at 1380-81 (rejecting claim that defendant had duty to disclose the impact of pull in sales on future quarters because, among other things, pull ins "do not result in the improper recognition of revenue"). In any event, Plaintiffs have not sufficiently alleged that Defendants expected pull in sales to have a negative impact on future periods. *See infra* Sec. II.A.1.

Finally, Plaintiffs claim that disclosure of the Company's use of pull ins was required under Item 303 of Regulation S-K. TAC ¶ 332, 339-42; *see also* TAC ¶¶ 168(h), 191(j), 208(j), 244(l), 264(h). Item 303 instructs registrants to "[d]escribe any known trends or uncertainties that have had or that the registrant reasonably expects will have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations." 17 C.F.R. § 229.303(a)(3)(ii). This Court and others have held that Item 303 does not create a duty to disclose that is privately enforceable under Rule 10b-5 "because the materiality standards under [Rule] 10b-5 and [Item] 303 differ significantly." *Shah v. GenVec, Inc.*, 2013 WL 5348133, at *15 n.16 (D. Md. Sept. 20, 2013); *see also Oran v. Stafford*, 226 F.3d 275, 288 (3d Cir. 2000) (Alito, J.); *In re Maximus, Inc. Sec. Litig.*, 2018 WL 4076359, at *15 (E.D. Va. Aug. 27, 2018).

Furthermore, Plaintiffs have not sufficiently alleged an Item 303 violation. They cursorily allege that Defendants knew pull in sales were "expected to result in lower shipments and revenue in the next period" (TAC ¶ 341), but fail to provide detailed factual allegations quantifying the amount of pull in sales or the impact on future periods.[10] Without such

[10] This same failure also undermines Plaintiffs' claim that the Company violated GAAP by failing to disclose its legitimate pull in sales in the footnotes to its financial statements. TAC ¶¶ 334-35. Plaintiffs speculate that "significant channel stuffing would also trigger the need for . . . disclosure" under GAAP (TAC ¶ 334), but without detailed factual allegations quantifying

allegations, the Item 303 claim fails. *See Cytyc*, 2005 WL 3801468, at *17-19, *22; *see also Wietschner v. Monterey Pasta Co.*, 294 F. Supp. 2d 1102, 1117-18 & n.9 (N.D. Cal. 2003); *In re Viewlogic Sys. Sec. Litig.*, 1996 U.S. Dist. LEXIS 22371, at *36 & n.19 (D. Mass. Mar. 13, 1996) (rejecting allegations that channel stuffing practices and double counting sales rendered statements regarding historical growth "inconsistent with trends known to the company").

II. PLAINTIFFS FAIL TO PLEAD THE REQUISITE "STRONG" INFERENCE OF SCIENTER

To state a claim for securities fraud under Section 10(b) of the Exchange Act and SEC Rule 10b-5, a plaintiff must plead with particularity facts giving rise to a "strong inference" that each defendant acted with scienter, *i.e.*, "a mental state embracing intent to deceive, manipulate, or defraud." *Tellabs*, 551 U.S. at 313, 319, 321. "[T]he inference of scienter must be more than merely reasonable or permissible—it must be cogent and compelling, thus strong in light of other explanations." *Maguire Fin., LP v. PowerSecure Int'l, Inc.*, 876 F.3d 541, 547 (4th Cir. 2017), *cert. denied*, 138 S. Ct. 2027 (2018). As this Court recognized, "[p]leading a 'strong inference' of scienter is no small burden" and the inference of scienter must be "at least as likely as any plausible opposing inference." *UA II*, 409 F. Supp. 3d at 458 (emphasis in original).

A. New Allegations in the TAC Still Fail to Give Rise to a Strong Inference that Mr. Plank Engaged in Intentional Misconduct or Was Severely Reckless

To succeed on a securities fraud claim, "[a] plaintiff must show either intentional misconduct or such severe recklessness that the danger of misleading investors was either known to the defendant or so obvious that the defendant must have been aware of it." *Cozzarelli*, 549 F.3d at 623. The term "recklessness" in this context means conduct "so highly unreasonable" that it represents an "extreme departure from the standard of ordinary care." *Yates*, 744 F.3d at

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the Company's pull in sales in a given period or their effect on future periods, Plaintiffs do not adequately plead that disclosure was required.

884. Thus, it "must, in fact, approximate an actual intent to aid in the fraud." *Chill v. Gen. Elec. Co.*, 101 F.3d 263, 269 (2d Cir. 1996).

In dismissing the SAC, the Court ruled that Plaintiffs failed to adequately plead the requisite strong inference that Mr. Plank was aware of the Company's supposed sales problems:

> After consideration of all the alleged facts and inferences, this Court concludes that the most reasonable likely inference to be drawn is that Plank interpreted the data that was available to him through the lens of the Company's consistent success to date, attributed any non-conforming data to typical retail market challenges, and assumed the Company would continue to rise above such challenges as it had always done in the past. . . . [T]here is no strong or compelling inference of deliberately intentional misconduct or such severe recklessness that it rises to the level of fraud."

UA II, 409 F. Supp. 3d at 462. In the TAC, Plaintiffs re-plead many of the same deficient scienter allegations that the Court has already once (and, in certain instances, twice) rejected:

- Plaintiffs re-plead facially insufficient allegations regarding Mr. Plank's supposed access to "systems in place to closely monitor . . . the Company's business." *Compare* TAC ¶¶ 106-08 *with* SAC ¶¶ 62-64; *compare* TAC ¶¶ 109-12 *with* CAC ¶¶ 127-30. But these claims again fail because the TAC does not to provide "corroborating factual allegations" regarding the actual data on those systems. *UA I*, 342 F. Supp. 3d at 691; *City of Warren Police & Fire Ret. Sys. v. Foot Locker, Inc.*, 412 F. Supp. 3d 206, 228 (E.D.N.Y. 2019).

- Plaintiffs again attempt to buttress the "reliability" of the third party SportScan data cited in the Morgan Stanley Report as a proxy for the Company's internal data. *Compare* TAC ¶¶ 113-19 *with* SAC ¶¶ 65-71. Without facts concerning what internal data Mr. Plank reviewed and when, allegations relying on third party data fail. *UA II*, 409 F. Supp. 3d at 462; *see also Pearlstein v. BlackBerry Ltd.*, 93 F. Supp. 3d 233, 246-47 (S.D.N.Y. 2015), *aff'd sub nom. Cox v. Blackberry Ltd.*, 660 F. App'x 23 (2d Cir. 2016).

- Plaintiffs cite Mr. Plank's statements about the Company's performance on analyst calls (*compare* TAC ¶ 106 *with* SAC ¶ 62), but "discussing company business on conference calls" is "part and parcel of the role of a senior executive and do[es] not, without more, support an inference of actual exposure to a problem as required to establish scienter." *Knurr v. Orbital ATK Inc.*, 272 F. Supp. 3d 784, 800 (E.D. Va. 2017); *see also In re Alamosa Holdings, Inc. Sec. Litig.*, 382 F. Supp. 2d 832, 858 (N.D. Tex. 2005).

- Plaintiffs rely on Mr. Plank's alleged participation in meetings where the Company's performance was discussed, including internal "town hall" meetings as well as meetings with Dick's. *Compare* TAC ¶¶ 120-22 *with* SAC ¶¶ 76-78. However, they do not allege a single piece of information Mr. Plank is supposed to have discussed or learned at these

meetings that contradict his public statements. *See Local 210 Unity Pension & Welfare Funds v. McDermott Int'l Inc.*, 2015 WL 1143081, at *9 (S.D. Tex. Mar. 13, 2015); *see also Coyne v. Metabolix, Inc.*, 943 F. Supp. 2d 259, 273 (D. Mass. 2013).

Plaintiffs also offer new purported "evidence" of Mr. Plank's scienter: (1) "emails" supposedly showing that Mr. Plank was aware of allegedly improper sales and accounting practices; (2) his transition from CEO to Executive Chairman and Brand Chief in January 2020; and (3) his receipt of a Wells Notice. TAC ¶¶ 99-105. Whether viewed separately from, or together with, the deficient allegations the Court has already rejected, these allegations fail.

1. Allegations Regarding Alleged Sales and Accounting Problems Fail to Support a Strong Inference of Scienter

Plaintiffs claim that Mr. Plank's awareness of the Company's purported sales problems can be inferred from his "direct knowledge of" the supposedly improper sales and accounting practices alleged in the TAC. TAC ¶¶ 99-100. The crux of these allegations is a single sentence from the 11/14/19 WSJ Article: "[i]nvestigators are examining emails that show [Mr.] Plank[] knew about efforts to move revenue between quarters, according to a personal familiar with the matter." Pls.' Ex. A at 2; TAC ¶ 100. Neither the TAC nor the 11/14/19 WSJ Article provide any further information about these vaguely described emails, such as when they were sent or received, or by whom, or what they say about the Company's pull in sales. Even if the Court assumes that these emails do show that Mr. Plank was aware of those pull in sales, that would not be enough to support a strong inference of scienter because they do not show his awareness of improper sales and accounting practices or the Company's purported sales problems.

As an initial matter, Plaintiffs' allegations are based on the faulty premise that the TAC has adequately pled any improper sales or accounting practices. Because Plaintiffs have not adequately pled any illegitimate channel stuffing or revenue recognition (*see supra* Sec. I.A), those allegations do not contribute to an inference of scienter. *See Hain I*, 2019 WL 1429560, at

*17 (because plaintiffs "failed to adequately allege that the Defendants engaged in a fraudulent channel stuffing scheme[,] . . . allegations relating to th[at] scheme do not give rise to a strong inference of scienter"); *Wietschner*, 294 F. Supp. 2d at 1114 (similar). Plaintiffs' GAAP allegations likewise fail, as the TAC does not adequately plead any GAAP violations. *See Cytyc*, 2005 WL 3801468, at *28 (alleged accounting improprieties did not support scienter where "the record [was] devoid of any [GAAP] violations"); *see also Coca-Cola*, 510 F. Supp. 2d at 1200.[11]

Absent detailed allegations of channel stuffing, improper revenue recognition, or GAAP violations, emails supposedly showing Mr. Plank's awareness of pull in sales do not give rise to strong inference of scienter. *See Cytyc*, 2005 WL 3801468, at *27 (pull in sales did not support scienter where the complaint lacked "any additional suggestion of inventory parking, contingent sales or other improper activity"); *Gavish*, 2004 WL 2210269, at *19 (alleged pull in sales and discounting "do not by themselves raise a strong inference of scienter"); *see also supra* Sec. I.A. Because the pull in sales were real sales to real customers, "there is nothing to indicate that [those sales] had anything to do with improper sales practices, much less to do with fraud." *See In re Sawtek, Inc. Sec. Litig.*, 2005 WL 2465041, at *8 (M.D. Fla. Oct. 6, 2005) (allegation that defendants knew about timing shifts "[did] nothing to establish scienter"); *see also Trex*, 212 F. Supp. 2d at 608-10 (similar).

Nor does Mr. Plank's alleged awareness of pull in sales support the <u>further</u> inference that he was <u>also</u> aware of the purported undisclosed declines in consumer demand and sales problems

[11] Even if Plaintiffs had adequately pled their GAAP claims (which they have not), the allegations would not support an inference of scienter as to Mr. Plank because the TAC does not plead any facts suggesting that Mr. Plank had a role in, or otherwise was aware of, the allegedly improper accounting practices. *See Yates*, 744 F.3d at 887 ("a failure to follow GAAP, without more, does not establish scienter"); *see also PEC Sols.*, 418 F.3d at 389 (similar); *Garfield v. NDC Health Corp.*, 466 F.3d 1255, 1264 (11th Cir. 2006) (dismissing allegations of improper revenue recognition and reserves accounting because the complaint "lacked detailed allegations of scienter" as to those claims); *BMS*, 312 F. Supp. 2d at 568.

alleged in the TAC. Plaintiffs claim that the pull in sales support their allegations of scienter because they were used to "mask slowing demand." *E.g.*, TAC ¶ 11. The 11/14/19 WSJ Article says nothing about whether Mr. Plank had any knowledge about the reasons for the pull in sales, much less that he knew that those sales were being used to mask declining demand.

The First Circuit rejected a similar argument in *Greebel*. There, the plaintiffs alleged that the defendants' end-of-quarter sales practices, including offering discounts and other incentives to boost results, demonstrated that defendants "knew that revenues during the Class Period would be low and attempted to hide that fact by shifting income through channel stuffing . . . and by artificially inflating income through improper revenue recognition." 194 F.3d at 202-03. The court disagreed, ruling that the probative value of those allegations was "weak." *Id.* at 203. Contrasting alleged pull in sales with fictitious sales that had no alternative innocent justification, the Court explained that pull in sales did not demonstrate knowledge of sales problems because "there may be any number of legitimate reasons for attempting to achieve sales earlier." *Id.*

The same logic applies here. Because the Company's pull in sales were real transactions, they do not support a strong inference that Mr. Plank (or anyone else at the Company) was aware of (much less seeking to conceal) supposed sales problems. *See id.*; *see also Wietschner*, 294 F. Supp. 2d at 1114 & n.4 (allegations that channel stuffing was used "to outwardly project a false image of sales and earnings growth" did not support strong inference of scienter). That the Company allegedly used pull in sales to "hit aggressive sales goals or close the gap" (*e.g.*, TAC ¶ 11) does not change this conclusion. *See Gavish*, 2004 WL 2210269, at *19 (allegations that defendants used discounting to boost sales and achieve revenue targets did not support an inference that they were aware of negative trends in the company's business); *see also BMS*, 312 F. Supp. 2d at 568 ("where it is alleged that (i) management set aggressive targets, (ii) incentives

were given to wholesalers to buy product before they actually needed it, (iii) in order to meet earnings estimates, (iv) it was known that wholesaler inventories were higher than usual, and (v) real products were shipped to real customers who paid real money, . . . conscious misbehavior or recklessness cannot be inferred"); *Hain I*, 2019 WL 1429560, at *17 (same).

Plaintiffs' theory is further undermined by their failure to reliably quantify, even broadly, revenues attributable to pull in sales. This failure is particularly damning due to the significant year-over-year quarterly net revenue growth that the Company achieved during the relevant part of the Class Period (when it was supposedly engaging in pull in sales): $266 million (28%) in 3Q15; $276 million (31%) in 4Q15; $243 million (30%) in 1Q16; and $217 million (28%) in 2Q16. *See supra* at 4-5. Even in 3Q16, when the Company first recognized (and then promptly disclosed) the impact of the slowdown in the North American market, net revenues increased by $268 million (22%) over 3Q15. *See supra* at 5. Plaintiffs assume that the Company must have been pulling in more sales each quarter (TAC ¶ 341 n.105) but do not offer any reliable data (such as the dollar amount or percentage of sales pulled in) to support their speculation. Given this growth, and that customers were agreeing to accept orders early (Pls.' Ex. A at 3), there is no support for Plaintiffs' claim that Mr. Plank knew (or even should have known) that demand was declining or that future business was being harmed simply because some of the Company's revenue was derived from pull in sales. *See In re Smith & Wesson Holding Corp. Sec. Litig.*, 669 F.3d 68, 75-76 (1st Cir. 2012) (rejecting allegations that pull in sales showed knowledge of declining demand where "nothing shows that pull-ins were unusual, represented a significant percentage of the reported sales for the quarter, or were otherwise suspect").

Plaintiffs' remaining allegations add nothing. They claim that Mr. Plank "pressur[ed] employees to achieve 20% growth" and that pull in sales "helped the [Company] sustain its

growth record, which employees knew was important to Mr. Plank" (TAC ¶ 100 (emphasis omitted)), but these allegations do not show that Mr. Plank was engaged in any wrongdoing. *See Cytyc*, 2005 WL 3801468, at *28 (allegations that defendants "set[] and encourage[d] unrealistic sales quotas" did not support strong inference of scienter); *Boca Raton Firefighters' & Police Pension Fund v. DeVry Inc.*, 2012 WL 1030474, at *11 (N.D. Ill. Mar. 27, 2012) ("[P]ushing for more sales is hardly grounds for a fraud claim. It would be more surprising if officers did not put sales demands on their employees. Regardless, doing so does not create a strong inference of scienter."). Plaintiffs also allege, based on a statement from a former executive in the 11/14/19 WSJ Article, that "[t]he strains in [the Company]'s business were evident inside the Company in 2016." TAC ¶ 100. But this statement provides no insight into Mr. Plank's knowledge. *See Nolte v. Capital One Fin. Corp.*, 390 F.3d 311, 316 (4th Cir. 2004) (allegation that employees were aware of problems did not support an inference regarding defendants' knowledge); *Fitzer v. Sec. Dynamics Techs., Inc.*, 119 F. Supp. 2d 12, 25 (D. Mass. 2000) (declining to "speculate that because former employees in the corporation knew of" allegedly undisclosed facts, that defendants "must also have known about [those facts] and fraudulently concealed them").

2. Mr. Plank's Title Change Adds Nothing to the Scienter Analysis

Plaintiffs allege that the "suspicious timing" of Mr. Plank's transition to Executive Chairman and Brand Chief, announced on October 22, 2019, contributes to an inference of scienter. TAC ¶ 102.[12] However, the Court has already rejected this claim and with good reason: Mr. Plank remains a high ranking executive and the leader of the Company's Board of Directors. *UA III*, 2020 WL 363411, at *5. As this Court explained, "changes in job position of

[12] As they did in their Rule 60(b) motion, Plaintiffs again misleadingly characterize Mr. Plank's title change, this time as a "resignation." TAC ¶ 102; ECF No. 106-2 at 20 (misleadingly claiming that Mr. Plank "retire[d]"). As Plaintiffs admit, however, Mr. Plank did not "resign," but rather "transitioned to Executive Chairman and Brand Chief." TAC ¶ 31.

this kind have been described as 'benign.'" *Id.*; *see also In re NVIDIA Corp. Sec. Litig.*, 768 F.3d 1046, 1063 (9th Cir. 2014) (same); *Mattel*, 321 F. Supp. 3d at 1155 ("It is unreasonable to infer that by retaining [its former CEO] in a high-profile, well-paid position, Mattel was punishing [him] for fraudulent conduct.").

The TAC also does not offer any particularized facts tying Mr. Plank's title change to the alleged wrongdoing that is supposed to have occurred more than three years earlier. *See Hirtenstein v. Cempra, Inc.*, 348 F. Supp. 3d 530, 561 (M.D.N.C. 2018) ("Without additional relevant factual allegations, subsequent resignations by executives are insufficient to support a strong inference of scienter"), *aff'd sub nom. Janies v. Cempra*, 816 F. App'x 747 (4th Cir. 2020); *UA I*, 342 F. Supp. 3d at 692 (similar).[13] Ultimately, the far more compelling inference is that the title change was innocent and had nothing to do with the alleged misconduct. *See Woolgar v. Kingstone Cos.*, 2020 WL 4586792, at *26 (S.D.N.Y. Aug. 10, 2020) (rejecting allegations regarding executive departures because "there are any number of reasons that an executive might resign, most of which are not related to fraud").

3. The Wells Notice Does Not Establish a Strong Inference Scienter

Plaintiffs also allege that Mr. Plank's "direct knowledge of the Company's suspect sales practices is further evidenced by the fact that [he] personally received" a Wells Notice. TAC ¶ 101. Not so. A Wells Notice is neither a final determination that the recipient has violated any law nor a formal charge of wrongdoing. *See Richman v. Goldman Sachs Grp., Inc.*, 868 F. Supp. 2d 261, 274 (S.D.N.Y. 2012) ("At best, a Wells Notice indicates not litigation but only the desire

[13] Citing a journalist's conjecture in a news report, Plaintiffs speculate that the timing of the title change announcement may have been linked to the WSJ articles two weeks later disclosing the SEC and DOJ investigations. TAC ¶¶ 103-04. However, "[t]he complaint must rise or fall on allegations about defendant['s] conduct and not on wide-eyed citation to the gratuitous commentary of outsiders." *Chan v. New Oriental Educ. & Tech. Grp. Inc.*, 2019 WL 2865452, at *7 (D.N.J. July 3, 2019); *see also Conagra*, 2020 WL 6118605, at *10 (similar).

of the [SEC] Enforcement staff to move forward, which it has no power to effectuate."); *In re Lions Gate Ent. Corp. Sec. Litig.*, 165 F. Supp. 3d 1, 12 (S.D.N.Y. 2016) (similar). Moreover, Plaintiffs do not adequately "connect[] the investigation to the state of mind of" Mr. Plank at the time of the challenged conduct. *Schaffer v. Horizon Pharma PLC*, 2018 WL 481883, at *13 (S.D.N.Y. Jan. 18, 2018). Thus, the Wells Notice here does not establish a strong inference of scienter. *See Cozzarelli*, 549 F.3d at 628 n.2; *see also Knurr*, 272 F. Supp. 3d at 807 ("The Fourth Circuit has stated that the allegation that the SEC is conducting an investigation 'is too speculative to add much, if anything, to an inference of scienter.'").

B. Plaintiffs' Motive Allegations Fail Again

1. Mr. Plank's Stock Sales Do Not Support an Inference of Scienter

"[I]nsider trading can imply scienter only if the timing and amount of a defendant's trading were unusual or suspicious." *Teachers' Ret. Sys. of La. v. Hunter*, 477 F.3d 162, 184 (4th Cir. 2007). Plaintiffs have twice alleged that Mr. Plank's stock sales in November 2015 and April 2016—executed pursuant to a non-discretionary rule 10b-5 plan and comprising less than 5% of his overall holdings—were suspicious in timing and amount, and twice the Court has rejected those allegations as insufficient to plead scienter. *UA I*, 342 F. Supp. 3d at 693; *UA II*, 409 F. Supp. 3d at 462. In the TAC, Plaintiffs cite these same stock sales in support of their scienter allegations for a third time. TAC ¶¶ 125-37. For a third time, they fail.

First, the TAC does not plead any new allegations indicating that the stock sales were unusual in size. In fact, Plaintiffs abandoned their allegations that the sales were inconsistent with Mr. Plank's prior trading. While this concession is unsurprising—the Court has observed that Mr. Plank sold more shares for more profit before the Class Period (SAC ¶ 90; *UA II*, 409 F. Supp. 3d at 461)—it is nevertheless fatal (*UA I*, 342 F. Supp. 3d at 693 (trading allegations failed where "there [we]re no allegations that the selling pattern was dramatically out of line with prior

trading practices")).[14] Class period stock sales are not suspicious if they are smaller than pre-class period sales. *See DXC*, 2020 WL 3456129, at *13 (trading allegations failed where the executive "sold less stock during the Class Period than during the preceding [period]"); *Proter v. Medifast, Inc.*, 2013 WL 1316034, at *20 (D. Md. Mar. 28, 2013) (class period sales of 22% of holdings were "hardly unusual" when defendant sold 24% before class period). The fact remains that Mr. Plank retains more than 95% of his pre-Class Period holdings to this day. *See UA I*, 342 F. Supp. 3d at 693; *PEC Sols.*, 418 F.3d at 390 (stock sales were not suspicious when defendants retained large portions of their holdings and lost money when share prices declined).[15]

Second, Plaintiffs' new allegations do not show that Mr. Plank's sales were suspiciously timed. Allegations that Mr. Plank's trades were intended to capitalize on purported channel stuffing (TAC ¶ 130) fail because Plaintiffs have not adequately pled any channel stuffing. *See Spectrum*, 461 F. Supp. 2d at 1318 ("[i]n the absence of appropriately pled allegations regarding channel-stuffing, there is no basis for the Court to infer that the individual defendants engaged in insider trading because they knew that their statements were misleading in light of channel-stuffing activities"); *see also Harley Davidson*, 660 F. Supp. 2d at 1003 (similar). Allegations regarding Mr. Plank's receipt of a Wells Notice and the "undated" emails supposedly showing that, at some undefined point in time, Mr. Plank became "aware" of the Company's pull in sales (TAC ¶¶ 126, 130, 134-35) also fail because they say nothing about what Mr. Plank knew at the time he entered into his trading plan in October 2015 or at the time of the sales in question. *See*

[14] As the Court has twice rejected claims based on Mr. Plank's trading, Defendants have not burdened the Court with duplicative copies of Mr. Plank's publicly filed trading records between 2012 and 2016. Should the Court wish to review these public records, they are available on the docket as an exhibit filed with Defendants' motion to dismiss the SAC (*see* ECF No. 80-23).

[15] Plaintiffs attempt in various ways to circumvent these incontrovertible facts, comparing Mr. Plank's trades to his total "available" shares (TAC ¶ 130-31), subsequent trading (TAC ¶ 132), and "typical sales by public company executives" (TAC ¶ 133), but they made these allegations before (SAC ¶¶ 88-89, 91-92), and the Court rejected them. *UA II*, 409 F. Supp. 3d at 459-62.

Plymouth Cty. Ret. Sys. v. Carter's Inc., 2011 WL 13124501, at *27 (N.D. Ga. Mar. 17, 2011) ("any stock sales made in 2005 and possibly early 2006 are not suspicious because Plaintiffs do not allege that the [defendants] had any insider knowledge at that point"); *In re Lululemon Sec. Litig.*, 14 F. Supp. 3d 553, 585 (S.D.N.Y. 2014) (10b5-1 plan entered into during class period shielded defendant where there were no allegations that it was created to "capitalize on insider knowledge of . . . allegedly undisclosed . . . issues"), *aff'd*, 604 F. App'x 62 (2d Cir. 2015).

Furthermore, and as Plaintiffs expressly concede, Mr. Plank publicly stated his intention to "continue selling millions of dollars in Under Armour stock" months before the Class Period began. TAC ¶ 127. In a June 2015 public letter to stockholders, Mr. Plank explained that the issuance of a new class of stock would allow him "the flexibility of selling [] shares" over time. TAC ¶ 33. Because Mr. Plank's sales were executed in connection with this publicly documented long-term strategy that pre-dated the Class Period, "the inference that [the] stock sales during the Class Period were carefully timed to capitalize on deliberately inflated stock prices is not as likely as the inference that [Mr.] Plank sold shares during the Class Period as he'd previously announced was his plan." *UA II*, 409 F. Supp. 3d at 462; *see also Proter*, 2013 WL 1316034, at *21 ("it strains credulity, to allege . . . that [defendants] were engaging in a nefarious scheme to inflate the price of Company stock for their own benefit while simultaneously making a public disclosure of their intention to sell shares far in advance").[16]

2. The Bond Offering Still Does Not Support Motive Allegations

Plaintiffs also re-plead virtually verbatim their claim that Mr. Plank was supposedly

[16] In a footnote, Plaintiffs claim that Mr. Plank "belatedly disclosed additional Class Period sales from 2016 that were also suspicious in timing." TAC ¶ 135 n.61. While Plaintiffs repeatedly emphasize the size of Mr. Plank's November 2015 and April 2016 sales, they conspicuously omit details about the size of these additional trades, as well as information regarding the dates, proceeds, or percentage of overall holdings sold. *See AXT*, 2005 WL 2347125, at *13 (trading allegations did not support any inference of scienter where "Plaintiff alleges no facts about the dates, prices per share, or sizes of each of [defendant's] Class Period sales").

motivated to conceal the Company's "true" financial condition to obtain more favorable terms for the Company's June 2016 bond offering. *Compare* TAC ¶¶ 138-39 *with* SAC ¶¶ 98-99. These allegations fail again because Plaintiffs still do not identify any facts suggesting "an unusual corporate need for the proceeds of the [o]ffering other than repaying outstanding debt." *UA I*, 342 F. Supp. 3d at 693; *see also Maguire*, 876 F.3d at 551.

C. Plaintiffs' "Corporate Scienter" Theory Fails

To plead corporate scienter, a complaint must allege facts "giving rise to a strong inference that at least one corporate agent acted with the required state of mind"—*i.e.*, scienter. *Matrix Cap. Mgmt. Fund, LP v. BearingPoint, Inc.*, 576 F.3d 172, 189 (4th Cir. 2009); *see also Teachers'*, 477 F.3d at 184 (similar). Plaintiffs allege that, at various undefined times during the Class Period, former CFOs Brad Dickerson and Mr. Molloy, current CFO Mr. Bergman, and several executives (including Kip Fulks, Brian Cummings, Matthew Mirchin, Rob Goodwin, Bill Healy, and Kevin Eskridge) supposedly possessed negative information about the Company, and Plaintiffs claim that this knowledge can be imputed to the Company. TAC ¶¶ 140-47. These allegations fail because the TAC does not adequately plead scienter as to any of the individuals.[17]

1. Allegations About Mr. Dickerson and Mr. Molloy Have Been Rejected

Plaintiffs' attempt to plead Under Armour's scienter based on the supposed "personal knowledge" of Messrs. Dickerson and Molloy is little more than a rehashing (word-for-word, in some places) of the deficient scienter allegations Plaintiffs unsuccessfully pled against those two individuals when they were defendants. Plaintiffs again assert that their scienter can be inferred from participation in analyst calls (*compare* TAC ¶ 142 *with* CAC ¶ 123), certification of quarterly and annual reports (*compare* TAC ¶ 142 *with* CAC ¶¶ 161, 183, 196, 227, 249), their

[17] As discussed *supra* in Section II.A, Plaintiffs fail to allege a strong inference of scienter with respect to Mr. Plank, and thus his knowledge cannot be imputed to Under Armour.

departures from the Company (*compare* TAC ¶ 143 *with* CAC ¶ 132), and Mr. Dickerson's supposed knowledge of the SportScan data cited in the Morgan Stanley Report (*compare* TAC ¶ 142 *with* CAC ¶ 126). The Court determined that these allegations did "not support a strong inference of scienter" as to either Mr. Dickerson or Mr. Molloy (*UA I*, 342 F. Supp. 3d at 691-94), and they thus fail to a support a strong inference of scienter as to the Company (*see Teachers'*, 477 F.3d at 184 (requiring "facts that support a strong inference of scienter with respect to at least one authorized agent of the corporation" to plead corporate scienter)).

The only new allegation in the TAC about either Mr. Molloy or Mr. Dickerson is that, "according to the WSJ, investigators are examining the tenure of former finance chief Chip Molloy." TAC ¶ 143. But "[a]n investigation is not a violation" (*In re Key Energy Servs., Inc. Sec. Litig.*, 166 F. Supp. 3d 822, 863 (S.D. Tex. 2016); *see also UA III*, 2020 WL 363411, at *8 (same)), so this allegation does not add anything to Plaintiffs' deficient allegations regarding Mr. Molloy's knowledge (*see Cozzarelli*, 549 F.3d at 628 n.2; *see also supra* Sec. II.A.3).

2. Allegations Regarding Mr. Bergman Are Insufficient

Plaintiffs' allegations as to Mr. Bergman are even weaker. They claim that Mr. Bergman's scienter can be inferred (and therefore imputed to the Company) because he "signed and certified" the Company's quarterly and annual reports (TAC ¶ 144), but this allegation contributes nothing to an inference of scienter. *See Cozzarelli*, 549 F.3d at 628 n.2 (allegation that defendant "lied when she certified . . . financial statements . . . does not provide independent support for an inference of scienter"). Plaintiffs also allege that Mr. Bergman "personally received a Wells Notice from the SEC." TAC ¶ 144. As discussed above, however, the existence of an unresolved investigation or receipt of a Wells Notice is insufficient to establish a strong inference of scienter. *See supra* Secs. II.A.3, II.C.1. Thus, there are no well-pled allegations of scienter as to Mr. Bergman that can be imputed to Under Armour.

3. Plaintiffs' Remaining Allegations Fail

Finally, Plaintiffs re-allege the same claims regarding Mr. Fulks, Mr. Cummings, and other executives that they unsuccessfully alleged in the SAC. *Compare* SAC ¶¶ 111-13 *with* TAC ¶¶ 145-47; *see also UA II*, 409 F. Supp. 3d at 463. The only new allegation relating to them is that they, along with unnamed non-executive employees in the Company's sales and planning departments, had access to "massive and constantly-updated spreadsheets with detailed sales and inventory data to track the Company's undisclosed practice of pulling forward sales and determine what inventory to get rid of." TAC ¶ 141. This allegation merely confirms that the pull in sales were, in fact, real sales of real products to real customers. In any event, because pull in sales are not improper, allegations that individuals at the Company were aware of and had access to documents concerning those sales add nothing. *See supra* Secs. I.A & II.A.

These allegations do not fix the fatal flaw with Plaintiffs' effort to plead the Company's scienter based on the knowledge of these executives. As with the SAC, there are "no allegations that [the executives] provided information that was used in a misleading public statement, and there are no allegations that [the executives] were involved with the issuance of misstatements to the public." *UA II*, 409 F. Supp. 3d at 463; *see also Maximus*, 2018 WL 4076359, at *11 n.5.[18]

Because the TAC does not plead any connection between these individuals and the challenged statements, and because there are "no factual allegations that the[se] corporate agents acted with scienter," these allegations should again be rejected. *UA II*, 409 F. Supp. 3d at 463; *see also Matrix*, 576 F.3d at 189 (to plead corporate scienter, a plaintiff must allege

[18] Mr. Mirchin is alleged to have made misstatements regarding the Company's growth at 2015 Investor Day. TAC ¶ 156. However, Plaintiffs do not plead any contemporaneous, detailed facts suggesting Mr. Mirchin's statements were false (*see infra* Sec. III.A.1; *see also UA I*, 342 F. Supp. 3d at 680-81), much less suggesting that Mr. Mirchin knew his statements were false. *See Lululemon*, 14 F. Supp. 3d at 581 (scienter allegations failed because the complaint "[did] not establish what specific contradictory information the makers of the statements had and the connection (temporal or otherwise) between that information and the statements at issue").

particularized facts showing that a "corporate agent acted with scienter in issuing any of the challenged financial statements").

D. Taken Together, Plaintiffs' Allegations Still Fail to Support a Strong Inference of Scienter

Viewed collectively, Plaintiffs' allegations do not raise a strong inference of scienter. Merely "[c]obbling together a litany of inadequate allegations does not render [them] particularized in accordance with . . . the PSLRA." *Cal. Pub. Emps.' Ret. Sys. v. Chubb Corp.*, 394 F.3d 126, 155 (3d Cir. 2004). Here, too, "even taken together, [the allegations] fail to make the culpable inference that [Defendants] actually knew about, or at least recklessly disregarded" the alleged problems with the Company's apparel business. *Proter*, 2013 WL 1316034, at *10.

III. PLAINTIFFS FAIL TO ADEQUATELY PLEAD FALSITY

The PSLRA's "heightened requirements for pleading misrepresentations or omissions" mandate that a court assess "whether the complaint states sufficient facts to permit a reasonable person to find . . . that the defendant made a false or misleading statement." *Teachers'*, 477 F.3d at 173 (emphasis in original). To satisfy this requirement, a complaint must "specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement . . . is made on information and belief, . . . state with particularity all facts on which that belief is formed." 15 U.S.C. § 78u-4(b)(1).

A. Falsity Allegations Re-alleged in the TAC

In *UA I*, the Court organized the challenged statements into four categories: (i) 2015 Investor Day statements; (ii) statements regarding 3Q15 results; (iii) partial disclosures in 2016; and (iv) 2016 statements regarding the Company's FY16 outlook. 342 F. Supp. 3d at 679-89. The Court held that Plaintiffs failed to plead falsity as to the first two categories. *Id.* at 679-82. As to the third and fourth categories, the Court held that Plaintiffs had pled falsity as to some of

the statements, but also ruled that statements of corporate optimism and accurate recitations of historical results were inactionable, and that forward-looking statements may be protected by the PSLRA's safe harbors. *Id.* at 682-89.[19] The new allegations in the TAC do not cure these deficiencies in the CAC. Additionally, Plaintiffs take two statements out of context to make it appear that there was a misstatement when, in fact, there was none.

1. September 16, 2015 Investor Day & 3Q15 Results

In *UA I*, the Court held that Plaintiffs failed to plead an actionable misstatement during Investor Day or in the Company's statements regarding its 3Q15 results. *See* 342 F. Supp. 3d at 679-82. In the TAC, Plaintiffs claim that Defendants failed to disclose that the Company was "using pull-forward sales and contingent sale[s] pursuant to buyback agreements to maintain a façade of growth." TAC ¶¶ 159(c) & (d), 168(c), (d) & (g). Plaintiffs have not, however, adequately pled even a single contingent sale (let alone one that occurred in 2015), and Defendants were under no duty to disclose entirely legitimate pull in sales. *See supra* Secs. I.A.3.a & I.B. Plaintiffs also claim that alleged GAAP violations rendered the Company's 3Q15 results reporting misleading (TAC ¶ 168(c)), but their GAAP allegations are insufficiently pled and thus do not support this claim. *See supra* Sec. I.A.3. As such, Plaintiffs still have not provided any particularized facts showing that the challenged statements were false when made. *See NECA-IBEW Health & Welfare Fund v. Pitney Bowes Inc.*, 2013 WL 1188050, at *34 (D. Conn. Mar. 23, 2013); *see also UA I*, 342 F. Supp. 3d at 679-82.

2. Alleged Partial Disclosures

Although the Court found that the CAC pled falsity with regard to some statements from 2016 that allegedly "downplayed the negative news about Under Armour's financial condition" following the Morgan Stanley Report, it also held that "[t]here [were] no allegations that the

[19] In *UA II*, the Court reiterated its prior ruling as to falsity. *See* 409 F. Supp. 3d at 457.

actual results reported were inaccurate or false" and that some of the statements in this category were "puffery or corporate optimism." *UA I*, 342 F. Supp. 3d at 682, 685. Neither the TAC's allegations regarding the Company's legitimate pull in sales nor its speculation about contingent sales and GAAP violations changes this analysis.[20]

a. *Accurate Statements of Historical Data*

The TAC challenges numerous statements of the Company's financial data, including:

- Recitations of the Company's quarterly revenues and growth rate. TAC ¶¶ 179 & 182 (4Q15), 197 (1Q16), 225 (2Q16), 257 (3Q16).
- The statement that the Company "ship[ped] product in the first quarter and the second quarter to [TSA]. . . . It is about 300 basis points to 400 basis points of our growth in the back half of the year without shipping to [TSA]. We have made up some of that, but not all of it." TAC ¶ 230.
- Statements concerning changes in inventory levels each quarter between 4Q15 and 3Q16, as compared to the prior year's figures. TAC ¶¶ 177, 195, 235, 256.
- Statements concerning changes in gross margins each quarter. TAC ¶¶ 177, 183-87, 191(i), 195, 208(h), 226, 235, 239, 251, 256, 259.

Because the TAC's GAAP allegations fail (*see supra* Sec. I.A.3), Plaintiffs still have not adequately pled that "the actual results reported were inaccurate or false." *UA I*, 342 F. Supp. 3d at 685; *see also Pub. Sch. Teachers' Pension & Ret. Fund of Chicago v. Ford Motor Co.*, 381 F.3d 563, 570 (6th Cir. 2004) (where plaintiffs "have not alleged the historical inaccuracy of [the Company]'s financial and earnings' statements, such statements are not misrepresentations").

[20] Plaintiffs also again challenge the statement from the 1Q16 10-Q that "we believe that our growth in net revenues has been driven by a growing interest in performance products and the strength of the Under Armour brand in the marketplace." TAC ¶ 206. The Court held that this opinion statement—concerning growth since 2011—was inactionable because the CAC "fail[ed] to adequately allege that [Defendants] did not in fact hold the stated opinions" and "fail[ed] to allege facts about how [Defendants] formed their opinion." *UA I*, 342 F. Supp. 3d at 676 (applying *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 135 S.Ct. 1318 (2015)). The TAC offers no new facts that would alter the Court's holding. Nor does it offer any facts showing that this opinion regarding growth since 2011 was subjectively false when issued by the Company at other times. TAC ¶¶ 189 (FY15), 242 (2Q16), 262 (3Q16).

Plaintiffs also claim it was misleading to disclose this data without also disclosing the pull in sales or explaining that demand "was shifting away from performance products offered by the Company to more fashion-oriented products offered by the Company's competitors, and the Company's brand strength was and had been diminishing since at least spring 2015." TAC ¶ 191(h); *see also* TAC ¶¶ 168(g), 208(d), 208(i), 244(k); 264(g). However, "[t]he disclosure of accurate historical data does not become misleading even if less favorable results might be predictable by the company in the future." *In re Sofamor Danek Grp., Inc.*, 123 F.3d 394, 401 n.3 (6th Cir. 1997); *see also Pipefitters Local No. 636 Defined Benefit Plan v. Tekelec*, 2013 WL 1192004, at *9 (E.D.N.C. Mar. 22, 2013) (similar).

b. *Corporate Optimism ("Puffery")*

In *UA I*, the Court recognized that "[i]ndefinite statements of corporate optimism, also known as puffery, are generally non-actionable, as they do not demonstrate falsity." 342 F. Supp. 3d at 676. The Court identified "[s]tatements such as 'demand for our product have never been stronger'" as "typical" inactionable puffery. *Id.* at 680. The TAC again challenges many of these "typical" puffing statements concerning the strength of the Company's business, its "growth story," and demand. *E.g.*, TAC ¶¶ 153, 155, 156, 161, 179, 185, 197, 199, 236-38, 257-58. These allegations fail. *See Timberland*, 2013 WL 1314426, at *16 ("cheerleading commentaries" regarding accurate financial results were not rendered actionable by alleged use of pull in sales); *Cytyc*, 2005 WL 3801468, at *21-22 (similar).[21]

[21] Many of these puffing statements are also inactionable opinion statements. *E.g.*, TAC ¶ 199 ("I think [1Q16 growth of 30%] is something that just continues to demonstrate the strength of the brand and how strong our portfolio ultimately is"). Plaintiffs allege that these statements were contradicted by internal data and the supposedly improper sales practices, but Plaintiffs never identify any actual contradictory internal data, and there is nothing about the Company's pull in sales (which are never quantified for any quarter in the TAC) that would suggest that the speaker did not honestly hold the stated opinions. *See UA I*, 342 F. Supp. 3d at 676 & n.13.

3. Statements Regarding Financial Outlook for 2016

The Court held that while the CAC pled falsity with respect to some of the challenged statements regarding the Company's 2016 outlook, others may have been forward-looking statements protected by the PSLRA's safe harbors. *See UA I*, 342 F. Supp. 3d at 685-89. The TAC challenges numerous forward-looking statements, including the Company's financial projections. TAC ¶¶ 163, 184-85, 187, 192-93, 198, 215, 229, 231, 251-53, 267, 270, 273-74, 278, 304. These statements are inactionable. *See* 15 U.S.C. § 78u-5(i)(1)(A)-(D); *Raab v. Gen. Physics Corp.*, 4 F.3d 286, 290 (4th Cir. 1993) ("projections of future performance not worded as guarantees are generally not actionable under the federal securities laws."). In particular, they qualify for protection under the PSLRA's safe harbors, which "immunize any forward-looking statement provided that either it is accompanied by meaningful cautionary statements . . . or the plaintiff fails to prove the forward-looking statement . . . was made with actual knowledge . . . that the statement was false or misleading." *OFI Asset Mgmt. v. Cooper Tire & Rubber Co.*, 834 F.3d 481, 502 (3d Cir. 2016). Here, both safe harbors apply.

The first safe harbor bars liability if a forward-looking statement is "accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement[s]." 15 U.S.C. § 78u-5(c)(1)(A)(i); *see also Elec. Workers Pension Tr. Fund of IBEW Local Union No. 58 v. CommScope, Inc.*, 2013 WL 4014978, at *11 (W.D.N.C. Aug. 6, 2013) ("[A]ll [defendants] need do is provide meaningful, cautionary language—nothing less, nothing more."). Because all defendants need to do is identify factors that "could" cause actual results to differ from projections, no liability will attach even if "the particular factor that ultimately cause[d] the forward-looking statement not to come true" was not disclosed. *Karacand v. Edwards*, 53 F. Supp. 2d 1236, 1243 (D. Utah 1999).

Here, the Company's SEC filings described the specific risk factors that could cause

actual results to differ from projections. *E.g.*, 10/22/15 8-K, Ex. 99.1 at 3.[22] In particular, the Company's FY14 and FY15 10-Ks cautioned that "[s]ales of performance products may not continue to grow and this could adversely impact [the Company's] ability to grow [its] business." 2/20/15 10-K at 11; 2/22/16 10-K at 11. The Company further explained:

> If consumers are not convinced [performance] products are a better choice than traditional alternatives, growth in the industry and our business could be adversely affected. . . . If industry-wide sales of performance products do not grow, our ability to continue to grow our business and our financial condition . . . could be materially adversely impacted.

2/20/15 10-K at 11; 2/22/16 10-K at 11. The Company also warned investors that it might not meet guidance if it could not "effectively develop and launch new, innovative and updated products" or "accurately forecast consumer demand for [its] products and manage [its] inventory in response to changing demands." *E.g.*, 10/22/15 8-K, Ex. 99.1 at 3; *see also* 2/20/15 10-K at 10; 2/22/16 10-K at 10. It also noted that "[i]nventory levels in excess of customer demand may result in . . . the sale of excess inventory at discounted prices, which could impair [its] brand image and have an adverse effect on gross margin." 2/20/15 10-K at 10; 2/22/16 10-K at 11.

These meaningful warnings were more than sufficient to invoke the first PSLRA safe harbor. *See Plymouth Cnty. Ret. Ass'n v. Primo Water Corp.*, 966 F. Supp. 2d 525, 550 (M.D.N.C. 2013); *In re Humphrey Hosp. Tr., Inc. Sec. Litig.*, 219 F. Supp. 2d 675, 683 (D. Md. 2002). That the Company did not also specifically disclose pull in sales (*e.g.*, TAC ¶ 194(b)-(d)) does not render these meaningful warnings inadequate. *See Sawtek*, 2005 WL 2465041, at *11 (rejecting allegations that cautionary language was not meaningful because it "omitted to disclose Sawtek's . . . pull-in's [and] push-out's"); *see also Karacand*, 53 F. Supp. 2d at 1243.

The challenged forward-looking statements are also protected by the second safe harbor,

[22] *See also* 3/4/16 8-K, Ex. 99.1 at 1-2; 4/21/16 8-K, Ex. 99.1 at 3; 1/28/16 Call Tr. at 1; 7/26/16 Call Tr. at 1; 10/25/16 Call Tr. at 1.

which immunizes forward-looking statements (even without cautionary language) unless the complaint pleads specific facts showing the speaker had "actual knowledge" that a statement was false. *See* 15 U.S.C. § 78u-5(c)(1)(B). "Actual knowledge" must be pled with particularity (*see id.* § 78u-4(b)(2)(A)), and allegations of recklessness "[are] insufficient." *In re Synchronoss Sec. Litig.*, 705 F. Supp. 2d 367, 402 (D.N.J. 2010). As detailed above (*see supra* Sec. II), Plaintiffs have not adequately pled that Defendants had "actual knowledge" that the challenged projections were "false when made." *Primo Water*, 966 F. Supp. 2d at 549.

4. Statements Taken Out of Context

Plaintiffs challenge Mr. Plank's statement in April 2016 that the Company was "driving massive growth" and "taking share" because, according to Plaintiffs, "growth and market share were falling as a result of the Company's apparel sales declines." TAC ¶¶ 200, 208(f) (emphasis omitted). However, this statement specifically concerned the Company's footwear business: "I think the 64% growth that we've demonstrated in the quarter, it demonstrates the diversity that we have as a brand today across Footwear. And again, we are to be clear driving massive growth, and we are taking share." 4/21/16 Call Tr. at 10. Plaintiffs admit that the Company "expand[ed] [its] footwear . . . business[]" during the Class Period. TAC ¶ 77.

The TAC also alleges that the statement in the 1Q16 10-Q that "[t]he increase in net sales [during 1Q16] was driven primarily by: Apparel unit sales growth and new offerings in multiple lines led by training and golf" was misleading because of the Company's pull in sales and because it later became apparent that "demand was shifting away from performance products offered by the Company." TAC ¶¶ 206, 208(d). As noted in *UA I*, the statement "included additional wording that [the CAC] omitted, and the full statement was back[ed] by numbers supporting the truth of the statement." 342 F. Supp. 3d at 677.

B. New Falsity Allegations in the TAC

The TAC also attempts to extend the Class Period alleged in the CAC and SAC by challenging a handful of statements in the thirty-three month period between January 31, 2017 and November 1, 2019. TAC ¶¶ 269-71, 282, 289-90, 300-04, 310-11, 315, 317. However, Plaintiffs have not adequately pled any actionable misstatements or omissions during this period.

1. Failure to Plead Falsity

Many of Plaintiffs' allegations regarding statements made by Defendants during this extended period fail for the same reasons as Plaintiffs' allegations from the earlier period.

For example, Plaintiffs challenge statements from the Company's January 31, 2017 earnings call regarding 4Q16 results, including statements explaining that, compared to 4Q15, "total [4Q16] revenue was up 12%," "sales to wholesale customers were up 5%," and "North American revenues . . . increased 6%." TAC ¶ 282; *see also* TAC ¶¶ 266, 272. The TAC also challenges the results reported for 1Q17 and 2Q17. TAC ¶¶ 289, 300. However, Plaintiffs offer no basis to conclude that the accurate historical data reported by the Company was false. *See Ford*, 381 F.3d at 570; *Sofamor Danek*, 123 F.3d 394 at 401 n.3; *see also supra* Sec. III.A.2.a.[23]

Plaintiffs also challenge statements in 2017 and 2018 supposedly touting the Company's "incredible brand strength," "rapid growth," and "growth strategy." TAC ¶¶ 282, 310. These statements are classic, inactionable puffery. *See Timberland*, 2013 WL 1314426, at *16; *Cytyc*, 2005 WL 3801468, at *21-22; *see also supra* Sec. III.A.2.b.

Finally, Plaintiffs cite the Company's forward-looking 2017 guidance, issued when the Company announced 4Q16 and 2Q17 results. TAC ¶¶ 267, 273-74, 278, 304. These projections

[23] Plaintiffs also assert that Mr. Plank's statement that inventory levels were "appropriate" during the Company's 1Q17 earnings call was misleading (TAC ¶ 291), but they concede that inventory levels grew in line with sales growth (TAC ¶ 289 (revenue growth of 7% and inventory growth of 8%)), and therefore in line with projections (TAC ¶ 274 (projecting inventory growth to be higher than revenue growth "for the first three quarters of 2017").

are indisputably forward-looking statements. Not only have Plaintiffs failed to plead any facts suggesting that Defendants did not believe they could achieve the projections, but the statements were also accompanied by meaningful cautionary language. *See, e.g.*, 1/31/17 8-K, Ex. 99.1 at 4 (noting that future results may vary from expectations due to, among other things, "our ability to effectively manage our growth . . . ; increased competition causing us to lose market share or reduce the prices of our products or to increase significantly our marketing efforts, which can impact our profitability and growth; . . . our ability to effectively develop and launch new, innovative and updated products; our ability to accurately forecast consumer demand for our products and manage our inventory in response to changing demands."); 8/1/17 8-K, Ex. 99.1 at 4 (similar). These projections thus qualify for both PSLRA safe harbors. *See supra* Sec. III.A.3.

2. No Actionable Omissions

Plaintiffs also assert that Defendants' statements between January 2017 and November 2019 were misleading because Defendants failed to disclose (i) the Company's supposedly improper sales practices in 2015 and 2016; and (ii) beginning in July 2017, the existence of the SEC and DOJ investigations. Neither theory has merit.

First, Defendants were under no duty to disclose its past use of pull in sales in statements between 2017 and 2019. According to Plaintiffs, Defendants misled the market by attributing the Company's 4Q16 and FY16 results to "challenges in [the] North American business," customer bankruptcies, "poor product assortment," "slower traffic," and "significant promotional activities" without also disclosing the purported impact of allegedly improper sales practices in 2015 and 2016. TAC ¶¶ 269-71, 283.[24] Plaintiffs also claim that Defendants "continued to

[24] Plaintiffs also allege that Defendants failed to disclose that apparel products "had been suffering from reduced consumer appeal" and that the Company was "pursuing high volume low priced sales." TAC ¶ 283(a)-(b). However, as Plaintiffs concede, the Company disclosed (i) the impacts of discounting and promotions on 2016 results, and (ii) that it "need[ed] to become more

mislead the market" by failing to disclose the impact of those practices when discussing the Company's 1Q17 and 2Q17 results (TAC ¶¶ 289-91, 300); restructuring efforts, announced in August 2017 (TAC ¶¶ 301-04); and historical growth on Investor Day 2018 (TAC ¶¶ 310, 315).

Defendants had no obligation to disclose any improper channel stuffing, as Plaintiffs do not adequately plead that any such activity occurred. *See PEC Sols.*, 2004 WL 1854202, at *6; *see also supra* Sec. I. And, because Defendants were not required to contemporaneously disclose legitimate pull in sales when discussing the Company's 2015 and 2016 results (*see supra* Sec. I.B), they certainly were not required to disclose those sales when later discussing those results. Nor were Defendants required to blame the Company's past pull in sales for the deceleration in the Company's growth rate or its inventory levels in 2017 and 2018. TAC ¶¶ 291, 311. Plaintiffs repeatedly claim in conclusory fashion that the Company was "still grappling with the consequences" and "ramifications" of pull in sales in 2017 (TAC ¶¶ 291, 311), but they do not offer any basis to accept their assumption that it was past sales practices that drove the Company's 2017 and 2018 performance, as opposed to the various factors that the Company disclosed. TAC ¶¶ 269-73, 275, 300-04; *see also In re Cerner Corp. Sec. Litig.*, 425 F.3d 1079, 1084 (8th Cir. 2005) (channel stuffing allegations failed where the complaint failed to quantify impact of alleged improper sales practices on later periods).

Second, Defendants had no obligation to disclose the SEC and DOJ investigations during the Class Period. "[A] government investigation, without more, does not trigger a generalized duty to disclose." *Lewis v. YRC Worldwide Inc.*, 2020 WL 1493915, at *10 (N.D.N.Y. Mar. 27, 2020); *see also In re Dell Inc., Sec. Litig.*, 591 F. Supp. 2d 877, 911 n.4 (W.D. Tex. 2008) (no duty to disclose SEC investigation into accounting practices). Disclosure is mandated "only

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fashionable" and that "higher demand for more lifestyle silhouettes caused [the Company] to be out of balance with its assortment" in 2016. TAC ¶¶ 269-76.

[w]hen the regulatory investigation matures to the point where litigation is apparent and substantially certain to occur." *In re Barclays Bank PLC Sec. Litig.*, 2017 WL 4082305, at *17 (S.D.N.Y. Sept. 13, 2017). The TAC does not plead any facts suggesting either investigation reached that stage during the Class Period. Indeed, in *Lions Gate*, 165 F. Supp. 3d at 12, the court held that there was no duty to disclose an SEC investigation even after the defendants received Wells Notices (which, as Plaintiffs admit, did not occur here until after the Class Period (TAC ¶ 95)). *See also UA III*, 2020 WL 363411, at *8 ("This Court does not suggest that Under Armour failed to uphold a duty to disclose the existence of this investigation.").[25]

IV. THE CONTROL PERSON CLAIM (COUNT II) AND THE SECTION 20A CLAIM (COUNT III) SHOULD BE DISMISSED

Count II of the TAC, which asserts control person liability claims against the Company and Mr. Plank under Section 20(a) of the Exchange Act, should be dismissed because Plaintiffs fail to adequately "allege a predicate violation of Section 10(b)." *UA II*, 409 F. Supp. 3d at 463. The same holds true for the Section 20A claim. *See id.* ("a [Section] 20A claim must contain a well-pled predicate violation of the Exchange Act.").

CONCLUSION

For these reasons, the TAC should be dismissed with prejudice in its entirety pursuant to Rules 9(b) and 12(b)(6) of the Federal Rules of Civil Procedure and the PSLRA.

[25] Plaintiffs also challenge announcements of executive departures in April and May 2019 and Mr. Plank's title change in October 2019 (TAC ¶¶ 316-17) but do not identify any statements in those announcements that were rendered misleading due to the omission of the investigations or past sales practices. *See PEC Sols.*, 2004 WL 1854202, at *9 (rejecting falsity allegations where plaintiffs "fail[ed] to identify the specific statements that [we]re allegedly misleading").

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Respectfully submitted,

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