UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JONATHAN STUDEN, Plaintiff, v. FUNKO, INC., et al., Defendants.	CASE NO. C23-0824JLR ORDER

I. INTRODUCTION

Before the court is Defendants Funko, Inc. ("Funko"), Andrew Perlmutter, and Jennifer Fall Jung's (Mr. Perlmutter and Ms. Jung together, the "Executive Defendants," and collectively, "Defendants") motion to dismiss the amended complaint. (MTD (Dkt. # 39); MTD Reply (Dkt. # 50); Request (Dkt. # 41); Request Reply (Dkt. # 51); *see also* Am. Compl. (Dkt. # 38).) Lead plaintiff Construction Laborers Pension Trust of Greater St. Louis (the "Pension Trust") and named plaintiff Paul Haddock (together, "Plaintiffs") oppose the motion. (MTD Resp. (Dkt. # 47); *see also* Request Resp. (Dkt. # 46).) The court has considered the motion, the parties' submissions in support of and in opposition to the motion, the applicable law, and the relevant portions of the record. Being fully advised,[1] the court GRANTS Defendants' motion to dismiss.

II. BACKGROUND

Plaintiffs bring this putative securities fraud class action on behalf of investors who purchased or otherwise acquired shares of Funko Class A common stock between March 3, 2022, through March 1, 2023, inclusive (the "Proposed Class Period"). (*See* Am. Compl. ¶¶ 1-2.) Plaintiffs allege that, during the Proposed Class Period, two of Funko's former executive officers, Mr. Perlmutter (Chief Executive Officer ("CEO")) and Ms. Jung (Chief Financial Officer ("CFO")), made "reckless and materially false and misleading statements [and omissions] to investors concerning Funko's abysmal execution of two highly touted infrastructure projects and its accumulation of excess and obsolete inventory." (*Id.* ¶ 2.) Plaintiffs further allege that Defendants' conduct artificially inflated the price of Funko's Class A stock, and when the true extent of Funko's floundering business initiatives came to light, "the price of Funko Class A stock significantly dropped," causing substantial losses to the putative class. (*Id.* ¶¶ 159-60.)

Below, the court sets forth the factual background as pleaded by Plaintiffs before turning to the relevant procedural history.[2]

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[1] No party requests oral argument (*see* MTD at 1; MTD Resp. at 1), and the court determines that oral argument would not aid in its disposition of the motion. *See* Local Rules W.D. Wash. LCR 7(b)(4).

[2] Defendants request judicial notice of certain exhibits pursuant to Federal Rule of Evidence 201 and the incorporation by reference doctrine. (*See generally* Request.) Plaintiffs

A. Funko and its Business

Funko[3] is a publicly-traded company headquartered in Everett, Washington that designs, produces, and sells consumer pop culture products, "including vinyl figures, apparel and accessories, board games," and more, "using licensed pop culture content related to movies, TV shows, video games, musicians and sports teams." (*Id.* ¶ 27.) Funko is particularly well-known for its flagship collectible "FunkoPop!" vinyl figures, which depict stylized pop culture characters based on licensed content from various media companies like Disney, Marvel, and HBO, among others. (*Id.* ¶¶ 3, 32-33.)

Funko has an "extensive licensing portfolio" that "is critical to its business model." (*Id.* ¶ 37.) Some Funko products—like Star Wars Classic and Harry Potter—are "not tied to a new or current release" and thus "do not have a defined duration of market demand." (*Id.* ¶ 35.) Meanwhile, other Funko products "are intended to 'capitalize on the excitement of fans surrounding the launch of new content' and have a limited duration of market demand depending on how popular the content ultimately proves." (*Id.*) During the Proposed Class Period, Funko's licensing agreements typically granted it rights to use the licensor's intellectual property for a discrete time period in exchange

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dispute only Exhibits 10 and 15. (*See* Request Resp. at 1.) The court agrees with the parties that Defendants' Exhibits 2 through 9, 11 through 14, and 16 through 18, are properly subject to judicial notice for the reasons explained in Defendants' briefing, and the court therefore takes judicial notice of these exhibits. (*See generally* McDonough Decl. (Dkt. # 40) ¶¶ 3-10, 12-15, 17-19 & Exs. 2-9, 11-14, 16-18.) The court addresses the disputed Exhibits 10 and 15 *infra*.

[3] Funko, Inc. is a holding company that was incorporated in 2017 for the purpose of completing an initial public offering in connection with Funko Acquisition Holdings LLC and its subsidiaries. (Am. Compl. ¶ 27.) Funko Acquisition Holdings LLC owns 100% of Funko, LLC, Funko's operating entity. (*Id.*) The court refers to these entities collectively as "Funko" for purposes of the instant motion.

for guaranteed minimum royalty payments. (*Id.* ¶ 37.) The contracts also provided "that the licensors owned the intellectual property rights in the products Funko designed and sold under the license, such that upon termination of those licenses, Funko no longer had the right to sell those products." (*Id.* ¶ 38.) Funko refers to products that it cannot sell due to expired licenses or lack of consumer demand as "dead" inventory. (*Id.*) In general, Funko's business model requires an ability "to quickly design, manufacture and ship" products, as well as "accurate demand forecasting and inventory management" to achieve optimal financial outcomes. (*Id.* ¶¶ 40-41.) Otherwise, the accumulation of excess dead inventory can cause Funko to lose revenue and miss financial targets. (*Id.* ¶ 42.) In 2019, for example, Funko was forced to write down $16.8 million in unsellable inventory that had accumulated in its Washington warehouses, leading to a stock price drop and subsequent securities fraud litigation that ultimately settled for $7 million. (*Id.* ¶¶ 42, 155.)

In recent years, Funko has "invest[ed] significantly in upgraded infrastructure" to facilitate the company's "impressive growth trajectory." (*Id.* ¶¶ 3-4.) Two such projects lie at the core of Plaintiffs' claims in this case: (1) the upgrade of Funko's enterprise resource planning ("ERP") software to Oracle, a more sophisticated platform (the "Oracle Project"); and (2) the relocation and consolidation of Funko's five Washington warehouses into a single "state-of-the-art" distribution center ("DC") in Buckeye, Arizona (the "Buckeye Project"). (*See id.* ¶¶ 4-21.)

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B. The Projects and the Alleged Fraud

In 2020, Funko decided to upgrade its ERP software from Microsoft NAV to Oracle. (*Id.* ¶ 47.) Funko's ERP system is the central information system and database that allows Funko to track its inventory and operations. (*See id.* ¶¶ 4, 6, 45.) Launching a new ERP system was a "massive endeavor" that was "manually intensive," and took longer than anticipated. (*Id.* ¶¶ 48, 51.) As Plaintiffs explain, "[i]n order for Oracle to be effective, Funko needed to 'clean' the Company's existing data so that it could be transferred to Oracle properly." (*Id.* ¶ 50.) But "Funko's data was a mess" due in large part to a lack of data governance, i.e., the "controls and processes for who creates certain data and how it should be entered into the system." (*Id.* ¶ 51.) Other issues hindered progress, too, including "deep rifts among Funko senior leadership," who "could not get 'aligned'" on "critical systems architecture decisions." (*Id.* ¶ 53.) By spring 2021, Chief Operating Officer ("COO") Joe Sansone stepped in, overseeing the project himself. (*Id.* ¶ 48.) By early 2022, however, "it was clear to employees across the Company's various departments that the Oracle project was far from being able to launch by" the targeted deadline of either "end of 2Q22 or early 3Q22." (*Id.* ¶¶ 8, 54.)

Against this backdrop, Funko also endeavored to launch the Buckeye DC—a brand new 860,000 square foot facility that would house Funko's retail operations in the United States. (*Id.* ¶¶ 55-57.) Funko signed the Buckeye lease in September 2021 and began the lease term in April 2022. (*Id.* ¶¶ 7, 57.) "Funko planned for the Buckeye DC to operate on its new Oracle platform's warehouse management software" ("WMS"), which would employ "analytics and various inventory tracking tools to greatly enhance the efficiency and productivity of Funko's order fulfillment and distribution operations." (*Id.* ¶ 6.) The Buckeye warehouse, however, was "a largely blank slate," requiring Funko "to build out the needed storage racks, office space, loading bays, and even bathrooms." (*Id.* ¶ 7.) Funko would also have to ship the "substantial" amount of "inventory in its Washington warehouses down to Buckeye," where the products would be processed, organized, and stored. (*Id.*) In short, the Buckeye DC would require significant planning and preparation to launch, and because it was intended to run on Oracle, its success was intertwined with that of the Oracle Project.

On March 3, 2022—the first day of Plaintiffs' Proposed Class Period—Defendants touted Funko's "exceptional revenue growth" in 2021 and offered optimistic revenue projections for 2022, despite "higher-than-normal" Selling, General and Administrative ("SG&A") expenses "due to the Oracle implementation and Buckeye DC opening during the first half of the year." (*Id.* ¶ 61.) Meanwhile, Plaintiffs allege "it was clear that the Company's infrastructure projects were nowhere close to being completed (or their costs accrued) by the deadlines" that Defendants promised. (*Id.* ¶ 64.) Indeed, the Buckeye DC was neither fully built nor fully staffed, and the Oracle WMS was not yet ready for use. (*Id.* ¶¶ 65-67.)

Nevertheless, Buckeye "opened" on April 4, 2022, and new employee training started in late April. (*Id.* ¶ 66.) Trucks began arriving from Washington, though Buckeye was "wholly unprepared for the onslaught of inventory"—including large quantities of dead inventory that Funko's Vice President ("VP") of Operations had opted to ship to Buckeye rather than discard. (*Id.* ¶¶ 68-70, 76.) Issues quickly ensued. For example, "none of the product was scanned in electronically so that its location [could] be tracked within the enormous DC" (*id.* ¶ 70), and it became apparent that "trailers were missing product, had extra product, or contained entirely different product" than expected (*id.* ¶ 71). As storage racks filled up, inventory was strewn about the DC "without any particular organization or identification." (*Id.* ¶ 75.) That Buckeye was operating on Microsoft NAV rather than Oracle was also "causing major disruption," as "the antiquated NAV system couldn't handle the workload of the new consolidated warehouse" and "frequently experienced system errors." (*Id.* ¶¶ 73-74.) Consequently, "order fulfillment began to get backed up." (*Id.* ¶ 75.)

On May 5, 2022, Defendants announced Funko's first quarter financial results. (*Id.* ¶ 79.) Inventory levels were "up 160.8% over the prior year," which Defendants explained was due in part to "pandemic-related supply chain disruptions." (*Id.*) Funko's anticipated revenue margins remained consistent with the previous quarter, reflecting "one-time project spend associated with" the Projects. (*Id.*) On an earnings call that day, Ms. Jung remained optimistic about year-end financial projections, noting that SG&A costs would be concentrated in the first half of the year as Buckeye had just launched and Oracle was "set" to launch "at the end of the quarter." (*Id.* ¶ 80.)

Despite this sunny forecast, "[b]y June, the chaos at the Buckeye warehouse had only increased." (*Id.* ¶ 84.) Oracle still had not launched, and Buckeye still was not fully built out or properly staffed. (*Id.*) Mr. Sansone "began appearing at Buckeye regularly, spending at least one or two weeks per month at the warehouse," having meetings with senior management "about the DC and walking the floor speaking with warehouse employees trying to solve immediate problems." (*Id.* ¶ 84.) "The chaos increased exponentially at the end of the month, when shipping containers that had been held up in transit during the COVID-19-related freight slowdowns and port delays . . . finally started to arrive with additional inventory." (*Id.* ¶ 85.) Funko incurred rental charges and late penalties for hundreds of shipping containers that began accumulating in the parking lot, where they sat until space inside the DC became available to store the inventory. (*Id.*)

On August 4, 2022, Defendants announced Funko's second quarter financial results. (*Id.* ¶ 86.) This included increased SG&A expenses and inventory levels compared to the same quarter in 2021, reflecting Project-related costs and receipt of delayed inventory at Buckeye. (*Id.*) Anticipated revenue margins remained steady, though Funko also expected "personnel and related costs to remain elevated" through the end of the year in connection with "the final transitions of our U.S. distribution warehouses," as well as "elevated costs related to our [ERP] implementation" which would be "finalize[d] in early 2023." (*Id.* ¶ 87.) On an earnings call the same day, Ms. Jung confirmed that Funko had "recently made the difficult decision to delay" Oracle implementation until 2023, so as not to impair existing "momentum." (*Id.* ¶ 88.) Regarding inventory, Ms. Jung stated her belief that inventory was "generally high quality" and that Funko was "well positioned to meet our consumer demand and support our strong second half growth forecast." (*Id.* ¶ 89.) Following the earnings call, Funko's Class A share price declined by $4.88, closing at $21.81 on August 5, 2022. (*Id.* ¶ 90.)

Back at Buckeye, the situation continued to devolve. By August, the DC was more than 50 days behind in fulfilling backlogged orders. (*Id.* ¶ 91.) The DC was not operating efficiently, with disorganized and overflowing inventory clogging the warehouse, conveyer belt systems still under construction, and "constant battle[s] between warehouse departments" to use what little equipment was available to reach product on the top shelves. (*Id.* ¶ 92.) The lack of order fulfillment capabilities began impacting forward sales. (*Id.* ¶ 91.) Sales team members struggled to meet quotas due to missing product, "artificial product shortages arising from the inability to unload containers," and order cancellations prompted by extreme shipping delays. (*Id.* ¶ 93.)

On September 13, 2022, Defendants held a Funko Investor Day. (*Id.* ¶ 94.) Ms. Jung touted Funko's strategy to meet optimistic revenue targets for 2026, representing that the new DC and forthcoming Oracle launch would "provide increased operational efficiencies." (*Id.*) When asked about future investments, Ms. Jung responded that "more distribution capabilities" would be necessary to support continuing growth, but that was "more of a future down the road within the 5-year plan, but not directly related within the next, call it, 12 months or so." (*Id.*) Within weeks of Investor Day, however, Funko hired a third-party logistics company to store slow-moving and dead inventory in a warehouse. (*Id.* ¶ 95.) That warehouse filled to capacity within months, prompting Funko to rent a second warehouse. (*Id.*)

On November 3, 2022, Funko announced disappointing third quarter results, revising its financial guidance for 2022 in stark contrast to the optimistic projections made on Investor Day. (*Id.* ¶ 97.) Sales were up, but SG&A expenses remained elevated and would grow even more in the fourth quarter, contributing to significantly reduced revenue margins. (*Id.* ¶¶ 97, 99.) SG&A expenses reflected considerable labor costs and costs related to third-party warehouse storage. (*Id.* ¶ 99.) Mr. Perlmutter admitted on the ensuing earnings call that Buckeye had been designed to run on Oracle and that the facility opened before it was ready. (*Id.*) Although inventory levels were high, Ms. Jung remained steadfast that "inventory 'was generally high quality.'" (*Id.* ¶ 100.)

Following the third quarter announcement, one analyst stated it felt "like we were hit with a bomb." (*Id.* ¶ 102.) Funko's stock dropped 59%—closing at $7.92 per share on November 4, 2022. (*Id.* ¶ 103.) On December 5, 2022, Funko announced leadership changes. (*Id.* ¶ 104.) Mr. Perlmutter was demoted from CEO to President, and Ms. Jung "stepp[ed] down" as CFO, effective immediately. (*Id.*)

On March 1, 2023—the last day of the Proposed Class Period—Funko announced its fourth quarter and year-end results for 2022. (*Id.* ¶ 105.) Net income and adjusted revenue margins decreased substantially compared to the prior year. (*Id.* ¶ 106.) Funko disclosed the decision to abandon the Oracle Project entirely, taking a $32.5 million write down of associated costs. (*Id.*) Funko also disclosed its intention to eliminate and write down between $30 million and $36 million in inventory in the first half of 2023. (*Id.*) Funko's Class A stock price closed at $9.94 per share on March 2, 2023, down from a prior day close of $10.70.

C. Procedural History

Former named plaintiff Jonathan Studen filed the original putative class action complaint in this matter on June 2, 2023. (*See generally* Compl. (Dkt. # 1).) Mr. Studen issued notice to the putative class pursuant to the Private Securities Litigation Reform Act of 1995 ("PSLRA"), 15 U.S.C. § 78u-4 *et seq.* (6/27/23 Order (Dkt. # 5) at 2.) On

August 1, 2023, Mr. Studen, the Pension Trust, and Mr. Haddock filed motions seeking appointment as lead plaintiff. (*See generally* Studen Mot. (Dkt. # 20); Pension Mot. (Dkt. # 22); Haddock Mot. (Dkt. # 24).) Mr. Studen and Mr. Haddock are individual class members, and the Pension Trust "is a multi-employer defined pension plan with approximately $1 billion in assets under management," including Funko Class A stock. (Am. Compl. ¶¶ 25-26; Compl. ¶ 18.) The court granted the Pension Trust's motion and appointed it as lead plaintiff on August 17, 2023. (8/17/23 Order (Dkt. # 29).)

The Pension Trust timely filed the amended complaint on October 19, 2023, asserting claims for violations of Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 (the "1934 Exchange Act"), 15 U.S.C. §§ 78j(b), 78t(a), and Rule 10b-5, 17 C.F.R. § 240.10b-5.[4] (Am. Compl. ¶¶ 190-204.) In the amended complaint, Plaintiffs allege the Executive Defendants were deeply involved in the Projects; knew, or were at least deliberately reckless, about the flailing infrastructure initiatives; and fraudulently concealed the truth from investors. (*See id.* ¶ 2.) Specifically, Plaintiffs identify 28 allegedly false or misleading statements made by Defendants throughout the Proposed Class Period, claiming these statements misled investors about the extent of the chaos unfolding at Buckeye, the health of Funko's inventory, the status of the Oracle Project, and Funko's overall financial outlook. (*See id.* ¶¶ 114-146.) Defendants timely moved to

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[4] The amended complaint does not name Mr. Studen. (*See generally* Am. Compl.) Therefore, the court directs the parties to state whether they object to amending the caption of this matter to name the Pension Trust and Mr. Haddock as Plaintiffs. (*See infra* Part IV.)

dismiss the amended complaint, and the motion is now ripe for decision. (*See generally* MTD.)

III. ANALYSIS

The court sets forth the relevant legal standard before addressing certain threshold procedural matters and then, the merits.

A. Legal Standard

To survive a motion to dismiss, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *see also* Fed. R. Civ. P. 8(a)(2) (requiring "a short and plain statement of the claim showing that the pleader is entitled to relief"). The court must accept all factual allegations in the complaint as true and construe the pleadings in the light most favorable to the plaintiff, but it need not "accept as true allegations that contradict matters properly subject to judicial notice or by exhibit," or "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008).

Securities fraud claims must also meet the more "exacting" pleading requirements of Federal Rule of Civil Procedure 9(b) and the PSLRA. *Or. Pub. Emps. Ret. Fund v. Apollo Grp. Inc.*, 774 F.3d 598, 604 (9th Cir. 2014). Rule 9(b) requires a plaintiff to "state with particularity the circumstances constituting fraud." Fed. R. Civ. P. 9(b). "That is, the complaint must allege the 'who, what, when, where, and how' of the fraud." *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 1008 (9th Cir. 2018) (quoting *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003)). Under the PSLRA, 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 or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed," 15 U.S.C. § 78u-4(b)(1)(B), and the complaint must also "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind," *id.* § 78u-4(b)(2)(A). *See id.* § 78u-4(b)(3)(A) (mandating dismissal on defendant's motion where the complaint fails to meet these requirements).

B. Preliminary Matters

Before examining the merits, the court must address threshold procedural matters.

First, Plaintiffs move to strike Defendants' Appendix A, asserting it is argumentative and an improper attempt to bypass applicable word limits. (MTD Resp. at 7; *see also* McDonough Decl. ¶ 2, Ex. 1 ("Appendix A")); Local Rules W.D. Wash. LCR 7(e)(3) (imposing 8,400-word limit on motions to dismiss). Appendix A is a chart created by Defendants that identifies (1) the 28 allegedly fraudulent statements at issue, (2) additional text "denot[ing] surrounding context that is omitted from the [amended complaint]," and (3) citations to Defendants' arguments, as set forth in their motion to dismiss, with respect to each challenged statement. (Appendix A at 1.) Plaintiffs ask the court to consider their responsive chart should it decline to strike Appendix A. (MTD Resp. at 7; *see also id.* at Ex. A ("Responsive Chart").) The court agrees with Defendants that Appendix A comprises "organizational work that the Court would otherwise have to take upon itself," and therefore declines to strike it. (MTD Reply at 2 (quoting *Waswick* *v. Torrid Holdings, Inc.*, No. 2:22-cv-08375-JLS-AS, 2023 WL 9197563, at *3 (C.D. Cal. Dec. 1, 2023)).) The court will consider both Defendants' Appendix A and Plaintiffs' Responsive Chart.

Second, Defendants ask the court to judicially notice their Exhibits 10 and 15 pursuant to Federal Rule of Evidence 201. (Request at 3); *see also* Fed. R. Evid. 201(b)(1)-(2) (authorizing judicial notice of adjudicative facts that are "not subject to reasonable dispute" and (1) are generally known within the court's jurisdiction, or (2) "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned"). Exhibit 10 is Funko's Form 8-K, filed with the Securities and Exchange Commission ("SEC") on December 5, 2022. (*See generally* McDonough Decl. ¶ 11, Ex. 10.) Exhibit 15 "is a PowerPoint slide deck that Defendants displayed and referred to during a September 13, 2022 'Analyst/Investor Day' conference," and "is publicly available on Funko's website." (Request at 4. *See generally* McDonough Decl. ¶ 16, Ex. 15 ("Investor Day Deck").) Plaintiffs oppose Defendants' request, arguing the exhibits at issue "are subject to reasonable dispute" and that it would be improper to accept their contents as true. (Request Resp. at 4.)

Under Federal Rule of Evidence 201(b), courts may take judicial notice of publicly available documents "introduced to 'indicate what was in the public realm at the time, not whether the contents of those [documents] were in fact true.'" *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 960 (9th Cir. 2010) (quoting *Premier Growth Fund v. All. Cap. Mgmt.*, 435 F.3d 396, 401 n.15 (3d Cir. 2006)). Accordingly, the court will take judicial notice of Exhibits 10 and 15 not for the truth of their contents, but for the narrow purpose of considering the representations made and information available to investors during the Proposed Class Period. *See, e.g.*, *In re Zillow Grp., Inc. Sec. Litig.*, No. C17-1387JCC, 2018 WL 4735711, at *3 (W.D. Wash. Oct. 2, 2018) (taking "judicial notice of the fact that Zillow filed the June 2018 Form 8-K, as well as of that document's contents," but declining to accept the form's contents as true); *Kipling v. Flex Ltd.*, No. 18-CV-02706-LHK, 2020 WL 7261314, at *7 (N.D. Cal. Dec. 10, 2020) (taking judicial notice of public documents including "transcripts from earnings calls, investor and analyst conferences, and related presentations . . . 'for the sole purpose of determining what representations [Defendants] made to the market'" (quoting *Wochos v. Tesla, Inc.*, No. 17-cv-05828-CRB, 2018 WL 4076437, at *2 (N.D. Cal. Aug. 27, 2018))).

The court now turns to the merits.

C. Plaintiffs' Claims Under Section 10(b)

Section 10(b) of the 1934 Exchange Act makes it unlawful for "any person . . . [t]o use or employ, in connection with the purchase or sale of any security registered on a national securities exchange . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [SEC] may prescribe as necessary or appropriate in the public interest or for the protection of investors." 15 U.S.C. § 78j(b). "Rule 10b-5 implements Section 10(b) by making it unlawful '[t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.'" *Glazer Cap. Mgmt., L.P. v. Forescout Techs., Inc.*, 63 F.4th 747, 764

(9th Cir. 2023) (quoting 17 C.F.R. § 240.10b-5(b)). To state a claim for securities fraud under Section 10(b) and Rule 10b-5, a plaintiff must allege: (1) a material misrepresentation or omission in connection with the purchase or sale of a security (i.e., falsity); (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. *Id.*

Here, the parties dispute only falsity and scienter. The court addresses each element in turn, explaining why neither is met.

1. <u>Falsity</u>

Section 10(b) and Rule 10b-5 require a plaintiff to show that the defendant made a statement that was false or misleading as to a material fact. *Basic Inc. v. Levinson*, 485 U.S. 224, 238 (1988). A statement is false or misleading if it directly contradicts what the defendant knew at the time or omits material information. *Weston Fam. P'ship LLLP v. Twitter, Inc.*, 29 F.4th 611, 619 (9th Cir. 2022). Plaintiffs "may rely on either an affirmative misrepresentation theory or an omission theory." *Wochos v. Tesla*, 985 F.3d 1180, 1188 (9th Cir. 2021). "'[A]n affirmative misrepresentation is an untrue statement of a material fact,' and a fraudulent omission is a failure to 'state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.'" *Id.* (quoting 17 C.F.R. § 240.10b-5(b)). "Courts apply the objective standard of a 'reasonable investor' to determine whether a statement is misleading." *In re Splunk Inc. Sec. Litig.*, 592 F. Supp. 3d 919, 932 (N.D. Cal. 2022) (citing *In re VeriFone Sec. Litig.*, 11 F.3d 865, 869 (9th Cir. 1993)). A "statement is misleading if it would give a reasonable investor the impression of a state of affairs that differs in a material way from the one that actually exists." *In re Cutera Sec. Litig.*, 610 F.3d 1103, 1109 (9th Cir. 2010) (quoting *Berson v. Applied Signal Tech., Inc.*, 527 F.3d 982, 985 (9th Cir. 2008)).

Certain types of statements are not actionable for securities fraud. Relevant here, the PSLRA carves out a "safe harbor for forward-looking statements." 15 U.S.C. § 78u-5; *see also id.* § 78u-5(i)(1) (defining "forward-looking" statements as including those that concern financial projections, future economic performance, and the plans and objectives of management for future operations). The safe harbor "'is designed to protect companies and their officials' when they merely fall short of their 'optimistic projections.'" *Wochos*, 985 F.3d at 1189 (quoting *In re Quality Sys., Inc. Sec. Litig.*, 865 F.3d 1130, 1142 (9th Cir. 2017)). The safe harbor shields two types of forward-looking statements. It first protects forward-looking statements that are (1) identified as such, and (2) "accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement." 15 U.S.C. § 78u-5(c)(1)(A)(i). The safe harbor also protects forward-looking statements "not identified and not accompanied by cautionary language, unless they were 'made with actual knowledge . . . that [they were] false or misleading.'" *Cutera*, 610 F.3d at 1108 (quoting 15 U.S.C. § 78u-5(c)(1)(B)(i)-(ii)).

In general, pure statements of honest opinion also are not actionable. *Wochos*, 985 F.3d at 1189. There are only three circumstances in which an opinion statement may be actionable: where (1) the speaker did not actually hold the stated belief, (2) the opinion contains an embedded statement of untrue fact, or (3) a reasonable investor would "understand an opinion statement to convey facts . . . about the speaker's basis for holding that view," but those facts are untrue. *Id.* (quoting *Omnicare, Inc. v. Laborers Dist. Council Const. Indus. Pension Fund*, 575 U.S. 175, 188 (2015)). The third category captures opinions that are "misleading by omission." *In re Atossa Genetics Inc. Sec. Litig.*, 868 F.3d 784, 802 (9th Cir. 2017). "[F]or an opinion to be misleading by omission, (1) the 'statement [must] omit[] material facts about the [defendant's] inquiry into or knowledge concerning a statement of opinion,' and (2) 'those facts [must] conflict with what a reasonable investor would take from the statement itself.'" *Id.* (quoting *City of Dearborn Heights Act 345 Police & Fire Ret. Sys. v. Align Tech., Inc.*, 856 F.3d 605, 615 (9th Cir. 2017)).

"Puffery" statements likewise are not actionable. *Macomb Cnty. Emps.' Ret. Sys. v. Align Tech., Inc.*, 39 F.4th 1092, 1098 (9th Cir. 2022). "Corporate 'puffing' involves 'expressing an opinion' that is not 'capable of objective verification.'" *Id.* at 1098-99 (quoting *Retail Wholesale & Dep't Store Union Loc. 338 Ret. Fund v. Hewlett-Packard Co.*, 845 F.3d 1268, 1275 (9th Cir. 2017)). "These 'vague statements of optimism like "good," "well-regarded," or other feel good monikers, are not actionable because professional investors, and most amateur investors as well, know how to devalue the optimism of corporate executives.'" *Id.* at 1099 (quoting *Police Ret. Sys. of St. Louis v. Intuitive Surgical, Inc.*, 759 F.3d 1051, 1060 (9th Cir. 2014)). Puffery "statements rise to the level of materially misleading statements," and thus may be actionable, "only if they provide 'concrete description of the past and present' that affirmatively create a plausibly misleading impression of a 'state of affairs that differed in a material way from the one that actually existed.'" *In re Alphabet, Inc. Sec. Litig.*, 1 F.4th 687, 700 (9th Cir. 2021) (quoting *Quality Sys.*, 865 F.3d at 1144).

With these principles in mind, the court now turns to the challenged statements, addressing them in groups. Defendants argue that Plaintiffs fail to establish falsity because the challenged statements either are not false or misleading, or are protected forward-looking statements, opinions, or puffery. Although Defendants are not correct on every account, the court generally agrees.

a. Risk Disclosures

First, Plaintiffs challenge six "Risk Factors" contained within public SEC filings that Funko issued throughout 2022. (*See* Am. Compl. ¶¶ 114, 122-23, 128-29, 143.) The court concludes that none are actionable.

Four of the challenged risk disclosures identify potential risks in connection with inventory management. (*See id.* ¶¶ 114, 123, 128, 143.) These disclosures are identical to one another and were issued on March 3, 2022, May 5, 2022, August 4, 2022, and November 3, 2022. They state as follows:

> Our success depends, in part, on our ability to successfully manage our inventories. . . . If demand or future sales do not reach forecasted levels, we could have excess inventory that we may need to hold for a long period of time, write down, sell at prices lower than expected or discard. . . . If we are not successful in managing our inventory, our business, financial condition and results of operations could be adversely affected.

(McDonough Decl. ¶ 14, Ex. 13 ("21 Form 10-K") at 27; *id.* ¶ 17, Ex. 16 ("1Q22 Form 10-Q") at 42; *id.* ¶ 18, Ex. 17 ("2Q22 Form 10-Q") at 49; *id.* ¶ 19, Ex. 18 ("3Q22 Form

10-Q") at 46.) Two additional disclosures concern Funko's ERP systems. (*See* Am. Compl. ¶¶ 122, 129.) These disclosures are largely identical to one another and were issued on May 5, 2022, and August 4, 2022. They state as follows:

> The failure of these information systems to perform as designed, our failure to operate them effectively, or a security breach or disruption in operation of our information systems could disrupt our business . . . . If the potential upgrades are not successful or result in [further[5]] delays, our business could be disrupted or harmed.

(1Q22 Form 10-Q at 57; 2Q22 Form 10-Q at 64.)

Defendants argue these risk disclosures receive safe harbor protection under 15 U.S.C. § 78u-5(c)(1)(A)(i) because they are forward-looking, identified as such, and accompanied by meaningful cautionary language. (MTD at 8-9.) The court agrees with Defendants that the risk disclosures are forward-looking "to the extent that they describe the future challenges [Funko] might confront." *Wochos*, 985 F.3d at 1195. But the disclosures are not *identified* as forward-looking. On this point, Funko's public SEC filings contradict Defendants' argument because the filings identify the challenged risk disclosures separately from Funko's forward-looking statements concerning financial or operational projections. (*See, e.g.*, 1Q22 Form 10-Q at 1 ("These forward-looking statements are subject to a number of risks, uncertainties, and assumptions, including . . . 'Risk Factors' . . . that may cause our actual results, performance or achievements to differ materially and adversely from those expressed or implied by the

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[5] The word "further" appears in the second quarter disclosure issued on August 4, 2022, but not the first quarter disclosure issued on May 5, 2022.

forward-looking statements.”).) Accordingly, the risk disclosures are not protected by the PSLRA safe harbor under 15 U.S.C. § 78u-5(c)(1)(A)(i).

Plaintiffs argue that the disclosures are false or misleading because they describe risks that “had *already materialized*.” (*E.g.*, Am. Compl. ¶ 138(a). *See also* MTD Resp. at 16-17.) Plaintiffs are correct that in some instances, falsity allegations respecting risk disclosures may suffice where “a company’s SEC filings warned that risks ‘could’ occur when, in fact, those risks had already materialized.” *In re Facebook, Inc. Sec. Litig.*, 87 F.4th 934, 948-49 (9th Cir. 2023); *Alphabet*, 1 F.4th at 703-04; *see also Glazer*, 63 F.4th at 780-81 (stating that the risk need not have become an absolute certainty to mislead, and that defendants’ awareness “of a significant likelihood that the risk would materialize” suffices). Importantly, *Facebook* and *Alphabet* instruct that plaintiffs challenging risk disclosures can successfully plead falsity only where their allegations show the defendants “*knew* that those risks had materialized.” *Alphabet*, 1 F.4th at 704 (emphasis added) (holding plaintiffs adequately pled falsity with respect to disclosures identifying potential security risks, because the disclosures failed to mention an existing privacy bug of which Google executives were allegedly aware as they had “received and read” a legal memo detailing the issue); *see also Facebook*, 87 F.4th at 948 (holding plaintiffs adequately pled falsity with respect to disclosures concerning potential security risks, based on numerous particularized allegations that Facebook executives knew of existing data violations by Cambridge Analytica). Conversely, where “the plaintiff fails to prove” forward-looking statements were “made with actual knowledge that [they were]

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false or misleading," those statements are entitled to safe harbor protection under the PSLRA. *See* 15 U.S.C. § 78u-5(c)(1)(B); (*see also* MTD at 11-13.)

Having determined that the challenged risk disclosures are forward-looking, *see supra*, the court's analysis thus turns on Defendants' knowledge: Plaintiffs meet the falsity requirement if they plausibly allege Defendants knew the stated risks had already transpired or were substantially likely to occur at the time they disclosed those risks as possibilities, *e.g.*, *Alphabet*, 1 F.4th at 704, but the disclosures receive safe harbor protection if Plaintiffs fail to plausibly allege Defendants' actual knowledge of the same, 15 U.S.C. § 78u-5(c)(1)(B). For the reasons explained below, Plaintiffs' challenges to Defendants' risk disclosures fail.

i. Inventory-Related Disclosures

As noted, four challenged risk disclosures warned of possible risks in connection with inventory management—specifically, that Funko "could have excess inventory that [it] may need to hold for a long period of time, write down, sell at prices lower than expected or discard." (*E.g.*, Am. Compl. ¶ 114.) Plaintiffs, however, fail to offer particularized allegations demonstrating the Executive Defendants knew at the time of the disclosures that the stated risks had materialized or were substantially likely to occur.

Plaintiffs come somewhat close by alleging that Mr. Sansone, Funko's COO, "began appearing at Buckeye regularly" in June 2022, "spending at least one or two weeks per month at the warehouse, having meetings . . . about the DC and walking the floor speaking with warehouse employees trying to solve immediate problems." (*Id.* ¶¶ 84, 149.) At this time, the Buckeye DC was allegedly in "chaos" due to staffing issues, significant quantities of missing or misplaced inventory "with no Oracle system to assist with keeping track of" it, a "substantial amount of non-moving and dead inventory," and an influx of additional inventory "arriving en masse" with nowhere to store it, as "the existing racks in the Buckeye DC were already full." (*Id.* ¶¶ 84-85.) As many as 300 to 500 shipping containers sat unloaded in the parking lot on any given day, accruing rental charges and late penalties. (*Id.* ¶ 85.) Plaintiffs assert that as a result, "[e]ven a casual observer at Buckeye could tell that the DC was over capacity and not able to operate with even close to the necessary productivity." (*Id.* ¶ 152.) Viewing these allegations in the light most favorable to Plaintiffs leads to an inference that Mr. Sansone knew of excess inventory issues that were openly escalating at Buckeye. But Plaintiffs fail to connect the dots. Absent from the amended complaint are particularized allegations showing the Executive Defendants had regular conversations, debates, and meetings with Mr. Sansone that specifically concerned these excess inventory issues. Plaintiffs also fail to allege the specific contents of any such conversation. Instead, Plaintiffs allege in conclusory fashion that "[u]ndoubtedly, Sansone reported back to Perlmutter, and most likely to Fall Jung, what he was seeing" at Buckeye. (*Id.* ¶ 152.) That falls short of the demanding PSLRA standard.

Plaintiffs also suggest the Executive Defendants knew about excess inventory issues at Buckeye because (1) they participated in regular meetings "to discuss Sales forecasts and available inventory, as well as what inventory was not selling," (2) Ms. "Jung's group had responsibility for accounting for Funko's inventory levels," (3) Defendants stated they were "constantly" and "always" looking at inventory health, and (4) Mr. "Perlmutter himself visited the Buckeye DC" some unidentified time "during 3Q22." (*Id.* ¶¶ 148, 152.) These allegations are not sufficiently particular to plead the Executive Defendants' actual knowledge under the heightened standards imposed by the PSLRA. For example, Plaintiffs do not specify when or how often the sales meetings took place—"regular" could mean once per week, month, year, or anywhere in between. Vague allegations that these meetings addressed "forecasts," "available inventory," and "inventory [that] was not selling" do not demonstrate whether the Executive Defendants received specific details about the precise quantity and value of inventory that was obsolete, or how long Funko had been holding obsolete inventory. Nor does the amended complaint reveal the date or length of Mr. Perlmutter's visit, the purpose of the visit, whether he interacted with employees during that visit, or any other alleged facts that would tend to show Mr. Perlmutter witnessed and appreciated the extent of excess inventory issues at Buckeye.

On the whole, Plaintiffs' generalized allegations fail to plausibly show the Executive Defendants knew that Funko was holding excess product for a long period of time, writing down excess product, or discarding excess product—the specific risks that the inventory-related disclosures warned of. *See Ferreira v. Funko Inc.*, No. 2:20-cv-02139-VAP (PJWx), 2021 WL 8820650, at *15-20 (C.D. Cal. Oct. 22, 2021) (holding, in prior securities fraud action against Funko, that identical inventory risk disclosure dated August 8, 2019, was not misleading because plaintiffs failed to plead particularized facts showing it was issued with actual knowledge of falsity). *Cf. id.* at *20-22 (holding, in same case, that identical inventory risk disclosure dated October 31, 2019 was misleading because defendants allegedly issued it after (1) discussing approximately 13 weekly "aged inventory report[s]" that "set forth exactly what inventory Funko held, including how much was obsolete and slated for destruction, as well as its monetary value"; (2) repeatedly discussing an "Open to Buy plan" that detailed "the present amount of inventory, excess inventory, the estimated cost of sale of the inventory, and . . . a line item called 'write-down,' indicating how much of the inventory was obsolete," and (3) being told that Funko had leased a warehouse to store dead inventory that would be destroyed). Thus, these four disclosures come within the PSLRA safe harbor, 15 U.S.C. § 78u-5(c)(1)(B), and are not actionable. (*See* Am. Compl. ¶¶ 114, 123, 128, 143.)

ii. ERP-Related Disclosures

The remaining two disclosures warned of possible risks in connection with ERP implementation. Consistent with Plaintiffs' briefing, the court focuses its inquiry on the specific risk of "delays in the ERP system upgrades" and whether the Executive Defendants actually knew a delay was certain or substantially likely to occur when they disclosed it as a mere possibility on May 5, 2022, and August 4, 2022. (MTD Resp. at 17.)

To begin, the court notes a critical difference between these two disclosures. Defendants revised the latter disclosure to inform shareholders of Funko's decision to "delay[] the remaining steps for implementation of our enterprise resource planning software to 2023." (2Q22 Form 10-Q at 64 (warning of possible risks in connection with "further" delays); *see also* 2Q22 Call Tr. at 6 (Ms. Jung advising on same day earnings call that "[r]egarding our ERP, we recently made the difficult decision to delay the remaining steps until 2023").) The court cannot draw the inference that the August 4, 2022 disclosure was misleading when it expressly advised that certain risks related to the Oracle Project had indeed come to pass. Rather than creating "the impression of a state of affairs that differ[ed] in a material way from the one that actually exist[ed]," the disclosure candidly informed investors that Oracle would not timely launch. *Cutera*, 610 F.3d at 1109. *Cf. Glazer*, 63 F.4th at 780-81 (holding disclosure with mere "boilerplate listing of generic risks" was misleading where defendants "did not meaningfully update the risk disclosure" after learning new information that made the risk significantly more likely to occur). Plaintiffs therefore fail to plausibly allege falsity as to the ERP-related risk disclosure issued on August 4, 2022. (*See* Am. Compl. ¶ 129.)

Turning now to the first quarter disclosure, the court concludes Plaintiffs fare no better because they fail to plausibly allege the Executive Defendants actually knew by May 5, 2022, that a delay of the Oracle launch was certain or substantially likely to occur.

According to Plaintiffs, the new ERP system could not have possibly launched by "by the end of 2Q22 or early 3Q22" as planned, for two principal reasons: (1) Funko's data was a "mess" without "data governance" controls, resulting in a "manually intensive" implementation process that required significant institutional resources and knowledge, both of which were lacking; and (2) corporate infighting hindered progress because "[t]he C-Suite simply could not get 'aligned' as to . . . critical systems architecture decisions." (*Id.* ¶¶ 8, 51-53.) As a result of these problems, "[b]y early

2022, it was clear to employees across [Funko]'s various departments that the Oracle project was far from being able to launch by [Funko]'s targeted" deadline. (*Id.* ¶ 54.) Plaintiffs argue the Executive Defendants must have known this, too, as they were personally involved in the Oracle Project. (*See* MTD Resp. at 2, 21.) Specifically, both Ms. Jung and Mr. Perlmutter participated in "bi-weekly 'Steering Committee' leadership meetings" in which "all of the C-Suite individuals" discussed critical "decisions as to how the [ERP] system should be set up." (*Id.* ¶ 53.) Mr. Sansone—who personally oversaw the Oracle Project—also attended these meetings, which had been ongoing since 2021. (*Id.* ¶¶ 48, 53, 149.) Ms. Jung in particular "debated various aspects of the Oracle project" with Mr. Sansone at the biweekly meetings, and the two were "constantly at odds with one another" like "oil and water." (*Id.* ¶¶ 53, 149.) In addition, "status reports about the project [were] emailed to executives following" each biweekly meeting (*id.*), and these reports "discuss[ed] the ongoing problems that needed to be dealt with (but weren't being dealt with) prior to" the targeted launch deadline (*id.* ¶ 64). Mr. Perlmutter, for his part, "had conversations with the Oracle implementation team regarding the difficulty they were having obtaining necessary information and decisions, as well as the lack of leadership alignment on the project." (*Id.* ¶ 149.)

These allegations suggest the Executive Defendants likely should have known that the targeted launch date was not feasible, but they do not allege with particularity that the Executive Defendants *actually* knew that a delay was certain or substantially likely to occur. Plaintiffs speak only in generalities, failing to explain "the who, what, when, where, and how of the fraud." *Khoja*, 899 F.3d at 1008 (internal quotation marks omitted). The vague allegation, for example, that the C-Suite "could not get 'aligned'" as to "critical systems architecture decisions" (Am. Compl. ¶ 53) does not reveal what those decisions were, how many were outstanding, how they were critical, or by when they needed to be made to ensure a timely ERP launch. Without more, it is difficult to understand the significance of these decisions, how they allegedly affected the project timeline, or whether certain outstanding decisions would have signaled to the Executive Defendants by May 5, 2022, that Oracle could not timely launch. Moreover, general allegations that the Executive Defendants attended biweekly meetings and received status reports about unspecified "ongoing problems" (*id.* ¶ 64) do not establish with particularity that the Executive Defendants received information about the specific reasons that made the target launch date impossible or highly improbable. At no point do Plaintiffs allege the Executive Defendants received status reports that specifically concerned data-related problems, or the overall progress of Funko's data transfer, for instance. (*See generally id.*) Similarly, although Mr. Perlmutter allegedly "had conversations with the Oracle implementation team" about "difficult[ies] they were having" (*id.* ¶ 149), Plaintiffs do not specify the date(s) or number of conversations, the participants, nor the specific contents of any such conversation. Even when taking the allegations all together in the light most favorable to Plaintiffs, Plaintiffs fail to plead the Executive Defendants' actual knowledge with the particularity required by the PSLRA.

In sum, Plaintiffs' challenges to Defendants' risk disclosures fail. With respect to the revised August 4, 2022 risk disclosure that expressly informed shareholders of the Oracle delay, the court concludes that Plaintiffs fail to plead falsity. (*See* Am. Compl.

¶ 129.) With respect to the remaining risk disclosures, the amended complaint lacks particularized allegations showing the Executive Defendants knew the stated risks had materialized or were substantially likely to occur when the disclosures were made. The disclosures are entitled to safe harbor protection under 15 U.S.C. § 78u-5(c)(1)(b).[6] (*Id.* ¶¶ 114, 122-23, 128, 143.) Plaintiffs' claims as to all of the challenged risk disclosures are therefore dismissed.

b. Forward-Looking Statements

Next, ten more of the challenged statements are not actionable because they come within the PSLRA safe harbor for forward-looking statements that are identified as such and accompanied by meaningful cautionary language, 15 U.S.C. § 78u-5(c)(1)(A)(i). (*See* Am. Compl. ¶¶ 115, 117-18, 120-21, 124-26, 130, 141.)

These statements are forward-looking because they concern financial projections or the plans and objectives for future operations, or because they state assumptions underlying the same. 15 U.S.C. § 78u-5(i)(1)(A)-(B), (D). For example, Plaintiffs challenge mere predictions that "SG&A as a percent of sales is [] expected to be slightly higher in the first half of" 2022 (Am. Compl. ¶ 115 (quoting McDonough Decl. ¶ 4, Ex. 3 ("4Q21 Form 8-K") at 8)); that Funko's "full year 2022 financial results" would reflect "[a]djusted EBITDA margin of approximately 14.6% at the midpoint of our revenue

[6] For the reasons explained *infra* § III(C)(2)(a), Plaintiffs' scienter allegations—including those concerning the core operations doctrine—do not aid in plausibly alleging the Executive Defendants' actual knowledge. *See Glazer*, 63 F.4th at 766 (stating that, although falsity and scienter are separate inquiries subject to different standards of plausibility, "some facts might be used to support both an inference of scienter and an inference of falsity").

range" due to "approximately 80 bps of headwind from one-time project spend" (*id.* ¶ 120 (quoting McDonough Decl. ¶ 15, Ex. 14 ("1Q22 Form 8-K") at 8)); and that "down the road," Funko would need "more distribution capabilities to continue [to] support the growth, but that's more of a future down the road within the 5-year plan, but not directly related within the next, call it, 12 months or so" (*id.* ¶ 141 (quoting McDonough Decl. ¶ 8, Ex. 7 ("Investor Day Tr.") at 28)). These statements plainly are forward-looking in that they describe financial and operational expectations for the future. In addition, all ten of these forward-looking statements are identified as such, 15 U.S.C. § 78u-5(i)(1)(A)(i). (*See, e.g.*, 4Q21 Form 8-K at 9; Investor Day Deck at 2; 1Q22 Form 8-K at 9.)

To the extent Plaintiffs argue that some of these forward-looking statements address "current fact" (*see* MTD Resp. at 13, 15), this "mixed"-statement argument fails under *Wochos*. A "mixed" statement may be actionable only where the allegations "show that the statement goes *beyond* the articulation of 'plans,' 'objectives,' and 'assumptions' and instead contains an express or implied 'concrete' assertion concerning a specific 'current or past fact[].'" *Wochos*, 985 F.3d at 1191 (quoting *Quality Sys.*, 865 F.3d at 1142, 1144). By contrast, mere "assumptions incorporated into a projection" and "statements reaffirming an objective are themselves forward-looking under the PSLRA." (MTD Reply at 2-3 (citing *Wochos*, 985 F.3d at 1192).) Defendants' May 5, 2022 statements that "[w]e remain on track to deliver full year adjusted EBITDA margins," (Am. Compl. ¶ 124 (quoting McDonough Decl. ¶ 5, Ex. 4 ("1Q22 Call Tr.") at 8)), and that "ERP is set to come out at the end of the quarter," (*id.* ¶ 125 (quoting McDonough

Decl. ¶ 5, Ex. 4 ("1Q22 Call Tr.") at 9)), are protected as mere "'assumptions' about future events on which" Defendants' financial and operational projections are based. *Wochos*, 985 F.3d at 1192 ("Like the goal itself, such projected timelines are forward-looking statements."); *see also* 15 U.S.C. § 78u-5(i)(1)(D).[7]

The next, more difficult question is whether these forward-looking statements are accompanied by meaningful cautionary language. Defendants point to several paragraphs of cautionary language that they assert is meaningful, including the risk disclosures discussed *supra*. (*See generally* Appendix A.) Plaintiffs argue this language is not meaningful because it warns of risks that had already materialized. (*See* MTD Resp. at 17.) The court agrees with Defendants.

"To be 'meaningful,' the cautionary language must 'identify[] important factors that could cause actual results to differ.'" *Glazer*, 63 F.4th at 780 (quoting 15 U.S.C. § 78u-5(c)(1)(A)(i)). Relevant here, the Ninth Circuit has extended the logic of *Alphabet* to the instant "context of the safe harbor," holding that "cautionary language is not 'meaningful' if it discusses as a mere *possibility* a risk that has already materialized."

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[7] With specific respect to Ms. Jung's May 5, 2022 statement that "Q2 is where we're seeing the pressure from the net SG&A perspective" (Am. Compl. ¶ 126 (quoting 1Q22 Call. Tr. at 10)), the court disagrees with Plaintiffs' framing of this statement as "mixed." (*See* MTD Resp. at 15.) *Wochos* is instructive. There, the Ninth Circuit addressed an "August 2 statement [] made in response to a question about anticipated gross margins for the third quarter of 2017, which still had nearly two months left to go." 985 F.3d at 1198. The court upheld the district court's conclusion "that it was a 'projection, rather than a statement about then-current production levels,'" because when read in context, the remark could "only be understood only as contrasting overall third-quarter expectations with the year-end goal." *Id.* The same reasoning applies here: the remark was made with nearly two months remaining in the second quarter, in response to a question about how anticipated second quarter margins might affect year-end goals. (*See* 1Q22 Call Tr. at 10.) Thus, this statement is properly understood as a forward-looking projection.

Glazer, 63 F.4th at 780-81 (holding "boilerplate listing of generic risks" was not meaningful where it failed to "mention the specific risk to which [the defendant] had been alerted"). Similarly critical to this inquiry is whether the Executive Defendants *knew* that hypothetical risks had come to pass or were substantially likely to occur. *See id.* at 781 (rejecting safe harbor argument where defendant "was aware of a significant likelihood that the risk would materialize"). For the reasons explained *supra*, however, Plaintiffs fail to plausibly allege the Executive Defendants actually knew that the risks identified in the disclosures had transpired or were substantially likely to occur at the time the disclosures were made. (*See supra* § III(C)(1)(a)(i)-(ii).) And, as noted, Defendants meaningfully revised the ERP-related disclosure issued on August 5, 2022, to inform shareholders of the Oracle delay. (*See id.* § III(C)(1)(a)(ii).) The court therefore concludes that all ten forward-looking statements are accompanied by meaningful cautionary language, 15 U.S.C. § 78u-5(i)(1)(A)(i), and these statements meet the requirements for safe harbor protection.

Because ten of the challenged statements are subject to safe harbor protection under 15 U.S.C. § 78u-5(c)(1)(A)(i), the court dismisses Plaintiffs' claims as to these statements. (*See* Am. Compl. ¶¶ 115, 117-18, 120-21, 124-26, 130, 141.)

c. Opinion and Puffery Statements

Next, several challenged statements are not actionable because they amount to puffery and/or opinion. (*See* Am. Compl. ¶¶ 116, 133-36, 139, 144-45.)

Two statements unquestionably constitute puffery because they reflect nothing more than "vague statements of optimism" that are "not capable of objective verification." *In re Arrowhead Pharms., Inc. Sec. Litig.*, No. CV 16-08505 PSG-PJW, 2017 WL 5635422, at *4 (C.D. Cal. Sept. 20, 2017) ("Puffing language includes vague statements of optimism like 'business couldn't be better' and 'industry-leading,' as well as words like 'strong,' 'robust,' 'well positioned,' 'solid,' and 'improved.'"). This includes Mr. Perlmutter's statement that "we've proven our ability to deliver in difficult environments, and I'm very confident we are well positioned to meet our objectives for the year" (Am. Compl. ¶ 116 (quoting McDonough Decl. ¶ 3, Ex. 2 ("1Q22 Call Tr.") at 7)), and Ms. Jung's statement that "ultimately, we did not want to impair the momentum that we have today" (*id.* ¶ 133 (quoting McDonough Decl. ¶ 7, Ex. 6 ("2Q22 Call Tr.") at 6)). Neither statement provides a "'concrete description of the past and present' that affirmatively create[s] a plausibly misleading impression of a 'state of affairs that differed in a material way from the one that actually existed.'" *Alphabet*, 1 F.4th at 700 (quoting *Quality Sys.*, 865 F.3d at 1144). Accordingly, these puffery statements are not actionable.

Two other statements reflect pure opinion regarding the Oracle delay or the health of Funko's inventory. (*See id.* ¶¶ 136 (quoting 2Q22 Call Tr. at 9 (regarding the Oracle delay, "we don't see it as a major headwind in 2022 so far, but we feel good we made the right decision for the business to not have business interruption as we go into the holiday season")), 144 (quoting McDonough Decl. ¶ 10, Ex. 9 ("3Q22 Call Tr.") at 7 ("We believe that our inventory is generally high quality . . . .")).) Even if these opinions reflected facts that later proved untrue, "an investor cannot state a claim by alleging only that an opinion was wrong." *Omnicare*, 575 U.S. at 194; *see also id.* at 184 ("[A]lthough a plaintiff could later prove [an] opinion erroneous, the words 'I believe' themselves admit[] that possibility, thus precluding liability for an untrue statement of fact."). Moreover, neither of these statements is actionable under the three-part *Omnicare* test because (1) Plaintiffs fail to allege the speakers did not actually hold the stated beliefs, (2) neither statement contains an embedded statement of untrue fact, and (3) neither opinion statement was misleading by omission. *See Wochos*, 985 F.3d at 1188-89 (citing *Omnicare*, 575 U.S. at 183-85, 188). With specific respect to the third "misleading by omission" category, Plaintiffs argue Ms. Jung's opinion statement regarding inventory quality misleadingly conveyed that "Funko's inventory consisted of *salable* products—both legally and because customers would want them." (MTD Resp. at 11.) Plaintiffs argue Ms. Jung omitted the fact that "Funko's inventory was bloated with millions of dollars of obsolete and aged inventory." (*Id.*) But, as discussed, Plaintiffs fall short of pleading Ms. Jung's actual knowledge of the purportedly omitted fact. (*See supra* § III(C)(1)(a)(i).) This omissions theory of liability therefore fails in the absence of a showing that the opinion statement "did not 'fairly align[] with the information in [Ms. Jung's] possession at the time.'" *Glazer*, 63 F.4th at 779 (quoting *Omnicare*, 575 U.S. at 189); *see also Atossa*, 868 F.3d at 802 (explaining that "for an opinion to be misleading by omission," it must "omit[] material facts about the [defendant's] inquiry into or knowledge concerning a statement of opinion" (quoting *City of Dearborn Heights*, 856 F.3d at 615)).

Two more statements reflect both opinion and puffery. (*See* Am. Compl. ¶¶ 134 (quoting 2Q22 Call Tr. at 7 (expressing opinion that "we believe that inventory is generally high quality," and puffing that Funko was "well positioned to meet our consumer demand and support our strong second half growth forecast")), 145 (quoting 3Q22 Call Tr. at 8 (expressing opinion that "we think [inventory quality] generally is very healthy right now," and puffing that "in the event where we have seen a pullback a little bit in Q4, we have been making the right edits to our inventory")).) Thus, neither statement is actionable.

Finally, two more challenged statements reflect either opinion or puffery, *and* lack sufficient allegations of falsity. When asked on the second quarter earnings call about inventory levels, Ms. Jung responded that although "we're now looking into the back half of the year, we feel the inventory is in a really good healthy position, and we're poised to deliver on our back half results," before stating "[i]t was really about just managing through the congestion that we saw so far. . . . So there is a large portion of the [inventory] in-transit, but we're working to get that into the DC and get that out to our customers." (*Id.* ¶ 135 (quoting 2Q22 Call Tr. at 8).) The first portion of the sentence reflects protected opinion.[8] The second portion of the sentence is not false, as Plaintiffs' own allegations confirm that in or around August 4, 2022, "congestion" existed due to large quantities of inventory "in-transit" that was still getting "into the DC." (*See id.* ¶¶ 85 (alleging that "[b]y July 2022, the [shipping] containers were arriving [to Buckeye]

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[8] In addition, "poised to deliver on back half results" constitutes a forward-looking projection entitled to safe harbor protection under 15 U.S.C. § 78u-5(c)(1)(A)(i). (*See* 2Q22 Call Tr. at 4 (identified as forward-looking and accompanied by meaningful cautionary language); 2Q22 Form 10-Q at 49-50 (additional meaningful cautionary language incorporated by reference).)

en masse, along with the remaining trailers from Washington”), 138(i) (acknowledging that inventory in shipping containers “simply sitting in the parking lot” at Buckeye was “considered ‘in-transit’”).) And rather than misleading investors by omitting material information, the statement candidly discloses ongoing, significant congestion at Buckeye.

Similarly, Mr. Perlmutter stated on Funko’s Investor Day that “last, but certainly not least, is the unlock of technology to help us get where we’re going faster and better,” and “that’s some of the investments that we’ve made this year.” (*Id.* ¶ 139 (quoting Investor Day Tr. at 8).) The first portion of this sentence is a “vague statement[] of optimism” “not capable of objective verification” and therefore constitutes puffery. *Arrowhead Pharms.*, 2017 WL 5635422, at *4. To the extent the second portion of this sentence contains representations about current or past fact, it is neither false nor misleading, as Funko indeed invested in technology in 2022. (*See id.* ¶¶ 47-52, 82 (describing the Oracle project and related SG&A costs in 2022)); *see also Wochos*, 985 F.3d at 1198 (holding Tesla’s remark “that ‘great progress’ was being made on battery production would potentially be an actionable false statement only if . . . Tesla had been ‘making no progress at all’”).

In total, eight challenged statements reflect opinion and/or puffery and thus are not actionable. (*See* Am. Compl. ¶¶ 116, 133-36, 139, 144-45.) The court therefore dismisses Plaintiffs’ claims as to these statements.

d. Statements that Are Not False or Misleading

Finally, as to the four remaining challenged statements (*see* Am. Compl. ¶¶ 131-32, 137, 140), Plaintiffs fail to plausibly allege they were false when made or that they created an "impression of a state of affairs that differ[ed] in a material way from the one that actually exist[ed]." *Cutera*, 610 F.3d at 1109. For example, Plaintiffs challenge Ms. Jung's August 4, 2022 statement that inventory levels were "up 170.9% compared to a year ago, reflecting receipt of delayed inventory." (Am. Compl. ¶ 132 (quoting McDonough Decl. ¶ 6, Ex. 5 ("2Q22 Form 8-K") at 7).) Plaintiffs argue this statement "attribut[ed] the increase in Funko's inventory *solely* to 'receipt of delayed inventory,'" omitting that the increase stemmed from other factors too, like the receipt of dead inventory from Washington warehouses. (*Id.* ¶ 138(a) (emphasis added).) But as Defendants explain, Ms. Jung never said "that delayed inventory was the only factor contributing to the increase," and the amended complaint shows that "the receipt of delayed inventory *did* contribute to the increases." (MTD at 16 (citing Am. Compl. ¶ 138(a)).) The court is not persuaded by Plaintiffs' attempt to "rewrite" Ms. Jung's statement. *Wochos*, 985 F.3d at 1193.

In sum, Plaintiffs fail to plausibly allege falsity as to any of the 28 challenged statements, and the complaint is therefore dismissed in its entirety.

2. Scienter

Beyond falsity problems, dismissal is warranted for the independent reason that Plaintiffs fall short of plausibly alleging scienter.

Scienter "is a 'mental state embracing intent to deceive, manipulate, or defraud.'" *Nguyen v. Endologix, Inc.*, 962 F.3d 405, 414 (9th Cir. 2020) (quoting *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 319 (2007)). To adequately plead scienter, the complaint must "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u-4(b)(2). Specifically, the defendants must have "made false or misleading statements either intentionally or with deliberate recklessness." *Nguyen*, 962 F.3d at 414 (quoting *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 991 (9th Cir. 2009)). "[D]eliberate recklessness represents an extreme departure from the standards of ordinary care . . . which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it.'" *Espy v. J2 Glob., Inc.*, --- F.4th ----, No. 22-55829, 2024 WL 1689091, at *4 (9th Cir. Apr. 19, 2024) (quoting *Zucco*, 552 F.3d at 991). The scienter element is met "[o]nly if a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged." *Nguyen*, 962 F.3d at 414 (quoting *Tellabs*, 551 U.S. at 324). The "inquiry is inherently comparative," requiring the court to consider "plausible opposing inferences." *Id.* (quoting *Tellabs*, 551 U.S. at 324). Although the scienter inquiry must be performed "holistically," the Ninth Circuit has directed that "it would be folly to simply skirt the major allegations." *Webb v. Solarcity Corp.*, 884 F.3d 844, 851 (9th Cir. 2018) (quoting *In re VeriFone Holdings, Inc. Sec. Litig.*, 704 F.3d 694, 704 (9th Cir. 2012)).

Here, as an initial matter, there appears to be no dispute that the amended complaint lacks a coherent theory of motive to defraud. (*See* MTD at 17; MTD Resp. at 24 n.17; MTD Reply at 7.) "Generally, we expect that a financial motive for securities fraud will be clear." *Prodnova v. H.C. Wainwright & Co., LLC*, 993 F.3d 1097, 1108 (9th Cir. 2021) ("[F]or example, someone inside a company stands to gain a substantial profit by engaging in deceptive behavior, such as selling shares before the company discloses negative information.”). Although lack of a plausible motive is not fatal, it “makes it much less likely that a plaintiff can show a strong inference of scienter.” *Id.* “Only where a complaint otherwise asserts compelling and particularized facts showing fraudulent intent or deliberate recklessness will we overlook the failure to allege a plausible motive.” *Id.* The court therefore addresses Plaintiffs’ primary scienter theories before evaluating the amended complaint holistically to determine whether “compelling and particularized facts” give rise to a strong inference of scienter, despite the absence of allegations demonstrating motive. *Id.*

a. Individual Scienter Theories

Plaintiffs raise several theories of scienter, including the core operations doctrine, confidential witness accounts, prior litigation, and more. (MTD Resp. 17-24; *see also* Am. Compl. ¶¶ 147-58.) The court addresses each in turn, below.

i. Core Operations Doctrine

The core operations doctrine is a “narrow” scienter theory, *Zucco*, 552 F.3d at 1000, that permits the court in limited circumstances to “infer[] that facts critical to a business’s ‘core operations’ or an important transaction are known to a company’s key officers.” *S. Ferry LP, # 2 v. Killinger*, 542 F.3d 776, 783 (9th Cir. 2008) (“*South Ferry I*”). The doctrine may satisfy the PSLRA’s heightened pleading standard in two situations. *Zucco,* 552 F.3d at 1000 (citing *S. Ferry I*, 542 F.3d at 785). First, “general allegations about ‘management’s role in a corporate structure and the importance of the corporate information about which management made false or misleading statements’” may "create a strong inference of scienter when these allegations are buttressed with 'detailed and specific allegations about management's exposure to factual information within the company.'" *Id.* (quoting *S. Ferry I*, 542 F.3d at 785). Second, if the complaint lacks additional detailed allegations about the defendants' actual exposure to information, generalized allegations about a company's "core operations" standing alone may nonetheless be indicative of scienter "where the falsity is patently obvious—where the 'facts [are] prominent enough that it would be "absurd to suggest" that top management was unaware of them.'" *Id.* at 1001 (quoting *Berson*, 527 F.3d at 989). This second category of cases is "exceedingly rare." *S. Ferry I*, 542 F.3d at 785 n.3.

Here, Plaintiffs fail to allege facts that satisfy either situation. First, Plaintiffs fail to set forth "detailed and specific allegations" showing how the Executive Defendants were "expos[ed] to factual information within the company." *Id.* at 785. As discussed *supra* § III(C)(1)(a)(i)-(ii), Plaintiffs offer only "[g]eneral allegations of defendants' hands-on management style, their interaction with other officers and employees, their attendance at meetings, and their receipt of unspecified weekly or monthly reports," all of which is "insufficient" to plausibly allege scienter. *In re Daou Sys., Inc.*, 411 F.3d 1006, 1022 (9th Cir. 2005) (internal quotation marks omitted), *abrogated on other grounds as recognized by Glazer*, 63 F.4th at 766. Relying on *South Ferry LP #2 v. Killinger*, 687 F. Supp. 2d 1248 (W.D. Wash. 2009) ("*South Ferry II*"), Plaintiffs argue the Executive Defendants held themselves out as knowledgeable in response to direct questioning, which is "sufficient to satisfy the actual knowledge analysis." (MTD Resp. at 21 (quoting *S. Ferry II*, 687 F. Supp. 2d at 1259-60).) In *South Ferry II*, the district court on remand found sufficiently particularized allegations regarding the defendant CEO's knowledge to establish scienter because the defendant's public statements themselves "represented that he had access to the information that underpinned his sunny announcements about [the company's] risk-management capabilities." 687 F. Supp. 2d at 1259-60 (finding the defendant, "in the face of *direct questioning*," "maintained that he knew what he was talking about" and "displayed an intimate knowledge" of the relevant topics, which he discussed "with a high degree of specificity on more than one occasion"). The court concludes that in this case, the Executive Defendants' public statements do not evince such intimate, personal knowledge with a "high degree of specificity." *Id.* For example, the generalized statements that "we are constantly looking at the quality of our inventory," that Funko had experienced "supply chain challenges," and that inventory "generally is very healthy right now," (Am. Compl. ¶ 154(e)), do not rise to "*specific* admissions from top executives" that they personally were "involved in *every detail*" of inventory monitoring or that they knew "*exactly* how much" inventory was lost, slow-moving, dead, and would ultimately be written down, *Zucco*, 552 F.3d at 1000 (emphasis added) (quoting *Daou*, 411 F.3d at 1022-23).

Second, this is not the "exceedingly rare" and "unusual" case where the court can impute knowledge to the Executive Defendants solely through their executive roles, without particularized allegations regarding their actual exposure to information. *S. Ferry I*, 542 F.3d at 785 & n.3. For example, that Funko was accumulating excess dead inventory at the Buckeye DC would not have been patently obvious to senior executives based on "granular details . . . such as the state of the storage racks, that certain machines 'could [not] reach the top several shelves,'" "that there were 'pallets of partial orders' on the warehouse floor,'" or the presence of shipping containers in the parking lot. (MTD Reply at 10 (quoting Am. Compl. ¶¶ 9, 11)); *see also Ferreira*, 2021 WL 8820650, at *20 (holding Plaintiffs failed to plausibly show defendants "were aware of the existence of [shipping] containers" full of dead inventory in the Funko parking lot and the Port of Seattle, or that defendants were "aware of their contents, how they obtained this understanding, or even how long these containers were stored in these locations"). With respect to the Oracle Project, the court is not persuaded that ongoing data issues would have been so "prominent" that senior executives not personally involved in the intricacies of the data transfer process *must* have known that "ERP system implementation would not be possible by" the targeted date. (Am. Compl. ¶ 8.) And although the Executive Defendants were involved in high-level "systems architecture decisions" (*id.* ¶ 53) related to ERP implementation, Plaintiffs have not alleged particularized facts about what those decisions were or their effect on the project timeline. (*See supra* § III(C)(1)(a)(ii).) Absent these details, the court cannot draw the inference that the falsity of Defendants' statements concerning the Oracle Project timeline was "patently obvious." *Zucco,* 552 F.3d at 1000.

Accordingly, the core operations doctrine does not give rise to a strong inference of scienter in this case.

ii. Confidential Witnesses

Plaintiffs' confidential witness ("CW") allegations similarly fail. (*See* MTD Resp. at 18-19.) CWs (1) "must be described with sufficient particularity to establish their reliability and personal knowledge," and (2) must offer accounts that are "themselves . . . indicative of scienter." *Zucco*, 552 F.3d at 995. Plaintiffs fail at both steps.

First, Plaintiffs' most direct (and perhaps strongest) CW allegation concerns an employee who told Ms. Jung "in January or February 2022 during a one-on-one video call that the employee could not see the Oracle program being completed on time and that the project was not going well." (Am. Compl. ¶ 54.) But Plaintiffs offer no details about the CW's personal knowledge of the matter beyond his or her "cleaning [of] one business unit's financial data" in preparation for the Oracle launch. (*Id.*) In fact, this CW account pre-dates the Proposed Class Period and Plaintiffs make no allegation that Funko employed the CW at all during the Proposed Class Period. (*See id.*) Without more, the court cannot credit this CW as reliable and having the requisite personal knowledge. *See Zucco*, 552 F.3d at 996-97 (concluding CWs were unreliable because they "were not employed by [defendant] during the time period in question" and the court could "discern no basis for" their claims absent more detail); *see also Ferreira*, 2021 WL 8820650, at *32 (finding CWs unreliable where neither "were employed by Funko during the Class Period"); *In re Rackable Sys., Inc. Sec. Litig.*, No. C 09-0222 CW, 2010 WL 199703, at *8 (N.D. Cal. Jan. 13, 2010) ("Four of the [CWs] . . . were not employed [by defendant] during the Class Period, which makes it unlikely that they had personal knowledge of Defendants' relevant state of mind.").

Second, assuming without deciding that Plaintiffs' other CWs are reliable and have personal knowledge, the remaining CW allegations are not themselves indicative of scienter. In general, the CW accounts amount to vague allegations of internal disagreement and concern that establish, at most, a serious disconnect between Funko's C-Suite and its operations on the ground. (*See, e.g.*, Am. Compl. ¶¶ 44 (alleging employee disagreed with "unrealistically optimistic" sales forecasts), 51 (alleging employee voiced concerns to a VP and Manager about Funko's "lack of data governance controls during team meetings to discuss the Oracle project"), 64 (alleging "numerous employees" stated "it was evident inside [Funko] that the ERP would not be operative by July or August 2022"), 70-72 (alleging a "former Operations Lead" "wrote a heated letter to an Operations Manager" complaining about inventory operations at Buckeye), 78 (alleging a warehouse supervisor discussed the accumulation of dead inventory at Buckeye with the Senior Director of Fulfillment Operations and an Assistant General Manager), 81 (alleging a warehouse supervisor thought Ms. Jung's optimistic statement about Oracle implementation "was a weird thing to say").) None of these CW allegations establish that the Executive Defendants personally knew the extent of Funko's ground-level problems and intentionally or with deliberate recklessness concealed that information from investors. As the Ninth Circuit recently put it, "[d]issatisfaction with a company's strategy, management, and approach . . . coupled with a stock drop, make for interesting reading but not an actionable securities fraud claim." *Espy*, 2024 WL 1689091, at *1; *see also id.* at *5 (rejecting CW allegations that amounted to mere "criticisms" and "negative opinions"); *Zucco*, 552 F.3d at 998 (rejecting finding of deliberate recklessness based on CW accounts that showed only "some disagreement within the corporation"); *In re Medicis Pharm. Corp. Sec. Litig.*, 689 F. Supp. 2d 1192, 1211, 1213 (D. Ariz. 2009) (holding "[v]ague allegations of disagreement and concern" did not establish defendants' deliberate recklessness); *In re Watchguard Sec. Litig.*, No. C05-0678JLR, 2006 WL 2927663, at *7 (W.D. Wash. Oct. 12, 2006) ("Although each of the [C]Ws was one or two 'direct reports' away from a Defendant, there is no indication that any Defendant acquired any [C]Ws' (or anyone else's) knowledge of WatchGuard's ground-level problems."). *Cf. Ferreira*, 2021 WL 8820650, at *33 (finding strong inference of scienter based on CW's "particularized allegations" that defendants "knew specific details about" Funko's accumulation of "obsolete inventory valued at several million dollars," including the "amount," "value," and "volume," because defendants received "aged inventory reports, the Open to Buy plan data, and emails summarizing the discussion at every weekly sales meeting" over several months).

Accordingly, Plaintiffs' confidential witness accounts do not, on their own, give rise to a strong inference of scienter.

iii. Prior Litigation

Plaintiffs next raise scienter allegations related to the previous lawsuit against Funko and its senior executives, which ensued following a write down of $16.8 million in excess dead inventory that had accumulated in 2019. (Am. Compl. ¶ 155 & n.8 (citing *Ferreira*, 2021 WL 8820650, at *15, *20-22 (denying motion to dismiss in part and directing defendants to answer second amended complaint)); *see also id.* ¶ 155 (noting the case settled following the court's partial denial of the motion to dismiss).) Plaintiffs argue Defendants' involvement "in securities fraud litigation regarding some of the very same conduct as alleged above within *six months* of the start of the Class Period further supports a strong inference of scienter." (*Id.*; *see also* MTD Resp. at 23-24.) This court, however, is not persuaded that separate litigation involving a different time period and different, now-settled claims "'should have put the [defendants] on notice that" the statements at issue here "were misleading." (MTD Resp. at 23 (quoting *In re Refco, Inc. Sec. Litig.*, 503 F. Supp. 2d 611, 649 (S.D.N.Y. 2007))); *see also Pugh v. Tribune Co.*, 521 F.3d 686, 695 (9th Cir. 2008) ("[*A*]*ccusations* of fraud" as opposed to "fraud itself" do "not establish a strong inference of scienter.").

iv. Remaining Scienter Allegations

Lastly, Plaintiffs argue the Executive Defendants' Sarbanes-Oxley "(SOX") certifications, Mr. Perlmutter's demotion, and Ms. Jung's termination each raise a strong inference of scienter. (MTD Resp. at 22-23.) But these factors alone "add nothing substantial to the scienter calculus." *Zucco*, 552 F.3d at 1003-04 (regarding SOX certifications); *see also Gammel v. Hewlett-Packard Co.*, 905 F. Supp. 2d 1052, 1078 (C.D. Cal. 2012) ("[N]otable departures are not in and of themselves evidence of scienter." (quoting *In re Cornerstone Propane Partners, L.P.*, 355 F. Supp. 2d 1069, 1093 (N.D. Cal. 2005) ("Most major stock losses are often accompanied by management departures, and it would be unwise for courts to penalize directors for these decisions."))). Accordingly, none of Plaintiffs' individual scienter allegations are sufficiently "compelling and particularized" to raise a strong inference of scienter.

b. Holistic Analysis

A holistic view of the amended complaint does not change the court's conclusion. Plaintiffs paint a dubious picture of fraud, alleging the Executive Defendants intentionally inflated the value of Funko stock by concealing a "multi-million-dollar stockpile" of dead inventory and the "disastrous consequences of two highly-touted infrastructure upgrades" (MTD Resp. at 1), while also revealing the truth of the same in "a series of partial disclosures" issued throughout the Proposed Class Period (Am. Compl. ¶ 160). Having considered the factual allegations all together and in the light most favorable to Plaintiffs, the court concludes the inference that the Executive Defendants acted with scienter is less compelling than the contrary inference of nonculpable conduct. Indeed, it is more plausible to infer that (1) the Executive Defendants lacked specific details about the infrastructural problems unfolding on the ground; (2) Funko promptly disclosed the delay once it became clear that the Oracle Project would not launch on time; (3) Funko promptly disclosed (and continued to disclose) rising operational costs once they became apparent; (4) the Executive Defendants genuinely viewed those costs as temporary, stemming from short-term congestion at Buckeye due to the DC launch and pandemic-related transit delays; (5) the Executive Defendants sincerely believed that Funko's inventory was healthy overall and that Funko would meet its financial projections; (6) in hindsight, those projections proved far too optimistic; and, (7) naturally, the Executive Defendants faced personal consequences for their corporate failures.

Plaintiffs therefore fall short of pleading facts giving rise to a "strong" and "cogent" inference of scienter that is "at least as compelling as any opposing inference one could draw from the facts alleged." *Nguyen*, 962 F.3d at 414. This conclusion follows from "the lack of a plausible motive as well as the lack of particularized facts showing any individual's knowledge or deliberate recklessness" under the circumstances. *Prodanova v. H.C. Wainwright & Co.*, LLC, 993 F.3d 1097, 1113 (9th Cir. 2021).

D. Plaintiffs' Claims Under Section 20(a)

A Section 20(a) claim requires underlying primary violations of the securities laws. 15 U.S.C. § 78t(a); *In re Rigel Pharms., Inc. Sec. Litig.*, 697 F.3d 869, 886 (9th Cir. 2012). Because Plaintiffs have failed to plead an underlying violation of the federal securities laws, their Section 20(a) claims must be dismissed.

E. Leave to Amend

This court must apply the Ninth Circuit's policy favoring leave to amend with "extreme liberality." *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987) (quoting *United States v. Webb*, 655 F.2d 977, 979 (9th Cir. 1981)). "Dismissal without leave to amend is improper unless it is clear . . . that the complaint could not be saved by any amendment." *Gompper v. VISX, Inc.*, 298 F.3d 893, 898 (9th Cir. 2002) (quoting *Polich v. Burlington N., Inc.*, 942 F.2d 1467, 1472 (9th Cir. 1991)). Because Plaintiffs could plead facts that cure the deficiencies identified herein, the court will grant them leave to amend.

IV. CONCLUSION

For the foregoing reasons, the court GRANTS Defendants' motion to dismiss (Dkt. # 39), and GRANTS Plaintiffs leave to file a second amended complaint. The court ORDERS the parties to file, by no later than May 23, 2024, a joint statement that (1) proposes a schedule for the filing of a second amended complaint, and any answer to

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the amended complaint or motion to dismiss the same, and (2) informs the court whether the parties object to amending the caption (*see supra* at 11 n.4).

Dated this 16th day of May, 2024.

JAMES L. ROBART
United States District Judge