IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Plymouth County Retirement System and Scott Mylroie,	:	
Plaintiffs,	:	
v.	:	CIVIL ACTION NO. 1:08-cv-02940-JOF
Carter's Inc., et al.,	:	
Defendants.	:	

OPINION & ORDER

This matter is before the court on Defendant Pricewaterhousecoopers LLP's Motion to Dismiss [66], Defendants Michael D. Casey, Andrew North, Frederick Rowan II, and Charles Whetzel, Jr.'s Motion to Dismiss [67], Defendant Joseph Pacifico's Motion to Dismiss [69], Defendant Carter's Inc.'s Motion to Dismiss [72], Defendant Joseph Pacifico's Motion for Leave to File Excess Pages [81], and Defendants' Motion for Oral Argument [86].

I. Background

A. Factual and Procedural History

This is a securities class action alleging multiple violations of the Federal Securities Exchange Act of 1934 (the "Exchange Act"). On September 19, 2008, Plaintiff Plymouth

County Retirement System brought the instant federal securities class action on behalf of all purchasers of Carter's securities between February 21, 2006 and July 24, 2007, against Defendants Carter's, Frederick Rowan, Joseph Pacifico, Michael Casey, and Charles Whetzel, alleging securities violations under § 10b and 10b-5 of the Securities Exchange Act by Defendant Carter's and violations under § 20(a) by the individual Defendants. On November 17, 2009, a separate action was filed by Scott Mylroie who also asserted violations of the Exchange Act against Carter's and the same individuals as Plymouth. The court consolidated the two cases, and Plaintiffs filed an Amended and Consolidated Class Action Complaint (the "Amended Complaint") on March 15, 2010. In the Amended Complaint, Plaintiffs assert claims on behalf of all purchasers of Carter's securities between March 16, 2005 and November 10, 2009 against Defendants Carter's Inc., Frederick Rowan, Joseph Pacifico, Michael Casey, Charles Whetzel, Andrew North, and Pricewaterhousecoopers LLP.

Plaintiffs allege false and misleading statements and other fraudulent conduct arising out of two sets of alleged fraud. In Plaintiffs' own words,

> The Complaint describes how the Individual Defendants . . . engaged in a fraudulent scheme to milk as much profit as they possibly could from Carter's unsuspecting investors. This scheme was two-pronged. First, the Individual Defendants . . . "smoothed" Carter's financials (in violation of GAAP)[1] to

[1] "Generally Accepted Accounting Principles ('GAAP') are the 'basic postulates and broad principles' that guide business accounting. GAAP is approved by the Auditing Standards Board of the American Institute of Certified Public Accountants ('AICPA')."

> portray the false impression that Carter's was a company capable of delivering consistent and predictable earnings, a quality prized by the investing public as reflective of management's perceived skill and credibility. In order to pump up Carter's stock even more, however, the Individual Defendants (excluding North) sought a growth engine for the Company. To that end, Carter's acquired children's apparel manufacturer OshKosh B'Gosh, Inc. ("OshKosh") in July 2005, and the Individual Defendants (excluding North) spent the next two years relentlessly, and falsely . . . convincing the market that OshKosh was going to be a huge growth engine for Carter's.

¶ 4. The allegations relating to the smoothing of Carter's financials will be referred to as the "Accommodations Fraud," and the allegations relating to the OshKosh portion of Carter's business will be referred to as the "OshKosh Fraud."

Plaintiffs bring claims against all Defendants for purported violations of § 10(b) of the Exchange Act and Rule 10b-5(b) arising out of the Accommodations Fraud. Plaintiffs also assert claims against Defendants Carter's Inc., Rowan, Pacifico, Casey, and Whetzel for purported violations of § 10(b) of the Exchange Act and Rule 10b-5(b) arising out of the OshKosh Fraud, and claims against Carter's Inc., Rowan, Pacifico, Casey, Whetzel, and North (the "the Carter's Defendants") for purported violations of § 10(b) of the Exchange Act and Rule 10b-5(a) and (c) arising out of both the OshKosh and Accommodations Fraud. Plaintiffs additionally assert claims against all five of the Individual Defendants, Rowan,

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Garfield v. NDC Health Corp., 466 F.3d 1255, 1267 n. 8 (11th Cir. 2006) (internal citations omitted). "Generally Accepted Auditing Standards ('GAAS') are the standards prescribed by the AICPA for the conduct of auditors in the performance of an examination. GAAP and GAAS establish guidelines for measuring, recording, and classifying a business entity's transactions." *Id.*

Pacifico, Casey, Whetzel, and North, for purported violations of § 20(a) of the Exchange Act relating to the Accommodations Fraud, and violations for that same section against Rowan, Pacifico, Casey, and Whetzel relating to the OshKosh Fraud. And finally, Plaintiffs bring claims against Defendants Rowan, Pacifico, Casey, and Whetzel for purported violations of § 20A of the Exchange Act.[2]

Defendant Pricewaterhousecoopers LLP, Defendants Casey, North, Rowan, and Whetzel, Defendant Carter's Inc., and Defendant Pacifico all filed their respective Motions to Dismiss the Amended Complaint on April 30, 2010. Defendant Pacifico filed a Motion for Leave to File Excess Pages on July 23, 2010,[3] and Defendants filed a Motion for Oral Argument on September 3, 2010.

1. The Parties and General Background

Lead Plaintiff Plymouth County Retirement System "represents more than 9,700 active and retired public employees of Plymouth County, Massachusetts, and manages approximately $636 million in assets . . . . Plaintiff purchased the common stock of Carter's

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[2] In light of the fact that Plaintiffs bring different claims against different individuals, when discussing the Accommodations Fraud, the court will refer to all five of the individual Defendants as the "Individual Defendants." As the OshKosh Fraud claims are brought only against Carter's and four of the individual Defendants, Whetzel, Rowan, Casey, and Pacifico, these four individual Defendants will be referred to as the "OshKosh Individual Defendants," or the "OshKosh Defendants" if the court is also referring to Carter's.

[3] Defendant Joseph Pacifico's Motion for Leave to File Excess Pages is GRANTED [81].

at artificially inflated prices during the Class Period." Amended Compl., ¶ 31.[4] Plaintiff Mylroie also purchased Carter's stock at allegedly artificially inflated prices during the Class Period. ¶ 32.

Defendant Carter's is a corporation that "designs, sources, and markets apparel for babies and young children in the U.S. under various labels." ¶ 1. On October 24, 2003, Carter's went public in an Initial Public Offering, which resulted in a "30% increase in Carter's stock at the end of the first day of trading." ¶ 3. By December 29, 2007, Carter's operated 228 Carter's outlet and brand retail stores. ¶ 33.

Defendant Frederick Rowan was Chief Executive Officer of Carter's from 1992 to August 1, 2008, and he was also Chairman of the Board from October 1996 to August 1, 2008. ¶ 34. Additionally, Rowan was President of Carter's from 1992 to May of 2004. *Id*. For Fiscal Years 2004-2007, Rowan signed Carter's Forms 10-K, and he also signed Carter's Forms 10-Q for the first three quarters of 2005, the first three quarters of 2006, the first three quarters of 2007, and the first quarter of 2008. *Id*. Rowan's retirement was

[4] For the remainder of this Order and for the sake of brevity, citations to the Amended Complaint will be designated solely by a citation to the paragraph number, e.g., ¶ 31. Furthermore, the following facts are taken from the Amended Complaint, presumed true for the purposes of the motions to dismiss, and construed in the light most favorable to Plaintiffs. *See In re Coca-Cola Enters. Inc. Sec. Litig.*, 510 F. Supp. 2d 1187, 1194 (N.D. Ga. 2007) (Thrash, J.). The court also takes judicial notice of, for the purposes of determining what statements the documents contain only, those relevant documents required to be filed with the SEC and actually filed. *See Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1277 (11th Cir. 1999). Defendants have filed multiple SEC documents with their motions to dismiss, of which the court takes judicial notice.

announced on June 11, 2008. ¶ 291.

During the Class Period, Defendant Joseph Pacifico was President of Carter's. ¶ 35. He left the company on December 21, 2009. *Id*.

Defendant Michael D. Casey "was Executive Vice-President and Chief Financial Officer of Carter's, becoming [Chief Executive Officer] in August 2008 following [Defendant] Rowan's departure, and Chairman of the Board in September, 2009." ¶ 36. Plaintiffs do not expressly state whether Defendant Casey was Vice President and Chief Financial Officer of Carter's for the entire Class Period. *See id*. However, Casey did sign Carter's Forms 10-K for Fiscal Years 2004-2008, and he signed Carter's Forms 10-Q throughout the Class Period. *Id*.

Throughout the Class Period, Defendant Charles Whetzel was Executive Vice-President and Chief Sourcing Officer. ¶ 37.

Defendant Andrew North was Vice President of Corporate Compliance until July 2007. ¶ 38. Plaintiff does not state when Defendant North started as Vice President of Corporate Compliance. In July 2007, North became Carter's Vice President of Finance under Chief Financial Officer Casey. *Id*. From August 1, 2008 to January 19, 2009, North also acted as Interim Chief Financial Officer, and after that stint, returned to his position as Vice President of Finance. *Id*. North signed Carter's Forms 10-Q for the second and third quarters of 2008. *Id*.

Defendant Pricewaterhousecoopers LLP has been Carter's outside auditor at least since Carter's Initial Public Offering. ¶ 41. Pricewaterhousecoopers LLP "provided audit-related services to [Carter's] . . . including the issuance of an unqualified opinion on [Carter's] 2005, 2006, 2007, and 2008 Forms 10-K regarding [Carter's] consolidated financial statements, and the sufficiency of [Carter's] internal controls over financial reporting, in each of those years." *Id.*

2. Accommodations Fraud

"Accommodation payments, also known as 'margin support,' are a standard business feature in the retail industry." ¶ 57. Carter's grants accommodations to its wholesale and mass channel customers in an effort to "assist . . . customers with inventory clearance or promotions." *Id*. Carter's then reflects the accommodation payments as a reduction in net sales, and the payments are "recorded based upon historical trends and annual forecasts." *Id*. Plaintiffs allege that Carter's fraudulently booked accommodation payments by manipulating the reporting period in which they were reported. This then affected Carter's reported net sales, because "net sales that would normally be reduced by the appropriate accommodation payment amount were either artificially high (in periods where the Defendants 'pushed' the accommodation payments into another period) or low (in periods where the Defendants improperly 'pulled,' or booked, the payments)." ¶ 75. Plaintiffs refer to this as "smoothing." *See id*. at ¶ 104. The change in net sales figures also "directly

affected Carter's Accounts Receivable . . . numbers – an inflated net sales figure that fails to reflect an accommodation payment results in a corresponding overstatement of [Accounts Receivable]. This is because the [Accounts Receivable], representing the amount outstanding from a completed sale, fails to reflect the true value of the sale, which should have been discounted by the accommodation amount." ¶ 76. Plaintiffs allege that these improperly booked accommodation payments "rendered Carter's net sales for each reporting period in the Class Period materially false." ¶ 75. Plaintiffs also allege that the "smoothing" inflated stock prices because it "gave the marketplace (and Carter's Board) a correspondingly false image of the Individual Defendants' management skills in seeming to consistently beat guidance," and continued smoothing kept Carter's stock prices at artificially inflated levels throughout the Class Period. ¶ 104.

The Amended Complaint contains the following chart outlining the statements Plaintiffs find false, which the court presumes contains all of Carter's Forms 8K, 10K, and 10Q from March 16, 2005 through July 31, 2009:

Date	False and Misleading Statements
3/16/2005 10K for FY 2004	Net sales for FY 2004: $823.1M Net sales for 4Q 2004: $232.7 M
4/26/2005 8K	Net sales for 1Q 2005: $206.2 M
4/28/2005 10Q	Net sales for 1Q 2005: $206.2 M
7/27/2005 8K	Net sales for 2Q 2005: $192.5 M
8/10/2005 10Q	Net sales for 2Q 2005: $192.5 M

9/28/2005 8K	Reciting 1Q 2005 net sales of $206.2M
10/26/2005 8K	Net sales for 3Q 2005: $372.2 M
11/10/2005 10Q	Net sales for 3Q 2005: $372.1 M
2/22/2006 8K	Net sales for 4Q 2005: $350.5 M Net sales for FY 2005: $1.1 B
3/15/2006 10K	Net sales for 4Q 2005: $350.5 M Net sales for FY 2005: $1.1 B
4/25/2006 8K	Net sales for 1Q 2006: $296.4M
5/11/2006 10Q	Net sales for 1Q 2006: $296. 4M
7/26/2006 8K	Net sales for 2Q 2006: $277.6 M
8/9/2006 10Q	Net sales for 2Q 2006: $277.6 M
10/25/2006 8K	Net sales for 3Q 2006: $392.0 M
11/9/2006 10Q	Net sales for 3Q 2006: $392.0 M
2/13/2007 8K	Net sales for 4Q 2006: $377.5 M Net sales for FY 2006: $1.343 B
2/21/2007 8K	Net sales for 4Q 2006: $377.5 M Net sales for FY 2006: $1.3 B
2/28/2007 10K	Net sales for FY 2006: $1.34 B Net sales for 4Q 2006: $377.5 M
4/24/2007 8K	Net sales for 1Q 2007: $320.1 M
5/10/2007 10Q	Net sales for 1Q 2007: $320.1 M
7/24/2007 8K	Net sales for 1Q 2007: $320.1 M
8/9/2007 10Q	Net sales for 1Q 2007: $320.1 M
10/23/2007 10Q	Net sales for 3Q 2007: $410.9 M
10/29/2007 10Q	Net sales for 3Q 2007: $410.9 M

2/26/2008 8K	Net sales for 2Q 2007: $393.4 M Net sales for FY 2007: $1.4 B
2/27/2008 10K	Net sales for FY 2007: $1.41 B Net sales for 4Q 2007: $393.4 M
4/22/2008 8K	Net sales for 1Q 2008: $330.0 M
4/25/2008 10Q	Net sales for 1Q 2008: $330.0 M
7/22/2008 8K	Net sales for 2Q 2008: $301.7 M
8/6/2008 10Q	Net sales for 2Q 2008: $301.7 M
10/21/2008 8K	Net sales for 3Q 2008: $436.4 M
10/30/2008 10Q	Net sales for 3Q 2008: $436.4 M
2/24/2009 8K	Net sales for 4Q 2008: $422.0 M Net sales for FY 2008: $1.5 B
2/27/2009 10K	Net sales for FY 2008: $1.49 B Net sales for 4Q 2008: $422.0 M
4/28/2009 10Q	Net sales for 1Q 2009: $356.8 M
4/30/2009 10Q	Net sales for 1Q 2009: $356.8 M
7/28/2009 8K	Net sales for 2Q 2009: $317.9 M
7/31/2009 10Q	Net sales for 2Q 2009: $317.9 M

¶ 77. Plaintiffs generally allege that the net sales were either artificially high or artificially low, depending on how the smoothing occurred, but as far as the court is aware, Plaintiffs never explain any details regarding the smoothing, including what any particular net sales figure should actually have been. Plaintiffs contend that because "net sales is the basis for each core financial metric reported by Carter's, and relied on by investors, all of Carter's key financial metrics deriving from net sales . . . most importantly, earnings per share . . .

were rendered materially false and misleading." ¶ 76. Accounts receivable numbers were also incorrect due to incorrect net sales figures.[5] *Id.*

[5]The chart listing the net sales figures that Plaintiffs contend were false is found in a portion of the Amended Complaint entitled "Defendants' Materially False and Misleading Statements and Omissions Relating to the Accommodations Fraud." With respect to the net sales figures, Plaintiffs explain exactly which statements they contend are misleading, and when and where those statements were made. In that same section, Plaintiffs also make these general allegations that all of Carter's core financials were incorrect due to the falsified net sales numbers, including earnings per share and accounts receivable. However, Plaintiffs allege no specifics with regard to any statements of earnings per share or accounts receivable, such as what the incorrect number was.

As discussed in much more detail below, Federal Rule of Civil Procedure 9(b) requires that with respect to Plaintiffs' Rule 10b-5 claims, the Amended Complaint "sets forth . . . precisely what statements were made in what documents or oral representations or what omissions were made, and . . . the content of such statements . . . ." *Garfield*, 466 F.3d at 1262 (internal quotations and citations omitted). The court presumes, therefore, that the net sales figures are the allegedly false and misleading statements that Plaintiffs are basing their claims on. The court makes this presumption because of the title Plaintiffs give this section, and the fact that Plaintiffs assert only general allegations regarding accounts receivable and earnings per share that do not include allegations of what exactly the misstatements were or where and when the misstatements were made. Plaintiffs do discuss earnings per share and accounts receivable more specifically throughout other sections of the Amended Complaint but not in this section that appears to be intended to set out those relevant materially false and misleading statements that are the basis of Plaintiffs' 10b-5 claims. As discussed below, the court is giving Plaintiffs leave to amend their complaint. To the extent Plaintiffs are contending that the earnings per share and accounts receivable constitute a separate basis for their 10b-5 claims, Plaintiffs should make that clear when they amend their complaint.

Plaintiffs allege that the Accommodations Fraud was "discovered" at the beginning of 2009, and this discovery initiated the disclosure of the fraud to the public. Richard Westenberger became the new Chief Financial Officer, replacing an interim Defendant North, in January of 2009.[6] ¶ 97. Soon after his arrival and a few weeks before Carter's was supposed to release its third quarter results for 2009, Westenberger met with one of Carter's big customers, Kohl's, and said to Kohl's Chief Executive Officer, "hey there's an amount that's in question," and Kohl's responded, "yeah absolutely, you owe it to us." ¶¶ 98-99. Westenberger then went back to Carter's and stated that "from an accounting standpoint we've got to disclose this, etc." ¶ 98. Due to this visit and the discoveries made by Westenberger, Westenberger was the one who "triggered the subsequent accounting review of the booking of accommodation payments, uncovering the Accommodations Fraud within just a few months of becoming Carter's CFO." *Id*. Carter's 10K-A filed on January 15, 2010 confirms that "Management initially began a review of margin support arrangements with respect to a single wholesale customer (the "Initial Customer") after becoming aware of a disputed amount of margin support with the Initial Customer." D.E. [72-26], Ex. 25.

This discovery then led to the first partial disclosure to the public of the Accommodations Fraud. On October 27, 2009, Carter's issued a press release "announcing

[6] These allegations are attributed to Confidential Witness 1 ("CW1"), who is a former Carter's Vice President of Investor Relations that worked at Carter's from 2003 to March 2009. ¶ 58.

that it would delay its third quarter earnings release in order to complete a review of its accounting for margin support to its wholesale customers. The stock plummeted by 23% the day of the announcement on extremely heavy trading (14.2 million shares) . . . ." ¶ 99. The full truth was then exposed on November 9, 2009, when Carter's issued another press release noting that it would be restating its financials for fiscal years 2004-2008 and the first two quarters of 2009, due to accommodations issues. ¶ 100. After the announcement, Carter's stock dropped another 14% and 5.5 million shares were traded in one day, which is higher than the "average daily trading volume during the Class Period [, which] was approximately 753,000 shares." *Id*. On December 23, 2009, Carter's issued another press release regarding its own investigation into its accommodation payment procedures and noted that the Company had "self-reported information concerning this investigation to the Securities and Exchange Commission. The Company has also been informed that the United States Attorney's Office [was] conducting an inquiry into this matter." ¶ 115.

In Carter's January 15, 2010 Form 10-K/A, which contained the financial restatement, Carter's stated that:

> The Audit Committee has completed its review and investigation, which was conducted with the assistance of outside counsel and forensic accountants engaged by outside counsel, and has concluded that the Company reported various customer accommodations in incorrect fiscal periods. The investigation uncovered irregularities involving members of the sales organization intentionally not disclosing accommodations arrangements with customers to the Company's finance organization and intentionally providing inaccurate documentation and explanations regarding accommodations to the

> finance organization. Consequently, such arrangements were not communicated to the Company's independent registered public accounting firm.

D.E. [72-26], Ex. 25. The 10K-A stated that "[t]he deferrals related primarily to the Initial Customer and, to a lesser extent, other wholesale customers." *Id*. Carter's also admitted to "control deficiencies in its internal controls associated with customer accommodations processes that constitute material weaknesses . . . ."[7] ¶ 108. *See also* D.E. [72-26], Ex. 25. Carter's remarked that after January 3, 2009, it would be implementing certain changes in an effort to fix the problems with its accommodation payment procedures. ¶ 135.

When Carter's issued its financial restatement on January 15, 2010, it restated its annual figures for fiscal years 2004-2006, without restating the quarterly figures for those years, its quarterly and annual figures for 2007 and 2008, and its figures for the first two quarters of 2009. ¶ 101. The cumulative after-tax impact of the restatement was a "3% reduction in retained earnings in the amount of $7.5 million as of July 4, 2009." ¶ 102. The restatement further stated that the 3% reduction amount "reflects the sum of adjustments to net income for fiscal 2004 through the six-month period ended July 4, 2009, which total $4.4 million, and a 2003 cumulative adjustment to retained earnings in the amount of $3.1 million." ¶ 102. Although Carter's did not explain the 2003 overstatement, in the December

[7] A "material weakness is a control deficiency, or combination of control deficiencies, that results in more than a remote likelihood that a material misstatement of the annual or interim consolidated financial statements will not be prevented or detected." ¶ 108.

23, 2009 press release, Carter's stated that the 2003 amount reflected an "[a]ccommodations adjustment." *Id*. According to Plaintiffs, the restatement shows that the "restated [earnings per share] (adjusted for one-time, non-recurring events per the originally reported adjustment amounts) was less than Company guidance, while the originally reported adjusted [earnings per share] was greater than Company guidance." ¶ 103. The restatement also revealed "significant effects of the Defendants' improper accounting of accommodation payments on the Company's Accounts Receivable figures . . . ." ¶ 106.[8] The Amended Complaint does not state what the restated net sales figures were.

3. Pricewaterhousecoopers LLP and the Accommodations Fraud

As stated previously, Pricewaterhousecoopers LLP is, and was at all times relevant to this suit, Carter's outside auditor. Pricewaterhousecoopers LLP "issued a 'clean opinion' pursuant to each of its audits of Carter's financial statements for the fiscal years 2004-2008." ¶ 149. Plaintiffs allege that Pricewaterhousecoopers LLP made false statements in each of those opinions because the opinions incorrectly stated that the relevant financial statement complied with GAAP and that Carter's maintained effective internal control over financial reporting.

4. OshKosh Fraud

[8] According to the Amended Complaint, the Accounts Receivables were overstated by the following: 13.9% for July 9, 2009, 21.8% for April 3, 2009, 24.1% for January 3, 2009, 26.5% for December 29, 2008, 18.0% for December 30, 2006, and 8.3% for December 31, 2005. *Id*.

On July 14, 2005, Carter's wholly-owned subsidiary, The William Carter Company, acquired all of the outstanding common stock of OshKosh B'Gosh, Inc. ¶ 192. Carter's paid $312.1 million dollars for OshKosh, and $151 million of that price reflected the purchase of OshKosh's goodwill. ¶ 193. Right from the beginning, Carter's "tout[ed] OshKosh as a source of growth for Carter's." ¶ 196. By August of 2005, Carter's stock price had increased by 50% since the date the OshKosh purchase was announced, and by the beginning of 2006, Carter's stock was up 61% since the date the OshKosh purchase was announced. ¶ 221.

Plaintiffs allege that the first of several misleading statements occurred on February 22, 2006, during an earnings call.[9] As an example of the types of false and misleading statements alleged by Plaintiffs, the allegedly false statements from that Earnings Call and the statement makers are:

[9] Plaintiffs allege in their response to Defendants' motions to dismiss that they have sufficiently alleged false statements and omissions with respect to the OshKosh Fraud, and those statements are found in ¶¶ 222, 224, 226, 228, 231, 238, 239, 250, 262, 264, 279 of the Amended Complaint. The court, therefore, only focuses on those paragraphs. In sum, Plaintiffs allege that Defendants Rowan, Pacifico, and Casey made allegedly false statements on February 22, 2006, during an earnings call, ¶¶ 222-29; Defendant Pacifico made a false statement on April 26, 2006, during an earnings call, ¶¶ 231-32; Defendant Casey made a false statement on July 26, 2006, during an earnings call, ¶¶ 239-40; Defendant Casey made a false statement during an October 25, 2006, earnings call, ¶ 250; Defendants Rowan and Pacifico made false statements during a February 21, 2007, earnings call, ¶¶ 262-65; and "the OshKosh Defendants" made a false statement during an April 25, 2007, earnings call, ¶ 279. According to this court's review, the Amended Complaint does not actually allege that the statement in ¶ 238 is misleading. Furthermore, the statement quoted in ¶ 279 that is alleged to be misleading is attributed to all OshKosh Defendants, which is improper pleading under Federal Rule of Civil Procedure 9(b), as it does not allege who exactly made the statement.

Defendant Rowan	[L]et me say we feel we did the right thing acquiring [OshKosh]. *There were no material surprises* after the deal due to our good due diligence. *We feel the brand has a billion dollar potential*. We feel we are on our plan. It's important to realize this will take some time to reach the potential. *Fall '06 product is materially better but holiday '06 and Spring and Fall of next year will move well ahead of Fall '06*. ¶222 (emphasis in original).[10]
Defendant Pacifico	Talk about Oshkosh now, we built a strong integration plan after acquiring Oshkosh in July of last year. The integration is on plan. I feel good about the progress we've made and *even better about the opportunity I see to increase the power in the Oshkosh brand….Most importantly we significantly upgraded the product for Fall '06*. We have integrated all of our support functions of Oshkosh under Carter's management and we also moved Oshkosh design under Patty DeRosa as of January 1. . . . [W]e continue to clean up the Oshkosh wholesale distribution channel but we are planning a double-digit increase for Fall. *We are projecting a double-digit increase for Fall '06*. *All the orders are due by the end of the month* [February]. I'm confident we'll achieve that plan even though we excluded a lot of accounts from year before. ¶ 224 (emphasis in original).

[10] Although Plaintiffs use italics to emphasize certain phrases in the statements they allege are false, they do not state that those are the only portions of the statements that they contend are misleading. Instead, they appear to allege that the entire quoted statement is misleading, and therefore, the court presumes that Plaintiffs are contending such. This is true for any other italicized portions of the allegedly misleading statements quoted by the court.

Defendant Casey	We've made significant changes to Oshkosh's business. *We've stopped the decline in earnings and we have begun rebuilding Oshkosh to the profitable growth business* that it was not that long ago. . . . *We continue to believe we can make significant progress improving Oshkosh's operating margin from less than 5% in 2005 to over 9% in 2006 and over 10% in 2007*. Over the next few years we believe Oshkosh's operating margin could approach Carter's operating margin. So in summary, we've continued to deliver strong organic growth at Carter's. *We've moved quickly to correct the Oshkosh business* and have made very good progress with the integration. . . . The more powerful story is the second half of the year, again, exclusive of these off price customers, we're planning double digit growth in the wholesale business, so that's-- we're very encouraged by that. *We're getting good support for the product* and planning double digit growth . . . . *What we love about Oshkosh it's* [sic] *going to enable us to continue putting up good revenue and earnings growth numbers for the foreseeable future*….one of the reasons we loved the Oshkosh opportunity is we felt as though it was significantly under performing its potential for profitability, *so we're focused on improving their operating margins and we're making good progress doing that*. ¶ 228 (emphasis in original).

Plaintiffs offer generally the same reasons for their contention that those statements were false and misleading: "[T]he OshKosh Defendants knew sales were not going to be up for the Fall 2006 line by the end of February, and that their customers were not receptive to their redesign of OshKosh clothing, which was both of lower quality, and priced higher than the product prior to the Carter's redesign. Yet, the OshKosh Defendants omitted to disclose this material information to the investing public." ¶ 225. *See* also ¶¶ 223, 229. Plaintiffs

essentially repeat this same set of reasons, in whole or in part, for each of the allegedly false or misleading statements.

The first line designed by Carter's after the OshKosh purchase was the Fall 2006 line, and CW1 alleges that the OshKosh Defendants "were aware that it would be a failure months in advance because of information they obtained from the 'Fall sell-through.'" ¶ 216. Confidential Witness 3 ("CW3") is a former Inventory Control and Cost Account Manager who worked at OshKosh from 1988, through the acquisition, to September 2007. ¶ 212. According to CW3, Carter's "played around" with the styling of the OshKosh brand and placed more "bells and whistles" into the product to position the product at a higher price point. *Id*. CW3 alleges that this strategy "backfired" on Carter's as sales started "slumping." *Id*. Other Confidential Witnesses also allege that the quality of the OshKosh line declined after Carter's took over. ¶¶ 213-14. Furthermore, Macy's West was not carrying the OshKosh Fall 2006 line, ¶ 242, and clients such as Belk and JC Penney "could not get desirable price points." ¶ 213.

The essence of Plaintiffs' Amended Complaint is that the OshKosh Defendants touted the OshKosh acquisition as a "growth engine" for Carter's, despite the fact that they knew that the OshKosh division was losing sales and money. *See* ¶ 4. These misleading

statements inflated the price of the OshKosh stock, and that inflation was reversed when the OshKosh Fraud was disclosed to the public through a series of disclosures.

The first corrective disclosure occurred on July 25, 2006 during a press release and on a July 26, 2006 earnings call. ¶ 237. Carter's announced that a "full year earnings guidance for the remainder of 2006 that was well-below analysts' expectations, due to lower than expected fall sales from OshKosh." *Id*. On July 26, 2006, Carter's stock price dropped 23% to a 52-week low, and there was heavy trading volume. *Id*. The next disclosure occurred on February 13, 2007, when Carter's "issued a sharply-downward revised outlook for 2007 and, for the first time, disclosed that they expected no growth in comparable store sales . . . ." ¶ 257. On February 14, 2007, Carter's stock dropped again 16.7% to $21.05 per share with heavy volume being traded. ¶ 258. Even while the corrective disclosures were going on, Plaintiffs allege that some of the OshKosh Defendants continued to falsely purport that OshKosh was a growth opportunity for Carter's. *See, e.g.*, ¶ 264. As part of this scheme, on February 21, 2007, Carter's announced a $100 million share repurchase program, stating that the "timing and amount of any repurchases will be determined by the Company's management, based on its evaluation of market conditions, share price, and other factors." ¶ 266. By April 24, 2007, Carter's had repurchased 1,252,832 of its shares of common stock for about $30 million at an average rate of $23.95. *Id*.

On April 25, 2007, during Carter's First Quarter 2007 earnings call, "Defendants admitted that '[their] over-the-counter selling of [OshKosh] spring product [was] below [their] expectations' but emphasized that 'summer bookings . . . were up 20% to last year.'" ¶ 279. Carter's May 10, 2007 Form 10-Q showed that the "OshKosh brand wholesale sales decreased $3.7 million, or 12.9%, in the first quarter of fiscal 2007 to $25.0 million." ¶ 281. The final corrective disclosure occurred on July 24, 2007, when Carter's announced that "it was writing down all of the OshKosh goodwill on its books . . . ." ¶ 285. The next day, Carter's stock fell from $24.87 per share to $22.75 per share, again with heavy volume being traded. ¶ 288.

B. Contentions

All of the Carter's Defendants generally assert the existence of the same or similar problems with the Amended Complaint. As to the Accommodations Fraud, the Carter's Defendants contend that neither Plaintiff Plymouth nor Plaintiff Mylroie have standing to assert the claims regarding the Accommodations Fraud, and further, there are not sufficient allegations of scienter in the Amended Complaint. As to the OshKosh Fraud, the OshKosh Defendants also allege that there are insufficient allegations of scienter, but they additionally allege that the Amended Complaint fails to plead loss causation and that all of the statements alleged to be false fall under a statutory safe harbor. Pricewaterhousecoopers LLP similarly bases its motion to dismiss on the argument that Plaintiffs have failed to adequately plead

scienter. Those Defendants subject to the claims under § 20(a), allege that because the primary violation claims fail as described above, so do the claims brought pursuant to § 20(a). Those Defendants subject to claims under § 20A allege that those claims fail as well because Plaintiffs failed to plead a primary violation.

II. Discussion

A. Accommodations Fraud

"Section 10(b) and Rule 10b-5 make it unlawful for any individual to employ a manipulative or deceptive device in connection with the purchase or sale of any security." *Garfield*, 466 F.3d at 1261. Rule 10b-5 states:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To 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, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5. Plaintiffs' Amended Complaint therefore must allege "1) a misstatement or omission, 2) a material fact, 3) made with scienter, 4) on which plaintiff

relied, 5) that proximately caused his injury."[4] *Id*. To survive a motion to dismiss, a complaint alleging violations of the Exchange Act should meet more than just the requirements of Federal Rule of Civil Procedure 8. The Amended Complaint must also meet the heightened pleadings standards imposed by the Private Securities Litigation Reform Act ("PSLRA"), 15 U.S.C.A. § 78u-4, and Fed. R. Civ. P. 9(b). Rule 9(b) states that claims of fraud must be pled with particularity, and

> Rule 9(b) is satisfied if the complaint sets forth (1) precisely what statements were made in what documents or oral representations or what omissions were made, and (2) the time and place of each such statement and the person responsible for making (or, in the case of omissions, not making) same, and (3) the content of such statements and the manner in which they misled the plaintiff, and (4) what the defendants obtained as a consequence of the fraud. A sufficient level of factual support for a [10b] claim may be found where the circumstances of the fraud are pled in detail. This means the who, what, when[,] where, and how: the first paragraph of any newspaper story.

Garfield, 466 F.3d at 1262 (internal quotations and citations omitted). In addition, the PSLRA requires that the complaint "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). Furthermore,

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[4] Although Plaintiffs' claims pursuant to 10b-5(a) and (c) do not require a false statement to be pled, Plaintiffs still must show the other elements of a Rule 10b-5 claim, such as scienter and proximate causation, and Plaintiffs still must plead the circumstances of the fraud and scienter with particularity. *See In re Initial Public Offering Sec. Litig.*, 241 F. Supp. 2d 281, 334 (S.D. N.Y. 2003).

the PSLRA requires that where a defendant's state of mind is relevant to recovery, 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).

1. Standing

Defendants allege that neither named Plaintiff, Plymouth nor Mylroie, has standing to bring claims for the Accommodations Fraud because neither Plaintiff has suffered the injury upon which the claims are based. To assert a claim in federal court and invoke the jurisdiction of the court, the burden is on the plaintiff to show that the plaintiff has constitutional standing. *Koziara v. City of Casselberry*, 392 F.3d 1302, 1304 (11th Cir. 2004). "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Id*. (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)). "If a plaintiff lacks standing, the 'case' or 'controversy' requirement of Article III, § 2 of the U.S. Constitution is not satisfied, and the case must be dismissed." *Id*. Further, "a plaintiff cannot include class action allegations in a complaint and expect to be relieved of personally meeting the requirements of constitutional standing, 'even if the persons described in the class definition would have standing themselves to sue.'" *Griffin v. Dugger*, 823 F.2d 1476, 1483 (11th Cir. 1987). *See also Bowen v. First Family Fin. Servs., Inc.*, 233 F.3d 1331, 1339 (11th Cir. 2000) ("The fact that this suit was

brought as a class action does not affect the plaintiffs' burden of showing that they individually satisfy the constitutional requirements of standing.").

Therefore, to show standing Plaintiffs must show that one of them, with regard to the Accommodations Fraud,

> (1) . . . has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Koziara, 392 F.3d at 1304-05 (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000)). Defendants focus on the lack of an injury in fact. "An injury in fact cannot be an abstract injury." *Id*. at 1305. Plaintiffs "must point to some type of cognizable harm, whether such harm is physical, economic, reputational, contractual, or even aesthetic." *Id*.

To recover on a claim under Rule 10b-5, a securities plaintiff must prove that his injury was proximately caused by the alleged fraud. *Robbins v. Kroger Properties, Inc.*, 116 F.3d 1441, 1447 (11th Cir. 1997). To prove proximate cause, "loss causation" must be shown. *Id*. Loss causation can be pled by alleging that the artificially inflated stock price, caused by the fraudulent misrepresentations, was "corrected" or deflated by way of corrective disclosures that reveal the fraud. *See Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 347 (2005) (holding that the loss causation requirement can be satisfied by pleading that the

shares decreased in price "after the truth became known" with respect to the allegedly false misrepresentations or omissions). Defendants' standing argument revolves around the two corrective disclosures alleged by Plaintiffs with regard to the Accommodations Fraud, which are the October 27, 2009 press release by Carter's "announcing that it would delay its third quarter earnings release in order to complete a review of its accounting for margin support to its wholesale customers," ¶ 99, and the November 9, 2009 press release stating that Carter's would be restating its financials for fiscal years 2004-2008 and the first two quarters of 2009. ¶ 100. Plaintiff Plymouth did not hold any Carter's stock at the time of either aforementioned disclosure,[5] and therefore, Defendants claim that Plymouth suffered no injury from the Accommodations Fraud. Plaintiff Mylroie did not own Carter's stock on November 9, 2009, the date of the second disclosure.[6] Mylroie did own stock on October 27, 2009, and undisputedly lost some money on his purchase of Carter's stock, but Defendants argue that there was no corrective disclosure on that date, and therefore, "[a]ny change in the stock price following the announcement of an earnings delay or the beginning of an internal review is pure market speculation, not a 'correction' of some prior artificial inflation." D.E. [72-39], 76. Because the announcement did not correct any of the allegedly

[5] Plaintiff Plymouth bought shares after the October 27, 2009 press release and subsequent price drop and sold all of its Carter's shares before the November 9, 2009 press release.

[6] Plaintiff Mylroie purchased Carter's shares on October 12, 2009, and then sold his shares on October 27, 2009, just after the October 27, 2009 press release.

fraudulent inflation, Plaintiff Mylroie also suffered no injury, according to Defendants. Defendants' argument essentially hinges on whether the October 27, 2009 press release suffices as a corrective disclosure, and their implied argument that loss causation (or proximate causation) must be shown for standing to exist.

First, the court notes that although there are few cases addressing standing in securities claims in a similar context, the Eleventh Circuit has made it clear in other contexts that "no authority even remotely suggests that proximate causation applies to the doctrine of standing. Instead, even harms that flow indirectly from the action in question can be said to be fairly traceable to that action for standing purposes." *Focus on the Family v. Pinellas Suncoast Transit Auth.*, 344 F.3d 1263, 1273 (11th Cir. 2003) (internal quotations and citations omitted) (discussing standing and causation in a 42 U.S.C. § 1983 case). In fact, "in evaluating Article III's causation (or 'traceability') requirement, [courts] are concerned with something less than the concept of 'proximate cause.'" *Id*. As such, proximate causation need not be sufficiently alleged for a plaintiff to successfully assert standing.

At any rate, the court finds that the October 27, 2009, press release is a partial corrective disclosure for the purposes of loss causation because it directly relates to the issue involved in this allegedly fraudulent scheme: Carter's accommodations accounting. Further, the Amended Complaint alleges that after the October 27, 2009 press release, that same day, Carter's stock price dropped significantly. ¶ 23. *See Dura Pharm., Inc. v. Broudo*, 544 U.S.

336, 347 (2005) (holding that the loss causation requirement can be satisfied by pleading that the shares decreased in price "after the truth became known" with respect to the allegedly false misrepresentations or omissions). Plaintiff Mylroie sold his stock after the press release and after the stock price dropped. Therefore, Plaintiffs sufficiently allege that the October press release was a partial disclosure and corrected some of the artificial inflation of Carter's stock. Although it was not until November 9, 2009, that Carter's announced that it would actually be restating its financials for fiscal years 2004-2008 and the first two quarters of 2009, the October 27th press release made it clear that there might be problems pertaining to margin profit accounting. Even if not a partial corrective disclosure for the purposes of loss causation, the court finds that Plaintiff Mylroie has sufficiently pled facts showing that he suffered harm that can be fairly traced to his purchase of Carter's stock at prices that were allegedly inflated by the Accommodations Fraud. ¶ 32.

Some courts have required only an out-of-pocket loss to be asserted for the plaintiff to have standing in a securities case. *See Barr v. Matria Healthcare, Inc.*, 324 F. Supp. 2d 1369,1377 (N.D. Ga. 2004) (Thrash, J.). In the *Barr* case, the plaintiff alleged that the defendants' misrepresentations caused the company's stock price to be artificially inflated. *Id*. at 1373-74. The plaintiff purchased his stock at one price and sold his stock at a lower price, months before the truth was revealed to the public through a corrective disclosure. *Id*. at 1374. The defendants challenged the plaintiff's standing, alleging that because the

plaintiff sold his stock prior to the fraud being revealed, according to the plaintiff's own theory, the plaintiff both bought and sold stock at artificially inflated prices. *Id*. at 1376. Therefore, the defendants contended that the plaintiff suffered no injury. *Id*. The plaintiff argued that he suffered the injury necessary to give him standing by purchasing stock at an artificially inflated price and later selling it at a lower price. *Id*.

The *Barr* court noted that "[c]ase law from one circuit court and numerous district courts suggests that an in-and-out trader, one who both buys and sells his stock within the class period, can have standing as a class representative." *Barr*, 324 F. Supp. 2d at 1376 (citing cases, including *Wool v. Tandem Computers Inc.*, 818 F.2d 1433 (9th Cir. 1987)). "The Ninth Circuit reached this result based upon the out-of-pocket rule, which fixes recoverable damages as 'the difference between the purchase price and the value of the stock at the date of purchase.'" *Id*. (quoting *Wool*, 818 F.2d at 1437). "The Eleventh Circuit . . . employs the out-of-pocket rule to measure damages in Rule 10b-5 actions." *Id*. (citing *Robbins*, 116 F.3d at 1447). According to the *Barr* court, "[t]he principle underpinning the out-of-pocket rule is that a plaintiff's injury is not the loss of what he might have gained if the false facts had been true, but rather what he has actually lost by being deceived into the purchase." *Id*. The court found that because the plaintiff suffered an out-of-pocket loss, he had standing to sue despite the fact that he sold his stock prior to the alleged corrective disclosure. *See id*. It is undisputed that Plaintiff Mylroie traded in and out of his Carter's

stock during the class period, and as noted above, the Amended Complaint alleges that Plaintiff Mylroie suffered a loss of $5,198.49 after he bought Carter's stock at an artificially inflated price. ¶ 32.

Plaintiff Mylroie has standing to assert the Accommodations Fraud claims, and there are no allegations that either party lacks standing with respect to the OshKosh Fraud. Therefore, as at least one named Plaintiff has standing regarding each set of fraud alleged in the Amended Complaint, the court finds that standing has been sufficiently alleged. *See Prado-Steiman ex rel. Prado v. Bush*, 221 F.3d 1266, 1279-80 (11th Cir. 2000) ("[I]t is well-settled that prior to the certification of a class . . . the district court must determine that at least one named class representative has Article III standing to raise each class . . . claim.").

2. Group Pleading

The Carter's Defendants contend that Plaintiffs have not alleged a single misrepresentation made by Defendant Whetzel, with regard to either the Accommodations or the OshKosh Fraud, and therefore, the claims against him for making false or misleading statements must be dismissed. Defendant Whetzel is not alleged to have signed any of Carter's Forms 8K, 10K, or 10Q, ¶ 37, nor is there a single oral statement attributed to

Defendant Whetzel. Plaintiffs contend that the group pleading doctrine saves their claims against Whetzel.[7]

In *Phillips v. Scientific-Atlanta, Inc.*, 374 F.3d 1015, 1018 (11th Cir. 2004), the Eleventh Circuit described the group pleading doctrine as follows: "The group pleading doctrine in securities litigation varies somewhat among the circuits, but it can be broadly characterized as a presumption of group responsibility for statements and omissions in order to satisfy the particularity requirements for pleading fraud under Federal Rule of Civil Procedure 9(b)." This court can find no case law in which the Eleventh Circuit has adopted the group pleading doctrine, even pre-PSLRA, and there is a split among courts, including those in this circuit, as to the viability of the group pleading doctrine after enactment of the PSLRA. *See In re Premiere Techs. Inc.*, No. 1:98-CV-1804-JOF, 2000 WL 33231639, at *10 (N.D. Ga. Dec. 8, 2000) (Forrester, J.) (citing cases). *See also Southland Sec. Corp. v. INSpire Ins. Solutions Inc.*, 365 F.3d 353, 364 (5th Cir. 2004) (citing cases). In *Phillips*, the Eleventh Circuit intentionally did not address the viability of the group pleading doctrine, *id.* at 1019, but based on the language of the PSLRA, did conclude that "scienter must be

[7] The court also notes that with regard to the Accommodations Fraud, the court does not think that any of the statements made are attributed to Joseph Pacifico, as he is not alleged to have signed any of the Forms 8K, 10K, or 10Q. *Compare* ¶ 35 (does not allege that Pacifico signed any documents), *with* ¶ 36 (alleges that Casey signed the Company's Forms 10-K for the Fiscal Years 2004, 2005, 2006, 2007, and 2008, among other things). However, neither Plaintiffs nor Defendants address this, and therefore, the court does not either.

found with respect to each defendant and with respect to each alleged violation of the statute," *id*. at 1017-18.

This court has previously held that the "group pleading doctrine did not survive the PSLRA" based upon the fact that "the PSLRA specifically requires that the untrue statements or omissions be set forth with particularity as to 'the defendant' and that scienter be pled in regards to 'each act or omission' sufficient to give 'rise to a strong inference that the defendant acted with the required state of mind.'" *In re Premiere Techs. Inc.*, 2000 WL 33231639, at *11. The court still finds that the doctrine is "inconsistent with the specificity required for pleading under the PSLRA," and Rule 9(b). *Id.* at *10. The group pleading doctrine is a "judicial construct" that cannot be reconciled with the language of the PSLRA. *Id*. at *11.

Since this court's decision in *In re Premiere Techs. Inc.*, as noted by the Eleventh Circuit in *Phillips*, the Fifth Circuit has also concluded that the group pleading doctrine did not survive the PSLRA. *Southland Sec. Corp.*, 365 F.3d at 365. The Fifth Circuit further stated that:

> [C]orporate officers may not be held responsible for unattributed corporate statements solely on the basis of their titles, even if their general level of day-to-day involvement in the corporation's affairs is pleaded. However, corporate documents that have no stated author or statements within documents not attributed to any individual may be charged to one or more corporate officers provided specific factual allegations link the individual to the statement at issue. Such specific facts tying a corporate officer to a statement would include a signature on the document or particular factual

> allegations explaining the individual's involvement in the formulation of either the entire document, or that specific portion of the document, containing the statement.

Id. The *Southland Sec. Corp.* court also held that:

> Various unattributed statements within documents may be charged to different individuals, and specific facts may tie more than one individual to the same statement. And, the corporation itself may be treated as making press releases and public statements issued by authorized officers on its behalf, and statements made by its authorized officers to further the interests of the corporation.

Id.

The court finds this analysis persuasive. There are no allegations in the Amended Complaint that Defendant Whetzel made any statements regarding the OshKosh Fraud or that he signed or helped prepare any of the documents containing the false statements that are the basis of the Accommodations Fraud. The Amended Complaint fails to state a claim against him for violation of Rule 10b-5(b).

3. Scienter[8]

The PSLRA raised the standard for pleading scienter in securities fraud class actions. *Mizzaro v. Home Depot, Inc.*, 544 F.3d 1230, 1238 (11th Cir. 2008). "[T]he complaint shall, with respect to each act or omission alleged to violate this chapter, *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) (emphasis added). Therefore, scienter cannot be pled generally. Instead "the complaint must allege facts supporting a strong inference of scienter 'for each defendant with respect to each violation.'" *Mizzaro*, 544 F.3d at 1238. Scienter includes the "intent to deceive, manipulate, or defraud," or "severe recklessness." *Id*. Severe recklessness has been defined by the Eleventh Circuit as being:

> [L]imited to those highly unreasonable omissions or misrepresentations that involve not merely simple or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and that present a danger of

[8] Failure to plead scienter for individual defendants does not always mean that scienter cannot be established against a corporation. "Corporations, of course, have no state of mind of their own. Instead, the scienter of their agents must be imputed to them." *Mizzaro*, 544 F.3d at 1254. The court notes that Plaintiffs have not attempted to allege scienter as to anyone other than the named Individual Defendants nor are any of the allegedly false statements attributed to any other individuals, and therefore, for the purposes of analyzing whether the company, Carter's, had the requisite intent, the court only needs to address the allegations of scienter as to the Individual Defendants. *See Thompson v. RelationServe Media, Inc.*, 610 F.3d 628, 635 (11th Cir. 2010). *See also Mizzaro v. Home Depot, Inc.*, 544 F.3d 1230, 1254-55 (11th Cir. 2008).

> misleading buyers or sellers which is either known to the defendant or is so obvious that the defendant must have been aware of it.

Id. As the *Mizzaro* court put it, Plaintiffs "must (in addition to pleading all of the other elements of a § 10(b) claim) plead 'with particularity facts giving rise to a strong inference' that the defendants either intended to defraud investors or were severely reckless when they made the allegedly materially false or incomplete statements." *Id*.

In *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 314 (2007), the Supreme Court held that in securities fraud class actions, "an inference of scienter must be more than merely plausible or reasonable-it must be cogent and at least as compelling as any opposing inference of nonfraudulent intent." This court should:

> [C]onsider plausible nonculpable explanations for the defendant's conduct, as well as inferences favoring the plaintiff. The inference that the defendant acted with scienter need not be irrefutable, *i.e.*, of the "smoking-gun" genre, or even the "most plausible of competing inferences[.]" . . . [But a] complaint will survive . . . only 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.

Id. at 323-24. "[P]laintiffs may create a 'strong inference' of scienter by circumstantial evidence alone." *Mizzaro*, 544 F.3d at 1249. The court "must consider the complaint in its entirety," as "[t]he inquiry . . . is whether all of the facts alleged, taken collectively, give rise to a strong inference of scienter, not whether any individual allegation, scrutinized in isolation, meets that standard." *Tellabs*, 551 U.S. at 314. The court will address each group of individualized allegations of scienter, and then address them cumulatively.

Plaintiffs' allegations of scienter essentially rely on the allegations of certain confidential witnesses, allegations of motive and opportunity involving stock sales, compensation, the core operations doctrine, and the length and nature of the restatement and the GAAP violations. Recognizing the scienter allegations must be viewed as a whole, the court first addresses the different categories of scienter allegations separately. As shown in the chart above, Plaintiffs are asserting that there were almost fifty false or misleading statements made over a four-year period. Plaintiffs must plead particularized facts that allege scienter as to the Defendant that made each statement at the time each statement was made. *Mizzaro*, 544 F.3d at 1247 ("[S]imply alleging that a widespread fraud may have occurred is not enough. . . . [The] allegations must create a *strong inference* . . . that the individual defendants knew about the alleged fraud . . . **when they made the purportedly false or misleading statements.**") (emphasis added).

a. Actual Knowledge and the Confidential Witnesses

Plaintiffs' claims that the Carter's Defendants had actual knowledge of and/or participated in or orchestrated the Accommodations Fraud rest largely on allegations made by Confidential Witnesses 1 and 2. The Eleventh Circuit has addressed how district courts are to evaluate the weight to be given to allegations made by confidential witnesses. The Eleventh Circuit declined to adopt a *per se* ruling requiring that confidential witnesses should be named, but the complaint must "unambiguously provide in a cognizable and

detailed way the basis of" the confidential witnesses' knowledge. *Mizzaro*, 544 F.3d at 1240. Further,

> [T]he weight to be afforded to allegations based on statements proffered by a confidential source depends on the particularity of the allegations made in each case, and confidentiality is one factor that courts may consider. Confidentiality, however, should not eviscerate the weight given if the complaint otherwise fully describes the foundation or basis of the confidential witness's knowledge, including the position(s) held, the proximity to the offending conduct, and the relevant time frame.

Id. at 1241.

As stated previously, CW1 is a former Carter's Vice President of Investor Relations, who worked at Carter's from 2003 to March 2009. ¶ 58. CW1 was "responsible for interfacing with investors, being the Company's spokesperson and presenting financial results to investors as well as analysts," and as such, CW1 attended many meetings where the preparation of the financial statements and analyst calls were discussed including "budget" or "forecast meetings." *Id.* At the budget meetings, CW1 states that there were "heated conversations" about accommodations.[9] *Id*. CW1 also accuses Carter's of "skirting the gray zone in terms of controls in the audit process and the accounting process." ¶ 59.

[9] The fact that some or all of the Individual Defendants attended meetings where accommodations were discussed does not demonstrate scienter. CW1 does not allege which Defendants attended which meetings, when the meetings were, or what the topic of conversation was beyond "heated conversations" about accommodations. "Bare, unspecific allegations that officers attended meetings at which a segment of the Company's business was discussed cannot, alone, demonstrate scienter." *In re NDCHealth Corp., Inc.*, No. 1:04-cv-0970-WSD, 2005 WL 6074918, at *9 (N.D. Ga. July 27, 2005) (Duffey, J.). *See also In re Spectrum Brand, Inc.*, 461 F. Supp. 2d 1297, 1319 (N.D. Ga. 2006) (Duffey, J.).

CW1 alleges that Defendant Casey "ran the internal accounting group that actually calculated the numbers for the Company's SEC filings . . . ," and he "was the sole person responsible for the accounting and he was pretty tightly in control of that along with Andy North." ¶ 66.

CW1 labels North and Casey the "financial architects" of the purported Accommodations Fraud, ¶ 68, and the Amended Complaint also alleges that CW1 said that Defendant Casey would instruct senior sales people to re-book the accommodations in order to make the numbers for a particular quarter, and Casey would "use North" to instruct sales people to re-book accommodations. ¶ 72. However, the actual quotes attributed to CW1 are much more indefinite. Take for example the statement that:

> Based on sitting in meetings, based on conversations I've had with people, that in summary Mike [Casey] threw in Andy North, VP of finance and certain people in the accounting team. And I think it was mostly directed through Andy North. They would manipulate . . . they would book the accommodations in a way to manipulate or control the earnings by quarter, thus what we would call, his people would call smoothing out or, you know, pulling or pushing from one quarter to the other.

¶ 68. The "smoothing" by Carter's "occurred for a number of years," according to CW1. *Id*. CW1 also states that he:

> [W]as told by certain people in Sales that they were instructed by, it's my understanding with the blessing of Mike [Casey], to re-book the timing of when those accommodations should hit. So meaning they were, sales was pretty straightforward, they get the accommodation request and they fill out the paperwork and put it in…And I remember a number of times that when

> the accommodations would come in too high and it didn't meet the timing of when Mike [Casey] wanted it, because obviously it would cause the quarter [to] miss the street numbers, or miss the numbers that the Board…was expecting.

¶ 71.

These allegations are not pled with sufficient particularity to support a strong inference of scienter on behalf of any Individual Defendant. First, many of CW1's allegations rely on hearsay, which in and of itself is not fatal, but the hearsay statements CW1 relies upon are vague.[10] CW1 states that "based on conversations I've had with people," North and Casey "manipulated accommodations," and CW1 "[w]as told by certain people in Sales that they were instructed by, it's my understanding with the blessing of Mike [Casey], to re-book the timing of when those accommodations should hit." ¶¶ 68, 71. CW1 does not state when any of these conversations happened or who specifically CW1 spoke to, other than "certain people in Sales." Furthermore, the second allegation is simply that people in Sales were told to book accommodations in the wrong period by some unknown person, and it was CW1's "understanding" that Mike Casey gave his blessing.

[10] The court notes that when CW1 does rely on his own observations or his own interactions with any of the Individual Defendants, those observations generally lack specificity as to the details surrounding the observation, including the date.

CW1 does specifically allege that Casey would instruct senior sales people to re-book the accommodations in order to make the numbers for a particular quarter, and Casey would also "use North" to instruct sales people to re-book accommodations. ¶ 72. However, CW1 does not state when any of these alleged instructions to re-book happened or how much was being re-booked at any particular time or which companies' accommodation payments were re-booked. *In re Spectrum Brands, Inc.*, 461 F. Supp. 2d at 1306 ("Rule 9(b) requires plaintiffs in a securities fraud case to specify the who, what, where, when, why and how of the alleged fraud."). CW1 only gives one specific instance of an improperly booked accommodation, alleging that in the fourth quarter of 2006, "Defendants were forced to improperly book fall accommodation payments in later quarters." ¶ 96. CW1 states that "several of Carter's key accounts, including JC Penney and Belk 'asked for more money due to poor Fall performance but [accommodation] expenses [were] booked' in later periods, because the Defendants were concerned with meeting guidance at the end of 2006." *Id*. CW1 does not say who re-booked those specific payments or instructed them to be re-booked, how any of the Defendants were aware that these particular payments had to be and/or were re-booked, or how much the re-booked payments were.

CW2 was a Manager of Financial Analysis at Carter's from October 2006 until December of 2008, and CW2 "analyzed Carter's budgeting models, was responsible (among other things) for the reporting of financials, and helped prepare the presentation 'books' of

financials given to the Board of Directors at their meetings with management." ¶ 60. CW2 reported to the Vice President of Finance, and North was the Vice President of Finance during CW2's last six months at Carter's. *Id*. CW2 alleges that there was a lack of internal controls at Carter's, including the fact that the Vice President of Finance supervised both internal and external audit procedures. ¶ 61. CW2 claims that "Andy [North] is the one that runs all of the auditing and gives the direction to auditing." *Id*. CW2 never saw a written policy regarding accommodations but observed that "accommodations were always a big contention while [she] was there." ¶ 62. Despite the fact that CW2 was heavily involved in Carter's financials, CW2 does not actually allege that there was any smoothing of accommodation payments. CW2 simply states that accommodations were not tracked or controlled while she worked at Carter's, and they were a contentious issue. *Id*. Despite allegations that accommodations were not tracked, CW2 also claims that she had access to an "accommodations list" which was a master spreadsheet detailing Carter's accommodation payments. ¶ 63. North and "other top executives" also had direct access to the spreadsheet which was stored on a shared drive. *Id*. CW2 additionally alleges that Defendant Pacifico, while he was President, "was involved in setting up a lot of these accommodations."[11] ¶ 73.

[11]The court finds it relevant that this is the only allegation by CW1 or CW2 that explicitly refers to Defendant Pacifico, and neither CW1 or CW2 specifically mention Defendants Rowan or Whetzel by name or makes any specific allegations regarding their knowledge. The allegation that Pacifico helped "set up" the accommodations does not indicate that he knew how the payments were being accounted for or had any involvement in determining the accounting procedures for booking accommodation payments.

These allegations are also insufficient to create a strong inference of scienter, and many are not pled with particularity. CW2 generally alleges that there was a lack of internal controls regarding auditing. This is insufficient alone to indicate scienter, *In re Spear & Jackson Sec. Litig.*, 399 F. Supp. 2d 1350, 1362-63 (S.D. Fla. 2005), although the court recognizes that this must be viewed in light of all allegations of scienter in the Amended Complaint. CW2 claims that North and other "top executives" had "direct access" to the master spreadsheet. However, CW2 does not allege that any of the Defendants actually looked at the sheet or that the sheet showed improper accommodations booking, and the fact that the sheet existed and some or all of the Individual Defendants may have had access to it, does not create a strong inference of scienter. Mere access to information is not enough. *See Hubbard v. BankAtlantic Bancorp, Inc.*, 625 F. Supp. 2d 1267, 1286 (S.D. Fla. 2008).

CW1 also notes that he had access to Carter's "flux balance sheet," which is where Carter's would break down its reserves relating to accommodations, and the flux balance sheets were prepared every quarter and provided to the Individual Defendants. ¶ 129. The flux balance sheets "were very detailed and broke down all the reserves. So accommodations, inventory, A/P, good will . . . was all detailed out in terms of the logic behind every component in the P&L [profit and loss], cash flow, balance sheet." *Id*. CW1 further states, "I would see the flux balance sheet, you know, where they would break down all the reserves that were hung up, to see in there what was done by account and I would

kind of, that's where I would kind of call out, now why is a certain account up, you know, 40% accommodations and another account is down. And that's because they were moving the dollars around between accounts." *Id*. The Amended Complaint does not cite to a single flux balance sheet or give any real detail regarding the contents of any particular flux balance sheet, but instead, relies solely on the aforementioned description by CW1, which contributes to the general lack of particularity of the Confidential Witness allegations in the Amended Complaint. *See In re Boston Tech., Inc. Sec. Litig.*, 8 F. Supp. 2d 43, 57 (D. Mass. 1998) (Although there are other ways to prove knowledge, "complaints typically identify internal reports, memoranda, or the like, and allege both the contents of those documents and defendants' possession of them at the relevant time."). The fact that the flux balance sheets were given to the Individual Defendants every quarter could help support Plaintiffs' allegations of scienter, and an allegation that the flux balance sheet showed that money was being moved between accounts could also be indicative of scienter. However, as there is no detail regarding any particulars of any flux balance sheet, there is no way to tell that even if the Individual Defendants did look at the flux balance sheets for each quarter, what exactly that would put them on notice of and when.

Over all, there is little information in the Amended Complaint regarding the details and timing of the alleged Accommodations Fraud beyond the fact that Carter's undisputedly issued a financial restatement after an investigation into its margin profit accounting and the

conclusory accusations by the Confidential Witnesses, including those that North and Casey were the financial architects of the fraud. The Confidential Witnesses make no specific, relevant allegations as to Defendants Whetzel, Pacifico, or Rowan. Although Plaintiffs are attempting to paint a picture of widespread fraud that Casey and North orchestrated, the Confidential Witnesses do nothing to indicate exactly when Casey and North knew about or began re-booking accommodations or when they should have known about it. Scienter must be shown as to each Defendant and each alleged misrepresentation. Here, there are several Defendants and a large number of allegedly false statements spanning over a number of years, yet little to no discussion of exactly when Defendants knew of or began participating in the Accommodations Fraud. The Confidential Witness statements alone do not provide a strong inference that at the time each allegedly false net sales figure was stated, Defendants knew the statements were false or were severely reckless in not knowing.

b. Core Operations Doctrine

Plaintiffs assert that "because the manipulation of the accommodation payments required the participation of senior management, the Individual Defendants (all senior managers) were, at the very least, reckless." D.E. [77], 88. Furthermore, Plaintiffs argue that because the flux balance sheet and the master spreadsheet detailing accommodation payments "were . . made available to the Individual Defendants," Casey and North were highly involved in the financial end of Carter's business, and Pacifico was "involved in

setting up accommodations, [which] are a fundamental part of the retail business," the court should apply the core operations doctrine and impute the knowledge of contradictory information to all of the Individual Defendants. *Id*.

The court first notes that the Eleventh Circuit has never adopted the core operations doctrine, and very few courts in this circuit have addressed it. Essentially the core operations doctrine is used by plaintiffs, not to show actual knowledge, but instead, to show what the defendant should have known based upon their position with the company. *South Ferry LP, No. 2 v. Killinger*, 542 F.3d 776, 783 (9th Cir. 2008) (describing the core operations doctrine as "a scienter theory that infers that facts critical to a business's 'core operations' or an important transaction are known to a company's key officers . . ."). Courts analyzing the doctrine recognize that if it is relied upon, it very rarely can create a strong inference of scienter on its own. *See, e.g., id*. at 784. "Where a complaint relies on allegations that management had an important role in the company but does not contain additional detailed allegations about the defendants' actual exposure to information, it will usually fall short of the PSLRA standard. In such cases the inference that defendants had knowledge of the relevant facts will not be much stronger, if at all, than the inference that defendants remained unaware." *Id*.

The court agrees with the "basic proposition that a person's status as a corporate officer, when considered alongside other allegations, can help support an inference that this person is familiar with the company's most important operations." *In re Alstrom SA*, 406 F. Supp. 2d 433, 472-73 (S.D. N.Y. 2005). But "it is not automatically assumed that a corporate officer is familiar with certain facts just because these facts are important to the company's business; there must be other, individualized allegations that further suggest that the officer had knowledge of the fact in question." *Id*. That is especially so here where the alleged fraud revolves around accounting practices. *See In re AFC Enters., Inc.*, 348 F. Supp. 2d 1363, 1374 (N.D. Ga. 2004) (Thrash, J.) ("It is more tenuous to impute knowledge of cumulative accounting errors generally to operational officers and directors of a corporation."). In light of the PSLRA's requirement that scienter be pled with particularity, the court does not find that the core operations doctrine alone could save a plaintiff that failed to allege other individualized allegations against each defendant, and due to the nature of the alleged fraud here, which involves accounting methods, it offers little help even when combined with other allegations, with respect to those Defendants who were not alleged to be involved in the accounting and auditing process.

Although the Amended Complaint alleges generally that accommodation payments are important to Carter's and an important part of the retail industry generally, it does not automatically follow that the method for the accounting of those accommodation payments

was equally as important and known to all Defendants. The Amended Complaint only alleges that there were meetings where there were "heated discussions" about accommodations, but there are no allegations as to when those meetings occurred, which Defendants attended, and what about accommodations was being discussed. The mere fact that accommodations were discussed does not indicate that the accounting procedures for recognizing accommodation payments were discussed. There are no facts in the Amended Complaint that support an inference of scienter against Whetzel, Pacifico, or Rowan by their positions alone, or when combined with other allegations in the Amended Complaint regarding their job duties or participation in the Accommodations Fraud.

Defendants Casey and North's positions could bolster an inference of scienter, if combined with other particularized allegations, because prior to 2008, Casey was Chief Financial Officer, and North was either Vice President of Finance or Interim Chief Financial Officer during the Class Period, and Plaintiffs have alleged generally that both were very involved in the accounting and auditing process. These inferences by themselves are not enough, however, without other, individualized allegations, and the Amended Complaint does not connect either Defendants' position to any particular statement.

c. Motive and Opportunity

The Amended Complaint alleges that Defendants had the motive and the opportunity to commit the Accommodations Fraud and inflate Carter's stock prices, and this is indicative

of scienter. These allegations stem from the fact that Defendants made stock sales throughout the Class Period, Defendants' bonuses were tied to Carter's financial performance, some of their compensation was in stock options, and Defendants were required to own a certain amount of stock in order to be officers. Defendants argue that allegations of motive and opportunity alone do not show scienter, and further, those specific facts from the Amended Complaint relating to motive do not show scienter. It is well-established in this circuit that "allegations of motive and opportunity to commit fraud, standing alone, are [in]sufficient to establish scienter . . . ." *Bryant*, 187 F.3d at 1285. However, allegations of motive and opportunity can be considered in the mix of scienter allegations. Even so, the court finds that many of Plaintiffs' allegations of motive do not help support a strong inference of scienter.

As for enhanced compensation, courts have expressed different views regarding the effect of compensation packages on scienter. For instance, the Fifth Circuit has stated that:

> Incentive compensation can hardly be the basis on which an allegation of fraud is predicated. On a practical level, were the opposite true, the executives of virtually every corporation in the United States would be subject to fraud allegations. It does not follow that because executives have components of their compensation keyed to performance, one can infer fraudulent intent.

Abrams v. Baker Hughes Inc., 292 F.3d 424, 434 (5th Cir. 2002). At least one court in this circuit, however, has found that the fact that the defendants' "bonuses were tied to the Company's earnings" was indicative, in part, of a bad purpose. *In re Paincare Holdings Sec.*

Litig., 541 F. Supp. 2d 1283, 1293 (M.D. Fla. 2008). Even the Fifth Circuit recognized that where there are "allegation[s] that the defendants profited from the inflated stock value or the offerings," then the existence of enhanced compensation packages might be relevant to scienter. *Abrams*, 292 F.3d at 434.

The Amended Complaint does allege that Defendants' bonuses were tied to measures that were affected by Carter's finances, the amount of net sales was inflated due to the Accommodations Fraud, and Defendants received annual bonuses as high as $2.9 million. ¶¶ 79-88. However, some of the yearly bonuses were significantly lower. ¶ 88. There are also no allegations in the Amended Complaint that the "financial incentives to exaggerate earnings go far beyond the usual arrangements of compensation based on the company's earnings." *Aldridge v. AT Cross Corp.*, 284 F.3d 72, 83 (1st Cir. 2002). "If simple allegations of pecuniary motive were enough to establish scienter, 'virtually every company in the United States that experiences a downturn in stock price could be forced to defend securities fraud actions.'" *Zucco Partners, LLC*, 552 F.3d at 1005. The same is true for Plaintiffs' allegations that the named executives had to "own a certain multiple of their base salary in Carter's stock," stating that at a minimum, "ownership guidelines require[d] [Carter's] remaining named executive officers to each own five times their base salary in Company stock." ¶ 91. Further, Plaintiffs allege that net sales were "smoothed," meaning that sometimes the actual net sales figure would have been higher than the reported figure,

and therefore, in some instances, Carter's core financials would have appeared worse than they actually were.

The Amended Complaint also alleges that Defendants received stock-based compensation, and some of those grants were performance-based. ¶¶ 89-92. Plaintiffs have pled with particularity that there was some correlation between Carter's performance and the award of stock options to the Individual Defendants. For instance, the Amended Complaint states that in November of 2005, Pacifico received 200,000 performance-based stock options. ¶ 92. In May 2005, Rowan received 400,000 performance-based stock options. *Id*. Casey was granted 75,000 performance-based shares in August of 2008, and North received 37,440 performance-based stock options in September of 2003. *Id.* To the extent that a connection is pled between these individuals and any false statements occasioned by the Accommodations Fraud, this creates some inference that their actions were taken with bad purpose.

However, it is unclear to the court from a reading of the Amended Complaint whether the Accommodations Fraud had any actual effect on Defendants' receipt of all of the performance-based stock options. Furthermore, there are no particular allegations as to any performance-based stock options given to Whetzel, nor are there particularized allegations regarding any other performance-based stock options given to Rowan, Casey, North, and Pacifico, other than those mentioned above. The number of performance-based stock

received by Defendants, as alleged in the Amended Complaint, was small when compared to their overall holdings, which cuts against any existence of motive.[12] Finally, it appears that many of the options did not vest until years after they were granted based on multiple factors, ¶ 92, and the court finds it less likely that Defendants would have perpetrated the Accommodations Fraud for years merely to ensure they received the performance-based stock.

d. Restatement, GAAP Violations, and Internal Controls

Plaintiffs contend that the necessity of the restatement of Carter's financials and the duration of the restatement all indicate scienter, as does the lack of internal controls over the auditing process. Defendants argue that neither the existence of an internal control weakness nor a violation of GAAP are alone sufficient to infer fraudulent intent, and Plaintiffs have

[12] For instance, Rowan had over 3,600,000 shares of stock throughout the Class Period, and the Amended Complaint only contains particularized facts showing that he received 200,000 performance-based stock options, which is a small amount compared to his over all holdings. The court determined Rowan's overall holdings based on the chart provided by Plaintiffs in the Amended Complaint. ¶ 293. Plaintiffs allege that Rowan sold 1.2 million shares by the end of the Class Period, which accounted for 33% of his total holdings. ¶ 293. If 1.2 million is 33% of his entire holdings, Rowan's entire holdings must have been at least 3,600,000 shares. The same is true for Casey, whose total holdings, based upon examination of the Amended Complaint, was over 740,000 shares, and Pacifico, whose total holdings, based upon examination of the Amended Complaint, was over 655,000 shares. *See id*. Furthermore, although the Amended Complaint does discuss stock sales by some of the Defendants, those discussions truly pertain to the OshKosh Fraud, as the only specific allegations of suspicious sales (other than the general allegation that some of the Defendants sold a large number of stock over the entire class period), are tied to statements about OshKosh. Therefore, the court will discuss the allegedly suspicious sales with reference to the sufficient pleading of scienter for the OshKosh Fraud.

failed to allege any particular "red flag" that Defendants should have seen.

"[A]llegations of violations of . . . GAAP, standing alone, do not satisfy the particularity requirement of Rule 9(b)." *Ziemba v. Cascade Intern., Inc.*, 256 F.3d 1194, 1208-09 (11th Cir. 2001). Nor do they show scienter alone. *See Garfield*, 466 F.3d at 1267-68. However, an attempt to allege more than just GAAP violations by pointing to "red flags" that Defendants ignored can be sufficient to state a claim of securities fraud. *Ziemba*, 256 F.3d at 1209-10. However, those red flags must show more than just negligence. *See id*. at 1210. Here, the Accommodations Fraud is premised on GAAP violations. As discussed previously, Plaintiffs have not alleged with sufficient particularity any facts suggesting actual awareness by Carter's or the Individual Defendants of any fraud or any red flags other than the existence of overstated net sales and accounts receivable, and they have pointed to no "'tips, letters, or conversations raising inferences that [Carter's] knew of any fraud," *id*., other than the previously discussed confidential witness statements.

Some courts in this circuit have held that "alleged GAAP violations combined with a profound overstatement of financial results of a company may establish severe recklessness. . . .Where the number, size, timing, nature, frequency, and context of the . . . restatement are taken into account, the balance of the inferences to be drawn from such allegations may shift significantly in favor of scienter." *In re AFC Enters., Inc.*, 348 F. Supp. 2d at 1372 (internal quotations and citations omitted). The Sixth Circuit, however, has

explicitly "decline[d] to follow cases that hold the magnitude of financial fraud contributes to an inference of scienter on the part of the defendant." *Ley v. Visteon Corp.*, 543 F.3d 801, 816 (6th Cir. 2008). The Sixth Circuit explained that "[a]llowing an inference of scienter based on the magnitude of fraud 'would eviscerate the principle that accounting errors alone cannot justify a finding of scienter.'" *Id*. Further, it would "allow the court to engage in speculation and hindsight, both of which are counter to the PSLRA's mandates." *Id*. The Restatement issued by Carter's did restate financials for a substantial period of time and did indicate that material internal control weaknesses existed. However, Plaintiffs must allege the existence of scienter at the time the statements were made, which requires more than just an admission to a problem after the fact.

4. Conclusion

The court now examines all of the allegations of scienter in conjunction with one another. Considering the Amended Complaint in its entirety, the court finds that the Amended Complaint's allegations against the relevant Carter's Defendants regarding the Accommodations Fraud cannot survive because "a reasonable person would [not] deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged." *Tellabs, Inc.*, 551 U.S. at 324. This is especially so with regard to Defendants Whetzel, North, and Pacifico, as the allegations of scienter against them rest almost entirely on motive and opportunity. Defendants Casey and North give the court pause

in light of the confidential witness allegations and their involvement in Carter's accounting and auditing. However, the lack of particularity surrounding the allegations of scienter as to those two Defendants is fatal in the court's opinion because the Amended Complaint fails to establish when either Defendant knew of or began participating in the alleged Accommodations Fraud. The question here is not just whether the accommodations issues existed and whether Defendants were involved. The question is also whether Defendants had the requisite scienter and knowledge at the time the statements were made. Plaintiffs have failed to establish a strong inference of scienter and failed to plead many of their allegations of scienter with particularity. The competing and stronger inferences are that Defendants were unaware that the accommodations were being improperly manipulated by others in the company, and Plaintiffs have only created a permissible or reasonable inference of scienter.

B. Pricewaterhousecoopers and the Accommodations Fraud

Pricewaterhousecoopers LLP was, throughout the Class Period and before, Carter's outside auditor. Pricewaterhousecoopers "issued a 'clean opinion' pursuant to each of its audits of Carter's financial statements for the fiscal years 2004-2008." ¶ 149. In those opinions, Pricewaterhousecoopers LLP opined that the results of Carter's "operations and cash flow" complied with GAAP, and further, that Carter's maintained effective internal control over financial reporting. *See* ¶ 149 (containing quote from March 16, 2005 opinion); ¶ 150 (containing quote from March 15, 2006 opinion); ¶ 151 (containing quote from

February 28, 2007 opinion); ¶ 152 (containing quote from February 27, 2008 opinion); and ¶ 153 (containing quote from February 27, 2009). Plaintiffs allege that these statements were false, and Pricewaterhousecoopers LLP had the requisite scienter because (1) Pricewaterhousecoopers LLP failed to maintain independence and had too close a relationship with Carter's employees, (2) Pricewaterhousecoopers LLP did not comply with GAAS and GAAP, and (3) Pricewaterhousecoopers LLP should have known the Accommodations Fraud existed due to certain "red flags." Defendant Pricewaterhousecoopers LLP argues that Plaintiffs have failed to plead a strong inference of scienter.

The same standards for pleading found in Rule 9(b) and the PSLRA apply to Plaintiffs' claims against Pricewaterhousecoopers LLP. "However, the meaning of recklessness in securities fraud cases is especially stringent when the claim is brought against an outside auditor. Recklessness on the part of an independent auditor entails a mental state so culpable that it approximate[s] an actual intent to aid in the fraud being perpetrated by the audited company." *Ley*, 543 F.3d at 814. In fact, "[t]he [plaintiff] must prove that the accounting practices were so deficient that the audit amounted to no audit at all, or an egregious refusal to see the obvious, or to investigate the doubtful . . . ." *Id.*

Plaintiffs rely heavily on Pricewaterhousecoopers LLP's purported lack of independence from Carter's. Defendant Casey and North formerly worked for Pricewaterhousecoopers LLP, and Defendant Casey was "the lead accountant responsible for the Carter's account at Pricewaterhousecoopers LLP's predecessor company, Price Waterhouse LLP." ¶ 144. Beyond the fact that Casey and North were former Pricewaterhousecoopers LLP employees, Plaintiffs support their allegations of an overly "cozy" relationship by relying on the statements of CW1 and CW2. With regard to CW1, the Amended Complaint alleges that:

> CW 1 participated in meetings that the Carter's finance executives (including the Individual Defendants) had with their supposedly independent outside auditor, [Pricewaterhousecoopers LLP]. CW 1 stated that CW 1 "always questioned how they could do [the smoothing]. And [Casey and North] would come up with all these fancy documentations, and spend hours and hours, you know, with [Pricewaterhousecoopers LLP]. That would always be something that they would always work very hard, because I never helped them craft this message, I would just occasionally go sit in on these clearance calls with the auditors. And a lot of it was just, you know, Andy [North] had already worked with his contacts at [Pricewaterhousecoopers LLP] because they had the relationship up at the Connecticut office because that's where Andy came from. You kind of see how they got away with it, because that's where Mike [Casey] came from, that's where Andy came from, so they had the relationships there. I think [Casey and North] worked very hard on controlling that message to [Pricewaterhousecoopers LLP]…so it kind of raised a red flag to me…that they were trying to book that [accommodation payment] expense to how they wanted it to come out for whatever reason."

¶ 142. CW1 further alleges that a partner at Pricewaterhousecoopers LLP would "allow certain things to slide." *Id*.

CW2 contends that Pricewaterhousecoopers LLP "auditors definitely . . . are very close to the executives, to those folks there and they know a lot of what goes on there."[13] ¶ 145. CW2 sat close to Christina DeMarvel, the head of Internal Audit for Carter's, and CW2 "interfaced" with Pricewaterhousecoopers LLP on a regular basis. ¶ 146. "Due to the proximity of their workspaces," CW2 observed Pricewaterhousecoopers LLP being "extremely lenient in their audits." *Id*. For instance, if "North said 'we've got it under control' then [Pricewaterhousecoopers LLP] would take his word for it and not actually perform additional testing." *Id*. CW2 also overheard conversations due to the open working area at Carter's, and she "concluded that [Pricewaterhousecoopers LLP] was not as extensive in their testing as they would be with other clients" and Pricewaterhousecoopers LLP "was not testing Carter's internal control as rigorously as CW2 had observed other auditors typically did in CW2's prior experience at other companies." *Id*.

The fact that Casey and North were former employees of Pricewaterhousecoopers LLP does not in and of itself suggest an inappropriately close working relationship or a lack of independence on the part of Pricewaterhousecoopers LLP, and CW1 and CW2's statements do not bolster Plaintiffs' claims. Neither CW1 nor CW2's allegations are pled with enough specificity to indicate that the relationship between Casey and North and Pricewaterhousecoopers LLP was suspiciously close or that Pricewaterhousecoopers LLP

[13] The court presumes that the "there" in CW2's statement refers to Carter's.

failed to audit Carter's as closely as it should have based on that relationship. Both Confidential Witnesses make general and conclusory allegations such as CW1's declaration that Pricewaterhousecoopers LLP would "allow certain things to slide," which without more information or examples is not helpful to the present inquiry. CW2's allegations are similarly deficient, containing no detail and only general accusations that Pricewaterhousecoopers LLP did not audit Carter's extensively enough or test Carter's internal controls well enough. None of the facts alleged in the Amended Complaint are pled with enough particularity to suggest anything more sinister than a normal working relationship.

Plaintiffs also assert an amalgamation of GAAP and GAAS violations in support of their allegations of scienter against Pricewaterhousecoopers LLP. As for GAAS, Plaintiffs allege that Pricewaterhousecoopers LLP failed to exercise professional skepticism when conducting its audits and failed to obtain sufficient competent evidence to support a reasonable basis for its opinions. Plaintiffs also allege that the fact that financials were restated for such a long period of time indicates that Pricewaterhousecoopers LLP's audit of Carter's financials was inadequate, and therefore, Pricewaterhousecoopers LLP must have ignored certain risk factors such as North and Casey's familiarity with Pricewaterhousecoopers LLP's auditing process as former employees, "management's commitment to aggressive and unrealistic forecasts," and the existence of a lack of segregation between the internal and external audit departments at Carter's. D.E. [77], 115.

"GAAP and GAAS violations alone are not enough to establish a strong inference of scienter on the part of an independent auditor even if the auditor is grossly negligent in carrying out its responsibilities." *In re Sunterra Corp. Sec. Litig.*, 199 F. Supp. 2d 1308, 1333 (M.D. Fla. 2002). But "if such dereliction of responsibility is accompanied by other 'red flags' which the auditor chooses to ignore, there may be enough to establish scienter." *Id*. "Red flags are 'those facts which come to the attention of an auditor which would place a reasonable auditor on notice that the audited company was engaged in wrongdoing to the detriment of its investors.'" *Garfield*, 466 F.3d at 1268 (citing *In re Sunterra Corp.*, 199 F. Supp. 2d at 1333. "Whether scienter is sufficiently alleged may depend on the scope and severity of the auditor's failure to pay heed to 'red flags.'" *In re Sunterra Corp.*, 199 F. Supp. 2d at 1333-34. And "[b]ecause an independent accountant often depends on its client to provide the information base for the audit, it is almost always more difficult to establish scienter on the part of the accountant than on the part of its client." *Id*. at 1338. The red flags Plaintiffs rely on are Carter's "grossly overstated" accounts receivable, the fact that Pricewaterhousecoopers LLP received the quarterly flux balance sheets, and the lack of internal controls.

In part, Plaintiffs merely "re-hash" alleged GAAP and GAAS violations, which is not sufficient for the purposes of establishing the existence of sufficient red flags. *Garfield*, 466 F.3d at 1268. The court also finds it significant that the Amended Complaint does not

contain any allegations regarding what motive Pricewaterhousecoopers LLP would have to ignore or help Carter's commit fraud beyond the fact that Casey and North were former employees who had a friendly relationship with Pricewaterhousecoopers LLP employees.[14] As the *In re Sunterra Corp.* court said, "Plaintiffs do not allege any stock ownership by [the outside auditor] or any other benefit that would enure to [the outside auditor] as a result of returning an audit favorable to [the defendant company]. An auditor's conflict of interest compromising the auditor's independence might well weigh heavily in favor of a finding of scienter. Such a conflict exists as a result of a special financial relationship between corporation and auditor whereby the auditor has a stake in the corporation's success." 199 F. Supp. 2d at 1337. No such conflict has been alleged here. There are also no particularized allegations in the Amended Complaint showing that anyone ever explicitly told Pricewaterhousecoopers LLC about Carter's alleged accommodation booking practices, or "tipped" them off as to the fraud. *See In re Eagle Bldg. Techs., Inc., Securities Litigation*, 319 F. Supp. 2d 1318, 1331 (S.D. Fla. 2004) (considering whether the outside investigator was tipped off as to the fraud).

After a review of all allegations of scienter alleged against Pricewaterhousecoopers LLP, the court finds that Plaintiffs have not sufficiently pled a strong inference of scienter. At best, they have pled negligence or gross negligence, and the opposing non-culpable

[14] Although "the absence of a motive allegation is not fatal," it is relevant to the consideration of scienter. *Tellabs, Inc.*, 551 U.S. at 325.

inference, that Pricewaterhousecoopers LLP was actually or negligently unaware that any Accommodations Fraud was occurring,[15] is the much stronger inference.

C. OshKosh Fraud

The essence of Plaintiffs' argument regarding the OshKosh Fraud is that Defendants repeatedly touted the OshKosh division as a "growth engine," while knowing that sales were slumping and customers were unhappy with Carter's redesign of the OshKosh lines. Defendants argue that Plaintiffs fail to state a claim for the OshKosh Fraud because the alleged misstatements are forward-looking and protected by the PSLRA's safe harbor, Plaintiffs again fail to allege scienter, and the Amended Complaint fails to adequately plead loss causation.

1. Scienter

a. Confidential Witnesses and Core Operations

Plaintiffs once more rely on the statements of several confidential witnesses in support of their scienter allegations against the OshKosh Defendants. Confidential Witness 3 ("CW3") is a former Inventory Control and Cost Account Manager who worked at OshKosh for 19 years, until September 2007, and "who reported to the former OshKosh CFO," and CW3 stated that "Carter's 'played around' with the styling of the OshKosh brand by placing more 'needles, bells and whistles' into the product in order to position OshKosh

[15] Carter's itself stated in its Form 10-K/A that the Accommodations Fraud was not revealed to Pricewaterhousecoopers LLP.

at a higher price point." ¶ 212. CW3 "confirmed that this strategy backfired on Carter's, as it became evident during 2006 that OshKosh sales were slumping." *Id*. The Amended Complaint also alleges that "[b]ecause wholesalers placed orders several months in advance of actual sales, Carter's received accurate indications of what OshKosh sales would be months before actual sales were reported." *Id*. CW3 contends that Carter's knew by the summer of 2006 that the Fall 2006 OshKosh line would "be a failure in sales terms."[16] *Id*.

Other confidential witnesses agree that the Fall 2006 line, which was the first OshKosh line that Carter's had control over, was not of good quality. Confidential Witness 5 ("CW5") was an assistant store manager who worked at Carter's from November 2005 to March 2008, and CW5 contends that "after the acquisition, there was a noticeable deterioration of quality in OshKosh clothing, including fading and shredding, and a corresponding increase in returns." ¶ 213. Confidential Witness 6 ("CW6"), a former District Manager for OshKosh from 1998, through the acquisition, until March 2006, also agreed that the lines created by Carter's lessened the quality and durability of OshKosh clothing. *Id*. Confidential Witness 4 ("CW4"), a former Director of Cost Accounting and Budgeting, worked for OshKosh through the Carter's acquisition and until March 2006, "said that Carter's wholesale customers, like Kohl's and JC Penney, could not get desirable price points with the new OshKosh line from Carter's. As a result, wholesale orders fell."

[16] Several of the misleading statements alleged by Plaintiffs occurred prior to the summer of 2006.

Id. The court notes that none of these Confidential Witnesses claim they ever spoke to or provided any of this information to the OshKosh Defendants, nor does CW4 give any numbers or details regarding how much or when wholesale orders fell, nor does CW1 state that Kohl's or JC Penney purchased less OshKosh product than before.

CW1 also makes allegations regarding the OshKosh fraud. CW1 again alleges that Rowan and Casey:

> [M]ade a bunch of misrepresentations to the investors and the Board . . . the issue was, okay, we're going to cut down skus [stock keeping units] and take out less complexity, which is thus one of the reasons why we acquired it that could justify the valuation of the brand, right?...Well that wasn't the case. And there was…a big conflict between OshKosh and the people that were running the brand and what the management team had represented to investors and the board that was actually occurring. *And they knew for a fact that it was actually getting more complex*, and that that strategy was not getting executed even though it was being represented to investors and the board..

¶ 215 (emphasis in original). CW1 further contends that due to a "fall sell-through," "everyone realized that there was issues, and that's when things really started to get heated up," and "obviously Mike [Casey] and Fred [Rowan] realized that all of the representations were probably off, and there was lots of heated debate and finger pointing."*Id*. CW1 does not explain what the fall sell-through is, exactly when and what information was received by which of the OshKosh Defendants. However, Defendant Casey did state in the February 22, 2006 earnings call that orders were due by the end of February for the Fall 2006 line. ¶ 228.

"CW1 also confirmed that Rowan and Casey instructed him to convey to unsuspecting investors that Carter's was going to turn the OshKosh line around, when the OshKosh Defendants already knew that the redesigned line was a failure . . . ." ¶ 217. CW1 does not state when Rowan and Casey instructed him to convey such a message. CW1 additionally points to an email exchanged between CW1 and Casey from June 2007, which is after the last misleading statement alleged by Plaintiffs, in which Casey stated that "We've made mistakes in an aggressive attempt to make [OshKosh] and retail something it is not," in response to investor concern about why Carter's had been so "off" with OshKosh.[17] ¶ 219. CW1 additionally alleges that prior to the October 25, 2006 earnings call, "management discussed [OshKosh growth] in-depth and made the decision to make statements that were not supported by the current budget or orders by the wholesale channel." ¶ 250.

Although not a statement of a Confidential Witness, the Amended Complaint does show that on September 14, 2006, a Morgan Keegan analyst reported that Macy's West was not carrying the OshKosh line at all and that she "believed Macy's corporate made the call to not carry OshKosh at the last minute . . . ." ¶ 243. This is a particularized fact that shows that at least one retailer did not carry the OshKosh line as of September 2006, although as far as the court can tell, the Amended Complaint does not say when the Fall 2006 line was

[17] As this email was sent after the last allegedly misleading statement was made, it does not speak to Defendant Casey's state of mind at the time he made any of the allegedly misleading statements.

out of production or when it was delivered to purchasers. CW1 states that "the OshKosh Defendants knew that Macy's, a potentially huge account, had refused to carry the redesigned OshKosh line *at the same time* they were telling investors the exact opposite," without saying exactly when or how they knew. ¶ 243. The court notes, however, that none of the allegedly false statements pled by Plaintiffs in connection with the OshKosh Fraud specifically mention Macy's, nor does the Amended Complaint discuss Macy's purchase history with OshKosh.

Many of the statements and allegations made by the Confidential Witnesses do not support an inference of scienter because none of the Confidential Witnesses say which Defendants knew what, when they knew it, or how they received the information that would have made them aware that their statements were false. The best allegation the Confidential Witnesses offer is that wholesale retailers placed orders months in advance, so Defendants would have been aware that the Fall 2006 line was not doing well. However, this in itself is not particularized because the Amended Complaint does not explain exactly what information the sell-through would have provided and to whom or when it was provided. The only sufficiently particularized facts are that Macy's was not carrying OshKosh brand clothing as of September 2006, the Fall 2006 line was not of as good a quality as previous lines, JC Penney and Belk's "could not get desirable price points with the new OshKosh line from Carter's," and wholesale orders for the Fall of 2006 line were due by the end of

February.

Because most of the Confidential Witness allegations, especially those concerning the quality of the OshKosh lines produced by Carter's, do not show that the quality issues were communicated to Defendants, Plaintiffs essentially need to rely on the core operations doctrine to make the Confidential Witness allegations relevant to scienter. Neither CW3, CW4, CW5 , CW6, the only ones who speak to product quality, state that they had any interaction with any particular OshKosh Defendant. Furthermore, the allegations by the Confidential Witnesses that the Defendants knew or had access to information regarding wholesale orders are conclusory. As stated previously, the Eleventh Circuit has not adopted the core operations doctrine, which is used by plaintiffs not to show actual knowledge, but instead, to show what the defendant(s) should have known by virtue of their position and the importance of the information to the company. Again, the court agrees with the "basic proposition that a person's status as a corporate officer, when considered alongside other allegations, can help support an inference that this person is familiar with the company's most important operations." *In re Alstrom SA*, 406 F. Supp. 2d 433, 472-73 (S.D. N.Y. 2005). But "it is not automatically assumed that a corporate officer is familiar with certain facts just because these facts are important to the company's business; there must be other, individualized allegations that further suggest that the officer had knowledge of the fact in question." *Id*. Therefore, the court considers the Confidential Witness allegations regarding

quality and the Defendants' positions as officers in light of other particularized factual allegations, which there are very few of in the Amended Complaint.[18]

b. Motive and Opportunity

As discussed previously, Plaintiffs offer multiple allegations of motive and opportunity. The court has already discussed Defendants' bonuses and compensation packages and will not discuss them again, although the court considers it in the overall mix of scienter allegations with regard to the OshKosh Fraud. Also in connection with the OshKosh Fraud, Plaintiffs offer further allegations of motive: suspicious stock sales, Carter's stock repurchase program, and Defendant Rowan's receipt of a bonus that was directly tied to the OshKosh acquisition.

1. Stock Sales

Stock sales that are suspicious are relevant to the scienter inquiry, and "[s]tock sales or purchases timed to maximize returns on nonpublic information weigh in favor of inferring scienter; the lack of similar sales weighs against inferring scienter." *Mizzaro*, 544 F.3d at 1253. In determining whether stock sales are suspicious, some courts look to factors such as (1) percentage of holdings sold by a defendant, (2) the number of defendants who sold stock, and (3) the difference between stock sales during the relevant time period and prior

[18] The court notes that Plaintiffs have made no particularized allegations in the Amended Complaint regarding the quality or number of wholesale orders of any line other than the Fall 2006 line, even though some of the allegedly false or misleading statements revolve around other later lines, sales, and bookings.

activity. *See, e.g.*, *Druskin v. Answerthink, Inc.*, 288 F. Supp. 2d 1307, 1335-36 (S.D. Fla. 2004); *In re John Alden Fin. Corp. Sec. Litig.*, 249 F. Supp. 2d 1273, 1282 (S.D. Fla. 2003).

In the present case, Plaintiffs focus on the percentage of holdings sold by the Individual OshKosh Defendants, alleging that:

> By the end of the Class Period, Rowan had sold 1.2 million shares, making a profit of $37 million, which accounted for 33% of his total holdings; Casey had sold 163,000 shares (profit of $4.5 million) accounting for 22% of his holdings; Pacifico had sold 190,000 shares (profit of $5.1 million) accounting for 29% of his holdings; and Whetzel had sold 307,000 shares (profit of $8 million) accounting for 44% of his holdings.

¶ 293. Plaintiffs provide the court with a chart of stock sales for each of the Individual OshKosh Defendants, which the court presumes is intended to encompass all sales made during the Class Period, although the Amended Complaint does not explicitly say so. *Id*. Plaintiffs allege that the chart "demonstrates that the Individual OshKosh Defendants made a significant proportion of their sales during the period in which they were effusively describing the purported OshKosh growth opportunity, and before the whole truth about the OshKosh Fraud was revealed on July 24, 2007." *Id*. However, stock sales are suspicious where they are timed to maximize returns on non-public information, so all sales throughout the class period are not necessarily relevant. *Mizzaro*, 544 F.3d at 1253. Instead, the allegations must show that the sales are suspicious.

Plaintiffs do allege that some specific sales were suspicious, stating that "Two days after [an] earnings call in which the OshKosh Defendants stressed that OshKosh remained

on the verge of a turnaround," Rowan sold 105,000 shares on October 27, 2006; 195,000 shares on October 30, 2006; 120,000 shares on October 31; 104,400 shares on November 1; 100,000 shares on November 2; and 12,000 shares on November 3, realizing proceeds of $18 million. ¶ 251. Whetzel sold 53,500 shares from October 9, 2006 through November 16, 2006, realizing $1.5 million in proceeds. ¶ 252. Pacifico sold 8,696 shares on November 3; 18,005 shares on November 7; and 123,300 shares on November 13 for a total of 150,000 shares and $3.85 million in proceeds. *Id*.

Plaintiffs next allege that after an April 25, 2007 earnings call in which several of the Individual OshKosh Defendants expressed a "positive assessment" about OshKosh's growth potential, the Individual Defendants sold more stock. Rowan sold 272,000 shares on April 27, 2007; 64,100 shares on May 1, 2007; and 73,900 shares on May 2, 2007, gaining $11 million in proceeds. ¶¶ 279-80. Defendant Whetzel sold 100,000 shares in the period from May 3 to May 18, 2007, for a total of $2.6 million. Defendant Pacifico sold 40,000 shares in the three-day period between May 18, 2007 and May 21, 2007, for $1.03 million in proceeds. ¶ 280. Casey sold 146,200 on April 27, 2007 for $4 million in proceeds. *Id*.

Defendants contend that the stock sales are not evidence of scienter for several reasons. First, the Class Period chosen by Plaintiffs is long, and therefore, "artificially exaggerat[es] the volume of the [Individual] OshKosh Defendants' stock sales." D.E. [72-39], 52. Furthermore, each Defendant retained a large percentage of his stock, all of them

retaining over fifty percent. Next, Defendants claim that Defendant Rowan sold consistent with his personal circumstances because his retirement was pending, and it makes sense that he would sell some stock in light of that fact.

The court notes that Plaintiffs often focus on the total number of stock sold by Defendants throughout the Class Period. However, a reading of the Amended Complaint shows that the earliest Plaintiffs allege some sort of knowledge that OshKosh was having problems is by way of the Fall sell-through, which occurred "months" before the Fall 2006 line was actually released, and Plaintiffs aver that the OshKosh Defendants knew sales were not going to be up for the Fall 2006 line by the end of February. ¶ 229. Therefore, any stock sales made in 2005 and possibly early 2006 are not suspicious because Plaintiffs do not allege that the Individual OshKosh Defendants had any insider knowledge at that point.

The court also notes that Plaintiffs have only provided evidence of Defendants' stock sales during the Class Period, despite the fact that Carter's Initial Public Offering was in October of 2003. "The complaint must allege some information about the insider's trading history for us to determine whether 'the level of trading is dramatically out of line with prior trading practices at times calculated to maximize the personal benefit from undisclosed inside information.'" *Edward J. Goodman Life Income Trust v. Jabil Circuit, Inc.*, 594 F.3d 783, 793 (11th Cir. 2010). In *Edward J. Goodman*, the Eleventh Circuit held that because "[t]he shareholders failed to plead any information about any [officer's] trading history

before the class period . . . there is no way to determine from the complaint that the sales of large numbers of shares is suspicious enough to add to an inference of scienter." *Id*. As a result, the Eleventh Circuit gave "the conclusory allegations of insider trading no weight in considering the inference of scienter raised by the complaint." *Id*. Although Plaintiffs have correctly noted that the trading history here would be short due to the fact that Carter's did not go public until late 2003 and the class period starts in early 2005, Plaintiffs still failed to allege any trading history prior to the Class Period, including any that might have been available for late 2003, all of 2004, and the first part of 2005. This entitles Plaintiffs' allegations of insider trading significantly less weight.

The court starts with Defendant Casey.[19] It appears that Defendant Casey sold the least amount of stock over the Class Period or 21.67% of his total earnings. Casey made no sales in 2005, very few sales in 2006, no sales in 2008, and a small sale of 1,825 shares in 2009. Casey did sell 146,200 shares on April 27, 2007, which Plaintiffs contend was suspicious because it occurred after an April 25, 2007 earnings call in which several of the Individual OshKosh Defendants expressed a "positive assessment" about OshKosh's growth potential. The court agrees to some extent. This was by far the largest sale Casey made based on the information before the court, and it did occur after an earnings call in which

[19] The court gets most information regarding the amount and timing of Defendants' stock sales from the Amended Complaint and the chart provided by Plaintiffs. See ¶ 293.

some of the Individual Defendants expressed optimism about OshKosh's future prospects. However, the court notes that Plaintiffs themselves allege that in this same earnings call, the OshKosh Defendants admitted that the "over-the-counter selling of [OshKosh] spring product is below our expectations." That Defendant Casey sold stock after Carter's made both positive and negative statements about OshKosh makes Casey's sales less suspicious. Furthermore, Casey sold very little stock prior to this 2007 sale, even though Plaintiffs allege that Defendants had insider knowledge of slumping sales in early 2006, and the court also finds it pertinent that Casey sold little to no stock until after the alleged disclosures of the fraud to the public began.

Defendant Pacifico sold 29.01% of his stock over the Class Period. He sold no stock in 2005, and then sold a large amount on November 13, 2006, over 120,000 shares, and then made no sales until May 18, 2007, where he sold 27,500 shares and then 12,500 shares on May 21, 2007. Pacifico sold no stock in 2008 or 2009. As to Pacifico's sales in November 2006, which constitute the majority of his sales, Plaintiffs have alleged that this sale was made after an earnings call containing allegedly false statements and in which the OshKosh Defendants "stressed that OshKosh remained on the verge of a turnaround." ¶ 251. Plaintiffs' assertions of suspicion are somewhat supported by the fact that Pacifico appears to have only sold stock during the time period in which the alleged OshKosh Fraud occurred. However, the court also finds it relevant that again, all of Defendant Pacifico's

stock sales were made after the first partial disclosure, which Plaintiffs allege occurred in July of 2006, and well after Plaintiffs allege that Defendants first had insider knowledge about slumping OshKosh wholesales. Furthermore, Pacifico's May 2007 stock sales occurred relatively soon after Carter's May 10, 2007 Form 10-Q showed that the "OshKosh brand wholesale sales decreased $3.7 million, or 12.9%, in the first quarter of fiscal 2007 to $25.0 million." ¶ 281.

Plaintiffs allege that Defendant Rowan suspiciously sold over a third of his stock during the Class Period. The court notes that a good portion of that, 150,000 plus shares, was sold in 2005, which is prior to the time Plaintiffs allege that Defendants became aware of the OshKosh problems. In fact, Defendant Rowan sold around 95,000 shares in one week in August of 2005, and over 50,000 shares on one day in December of 2005. It appears from the Amended Complaint that Defendant Rowan often sold large chunks of stock on one day or over a few days. However, Defendant Rowan did sell several large portions of stock in late October and early November, which Plaintiffs allege is suspicious due to its proximity to an October 25, 2006 earnings call in which the OshKosh Defendants touted the progress of the OshKosh business. Plaintiffs' argument has some merit, although the court again notes that these sales occurred after Plaintiffs allege the partial disclosures revealing the OshKosh Fraud began, and Defendant Rowan's April 2007 and May 2007 sales happened in close proximity to statements made by Defendants that contained both positive and

negative information, which cuts against suspiciousness. The court does take into consideration that Defendant Rowan sold a large portion of his stock during the time Plaintiffs allege that Defendants' misleading statements inflated Carter's stock price, yet before the final disclosure of the fraud. In fact, it appears that Defendant Rowan sold no stock after the final disclosure.[20]

Defendant Whetzel sold the most stock during the Class Period, a total of 43.89%. However, this figure is again misleading because some of those stock sales occurred in 2005. Defendant Whetzel sold no stock in 2008, and resumed selling stock in 2009. Although Plaintiffs lump all of Defendants Whetzel's October and November 2006 sales together, the earnings call touting positive growth that Plaintiffs allege made those stock sales suspicious did not occur until October 25, 2006. Whetzel only sold 5,300 shares on the day of the earnings call, and 300 shares on November 16, 2006. The other shares sold in October 2006 were sold before the earnings call, and there were no other sales in November of 2006. Whetzel did not sell any more shares until May of 2007, after two of the partial disclosures of the OshKosh Fraud had occurred. Defendant Whetzel did sell 100,000 shares in the period from May 3 to May 18, 2007, which is in fairly close proximity to the April

[20] Defendants allege that it only makes sense that Defendant Rowan would sell a large portion of his Carter's stock since he was preparing to retire. However, the announcement that Rowan was going to retire was not made until June 11, 2008, after Plaintiffs allege that the OshKosh Fraud was fully disclosed (July 24, 2007). ¶ 291. It appears from the Amended Complaint that Rowan made his last sale on May 2, 2007, almost a year before his retirement was announced. There appears to be little connection between the events.

25, 2007 earnings call in which Defendants offered a positive assessment of OshKosh's future growth potential. However, again Plaintiffs also allege that there were negative statements made on that same day, lessening the suspiciousness of the stock sale.

None of these stock sales are suspicious enough alone to show that any of the Defendants acted with the requisite scienter, and many are not suspicious at all. However, the court will consider the stock sales in the total mix of information pled by Plaintiffs with regard to scienter.

2. Repurchase Plan

On February 21, 2007, Carter's announced a share repurchase program through which Carter's would repurchase up to $100 million worth of shares. ¶ 266. On April 24, 2007, Carter's announced that it had repurchased 1,252,832 shares of its common stock for a total purchase price of approximately $30 million. ¶ 277. According to Defendants, Carter's continued to repurchase nearly $18 million of shares during the remainder of 2007. D.E. [72-39], 57. Plaintiffs allege that the repurchase program was intended to keep Carter's stock price inflated while the Individual Defendants continued to sell their stock. Defendants, on the other hand, argue that if Defendants had known and intended for Carter's stock to be artificially inflated, they would not have purchased stock back at inflated prices, and therefore, the stock repurchase program undermines any inference of scienter. Most courts that have addressed the issue have held that the existence of a stock repurchase

program generally negates the inference of scienter. *See, e.g., In re America Serv. Group, Inc.*, No. 3:06-0323, 2009 WL 1348163, at *57 (M.D. Tenn. Mar. 31, 2009); *Plumbers and Pipefitters Local Union v. Zimmer*, 673 F. Supp. 2d 718, 749 (S.D. Ind. 2009) ("[S]tock repurchase programs actually *negate* a finding of scienter.") (emphasis in original) (internal quotations omitted); *In re Tibco Software, Inc.*, No. C 05-2146 SBA, 2006 WL 1469654, at *21 (N.D. Cal. May 25, 2006); *Morse v. McWhorter*, 200 F. Supp. 2d 853, 898 (M.D. Tenn. 2000), vacated on other grounds by *Morse v. McWhorter*, 290 F.3d 795 (6th Cir. 2002); *Mathes v. Centex Telemanagement, Inc.*, No. C-92-1837-CAL, 1994 WL 269734, at *8 (N.D. Cal. June 8, 1994). However, the court acknowledges that Plaintiffs' argument has some merit in the present case where some of the Individual OshKosh Defendants did sell stock in relatively close proximity to the announcement of the repurchase program results, and Plaintiffs generally alleged that the repurchase program was keeping Carter's stock price inflated. Nevertheless, the existence of the stock repurchase plan alone certainly does not support a strong inference of scienter, as it merely pertains to Defendants' motive to commit fraud, and allegations of motive and opportunity are not enough to create a strong inference of scienter. *Bryant*, 187 F.3d at 1285.

3. Bonus

The Amended Complaint alleges that Rowan "stood to earn bonuses 'of $500K in 2005, $1M in 2006, and $1M in 2007, subject to the Company's achievement of pre-

determined net income and other qualitative performance targets relating to the integration of OshKosh, the Company's recently acquired division[.]'" ¶ 202. Plaintiffs argue that this is further evidence of motive, giving Rowan a "powerful incentive to make the OshKosh acquisition a seeming success for Carter's." ¶ 202. Rowan received the $500,000 bonus for 2005, ¶ 209, and $1,000,000 in 2006, ¶ 276. This certainly does speak to motive, but again motive and opportunity are not enough. *Bryant*, 187 F.3d at 1285.

c. Conclusion

The court concludes that Plaintiffs have failed to plead a strong inference of scienter, based in part, on the lack of particularity of many of their factual allegations. There are few particularized allegations regarding which Defendant knew what or when the Defendants knew what, and therefore, Plaintiffs rely almost entirely on allegations of motive and opportunity. The court concludes that the allegations in the Amended Complaint as to the OshKosh Fraud, even when read in their entirety, do not support a cogent and compelling inference that the OshKosh Defendants intended to defraud the public into believing that OshKosh had huge growth potential all the while knowing that it did not, or were severely reckless in not knowing that it did not. As such, Plaintiffs' claims regarding Rule 10b-5 and the OshKosh Fraud must also be dismissed.

1. Loss Causation[21]

[21] Although the court need not address loss causation, due to its decision regarding Plaintiffs' failure to plead scienter, the court does so briefly, in light of its decision,

> The Eleventh Circuit has said the following about loss causation:
>
> > To prove loss causation, a plaintiff must show that the untruth was in some reasonably direct, or proximate, way responsible for his loss. If the investment decision is induced by misstatements or omissions that are material and that were relied on by the claimant, but are not the proximate reason for his pecuniary loss, recovery under the Rule is not permitted. In other words, loss causation describes the link between the defendant's misconduct and the plaintiff's economic loss.
> >
> > Because market responses, such as stock downturns, are often the result of many different, complex, and often unknowable factors, the plaintiff need not show that the defendant's act was the sole and exclusive cause of the injury he has suffered; he need only show that it was substantial, i.e., a significant contributing cause.

Robbins, 116 F.3d at 1447 (internal citations and quotations omitted). Loss causation can be pled by showing that the inflated stock price was "corrected" by way of corrective disclosures. *See Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 347 (2005) (holding that the loss causation requirement cannot be satisfied by only pleading that a stock was purchased at an "artificially inflated price," but instead, the complaint must demonstrate that the shares fell "after the truth became known" with respect to the relevant misrepresentations or omissions). A corrective disclosure or a series of corrective disclosures may not even be required. *In re Coca-Cola Enters. Inc. Sec. Litig.*, 510 F. Supp. 2d at 1203 ("Plaintiffs may meet the pleading requirement for loss causation simply by providing Defendants with 'some indication of the loss and the causal connection that the plaintiff has in mind.'")

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discussed below, to allow Plaintiffs to file a subsequent amended complaint.

(citing *Dura*, 544 U.S. at 347). "Unlike a pleading of materiality or scienter . . . the pleading standard for loss causation in a securities fraud case does not impose 'any special requirement' on the plaintiff." *Id* at 1203. Most courts that have addressed the issue have held that plaintiffs only need to meet the standards in Federal Rule of Civil Procedure 8. *See id*. at 1203-04 (citing cases).

Here, Plaintiffs have alleged that Defendants made false and misleading statements regarding the growth potential of the OshKosh division and the success of OshKosh-brand product wholesales, which inflated Carter's stock price, despite knowledge of slumping sales and wholesaler dissatisfaction. Plaintiffs then allege that corrective disclosures occurred on July 26, 2006, February 13, 2007, and July 24, 2007, and in those corrective disclosures, Defendants admitted that their sales were not as high as expected, OshKosh's wholesale segment was less successful than originally planned, and sales were down due to improper positioning of certain price models, and then Defendants, in the final disclosure, announced that OshKosh's goodwill was fully impaired. Plaintiffs also allege that after each announcement, OshKosh's stock price dropped. The court finds that Plaintiffs have sufficiently pled loss causation. "Even though loss causation may be difficult for Plaintiffs to prove, the Court finds the Amended Complaint provides Defendants with sufficient notice of Plaintiffs' claims to meet the minimal pleading standard of Federal Rule of Civil Procedure 8." *In re Immucor Inc.*, No. 1:05-CV-2276-WSD, 2006 WL 3000133, at *20

(N.D. Ga. 2006) (Duffey, J.).

2. Safe Harbor[22]

Defendants also contend that all of the statements Plaintiffs allege to be false with regard to the OshKosh Fraud are protected by the PSLRA's safe harbor because they are forward-looking and accompanied by meaningful cautionary language, or in the alternative, they are forward-looking and Plaintiffs failed to show that Defendants had actual knowledge of the falsity. Plaintiffs contend that the statements are not forward-looking because they "were based on then-current facts known to the Defendants at the time" the statements were made. D.E. [77], 51. Furthermore, Plaintiffs allege that the cautionary language Defendants refer to was not sufficient and merely boilerplate language.

The PSLRA provides a so-called "safe harbor" from liability for "forward-looking statements." *Harris v. Ivax Corp.*, 182 F.3d 799, 803 (11th Cir. 1999) (citing 15 U.S.C. § 78u-5(c)(1)). "In that safe harbor, corporations and individual defendants may avoid liability for forward-looking statements that prove false if the 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.'" *Id*. (citing 15 U.S.C. § 78u-5(c)(1)(A)(I)). Even where there is no cautionary language, the safe harbor still

[22]Although the court does not need to address the safe harbor issue due to its decision regarding Plaintiffs' failure to plead scienter, the court does so briefly, in light of its decision, discussed below, to allow Plaintiffs to file a subsequent amended complaint.

applies, where the plaintiff cannot prove that the defendant made the allegedly false statement with "actual knowledge" that the statement was "false or misleading." *Id.* (citing 15 U.S.C. § 78u-5(c)(1)(b)). In analyzing whether the safe harbor applies, the court must first determine if the statements are indeed forward-looking. *In re Noven Pharms., Inc. Sec. Litig.*, 238 F. Supp. 2d 1315, 1319 (S.D. Fla. 2002). Forward-looking statements are "statements in the nature of economic forecasts." *Bryant*, 187 F.3d at 1276. The PSLRA states that:

> The term "forward-looking statement" means--
>
> (A) a statement containing a projection of revenues, income (including income loss), earnings (including earnings loss) per share, capital expenditures, dividends, capital structure, or other financial items;
>
> (B) a statement of the plans and objectives of management for future operations, including plans or objectives relating to the products or services of the issuer;
>
> (C) a statement of future economic performance, including any such statement contained in a discussion and analysis of financial condition by the management or in the results of operations included pursuant to the rules and regulations of the Commission . . .

15 U.S.C. § 78u-5(i)(1). Also included in the definition are "statements of the assumptions underlying or relating to any statement described" above. *Id.*

"In evaluating the application of the PSLRA safe harbor for forward-looking statements, the Eleventh Circuit has held that courts must conduct a 'piecemeal examination of the statements found in a company communication.'" *Schultz v. Applica Inc.*, 488 F.

Supp. 2d 1219, 1228 (S.D. Fla. 2007) (citing *Harris*, 182 F.3d at 804). Therefore, when applying the safe harbor analysis, the court should separately look to each statement alleged to be false by Plaintiffs. *Id*. However, where within each statement alleged to be false, there are both forward-looking and not forward-looking portions, the Eleventh Circuit has indicated that courts should treat the entire statement as forward-looking.[23] *Harris*, 182 F.3d at 806-07. No matter what tense is used, "a statement about the state of a company whose truth or falsity is discernible only after it is made necessarily refers only to future performance . . . ." *Id*. at 805.

Many of the statements Plaintiffs allege are false are mixed, containing both forward-looking statements and statements that could have been presently verifiable. The court finds that the statements in ¶¶ 222, 224, 226, 228, 231, 239, 250,[24] 262, and 264 are forward-looking. These statements include forward-looking statements regarding future economic performance, management objectives, statements of financial projection, and their

[23] The Eleventh Circuit did note that "if any of the individual sentences describing known facts . . . were allegedly false, we could easily conclude that that smaller, non-forward-looking statement falls outside the safe harbor." *Harris*, 182 F.3d at 803. The problem in *Harris* was that the plaintiff alleged that an entire list was misleading, rather than alleging that individual statements in the list were misleading. *Id*. *See also Ehlert v. Singer*, 245 F.3d 1313, 1318 (11th Cir. 2001).

[24] The statement made by Casey during the October 25, 2006 earnings call that "Now that we have an opportunity to turn the OshKosh business around, that would be the growth vehicle for [Carter's]," ¶ 250, is also corporate optimism and immaterial as a matter of law, as no reasonable investor would have relied on this statement in making an investment decision.

underlying assumptions. For instance, the statement made by Defendant Casey during the February 22, 2006 earnings call where he says "We've stopped the decline in [OshKosh] earnings . . . ," is a present, verifiable fact. ¶ 229. Casey also says that "We continue to believe we can make significant progress in improving Oshkosh's operating margin . . . ." and "Over the next few years we believe Oshkosh's operating margin could approach Carter's operating margin," which are forward looking-statements. *Id*. Plaintiffs then allege that the entire statement found in that paragraph of the Amended Complaint is misleading as a whole, without directing the court to any particular portion of the statement, and therefore, the entire statement should be considered forward-looking pursuant to *Harris*. Each statement, as pled by Plaintiffs, is alleged to be misleading due to an omission by Defendants, and as the Eleventh Circuit held in *Harris*, "when the factors underlying a projection or economic forecast include both assumptions and statements of known fact, and

a plaintiff alleges that a material factor is missing, the entire list of factors is treated as a forward-looking statement." 182 F.3d at 807.

"After having determined that the statement is forward-looking, and thus that the safe-harbor provision applies, the next step in the analysis is to determine whether the statement is protected by the safe-harbor." *Ehlert*, 245 F.3d at 1318. One way is by determining whether "the plaintiff fail[ed] to plead with particularity facts giving rise to a strong inference that the defendants had actual knowledge of the falsity of their statements when made." *In re Noven Pharms., Inc. Sec. Litig.*, 238 F. Supp. 2d 1315, 1319 (S.D. Fla. 2002). To the extent that the Amended Complaint does allege forward-looking statements by Defendants, these statements are protected by the statutory safe harbor, because the Plaintiffs have failed adequately to allege actual knowledge of falsity as discussed above. The other "way in which a forward-looking statement can be protected is for it to be 'accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement.'" *Ehlert*, 245 F.3d at 1318 (citing 15 U.S.C. § 77z-2(c)(1)(A)(I)).

Assuming Plaintiffs will attempt to re-plead their Amended Complaint and fix issues regarding the pleading of actual falsity, and refine which statements they contend are false and misleading, the court addresses the matter of meaningful cautionary language. The court finds that the statement regarding risks made at the beginning of each earnings call in which

fraudulent statements are alleged to have been made does not constitute meaningful cautionary statements. At the beginning of the February 22, 2006 earnings call, Defendant Rowan stated "Before we begin, let me remind you that statements made on this earnings call and in the Company's press release, other than those concerning historical information, should be considered forward-looking statements, and actual results may differ materially." D.E. [72-5], 1. While the Eleventh Circuit does not require that the cautionary language mention the explicit risk factor that "ultimately belies a forward-looking statement, . . . the warning [should] mention 'important factors that could cause actual results to differ materially from those in the forward-looking statement.'" *Harris*, 182 F.3d at 807. This statement contains no factors that might cause different results. The same is true for the statements made at the outset of the other relevant earnings calls.[25]

However, on the February 22, 2006 earnings call, Defendant Rowan does state, "[f]or a detailed discussion of factors that could cause actual results to vary from those contained in the forward-looking statements, please refer to the Company's most recent annual report filed with the Securities and Exchange Commission."[26] D.E. [72-5], 1. With regard to oral

[25] The statements made regarding risks at the outset of the April 26, 2006, July 26, 2006, October 25, 2006, and February 21, 2007 earnings calls are identical to the statement made at the start of the February 22, 2006 earnings call. D.E. [72-9], 1; D.E. [72-11], 1; D.E. [72-14], 1; D.E. [72-18], 1.

[26] The other earnings calls contain similar instructions. On the other 2006 earnings calls, Defendant Rowan also says, "For a detailed discussion of factors that could cause actual results to vary from those contained in the forward looking statements, please refer

statements, the PSLRA allows a forward-looking statement to incorporate by reference cautionary language "contained in a readily available written document, or portion thereof."' *See* 15 U.S.C. § 78u-5(c)(2)(B). This includes SEC filings. 15 U.S.C. § 78u-5(c)(2)(C). The issue for the court here, at least with regard to the February 22, 2006 earnings call, is that the court only has a copy of the Form 10-K, Carter's annual report filed March 15, 2006, which was after these allegedly false statements were made, and therefore not readily available at the same time the statements were made. *Cf. Grossman v. Novell, Inc.*, 120 F.3d 1112, 1122 (10th Cir. 1997) ("Particularly in a fraud on the market case, the relevant inquiry concerns the total mix of information available to the market at the time of the allegedly fraudulent statements."). The court has no way of determining whether the February 22, 2006 statements are accompanied by meaningful cautionary language by reference to the "most recent annual report" because that Form 10-K is not before it. However, the Form 10-K filed on March 15, 2006 was the "most recent" annual report filed with respect to the April 26, 2006, July 26, 2006, and February 21, 2007 earnings calls, as the next Form 10-K was not filed until February 28, 2007. *See* D.E. [72-1], Christopher Green Declaration. The

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to the company's most recent annual report filed with the Securities and Exchange Commission." D.E. [72-9], 1; D.E. [72-11], 1; D.E. [72-14], 1. In the February 21, 2007 earnings call, Defendant Rowan makes an additional reference, saying, "[f]or a detailed discussion of factors that could cause actual results to vary from those contained in the forward-looking statements, please refer **to the company's fourth quarter and fiscal 2006 earnings release** and at the most recent annual report filed with the Securities and Exchange Commission." D.E. [72-18], 1 (emphasis added).

court finds that the Form 10-K filed on March 15, 2006 contains meaningful cautionary language relevant to this case, as it warns both of the risks and consequences of losing key customers and of the marketplace not accepting Carter's product. Therefore, the allegedly false statements pled in the Amended Complaint that occurred during earnings calls after February 22, 2006 are protected by the PSLRA's safe harbor.

3. Conclusion

In conclusion, Plaintiffs' allegations in the Amended Complaint regarding the OshKosh Fraud must be dismissed for failure to plead with particularity and failure to plead a strong inference of scienter. Furthermore, the statements alleged to be false are either forward-looking or immaterial as a matter of law, and most of those that are forward-looking are accompanied by meaningful cautionary language.

D. Remaining Claims: § 20(a) and § 20A

1. Section 20(a)

Plaintiffs bring claims against Defendants Rowan, Pacifico, Casey, and Whetzel for purported violations of § 20(a) of the Exchange Act arising out of the OshKosh Fraud and against all of the Individual Defendants with regard to the Accommodations Fraud. Section 20(a) extends liability for a corporation's violations of Rule 10b-5 to the controlling persons of such corporation, making persons "who, directly or indirectly, control[ ] any person liable under any provision of [the act] or of any rule or regulation thereunder ... liable jointly and

severally with ... such controlled person." 15 U.S.C. § 78t(a). "The complaint must adequately allege primary liability for another Securities Exchange Act violation in order to state a claim for secondary liability under section 20(a)." *Edward J. Goodman Life Income Trust*, 594 F.3d at 797. Plaintiffs have not sufficiently pled scienter for any of their primary violations, as discussed above, and therefore, their § 20(a) claims are also due to be dismissed.

2. Section 20A

Plaintiffs bring claims against Defendants Rowan, Pacifico, Casey, and Whetzel for purported violations of § 20A of the Exchange Act. Pursuant to § 20A of the Exchange Act, a corporate insider who sells stock "while in possession of material, nonpublic information" is liable to any person who traded contemporaneously[27] with the insider. 15 U.S.C.A. §78t-1(a). To state a claim under § 20A, a plaintiff must allege a predicate violation of the Exchange Act. *Id*. (requiring a violation of "this chapter or the rules or regulations thereunder"). *See also Edward J. Goodman Life Income Trust*, 594 F.3d at 797. In Count VI of the Amended Complaint, where Plaintiffs detail their § 20A claims, they do not state exactly what predicate act they are basing the § 20A claims on, although they do allege that

[27]"Neither the Act nor the rules or regulations define 'contemporaneously.' The strict interpretation of 'contemporaneously' includes only trades on the same day. A more lenient interpretation defines "contemporaneously" to include trades within several days of each other." *Edward J. Goodman Life Income Trust*, 560 F. Supp. 2d 1221, 1245 (M.D. Fla. 2008) (citing cases) (internal citations omitted). Either way, the plaintiff's purchase must not precede a defendant's sale. *Id*.

Defendants had access to material information regarding both OshKosh's growth and profitability and Carter's financial statements, which were rendered false and misleading by the Accommodations Fraud. ¶ 344. However, as discussed above, Plaintiffs have failed to properly allege scienter with regard to any potential predicate act, and therefore, Plaintiffs' § 20A claims fail for lack of underlying violations.

III. Conclusion

Defendants request oral argument with regard to their motions to dismiss because they believe that oral argument would benefit the court due to the parties' substantial briefing. However, after the parties' substantial briefing, the court has all it needs to rule on Defendants' motions, and therefore, Defendants' Motion for Oral Argument is DENIED [86]. Defendant Pricewaterhousecoopers LLP's Motion to Dismiss is GRANTED [66], Defendants Michael D. Casey, Andrew North, Frederick Rowan, II, and Charles Whetzel, Jr.'s Motion to Dismiss is GRANTED [67], Defendant Joseph Pacifico's Motion to Dismiss is GRANTED [69], and Defendant Carter's Inc.'s Motion to Dismiss is GRANTED [72].

"In the Eleventh Circuit, there is a presumption that leave to amend should be granted at least once after the dismissal of a complaint when a more adequately pled complaint might state a cause of action." *In re Theragenics Corp. Sec. Litig.*, 105 F. Supp. 2d 1342, 1362 (N.D. Ga. 2000) (Thrash, J.). *See, e.g.*, *Bank v. Pitt*, 928 F.2d 1108, 1112 (11th Cir.1991) ("If our precedent leaves any doubt regarding the rule to be applied in this circuit,

we now dispel that doubt by restating the rule. Where a more carefully drafted complaint might well state a claim, a plaintiff must be given at least one chance to amend the complaint before the district court dismisses the action with prejudice."). Here, many of the flaws with Plaintiffs' Amended Complaint arise from a failure to plead with particularity and a failure to allege a strong inference of scienter, and a more carefully drafted complaint might state a claim. Although the court does not believe Plaintiffs have requested leave to amend, the court finds that Plaintiffs should still be given an opportunity to restate their claims in a manner consistent with this Order. Plaintiffs may file another Amended Complaint within sixty (60) days from the date of this Order.

IT IS SO ORDERED this 16th day of March, 2011.

/s/ J. Owen Forrester
J. OWEN FORRESTER
SENIOR UNITED STATES DISTRICT JUDGE