

UNITED STATES DISTRICT COURT

DISTRICT OF UTAH

_____, Individually and on Behalf of All
Others Similarly Situated,

Plaintiff,

v.

BEYOND, INC., DAVID J. NIELSEN,
CHANDRA HOLT, MARCUS A. LEMONIS,
and ADRIANNE B. LEE,

Defendants.

**CLASS ACTION COMPLAINT FOR
VIOLATIONS OF THE FEDERAL
SECURITIES LAWS**

DEMAND FOR JURY TRIAL

Case No.

Plaintiff _____ (“Plaintiff”), individually and on behalf of all others similarly situated, by and through his attorneys, alleges the following upon information and belief, except as to those allegations concerning Plaintiff, which are alleged upon personal knowledge. Plaintiff’s information and belief is based upon, among other things, his counsel’s investigation, which includes without limitation: (a) review and analysis of regulatory filings made by Beyond, Inc., (“Beyond” or the “Company”) with the United States (“U.S.”) Securities and Exchange Commission (“SEC”); (b) review and analysis of press releases and media reports issued by and disseminated by Beyond; and (c) review of other publicly available information concerning Beyond.

NATURE OF THE ACTION AND OVERVIEW

1. This is a class action on behalf of persons and entities that purchased or otherwise acquired Beyond securities between December 4, 2023 and May 6, 2024 inclusive (the “Class Period”). Plaintiff pursues claims against the Defendants under the Securities Exchange Act of 1934 (the “Exchange Act”).

2. Beyond is an online retailer of furniture and home furnishings products in the United States and Canada. Beyond, formerly known as Overstock.com, acquired Bed Bath & Beyond’s brand and key intellectual property elements in June of 2023. The Company then undertook a transformation; relaunching its e-commerce sites in Canada and the United States under new branding. In November of 2023 the Company renamed itself to Beyond and transferred its stock listing from the Nasdaq Global Market under ticker symbol OSTK to the New York Stock Exchange under ticker symbol BYON.

3. Throughout the class period, Beyond issued statements and guidance related to the Company’s 2024 and 2024 annualized run rate as it underwent this transformation. For example, on February 20, 2024, Beyond announced “[i]t is our goal to achieve \$2 billion of revenue in 2024,

and a \$3 billion revenue run rate by the end of 2025.” The Company referred to these goals as “projected revenue improvement.”

4. On May 6, 2024, after the market closed, Beyond announced the Company’s first quarter 2024 financial results, revealing first quarter total net revenue of \$382 million, an increase of only 0.3% year-over-year, and a first quarter net loss of \$74 million. The Company disclosed that “in analyzing the profitability of that growth” the Company would be “making the strategic decision” to “build our brands for sustainable growth, not transient, transactional growth” and “[t]o that end” the Company will aim to “*yield sequential improvements in our margin profile.*” The Company therefore declined to reiterate its previously issued goal to achieve \$2 billion of revenue in 2024, and a \$3 billion revenue run rate by the end of 2025.

5. On May 7, 2024, before the market opened, Beyond hosted an earnings call pursuant to the Company’s first quarter 2024 financial results. During the earnings call, Marcus A. Lemonis (“Lemonis”) was asked by analyst Peter Keith of Piper Sandler “how do you feel about that \$2 billion target for this year at this point?” to which Defendant Lemonis responded, in relevant part, that “*I, early on myself, nobody else, [] felt like a \$2 billion annualized revenue goal was something that was possible.*” Further, when asked by analyst Anna Andreeva of Needham, “So, should we still expect Beyond to be profitable in 3Q and 4Q? And as you look out to 2025, do you think low single-digit EBITDA margins is a realistic level for the business?” Defendant Lemonis responded, in relevant part, that “So, no, *I do not expect there to be positive contribution through the end of this year[.]*”

6. On this news, the Company’s share price fell \$5.37 or 24.5%, to close at \$16.52 on May 7, 2024, on unusually heavy trading volume.

7. Throughout the Class Period, Defendants made materially false and/or misleading statements, as well as failed to disclose material adverse facts about the Company's business, operations, and prospects. Specifically, Defendants failed to disclose to investors: (1) that the Company misrepresented its ability to achieve \$2 billion in annualized revenue in 2024; (2) that the Company's \$2 billion annualized revenue goal for 2024 was not considered "something that was possible" by the Company; (3) that, as a result, the Company would be unlikely to meet its 2025 annualized run-rate goals; (4) that despite the Company's statements, the Company was, in fact, projecting a cumulative loss in the near future; and (5) that, as a result of the foregoing, Defendants' positive statements about the Company's business, operations, and prospects were materially misleading and/or lacked a reasonable basis.

8. As a result of Defendants' wrongful acts and omissions, and the precipitous decline in the market value of the Company's securities, Plaintiff and other Class members have suffered significant losses and damages.

JURISDICTION AND VENUE

9. The claims asserted herein arise under Sections 10(b) and 20(a) of the Exchange Act (15 U.S.C. §§ 78j(b) and 78t(a)) and Rule 10b-5 promulgated thereunder by the SEC (17 C.F.R. § 240.10b-5).

10. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331 and Section 27 of the Exchange Act (15 U.S.C. § 78aa).

11. Venue is proper in this Judicial District pursuant to 28 U.S.C. § 1391(b) and Section 27 of the Exchange Act (15 U.S.C. § 78aa(c)). Substantial acts in furtherance of the alleged fraud or the effects of the fraud have occurred in this Judicial District. Many of the acts charged herein, including the dissemination of materially false and/or misleading information, occurred in

substantial part in this Judicial District. In addition, the Company's principle executive offices are located in this District.

12. In connection with the acts, transactions, and conduct alleged herein, Defendants directly and indirectly used the means and instrumentalities of interstate commerce, including the United States mail, interstate telephone communications, and the facilities of a national securities exchange.

PARTIES

13. Plaintiff _____, as set forth in the accompanying certification, incorporated by reference herein, purchased Beyond securities during the Class Period, and suffered damages as a result of the federal securities law violations and false and/or misleading statements and/or material omissions alleged herein.

14. Defendant Beyond is incorporated under the laws of Delaware with its principal executive offices located in Midvale, Utah. Beyond's common stock trades on the New York Stock Exchange under the symbol "BYON."

15. Defendant David J. Nielsen ("Nielsen") was the Company's Co-Principal Executive Officer and President at all relevant times.

16. Defendant Chandra Holt ("Holt") was the Company's Co-Principal Executive Officer at all relevant times.

17. Defendant Lemonis was the Company's Executive Chairman of the Board at all relevant times.

18. Defendant Adrienne B. Lee ("Lee") was the Company's Chief Financial Officer ("CFO") at all relevant times.

19. Defendants Nielsen, Holt, Lemonis, and Lee (together, the "Individual Defendants"), because of their positions with the Company, possessed the power and authority to

control the contents of the Company's reports to the SEC, press releases and presentations to securities analysts, money and portfolio managers and institutional investors, i.e., the market. The Individual Defendants were provided with copies of the Company's reports and press releases alleged herein to be misleading prior to, or shortly after, their issuance and had the ability and opportunity to prevent their issuance or cause them to be corrected. Because of their positions and access to material non-public information available to them, the Individual Defendants knew that the adverse facts specified herein had not been disclosed to, and were being concealed from, the public, and that the positive representations which were being made were then materially false and/or misleading. The Individual Defendants are liable for the false statements pleaded herein.

SUBSTANTIVE ALLEGATIONS

Background

20. Beyond is an online retailer of furniture and home furnishings products in the United States and Canada. Beyond, formerly known as Overstock.com, acquired Bed Bath & Beyond's brand and key intellectual property elements in June of 2023. The Company then undertook a transformation; relaunching its e-commerce sites in Canada and the United States under new branding. In November of 2023 the Company renamed itself to Beyond and transferred its stock listing from the Nasdaq Global Market under ticker symbol OSTK to the New York Stock Exchange under ticker symbol BYON.

Materially False and Misleading

Statements Issued During the Class Period

21. The Class Period begins on December 4, 2023. On that day, Beyond issued a press release announcing, "record sales performance" and that "it has initiated a fixed cost restructuring plan targeting approximately \$25 million of annualized reductions by early 2025" leading to

savings arriving “in late Q4 2023, *with a target to achieve the full annualized run-rate by early 2025.*” Specifically, the Company’s press release reported: ¹

Beyond, Inc., (NYSE: BYON) (“Beyond” or the “Company”), the parent company of online furniture and home furnishings retailer Bed Bath & Beyond, formerly known as Overstock, today announced **record sales performance for the “Cyber 5” period from Thanksgiving Day (11/23) through Cyber Monday (11/27). The Company also announced that it has initiated a fixed cost restructuring plan targeting approximately \$25 million of annualized reductions by early 2025.**

2023 Cyber 5 sales were the largest in the Company’s history. Estimated net revenue grew 24% year-over-year. On an aggregate basis, bedding, bath, kitchen and core furniture and décor categories delivered growth. Active customers at the end of the Cyber 5 period exceeded 5.3 million (measured on a trailing twelve-month basis)

* * *

The fixed cost restructuring plan is expected to deliver annualized technology and SG&A cost savings of approximately \$25 million, which represents approximately 12.5% of our trailing twelve-month expense run-rate as of September 30, 2023. This plan includes about 10% reduction in our current employee base, right sizing our facility footprint, re-negotiation of vendor contracts, and outsourcing certain functions. *The savings from the fixed cost restructuring plan will begin to accrue in late Q4 2023, with a target to achieve the full annualized run-rate by early 2025.*

22. On February 20, 2024, Beyond issued a press release which announced the Company’s fourth quarter and full year 2023 financial results for the fiscal year ended December 31, 2023. The press release reported the Company’s fourth quarter revenue of \$384 million, fourth quarter net loss of \$161 million, full year revenue of \$1.6 billion, and full year net loss of \$308 million. The press release further announced the Company’s outlook for the fiscal year 2024 as well as fiscal year 2025, stating in relevant part:

Beyond, Inc. reports fourth quarter 2023 financial results, sees rapid growth in active customer file, delivering positive sales results since Nov. 1

¹ Unless otherwise stated, all emphasis in bold and italics hereinafter is added, and all footnotes are omitted.

Sales trends and continued cost reductions positioning company for 2024 growth

* * *

It is our goal to achieve \$2 billion of revenue in 2024, and a \$3 billion revenue run rate by the end of 2025. This projected revenue improvement, coupled with improved margins and a reduced expense structure provides a clear path to profitability.

* * *

“Planned investments to support the Bed Bath & Beyond brand launch and reignite our customer file are delivering results,” said Dave Nielsen, CEO of Overstock. “We have accelerated customer acquisition during the quarter, driving a vast improvement in our revenue performance. While we spent the back half of the year launching Bed Bath & Beyond, we’ve simultaneously laid the groundwork to reignite Overstock by the end of the first quarter. We believe the combination of these two anchor brands will contribute to *achieving our revenue goals.*”

23. On February 20, 2023, the Company held earnings call pursuant to the Company’s fourth quarter and full year 2023 financial results for the fiscal year ended December 31, 2023. During the earnings call, Defendant Marcus Lemonis offered management’s prepared remarks, stating the Company’s *“primary focus this year is to achieve \$2 billion in sales, a material increase from 2023, and follow that up with achieving a run rate of \$3 billion by the end of 2025.”* Defendant Adrienne Lee similarly offered prepared remarks, including reiterating the Company’s *“\$2 billion revenue goal.”* In a follow up response to a question posted to Jonathan Matuszewski of *Jefferies*, Lemonis again repeated the Company has *“confidence that \$2 billion is a clear path”* for Beyond. Specifically, during the earnings call, the following discussions occurred, in relevant part:

<Marcus Lemonis> *Our primary focus this year is to achieve \$2 billion in sales, a material increase from 2023, and follow that up with achieving a run rate of \$3 billion by the end of 2025*, all while sequentially improving margins over that period back to the 20%-margin-plus level. *Those two factors, coupled with material SG&A reductions, will result in a profitable run rate by year-end 2024.* We believe the bridge and building blocks to achieve that are clear and the team is going to walk you through that bridge shortly.

* * *

<Adrienne Lee> I want to highlight that we have revised our executive team's equity compensation to align it with stock price appreciation and revenue growth. This is meaningful as it incentivizes the team to push to **our \$2 billion revenue goal**, make progress towards getting back to a 20%-plus gross margin, and continue to identify cost savings.

* * *

<Adrienne Lee> Chandra and Dave are focused on growing our anchor brands and launching new products and services. These products are under various stages of launch. Our margin and cost saving actions are well underway. So, as far as expectations, we expect revenue to be positive year-over-year in Q1 with the goal of **\$2 billion for 2024**. We expect gross margins to be in the 16% to 17% range in Q1, with a goal for the full year closer to 20%. We expect the second half of the year to be profitable.

* * *

<Q: Jonathan Matuszewski> Great. Good morning, everyone, and thanks for taking my questions. And welcome to the team, Chandra. My first question is on the 2024 sales goal. Maybe if you could just break that down a little bit, the \$2 billion? Marcus, I think you described Overstock.com as the silver bullet. So just curious how much you see Overstock.com contributing to 2024 after the 1Q launch? Thanks.

<A: Marcus Lemonis> Yeah. Thanks, Jonathan. I read your note last evening that came out shortly after we released our earnings. **And I suppose I can understand why you asked or why you questioned our ability to get to \$2 billion**. At this moment in time, Overstock and Bed Bath & Beyond are not separate reporting segments. We expect that in the 2025 calendar year, because of the materiality of what we believe Overstock will become, that we will report them separately.

But if you look at the financials for 2023 from a revenue standpoint, we were approximately at \$1.6 billion. And Bed Bath & Beyond's business did not layer into that number until the early -- the late summer, early fall August of 2023. What happened in that moment is when Bed Bath & Beyond -- when the website literally went from red to blue, you literally just changed the name of it. You not only confuse people, but I think you sent away Overstock customers.

So, the way that I've asked the team to think about it is if you take the Bed Bath & Beyond core segment business from August 1st through December 31st or quite frankly even through today and you annualize that, and then you took the historical Overstock business that was January through July 31st and you annualized that, and then took out some of that crossover categories, that's what gives **us confidence that \$2 billion is a clear path**.

Let me also add to that that we know that adding Baby and Beyond and a few other ancillary things also contribute to that. But we are not able to tell you because of SEC reporting how that \$2 billion is going to be broken out. The reason I said that that Overstock is the silver bullet is there's a gap to fill. And that's about as good as I can be. There's a gap to fill. But we did use science and historical information to lay this track down. *It wasn't just some wild finger in the air swag.*

24. On February 23, 2024, the Company submitted its annual report for the fiscal year ended December 31, 2023 on a Form 10-K filed with the SEC (the “2023 Annual Report”). The 2023 Annual Report affirmed the Company’s previously reported financial results. The 2023 Annual Report further asserted the Company was engaged in monitoring and evaluating all capital forecasts, stating in relevant part:

We believe that our cash and cash equivalents currently on hand and expected cash flows from future operations will be sufficient to continue operations for at least the next twelve months. *We continue to monitor, evaluate, and manage our operating plans, forecasts,* and liquidity considering the most recent developments driven by macroeconomic conditions, such as supply chain challenges, inflation, rising interest rates, and geopolitical events.

25. The 2023 Annual Report purported to advise investors that the Company “assess[es] available positive and negative evidence to estimate whether [the Company] will generate sufficient future taxable income to use our existing deferred tax assets” and that, due to “*recent changes in management and operational focus*” the Company has “*the expectation to be in a cumulative loss position over a three-year period, in the near future.*” Specifically, the 2023 Annual Report stated in relevant part:

We assess available positive and negative evidence to estimate whether we will generate sufficient future taxable income to use our existing deferred tax assets. *A significant piece of objective negative evidence evaluated as of December 31, 2023, is the expectation to be in a cumulative loss position over a three-year period, in the near future. This expectation stems from recent changes in management and operational focus;* the Company will be focused on driving growth in active customers and launching new products and services. While these changes are projected to increase both revenues and profits in the long-term, *in the short-term we are projecting losses as we invest in these endeavors. These short-term losses, coupled with our recent operating results, indicate we will be in a cumulative loss position over a three-year period, in the near future. A cumulative*

loss, including the expectation to be in a cumulative loss position in the near-term because of forecasting near-term losses, is significant negative evidence that is difficult to overcome. Such objective negative evidence limits our ability to consider other more subjective evidence such as our projections for future growth. On the basis of this evaluation, as of December 31, 2023, a valuation allowance has been recorded against our deferred tax assets for the U.S. jurisdiction, not supported by reversals of taxable temporary differences

26. On March 4, 2024, Defendant Lemonis provided the final keynote session for “The Inspired Home Show,” an investor and industry exhibition, in a speech entitled “Going Beyond for the Housewares Business” during which Lemonis stated Beyond was **“going to do \$2 billion this year and that’s a small amount[.]”** Specifically, Lemonis stated, in relevant part:

<Q: Audience member > A question for Marcus or Chandra hang on I'll coming over hey uh so first of all that was really a breath of fresh air I think um focusing on the vendor uh and vendor relations and really making us a partner in the process um I come from the world of Amazon and selling things on Amazon where that is not the case and things are getting really kind of crazy over there in terms of fees and things like that um but my question to you is um you know the presentation talks about having lower prices and enforcing lower prices and you know giving us a great place to get rid of lower prices getting great margins how is that possible in a world where you know Amazon will take away or buy box if you have a lower price on your site as much as we'd love to give it to you and sell to you how do you reconcile that and how do you make that work in this world when there's such a such a big volume of online sales

<A: Marcus A. Lemonis> Well first of all we need you to have a higher uh belief in the value of your product where Amazon doesn't have to be the only place that you sell it I think that starts with suppliers having confidence in the R&D and the development of the product in the packaging and in the quality of materials because if not then it's just going to be a race to the bottom called Temu. That's really what it's going to become. And if you've bought anything from them it is a fun place to shop until you get it. So that's number one. Number two the goal is to create a stratified opportunity where there are different places for you to put your product based on where it is in the life cycle and if you believe that you have a glut of inventory that best place may not be Bed Bath and Beyond or the upper tier, it may be Overstock. And if it's more extreme than that it goes on to Zulily. The strategy with Zulily - a lot of people are not familiar with – it is not a place where a vendor has to worry about that price being visible to the marketplace. It is an email registration membership site where 18 million people are members of that site today, and that product gets uploaded, and they get notified that there's a flash sale. So, we want to protect the brand. We think Amazon in some cases is going to be the Juggernaut forever the question is that the right place for your brand? It may be in some cases, but it can't be the only place.

<Q: Audience member > No I mean it's not and I would love to get away but if there're you know 90% of my sales it's hard to--

<A: Marcus A. Lemonis> They're 90% of your sales, is that where you put 90% of your effort? Okay, and then that's it. **But we're going to do 2 billion dollars this year this year and that's a small amount.** Wayfair is going to do 10, 11, 12, billion. So, there is \$13 billion happening that doesn't look like that. I think if I was in your shoes I would start to creep up a couple percentage points and spread them around where you're not taking too much risk for your family but you're testing and sampling what other things could do. But small, be careful. On March 7, 2024, Beyond issued a press release announcing the Company's acquisition of certain intellectual property of Zulily pursuant to an asset purchase agreement with Zulily ABC, LLC, and which reported that "[t]he new Zulily site is expected to be fully functional by the end of Q2 2024 and contribute to **Beyond's 24-month revenue goal** without adding any additional incremental fixed expense."

27. On March 7, 2024, a webcast with Defendant Lemonis was published by Hedgeye, a stock and policy investor group, as part of an interview of Lemonis hosted by retail analysts Brian McGough and Jeremy McLean. During the interview, Defendant Lemonis discussed Beyond's revenue generation and cost cutting measures, concluding that "when you cut all these expenses, and you largely restructure the marketing, that is why I'm so able **to confidently look you in the face and say \$2 billion dollars, we're going to cut the SG&A and we're going to get to profitability at some point in 2024, and say it with conviction.**" Lemonis continued, stating "**and with me, the one thing you should always assume is that if I makes statement about where I'm going to get to, that I usually have a plan.**" Lemonis concluded "**I value my reputation more than I do money and I know that I'll make money if my reputation stays clean, and the only way my reputation stays clean is if I do what I say what I'm going to do.**" Specifically, Lemonis stated, in relevant part:

<Q: Brian McGough – Hedgeye Retail > You've got some big revenue targets out there, you've got big cost cutting targets, I like your facial reaction there, but usually when I see companies that talk about cutting costs and growing revenue at the same time, I usually call bullshit on that

<A: Marcus A. Lemonis> -right, you should -

<Q: Brian McGough – Hedgeye Retail > -because in the world of retail you generally have to spend money to make money, you have to invest in SG&A, invest to a certain extent in CAPEX or working capital in order to drive your top line and drive your gross profits dollars. You're kind of unique in the value proposition you're putting up right now in that you are cutting costs, I understand that you are reinvesting back in the business, which is critical, and I love seeing, but help, help me reconcile how you can do what other companies have tried to and failed which is actually cutting costs while growing the top line?

<A: Marcus A. Lemonis> Well first of all, you've been very public about your debate on this topic specifically with me and appreciate the candor around it because if this was a mature company that I had been at for ten years, and I was pitching you that at Camping World, I would understand that you have more resolve because you would make the assumption that the cost structure should have been right to begin with and then why wasn't it right to begin with? But even in a business like that, new technologies can lead us to efficiencies we that haven't experienced before which allow costs to be reduced but I don't want to sell that. In the case of Beyond it really is very simple for me – and that is, the assumption that you have made, along with plenty of others – that the cost structure wasn't out of wack to begin with- and when you look at a cost structure, it isn't just about looking at the overall SG&A and understanding the different line items in totality, It's really breaking that thing down, which is I think is a little bit of a superpower of mine, to break down the SG&A and overall expense structure in a way where you understand where revenue is being generated and where efficiency is being created. And I usually start on the labor side as a first attack, and that is, tell me all the people that are generating revenue and tell me the people that are supporting the revenue that's being generated, and then tell me all the people that don't fit in those two buckets, and so it isn't just about having high-fliers and high performers, we still have to count the eggs, we still have to make sure the supply chain works, we still have to make sure the computer is plugged in, but those are obvious things, so once I get passed the people and I make that first assessment, I start digging into what are the biggest expenses that are out there, and you can go to some obvious ones, but in a traditional business particularly retail its going to be occupancy costs and marketing, aside from people.

In the case of Beyond it was very simple to me, this company was operating in a 220 thousand square foot building that costs the company 8.2 million dollars whether it was through the P&L or not, its 8.2 million dollars of cash that's leaving the system. Nobody needs an office that elaborate, I don't care if we're in a trailer on the – on the west side of the highway, because it sends a bad message to the people that work there. And if you take a poll when you work at a company, employees will tell you where the waste is – particularly the real high-flying performing one who are paid on the bottom line, so you start with one thing, you modify everybody's pay plan to be based on the performance, and you pick the things you believe are the biggest weakness and you allow them to dissect them and to rip them out – costs were one of them – and Adrian and Dave and a number

of the other senior managers were very honest with me from day one. They just said the expenses here are crazy.

First meeting I every had with the company I said what does it cost the company to operate on an annual basis – she said 200 million – I said what are the costs if the revenue drops 30%? She said 200 million. I said that’s problem number one. We’re going to have a variable expense structure that ebbs and flows with revenue and that includes people’s income and that includes marketing dollars and that’s why you heard me talk about advertising as a percentage of revenue.

The second thing is you can actually cut costs, then reach a new flat level, and then take some of those savings, and reinvest those in driving revenue. So, if I start at 200 million, as an example, you heard me announce a 25 million dollar cut in I think was in October or November or December, those got done in 30 days, and now we’re going for the next 25 million. You should assume that I’m cutting more than 50 million but that I’m reinvesting some of those dollars in marketing. I believe that the company has been less than great in terms of how it deploys its marketing dollars. a portion of it goes to performance marketing which is digital marketing like Facebook and Google ads and you know ads you see that you’re served up when you’re on the internet and a portion of it is to customer service - which it should be, and another portion of it is to establishing what the brand is, and I think the company has done maybe a D+ to maybe a C- job at figuring out how to do their marketing dollars.

I’m a big believer that it’s a ground up model and so when you cut all these expenses, and you largely restructure the marketing, **that is why I’m so able to confidently look you in the face and say \$2 billion dollars, we’re going to cut the SG&A and we’re going to get to profitability at some point in 2024, and say it with conviction.** The other piece that people probably including yourself probably don’t know. Is that you’re assuming that the facts set, the input and entries and what you see in front of you today, is what’s going to be there through the calendar year. ***And with me, the one thing you should always assume is that if I makes statement about where I’m going to get to, that I usually have a plan that you may not fully see, because its just in the prep stage and not fully baked, but I, I value my reputation more than money. I want you to sit on that for a minute. I value my reputation more than I do money and I know that I’ll make money if my reputation stays clean, and the only way my reputation stays clean is if I do what I say what I’m going to do, and I kick everybody’s ass.***

28. On April 23, 2024, an interview with Defendant Lemonis was published on ETF Think Tank hosted by Dan Weiskopf. In that interview, Lemonis discussed Beyond’s revenue goals, ***reiterating the \$2 billion revenue target*** and reassuring investors that, though “***somebody said to me you're going to get severely punished if you miss two billion***” he responded, “***I'm***

going to die trying whatever the consequences are.” Specifically, Defendant Lemonis stated, in relevant part:

[S]o there's a lot of interesting things out there that we're doing, ***and I know 100% that putting a \$2 billion Revenue Target out there was like putting a giant target on my giant forehead*** I knew that but at what point do you do you do you decide to give everybody something to shoot for

* * *

[W]hen you look at the sells-side analysts I don't think very many of them even have me at much above 1850 and I'm not arguing with them and if and if I end up what's interesting to me is if I end up beating every one of the quarters or matching the quarters and getting to 1 billion 851 which I think was like around the consensus I don't even have in front of me so don't quote me on any of it then then you would be a hero in most cases but if you miss two billion people are going to punish you ***and somebody said to me you're going to get severely punished if you miss two billion and my response was I've been severely punished many times and I always figure out how to come back I learn from what I made a mistake on I learn from what I miss I'll never let it happen again but I'm going to die trying whatever the consequences are.***

29. The above statements identified in ¶¶ 21-28 were materially false and/or misleading, and failed to disclose material adverse facts about the Company's business, operations, and prospects. Specifically, Defendants failed to disclose to investors: (1) that the Company misrepresented its ability to achieve \$2 billion in annualized revenue in 2024; (2) that the Company's \$2 billion annualized revenue goal for 2024 was not considered "something that was possible" by the Company; (3) that, as a result, the Company would be unlikely to meet its 2025 annualized run-rate goals; (4) that despite the Company's statements, the Company was, in fact, projecting a cumulative loss in the near future; and (5) that, as a result of the foregoing, Defendants' positive statements about the Company's business, operations, and prospects were materially misleading and/or lacked a reasonable basis.

Disclosures at the End of the Class Period

30. On May 6, 2024, after the market closed, Beyond announced the Company's first quarter 2024 financial results, revealing first quarter total net revenue of \$382 million, an increase of only 0.3% year-over-year, and a first quarter net loss of \$74 million. The Company disclosed that "in analyzing the profitability of that growth" the Company would be "making the strategic decision" to "build our brands for sustainable growth, not transient, transactional growth" and "[t]o that end" the Company "will aim to continue to eliminate unnecessary fixed costs and create a more variable cost structure" in order to "*yield sequential improvements in our margin profile.*" The Company therefore declined to reiterate its previously issued goal to achieve \$2 billion of revenue in 2024, and a \$3 billion revenue run rate by the end of 2025.

31. On May 7, 2024, before the market opened, Beyond hosted an earnings call pursuant to the Company's first quarter 2024 financial results. During the earnings call, Marcus A. Lemonis ("Lemonis") was asked by analyst Peter Keith of Piper Sandler "how do you feel about that \$2 billion target for this year at this point?" to which Defendant Lemonis responded, in relevant part, that "*I, early on myself, nobody else, [] felt like a \$2 billion annualized revenue goal was something that was possible.*" Further, when asked by analyst Anna Andreeva, "So, should we still expect Beyond to be profitable in 3Q and 4Q? And as you look out to 2025, do you think low single-digit EBITDA margins is a realistic level for the business?" Defendant Lemonis responded, in relevant part, that "So, no, *I do not expect there to be positive contribution through the end of this year[.]*" Specifically, the transcript of the first quarter 2024 financial results states, in relevant part:

<Q: Peter Keith - Piper Sandler > Hi, thank you. Good morning, everyone. I was wondering, I know - I believe it was Anna asked earlier about some of the profitability target. I guess I'm also curious just around the \$2 billion revenue target for 2024. As you're getting a Bed Bath & Beyond growing and ramping Overstock,

now you have Zulily, how do you feel about that \$2 billion target for this year at this point?

<A: Marcus A. Lemonis> ***I, early on myself, nobody else, on February 2nd, felt like a \$2 billion annualized revenue goal was something that was possible.*** As I dug in deeper and understood more clearly how to best manage our cash, best manage our vendor relationships, best manage our human capital, and most importantly, manage this business to drive towards profitability, I've revised my outlook and no longer want to spend recklessly to try to get there. Quite frankly, in the first 100 days, I learned a lot. And while I believe this company could get to \$2 billion, the cost of doing it does not seem prudent. And if I was managing this business as if it was my own personal business, I would not make the leap to spend money recklessly. As a capitalist, I understand how hard it is to make a dollar, and to watch people in other companies and in other industries burn money as if it's okay is just something we're not going to do. Now, is there an outside shot that Overstock hits the moon and takes off? You bet. Is there a chance that Zulily outpaces our expectations? You bet. But what we're not going to do is pour gas on it and light it on fire while cash is burning just to be able to hit a number that we don't believe builds foundational stability for the long term. Do I believe that \$2 billion, \$3 billion, and \$4 billion are possible? You bet. And quite frankly, that's the only reason I'm here working for free. I have my time and my reputation on the line, and I only make money when this company hits a certain level of performance, which would indicate that the stock would go to a certain place. And I will invest as many hours and as much time as I need to because I truly believe that I see green shoots everywhere, everywhere, in monetizing the brand, in finding new ways to make money, in finding new ways to cut costs. I'm confident that the proclamation that I made in February, we could do, but as a management team, we look at your capital differently. We do not want to be the company that gets to \$2 billion and \$3 billion by taking on billions of dollars of debt. We're debt-free, other than the mortgage on our building, \$256 million in our bank account. We do not want to be the company that has to take on more equity holders and dilute our current shareholders just to hit a temporary number. If I was a shareholder of this company, which I am, I don't want to be diluted. I want the management team to earn and work hard to receive their compensation, to earn and work hard to grow my investment without diluting me, without taking on debt, and I want them to do it prudently and smart. And that's my vantage point as an investor, as a person who's working here for free, and as a good capitalist who understands how hard it is to make a dollar.

* * *

<Q: Anna Andreeva – Needham> Great. Thanks so much, and good morning. Two questions. You had previously talked about profitability in back half, and the comments this morning I think are about more of a sequential improvement as we go through the year. So, should we still expect Beyond to be profitable in 3Q and 4Q? And as you look out to 2025, do you think low single-digit EBITDA margins is a realistic level for the business? And then we had a follow-up.

<A: Marcus A. Lemonis> *Yes, I think it's an excellent question. After really digging into the first 100 days, we realized that the investment required to build these three standalone brands in a way that is foundational, that will last us a lifetime, will take longer than we expected.* We need to ensure that the technology stack is clear, that the customer experience is unique, that the vendor relationships are set up in a way that are profitable, and that every single dollar that runs through our P&L between now and the end of the year, is exclusively and singularly related to either building the technology stack, improving the customer experience, hiring and bringing on the best talent that we believe is possible, and acquiring and retaining customers that we believe have a lifetime value proposition. As we unpack the financial statement for the balance of the year, what we have decided is, we are not going to chase what we believe is going to be unprofitable transactions, but there still needs to be an investment in waking up historical customers that haven't been communicated to in months, in identifying target-specific audiences through the Salesforce CRM that we can mature, water, and create green shoots out of, and quite honestly, bringing those three brands back to life in different ways, and whether that's licensing or branding or partnering, there is work to be done.

So, no, I do not expect there to be positive contribution through the end of this year, but I want to caveat that. That delta between what we previously thought and now, isn't the function of us not managing our cost. We are well on our way of eliminating the \$45 million that we've identified. We're slightly more than half and have a very clear path to finishing that. The delta is truly related to how we want to allocate our capital to invest intelligently in building the right foundation. I wish that a lot of these costs could be capitalized, but gap accounting doesn't allow that. And when you launch a brand new business like Overstock, while it had a legacy name, it does not have a legacy platform. And while you launch a legacy business like Zulily that stopped a year ago, it costs money on the human capital side, on the technology side, on the customer experience side, and the marketing side. And I would strongly encourage and respectfully request that everybody look at all of the costs that are going to go on through the balance of this year, has nothing more than a true investment that is going to run through the P&L. No wasteful spending, I can guarantee you that.

32. On this news, the Company's share price fell \$5.37 or 24.5%, to close at \$16.52 on May 7, 2024, on unusually heavy trading volume.

CLASS ACTION ALLEGATIONS

33. Plaintiff brings this action as a class action pursuant to Federal Rule of Civil Procedure 23(a) and (b)(3) on behalf of a class, consisting of all persons and entities that purchased or otherwise acquired Beyond securities between December 4, 2023 and May 6, 2024, inclusive, and who were damaged thereby (the "Class"). Excluded from the Class are Defendants, the

officers and directors of the Company, at all relevant times, members of their immediate families and their legal representatives, heirs, successors, or assigns, and any entity in which Defendants have or had a controlling interest.

34. The members of the Class are so numerous that joinder of all members is impracticable. Throughout the Class Period, Beyond's shares actively traded on the New York Stock Exchange. While the exact number of Class members is unknown to Plaintiff at this time and can only be ascertained through appropriate discovery, Plaintiff believes that there are at least hundreds or thousands of members in the proposed Class. Millions of Beyond shares were traded publicly during the Class Period on the New York Stock Exchange. Record owners and other members of the Class may be identified from records maintained by Beyond or its transfer agent and may be notified of the pendency of this action by mail, using the form of notice similar to that customarily used in securities class actions.

35. Plaintiff's claims are typical of the claims of the members of the Class as all members of the Class are similarly affected by Defendants' wrongful conduct in violation of federal law that is complained of herein.

36. Plaintiff will fairly and adequately protect the interests of the members of the Class and has retained counsel competent and experienced in class and securities litigation.

37. Common questions of law and fact exist as to all members of the Class and predominate over any questions solely affecting individual members of the Class. Among the questions of law and fact common to the Class are:

(a) whether the federal securities laws were violated by Defendants' acts as alleged herein;

(b) whether statements made by Defendants to the investing public during the Class Period omitted and/or misrepresented material facts about the business, operations, and prospects of Beyond; and

(c) to what extent the members of the Class have sustained damages and the proper measure of damages.

38. A class action is superior to all other available methods for the fair and efficient adjudication of this controversy since joinder of all members is impracticable. Furthermore, as the damages suffered by individual Class members may be relatively small, the expense and burden of individual litigation makes it impossible for members of the Class to individually redress the wrongs done to them. There will be no difficulty in the management of this action as a class action.

UNDISCLOSED ADVERSE FACTS

39. The market for Beyond's securities was open, well-developed and efficient at all relevant times. As a result of these materially false and/or misleading statements, and/or failures to disclose, Beyond's securities traded at artificially inflated prices during the Class Period. Plaintiff and other members of the Class purchased or otherwise acquired Beyond's securities relying upon the integrity of the market price of the Company's securities and market information relating to Beyond, and have been damaged thereby.

40. During the Class Period, Defendants materially misled the investing public, thereby inflating the price of Beyond's securities, by publicly issuing false and/or misleading statements and/or omitting to disclose material facts necessary to make Defendants' statements, as set forth herein, not false and/or misleading. The statements and omissions were materially false and/or misleading because they failed to disclose material adverse information and/or misrepresented the truth about Beyond's business, operations, and prospects as alleged herein.

41. At all relevant times, the material misrepresentations and omissions particularized in this Complaint directly or proximately caused or were a substantial contributing cause of the damages sustained by Plaintiff and other members of the Class. As described herein, during the Class Period, Defendants made or caused to be made a series of materially false and/or misleading statements about Beyond's financial well-being and prospects. These material misstatements and/or omissions had the cause and effect of creating in the market an unrealistically positive assessment of the Company and its financial well-being and prospects, thus causing the Company's securities to be overvalued and artificially inflated at all relevant times. Defendants' materially false and/or misleading statements during the Class Period resulted in Plaintiff and other members of the Class purchasing the Company's securities at artificially inflated prices, thus causing the damages complained of herein when the truth was revealed.

LOSS CAUSATION

42. Defendants' wrongful conduct, as alleged herein, directly and proximately caused the economic loss suffered by Plaintiff and the Class.

43. During the Class Period, Plaintiff and the Class purchased Beyond's securities at artificially inflated prices and were damaged thereby. The price of the Company's securities significantly declined when the misrepresentations made to the market, and/or the information alleged herein to have been concealed from the market, and/or the effects thereof, were revealed, causing investors' losses.

SCIENTER ALLEGATIONS

44. As alleged herein, Defendants acted with scienter since Defendants knew that the public documents and statements issued or disseminated in the name of the Company were materially false and/or misleading; knew that such statements or documents would be issued or disseminated to the investing public; and knowingly and substantially participated or acquiesced

in the issuance or dissemination of such statements or documents as primary violations of the federal securities laws. As set forth elsewhere herein in detail, the Individual Defendants, by virtue of their receipt of information reflecting the true facts regarding Beyond, their control over, and/or receipt and/or modification of Beyond's allegedly materially misleading misstatements and/or their associations with the Company which made them privy to confidential proprietary information concerning Beyond, participated in the fraudulent scheme alleged herein.

APPLICABILITY OF PRESUMPTION OF RELIANCE

(FRAUD-ON-THE-MARKET DOCTRINE)

45. The market for Beyond's securities was open, well-developed and efficient at all relevant times. As a result of the materially false and/or misleading statements and/or failures to disclose, Beyond's securities traded at artificially inflated prices during the Class Period. On March 27, 2024, the Company's share price closed at a Class Period high of \$36.02 per share. Plaintiff and other members of the Class purchased or otherwise acquired the Company's securities relying upon the integrity of the market price of Beyond's securities and market information relating to Beyond, and have been damaged thereby.

46. During the Class Period, the artificial inflation of Beyond's shares was caused by the material misrepresentations and/or omissions particularized in this Complaint causing the damages sustained by Plaintiff and other members of the Class. As described herein, during the Class Period, Defendants made or caused to be made a series of materially false and/or misleading statements about Beyond's business, prospects, and operations. These material misstatements and/or omissions created an unrealistically positive assessment of Beyond and its business, operations, and prospects, thus causing the price of the Company's securities to be artificially inflated at all relevant times, and when disclosed, negatively affected the value of the Company shares. Defendants' materially false and/or misleading statements during the Class Period resulted

in Plaintiff and other members of the Class purchasing the Company's securities at such artificially inflated prices, and each of them has been damaged as a result.

47. At all relevant times, the market for Beyond's securities was an efficient market for the following reasons, among others:

(a) Beyond shares met the requirements for listing, and was listed and actively traded on the New York Stock Exchange, a highly efficient and automated market;

(b) As a regulated issuer, Beyond filed periodic public reports with the SEC and/or the New York Stock Exchange;

(c) Beyond regularly communicated with public investors via established market communication mechanisms, including through regular dissemination of press releases on the national circuits of major newswire services and through other wide-ranging public disclosures, such as communications with the financial press and other similar reporting services; and/or

(d) Beyond was followed by securities analysts employed by brokerage firms who wrote reports about the Company, and these reports were distributed to the sales force and certain customers of their respective brokerage firms. Each of these reports was publicly available and entered the public marketplace.

48. As a result of the foregoing, the market for Beyond's securities promptly digested current information regarding Beyond from all publicly available sources and reflected such information in Beyond's share price. Under these circumstances, all purchasers of Beyond's securities during the Class Period suffered similar injury through their purchase of Beyond's securities at artificially inflated prices and a presumption of reliance applies.

49. A Class-wide presumption of reliance is also appropriate in this action under the Supreme Court's holding in *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128 (1972),

because the Class's claims are, in large part, grounded on Defendants' material misstatements and/or omissions. Because this action involves Defendants' failure to disclose material adverse information regarding the Company's business operations and financial prospects—information that Defendants were obligated to disclose—positive proof of reliance is not a prerequisite to recovery. All that is necessary is that the facts withheld be material in the sense that a reasonable investor might have considered them important in making investment decisions. Given the importance of the Class Period material misstatements and omissions set forth above, that requirement is satisfied here.

NO SAFE HARBOR

50. The statutory safe harbor provided for forward-looking statements under certain circumstances does not apply to any of the allegedly false statements pleaded in this Complaint. The statements alleged to be false and misleading herein all relate to then-existing facts and conditions. In addition, to the extent certain of the statements alleged to be false may be characterized as forward looking, they were not identified as “forward-looking statements” when made and there were no meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the purportedly forward-looking statements. In the alternative, to the extent that the statutory safe harbor is determined to apply to any forward-looking statements pleaded herein, Defendants are liable for those false forward-looking statements because at the time each of those forward-looking statements was made, the speaker had actual knowledge that the forward-looking statement was materially false or misleading, and/or the forward-looking statement was authorized or approved by an executive officer of Beyond who knew that the statement was false when made.

FIRST CLAIM

**Violation of Section 10(b) of The Exchange Act and
Rule 10b-5 Promulgated Thereunder**

Against All Defendants

51. Plaintiff repeats and re-alleges each and every allegation contained above as if fully set forth herein.

52. During the Class Period, Defendants carried out a plan, scheme and course of conduct which was intended to and, throughout the Class Period, did: (i) deceive the investing public, including Plaintiff and other Class members, as alleged herein; and (ii) cause Plaintiff and other members of the Class to purchase Beyond's securities at artificially inflated prices. In furtherance of this unlawful scheme, plan and course of conduct, Defendants, and each defendant, took the actions set forth herein.

53. Defendants (i) employed devices, schemes, and artifices to defraud; (ii) made untrue statements of material fact and/or omitted to state material facts necessary to make the statements not misleading; and (iii) engaged in acts, practices, and a course of business which operated as a fraud and deceit upon the purchasers of the Company's securities in an effort to maintain artificially high market prices for Beyond's securities in violation of Section 10(b) of the Exchange Act and Rule 10b-5. All Defendants are sued either as primary participants in the wrongful and illegal conduct charged herein or as controlling persons as alleged below.

54. Defendants, individually and in concert, directly and indirectly, by the use, means or instrumentalities of interstate commerce and/or of the mails, engaged and participated in a continuous course of conduct to conceal adverse material information about Beyond's financial well-being and prospects, as specified herein.

55. Defendants employed devices, schemes and artifices to defraud, while in possession of material adverse non-public information and engaged in acts, practices, and a course of conduct as alleged herein in an effort to assure investors of Beyond's value and performance and continued substantial growth, which included the making of, or the participation in the making of, untrue statements of material facts and/or omitting to state material facts necessary in order to make the statements made about Beyond and its business operations and future prospects in light of the circumstances under which they were made, not misleading, as set forth more particularly herein, and engaged in transactions, practices and a course of business which operated as a fraud and deceit upon the purchasers of the Company's securities during the Class Period.

56. Each of the Individual Defendants' primary liability and controlling person liability arises from the following facts: (i) the Individual Defendants were high-level executives and/or directors at the Company during the Class Period and members of the Company's management team or had control thereof; (ii) each of these defendants, by virtue of their responsibilities and activities as a senior officer and/or director of the Company, was privy to and participated in the creation, development and reporting of the Company's internal budgets, plans, projections and/or reports; (iii) each of these defendants enjoyed significant personal contact and familiarity with the other defendants and was advised of, and had access to, other members of the Company's management team, internal reports and other data and information about the Company's finances, operations, and sales at all relevant times; and (iv) each of these defendants was aware of the Company's dissemination of information to the investing public which they knew and/or recklessly disregarded was materially false and misleading.

57. Defendants had actual knowledge of the misrepresentations and/or omissions of material facts set forth herein, or acted with reckless disregard for the truth in that they failed to

ascertain and to disclose such facts, even though such facts were available to them. Such defendants' material misrepresentations and/or omissions were done knowingly or recklessly and for the purpose and effect of concealing Beyond's financial well-being and prospects from the investing public and supporting the artificially inflated price of its securities. As demonstrated by Defendants' overstatements and/or misstatements of the Company's business, operations, financial well-being, and prospects throughout the Class Period, Defendants, if they did not have actual knowledge of the misrepresentations and/or omissions alleged, were reckless in failing to obtain such knowledge by deliberately refraining from taking those steps necessary to discover whether those statements were false or misleading.

58. As a result of the dissemination of the materially false and/or misleading information and/or failure to disclose material facts, as set forth above, the market price of Beyond's securities was artificially inflated during the Class Period. In ignorance of the fact that market prices of the Company's securities were artificially inflated, and relying directly or indirectly on the false and misleading statements made by Defendants, or upon the integrity of the market in which the securities trades, and/or in the absence of material adverse information that was known to or recklessly disregarded by Defendants, but not disclosed in public statements by Defendants during the Class Period, Plaintiff and the other members of the Class acquired Beyond's securities during the Class Period at artificially high prices and were damaged thereby.

59. At the time of said misrepresentations and/or omissions, Plaintiff and other members of the Class were ignorant of their falsity, and believed them to be true. Had Plaintiff and the other members of the Class and the marketplace known the truth regarding the problems that Beyond was experiencing, which were not disclosed by Defendants, Plaintiff and other members of the Class would not have purchased or otherwise acquired their Beyond securities, or,

if they had acquired such securities during the Class Period, they would not have done so at the artificially inflated prices which they paid.

60. By virtue of the foregoing, Defendants violated Section 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder.

61. As a direct and proximate result of Defendants' wrongful conduct, Plaintiff and the other members of the Class suffered damages in connection with their respective purchases and sales of the Company's securities during the Class Period.

SECOND CLAIM

Violation of Section 20(a) of The Exchange Act

Against the Individual Defendants

62. Plaintiff repeats and re-alleges each and every allegation contained above as if fully set forth herein.

63. Individual Defendants acted as controlling persons of Beyond within the meaning of Section 20(a) of the Exchange Act as alleged herein. By virtue of their high-level positions and their ownership and contractual rights, participation in, and/or awareness of the Company's operations and intimate knowledge of the false financial statements filed by the Company with the SEC and disseminated to the investing public, Individual Defendants had the power to influence and control and did influence and control, directly or indirectly, the decision-making of the Company, including the content and dissemination of the various statements which Plaintiff contends are false and misleading. Individual Defendants were provided with or had unlimited access to copies of the Company's reports, press releases, public filings, and other statements alleged by Plaintiff to be misleading prior to and/or shortly after these statements were issued and had the ability to prevent the issuance of the statements or cause the statements to be corrected.

64. In particular, Individual Defendants had direct and supervisory involvement in the day-to-day operations of the Company and, therefore, had the power to control or influence the particular transactions giving rise to the securities violations as alleged herein, and exercised the same.

65. As set forth above, Beyond and Individual Defendants each violated Section 10(b) and Rule 10b-5 by their acts and omissions as alleged in this Complaint. By virtue of their position as controlling persons, Individual Defendants are liable pursuant to Section 20(a) of the Exchange Act. As a direct and proximate result of Defendants' wrongful conduct, Plaintiff and other members of the Class suffered damages in connection with their purchases of the Company's securities during the Class Period.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for relief and judgment, as follows:

- (a) Determining that this action is a proper class action under Rule 23 of the Federal Rules of Civil Procedure;
- (b) Awarding compensatory damages in favor of Plaintiff and the other Class members against all defendants, jointly and severally, for all damages sustained as a result of Defendants' wrongdoing, in an amount to be proven at trial, including interest thereon;
- (c) Awarding Plaintiff and the Class their reasonable costs and expenses incurred in this action, including counsel fees and expert fees; and
- (d) Such other and further relief as the Court may deem just and proper.

JURY TRIAL DEMANDED

Plaintiff hereby demands a trial by jury.

Dated: _____, 2024

LAW OFFICES OF HOWARD G. SMITH

Howard G. Smith
3070 Bristol Pike, Suite 112
Bensalem PA 19020
Telephone: (215) 638-4847
Facsimile: (215) 638-4867

GLANCY PRONGAY & MURRAY LLP

Robert V. Prongay
Charles H. Linehan
1925 Century Park East, Suite 2100
Los Angeles, CA 90067
Telephone: (310) 201-9150
Facsimile: (310) 201-9160

Counsel for Plaintiff _____