SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

In re Altice, USA, Inc. Securities Litigation	Index No. 711788/2018 Commercial Division Hon. Joseph Risi

MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANTS' MOTION TO DISMISS

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1. Defendants Altice USA, Inc. ("Altice USA"), Altice Europe N.V. ("Altice Europe"), Patrick Drahi, Jérémie Jean Bonnin, Abdelhakim Boubazine, Michel Combes, David P. Connolly, Dexter G. Goei, Victoria M. Mink, Mark Christopher Mullen, Dennis Okhuijsen, Lisa Rosenblum, Charles F. Stewart, Raymond Svider (collectively, the "Individual Defendants"), Goldman Sachs & Co. LLC, J.P. Morgan Securities LLC, Morgan Stanley & Co. LLC, Citigroup Global Markets Inc., Merrill Lynch, Pierce Fenner & Smith, Inc., Barclays Capital Inc., BNP Paribas Securities Corp., Credit Agricole Securities (USA) Inc., Deutsche Bank Securities Inc., RBC Capital Markets, LLC, Scotia Capital (USA) Inc., SG Americas Securities LLC, and TD Securities (USA) LLC (collectively, the "Underwriter Defendants") (together, "Defendants") respectfully submit this Memorandum of Law, together with the Affirmation of K. Mallory Brennan and exhibits thereto ("Ex.__"), in support of their Motion to Dismiss the Amended Class Action Complaint ("Amended Complaint" or "AC") pursuant to CPLR §3211(a)(7) for failure to state a claim under Sections 11, 12(a)(2) and 15 of the Securities Act of 1933 (the "Securities Act").

PRELIMINARY STATEMENT

2. This case is a classic attempt by Plaintiffs to use the federal securities laws as an insurance policy for their investment in Altice USA's June 2017 initial public offering (IPO). The IPO Registration Statement and Prospectus (the "Prospectus") is replete with detailed information about Altice USA's business operations and performance, none of which Plaintiffs challenge. Instead, Plaintiffs contend that optimistic statements about a five-principle business strategy referred to as the "Altice Way" were misleading because one aspect of the strategy—enhanced customer experience—had not been "successfully implemented" at SFR, a French subsidiary of Altice Europe. Plaintiffs assert that this rendered the entire Prospectus materially

misleading in violation of the Securities Act. Plaintiffs are wrong as a matter of law, and their claims are plagued by a host of defects that, independently and together, mandate dismissal.

3. *First*, Plaintiffs fail to plead an actionable, material misstatement. The Prospectus accurately described Altice USA's view of the Altice Way. Moreover, statements about the Altice Way are textbook corporate puffery: high-level descriptions about the success of a business strategy. Courts routinely deem such marketing speak as nonactionable under the Securities Act. The detailed disclosures in the Prospectus about the operations and finances of Altice USA—which Plaintiffs do not challenge—render immaterial an isolated generic statement about implementing the Altice Way across the company, particularly given that Plaintiffs assert that just one aspect of the strategy was not implemented successfully at SFR, a different company, operating in a foreign country.

4. *Second*, Plaintiffs' omission claims fail as a matter of law. Plaintiffs assert that the Prospectus improperly omitted detailed financial information about Altice Europe. But Plaintiffs do not and cannot allege that Altice USA had a duty to disclose information about *other* companies' financial performances: the Prospectus focused on information about Altice USA, not other companies whose stock was not for sale in the IPO. Nor do Plaintiffs credibly allege that Altice Europe's third-quarter 2017 constitute a materially adverse fact, trend, or uncertainty about Altice USA such that it was required to disclose the other companies' performance under Items 303 and 503 of SEC Regulation S-K. In any event, the Prospectus warned investors of the precise danger about which Plaintiffs complain: that the performance of other Altice companies could impact Altice USA's stock price.

5. *Third*, Plaintiffs' claims are barred by negative causation because it is clear on the face of the Amended Complaint that the alleged misstatements in the Prospectus did not cause

Plaintiffs' purported losses. Plaintiffs allege that they suffered losses when Altice USA's stock dropped on November 3, 2017, after disappointing earnings were announced at Altice Europe. AC ¶83. But the day of the press conference at which Plaintiffs claim it was revealed that the Altice Way was not "successfully implemented" in France, the Altice USA stock price *increased*. Notwithstanding Plaintiffs' efforts to obscure the truth, their own allegations in the Amended Complaint make plain that they believe Altice USA's stock drop had to do with Altice Europe's financial performance—not implementation of the Altice Way in France.

6. *Fourth*, with respect to the Section 12(a)(2) claim against the Underwriter Defendants, Plaintiffs do not allege specific facts showing that those Defendants are "statutory sellers." This is an independent basis upon which to dismiss the Underwriter Defendants from the action.

7. *Finally*, Plaintiffs' control person claims under Section 15 fail because, for all of the reasons discussed above, Plaintiffs do not plead a primary violation.

8. As these defects are incurable, and Plaintiffs have already spent more than a year investigating and preparing their Amended Complaint, this case should be dismissed in its entirety and with prejudice.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. The Altice Companies

9. Altice Europe, N.V. (formerly known as Altice, N.V.) is a Netherlands-based multinational telecommunications company founded by Patrick Drahi, who remains the controlling shareholder of Altice Europe. AC ¶¶28–29. Altice Europe is the ultimate parent company of subsidiaries in France, Portugal, Israel, and the Dominican Republic that offer Internet, television, and telephony services, among other related services and products (with

Altice USA, at the time of the IPO, the "Altice Group"). *See id.* ¶¶3–4. Altice Europe is a named defendant only as to Plaintiffs' Section 15 claim.

10. Altice USA is a cable operator based in the United States that provides broadband communications and video services to customers in 21 states through the Suddenlink, Optimum, and Altice USA brands. *Id.* ¶27. Altice USA serves almost 5 million residential and business customers in the United States. *Id.* Altice USA was, until June 2018, a subsidiary of Altice Europe.

B. The June 2017 Altice USA IPO

11. On June 23, 2017, Altice USA filed the final Prospectus[1] for its IPO with the Securities and Exchange Commission. *Id.* ¶64. Defendants Boubazine, Connolly, Goei, Mink, Rosenblum, and Stewart signed the Prospectus. *Id.* ¶¶31–36. These signatories, and all other Individual Defendants, are named defendants for the Section 11 and 12(a)(2) claims. The Underwriter Defendants underwrote the IPO offering and are also named defendants as to the Section 11 and 12(a)(2) claims. *Id.* ¶¶42–54.

12. The 400-plus page Prospectus contained extensive disclosures about the terms of the stock offering, the broadband communications and video services industry, the nature of Altice USA's business, and detailed historical and pro forma financial data of Altice USA. The Prospectus detailed how Altice USA combined and improved Optimum and Suddenlink and the impact of those efforts. For example, the Prospectus discussed the combination of installation and maintenance departments (Prospectus at 149), enhancing the broadband network across the footprint of both companies (*id.* at 145), increasing gross sales via online channels (*id.* at 152), and improving service reliability, resulting in notable year-over-year (YoY) decreases in

[1] Relevant portions of the Prospectus are excerpted in Ex. A, cited herein as "Prospectus".

customer service requests. *Id.* The Prospectus disclosed that, as a result, in Q1 2017 Altice USA had revenue growth for phone, internet, and television operations of 3.8% YoY. *Id.* at 149.

13. The Prospectus also discussed the five principles of the "Altice Way" business strategy, described as "a founder-inspired owner-operator culture and strategy of operational efficiency, innovation and long-term value creation for stockholders," specifically to: (i) simplify and optimize corporate structure, (ii) invest savings in infrastructure and content, (iii) invest in sales, marketing, and innovation, (iv) improve the customer experience, and (v) use cross-selling, market share gains, increased efficiency, and new product offerings to drive revenue growth. AC ¶67 (citing Prospectus at 144). The Prospectus further stated that Altice USA "believe[d] the Altice Way, which has been successfully implemented across Altice Group, distinguishes us from our U.S. industry peers and competitors." *Id.*

14. The Prospectus also set forth extensive "Risk Factors" that cautioned investors regarding Altice USA's business prospects. Prospectus at 20–48. One of those factors included that the "[i]mpairment of Altice Group's reputation could adversely affect current and future customers' perception of Altice USA." *Id.* at 33. The Prospectus explained that this was because Altice USA's "ability to attract and retain customers depends, in part, upon the external perceptions of Altice Group's reputation, the quality of its products and its corporate and management integrity." *Id.* The Prospectus also warned that Altice USA's "future growth, profitability and results of operation depend on [its] ability to successfully implement [its] business strategy, which, in turn is dependent upon a number of factors, including [its] ability to continue to implement" the Altice Way. *Id.* Additionally, the Prospectus stated that any "forward-looking statements are based on management's current expectations and beliefs," and are, as with any projection "susceptible to uncertainty and changes in circumstance." *Id.* at 48

15. The Prospectus made no representations about the future performance of any of the Altice Group companies operating outside the United States. In particular, the Prospectus said nothing about the business prospects of SFR in France or Portugal Telecom in Portugal and included only three sentences about Altice Europe's recent acquisitions and resulting increased margins. *Id.* at 153. The risk factors also made clear that there is "no assurance that [Altice USA] would be able to achieve similar results or that any such acquisitions would have a similar impact on our stock price performance." *Id.*

16. On June 22, 2017, one day after filing the Prospectus, Altice USA completed its IPO at $30 per share. AC ¶¶1, 9.

C. Post-IPO Events and Performance of Altice USA Stock

17. On July 27, 2017, one month after the Altice USA IPO, Altice Europe released financial results for Q2 of 2017. The company reported that "[a]ll major markets [were] progressing as expected in Q2" and updated investors on progress with respect to Altice Europe's operations in France and Portugal. *See* Ex. B at 2. Altice USA reported revenue growth of 3.2% YoY, while EBITDA grew 21.9% YoY and EBITDA margin increased 6.6% YoY. *See* Ex. G at 1.[2]

18. After the IPO, the Altice USA stock price began to decline. On November 2, 2017, just prior to the announcement of Altice Europe and Altice USA's earnings for the third quarter of 2017, Altice USA's stock price was at $24.50 per share. *See* AC ¶¶14, 83. The quarterly results for Altice Europe for Q3 2017 reflected declining revenue and adjusted

[2] Quarterly earnings press releases are properly considered on a motion made under CPLR §3211(a)(7). *See Matter of Avon Prods., Inc. S'holders Litig.*, 2013 N.Y. Misc. LEXIS 3506, at *1 n.1 (Sup. Ct. N.Y. Cty. Mar. 5, 2013) (on a motion to dismiss courts may consider "publicly-available documents, including . . . press releases"); *Etzion v. Etzion*, 62 A.D.3d 646, 649 (2d Dep't 2009) (considering press releases submitted by defendant with its motion to dismiss pursuant to CPLR §3211(a)(7)).

EBITDA for SFR in France and Portugal Telecom, despite revenue growth of 0.3% YoY across Altice Europe as a whole. *Id*. ¶83. Altice USA posted another successful quarter, with Q3 revenue growth of 3.2% YoY, EBITDA growth of 18.9% YoY, and an EBITDA margin increase of 5.8% YoY. *See* Ex. H at 1.

19. An RBC analyst report on these results pointed to poor subscriber performance in France. AC ¶88. Wells Fargo's analyst report questioned whether Altice Europe could achieve "sustainable revenue growth [] with such deep cost cutting measures." *See* AC ¶88; Ex. C. Other market reports questioned the efficacy of SFR's "strategy" involving increasing pricing and cost-cutting. *See* AC ¶¶17, 85; Exs. D, E. The day after Q3 earnings were reported, Altice USA stock moved to $22.59 per share, a decrease of $1.91 per share. AC ¶86.

20. On November 15, 2017, about two weeks after Q3 results were reported, Mr. Drahi observed at a conference that at SFR, while "[o]ur networks are good [and] [o]ur products are good," the problem was "a management issue to deal with every little details of the customer. And this is what we know best, but that we haven't been focused enough to deliver in this year." Ex. F (Nov. 15 Morgan Stanley TMT Press Conference Tr.) at 5. Mr. Drahi summarized the problems in France by observing that they related to customer experience and, in response to a single question referencing the Altice Way, stated that, unlike in other major Altice Group markets like Israel and the Caribbean, "if we're referring to France, we never applied the Altice Way from A to Z." AC ¶89. Mr. Drahi stated further that the customer experience issues in France *did not* also exist with Altice USA, where he believed that the Altice Way was "working very well." *Id*. Plaintiffs claim this statement revealed material misrepresentations and omissions in the Prospectus, which was issued nearly five months earlier. *Id*. ¶90. Though Plaintiffs claim this caused Altice USA's stock to drop on the day of the press conference (*id.*

¶¶15, 16), in fact Altice USA's stock price *increased* from $19.50 per share to close at $20.26 per share on that day. Ex. I (historical stock data on Nov. 15, 2017 from Yahoo Finance).[3]

D. Litigation History and Plaintiffs' Allegations

21. On June 12, 2018, Plaintiffs filed the first of seven substantively identical complaints in New York Supreme Court in Queens and Nassau Counties. Six of the cases were consolidated before this Court on March 7, 2019. Plaintiffs filed the Amended Complaint on June 27, 2019.

22. In the Amended Complaint, Plaintiffs contend that the Prospectus contained materially misleading statements that "touted the 'Altice Way,' referenced the Altice Group's and Altice USA's implementation of the Altice Way, and emphasized that the Altice Group's experience in implementing the Altice Way positively differentiated Altice USA from its competitors." AC ¶¶67–72. Plaintiffs contend that these statements were misleading because the Altice Way had not been successfully implemented in France, and Altice Europe's operations in France were suffering from "severe problems." *Id.* ¶¶73, 74 (alleging operational problems, but not problems with the Altice Way, in Portugal). Plaintiffs further contend that the Prospectus for Altice USA included material omissions because it should have disclosed detailed information about the operations of Altice Europe, in particular SFR in France and Portugal Telecom in Portugal. *Id.* ¶75. Plaintiffs further allege that the Prospectus omitted that the post-IPO performance in France and Portugal constituted a known event or uncertainty and significant risk factor that should have been disclosed under Items 303, 17 C.F.R. §229.303(a)(3)(ii), and

[3] The Court is free to take judicial notice of publicly available information such as stock prices. *See Mahoney-Buntzman v. Buntzman*, 13 Misc.3d 1205(A), at *2 (Sup. Ct. Westchester Co. 2006).

503, 17 C.F.R. §229.503, respectively, of Regulation S-K (hereinafter, "Item 303" and "Item 503"). AC ¶¶77–80.

23. Plaintiffs contend that Altice USA's stock price dropped the day after earnings results for Altice Europe were issued on November 2, 2017, which revealed performance issues at SFR in France and at Portugal Telecom. Plaintiffs erroneously claim that the stock dropped again after comments from Mr. Drahi about implementing the Altice Way in France. *Id.* ¶¶83–89. In fact, the day of Mr. Drahi's November 15, 2017 comments, the price of Altice USA's stock increased by $0.76. *See supra* ¶20.

24. Plaintiffs assert claims under Sections 11 and 12(a)(2) against Altice USA, the Individual Defendants, and the Underwriter Defendants. Plaintiffs assert control person claims under Section 15 of the Securities Act against Mr. Drahi and Altice Europe.

ARGUMENT

25. New York law provides that "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that…the pleading fails to state a cause of action." CPLR §3211(a)(7). Although it is generally true that the facts as alleged are accepted as true on a 3211 motion, "[v]ague and conclusory allegations…are not sufficient to sustain a cause of action." *CIMB Thai Bank PCL v. Stanley*, 2013 N.Y. Misc. LEXIS 4280, at *8 (Sup. Ct. N.Y. Cty. Sept. 18, 2013). Furthermore, "where the legal conclusions and factual allegations are flatly contradicted by documentary evidence, they are not presumed to be true or accorded every favorable inference." *Morgenthow & Latham v. Bank of N.Y. Co.*, 305 A.D.2d 74, 78 (1st Dep't 2003).[4]

[4] Plaintiffs must plead their claims with particularity under CPLR §3016(b) because the allegations in the Amended Complaint sound in fraud given that Plaintiffs' entire theory of the case rests on the notion that Defendants knew of poor performance at SFR but did not disclose it. *See* AC ¶111. *See, e.g.*, *Moore v. Liberty Power Corp.*, 72 A.D.3d 660, 661 (2d Dep't 2010); *Rombach v. Chang*, 355 F.3d 164, 171–72 (2d Cir. 2004) (finding that plaintiffs' Section

I. The Section 11 and 12(a)(2) Claims Fail

26. To state a cause of action under Section 11, Plaintiffs must allege that "the registration statement…contained an untrue statement of a material fact or omitted…a material fact…necessary to make the statements therein not misleading." 15 U.S.C. §77k. Similarly, Section 12(a)(2) requires "an untrue statement of a material fact or omi[ssion] to state a material fact necessary in order to make the statements, in light of the circumstances under which they were made, not misleading." *Id.* §77l; *see also Antipodean Domestic Partners, LP v. Clovis Oncology, Inc.*, 2018 N.Y. Misc. LEXIS 1592, at *13 (Sup. Ct. N.Y. Cty. Apr. 30, 2018) (Section 11 and 12(a)(2) claimants must allege an "untrue statement of material fact or a material omission"). Statements and omissions are "material" only if there is a "substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the total mix of information available." *Id.*, at *13; *Acacia Nat'l Life Ins. Co. v. Kay Jewelers*, 203 A.D.2d 40, 44 (1st Dep't 1994) (relevant question is "whether defendants' representations, taken together and in context, would have [misled] a reasonable investor").

27. Plaintiffs' Section 12(a)(2) claim relies on the same alleged misstatements as their Section 11 claim. AC ¶2. Accordingly, their failure to state a cause of action under Section 11 also mandates dismissal of the Section 12(a)(2) claim. *In re Agria Corp. Sec. Litig.*, 672 F. Supp. 2d 520, 525 (S.D.N.Y. 2009) ("A plaintiff who fails to plead a §11 claim necessarily fails to plead a §12(a)(2) claim"). [5]

11 claims did "sound in fraud" despite protestations to the contrary, because, among other things, the complaint alleged that defendants' Registration Statement contained "materially false and misleading written statements").

[5] New York courts generally apply federal securities precedent when ruling on claims brought under the Securities Act. *See, e.g.*, *Phoenix Light SF Ltd. v. Ace Sec. Corp.*, 439 Misc. 3d 1218(A), 2013 WL 1788007, at *7 (Sup. Ct. N.Y. Cty. Apr. 24, 2013); *Acacia Nat'l Life*, 203 A.D.2d at 44–46.

A. Plaintiffs Fail to Allege a Material Misrepresentation

28. The crux of Plaintiffs' claim—that the Prospectus was misleading because a French subsidiary had not fully improved its customer experience, which is one component of Altice Europe's corporate strategy—rests on statements that are neither misrepresentations nor material.

29. *First*, Plaintiffs do not adequately allege falsity. Plaintiffs point to statements that Altice USA believed the corporate strategy had positioned Altice USA for success, distinguished the cable provider from its competitors, and was a competitive strength that would position Altice USA for growth, AC ¶¶67–72, but never claim that Altice USA did not actually believe these statements or was not following the Altice Way strategy. Plaintiffs' failure to do so is fatal because opinion statements are actionable "only if the speaker did not hold the belief she professed." *See Omnicare, Inc. v. Laborers Dist. Council Const. Indus.*, 135 S. Ct. 1318, 1327 (2015); Ex. J, *In re Netshoes Sec. Litig.*, No. 157435/2018, Slip Op. at 8–9 (Sup. Ct. N.Y. Cty. Jul. 11, 2019) ("To be actionable, the opinion statements must be (i) false and (ii) not honestly believed when made").

30. Plaintiffs also claim that SFR failed to fully enhance the customer experience in France, and this renders Altice USA's Prospectus materially inaccurate. However, a single misstep in one country does not convert a broad statement about successful implementation of the Altice Way across the Altice Group into a misrepresentation. Federal courts routinely reject such claims. For example, the SDNY has dismissed Section 11 claims because "termination of a single product line sold in the United States" did not render untrue defendant's statement that its "brand was expanding globally." *In re Coty Inc. Sec. Litig*., 2016 WL 1271065, at *9 (S.D.N.Y. Mar. 29, 2016). The Sixth Circuit affirmed dismissal of Section 11 claims for the same reason. *See Bondali v. Yum! Brands, Inc.*, 620 F. App'x 483, 489 (6th Cir. 2015) ("That a

few suppliers did not adhere to the standards does not mean Yum did not have the standards in place, and it is not reasonable to interpret Yum's statements as a guarantee that its suppliers would, in all instances, abide by the corporate standards and protocols"). In other words, by simply praising the Altice Way and its application, Altice USA "did not imply that [Altice Europe] had never experienced any" managerial or customer service-related issues (or that it never would suffer such issues in the future). *In re Heartland Payment Sys., Inc. Sec. Litig.*, 2009 WL 4798148, at *6 (D.N.J. Dec. 7, 2009) (emphasis on data security in earnings calls and 10-K were not rendered misleading merely because a data security issue was later uncovered).

31. *Second*, positive statements about the success of the "Altice Way" are mere sales speak based on "corporate optimism" that are immaterial as a matter of law and thus "do not give rise to securities violations." *See Antipodean*, 2018 N.Y. Misc. LEXIS 1592, at *17; Ex. J, *Netshoes*, Slip Op. at 8. The Commercial Division dismissed similar claims under Section 11 and 12(a)(2) claims on that very basis in *In re Netshoes. See id*. Plaintiffs there challenged defendant's statements praising its "'high margin' business model specializing in 'easy-to-ship items with high margins and short replacement cycles." Ex. J, *Netshoes*, Slip Op. at 13. The court rejected those allegations as "puffery and corporate optimism" inadequate to state a claim under the federal securities laws. *Id.* Thus, New York state courts follow federal law in recognizing that statements about a "business model at a high level are exactly the kind of 'puffery'…insufficient to generate liability." See *Brewer v. Breen*, 2018 WL 565267, at *9 (S.D.N.Y Jan. 23, 2018); *accord Galati v. Commerce Bancorp, Inc.,* 220 F. App'x 97, 102 (3d Cir. 2007) (affirming dismissal of Exchange Act claim because "statements concerning [a] 'unique business model' constitute nothing more than mere 'puffery'").

32. In *Schaffer v. Horizon Pharma PLC.*, for example, the plaintiffs challenged statements touting a new, unique, pharmaceuticals distribution strategy. 2018 WL 481883, at *1 (S.D.N.Y. Jan. 18, 2018). The court deemed those statements "extolling 'their unique commercial business model'" inactionable under the securities laws. *Id.* at 9. Describing the statements as "textbook cases of corporate puffery," the court dismissed the claims. *Id.*; *see also Lasker v. N.Y. State Elec. & Gas Corp.*, 85 F.3d 55, 59 (2d Cir. 1996) (statements that defendant's "business strategies [would] lead to continued prosperity" were inactionable puffery); *accord Rombach*, 355 F.3d at 168, 174 (statements that new golf courses were "progressing smoothly" were inactionable "corporate optimism"); *ECA & Local 134 IBEW Joint Pension Tr. of Chi. v. JP Morgan Chase Co*., 553 F. 3d 187, 205–06 (2d Cir. 2009) (statements about "'highly disciplined' risk management . . . are no more than 'puffery' which does not give rise to securities violations"). This Court should do the same.

33. *Third*, even if the alleged misstatements were not puffery, they still would be immaterial. The Prospectus described the concrete operational steps and resulting financial impact of incorporating the principles of the Altice Way at Altice USA—the critical market to IPO investors. Those disclosures, which Plaintiffs do not challenge, provided to investors the key information about the company. Plaintiffs essentially contend that the Prospectus should have stated that the Altice Way had been "been successfully implemented across Altice Group, except with respect to enhanced customer experience in France." Such a revision would not have "significantly alter[ed] the total mix of information already made available" to investors in Altice USA. *See In re ProShares Trust Sec. Lit.*, 728 F.3d 96, 102 (2d Cir. 2013); *Antipodean*, 2018 N.Y. Misc. LEXIS 1592, at *13. Two references to the "successful implementation" of the Altice Way in the Altice Group were not material in light of the company-specific

information provided. *See Steinberg v. PRT Grp., Inc.*, 88 F. Supp. 2d 294, 302 (S.D.N.Y. 2000) ("isolated references" to "proprietary software" were not materially misleading given other statements in the prospectus that defendant did not hold any software patents and often used third-party software).

34. *Finally*, to the extent Plaintiffs contend that Defendants misrepresented the likelihood that the Altice Way could be successful in the United States because it was previously successful elsewhere, that theory also fails. Courts routinely dismiss claims asserting that statements of previously successful business strategies somehow "insured that…stock price would not decline." *Lasker*, 85 F.3d at 59; *see also In re IBM Corp. Sec. Litig*., 163 F.3d 102, 108 (2d Cir. 1998) (rejecting as nonactionable indefinite "expressions of optimism" that provide no "long-term guarantee or assurance"); *accord Antipodean*, 2018 N.Y. Misc. LEXIS 1592, at *17 (statements that are "merely opinion, expectation, or intention" are not actionable). Further, in its Risk Factors section, the Prospectus warned that "[a]ll of these forward-looking statements are based on management's current expectations and beliefs," and are, as with any projection "susceptible to uncertainty and changes in circumstance." Prospectus at 48. General statements that Altice Europe had applied the Altice Way successfully in the past, and that Altice USA hoped to do the same in the United States, cannot give rise to viable securities claims.

B. Plaintiffs Fail To Plead an Actionable Omission

35. Plaintiffs erroneously assert that the Prospectus was materially misleading because it omitted to state that (i) one principle of the Altice Way had not yet been successfully implemented by SFR in France, and (ii) SFR's operations in France were deteriorating. AC ¶73. According to Plaintiffs, Altice USA should have disclosed in its own Prospectus financial information about two companies that were not for sale in the IPO, cautioned Altice USA investors about SFR customer complaints and churn, alerted Altice USA investors about Altice

Europe's competitors' price changes and Altice Europe's supposedly inadequate response, and told Altice USA investors that these problems would impact Altice USA's stock price. *Id.* ¶75. Plaintiffs are wrong.

36. Altice USA had no duty to disclose information about the operations of companies in France, Portugal, or any other country. "[A]n omission is actionable under the securities laws only when the corporation is subject to a duty to disclose the omitted facts." *Dalberth v. Xerox Corp.*, 766 F.3d 172, 183 (2d Cir. 2014); *In re Morgan Stanley Tech. Fund Sec. Litig.*, 643 F. Supp. 2d 366, 375 (S.D.N.Y. 2009), *aff'd sub nom. In re Morgan Stanley Info. Fund Sec. Litig.*, 592 F.3d 347 (2d Cir. 2010). Courts have made clear that "disclosure [in a prospectus] is not a 'rite of confession," *Acacia*, 203 A.D.2d at 44, and the securities laws do not impose a "general duty . . . to provide the public with all material information." *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1432 (3d Cir. 1997). This is equally true with respect to the business challenges a company faces. *In re Winn-Dixie Stores Sec. Litig*., 531 F. Supp. 2d 1334, 1345 (M.D. Fla. 2007) (securities laws do not require companies to disclose every detail of their business challenges and collecting cases). To plead a claim by omission, a plaintiff must establish either: (i) "an omission of information that is necessary to prevent existing disclosures from being misleading," or (ii) "an omission in contravention of an affirmative legal disclosure obligation." *In re Morgan Stanley Info. Fund*, 592 F.3d at 360. Plaintiffs here do neither.

37. The Prospectus provided virtually no information about Altice Europe's financial performance. Indeed, other than two sentences summarizing Altice Europe's five largest acquisitions and the resulting increase in business—which Plaintiffs do not allege were false—the Prospectus is silent as to Altice Europe's financials. Prospectus at 153. Accordingly, Altice USA had no duty to disclose additional detail because none was provided to begin with. This is

particularly true where, as here, the financial disclosures for the other companies were publicly available.[6] *In re Merrill Lynch & Co. Research Reports Sec. Litig.*, 272 F.Supp.2d 243, 249–50 (S.D.N.Y. 2003) ("Sections 11 and 12(a)(2) do not require the disclosure of publicly available information").[7]

38. Plaintiffs also utterly fail to allege facts to support their conclusory assertion that the problems at SFR and Portugal Telecom were "already occurring" at the time of the IPO. AC ¶77. In fact, Altice Europe's financial performance in the quarters immediately before and after the IPO undermine Plaintiffs' allegations. As those financial results show, Altice Europe was meeting or exceeding financial projections in the preceding quarter. *See supra* ¶17. Though Plaintiffs suggest that the Q2 2017 results revealed widespread problems (AC ¶75), a trend that is "already occurring" requires more than one event. *In re Noah Educ. Holdings, Ltd. Sec. Litig.*, 2010 WL 1372709, at *6 (S.D.N.Y. Mar. 31, 2010); *see also Kapps v. Torch Offshore, Inc.*, 379 F.3d 207, 211 (5th Cir. 2004) (holding that a 60% drop in natural gas over a two-month period before the filing of a prospectus, followed by a gradual decline, was not a trend requiring disclosure). And Plaintiffs certainly cannot allege an actionable omission based on the Q3 2017 results for Altice Europe, which occurred five months after the IPO. *In re TVIX Sec. Litig.*, 25 F. Supp. 3d 444, 450 (S.D.N.Y.); *In re Ply Gem Holdings Inc. Sec. Litig.*, 135 F. Supp. 3d 145, 150 (S.D.N.Y. 2015) (dismissing Section 11 claims for failure to plead misstatement at the time of the IPO).

[6] *See Investor Relations*, ALTICE EUROPE, http://altice.net/investor-relations (last updated May 31, 2019).

[7] Nor can Plaintiffs suggest that the Prospectus misrepresented the relationship between Altice USA and Altice Europe. The Prospectus expressly warned that the reputation of the Altice Group, including Altice Europe, could impact performance at Altice USA. *See supra* ¶14.

39. Plaintiffs fail to adequately plead an affirmative legal obligation to disclosure under Items 303 and 503 of Regulation S-K.[8] These regulations require the disclosure of known trends, uncertainties, and significant risk factors that make investment speculative. As discussed above, the developments Plaintiffs say should have been disclosed had not yet come to fruition. And even if France and Portugal were already suffering from customer dissatisfaction at the time of the IPO, Plaintiffs fail to adequately plead that Altice USA knew about this development. Instead, Plaintiffs simply state that Altice USA was "required to disclose any known events" pursuant to Item 303 (AC ¶78). Recitation of a legal element does not constitute a well-pleaded fact. *See, e.g.*, *Franklin Mint, LLC v. Franklin Mint, Inc.*, 2011 N.Y. Misc. LEXIS 7011, at *6 (Sup. Ct. N.Y. Cty. Nov. 18, 2011) ("liberal construction cannot be used as a substitute for substance").

40. Courts routinely dismiss omission claims premised on Items 303 and 503 for failure to allege actual knowledge of the supposedly undisclosed information. This is so even for Section 11 claims because "Item 303's requirement of knowledge requires that a plaintiff plead, with some specificity, facts establishing that the defendant had actual knowledge of the purported trend." *Blackmoss Invs. Inc. v. ACA Capital Holdings, Inc.*, 2010 WL 148617, at *9–10 (S.D.N.Y. Jan. 14, 2010) (dismissing claims where trend was unknown until after IPO). Similarly, in *Garber v. Legg Mason, Inc.*, the District Court dismissed Section 11 claims given plaintiffs' failure to plead the level of knowledge required under Item 303. 537 F. Supp. 2d 597,

[8] Item 503 requires, "where appropriate…a discussion of the most significant factors that make the offering speculative or risky." 17 C.F.R. §229.503. Courts interpret Item 503 as having a knowledge requirement. *See Silverstrand Invs v. AMAG Pharm, Inc.*, 707 F.3d 95, 103 (1st Cir. 2013); *accord Panther Partners, Inc. v. Ikanos Commc'ns, Inc.*, 538 F. Supp. 2d 662, 669 (S.D.N.Y 2008). Item 303 generally requires disclosure of "known trends or uncertainties that have had or that the registrant reasonably expects will have a material favorable or unfavorable impact." 17 C.F.R. §229.303(a)(3)(ii). Item 303 applies to information (i) presently known to management and (ii) reasonably likely to have material effects on the registrant's financial condition or results of operation. *Id.*, Instruction 3.

614 (S.D.N.Y. 2008); *accord Panther Partners*, 538 F. Supp. at 669 (S.D.N.Y 2008) ("critical inquiry" for purpose of a 503 claim is whether registrant knew of the issue and the potential impact at the time of filing). Here, Plaintiffs' bald assertion that Altice USA knew about problems in France and Portugal does not adequately plead actual knowledge. *See Vanscoy v. Namic USA Corp.*, 234 A.D.2d 680, 681–82 (3d Dep't 1996) ("conclusory averments of wrongdoing are insufficient to sustain a [cause of action] unless supported by allegations of ultimate fact"). Additionally, Mr. Drahi's *after-the-fact* statement regarding the customer experience at SFR does not sufficiently plead knowledge that any Defendant had knowledge of such issues at the time of the IPO. *Blackmoss*, 2010 WL 148617, at *10; *Howard v. Arconic, Inc.*, 2019 WL 2560017, at *35 (W.D. Pa. June 21, 2019) (dismissing claim because after-the-fact statement by defendant did not establish knowledge of problem prior to offering).

41. Finally, the Prospectus warned of exactly the risk about which Plaintiffs complain: that "external perceptions of Altice Group's reputation, the quality of its products, and its corporate and management integrity" could impact Altice USA. Prospectus at 33. One risk factor expressly cautioned that the "[i]mpairment of Altice Group's reputation could adversely affect current and future customers' perception of Altice USA." *Id.* Thus the Prospectus already complied with Item 503, and no further disclosure was required.

C. The Defense of Negative Causation Bars Plaintiffs' Claims

42. Even if the Amended Complaint stated a cognizable claim—and it does not—it should still be dismissed under the doctrine of negative causation. The negative causation defense, which "precludes recovery for price declines that are not the result of an alleged misrepresentation . . . may be considered on a dismissal motion where the absence of loss causation is apparent on the face of the complaint." *Blackmoss*, 2010 WL 148617, at *11; *see*

also 15 U.S.C. §77k(e) (Section 11 claims) and §77*l*(b) (Section 12(a)(2) claims). The facts alleged in the Amended Complaint disprove loss causation.

43. Plaintiffs contend that Altice USA's stock dropped on November 3, 2017. *See* AC ¶¶83, 84. But, the day of the supposed revelation by Mr. Drahi that one aspect of the Altice Way had not yet been fully implemented in France (*see* AC ¶83), the stock price of Altice USA actually *increased* by 76 cents. *See supra* ¶20.[9] Thus, either Mr. Drahi's comments buoyed investor confidence in the Altice Way or Altice USA investors did not find this material. Either way, the increase in the stock price makes plain that the purported misstatements in the Prospectus regarding the Altice Way did not cause Plaintiffs' losses. *In re Britannia Bulk Holdings Sec. Litig.*, 665 F. Supp. 2d 404, 420 (S.D.N.Y. 2009) (dismissing Section 11 claims where "Plaintiff's losses were not the result of any corrective disclosure concerning the alleged misstatements or omissions"); *In re Alamosa Holdings, Inc. Sec. Litig.*, 382 F. Supp. 2d 832, 866 (N.D. Tex. 2005) (dismissing complaint because the complaint alleged the stock fell due to "a circumstance other than the untrue Registration Statement"). Plaintiffs' unfounded assertion to the contrary should be given no weight. *CIMB Thai Bank PCL*, 2013 N.Y. Misc. LEXIS 4280, at *8 ("conclusory allegations…are not sufficient to sustain a cause of action").

D. The Underwriter Defendants Are Not "Statutory Sellers"

44. Under Section 12(a)(2), Plaintiffs may bring a claim only against a "statutory seller," which the Supreme Court has defined as either (i) the person "who passes title, or other interest [in the security] to the buyer" or (ii) "the person who successfully solicits the purchase"

[9] Plaintiffs assertion that by market close on November 15, 2017, "Altice USA's share price had fallen even further to only $20.26" (AC ¶16) mischaracterizes the stock's price movement on that day. The stock price started the day at $19.50, meaning that the price at market close reflected an increase after Mr. Drahi's statements.

of the security. *Pinter v. Dahl*, 486 U.S. 622, 642, 647 (1988). Plaintiffs have failed to allege that the Underwriter Defendants are statutory sellers under either definition.

45. *First*, Plaintiffs do not allege that they purchased their shares from the Underwriter Defendants, and plead no facts at all about from whom they purchased shares. *See* AC ¶¶24–26. They have thus failed to plead that the Underwriter Defendants sold the securities directly to them, which precludes their Section 12(a)(2) claim. *E.g.*, *Antipodean*, 2018 N.Y. Misc. LEXIS 1592, at *28–29 ("A statutory seller is one who passes title or other interest in the security to the buyer for value, or who successfully solicits the purchase of a security . . . ."); *David v. Simware*, 1997 N.Y. Misc. LEXIS 201, at *10 (Sup. Ct. N.Y. Cty. Mar. 7, 1997) ("all of the [section] 12(2) claims must be dismissed . . . [because section] 12 contemplates only an action by a buyer against his or her immediate seller"); *see also Stadnick v. Vivint Solar, Inc.*, 2015 WL 8492757, at *16 (S.D.N.Y. Dec. 10, 2015), (dismissing plaintiff's §12(a)(2) claims against underwriters because plaintiff was "not alleged to have purchased his shares . . . directly from the Underwriter Defendants").

46. Plaintiffs LaPoint and Newman assert only that they acquired Altice USA securities "*traceable* to the Offering Documents," and indeed allege that they purchased their shares days after the IPO and at higher prices than the offering price of $30 per share. *See* AC ¶¶24-26. These allegations are plainly insufficient. *See Simware*, 1997 N.Y. Misc. LEXIS 201, at *10 (a buyer's §12 claim must be "against his or her immediate seller"); *Stadnick*, 2015 WL 8492757, at *16 (plaintiff lacked Section 12(a)(2) standing where he bought stock above the offering price, "which necessarily means that he did not buy through the initial public offering itself"). Nor is Plaintiff O'Neill's allegation that he purchased stock "pursuant or traceable to the Offering Documents," AC ¶25, satisfactory. *See, e.g.*, *Pub. Emps.' Ret. Sys. of Miss. v. Merrill*

Lynch & Co., 714 F. Supp. 2d 475, 484 (S.D.N.Y. 2010) (allegation that plaintiff bought securities "pursuant and/or traceable to" coffering documents "insufficient to allege standing . . . [e]ven under the modest [notice pleading] requirements of Rule 8(a)"); *N.J. Carpenters Health Fund v. DLJ Mortg. Capital, Inc.*, 2010 WL 1473288, at *4 (S.D.N.Y. Mar. 29, 2010) (same); *cf. In re Bioscrip, Inc. Sec. Litig.*, 95 F. Supp. 3d 711, 745 (S.D.N.Y. 2015) (finding Section 12(a)(2) standing adequately pled where plaintiff attached a schedule specifying purchases made through "direct participation in the offering").

47. *Second*, the Amended Complaint does not adequately allege that any Underwriter Defendant solicited Plaintiffs' purchase of shares. Under *Pinter*, a statutory seller must "direct[ly] and active[ly] participat[e] in the solicitation *of the immediate sale*." *Maher v. Durango Metals, Inc.*, 144 F.3d 1302, 1307 (10th Cir. 1998) (emphasis added) (quoting *In re Westinghouse Sec. Litig.*, 90 F.3d 696, 717 n.19 (3d Cir. 1996)). At a minimum, "solicitation" requires the seller to "directly communicate" with the buyer. *See, e.g.*, *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 871 (5th Cir. 2003).

48. Here, the Amended Complaint contains generalized allegations that the Underwriter Defendants "help[ed] to draft and disseminate the Offering Documents and solicit investors to purchase Altice USA securities issued pursuant thereto." AC ¶¶42–54. But Plaintiffs nowhere allege that the Underwriter Defendants "successfully solicit[ed] [Plaintiffs'] purchase" of the securities. *Pinter*, 486 U.S. at 647. The Amended Complaint contains only threadbare allegations about Plaintiffs purported purchases, including whether they did so directly or in the secondary market. *Simware*, 1997 N.Y. Misc. LEXIS 201, at *10 ("the complaint also fails to identify the particular underwriter from whom the plaintiff purchased his shares and therefore the [§12] claim must be dismissed as to Underwriter Defendants."); *In re*

UBS AG Sec. Litig., 2012 WL 4471265, at *26–27 (S.D.N.Y. Sept. 28, 2012), (dismissing Section 12(a)(2) claim where complaint failed to adequately allege "the manner in which the underwriters solicited the sale of securities or whether any of its solicitations were actually successful"). Therefore, Plaintiffs' claims against the Underwriter Defendants should be dismissed.

II. The Section 15 Claim Should Be Dismissed Because the Section 11 and 12 Claims Fail

49. Plaintiffs cannot plead a Section 15 "control person" claim against Mr. Drahi or Altice Europe because they fail to establish a primary violation of Sections 11 or 12. Section 15 makes jointly and severally liable for underlying violations of the Securities Act those persons who control defendants "by or through stock owners, agency, or otherwise." 15 U.S.C. §77o(a). To plead a Section 15 claim, Plaintiffs must allege not only control but also "facts that set forth a primary violation of the securities laws." *Acacia*, 203 A.D.2d at 45, 46; *accord ECA & Local*, 552 F.3d at 206-07 (dismissing Section 15 claim "for want of a primary violation" under Section 11); *Altayyar v. Etsy, Inc.*, 242 F. Supp. 3d 161, 186 (E.D.N.Y. 2017) (plaintiffs who "fail[ed] to state a primary violation of Sections 11 and 12(a)(2) . . . likewise fail[ed] to state a claim under Section 15"). Given that Plaintiffs fail to state a claim under Section 11 or 12(a)(2)—for all those reasons discussed above—their control person claims likewise fail.

CONCLUSION

50. For all of the foregoing reasons, this Court should dismiss Plaintiffs' Amended Complaint in its entirety and with prejudice.

Date: July 23, 2019

Respectfully submitted,

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WORD COUNT CERTIFICATION

I, K. Mallory Brennan, hereby certify that this memorandum contains 6,971 words.

Date: July 23, 2019

/s/ K. Mallory Brennan
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