UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

JOSHUA KUPFNER, Individually and on Behalf of All Others Similarly Situated

Plaintiff,

vs.

ALTICE USA, INC., *et al.*,

Defendants.

Case No. 1:18-cv-06601-LDH-PK

DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS THE AMENDED CLASS ACTION COMPLAINT

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PRELIMINARY STATEMENT

In their opposition, Plaintiffs admit that the "corrective disclosures" occurred more than a year before they filed suit, rendering the Securities Act claims time-barred. Plaintiffs concede that they allege no omission, acknowledging that their claims rest on just one inactionable statement in the Prospectus—that Altice USA "believe[s] the Altice Way, which has been successfully implemented across Altice Group, distinguishes us from our U.S. industry peers and competitors." Prospectus at 1, *see* Opp. at 10. And Plaintiffs admit that Altice USA's stock price increased after the supposed corrective disclosure about the strategy, disproving materiality and loss causation. Each of these admissions, on its own, mandates dismissal.

The balance of the Opposition merely confirms that this case should be dismissed. Plaintiffs attempt to manufacture a viable theory of liability by mischaracterizing both the contents of the Prospectus and the statement by Mr. Drahi that Plaintiffs herald as a corrective disclosure. But the Prospectus contained detailed disclosures about the financial and business operations of Altice USA. The transcript of Mr. Drahi's statement also confirms that he did not say that the Altice Way was "never implemented" in France—he said that implementation of one aspect of it had not been perfected and was "always improving."

Having already amended the Complaint once and declined the opportunity to do so again, the Amended Complaint should be dismissed with prejudice in its entirety.

ARGUMENT

Plaintiffs do not dispute that the Amended Complaint sounds in fraud. The words "fraud," "false," "untrue," and "misleading" appear nearly fifty times in the Amended Complaint and Opposition. Plaintiffs rely on fraud cases in support of their Securities Act claims, and they allege no basis other than fraud for the supposed misstatement in the Prospectus. Thus,

Plaintiffs' allegations must meet the heightened pleading requirements of FRCP 9(b). *Rombach v. Chang*, 355 F.3d 164, 170 (2d Cir. 2004); *accord Tellabs, Inc. v Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007). Even under FRCP 8(a), however, the Amended Complaint fails.

I. Plaintiffs' Securities Act Claims Are Time-Barred

There is no question that the last supposedly corrective disclosure was made on November 15, 2017 and that this case was filed more than a year later. *See* Opp. at 25. Second Circuit law is clear: "[t]he corrective disclosure date is the same as the constructive notice date for purposes of limitations." *Amorosa v. AOL Time Warner Inc.*, 409 F. App'x 412, 416 (2d Cir. 2011); *accord Freidus v. Barclays Bank PLC*, 734 F.3d 132, 138 (2d Cir. 2013).

Plaintiffs cite no Securities Act authority to the contrary and do not distinguish Defendants' authority. Instead, Plaintiffs cite Exchange Act cases to argue that timeliness cannot be decided on a motion to dismiss. *See* Opp. at 9. These cases are inapposite. Exchange Act claims require proof of intent and reliance, which are not elements of Securities Act claims. *See Marini v. Adamo*, 995 F. Supp. 2d 155, 184 (E.D.N.Y. 2014). Even Plaintiffs' Exchange Act cases hold such claims are "readily resolve[d]" on the pleadings where—as here—"the facts needed for determination of when a reasonable investor . . . would have been aware of the . . . fraud can be gleaned from the complaint and [related] papers." *Staehr v. Hartford Fin. Servs. Grp., Inc.*, 547 F.3d 406, 412 (2d Cir. 2008). Thus, the one-year limitations period expired no later than November 15, 2018—four days before Plaintiffs initiated this lawsuit—and the Securities Act Claims are untimely.

II. Plaintiffs' Securities Act Claims Fail as a Matter of Law

A. Plaintiffs Fail to Allege an Actionable Misrepresentation

Plaintiffs do not claim that statements in the Prospectus about the benefits of the Altice Way were misleading. *See* Opp. at 12. Nor do Plaintiffs argue that Prospectus disclosures about

Altice USA's implementation of the Altice Way, or the financial and operational impact of that implementation on its business, were misleading. Instead, Plaintiffs untenably hang their case on a single generic phrase: that Altice USA "believe[s] the Altice Way, which has been successfully implemented across Altice Group, distinguishes us from our U.S. industry peers and competitors." *See* Prospectus at 1, AC ¶¶ 72, 75.[1]

1. Plaintiffs Do Not Allege Falsity

Plaintiffs' Opposition, like the Amended Complaint, relies heavily on a gross mischaracterization of Mr. Drahi's November 15, 2017 statement to argue that the Prospectus was misleading. Four times in the Opposition alone, Plaintiffs erroneously assert that Mr. Drahi announced on November 15 that Altice Europe "never applied the Altice Way" in France. *See* Opp. at 2, 11, 13, 16; *see also* AC ¶ 10. The transcript refutes this mischaracterization. In discussing the customer service efforts of French company SFR, Mr. Drahi explained that "[t]here are always things that need[] to be changed to be improved. And we're always improving the Altice Way. But in fact, and if we're referring to France, we never applied the Altice Way from A to Z." Mot. Ex. F (Tr. of Morgan Stanley TMT Press Conference Nov. 15, 2017) at 13. This statement cannot support a securities fraud claim.

Enhanced customer service was just one of five components of the Altice business strategy. *See* Prospectus at 1. That SFR was still improving customer service does not suddenly transform a general positive statement about a corporate strategy into an actionable misrepresentation. *See In re Coty Inc. Sec. Litig.*, No. 140-cv-919, 2016 WL 1271065, at *9 (S.D.N.Y. Mar. 29, 2016) (statement that the company brand was expanding was not false because one product line was terminated); *Bondali v. Yum! Brands, Inc.*, 620 F. App'x 483, 489

[1] Plaintiffs do not respond to Defendants' arguments that they failed to plead an actionable omission (*see* Mot. at 14–15) and therefore concede that they state no such claim.

(6th Cir. 2015) (statement about adherence to supplier standards was not false because some suppliers failed to adhere).

Plaintiffs' efforts to distinguish these cases highlight their relevance. In *Coty*, the court reasoned that a broad statement about global expansion was not rendered false simply because one product line was terminated in a single market. 2016 WL 1271065, at *9. Here too, Altice USA's broad statement describing a business strategy as "successfully implemented" across various markets is not false just because a different market had implemented the Altice Way, but had yet to perfect one aspect of the five-component strategy. The Prospectus never guaranteed perfection in all respects everywhere at all times.

In *Bondali*, the court found that Yum's statements describing one policy as "strict" were "reasonably grounded in objective fact" and were not rendered untrue even though certain standards and protocols were allegedly structurally weak. The Sixth Circuit held that the allegations might call into question what constitutes a "strict" policy, but did not state a claim. 620 F. App'x at 490. So too here. At most, the Amended Complaint suggests that the Altice Way was "successfully implemented" everywhere but France, where it was 80% successful (with just one of the five components allegedly lacking). Plaintiffs may quibble with what successful means, but quibbling is not enough to plead falsity for a securities claim. *See id.*

Moreover, the Prospectus warned potential investors that—despite the generally successful application of the Altice Way—adverse performance by Altice Group's foreign companies could impact the performance of Altice USA's stock. Prospectus at 33–34. In other words, Defendants' other disclosures—which warned that developments in other countries could impact Altice USA's stock price—further show that their statement about the Altice Way's

successful implementation was not a blanket promise that the Altice Way would operate to complete perfection in every corner of the globe.[2]

2. The Alleged Misstatement Is Inactionable Puffery

Plaintiffs' arguments fail to convert Altice USA's descriptions of corporate strategy from inactionable puffery to material misstatements. *See, e.g.*, *Lasker v. N.Y. Elec. & Gas Corp.*, 85 F.3d 55, 59 (2d Cir. 1996) (dismissing claims that challenged optimistic statements about how company's "business strategies [would] lead to continued prosperity" as inactionable). A statement is only "material" 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." *Basic, Inc. v. Levinson*, 485 U.S. 224, 231–32 (1988).

First, Plaintiffs appear to suggest that because the Prospectus described the components of the strategy, and because Altice USA believed the strategy was a competitive advantage, the description of the Altice Way as successfully implemented automatically become material. *See* Opp. at 14–15. This is illogical. Presumably, any company that describes its corporate strategy believes it to be beneficial. And in any event, Plaintiffs do not claim that the Prospectus misdescribed the elements of the strategy or Altice USA's opinion about its benefits.

Second, Plaintiffs argue that because a third-party financial analyst believed the cost-cutting measures of the Altice Way *at Altice USA* could yield in excess of $1 billion in savings, the general statement about the strategy's implementation *at other companies in foreign markets* was material. *See* Opp. at 14.[3] If anything, this proves the opposite: analysts cared about the

[2] Plaintiffs' citation to *Omnicare* is inapposite for the same reason. Even if the statement was a hybrid statement of fact and opinion, Plaintiffs have not plausibly alleged that the purported factual part of the statement was ever false, for all of the reasons discussed above and in the Opening Brief.

[3] The Opposition obscures that these estimated cost savings were for Altice USA, not SFR or any other company. Nothing in the report suggests that these estimates hinged upon savings achieved at other companies. *See* Declaration of K. Mallory Brennan in Support of Defendants' Reply Memorandum, Ex. A.

impact of the strategy at Altice USA, not elsewhere. Further, Plaintiffs cannot spin puffery about the Altice Way into material fact simply because the Prospectus said that the Altice Way would provide "measurable operational and financial benefits." *See* Opp. at 14–15. Plaintiffs do not allege that the specific operational or financial disclosures in the Prospectus were false or that Altice USA did not believe the business model would lead to efficiencies. Adding a general statement about perceived benefits to a general statement about the implementation at other companies does not convert those statements from puffery to material representations.

Third, Plaintiffs cite no support for their statement that consulting fees paid to experienced executives "clearly refers to their experience with the Altice Way strategy," Opp. at 14, because that is not what the Prospectus says. The Prospectus merely explains that executives were paid for consulting and other services related to Altice USA's "acquisitions, divestitures, investments, capital raising, financial and business affairs," and Plaintiffs do not—and cannot—assert that those statements were false or misleading. *See* AC ¶ 64; Prospectus at 44.

Finally, Plaintiffs fail to distinguish Defendants' authority, wrongly arguing that the cases involved "vague declarations about unspecified corporate strategies." Opp. at 15. In *Schaffer v. Horizon*, for example, the defendant allegedly detailed its "Prescriptions Made Easy" program, explaining how company representatives enabled doctors to transmit prescriptions directly to pharmacies and implemented a new and unique procedure for disputed insurance claims. No. 16-cv-1763, 2018 WL 481883, at *1–2 (S.D.N.Y. Jan. 18, 2018). Defendants' authority rejected claims based on statements similar to the "successful implementation" of the Altice Way.

B. Plaintiffs Do Not Allege that the Underwriter Defendants are Statutory Sellers

Plaintiffs do not dispute that three of the four named plaintiffs (Hadzimachalis, Anderson, and Chauvin) lack statutory standing. *See* Opp. at 17. Plaintiff Garcia's Section 12(a)(2) claim

should be dismissed as well. Plaintiffs argue that they can establish standing merely by alleging that they "purchased shares on the date of the IPO at the IPO price." Opp. at 16 (citing *In re BioScrip, Inc. Sec. Litig.*, 95 F. Supp. 3d 711 (S.D.N.Y. 2015)). However, the *BioScrip* court specifically noted that plaintiffs attached a schedule identifying the purchases made through "direct participation in the offering," which Plaintiffs have not done here.[4] *Id.* at 745. Subsequent cases from this district have reconfirmed that more is required to allege standing. *See, e.g.*, *In re UBS AG Sec. Litig.*, No. 07-civ-11225, 2012 WL 4471265, at *27 (S.D.N.Y. Sept. 28, 2012).

C. Plaintiffs' Section 15 Claims Also Fail

Because Plaintiffs fail to plead a primary violation of Section 11 or 12(a)(2), their Section 15 claims fail as well. *Altayyar v. Etsy, Inc.*, 242 F. Supp. 3d 161, 186 (E.D.N.Y. 2017).

III. Plaintiffs' Exchange Act Claims Fail as a Matter of Law

A. Plaintiffs Fail To Plead an Actionable Material Misstatement or Omission

Plaintiffs plead no actionable misrepresentation or omission supporting an Exchange Act claim. *Supra* Section II; Mot. at 11–15.

B. Plaintiffs Fail To Allege Scienter

1. Plaintiffs Fail To Allege Motive and Opportunity To Commit Fraud

Plaintiffs concede that "a complaint cannot plead scienter by pointing to *generic* motives that are applicable to virtually all officers of a public company." Opp. at 19; *see also Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1130 (2d Cir. 1994); *Kalnit v. Eichler*, 264 F.3d 131, 140 (2d Cir. 2001); *In re Gilat Satellite Networks, Ltd.*, No. CV-02-1510, 2005 WL 2277476 at *19

[4] Nor does *In re Lehman Bros. Securities & ERISA Litigation*, 799 F. Supp. 2d 258, 311 (S.D.N.Y. 2011) support Plaintiffs' proposition. There, plaintiffs alleged both that they purchased securities "pursuant to" the offering *and* the specific dates and amounts of the securities purchased. *Id.* at 310–11. "A complaint that alleges that the plaintiff purchased its securities 'pursuant and/or traceable to' the Offering Documents"—as here—is not sufficient. *Id.*

(E.D.N.Y. Sept. 19, 2005). They also concede that their only allegation as to Mr. Goei's fraudulent intent was to keep his job and compensation. It is hard to imagine a more generic motive.

Plaintiffs try to bolster their flawed theory by claiming that Mr. Goei's motivation derived from his relationship to Mr. Drahi. *See* Opp. at 19. This is a distinction without a difference, as virtually every employee's compensation is tied to their superiors. Moreover, Plaintiffs cite no authority for the proposition that unilateral approval by a superior of an employee's compensation is sufficient to allege motive,[5] and courts in the Second Circuit have rejected the theory. *Shields*, 25 F.3d at 1130 ("[i]f motive could be pleaded by alleging the defendant's desire for continued employment . . . the required showing of motive . . . would be no realistic check on aspersions of fraud").

2. Plaintiffs Fail To Allege Conscious Misbehavior or Recklessness

In an attempt to plead recklessness, Plaintiffs resort to circular logic—that Mr. Goei must have known the Prospectus was misleading because he must have known the Altice Way had not been successfully implemented at SFR. *See* Opp. at 20. Plaintiffs also presume that Mr. Goei was responsible for implementing the Altice Way merely because he sat on the board of Altice Europe. *See* Opp. at 20–21. This theory would impute scienter to every board member for any conceivable fact about a company. That is not the law.[6] *See* Mot. at 21–23.

[5] The sole case Plaintiffs cite arose from very different facts. Opp. at 19 (citing *Nguyen v. New Link Genetics Corp.*, 297 F. Supp. 3d 472, 498 (S.D.N.Y. 2018)). There, plaintiff alleged that defendants misrepresented the number of patients in a drug trial because their bonuses were conditioned on enrolling a set number of patients. *Id*. The court held because defendants' compensation depended on hitting *specific* numbers, defendants were motivated to manipulate those numbers. No such benchmark is alleged here.

[6] Plaintiffs' reliance on *In re Lehman Bros. Sec. & Erisa Litig.*, 799 F. Supp. 2d 258 (S.D.N.Y. 2011) (Opp. at 20) is misplaced. In *Lehman*, plaintiffs alleged that members of the risk committee knew certain statements about risk management were false because they had established the risk management policies and had weekly oversight of their implementation. *Id.* at 297. Here, by contrast, Plaintiffs have offered no facts at all regarding Mr. Goei's role as a board member or employee, much less that he monitored implementation of the Altice Way at SFR.

3. Plaintiffs Fail To Allege Scienter Against Altice USA

In an attempt to allege scienter as to Altice USA, Plaintiffs claim that Mr. Drahi acted fraudulently to receive consulting fees. Opp. at 22. But a desire to be compensated does not, without more, amount to scienter. *See supra* Section III.B.1. Plaintiffs argue that these fees related to the Altice Way, but nothing in the Prospectus says that, and Plaintiffs provide no other factual support. Prospectus at 44; AC ¶¶ 63, 64.[7] In any event, Plaintiffs' theory would mean that any specialized employee would automatically have intent to defraud with respect to their specialized area. Again, that is not the law. *See* Mot. at 23.

Plaintiffs also do not credibly distinguish Defendants' authority. Plaintiffs seize on one decision referencing actors "in the securities industry" who earned management fees, suggesting that payment of management fees to hedge fund managers is somehow inherently distinct from payments of such fees to executives in other industries. *See* Opp. at 23–24. The applicable law on scienter makes no such distinction among industries. *See, e.g.*, *Tuchman v. DSC Commc'ns Corp.*, 14 F.3d 1061, 1068 (5th Cir. 1994) (allegations that telecom executives "secur[ed], maintain[ed] and/or increase[ed] compensation" were insufficient to plead scienter).

C. Plaintiffs Fail To Plead Loss Causation

To circumvent the undisputable fact that Altice USA's stock *increased* following the alleged corrective disclosure, Plaintiffs argue that an earlier earnings release for Altice Europe was the actual corrective disclosure. *See* Opp. at 25. That assertion is wholly inconsistent with Plaintiffs' allegations and arguments.

Instead, Plaintiffs' Opposition confirms that the purported failure to implement the Altice Way at SFR, allegedly disclosed by Mr. Drahi on November 15, is the sole basis for their claims.

[7] Though the Opposition asserts that "Altice previously identified this fee . . . as a fee for implementing the 'Altice Way'" (Opp. at 22 citing ¶ 61), nothing in the Amended Complaint that quotes Altice USA says any such thing.

Opp. at 12. The Amended Complaint also alleges that, in response, analysts noted a lack of confidence in Altice management, disappointment with earnings, and doubts about the *effectiveness* of the Altice Way. AC ¶¶ 77–84. But Plaintiffs do not allege that the earnings call—or analyses that followed—had anything to do with *implementation* of the Altice Way. If Altice USA shareholders' realization that the Altice Way was not "successfully implemented" in France truly caused Altice USA's stock price to drop, then the price should have dropped after Mr. Drahi's supposedly revelatory statement on November 15. Instead, it increased. Plaintiffs, therefore, fail to plead loss causation.[8] *See Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 342 (2005).

D. Plaintiffs' Control Person Claim Under Section 20(a) Fails

Plaintiffs' Section 20(a) claim fails because Plaintiffs plead no primary Exchange Act violation and no particularized facts showing culpable participation in the alleged fraud. *Supra* Section III.A; *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1472 (2d Cir. 1996).

CONCLUSION

For the reasons above and in Defendants' Opening Brief, the Amended Complaint should be dismissed in its entirety and with prejudice.

[8] *In re Two-Take Interactive*, 551 F. Supp. 2d 247 (S.D.N.Y. 2008) is inapposite. There, the alleged stock option fraud was disclosed by announcement of an SEC investigation into the fraud; the November 3, 2017 earnings call said nothing whatsoever about the Altice Way.

Date: November 27, 2019

Respectfully submitted,

/s/ K. Mallory Brennan

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CERTIFICATE OF SERVICE

I hereby certify that I served copies of this letter and the above referenced documents dated November 27, 2019 by email to the following counsel for Plaintiffs on November 27, 2019:

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