SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS: COMMERCIAL DIVISION

IN RE ALTICE USA, INC. SECURITIES LITIGATION	Master Index No. 711788/2018 (Hon. Joseph Risi) Motion Seq. No. 003

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE(S)

CASES

STATUTES, RULES & REGULATIONS

Co-Lead Plaintiffs Ryan Newman, Brian LaPoint, and Andrew O'Neill ("Plaintiffs"), respectfully submit this memorandum of law in opposition to Defendants' motion to dismiss ("Motion").[1]

PRELIMINARY STATEMENT

1. Plaintiffs bring this class action on behalf of investors who acquired Altice USA common stock pursuant to the materially inaccurate registration statement and prospectus (collectively, "Offering Documents") for Altice USA's June 22, 2017 initial public offering ("IPO" or "Offering"). The question before the Court on Defendants' Motion is whether Plaintiffs satisfy the notice pleading standards of CPLR §3013 by being "sufficiently particular to give the court and parties notice" of the claims that Plaintiffs intend to prove and "the material elements of each cause of action or defense." Plaintiffs' detailed Complaint easily meets this standard.

2. Passed following the Great Depression to better regulate U.S. capital markets, the Securities Act of 1933 ("Securities Act") provides investors with powerful strict liability causes of action that were deliberately made easy to plead and prove. To state a *prima facie* case, investors must only plead a material statement or omission in the Offering Documents. Plaintiffs need not plead reliance, causation, fraudulent intent, or even negligence.

3. Consistent with the foregoing, Plaintiffs plead that Defendants made a series of statements in the Offering Documents about the competitive advantages that Altice USA derived from its "Altice Way" business strategy, its relationship with Altice N.V. (its corporate parent), and its affiliated "Altice Group" companies. The Offering Documents represented that the Altice

[1] "Defendants" include Altice USA, Inc. ("Altice USA"); Altice Europe N.V. ("Altice N.V."); Patrick Drahi ("Drahi"); 11 other Altice USA directors who signed the Offering Materials ("Individual Defendants"); and 13 banks that underwrote the Offering (the "Underwriter Defendants"). "Br." refers to Defendants' memorandum in support of the Motion (NYSCEF Doc. No. 80). All "¶" citations are to the Consolidated Complaint for Violations of the Securities Act of 1933 ("Complaint") (NYSCEF Doc. No. 58). Unless otherwise stated, all emphases are added and internal citations are omitted.

Way had been successfully implemented across Altice USA and the broader Altice Group, resulting in "developed and tested" innovation, management expertise, and best practices that set Altice USA apart and justified an IPO investment at the $30 per share Offering price. Plaintiffs, however, allege that these statements were false and misleading because the Altice Way had ***never*** been fully implemented across the Altice Group and major portions of the Altice Group's European operations were in serious decline as of the IPO. When investors learned these facts four months after the IPO, the price of Altice USA dropped sharply as investors came to doubt the representation that the Altice Way conferred a competitive advantage. Taking these facts as true, Plaintiffs adequately plead Securities Act claims.

4. Defendants' contrary arguments are unavailing. Defendants assert that "[t]his case is a classic attempt by Plaintiffs to use the federal securities laws as an insurance policy for their investment" (Br. at 1), but that is an argument for the jury, not for a motion to dismiss. Defendants' argument that Plaintiffs do not sufficiently allege material misrepresentations or omissions ignores the Complaint's straight-forward allegations and applicable CPLR §3013 notice pleading standards. Defendants' argument that the misstatements at issue are immaterial corporate "puffery" is contrary to the case law and raises mixed questions of fact and law that, at best, are inappropriate to resolve on a motion to dismiss. Defendants also plainly fail to carry ***their*** "heavy" burden of establishing an affirmative "negative causation" defense, which typically requires expert testimony and is rarely sustained even at summary judgment.

5. Accordingly, Defendants' Motion should be denied.

STATEMENT OF FACTS

I. THE JUNE 2017 IPO

6. Altice USA provides broadband communications and video services in the United States. At all relevant times, Altice USA was a subsidiary of Altice N.V., a Dutch multinational

telecommunications company founded by Defendant Drahi, and a member of the "Altice Group" (which includes all Altice N.V. subsidiaries). Altice N.V., at all relevant times, was majority owned and controlled by Drahi. ¶¶27-29. The interconnectedness between Altice USA and Altice N.V. was further illustrated by the significant overlap of shared directors and officers between the two companies as of the IPO. In particular, Individual Defendants Goei, Combes, Okhuijsen, and Bonnin served in high-level positions at both Altice USA and at other Altice Group companies as of the IPO. ¶¶60-61.

7. Altice N.V. created Altice USA in 2015 as its vehicle to expand into the United States. ¶56. By 2016, Altice USA had become Altice Group's second largest operating unit, accounting for 35% of its total reported revenue in 2016 (behind only Altice N.V.'s French telecom subsidiary, SFR Group ("SFR"), which generated 47% of the Group's revenue). ¶57.

8. On June 27, 2017, Drahi caused Altice N.V. to take Altice USA public. The IPO resulted in the sale of over 71 million Altice USA common shares at $30 per share pursuant to the Offering Documents – generating proceeds of over $2 billion (plus $71 million in fees and commissions for the Underwriter Defendants). ¶¶63-66.

II. THE FALSE AND MISLEADING OFFERING DOCUMENTS

A. The Offering Documents Misleadingly Emphasize the Supposed Benefits of Altice USA's Close Relationship with the Altice Group and the Successful Implementation of the "Altice Way"

9. The Offering Documents repeatedly emphasized Altice USA's close association with Altice N.V. and other Altice Group members as the keys to Altice USA's success and growth prospects which differentiated Altice USA from its competitors. For example, the Offering Documents stressed that "***Unlike most of our U.S. industry peers, we benefit from being part of an international media and communications group***. As the U.S. business of Altice N.V., ***we have access to the innovation, management expertise and best practices developed and tested in other***

Altice Group markets such as France[.]" ¶69. The Offering Documents also described how Altice USA's interwoven relationships with the other Altice Group members assisted "in increasing our operating efficiency and reducing our capital expenditures while also improving the customer experience." ¶72.

10. Similarly, the Offering Documents stressed Altice USA's and the Altice Group's implementation of the "Altice Way" as a key strength and attributed their purported success primarily to their adoption of the so-called "Altice Way" – which the Offering Documents described as a "founder-inspired owner-operator culture and strategy of operational efficiency, innovation and long-term value creation for stockholders" based on the following five principles:

- ***Simplifying and optimizing the organization*** through streamlining business processes, centralizing functions and eliminating non-essential operating expenses and service arrangements.
- ***Reinvesting in infrastructure and content***, including upgrading ... network[s] to strengthen [] infrastructure capabilities and competitiveness.
- ***Investing in sales, marketing and innovation***, including brand-building, enhancing [] sales channels, and automating provisioning and installation processes.
- ***Enhancing the customer experience*** by offering a technologically advanced customer platform combined with superior connectivity and service across the customer lifecycle.
- ***Driving revenue and cash flow growth*** through cross-selling, market share gains, new product launches and improvements in [] operati[ons] and capital efficiency.

¶67.

11. The Offering Documents further represented that the Altice Group's "owner-operator culture and the Altice Way differentiate us and position us to outperform our U.S. industry peers" and "have been instrumental to our success and position us for future growth and strong financial performance." ¶68. The Offering Documents listed the "[b]enefits of a Global

Communications Group" as a "Competitive Strength[,]" citing the Altice Group's "experience in successfully implementing the Altice Way around the world." ¶69.

12. The Offering Documents similarly emphasized how Altice USA benefitted from being part of the Altice Group, due to shared "scale benefits and operational expertise," and the common application of the "Altice Way" across all members. *See* ¶¶70-72 (Altice "applies a common approach, [called] the Altice Way, to leveraging the Altice Group's core strategic, operational and technical capabilities in a coordinated, centralized manner for the benefit of its operating subsidiaries and to reorganize their processes and redeploy their resources ... to improve operational efficiency … and create long-term value.").

13. Such statements, however, were materially misleading and/or omitted to disclose material adverse facts. In particular, the Offering Documents nowhere disclosed that, notwithstanding Defendants' purported reliance on the "tested" Altice Way, Altice N.V. had only partially implemented the Altice Way in its flagship French SFR subsidiary's operations (which accounted for 47% of the Group's revenue). Nor did they disclose that SFR was then experiencing a sharp decline in financial performance and related problems that caused Altice N.V. to report disastrous financial results just months after the IPO. As the extent of the deterioration of the Altice brand, unreliability of the supposedly "tested" Altice Way, and downsides of Altice USA's interdependent relationship with Altice N.V became clear, the value of Altice USA shares plummeted. ¶73.

B. Defendants Fail to Disclose Adverse Events, Trends, and Uncertainties in the Offering Documents

14. The Offering Documents were also materially misleading because they suffered from material omissions. The Offering Documents, amid the numerous and repeated statements representing Altice USA's close relationship with the Altice Group and the "tested" benefits of the

Altice Way, failed to disclose that, unbeknownst to investors: (i) Altice N.V. had only partially implemented the Altice Way in France (at SFR); and (ii) that Altice N.V.'s French and other European operations were plagued by deteriorating financial performance that threatened the entire Altice brand. *Id.*

15. Indeed, far from providing any "competitive advantage," the Altice approach was resulting in severe problems and customer attrition in Altice N.V.'s most important markets, France and Portugal. In particular, the Offering Documents failed to disclose the following material adverse facts, events, trends, and uncertainties:

- Altice N.V.'s revenues and EBITDA were declining in both France and Portugal;
- Altice N.V.'s margins were declining in France;
- Altice N.V. was experiencing significant problems and customer complaints about its network and customer service in Europe, resulting in customer churn and decreased revenues; [and]
- Altice N.V. was losing customers to competitors who were undercutting Altice N.V.'s prices in Europe, and Altice N.V. was not properly managing its response to competitor price changes[.]

¶75. In breach of applicable disclosure obligations, the Offering Documents failed to disclose that these events, trends, and uncertainties were likely to, and ultimately did, adversely affect the Altice brand and thereby adversely affected Altice USA and its stock price.

III. THE OFFERING DOCUMENTS' STATEMENTS CONCERNING THE "TESTED" NATURE AND MATERIAL BENEFITS OF THE ALTICE WAY AND INTERDEPENDENCE ON ALTICE N.V. WERE MATERIALLY MISLEADING

16. As Plaintiffs allege, Wall Street analyst reports confirm that the Offering Documents' representations that the "Altice Way" provided a distinctive and "tested" business model that gave Altice Group members (including Altice USA) key competitive advantages over their competitors were ***highly*** material. ¶8. For example, a July 2017 Guggenheim Securities

report stated that "Leveraging operational efficiency is a key component of the Altice Way[.] ... For example, we believe that reorganization efforts to align Altice USA's procurement and technical services under Altice NV's operations can allow for Altice USA to efficiently manage capital and operating expenditures and focus on investment in functional advantages." ¶59. Similarly, an August 2017 J.P.Morgan Chase report emphasized that the Altice Way was the key to Altice USA's ability to compete successfully, stating "[w]e believe the Altice USA bull thesis remains intact with substantial EBITDA growth in the coming years as the company realizes its announced deal synergies and deploys its Altice Way operating strategy across its US-based systems." *Id.* Indeed, in a June 2017 interview, Defendant Combes (an Altice USA director and Altice N.V.'s CEO) similarly emphasized how:

> Within Altice, we work in a horizontal way which makes us more efficient and flexible than the predominantly centralized and vertical organizations of our competitors. ... In concrete terms, a well thought out innovation developed in one country may benefit all our subsidiaries and consequently all our customers throughout the world. In a word, we ensure that the knowledge and expertise of each subsidiary benefits the others.

Id.

IV. THE TRUTH EMERGES AFTER THE IPO

17. Barely a month after the IPO, on July 27, 2017, Altice N.V. reported severe declines in its financial performance, including disappointing revenue, margin, and earnings results for the second quarter of 2017 in its French and Portuguese markets. In response, the price of both Altice N.V. and Altice USA shares fell. ¶82. On November 2, 2017, Altice N.V. announced even more severely disappointing third quarter 2017 revenue, margin, and earnings declines in France and Portugal. In response, Altice N.V.'s stock plummeted almost 23% and Altice USA's fell 8%, wiping out approximately €1 billion and $1.2 billion in shareholder value, respectively, in just one day. ¶83.

18. As one analyst noted in surveying this wreckage:

> **[Altice N.V.'s] European struggles do lead to questions...** Throughout [Altice USA]'s IPO process, we consistently heard about the implementation of "The Altice Way" as the primary means to superior margin performance. ... Unfortunately, the results in Europe don't necessarily inspire confidence, in our view[.]

¶86. Indeed, the previously undisclosed rot at Altice Group was so severe that within days, Drahi announced wholesale reorganizations at both Altice N.V. and Altice USA on November 9, 2017. Moreover, Drahi further conceded, on November 15, 2017, that SFR had never even fully implemented the Altice Way. As Drahi stated: "***[I]n fact, and if we're referring to France, we never applied the Altice Way from A to Z***." ¶89. In short, Drahi admitted that the Altice Way was ***not "well 'developed and tested***"' and was ***not a '"common approach'"*** applied across the entire Altice Group, as the Offering Documents had represented. ¶¶87-90.

19. Altice USA shares thereafter continued to decline, eventually falling to approximately $18 per share – a ***40% decline*** from the stock's $30 IPO price. ¶92.

ARGUMENT

I. LEGAL STANDARDS

A. Standard Under CPLR §3211

20. Under CPLR §3211, courts "must 'afford the complaint a liberal construction, accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. The plaintiff's ultimate ability to prove those allegations is not relevant.'" *SV Vernon 43, LLC v. Malik*, 30 N.Y.S.3d 136, 138 (2d Dep't 2016). Instead, dismissal under CPLR §3211(a)(7) "must be denied 'unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it.'" *Neuman v. Echevarria*, 97 N.Y.S.3d 203, 206 (2d Dep't 2019) (quoting *Sokol v. Leader*, 904 N.Y.S.2d 153, 156 (2d Dep't 2010)).

21. Additionally, courts must make allowances where relevant facts are '"peculiarly within the knowledge'" of the defendant, *Bibbo v. Arvanitakis*, 44 N.Y.S.3d 448, 451 (2d Dep't 2016), or where "it would be unreasonable to expect Plaintiff to state" certain allegations "in detail without permitting him fact discovery." *Lazzarino v. Warner Bros. Entm't, Inc.*, No. 602029/05, 2006 WL 3069276, at *9 (N.Y. Sup. Ct. Oct. 30, 2006). In sum, "[t]he court does not assess the merits of the complaint, but merely inquires whether, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action." *Antipodean Domestic Partners, LP v Clovis Oncology, Inc*., No. 655908/16, 2018 WL 2045541, at *4 (N.Y. Sup. Ct. Apr. 30, 2018).

22. CPLR §3013 thus requires only that the complaint be "sufficiently particular to give the appellants ***notice*** of the transactions or occurrences intended to be proved." *Ctr. for Rehab. & Nursing at Birchwood, LLC v. S & L Birchwood, LLC*, 939 N.Y.S.2d 78, 80 (2d Dep't 2012). Plaintiffs meet that burden here. "Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove [his or her] claims, of course, plays no part in the determination of a prediscovery CPLR 3211 motion to dismiss." *Shaya B. Pac., LLC v. Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 A.D.3d 34, 38 (2d Dep't 2006).

B. Defendants' Efforts to Impose Heightened Pleading Should Be Rejected

23. Though Defendants concede that CPLR pleading standards apply, they suggest that CPLR §3016(b)'s heightened standards for negligent misrepresentation (which requires pleading facts demonstrating a "special relationship"[2]) or fraud apply here. Br. at 9 n.4. Recent New York decisions, however, confirm that Securities Act claims are subject only to CPLR §3013's notice

[2] *E.g., Baer v. Complete Office Supply Warehouse Corp.*, 934 N.Y.S 2d 179, 181 (2d Dep't 2011).

pleading standard. *Matter of Netshoes Sec. Litig.*, No. 157435/2018, 2019 WL 3227251, at *3 (N.Y. Sup. Ct. July 16, 2019) (Borrok, J.) ("[A]s federal courts have held, a [§§11 or 12(a)(2) complaint that] does not explicitly allege fraud ... in the preparation of the [Offering Documents] is ***not*** subject to a heightened pleading standard." (emphasis in original)); *CIFG Assurance N. Am., Inc. v. Bank of Am., N.A.*, No. 654028/12, 2013 WL 5380385, at *4 (N.Y. Sup. Ct. Sept. 23, 2013) (Ramos, J.) ("Securities Act [claims] ... are only subject to the 'short and plain statement' requirement."). And even if CPLR §3016(b) applied, the Complaint's 118 paragraphs and 39 pages easily satisfy it.

24. In evaluating the Complaint, the Court should also remember that the Securities Act was enacted to protect investors following the 1929 stock market crash, and Congress deliberately chose to impose stringent disclosure obligations on those involved in offering securities to the public. Thus, liability exists if "***any*** part of the registration statement ... contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading[.]" 15 U.S.C. §77k(a). Unlike securities fraud claims under §10(b) of the Exchange Act of 1934, a §§11 and 12(a)(2) plaintiff '"need not allege scienter, reliance, or loss causation,'" but need only allege a material misstatement or omission to state a *prima facie* case. *Antipodean*, 2018 WL 2045541 at *4. Individual defendants and underwriters may try to establish a "due diligence" affirmative defense, but as the U.S. Supreme Court has stated, "[l]iability against the issuer of a security is virtually absolute, even for innocent misstatements." *Herman & MacLean v. Huddleston*, 459 U.S. 375, 382 (1983). Accordingly, the pleading requirements for §§11 and 12(a)(2) claims are "relatively minimal," *Litwin v. Blackstone Grp., L.P.*, 634 F.3d 706, 718 (2d Cir. 2011); *In re Giant Interactive Grp., Inc. Sec. Litig.*, 643 F. Supp. 2d 562, 568 (S.D.N.Y. 2009) ("[p]leading a Section 11 claim

is not difficult"), and even under federal law a Securities Act complaint '"is an ordinary notice pleading case, subject only to the "short and plain statement" requirements.'" *N.J. Carpenters Health Fund v. Royal Bank of Scot. Grp., PLC*, 709 F.3d 109, 120 (2d Cir. 2013).

25. Further, in evaluating Securities Act claims, courts must review the Offering Documents "as a whole[.]" *In re Fuwei Films Sec. Litig.*, 634 F. Supp. 2d 419, 440 (S.D.N.Y. 2009). '"The literal truth of an isolated statement is insufficient; the proper inquiry requires an examination of defendants' representations, taken together and in context. Thus, when an offering participant makes a disclosure about a particular topic, whether voluntary or required, the representation must be complete and accurate.'" *Meyer v. JinkoSolar Holdings Co., Ltd.*, 761 F.3d 245, 250-51 (2d Cir. 2014).

II. PLAINTIFFS ADEQUATELY ALLEGE §11 CLAIMS

A. The Complaint Adequately Pleads Material Misrepresentations and Omissions

26. Plaintiffs have satisfied CPLR §3013 by identifying the statements in the Offering Documents that they allege to be misleading. *See supra* §II.A. Specifically, Plaintiffs allege how the Offering Documents misleadingly represented the "tested" Altice Way and the supposed benefits of Altice USA's close relationships with Altice N.V. and other Altice Group members. *Id.*; ¶¶67-72. In sum, these statements were misleading because the Altice Way had not been fully implemented, the Offering Documents failed to disclose the adverse events, trends, and uncertainties that were plaguing parent Altice N.V.'s operations as of the IPO, and Altice USA's reliance on the "Altice Way" and purported benefits of its association with the Altice Group were materially overstated. ¶¶73-80.

27. These allegations are sufficient to plead a violation of §11 of the Securities Act. *See, e.g.*, *Antipodean*, 2018 WL 2045541, at *4 (describing how misstatement or misleading

omission states a *prima facie* case). Here, Plaintiffs allege that it was misleading to repeatedly stress the competitive advantages of the Altice Way and benefits of interdependent relations with Altice N.V. without disclosing the negative facts that undercut those representations. It is well-established that once defendants choose to speak on a subject, they are required to disclose facts "necessary 'to make ... statements made, in the light of the circumstances under which they were made, not misleading." *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 44 (2011); *see also Meyer*, 761 F.3d at 250; *Caiola v. Citibank, N.A., N.Y.*, 295 F.3d 312, 331 (2d Cir. 2002); *Shapiro v. UJB Fin. Corp*., 964 F.2d 272, 282 (3d Cir. 1992) (where a defendant makes a representation, "the subject is 'in play[,]' and the defendant "thus is bound to speak truthfully").

28. Courts have found similar misstatements and omissions to be actionable under the securities laws. For example, in *In re Van der Moolen Holding N.V. Sec. Litig*., the court found that plaintiffs adequately alleged that a parent company's statements were false and misleading because they failed to reveal that its subsidiary's revenues had been generated, at least in part, by illegal forms of proprietary trading. 405 F. Supp. 2d 388 (S.D.N.Y. 2005). There, since defendants' statements put the sources of the subsidiary's revenues at issue, defendants were thus '"obligated to disclose information concerning the source of its success, since reasonable investors would find that such information would significantly alter the mix of available information.'" *Id.* at 401. Here, because Altice USA put the sources of its competitive advantage – namely, its relationship with Altice N.V. and the success of the Altice Way as implemented at Altice N.V.'s key subsidiaries – in play, Altice USA was obligated to disclose the issues associated with Altice N.V. and the failed implementation of the Altice Way at SFR. *See also, e.g.*, *In re Grupo Televisa Sec. Litig*., 368 F. Supp. 3d 711, 721 (S.D.N.Y. 2019) ("Even if Televisa was not otherwise obligated to disclose that it or its subsidiary participated in bribing FIFA officials, speaking about

the issue imposed a duty to do so."); *Freudenberg v. E*Trade Fin. Corp.*, 712 F. Supp. 2d 171, 180 (S.D.N.Y. 2010) (where company '"puts the topic of the cause of its financial success at issue, then it is obligated to disclose information concerning the source of its success'").

B. Plaintiffs Also Adequately Allege Breaches of SEC Regulation S-K's Affirmative Disclosure Obligations

29. Plaintiffs also allege that Defendants violated the affirmative duty to disclose material adverse trends, events, and uncertainties in violation of the Securities Act. ¶¶78-79. The Securities Act and Regulation S-K thereunder required the Offering Documents to disclose "any known trends or uncertainties ... that the registrant reasonably expects will have a material ... unfavorable impact on ... revenues or income from continuing operations." 17 C.F.R. §229.303(a)(3)(ii) ("Item 303"). Even under more demanding federal pleading standards, an Item 303 claim need only satisfy the applicable notice pleading standard. *See In re CPI Card Grp. Inc. Sec. Litig.*, No. 16-cv-4531 (LAK), 2017 WL 4941597, at *4-5 (S.D.N.Y. Oct. 30, 2017). Likewise, to state a claim under Regulation S-K Item 503(c), 17 C.F.R. §229.503(c) ("Item 503"), Plaintiffs need only allege that the Registration Statement omitted ***specific*** disclosures regarding existing factors that made the offering speculative or risky. *Jaroslawicz v. M&T Bank Corp.*, 912 F.3d 96, 108-09 (3d Cir. 2018) ("[G]eneric [risk] disclosures ... are insufficient. Rather, adequate disclosures are company-specific ... [and] include facts particular to a company, such as its financial status, its products, any ongoing investigations, and its relationships with other entities.").

30. Plaintiffs adequately plead violations of Items 303 and 503. Specifically, Plaintiffs allege that the Offering Documents did not disclose the failure to implement the Altice Way, or the severe shortcomings of that strategy in Europe. ¶¶73-80. These omissions caused investors to believe that Altice USA had competitive advantages that did not really exist. *Id.* Courts regularly find omissions substantially similar to those at issue here actionable. For example, in *Litwin*,

plaintiffs "allege[d] that, at the time of the IPO, and unbeknownst to non-insider purchasers of Blackstone common units, two of Blackstone's portfolio companies as well as its real estate fund investments were experiencing problems." 634 F.3d at 710. The Second Circuit found that defendants had violated Item 303 because "Blackstone omitted information related to [the two portfolio companies] that plaintiffs allege was reasonably likely to have a material effect on the revenues of Blackstone's Corporate Private Equity segment and, in turn, on Blackstone as a whole." *Id.* at 720. This was the case even though one portfolio company "was not even mentioned in Blackstone's Registration Statement." *Id.* at 719; *see also, e.g.*, *CPI Card*, 2017 WL 4941597, at *4 (complaint adequately alleged that company management "knew of the trend before the IPO," due to the "temporal proximity of the [October 2015] IPO [to] the [February 2016] sales drop-off," and also noted that the assurances in the registration statement regarding '"long-standing trust-based relationships'" that "would have alerted [the company] to the trend'"); *Okla. Firefighters Pension & Ret. Sys. v. Lexmark Int'l, Inc.*, 367 F. Supp. 3d 16, 35 (S.D.N.Y. 2019) (finding plaintiffs pleaded an actionable Item 303 omission where defendants failed to disclose issues with '"primary profit engine'").[3]

31. Defendants' cited contrary authority is inapposite (Br. at 16) and seeks to drag the Court into factual issues that are not appropriately addressed at the motion to dismiss. Contrary to Defendants' argument, "whether a pattern or occurrence is sufficiently lengthy to constitute a trend is a question that should not be resolved at the motion to dismiss stage." *CPI Card*, 2017 WL

[3] Plaintiffs satisfy Item 303's "knowledge" requirement by '"pleading, with some specificity, facts establishing that defendants had actual knowledge of the purported trend.'" *Id.* Here, Plaintiffs specifically allege that Defendants (including overlapping officers and/or directors at Altice N.V. and Altice USA) were aware of the already occurring mismanagement, customer attrition, and negative financial results at Altice N.V., which were first reported a mere month after the IPO, and of the failure to fully implement the Altice Way at SFR. ¶¶77-80, 89-90. Finally, with respect to Defendants' purportedly adequate risk warnings (Br. at 18), Defendants did not warn of the relevant risk here because the risk factors did not even mention the risk posed by the already occurring customer attrition in Altice N.V.'s most important markets, much less the likely negative effect on Altice USA. *See Jaroslawicz*, 912 F.3d at 108-09; *Hunt v. All. N. Am. Gov't Income Tr., Inc.*, 159 F.3d 723, 729 (2d Cir. 1998).

4941597, at *3; *see also Antipodean*, 2018 WL 2045541, at *4 ("The court does not assess the merits of the complaint[.]")

C. The Alleged Misstatements Are Not Puffery

32. Defendants assert that several misstatements constitute inactionable puffery. Br. at 12-13. However, courts recognize that misstatements and omissions about business strategy and a company's competitive advantages – such as those at issue in this case – are actionable under the securities laws.

33. For example, in *In re Am. Bank Note Holographics, Inc. Sec. Litig.*, the complaint challenged a representation that the defendants '"intend to de-leverage and are taking the necessary steps to insure the success of this program[,]'" put the company '"in a vastly improved financial condition[,]'" and '"concentrate on continuing the profitable growth of its core … business as well as explore business and market expansion opportunities.'" 93 F. Supp. 2d 424, 443 (S.D.N.Y. 2000). The court rejected defendants' puffery arguments, holding that:

> [The] statements did not reflect [mere] generalized optimism about the future, but rather the position that [the company] was, *at the time [defendant] made the statement,* a valuable company[.] … [Defendant] further stated that, following the IPO, [the company] would be able to concentrate on continuing the profitable growth it had begun [earlier] …, [but] all this was untrue at the time the statements were made.

Id. (emphasis in original). Similarly, in *Galestan v. OneMain Holdings, Inc.*, defendants adopted the business tactics of a recently acquired subsidiary, which they described as '"very successful,'" adding that '"we're very confident that they'll be equally effective [at the defendant company].'" 348 F. Supp. 3d 282, 290 (S.D.N.Y. 2018). The court held that these statements were not "puffery," but, rather, were actionable under the securities laws. *Id.* at 303.

34. As in *OneMain* and *American Bank*, the statements at issue here are actionable because they stressed Altice USA's supposed competitive advantages and strategies. ¶¶7-8, 10,

58, 67-70, 72. Demonstrating the significance of these statements, analysts covering Altice USA repeatedly cited to these representations when evaluating Altice USA as an investment prospect. ¶¶8, 13-14, 18, 59, 85-86, 88, 91. As Justice Masley ruled in denying a motion to dismiss a Securities Act case, statements are not puffery if they at least "suggest" an underlying "fact." *Antipodean*, 2018 WL 2045541, *6. Thus, words as general as '"very manageable'" or '"durable' [were] actionable" because, in context, they contained factual elements that could be verified. *Id.* at *6-7. Justice Masley's reasoning applies with equal force here because it is a verifiable fact whether the Altice Way was implemented and whether it generated concrete competitive advantages for Altice USA. Demonstrating this, Drahi admitted that, as a matter of fact, the Altice Group had not implemented the Altice Way in France, a nation responsible for 47% of the Altice Group's revenue. ¶¶15, 89-90.

35. Nor do courts allow defendants to deem a statement as puffery merely because it is "high level" in nature. *See* Br. at 12. In *In re Ambac Fin. Grp., Inc. Sec. Litig.*, defendants emphasized that their "cautious" and "conservative" underwriting standards set them apart from their competition and allowed them to outperform the market and relevant indices. 693 F. Supp. 2d 241, 271-72 (S.D.N.Y. 2010). The court rejected the argument that the statements were so "high level" or generic as to be puffery and found them actionable. *Id.* Likewise, in *Ark. Teacher Ret. Sys. v. Bankrate, Inc.*, defendants cited the '"competitive advantage'" that their strategy of '"testing and monitoring'" customer leads to ensure that they are of '"high-quality'" provided, and the court rejected defendants' puffery characterization. 18 F. Supp. 3d 482, 484 (S.D.N.Y. 2014).

36. Furthermore, "[w]hether a representation is 'mere puffery' depends, in part, on the context in which it is made." *In re Petrobras Sec. Litig.*, 116 F. Supp. 3d 368, 381 (S.D.N.Y. 2015). In *Petrobras*, defendants repeatedly emphasized that the company pursued '"the highest

ethical standards,'" '"adopts the best corporate governance practices,'" undertook to '"conduct its business with transparency and integrity,'" and was '"fully committed to implementing a fair and transparent operation.'" *Id.* The court held they were not puffery because they were made to assure investors that the company followed an ethical business model. Likewise, here, the Offering Documents repeatedly emphasized (52 total references) the advantages of the "Altice Way" to assure investors that Altice USA had the same recipe for success that had been tried and proved at Altice N.V. *In re Signet Jewelers Ltd. Sec. Litig.*, No. 16 Civ. 6728 (CM), 2018 WL 6167889, at *11 (S.D.N.Y. Nov. 26, 2018) (if '"made repeatedly in an effort to reassure the investing public about matters particularly important to the company and investors, those statements may become material to investors'"). The benefits and purported success of the "Altice Way" constituted a critical element of Defendants' pitch to investors and cannot be deemed immaterial as a matter of law.[4]

D. Defendants' Other Miscellaneous Materiality Arguments Also Fail

37. For essentially the same reasons as discussed above, Plaintiffs adequately plead materiality. Plaintiffs allege that the Offering Documents materially mislead investors by repeatedly emphasizing Altice USA's interdependent relationship with the Altice Group and that this relationship, when combined with implementation of the Altice Group's business strategy (the "Altice Way"), gave Altice USA a competitive advantage over competitors. ¶¶7-8, 10, 58, 67-70, 72. Plaintiffs allege that the market relied on these statements when evaluating Altice USA. ¶¶8, 13-14, 18, 59, 85-86, 88, 91. Further, Plaintiffs allege that when the true facts underlying these statements came to light, the market reacted and Altice USA's stock price dropped. ¶¶14, 16, 82,

[4] And of course, puffery does not immunize Defendants from liability for their material omissions.

86, 92. As set forth below, Defendants' hodge-podge of remaining materiality arguments should also be rejected.

38. First, materiality is a mixed question of fact and law generally inappropriate for resolution on a motion to dismiss. *Ganino v. Citizens Utils. Co.*, 228 F.3d 154, 161 (2d Cir. 2000) ("At the pleading stage, a plaintiff satisfies the materiality requirement ... by alleging a statement or omission that a reasonable investor would have considered significant in making investment decisions."); *Goldman v. Belden*, 754 F.2d 1059, 1067 (2d Cir. 1985) ("Materiality is a mixed question of law and fact ... and a complaint may not properly be dismissed … on the ground that the alleged misstatements or omissions are not material unless they are so obviously unimportant to a reasonable investor that reasonable minds could not differ on the question of their importance."); *Vladeck, Waldman, Elias & Engelhard, P.C. v. Paramount Leasehold, L.P.*, 9 N.Y.S.3d 596 (N.Y. Sup. Ct. 2015) (same).

39. Second, where the complaint connects a stock price decline to the release of negative information – a corrective disclosure – the materiality of the newly disclosed information is plainly alleged. *In re Sadia, S.A. Sec. Litig.*, 269 F.R.D. 298, 302 (S.D.N.Y. 2010) ("In the typical case, where a plaintiff can demonstrate that a stock price decline followed a corrective disclosure, a court can infer that the information contained in that disclosure was material on the day the stock price declined ***and*** throughout the class period." (emphasis in original)); *Fresno Cty. Emps.' Ret. Ass'n v. comScore, Inc.*, 268 F. Supp. 3d 526, 550 (S.D.N.Y. 2017) (defendant company's "significant stock drop further supports an inference of materiality"). Here, the Complaint sufficiently connects Defendants' disclosures about the Altice Group's business struggles and failure to implement the "Altice Way" to Altice USA's stock price declines. ¶¶14, 16, 82, 86, 92. No more is needed.

40. Third, Plaintiffs' allegations do not (as Defendants' Br. at 13 posits) involve "a single misstep in one country" or fail to consider "the critical market" that IPO investors care about. Defendants' argument makes no sense because the performance of SFR, which failed to implement the Altice Way, comprised 47% of the Group's revenue and was obviously going to be of enormous significance to investors concerned about just how "proven" or "tested" the Altice Way model was. Here, Plaintiffs plainly identify how Defendants' "Altice Way" pitch to investors, and their emphasis on the benefits of Altice USA's interconnectedness with the other Altice Group companies, was misleading and omitted material information as of the IPO – and further cite analyst reports confirming that Wall Street also viewed the Altice Way as highly material to Altice USA's growth. ¶¶12, 14-15, 67, 69, 71, 73, 86, 89-90. Nor can Defendants deny that markets punished Altice USA shares in November 2017 upon learning how badly deteriorated the broader Altice brand had become. *See Kronfield v. Trans World Airlines, Inc.*, 832 F.2d 726, 732 (2d Cir. 1987) ('"Material facts include not only information disclosing the earnings and distributions of a company but also those facts which affect the probable future of the company and those which may affect the desire of investors to buy, sell, or hold the company's securities.'").

E. Defendants' Misstatements Are Not Inactionable Opinions

41. Defendants' "inactionable opinions" argument also fails. Br. at 11, 14.

42. First, most statements at issue here are misstatements of fact, not opinion. ¶¶67-72. For example, in discussing the Altice Way, the Offering Documents represented that the Altice USA benefitted from "innovation, management expertise and best practices developed and tested in other Altice Markets such as France," and senior management had "experience in successfully implementing the Altice Way around the world." *Id.* These are statements of fact that, as pled in the Complaint, were untrue or misleading. ¶89. Moreover, a factual statement cannot be converted

into a statement of opinion merely by inserting the word "believe" as Defendants claim. *Omnicare, Inc. v. Laborers Dist. Council Const. Indus.*, 135 S. Ct. 1318, 1336-37 (2015) (simply inserting "I believe" in front of a statement does not convert a fact statement into an opinion).

43. Moreover, even if the Court deems some statements opinions, Plaintiffs still adequately plead liability under *Omnicare* based on Defendants' omissions of material facts. Under *Omnicare*, opinion statements are actionable if plaintiffs identify "particular (and material) facts going to the basis for the issuer's opinion—facts about the inquiry the issuer did or did not conduct or the knowledge it did or did not have—whose omission makes the opinion statement at issue misleading to a reasonable person reading the statement fairly and in context." *Id.* at 1325. Therefore, opinion statements are actionable if '"the speaker omits information whose omission makes the statement misleading to a reasonable investor[,]'" *Lexmark*, 367 F. Supp. 3d at 32, or '"upon a showing that the defendants did not genuinely or reasonably believe the positive opinions they touted.'" *Richman v. Goldman Sachs Grp., Inc.*, 868 F. Supp. 2d 261, 277-78 (S.D.N.Y. 2012). Here, Defendants misrepresented and/or omitted the failure to implement the "Altice Way" at Altice N.V.'s SFR subsidiary and failed to disclose the deterioration in Altice N.V.'s and the broader Altice Group's performance. ¶¶12-15, 67-80, 85-86, 89-91. This deterioration and related problems existed and were known to Defendants, as of the IPO, and significantly undercut any purported basis for the Offering Documents' purported "belief" in the benefits of the Altice Way and of Altice USA's interdependent relationship with Altice N.V.

F. Defendants Have Not Proven "Negative Causation"

44. Defendants' negative causation argument also lacks merit.

45. First, and most importantly, Plaintiffs need not prove (let alone plead) causation. Instead, "negative causation" is an affirmative defense inappropriate for resolution at the motion to dismiss stage. *N.J. Carpenters*, 709 F.3d at 120; *McMahan & Co. v. Wherehouse Entm't, Inc.*,

65 F.3d 1044, 1048 (2d Cir. 1995) ("[A]ny decline in value is presumed to be caused by the misrepresentation in the registration statement[.]"); *In re Bear Stearns Mortg. Pass-Through Certificates Litig.*, 851 F. Supp. 2d 746, 769 n.25 (S.D.N.Y. 2012) ("If Defendants wish to challenge [the statutory] presumption [of loss causation] they may present evidence at a later stage establishing an alternative cause of loss.").

46. Second, Defendants' argument is factually unsupported. Proving an affirmative negative causation defense imposes a "heavy burden" on defendants, which typically requires supporting expert testimony. *Fed. Hous. Fin. Agency for Fed. Nat'l Mortg. Ass'n v. Nomura Holding Am., Inc.*, 873 F.3d 85, 153 (2d Cir. 2017) (citing defendants' '"heavy'" burden, "given 'Congress' desire to allocate the risk of uncertainty to the defendants in Securities Act cases'"); *Giant Interactive*, 643 F. Supp. 2d at 573 (absent expert testimony, '"the Court cannot discern from the evidence'" what the impact of any particular events might have been in causing any stock price movements). Defendants do not even attempt to make any evidentiary showing. And finally, Defendants simply ignore the Complaint's allegations that the disclosures of deterioration in Altice N.V.'s performance and brand perception in November 2017 resulted in a sharp decline in Altice USA's stock price. ¶86.

III. PLAINTIFFS ADEQUATELY ALLEGE §12(A)(2) CLAIMS

47. The Underwriter Defendants also assert that Plaintiffs insufficiently allege they were "statutory sellers" under §12. Br. at 19-22. An entity is a "statutory seller" if it: (i) directly passed title to the securities; ***or*** (ii) solicited the purchase of securities to serve its own or the securities' owner's interests. *Perry v. Duoyuan Printing, Inc.*, No. 10 Civ. 7235(GBD), 2013 WL 4505199, at *10 (S.D.N.Y. Aug. 22, 2013). Plaintiffs need not identify which underwriter sold to them. *See In re MF Glob. Holdings Ltd. Sec. Litig.*, 982 F. Supp. 2d 277, 323-24 (S.D.N.Y. 2013). Instead, plaintiffs (as here) need only make "sufficient allegations ... to give the Underwriter

Defendants fair notice of the basis for the claims against them[.]" *In re WorldCom, Inc. Sec. Litig.*, 294 F. Supp. 2d 392, 423 (S.D.N.Y. 2003).

48. Plaintiffs allege that the Underwriter Defendants solicited the purchase of securities for their own and the securities owners' interests. Specifically, they allege that the Underwriter Defendants: (i) participated in the promotion and sale of Altice USA common stock to Plaintiffs and investors, including through road shows where they met with investors; (ii) did so to promote their own financial interests and those of the Company, while collecting roughly $71 million in underwriting fees and commissions in connection with the IPO; and (iii) drafted and disseminated the Offering Documents. ¶¶41-55. Courts have held that such allegations suffice. *See WorldCom*, 294 F. Supp. 2d at 423.[5]

49. In any event, the Underwriter Defendants' argument is premature because whether they qualify as "statutory sellers" is a fact question that cannot be properly decided on the pleadings. *See Degulis v. LXR Biotech., Inc.*, No. 95 Civ. 4204 (RWS), 1997 WL 20832, at *6 (S.D.N.Y. Jan. 21, 1997) ("whether a defendant is a 'seller' under section 12(2) is a question of fact"); *In re Westinghouse Sec. Litig.*, 90 F.3d 696, 717 (3d Cir. 1996) (same).

IV. THE §15 CLAIMS

50. Defendants' sole argument to dismiss Plaintiffs' §15 claims is failure to plead underlying primary §§11 or 12(a)(2) claims. That argument fails for the reasons discussed above.

CONCLUSION

51. Accordingly, Defendants' Motion should be denied.

[5] Defendants also contend §12 only provides a claim to investors who purchased their shares though "direct participation in the offering." Br. at 20-21. This contention is wrong. *See, e.g., Giant Interactive*, 643 F. Supp. at 573-74 (§12 applies to aftermarket purchases); *Feiner v. SS&C Techs., Inc.*, 47 F. Supp. 2d 250, 252 (D. Conn. 1999) (same).

Dated: August 6, 2019
New York, New York

SCOTT+SCOTT ATTORNEYS AT LAW LLP

/s/ Thomas L. Laughlin

Thomas L. Laughlin, IV (4471975)
William C. Fredericks (2336303)
Randy Moonan (5201686)
Jeffrey P. Jacobson (5606025)
The Helmsley Building
230 Park Avenue, 17th Floor
New York, NY 10169
Telephone: (212) 223-6444
Facsimile: (212) 223-6334
tlaughlin@scott-scott.com
wfredericks@scott-scott.com
rmoonan@scott-scott.com
jjacobson@scott-scott.com

Lead Counsel for Co-Lead Plaintiffs and the Proposed Class

Jeffrey D. Lebowitz (1161603)
Scott B. Fisher (2383933)
JASPAN SCHLESINGER LLP
300 Garden City Plaza
Garden City, NY 11530
Telephone: (516) 746-8000
Facsimile: (516) 393-8282
jlebowitz@jaspanllp.com
sfisher@jaspanllp.com

Additional Counsel for Co-Lead Plaintiffs and the Proposed Class

David W. Hall
HEDIN HALL LLP
Four Embarcadero Center, Suite 1400
San Francisco, CA 94104
Telephone: (415) 766-3534
Facsimile: (415) 402-0058
dhall@hedinhall.com
fhedin@hedinhall.com

Additional Counsel for Co-Lead Plaintiffs and the Proposed Class

WORD COUNT CERTIFICATION

I, Thomas L. Laughlin, IV, hereby certify that the foregoing Memorandum of Law in Opposition to Defendants' Motion to Dismiss contains 6,966 words.

Dated: August 6, 2019

/s/ Thomas L. Laughlin
Thomas L. Laughlin, IV (4471975)