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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

JOSHUA KUPFNER, Individually on Behalf of All Others Similarly Situated, Plaintiff, vs. ALTICE USA, INC, et al, Defendants	Case No. 1:18-cv-06601-(LDH) (PK) **MEMORANDUM OF LAW IN OPPOSITION TO MOTION TO DISMISS** **JURY TRIAL DEMANDED**

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Lead Plaintiff Andrea Hadzimachalis and named plaintiffs Garfield Anderson, Stephanie Garcia, and Franck Chauvin, ("Plaintiffs'), by Plaintiffs' undersigned attorneys, individually and on behalf of all other persons similarly situated, hereby oppose Defendants' motion to dismiss (Dkt. Nos. 27 (the "Motion") and 28 ("Def. Br.")).

I. Introduction

Altice USA, Inc. ("Altice USA") is a telecommunications company that was wholly owned by Altice N.V. until its IPO on June 22, 2017 and was a majority owned subsidiary of Altice N.V. until June 2018. ¶ 48.[1] Altice USA's registration statement (the "Registration Statement") heavily touted its business strategy, the "Altice Way" which entailed cutting expenses by streamlining operations and simplifying organizational structure, using the cash saved to invest in improving infrastructure and acquiring content. ¶9. Defendants claimed that "[t]he benefits of the Altice Way have already significantly strengthened our financial performance and will continue to do so, allowing us to deliver strong returns" ¶54. During the class period, securities analysts cited the Altice Way as crucial to Altice USA's value. ¶57-59. Morgan Stanley predicted that the Altice Way could save over $1 billion in expenses by year end 2020. ¶60. Altice USA even used the Altice Way to justify paying $30 million to Altice NV for help implementing the Altice Way. ¶63. Altice substantiated the immense importance of the Altice Way by emphasizing that they had successfully implemented the Altice Way throughout Altice N.V. ¶72. Because Altice USA had tied its own prospects to Altice NV, when Altice NV showed poor results in France, Altice USA's stock price fell. ¶79. As the analyst Pivotal Research Group noted, these poor results led investors to question "the ultimate effectiveness of the 'Altice Way'", driving Altice USA's stock price down. ¶82. Defendant Patrick Drahi later admitted that Altice N.V. performed poorly in France

[1] All references to "¶_ refer to the Amended Class Action Complaint ("Complaint") Dkt. 47.

because Defendants had never actually implemented the Altice Way in that country. ¶85. By falsely asserting that Altice N.V. had actually implemented the Altice Way, Defendants inflated the value of Altice USA's stock, harming investors.

II. Statement of Facts

A. Company Background

Altice N.V. was founded by Patrick Drahi, originally as a regional cable operator in France. ¶48. Altice N.V. expanded through acquisition in France and eventually internationally, acquiring cable and telecommunications companies in Israel, the Dominican Republic, the Netherlands, and Portugal. *Id.* Altice N.V. entered the US market by purchasing Suddenlink Communications, the 7th largest cable provider in the United States, in a transaction that closed on December 21, 2015. ¶49. Altice N.V. also acquired a majority stake in Cablevision in a transaction that closed on June 21, 2016, with minority stakes purchased by CPPIB and BC Partners. *Id.* These assets were consolidated into subsidiaries of Altice USA. *Id.*

Altice N.V. has long boasted of a particular management strategy that it calls the Altice Way and claimed that it implemented the Altice Way companywide and within its various subsidiaries. ¶50. As Altice USA explained in the Registration Statement, the Altice Way is "our founder-inspired owner-operator culture and strategy of operational efficiency, innovation and long-term value creation for stockholders. ¶51. In developing and implementing our strategy, we are focused on the following principles, which are part of the Altice Way:

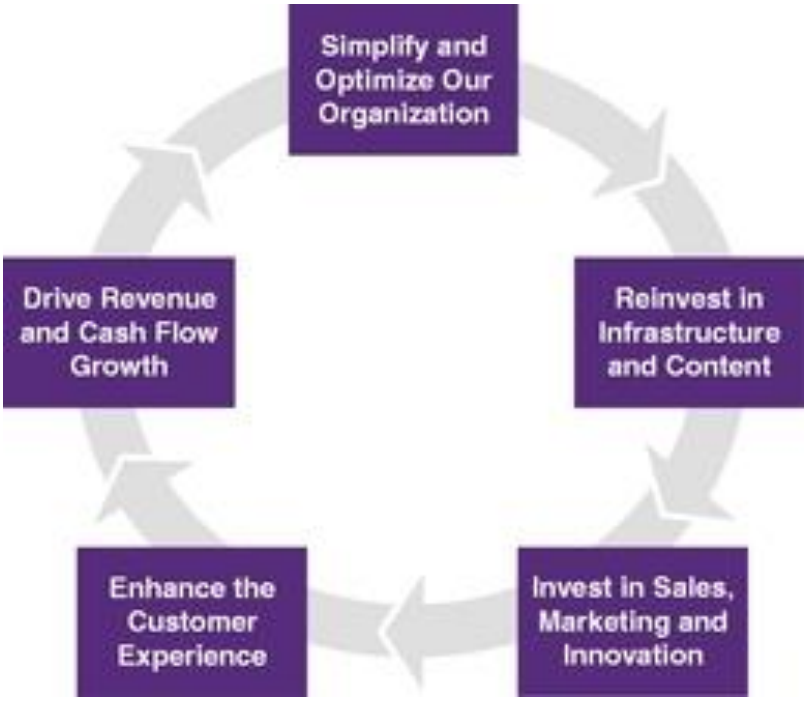
> • ***Simplify and optimize our organization*** through streamlining business processes, centralizing functions and eliminating non-essential operating expenses and service arrangements.
>
> • ***Reinvest in infrastructure and content***, including upgrading our HFC network and building out a FTTH network to strengthen our infrastructure capabilities and competitiveness.

• ***Invest in sales, marketing and innovation***, including brand-building, enhancing our sales channels and automating provisioning and installation processes.

• ***Enhance the customer experience*** by offering a technologically advanced customer platform combined with superior connectivity and service across the customer lifecycle.

• ***Drive revenue and cash flow growth*** through cross-selling, market share gains, new product launches and improvements in our operating and capital efficiency.

The Registration Statement also included the below chart to illustrate the Altice Way:



¶52.

The Registration Statement stated how Altice USA had experience executing the "Altice Way":

> Our CEO and Co-Presidents have substantial experience in communications and media operations, finance and mergers and acquisitions, and a proven track record in executing the Altice Way.

¶53.

The Registration Statement also stated that Altice USA was already implementing the Altice Way in its U.S. operations, allowing it to deliver strong returns:

> Following the Acquisitions [of the U.S. businesses], we began employing the Altice Way to simplify our organizational structure, reduce management layers, streamline decision-making processes and redeploy resources with a focus on network investment, customer service enhancements and marketing support. As a result, we have made significant progress in integrating the operations of Optimum and Suddenlink, centralizing our business functions, reorganizing our procurement processes, eliminating duplicative management functions, terminating lower-return projects and non-essential consulting and third-party service arrangements, and investing in our employee relations and our culture. Improved operational efficiency has allowed us to redeploy physical, technical and financial resources towards upgrading our network and enhancing the customer experience to drive customer growth. This focus is demonstrated by reduced network outages since the Acquisitions, which we believe improves the consistency and quality of the customer experience. In addition, we have expanded, and intend to continue expanding, our e-commerce channels for sales and marketing.
> * * *
> [T]he benefits of the Altice Way have already significantly strengthened our financial performance and will continue to do so, allowing us to deliver strong returns.

¶54.

The Registration Statement stated that Altice USA was favorably positioned to compete in its industry because of the Altice Way:

> [O]ur leading market positions in our footprint, technologically advanced network infrastructure, including our FTTH build-out, our new home communications hub and our focus on enhancing the customer experience, consistent with the Altice Way, favorably position us to compete in our industry.

¶55.

In the Registration Statement, Defendants touted that implementing the "Altice Way" significantly benefitted Altice USA. ¶56. This increased investors' valuation of Altice and persuaded investors that Altice USA was a sound investment. *Id.* Several analysts discussing Altice USA noted the Altice Way as a distinct positive. *Id.*

Guggenheim Partners, in its Initiating Coverage report on Altice USA dated July 11, 2017, issued a Buy rating in part because of the Altice Way, stating:

> ATUS is a subsidiary of Altice N.V., which collectively reaches more than 50mm

> customers across the U.S., Western Europe, Israel and the Dominican Republic. The company believes (and we agree) that this significant global footprint provides ATUS with competitive advantages beyond those typical for a US-based firm of the same size.
>
> Parent company management organizes its business focus around the "Altice Way"—a five principal structure that guides strategy and operations.
>
> ¶57.

Similarly, Deutsche Bank, in its Initiation of Coverage Report dated July 17, 2017, issued a Buy rating and expressed strong approval of the Altice Way, noting the strong performance of Altice in 2016 and concluding "All eyes in the US cable industry are on Altice as it ponders the question, 'Is the Altice way indeed a better, and sustainable, way to operate?' ¶58. Wells Fargo took a more guarded approach to Altice at the time of the IPO, issuing a Market Perform[2] rating in its Initiation of Coverage Report dated July 26, 2017. ¶59. Nonetheless, Wells Fargo noted that the viability of the Altice Way is key to Altice USA's success. *Id.* Wells Fargo explained that "[w]e have no reason to say that ATUS CAN'T achieve its goals via The Altice Way. *Id.* But at the same time, there isn't one particular market that we can hang our hat on given all seem to be in some level of transition." *Id.* Morgan Stanley, in a report dated August 23, 2017, predicted that the "'Altice Way' can drive roughly ~$1-1.1B of operating expense savings by YE20E, driving industry leading EBITDA margins." ¶60.

The analyst consensus therefore reflected that the Altice Way was an appealing strategy if it could be implemented successfully, and that the key issue in valuing Altice USA's stock was whether management would be able to successfully execute on the Altice Way. ¶61. Analysts were also consistent in noting that a key question in determining whether management really could

[2] A "Market Perform" means that the price of a company's stock will mirror the overall market, and is similar to a "hold" rating given by some other analysts.

execute on the Altice Way strategy was whether that strategy was successful in Europe. *Id.*

Altice N.V. also placed a great emphasis on the value of the Altice Way, going so far as to charge large annual fees to subsidiaries, including Altice USA, for implementation of the Altice Way. ¶62. Altice USA paid Altice N.V. $30 million in 2017, as stated in the Registration Statement. ¶63. According to the Registration Statement, this payment is to a "subsidiary of Altice N.V. [which] provides certain executive services, including CEO, CFO and COO services." This fee is separate from and in addition to the compensation Altice USA paid directly to its executive officers. *Id.*

As Altice USA explained, in a letter to the SEC dated May 17, 2017, this fee was an "annual management fee charged in connection with services provided by Altice N.V. Such management fee represents the charge for consulting, advisory and other services to the Company in connection with our acquisitions, divestitures, investments, capital raising, financial and business affairs. Such services are unique in that they represent very specialized knowledge and skills of executives at Altice N.V. and are not comparable to other services in the market." ¶64.

As noted in the 2018 Annual Report for Altice N.V., at the end of 2017 Altice terminated the practice of charging a flat "Altice Way" fee to all of its subsidiaries. ¶65. However, as revealed in Altice USA's 10-Q for the first quarter of 2018, filed May 14, 2018, Altice USA continued to pay this fee to Altice USA up until Altice N.V. distributed all remaining shares of Altice USA to the shareholders of Altice N.V., an event that occurred on May 23, 2018. *Id.* In addition to the Altice Way management fee, the Altice USA board approved a discretionary stock option award for Drahi, who was not an employee of Altice USA during 2017. ¶66. Altice USA valued the award at $5,291,321, according to the Amended Annual Report for 2017, filed with the SEC on April 30, 2018. *Is.* Altice USA stated that the board issued the award "[i]n light of Mr. Drahi's significant

and ongoing direct contributions to the development and implementation of the Altice USA, Inc. strategic vision." *Id.* This practice of charging management fees was highly unusual and drew skepticism from the press. ¶67. The Wall Street Journal, in an article dated May 20, 2017 titled "Watch Out for the 'Altice Way' of Doing Business", noted that the practice of charging management fees to subsidiaries in the telecom industry is highly unusual. *Id.* The article also noted that French authorities had cast skepticism on Altice's practice of charging a fee to a different subsidiary for use of the Altice Way. *Id.*

In turn, Drahi, despite having retired as CEO of all Altice entities in 2016, charged Altice N.V. a hefty price for his advising services. ¶68. As the Wall Street Journal noted in an article dated May 25, 2017, Altice N.V. agreed to pay Drahi for his advising it with a stock option award that, depending on the value of Altice N.V.'s stock price, could be worth €1.1 billion. *Id.* Altice N.V. has itself acknowledged that this arrangement is wholly unique, acknowledging in its Annual Report for 2017 that Altice N.V. "is not aware of any comparable agreement in the market in which [Altice N.V.] operates and, more specifically, where the consideration is in the form of stock options". Altice N.V. has acknowledged that this arrangement places them out of compliance with corporate governance best practices defined under Dutch law that requires "[a]ll transactions between the company and legal or natural persons who hold at least ten percent of the shares in the company should be agreed on terms that are customary in the market." Altice N.V. attempts to excuse this self-dealing arrangement by claiming that it "better aligns the interests of Next Alt", the vehicle through which Drahi owns most of his shares of Altice, with minority shareholders.

B. IPO Background

On April 11, 2017, the Company filed a registration statement on Form S-1 with the SEC in connection with its IPO. ¶69. The registration statement was subsequently amended, with the final amended registration statement on Form S-1/A filed on June 21, 2017 with the SEC. *Id.* The

Registration Statement was declared effected by the SEC on June 21, 2017. *Id.* Immediately prior to the IPO, Altice NV created a multiple share class structure, giving the shares owned by Altice N.V. and in turn controlled by Drahi, disproportionate voting rights over Altice USA, and ensured that Drahi could exercise total control over Altice USA. *Id.* Because of Drahi's overwhelming voting majority over Altice N.V. and Altice USA, the Registration Statement identified Altice USA as a controlled company which was not required to and in fact would not have a majority of independent directors. ¶70. On June 22, 2017, Altice USA priced its IPO at $30 per share and sold 71,724,139 shares of common stock, including the underwriters' full exercise of their option to purchase 7,781,110 to cover over-allotments, for gross proceeds of $1,918,290,870.00. ¶71

III. Argument

A. Legal Standard

On a Rule 12(b)(6) motion, the Court must "accept all factual allegations as true and draw all reasonable inferences in favor of the plaintiff." *Metz v. U.S. Life Ins. Co. in City of New York*, 662 F.3d 600, 602 (2d Cir. 2011).[3] To survive a motion to dismiss, a complaint need only "contain sufficient factual matter…to 'state a claim that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009); *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 131 S. Ct. 1309, 1322-23, 179 L. Ed. 2d 398 (2011) (same). To state a claim under Section 10(b) and Rule 10b-5, a plaintiff must allege: (1) a material misrepresentation or omission ("falsity"); (2) scienter; (3) a connection with the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation. *Matrixx*, 131 S. Ct. at 1317. Here, Defendants contest only falsity, scienter, and loss causation.[4] As to these and all

[3] Internal citations and quotations are omitted throughout unless otherwise stated.
[4] Defendants waived their right to challenge the other elements §10(b), and these non-contested elements are not addressed herein. *See* Fed. R. Civ. P. 12(g).

required elements, the Complaint is sufficient.

B. The Complaint Properly Alleges Securities Act Violations

1. Plaintiffs' Securities Act Claims are Timely

Defendants fail to show that the Securities Act violations are time barred. The limitations period for Securities Act claims begins to run when a shareholder should have discovered the misleading nature of the statements in question. 15 U.S.C. § 77m. "[A] fact is not deemed 'discovered' until a reasonably diligent plaintiff would have sufficient information about that fact to adequately plead it in a complaint." *City of Pontiac Gen. Employees' Ret. Sys. v. MBIA, Inc.*, 637 F.3d 169, 175 (2d Cir. 2011). Nor is a reasonable plaintiff expected to know all information that is nominally publicly available. Instead, a plaintiff is only charged with knowing information in a source that "an investor of ordinary intelligence would regularly search." *Staehr v. Hartford Fin. Servs. Grp., Inc.*, 547 F.3d 406, 432 (2d Cir. 2008). Defendants claim that the misstatement was revealed on November 15, when Drahi delivered remarks during a surprise appearance at a conference. ¶85. Defendants provide no basis for the implausible inference that an investor should review every presentation by Altice's controller, let alone a surprise one, immediately. This presentation was the only statement that would have allowed plaintiffs to successfully allege a misstatement, and an ordinary investor cannot be expected to have immediately discovered it. In any event, whether reasonable diligence required prompt discovery of that conference statement is a factual question not appropriate for a motion to dismiss. *Marini v. Adamo*, 995 F. Supp. 2d 155, 184 (E.D.N.Y. 2014), *aff'd*, 644 F. App'x 33 (2d Cir. 2016), and *aff'd*, 644 F. App'x 33 (2d Cir. 2016).

2. The Complaint Alleges that Defendants Made Materially False and Misleading Statements

a. Applicable Falsity Pleading Standard

Section 11 provides a remedy if "any part of the registration statement, when such part became effective, 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). A statement is 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 made available." *Arfa v. Mecox Lane Ltd.*, No. 10 CIV. 9053, 2012 WL 697155, at *5 (S.D.N.Y. Mar. 5, 2012), *aff'd*, 504 F. App'x 14 (2d Cir. 2012), *quoting Basic Inc. v. Levinson*, 485 U.S. 224, 231, 108 S. Ct. 978, 99 L. Ed. 2d 194 (1988). At the pleading stage, however, dismissal on materiality grounds is only appropriate where there is "no dispute regarding the importance of the misstatement to a reasonable investor." *In re AMF Bowling Sec. Litig.*, No. 99 CIV. 3023 (DC), 2001 WL 286758, at *3 (S.D.N.Y. Mar. 23, 2001).

b. The Complaint Alleges that the Registration Statement's Claims about the Altice Way were False and Misleading

The Registration Statement informed investors that the Altice Way had been "successfully implemented across [the] Altice Group". ¶72. Defendants made clear that the Altice Way was material to Altice USA's success, as it had been to Altice N.V.'s in the past. Defendants asserted that "[t]he benefits of the Altice Way have been demonstrated by Altice N.V.'s performance, which is reflected in the 42% average annual total return of Altice N.V.'s Class A ordinary shares since its initial public offering in January 2014 through March 31, 2017, compared to the 5% average annual total return of the STOXX Europe 600 Telecommunications Index." ¶73. The Registration Statement as connected the Altice Way to the quality of their management, stating that Altice USA will "benefit from our senior management's experience in successfully implementing the Altice Way around the

world." Defendants' claims that the Altice Way had been successfully applied "across" the company and "around the world" was false because as Defendant Drahi eventually admitted, Altice NV "never applied the Altice Way" in France. ¶85.

c. Under *Omnicare*, Defendants' Statements were Misstatements of Fact, Not Opinion Statements

The Complaint alleges that Defendants misled investors by falsely claiming that "the Altice Way had been successfully implemented across Altice N.V. and its subsidiaries," and therefore identifies a false statement of fact, not a statement of opinion. ¶75. As *Omnicare* explained, "[a] fact is 'a thing done or existing' or '[a]n actual happening.' An opinion is 'a belief[,] a view,' or a 'sentiment which the mind forms of persons or things.'" *Omnicare, Inc. v. Laborers Dist. Council Const. Indus. Pension Fund*, 135 S. Ct. 1318, 1325, 191 L. Ed. 2d 253 (2015) *quoting* Webster's New International Dictionary 782 (1927). Under *Omnicare*, then, Defendants' statements that Altice NV had already successfully implemented the Altice Way across the company is a statement of fact. In their attempt to argue to the contrary, Defendants wholly mischaracterize the allegations in the Complaint. Defendants claimed that the Complaint identifies as misleading "statements that Altice USA believed its corporate strategy was a competitive strength that would benefit the company by yielding growth and distinguishing it from competitors." According to Defendants, "[t]hese statements are, at their very core, based on Altice USA's opinion that implementing the Altice Way in the United States would be good for the company." Yet the Complaint contains no allegations that Defendants' registration statement was misleading merely for claiming that the Altice Way would be beneficial to Altice USA. While certain of Defendants' factual misstatements were tied to statements of opinion about the benefits of the Altice Way to Altice USA, the fact that such statements are so intertwined does not make the factual portion of those statements inactionable. *Omnicare* noted that "some sentences that begin with opinion words like

'I believe' contain embedded statements of fact" which are subject to the same standards of pleading as any other statement of fact. *Omnicare, Inc.*, 135 S. Ct. at 1327. To the extent that any of the statements that Defendants cite contain Defendants' opinions, they also contain statements of embedded fact – that Altice had implemented the Altice Way companywide. The Complaint nowhere alleges that the statements are misleading for claiming that the Altice Way would benefit Altice USA if actually implemented. Rather, Plaintiffs allege that Defendants mislead the public about a fact – that the Altice Way had already been successfully implemented companywide.

d. Defendants' Failure to Implement the Altice Way in France Rendered their Statement Misleading

Defendants posit that their statements that they had implemented the Altice Way "across" Altice NV was not false or misleading even though Altice had failed to implement the Altice Way in France – One of Altice NV's largest markets and the first country where Altice operated. ¶¶48, 76. Defendants ignore that Altice's registration statement claimed that the Altice Way had been implemented "across" the company, had been "successfully implemented around the world" and was "demonstrated by Altice N.V.'s performance". The phrase "across" is synonymous with "throughout" and means "so as to include or take into consideration all classes or categories."[5] And analysts' responses to these negative results made clear that they understood the Registration Statement to have claimed that the Altice Way had been implemented in every market, including France, with multiple analysts questioning the effectiveness of the Altice Way in connection with the negative results. ¶¶81-82.

Attempting to avoid the plain meaning of their own statements, Defendants attempt to equate this statement to a very different one found not misleading in another case. In *In re Coty, Inc. Sec. Litig*, the court dismissed a claim that alleged that a statement that the "OPI" brand was

[5] https://www.merriam-webster.com/dictionary/across

expanding globally was false because Coty terminated one brand within the OPI line within the United States. *In re Coty Inc. Sec. Litig.*, No. 14-CV-919 (RJS), 2016 WL 1271065, at *9 (S.D.N.Y. Mar. 29, 2016). But the statement in *Coty* was about aggregate expansion, and so can be true even if one product line within a brand was contracting or even folding. But Altice's statement that the Altice Way has been implemented "across" the company would have led a reasonable investor to believe that it had been implemented in every one of Altice's markets, particularly Altice's France, Altice's *original market*.

The Sixth Circuit's opinion in *Bondali* also does not support Defendants' claim that their failure to implement the Altice Way in France rendered false their statement that they had implemented the Altice Way across the company. Defendants claim that "the Sixth Circuit has rejected claims that statements about adherence to supplier standards" were rendered false by a few suppliers' non-adherence to company standards. Yet, Defendants' summary of the case omits an important fact. In *Bondali*, plaintiffs challenged statements that defendant Yum Brands "require[d] its suppliers to adhere to corporate food standards and safety protocols." *Bondali v. Yum! Brands, Inc.*, 620 F. App'x 483, 489 (6th Cir. 2015). The Sixth Circuit held that this statement was not misleading merely because certain suppliers violated those protocols. Thus, the statement that Yum maintained protocols and standards was truthful because Yum adhered to those standards, even if some of its suppliers did not. The Sixth Circuit emphasized that there was no allegation that Yum itself failed to adhere to each and every standard and protocol.

e. Defendants' Misstatements Are Material, not Puffery

Defendants' claim that the misleading statements alleged in the complaint are mere "puffery" is baseless. "Statements are not puffery if shareholders could reasonably interpret them as material misstatements." *Gross v. GFI Grp., Inc.*, 162 F. Supp. 3d 263, 268 (S.D.N.Y. 2016). Whether a statement is actionable depends on the context. *Id.* "As with the general standard

governing materiality, determining whether certain statements constitute puffery entails looking at 'context,' including the 'specific[ity]' of the statements and whether the statements are 'clearly designed to distinguish the company' to the investing public in some meaningful way." *In re Signet Jewelers Ltd. Securities Litig.*, 389 F. Supp. 3d 221, 229 (S.D.N.Y. 2019) *quoting Indiana Pub. Ret. Sys. v. SAIC, Inc.*, 818 F.3d 85, 98 (2d Cir. 2016). Under this standard, Defendants' statements are not mere puffery. The Complaint details the substance of the Altice Way described in the Registration Statement, summarized as "a business strategy of cutting expenses by streamlining operations and simplifying a company's organizational structure, and using the cash saved to invest in improving a cable company's infrastructure and content." ¶¶9, 51-55. Altice specifically asserted that the Altice Way constituted a competitive advantage. ¶73. In addition, Altice USA apparently considered the Altice Way so significant that it paid Altice NV $30 million per year for its use. ¶62-66. Sophisticated securities analysts did not treat the the Altice Way as mere puffery, with Defendant Morgan Stanley predicting that the "'Altice Way' can drive roughly ~$1-1.1B of operating expense savings by" the end of 2020. ¶60. Sophisticated companies do not pay $30 million for puffery, and analysts do not predict that puffery can generate $1 billion in savings. Defendants suggest that the management and consulting fees it paid do not show that its statements regarding the Altice Way were material because the payments were for the services of highly experienced executives from Altice N.V. But this misses a crucial point – that Defendants did not merely claim that the executives from Altice N.V. were experienced, but that they had "very specialized knowledge and skills" were "not comparable to other services in the market" which, in context, clearly refers to their experience with the Altice Way strategy.

Defendants' brief cites several cases where courts found that a general statement about "corporate strategy" is puffery. In doing so, they make the mistake of assuming that whether a

statement is puffery turns on its subject matter, rather than on the context of the statement and the statement's specificity. In reality, all of the cases Defendants cite involve vague declarations about unspecified corporate strategies. In *Lasker*, plaintiffs merely pointed to defendants' statements that their unspecified "business strategies" will lead to continued prosperity. *Lasker v. New York State Elec. & Gas Corp.*, 85 F.3d 55, 57 (2d Cir. 1996). The *Lasker* court gave no indication that defendants had described their strategy in any detail or explained why it would give them a competitive advantage.

The *JP Morgan* case is no more relevant. In *JP Morgan*, the Second Circuit found that JP Morgan's statements that it had a "highly disciplined risk management" strategy were inactionable because they are "are too general to cause a reasonable investor to rely upon them." *ECA, Local 134 IBEW Joint Pension Tr. of Chicago v. JP Morgan Chase Co.*, 553 F.3d 187, 206 (2d Cir. 2009). Crucially, the Second Circuit gave no indication that defendants described the risk management strategy or asserted that the risk management strategy constituted a unique competitive advantage. Similarly, in *Schaefer*, the court found that a statement that generically extolled a company's "unique business strategy" was puffery. *Schaffer v. Horizon Pharma PLC*, 16-CV-1763 (JMF), 2018 WL 481883, at *9 (S.D.N.Y. Jan. 18, 2018). But that case gave no indication that plaintiffs identified what that strategy was, whether it had been implemented, or how much money, specifically, that strategy was alleged to be worth. Here Defendants claimed the Altice Way provided measurable operational and financial benefits that resulted in a competitive advantage.

f. Defendants' Risk Disclosures do Nothing to Cure their Misleading Statements

Defendants assert that their disclosure in the Registration Statement that Altice USA's performance depends "upon the external perceptions of Altice Group's reputation" somehow cures

their misleading statements regarding management's success in implementing the Altice Way. Firstly, the false statements have nothing to do with perceptions or with reputation. Defendants falsely claimed that Altice had successfully implemented a specific measurable business process throughout its operations. Secondly, "[c]autionary words about future risk cannot insulate from liability the failure to disclose that the risk has transpired." *Rombach v. Chang*, 355 F.3d 164, 173 (2d Cir. 2004). Drahi himself admitted that Defendants never implemented the Altice Way in France. That means it had not been implemented at the time of the Registration Statement, which claimed that the Altice Way *had* been successfully implemented *across* Altice Group. Because the statement was false when made, Defendants' risk disclosures do nothing to cure their misleading nature.

3. The Complaint Alleges Violation of 12(a)(2) of the Securities Act

To state a claim under Section 12(a)(2) of the Securities Act, a complaint must allege that "(1) the defendant is a 'statutory seller'; (2) the sale was effectuated 'by means of a prospectus or oral communication'; and (3) the prospectus or oral communication 'include[d] an untrue statement of a material fact or omit[ted] to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading.'" *In re Morgan Stanley Info. Fund Sec. Litig.*, 592 F.3d 347, 359 (2d Cir. 2010). The third element of a claim under 12(a)(2) is parallel to Section 11's requirement.

Defendants allege that Plaintiffs failed to properly allege that Defendants are statutory sellers. To establish that an Underwriter is a statutory seller under 12(a)(2), and, relatedly, to establish statutory standing, a plaintiff must merely show that they purchased directly from an underwriter in the relevant securities offering. It is sufficient for pleading purposes to establish this by showing that an investor purchased shares on the date of the IPO at the IPO price. *In re BioScrip, Inc. Sec. Litig.*, 95 F. Supp. 3d 711, 745 (S.D.N.Y. 2015); *In re Lehman Bros. Sec. &*

Erisa Litig., 799 F. Supp. 2d 258, 311 (S.D.N.Y. 2011). In addition, it is unnecessary at the pleading stage to allege *which* underwriter plaintiffs purchased from. *Perry v. Duoyuan Printing, Inc.*, No. 10 CIV. 7235 GBD, 2013 WL 4505199, at *12 (S.D.N.Y. Aug. 22, 2013). Given this pleading standard, the Complaint established Plaintiff Garcia's standing by including a PSLRA certification that establishes that Garcia purchased shares on the date of the IPO at the IPO price. Docket No. 47-1.

4. Plaintiffs Allege Control Person Liability

As Defendants note, to establish control person liability under Section 15 of the Securities Act, a complaint must allege that the Section 15 defendants controlled an entity that committed a primary violation of Section 11 or 12 of the Securities Act. *Altayyar v. Etsy, Inc.*, 242 F. Supp. 3d 161, 185 (E.D.N.Y. 2017), *aff'd,* 731 F. App'x 35 (2d Cir. 2018). The Section 15 Defendants do not contest that they control Altice USA. And because, for the reasons stated above, the Complaint establishes that Altice USA violated Sections 11 and 12(a)(2) of the Securities Act, the Complaint states a claim for violation of Section 15.

C. The complaint Alleges An Exchange Act Violation

To state a claim under Section 10(b) and Rule 10b-5, a plaintiff must allege: (1) a material misrepresentation or omission ("falsity"); (2) scienter; (3) a connection with the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation. *Matrixx*, 131 S. Ct. at 1317. Here, Defendants contest only falsity, scienter, and loss causation.[6] As to these and all required elements, the Complaint is sufficient.

1. The Complaint Pleads Actionable Misstatements or Omissions

In their memorandum, Defendants assert that the Complaint fails to allege an actionable

[6] Defendants waived their right to challenge the other elements §10(b), and these non-contested elements are not addressed herein. *See* Fed. R. Civ. P. 12(g).

misstatement or omission for the same reasons alleged with respect to the Securities Act claims. For the reasons set forth in Section III.B.2 above, the Complaint alleges materially false statements.

2. The Complaint Alleges a Strong inference of Scienter

a. Applicable Scienter Pleading Standards

The PSLRA requires plaintiffs to allege facts which give rise to a "strong inference" that the defendants acted with scienter. 15 U.S.C. § 78u-4(b)(2). In the Second Circuit, a complaint satisfies the scienter element where plaintiffs allege: (a) "motive and opportunity to commit fraud," or (b) "strong circumstantial evidence of conscious misbehavior or recklessness." *Novak v. Kasaks*, 216 F.3d 300, 307 (2d Cir. 2000). Recklessness amounts to actionable scienter if the conduct was "highly unreasonable" and an "extreme departure from the standards of ordinary care." *Id.* at 308 (citations omitted). A complaint can show recklessness by alleging that the defendants "knew facts or had access to information suggesting that their public statements were not accurate [or] failed to check information they had a duty to monitor." *Id.* at 311. A complaint adequately alleges scienter if the facts, taken as true, give rise to an inference that Defendants intentionally or recklessly misled the public which is *at least as* compelling as any non-culpable inference. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 324, 127 S. Ct. 2499, 168 L. Ed. 2d 179 (2007). The inference of scienter need not be more likely than any plausible opposing inference; the tie goes to the plaintiff. *Id.* at 324. The proper inquiry "is whether *all* of the facts alleged, taken collectively, give rise to a strong inference of scienter, not whether any individual allegation, scrutinized in isolation, meets that standard." *Id.* at 322-23 & 326 (allegations are to be read "holistically").

b. The Complaint Alleges Scienter against Goei

1. The Complaint Alleges that Goei had Motive and Opportunity to Commit Fraud

Goei had motive to commit fraud because he received massive financial compensation that was contingent, not on the performance of Altice USA, but the good graces of Patrick Drahi, who materially benefitted from the false claim that the Altice Way was a tested strategy that Altice NV applied throughout its organization. A complaint demonstrates a strong inference of scienter by alleging a specific connection between the form of an executive's compensation and that executive's incentive to lie about the specific challenged statements. *Nguyen v. New Link Genetics Corp.*, 297 F. Supp. 3d 472, 498 (S.D.N.Y. 2018). In *Nguyen*, a complaint successfully alleged motive by establishing that defendants' bonuses were tied to enrollment in a clinical trial, and that defendants misstated those enrolment numbers. Here, the Complaint alleges that Goei's compensation was tied to his continued employment at Altice USA *or* Altice NV, that Drahi controlled both companies and therefore had the ability to determine Goei's continued employment, that Drahi personally and unilaterally approved Goei's bonus, and that Drahi received highly unusual payments from Altice USA for use of the Altice Way. ¶¶51-55, 62-66, 91-92. This creates a unique and strong motive for Goei to support the fiction that the management team, led by Drahi, had successfully implemented the Altice Way.

The case law that defendants cite is not to the contrary. Defendants line of cases hold that a complaint cannot plead scienter by pointing to *generic* motives that are applicable to virtually all officers of a public company. For instance, the Second Circuit found too generic the allegation that defendants in *Shields*' motive to commit fraud was to "protect their executive positions and the compensation and prestige they enjoy thereby." *Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1130 (2d Cir. 1994). But this holding was based on the fact that such allegations could be

alleged with respect to nearly any executive of a public company. Here, the situation is different. Goei is in a highly unusual position in that his large incentive compensation is not based on the performance of Altice USA or even his continued employment at Altice USA, but his employment within any of the several affiliated companies that Drahi controls, including Altice NV. And Goei's statements benefitted Altice NV and Drahi by justifying highly unusual payments to Drahi and Altice NV for use of the "Altice Way." Similarly, *Struogo* merely held that "it is well settled in this Circuit that general allegations of a profit or prestige motive" are insufficient. *Strougo v. Barclays PLC*, 105 F. Supp. 3d 330, 350 (S.D.N.Y. 2015). Here, by contrast, the complaint alleges that the unusual form of Goei's compensation gave him a motivation to make the specific misstatements at issue here.

2. The Complaint Alleges Goei's Conscious Misbehavior or Recklessness

The fact that Goei, as president of the board of Altice N.V., oversaw implementation of the Altice Way in Europe, also creates a strong inference of scienter. ¶22. The Court can infer that an officer or director tasked with setting and overseeing the implementation of a company policy and makes false statements regarding how that policy was implemented knew, or was reckless for not knowing, that the information was false. *In re Lehman Bros. Securities and Erisa Litigation*, 799 F. Supp. 2d at 297 (complaint alleged scienter when it "sufficiently allege[d] facts giving rise to an inference that … defendants were involved in setting Lehman's risk policies and knew that the statements concerning enforcement of risk management policies were false."). Because Goei was responsible for overseeing the implementation of the Altice Way strategy across Altice NV, and falsely informed investors that the Altice NV had successfully implemented Altice Way across the company, the Court can infer that he knew his statement was false.

Defendants cite a line of cases that are fundamentally off point because the cases defendants

cite do not pertain to misstatements about defendants' own actions, but defendants' failure to disclose disappointing *results*. In *Wachovia*, the complaint alleged that defendants made false statements regarding Wachovia's loans' performance, and the court held that plaintiffs failed to plead scienter because it did not identify when defendants would have learned of the poor performance. *In re Wachovia Equity Sec. Litig.*, 753 F. Supp. 2d 326, 350 (S.D.N.Y. 2011). Similarly, *Dobina* found a lack of scienter regarding defendants' inaccurate statements regarding their own tax expenses, because plaintiffs failed to allege that any of the documents to which defendants had access contained the accurate information. *Dobina v. Weatherford Int'l Ltd.*, 909 F. Supp. 2d 228, 249 (S.D.N.Y. 2012). Again, the misstatements in *Dobina* relate to defendants' results, not defendants *actions*. *In re Hain*, the final case that defendants cite, simply holds that a bare allegation that "defendants access to reports supports a strong inference of scienter" is insufficient without more to establish scienter. *In re The Hain Celestial Grp. Inc. Sec. Litig.*, No. 216CV04581ADSSIL, 2019 WL 1429560, at *19 (E.D.N.Y. Mar. 29, 2019). None of those cases hold that, when a misstatement relates to defendants' conduct, that allegations of the type included in the Complaint are insufficient.

c. The Complaint Alleges Scienter Against Altice USA

To plead scienter as to a corporate defendant, "the pleaded facts must create a strong inference that someone whose intent could be imputed to the corporation acted with the requisite scienter." *Teamsters Local 445 Freight Div. Pension Fund v. Dynex Capital Inc.*, 531 F.3d 190, 195 (2d Cir. 2008). That "someone" can be the individual who made the false statement in question, but the Second Circuit has made clear that it is not limited to such individuals. *Loreley Financing (Jersey) No. 3 Ltd. v. Wells Fargo Securities, LLC*, 797 F.3d 160, 177 (2d Cir. 2015) (inferring corporate scienter based on knowledge of non-defendant employees). Under agency principles, a controlling shareholder's knowledge is attributable to a company that the shareholder

controls. *Rex & Roberta Ling Living Tr. u/a Dec. 6, 1990 v. B Commc'ns Ltd.*, 346 F. Supp. 3d 389, 408 (S.D.N.Y. 2018) (holding that a controlling shareholder's knowledge is attributable to company). Therefore, Drahi's knowledge is attributable to Altice USA.

And Drahi had an overwhelming motive to insist, despite the underlying facts, that Altice NV had successfully implemented the Altice Way strategy companywide in the form of a series of payments of cash and stock that Altice USA made to Altice NV and Drahi himself. Altice USA paid an annual management fee to Altice NV for the "very specialized knowledge and skills of executives at Altice N.V. [which] are not comparable to other services in the market." ¶64. Altice previously identified this fee, which was similar to those charged to all Altice subsidiaries, as a fee for implementing the "Altice Way." ¶61. Altice USA also approved a discretionary stock option award to Drahi, despite the fact that he was not an employee. ¶66. This fee was awarded "[i]n light of Mr. Drahi's significant and ongoing direct contributions to the development and implementation of the Altice USA, Inc. strategic vision." *Id.* The Complaint also provides specific facts to establish that these fees are highly unusual. The Wall Street Journal noted that these fees were out of the ordinary and that French authorities had expressed skepticism regarding them. ¶67. Altice N.V. also made direct payments to Drahi despite the fact that Drahi was retired, and admitted that the company was unaware "of any comparable agreement in the market in which [Altice N.V.] operates." ¶68. Thus, Drahi justified highly unusual fees by claiming that they were compensation for his implementation of the Altice Way across the company. These fees, which already were under significant governmental scrutiny in both the US and in France, would have been impossible to justify if Drahi admitted that he had not even implemented the Altice Way strategy across the company. In addition, Drahi specifically acknowledged that it was his own lack of attention to France that caused Altice N.V. to fail to implement the Altice Way there. ¶94.

Despite the well-pled allegations establishing the highly unusual nature of these payments, including Altice N.V.'s admission that they are virtually unheard of in the telecom industry, Defendants cite wholly irrelevant case law in a vain attempt to analogize these fees to fundamentally dissimilar ones that are customary in unrelated industries. Defendants cite to *Fannie Mae* and *Edison Fund* for the proposition that "the desire to earn management fees is a motive possessed by virtually every person involved in the securities industry." The problem, however, is that unlike the hedge fund managers that the quoted passages in *Fannie Mae* and *Edison Fund* refer to, neither Drahi nor any of the defendants are in the securities industry – they are in the telecom industry. *Edison Fund* held that "[t]he desire to earn management fees is a motive generally possessed by hedge fund managers." *Edison Fund v. Cogent Inv. Strategies Fund, Ltd.*, 551 F. Supp. 2d 210, 227 (S.D.N.Y. 2008). But comparing a hedge fund manager's management fee to the fees Drahi received compares apples to oranges. Hedge funds are in the business of managing money for their clients. Thus, their basic form of compensation is referred to as a "management fee" and the fact that a hedge fund manager receives a management fee is entirely unremarkable. As the Complaint establishes, however, telecom companies do not typically pay "management fees" to affiliates nor do telecom companies typically pay stock option awards to controlling shareholders to for "implementation" of the company's "strategic vision". ¶66. Similarly, Defendants' reliance on *Citigroup* is misplaced. That case held that "[c]ourts have repeatedly rejected conclusory allegations regarding the motivation to earn unspecified fees as a basis for inferring scienter." *In re Citigroup Auction Rate Sec. Litig.*, 700 F. Supp. 2d 294, 305 (S.D.N.Y. 2009). Here, the Complaint *specified* the fees Drahi received and why they were unusual. Likewise, *In re Salomon* merely held that a general desire to attract business (for which the defendants naturally charged fees) does not support scienter. *In re Salomon Analyst Winstar*

Litig., No. 02 CIV. 6171 (GEL), 2006 WL 510526, at *10 (S.D.N.Y. Feb. 28, 2006).

3. The Complaint Pleads Loss Causation

To establish loss causation, a complaint need only provide "some indication of the loss and the causal connection that the plaintiff has in mind." *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 347, 125 S. Ct. 1627, 161 L. Ed. 2d 577 (2005). To establish such a causal connection, a complaint should show that "the subject of the fraudulent statement or omission was the cause of the actual loss suffered." *Suez Equity Inv'rs, L.P. v. Toronto-Dominion Bank*, 250 F.3d 87, 95 (2d Cir. 2001). This causal connection can be alleged in multiple ways, including a corrective disclosure, or where the loss was a "foreseeable materialization of the risk" concealed by a defendant's misstatements or omissions. *Carpenters Pension Trust Fund of St. Louis v. Barclays PLC*, 750 F.3d 227, 232-33 (2d Cir. 2014) (citing *In re Omnicom Grp., Inc. Sec. Litig.*, 597 F.3d 501, 511, 513 (2d Cir. 2010)). The Second Circuit has recently clarified, however, that "'corrective disclosure' and 'materialization of risk' are not wholly distinct theories of loss causation." *In re Vivendi, S.A. Sec. Litig.*, 838 F.3d 223, 262 (2d Cir. 2016). Rather, all that Plaintiffs must do is provide a sufficiently direct causal relationship between the subject of Defendants' fraud and Plaintiffs' losses. The Complaint alleges just such a relationship. Defendants artificially inflated the price of Altice USA's stock by falsely claiming that Altice NV had implemented the Altice Way across the company. According to Drahi himself, Altice NV did not in fact implement the Altice Way across the company, and specifically had not implemented it in France. Again, by Drahi's own admission, this failure caused Altice NV's poor results in France, and those poor results caused Altice USA investors to lose confidence in management, and caused a decline in Altice USA's stock.

In their bare bones argument against loss causation, which does not even cite the standard for loss causation within the Second Circuit, Defendants argue that the fact that Altice USA's stock price did not drop after Drahi made his November 15 remarks linking Altice France's poor

performance to its failure to implement the Altice Way strategy. Yet, the fact that the market did not react to the November 15 disclosure does not prove that the November 3 disclosure was unrelated to the fraud. Because the market reacted to the initial partial corrective disclosure, the fact it did not react later when further information about the fraud was revealed, does not undercut loss causation. *In re Take-Two Interactive Sec. Litig.*, 551 F. Supp. 2d 247, 289 (S.D.N.Y. 2008).

4. The Complaint Pleads Control Person Liability

Defendants allege that Plaintiffs fail to plead control person liability because the Complaint fails to show a primary violation. For the reasons set forth in the preceding sections of this brief, that argument is without merit.

Defendants also claim that Plaintiffs fail to allege that any of the alleged control persons, that is, Goei, Drahi, and Altice Europe, culpably participated in Altice USA's fraud. As defendants noted, the pleading standards for culpable participation are equivalent to the scienter requirements under 10(b) violations. *In re Take-Two Interactive Securities Litigation*, 551 F. Supp. 2d at 307. But, as set forth in Section III.C.2 above, the Complaint alleges scienter as to Goei and Drahi. In addition, because Drahi is the controlling shareholder of Altice NV, his scienter can be attributed to Altice NV.

IV. Conclusion

For the foregoing reasons, the motion should be denied.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I served copies of this Memorandum of Law in Opposition to Motion to Dismiss the Amended Class Action Complaint dated October 14, 2019 by email to the following counsel for Defendants on November 13, 2019:

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