Short Form Order

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QUEENS COUNTY

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JOSEPH RISI
A. J. S. C.

IA Part 3

--X

Index Number 711788/2018

IN RE ALTICE USA, INC. SECURITIES LITIGATION

DECISION / ORDER

Motion Seq. #3

--X

The following numbered papers read on this motion by defendants Altice USA, Inc. ("Altice USA"), Altice Europe N.V. ("Altice Europe"), Patrick Drahi, Jeremie Jean Bonnin, Abdelhakim Boubazine, Michel Combes, David P. Connolly, Dexter G. Goei, Victoria M. Mink, Mark Christopher Mullen, Dennis Okhuijsen, Lisa Rosenblum, Charles F. Stewart, Raymond Svider collectively the Individual Defendants), Goldman Sachs & Co. LLC, J.P. Morgan Securities LLC, Morgan Stanley & Co. LLC, Citigroup Global Markets Inc., Merrill Lynch, Pierce, Fenner & Smith, Inc., Barclays Capital Inc., BNP Paribas Securities Corp., Credit Agricole Securities (USA) Inc., Deutsche Bank Securities Inc., RBC Capital Markets, LLC, Scotia Capital (USA) Inc., SG Americas Securities LLC, and TD Securities (USA) LLC (collectively, the Underwriter Defendants) (together, the Defendants) pursuant to CPLR §3211(a)(7) dismissing the plaintiff's amended complaint with prejudice for failure to state to state a claim under Sections 11, 12(a)(2) and 15 of the Securities Act of 1933.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits..	EF 79-91
Answering Affidavits - Exhibits..	EF 92
Reply Affidavits..	EF 93
Additional Papers..	EF 111-113

Upon the foregoing papers, it is ordered that this motion is determined as follows:

On June 12, 2018, the first in a series of 1933 Securities Act class action cases was filed in this court. On July 31, 2018, co-lead plaintiff O'Neill filed a complaint. Several additional lawsuits were filed. The plaintiff in all of these class actions entered into a so-ordered stipulation in which

they agreed to consolidate the actions into a single case. The plaintiff then filed briefs to become lead plaintiff and the appointment of their counsel as lead counsel. On June 4, 2018, this court issued an order selecting co-lead plaintiffs and appointed lead counsel. Thereafter, on June 27, 2019, the lead plaintiffs filed a Consolidated Amended Complaint ("CAC").

In this action, the plaintiffs allege violations of the Securities Act of 1933 in connection with the Initial Public Offering ("IPO") of Altice USA in June 2017. Altice USA is a provider of broadband communications and video services in the United States. Altice USA is a subsidiary of Altice Europe. Altice Europe is the parent company of subsidiaries in France, Portugal, Israel and the Dominican Republic. On June 23, 2017, Altice USA filed its final Prospectus. Defendants Boubazine, Connolly, Goei, Mink, Rosenblum and Stewart signed the Prospectus. These signatories and all the Individual Defendants are named for Section 11 and 12(a)(2) causes of action. The Underwriter Defendants underwrote the IPO and are named as defendants as to the Section 11 and 12(a)(2) causes of action.

The complaint alleges that the offering materials contained material misleading misstatements and omissions. These misstatements were concerning a business strategy called the "Altice Way" which calls for cutting expenses, streamlining operations and corporate structure, reinvesting in infrastructure and content, investing in sales, marketing and innovation, enhancing the customer experience, driving revenue and cash flow growth, which the offering plan stated was used by Altice Europe. The complaint alleges that in fact, the "Altice Way" had not yet been fully implemented at SFR, a subsidiary of Altice Europe in France and that Altice Group's operations in France and Portugal were suffering from deteriorating financial performance. The CAC alleges that Altice Europe and Altice USA announced earnings results for Altice Europe and Altice USA on November 2, 2017, which revealed that Altice Europe's performance was impacted by issues at Altice Europe's business units in France (its largest market) and Portugal (its second largest market). As a result of these disappointing earnings, Altice USA's stock price dropped 8% in one day.

The Defendants have now moved to dismiss the complaint. First, the court turns to the defendants' argument that the heightened pleading requirement of CPLR §3016 should control. The defendants argue that as plaintiff's claims sound in fraud, they are subject to the heightened pleading requirements of CPLR §3016(b). However, Section 11 and Section 12 of the 1933 Act do not require fraud as an element and a plaintiff need only allege negligence (*see Litwin v Blackstone Group, L.P.*, 634 F3d 706, 715 [2d Cir 2011]). The 2nd Circuit has, thus, held that 1933 Act, Section 11 and 12(a) claims do not require the heightened pleading requirement for a fraud action, but rather these causes of action are subject to a regular notice pleading (*id.* at 715). Plaintiffs' claims brought in this court should not be subject to a heightened pleading requirement that they would not be subject to in federal court. Therefore, the causes of action are subject to the notice pleading standard of CPLR §3013.

The court next turns to whether the plaintiffs stated a cause of action. The defendants have moved to dismiss under CPLR §3211(a)(7). The sole criteria on a motion to dismiss a complaint, is whether the pleading and the factual allegation contained within its four corners manifests any

cause of action cognizable at law (*see Gaidon v Guardian Life Ins. Co. of Am.*, 94 NY2d 330 [1999]); *Cheslowitz v Board of Trustees of the Knox Sch.*, 156 AD3d 753 [2d Dept 2017]). To withstand dismissal, the requisite elements of the cause of action must be discernable from the pleadings, and the complaint must give notice of the transactions and occurrences to be proved" (CPLR §3013; *see Dolphin Holdings, Ltd. v Gander & White Shipping, Inc.*, 122 AD3d 901 [2d Dept 2014]). On a motion to dismiss for failure to state a cause of action under CPLR §3211(a)(7) a court must accept as true the allegations of the complaint and give the plaintiff every favorable inference to determine if the allegations fit within a cognizable legal theory (*see Leon v Martinez*, 84 NY2d 83 [1994]; *Baker v Town of Wallkill*, 84 AD3d 1134 [2011]; *Konidaris v Aeneas Capital Mgt., LP*, 8 AD3d 244 [2004]). A motion to dismiss merely addresses the adequacy of the pleading and does not reach the substantive merits of plaintiff's cause of action (*see Kaplan v New York City Dept. of Health & Mental Hygiene*, 142 AD3d 1050 [2d Dept 2016]; *Lieberman v Green*, 139 AD3d 815 [2d Dept 2016]).

"The Securities Act of 1933...was designed to provide investors with full disclosure of material information concerning public offerings of securities in commerce" (*In re Initial Pub. Offering Sec. Litig.*, 358 F Supp 2d 189, 206 [SD NY 2004] *quoting Ernst & Ersnt v Hochfelder*, 425 US 185, 195 [1976]). Under Section 11 of the 1933 Securities Act:

> "In case 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 statements therein not misleading." 15 USC § 77k

Thus, under Section 11 there are two ways for issuers to be held liable for the contents of a registration statement "one focusing on what a statement says and the other on what it leaves out." (*Omnicare, Inc. v Laborers Dist. Council Const. Indus.*, 575 US 175, 179 [2015]). "To state a claim under section 11, plaintiffs must allege that 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" (*In re Initial Pub. Offering Sec. Litig.*, 358 F Supp 2d at 205).

Section 12(a)(2) imposes liability on a person who "offers or sells a security...by means of a prospectus...which includes an untrue statement of material fact or omitting to state a material fact necessary in order to make the statements, in light of the circumstances under which they were made not misleading" 15 USC § 77l(a)(2). The plaintiff relies on the same alleged misstatements and omissions in both their Section 11 and Section 12(a)(2) causes of action.

Here, the complaint alleges that offering documents repeatedly emphasized Altice USA's close relationship to Altice Europe and the entire Altice Group. Indicating that the key strength of Altice USA was the implementation of the Altice Way. Specifically the plaintiffs allege the offering documents summarized the Altice Way as a "founder-inspired owner-operated culture and strategy of operational efficiency, innovation and long term value creation for stockholders[.]" The complaint alleges that the offering documents emphasized how Altice USA benefitted from being a part of the Altice Group due to shared "scale benefits and operational expertise" and the common

application of the Altice Way across the various members. The prospectus stated that the Altice Way included five principles:

> "Simplify and optimize our organization through streamlining business processes, centralizing functions and eliminating non-essential operating expenses and service agreements.
>
> 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 plaintiffs allege that these statements in the offering documents were misleading because despite touting the benefits of the Altice Way they did not disclose that SFR, the French subsidiary of Altice Europe, had not fully implemented the entire Altice Way. The plaintiffs further allege that the offering documents did not disclose that SFR was experiencing a sharp decline in financial performance.

The statements relied upon by the plaintiffs regarding the benefits of the Altice Way are not actionable as they amount to statements of corporate optimism and puffery. Such expressions of puffery and corporate optimism are not actionable under the Securities Laws (*see Rudman v CHC Group Ltd.*, 217 F Supp 3d 718, 728 [SD NY 2018]). "This is especially true where...the allegedly fraudulent statements about future performance were accompanied with adequate cautionary language and not stated as guarantees. Further, a firm has no duty to update [such] vague statements of optimism or expressions of opinion in light of changed circumstances" (*Nadoff v Duane Reade, Inc.*, 107 Fed Appx 250, 252 [2d Cir 2004]). Here, the statements touting the Atlice Way are generalized, not verifiable and thus are statements of opinion that are not actionable. These statements are "quite general, delivered in corporate jargon, and relate to future expectations" (*Hawaii Structural Ironworkers Pension Trust Fund v AMC Entertainment Holdings, Inc.*, 422 F Supp 3d 821, 845 [SD NY 2019]).

The cases relied upon by the plaintiffs, on the other hand, are inapposite as they rely on concrete and measurable facts. Here, the plaintiffs do not challenge the specific information contained in the prospectus. Rather they challenge the benefits of a business model. Such descriptions of a business model are corporate puffery and do not support these causes of action. Furthermore, the statements also were prefaced with wording such as "we believe" and "we intend." Such statements which concern a company's business potential are not actionable (*see Matter of*

Sundial Growers, Inc. Sec. Litig., 67 Misc 3d 1217(A), 2020 NY Slip Op 50579[U] [Sup Ct, NY County May 15, 2020]). Additionally the prospectus contained extensive risk factors regarding Altice USA's business prospects. One of the risk factors included any harm or worsening of Altice Europe, could have an adverse affect on Altice USA, including its ability to attract customers, which would affect its future growth and profitability.

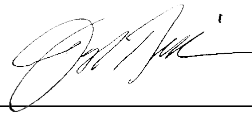
The plaintiffs also allege that the offering documents were misleading due to omissions. The plaintiffs' assertion that because the defendants omitted to state in the offering documents that the Altice Way had not yet been implemented fully in France and the subsidiary's operations were deteriorating, is also without merit. However, the prospectus did not state that the Altice Way had been perfectly executed in all aspects across countries. It simply touted the believed in benefits of this corporate strategy. There is no allegation that the defendants did not believe in the Altice Way and its effectiveness or that they did not implement the Altice Way effectively in Altice USA. That one aspect of the Altice Way, a corporate strategy, had not been implemented yet does not amount to a material omission and is not actionable (*see In Re Coty, Inc. Sec. Lit.*, 2016 WL 1271065, *9, 2016 US Dist LEXIS 41484, *29 [SD NY, March 29, 2016, No. 14-CV-919(RJS)]).

Furthermore, the allegations concerning trends also fail. Item 303 of Regulation S-K requires disclosure of known trends. The elements necessary to support an Item 303 claim are that 1) there was a known trend or uncertainty and 2) that the trend or uncertainty had or the registrant reasonably expected it to have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations (*see Litwin*, 634 F. 3d 716-17). Similarly to state a claim based under Item 303 plaintiff needs to allege that the registration statement omitted specific disclosures regarding existing factors that made the offering speculative or risky (*see Hutchinson v Deutsche Bank Sec., Inc.*, 647 F3d 479 [2d Cir 2011]). First, the plaintiffs do not allege any facts that support the argument that the trends were already occurring at SFR and PT telecom (a Portugese subsidiary) and were known at the time of the IPO *(see Jiajia Luo v Sogou, Inc*., 2020 WL 3051019, 2020 US Dist LEXIS 100025 [SD NY, June 8, 2020, No. 19-CV-230 (LJL)]). Additionally, the defendants were not obligated to make such disclosures. This is not the case where the trends of a subsidiary directly effect the financial situation of a parent. Rather, the trends occurred at other subsidiaries and the parent corporation itself, which do not directly affect the financial standing of a separate subsidiary. Furthermore, the prospectus did not include any information or statements regarding Altice Europe's financial performance.

Finally, the court turns to the cause of action under Section 15 of the 1933 Securities Act. Section 15 extends liability to control persons who control any person liable under Section 11 or 12 (15 U.S.C. § 77o; *see In re Morgan Stanley Info. Fund Sec. Litig.*, 592 F3d 347, 358 [2d Cir 2010]). In light of the determination that there is no liability under Section 11 or Section 12, plaintiff's cause of action under Section 15 is dismissed as moot.

Accordingly, the Defendants motion pursuant to CPLR §3211(a)(7) to dismiss the amended complaint is granted and the amended complaint is dismissed.

This is the decision and order of the Court.



Date: June 16, 2020

Hon. Joseph Risi, A.J.S.C.

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