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. 004

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION TO: (1) MODIFY THE COURT'S JUNE 26, 2020 ORDER TO ALLOW PLAINTIFFS TO FILE A FURTHER AMENDED COMPLAINT (OR A MOTION FOR LEAVE TO FILE SUCH A FURTHER AMENDED COMPLAINT) WITHIN 45 DAYS; AND (2) DELAY ENTRY OF FINAL JUDGMENT PENDING OPPORTUNITY TO FILE AMENDED COMPLAINT

Co-Lead Plaintiffs Ryan Newman, Brian LaPoint, and Andrew O'Neill (collectively, "Plaintiffs") respectfully submit this memorandum of law in support of their motion for an order to amend the Court's Decision and Order of June 26, 2020 (NYSCEF No. 119) (the "June 26 Order") (which dismissed Plaintiffs' Consolidated Amended Complaint ("CAC")) to allow Plaintiffs leave to file a further amended complaint (or at least a motion for leave to file an amended complaint) within 45 days of entry of the requested order.

PRELIMINARY STATEMENT

CPLR §3025(b) provides that leave to amend "shall be freely given upon such terms as may be just." Plaintiffs wish to have the option to file a further amended complaint, which asserts claims under the federal Securities Act of 1933 ("1933 Act"), to cure pleading deficiencies in the just-dismissed CAC. In this regard, Plaintiffs note that they have only recently, after a many-months' long delay, received approximately 1,200 documents that Defendants (defined below) previously agreed to provide in response to Plaintiffs' previously served discovery requests.

Granting Plaintiffs leave to file a second amended complaint ("SAC"), or at least permission to file a motion for leave to file a SAC with an accompanying draft SAC within 45 days of entry of the Court's June 26 Order, would further New York's strong judicial policy in support of having claims decided on the merits. *Cong. Talcott Corp. v. Pacemakers Trading Corp.*, 161 A.D.2d 554, 555 (1st Dep't 1990) ("It is the policy of this court to allow matters to proceed to trial on the merits, whenever possible."). Indeed, consistent with this policy, courts in New York routinely grant leave to amend. *See Varo, Inc. v. Alvis PLC*, 261 A.D.2d 262, 267 (1st Dep't 1999) ("[W]hen motion to dismiss is predicated on claim of failure to state a cause of action, plaintiff must be afforded an opportunity to seek leave to replead."). This principle has also recently been honored by Justice Borrok in the 1933 Act context in *Matter of Netshoes Sec. Litig.*, 64 Misc. 3d

926, 941 (N.Y. Sup. Ct., N.Y. Cty. 2019) (in 1933 Act case, granting motion to dismiss for failure to state a claim without prejudice, but also simultaneously granting leave to amend) (Borrok, J.).

Here, the Altice USA, Inc. ("Altice USA" or the "Company") initial public offering ("IPO" or "Offering") occurred on June 21, 2017 – three years and five days ago. Had Plaintiffs bought claims under New York law, Plaintiffs would not need to seek leave to amend because they would be entitled to commence a new action within six months under CPLR §205(a). Specifically, CPLR §205(a) provides: "[I]f an action is timely commenced and is terminated in any other manner than by . . . a final judgment upon the merits, the plaintiff . . . may commence a ***new action*** upon the same transaction or occurrence or series of transactions or occurrences within six months." (Emphasis added.) Here, however, Plaintiffs' claims are brought under the ***federal*** 1933 Act, which expressly provides for a three-year ***statute of repose*** on all claims at issue (*see* 15 U.S.C. §77m).

Accordingly, even if Plaintiffs followed customary New York state practice by filing a "new action" (with a *de facto* further amended complaint) that would be timely under CPLR §205(a), it is at least arguable that this Court would still be required to find that, as a matter of federalism and choice-of-law principles, any such "new action" would nonetheless by barred by the 1933 Act's three-year statute of repose. Granting Plaintiffs 45 days to seek leave to amend would save this Court significant time and effort from resolving complex and difficult choice-of-law and federalism issues as to whether state law or federal law has the "final say" in determining whether a "new action" asserting 1933 Act claims that is timely filed under CPLR §205 is nonetheless barred by 15 U.S.C. §77m.

BACKGROUND

Altice USA was created in 2015 by Altice Europe N.V. ("Altice N.V."), the multi-billion dollar Netherlands-based multinational telecommunications company founded and controlled by

Defendant Patrick Drahi, to be the vehicle for the Altice Group to expand into telecom markets in the United States. NYSCEF No. 58 ¶56. By June 27, 2017, the Company issued 71,724,139 shares of common stock in the IPO, pursuant to the terms of a Registration Statement and Prospectus, and all documents incorporated therein (collectively, the "Offering Documents"), generating proceeds of approximately $2.5 billion. *Id.* ¶¶67-68. Plaintiffs commenced this class action, on July 31, 2018, asserting claims under §§11 and 12 of the 1933 Act against Altice USA, certain of its current and former officers and directors, and the underwriters of the IPO (collectively, "Defendants"). NYSCEF No. 1. Plaintiffs filed the CAC on June 27, 2019. NYSCEF No. 58.

On July 19, 2010, Plaintiffs filed their first request for the production of documents (the "Requests") directed to Altice USA and the Individual Defendants. NYSCEF No. 95. Defendants responded on August 8, 2019, largely objecting to the Requests, but agreeing to meet and confer on certain issues. NYSCEF No. 96. Defendants also filed their motion to dismiss the CAC on July 23, 2019 (NYSCEF No. 79) and briefing was completed on that motion on August 8, 2019. NYSCEF No. 93.

After several meet and confers regarding the Requests, in late October 2019, Defendant Altice USA agreed to produce certain categories of documents responsive to the Requests, and in exchange, Plaintiffs agreed to defer efforts to obtain additional documents until after resolution of Defendants' motion to dismiss. *See* NYSCEF No. 114. The parties thereafter negotiated and filed a stipulation and [proposed] order for the production and exchange of confidential information (the "Protective Order") on January 10, 2020. NYSCEF No. 115. The Protective Order was approved by the Court on March 5, 2020. NYSCEF No. 116. In the end, however, it was only in April 2020 – more than five months after Defendants had first agreed to produce certain categories of documents – that Defendants finally produced any documents.

ARGUMENT

Leave to amend is "freely given upon such terms as may be just." CPLR §3025(b). "[A] plaintiff is not required to establish the merit of its proposed amendment, but must 'simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit.'" *Commisso v. Pricewaterhousecoopers LLP*, 2014 N.Y. Misc. LEXIS 3382, at *7 (N.Y. Sup. Ct., N.Y. Cty. July 11, 2014) (Scarpulla. J.) (quoting *MBIA Ins. Corp. v. Greystone & Co.*, 74 A.D.3d 499, 500 (1st Dep't 2010)). "[O]nly if there is 'prejudice or surprise resulting directly from the delay'" may a court deny leave. *McGhee v. Odell*, 96 A.D.3d 449, 450 (1st Dep't 2012) (quoting *McCaskey, Davies & Assoc. v. N.Y.C. Health & Hosps. Corp.*, 59 N.Y.2d 755, 757 (1983)). "A party opposing leave to amend must overcome a heavy presumption of validity in favor of [permitting amendment.]" *LDIR, LLC v. DB Structured Prods., Inc.*, 172 A.D.3d 1, 4 (1st Dep't 2019) (citation omitted).

Here, Plaintiffs should not be denied an opportunity to file a SAC that might be able to cure pleading deficiencies identified in the Court's June 26 Order simply because the federal statute of repose for filing a "new action" arguably expired four days ago. This is particularly true where, as here, Plaintiffs have only recently received from Defendants previously promised documents in discovery.

Normally, where a plaintiff brings a timely action and the court dismisses it for failure to state a claim under CPLR §3211(a)(7), a plaintiff has the right to commence a "new action" within six months pursuant to CPLR §205(a) – ***even if the "new action" would otherwise be untimely***. (Emphasis added.) Here, however, Plaintiffs brought claims solely under the federal 1933 Act, which imposes a three-year statute of repose. 15 U.S.C. §77m. Accordingly, it is at least arguable that any ***new*** action timely filed in accordance with CPLR §205 would – as a matter of federal substantive law – nonetheless be barred by the federal three-year statute of repose for 1933 Act

claims. *See CALPERS v. ANZ Sec., Inc.*, 137 S. Ct. 2042, 2049 (2017) ("The [1933 Act] provides in clear terms that '[i]n no event' shall an action be brought more than three years after the securities offering on which it is based. 15 U.S.C. §77m. This instruction admits of no exception.").

To avoid forcing Plaintiffs to risk having a "new action" be deemed untimely under 15 U.S.C. §77m – and to avoid forcing the Court to decide unprecedented and potentially complex choice-of-law and federalism issues – the interests of justice warrant granting Plaintiffs ***leave to file an amended complaint*** rather than rely on CPLR §205(a). In other words, because an amended complaint in this action would "relate back" to the filing of the original action even under federal law, granting the requested relief will moot difficult issues that would otherwise arise if Plaintiffs were not given leave to file a SAC (or at least permission to file a motion for leave to amend) within a reasonable time, but were instead forced to file a new action under CPLR §205(a).

Granting leave to amend would also further New York's strong judicial policy in favor of having claims decided on the merits. *See Malay v City of Syracuse*, 25 N.Y.3d 323, 329 (2015) (noting "remedial purpose of [CPLR §205] in allowing plaintiffs to avoid the harsh consequences of the statute of limitations and have their claims determined on the merits"). Indeed, New York courts routinely grant leave to amend, and CPLR §3025(b) instructs that leave to amend is to be "freely given upon terms as may be just." CPLR §3025(b); *Janssen v. Inc. Vill. of Rockville Ctr.*, 59 A.D.3d 15, 27 (2d Dep't 2008) (holding that leave to re-plead should be freely granted absent prejudice or surprise to the opposing party).

In this regard, Plaintiffs note that in another recent 1933 Act case Justice Borrok issued an opinion dismissing all claims, but specifically granted Plaintiffs leave to amend. *See Netshoes*, 64 Misc. 3d at 941 (in 1933 Act case, granting motion to dismiss for failure to state a claim without prejudice, but also simultaneously granting leave to amend). Notably, after dismissing the first

amended complaint in that case, Justice Borrok thereafter ***denied*** Defendants' motion to dismiss the subsequent second amended complaint in that action. *See Matter of Netshoes Sec. Litig.*, Index No. 157435/2018, NYSCEF No. 113 (N.Y. Sup. Ct., N.Y. Cty. June 2, 2019) (Borrok, J.).

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs leave to file a SAC (or at least a motion for leave to file such a further amended complaint, with accompanying draft complaint) within 45 days and direct the Clerk of the Court to delay entry of final judgment pending Plaintiffs having had an opportunity to file a further amended complaint.

Dated: June 26, 2020
New York, New York

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PRINTING SPECIFICATION CERTIFICATION

1. Pursuant to 22 N.Y.C.R.R. §202.70(g), Rule 17, the undersigned counsel certifies that the foregoing brief was prepared on a computer using Microsoft Word. A proportionally spaced typeface was used as follows:

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2. The total number of words in the brief, inclusive of point headings and footnotes and exclusive of the caption, signature block, and this Certification, is 1,784 words.

Dated: June 26, 2020
New York, New York

/s/ William C. Fredericks
William C. Fredericks (2336303)

AFFIRMATION OF SERVICE

I hereby affirm that on June 26, 2020, I authorized the electronic filing of the foregoing with the Clerk of the Court using the NYSCEF system which will send notification of such filing to the registered participants.

I affirm under penalty of perjury under the laws of the State of New York that the foregoing is true and correct.

Dated: June 26, 2020
New York, New York

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