SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

In re Altice, USA, Inc. Securities Litigation	Index No. 711788/2018 Commercial Division Hon. Joseph Risi Motion Seq. No. 004

MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION TO FILE [PROPOSED] FIRST AMENDED CONSOLIDATED COMPLAINT

Defendants Altice USA, Inc. ("Altice USA"), Altice Europe N.V. ("Altice Europe"), Patrick Drahi, Jérémie 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, 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, "Defendants") respectfully submit this Memorandum of Law in Opposition to Plaintiffs' Motion to File [Proposed] First Amended Complaint (the "Motion" or "Mot.").

PRELIMINARY STATEMENT

Plaintiffs' Motion seeking to file yet another complaint in this Action disregards not only the rules of civil procedure but also the gravamen of this Court's order dismissing their claims with prejudice. Plaintiffs' rationale amounts to little more than arguing that the Court got it wrong. That is of course no basis for the Court to modify or set aside its Order under CPLR 5015. Plaintiffs try to sidestep the high burden imposed to attain modification of an order by instead moving for leave to further amend the Consolidated Amended Complaint under CPLR 3025(b). But the Court already dismissed the Consolidated Amended Complaint, and consequently, "there [is] no complaint left before the Court to amend. *Tanner v. Stack*, 176 A.D.3d 429, 107 N.Y.S.3d 660 (2019). That alone mandates denial.

Even if a motion for leave to amend was procedurally proper—and it is not—Plaintiffs' Motion fails because their proposed amendments are futile. If allowed to amend, Plaintiffs would add references to generic economic principles, such as the interdependent relationship between parent and subsidiary stock processes. But none of the "new" information that Plaintiffs propose

to add is actually new, and none of the proffered amendments save Plaintiffs' claims, which are still based on statements by Altice USA that are neither false nor material. As this Court rightly held, none of "[t]he statements relied upon by the plaintiffs regarding the benefits of the Altice Way are [] actionable as they amount to statements of corporate optimism and puffery" (Order at 4) and involved foreign subsidiaries of Altice Europe, not Altice USA. *Id.* at 5.

Rather than attempting to fix these fatal deficiencies, Plaintiffs devote the bulk of their argument to four purported "errors" in the Court's decision. This merely underscores that Plaintiffs seek to modify the Court's Order under CPLR 5015, not to amend the Complaint, and in any event their arguments are wrong for the reasons discussed below. Plaintiffs' Motion should be denied, and final judgment should be entered dismissing the case.

PROCEDURAL HISTORY

On June 12, 2018, Plaintiffs filed the first of seven complaints in New York Supreme Court in Queens and Nassau Counties—almost one year after Altice USA's IPO and eight months after the alleged corrective disclosures were made in November 2017.[1] The cases were eventually consolidated before this Court in March 2019 (Dkt. 40), and the Consolidated Amended Complaint ("Complaint" or "CAC") was filed on June 27, 2019. Dkt. 58.

On July 23, 2019, Defendants moved to dismiss the CAC, arguing that: (i) the statements in the Prospectus about the Altice Way were, at their core, based on Altice USA's *opinion* that implementing the corporate strategy in the United States would be good for the company; (ii) these opinion statements were not actionable because Plaintiffs did not allege that Altice USA did not actually believe them; (iii) Plaintiffs' assertion about the purportedly inadequate implementation

[1] For the sake of brevity, we will not repeat the factual background that the Court has already considered and incorporate the background set forth in the Court's order dismissing the CAC with Prejudice (Dkt. 119) (the "Order").

of one aspect of the Altice Way at two companies in different countries does not render false a broad statement by Altice USA about the successful implementation of the strategy; and (iv) statements about the Altice Way business strategy are classic examples of corporate puffery that cannot give rise to a securities violation. Dkt. 80. Thereafter, the parties negotiated limited discovery, and Altice USA produced approximately 1,200 documents, including quarterly financial reports, organizational charts, and various documents from the IPO data room. Dkt. 116.

On June 26, 2020, this Court granted Defendants' Motion to Dismiss with prejudice. Dkt. 119. In doing so, the Court found that, among other things, the challenged statements about the Altice Way business model were non-actionable expressions of general corporate optimism and puffery, that the Prospectus detailed the risks associated with Altice USA's commercial prospects, and that even if one component of the Altice Way was not yet fully implemented in France, that could not support a cognizable claim against Altice USA because (i) the Prospectus did not claim the Altice Way had been perfectly executed in all countries; and (ii) the fact that the Altice Way was not fully implemented by Altice Europe was not a material omission as to Altice USA. Dkt. 119 at 4–5.

Later that same day, Plaintiffs filed a hasty motion to modify the Court's order and request permission to file yet another amended complaint. Dkt. 121. Plaintiffs thereafter insisted that Altice USA produce additional discovery so that they could use that discovery in amending their complaint and asked Defendants for more time to draft and brief a motion for leave to amend. Although Altice USA had no obligation to provide further discovery in a dismissed case, they did so and also agreed to a schedule that allowed Plaintiffs the opportunity to review the discovery and file a new Motion with an amended complaint attached. Although Plaintiffs did not file the present motion to amend their complaint until September 4, 2020 (Dkt. 128), three weeks after

Defendants' production, ***none*** of the discovery that Altice USA provided was used in their proposed amendments.

ARGUMENT

I. Plaintiffs Offer No Justification To Modify The Court's Order

Plaintiffs studiously avoid characterizing their Motion as a motion to modify the Court's Order, but careful wording cannot disguise the true nature of the relief that they seek. Plaintiffs ask the Court to modify its Order to dismiss without prejudice so that they have leave to amend.[2] But Plaintiffs cannot meet the burden required to modify or set aside an Order under CPLR 5015.

To begin with, the Court has already dismissed the CAC with prejudice, and, accordingly, there is no complaint left before the Court to amend. *Tanner v. Stack*, 176 A.D.3d 429, 107 N.Y.S.3d 660 (1st Dep't 2019). Plaintiffs' Motion should therefore be denied on that basis alone.

In any event, Plaintiffs cannot satisfy the heavy burden imposed by CPLR 5015, which is presumably why they studiously avoid mention of the applicable rule and instead frame their motion as one seeking leave to amend. New York rules are clear and state that a court order should be modified only where a party can show "excusable default," "newly discovered evidence," or "fraud, misrepresentation, or other misconduct of an adverse party." CPLR 5015(a)(1)–(3).

Plaintiffs identify nothing of the sort in their Motion. Instead, they identify certain legal errors that they contend the Court made in its June 26 ruling, including the Court's holdings that statements in the Prospectus were inactionable puffery and that Altice USA was under no obligation to make disclosures regarding the performance of foreign subsidiaries. Mot. at 3. Plaintiffs' self-serving suggestion that the Court "erred" does not rise to the level of fraud, neglect,

[2] Plaintiffs' original motion was more forthcoming, as they acknowledged it was a motion to "modify" the Court's order, but they still never once discussed the applicable CPLR rule, 5015. Although Plaintiffs' present motion has dropped the explicit request for modification, both motions ultimately seek the same relief.

or misconduct, and does not justify modification of this Court's ruling. *See LaSalle Bank, N.A. v. Delice*, 175 A.D.3d 1283, 1284, 109 N.Y.S.3d 106 (2019) ("a court's inherent power to exercise control over its judgments is not plenary, and should be resorted to only to relieve a party from judgments taken through fraud, mistake, inadvertence, surprise or excusable neglect") (internal quotations removed). If Plaintiffs disagree with the Court's ruling, they may attempt an appeal, but one party's disagreement is no basis to set aside the Court's Order.

II. Leave To Amend Should Be Denied Because The Proposed Amendments Are Futile

Even if Plaintiffs' Motion could be treated as a motion for leave to amend, Plaintiffs' proposed amendments fall well short of CPLR 3025(b), which requires a plaintiff to "show[] the viability of [their] proposed claims, by alleging their elements in a proposed verified amended complaint or supporting them with other admissible evidence." *Pizarro v. Lignelli*, 2014 N.Y. Slip Op. 51560(U), at *3 (Sup. Ct. N.Y. Cty. Jan. 6, 2014). This is because "leave to amend should not be granted where the proposed [amendment] is totally without merit or 'palpably insufficient or clearly devoid of merit.'" *Swedin v. Russo*, 2018 WL 1596291, at *1 (Sup. Ct. N.Y. Cty. Mar. 28, 2018).

Plaintiffs' proposed amendments are palpably deficient. They do nothing to address the fatal deficiencies in the Complaint clearly laid out in the Court's June 26 Order, but rather attempt to persuade the Court that it "erred" in dismissing the claims. As discussed below, this is insufficient.

A. The Proposed Amendments Fail To Allege Misstatements Beyond Inactionable Corporate Optimism And Puffery

The CAC relied on the flawed premise that the offering documents' broad statements about the Altice Way amounted to actionable misstatements under the Securities Laws. CAC ¶¶ 67–72. The Court dismissed the CAC because "[t]he 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." Order at 4. "[T]he statements touting the Altice Way are generalized, not verifiable and thus are statements of opinion that are not actionable." *Id.* There is no merit to Plaintiffs' request to file an amended complaint as the Proposed Amendment relies on the exact same inactionable "misstatements." Rather than alleging new or different purported inaccuracies, and consistent with their desire to modify the Court's Order, Plaintiffs criticize the Court's Order as "failing to read the prior complaint's allegations in their totality and in context" (Mot. at 18) and recycle defective legal arguments from Plaintiffs' opposition to Defendants' motion to dismiss that the Court already has rejected. *Id.*; *see also* Dkt. 92 at ¶ 36.

In its Order, the Court explained that "plaintiffs do not challenge the specific information contained in the prospectus. Rather they challenge the benefits of a business model." Order at 4. The cases Plaintiffs relied on in their opposition briefing were "inapposite as they rely on concrete and measurable facts." *Id.* Yet, in their proposed amendments, Plaintiffs offer no "concrete and measurable facts" about the Altice Way. In fact, Paragraphs 60 through 70 of Exhibit A to the Motion, which Plaintiffs cite as providing "additional context" regarding the Altice Way (Mot. at 18), mention the Altice Way only *once* in passing and do not attempt to provide concrete or measurable facts regarding the challenged statements about this business model.

Plaintiffs instead purport to address these deficiencies by referring the Court to purported "scholars" that have opined that "investors routinely consider the benefits—*and detriments*—of a subsidiary's relationships with its parent in valuing the subsidiary's publicly traded shares." Mot. at 18–19; Mot. Ex. A ¶¶ 60–70. Despite Plaintiffs' argument that this "additional context" proves that Altice USA's statements "were at best actionable half-truths that were *likely* to mislead a reasonable investor," (Mot. at 18), generalized economic theory about the relationship between

parents and subsidiaries—which is hardly new information—is wholly irrelevant to the Court's finding that the alleged misstatements about the Altice Way were inactionable statements of corporate optimism and puffery.

B. The Proposed Amendments Fail To Address Deficiencies Related To Purported Trends At Certain Foreign Subsidiaries

Plaintiffs argue that the alleged misstatements and omissions concerning adverse events and trends in Altice N.V.'s European subsidiaries materially misled investors as to the value of Altice USA (Mot. at 10), despite the fact that this Court already found that the performance trends at subsidiaries of Altice Europe "do not directly affect the financial standing of a separate subsidiary" (Order at 5), and rejected Plaintiffs' Item 303 claims on that basis. On this motion, rather than address their flawed legal argument that Altice USA had an obligation to disclose information about the operations of these subsidiaries in France and Portugal, Plaintiffs double down on their theory and argue that the "Court's Order in this regard was error." Mot. at 10.

In particular, Plaintiffs propose to add references to the same supposed scholars and "expert analysis" that purportedly demonstrates that Altice USA's stock price changed in relation to Altice Europe's stock price. Mot. at 10–13; Mot. Ex. A ¶¶ 60–70. But high-level economic theory about the relationships between parents and subsidiaries cannot cure the defects in Plaintiffs' allegations, nor can data related to the stock price of Altice's parent. Plaintiffs fail to allege *any* new facts that would counter the Court's correct finding that the alleged trends experienced by Altice's European subsidiaries "do not *directly* affect the financial standing of a separate subsidiary [*i.e.*, Altice USA]," particularly where the prospectus did not include any information or statements regarding the financial performance of those subsidiaries. Order at 5 (emphasis added). These proposed amendments do nothing more than re-litigate Plaintiffs' old arguments that already have been rejected by the Court.

C. The Proposed Amendments Fail To Allege Facts Supporting The Argument That The Trends Were Occurring And Known At The Time Of The IPO

The Court held that Plaintiffs' trend claims fail for the additional reason that Plaintiffs did "not allege any facts that support the argument that the trends were already occurring at SFR and PT telecom . . . and were known at the time of the IPO" and because Altice USA was "not obligated to make such disclosures." Order at 5. Plaintiffs attempt to argue that the relevant trend occurred and was known before Altice USA's June 2017 IPO, but beyond conclusory statements that the trends were occurring in 2016 and that the Defendants must have known about these trends (Mot. at 14–15)—which were already present in the dismissed Complaint—Plaintiffs add nothing to substantiate their bare assertions. The most that Plaintiffs muster is a single statement made in November 2017 regarding a price increase at SFR and the generalized notion that several of the Defendants were "dual-hatted" with experience at both Altice Europe and Altice USA. *Id*. But the CAC already made plain that certain executives held roles at both Altice Europe and Altice USA (CAC ¶¶ 29–31, 37, 38.)

In any event, these claims do not address the Court's holding that "defendants were not obligated to make" the supposedly omitted disclosures. Order at 5. That is a separate and independent basis for dismissal that Plaintiffs' proposed amendments do nothing to correct.

D. The Proposed Amendments Fail To Address Deficiencies Involving Opinion Statements And Risk Factors

In dismissing the CAC, the Court also held that the alleged misstatements were not actionable because they "were prefaced with wording such as 'we believe' and 'we intend.'" Order at 5. The Order further held that these statements were independently inactionable because of the extensive risk factors contained in Altice USA's prospectus. *Id.* In lieu of new allegations that could cure these deficiencies, Plaintiffs' motion instead argues that the opinion doctrine and bespeaks caution doctrine do not apply because "non-disclosure of material adverse facts

concerning Altice Europe was actionable" and "the adverse events and trends at issue were both 'already occurring' and 'known to defendants.'" Mot. at 15. As explained in § II(C) above, conclusory allegations that there was a problem before 2017 and that someone must have known about it are palpably insufficient to address the deficiencies described in the Court's Order.

Plaintiffs argue that "the bespeaks caution doctrine applies ***only*** where the adverse events or circumstances that are the subject of an offering document's 'risk warnings' have ***not yet materialized*** as of the offering" (Mot. at 16) and that "the 'opinion doctrine' does not apply where the speaker is aware of material adverse facts that, if disclosed, would materially undermine the basis for the stated opinion." *Id.* But Plaintiffs simply reiterate their old arguments and allege no new facts suggesting that such adverse events were already happening or that Altice USA was aware of them. Plaintiffs completely ignore the fact that Altice Europe reported that "[a]ll major markets [were] progressing as expected" in the quarter preceding Altice USA's IPO (*See* Dkt. 83 at 2) and instead rely solely on conclusory statements that the alleged trends in France and Portugal were already occurring before the IPO. Mot. at 14–15.

Plaintiffs cannot amend the CAC to cure the defects that led the Court to grant Defendants' motion to dismiss with prejudice. The Court applied well-settled securities law that the statements on which Plaintiffs rely were not actionable, both because they were corporate puffery and optimism or were immaterial because they involved foreign subsidiaries, not Altice USA. Plaintiffs cannot change well-settled law on these points, and their conclusory amendments fail to cure these threshold pleading defects.

III. Permitting Plaintiffs To Amend Yet Again Would Prejudice Defendants

Plaintiffs could have included all the information that appears in their proposed amendments in their original complaint, but they chose not to do so. Plaintiffs also could have filed their proposed amended complaint in response to Defendants' Motion to Dismiss before the

Court ruled. But again, they chose not to do so. *See, e.g.*, *Ackerman v. Phillip Fleischer, Inc.*, 21 Misc.2d 590, 591 (Sup. Ct. Kings Cty. 1959) (denying motion to amend where "the pleader had full knowledge [of the facts he sought to add] when the pleading was first interposed," because permitting amendment now "would be prejudicial"); *see also Munoz-Feliciano v. Monroe-Woodbury Cen. School Dist.*, 2015 WL 1379702, at *14 (S.D.N.Y. Mar. 25, 2015) (denying leave to amend where the court "warned Plaintiff at the pre-motion conference that she would not be given another opportunity to amend," and defendants and the court have already "[wasted] time and resources dealing with a motion to dismiss"). Plaintiffs' lengthy delay in filing the amendments they now seek to include imposes substantial prejudice on Defendants and provides further grounds to deny their motion.

Plaintiffs assert that granting their motion to amend would not prejudice Defendants simply because they filed their first motion to modify the order promptly after the Court dismissed the CAC with prejudice. Mot. at 20. This ignores the time and cost that Defendants already devoted to moving to dismiss the CAC and the time that the Court devoted to ruling on that motion. Forcing Defendants to relitigate the *exact same arguments* over a year later would prejudice Defendants, impose a significant and unjustified financial burden on them, and would further be a poor use of judicial resources, given that the Court has already rejected identical arguments.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion should be denied.

Date: October 2, 2020

Respectfully submitted,

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WORD COUNT CERTIFICATION

I, K. Mallory Brennan, hereby certify that this memorandum contains 3,207 words.

Date: October 2, 2020

/s/ K. Mallory Brennan
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