

Kirkland v Wideopenwest, Inc.
2020 NY Slip Op 31529(U)
May 18, 2020
Supreme Court, New York County
Docket Number: Index No. 653248/2018
Judge: Andrea Masley
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREA MASLEY PART IAS MOTION 48EFM

Justice

-----X

INDEX NO. 653248/2018

JEFF KIRKLAND, ANTHONY FIORE, EMPLOYEES
RETIREMENT SYSTEM OF THE PUERTO RICO
ELECTRIC POWER AUTHORITY,

MOTION DATE _____

MOTION SEQ. NO. 001

Plaintiffs,

- v -

WIDEPENWEST, INC., STEVEN COCHRAN, RICHARD
FISH, DAVID BURGSTAHLER, BRIAN CASSIDY, DANIEL
KILPATRICK, JEFFREY MARCUS, PHIL SESKIN, JOSHUA
TAMAROFF, AVISTA CAPITAL PARTNERS, CRESTVIEW
PARTNERS, UBS SECURITIES LLC, CREDIT SUISSE
SECURITIES (USA) LLC, RBC CAPITAL MARKETS, LLC,
SUNTRUST ROBINSON HUMPHREY, INC., EVERCORE
GROUP L.L.C., MACQUARIE CAPITAL (USA) INC.,
LIONTREE ADVISORS LLC, RAYMOND JAMES &
ASSOCIATES, INC.,

**DECISION + ORDER ON
MOTION**

Defendants.

-----X

MASLEY, J.:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 40, 41, 42, 43, 44, 45, 46, 47, 48, 51, 52, 53, 54, 55, 56, 57, 58, 64, 65, 66

were read on this motion to/for DISMISS

In motion sequence number 001, defendants WideOpenWest, Inc. (WOW), Steven Cochran, Richard Fish, David Burgstahler, Brian Cassidy, Daniel Kilpatrick, Jeffrey Marcus, Phil Seskin, Joshua Tamaroff, Avista Capital Partners (Avista), Crestview Partners (Crestview), UBS Securities LLC (UBS), Credit Suisse Securities (USA) LLC (Credit Suisse), RBC Capital Markets LLC (RBC), Suntrust Robinson Humphrey Inc. (Suntrust), Evercore Group LLC (Evercore), Macquarie Capital (USA) Inc., (Macquarie), LionTree Advisors LLC (LionTree), and Raymond James & Associates, Inc. (RJA) move pursuant to CPLR 3211(a)(7) to dismiss the amended complaint of plaintiffs Jeff Kirkland, Anthony Fiore and Employees Retirement System of the Puerto Rico Electric Power Authority (ERS) and

other members of this class action.

Background

The following facts are alleged in the amended complaint unless noted otherwise and, for purposes of this motion, accepted as true. WOW is an internet service provider that provides high-speed data, cable television, voice-over IP-based telephony and business-class services. (NYSCEF Doc. No. [NYSCEF] 28, Amended Complaint ¶ 4.) As of December 31, 2016, WOW was the sixth largest cable operator in the United States ranked by number of consumers located in Alabama, Florida, Georgia, Illinois, Indiana, Maryland, Michigan, Ohio, South Carolina, and Tennessee. (*Id.* ¶ 4.) On May 25, 2017, WOW conducted an Initial Public Offering (IPO) of 20,970,589 shares of common stock at a price of \$17.00 per share for approximately \$365 million in total proceeds. (*Id.* ¶ 5.)

On May 19, 2017, WOW filed its IPO Registration Statement with the Securities Exchange Commission (SEC) which declared it effective on May 24, 2017. (*Id.* ¶¶ 2 n 2, 199.) The Registration Statement consisted of a Prospectus that WOW filed on May 25, 2017. (*Id.* ¶ 2 n 3.) The Registration Statement and Prospectus constitute the "Offering Materials". (*Id.* ¶ 2.) At the time of the IPO, defendants Cochran and Fish (collectively, Officer Defendants) served as WOW's Chief Executive Officer and Chief Financial Officer, respectively. (*Id.* ¶¶ 23, 24, 25.) Defendants Burgstahler, Cassidy, Kilpatrick, Marcus, Seskin, and Tamaroff (collectively with the Officer Defendants, Individual Defendants) were members of WOW's board of directors and signed the Registration Statement. (*Id.* ¶¶ 26-32.) Defendants UBS, Credit Suisse, RBC, SunTrust, Evercore, Macquarie, LionTree, and RJA (collectively, Underwriter Defendants) acted as underwriters. (*Id.* ¶¶ 47-56.) Defendants Avista and Crestview (together, Private Equity Defendants) are distinct private

equity firms that owned varying percentages of WOW common stock before and after the IPO. (*Id.* ¶¶ 34-41, 46.)

Plaintiffs allege that WOW, the Officer Defendants and the Underwriter Defendants “sold WOW stock to the plaintiffs.” (*Id.* ¶ 211.) Plaintiffs Kirkland and Fiore purchased WOW’s common stock “pursuant to or traceable to [WOW’s] IPO on May 25, 2017,” while ERS “purchased WOW common stock both pursuant to and traceable to the Offering Materials issued in connection with the ... IPO.” (*Id.* ¶¶ 1, 20.) On May 31, 2017, WOW announced the closing of the IPO. (*Id.* ¶ 5.)

Approximately two months later, WOW “announced that it would be selling a ‘portion’ of its Chicago fiber network (CFN) to a subsidiary of non-party Verizon for \$225 million in cash.” (*Id.* ¶ 11.) Plaintiffs allege that the announcement failed to disclose that WOW was selling all of its CFN. (*Id.*) When WOW issued “its financial results for the fourth quarter and full fiscal year ended December 31, 2017”, “the results revealed a shocking *decline* in 2017 in WOW’s total revenue of approximately 4% on a year-on-year basis compared to 2016.” (*Id.* ¶ 12.) WOW acknowledged that “over the course of 2017, we fell short in some of our key operating and financial metrics and have not lived up to our long-held reputation of providing exceptional customer experiences.” (*Id.*) WOW further disclosed that it would need “investments of between \$20 million and \$25 million ... in customer experience, customer acquisition and retention, products and services, and of course, our people.” (*Id.*) WOW also announced that it recorded a \$147.4 million impairment charge to its intangible assets and goodwill. (*Id.*)

On March 15, 2018, “WOW’s stock plunged more than 23%”, closing at \$7.04, which was “59% below the IPO price.” (*Id.* ¶ 13.) On May 11, 2018, WOW announced another impairment charge of \$256.4 million related to goodwill and the value of franchise operating

rights. (*Id.* ¶ 13 n 5.) Since then, “WOW’s common stock has continued to trade at depressed levels ... with the stock trading as low as \$6.25.” (*Id.* ¶ 14.)

Kirkland, Fiore and ERS commenced this class action, on behalf of themselves and all persons or entities who purchased WOW’s common stock, for violations of the Securities Act of 1933 (1933 Act). The claims include: (1) Kirkland, Fiore and ERS allege violations of Section 11 of the 1933 Act against all the defendants except the Private Equity Defendants; (2) ERS alleges violations of Section 12 (a) (2) against WOW, the Officer Defendants and the Underwriter Defendants; and (3) Kirkland, Fiore and ERS allege violations of Section 15 against the Private Equity Defendants and the Individual Defendants.

Discussion

On a motion to dismiss pursuant to CPLR 3211 (a) (7), the court must “accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994].) However, factual allegations “that consist of bare legal conclusions, as well as factual claims which are either inherently incredible or flatly contradicted by documentary evidence” cannot survive a motion to dismiss. (*Summit Solomon & Feldesman v Lacher*, 212 AD2d 487, 487 [1st Dept 1995] [citation omitted].)

A. Pleading 1933 Act Claims

The court rejects defendants’ assertion that plaintiffs here must satisfy the heightened standard for fraud claims under CPLR 3016 (b). According to the Second Circuit “[f]raud is not an element or a requisite of a claim under Section 11 or Section 12(a)(2); at the same time, claims under those sections may be-and often are-predicated on fraud.” (*Rombach v Chang*, 355 F3d 164, 171 [2d Cir 2004].) “So while a plaintiff need

allege no more than negligence to proceed under Section 11 and Section 12(a)(2), claims that do rely upon averments of fraud” in the federal courts “are subject to the test of Rule 9(b).” (*Id.*) Stated otherwise, “[n]either scienter, reliance, nor loss causation is an element of § 11 or § 12(a)(2) claims which—unless they are premised on allegations of fraud—need not satisfy the heightened particularity requirements of Rule 9(b) of the Federal Rules of Civil Procedure.” (*Panther Partners Inc. v Ikanos Communications, Inc.*, 681 F3d 114, 120 [2d Cir 2012] [citations omitted].) The court must determine whether plaintiff’s 1933 Act claims are fraud or negligence based. (*City of Pontiac Policemen’s & Firemen’s Retirement Sys. v USB AG*, 752 F3d 173, 183 [2d Cir 2014] [citation omitted].)

Here, plaintiffs’ 72-page amended complaint does not sound in fraud because plaintiffs do not assert a single allegation of scienter or reliance. The amended complaint is bereft of any allegation that defendants acted with knowledge of the Offering Material’s falsity. (*See Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009] [“The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages.”].)

Additionally, plaintiffs allege that “[f]or all claims stated herein, Plaintiffs expressly disclaim any allegation of fraud or intentional or reckless misconduct, and any intention for any allegation to suggest or ‘sound’ in fraud.” (NYSCEF 28, Amended Complaint ¶ 2.) Such disclaimers are credited when reviewing Section 11 claims. (*See Omnicare, Inc. v Laborers Dist. Council Const. Indus. Pension Fund*, 575 US 175, 186 [2015].) Accordingly, plaintiffs need not plead these claims with particularity because they sound in negligence. Dismissal on this ground is denied.

B. Pleading Confidential Witnesses or Sources

The court also rejects defendants' contention that plaintiffs' allegations based on confidential witnesses are deficient. On this motion, the court is "limited to determining whether the pleading states a cause of action, not whether there is evidentiary support to establish a meritorious [claim]." (*Major League Soccer, L.L.C. v. Fed. Ins. Co.*, 2014 WL 5431173, at *2 [Sup Ct, NY County 2014]; *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

Defendants rely on *Novak v Kasaks*, 216 F3d 300, 314 (2d Cir 2000) for the proposition that plaintiffs must allege facts "in the complaint with sufficient particularity to support the probability that a person in the position occupied by the source would possess the information alleged." However, *Novak* concerned securities fraud in violation of Sections 10 (b) and 20 (a) of the 1934 Act and Rule 10b-5, not violations of Sections 11 (a), 12 (a) (2), and 15 of the 1933 Act. (*Id.* at 303.) Accordingly, the Second Circuit articulated the above standard concerning confidential sources for the purposes of pleading scienter under Rule 9(b) of the Federal Rules of Civil Procedure and the 1934 Act. (*Id.* at 312-314.) Here, plaintiffs' claims are not based upon fraud or the 1934 Act; thus, the heightened pleading standard applied in *Novak* does not apply here.¹

Nonetheless, plaintiffs' allegations satisfy *Novak*. Courts applying the *Novak* standard evaluate "the level of detail provided by the confidential sources, the corroborative

¹ For the same reasons, defendants' reliance on *Matter of Citigroup Incorporated Securities Litigation*, 753 F Supp 2d 206, 245 (SD NY 2010), for the proposition that "[p]laintiffs cannot rely on assertions that the information presented by confidential witnesses was known or common knowledge within the company" is misplaced where that case also concerned securities fraud claims under the 1934 Act and not negligent or strict liability claims under the 1933 Act. (Accord *California Pub. Empl. Retirement Sys. v Chubb Corp.*, 394 F3d 126, 148 [3d Cir 2004] ["Plaintiffs reliance on confidential sources to supply the requisite particularity for their fraud claims thus assumes a heightened importance."].)

nature of the other facts alleged... the coherence and plausibility of the allegations, the number of sources, the reliability of the sources, and similar indicia." (*In re Philip Servs. Corp. Sec. Litig.*, 383 F Supp 2d 463, 478-80 [SDNY 2004] [citations omitted].) Here, plaintiffs allege that CW1 (senior customer service supervisor who reported to WOW's SVP for Customer Care), CW2 (13-year WOW veteran and customer retention supervisor), and CW3 (15-year employee and longtime senior customer service supervisor) are all identified by position and years of service, and were in positions to know about WOW's customer service problems, defective products, and deteriorating customer quality. (NYSCEF 28, Amended Complaint ¶¶ 74-75, 82, 129-31, 134-35, 135 n 18).

Accordingly, dismissal on this ground is denied.

C. Standing

Plaintiffs have standing to bring this action under Section 11 of the 1933 Act. The Second Circuit's "long-standing practice ... of permitting suit under § 11 by those who can 'trace' their shares to the allegedly defective registration statement" is instructive. (*DeMaria v Andersen*, 318 F3d 170, 176 [2d Cir 2003].) Effectively, buyers have standing under Section 11 if they "purchased a security issued under the registration statement at issue, rather than some other registration statement." (*Id.*, quoting *Joseph v Q.T. Wiles*, 223 F3d 1155, 1159 [10th Cir 2000].)

Here, plaintiffs allege that "they acquired WOW common stock pursuant or traceable to the Registration Statement used for the IPO" and that is sufficient at this juncture. (NYSCEF 28, Amended Complaint ¶ 205.) Defendants' argument that plaintiffs fail to plead facts indicating whether they purchased IPO or non-IPO shares is unavailing. Additionally, defendants' argument that tracing shares to the IPO is likely impossible is unpersuasive because "[w]hether the plaintiff can ultimately establish its allegations is not part of the

calculus in determining a motion to dismiss.” (*Nomura Home Equity Loan, Inc., Series 2006-FM2 v Nomura Credit & Capital, Inc.*, 30 NY3d 572, 601 [2017] [internal quotation marks and citations omitted].) Dismissal on this ground is denied.

ERS also has standing to bring this action under Section 12(a)(2) of the 1933 Act. “[T]o have standing under § 12(a)(2), ... plaintiffs must have purchased securities directly from the defendants.” (*Freidus v Barclays Bank PLC*, 734 F3d 132, 142 [2d Cir 2013] [citations omitted].) Indeed, Section 12 (a) (2) relief is only available for purchasers of securities in public offerings and does not apply to private transactions in the secondary market. (*Yung v Lee*, 432 F3d 142, 148-149 [2d Cir 2005], citing *Gustafson v Alloyd Co.*, 513 US 561, 571 [1995].)

Here, ERS alleges that “[it] purchased WOW common stock *both pursuant to and traceable to the Offering Materials issued in connection with the ... IPO.*” (NYSCEF 28, Amended Complaint ¶ 20 [emphasis added].) It further alleges that “[t]he Defendants ... owed Plaintiffs and the members of the Class, *who purchased WOW common stock pursuant to the Offering Material*, the duty to make a reasonable and diligent investigation.” (*Id.* at ¶ 214 [emphasis added].) ERS supplements the amended complaint with an affidavit which this “court may freely consider ... to remedy any defects in the complaint.” (*Leon*, 84 NY2d at 88.) The affiant states that “[t]he purchases on May 25, 2017 were *pursuant to the Registration Statement and Prospectus for the IPO.*” (NYSCEF 55, Hernandez Ramirez² aff. at ¶ 3 [emphasis added].)

ERS’s allegations, as supplemented, are sufficient. (*See Matter of PPDAl Group Sec. Litig. v XXX*, 66 Misc 3d 1226(A), *12 [Sup Ct, NY County 2020] [Plaintiffs’ allegation

² Maria Hernandez Ramirez is Acting Administrator of ERS. (NYSCEF 55, Hernandez Ramirez aff. at ¶ 1.)

“that they purchased shares ‘in connection with the IPO and pursuant and/or traceable to the Offering Materials’ is sufficient for standing.”]. Dismissal on this ground is denied.

D. Section 11

Section 11(a) of the 1933 Act provides “for a cause of action by the purchaser of the registered security against the security’s issuer, its underwriter, and certain other statutorily enumerated parties” such as “directors, experts, and signers of the registration statement.” (*Matter of Morgan Stanley Info. Fund Sec. Litig.*, 592 F3d 347, 358 [2d Cir 2010], citing 15 USC § 77k[a].) “To state a claim under section 11, the plaintiff must allege that: (1) she purchased a registered security, either directly from the issuer or in the aftermarket following the offering; (2) the defendant participated in the offering in a manner sufficient to give rise to liability under section 11; and (3) the registration statement ‘contained an untrue statement of a material fact, omitted to state a material fact required to be stated therein, or necessary to make the statements therein not misleading.’” (*Id.*)

“The statute is violated when material facts are omitted or presented in such a way as to obscure or distort their significance. The test ... [for] determining whether a prospectus is materially misleading is ‘whether defendants’ representations, taken together and in context, would have [misled] a reasonable investor.” (*Acacia Natl. Life Ins. Co. v Kay Jewelers*, 203 AD2d 40, 44 [1st Dept 1994] [internal quotation marks and citations omitted].) Indeed, “a prospectus must openly disclose material objective factual matters in a manner designed to accurately inform rather than mislead prospective buyers.” (*Id.*)

“Materiality is an inherently fact-specific finding that is satisfied when a plaintiff alleges a statement or omission that a reasonable investor would have considered significant in making investment decisions. There must be 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.”

(*Litwin v Blackstone Group, L.P.*, 634 F3d 706, 716-717 [2d Cir 2011] [internal quotation marks and citations omitted].) On a motion to dismiss, courts typically need not make a finding of materiality. An exception will be applied if the misstatements or omissions “are so obviously unimportant to a reasonable investor that reasonable minds could not differ on the question of their importance.” (*Id.* at 717 [citations omitted]; see also *Halperin v Ebanker Usa.com*, 295 F3d 352, 357 [2d Cir. 2002] [“Recognizing that the materiality of an omission is a mixed question of law and fact, courts often will not dismiss a securities fraud complaint at the pleading stage of the proceedings, unless reasonable minds could not differ on the importance of the omission”].)

Here, plaintiffs sufficiently allege the first and second elements of their Section 11 claim (NYSCEF 28, Amended Complaint ¶¶ 1, 23, 24, 25, 26, 27, 28, 29, 30, 31, 47, 48, 50, 51, 52, 53, 54, 55, 56, 199.)

Plaintiffs have sufficiently alleged the third element to the extent set forth below.

1. WOW's Customer Service

With regard to WOW's customer service, defendants challenge materiality arguing that reasonable investors would find these statements unimportant and classic puffery. “[G]eneral statements about reputation, integrity, and compliance with ethical norms are inactionable ‘puffery’ meaning that they are ‘too general to cause a reasonable investor to rely upon them.’” (*City of Pontiac Policemen's & Firemen's Retirement Sys. v USB AG*, 752 F3d at 183.) “The ‘puffery’ designation ... stems from the generic, indefinite nature of the statements at issue, not their scope.” (*Boca Raton Firefighters & Police Pension Fund v Bahash*, 506 F Appx 32, 37 [2d Cir 2012] [citation omitted].)

For instance, “generalizations regarding ... business practices” are inactionable puffery. (*ECA, Local 134 IBEW Joint Pension Trust of Chicago v JP Morgan Chase Co.*,

553 F3d 187, 206 [2d Cir 2009] [finding the statement “risk management processes that are highly disciplined and designed to preserve the integrity of the risk management process” was inactionable puffery].) Indeed, statements such as “[t]he integrity, reliability and credibility of S&P have enabled us to compete successfully in an increasingly global and complex market” or that a posted code of policies and procedures “underscores our own dedication towards [a] transparent and independent decision-making process” are inactionable puffery. (*Boca Raton Firefighters & Police Pension Fund*, 506 F Appx at 37.) Similarly, expressions of corporate optimism, “vague aspirational statements,” and “statements of policy and values” are inactionable. (*Altayyar v Etsy, Inc.*, 731 Fed Appx 35, 37 [2d Cir 2018] [citations omitted]; *Rombach*, 355 F3d at 174.) A “claim that these statements were knowingly and verifiably false when made does not cure their generality, which is what prevents them from rising to the level of materiality required for the basis for assessing a potential investment.” (*City of Pontiac Policemen’s & Firemen’s Retirement Sys.*, 752 F3d at 183.)

WOW’s statements at issue are: (1) “We have established an enduring record of delivering award winning customers service and satisfaction”; (2) “We compete strategically by adhering to our operating philosophy which is: “To deliver an employee and customer experience that lives up to our name”; (3) “we compete against other data service providers by offering high-quality HSD services and a differentiated customer service experience”; (4) “we have a proven track record of winning customers from other operators by providing superior HSD product offerings . . . and delivering strong customer service while leveraging our advanced network”; and (5) “we believe that our advanced network, competitive HSD products and emphasis on customer service will continue to be a strategic initiative” (NYSCEF 28, Amended Complaint ¶¶ 68-72.) WOW’s statements are generic and

indefinite in nature concerning matters of reputation, ethical norms, generalized business practices, corporate optimism, aspirational goals, policy and values and thus insufficient.

Even if there was a single allegation in the amended complaint that these statements were “knowingly and verifiably false when made”, of which there is not, it would not cure their generality. (*City of Pontiac Policemen’s & Firemen’s Retirement Sys.*, 752 F3d at 183.) These statements are so generalized that “no reasonable purchaser of [WOW] common stock would view statements such as these as meaningfully altering the mix of available information about the company.” (*Boca Raton Firefighters & Police Pension Fund*, 506 F Appx at 37.)

Plaintiffs rely on Item 303 of SEC Regulation S-K to sustain these insufficient claims. (NYSCEF 28, Amended Complaint ¶¶ 3, 202-203.) Based on Section 11 which not only forbids misrepresentations, but also omissions where their disclosure is required, plaintiffs assert that defendants failed to provide the adequate disclosures.

“Item 303 of Regulation S-K requires the disclosure of ‘any known trends ... the registrant reasonably expects will have a material ... impact on net sales or revenues or income. Disclosure is required where the trend is both (1) known to management and (2) ‘reasonably likely to have material effects on the registrant’s financial condition or results of operations.’”

(*Stadnick v Vivint Solar, Inc.*, 861 F3d 31, 39 [2d Cir 2017] [internal quotation marks and citations omitted].) The Second Circuit has stated that “[t]he plain language of Item 303 . . . requires the registrant’s actual knowledge of the relevant trend or uncertainty.” (*Indiana Pub. Ret. Sys. v. SAIC, Inc.*, 818 F3d 85, 95 [2d Cir 2016].) Failing to allege “defendant’s actual knowledge” is fatal. (*Medina v Tremor Video, Inc.*, 640 F Appx 45, 48 [2d Cir 2016].) “[I]t is not enough that [defendants] should have known of the existing trend, event or uncertainty.” (*Indiana Pub. Ret. Sys.*, 818 F 3d at 95.) Similarly, alleging “suppositions of

what defendants 'would have' known or were 'in a position to know'" is insufficient. (*Medina*, 640 F Appx at 48.)

"While it is true that Section 11 claims generally do not require pleading scienter, Item 303's requirement of knowledge requires that a plaintiff plead, with some specificity, facts establishing that the defendant had actual knowledge of the purported trend." (*Blackmoss Invs. Inc. v Aca Capital Holdings, Inc.*, 2010 WL 148617, *9, 2010 US Dist LEXIS 2899, *24 [SD NY 2010] [citations omitted].) In *Blackmoss Investments, Inc.*, the court explains that "omissions are only actionable under Sections 11 and 12(a)(2) where defendants had a legal obligation to disclose the allegedly omitted information" and "Item 303 specifies when information became subject to disclosure, i.e., when it becomes a known trend." (*Id.* at *10 [internal quotation marks and citations omitted].) Thus, "in order to state a claim arising from a violation of Item 303, sufficient factual allegations must be proffered to establish the requisite legal obligation." (*Id.*)

Here, plaintiffs fail to allege that defendants had "actual knowledge" of any trends or uncertainties concerning WOW's customer service. Therefore, plaintiffs fail to state a claim based on a failure to disclose, as required by Item 303, matters concerning WOW's customer service. Plaintiffs' allegations that the Individual Defendants and Underwriter Defendants "should have known of the material misstatements and omissions" (NYSCEF 28, Amended Complaint ¶¶ 200, 201), are insufficient to save this part of the claim.

Accordingly, this portion of the first cause of action fails to allege materiality grounds.

2. WOW's Technological Products Including Ultra DVR

Plaintiffs identify two allegedly "false, misleading and incomplete statements" in the Offering Materials concerning WOW's technological products, including its Ultra DVR. This first statement is that WOW "operate[s] in a highly competitive, consumer-driven, rapidly

changing environment” where WOW’s “success is, to a large extent, dependent on [its] ability to acquire, develop, adopt and exploit new and existing technologies to distinguish [its] services from those of [its] competitors.” (NYSCEF 28, Amended Complaint ¶ 88.) The statement is nonactionable puffery as it is “generic” and “indefinite” in nature.

The second statement provides that

“[i]n approximately 79% of our footprint, we also offer our ‘Ultra’ video product, which is a technologically advanced, Internet protocol (IP) enabled, whole-home DVR solution that integrates traditional linear video, an advanced user interface and direct access to OTT content³, such as Netflix and other applications.”

(*Id.* ¶ 87 [emphasis omitted].) This alleged false, misleading and incomplete

statement is not inactionable puffery as it is not generic and indefinite nature (*Boca Raton Firefighters & Police Pension Fund*, 506 F Appx at 37.)

Plaintiffs sufficiently allege that this statement is untrue by alleging that, despite WOW’s statement customers would have direct access to Netflix and other applications, “the only application that the Ultra DVR product supported at the time of the IPO was Netflix.” (NYSCEF 28, Amended Complaint ¶ 101.)

Further, plaintiffs also allege that this statement concerned material facts and omissions. (NYSCEF 28, Amended Complaint ¶ 198, 200-201.) In addition, plaintiffs also allege the Ultra DVR had been “problematic” since 2003, and at the time of the IPO, “it was clear that the product was in major trouble” and suffered from “fundamental design flaws”, causing large numbers of WOW’s customers to migrate to WOW’s competitors. (*Id.* at ¶¶ 91-93, 98.)

At this stage, plaintiffs’ allegations (*id.* at ¶¶ 89-103) sufficiently allege materiality.

³ As defined in the amended complaint, “[o]ver-the-top content’ or OTT, refers to audio, video, and other media content delivered over the Internet without the involvement of a multiple-system operator in the control or distribution of the content.” (NYSCEF 28, Amended Complaint ¶ 87 n 13.

Reasonable minds could differ on the importance of the alleged misrepresentations and omissions. (*Halperin v Ebanker Usa.com*, 295 F3d at 357.) Further, a trier of fact could find these omissions were “of substantial importance to investors.” (*Meyer v Jinkosolar Holdings Co., Ltd.*, 761 F3d 245, 252 [2d Cir 2014].) Thus, plaintiffs have stated a claim under Section 11 in regard to WOW’s technological products, including its Ultra DVR, as detailed above.

Plaintiffs’ attempt to invoke Item 303 for failing to provide adequate disclosures as to the technology is rejected, as discussed above, because the amended complaint is bereft of any allegation that management had actual knowledge.

3. WOW’s Customer Credit Quality and Credit Risk Management

Plaintiffs also allege materiality in connection with WOW’s customer quality and credit risk management. The relevant portion of the Offering Materials states that,

“[WOW’s] trade receivables are subject to credit risk, as customer deposits are generally not required. The Company’s credit risk is limited due to the large number of customers, individually small balances and short payment terms. We manage credit risk by screening applicants through the use of internal customer information, identification verification tools and credit bureau data. If a customer account is delinquent, various measures are used to collect amounts owed, including termination of the customer’s service.”

(NYSCEF 28, Amended Complaint ¶ 104.) The Prospectus further provides that “[WOW] manages credit risk by disconnecting services to customers who are delinquent, generally after sixty days of delinquency.” (*Id.* ¶ 106.)

Plaintiffs have sufficiently alleged that the statement “we manage credit risk by screening applicants through the use of internal customer information, identification verification tools and credit bureau data” omitted to state a material fact required or necessary to make the statement not misleading. Specifically, plaintiffs allege that “at the time of the IPO, it was WOW’s policy that only those customers in the southeastern region

of the United States (including Florida, South Carolina, Alabama and Georgia) were subject to credit checks.” (*Id.* ¶ 112.) However, under the policy certain customers were allegedly flagged “but totally ignored the other half of WOW’s customer base.” (*Id.*) Additionally, plaintiffs allege that WOW “made no efforts in WOW’s northern markets, outside of the Chicago market, to conduct fraud prevention screenings.” (*Id.* ¶ 113.) Allegedly, “certain supervisors knowingly approved new customers even if they had failed the fraud screening, so that supervisors could boost subscription numbers.” (*Id.*)

Plaintiffs sufficiently allege that the representations in the Offering Materials could “mislead a reasonable investor” under *Acacia*, 203 AD2d at 44; that reasonable minds could differ on the importance of these alleged misrepresentations under *Halperin*, 295 F3d at 357; and these alleged misrepresentations were “of substantial importance to investors” under *Meyer*, 761 F3d at 252.

These representations are not inactionable puffery, as defendants argue, because “screening applicants through the use of internal customer information, identification verification tools and credit bureau data” are not generic or indefinite but specific and definitive facts that could be material to an investor assessing an investment. (*Matter of Vivendi*, 838 F3d at 245.)

Additionally, as to the statement that “[WOW] manages credit risk by disconnecting services to customers who are delinquent, generally after sixty days of delinquency”, plaintiffs sufficiently allege an omission to state a material fact required or necessary to make the statement not misleading by alleging in contradiction to WOW’s statement that “prior to the IPO, [WOW] had a widespread problem with terminated customers who could continue to receive service even after the supposed cancellation of services.” (NSYCEF 28, Amended Complaint ¶¶ 106, 114.) Plaintiffs further allege that “it was ‘50/50’ whether

WOW's attempts to terminate such customers would actually be successful, because WOW's service offerings were not encrypted and could not be remotely disconnected, but instead required a physical disconnection of the customer." (*Id.* ¶ 115.)

Accordingly, plaintiffs sufficiently allege enough to show that WOW's representation that it managed credit risk by disconnecting delinquent customers generally after sixty days, but omitting that it could not actually stop providing its product to about half of its delinquent customers, could mislead a reasonable investor. (NYSCEF 28, Amended Complaint ¶ 198; *Acacia*, 203 AD2d at 44.) Again, plaintiffs' allegations satisfy *Halperin*, 295 F3d at 357, and *Meyer*, 761 F3d at 252. Thus, materiality is alleged as to these claims.

Similarly, the statement "disconnecting services to customers who are delinquent" is not puffery because it is not generic or indefinite but specific and definitive. (*Matter of Vivendi*, 838 F 3d at 245.) The court has considered the balance of defendants' arguments on the matter of WOW's customer quality and credit risk and finds that they do not alter the result here.

4. The Chicago Fiber Network

Plaintiffs also allege materiality in connection with WOW's CFN.

The Offering Materials state, "[w]e have also made significant investments in our fiber network in the Chicago area ... there is significant capacity on the network that we expect will support future growth. As a result, we believe there is considerable embedded value in this asset." (NYSCEF 28, Amended Complaint ¶ 122.) Plaintiffs allege that the CFN was a critical growth driver to WOW's "business service capabilities." (*Id.*) To this point, the Prospectus states, "[w]e believe that business services represent a substantial growth area for WOW! ... We believe that we have a significant market penetration growth opportunity in several of our markets ... and that our advanced network positions us to capitalize on the

substantial business services opportunity” and “[w]e estimate there is an approximately \$1.3 billion addressable revenue opportunity across our market.” (*Id.* ¶ 123.) Lastly, the Offering Materials provide,

“[o]ur future growth is partially dependent upon a business services strategy, which may or may not be successful. One of the elements of our growth strategy is to execute upon a meaningful expansion in the business services market. To accommodate this growth, we may commit significant capital investments to technology, equipment and personnel focused on our business services. *If we are unable to sufficiently build the necessary infrastructure and internal support functions to scale* and expand our customer base, the potential growth of business services would be limited ... We may not be able to successfully compete with ... competitors or be able to make the operational or financial investments necessary to successfully serve the targeted customer base.”

(*Id.* ¶ 126 [emphasis added].)

Plaintiffs allege that these statements were false and misleading because defendants did not disclose that the “‘risk’ of a significant decline in [WOW’s] ability to grow its Business Services segment had already materialized (or was imminent) at the time of the IPO; namely its decision to sell the [CFN].” (*Id.* ¶ 127.) The CFN was a project in which nonparty Verizon engaged WOW to build a fiber optic network in the Chicago area for the purpose of creating connectivity to the downtown Chicago business district. (*Id.* ¶ 128.) This contract was beneficial for WOW because Verizon would lease “no more than 48 strands at any given point, or just 11% of the 442 available in the cable.” (*Id.*) As a result, “WOW retained significant unleased capacity that it could monetize.” (*Id.* ¶ 130.) “[T]he profitability of the [CPN] ... hinged on [WOW’s] ability to sell the fiber not being used by Verizon to its own customers.” (*Id.* ¶ 140.) To achieve this end, WOW would begin trying to build its “Business Services” offerings through the use of the CPN. (*Id.* ¶ 142.) Nevertheless, any “delay in construction completion” of the CPN would cost WOW because the contract provided for heavy financial penalties under such circumstances, and if WOW fell behind

schedule to a certain degree, the contract provided for a triggered sale of the leased portions of the network to Verizon. (*Id.* ¶¶ 133, 134, 147.)

Plaintiffs allege that “by February 2017, it had become clear that Verizon would acquire the [CPN] because of WOW’s failure to meet its contract terms, and “by January 2017 WOW had completed just 186 of the 487 towers it was required to build under the contract, thereby exposing WOW to significant financial penalties going forward.” (*Id.* ¶ 145.) Accordingly, “by the spring of 2017 WOW’s senior management had already decided to try to sell [the CPN], even though WOW continued its work on constructing it.” (*Id.* ¶ 146.) That is, before the IPO, and allegedly “in April 2017 ... the [CPN] had been placed ‘on the block,’ and ... there were three potential acquirers (including Verizon)”. (*Id.* ¶ 146) Moreover, “WOW management understood” that Verizon’s forced sale option “would ultimately result in WOW losing not just the [CPN] because of the impracticality of seeking to divide and sell just the leased fibers, but also the parts of [WOW’s] fiber network that had been connected to the [CPN] ... to offset [WOW’s] construction progress failures.” (*Id.* ¶ 150.)

Plaintiffs allege that, in spite of the decision to try and sell the CPN and the understanding that it was effectively encumbered by the forced sale option held by Verizon and cost-overruns, defendants represented in the IPO that “there is significant capacity on the network that we expect will support future growth. As a result, we believe there is considerable embedded value in this asset.” (*Id.* ¶¶ 150, 122.)

“Congress adopted § 11 to ensure that issuers ‘tell[] the whole truth’ to investors. For that reason, literal accuracy is not enough; an issuer must as well desist from misleading investors by saying one thing and holding back another.” (*Omnicare, Inc.*, 575 US at 192.) Statements such as “‘we believe’ or ‘we think’ ... [are] magic words [that] can preface nearly

any conclusion, and the resulting statements ... remain perfectly capable of misleading investors." (*Id.* at 193.) A reasonable investor

"expects not just that the issuer believe the opinion (however irrationally) but that it fairly aligns with the information in the issuer's possession at the time. Thus, if a registration statement omits material facts about the issuer's inquiry into or knowledge concerning a statement of opinion, and if those facts conflict with what a reasonable investor would take from the statement itself, then § 11's omissions clause creates liability."

(*Id.* at 189.) Similarly, "a duty to disclose arises whenever secret information renders prior public statements materially misleading, not merely when that information completely negates the public statements." (*Matter of Time Warner Inc. Sec. Litig.* 9 F 3d 259, 268 [2d Cir 1993].) Even "[c]autious words about future risk cannot insulate from liability the failure to disclose that the risk has transpired." (*Rombach*, 355 F3d at 173.)

Here, plaintiffs sufficiently allege that defendants did not tell the whole truth to investors when they represented that there was significant capacity on the CPN that they expected would support future growth but omitted that they had decided to try and sell the CPN because of cost-overruns and that a forced sale of the CPN was looming. (*Omnicare, Inc.*, 575 US at 192; compare *Meyer*, 761 F3d at 251["the failure to disclose then ongoing and serious pollution violations would cause a reasonable investor to take an overly optimistic assessment of the risk."].)

Issuers cannot say one thing and hold back another. (*Omnicare, Inc.*, 575 US at 192.) Here, plaintiffs complain that defendants' failure to disclose -- its decision to sell, cost-overruns, and the looming forced sale -- conflict with what a reasonable investor would take from the statement "there is significant capacity on the network that we expect will support future growth." (*Id.*; NYSCEF 28, Amended Complaint ¶ 122.) The statement might be literally accurate, but when viewed against the omissions, literal accuracy is not enough

because a reasonable investor may well have understood that defendants intended to keep their non-distressed asset to generate growth. Indeed, there is a substantial likelihood that a reasonable investor would have viewed this omission as having significantly altered the total mix of available information because an internet service providers' statement that its fiber network will support future growth takes on a different meaning when that fiber network is connected to cost-overruns and the company has decided to sell it. (*Litwin*, 634 F3d at 717.) It cannot be said that the omissions are "so obviously unimportant to a reasonable investor that reasonable minds could not differ on the question of their importance." (*Id.*)

Prefacing the public statements with opinions such as "we believe" or "we expect" do not protect defendants' statements. (*Omnicare, Inc.*, 575 US at 192.) Moreover, the cautionary language used in the Offering Materials such as "[o]ur future growth is partially dependent upon a business services strategy, which may or may not be successful" cannot insulate defendants from liability because plaintiffs allege that "WOW failed to disclose that the risk ... had already materialized (or was imminent) at the time of the IPO; namely, the decision to sell the [CPN], which was a key to WOW's ability to expand its Business Services segment." (NYSCEF 28, Amended Complaint ¶¶ 126, 127; *Rombach*, 355 F3d at 173). Thus, materiality is alleged. (See *also* NYSCEF 28, Amended Complaint ¶ 198.)

5. WOW's Goodwill

Defendants object to the absence of a factual basis for plaintiffs' claims attacking the timing of WOW's assessment of goodwill. "Estimates of goodwill depend on management's determination of the 'fair value' of the assets acquired and liabilities assumed, which are not matters of objective fact." (*Fait v Regions Financial Corp.*, 655 F3d 105, 110 [2d Cir 2011] [citation omitted].) Rather, they are "subjective" statements of "opinion" because absent an

objective standard such as market price, “an estimate of the fair value of those assets will vary depending on the particular methodology and assumptions used.” (*Id.* at 110-111.)

Because statements concerning goodwill are statements of opinion, they are evaluated in accordance with the *Omnicare* standard. (See *Tongue v Sanofi*, 816 F3d 199, 209-210 [2d Cir 2016] [noting that *Omnicare* altered the standard for assessing opinion statements articulated by the Second Circuit in *Fait*].) Accordingly, “allegations that various statements concerning goodwill were false and misleading due to defendants’ failure to conduct timely interim impairment testing” may serve as the basis for a 1933 Act claim. (See *City of Omaha, Neb. Civilian Employees’ Retirement Sys. v CBS Corp.*, 679 F3d 64, 67-68 [2d Cir 2012]; *Fait v Regions Financial Corp.*, 655 F 3d 105.)

Plaintiffs rely on the section of the Prospectus that states,

“[w]e also, at least annually on October 1, evaluate our goodwill for impairment for each reporting unit (which generally are represented by geographical operations of cable systems managed by us), utilizing both quantitative and qualitative methods. Qualitative analysis is performed for franchise assets in the event the previous analysis indicates that there is a significant margin between carrying value of franchise operating rights and estimated fair value of those rights, and that it is more likely than not that the estimated fair value equals or exceeds carrying value. For our quantitative evaluation of our goodwill, we utilize both an income approach as well as a market approach. The income approach utilizes a discounted cash flow analysis to estimate the fair value of each reporting unit, while the market approach utilizes multiples derived from actual precedent transactions of similar businesses and market valuations of guideline public companies. In the event that the carrying amount exceeds the fair value, we would be required to estimate the fair value of the assets and liabilities of the reporting unit as if the unit was acquired in a business combination, thereby revaluing goodwill. Any excess of the carrying value of goodwill over the revalued goodwill would be expensed as an impairment loss. From a qualitative standpoint, we concluded that the goodwill of each reporting unit has not been impaired. From those reporting units where we performed a quantitative assessment, the percentages by which fair value exceeded carrying value are as follows:

Panama City, FL 38%
Montgomery, AL 18%
Huntsville, AL 19%
Dothan, AL 55%.”

(NYSCEE 28, Amended Complaint ¶ 151.)

Plaintiffs challenge: WOW's failure to conduct timely interim impairment testing after October 1, 2016, but before the IPO, in light of the "increasing credit risk due to the aggressive pursuit of new customers with little regard for their credit worthiness and limited ability to force collection because WOW lacked the ability to remotely terminate service to non-paying customers" (*Id.* ¶¶ 153-154); WOW's use of "outdated and problematic equipment which required increased customer service attention" (*Id.* ¶ 154); and that "[a]ll of these conditions, if properly considered, would have led [WOW] to conclude that it had to evaluate its goodwill for impairment before the next annual impairment testing date." (*Id.* ¶ 155.) In support of this claim, plaintiffs allege that WOW recognized a goodwill impairment in March and May of 2018 that represented more than 50% of its goodwill value disclosed in its Offering Materials. (*Id.* ¶ 157.)

WOW's "accounting policy was consistent with GAAP" and WOW "was required by GAAP and its own accounting policy to assess whether there were events or changes in the circumstances subsequent to the October 1, 2016 valuation date." (*Id.* ¶¶ 152-153.) To determine whether an event or a change in the circumstances would trigger an interim goodwill impairment test, plaintiffs allege that GAAP lists factors for consideration including: (1) "cost factors such as increases in raw materials, labor, or other costs that have a negative effect on earnings and cash flows" and (2) "other relevant entity-specific events such as changes in management, key personnel, strategy, or customers." (*Id.* ¶ 155.)

Here, the Prospectus clearly states that both the quantitative and qualitative methods use fair value estimates, and therefore, this portion of the Prospectus concerns statements of opinions. (*Fiat*, 655 F 3d at 110-111.) Under the *Omnicare* test the question is would a reasonable investor have expected not only that WOW believed its goodwill projections

(however irrationally) but that the goodwill projections fairly aligned with the information in WOW's possession at the time. (*Omnicare*, 575 US 175 at 189.)

Plaintiffs allege sufficient facts to state a claim that the goodwill projections here did not align with the information in WOW's possession concerning its credit practices, its ability to force collection from non-paying customers, and its products. Indeed, plaintiffs allege that these conditions would have led WOW to conclude that it needed to evaluate its goodwill for impairment before the next annual impairment testing date. Accordingly, plaintiffs sufficiently allege that the goodwill statement was misleading due to the defendants' failure to conduct timely interim impairment testing which passes the minimum threshold for materiality.

6. WOW's Valuation of Franchise Operation Rights

Likewise, defendants object to plaintiffs' claims arising from WOW's valuation of franchise operation rights. For this claim plaintiffs rely on the portion of the Prospectus that provides,

"[w]e evaluate the recoverability of our franchise operating rights at least annually on October 1, or more frequently whenever events or substantive changes in circumstances indicate that the assets might be impaired. Franchise operating rights are evaluated for impairment by comparing the carrying value of the intangible asset to its estimated fair value, utilizing both quantitative and qualitative methods. Qualitative analysis is performed for franchise assets in the event the previous analysis indicates that there is a significant margin between carrying value of franchise operating rights and estimated fair value of those rights, and that it is more likely than not that the estimated fair values equal or exceed carrying value. For franchise assets that undergo quantitative analysis, we calculate the fair value of franchise operating rights using the multi-period excess earnings method, an income approach, which calculates the value of an intangible asset by discounting its future cash flows. The fair value is determined based on estimated discrete discounted future cash flows attributable to each franchise operating right intangible asset using assumptions consistent with internal forecasts. Assumptions key in estimating fair value under this method include, but are not limited to, revenue and subscriber growth rates (less anticipated customer churn), operating expenditures, capital expenditures (including any build out), market share achieved, contributory asset charge rates, tax rates and discount rate. The discount rate used in the model represents a weighted average cost of capital and the perceived risk associated with an intangible asset such as our franchise operating rights. The estimates and assumptions made in our valuations are inherently subject to significant uncertainties, many of which are beyond our control, and there is no assurance that these results can be achieved. The

primary assumptions for which there is a reasonable possibility of the occurrence of a variation that would significantly affect the measurement value include the assumptions regarding revenue growth, programming expense growth rates, the amount and timing of capital expenditures and the discount rate utilized. From a qualitative standpoint, we do not believe that any of our material franchise operating rights is at risk of impairment. Quantitatively, the percentages by which fair value exceeded carrying value are as follows:

Panama City, FL 45%
Montgomery, AL 17%
Huntsville, AL 13%
Dothan, AL 18%."

(NYSCEF 28, Amended Complaint ¶ 158.)

This portion of the Prospectus also contains an opinion because of its consideration of fair value and explicit statements such as "[t]he estimates and assumptions made in our valuations are inherently subject to significant uncertainties, many of which are beyond our control, and there is no assurance that these results can be achieved." (*Id.*)

Plaintiffs allege that WOW "did not believe that any of its material franchise operating rights were at risk of impairment was false and misleading because it did not consider all relevant events and circumstances that could affect the significant inputs used to determine the fair value of [WOW's] franchise operating rights." (*Id.* ¶ 163.) These conditions included the increasing credit risk due to pursuing new customers with little regard for their credit worthiness, limited ability to force collection because WOW lacked the ability to effectively terminate service to non-paying customers, and the problematic equipment used. (*Id.* ¶ 161.) Plaintiffs allege that "all of these conditions, if properly considered, would have led [WOW] to conclude that it had to evaluate its franchise operating rights for impairment before the next impairment testing date." (*Id.* ¶ 162.) Indeed, "WOW finally recognized a \$14.1 million franchise operating rights impairment in its 2017 Annual Report filed with the SEC on Form 10-K on March 14, 2018, followed by an even larger \$143.2 million franchise operating rights impairment for the same reporting units in the Company's 1Q2018 quarterly

report filed with the SEC on Form 10-Q on May 11, 2018.” (*Id.* ¶ 164.) However, plaintiffs assert this was too late. For largely the same reasons discussed concerning WOW’s goodwill, a claim is stated.

7. WOW’s Bad Debt Expense and Allowance For Doubtful Accounts

Plaintiffs fail to allege that the Offering Materials contained an untrue statement of a material fact and omitted to state a material fact required to be stated, or necessary to make the statements not misleading in connection with WOW’s bad debt expenses. The bad debt portion of the first cause of action boils down to the following allegations: (1) “when told that WOW took only a \$4 million quarterly provision for doubt accounts for the first quarter of 2017 (the quarter just before the IPO), [Confidential Witness #1] said that “was not possible” (2) “there were no new events, conditions, or circumstances that occurred during the first quarter 2017 that would have enabled [WOW] to genuinely lower its bad debt expense” and (3) “[o]n December 31, 2016, WOW’s reported \$9.4 million allowance for doubtful amounts represented 9.7% of its gross accounts receivable; however, at the end of the first quarter 2017, the allowance for doubtful accounts dropped almost in half to \$5.0 million” which was an “illusion.” (NYSCEF 28, Amended Complaint ¶¶ 168, 171, 172.)

These allegations are insufficient to allege a misrepresentation for a 1933 Act claim because they are conclusory. At most, plaintiffs are asking the court to preserve this claim on the basis that the court should infer some sort of misconduct because WOW’s allowance for doubtful amounts dropped before the IPO which Confidential Witness #1 said was impossible. This inference is insufficient to satisfy the materiality requirement.

E. Section 12(a)(2)

Defendants also challenge ERS’s claim against WOW, the Officer Defendants and the Underwriter on materiality grounds under Section 12 (a) (2). “[T]he elements of a prima

facie claim under section 12(a)(2) are: (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 "included an untrue statement of a material fact or omit[ted] to state a material fact necessary in order to make the statements, in light of the circumstances under which they were made, not misleading." (*Matter of Morgan Stanley Info. Fund Sec. Litig.*, 592 F3d at 359.) "The definition of materiality is the same" for claims under Section 12(a)(2) and Section 11(a). (*Id.* at 360.) "The test for whether a statement is materially misleading under Section 12(a)(2) is identical to that under ... Section 11." (*Berger v Apple REIT Ten, Inc.*, 563 Fed Appx 81, 83 [2d Cir 2014].)

ERS alleges the third element to the extent that the other plaintiffs sufficiently alleged the third element of the Section 11 claim as previously discussed. That materiality discussion for the Section 11 claim is incorporated by reference here in its entirety. For those same reasons, ERS has stated a Section 12 (a) (2) claim.

F. Underwriter Defenses

The Underwriter Defendants assert a statutory defense of due diligence in connection with those portions of the amended complaint concerning misrepresentations of WOW's goodwill and valuation of the franchise operations rights. Defendants insist that there is no connection between WOW's 2018 impairment charges and the purported "adverse conditions" that plaintiffs claim required an earlier impairment charge. According to defendants, the court is compelled to dismiss these claims because plaintiff fail to raise red flags concerning goodwill and franchise operations rights. As discussed earlier, plaintiffs have alleged facts and misrepresentations that are tantamount of red flags. Moreover, "due diligence cannot be asserted as a basis for dismissal." (*Fed. Hous. Fin. Agency v UBS*

Ams., Inc., 858 F Supp 2d 306, 329 [SDNY 2012], *aff'd*, 712 F3d 136 [2d Cir 2013]).

Dismissal on these grounds is denied.

G. Section 15

"Liability may be imposed under § 15 of the 1933 Act on individuals who directly or indirectly exert control over a primary violator of the securities laws." (*Acacia Natl. Life Ins. Co.*, 203 AD2d at 45.) "To establish a claim, a plaintiff must allege facts that set forth a primary violation of the securities laws and a defendant's control person status." (*Id.*; compare *Fed. Hous. Finance Agency*, 873 F 3d at 99.) Control is "the power to direct or cause the direction of the management and policies of [the primary violators], whether through the ownership of voting securities, by contract, or otherwise." (*Matter of Lehman Bros. Mortgage-Backed Sec. Litig.*, 650 F3d 167, 185 [2d Cir 2011].) "To survive a motion to dismiss, a plaintiff need only plead facts supporting a reasonable inference of control." (*Matter of Asia Pulp & Paper Securities Litigation*, 293, F Supp 2d 391, 396 [SD NY 2003] [internal quotation marks and citation omitted].)

Plaintiffs allege that Avista held 56.9% of WOW's common stock before the IPO and Crestview held 37.3% of WOW's common stock before the IPO. (NYSCEF 28, Amended Complaint ¶¶ 34, 37.) Plaintiffs further allege that these Private Equity Defendants "were control persons of ... WOW by virtue of their majority stock ownership in [WOW] and majority designee control over the Board." (NYSCEF 28, Amended Complaint ¶ 221.)

Plaintiffs' allegations of control are conclusory as to Crestview, a 37.3% minority shareholder. (*Matter of Global Crossing, Ltd. Sec. Litig.*, 2005 WL 1907005, *12, 2005 US Dist LEXIS 16228, *38-39 [SD NY 2005] [stating "[c]onclusory allegations of control are insufficient as a matter of law ... Neither is status as a minority shareholder sufficient 'by itself to infer control.'"]). Plaintiffs cannot save their claim against the minority shareholder

Crestview using a collective control theory, because they fail to allege any sort of “collective control” or agreements with other shareholders to create a “collective control.” (*Cf. McKenna v Smart Tech. Inc.*, 2012 WL 1131935 [SD NY 2012].) Asserting in opposition that the Prospectus refers to WOW as a controlled company under the applicable stock exchange corporate governance standards without articulating why that is meaningful for a Section 15 analysis is insufficient.

As to Avista, plaintiffs allege that Avista held a majority of WOW’s stock prior to the IPO (56.9%), had the right to designate three directors to WOW’s board, earned “an annual management fee of approximately \$1,500,000 plus expenses to Avista ‘to provide certain advisory and consulting services’” and had the ability to control WOW’s decisions (NYSCEF 28, Amended Complaint ¶¶ 34, 43, 42, 46.) These allegations support a reasonable inference of control. (*Matter of Prestige Brand Holdings, Inc. Securities Litigation*, 2006 WL 6900987, *2 [SD NY 2006].)

The portion of the claim providing that the “Individual Defendants each were control persons of WOW by virtue of their positions as directors or senior officers of WOW” is sufficient because they signed the Registration Statement. (*Matter of BioScrip, Inc., Sec. Litig.*, 95 F Supp 3d 711 [SD NY 2015] “[C]orporate officers usually are presumed to possess the ability to control the actions of their employees and directors and officers who sign registration statements or other SEC filings are presumed to control those who draft those documents.”) [internal quotation marks and citation omitted].)

The court has considered the parties’ remaining arguments and finds them unavailing without merit or otherwise not requiring an alternate result.

Accordingly, it is

ORDERED that the defendants' motion to dismiss is granted to the extent that the complaint is dismissed in its entirety as against Crestview Partners, with costs and disbursements of this defendant as taxed by the County Clerk; and it is further

ORDERED that the action is severed and continued against the remaining defendants in accordance with this decision; and it is further

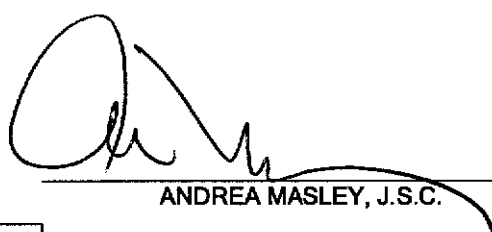
ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving parties shall serve a copy of this order with notice of entry upon the County Clerk and the Clerk of the General Clerk's Office, in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases, who are directed to mark the court's records to reflect the change in the caption herein; and it further

ORDERED that the remaining defendants answer the amended complaint within 20 days of this Decision and Order's entry onto NYSCEF by the court; and it is further

ORDERED that plaintiffs and the remaining defendants meet and confer and submit a proposed preliminary conference order to the court via email (SFC-Part48@nycourts.gov) 20 days after defendants' answer is filed.

5/18/2020
DATE


ANDREA MASLEY, J.S.C.

CHECK ONE:

- CASE DISPOSED
- GRANTED DENIED
- SETTLE ORDER
- INCLUDES TRANSFER/REASSIGN

- NON-FINAL DISPOSITION
- GRANTED IN PART OTHER
- SUBMIT ORDER
- FIDUCIARY APPOINTMENT REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: