UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LILIAN LAU and LEON M. BROWN,

Plaintiffs,

- against -

OPERA LIMTIED, ET AL.,

Defendants.

20-cv-674 (JGK)

MEMORANDUM OPINION AND ORDER

JOHN G. KOELTL, District Judge:

The plaintiffs, Lilian Lau and Leon M. Brown, bring this putative class action against Opera Limited ("Opera"), its individual directors, and the financial institutions that underwrote Opera's Initial Public Offering ("IPO") for alleged material misstatements and omissions. The plaintiffs bring claims for violations of: (1) Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. § 78j(b) and Rule 10b-5, 17 C.F.R. § 240.10b-5; (2) Section 11 of the Securities Act of 1933 (the "Securities Act"), 15 U.S.C. § 77k; (3) Section 15 of the Securities Act, 15 U.S.C. § 77o; and (4) Section 20(a) of the Exchange Act, 15 U.S.C. § 78t. The alleged misstatements and omissions concern Opera's market share with respect to web browser services and its entry into the financial technology ("fintech") market. The defendants move to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). For the following reasons, the motion to dismiss is **granted**.

I.

The following facts are drawn from allegations in the Amended Complaint and are accepted as true for purposes of this motion to dismiss.

Opera is a limited liability holding company headquartered in Norway and incorporated in the Cayman Islands. Am. Compl. ¶¶ 7, 48. Defendant Yahui Zhou ("Y. Zhou") is the Chairman of the Board and the Chief Executive Officer ("CEO") of Opera. Am. Compl. ¶ 49. Defendant Hongyi Zhou ("H. Zhou"), not related to Y. Zhou, was a Director of Opera at the time of the IPO and signed or authorized the signing of the Registration Statement filed with the Securities and Exchange Commission (the "SEC"). Am. Compl. ¶ 51. Defendant Frode Jacobsen has served as Opera's Chief Financial Officer during all relevant times. Am. Compl. ¶ 50. Defendant Han Fang served as a Director of Opera at the time of Opera's IPO. Am. Compl. ¶ 52. Defendants Lori Wheeler Naess and Trond Riiber Knudsen were Directors of Opera at the time of the IPO. Am. Compl. ¶¶ 53-54. Derrick Nueman was Opera's Vice President and head of Investor Relations since March 11, 2019. Am. Compl. ¶ 113. Lin Song was Opera's Chief Operating Officer at all relevant times. Am. Compl. ¶ 112. Defendants China International Capital Corporation Hong Kong Securities Limited, Citigroup Global Markets Inc., and Carnegie AS are investment banks that underwrote the IPO, helped draft

and disseminate the Registration Statement and Prospectus to the IPO (together, the "Offering Documents"), and shared more than $9 million in underwriting fees. Am. Compl. ¶ 57. The plaintiffs are Opera investors who purchased American Depository Shares ("ADSs") of Opera. Am. Compl. ¶ 47.

On August 9, 2018, Opera completed its IPO. Am. Compl. ¶ 10. The Registration Statement and Prospectus for the IPO were submitted to the SEC in June and July 2018 respectively. Am. Compl. ¶¶ 8-9. In its IPO, Opera issued 9.6 million ADSs priced at $12.00 per share, raising approximately $115.2 million. Am. Compl. ¶ 10.

According to its Prospectus, Opera was "one of the world's leading browser providers." Am. Compl. ¶ 11. The Prospectus provided that the number of its browser users, in terms of monthly active users ("MAUs"), had been increasing year after year. Am. Compl. ¶ 12. Specifically, the Prospectus stated:

> Our mobile browsers, with a global user base of 264.3 million average MAUs in the three months ended March 31, 2018, of which 182.0 million were smartphone users, compared to 160.0 million smartphone users in the same period in 2017, are among the market leaders in high growth regions such as South Asia, Southeast Asia and Africa in terms of market share, according to StatCounter.

Am. Compl. ¶ 60. The Prospectus also stated:

> Our smartphone user base followed a positive growth trend across 2016, 2017 and the three months ended March 31, 2018, adding 40.7 million MAUs over the period with

> seasonally highest growth in the third and fourth quarters.

Id. (together, the "IPO Prospectus Market Share Statements").

The plaintiffs allege that various fillings and statements that Opera made were misleading because they failed to state that Opera's market share was decreasing. According to StatCounter, an independent web analytics company, in August 2015, Opera's user base represented 6.57% of the worldwide market, but at the time of the IPO, Opera's worldwide market share was 3.46%. Am. Compl. ¶ 14. StatCounter reported that between August 2015 and July 2018, Opera's Africa market share declined from approximately 40% to about 15.37%. Am. Compl. ¶ 16. Likewise, StatCounter reported that between August 2015 and July 2018, Opera's Asia market share dropped from 8.12% to 4.11%. Am. Compl. ¶ 18.

According to the Prospectus, about 53% of Opera's overall revenue came from browser revenue. Am. Compl. ¶ 20. The Prospectus also noted that the market for internet and mobile users, including where Opera competed in Southeast Asia, South Asia, and Africa, was expected to experience substantial growth. Hood Decl. Ex. B, Prospectus at 87. Opera's reported revenue increased over the relevant period. From 2018 to 2019, Opera's overall revenue increased from about $172 million to about $335 million, and its revenue from its "Browser & News" business

increased from about $138 million to about $155 million. Hood Decl. Ex. I, Press Release at 1, 9. From 2018 to 2019, Opera also experienced about a 65% increase in net income. Hood Decl. Ex. J, 2019 Annual Report at 49, 54.

Opera stated in its 2018 Annual Report, published on April 17, 2019, as follows:

> Our mobile browsers, with a global user base of 326.7 million average MAUs in 2018, of which 192.6 million were smartphone users, compared to 168.1 million smartphone users in 2017, are among the market leaders in high growth regions such as South Asia, Southeast Asia and Africa in terms of market share, according to StatCounter. Our PC browsers, available for both Windows and macOS platforms, also had a substantial user base of 58.5 million average MAUs in 2018, compared to 48.1 million in 2017.

and

> Our smartphone browser user base followed a positive growth trend across 2016, 2017 and 2018, adding 47.2 million MAUs over that period with seasonally highest growth in the third and fourth quarters. As we oriented our marketing and distribution efforts around the new dedicated Opera News app during 2018, our overall smartphone user base grew faster than the browser subset, adding a total of 27.6 million in 2018 alone.

Am. Compl. ¶ 138 (together, the "2018 Annual Report Market Share Statements").

In addition to allegedly misleading statements regarding market share, the plaintiffs allege that the defendants omitted from its Offering Documents material information concerning Opera's entry into the fintech market. The plaintiffs allege that prior to the IPO, Opera began shifting its focus to fintech

operations in developing countries, but failed to disclose this shift in the Offering Documents. Am. Compl. ¶ 21. On November 1, 2017, Opera entered into a services agreement with Opay Digital Services Limited (HK) ("Opay"). Am. Compl. ¶ 22. Opay was an online payment service provider operating in Africa and controlled by Y. Zhou, the CEO of Opera. Id. As of December 31, 2017, Opera had a 19.9% ownership share of Opay. Id. Beginning on March 12, 2018, Opay launched a microlending app in Kenya called OKash. Am. Compl. ¶ 23. As of March 31, 2018, Opera had 410 full-time employees, 51 of whom did work for Opay pursuant to a services agreement between Opera and Opay. Am. Compl. ¶ 24. On December 19, 2018, Opera acquired OKash from Opay. Am. Compl. ¶ 23. As of December 31, 2018, Opera employed 464 full-time employees, 89 of whom were dedicated to Opera's microlending programs. Am. Compl. ¶ 26. In 2018, Opera derived 1.0% of its total revenue from its fintech operations, and by 2019, Opera derived 38.3% of its total revenue from its fintech operations. Am. Compl. ¶ 27. The plaintiffs allege that as of the date of the IPO, Opera was already focused on developing its microlending operations into a significant source of revenue. Am. Compl. ¶ 71. In the Prospectus, the defendants disclosed that Opera held a 19.9% ownership interest in Opay, had provided certain loans to Opay, and that in 2017 and 2018, Opera entered into an agreement with Opay to provide it professional services.

Hood Decl. Ex B, Prospectus at 116, F-48; see also Hood Decl. Ex. A, Registration Statement at Exhibit 10.7.

Specifically, Opera's Prospectus made the following disclosure regarding Opay:

> Opay Digital Services Limited (HK), or Opay, is our equity investee which our chief executive officer and chairman controls through Balder Investment Inc., where certain of our other officers also have financial interests but no voting rights. Opay is an online payment service provider targeting African users. In 2017, we provided a loan of US$5.6 million to Opay in relation to its business expansion in Nigeria. In 2018, we provided a loan of US$0.4 million to Opay in relation to its business expansion in Kenya. Both loans are interest-free for the first 60 days and are due and payable upon notice. We also provided professional services to Opay and recorded operating revenue of US$2.8 million in 2017. As of March 31, 2018, we had US$5.5 million of trade receivable and US$1.0 million loan receivable, due from Opay. Our investment in and relevant transactions with Opay are in line with our business growth strategy and we expect to continue investing in Opay as its business develops.

Am. Compl. ¶ 76 (the "IPO Prospectus Opay Statement").

Opera's microlending, primarily OKash, was conducted through apps available for download on Google Play and other platforms. Am. Compl. ¶ 29. As of December 2019, Google's Android platform held over 84% of the market share for app platforms in Kenya, over 94% market share in India, and over 79% of the market share in Nigeria, which were the three geographic regions where Opera operated its microlending businesses. Id. Since 2011, Google Play has implemented certain policies prohibiting predatory lending practices for apps using its

Android platform. Am. Compl. ¶ 30. In July 2016, Google Play banned ads for payday loans "where repayment is due within 60 days of the date of issue." Am. Compl. ¶ 31. On August 21, 2019, Google Play banned short-term loan apps. Am. Compl. ¶ 32. The plaintiffs allege that Opera continued to operate its microlending apps in violation of Google Play's policy, but failed to disclose that fact. Am. Compl. ¶ 36.

On September 20, 2019, Opera completed a Secondary Public Offering ("SPO"). Am. Compl. ¶ 140. In the Prospectus to the SPO, Opera disclosed its entry into the fintech business through its acquisition of OKash. Hood Decl. Ex. F, SPO Prospectus Supplement, at S-20. Opera also disclosed generic risk factors associated with its entry into the fintech business, including credit risks, the risk of payment collection, new and evolving regulatory regimes, and others. Id. at S-26. Moreover, Opera made the following statement regarding market share:

> We have a massive user base of over 350 million monthly active users in the quarter ended June 30, 2019 that we believe provides us with the scale and global reach necessary to capitalize on market opportunities and expand our offerings. Our global smartphone user base was 227 million MAUs, on average, in the quarter ended June 30, 2019, compared to 182 million MAUs in the second quarter of 2018. Our mobile browser user base reached 256 million average MAU in 2018, of which 181 million were smartphone users. Opera is among the market leaders in high growth mobile-first regions such as Africa and Asia in terms of market share, according to web traffic analyst StatCounter. Our PC products also had a substantial user base of 65 million average MAUs in the

> quarter ended June 30, 2019, compared to 57 million in the second quarter of 2018.

Am. Compl. ¶ 141 (the "SPO Prospectus Market Share Statement").

The defendants also disclosed its entry into the fintech business in the SPO Prospectus. Specifically, the SPO Prospectus stated:

> [W]e entered the fintech business with the acquisition of OKash. . . . [A]dding new products and services subjects us to additional competition and new competitors."

Hood Decl., Ex. F, SPO Prospectus Supplement, at S-20 (the "SPO Prospectus Fintech Statement").

On December 9, 2019, Opera participated in the UBS Global TMT Conference. Am. Compl. ¶ 145. On that call, Derrick Nueman, Opera's Vice President and head of Investor Relations, made the following statement concerning market growth:

> Unidentified Analyst:
>
> Yes, yes. No, that makes sense. Well, look, you've touched on the supply of the platform. Give us a sense of the health of the user base. What is the type of user base? What are they looking for? And I imagine that it's going to be pretty different between different parts of the world.
>
> Derrick L. Nueman - Opera Limited - VP of IR:
>
> Very, very different on geographies. Our overall user base grew 10% year-over-year in Q3, and that was driven by growth across all products. I mean, news was the fastest-growing product. But as I said earlier, browser grew as well. Seeing growth in all regions. Europe tends to be a higher-end consumer, somebody who's pretty tech-savvy, who opt into our browser again because they wanted privacy and security or they like our gaming browser.

> . . .
> I mean, look, Africa by far is our best region. Our brand is everywhere. We have big market share in some of these countries. Like a place, for example, like Nigeria, we have close to 50% browser market share. We have multiple products, you see Opera everywhere. And many Internet users haven't used anything other than Opera. They view Opera as the Internet. Versus in Europe, we have a ton of users, but there's also a ton of Google users, a ton of Facebook users. And our brand isn't as strong, but we still have opportunities. And a place like Asia is super competitive. And we tend to say we're going to compete more organically versus, say, marketing and distribution.

Am. Compl. ¶ 146.

Opera also participated in the Needham Growth Conference, on January 15, 2020, during which Nueman made the following statement:

> I want to go back here to some of the stats that I referenced earlier. You can see that we've grown both on mobile and PC. Interesting enough, mobile, we're very strong in emerging markets, Africa and Asia. And PC, we're very strong in Europe. Obviously, in a place like Africa and Asia, there aren't a lot of PC users given some of the bandwidth constraints. We have very good brand awareness in a couple of key markets in Africa. As an example, in Nigeria, we have close to 50% market share. And that's important as we launch new products.

Am. Compl. ¶¶ 149-50 (together with the December 9, 2019 statements, the "Analyst Calls Market Share Statements").

On January 16, 2020, Hindenburg Research, a research firm that publishes reports regarding publicly-traded companies, published a report concluding that Opera's browser market share was declining, and that Opera was involved in predatory short-term loans in Africa and India, deploying deceptive tactics,

charging interest rates between 365% and 876%. Am. Compl. ¶ 37. The report also asserted that the apps were in violation of Google Play's terms and conditions. Id. According to the Report, by January 2020, Opera's browser market share was down about 30% since its IPO. Am. Compl. ¶ 38. The day before the Hindenburg report was published, on January 15, 2020, Opera's ADS closing price was $9.02 per ADS. Am. Compl. ¶ 42. The day of the report, at the close of January 16, 2020, the price fell to $7.33, and at the close of January 17, 2020, the price fell to $7.06. Id.

II.

In deciding a motion to dismiss pursuant to Rule 12(b)(6), the allegations in the complaint are accepted as true, and all reasonable inferences must be drawn in the plaintiffs' favor. McCarthy v. Dun & Bradstreet Corp., 482 F.3d 184, 191 (2d Cir. 2007).[1] The Court's function on a motion to dismiss is "not to weigh the evidence that might be presented at a trial but merely to determine whether the complaint itself is legally sufficient." Goldman v. Belden, 754 F.2d 1059, 1067 (2d Cir. 1985). The Court should not dismiss the complaint if the plaintiffs have stated "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550

[1] Unless otherwise noted, this Memorandum Opinion and Order omits all alterations, citations, footnotes, emphasis, and internal quotation marks in quoted text.

U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

A claim under Section 10(b) of the Exchange Act sounds in fraud and must meet the pleading requirements of Rule 9(b) of the Federal Rules of Civil Procedure and of the Private Securities Litigation Reform Act ("PSLRA"), 15 U.S.C. § 78u-4(b). A securities fraud complaint based on misstatements must "(1) specify the statements that the plaintiff[s] contend[ ] were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." ATSI Commc'ns, Inc. v. Shaar Fund, Ltd., 493 F.3d 87, 99 (2d Cir. 2007). The PSLRA similarly requires that the complaint "specify each statement alleged to have been misleading [and] the reason or reasons why the statement is misleading," and it adds the requirement that "if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed." 15 U.S.C. § 78u-4(b)(1); ATSI, 493 F.3d at 99.

While the Court should construe the factual allegations in the light most favorable to the plaintiffs, "the tenet that a

court must accept as true all of the allegations contained in the complaint is inapplicable to legal conclusions." Iqbal, 556 U.S. at 678. When presented with a motion to dismiss pursuant to Rule 12(b)(6), the Court may consider documents that are referenced in the complaint, documents that the plaintiffs relied on in bringing suit and that are either in the plaintiffs' possession or that the plaintiffs knew of when bringing suit, or matters of which judicial notice may be taken. See Chambers v. Time Warner, Inc., 282 F.3d 147, 153 (2d Cir. 2002). The Court can take judicial notice of public disclosure documents that must be filed with the SEC and documents that both "bear on the adequacy" of SEC disclosures and are "public disclosure documents required by law." Kramer v. Time Warner, Inc., 937 F.2d 767, 773-74 (2d Cir. 1991); see also Plumbers & Pipefitters Nat'l Pension Fund v. Orthofix Int'l N.V., 89 F. Supp. 3d 602, 607-08 (S.D.N.Y. 2015); Silsby v. Icahn, 17 F. Supp.3d 348, 353-54 (S.D.N.Y. 2014), aff'd sub nom., Lucas v. Icahn, 616 F. App'x 448 (2d Cir. 2015).

III.

The plaintiffs bring claims for violations of: (1) Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b) and Rule 10b-5, 17 C.F.R. § 240.10b-5; (2) Section 11 of the Securities Act, 15 U.S.C. § 77k; (3) Section 15 of the Securities Act, 15 U.S.C.

§ 77o; and (4) Section 20(a) of the Exchange Act, 15 U.S.C. § 78t.

A. Alleged Misstatements and Omissions

Claims brought pursuant to Section 11 of the Securities Act and Section 10(b) of the Exchange Act require the plaintiff to plead a material misstatement or omission. See In re Morgan Stanley Info. Fund Sec. Litig., 592 F.3d 347, 360 (2d Cir. 2010); Lattanzio v. Deloitte & Touche LLP, 476 F.3d 147, 153 (2d Cir. 2007). A misrepresentation or omission is material if there is a substantial likelihood that a reasonably prudent investor would consider it important in making a decision. See Basic Inc. v. Levinson, 485 U.S. 224, 231 (1988); TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976) ("[T]here 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."); Feinman v. Dean Witter Reynolds, Inc., 84 F.3d 539, 540-41 (2d Cir. 1996).

Generally, materiality is a mixed question of law and fact ordinarily left to the finder of fact to determine. TSC, 426 U.S. at 450. The question of materiality may be decided as a matter of law on a motion to dismiss if the alleged misstatement or omission is "so obviously unimportant to a reasonable investor that reasonable minds could not differ on the question

of [its] importance." Feinman, 84 F.3d at 540-41. "The central inquiry in determining whether a prospectus is materially misleading . . . is therefore whether defendants' misrepresentations, taken together and in context, would have [misled] a reasonable investor about the nature of the investment." I. Meyer Pincus & Assocs., P.C. v. Oppenheimer & Co., 936 F.2d 759, 761 (2d Cir. 1991).

"A[n] omission is actionable under federal securities laws only when the [defendant] is subject to a duty to disclose the omitted facts." In re Time Warner Inc. Sec. Litig., 9 F.3d 259, 267 (2d Cir. 1993). While in some circumstances, parties have no duty to disclose information, once a party chooses to speak, it has a "duty to be both accurate and complete." Caiola v. Citibank, N.A., 295 F.3d 312, 331 (2d Cir. 2002). "[A]n entirely truthful statement may provide a basis for liability if material omissions related to the content of the statement make it . . . materially misleading." In re Bristol Myers Squibb Co. Sec. Litig., 586 F. Supp. 2d 148, 160 (S.D.N.Y. 2008); see also City of Roseville Employees' Ret. Sys. v. EnergySolutions, Inc., 814 F. Supp. 2d 395, 410 (S.D.N.Y. 2011). However, corporations are "not required to disclose a fact merely because a reasonable investor would very much like to know that fact." In re Time Warner, 9 F.3d at 267; see also In re Vivendi, S.A. Sec. Litig., 838 F.3d 223, 239-40 (2d Cir. 2016); In re Bank of Am. AIG

Disclosure Sec. Litig., 980 F. Supp. 2d 564, 575 (S.D.N.Y. 2013), aff'd, 566 F. App'x 93 (2d Cir. 2014).

The statements at issue in this case are the IPO Prospectus Market Share Statements, the IPO Prospectus Opay Statement, the 2018 Annual Report Market Share Statements, the SPO Prospectus Market Share Statement, the SPO Prospectus Fintech Statement, and the Market Share Statements in the Analyst Calls. The plaintiffs assert two general types of claims: (1) certain statements are materially misleading because they allegedly misrepresent Opera's market share and growth; and (2) certain statements omit material information about Opera's entry into the fintech market. The plaintiffs contend that only the Analyst Calls Market Share Statements contain factually inaccurate information, and that the basis for liability for the remaining statements stems from omissions rendering the statements materially misleading.

The plaintiffs first contend that Opera's market share was declining, and that the decline was likely to affect annual revenue. According to the plaintiffs, the defendants had a duty to disclose the decline in market share pursuant Item 303 of Regulation S-K. This is especially true, the plaintiffs argue, because Opera's prospectuses identified Opera as a market leader. Item 303 of Regulation S-K, in part, requires the defendants to disclose "known trends or uncertainties that have

had or that the registrant reasonably expects will have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations." 17 C.F.R. § 229.303(a)(3)(ii). Item 303 "imposes a disclosure duty where a trend, demand, commitment, event or uncertainty is both (1) presently known to management and (2) reasonably likely to have material effects on the registrant's financial condition or results of operations." Panther Partners Inc. v. Ikanos Commc'ns, Inc., 681 F.3d 114, 120 (2d Cir. 2012).

In this case, Opera's reported annual "Browser & News revenue" increased from 2018 to 2019. Hood Decl. Ex. J, 2019 Annual Report at 49; Ex. I, February 25, 2020 Press Release, at 2. The plaintiffs do not contest Opera's reported annual revenue figures. As the defendants point out, loss of market share does not necessarily imply a loss of revenue when the market is rapidly growing. The defendants disclosed that the markets where they were competing were expanding rapidly, and therefore the decrease in market share does not imply that it would be reasonably likely that Opera would suffer a decrease in revenue. And the plaintiffs do not contend that Opera's statement that it added 40.7 million MAUs was false. In fact, Opera's reported revenue and net income increased while its share of the total browser market share was declining. See Stadnick v. Vivint Solar, Inc., 861 F.3d 31, 39 (2d Cir. 2017)

(no obligation under Item 303 to disclose decline of market share in a particular region where there was no evidence of a decline in revenues).

Moreover, the statements at issue concerned mobile user statistics, but the plaintiffs object that the defendants did not disclose Opera's declining market share of the total browser user base, which includes mobile users and PC users. However, the defendants did not make any representations in the Offering Documents that it was a market leader in terms of market share for the total user base; the defendants cabined the statements to market share of mobile users. Therefore, the fact that Opera experienced a decline in market share for the total user base is even more tenuously related to the statements in the Offering Papers and the 2018 Annual Report, and the plaintiffs have not shown that the decrease in market share of the total browser market would have been likely to negatively affect revenue. Accordingly, the plaintiffs cannot show an Item 303 violation because they have failed to plead adequately that Opera suffered or would have been likely to suffer a decline in revenue. See, e.g., Holbrook v. Trivago, N.V., 2019 WL 948809, at *12-14 (S.D.N.Y. Feb. 26, 2019), aff'd sub nom., Shetty v. Trivago N.V., 796 F. App'x 31 (2d Cir. 2019).

Furthermore, as the defendants contend, the defendants' statements about Opera's market share could not be material

because the "truth" was publicly available. See White v. H&R Block, Inc., 2004 WL 1698628, at *12 (S.D.N.Y. July 28, 2004) (noting that courts in this Circuit recognize the "truth-on-the-market" defense). Alleged misstatements are not material where the truth was fully disclosed or concerned a matter of public knowledge. See, e.g., id.; Rubenstein v. Credit Suisse Grp. AG, No. 19-cv-1069 2020 WL 2036850, at *6 (S.D.N.Y. Apr. 28, 2020); Colbert v. Rio Tinto PLC, 392 F. Supp. 3d 329, 339-40 (S.D.N.Y. 2019); Monroe Cnty. Emps. Ret. Syst. v. YPF Sociedad Anonima, 15 F. Supp. 3d 336, 355-56 (S.D.N.Y. 2014); In re IAC/InterActiveCorp Sec. Litig., 695 F. Supp. 2d 109, 118, 122 (S.D.N.Y. 2010). "Although the underlying philosophy of federal securities regulation is that of full disclosure, there is no duty to disclose information to one who reasonably should be aware of it." Seibert v. Sperry Rand Corp., 586 F.2d 949, 952 (2d Cir. 1978). "Where allegedly undisclosed material information is in fact readily accessible in the public domain, . . . a defendant may not be held liable for failing to disclose this information." In re KeySpan Corp. Sec. Litig., 383 F.Supp.2d 358, 377 (E.D.N.Y. 2003); see also In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig., 272 F.Supp.2d 243, 249-250 (S.D.N.Y. 2003) ("[T]he Defendants cannot be held liable for failing to disclose . . . publicly available information.").

The plaintiffs allege that, according to the information on StatCounter, the defendants' statements were false or misleading. However, in its public statements, the defendants directed readers to StatCounter for more complete information. Therefore, the statements cannot be misleading when the defendants directed readers to the complete statistics available on StatCounter. Moreover, the defendants contested, and the plaintiffs do not dispute, that the information was publicly available free of charge. The plaintiffs cite to Staehr v. Hartford Financial Services for the proposition that the plaintiffs cannot be charged with the knowledge or duty to investigate Opera's market share from obscure or minimally reported sources. See 547 F.3d 406, 427-28 (2d Cir. 2008). In this case, the very statements that the plaintiffs contend are misleading directed investors to StatCounter. For each alleged misstatement about market share, a diligent investor would have seen the data as reported by StatCounter, undercutting the plaintiffs' argument that the alleged misstatements were material.

Moreover, to the extent that the plaintiffs complain about statements concerning being a market leader, courts have long understood such statements to constitute corporate puffery. Such statements are "no more than puffery which [do] not give rise to securities violations," because they are "too general to

cause a reasonable investor to rely upon them." ECA & Local 134 IBEW Joint Pension Trust of Chicago v. JP Morgan Chase Co., 553 F.3d 187, 205-06 (2d Cir. 2009). Statements are general puffery when they are "too general to cause a reasonable investor to rely upon them" or "merely generalizations regarding [a company]'s business practices." Id. at 206. The statements about Opera's growth and being a market leader are corporate optimism more appropriately described as puffery. See, e.g., In re Nokia Oyj (Nokia Corp.) Sec. Litig., 423 F. Supp. 2d 364, 395-97 (S.D.N.Y. 2006) (holding that optimistic statements about growth were puffery). To the extent that the statements gave more specific assertions, those statements directed investors to StatCounter, where the investors could find the complete information. Therefore, apart from the Analyst Calls Market Share Statements, which include specific data about Opera's market share in Nigeria without referring investors to StatCounter, Opera's statements relating to market share are not materially misleading.[2]

The plaintiffs next contend that Opera's Offering Documents in connection with the IPO were misleading because they failed to disclose Opera's entry into the fintech market. Item 101 of Regulation S-K requires the defendants to disclose "the general

[2] As described below, the plaintiffs still fail to state a Section 10(b) claim with respect to the Analyst Calls Market Share Statements because they fail to plead any facts giving rise to an inference of scienter.

development of the business of the registrant, its subsidiaries, and any predecessor(s)" including "any material changes in the mode of conducting the business." 17 C.F.R. § 229.101. Item 105 of Regulation S-K requires the defendants to provide "a discussion of the material factors that make an investment in the registrant or offering speculative or risky." 17 C.F.R. § 229.105. When the omitted information concerns a contingent or speculative event, "the materiality of those events depends on a balancing of both the indicated probability that the event will occur and the anticipated magnitude of the event in light of the totality of the company activity." Castellano v. Young & Rubicam, Inc., 257 F.3d 171, 180 (2d Cir. 2001); see also In re Alliance Pharmaceutical Corp. Sec. Litig., 279 F. Supp. 2d 171, 196 (S.D.N.Y. 2003). Future plans need to be disclosed when they "are under active and serious consideration." In re Time Warner, 9 F.3d at 268; see also San Leandro Emergency Medical Group Profit Sharing Plan v. Philip Morris, Co., Inc., 75 F.3d 801, 810-11 (2d Cir. 1996); Bratusov v. Comscore, Inc., No. 19-cv-3210, 2020 WL 3447989, at *10-11 (S.D.N.Y. June 24, 2020); In re Cosi, Inc. Sec. Litig., 379 F. Supp. 2d 580, 587 (S.D.N.Y. 2005).

The plaintiffs have failed to allege adequately a violation of Item 101 because the plaintiffs do not allege adequately that Opay was a subsidiary of Opera or that Opera itself entered into

the fintech market at the time Opera published its Offering Documents or completed its IPO. Item 101 only requires disclosure for the "registrant, its subsidiaries, and any predecessor(s)." 17 C.F.R. § 229.101. Opera disclosed that it held a minority interest in Opay, that Opay was controlled by Opera's Chairman and Chief Executive Officer, that Opay conducted microlending, that Opera provided services to Opay pursuant to a services agreement, and that Opera provided loans to Opay. While Opera did have a minority share in Opay, Opera would need a controlling interest of Opay for it to be considered a subsidiary of Opera. See 17 C.F.R. § 240.12b-2 (Exchange Act Rule 12b-2 defines "subsidiary" as "an affiliate controlled by such person directly, or indirectly through one or more intermediaries"); Subsidiary Corporation, Black's Law Dictionary (11th ed. 2019) ("A corporation in which a parent corporation has a controlling share."). While an entity could be considered a "subsidiary" where the parent entity has a controlling interest with less than a 50% ownership share, the plaintiffs have not pleaded enough facts in the operative complaint to make a plausible allegation that Opay was a subsidiary of Opera. Because the plaintiffs have failed to plead adequately that Opay was Opera's subsidiary, the defendants did not have an obligation, pursuant to Item 101, to disclose the general business development of Opay. Therefore,

the fact that the defendants did not disclose the specific details about Opay's lending business cannot constitute a material omission because Opera had no duty to disclose that information.

The plaintiffs contend that Opera itself entered into the fintech market by virtue of its relationship with Opay, or at least should have disclosed its plans to engage in fintech imminently. Item 101 requires a corporation to "[d]escribe the business done and intended to be done by the registrant and its subsidiaries, focusing upon the registrant's dominant segment or each reportable segment about which financial information is presented in the financial statements." 17 C.F.R. § 229.101(c)(1). However, the plaintiffs have failed to allege adequately that Opera entered the fintech business before it acquired OKash in December 2018, after Opera's IPO in August 2018, or had plans to enter the fintech market imminently. The plaintiffs' allegations are insufficient to show that the defendants had a duty to disclose its future entry into the fintech market at the time of the IPO. See, e.g., In re Centerline Holding Co., 380 F. App'x 91, 94 (2d Cir. 2010) (affirming dismissal of securities claims where the defendants did not have a duty to disclose future plans); In re Cosi, 379 F. Supp. 2d at 586-88 (dismissing securities claims where the defendants did not have a duty to disclose future business

plans).[3] While Opera had a minority interest in Opay, a services agreement with Opay, and provided loans to Opay, those allegations are insufficient to show that Opera was going to engage imminently in the fintech market. The extent of the relationship between Opera and Opay, as it existed at the time, was disclosed in Opera's Offering Documents. And to the extent that the plaintiffs rely on events occurring after Opera's IPO, the defendants plainly had no obligation or ability to disclose those events in the Offering Documents. See Novak v. Kasaks, 216 F.3d 300, 309 (2d Cir. 2000) ("[A]llegations that the defendants should have anticipated future events and made certain disclosures earlier than they actually did do not suffice to make out a claim of securities fraud."). Additionally, the defendants did disclose that Opera intended to continue investing in and working with Opay. Specifically, the IPO Prospectus Opay Statement provided that Opera "expect[ed] to continue investing in Opay as its business develops." Am. Compl. ¶ 76. Accordingly, the defendants did disclose Opera's intention to continue working with Opay as Opay developed its fintech business, and the plaintiffs have failed to plead adequately a material omission with respect to Opera's entry into the fintech market.

[3] The defendants did disclose Opera's entry into the fintech market in the SPO Prospectus Fintech Statement.

Similarly, Opera could not have disclosed the risk from Google Play's policy regarding predatory lending in its Offering Documents because Google Play implemented that policy after the IPO. When Google Play had changed its policies, Opera disclosed those risks at that time. Specifically, in the SPO Prospectus, Opera stated as follows:

> If any of these third-party channel providers [including Google Play] delivers unsatisfactory services, engages in fraudulent action, or is unable or refuses to continue to provide its services to us and our users for any reason, it may materially and adversely affect our business, financial condition and results of operations.

Hood Decl. Ex. E, SPO Prospectus, at S-26.

Therefore, the plaintiffs' argument that Opera's failure to disclose the risks of the fintech business constituted a violation of Item 105 is unavailing. The defendants did disclose certain risks in Opera's investment in Opay, and when Opera did enter into the fintech market, the defendants disclosed that fact in the SPO Prospectus Fintech Statement. Moreover, the defendants disclosed the risks of its entry into the fintech market in its Prospectus to the SPO based on "new and evolving" regulatory regimes, as well as other risks associated with its entry into the fintech market, including the risk that Google Play would cease providing its services to Opera. Accordingly, the plaintiffs have failed to allege adequately that the defendants violated a duty to disclose

Opera's entry into the fintech market pursuant to Items 101 and 105.

Therefore, the plaintiffs have failed to state adequately, pursuant to the plaintiffs' Section 10(b) and Section 11 claims, that the defendants made material misstatements or omissions in the IPO Market Share Statements, the IPO Opay Statement, the 2018 Annual Report Statements, the SPO Prospectus Market Share Statement, and the SPO Prospectus Fintech Statement.

B. Section 10(b)

Section 10(b), as effectuated by Rule 10b-5, makes it "unlawful for any person . . . [t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading." 17 C.F.R. § 240.10b-5(b). To state a claim under Section 10(b) and Rule 10b-5, the plaintiffs must allege that the defendants, in connection with the purchase or sale of securities, made a materially false statement or omitted a material fact, with scienter, and that the plaintiffs' reliance on the defendants' action caused injury to the plaintiffs. Ganino v. Citizens Utils. Co., 228 F.3d 154, 161 (2d Cir. 2000); see also City of Roseville, 814 F. Supp. 2d at 409. With the possible exception of statements with respect to market share that Nueman made in the Analyst Calls, the Section 10(b) claims fail because the

plaintiffs have failed to plead that Opera made any false or misleading statements. The Section 10(b) claims also fail because the plaintiffs have failed to plead adequately scienter and loss causation.

1. Scienter

The defendants argue that the plaintiffs have failed to plead a strong inference of scienter for any of the Section 10(b) claims. The scienter required to support a securities fraud claim can be "intent to deceive, manipulate, or defraud, or at least knowing misconduct." SEC v. First Jersey Sec., Inc., 101 F.3d 1450, 1467 (2d Cir. 1996). The PSLRA requires that a complaint alleging securities fraud "state with particularity facts giving rise to a strong inference that the defendant[s] acted with the required state of mind." 15 U.S.C. § 78u-4(b)(2). A "strong inference" of scienter can arise from (1) facts showing that a defendant had "both motive and opportunity to commit the fraud," or (2) facts that constitute "strong circumstantial evidence of conscious misbehavior or recklessness." ATSI, 493 F.3d at 99; see also City of Roseville, 814 F. Supp. 2d at 418-19 (same). In order to plead scienter adequately, the plaintiffs must allege facts supporting a strong inference with respect to each defendant. See Plumbers & Pipefitters Local Union No. 630 Pension-Annuity Trust Fund v. Arbitron Inc., 741 F. Supp. 2d 474, 488 (S.D.N.Y. 2010). "[I]n

determining whether the pleaded facts give rise to a strong inference of scienter, the court must take into account plausible opposing inferences." Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 323 (2007). A complaint sufficiently alleges a strong inference of scienter when "a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged." Id. at 324; see also Slayton v. Am. Express Co., 604 F.3d 758, 766 (2d Cir. 2010); Silsby, 17 F. Supp. 3d at 364-65. Courts conduct the scienter analysis holistically to determine whether "all of the facts alleged, taken collectively, give rise to a strong inference of scienter." Tellabs, Inc., 551 U.S. at 322-23.

The plaintiffs first assert that the defendants knew or deliberately disregarded market share data in making statements about Opera's being a market leader. "[W]here plaintiffs contend defendants had access to contrary facts, they must specifically identify the reports or statements containing this information" to support an inference of scienter. Teamsters Local 445 Freight Div. Pension Fund v. Dynex Capital Inc., 531 F.3d 190, 196 (2d Cir. 2008). Moreover, the information contained in those reports must be non-public. See In re Scholastic Corp. Sec. Litig., 252 F.3d 63, 76 (2d Cir. 2001); see also In re GeoPharma, Inc. Sec. Litig., 399 F. Supp. 2d 432,

452 (S.D.N.Y. 2005) ("Cases in this Circuit assume that the contradictory information in question must be non-public.").

In this case, the defendants specifically referred investors to StatCounter. As such, the plaintiffs cannot allege adequately that the defendants had access to facts contrary to what they stated, namely data from StatCounter, because the very statements in question referred to the information on StatCounter. Moreover, the plaintiffs cannot assert that the defendants disregarded that information, because the allegedly misleading statements refer to StatCounter. Further, it would not be plausible that the defendants deliberately attempted to mislead investors by referring them to the very sources that would allegedly disclose the misleading nature of the statements. And while the plaintiffs contend that Opera's market share of the total user base was declining, the statements at issue in this case concern Opera's market share of mobile users. The plaintiffs have failed to allege adequately that the statements were misleading when viewed in the context of the mobile market, and the plaintiffs' argument that the defendants should have nonetheless included that their market share of the total user base was declining is unavailing. Accordingly, the plaintiffs have failed to plead adequately an inference of scienter with respect to the IPO Prospectus Market

Share Statements, the 2018 Annual Report Market Share Statements, and the SPO Prospectus Market Share Statement.

The plaintiffs also assert that Nueman made two misstatements during analyst calls with respect to Opera's market share in Nigeria. However, the plaintiffs have failed to allege any facts leading to an inference of scienter with respect to the Analyst Calls Market Share Statements.[4] It is not plausible, much less indicative of a strong inference of scienter, that Nueman would consciously or recklessly misstate market share statistics that were publicly available on StatCounter when Opera repeatedly referred the public to StatCounter for the statistics on market share. When plaintiffs fail to allege facts giving rise to an inference of scienter, the plaintiffs' Section 10(b) claims must be dismissed. See, e.g., Wilson v. Dalene, 699 F. Supp. 2d 534, 559 (E.D.N.Y. 2010); In re Gildan Activewear, Inc. Sec. Litig., 636 F. Supp. 2d 261, 273 (S.D.N.Y. 2009). Because the plaintiffs failed to allege any facts sufficient to infer scienter with respect to

[4] The plaintiffs contend that the Analyst Calls Market Share Statements were factually inaccurate because the statements that Opera had close to a 50% market share in Nigeria appeared to refer to market share of total user base. The defendants contend that the 50% market share claim was related to market share of mobile users, and were an accurate description of market share in that market. This is a factual issue that cannot be decided on a motion to dismiss. In any event, the Analyst Market Share Statements are not actionable as pleaded because the plaintiffs have failed to allege a strong inference of scienter.

the Analyst Calls Market Share Statements, the Section 10(b) claims with respect to those statements must be dismissed.

The plaintiffs also fail to plead scienter sufficiently with respect to the alleged omissions in the IPO Prospectus Opay Statement regarding Opera's entry into the fintech market at the time of Opera's IPO. First, the plaintiffs fail to point to any specific reports or contrary information that the defendants failed to disclose, beyond speculation about mere abstract plans that Opera was considering entering the fintech market which are not specifically identified. Second, the defendants did disclose that Opera had provided Opay loans, that Opera executed a services agreement Opay, and that Opera held a minority interest in Opay. The plaintiffs have not alleged that there was anything more concrete to disclose at the time of the IPO, apart from what the defendants in fact disclosed. The extent of the disclosures in the IPO Prospectus undercuts the plaintiffs' arguments that the defendants failed to disclose any information with fraudulent intent.

To show scienter with respect to the alleged omissions concerning Opera's entry into the fintech market, the plaintiffs point to the existence of other litigation. Opera's CEO, Y. Zhou, was a director of Qudian, a company not affiliated with Opera. Qudian shareholders sued Y. Zhou and others alleging a failure to disclose that Qudian entered a materially different

business line. See Am. Compl. ¶¶ 165-69; see also In re Qudian Inc. Sec. Litig., 17-cv-9741, ECF No. 134, Consolidated Second Amended Complaint, (S.D.N.Y. July 27, 2018). The plaintiffs allege that because the allegations in the Qudian case and in this case both amount to a failure of the defendants to disclose an entry into a new line of business, the Qudian litigation provides support for the scienter allegation in this case. In the Qudian litigation, however, there has not been an adjudication on the merits and unproven allegations in another case provide no support for an inference of scienter in this case. See, e.g., RSM Prod. Corp. v. Fridman, 643 F. Supp. 2d 382, 403 (S.D.N.Y. 2009), aff'd, 387 F. App'x 72 (2d Cir. 2010). Indeed, many of the plaintiffs' claims in Qudian were dismissed, See In re Qudian Inc. Sec. Litig., 2019 WL 4735376 (S.D.N.Y. Sept. 27, 2019), and the case is in the process of being settled without an adjudication on the merits. See In re Qudian Inc. Sec. Litig., 17-cv-9741, ECF No. 228, Preliminary Approval Order, (S.D.N.Y. Nov. 16, 2020).

The plaintiffs have also failed to plead that there was a motive for the allegedly false statements. The plaintiffs assert an inference of scienter with respect to all statements because, as alleged by the plaintiffs, a portion of the IPO and SPO proceeds were used by Opera in transactions with entities that were controlled by Y. Zhou and H. Zhou. See Am. Compl.

¶¶ 170-73. Based on this, the plaintiffs assert that the defendants had a motive to deceive Opera's investors. An inference of scienter is supported based on the motive theory when the plaintiffs allege that the defendants "benefitted in some concrete and personal way from the purported fraud." Novak, 216 F.3d at 311. "[T]he particular fraud alleged must specifically enable the schemes or business plans plaintiffs contend conferred concrete and personal benefits on the defendants." Glaser v. The9 Ltd., 772 F. Supp. 2d 573, 586 (S.D.N.Y. 2011). Alleging related-party transactions, without any unique connection between alleged fraud and the transactions, is insufficient for an inference of scienter. Id. at 592.

In this case, the plaintiffs have failed to allege a unique connection between the alleged fraud and the related-party transactions. While the plaintiffs assert that the defendants raised money from the IPO and SPO that was later used in related-party transactions, some of the transactions that occurred were disclosed in the IPO Prospectus and occurred before the IPO. See Hood Decl. Ex. B, Prospectus at 115-16. With respect to the transactions that occurred after the public offerings, the plaintiffs do not allege that the terms of the related-party transactions were unfavorable to Opera or Opera's shareholders. The plaintiffs have failed to allege how Y. Zhou

and H. Zhou enriched themselves at the expense of Opera and Opera's shareholders. Merely noting that the defendants raised capital from the public offerings, and then used that capital in future related-party transactions, is insufficient, without more, to allege a strong inference of scienter. Therefore, the related-party transactions, as alleged in the Amended Complaint, are insufficient to support a strong inference of scienter.

The plaintiffs' allegations taken together fail to support a strong inference of scienter with respect to any of the alleged misstatements and omissions, and therefore, all of the plaintiffs' Section 10(b) claims must be dismissed.

2. Loss Causation

The defendants argue that the plaintiffs have failed to plead that the alleged misrepresentations and omissions caused the plaintiff's loss. To allege loss causation under Section 10(b) and Rule 10b-5, the plaintiffs must provide in the complaint "notice of what the relevant economic loss might be and what the causal connection might be between that loss and the misrepresentation." Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 347 (2005). The plaintiffs must allege that the misrepresentation or omission proximately caused the plaintiffs' economic loss. Id. at 346. To provide the requisite notice, the plaintiffs must plead economic loss and either "that the loss was foreseeable and caused by the materialization of the

risk concealed by the fraudulent statement," ATSI, 493 F.3d at 107, or "that the misstatement or omission concealed something from the market that, when disclosed, negatively affected the value of the security." Lentell v. Merrill Lynch & Co., 396 F.3d 161, 173 (2d Cir. 2005); see also Carpenters Pension Tr. Fund of St. Louis v. Barclays PLC, 750 F.3d 227, 232-33 (2d Cir. 2014); In re New Oriental Educ. & Tech. Grp. Sec. Litig., 988 F. Supp. 2d 406, 428 (S.D.N.Y. 2013). "[P]artial disclosures can satisfy the loss causation requirement." Freudenberg v. E*Trade Fin. Corp., 712 F. Supp. 2d 171, 202 (S.D.N.Y. 2010).

To show loss causation, a corrective disclosure must "purport[] to reveal some then-undisclosed fact with regard to the specific misrepresentations alleged in the complaint." See In re Omnicom Grp., Inc. Sec. Litig., 597 F.3d 501, 511 (2d Cir. 2010). Already-public information cannot constitute a corrective disclosure for purposes of alleging loss causation. See id. at 511-12; see also Fila v. Pingtan Marine Enter. Ltd., 195 F. Supp. 3d 489, 496 (S.D.N.Y. 2016) (holding that the plaintiffs could not allege loss causation "based solely on public information").

In this case, the alleged corrective disclosure at issue is the Hindenburg report. However, that report contained an analysis of publicly available information. The Hindenburg report cited market share data obtained from StatCounter.

Opera's disclosures referred investors to that same data in the Prospectus to the IPO, the 2018 Annual Report, and the Prospectus to the SPO. Therefore, the Hindenburg report cannot constitute a corrective disclosure sufficient to allege loss causation because it merely analyzed the public data to which the defendants directed investors. See, e.g., Cent. States, Se. & Sw. Areas Pension Fund v. Fed. Home Loan Mortg. Corp., 543 F. App'x 72, 74-75 (2d Cir. 2013) ("[T]he cited third-party articles and reports [that] expressed negative opinions about [the defendant's] solvency based on information that was already publicly available . . . are not corrective for the purpose of pleading loss causation."). Accordingly, the plaintiffs have failed to allege adequately loss causation with respect to the statements concerning Opera's market share. For the same reasons, the Hindenburg report cannot serve as a corrective disclosure for Opera's entry into the fintech market. In February 2019, Opera disclosed its acquisition of OKash in a press release. That disclosure came almost a year before the Hindenburg report was published in January 2020, and the plaintiffs have not alleged that the Hindenburg report relied on any non-public information with respect to Opera's participation in the fintech market.

C. Section 11

In addition to the fact that the Section 11 claims fail because the plaintiffs have failed to show a material misstatement in the Offering documents, the Section 11 claims also fail because the claims are untimely and the defendants have shown that the alleged misstatements did not cause the plaintiffs' alleged loss.

Section 11(a) of the Securities Act provides that any signatory to a Registration Statement, director of the issuer of securities, or underwriter with respect to such securities, among others, may be held liable to purchasers of registered securities if the Registration Statement contains "an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading." 15 U.S.C. § 77k(a). Section 11 imposes "a stringent standard of liability on the parties who play a direct role in a registered offering." Herman & MacLean v. Huddleston, 459 U.S. 375, 381-82 (1983); see also In re Flag Telecom Holdings, Ltd. Secs. Litig., 618 F. Supp. 2d 311, 321 (S.D.N.Y. 2009). To establish a prima facie claim under Section 11, "[a] plaintiff need only plead a material misstatement or omission in the registration statement." In re Flag Telecom Holdings, Ltd. Secs. Litig., 411 F. Supp. 2d 377, 382 (S.D.N.Y. 2006), abrogated on other

grounds, 574 F.3d 29 (2d Cir. 2009). Under Section 11, "[l]iability against the issuer of a security is virtually absolute, even for innocent misstatements," while "[o]ther defendants bear the burden of demonstrating due diligence." Herman & MacLean, 459 U.S. at 382.

1. Statute of Limitations

Section 11 requires that claims be brought "within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence . . . ." 15 U.S.C. § 77m. "A securities-law violation is discovered when the plaintiff learns sufficient information about the violation to plead it in a complaint with enough detail and particularity to survive a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss" and a plaintiff is "charged with knowledge of any fact that a reasonably diligent plaintiff would have discovered." Fed. Hous. Fin. Agency for Fed. Nat'l Mortg. Ass'n v. Nomura Holding Am., Inc., 873 F.3d 85, 119 (2d Cir. 2017).

In this case, the plaintiffs allege that the statements regarding Opera's market share and number of MAUs were false or misleading according to data from StatCounter. However, the allegedly misleading statements specifically referred to StatCounter. Based on the explicit reference to StatCounter, a reasonably diligent plaintiff would have discovered the alleged

misstatement when it was made, or immediately thereafter. The allegedly misleading statements with the reference to StatCounter were made in July 2018. This case was not filed until January 2020.

The allegedly misleading omissions regarding Opera's entry into the fintech market suffer the same defect. The plaintiffs allege that at the time of the IPO, Opera had either already entered the fintech market or had imminent plans to do so. The support from the plaintiffs' allegations comes from other statements the defendants disclosed in June and July 2018 in Opera's Registration Statement and Prospectus, namely the services agreement between Opera and Opay, the loan from Opera to Opay, and that Opera owned a minority interest in Opay. To the extent that it could be said that those statements omitted material information, the plaintiffs filed this suit over a year after discovery of the alleged omission should have been made.

Accordingly, the plaintiffs' Section 11 claims are untimely with respect to the statements made in the Offering Documents of the IPO.

2. Standing

The defendants argue that plaintiff Lilian Lau lacks standing to pursue her Section 11 claims. "To establish standing under § 11 at the motion-to-dismiss stage, . . . Plaintiffs need only assert that they purchased shares issued

pursuant to, or traceable to the public offerings." City of Omaha Police & Fire Ret. Sys. v. Evoqua Water Techs. Corp., 450 F. Supp. 3d 379, 403 (S.D.N.Y. 2020); see also DeMaria v. Andersen, 318 F.3d 170, 176 (2d Cir. 2003) (holding that "aftermarket purchasers" can have standing under Section 11 if they can trace their shares to the allegedly defective registration statement). Lau did not purchase any shares of Opera until November 12, 2019, which was after the IPO in July 2018 and SPO in September 2019. Lau has failed to allege how the stocks she purchased were traceable to the stocks issued in the public offerings. Therefore, Lau lacks standing to bring the Section 11 claims asserted in this case. There is no dispute that plaintiff Leon Brown has standing. Accordingly, plaintiff Lau has no standing to pursue her Section 11 claims. This conclusion does not affect Leon Brown's standing.

3. Negative Loss Causation

The defendants allege that the plaintiffs' Section 11 claims fail because the alleged truth of the defendants' statements was publicly available, and therefore any alleged misrepresentations or omissions could not have caused the plaintiffs' loss. Courts have recognized that the negative loss causation affirmative defense in the Section 11 context and the loss causation element of Section 10(b) claims are "mirror images." In re Worldcom, Inc. Sec. Litig., No. 02-cv-3288, 2005

WL 375314, at *6 (S.D.N.Y. Feb. 17, 2005). As described above, the plaintiffs have failed to allege adequately loss causation in the Section 10(b) context. For the same reasons, the Section 11 claims should be dismissed. See, e.g., Amorosa v. AOL Time Warner Inc., 409 F. App'x 412, 416-17 (2d Cir. 2011). Because the allegedly corrective information was already publicly known and referred to in the allegedly misleading statements, those statements could not have caused the plaintiffs' loss. Accordingly, the plaintiffs' Section 11 claims must be dismissed.

D. Sections 15 and 20(a)

The plaintiffs cannot establish control person liability. The plaintiffs' claims under Section 15 of the Securities Act and Section 20(a) of the Exchange Act fail because the plaintiffs have failed to allege adequately a primary violation. Section 15 of the Securities Act provides for liability for individuals who "control[] any person liable under" provisions including Section 11. 15 U.S.C. § 77o(a). Section 20(a) of the Exchange Act provides for liability for anyone who "controls any person liable under" provisions including Section 10(b). 15 U.S.C. § 78t.

"To establish a prima facie case of control person liability, a plaintiff must show (1) a primary violation by the controlled person, (2) control of the primary violator by the

defendant, and (3) that the defendant was, in some meaningful sense, a culpable participant in the controlled person's fraud." ATSI, 493 F.3d at 108; see also In re Lions Gate Entm't Corp. Sec. Litig., 165 F. Supp. 3d 1, 25 (S.D.N.Y. 2016). Because the plaintiffs' claims under Section 10(b) of the Exchange Act and Section 11 of the Securities Act fail, the plaintiff cannot establish control person liability under Section 15 of the Securities Act or Section 20(a) of the Exchange Act. Accordingly, the plaintiffs' claims under Section 15 of the Securities Act and Section 20(a) of the Exchange Act must be dismissed.

CONCLUSION

The Court has considered all of the arguments of the parties. To the extent not discussed above, the arguments are either moot or without merit. For the foregoing reasons, the defendant's motion to dismiss is **granted.** The plaintiffs may file a Second Amended Complaint by **April 16, 2021.** The Clerk is directed to close Docket No. 56.

SO ORDERED.

Dated: New York, New York
March 13, 2021

/s/ John G. Koeltl
John G. Koeltl
United States District Judge