SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53EFM

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IN RE NETSHOES SECURITIES LITIGATION

Plaintiff,

- v -

XXX,

Defendant.

INDEX NO. 157435/2018

MOTION DATE 12/14/2018, 05/20/2019

MOTION SEQ. NO. 002 003

DECISION AND ORDER

----------X

HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 49, 50, 51, 52, 53, 54, 55
were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70
were read on this motion to/for ALTERNATE SERVICE.

This is an action brought in the Commercial Division of New York County following the United States Supreme Court decision in *Cyan, Inc. v Beaver County. Emps. Retirement Fund,* 138 S Ct 1061 (2018). Inasmuch as securities litigation brought in New York, generally, was discussed at oral argument, a brief summary of the framework in which the instant action is brought is provided for clarity.

As the *Cyan* Court chronicled, following the stock market crash in 1929, and to promote honest business practices in the securities markets, Congress enacted the Securities and Exchange Act of 1933 (the **1933 Act**) and the Securities and Exchange Act of 1934 (the **1934 Act**). The 1933 Act

created private rights of action in connection with the initial public offering of securities and the 1934 Act regulates subsequent trading activity. Under the 1933 Act, although concurrent state and federal court jurisdiction is authorized, removal is prohibited. Under the 1934 Act, federal courts have exclusive jurisdiction. In 1995, to address perceived abuses in class action lawsuits, Congress passed the Private Securities Litigation Reform Act (the **Reform Act**) which both substantively and procedurally amended the 1933 Act and the 1934 Act (*Cyan*, 138 S Ct at 1066, citing *Merrill Lynch, Pierce, Fenner & Smith v Dabit,* 547 US 71, 81 [2006]). For example, among other substantive amendments, the Reform Act created a "safe harbor" for "forward looking statements" made by company officials (15 USC § 77z-2 [1933 Act] and § 78u-5 [1934 Act]). Among other procedural amendments, the Reform Act requires the lead plaintiff to execute a sworn certification that the purchase of the relevant securities was not at the direction of plaintiff's counsel (§ 77z-1[a][2][A][ii] [1933 Act]; § 78u-4[a][2][ii] [1934 Act]). Although the Reform Act's substantive amendments affected both the state and federal courts, the Reform Act's procedural amendments affected only the federal courts. Accordingly, plaintiffs could avoid the procedural reforms of the Reform Act by bringing their complaints of securities misconduct under state law. To address this unintended "loophole," Congress passed the Securities Litigation Uniform Standards Act of 1988 (**SLUSA**) which barred state-law based securities class actions (and authorized their removal to ensure their dismissal) and guaranteed that the Reform Act's heightened substantive standards would govern all future securities class action litigation.

Following its adoption, there was some apparent confusion as to the breadth and scope of SLUSA as it related to two questions: (i) whether state courts had been stripped of jurisdiction to

adjudicate class actions brought under the 1933 Act, and (ii) whether such class actions could be removed to federal court. For example, the court in *Schwartz v Concordia Intl. Corp.*, held that following Congressional enactment of SLUSA, class actions that solely assert claims under the 1933 Act "must be removable [to federal court] because SLUSA vested federal courts with exclusive jurisdiction over" such claims (255 F Supp 3d 380, 383 [ED NY 2017; *see also Knox v Agria Corp.,* 613 F Supp 2d 419 [SD NY 2009]; *Brody v Homestore, Inc.*, 240 F Supp 2d 1122 [CD CA 2003]). Other courts, however, looking to the plain language of the 1933 Act, held that SLUSA did not strip state courts of their jurisdiction to adjudicate class actions alleging only 1933 Act violations as it did not expressly authorize removal of such actions from state to federal court (*e.g.*, *Fortunato v Akebia Therapeutics, Inc.,* 183 F Supp 3d 326 [D Mass 2016]; *Christians v KemPharm, Inc.,* 265 F Supp 971 [SD Iowa 2017]). In *Cyan*, the United States Supreme Court unanimously resolved these two questions in the negative. Now, as prior to SLUSA, 1933 Act claims can be brought in either state or federal court, but once filed in state court, removal is not permitted.

The 1933 Act "protects investors by ensuring that companies issuing securities … make a full and fair disclosure of information relevant to a public offering" (*Omnicare, Inc. v Laborers Dist. Council Const. Indus.,* 135 S Ct 1318, 1323 [2015] [internal quotation and citation omitted]). As further discussed below, sections 11, 12, and 15 of the 1933 Act impose "strict liability for material misstatements contained in registered securities offerings" (*NECA-IBEW Health & Welfare Fund v Goldman Sachs & Co.*, 693 F3d 145, 148 [2d Cir 2012]).

In their Amended Complaint (the **Complaint**), the plaintiffs allege strict liability and negligence claims under sections 11, 12(a)(2), and 15 of the 1933 Act against Netshoes (Cayman) Limited (**Netshoes**), a Brazilian based online retailer, certain of its senior executives and directors, and the investment banks that acted as its underwriters in connection with its April 12, 2017 initial public offering (**IPO**).

To wit, the Complaint alleges that Netshoes' Registration Statement and Prospectus (collectively, the **Offering Documents**), issued in connection with its IPO, painted a materially false and misleading picture of Netshoes' business, and, thus, inappropriately and unlawfully lifted the IPO offering price. The gravamen of the allegations are that although the Offering Documents touted Netshoes' competitive position, "high margin" business strategy, and the new business-to-business (**B2B**) supplements and vitamins distribution business (the **B2B Business**), in fact, Netshoes' core sports and lifestyle eCommerce business was under intense pressure to significantly increase its marketing and to provide further and deeper discounts to customers so as to preserve its market share at the expense of its supposedly "high margin" business model. More specifically, the plaintiffs allege that Netshoes knew or should have known at the time of the IPO that the income set forth in its financial statements for the year ended December 2016 (the **2016 Financial Statements**) was overstated because certain substantial write-downs taken subsequently for its accounts receivable meant that there ***must have been*** a return policy which was not disclosed to investors, and, accordingly, the financial statements were not prepared in accordance with International Financial Reporting Standards (**IFRS**),[1] contrary to the

[1] Many jurisdictions around the world, including Brazil, require public companies' financial statements to comply with International Financial Reporting Standards (IFRS). The United States has not adopted IFRS, and instead uses Generally Accepted Accounting Principles (GAAP) (*In re Barclays Bank PLC Securities Litigation*, 2017 WL

representations contained in the Offering Documents. The Complaint alleges that as a result of the foregoing, Netshoes' stock collapsed from its $18 per share IPO price on April 12, 2017 to $2.87 per share on May 15, 2018 and has not materially recovered.

The defendants have moved to dismiss the action with prejudice (mtn. seq. no. 002), pursuant to CPLR 3211(a)(1), (a)(5), and (a)(7) – *i.e.*, based on documentary evidence, statute of limitations, and failure to state a claim. The plaintiffs have moved for alternative service as it relates to certain unserved defendants (mtn. seq. no. 003).

Under CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the claims asserted as a matter of law (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). To be entitled to dismissal of the action as untimely under CPLR 3211(a)(5), the defendant must establish, *prima facie*, that the time in which to commence the action has expired. The burden then shifts to the plaintiff to raise an issue of fact as to whether the statute of limitation is tolled or otherwise inapplicable. Finally, when considering a motion to dismiss for failure to state a claim under CPLR 3211(a)(7), the court, accepting all facts alleged as true and according the plaintiff the benefit of every favorable inference, must determine if the allegations fit within any cognizable legal theory (*id.,* 84 NY2d at 87-88; *EBC I, Inc. v Goldman, Sachs, & Co.*, 5 NY3d 11 [2005]). When documentary evidence is submitted on a motion to dismiss for failure to state a claim, the court must consider not just whether the plaintiff has stated a cause of action, but also whether it has one (*Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 135 [1st Dept 2014] [citation omitted]).

4082305, n. 13). In the United States, IFRS standards are permitted, though not required, in SEC filings (www.ifrs.org/use-around-the-world/use-of-ifrs-standards-by-jurisdiction/united-states/).

Dismissal is appropriate if a well-pleaded cognizable claim is "flatly rejected by the documentary evidence" (*id.*).

To the extent that the claims alleged in the Complaint contain allegations of fraud or misrepresentation, the defendants urge the court to apply the heightened pleading standard of CPLR 3016(b) to the plaintiffs' claims, *i.e.,*

> Where a cause of action or defense is based upon misrepresentations, fraud, mistake, willful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail.

The federal analog to CPLR 3016(b) is contained in Rule 9(b) of the Federal Rules of Civil Procedure and states:

> **Fraud or Mistake, Conditions of the Mind**. In alleging fraud or mistake a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.

However, as federal courts have held, a claim brought pursuant to sections 11 and 12(a)(2) of the 1933 Act which does not explicitly allege fraud (*i.e.,* it only alleges negligence) in the preparation of the registration statement and prospectus, is ***not*** subject to a heightened pleading standard (*e.g., Litwin v Blackstone Group, L.P.*, 634 F3d 706, 715 [2d Cir 2011] [explaining that heightened pleading standard of Federal Rule of Civil Procedure Rule 9(b) applies to claims under §§ 11 and 12(a)(2) only insofar as claims are premised on allegations of fraud]; *NECA-IBEW Health & Welfare Fund v Goldman Sachs & Co.*, 693 F3d 145, 156-57 [2d Cir 2012]).

I. Heightened Pleading Standard Does Not Apply to Plaintiffs' Claims

Although the Complaint alleges that Netshoes made materially false and misleading statements, it does not specifically allege any claim for fraud or misrepresentation and only alleges claims based on negligence and strict liability. Accordingly, a heightened pleading standard is not warranted (*Litwin*, *supra,* 634 F3d at 715).

II. Plaintiffs Fail to State a Claim Under Sections 11 and 12(a)(2) of the 1933 Act

Section 11 of the 1933 Act provides:

> In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the facts stated therein not misleading, any person acquiring such security . . . [may] sue[.] (15 USC § 77k[a]).

Section 12(a)(2) imposes liability under similar circumstances against certain "statutory sellers" for misstatements or omissions in a prospectus, *i.e.,* defendants Goldman Sachs & Co., J.P. Morgan Securities LLC, Banco Bradesco BBI S.A., Allen & Company LLC, and Jeffries LLC (15 USC § 77l [a][2]). In addition, Item 303 (**Item 303**) of SEC Regulation S-K, 17 CFR §229.303, requires the disclosure of "trends or uncertainties . . . that the registrant reasonably expects will have a material . . . unfavorable impact on . . . revenues or income from continuing operations'" (*Litwin, supra,* 634 F3d at 716).

The plaintiffs allege that Netshoes made the following false and/or misleading statements in its IPO about its:

1. Status as the "leading sports and lifestyle online retailer in Latin America and one of the largest online retailers in the region, as measured by net sales" (Compl., ¶ 41);

2. Lack of "a relevant direct competitor in the eCommerce sports category in the region" (*id.*, ¶ 42);

3. "'customer loyalty' and 'high repeat purchasing,' including that '74.5 % of [Netshoes] total orders came from repeat customers" (*id.*, ¶ 44);

4. "exclusive license to sell and distribute Midway Labs USA nutrition supplements," and the fact that for the fiscal year 2016, Netshoes "distributed such products to over 105 drugstores and supermarkets in Brazil," generating sales in excess of R$74 million (*id.*, ¶¶ 9, 51);

5. "High margin" business model specializing in "easy-to-ship items with high margins and short replacement cycles" (*id.,* ¶¶ 8, 45);

6. Ability to attract new customers (*id.*, ¶ 45); and

7. Financial reporting complying with International Accounting Standards (**IAS**) 18 and 39 (*id.*, ¶¶ 58-69).

Neither accurate statements about past performance, nor expressions of puffery and corporate optimism are actionable under the securities laws (*Nadoff v Duane Reade, Inc*., 107 F Appx 250, 252 [2d Cir 2004]). Accordingly, absent factual allegations demonstrating that these statements were false or misleading when made (and there are none in the Complaint), statements concerning Netshoes' customer loyalty and past performance (*e.g*., items 3 and 4, *supra*) do not give rise to a securities claim.

Likewise, statements of opinion are not actionable. As the U.S. Supreme Court has explained, "[a] sincere statement of pure opinion is not an 'untrue statement of material fact,' regardless [of] whether an investor can ultimately prove the belief wrong" (*Omnicare*, *Inc., supra,* 135 S Ct at 1327). To be actionable, the opinion statements must be (i) false and (ii) not honestly believed

when made (*Waterford Twp. Police & Fire Retirement Sys. v Regional Mgt Corp.*, 2016 WL 1261135, at *9 (SD NY 2016). To the extent that the Complaint alleges that, in fact, Netshoes faced competition from an ecommerce retailer active across all of Latin America called MercadoLibre and from Amazon, which was active in Mexico, at the time of the IPO, Netshoes' statements are inactionable as statements of opinion (*see Omnicare*, *supra*, 135 S Ct at 1327). To wit, what Netshoes actually stated in its Offering Documents was: "'we do not ***believe*** we have a relevant direct competitor in eCommerce sports category in the region,'" and "'we ***believe*** we have become a clear contender for the market leader in Brazil'" (Compl., ¶¶ 42, 43 [emphasis added]). In addition, Netshoes' statements with respect to its competition were counterbalanced by its disclosure, stated in bold italics in its prospectus that, "***[t]he online retail industry is intensely competitive, and we may not compete successfully against new and existing competitors, which may materially and adversely affect our results of operations***" (Netshoes Prospectus, Form 424[b][4], p. 18, NYSCEF Doc. No. 42]). This disclosure was part of a broader 21-page section of the prospectus entitled "Risk Factors" disclosing a number of other risks and uncertainties of the investment in the company (*id.*). In any event, to the extent that MercadoLibre was Netshoes' competitor in the marketplace, this information was publicly available at the time of the IPO (*see, In Re Merrill Lynch & Co., Inc. Research Reports Sec. Litig.*, 272 F Supp2d 243, 250 [SD NY 2003] [Sections 11, 12 of 1933 Act do not require disclosure of publicly available information]). Moreover, with respect to Amazon, the plaintiffs concede that Amazon only expanded into the Brazilian market beginning "in late 2017," *i.e.*, ***after*** the April 2017 IPO (Compl., ¶ 47, n. 22). Whether a statement is materially false and misleading is viewed at the time such statement is made – not retroactively, in hindsight.

To the extent that the Complaint asserts that Netshoes "hid from investors the poor performance of [its] B2B Business," this is also inactionable. First, as an initial matter, it is undisputed that Netshoes has not restated its financial documents (*compare with Fresno County Empl. Retirement Assn. v comScore, Inc.*, 268 F Supp 3d 526, 544 [SD NY 2017] [misstatements clear in light of defendant's admission it must restate its financial statements]). Rather, what Netshoes has done is increase its allowance for "doubtful accounts" relating to the B2B business in November of 2017 (Compl., ¶¶ 56-69) as more of its accounts receivable have aged. It is in regard to this "restatement" that the plaintiffs claim that Netshoes' did not comply with IAS 18 and 39. According to the Complaint, Section 14 of IAS 18 provides that revenue from sales transactions may only be recognized provided that all of the following conditions are satisfied:

(a) the significant risks and rewards of ownership of the goods have been transferred to the buyer;

(b) the seller has not retained either continuing managerial involvement to the degree usually associated with ownership or effective control over the goods sold;

(c) the amount of revenue can be measured reliably;

(d) it is probable that the economic benefits associated with the transaction will flow to the seller; and

(e) the costs incurred or to be incurred in respect of the transaction can be measured reliably (Compl., ¶ 58).

IAS 39 requires that companies assess whether objective evidence (*e.g.*, payment delinquencies or adverse changes in customer's credit condition) indicates that accounts receivables are impaired (*id.*, ¶ 64).

Notably, however, "IFRS … does not explicitly address uncertain tax positions" (*The Implication of IFRS on the Functioning of the Securities Antifraud Regime in the United States*, 108 MILR 603, 622, Lance J. Phillips, Note, Michigan Law Review [February 2010]). "Thus, under the IFRS regime, companies are free to adjust uncertain tax positions as they see fit, or even disregard the uncertainty of tax positions altogether, subject only to the broad constraints contained in various IFRS provisions addressing income-tax reporting such as [IAS] 12" (*id.*). Simply put, the accounting rules purportedly violated by Netshoes require a company's judgment to determine which accounts receivable are collectable based on the facts and circumstances of those particular sales at the time in which such sales and accounts receivable are reported. Therefore, to be actionable, the plaintiffs need to allege facts demonstrating that Netshoes did not subjectively believe its accounting judgments at the time that these judgments were made. "Valuations and write-downs are subjective statements of opinion" that are "actionable only if they are (1) subjectively disbelieved, *i.e.*, not 'honestly held'; or (2) omit[] material facts about the issuer's inquiry into or knowledge concerning [the] statement … if those facts conflict with what a reasonable investor would take from the statement itself" (*In re Barclays Bank PLC Sec. Litig.,* 2017 WL 4082305 [SD NY 2017], *affd* 2018 WL 6040846 [2d Cir 2018] [dismissing securities claims based on allegations defendant misvalued certain assets in its financial statements]). Both IAS 18 and 39 require complex accounting judgments and nowhere in the Complaint do the plaintiffs allege any facts to suggest that these judgments were not sincerely believed when made. Rather, the Complaint merely asserts that:

> 66. As a result [of Netshoes accounting practices] … while the Company's provision (expense) for doubtful accounts approximated R$6 million during each of the years ended December 31, 2015 and 2016, Netshoes ultimately recognized approximately R$25 million in bad debt expense in 2017.

More specifically, without alleging any actual contemporaneous facts, the plaintiffs argue that Netshoes ***must have had*** a returns policy given the subsequent accounts receivable write-downs (*i.e.*, increase in doubtful allowance), and that, therefore, the risk of loss had not transferred when the financial statements were issued, and that, accordingly, such financial statements were overstated and materially false and misleading as they failed to disclose this supposed secret returns policy which related to 4.3% of Netshoes' revenues. These house of cards suppositions without any supporting facts are simply insufficient as a matter of law to give rise to a cause of action under the 1933 Act.

To the extent that Netshoes' statements of future growth also form the basis for the plaintiffs' claim under the 1933 Act, those forward-looking statements are protected by the Reform Act which, as noted above, provides a "safe harbor" and excludes liability for forward-looking statements, including projections. The safe harbor protects any disclosure "identified as a forward-looking statement, and . . . accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement" (15 USC § 77zz-2(c)(1)(A); *see also Slayton v American Express Co.,* 604 F3d 758, 768 (2d Cir 2010). Many of the alleged misstatements are protected by the safe harbor, including Netshoes' statements that:

(1) its new B2B operations "'will play a key role in [Netshoes'] long-term growth strategy'" (Compl., ¶¶ 9, 51);

(2) there was "'significant room to further grow the customer base'" (*id.,* ¶¶ 6, 41);

(3) "'the online retail industry is intensely competitive, and we may not compete successfully against new and existing competitors, which may materially and adversely affect our results of operations'" (*id.,* ¶ 50);

(4) "Netshoes was and would 'continue to be well-positioned' to benefit as its market continued to expand" (*id*., ¶ 40); and

(5) "'in just one year of operation we believe we have become a clear contender for the market leader in Brazil'" (*id*., ¶ 43).

Similarly, statements of puffery and/or corporate optimism are also inactionable (*Rombach v Chang*, 355 F3d 164, 174 (2d Cir 2004). These include:

(1) "Netshoes was and would 'continue to be well-positioned' to benefit as its market continued to expand" (Compl., ¶ 40);

(2) Netshoes had "a 'leading' position in the 'expanding' Brazilian sports eCommerce market" (*id.,* ¶ 41);

(3) "'[Netshoes] believe[s] it has become a clear contender for the market leader in Brazil'" (*id.,* ¶ 43);

(4) Netshoes' Zattini website was "'quickly becoming a leading online brand for fashion and beauty in Brazil in terms of consumer recognition'" (*id.*, ¶ 43); and

(5) Netshoes had "'customer loyalty' and 'high repeat purchasing'" by customers (*id.*, ¶ 44).

Courts have repeatedly held that statements concerning a company's business potential and underlying value are inactionable as a matter of law (*see, e.g., In re Duane Reade Inc. Sec. Litig.,* 2003 WL 22801416, at *5 [SD NY 2003]).

The plaintiffs also fail to allege an actionable omission, which requires "a substantial likelihood that the disclosure of the omitted fact," when considered in the Offering Documents' entire context, "would have been viewed by the reasonable investor as having significantly altered the total mix of information made available" (*Singh v Schikan*, 106 F Supp 3d 439, 446 [SD NY 2015]). "[I]t is well established that there is no liability in the absence of a duty to disclose, even

if the information would have been material" (*In re Morgan Stanley Tech. Fund Sec. Litig.,* 643 F Supp 2d 366, 375 (SD NY 2009), *affd*, 592 F3d 347 [2d Cir 2010]). "[A]n alleged misrepresentation or omission is immaterial as a matter of law . . . where [it is] 'sufficiently balanced by cautionary language within the same prospectus such that no reasonable investor would be misled about the nature and risk of the offered security'" (*In re Britannia Bulk Holdings Inc. Sec. Litig*., 665 F Supp 2d 404, 413 [SD NY 2009]).

Netshoes disclosed the information that the plaintiffs claim was omitted. To the extent that it did not disclose certain information, it had no duty to do so.

III. Item 303

Item 303 imposes specific disclosure requirements on companies filing reports on SEC Forms 10-K and 10-Q (*Indiana Pub. Retirement Sys. v SAIC, Inc.*, 818 F3d 85, 94 [2d Cir 2016] [internal quotation and citation omitted]). Under Item 303, Netshoes was required to:

> "[d]escribe any 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 CFR 229.303(a)(3)(ii). According to the SEC's interpretive release regarding Item 303, "disclosure [under Item 303] is necessary 'where a trend, demand, commitment, event or uncertainty is both presently known to management and reasonably likely to have material effects on the registrant's financial conditions or results of operations'" (*id.* [citation omitted]).

To be a material and required disclosure under Item 303, "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, supra*, 634 F3d at 717 [internal quotation and citation omitted]). The federal courts have "consistently rejected a formulaic approach to assessing the materiality of an alleged misrepresentation" (*id.*). Although

bright-line numerical tests for materiality are inappropriate and have been rejected, courts do not entirely exclude analysis based on quantative considerations (*id.*; *Ganino v Citizens Util. Co.,* 228 F3d 154 (2d Cir 2000).

As the Court in *Litwin* explained:

> As the SEC stated, "[t]he use of a percentage as a numerical threshold, such as 5%, may provide the basis for a preliminary assumption that . . . a deviation of less than the specified percentage with respect to a particular item . . . is unlikely to be material . . . . But quantifying, in percentage terms, the magnitude of a misstatement . . . cannot appropriately be used as a substitute for a full analysis of all relevant considerations." SAB No. 99, 64 Fed Reg at 45,151; *see also ECA & Local 134,* 553 F3d at 204 (noting that a "five percent numerical threshold is a good *starting place* for assessing . . . materiality" (emphasis added)). Accordingly, a court must consider "both 'quantitative' and 'qualitative' factors in assessing an item's materiality," SAB No. 99, 64 Fed Reg at 45,151, and that consideration should be undertaken in an integrative manner. *See Ganino,* 228 F3d at 163;

Here, the B2B business constituted 4.3% of Netshoes' net sales (Prospectus, p. 59, NYSCEF Doc. No. 42). Just as importantly, the Offering Documents disclosed Netshoes' actual financial metrics for years 2014 through 2016, including that, from 2015 to 2016, its gross margins had decreased and its annual net sales growth had halved; its customer "credit risk" from overdue B2B accounts receivable had nearly quadrupled; and that its allowance for doubtful accounts had more than tripled. Thus, under either a quantative or a qualitative analysis, Netshoes did not violate Item 303.

IV. Section 15 Liability for Individual Officers and Directors is Dismissed as Moot

Section 15 of the 1933 Act "creates liability for individuals or entities that 'control [] any person liable' under section 11 or 12" of the Act and, thus, "relies in part on a plaintiff's ability to

demonstrate primary liability under sections 11 and 12" (*In re Morgan Stanley Info. Fund Sec. Litig.,* 592 F3d 347, 358 [2d Cir 2010]). As plaintiffs have failed to adequately plead section 11 and 12(a)(2) claims, their section 15 claims necessarily fail as a matter of law.

V. Statute of Limitations is Moot

Section 11 and 12(a)(2) claims must 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 USC § 77m). This statute of limitations under the 1933 Act applies both in state and federal court (*Hertz v Rubin,* 31 AD2d 919, 920 [1st Dept 1969], *affd* 27 NY2d 875 [1970]). The defendants assert that the claims alleged are untimely because the one-year statute of limitations began to run with the release of Netshoes' IQ2017 results on May 15, 2017, one month after the IPO, which disclosed that Netshoes' past due balances as a percentage of the Netshoes' total accounts receivable had risen to 20.8%. In their opposition papers, the plaintiffs argue that the disclosure of such one-time events is an insufficient basis upon which to find that a plaintiff was on inquiry notice of its claim, particularly where, as here, the disclosure was silent as to the cause of the reported change (citing *Newman v Warnaco Grp., Inc.*, 335 F3d 187 [2d Cir 2003]). As the court finds that the plaintiffs failed to state a claim in their complaint, the court declines to address this issue.

VI. Plaintiffs' Motion for Alternate Service (mtn. seq. no. 003) is Denied as Moot

The plaintiffs have moved for an order directing service of process pursuant to CPLR 308(5) upon Leonardo Tavares Dib, Hagop Chabab, Wolfgang Schwerdtle, and Nicolas Szekasy (the **Unserved Defendants**), by mailing a copy of the summons and complaint to the Unserved

Defendants at their last-known address and by delivering a copy of the summons and complaint to the Unserved Defendants' counsel, Skadden, Arps, Slate, Meagher & Flom LLP, at their New York offices. Because the Complaint is dismissed for the reasons set forth above, the motion is denied as moot.

Accordingly, it is

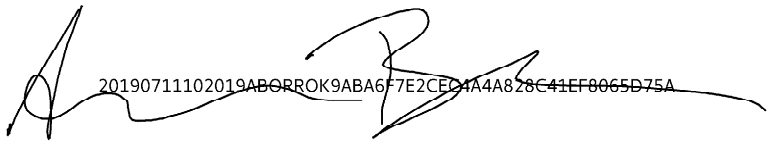
ORDERED that the defendants' motion (seq. no. 002) to dismiss the complaint herein is granted, without prejudice, and the complaint is dismissed in its entirety; and it is further

ORDERED that the plaintiffs are granted leave to serve and file an amended complaint within 30 days after service on the plaintiffs' attorney of a copy of this order with notice of entry; and it is further

ORDERED that, in the event that the plaintiffs fail to serve and file an amended complaint in conformity herewith within such time, leave to replead shall be deemed denied, and the Clerk of the Court, upon service upon him (60 Centre Street, Room 141B) of a copy of this order with notice of entry and an affirmation/affidavit by the defendants' counsel attesting to such non-compliance, is directed to enter judgment dismissing the action, with prejudice; and it is further

ORDERED that such service upon the Clerk of the Court shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh)]; and it is further

ORDERED that the plaintiffs' motion for alternate service (seq. no. 003) is denied as moot.



7/11/19
DATE

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