SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JENNIFER G. SCHECTER** **PART** **IAS MOTION 54EFM**

Justice

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INDEX NO. 653114/2018

DAN KOHL,

MOTION SEQ. NO. 002

Plaintiff,

- v -

LOMA NEGRA COMPANIA INDUSTRIAL ARGENTINA SOCIEDAD ANONIMA, LOMA NEGRA HOLDING GMBH, SERGIO FAIFMAN, MARCO GRADIN, RICARDO FONSECA DE MENDONCA LIMA, LUIZ KLECZ, PAULO DINIZ, CARLOS HUGHES, DIANA MONDINO, SERGIO ALONSO, BRADESCO SECURITIES INC.,CITIGROUP GLOBAL MARKETS INC.,HSBC SECURITIES (USA) INC.,ITAU BBA USA SECURITIES, INC.,MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED, MORGAN STANLEY & CO. LLC,

DECISION + ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 49, 50, 53, 54, 55, 56, 57

were read on this motion to/for DISMISS.

Defendants Loma Negra Compañía Industrial Argentina Sociedad Anónima (the Company), Bradesco Securities, Inc., Citigroup Global Markets Inc., HSBC Securities (USA) Inc., Itaú BBA USA Securities, Inc., Merrill Lynch, Pierce, Fenner & Smith Incorporated and Morgan Stanley & Co. LLC (exclusive of the Company, the Underwriters, with the Company, Defendants) move to dismiss the second amended complaint (Dkt. 29 [SAC]).[1] Plaintiff opposes.

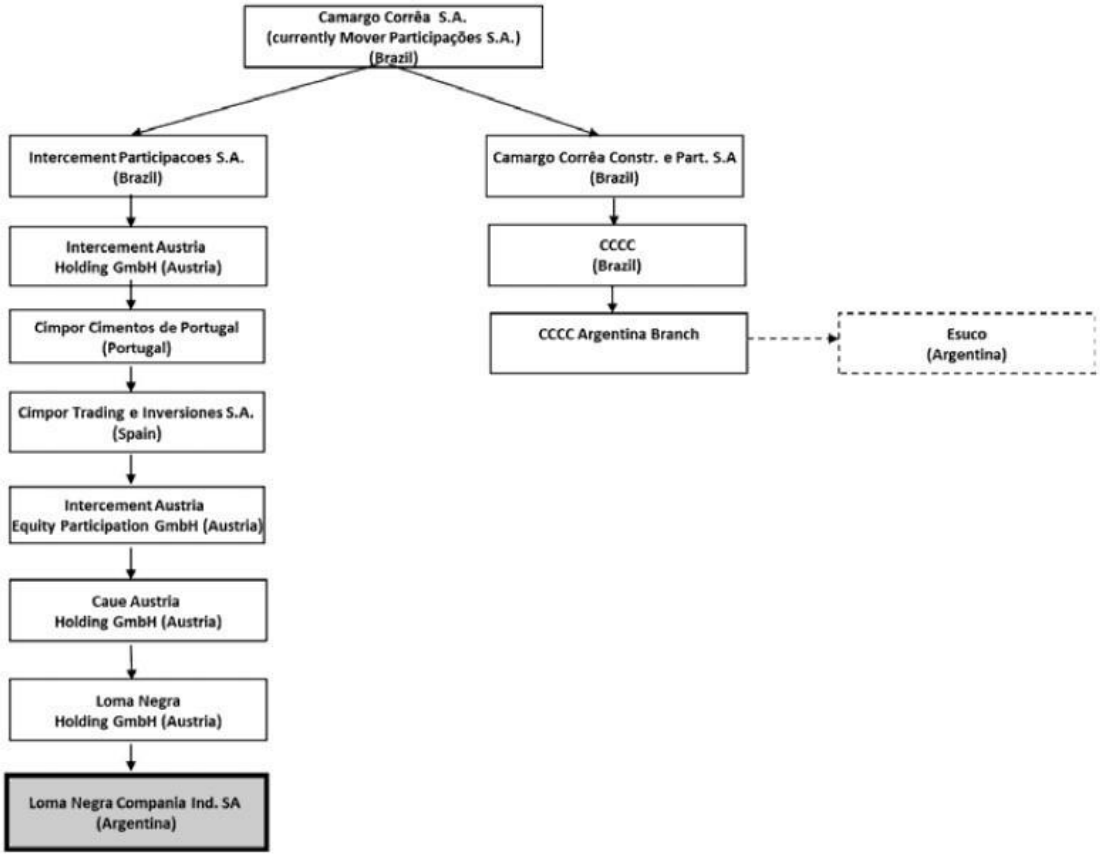
The motion is granted in part.

Background

For purposes of this motion, the facts pleaded in the SAC are assumed true.

[1] References to "Dkt." followed by a number refer to documents filed in this action on the New York State Courts Electronic Filing system (NYSCEF). Page numbers refer to the e-filed PDF.

The Company, incorporated in Argentina, produces and distributes cement, concrete and related materials to wholesale distributors, concrete producers and industrial customers in Argentina and Paraguay (SAC ¶¶ 3, 22). The Company's controlling shareholder, InterCement Participaçiões S.A. (InterCement), is controlled by Mover Participaçiões S.A. (Mover), formerly known as Camargo Corrêa S.A. (Camargo Corrêa), a multinational conglomerate based in Brazil (*id.* ¶¶ 4, 10). The Selling Shareholder is an Austrian limited liability company owned and controlled by InterCement (and, in turn, by Camargo Corrêa) (*id.* ¶ 38). Before the Company's initial public offering (IPO), Loma Negra Holding GmbH (Selling Shareholder) owned 99.4% of its outstanding capital stock (*id.*). Defendants provide the following simplified corporate chart from the time of the IPO (Dkt. 35 [Defs.' Opening Br.] at 15):



Nearly a decade before the IPO, in 2008, Camargo Corrêa formed a Unión Transitoria de Empresas (UTE), or joint partnership, between its engineering and construction subsidiary, Construções e Comércio Camargo Corrêa S.A. (CCCC), and an Argentine construction company, Esuco S.A. (Esuco) (SAC ¶¶ 5, 78). The UTE successfully bid on the Bicentenario, a public project to build a water plant in Argentina (¶¶ 78, 80). From its inception, the venture was allegedly rife with suspected bribes to Argentinean officials, kickbacks from the Argentine government and the use of substandard materials (¶¶ 87-93, 173). The SAC alleges that the Company "directly benefitted" from the bribery scheme by supplying building material for the Bicentenario (¶ 92).

In 2014, several years before the IPO, CCCC was accused of paying bribes to the Brazilian national oil company, Petróleo Brasiliero S.A. (Petrobras) (¶ 94). As a result, CCCC was banned from bidding on Petrobras projects (¶ 96). The bribery scheme was uncovered as part of a Brazilian government anti-corruption investigation, Operation Car Wash (¶¶ 94-95). In 2015, CCCC and two of its former employees and managers admitted to violations of Brazilian antitrust and anti-corruption laws and agreed to pay fines and indemnification (¶¶ 94-97).[2]

In September 2016, the Argentine government announced that it would invest $260 billion in infrastructure, including roads, highways, dams and social housing (¶¶ 109-110). By mid-2017, however, reports circulated in the construction industry that the government was quietly slowing public works spending and that the government had already fallen behind on payments to contractors (¶ 112).

In April 2017, "it was revealed" that the Argentine government was investigating Camargo Corrêa "related to" the Bicentenario project (¶ 105). In May 2017, Argentine authorities raided

[2] In early 2017, 40 Camargo Corrêa executives negotiated a plea deal with the Brazilian government as a result of the Operation Car Wash investigations (¶ 97). In January 2018, Petrobras settled a securities class action lawsuit in which it had been alleged that Petrobras executives had accepted bribes from Camargo Corrêa and other contractors (¶ 98).

Camargo Corrêa's offices (¶ 106). On June 21, 2017, Argentine prosecutors sought an inquest of two Camargo Corrêa executives (¶ 107).

In September 2017, public works project growth began to tank as the Argentine government sought to control the increasing national deficit (¶ 111). The government touted government partnerships with private companies (PPPs) to get projects done (¶¶ 115-116). Bidders engaged in bribery were to be automatically disqualified from PPPs (¶ 118).

Following the November 2017 IPO, public accusations surfaced that the Argentine government had been failing to pay its bills for construction on major public works contracts, including payments due before the IPO (¶¶ 114, 153). In early 2018, the Argentine government confirmed that it had frozen payments for public works projects due in November and December 2017 to avoid increasing the fiscal deficit during those months (¶ 154). In mid-2018, construction companies disclosed that, despite continuing assurances, provincial governments had been delaying payments for public works projects from 60-120 days, affecting payment to suppliers (¶ 156). The slowdown in payments included the Catamarca Province, where the Company has a production facility and recently upgraded its capacity (¶ 157).

In August 2018, an Argentine newspaper divulged details of a new scandal, involving up to up to $160 million in bribes to the Argentine government, uncovered by a series of "bribe notebooks" maintained between 2003 and 2015 (¶ 159). Over 40 government officials, construction company executives, and businesspeople were charged, including Esuco's founder, Carlos Wagner (¶ 160). Wagner accepted a plea in August 2018 in connection with systemic bribery in bidding schemes for Argentine government contracts (¶¶ 159-160, 162). In testimony and statements to prosecutors, Wagner and others described rampant bribery and corruption in the country's construction sector and his own extensive involvement as an intermediary between companies and government officials (¶¶ 163-167).

In September 2018, Camargo Corrêa's former president, a Brazilian national, was court-summoned to answer to Argentine criminal charges relating to bribery, but he failed to appear (¶ 172). Argentine charges against Wagner and against the two Camargo Corrêa executives who had been charged in June 2017 were upheld on appeal in December 2018 (¶¶ 174-175).

In the aftermath of the "bribe notebooks" scandal, the Argentine transportation minister announced that companies whose former employees were implicated in bribery schemes would continue to be allowed to participate in public works, but may still be subject to sanctions (¶ 179). Securing international financing for Argentine public works projects remains challenging in light of alleged industry-wide corruption (¶¶ 180-182).

Plaintiff proposes to bring this putative class action on behalf of purchasers or other acquirers of American Depositary Shares (ADSs) that were registered by the Company as a result of its IPO that began on November 1, 2017 and closed on November 3, 2017 (SAC at 4). Plaintiff alleges violations of §§ 11 and 15 of the Securities Act of 1933 (15 USC §§77k and 77o) based on false statements and material omissions included in the Company's (1) Form F-1 filed with the U.S. Securities and Exchange Commission (SEC) on or about September 5, 2017, along with subsequent amendments filed with the SEC between September 27 and October 19, 2017, and declared effective by the SEC on October 31, 2017 (the Registration Statement); and (2) Form 424B4 filed with the SEC on November 2, 2017 incorporated into the Registration Statement (the Prospectus, with the Registration Statement, Offering Materials). Defendants are the Company, certain members of its senior management and board of directors who signed the Registration Statement, the Selling Shareholder and the Underwriters, who participated in the IPO as

underwriters. They are alleged to have participated in the preparation of and signed, or authorized the signing of, the Registration Statement and the issuance of the Offering Materials.[3]

The SAC alleges that materially misleading statements in the Offering Materials artificially inflated the price of the ADSs at the time of the IPO (SAC ¶ 16). When the SAC was filed in January 2019, the Company's stock price was in an alleged "tailspin," trading more than 33% below the IPO price (¶ 15). The SAC also alleges that during the media's extensive August 2018 coverage of Camargo Corrêa's alleged bribery in Argentina, the Company's stock was trading as low as 68% below the IPO price (*id.*). The SAC blames the much-lower stock price on a lack of public confidence in the Argentine construction industry and in the country's public works plans (*id.*). The Company and Underwriters move to dismiss.[4]

Analysis

On a motion to dismiss, the facts alleged in the complaint are accepted as true, as are all reasonable inferences in plaintiff's favor that may be gleaned from them (*see Amaro v Gani Realty Corp.*, 60 AD3d 491, 492 [1st Dept 2009]; *Skillgames, LLC v Brody*, 1 AD3d 247, 250 [1st Dept 2003]). "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration" (*Skillgames*, 1 AD3d at 250). A motion to dismiss based on documentary evidence will only be granted if that "evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002], citing *Leon*, 84 NY2d at 88 [1994]). Dismissal must

[3] Plaintiff has not filed proof of service of the Selling Shareholder and the individual defendants, who have not yet appeared or answered.

[4] A federal action including some of the same claims was dismissed and there will be no appeal of that determination (*see* Dkts. 53-56).

be denied if the pleading sets forth a legally cognizable cause of action and deficiencies in the complaint may even be remedied by proper affidavits (*see Amaro*, 60 AD3d at 492; *see also Leon v Martinez*, 84 NY2d 83, 88 [1994]).

Section 11 Claims

Section 11 "imposes liability on issuers and other signatories of a registration statement that, upon becoming effective, 'contain[s] an untrue statement of a material fact or omit[s] to state a material fact required to be stated therein or necessary to make the statements therein not misleading'" (*Litwin v Blackstone Group, L.P.*, 634 F3d 706, 715 [2d Cir 2011], quoting 15 USC § 77k[a]). Plaintiff must plead facts demonstrating that "allegedly omitted facts both existed, and were known or knowable, at the time of the offering" (*Lin v Interactive Brokers Group., Inc.*, 574 F Supp 2d 408, 421 [SDNY 2008]; *see Scott v GM Co.*, 46 F Supp 3d 387, 393-94 [SDNY 2014], *affd* 605 Fed Appx 52 [2d Cir 2015]).

An omission is material if there is "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" (*Basic Inc. v Levinson*, 485 US 224, 231-32 [1988], quoting *TSC Indus., Inc. v Northway, Inc.*, 426 US 438, 448 [1976]). Materiality is ordinarily a question of fact that cannot be determined on a motion to dismiss (*In re Morgan Stanley Info. Fund Sec. Litig.*, 592 F3d 347, 360 [2d Cir 2010]). However, "[a]lleged misrepresentations in a stock offering are immaterial as a matter of law [if] it cannot be said that any reasonable investor could consider them important in light of adequate cautionary language set out in the same offering" (*Halperin v eBanker USA.com, Inc.*, 295 F3d 352, 357 [2d Cir 2002]). This "bespeaks-caution doctrine" establishes that "when cautionary language is present, we analyze the allegedly fraudulent materials in their entirety to determine whether a reasonable investor would have been misled" (*id.*). The "touchstone" of that inquiry is "whether defendants' representations or omissions,

considered together and in context, would affect the total mix of information and thereby mislead a reasonable investor regarding the nature of the securities offered" (*id.*).

At the outset, plaintiff's claims are sufficiently pleaded. The SAC, which does not allege fraud, identifies with particularity the statements that are allegedly misleading and the allegedly material information that was omitted.[5] Defendants have been informed of the substance and source of the allegations.

Car Wash Statements

The SAC asserts that the Offering Materials contain materially false or misleading statements relating to the Operation Car Wash investigation (the Car Wash Statements).

The Prospectus states:

> InterCement Participações S.A., our controlling shareholder, is a holding company for the cement business of the Camargo Corrêa group. Construções e Comércio Camargo Corrêa S.A., or CCCC, a construction and engineering affiliate of InterCement Participações S.A., is also controlled by the Camargo Corrêa group.
>
> CCCC and certain of its former senior management and employees have recently been the subjects of a Brazilian Federal Police investigation referred to as Operation Car Wash …. In connection with the Operation Car Wash investigation **and comprehensive internal investigations undertaken by CCCC** with the assistance of external experts, CCCC and certain of its former senior management and employees entered into leniency and plea bargain agreements with the Brazilian authorities …. In addition, **CCCC continues to conduct internal investigations on an ongoing basis** regarding its anti-corruption compliance.
>
> The news of Operation Car Wash also had repercussions in other Latin America countries where CCCC operates besides Brazil, including Peru, **Argentina** and Venezuela. **According to certain media reports, government investigations are underway** in those countries for alleged acts of corruption involving Brazilian

[5] Even if CPLR 3016(b) applies, and courts have concluded that it does not, the statute has been easily satisfied in this section 11 action where scienter is not an issue (*see Lyu v Ruhnn Holdings Ltd.*, 2020 WL 1939668, at *4 n 6 [Sup Ct, NY County Apr. 22, 2020]). Indeed, the parties essentially conceded at oral argument that the applicability of CPLR 3016(b) is not determinative since the SAC sets forth "the circumstances constituting the wrong … in detail."

> construction companies. **CCCC's management has conducted internal investigations with the help of external experts and to-date has not identified evidence of any wrongdoing performed by CCCC in these countries.**
>
> **Any additional violations of anti-corruption and/or antitrust laws involving CCCC may result in additional fines and/or indemnification obligations. In addition, any additional adverse events or developments could have a material adverse impact on CCCC and the Camargo Corrêa group, which may subject us to reputational damage and could materially adversely affect the trading price of our ordinary shares and ADSs.** … [N]o assurances can be given that affiliates of CCCC will not also be found to be liable … (Dkt. 37 at 195-196 [emphasis added]).

The Prospectus also sets forth:

> Adverse events affecting affiliates of our indirect controlling shareholder, Camargo Corrêa S.A., or Camargo Corrêa, including with respect to the involvement by a subsidiary of Camargo Corrêa in the so-called Operation Car Wash investigation in Brazil (Operação Lava Jato), may have a material adverse effect on our reputation and on the trading price of our ordinary shares and ADSs (Dkt. 37 at 57).

The SAC asserts that the Car Wash Statements failed to disclose evidence of Camargo Corrêa's alleged bribery in connection with the Bicentenario in Argentina or the likelihood that the Company would suffer adverse impact to its reputation and share price and be excluded from Argentine public works contracts as a result (SAC ¶¶ 138, 140). Plaintiff also points to a May 2017 raid of Camargo Corrêa's offices in Argentina (SAC ¶ 106), and the June 2017 inquest of two Camargo Corrêa executives (SAC ¶ 107) as undisclosed material facts.

Defendants argue that they had no obligation to disclose "uncharged, unadjudicated wrongdoing" allegedly committed by the Company's affiliate (*see City of Pontiac Policemen's & Firemen's Retirement Sys. v UBS AG*, 752 F3d 173, 184 [2d Cir 2014]). Defendants contend that because the SAC does not sufficiently allege that the Company knew or had reason to know of the

Bicentenario bribery,[6] it was not misleading to fail to disclose it (*see In re Ply Gem Holdings, Inc.*, 2016 WL 5339541, at *4-5 [SDNY Sept. 23, 2016]; *Charter Twp. of Clinton Police & Fire Retirement Sys. v KKR Fin. Holdings LLC*, 2010 WL 4642554, at *15-17 [SDNY Nov. 17, 2010]; *Lin*, 574 F Supp 2d at 421). Defendants also point to statements that purport to disclose the relevant government investigations and caution about future "adverse events or developments," asserting, for instance, that "[b]y disclosing the investigation, [the Company] necessarily disclosed the search of CCCC's offices, which was a subset of the reported investigation" (Dkt. 44 [Defs.' Reply Br.] at 15).

Professing the Company's actual ignorance of the bribery scheme is not enough for dismissal at the pleadings stage. In the face of public accusations against the Company's Brazilian affiliates, the Car Wash Statements touted the Company's insight on internal CCCC investigations that had not, thus far, uncovered wrongdoing in Argentina, characterizing such investigations as "comprehensive" and "ongoing." The Company asserts its knowledge "logically would be limited to what was reported to it" (Dkt. 44 [Defs.' Reply Br.] at 15). One may reasonably infer from the statements, taken as a whole, however, that the Company either had or misrepresented having an insider's knowledge of CCCC through their common control by Camargo Corrêa. While the Prospectus discloses "media reports" of Peruvian, Argentine and Venezuelan government investigations of unspecified "Brazilian companies"—it does ***not*** disclose the May and June 2017 raid or the inquest of Camargo Corrêa by Argentine authorities. The omission renders the disclosure misleading (*see Meyer v Jinkosolar Holdings Co.*, 761 F3d 245, 250 [2d Cir 2014] ["Even when there is no existing independent duty to disclose information, once a company

[6] Defendants argue that the requisite knowledge cannot be imputed to a corporate affiliate simply based on the corporate relationship (*see Defer LP v Raymond James Fin., Inc.*, 2010 WL 3452387, at *8 [SDNY Sept. 2, 2010]; *Cromer Fin. v Berger*, 137 F Supp 2d 452, 485 [SDNY 2001]).

speaks on an issue or topic, there is a duty to tell the whole truth"]; *see Morgan Stanley*, 592 F3d at 366 ["The literal truth of an isolated statement is insufficient; the proper inquiry requires an examination of 'defendants' representations, taken together and in context.' Thus, when an offering participant makes a disclosure about a particular topic, whether voluntary or required, the representation must be 'complete and accurate'" (citations omitted)]).

Consequently, the SAC sufficiently alleges that a reasonable investor would conclude based on the Operation Car Wash statements that pre-IPO, Camargo Corrêa and CCCC were not subject to government investigation in Argentina, which was false. Actual knowledge of the falsity—while it would be sufficient—is unnecessary, insofar as the Offering Materials misled investors about the Company's very ability to make such representations. The Company represented that it knew enough to report on the results of CCCC's internal investigations and cited only unspecified media reports of Argentine investigations of unspecified Brazilian companies. It now, in contrast, claims ignorance of any affiliate's investigation and too much distance to have been aware as a matter of law. It can't have it both ways and plaintiff's claims that the Car Wash Statements were materially false or misleading are not subject to CPLR 3211 dismissal.

Competitive Strengths Statements

The SAC asserts that the Offering Materials contain materially false or misleading statements touting the Company's so-called "competitive strengths" that "consistently differentiate" the Company from its competitors and contribute to its success (Competitive Strengths Statements). A section of the Prospectus titled "Our Competitive Strengths" describes the Company as a "Market leader in Argentina, uniquely positioned to capture increasing demand for cement" (Dkt. 37 at 134). It states:

> As the leading market player, we believe we are the best positioned company to benefit from the increase in cement consumption in Argentina. … We believe that our nationwide presence, production and distribution capabilities, our extensive limestone reserves as

> well as our recognized brand provide us with a competitive advantage to benefit from the expected growth dynamics in our markets in the near and medium term (Dkt. 37 at 143).
>
> Our favorable market position in Argentina and critical scale represent a significant barrier to entry for new cement players. As production capacity continues to exceed depressed demand in other parts of the world, we may in the future face the possibility of competition from the entry into our market of imported clinker or cement. However, we believe that cement companies in Argentina are relatively protected from imports since imported raw materials will incur significant incremental costs. Inland logistics to transport clinker and/or cement also present difficulties for our competitors. In addition, our limestone reserves are strategically located close to key markets and any new entrant would find it difficult to secure the sourcing of raw material in our main markets (*id.* at 144).
>
> Our controlling shareholder, the InterCement Group, has a deep knowledge of the cement industry resulting from its global leading position and is deeply committed to its investments in Argentina and Paraguay. We believe that InterCement Group's sponsorship gives us a competitive advantage, due to its continuing support and sharing of its global know-how (*id.* at 147).

The SAC asserts that the Competitive Strengths Statements failed to disclose Camargo Corrêa and CCCC's systematic bribery and kickback schemes, the discovery and cessation of which would make it difficult for the Company to retain its market share or obtain new major public works contracts (SAC ¶¶ 142, 144). "[A] duty to disclose uncharged wrongdoing can arise when a corporation puts the reasons for its success at issue, but 'fails to disclose that a material source of its success is the use of improper or illegal business practices.'" (*Menaldi v Och-Ziff Capital Mgt. Group LLC*, 164 F Supp 3d 568, 581 [SDNY 2016], quoting *In re FBR Sec. Litig.*, 544 F Supp 2d 346, 353 [SDNY 2008]). Plaintiff cites several cases where the touting of competitive strengths was a misrepresentation when the true strengths stemmed from illicit conduct (*see Doubleline Capital LP v Odebrecht Fin., Ltd.*, 323 F Supp 3d 393, 444 [SDNY 2018]; *In re VEON Ltd. Sec. Litig.*, Fed Sec L Rep P 99879, 2017 WL 4162342, at *5-7 [SDNY Sept. 19,

2017]; *In re Braskem S.A. Sec. Litig.*, 246 F Supp 3d 731, 759-760 [SDNY 2017]; *In re Par Pharm., Inc. Sec. Litig.*, 733 F Supp 668, 675 [SDNY 1990]).

Here, while the Offering Materials tout the relationship with ***InterCement*** as a benefit (*cf. In re SemGroup Energy Partners, L.P.*, 729 F Supp 2d 1276, 1304-05 [ND Okla 2010]), they emphasized that the Company's relationship to Camargo Corrêa and CCCC was a potential ***liability*** based on reputational and legal risks (although not to the necessary degree, as previously discussed). The complaint, moreover, falls short of alleging that InterCement or the Company actually participated in systematic bribery and kickback schemes. And no facts are alleged from which it may be inferred that Camargo Corrêa and CCCC's alleged bribery was to the Company's present material advantage or is otherwise responsible for its outsize market share (*see* SAC ¶ 59 [45.4% for the first half of 2017]). Consequently, the Competitive Strengths Statements as alleged are not misleading as a matter of law.[7]

Demand Statements

The SAC asserts that the Offering Materials contain materially false or misleading statements touting the Company's ability to benefit from increased demand driven by economic growth and public works projects (Demand Statements). The Prospectus states:

> We understand that the low cement consumption per capita in Argentina relative to other Latin American economies, the limited number of major infrastructure investments in the country over the last decade, the local housing deficit and the growth prospects for the Argentine economy create a compelling opportunity for the construction sector and will jointly drive demand for cement, masonry cement, concrete, aggregates, lime and other building materials (Dkt. 37 at 11).
>
> Similar to other regional markets, the demand for cement in Argentina is expected to be **driven by infrastructure projects** as well as residential and non-residential construction activity. In the

[7] Nevertheless, the issue of whether defendants knew of alleged bribery and kickback schemes by Camargo Corrêa and CCCC remains fair game for discovery in light of the other sufficiently pleaded allegations.

> near term, the **announced infrastructure projects** coupled with new financing sources for residential construction are expected to drive incremental local cement demand (*id.* at 135 [emphasis added]).
>
> We believe that [we have] a competitive advantage to benefit from the **expected growth dynamics in our markets** in the near and medium term. We also believe that the **relatively low cement consumption per capita in Argentina compared to other countries, the housing deficit, the positive macroeconomic outlook and the announced infrastructure investment plans will translate into growth opportunities** in the construction sector driving incremental demand for cement, masonry cement, concrete, lime, aggregates and other building materials (*id.* at 143 [emphasis added]).
>
> We intend … to consistently capture the **increasing cement demand anticipated as a consequence of the expected recovery of the Argentine economy**. In effect, as the leader in the Greater Buenos Aires region, **we are participating in most of the major construction and infrastructure public projects that have commenced in 2017 in the Province of Buenos Aires**, supplying their respective cement and concrete needs (*id.* at 147-48 [emphasis added]).

The SAC asserts that the Demand Statements failed to disclose that around the time of the IPO, fiscal deficits prevented the Argentine government from funding major infrastructure projects, and that the government was resorting to PPPs and delaying payments to contractors on existing projects (SAC ¶¶ 147, 149, 152). They also purportedly failed to disclose the risk that discovery of public corruption by construction companies in Argentina, including Camargo Corrêa, would dissuade foreign investment in Argentine public infrastructure projects and PPPs (*id.*). Plaintiff further asserts that the statements failed to disclose that because of Camargo Corrêa's involvement in the Bicentenario, the Company would likely be excluded from new public works projects (*id.*).

Defendants argue that the Demand Statements are forward-looking and are accompanied by sufficient cautionary language. In particular, Defendants point to the following cautionary language in the Prospectus:

Investing in an emerging economy such as Argentina entails certain inherent risks … includ[ing] **political, social and economic instability** that may affect Argentina's economic results. In the past, instability in Argentina has been caused by many different factors, including … **dependence on external financing** (Dkt. 37 at 36 [emphasis added[).

[S]ocial and political developments in Argentina, over which we have no control, may adversely affect our financial condition or results of operations (*id.* at 37).

[S]ome or all of the required changes and improvement to the economy and investment environment (**including the reduction of the fiscal deficit** …) may not be implemented, which would **adversely affect the continued improvement of the economy and investment environment** (*id.* at 39 [emphasis added]).

Argentina's economy has undergone a significant slowdown, and any further decline in Argentina's rate of economic growth could adversely affect our business, financial condition and results of operations… Economic conditions in Argentina from 2012 to 2015 included … **a rising fiscal deficit** and limitations on **Argentina's ability to service its restructured debt**…. (*id.* at 42 [emphasis added]).

[A] **decline in confidence among … foreign and domestic investors** … could lead to reduced demand for our services and adversely affect our business, financial condition and results of operations (*id.* [emphasis added]).

In the future the Argentine government could [take various steps] … which could limit our ability to access the international capital markets (*id.* at 43).

The Argentine government's ability to obtain financing from international markets is limited, which may impair its ability to implement reforms and foster economic growth and **may negatively impact our financial condition or cash flows** (*id.* at 44 [emphasis added]).

A reduction in private or public construction projects in Argentina … could have an adverse effect on our business, financial condition and results of operations. **Significant interruptions or delays in, or the termination of, private or public construction projects may adversely affect our business, financial condition and results of operations**. Private and public construction levels in our market depend on investments in the region which, in turn, are affected by economic conditions. **We cannot assure you that the Argentine … government[] will execute the infrastructure plans as communicated.** A reduction in public infrastructure spending in

> the markets in which [we] operate or **delay in the execution of these projects** could have an adverse effect on the general growth of the economy and, therefore, **could adversely affect our business, financial condition and results of operations** (*id.* at 47 [emphasis added]).

Defendants also point to the Car Wash Statements for disclosure of potential impacts of the Operation Car Wash investigations into alleged bribery at CCCC. There are no allegations that the Company itself has been excluded from public projects—reportedly, it does not contract directly with government entities (*cf.* SAC ¶ 3)—or has not been paid for supplying cement.

While the risks of fiscal deficits and a lack of international financing might have been adequately disclosed to investors, none of the above statements—including the Car Wash Statements, as previously discussed—address the Argentine government's pre-IPO investigative activity against Camargo Corrêa and CCCC. Nor do they address pre-existing, widespread bribery and corruption in the Argentine construction industry as alleged by the SAC.[8]

Additionally, the Demand Statements fail to address the alleged fact that pre-IPO, construction companies were already not getting paid for work in connection with Argentine public works projects. The SAC alleges that mid-2017, "reports began to circulate within the construction industry that … the [Argentine] government had already fallen behind on its payments to government contractors," citing July 2017 media quotations from industry players (SAC ¶¶ 112-

[8] Defendants contend that, as a subcontractor that did not directly enter into contracts with government entities, the Company did not know of pervasive industry corruption. In opposition, plaintiff submits a September 21, 2018 interview with Sergio Faifman, the Company's CEO and Vice President of the Board, as well as a Vice-President at InterCement (Dkts. 40-41; SAC ¶ 26). Faifman, who has been at the Company since 1994 and served in managerial roles at the Company and InterCement Brasil between May 2006 and September 2010 (SAC ¶ 26), described the corruption as "something that many suspected or knew." While that does not conclusively establish that he or others at the Company "suspected or knew" of alleged industry corruption at the time of the IPO, the statements sufficiently support allegations that the corruption was, at minimum, knowable to the Company, and defendants fail to carry their burden of conclusively demonstrating otherwise.

113). Defendants argue that the Company was not obligated to disclose "non-company specific information that was already known to investors through other public sources" (Dkt. 35 [Defs.' Opening Br.] at 38, citing *In re Keyspan Corp. Sec. Litig.*, 383 F Supp 2d 358, 377 [EDNY 2003] and *In re Merrill Lynch & Co. Research Reports Sec. Litig.*, 272 F Supp 2d 243, 250 [SDNY 2003]). The cases cited by defendants, however, involve matters of public record or extensive, years-long media coverage.

The SAC sufficiently alleges that it was materially misleading to tout the Company's participation in then-current "major construction and infrastructure public projects" without disclosing the risk of contractual nonpayment already affecting other industry players. Defendants have not conclusively shown that the alleged omissions would not have significantly altered the "total mix" of information made available (*see Basic*, 485 US at 231-32).[9] In fact, the Offering Materials expressly discouraged the use of outside information, stating that investors "should not rely upon any information other than the information in this prospectus and any free writing prospectus prepared by us or on our behalf" (Dkt. 37 [Prospectus] at 3). "A reasonable investor will not be charged to regard press reports as a reliable source of information after having read such advice" (*In re Facebook, Inc.*, 986 F Supp 2d 487, 522 [SDNY 2013], citing *SEC v Bank of Am. Corp.*, 677 F Supp 2d 717, 719 [SDNY 2010]).[10]

[9] Defendants have also not shown that the referenced media reports were transmitted with the requisite "degree of intensity and credibility" as required to assert a "truth on the market defense" (*see Ganino v Citizens Util. Co.*, 228 F3d 154, 167 [2d Cir 2000]).

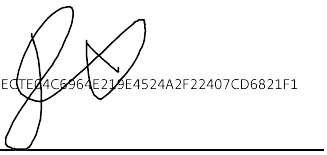
[10] Whether other factors (for example, the decline in the Argentine economy) led to the decline in the Company's stock price requires an analysis of loss causation, which relates to an affirmative defense and is not an element of the cause of action (*see In re Facebook, Inc. IPO Sec. & Derivative Litig.*, 986 F Supp 2d at 523; *In re Fuwei Films Sec. Litig.*, 634 F Supp 2d 419, 444 [SDNY 2009]). In any event, defendants have failed to conclusively show "negative causation."

Items 303 and 503 of Regulation S-K

In the SAC, plaintiff also alleges that defendants violated Items 303 and 503 of Regulation S-K. Item 303 requires disclosure of "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); *see Stratte-Mcclure v Morgan Stanley*, 776 F3d 94, 101 [2d Cir 2015]). A specific focus "on material events and uncertainties known to management that would cause reported financial information not to be necessarily indicative of future operating results or of future financial condition" is required (Instruction 3 to ¶ 303(a)). Thus, the prospectus must discuss important changes to the company's business or environment that "materially decreases the predictive value of … reported results" (*Oxford Asset Mgmt., Ltd. v Jaharis*, 297 F3d 1182, 1192 [11th Cir 2002]; *see Barilli v Sky Solar Holdings, Ltd.*, 389 F Supp 3d 232, 257 [SDNY 2019]). Similarly, Item 503 disclosures must describe the most significant factors that may adversely affect the company's business or future financial performance and explain how the risk affects the securities on offer (*see Silverstrand Invs. v AMAG Pharm., Inc.*, 707 F3d 95, 103 [1st Cir 2013]; *Barilli*, 389 F Supp 3d at 257). As discussed, plaintiff sufficiently pleaded that material information was omitted. The allegations also adequately support assertion of the regulatory violations based on non-disclosure of known trends or uncertainties--whether active Argentine government investigations into CCCC would bear fruit--and omission of the most significant factors that may adversely affect the Company's business or financial performance--the risk that the Argentine government might continue to delay payments to public works contractors. Accordingly, it is

ORDERED that defendants' motion to dismiss is granted only to the extent that the claims based on the Competitive Strengths Statements are dismissed and the motion is otherwise denied; and it is further

ORDERED that a telephonic preliminary conference will be held on November 13, 2020 at 2:00 p.m. (the parties shall circulate a dial-in number 30 minutes in advance), and the parties shall e-file and email the court (mrand@nycourts.gov) their joint letter at least one week before the conference.



10/22/2020
DATE

JENNIFER G. SCHECTER, J.S.C.

CHECK ONE: [ ] **CASE DISPOSED** [X] **NON-FINAL DISPOSITION**

[ ] **GRANTED** [ ] **DENIED** [X] **GRANTED IN PART** [ ] **OTHER**