IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

ATLAS MASTER FUND, LTD., et al.,

Plaintiffs,

v.

TERRAFORM GLOBAL, INC., et. al.,

Defendants.

Case No. 449742-V

MEMORANDUM AND ORDER

Defendant, Terraform Global, Inc. ("Global"), a company formerly controlled by SunEdison, Inc. ("SunEdison"), sold $675 million in newly-issued common stock to the public on July 31, 2015. The initial offering price was $15.00 per share and 45 million shares of common stock were sold. On December 28, 2017, Global was de-listed from the NASDAQ, the exchange on which it traded. Its stockholders were paid $5.10 per share when Global was acquired by an affiliate of Brookfield Asset Management Inc. Global's dramatic loss in value in span of some two years, resulted in large measure, it is alleged, from material misrepresentations and omissions in Global's registration statement.[1]

Global was a YieldCo, the second to be formed by SunEdison.[2] The first, Terraform Power ("TERP"), was formed in July 2014. While TERP focused on projects developed in the

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[1] With limited exceptions not relevant here, an issuer may offer securities to the public only after filing a registration statement with the Securities and Exchange Commission. 15 U.S.C. §§ 77d -77e.

[2] "A YieldCo is a financing structure that aims to 'recycle' capital in a tax efficient manner while allowing the parent company to retain significant control of the YieldCo subsidiary and generating demand from a non-core portion of the public investor base." E. Johnson, S. Matias, D. Suits & H. Wiggins, *Restructuring in the YieldCo Space: Implications for Renewable Energy Access to Capital Markets* 4 (Duke University 2017), https://dukespace.lib.duke.edu/dspace/bitstream/handle/10161/14205/Final%20YieldCo%20MP.pdf?sequence=1. (hereafter,"Duke Article").

United States, Global was to focus on projects in emerging markets, such as Brazil, India and China.

Due to its structure as a YieldCo, Global was completely controlled by its parent, or sponsor, SunEdison. At one point SunEdison had a market capitalization of $9.4 billion. SunEdison, filed for protection from creditors under Chapter 11 on April 21, 2016. SunEdison emerged from bankruptcy on December 29, 2017, as a privately held company. It is considered by some to be the biggest corporate implosion in the renewable energy industry's history.

As will be discussed below, the relationship between a sponsor, like SunEdison, and a YieldCo, like Global is more than symbiotic. A YieldCo is a tax-efficient financing structure that exists largely to benefit the sponsor. Among other things, this arrangement allows the sponsor to tap the public equity markets without giving up control over the underlying assets. It basically recycles capital for the parent company and passes much of the risk to the public stockholders of the YieldCo.

The defendants have moved to dismiss the complaint on a number of grounds. They first contend that the plaintiffs' claims are barred by the statute of limitations. In this regard, they argue that Maryland would not apply cross-jurisdictional tolling. They finally argue, for a number of reasons, that the plaintiffs have not pleaded viable claims for relief against any of the defendants under the Securities Act of 1933 (the "1933 Act").

The plaintiffs disagree, contending that because they were putative class members in *In re Terraform Global, Inc. Sec. Litig.*, 1:16-cv-07967-PKC (S.D.N.Y.), their individual 1933 Act claims were tolled under the doctrine first established in *American Pipe & Constr. Co., v. Utah,*[3] The plaintiffs argue that a state court should apply the federal statute of limitations to their 1933

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[3] 414 U.S. 538 (1974).

Act claims (which are exclusively federal claims) and that the defendants' misrepresentations and omissions alleged in this case are sufficiently similar to the claims asserted by the class in the federal suit to warrant tolling under the *American Pipe* doctrine. The plaintiffs contend that restrictions placed by some courts on cross-jurisdictional tolling (federal law to state law claims, or federal law claims where state law supplies the statute of limitations, such as under 42 U.S.C. § 1983) are simply inapplicable. Lastly, the plaintiffs contend that the complaint adequately pleads facts sufficient to constitute several violations of the 1933 Act, which is the sole basis for the claims asserted in this case.

The court held a hearing on December 7, 2018. For the reasons that follow, the defendants' motion to dismiss will be denied. Federal, not state, law supplies the statute of limitations for the 1933 Act claims asserted in this case. The statute of limitations for the plaintiffs' 1933 Act claims was tolled by the federal case pending in the Southern District of New York, from the filing of the complaint in that case until the plaintiffs opted-out of the proposed class settlement. Finally, the plaintiffs have adequately pleaded material misrepresentations and omissions by the defendants from Global's registration statement to withstand a motion to dismiss.

Background[4]

The plaintiffs are investment funds that acquired shares of Global common stock in, or traceable to, the initial public offering.[5] Global was a Delaware corporation that had its principal office in Bethesda, Maryland. As noted, Global now has been acquired by an affiliate of Brookfield.

Defendant Carlos Domenech Zornoza ("Domenech") was the CEO and a director of Global at the time of the initial public offering and signed the registration statement. Domenech also served as an executive vice president of SunEdison. Defendant Jeremy Avenier ("Avenier") was Global's chief financial officer at the time of the initial public offering and later served as a vice president of SunEdison. Defendant Martin Truong ("Truong") was a director of Global at the time of the offering. Defendant Truong also served as SunEdison's general counsel, secretary and vice president. Defendant Brian Wuebbels ("Wuebbels") was a director of Global at the time of the initial public offering. Defendant Wuebbels also was the chief financial officer of SunEdison.

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[4] On a motion to dismiss, the court's review is cabined to the language of the complaint, and any documents referred to, or incorporated by, reference into the complaint. In this case, the complaint quotes from, and refers repeatedly to, Global's registration statement. The court will consider that document in assessing whether the complaint states facts sufficient to constitute a cause of action. The defendants have filed an affidavit with their motion to dismiss attaching numerous other documents, including SEC filings made by SunEdison. These documents will not be considered. *See Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 1002-03 (9th Cir. 2018).

[5] The defendants have not challenged the plaintiffs' standing to bring 1933 Act claims. Most courts agree that, along with those who purchase at the initial offering, "aftermarket purchasers who can trace their shares to an allegedly misleading registration statement have standing to sue under § 11 of the 1933 Act." *DeMaria v. Anderson*, 318 F.3d 170, 178 (2d Cir. 2003).

The stock purchased by the plaintiffs in this case was in the type of entity known as a YieldCo.[6] This asset class was marketed as "a publicly traded corporation that like [a Master Limited Partnership], provides stable and growing distributions for investors from operating assets that generate a predictable stream of cash flow."[7]

> Since the first YieldCo was formed in early 2012, the sector has seen significant growth, swelling to over 10 entities with a cumulative market capitalization in 2015 of almost $ 18 billion. Many firms and analysts saw the YieldCo as an ideal way to capitalize on the growth trajectory of renewable energy, particularly in the United States, allowing firms to separate their long-lived, stable cash-generating renewable energy assets from their remaining businesses as a means to raise and deploy additional capital generated from the YieldCo public offerings.[8]

YieldCo's have a unique relationship with their parent corporation, or sponsor. There are built-in conflicts of interest unique to a YieldCo such as: (1) conflicts relating to corporate governance of the YieldCo; and (2) valuation of the assets to be "dropped-down" from the sponsor to the YieldCo. These corporations are essentially a tax-efficient financing structure, created to allow their parent to tap the public capital markets and, at the same time, provide the parent with a ready, or captive, buyer of the parent's assets.

The rise and fall of SunEdison, and the efficacy of its business model, was discussed in detail by the district court in *In re SunEdison, Inc. Securities, Litigation*.[9] The short version is that from 2013 to 2015, as part of an acquisition spree, SunEdison's debt ballooned from $2.6

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[6] YieldCo's are structured to avoid double taxation, similar to real estate investments trusts and master limited partnerships. A YieldCo is able to pass untaxed earnings through to its investors, while avoiding taxation at the corporate level.

[7] EY, *The YieldCo Structure: Unlocking the Value in Power Generation Assets* 1 (2015), https://www.ey.com/Publication/vwLUAssets/ey-yieldco-brochure/$FILE/ey-yieldco-brochure.pdf.

[8] Duke Article at p. 6.

[9] 300 F.Supp.3d 444, 458-60 (S.D.N.Y. 2018).

billion to $10.7 billion. By the time of its bankruptcy filing on April 21, 2016, SunEdison's debt had risen to $16 billion.

Discussion

The 1933 Act bars any person from offering or selling securities except pursuant to a registration statement approved by the SEC or in compliance with an exemption. The 1933 Act grants private right of action to purchasers of securities so that they can enforce its registration and disclosure requirements. State courts have concurrent jurisdiction with federal courts over claims by private 1933 Act plaintiffs, and defendants cannot remove 1933 Act cases filed in state court to federal court.[10]

Section 11 of the 1933 Act "allows purchasers of a registered security to sue certain enumerated parties in a registered offering when false or misleading information is included in a registration statement."[11] "Section 11 creates two ways to hold issuers liable for the contents of a registration statement – one focusing on what the statement says and the other on what it leaves out."[12] The liability of the issuer is virtually absolute.[13] "[E]very person who signed the registration statement" may be liable.[14] Defendants other than the issuer may avoid liability by proving a due diligence defense.[15] Section 12(a)(2) of the 1933 Act provides an additional cause

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[10] *Cyan, Inc. v. Beaver City Employees Retirement Fund*, 138 S. Ct. 1061, 1066 (2018).

[11] *Herman & MacLean v. Huddleston*, 459 U.S. 375, 381 (1983).

[12] *Omnicare, Inc. v. Laborers District Council*, 135 S. Ct. 1318, 1323 (2015).

[13] *Huddleston*, 459 U.S. at 381; *Pinter v. Dahl*, 486 U.S. 622, 638 (1988).

[14] 15 U.S.C. § 77k(a)(1).

[15] *Huddleston*, 459 U.S. at 382; *see* 15 U.S.C. § 77k(b) (setting forth due diligence and other defenses).

of action when a prospectus contains material misstatements or omissions.[16] The prospectus in this case was part of the registration statement. For present purposes, there is no need to differentiate between these documents.

Global was presented to the market with the promise of reliable dividend income and the prospect of steady growth. Income would be generated by long-term solar, wind, and hydroelectric generating assets, developed by SunEdison and then sold, or dropped down to Global. These assets would produce cash available for distribution to deliver dividend yields to investors. For this model to work, it was important for Global to receive a steady stream of projects from SunEdison and pay a fair price for those projects.

At the time of the initial public offering, SunEdison owned 98% of Global's voting stock, but only 30% of Global's total equity. Global had no employees or managers of its own. All of the personnel who managed Global's operations were employees of SunEdison and provided services to Global under a management services agreement.

One important aspect of the registration statement was the assurance that SunEdison, which borrowed money to purchase and develop the assets it sold to Global, had adequate capital and access to the capital markets to make acquisitions, and to develop projects. Consequently, the plaintiffs allege, that SunEdison's capitalization, liquidity, and debt load were material to the investors in Global's initial public offering. According to the complaint, Global's very business model was dependent upon a supply of fairly priced assets from SunEdison, and Global was not a viable entity without SunEdison.

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[16] 15 U.S.C. § 77l(a)(2); *see Gustafson v. Alloyd Co.*, 513 U.S. 561, 571 (1995) (distinguishing between § 11 and § 12 liability).

In order to retain favorable tax treatment and steady yields, the YieldCo model requires the acquisition by the parent of new power generation assets as the parent's portfolio assets approach their contract expirations. This pipeline of assets is needed to fuel the YieldCo with stable cash flows, enabling it to deliver dividend growth to the public investors. Global told investors in its registration statement that it planned to return 85% of its available cash flow annually as dividends, and that Global would achieve compound annual growth rates in dividends per share of 20% annually in each of the three years following the initial public offering.

The plaintiffs allege that Global's registration statement failed to disclose that, at the time of the public offering, SunEdison needed to secure a $169 million loan from an affiliate of Goldman Sachs, an underwriter of Global's initial public offering. Plaintiffs further allege the loan had an effective interest rate of 15% (loan interest rate of 9.25%, with an origination fee of $9 million, or 5.3%). This loan, it is alleged, was needed to satisfy an undisclosed margin call related to an earlier acquisition by SunEdison. According to the complaint, Global and SunEdison knew of the margin call before Global's offering. The interest rate on the margin loan exceeded SunEdison's disclosed 2.68% weighted average annual interest rate by 500%. Although the loan was consummated on August 11, 2015, the plaintiffs allege that the terms were known before the Global offering. Global's registration statement omitted any reference to the Goldman loan or the margin call. According to the complaint, the margin call was highly material to Global investors because, along with the Goldman loan, it showed that SunEdison faced a liquidity crisis that jeopardized its ability to acquire and develop drop down projects for Global.

The second 1933 Act violation occurred, according to the complaint, with respect to statements in the registration statement about corporate governance. To address potential conflicts of interest, the registration statement represented that Global would use a Conflicts Committee to protect Global's investors from domination by its controlling parent. The registration statement represented that the Conflicts Committee would be independent from SunEdison and would protect Global investors by complying at all times with Global's conflict of interests' policy.

Specifically, the registration statement provided that any material transaction between Global and SunEdison would require the approval by the Conflicts Committee. Each director of the Conflicts Committee would be independent within the meaning of the rules of its exchange, the NASDAQ, and evaluate each proposed transaction with Sun Edison from the financial point of view of Global, not SunEdison.

In October 2015, less than four months after the initial public offering, SunEdison asked Global to pre-pay for the acquisition of certain solar projects in India (the "India projects"). This was needed, the plaintiffs allege, to bail SunEdison out of cash flow difficulties. Global's Conflicts Committee refused, concluding that the pre-payment was not in Global's best interests. On October 19, 2015, defendants Chatila and Wuebbels, Sun Edison's CEO and CFO, and also Global directors, projected a cash burn rate for SunEdison of $801 million for the fourth quarter of 2015, $521 million for the first quarter of 2016, and an aggregate burn rate of $1.075 billion for the six quarters beginning with the fourth quarter of 2016.

On November 17, 2015, SunEdison paid $325 million in loan and transaction fees in connection with the margin loan agreement. SunEdison had until November 20, 2015, to pay another $100 million on the margin loan. Absent this payment, the entire margin loan would

become due, and trigger a cross-default of SunEdison's nearly $8 billion in debt. As of November 20, 2015, SunEdison had only $16 million in cash.

Global's Conflicts Committee declined to make $100 million available to SunEdison to meet the margin call. Promptly thereafter, on November 19, 2015, defendant Chatila scheduled a special meeting of Global's board and Conflicts Committee for the next day, November 20, 2015, the same day as the margin loan default deadline. The plaintiffs allege that at this meeting, defendants Chatila, Wuebbels and Truong (who was a Global director, as well as the general counsel of SunEdison), reconstituted Global's board and terminated Global's only two independent directors. SunEdison then appointed three new members to Global's board. None of these three new directors, it is alleged, were independent within the meaning of NASDAQ Rule 4200(a)(15), which defines director independence. Defendant Chatila then called a meeting of Global's newly reconstituted board for 2:00 p.m. on November 20, 2015. Between 2:15 p.m. and 2:40 p.m. that day, the new Global board agreed to buy the India projects from SunEdison for $231 million, with an immediate upfront payment of $150 million even though material terms of the agreement were still being negotiated. Shortly thereafter, defendant Wuebbels wired $150 million from Global's bank account to SunEdison.

SunEdison used these funds, it is alleged, not for the India Projects, but to pay-off the margin loan minutes before the 3:00 p.m. default deadline. On December 1, 2015, Global's newly reconstituted board agreed to revise the India projects transaction so that the full $231 million would be prepaid to SunEdison, allowing it to secure an immediate additional $181 million in cash from Global. Despite Global's payments, the India projects were never transferred to Global from SunEdison.

Finally, the plaintiffs allege that the registration statement was materially misleading because it hid from investors that SunEdison could, at will, decline to drop-down the projects needed by Global to drive sufficient yields for investors. The plaintiffs contend that the registration statement never warned that SunEdison could "pivot" and sell its energy projects to entities other than Global if the economics of selling the projects to Global did not favor SunEdison.

In October 2015, SunEdison announced that it would not drop down any projects to Global for the remainder of the year. Defendant Chatila, it is alleged, announced on an analyst conference call that SunEdison would "pivot to third party sales" because of a newly discovered "disconnect between the value of these underlying assets and what people are willing to pay for them in a yieldco." The plaintiffs contend that within a mere three months of the public offering, the business case for Global collapsed when SunEdison decided that it would not sell assets to Global when it was not in SunEdison's best interests to do so, even if the transactions were necessary to Global.

The Plaintiffs' Claims Are not Time -Barred

The defendants contend that all of the plaintiffs' 1933 Act claims are time-barred because their individual claims not having been filed within one year of the initial public offering.[17] The plaintiffs disagree. They were members of a putative class action, filed on the October 23, 2015, which was transferred to the Southern District of New York by the Panel on Multi-District Litigation ("MDL"). In the MDL proceeding, the plaintiff class reached a settlement with Global on December 14, 2017. The plaintiffs who filed this case opted out of the class settlement on March 17, 2018, and filed individual 1933 Act claims in Montgomery County,

[17] 15 U.S.C. § 77m.

Maryland on June 15, 2018. The plaintiffs contend that this case, filed promptly after they were given notice of their right to opt-out of the New York MDL settlement class, is timely under *American Pipe*.

The doctrine of class action tolling was first announced by the Supreme Court in *American Pipe*. In that case, the Supreme Court held that the statute of limitations is tolled during the pendency of a class action for putative class members who subsequently intervene in the same case after the denial of class certification.[18] The Supreme Court, thereafter, extended the *American Pipe* doctrine to cover members of the putative class who later filed individual suits rather than intervene in the original class action.[19] Strictly speaking, *American Pipe* concerned only the tolling of federal claims under a federal statute and did not address the tolling of limitations for state law claims.[20] In this case, however, the plaintiffs have not pleaded any claim other than 1933 Act claims.

In the wake of *American Pipe*, courts have considered whether to apply its tolling principles to circumstances when a class action is filed in one state and a putative class member seeks to bring an individual action in another state, thus spawning concepts of cross-jurisdictional tolling. Cross-jurisdictional tolling generally comes into play when plaintiffs have attempted to use a federal class action, asserting only federal claims or asserting both federal and

[18] *American Pipe*, U.S. at 552-554.

[19] *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 350 (1983); *see also China Agritech, Inc. v. Resh*, 138 S. Ct. 1800 (2018) (declining to extend *American Pipe* to new class actions, confining it to individual suits).

[20] *Chavez v. Occidental Chemical Corp.*, 300 F. Supp.3d 517, 529 (S.D.N.Y. 2018); *Vincent v. Money Store*, 915 F. Supp.2d 553, 560-61 (S.D.N.Y. 2013). It very well may be that limitations have run on all state law claims and that state law claims, whether based on Maryland law or the law of other states, were not tolled by the federal MDL litigation. *See* 1 McLaughlin on Class Actions § 3:15 (15th Ed.)(Oct. 2018 Update).

state law claims, to toll a subsequent state law cause of action brought in a state court, frequently after the denial of class certification.[21] Some state supreme courts have refused to apply cross-jurisdictional tolling.[22] Others have embraced it.[23]

The Court of Appeals of Maryland has not yet decided whether to adopt the doctrine.[24] The Court of Special Appeals rejected it in *Adedje v. Westat, Inc.*[25] In that case, the plaintiff was a member of a putative class action filed in the District of Maryland, which alleged both federal and state law claims regarding the failure to pay overtime. After the district court denied class certification, the plaintiff in *Adedje*, an Alabama resident who was a member of the putative class in federal court, filed suit in state court alleging only state law wage and hour claims. The Maryland trial court dismissed the state case based on the running of the statute of limitations. The dismissal was affirmed on appeal.[26] However, in *Adedje*, the claims sought to be pursued in state court were not the same claims for which class certification had been sought in the federal case. Class certification in federal court was sought only for violations of the federal Fair Labor

[21] The doctrine also may come into play when there was a class action pending in a federal court in one state and a second suit, based on state law claims, brought in a federal court in another state. *Wade v. Danek Medical, Inc.*, 182 F.3d 281, 286-90 (4th Cir. 1999).

[22] *E.g.*, *Maestas v. Sofamor Danek Group,* Inc., 33 S.W.3d 805808-09 (Tenn. 2000); *Portwood v. Ford Motor Co.*, 701 N.E.2d 1102, 1104-05 (1998).

[23] *E.g.*, *Patrickson v. Dole Food Co., Inc.*, 368 P.3d 959, 968-70 (Haw. 2015); *Dow Chemical Corp. v. Blanco,* 67 A.3d 392 (Del. 2013); *Vaccariello v. Smith & Nephew Richards, Inc.*, 763 N.E.2d 160, 163 (Ohio 2002).

[24] *Philip Morris USA, Inc. v. Christensen*, 394 Md. 227, 254 n. 9 (2006) ("We express no opinion as to whether we would recognize the doctrine of cross-jurisdictional class action tolling . . .").

[25] 214 Md. App. 1 (2013).

[26] *Id.* at 30.

Standards Act. The state case alleged violations of state statute, albeit on a similar subject as the federal claim.[27]

The court concludes that Maryland's jurisprudence on cross-jurisdictional tolling is irrelevant to this case. The plaintiffs are pursuing claims only under the 1933 Act, a federal cause of action that may be brought either in federal or state court. This cause of action was created by Congress and Congress has supplied the period of limitations. The Supreme Court has defined when, and under what circumstances, the federal claims of individual plaintiffs are tolled by the filing of a putative class action. State law concerns about statutes of limitation, and state law judge-made tolling doctrines are inapplicable. When federal law creates a right of action, and also provides for a statute of limitations, state law on the statute of limitations and state tolling rules simply do not apply.[28]

In enacting a federal statute of limitations to govern 1933 Act claims, "Congress manifested a desire to achieve uniformity in the treatment of [securities law] claims. To allow diverse laws of each state to determine when the limitation period on a federal cause of action is tolled, interrupted, or suspended, would tend to defeat the congressional policy of uniformity."[29] Accordingly, federal law, and only federal law applies here.[30]

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[27] *Id.* at 30-31.

[28] *E.g.*, *Garfield v. J.C. Nichols Real Estate*, 57 F.3d 662, 665 (8th Cir. 1995); *Brown v. Hartshorn Public School District No. 1*, 926 F.2d 959, 961 (10th Cir. 1991).

[29] *Abbot v. State*, 979 P.2d 994, 997 (Alaska 1999).

[30] *Sawyer v. Atlas Heating and Sheetmetal Works, Inc.*, 642 F.3d 560, 562063 (7th Cir. 2011) ("The source of law, and not the identity of the forum, determines the effect of a failed class action [under *American Pipe*]").

It does not matter whether the federal law is supplied by Congress or the Supreme Court.[31] Under the Supremacy Clause, federal law controls federally-created causes of action, unless Congress provides otherwise.[32]

Having determined that *American Pipe* applies, and that the plaintiffs' claims are not barred by contrary notions of cross-jurisdictional tolling, the next question concerns the scope of the tolled claims. This court is of the view that *American Pipe* tolling extends beyond the specific claims actually asserted in the class action to include individual claims that are "substantially similar" to the class claims. In this context, this means that individual claims which share a common nucleus of operative facts, and the same or similar evidence and witnesses with the class claims, may be brought in the second case by the former putative class members.[33] The reasons for this rule is that the defendants were on notice of the operative facts, witnesses, and evidence in the class actions.[34]

The plaintiffs in this case, like the New York class action plaintiffs, challenge the same registration statement under the same substantive provisions of the 1933 Act. The plaintiffs' specific challenges to the registration statement's allegedly inadequate disclosures rely on the same facts, witnesses, and evidence as the New York case. The defendants in this case cannot

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[31] *See Burnett v. New York Central R.R. Co.*, 380 U.S. 424, 432 (1985) (Supreme Court created a federal tolling rule for a federal cause of action that had been first improperly filed in state court and later properly filed in federal court).

[32] When Congress has created a cause of action, but not a statute of limitations, such as for claims under 42 U.S.C. § 1983, state law on limitations may be used as long as it is consistent with federal policy. *Hardin v. Straub*, 490 U.S. 536, 538 (1989).

[33] *See Asplundh Tree Expert Co., v. Abshire*, 517 S.W.2d 320, 342-43 (Tex. App. 2017) (collecting cases).

[34] *See Crown, Cork & Seal Co., Inc.*, 462 U.S. at 354-55 (Powell, J., concurring).

plausibly complain of being ambushed, given the pleadings filed in the Southern District of New York and the substance of the allegations in that case of which they were on notice.

The Plaintiffs Have Adequately Alleged Cognizable Claims under the 1933 Act

The familiar inquiry with respect to alleged omissions from a registration statement is whether there is "a substantial likelihood that the disclosure of the omitted [information] would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."[35] The court must read the registration statement as a whole.[36] Although it may not have been a material omission to leave something out of a registration statement entirely, "when an offering participant makes a disclosure about a particular topic, whether voluntary or required, the representation must be complete and accurate."[37] Further, there are cases in which a registration statement contains both seemingly accurate and inaccurate information. "Under such circumstances, the Supreme Court has cautioned that 'not every mixture with the true will neutralize the deceptive. If it would take a financial analyst to spot the tension between the one and the other, whatever is misleading will remain materially so, and liability should follow.'"[38]

In opposing the motion to dismiss, the plaintiffs focus on three aspects of Global's registration statement: (1) Global's Conflicts Committee, which was represented to be an effective control against self-dealing by SunEdison; (2) SunEdison's then-existing financial

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[35] *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976); *see Demaria v. Andersen*, 318 F.3d 170, 180 (2d Cir. 2003).

[36] *Olkey v. Hyperion 1999 Term Trust, Inc.*, 98 F.3d 2, 5 (2d Cir. 1996).

[37] *In re Morgan Stanley Info. Fund Secs. Litig.*, 592 F.3d 347, 366 (2d Cir. 2010).

[38] *DeMaria v. Andersen*, 318 F.3d at 179 (quoting *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1097 (1991)).

condition and ability to raise capital to acquire and fund drop-down projects; and (3) SunEdison's ability to disengage from the YieldCo model, and decline to drop-down projects to Global if SunEdison could get a better deal elsewhere. Each will be discussed, in turn.

Global went public on July 31, 2015. The defendants contend, therefore, that the November 2015 replacement of the Conflicts Committee cannot relate to any material misstatement in, or omission from, the registration statement. To the contrary, they contend, such events tend to show that SunEdison's liquidity crisis, and the steps SunEdison took to address it, did not occur until months after the IPO and thus there was nothing to disclose in this regard on July 31, 2015.

The plaintiffs see it differently, arguing that the registration statement gave investors a false view of the Conflicts Committee and its effectiveness as a bulwark against the domination of Global by SunEdison. For example, the plaintiffs allege that the registration statement represented that the Conflicts Committee would be comprised entirely of independent directors. Absent such independent directors, the Conflicts Committee could not plausibly act as a check on the inherent conflict of interest in Global's transactions with SunEdison, given the structure of a YieldCo.

It is true that the registration statement disclosed that SunEdison had the power to appoint all of Global's directors, including the members of the Conflicts Committee. But a fair reading of the registration statement makes it seem that there would be a meaningful check in place to block overreaching by SunEdison regarding drop-downs. No rational investor would equate the power to appoint Global's directors with the power to sack an independent Conflicts Committee, at will, and replace it with loyalists, the first time Global's Conflicts Committee rejected a SunEdison business proposal as not being in Global's business interests. If such were the case,

an independent Conflicts Committee would be a compete fiction, and render the detailed disclosure in the registration statement, which was meant to assure public stockholders, highly misleading.[39] At the very least, there is a factual question as to whether the registration statement was materially misleading in this regard.

The defendants next contend that the plaintiffs' factual allegations about SunEdison's liquidity troubles are legally insufficient because the allegations all concern matters that took place after Global's July 31, 2015, public offering. In other words, the defendants contend that the plaintiffs are attempting improperly to construct 1933 Act claims out of wholly post-IPO factual developments. They note, for example, that the $169 million Goldman loan was not closed until August 11, 2015.

The plaintiffs see things through a different lens. Although conceding that the registration statement warned generally about Global's dependence upon SunEdison, and need for liquidity, the plaintiffs contend that Global, and the individual defendants, knew about both the impending margin call and the Goldman loan on or before the date the registration statement became effective. While the final details of the margin call and the loan may have been worked out after the IPO, the plaintiffs contend that the material elements of both of these events were known to Global, and the individual defendants, before the IPO.

A registration statement may be misleading if it either warns of some future risk that already has occurred, or fails entirely to disclose a material risk that is already known by the

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[39] Under the defendants' thesis, the registration statement might well have read: "SunEdison will control Global's board and Global's directors will do SunEdison's bidding or they will be terminated and replaced with directors who will do as they are told."

company.[40] It remains to be seen what, if anything, can be proven, but it is a reasonable inference that the individual defendants, particularly Chatila and Wuebbels, who stood on both sides of the aisle, knew of these impending, and imminent, material financial events on July 31, 2015.

The registration statement did warn generally about the possible risk of SunEdison's solvency to Global but omitted, if the complaint's allegations are true, key information regarding SunEdison's actual financial condition.[41] For example, the registration statement did not disclose that, at the time of the offering, SunEdison needed to secure a $169 million loan from an affiliate of Global's underwriter, Goldman Sachs, at an effective interest rate of 15%. The existence of such emergency financing, and the margin call behind it, likely would have alerted potential Global investors of material risks, otherwise unknown to the public.[42]

The defendants contend, quite broadly, that Global had no duty to disclose any information about SunEdison's financial condition, even if it knew about it, to its public stockholders. Given the relationship between a sponsor and a YieldCo, the court disagrees with

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[40] *See In re Facebook, Inc. IPO Sec & Derivative Litig.*, 986 F. Supp. 2d 487, 518 (S.D.N.Y. 2013) ("The warnings only warned what might occur if certain contingencies were met; the disclosures did not make clear that such contingencies had, in fact, already occurred.").

[41] The margin call was issued on August 7, 2015, and the Goldman loan closed on August 11, 2015, both less than two weeks after the Global IPO. The complaint adequately alleges facts that the margin call would occur and the loan was needed before the IPO. Any suggestion that Global's directors were not aware of SunEdison's material financial events, given the overlap in personnel, begs credulity. The fact that SunEdison issued quarterly financial statements after the IPO, disclosing a worsening financial position, does not necessarily absolve Global and the individual defendants from liability under the 1933 Act.

[42] The district court in the MDL action concluded, as to claims against SunEdison, that the margin call and the Goldman loan were actionable. *In re SunEdison, Inc., Sec. Litig.*, 300 F. Supp.3d at 471-76. Although not bound by these conclusions, this court concurs. That a sister YieldCo's stock price already had crossed a margin call threshold is insufficient to alert a Global investor. The arithmetic proposed by the defendants still would leave a reasonable investor uncertain as to whether a margin call had been made at any particular point in time before it was publicly announced. *Id.* at 472-74.

this absolutist proposition. Global's business case, as described in its registration statement, made economic sense only if its parent's business case made sense. In this circumstance, the financial health of the parent is vitally important, and material to, the financial health of the controlled affiliate. This is not the typical circumstance of a wholly owned or controlled subsidiary that was not exclusively dependent upon a parent's success or financial condition. In that case, what the directors of the subsidiary may, or may not, know about the parent's financial condition might not be material to the stockholders of the subsidiary. Here, defendant Domenech was both the CEO of Global at the time of the public offering, and an executive Vice president of SunEdison. Defendant Chatila was Global's Chairman of the Board, and CEO and a board member of SunEdison. Defendant Wuebbels was both a Global director and SunEdison's CFO at the time of the offering. If the allegations in the complaint are true, they clearly knew about SunEdison's precarious financial position, including the impending margin call and the need for the Goldman loan before the Global IPO. In other words, this information likely was available to them at the time of the IPO and its omission from the registration statement is thus actionable under the 1933 Act.[43] In the same vein, they also clearly knew about the economic effects of these matters on Global. Given the more than symbiotic relationship between SunEdison and Global, it defies economic reality to say, first, that these defendants did not know about these matters, and second, these defendants did not know how they would affect Global and SunEdison's relationship with Global. Accordingly, the court rejects as overbroad the notion that Global had no duty to disclose information about SunEdison to Global's public offering investors.

[43] *Omnicare. Inc.*, 135 S. Ct. at 1333 (To be actionable under Section 11 of the 1933 Act, the omitted information must be available to the defendant at the time of the registration statement).

Finally, the defendants contend that the plaintiffs have failed to allege any material misstatements or omissions regarding SunEdison's decision not to sell projects to Global. The offering documents did disclose that SunEdison could pursue superior terms with third parties. It also was disclosed that SunEdison was not obligated to accept Global's proposed consideration for a project and could sell to third parties. Accordingly, the defendants assert that both SunEdison's right and ability to sell projects to other buyers was fully disclosed.

The plaintiffs respond that the registration statement led investors to believe that the "raison-d'etre" for the YieldCo model was for the parent, SunEdison, to "sell" projects to Global, the YieldCo., so that SunEdison could readily raise capital for new projects and for Global to pay dividends to its stockholders. In other words, the plaintiffs claim that the registration statement was misleading when it did not simply say that SunEdison could, at will, stop selling projects to Global.

This piece of the plaintiffs' 1933 Act claim is more tenuous. The registration statement certainly did not say that SunEdison could, at will, simply abandon Global. After all, why then bother to set up a YieldCo in which to "drop" emerging markets projects? On the other hand, the offering documents did say that neither party was required to buy or sell any project, or to do so on any particular terms. At this stage, however, giving the plaintiffs the benefit of all favorable inferences, the court is disinclined to dismiss the so-called project abandonment claim.[44]

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[44] The sole basis on which the defendants challenged the § 15 control person claims, is that no viable §11 or §12 claims were stated. Because the complaint states valid § 11 and § 12 claims, there is no basis to dismiss the § 15 claims at this juncture.

Conclusion

For the reasons set forth above, the defendants' motion to dismiss, is denied. It is so Ordered this 3rd day of January, 2019.

Ronald B. Rubin, Judge