SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. SALIANN SCARPULLA** **PART** **IAS MOTION 39EFM**

Justice

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IN RE PPDAI GROUP SECURITIES LITIGATION

Plaintiff,

- v -

XXX,

Defendant.

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INDEX NO. 654482/2018

MOTION DATE 12/20/2019

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 131, 132

were read on this motion to/for DISMISS.

Upon the foregoing documents, it is

In this putative class action alleging violations of the Securities Act of 1933 ("'33 Act"), defendants PPDAI Group, Inc. ("PPDAI"), Law Debenture, Giselle Manon, Credit Suisse Securities (USA) LLC ("Credit Suisse"), Citigroup Global Markets Inc. ("Citigroup") and Keefe, Bruyette & Woods, Inc. ("KBW") (collectively, "Defendants") move, pursuant to CPLR 3211(a)(1), (3), and (7), to dismiss the consolidated amended complaint (the "CAC") brought by plaintiffs Yizhong Huang ("Huang") and Ravindra Vora ("Vora") (together, "Plaintiffs").

Background

PPDAI is an online consumer finance marketplace with primary operations in the People's Republic of China ("PRC") that connects borrowers and investors "whose needs

have not been met by traditional financial institutions."[1] In its November 13, 2017 prospectus (the "Prospectus"), PPDAI stated that, through its full-service peer-to-peer ("P2P") lending platform, it generates revenue "primarily from fees charged to borrowers for [its] services in matching them with investors and for other services [it] provide[s] over the loan lifecycle." *See* Ex. A to the Affirmation of Robert A. Fumerton in Support of Defendants' Joint Motion to Dismiss. The company also generates revenue from loan facilitation service fees, post-facilitation service fees, collection fees and management fees.[2]

PPDAI sold shares to the public in an initial public offering ("IPO") in November 2017. The offering materials ("Offering Materials") included the Prospectus and Forms F-1 and F-5 registration statements (together, the "Registration Statement"). The SEC declared the Registration Statement effective on November 9, 2017. Then, on November 13, 2017, Defendants priced the American Depositary Shares ("ADS") at $13 per share and filed the final Prospectus for the IPO. Law Debenture served as PPDAI's agent for the service of process in the United States and the IPO underwriters were Credit Suisse, Citigroup and KBW. Plaintiffs allege that the IPO generated $221 million in proceeds before underwriting discounts and commissions (totaling $15.4 million).

Plaintiffs allege that by the Offering Materials' effective date, the PRC had increased its scrutiny and regulation of the P2P lending industry and that PPDAI engaged

[1] http://ir.finvgroup.com. PPDAI is now known as FinVolution Group.
[2] The factual statements in this decision and order are taken from the CAC.

in the type of lending and collection misconduct, such as usurious loan rates and abusive collection practices, that was the subject of the PRC's scrutiny.

PPDAI's Offering Materials stated that

> [a]lthough the interest rates of all our loan products are not more than 36% per annum, certain loans facilitated by our platform have interest rates over 24% per annum.
>
> ***
>
> We may continue to facilitate loans at or above the interest rate of 24% but no more than 36% per annum with funds from our investment programs. In the event that any of such loans become delinquent, we will not be able to collect the part of interests that exceed 24% per annum through PRC judicial enforcement. As a result, the investors of our investment programs may suffer losses, which would damage our reputation and harm our business. Were these to happen, our reputation, results of operations and financial condition would be adversely affected.
>
> ***
>
> The transaction fee we charge is recognized as our revenue and lenders will not receive any part of the transaction fee we charge from borrowers. As a result, we do not believe that our business operation violates this provision even though in some cases the combination of the interest rate and the transaction fee rate we charge from borrowers exceeds 36%. However, we cannot assure you that the PRC courts will hold the same view as ours, and parts or all of the transaction fees we collected may be ruled as invalid by the PRC courts, which would affect our results of operations and financial condition materially and adversely. In addition, if any future legislation, judicial interpretation or regulation sets caps on, limits or require publication of the overall costs to borrowers, for instance, the combination of the interest rate, the transaction fee rate we charge, and other borrowing costs (if any) incurred to borrowers, parts or all of the fees we charge may be ruled as invalid, borrower behavior may change and our business, financial condition and results of operations would be materially and adversely affected.

Plaintiffs allege that Defendants disclosed only the amount, terms and delinquency status of PPDAI's loans with rates between twenty-four and thirty-six percent, but did not, similar information concerning PPDAI's exposure to loans with rates higher than

thirty-six percent. Plaintiffs claim that this information was important because, under PRC law, the portion of any interest rate above thirty-six percent is unenforceable, and PPDAI was substantially facilitating such loans.

Less than a month following the IPO, analysts reported that PPDAI's average all-in rate of interest grossly exceeded thirty-six percent. Credit Suisse, in a December 6, 2017 report on the P2P lending industry, estimated that "the blended annualized cost [PPDAI] charged is around 60%."

In December 2017, after the PRC promulgated regulations prohibiting all-in rates above thirty-six percent and the Credit Suisse analyst report, PPDAI's trading price declined considerably.[3]

Under the PRC's Guidelines on Promoting the Healthy Development of Online Finance Industry ("Guidelines") and the Interim Measures on Administration of Business Activities of Online Lending Information Intermediaries ("Interim Measures"), PPDAI and other P2P lending platforms were prohibited from offering credit enhancement services. In the Offering Materials, PPDAI represented that it had previously engaged in practices with institutional investors that could be classified as the prohibited credit enhancement services. The Offering Materials noted that PPDAI

> used to provide cash deposit to certain institutional investors with our own funds at an amount equal to a certain percentage of their total investment, and, in some cases, were required to replenish such deposit from time to time, in order to compensate such investors' potential loss due to potential loan delinquency or underperformance. Although no payment has been made out of such deposit as of the date of this prospectus, such practice

[3] On November 30, 2017, the trading price of the ADSs closed at $9.60 per share and by the close of trading on December 7, 2017, the trading price dropped to $7.16 per share.

> could be regarded as a form of credit enhancement or guarantee provided by our platform to the investors, which is prohibited under the Guidelines and the Interim Measures. We have changed the cooperation model with these institutional investors and have ceased such practice as of the date of this prospectus[.]

Plaintiffs allege that, contrary to the aforementioned assurances, PPDAI engaged in prohibited credit enhancement practices "exposing PPDAI to fines and regulatory repercussions and jeopardizing PPDAI's ability to do business." A July 18, 2018 UBS analyst report (the "2018 UBS Report") noted that the continued engagement in credit enhancement practices by PPDAI and other P2Ps created "downside risks to their margins." Over the two-day period after the 2018 UBS Report, PPDAI's trading price declined.

In the CAC, Plaintiffs allege that the Defendants failed to disclose that PPDAI was engaged in improper and illegal predatory lending and collection practices. In the Offering Materials, PPDAI stated

> [w]e primarily rely on our in-house collection team to handle the collection of delinquent loans. We also engage certain third-party collection service providers to assist us with payment collection from time to time. If our or third party agencies' collection methods, such as phone calls, text messages, in-person visits and legal letters, are not as effective as they were and we fail to respond quickly and improve our collection methods, our delinquent loan collection rate may decrease and our investors may suffer loss. If those collection methods are viewed by the borrowers or regulatory authorities as harassments, threats or other illegal conducts, we may be subject to lawsuits initiated by the borrowers or prohibited by the regulatory authorities from using certain collection methods.

The CAC alleges the statement regarding collection methods was misleading because, at the time of the Offering Materials, PPDAI was engaging in improper collection methods – which Plaintiffs allege violated PRC law – and had received complaints about its

actions prior to the IPO. After news reports revealed that the PRC sought to tighten regulation of the P2P industry due to misconduct, PPDAI's ADS price declined.

Finally, Plaintiffs allege that, although the Offering Materials described exponential growth in its loan origination volume, "PPDAI was then facing circumstances that prevented it from maintaining its loan origination volume and could reasonably foresee a reversal of its trend of increasing loan originations." Plaintiffs allege that because the Offering Materials "heavily promoted" a trend of increasing loan origination volume at the time of the IPO, Defendants were required to disclose that PPDAI's practice of imposing excessive borrowing costs could quickly reverse the trend if regulators prohibited all-in rates in excess of thirty-six percent.

The CAC states that PPDAI had an affirmative obligation to disclose facts in the Offering Materials required by Item 303 of Regulation S-K, including information regarding known trends, uncertainties or events. Plaintiffs allege that PPDAI failed to disclose uncertainties and risks that were known to it at the time of the Offering Materials including those (1) "associated with its practice of imposing total annualized borrowing costs in excess of 36% of the loan amount;" and (2) "associated with its predatory, unethical and illegal loan origination and collection practices."

Procedural History

On September 10, 2018, Huang filed a complaint alleging violations the '33 Act in connection with the alleged materially misleading statements and omissions in PPDAI's IPO Offering Materials. Vora filed a similar complaint on September 27, 2018 and the

actions were subsequently consolidated.[4] On December 17, 2018, Plaintiffs filed the CAC, asserting three causes of action for violations of Sections 11, 12(a)(2) and 15 of the '33 Act.

Defendants now move to dismiss the CAC on the grounds of documentary evidence, lack of standing and failure to state a claim.

Standing

Section 12(a)(2) of the '33 Act states that any person who

> offers or sells a security… by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in light of the circumstances under which they were made, not misleading… shall be liable… to the person purchasing the security from him, who may sue…

15 USC § 77l.

A plaintiff may assert section 12(a)(2) claims "where the securities at issue were sold using prospectuses or oral communications that contain material misstatements or omissions." *In re Morgan Stanley Information Fund Sec. Litig.*, 592 F.3d 347, 359 (2d Cir. 2010). Thus, section 12(a)(2) permits claims against those deemed to be a "statutory seller," which is a defendant that either "(1) passed title, or other interest in the security,

[4] On November 26, 2018, Weichen Lai filed an action in the United States District Court for the Eastern District of New York (the "EDNY Action"). The allegations in the EDNY Action, entitled *Lai v. PPDAI Group, Inc.*, No. 18-cv-6716, are virtually identical to the allegations contained in the earlier-filed Huang and Vora complaints. On January 8, 2019, plaintiff in the EDNY Action filed an amended complaint, prior to the appointment of a lead plaintiff, which added a fraud claim under the Securities Exchange Act of 1934 ("'34 Act").

to the buyer for value, or (2) successfully solicit[ed] the purchase [of a security], motivated at least in part by a desire to serve his own financial interest or those of the securities[’] owner." *Id*. (internal quotation marks and citations omitted).

Here, the CAC states that "Plaintiffs purchased or otherwise acquired the ADSs in connection with the IPO and pursuant and/or traceable to the Offering Materials." The CAC also states that "[b]y means of the defective Prospectus and as otherwise detailed herein, Defendants promoted and sold, for the benefit of themselves and their associates, the ADSs to Plaintiffs and the other members of the Class."

Defendants argue that Plaintiffs' Section 12(a)(2) claims must be dismissed for lack of standing because Plaintiffs failed to allege with specificity that they purchased their shares directly from a qualified statutory seller as part of the IPO, rather than acquiring the shares in the secondary market. Defendants further contend that Plaintiffs use of the phrase that their shares were acquired "pursuant and/or traceable to the Offering Materials" is insufficient to confer standing.

In opposition, Plaintiffs state that they are not required to identify the specific defendant from whom they acquired shares in the CAC but must only allege that they purchased their shares in connection with the IPO. Moreover, Plaintiffs argue that PPDAI is a statutory seller because it effectuated the IPO by means of a prospectus and the remaining Defendants are statutory sellers because they "passed title" of the shares to Plaintiffs or solicited the purchases. Plaintiffs also argue that Plaintiffs have standing against any Defendant who signed the Offering Materials.

Contrary to Defendants' assertion, for Section 12(a)(2) standing, "it is sufficient to allege that [Plaintiffs] purchased [ADSs] in connection with the IPO" and Plaintiffs need not "identify the specific defendant from whom they purchased the ADSs." *In re iDreamSky Technology Ltd. Sec. Litig.*, 236 F.Supp.3d 824, 832 (S.D.N.Y. 2017). Thus, Plaintiffs statement in the CAC that they purchased shares "in connection with the IPO and pursuant and/or traceable to the Offering Materials" is sufficient for standing purposes and I decline to dismiss the Section 12(a)(2) claims based on standing. The cases cited by Defendants do not require a different result.[5]

Documentary Evidence and Failure to State a Claim

A motion to dismiss pursuant to CPLR 3211(a)(1) should only be granted when "the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.'" *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994). Further, courts deciding motions to dismiss pursuant to CPLR 3211(a)(7), "must 'accept the facts

[5] For example, one case cited by Defendants – *Plumbers' Union Local No. 12 Pension Fund v. Nomura Asset Acceptance Corp.*, 658 F. Supp. 2d 299, 305 (D. Mass. 2009), *aff'd in part, vacated in part*, 632 F.3d 762 (1st Cir. 2011) – is a non-binding Massachusetts federal case which the First Circuit Court of Appeals later vacated with respect to the decision on 12(a)(2) standing. *See Plumbers' Union Local No. 12 Pension Fund v. Nomura Asset Acceptance Corp.*, 632 F.3d 762, 776 (1st Cir. 2011) (holding that the "district court's dismissal of plaintiffs' section 12(a)(2) claims for failure to allege defendants' requisite connections with the sale was in error"). Another cited case, *In re Ultrafem Inc. Sec. Litig.*, 91 F.Supp.2d 678, (S.D.N.Y. 2000), actually allowed plaintiffs' allegations under Section 12(a)(2) to stand because they alleged that they purchased shares "pursuant to the Offering." *Id*. at 694. In the case before me, Plaintiffs have also alleged that they purchased shares pursuant to the IPO, thereby supporting a pre-answer motion to dismiss finding that they have standing.

as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.'" *Seaman v. Schulte Roth & Zabel LLP*, 176 A.D.3d 538, 536 (1st Dept. 2019) (citation omitted). However, such consideration does not apply to "factual allegations that do not state a viable cause of action [and/or] consist of bare legal conclusions." *Doe v. Bloomberg, L.P.*, 178 A.D.3d 44, 47 (1st Dept. 2019) (internal quotation marks and citation omitted).

A. Claims under Sections 11 and 12(a)(2) of the '33 Act

Plaintiffs allege that Defendants are liable under Section 11 and Section 12(a)(2), in their first and second causes of action respectively, for several misleading statements found in either the Registration Statement or Prospectus. Under Section 11(a) of the 1933 Act, where "any part of the registration statement… contained an untrue statement of material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security… may… sue." 15 USC § 77k(a). To determine whether "a misstatement or omission is material, a court 'must engage in a fact-specific inquiry' as to whether 'there is a substantial likelihood that a reasonable shareholder would consider it important' in making an investment decision." *In re Coty Inc. Securities Litigation*, No. 14-cv-919, 2016 WL 1271065, at *5 (S.D.N.Y. Mar. 29, 2016) (citation omitted). The crux of the inquiry is not whether the specific statements, viewed individually, were true, but whether the representations, viewed together, would mislead a reasonable investor. *Id*.

As a preliminary matter, Defendants posit that because Plaintiffs' claims include allegations of misrepresentation, the heightened pleading standard of CPLR 3016(b) applies. This is incorrect. Although the CAC alleges that Defendants made materially false and misleading statements, it does not contain claims for fraud or misrepresentation but rather alleges strict liability and negligence claims under Sections 11, 12(a)(2) and 15 of the '33 Act. Thus, CPLR 3016(b)'s heightened pleading standard does not apply. *See Litwin v. Blackstone Group, L.P.*, 634 F.3d 706, 715 (2d Cir. 2011).

Turning to the substance of Plaintiffs' Section 11 and Section 12(a)(2) claims, Plaintiffs have alleged four categories of misstatements, *i.e.*, statements concerning PPDAI's: 1) exposure for loans with all-in rates exceeding thirty-six percent; 2) loan collections processes; 3) credit enhancement services; and 4) loan origination volumes. In addition, Plaintiffs allege that Defendants' non-compliance with Item 303 and Item 503 of SEC Regulation S-K establish a claim under Sections 11 and 12(a)(2).

1. Allegations Regarding Interest Rates

Defendants argue that their statements concerning interest rates[6] are not actionable because they complied with then-existing legal requirements, and it was not until after the IPO that the PRC authorities announced new regulations on how "interest" was to be calculated and prohibited loans with an annualized interest rate above thirty-six percent. Defendants also contend that the Offering Documents "abundantly" disclosed the risk

[6] Plaintiffs allege that the Offering Documents failed to disclose "the scope and magnitude of PPDAI's exposure to usurious loans with all-in rates exceeding 36%."

that industry regulations were evolving and that new or heightened regulations could adversely impact PPDAI's business.

In opposition, Plaintiffs argue that, although the Offering Materials disclosed the amount of loans PPDAI facilitated with annual interest rates of between twenty-four percent and thirty-six percent, the amount of any "loans with rates above 36% that were subject to the most significant risks of invalidity and unenforceability" was not disclosed. Plaintiffs claim that, two years prior to the IPO, a PRC court had ruled that any amount of interest above thirty-six percent was invalid and legally unenforceable. Plaintiffs therefore argue that PPDAI's statement that "in some cases the combination of the interest rate and the transaction fee rate we charge from borrowers exceeds 36%" was wholly insufficient because it did not disclose the extent of PPDAI's practice of facilitating loans in excess of that cap and of its substantial exposure to invalid fees from those loans.

The '33 Act is violated when "material facts are omitted or presented in such a way as to obscure or distort their significance." *Acacia Nat. Life Ins. Co. v. Kay Jewelers, Inc.*, 203 A.D.2d 40, 44 (1st Dept. 1994). Here, Plaintiffs allege that: 1) PPDAI's loans with annualized all-in rates above thirty-six percent comprised a substantial part of its business, which it did not disclose; and 2) even though such loans were not illegal at the time of the IPO, the PRC courts had ruled that an interest rate above thirty-six percent was invalid and "legally unenforceable." Plaintiffs argue that the Offering Materials' bare statement that "in some cases the combination of the interest rate and the transaction fee rate we charge from borrowers exceeds 36%" did not convey

the substantial scope of PPDAI's exposure to the invalid fees from loans exceeding thirty-six percent, given its alleged practice of regularly facilitating loans in excess of the rate cap.

Plaintiffs' allegation that, absent information on the total extent or magnitude of PPDAI's exposure to loans above interest rates of thirty-six percent, investors could not adequately assess the ADS's actual value or the risks of purchasing them, is sufficient, at this stage of the litigation, to state a claim under sections 11 and 12(a)(2). *See In re EVCI Colls. Holding Corp. Sec. Litig.*, 469 F. Supp. 2d 88, 97 (S.D.N.Y. 2006) (holding that "whether [defendant's practice] was 'isolated,' as defendants claim, or was widespread, as plaintiffs allege" was "unsuited for resolution on a motion to dismiss").

The recent Southern District of New York case, *In re Qudian Inc. Sec. Litig.*, No. 17-CV-9741, 2019 WL 4735376 at *7 (S.D.N.Y. Sept. 27, 2019), does not, as Defendants contend, merit a different conclusion regarding the allegations in this case as pertain to interest rates in excess of thirty-six percent. As Defendants correctly note, in *Qudian*, the Southern District found that plaintiffs' allegations that "*Qudian* misleadingly represented that it had 'adjusted the pricing of all [of] its credit products in April 2017 to ensure that the annualized fee rates charged on all credit drawdowns do not exceed 36%'" were insufficient to state a securities law claim in light of the disclosures made in the offering materials. *Id*. at *7. However, with respect to allegations regarding interest rates in excess of thirty-six percent, *Qudian* is distinguishable. In particular, the language used in that prospectus differed significantly from the language employed in PPDAI's

Prospectus. Qudian Inc.'s 2017 prospectus fully identified the percentage of the company's 2016 loans that had fee rates that exceeded thirty-six percent as well as how Qudian Inc.'s total revenues would be impacted.[7] The specificity in the Qudian Inc. prospectus – regarding the extent/magnitude of potential exposure to loans above interest rates of thirty-six percent – is precisely what Plaintiffs allege is missing from PPDAI's Prospectus. *See Meyer v. Concordia Int'l Corp.*, 2017 WL 4083603, at *5 (S.D.N.Y. July 28, 2017) (holding that "even 'warnings of specific risks… do not shelter defendants from liability if they fail to disclose hard facts critical to appreciating the magnitude of the risks described.'") (citation omitted). As a result, the holding in *Qudian* as pertains to loans with interest rates in excess of thirty-six percent is not applicable here.

Accordingly, the alleged misrepresentations concerning interest rates in excess of thirty-six percent support a claim under Section 11 and Section 12(a)(2), and Defendants' motion to dismiss is therefore denied as to this category of alleged misrepresentations.

2. Loan Collection Processes Allegations

Defendants argue that Plaintiffs' claims regarding PPDAI's loan collection practices must be dismissed because the Offering Materials disclosed the risks associated

[7] According to Qudian Inc.'s prospectus, "[t]he annualized fee rates charged by us on a significant number of transactions facilitated were in excess of 36% historically. Among the number of transactions we facilitated in 2016, 59.5% of their annualized fee rates exceeded 36%. Had all such credit drawdowns reduced their annualized fee rates to 36%, our revenue would have been reduced by approximately RMB307 million, representing 21% of our total revenues in 2016. In an effort to comply with potentially applicable laws and regulations, we adjusted the pricing of all our credit products in April 2017 to ensure that the annualized fee rates charged on all credit drawdowns do not exceed 36%." *See* Ex. 7 to the Affirmation of Joseph Russello in Opposition to Defendants' Joint Motion to Dismiss.

with its collection practices and Plaintiffs failed to show that PPDAI engaged in illegal collection practices.

Plaintiffs assert that it was materially misleading for the Offering Materials to "innocuously" list collection methods, *e.g.*, phone calls and text messages, because PPDAI abused these methods by frequently harassing borrowers, including sending offensive messages to borrowers' contact lists and resorting to violence to obtain payments.

In a section of the Prospectus, entitled, "[i]f our ability to collect delinquent loans is impaired, our business and results of operations might be materially and adversely affected," investors were specifically and fully warned that PPDAI's in-house and third-party agencies' collection methods included "phone calls, text messages, in-person visits and legal letters" and, if the methods were "viewed by the borrowers or regulatory authorities as harassments, threats or other illegal conducts," PPDAI could be sued or prohibited from utilizing certain methods. Thus, the Offering Materials disclosed that the debt collection methods might be deemed threatening or illegal. These disclosures preclude Plaintiffs' claim that Defendants engaged in misrepresentations concerning its collection practices. *See In re Qudian Inc. Sec. Litig.*, 2019 WL 4735376 at *7 (finding that a reasonable investor could not claim to have been misled about company's collection practices where the registration statement "explicitly warned investors that the company could not assure investors that 'personnel will not engage in any misconduct as part of their collection efforts'").

In their opposition papers, Plaintiffs include two articles, translated from Chinese, detailing complaints about PPDAI's loan collection practices: 1) Tencent Finance Article, published December 15, 2017; and 2) P2PEye Article, dated April 4, 2018. Although the articles discussed allegedly disturbing collection practices by PPDAI[8], they both post-dated the IPO and, in light of the Offering Materials' disclosures about loan collection methods, fail to support a claim of misrepresentation. Defendants' motion to dismiss the Section 11 and Section 12(a)(2) claims, based on alleged misrepresentations about debt-collections, is therefore granted.

3. Allegations regarding Credit Enhancement Services

Defendants argue that Plaintiffs' allegations that PPDAI mislead investors about its credit enhancement services are insufficient to state a cause of action because the Offering Materials accurately described changes to PPDAI's credit enhancement program and disclosed the associated risks. Defendants also point out that Plaintiffs failed to allege that PPDAI's credit enhancement program violated PRC law.

In opposition, Plaintiffs contend that, despite PPDAI's reported termination of its prohibited credit enhancement practices, a new model of "investor protections" was also

[8] For example, a borrower was quoted in the Tencent Article as saying that PPDAI "not only stole my communication records, but also saved my photos from my WeChat moments, edited them into graphic information and sent them to my contacts. The message said that I had decided to sell myself as a paid lover because I couldn't afford the loan…" The P2PEye article stated, "[a]mong the complaints about ppdai.com, the most frequently mentioned ones are harassing relatives and friends by telephone and threatening the parties concerned. Secondly, the collector pretended to be the court clerk and made the pictures of the relevant personnel into pornographic pictures for dissemination on the internet."

a prohibited credit enhancement practice, albeit with a new name. Plaintiffs support this allegation by citing to the post-IPO 2018 UBS Report which discussed PPDAI's termination of its investor reserve fund ("IRF") practice for compliance reasons and confirmed that PPDAI still provided credit enhancement. Plaintiffs argue that the 2018 UBS Report contradicted the Offering Materials, rendering them materially untrue and misleading.

The Offering Materials contained several references to credit enhancement, including that PPDAI previously engaged in practices with institutional investors that could be deemed prohibited credit enhancement services and that PPDAI "changed the cooperation model with these institutional investors and have ceased such practice as of the date of this prospectus." Additionally, the Offering Materials stated that

> due to lack of detailed implementation rules on certain key requirements of the Interim Measures and different interpretation of the Interim Measures by the local authorities, we cannot be certain that our existing practices would not be deemed to violate any laws, rules and regulations that are applicable to our business. For instance, for investor protection purpose, we have established and maintained a quality assurance fund and several investor reserve funds, which are deposited in designated accounts under our company's name and reported as restricted cash on our balance sheet. This practice might be regarded by the PRC regulatory authorities as credit enhancement services or a form of guarantee prohibited by the Interim Measures.

The above-referenced disclosures in the Offering Materials regarding PPDAI's change in credit enhancement practices, and disclosure that PPDAI's new practices might ultimately be deemed noncompliant with the Guidelines and Interim Measures, are documentary evidence sufficient to refute Plaintiffs' allegations that the Offering

Materials would mislead a reasonable investor. *See In re Coty Inc. Securities Litigation*, 2016 WL 1271065 at *5.[9] Thus, I grant Defendants' motion to dismiss Plaintiffs' Section 11 and Section 12(a)(2) claims based on alleged misrepresentations concerning credit enhancement practices.

4. Loan Origination Volume Allegations

According to the CAC, the Offering Materials "conveyed the misleading impression that PPDAI was successfully increasing its loan originations and borrowers with conventional and unobjectionable lending methods." Plaintiffs allege that the Offering Materials should have disclosed the PPDAI's underlying conduct that resulted in the increased volume. Plaintiffs also state that the Offering Materials should have disclosed that the trend of increasing loan origination was not sustainable and at risk of reversal due to PPDAI's "illicit" lending practices and exposure to loans exceeding the thirty-six percent rate cap.

Defendants argue that these allegations fail to state a claim because the disclosures in the Offering Materials about PPDAI's "dramatic increase in loan origination volume[s]" in prior quarters reflect accurate historical data and are therefore not in

[9] The post-IPO 2018 UBS Report does not warrant a different conclusion. The 2018 UBS Report contained the following question, "Is the worst of regulatory uncertainty behind the sector?" As a response, it stated that "[w]hile listed P2P platforms are in good shape overall on compliance, we see downside risks to their margins as their current practices on credit enhancement still contradict their positioning as information intermediaries." This statement alone, in light of the explicit disclosures in the Offering Materials, does not support Plaintiffs' allegation that Defendants' statements about credit enhancement were misleading.

violation of the ’33 Act. Defendants additionally argue that this category of claims fails because the Offering Materials disclosed the relevant risks and that the post-IPO statements cited by Plaintiffs cannot furnish a basis for a ’33 Act claim.

The Offering Materials stated that PPDAI’s “business has grown substantially in recent years, but our past growth rates may not be indicative of our future growth.” The Offering Materials further stated that

> If we are unable to attract qualified borrowers and sufficient investor commitments or if borrowers and investors do not continue to participate in our marketplace at the current rates due to any change we may be required to make to the way we conduct our business to ensure compliance with existing or new PRC laws and regulations or due to other business or regulatory reasons, we might not be able to increase our loan transaction volume and revenues as we expect, and our business and results of operations may be adversely affected.

First, Defendants’ statements about loan origination volume and growth are statements of opinion, which are not actionable. *See Medina v. Tremor Video, Inc.*, No. 13-CV-8364, 2015 WL 3540809, at *2 (S.D.N.Y. June 5, 2015). Moreover, Defendants specifically cautioned investors about risks vis-à-vis continued increases in loan origination volume. For these reasons, Defendants’ statements about loan origination volume do not support a cause of action for violation of Section 11 and Section 12(a)(2). I therefore grant Defendants’ motion to dismiss the Section 11 and Section 12(a)(2) claims as to this category of alleged misrepresentations.

5. Claims Related to Item 303 and Item 503

Plaintiffs additionally allege that Defendants' failure to comply with Item 303 and Item 503 of SEC Regulation S-K constituted another violation of Sections 11 and 12(a)(2).

Item 303 requires registrants to "describe 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." A trend must be disclosed when it is both "(1) known to management and (2) 'reasonably likely to have material effects on the registrant's financial condition or results of operations.'" *Stadnick v. Vivint Solar, Inc.*, 861 F.3d 31, 39 (2d Cir. 2017) (citation omitted). Failure to comply with Item 303 by omitting known trends or uncertainties is actionable under Sections 11 and 12(a)(2) of the '33 Act. *Panther Partners Inc. v. Ikanos Communications, Inc.*, 681 F.3d 114, 120 (2d Cir. 2012).

Item 503(c) requires issuers to "explain how the risk affects the issuer or the securities." There is very little case law on Item 503, but "the inquiry can be boiled down to whether the Offering Documents were accurate and sufficiently candid." *In re BHP Billiton Ltd. Sec. Litig.*, 276 F.Supp.3d 65, 89 (S.D.N.Y. 2017) (internal quotation marks and citation omitted).

Here, Plaintiffs allege that PPDAI failed to disclose uncertainties and risks that were known to it at the time of the Offering Materials, including those (1) "associated with its practice of imposing total annualized borrowing costs in excess of 36% of the

loan amount;" and (2) "associated with its predatory, unethical and illegal loan origination and collection practices."

In a footnote, Defendants posit that Plaintiffs' "citations to Item 303… and Item 503… add nothing" because Plaintiffs failed to allege facts showing that PPDAI violated any law or engaged in a pattern of illegal conduct subjecting it to disclosure as a trend. Plaintiffs reply that "the Offering Materials failed to disclose that PPDAI's illicit lending, collection and credit enhancement practices—coupled with the undisclosed magnitude of its exposure to all-in rates over 36%—presented known uncertainties and risks that required disclosure."

Plaintiffs have adequately alleged that PPDAI knew the real extent and magnitude of its exposure to loans exceeding the thirty-six percent cap and also knew that this would be reasonably likely to have a material effect on PPDAI's financial condition. Therefore, at this pre-answer motion to dismiss stage, Plaintiffs have adequately plead that Defendants failed to comply with Item 303 and Item 503 by failing to disclose the uncertainties and risks associated with its practice of imposing total annualized borrowing costs in excess of thirty-six percent. *See Stadnick*, 861 F.3d at 39. Thus, this non-compliance states a claim for violation of Section 11 and Section 12(a)(2).

Plaintiffs have not, however, established Defendants' failure to comply with Item 303 and Item 503 based on non-disclosure of uncertainties and risks associated with either PPDAI's collection or loan origination practices for the reasons discussed above. Hence, that portion of Plaintiffs' Item 303 and Item 503 claim that is premised on

PPDAI's collection or loan origination practices cannot support a claim under Section 11 and Section 12(a)(2) and is dismissed.

B. Section 15 Claims

Plaintiffs' third cause of action is for violation of Section 15 of the '33 act and is brought against PPDAI, all Individual Defendants except Manon and Law Debenture. To impose liability pursuant to Section 15 of the '33 Act on those who directly or indirectly exert control over a primary securities law violator, "a plaintiff must allege facts that set forth a primary violation of the securities laws and a defendant's control person status." *Acacia Nat. Life Ins. Co.*, 203 A.D.2d at 45-46.

Defendants assert that because Plaintiffs have not alleged a primary violation under either Section 11 or Section 12(a)(2) of the '33 Act, the Section 15 claim must be dismissed. As I have denied Defendants' motion to dismiss Plaintiffs' Sections 11 and 12(a)(2) claims pertaining to loans with interest rates exceeding thirty-six percent, Defendants' ground for dismissal of the Section 15 claim is inapplicable as to that category of allegations. Accordingly, Defendants' motion to dismiss the Section 15 claim is denied as to the allegations regarding loan interest rates above thirty-six percent and otherwise granted.

Lastly, I deny Plaintiffs' generic request for leave to amend the dismissed portions of their first, second and third causes of action.

In accordance with the foregoing, it is

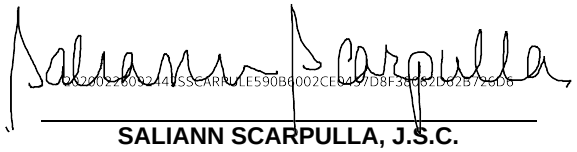
ORDERED that the motion by defendants PPDAI Group, Inc., Credit Suisse Securities (USA) LLC, Citigroup Global Markets Inc., Keefe, Bruyette & Woods, Law

Debenture Corporate Services Inc., and Giselle Manon to dismiss Plaintiffs' second cause of action based on standing is denied; and it is further

ORDERED that the motion by defendants PPDAI Group, Inc., Credit Suisse Securities (USA) LLC, Citigroup Global Markets Inc., Keefe, Bruyette & Woods, Law Debenture Corporate Services Inc., and Giselle Manon to dismiss Plaintiffs' first, second and third causes of action is denied with respect to the allegations concerning loan interest rates in excess of thirty-six percent (as set forth above) and otherwise granted; and it is further

ORDERED that counsel for the parties are directed to appear for a status conference at 60 Centre Street, Room 208 on March 18, 2020 at 2:15pm.

This constitutes the decision and order of the Court.



2/26/2020
DATE

SALIANN SCARPULLA, J.S.C.

CHECK ONE:		**CASE DISPOSED**			X	**NON-FINAL DISPOSITION**	
		GRANTED		**DENIED**	X	**GRANTED IN PART**	**OTHER**
APPLICATION:		**SETTLE ORDER**				**SUBMIT ORDER**	
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**				**FIDUCIARY APPOINTMENT**	**REFERENCE**