SUMMARY
March 31, 2022

2022COA37

No. 20CA1052, *Houser v. CenturyLink, Inc.* — Securities — Securities Act of 1933 — Civil Liability on Account of False Registration Statement — Untrue Statement of Material Fact — Omission of Material Fact — Liability of Controlling Persons

A division of the court of appeals holds that the plaintiff's complaint fails to state a claim under sections 11, 12(a)(2), and 15 of the Securities Act of 1933, 15 U.S.C. §§ 77k, 77*l*(a)(2), and 77o, based on alleged material misstatements in and omissions from a registration and a prospectus. In the course of reaching that conclusion, the division addresses a number of principles applicable to such claims.

COLORADO COURT OF APPEALS **2022COA37**

Court of Appeals No. 20CA1052
Boulder County District Court No. 18CV30556
Honorable Andrew R. Macdonald, Judge

Dean Houser, Individually and on Behalf of All Others Similarly Situated,

Plaintiff-Appellant,

v.

CenturyLink, Inc., Glen F. Post, III, R. Stewart Ewing, Jr., David D. Cole, William A. Owens, Martha H. Bejar, Virginia Boulet, Peter C. Crown, W. Bruce Hanks, Jeffrey K. Storey, Steven T. Clontz, Mary L. Landrieu, Gregory J. McCray, Harvey P. Perry, Michael J. Roberts, Laurie A. Siegel, and Sunit S. Patel,

Defendants-Appellees.

JUDGMENT AFFIRMED, ORDER AFFIRMED IN PART,
REVERSED IN PART, AND CASE REMANDED WITH DIRECTIONS

Division III
Opinion by JUDGE J. JONES
Lipinsky and Gomez, JJ., concur

Announced March 31, 2022

Ranson & Kane PC, Jason P. Kane, Colorado Springs, Colorado; Bottini & Bottini, Inc., Yury A. Kolesnikov, La Jolla, California, for Plaintiff-Appellant

Wheeler Trigg O'Donnell, LLP, Kathryn A. Reilly, Denver, Colorado; Willkie Farr & Gallagher LLP, Sameer Advani, Tariq Mundiya, New York, New York, for Defendants-Appellees

¶ 1 This case concerns class action claims asserted under sections 11, 12(a)(2), and 15 of the Securities Act of 1933 (the Act). 15 U.S.C. §§ 77k, 77*l*(a)(2), and 77o. More specifically, it involves the sufficiency of factual allegations supporting those claims, which relate to the 2017 merger of defendant CenturyLink, Inc., and Level 3 Communications, Inc. The claims allege material misstatements and omissions in a registration statement (section 11), material misstatements and omissions in a prospectus (section 12(a)(2)), and control person liability for the section 11 and section 12(a)(2) violations (section 15).

¶ 2 Apparently, no published Colorado appellate decision has addressed the sufficiency of facts alleged in support of such claims. Because parties are filing such claims in state court with increasing frequency,[1] we take this opportunity to provide some guidance to the district courts and the bar.

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[1] Until 2018, cases such as this were almost always filed in federal court because of uncertainty about state court jurisdiction. In that year, the United States Supreme Court held in *Cyan, Inc. v. Beaver County Employees Retirement Fund*, 583 U.S. ___, 138 S. Ct. 1061 (2018), that class action claims under sections 11, 12(a)(2), and 15 may be asserted in state as well as in federal courts.

¶ 3 Plaintiff, Dean Houser, on behalf of himself and a proposed class of similarly situated shareholders, appeals the district court's order granting CenturyLink's motion to dismiss under C.R.C.P. 12(b)(5) for failure to state a claim on which relief can be granted and its order denying his motion for leave to amend his complaint. We affirm the order dismissing the complaint and affirm in part and reverse in part the order denying Houser's motion for leave to amend his complaint.

I. Background

¶ 4 On October 31, 2016, CenturyLink and Level 3 issued a press release announcing that they had signed an agreement to merge (the Merger Agreement). On December 15, 2016, the companies filed a joint preliminary proxy statement/prospectus in a registration statement with the Securities and Exchange Commission (SEC). The SEC declared the final registration statement (the Registration Statement), which incorporated the joint proxy statement/prospectus (the Prospectus), effective on February 13, 2017. (We refer to the Registration Statement and the Prospectus together as "the Offering Documents.") The companies'

respective shareholders voted to approve the merger on March 16, 2017, and the merger closed on November 1, 2017.

¶ 5 In June 2018, Houser filed this putative class action against CenturyLink and certain of its officers and directors. The complaint asserts a claim under section 11 of the Act based on alleged material misstatements and omissions in the Registration Statement. It asserts a claim under section 12(a)(2) based on alleged material misstatements and omissions in the Prospectus. And it asserts a claim under section 15 against the officers and directors based on the allegation that, as "control persons" of CenturyLink, they are liable for the company's section 11 and section 12(a)(2) violations.

¶ 6 CenturyLink moved to dismiss the complaint under Rule 12(b)(5) and to stay the proceedings pending court approval of a proposed settlement of a similar securities class action filed in federal court.[2] The state court granted the stay. Several months

[2] The federal case, *Amedee v. Level 3 Commc'ns, Inc.*, No. 17-cv-00155-RM-STV, 2019 WL 1228058 (D. Colo. Mar. 3, 2019), involved the same merger underlying Houser's claims in this case.

later, Houser moved to lift the stay because the federal court didn't approve the proposed settlement. The state court lifted the stay.

¶ 7 After it lifted the stay, the state court heard argument on CenturyLink's motion to dismiss. At the hearing, Houser's counsel moved for leave to amend the complaint in the event the court granted CenturyLink's motion to dismiss, based on facts that had come to light in other cases relating to the merger after the filing of the complaint in this case.

¶ 8 The district court granted CenturyLink's motion to dismiss and denied Houser's motion for leave to amend the complaint. Houser appeals both rulings.

II. Discussion

¶ 9 We start by determining whether, as to the alleged misstatements and omissions Houser raises on appeal,[3] his complaint adequately pleads a claim for relief. We conclude that it does not. We then consider whether the district court should have

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[3] Houser's complaint contains allegations of material misstatements and omissions as to which he presents no argument on appeal. We therefore regard those allegations as abandoned and won't address them. *See Greenwood Tr. Co. v. Conley*, 938 P.2d 1141, 1145 n.7 (Colo. 1997).

allowed Houser to amend his complaint and conclude that, as to one theory, it should have, but as to all other theories, the district court didn't err by denying leave to amend.

A. Motion to Dismiss

¶ 10 The district court's order granting CenturyLink's motion to dismiss carefully parses the allegations of Houser's complaint and thoughtfully applies the applicable law. We don't see any basis for reversing the district court's order.

1. Standard of Review

¶ 11 We review de novo a district court's order granting a Rule 12(b)(5) motion to dismiss for failure to state a claim. *Bewley v. Semler*, 2018 CO 79, ¶ 14. And in doing so, we apply the same standards as the district court. *Sch. Dist. No. 1 v. Masters*, 2018 CO 18, ¶ 13. Thus, we determine whether the complaint's factual allegations are sufficient to raise a right to relief above the speculative level and provide plausible grounds for relief. *Warne v. Hall*, 2016 CO 50, ¶¶ 9, 24; *Walker v. Women's Pro. Rodeo Ass'n*, 2021 COA 105M, ¶ 37. In making that determination, we must accept all the complaint's factual allegations as true, viewing them in the light most favorable to the plaintiff. *Bewley*, ¶ 14. But we

don't consider "bare legal conclusions as true." *Norton v. Rocky Mountain Planned Parenthood, Inc.*, 2018 CO 3, ¶ 7; *accord Denver Post Corp. v. Ritter*, 255 P.3d 1083, 1088 (Colo. 2011) ("[W]e are not required to accept as true legal conclusions that are couched as factual allegations."); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009) ("[Fed. R. Civ. P.] 8 . . . does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.").[4]

¶ 12 Before going further, we pause to observe that Houser's briefs on appeal are suffused with assertions of fact that aren't included in his complaint but, rather, are garnered from the complaint in a different case, *In re CenturyLink Sales Pracs. & Sec. Litig.*, 403 F. Supp. 3d 712 (D. Minn. 2019).[5] But he doesn't cite any authority for the proposition that a party may salvage his own complaint by

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[4] Heightened pleading requirements apply to certain claims under the federal securities laws, but those requirements don't apply to claims under sections 11, 12(a)(2), and 15. *Panther Partners Inc. v. Ikanos Commc'ns, Inc.*, 681 F.3d 114, 120 (2d Cir. 2012).

[5] As discussed below, the factual allegations Houser includes in his briefs on appeal, which are not in the complaint, relate primarily to a whistleblower's allegations and CenturyLink officers' knowledge thereof and investigations by state agencies.

pointing the court to allegations in a complaint filed in a different case, and we aren't aware of any. We are limited to considering "the facts alleged in the pleadings, documents attached as exhibits or incorporated by reference, and matters proper for judicial notice." *Norton*, ¶ 7; *see also Slater v. A.G. Edwards & Sons, Inc.*, 719 F.3d 1190, 1196 (10th Cir. 2013) ("In a securities case, we may consider, in addition to the complaint, documents incorporated by reference into the complaint, public documents filed with the SEC, and documents the plaintiffs relied upon in bringing suit."). Allowing a party to rely on allegations in a complaint in another case would be inconsistent with C.R.C.P. 8(a)'s requirement that the *complaint* contain a short and plain statement of the claim showing that the plaintiff is entitled to relief and with C.R.C.P. 11(a)'s requirement that an attorney certify that the pleading is grounded in fact after reasonable inquiry.

2. Applicable Law

¶ 13 Sections 11 and 12(a)(2) impose strict liability for making material misleading statements or omissions in a registration statement (section 11) or in a prospectus or oral communication (section 12(a)(2)). 15 U.S.C. §§ 77k, 77*l*(a)(2); *see Panther Partners*

Inc. v. Ikanos Commc'ns, Inc., 681 F.3d 114, 120 (2d Cir. 2012); *In re Morgan Stanley Info. Fund Sec. Litig.*, 592 F.3d 347, 358-59 (2d Cir. 2010).

¶ 14 Thus, a plaintiff pleading a claim under section 11 or section 12(a)(2) must identify (1) a misstatement or omission that is (2) material. *See Slater*, 719 F.3d at 1196; *Panther Partners*, 681 F.3d at 120; *In re Morgan Stanley Info. Fund Sec. Litig.*, 592 F.3d at 360. As this articulation of elements implies, a plaintiff asserting claims under either of these provisions doesn't need to allege or prove scienter, reliance, or loss causation. *City of Pontiac Policemen's & Firemen's Ret. Sys. v. UBS AG*, 752 F.3d 173, 182-83 (2d Cir. 2014); *see Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 575 U.S. 175, 179 (2015) (intent to deceive or defraud isn't an element of a section 11 claim); *Panther Partners*, 681 F.3d at 120.[6]

[6] There are other elements to claims under these sections relating to the status of the plaintiff and the registrant, but those elements aren't at issue in this case. *See In re Morgan Stanley Info. Fund Sec. Litig.*, 592 F.3d 347, 358-59 (2d Cir. 2010).

¶ 15 In the case of an alleged omission, a plaintiff must allege that the securities laws required the omitted material fact to be included or that its absence rendered statements in the registration statement or prospectus misleading. *Slater*, 719 F.3d at 1196; *In re Adams Golf, Inc. Sec. Litig.*, 381 F.3d 267, 277 (3d Cir. 2004); *see McDonald v. Kinder-Morgan, Inc.*, 287 F.3d 992, 998 (10th Cir. 2002) ("[A] duty to disclose arises only where both the statement made is material, and the omitted fact is material to the statement in that it alters the meaning of the statement." (quoting *In re Bos. Tech., Inc. Sec. Litig.*, 8 F. Supp. 2d 43, 53 (D. Mass. 1998))). A duty to disclose a fact may arise from an affirmative obligation imposed by law. Houser relies on two such provisions: Item 303 of SEC Regulation S-K, 17 C.F.R. § 229.303 (2021), and Item 105 (formerly Item 503) of Regulation S-K, 17 C.F.R. § 229.105 (2021).

¶ 16 As relevant to this case, Item 303 requires disclosure in offering documents of

> [1] any known trends or any known demands, commitments, events or uncertainties that will result in or that are reasonably likely to result in the registrant's liquidity increasing or decreasing in any material way . . . [, and 2] any known trends or uncertainties that have had or that are reasonably likely to have a

> material favorable or unfavorable impact on net sales or revenues or income from continuing operations.

17 C.F.R. § 229.303(b)(1)(i), (b)(2)(ii) (2021); *see Slater*, 719 F.3d at 1197. To put a finer point on it, "a duty to disclose arises [under Item 303] 'where a trend, demand, commitment, event or uncertainty is both [1] presently known to management and [2] reasonably likely to have material effects on the registrant's financial condition or results of operations.'" *Slater*, 719 F.3d at 1197 (quoting Management's Discussion and Analysis of Financial Condition and Results of Operations, Securities Act Release No. 6835, 54 Fed. Reg. 22,427, 22,429 (May 18, 1989)).[7]

¶ 17 Item 105 requires a registrant to include in its offering materials "a discussion of the material factors that make an investment in the registrant or offering speculative or risky." 17 C.F.R. § 229.105(a) (2021); 17 C.F.R. § 229.503(c) (2018). This provision "creates liability where 'the registrant knew, as of the time

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[7] Item 303 isn't an independent basis of liability under the securities laws. Rather, it is a way of determining whether information was "required to be stated" under sections 11 and 12(a)(2). *See* 15 U.S.C. §§ 77k(a), § 77*l*(b).

of the offering, that (1) a risk factor existed; (2) the risk factor could adversely affect the registrant's present or future business expectations; and (3) the offering documents failed to disclose the risk factor.'" *Yan v. ReWalk Robotics Ltd.*, 973 F.3d 22, 33 (1st Cir. 2020) (quoting *Silverstrand Invs. v. AMAG Pharms., Inc.*, 707 F.3d 95, 103 (1st Cir. 2013)).

¶ 18 Materiality is, as noted, a requirement for stating a claim under either section 11 or section 12(a)(2). "A statement is material only if 'a reasonable investor would consider it important in determining whether to buy or sell stock.'" *Slater*, 719 F.3d at 1197 (quoting *McDonald*, 287 F.3d at 998); *see In re Morgan Stanley Info. Sec. Litig.*, 592 F.3d at 360 (materiality asks whether the registrant's representations, taken together and in context, would have misled a reasonable investor). Said somewhat differently, "unless the statement 'significantly altered the "total mix" of information' available, it will not be considered material." *Grossman v. Novell, Inc.*, 120 F.3d 1112, 1119 (10th Cir. 1997) (quoting *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)).

¶ 19 These principles establish the general framework for evaluating the sufficiency of a complaint's allegations supporting claims under section 11 and section 12(a)(2).[8] Other, more specific, principles apply to some of the misstatements and omissions alleged by Houser, and we identify and employ them below as relevant.

3. Analysis

¶ 20 Houser's complaint relies most heavily on allegations that, at all relevant times, CenturyLink engaged in illegal billing practices and failed to disclose that the fallout from the discovery and cessation of these practices would cause substantial loss of income. As well, Houser's complaint alleges several undisclosed spending and income trends pre-dating and post-dating the Offering Documents. His complaint also alleges material misstatements —

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[8] Section 15 is a vicarious liability provision; a control person can be liable under section 15 only if the control person's company is liable under section 11 or section 12(a)(2). Therefore, given our conclusion that Houser failed to adequately plead claims under section 11 and section 12(a)(2), we don't need to evaluate the sufficiency of Houser's allegations supporting section 15 liability. *See In re Alcatel Sec. Litig.*, 382 F. Supp. 2d 513, 533 (S.D.N.Y. 2005).

the Merger Agreement's representations that CenturyLink conducted its operations in accordance with the law and that it hadn't been notified of any violation of law. This allegation is tied to the alleged illegal billing practices.

¶ 21 Because Houser devotes most of his efforts to trying to salvage his claims to the extent they are based on the alleged material omissions, and because one of those alleged omissions underpins his material misstatement theory, we address the adequacy of the allegations pertaining to the alleged omissions before turning to the alleged misstatements.

a. Omissions

¶ 22 Houser contends that his complaint plausibly states claims under sections 11 and 12(a)(2) based on four different omissions from the Offering Documents.

i. Cramming (Item 303)

¶ 23 The complaint alleges that, before and after the Offering Documents were filed, "CenturyLink was charging customers for lines and services they did not request or authorize and charging customers hidden fees." These practices are referred to as "cramming." According to the complaint, CenturyLink knew that "a

material amount of [its] reported revenues and earnings had been realized by improper conduct, and thus that [its] revenues would decrease when customers switched to a different carrier or forced [it] to cancel services that had not been authorized." Houser argues that these cramming sales practices and the potential negative consequences thereof constituted a "known trend, event, or uncertainty" that CenturyLink had a duty to disclose in the Offering Documents under Item 303.

¶ 24 The district court concluded that the complaint fails to allege facts showing that CenturyLink officers involved in the merger process knew of the cramming sales practices or their extent and potential effect on revenues when the Offering Documents became effective. We agree with that conclusion.

¶ 25 The only allegations *in the complaint* bearing on CenturyLink officers' or executives' knowledge of the alleged cramming are:

- Heidi Heiser, "a customer service and sales agent" for CenturyLink, filed a "whistleblower lawsuit" on *June 14, 2017*, "alleging widespread misconduct *at Level 3* going back to 2015-2016, including charging customers for

lines and services they did not order or approve." (Emphasis added.)

- In her lawsuit, Heiser alleged that she told certain of her named "supervisors" of her concerns about the cramming at some unspecified point in time.
- In her lawsuit, Heiser alleged that she posted a question on a company online message board in October 2016 "asking the CenturyLink CEO why customers were being billed for things they did not ask for."
- In her lawsuit, Heiser alleged that she was suspended or fired two days after she posted the question on the online message board and the question was taken down from the online message board.
- After Heiser filed her whistleblower lawsuit, class action lawsuits were filed in several states alleging improper billing of customers.
- Minnesota's attorney general sued CenturyLink on "July 12, 2017, . . . alleging that CenturyLink frequently billed customers at higher rates than its sales agents quoted."

- At some unspecified time, there was a "barrage of complaints from [CenturyLink's] customers and own employees" about cramming. The complaint doesn't identify any recipient of any such complaint, save for those Heiser made to her supervisors.

¶ 26 For reasons discussed above, many of these allegations aren't well pleaded: they are only allegations that Heiser made certain allegations in another case.

¶ 27 Houser's reliance on *In re BofI Holding, Inc. Securities Litigation*, 977 F.3d 781 (9th Cir. 2020), for the proposition that he may plead allegations in this way is misplaced. In that case, the court addressed whether the plaintiffs had sufficiently pleaded loss causation — an element of a claim under section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b); and Rule 10b-5, 17 C.F.R. § 240.10b-5 (2021). 977 F.3d at 786-87. More specifically, the court addressed whether the plaintiff had sufficiently alleged loss causation by pointing to two "corrective disclosures." The court held that one of the alleged corrective disclosures — a whistleblower's lawsuit — qualified as a corrective disclosure and therefore the plaintiffs had sufficiently pleaded loss

causation. *Id.* at 786, 791-92. In so holding, the court also held that allegations in another lawsuit can qualify as a corrective disclosure "[i]f the market treats allegations in [the] lawsuit as sufficiently credible to be acted upon as truth, and the inflation in the stock price attributable to the defendant's misstatements is dissipated as a result." *Id.* at 792. The focus, then, was on the other lawsuit's effect on the market, and the court took pains to note that it was taking judicial notice of the contents of the complaint in the other case, but not of the truth of the allegations in that complaint. *Id.* at 791 n.2.

¶ 28 But this case doesn't involve any issue of loss causation or effect on the market, and, moreover, Houser seeks to use the allegations in Heiser's complaint in another case as evidence of knowledge, which depends on these allegations being true. They may not be so used.[9]

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[9] To the extent Houser desires to use such allegations on remand in an amended complaint, he must plead them as facts, not as allegations by someone else, and must do so only after reasonable inquiry as required by C.R.C.P. 11.

¶ 29 In any event, only a few of Houser's allegations potentially relate to events predating the February 13, 2017, effective date of the Offering Documents. One is the allegation that Heiser posted a question about sales practices on an online message board apparently open to all company employees. The others are that Heiser complained to her supervisors and that many customers and employees had complained about the sales practices. These allegations are insufficient to show, above the speculative level, that CenturyLink officers or executives were aware of those practices or the extent of those practices and the potential negative effect on company revenue when the Offering Documents became effective. (Recall, Houser's claims are based on alleged misstatements and omissions in the Registration Statement and Prospectus.) No facts are alleged, for example, that could show that such officers or executives were made aware of Heiser's message board post or complaints by others.

¶ 30 In this way, Houser's complaint is like the complaints deemed deficient in *Panther Partners*. In that case, the plaintiff's first complaint alleged that the defendant learned that its semiconductor chips were failing and that it was having to ship replacement chips

to certain customers, and that the defendant was required to disclose these facts in its offering documents. But the Second Circuit agreed with the district court that the plaintiff had not plausibly pleaded facts suggesting that the company "knew or should have known of the scope or magnitude of the defect" at the time of the offering. 681 F.3d at 118. The plaintiff's amended complaint added allegations that "the defect issue was becoming 'more pronounced' in the weeks leading up to the" offering, the defendant was receiving an increased number of calls from two of its customers about defects in the chips, and the defendant's board of directors "was discussing the issue at the time it arose." *Id.* But the Second Circuit held that even those allegations weren't sufficient "to allege plausibly that [the defendant] knew of abnormally high and potentially problematic defect rates before [it] published the registration statement." *Id.* (quoting *Panther Partners Inc. v. Ikanos Commc'ns, Inc.*, 347 F. App'x 617, 622 (2d Cir. 2009)). It wasn't until the plaintiff added allegations in its second amended complaint that the affected customers accounted for 72% of the defendant's business and the defendant "knew at the time it was receiving an increasing number of calls from these customers that it

would be unable to determine which chip sets contained defective chips" that the Second Circuit concluded the plaintiff had adequately alleged a known trend that Item 303 required the defendant to disclose. *Id.* at 119, 121.

¶ 31 Similarly in this case, the complaint alleges improper practices, but it doesn't allege facts showing that the practices were so widespread and well-known throughout this very large company, or could have such a material negative effect on revenues once they ceased, that CenturyLink's officers or executives involved in the merger preparation should have known of the alleged trend, event, or uncertainty.

¶ 32 Houser points to allegations made in the Minnesota federal case as showing knowledge by CenturyLink officers. But, as noted above, we can't consider allegations contained in a complaint in another case. Likewise, we can't consider assertions in Houser's appellate briefs about an investigation by the Arizona Attorney General in 2016.

¶ 33 We therefore conclude that Houser's complaint fails to sufficiently allege that CenturyLink was aware of the alleged cramming, its extent, and the potential repercussions to require it

to have disclosed a potentially negative effect on its revenues under Item 303.

ii. Further Increase in CenturyLink's Capital Expenditures (Item 303 and Item 105)

¶ 34 Next, Houser argues that his complaint sufficiently alleges that CenturyLink unlawfully failed to disclose that it had already decided to accelerate or increase its capital expenditures prior to filing its Offering Documents with the SEC.

¶ 35 As to this issue, Houser's complaint alleges the following:

- Maintaining "strong cash flow" is of critical importance to CenturyLink's shareholders.
- CenturyLink's "free cash flow figure" is the "most important factor necessary to support CenturyLink's continuing expenditures."
- The Offering Documents failed to disclose that CenturyLink "was incurring higher [capital] expenditures than forecast, which would negatively impact free cash flow, revenue and profits in 2017 and 2018."

- CenturyLink had "already decided it would need to accelerate capital expenditures due to increased competition from cable companies."
- The Offering Documents' "boilerplate risk disclosures were false and misleading because, at the time the Prospectus was filed, CenturyLink . . . had already decided it would need to increase its capital spending in the first half of 2017 beyond forecasted amount" because of "significantly increased competition from cable providers." (Emphasis omitted.)

The district court concluded that CenturyLink disclosed the risk of increased capital expenditures. That conclusion is correct. CenturyLink's documents disclosed that capital expenditures "will continue to be substantial" and that CenturyLink "anticipate[d]" it would be "require[d] . . . to make significant capital expenditures to increase network capacity or to implement network management practices to alleviate network capacity shortages" as a result of

certain market trends.[10] And CenturyLink's CEO told investors during a February 8, 2017, earnings call, "We have a significant amount of embedded capacity in our existing network, and our

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[10] The "RISK FACTORS" section in CenturyLink's Prospectus, for example, provided as follows:

> [Y]ou should carefully consider the following risks before deciding whether to vote for the adoption of the merger agreement, in the case of Level 3 stockholders, or for the issuance of shares of CenturyLink common stock in connection with the combination, in the case of CenturyLink stockholders. In addition, you should read and consider the risks associated with each of the businesses of CenturyLink and Level 3 because these risks will also affect the combined company. . . .
>
> . . . .
>
> The business of CenturyLink and Level 3 is capital intensive, and both anticipate that the combined company's capital requirements will continue to be substantial in the coming years. If CenturyLink determines that its networks must be expanded to handle the increased demands or to meet regulatory commitments or requirements, Century Link may determine that substantial additional capital expenditures are required, even though there is no assurance that the return on investment will be satisfactory.

broadband investments for 2017 are expected to actually be a little higher than the 2016 levels."[11]

¶ 36 Houser argues, however, that CenturyLink's statements were equivocal: CenturyLink only said it "anticipate[d]" the need to make significant capital expenditures. But the statements, taken together and considered in context, made clear that there would be an increase in capital expenditures and that those capital expenditures would be significant.

¶ 37 This case is therefore different than *In re Facebook, Inc., IPO Securities & Derivative Litigation*, 986 F. Supp. 2d 487 (S.D.N.Y. 2013), on which Houser relies. The statements at issue in that case were more equivocal than those in this case. And the statements in that case concerned an effect on revenue that had already occurred. *Id.* at 514 (the company said increased mobile usage and product decisions may negatively affect revenue but in fact they had already negatively affected revenue). CenturyLink's statements, in contrast, concerned future intentions, which are subject to change depending

[11] CenturyLink's Form 425 filed with the SEC on February 9, 2017, included a transcript of its fourth quarter earnings conference call.

on myriad circumstances. Simply put, we conclude that CenturyLink's statements sufficiently alerted investors to the likelihood of future increased capital expenditures.

¶ 38 It follows that the district court didn't err by concluding that Houser's complaint's allegations don't plausibly state a claim based on this alleged nondisclosure under either Item 303 or Item 105. *See Yan*, 973 F.3d at 33-34 (affirming the dismissal of the plaintiff's claims under Items 303 and 105 (formerly Item 503) because the defendant adequately disclosed the claimed risks or uncertainties that the plaintiff alleged hadn't been disclosed).

iii. Elongated Merger Process (Item 303 and Item 105)

¶ 39 Houser's complaint alleges that CenturyLink failed to disclose that "significant uncertainty was being caused by the elongated merger process, resulting in disruption in the sales force and lower revenues."[12] According to the complaint, the Offering Documents were misleading because they said that customers "*may* defer or delay decisions" (emphasis added) and that employees' uncertainty

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[12] Houser alleges that the disruption in the sales force and the lower revenues each constitutes a fact that CenturyLink was required to disclose.

about their roles with the combined company "*may* materially adversely affect" (emphasis added) CenturyLink's ability to attract and retain employees while the merger was pending, even though a significant number of customers had already deferred purchases and there had already been a significant disruption in the companies' respective sales forces.

¶ 40 The district court concluded that CenturyLink's disclosures about these risks were sufficient.[13] Again, we agree.

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[13] The "RISK FACTORS" section in the Prospectus said:

> In addition to the other information included and incorporated by reference into this joint proxy statement/prospectus, including the matters addressed in the section entitled "Cautionary Statement Regarding Forward-Looking Statements," you should carefully consider the following risks . . . .
>
> . . . .
>
> In connection with the pending combination, some customers or vendors of each of CenturyLink and Level 3 may delay or defer decisions or reduce their level of business with either or both of the companies, any of which could negatively affect the revenues, earnings, cash flows and expenses of Century Link and Level 3, regardless of whether the combination is completed. Similarly, current and

¶ 41 And again, we aren't persuaded that *In re Facebook* requires a different result. The Offering Documents' disclosures didn't imply that CenturyLink wasn't already experiencing the effects that Houser asserts. And we conclude that the risks of customer caution and employee instability are inherent in a merger of this nature and complexity. So the alleged nondisclosures didn't significantly alter the total mix of available information. *Cf. In re LeapFrog Enters., Inc. Sec. Litig.*, 527 F. Supp. 2d 1033, 1048-49 (N.D. Cal. 2007) ("[T]o the extent plaintiffs contend defendants should have stated that the adverse factors 'are' affecting financial results rather than 'may' affect financial results," those statements were not actionable.). Moreover, the complaint's assertions that a "significant" number of customers had already deferred purchases and that CenturyLink had already experienced employee instability

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> prospective employees of [both companies] may experience uncertainty about their future roles with the combined company following the combination, which may materially adversely affect the ability of [both companies] to attract and retain key management, sales, marketing, operational and technical personnel during the pendency of the combination.

are conclusory, unaccompanied by any allegations establishing a material impact on CenturyLink's operations or revenue.[14]

b. Affirmative Misstatements

¶ 42 Houser's complaint alleges that CenturyLink misstated, in the Merger Agreement, the fact that it had conducted business "in accordance with all applicable law," and that it hadn't received "notice of any violations [or investigations]" concerning any laws, regulations, or other legal requirements because of the cramming practices. But this allegation fares no better as an alleged misstatement than it does as an alleged omission. As discussed, the complaint fails to allege facts above the speculative level showing that the CenturyLink officers involved with the merger knew of the practices, the extent of the practices, and their potential negative effect on revenue. (And, as noted, we can't consider allegations that aren't well pleaded in the complaint.)

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[14] Houser also relies on statements by CenturyLink's former CEO made eight or nine months *after* the offering. We aren't persuaded that those statements say anything about his knowledge when the Offering Documents became effective.

¶ 43 As well, though Houser correctly points out that the Prospectus incorporated the Merger Agreement by reference, the Prospectus said that the information in the Merger Agreement wasn't intended to "provide any factual information about CenturyLink or Level 3." Instead, the statements in the Merger Agreement were made only for use by the parties thereto. And the Prospectus said the "representations and warranties [in the Merger Agreement] *should not be relied upon*" by anyone other than the contracting parties. *See Jaroslawicz v. M&T Bank Corp.*, Civ. A. No. 15-897-RGA, 2017 WL 1197716, at *5 (D. Del. Mar. 30, 2017) (the defendant company's disclaimer in its merger agreement specifically cautioned shareholders not to rely on certain information as accurate, signifying that no reasonable shareholder could rely on representations therein as true).[15]

¶ 44 Therefore, the district court properly dismissed Houser's claims to the extent they are based on affirmative misstatements.

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[15] Houser implies that the Third Circuit reversed this decision in *Jaroslawicz v. M&T Bank Corp.*, 962 F.3d 701 (3d Cir. 2020). But it actually reversed a different decision in the same case, one involving a different complaint asserting different theories of liability.

¶ 45 In sum, we conclude that the district court didn't err by dismissing Houser's claims under Rule 12(b)(5).

B. Motion for Leave to Amend

¶ 46 Houser contends the district court erred by denying his motion for leave to amend the complaint because, contrary to the district court's conclusion, an amendment wouldn't be futile. We agree with Houser that he should be allowed to amend his complaint to include additional allegations that CenturyLink failed to disclose the "cramming" practices.

¶ 47 We review a district court's decision denying a motion for leave to amend for an abuse of discretion. *Vinton v. Virzi*, 2012 CO 10, ¶ 10; *Settle v. Basinger*, 2013 COA 18, ¶ 20. But we review de novo a district court's determination that an amendment would be futile because the amended complaint couldn't survive a motion to dismiss. *Schaden v. DIA Brewing Co.*, 2021 CO 4M, ¶ 34; *Benton v. Adams*, 56 P.3d 81, 85 (Colo. 2002); *Armed Forces Bank, N.A. v. Hicks*, 2014 COA 74, ¶ 41.

¶ 48 "Whether leave to amend should be allowed or not depends upon the facts and circumstances." *Benton*, 56 P.3d at 86. A court may deny leave to amend because of undue delay, bad faith,

dilatory motive, repeated failures to cure deficiencies in the complaint, undue prejudice to the defendant, or futility of the proposed amendment. *Id.* An amendment would be futile if it is legally insufficient or fails to cure defects in the previous pleadings. *Id.* at 87.

¶ 49 The district court didn't find, CenturyLink doesn't assert, and the record doesn't show any undue delay, bad faith, dilatory motive, repeated failures to cure a complaint's deficiencies, or prejudice to CenturyLink; the only question is whether an amendment would be futile.

¶ 50 On appeal, as he did below, Houser argues that an amendment wouldn't be futile because many other relevant facts came to light after he filed his complaint — facts that the Minnesota federal court in *In re CenturyLink Sales Practices & Securities Litigation*, 403 F. Supp. 3d 712, found sufficient to state a claim even under a heightened pleading test. These facts relate to the cramming theory alleged in the complaint, and specifically to CenturyLink's knowledge of the nature and extent of the cramming practices and consequences when the Offering Documents became effective. We can't say as a matter of law, at this juncture, that

Houser would be unable to state omissions claims under sections 11, 12(a)(2), and 15 with the addition of such facts. We therefore reverse the district court's denial of Houser's motion for leave to amend as it pertains to the omissions claim based on the cramming theory. But because Houser hasn't articulated any argument pertaining to the other omissions or misstatements alleged in his complaint, we affirm the district court's order as it relates to those omissions and misstatements. *See Bristol Co., LP v. Osman*, 190 P.3d 752, 759 (Colo. App. 2007) ("[T]he trial court should allow amendment of the complaint when it will cure a deficiency that otherwise would justify dismissal."); *see also Benton*, 56 P.3d at 85 ("C.R.C.P. 15(a) encourages trial courts to look favorably upon motions to amend.").

III. Conclusion

¶ 51 We affirm the district court's order dismissing Houser's claims under Rule 12(b)(5). We reverse its order denying Houser's motion for leave to amend the complaint as it pertains to the omissions claim based on the cramming theory and remand the case for further proceedings. We otherwise affirm the district court's order denying Houser's motion for leave to amend.

JUDGE LIPINSKY and JUDGE GOMEZ concur.