UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE MERRILL LYNCH & CO., INC. RESEARCH REPORTS SECURITIES LITIGATION	:	02 MDL 1484 (MP)
IN RE MERRILL LYNCH & CO., INC. 24/7 REAL MEDIA, INC. RESEARCH REPORTS SECURITIES LITIGATION	:	02 CV 3210 (MP)
IN RE MERRILL LYNCH & CO., INC. INTERLIANT, INC. RESEARCH REPORTS SECURITIES LITIGATION	:	02 CV 3321 (MP)

ORDER

APPEARANCES FOR PLAINTIFFS:

KAPLAN FOX & KILSHEIMER LLP
(By Frederic S. Fox, Laurence D. King,
Donald R. Hall, of counsel)
805 Third Avenue, 22nd Floor
New York, NY 10022
Tel: (212) 687-1980

Plaintiffs' Liaison Counsel

COHEN, MILSTEIN, HAUSFELD & TOLL, P.L.L.C.
(By Herbert E. Milstein, Steven J. Toll,
Joshua S. Devore, of counsel)
1100 New York Avenue, N.W.
West Tower, Suite 500
Washington, DC 20005
Tel: (202) 408-4600

Lead Counsel for the Interliant Class
Co-Chairs of Plaintiffs' Executive Committee

SHAPIRO HABER & URMY LLP
(By Edward F. Haber, Michelle Blauner,
Theodore M. Hess-Mahan, of counsel)
75 State Street
Boston, MA 02109
Tel: (617) 439-3939

Co-Chairs of Plaintiffs' Executive Committee

APPEARANCES FOR DEFENDANTS:

SKADDEN, ARPS, SLATE, MEAGER & FLOM LLP
(By Jay B. Kasner, Edward J. Yodowitz,
Scott D. Musoff, Joanne Gaboriault)
Four Times Square
New York, NY 10036
Tel: (212) 735-3000

Attorneys for Defendants
Merrill Lynch & Co., Inc. and
Merrill Lynch, Pierce, Fenner
& Smith Incorporated

FOLEY & LARDNER
(By Douglas M. Hagerman,
James D. Ossyra, of counsel)
321 North Clark Street, Suite 2100
Chicago, Illinois 60610
Tel: (312) 832-4500

Samuel J. Winer
3000 K Street, N.W., Suite 500
Washington, D.C. 20007
Tel: (202) 672-5300

Attorneys for Defendant
Henry Blodget

FINKELSTEIN, THOMPSON
& LOUGHRAN
(By Donald G. Thompson, Donald J. Enright,
Conor R. Crowley, Adam T. Savett, of counsel)
1050 30th Street, N.W.
Washington, DC 20007
Tel: (202) 337-8000

Lead Counsel for the 24/7 Class
Member of Plaintiffs' Executive Committee

RABIN, MURRAY & FRANK LLP
(By Jacqueline Sailer, Eric J. Belfi,
Sharon M. Lee, of counsel)
275 Madison Avenue, 34th Floor
New York, NY 10016
Tel: (212) 682-1818

Co-Chairs of Plaintiffs' Executive Committee

POLLACK, Senior District Judge.

Plaintiffs move for reconsideration of this Court's June 30, 2003 Decision and Order dismissing with prejudice the amended complaints in the 24/7 Real Media, Inc. (24/7) and Interliant, Inc. (Interliant) consolidated actions. In addition, the 24/7 plaintiffs move for amendment of the judgment and for leave to amend their consolidated amended complaint. For the reasons set forth below, the motions are denied.

STATUTE OF LIMITATIONS AND RULE 59(e)

Plaintiffs find fault with the Court's determination, in *Part III* of the June 30 Decision and Order, that their claims are time-barred by the statute of limitations.[1] They assert that, the Court's findings notwithstanding, they were not on inquiry notice of the alleged fraud more than

[1] *See Decision and Order*, In re Merrill Lynch & Co., Inc. Research Reports Secs. Litig., 02 MDL 1484 (MP), 2003 WL 21500293 (S.D.N.Y. June 30, 2003), at *19–*22.

one year prior to the filing of their original complaints. In support of the motion for partial reconsideration, plaintiffs rely exclusively on the Second Circuit's recent decision in Newman v. Warnaco Group, Inc.,[2] claiming it should alter this Court's statute of limitations analysis.

The Warnaco decision does not change the analysis set forth in the June 30 Decision and Order. Warnaco relates to a corporate change in accounting practices, an entirely different set of facts. In the cases at bar, by contrast, there are no such comparable allegations. In their motion papers, plaintiffs have done nothing to change the unalterable, judicially-noticeable facts relating to the widespread public dissemination, years prior to the filing of the cases at bar, of information regarding research analyst conflicts of interest and the service of investment banking business.

The Court's June 30 Decision and Order noted that plaintiffs' current suits, and the New York Attorney General's report which precipitated them, simply

> brought to specific public attention certain aspects of the internal operations in securities firms that had notoriously and long existed and had been variously publicized but not focused on as undesirable conflicts that should be ameliorated, modified, conceivably controlled or eliminated.

Every complaint in this series of litigations claims it was inspired by the Dinallo Report. But, nothing in that Report acknowledges, indeed it strangely omits, any reference to the overwhelming notoriety expressed before and during the bubble, of the balancing facts of business life in the investment community (not inconsistent with ordinary understanding and experience). Some of the widely broadcast explanations that the business was not a public utility, in terms which could not have been misunderstood even by unsophisticated litigants in these suits, facts of ordinary comprehension, that were omitted in such a Report to the public, may be recalled from the following examples.[3]

---

[2] 2003 WL 21518460 (2d Cir. July 7, 2003).

[3] "[O]n a motion to dismiss, a court may consider . . . 'matters as to which judicial notice may be taken . . . .'" Chambers v. Time Warner, Inc., 282 F.3d 147, 153 (2d Cir. 2002) (quoting Brass v. American Film Technologies, Inc., 987 F.2d 142, 150 (2d Cir. 1993)). The Court may take judicial notice of newspaper articles for the fact of their publication without transforming the motion into one for summary judgment. See In re Sterling Foster & Co., Inc. Secs. Litig., 222 F. Supp. 2d 312, 321 (E.D.N.Y. 2002); Schwenk v. Kavanaugh, 4 F. Supp. 2d 116, 118 (N.D.N.Y. 1998).

(1) **May 2, 1996**, *Wall Street Journal*, "Today's Analyst Often Wears Two Hats" (Roger Lowenstein, at p. C1).

> Two scholars . . . looked at every IPO (save for the tiniest) in 1990 and 1991, focusing on which were recommended and by whom. Their intent was to test the objectivity of underwriters. . . .
>
> Messrs. Michaely and Womack differ from most financial scholars in that they write in English. Thus, we may quote their conclusion plainly: "The recommendations by underwriter analysts show significant evidence of bias and possible conflict of interest."
>
> Nor do the writers stint from identifying the source of conflict: Analysts get paid, in part, according to their contribution to corporate finance. To bring a company public, a firm needs its analyst on board. It is the analyst that explains—and implicitly, trumpets—the investment merits of the offering.

(2) **October 23, 1996**, *Boston Globe*, "Taking Analysts' Tempting Forecasts with Grain of Salt" (Steve Bailey & Steven Syre, at p. C1).

> [T]he bottom-line question, an important one for investors, is this: Can you trust what the analysts tell you?
>
> The mounting evidence: You trust them at your peril.
>
> A new study out of the Wharton School at the University of Pennsylvania and the Harvard Business School makes the case, saying analysts are systematically overly optimistic about long-term earnings forecasts for equity offerings. The researchers say the cause is the relationship between the analysts and the investment banking business that pays their bills. . . .
>
> Patricia M. Dechow and Richard G. Sloan of Wharton and Amy P. Sweeney of the Harvard Business School studied 1,179 stock offerings from 1981 to 1990. Like others before them, they found that new stock offerings underperformed the market overall; they put that underperformance at 12.7 percent over five years. . . .
>
> The integrity of the process was always supposed to be protected by the "Chinese wall" that separated the analysts and the investment banking business. But as commissions from trading have fallen on an increasingly competitive Wall Street, investment research hasn't been able to pay its own way.
>
> Instead, analysts have become an important sales tool for the investment bankers to land their super-profitable deals. A top analyst and the credibility he or she brings can be the difference between landing a deal

> or not—and the pay for the most sought-after analysts can top $ 5 million a year.
>
> Can that analyst then turn around and "dis" the firm's full-freight client? Amy Sweeney of the Harvard Business School thinks not. "It is just a huge conflict of interest for the analysts," she says.
>
> Adams Harkness' Frankel doesn't disagree: "That pressure is clear in the industry."

(3) **June 19, 1997**, *Wall Street Journal*, "All-Star Analysts 1997 Survey" (John R. Dorfman, at p. R1).

> . . . At big firms, compensation of $300,000 to $600,000 for top analysts is common, and $1 million is possible.
>
> Analysts earn that pay in lots of ways, some of which have little or nothing to do with picking stocks or accurately estimating corporate earnings. For example, at many firms, analysts are expected to bring in investment-banking deals—the job of handling the issuance of stock or bonds for companies, or of advising companies on mergers or acquisitions.
>
> By the unwritten laws of Wall Street, brokerage houses don't handle a stock offering unless they expect to tout its stock for a while after the offering. In Wall Street parlance, a post-offering recommendation is commonly called a "booster shot."
>
> Another important job of the analyst, at most firms, is to generate trading volume by getting clients excited about the recommended stocks. Even if they make superb recommendations, it's not enough for analysts to sit in a quiet room, listening to Bach and watching a computer screen. They have to work the phones, meet the clients, "pound the table" for the stocks they believe in. A great recommendation that nobody buys doesn't help the clients and doesn't make the brokerage firm any money.

(4) **April 8, 1998**, *Wall Street Journal*, "Heard in New England: Analysts May Hate to Say 'Sell,' But a Few Companies Do Hear It" (John Hechinger, at p. NE2).

> Rough-and-tumble Wall Street isn't known for politeness. But many securities analysts seem to live by one childhood lesson: If you can't say something nice about a stock, don't say anything at all.
>
> . . .
>
> Last week, *The Wall Street Journal* asked First Call, the Boston firm that tracks investment research, to pore over analyst opinions of the 743 stocks of companies based in New England. Amazingly, only 13 companies received even one "sell" rating . . . .

Consider the extent of this speak-no-evil policy. Out of 2,066 ratings, 68% were "buys" or "strong buys," 31% were "holds" and less than 1% were "weak sells" or "strong sells."

Critics complain that these skewed results show dangerous flaws in Wall Street's stock picking. Chuck Hill, First Call's director of research, says analysts often won't issue a "sell" because they don't like to anger companies that could be their firm's investment-banking clients.

"The pressure on analysts is growing," says Mr. Hill, a former Wall Street analyst. "The Chinese wall that existed at most brokerage houses between analysts and investment bankers has broken down."

. . .

John Adams, chairman and chief executive of Adams, Harkness & Hill, the Boston brokerage firm, says he's careful to root out positive bias in his firm's research. He claims that "sells" are scarce for a simple reason: They nearly always bear negative consequences for the analyst. Clients who hold the stock become livid, and the company's management can retaliate by keeping analysts out of the information loop. So, Mr. Adams says most analysts put out a "hold" rating, knowing that most investors consider it a "sell."

(5) **October 5, 1998**, *Business Week*, Cover Story, "Who Can You Trust? Wall Street's Spin Game — *Stock analysts often have a hidden agenda*" (Jeffrey M. Laderman, at p. 148).

. . . [A]nalysts who try to provide an honest and unconflicted opinion are becoming scarcer and scarcer on Wall Street. If there ever was a time when investors could use straight talk, it's now. . . .

The question for investors is: "Can you trust your analyst?" Unfortunately, the answer is not very much. At the major Wall Street houses, which thrive on investment banking, every analyst has a potential conflict of interest. The "Chinese Wall" that on paper still separates a firm's analysts from its investment bankers continues to crumble as analysts are encouraged to scout deals. The analyst's firm is either the investment banker for a company he or she is covering—or it's wooing the company for a piece of that juicy revenue stream.

A study co-authored by Georgia State University assistant professor Siva Nathan looked at reports on 250 companies by analysts whose firms had investment-banking ties with those companies and an equal number from analysts with no ties. The investment bankers' analysts had 6% higher earnings forecasts and nearly 25% more "buy" recommendations.

. . .

Analysts routinely play up good news and sugarcoat the bad. Positive corporate news—an unexpectedly strong earnings report or successful

> product launch—may get a recommendation of "strong buy." Bad news gets a "hold" or "neutral"—often a euphemism for "sell," which has all but vanished from the analysts' vocabulary. . . .
>
> Investors are bombarded with bullish sound bites and "strong buy" and "outperform" tips in print and on the air. . . . Investors picking up such tips need to be wary about motives. Official research reports must disclose if the firm is or has been involved in an investment-banking relationship with the company. But news reports of recommendations may not carry such disclaimers. The war between investment research and investment banking began in the 1980s, but it has heated up in the deal-crazed '90s. The reason is simple: money. Most Wall Street research is pitched to institutional investors who pay the firm about a nickel a share in commissions. But if an analyst spends his time trying to land an initial public offering, the firm can earn 15 to 30 times that amount per share. Merger advisory fees can be sweet as well. And directly or indirectly, some investment-banking fees will find their way back to the analyst's pocket. . . .
>
> [W]hat happens when there's a conflict between objective analyses and the demands of investment bankers? "Conflict?" asks Brown, the former DLJ analyst. "There's no conflict. That's been settled. The investment bankers won." It's not far from the truth. "Of all the jobs on Wall Street, the company analyst's role has changed the most in the last five years," says Alan Johnson of Johnson Associates, a Wall Street compensation consultant. "The analyst today is an investment banker in sheep's clothing."

(6) **March 22, 1999**, *Crain's New York Business*, "New Executive Henry Blodget; Merrill Lynch's Top Pick: Internet Analyst Lured from CIBC; On-Target Research Should Attract IPOs" (Jon Birger, at p. 11). Plaintiffs selectively quoted from this article in their complaints (24/7 Amended Compl. ¶ 30; Interliant Amended Compl. ¶ 32).

> Mr. Blodget's value to Merrill Lynch is unmistakable. Initial public offerings have become huge moneymakers for investment banks, and firms frequently select their underwriters based upon the reputation of the analyst who covers their industry.
>
> . . .
>
> Mr. Blodget is not as unabashedly bullish as some might think. True, he is a big believer in the Internet's business potential, and at CIBC maintained "buy" ratings on most of the firms he followed. However, his observations on the rise in Internet stocks are peppered with descriptives such as "bubble," "euphoria" and "tulip bulbs" — language usually associated with Internet skeptics.
>
> "All stocks do not grow to the sky," says Mr. Blodget.

(7) **April 17, 1999**, *The Economist*, "Frog Spawn."

> "Sell" is a four-letter word—but it is probably not out of a sense of decorum that Wall Street's financial analysts use it so rarely. Currently, "sells" account for a mere 1% of analysts' share recommendations, compared with "buys" at 68%. In the early 1980s, the ratio of buys to sells was roughly one to one. *The Economist*, along with some other market-watchers, has long suspected that the reason analysts have stopped uttering the S-word is that it no longer pays them to do so, even when they should; indeed it might get them fired.
>
> Wall Street's top regulator, **Arthur Levitt**, chairman of the Securities and Exchange Commission, is now on the case. In a speech on April 13th he pointed out that most analysts work for firms that do business with the companies they pronounce upon. He fretted that they are under "unspoken pressures" to bring in and retain business for their firms—an analyst's compensation is often based in part on the profits made by his bank's trading desk and its investment-banking division. And that relies on a good client relationship. "Companies quite naturally look more favorably on bankers whose analysts profess a full appreciation of their virtues." Indeed.
>
> In public, Wall Street brokers say that their research is objective, and its extreme bullishness has been more than justified in recent years. Privately, they concede that "sell" recommendations are bad for investment-banking business—but that investors know this, and correctly read between the lines when an analyst lowers his recommendation from "strong buy" to "buy," or from that to "hold" or "neutral." Mr. Levitt is not convinced. He said he was worried that investors heard from too many analysts keen to report that "what looks like a frog is really a prince." Sadly, of course, "sometimes a frog is just a frog." Unfortunately, Wall Street financial analysis is itself a pretty ugly frog. And it is not at all clear, beyond speaking out about it, that Mr. Levitt has any way to turn it into a prince. Perhaps a kiss?

(8) **November 20, 1999**, Investors' Town Meeting, Albuquerque, New Mexico, "Remarks by SEC Chairman Arthur Levitt." (Similar remarks were given in another speech entitled "Investing with Your Eyes Open" by then-Chairman Levitt on February 12, 2000 before the *Los Angeles Times*'s 4th Annual Investment Strategies Conference in Los Angeles.)

> Now, how many of you have seen analysts from Wall Street firms on television talking about one company or another? I'm willing to bet that not many of you have thought twice about that person's recommendation to buy or sell a particular stock. But, you should.

Most analysts work for firms that have business relationships with the same companies these analysts cover. And analysts' paychecks are typically tied to the performance of their employers. You can imagine how unpopular an analyst would be who downgrades his firm's best client. Is it any wonder that today, a "sell" recommendation from an analyst is as common as a Barbara Streisand concert?

As investors, you are confronted with a dizzying number of choices and opportunities. And those options can easily overwhelm and intimidate the most financially savvy person. In this day and age, there simply is no substitute for a person's awareness and wariness.

Don't fall for the illusion of easy money. And don't be pressured by an aggressive salesman or enticed by a fancy web site promising that you'll make a fortune with one quick gamble.

(9) **March 20, 2000**, *Fortune*, Cover Story, "The High Price of Research; *Caveat Investor: Stock and research analysts covering dot-coms aren't as independent as you think*" (Erick Schonfeld, at p. 118).

Objectivity should be the analyst's stock in trade. In the best of all worlds, analysts on Wall Street and at tech-industry research firms would spend their time giving unbiased, educated opinions about companies, markets, and trends. But in this world, filled as it is with dot-com money blowing every which way, objectivity seems a luxury few can afford. Analysts of all stripes—from Morgan Stanley's Mary Meeker on down to lowly researchers at the likes of the Aberdeen Group—increasingly derive a portion of their compensation, directly or indirectly, from the companies they cover. That helps put pressure on the quality of their work and encourages them to become more like cheerleaders than independent observers.

Let's be honest. It has always been hard to know how objective analysts really are. Consider who butters their bread. Wall Street investment banks compete to provide corporate finance services to many of the companies their analysts report on; firms such as Meta Group and Jupiter Communications sell consulting services and research to many of the companies that their analysts cover. Such basic conflicts have existed for years.

Internet mania exacerbates the problem. . . .

. . . Bill Burnham, an ex-Internet analyst at Credit Suisse First Boston and now a venture capitalist at Softbank, puts it bluntly: "In the technology world, there is no banking relationship without the analyst." The analyst is judge, jury, and executioner when it comes to deciding whether to pursue a company as a banking client, and it is the analyst who has the closest relationship with the company after the deal is done.

"This can collapse into a situation where the analyst becomes a spokesperson for the firm he is analyzing," warns Mathew Hayward, a professor at the London Business School. His research shows that companies get higher ratings from analysts they bank with than from analysts they don't. One example: Soon after Bank of America Securities underwrote a follow-on offering for theglobe.com, its analyst at the time, Alan Braverman, initiated coverage of the stock with a buy rating. The stock now trades below its initial offering price.

(10) **April 2, 2000**, *The Washington Post*, "Analyst with a Knack for Shaking up Net Stocks; Henry Blodget Is Wall Street's Link Between Online Firms, Investors" (David Streitfeld, at p. H1).

> . . . Blodget sees Amazon as a $100 stock in 12 to 18 months, which would only bring it back [down] to where it was two months ago.
>
> And that's for a company he likes. Many of the weaker companies, he predicts, won't be around in five years. . . .
>
> . . .
>
> Going to upgrade, he tells an assistant as he walks out the door at 8:20 p.m. Not that he expects Amazon to go up that much. "I think it's dead money for a while, but I want to differentiate it from all the pieces of [expletive] we have buys on," he says cheerfully.
>
> . . .
>
> Merrill is in the running to do the underwriting for the site's ["*PlanetOut*'s"] initial public offering, which makes this another conflict. If Merrill gets the job, Blodget will later be issuing reports on PlanetOut, and when was the last time an analyst was less than upbeat about a company his firm just underwrote?
>
> "It's never happened," says author Hooke. "Any analyst whose firm does major investment banking work—and nearly all of them do—is suspect. I don't know why the SEC doesn't ask these firms to spin off their research operations."
>
> Blodget admits that, for many analysts, "There's certainly a tendency to give the company a benefit of the doubt." But he argues that "the best analysts find a way of balancing the needs and wants of their constituencies."

(11) **June 12, 2000**, The Industry Standard, "Holding Analysts Accountable" (Eileen Buckley).

> It's one of Wall Street's best-known secrets, and a dirty one. Research analysts writing recommendations of closely watched Internet stocks routinely face conflicts of interest.
>
> Securities firms stand to rake in huge fees from underwriting the stock offerings of Internet companies, often the same companies that the firms' analysts recommend.

Thus, well before the internet bubble burst in March and April 2000, abundant material was in the public domain regarding the existence of widespread investment banking conflicts of interest and allegedly inflated buy ratings in Wall Street stock research, especially research related to new IPOs and technology companies. Plaintiffs make no allegation in their complaints that they read or relied upon the research reports that they allege misled them in the cases at bar. If they had read the reports, however, they would have noticed a company-specific disclosure statement, contained on each and every one of the forty-four 24/7 Real Media reports and on each of the thirty-four Interliant reports at issue, plainly admitting that defendant "was a manager of the most recent public offering of securities of this company within the last three years." All of the seventy-eight reports also contained a statement that defendant "or its affiliates may from time to time perform investment banking or other services for, or solicit investment banking or other business from, any entity mentioned in this report."

Plaintiffs make the astounding assertion in a reply brief that the overwhelming collection of notices from the press and top securities regulatory officials "would not have allowed an investor of reasonable intelligence to piece together" the purported alleged "fraud." The plethora of public information would have required even a *blind, deaf, or indifferent* investor to take notice of the purported alleged "fraud." Every investor of reasonable intelligence would have been absolutely on inquiry notice. Plaintiffs overlook the "uncontroverted evidence [that] irrefutably demonstrates" the inquiry notice.

Having access to all of the information contained in the public domain regarding the abundantly publicized conceivable conflicts of interest, plaintiffs, after the bubble burst in March and April 2000, took no action against defendants throughout all of 2000 and 2001, even as publicity surrounding the conflicts of interest continued. In fact, plaintiffs took no action until the weeks immediately following publication of the Dinallo affidavit on April 8, 2002—almost two years after the bubble had burst. The first complaints in 24/7 and Interliant were filed on April 25 and May 1, 2002, respectively, and relied almost exclusively on the *ex parte* regulatory inquiry under New York's Martin Act.

Palpably, plaintiffs, and indeed the whole investment community, were on inquiry notice of the asserted "fraud" well more than one year prior to the filing of the complaints herein, which invoked the one-year statute of limitations terminating these suits.[4] As indicated in Warnaco, the very decision upon which plaintiffs attempt to rely, "The issue that the Court must consider is not whether Plaintiffs in this case were given inadequate information about the alleged inventory fraud but whether Plaintiffs 'had constructive notice of facts sufficient to create a duty to inquire further into that matter. An investor does not have to have notice of the entire fraud being perpetrated to be on inquiry notice.'" Newman v. Warnaco Group, Inc., 2003 WL 21518460, at *5 (2d Cir. July 7, 2003) (quoting Dodds v. Cigna Sec., Inc., 12 F.3d 346, 350 (2d Cir. 1993)). The Warnaco Court further made clear that "[a] plaintiff in a federal securities case will be deemed to have discovered fraud for purposes of triggering the statute of limitations when a reasonable investor of ordinary intelligence would have discovered the existence of the fraud." Id. (quoting Dodds, 12 F.3d at 350); see also In re Merrill Lynch Ltd. Partnerships Litig., 154 F.3d 56, 60 (2d Cir. 1998) (noting that "the question of inquiry notice need not be left to a finder of fact").

As a final note, the dramatic decline in the price of Plaintiffs' shares in early 2000 also served to put them on notice of the alleged fraud. See Benfield v. Mocatta Metals Corp., 26 F.3d 19, 23 (2d Cir. 1994) (loss of value of highly recommended investment in a matter of months imposed a duty of inquiry); see also Lenz v. Associated Inns and Restaurants Co., 833 F. Supp. 362, 375 (S.D.N.Y. 1993) ("This court, and others both within and without the Second Circuit, have held that clear evidence that an investment asset has declined in value or has been subject to an artificially inflated estimate of its value, in direct contradiction of representation made to the plaintiff at the time of sale, constitutes inquiry notice as to the probability of fraud."); Hupp v. Gray, 500 F.2d 993, 997 (7th Cir. 1974) (noting that "the fact which would have put a reasonable

---

[4] Maybe there is substance to the observation that may have influenced the regulators that, "Wall Street conflicts of interest are inevitable—they cannot be eradicated; they can only be policed." John C. Coffee, Jr., "Wall Street's Conflicts Cannot Be Settled," *Financial Times*, April 29, 2003.

person on notice of the possibility of fraud, namely, the drastic fall in market price, was not concealed").

PLAINTIFFS WILL NOT BE PERMITTED TO FURTHER AMEND

In addition to plaintiffs' failure to articulate a proper basis for reconsideration or for amending the judgment of dismissal to be without prejudice where only one of four grounds for dismissal is challenged in the reconsideration motion (as discussed above), plaintiffs' requests for leave to amend must be denied for at least three additional reasons: (1) plaintiffs have already amended their complaints once—with guidance from the Court—and have failed to state a claim; (2) plaintiffs' requests are untimely and procedurally improper; and (3) the proposed amendments would be futile.

a. Plaintiffs Have Already Had Ample Opportunity to Attempt to Plead Legally Sufficient Claims and Have Previously Amended Their Complaints

The 24/7 and Interliant plaintiffs have no right to a second amendment—a third bite at the apple—particularly where, as here, they had ample opportunity to craft their complaints and were advised by the Court, prior to amending their complaints, of certain pleading deficiencies and what the Court would require. As Judge Sweet held, quoting Judge Friendly, "where a district court judge puts plaintiff's counsel 'on the plainest notice of what was required,' justice does not require the court to 'engage in still a third go-around.'" Moran v. Kidder Peabody & Co., 617 F. Supp. 1065, 1068 (S.D.N.Y. 1985) (quoting Denny v. Barber, 576 F.2d 465, 471 (2d Cir. 1978) (Friendly, J.)), aff'd mem., 788 F.2d 3 (2d Cir 1986); see also Blanchard v. Katz, 705 F. Supp. 1011, 1013–14 (S.D.N.Y. 1989) (Lasker, J.) (complaint dismissed with prejudice where plaintiffs "already had an opportunity to amend the complaint with notice of its deficiencies").

This Court was explicit in its instructions to plaintiffs concerning the pleading of loss causation and pleading with the particularity required by Fed. R. Civ. P. 9(b) and Section

21D(b)(1) & (2) of the PSLRA, and plaintiffs "failed to heed" these instructions.[5] See 2003 WL 21500293, at *15. For this reason alone, further amendment will not be permitted. See Denny, 576 F.2d at 471; see also In re Cybershop.com Sec. Litig., 189 F. Supp. 2d 214, 236–37 (D.N.J. 2002) (Pisano, J.) (denying leave to amend, noting that "[p]laintiff ha[d] already had its proverbial 'second bite at the apple'" when, following a case management conference in which the court had given plaintiff instructions concerning its pleadings, plaintiff served its first consolidated amended complaint).

b. Plaintiffs' Request to Amend Must Be Denied As Procedurally Improper

Where, as here, plaintiffs have waited until dismissal of their claims before requesting leave to amend, leave to amend is properly denied. In Vine v. Beneficial Fin. Co., the Second Circuit found that it was "certainly within the district court's discretion" to deny plaintiff leave to file a second amended complaint, where "one basis for denial of leave to amend was the bad faith of appellant in waiting to see how he would fare on the prior motion to dismiss." 374 F.2d 627, 636–37 (2d Cir. 1967) (district court denied leave to amend on ground that "[t]he new information alleged in the [proposed second amended] complaint was within plaintiff's knowledge before argument of the motion to dismiss the first amended complaint"). Vine is thus

---

[5] Prior to the first amendment of these complaints, this Court specifically admonished plaintiffs in Case Management Order No. 3 that "[c]onsolidated amended complaints should also be carefully framed in order that they may fully comply with all applicable law regarding the pleading of loss causation." 2003 WL 21500293, at *7. The Court also reminded plaintiffs in the same Order "that they should take special care to comply with the particularized pleading requirements:"

> Each counsel who has been appointed Lead Counsel in a particular consolidated action is responsible for obtaining the necessary information such that the consolidated amended complaint for that case will comply with the pleading requirements of Rule 9(b) of the Federal Rules of Civil Procedure and the PSLRA, in particular 15 U.S.C. § 78u–4(b)(1) & (2). The factual allegations must be specific to the security in question and should clearly allege who said what to whom concerning that security.

2003 WL 21500293, at *15.

squarely on point here, where the purportedly "new" information was within plaintiffs' knowledge before argument on the motion to dismiss. In the June 30 Decision and Order, this Court expressly noted plaintiffs' allusion to "other 'evidence'" and that plaintiffs were aware of the appropriate procedure to amend their complaints. Accordingly, this Court correctly concluded that "[t]hey cannot hold such 'evidence' back in hopes of having yet a third bite of the proverbial apple." Merrill Lynch, 2003 WL 21500293, at *17 n.52.

Plaintiffs' contention that their complaints "should not have been dismissed with prejudice" because they have "indicated an ability to amend the complaint" should be rejected not only for the reasons stated in Vine, 374 F.2d at 636–37, but also because the cases plaintiffs rely upon do not support their position here. (See 24/7 Mot. for Lv. to Amend at 4; Interliant Mot. and Mem. for Partial Recons. at 3 (citing Gurary v. Winehouse, 235 F.3d 792, 801 (2d Cir. 2000) (citing Oliver Schs., Inc. v. Foley, 930 F.2d 248, 252–53 (2d Cir. 1991) (noting that leave to amend should be granted even without an explicit motion where the adverse party had knowledge of desire to amend), cert. denied, 534 U.S. 826 (2001))).

Plaintiffs' "indicated ability" and "desire" to amend the complaint prior to dismissal of these actions consisted of a footnote in their opposition brief explaining that although they had received "an initial production" of documents from the Attorney General's investigation, "they have not had any opportunity to conduct their own discovery," and believe that additional documents from the Attorney General will enable them to amend.[6]

---

[6] The Interliant plaintiffs also alluded to unspecified "additional information" that they could provide in an amended complaint if the First Amended Complaint were dismissed. Plaintiffs' opposition brief otherwise includes no request for leave to amend their complaints and plaintiffs made no request to further amend their complaints prior to the briefing on these cases, which began on April 30, 2003. Plaintiffs were also given three extensions for the purpose of filing their consolidated amended complaints.

More fundamentally, plaintiffs' suggestion that they must be afforded the opportunity to review additional documents from the New York Attorney General in hopes of finding additional documents that could be used to amend their complaints flies in the face of the objective of the PSLRA's stay of discovery, namely, that plaintiffs be able to plead legally sufficient claims prior to any discovery. See 15 U.S.C. § 78u–4(b)(3)(B). "This stay provision gives effect to Congress' intent that 'discovery should be permitted in securities class actions only after the

(continued...)

Gurary v. Winehouse, relied on by plaintiffs, actually supports denial of plaintiffs' request for leave to amend, where, as here, plaintiffs merely indicated in their opposition brief that they could amend their complaints. See 235 F.3d at 801. Gurary held that the court did not abuse its discretion by denying leave to amend following plaintiff's first dismissal where plaintiff's request came in an affidavit opposing defendants' motion to dismiss. See id. at 796, 801 (citing Confederate Mem'l Ass'n. v. Hines, 995 F.2d 295, 299 (D.C. Cir. 1993) ("[T]he district court did not abuse its discretion by denying leave to amend where plaintiffs made only a 'bare request.'")). Oliver Schs. v. Foley, 930 F.2d 248, 253 (2d Cir. 1991), also does not support plaintiffs here because there, unlike here, the plaintiff had not previously amended its complaint. The same is true of the Pangburn and Ricciuti cases cited by the 24/7 plaintiffs in their separate motion "For Leave to Amend and to Amend the Judgment" (at 2–3.) See Pangburn v. Culbertson, 200 F.3d 65, 68–71 (2d Cir. 1999) (noting that a pro se litigant should have been given at least one opportunity to amend); Ricciuti v. N.Y.C. Transit Auth., 941 F.2d 119, 123 (2d Cir. 1991) (no prior amendment).[7]

c. Amendment Would Be Futile and Is Properly Denied Here

Plaintiffs' requests for leave to amend must be denied because they have given the Court no indication that they can amend their complaints to plead legally sufficient claims. "One good reason to deny leave to amend is when such leave would be futile." Acito v. IMCERA Group, Inc., 47 F.3d 47, 55 (2d Cir. 1995) (noting that district court examined proposed amended pleading and determined that additional allegations of fact "did not cure the complaint"); Chill v.

---

[6](...continued)
court has sustained the legal sufficiency of the complaint.'" Novak v. Kasaks, No. 96 Civ. 3073, 1996 WL 467534, at *1 (S.D.N.Y. Aug. 16, 1996) (Schwartz, J.) (quoting Senate Comm. on Banking, Housing, and Urban Affairs, Private Securities Litigation Reform Act of 1995, S. Rep. No. 98, 104th Cong., 1st Sess. 14 (1995)).

[7] The 24/7 plaintiffs' assertion that they are seeking "for the first time—to cure what appears to be a primary deficiency identified by the Court's Order of June 30, 2003" is incorrect. This is not their first amendment and as noted above, the Court had specifically admonished plaintiffs about the need to adequately plead loss causation and had given plaintiffs specific guidance on pleading with specificity prior to amendment.

General Elec. Co., 101 F.3d 263, 271–72 (2d Cir. 1996) (affirming dismissal without leave to replead where district court concluded "that there is no indication that plaintiffs could replead the complaint so as to establish GE's scienter"); San Leandro Emergency Med. Group Profit Sharing Plan v. Philip Morris Cos., 75 F.3d 801, 815 (2d Cir. 1996) (affirming dismissal with prejudice of plaintiffs' first consolidated amended complaint because district found plaintiffs' proffers concerning additional information they could provide would not have cured pleading defects); In re American Exp. Co. Shareholder Litig., 39 F.3d 395, 402 (2d Cir. 1994) (stating that "leave to amend may be denied if the amendment would be futile"); see also Cybershop.com, 189 F. Supp. at 236–37 (rejecting plaintiffs' request in opposition brief to be given leave to amend if complaint dismissed where plaintiff had not demonstrated that amendment would not be futile); Emergent Capital Inv. Management, LLC v. Stonepath Group, Inc., 195 F. Supp. 2d 551, 563 n.4 (S.D.N.Y. 2002) (same).

In Cybershop.com, the Court noted potential defects in plaintiffs' pleadings prior to their filing of a consolidated amended complaint. See 189 F. Supp. 2d at 236. Noting that plaintiff had already had one opportunity to amend when it filed the consolidated amended complaint, the Court rejected its attempt to amend again because it had already had its "proverbial 'second bite at the apple.'" Id.

> Plaintiff has failed to proffer any proposed, substantive amendment that would satisfy applicable pleading requirements; indeed, it does not suggest any amendment at all. Plaintiff had ample opportunity to craft a sufficiently pled complaint when the Court directed it to review the annual report, consolidated the thirteen pending cases in to this single class action, and ordered the lead Plaintiff to file an amended class action complaint.

Id. ("Ever mindful that leave to amend is ordinarily granted, see Fed. R. Civ. P. 15(a), the Court finds that any likely amendment will not cure the deficiencies plaguing the amended complaint."). The Cybershop.com Court further held that liberally allowing amendment is inconsistent with the PSLRA's heightened pleading standard and that courts are not required to repeatedly advise plaintiffs on how to improve their complaints. See 189 F. Supp. 2d at 237; see also In re NAHC, Inc. Sec. Litig., 306 F.3d 1314, 1332–33 (3d Cir. 2002).

Here, the 24/7 and Interliant plaintiffs' proffers are insufficient to show that amendment would not be futile. The 24/7 and Interliant plaintiffs' claims were dismissed on several grounds: (i) the complaints failed adequately to allege loss causation; (ii) the complaints failed to plead fraud with particularity, including failure to plead that the statements of opinion were false; (iii) the research analysts' opinions were inactionable because they adequately bespoke caution; and (iv) plaintiffs' claims were barred by the statute of limitations.[8] Any attempt to amend claims barred by the statute of limitations is futile. See, e.g., de la Fuente v. DCI Telecomms., Inc., 206 F.R.D. 369, 387 (S.D.N.Y. 2002) (McMahon, J.). But even were the Court to accept plaintiffs' argument that their claims are not barred by the statute of limitations—which, as discussed above, the Court will not do—the plaintiffs' motion for leave to replead does not address the three other independent grounds for dismissal and attempts only to address loss causation. Because none of the proposed amendments address all of the grounds for dismissal set forth in the Decision, the proposed amendments would necessarily be futile.

In the continually shifting sands of plaintiffs' loss causation arguments, the 24/7 plaintiffs seek to amend their Consolidated Amended Complaint yet again to add allegations that the price of 24/7 decreased more than certain internet stock indexes. Not only was this data available to plaintiffs years ago, but it utterly fails to address plaintiffs' deficiencies in pleading loss causation. The proposed allegations simply do not link any of the research reports to the decline in the price of 24/7. The price of 24/7 fell as a result of the bursting of the bubble—even if at a faster pace than the average—and the proposed allegations do not provide any facts from which it can be inferred that the 24/7 research reports were the cause of the decline. Indeed, plaintiffs

[8] The Court also found that the complaints were objectionable because they violated Rule 8(a)(2) & (e)(2) and recognized that defendants had reasonably requested that scores of paragraphs be stricken as immaterial under Rule 12(f) and considered dismissing them with leave to replead, but opted to work through the complaints in an attempt "to keep delays, costs and attorneys' fees at reasonable levels, and mindful of its obligation to construe pleadings so as to do substantial justice." 2003 WL 21500293, at *12–*13.

allege quite the opposite (i.e., that the reports were overly optimistic). Nor do the allegations provide any support for plaintiffs' theory in their opposition brief that the 24/7 research reports artificially inflated the price of 24/7 stock. In fact, the proposed allegations are inconsistent with any theory of loss causation in that they allege that the price of 24/7 underperformed against the index while Merrill Lynch issued "favorable" ratings.

Plaintiffs, in a reply memorandum, have also resorted to a hitherto undisclosed and unargued claim that in a further amended pleading they would allege that, in addition to inflating the market price of the stock by unspecified false reporting, defendants manipulated the market in the securities of 24/7 by price leadership and dominion and control of the market for the security, and attempting to reduce the floating supply of the security. Plaintiffs' proposed amendment does nothing to put forth a cognizable basis for this claim. The only attempted proof submitted is attached to the reply brief – a previously unreleased private client investor list, which allegedly purports to show that Merrill Lynch clients had the largest holdings in 24/7 as of March 1, 2000 which suffered a huge decline at that time.

Plaintiffs state that they can show thereby a "collapse of the market for the security after the manipulator's activities cease" and cite this Court's opinion in S.E.C. v. Martino, 255 F. Supp. 2d 268, 287 (S.D.N.Y. 2003) in support, as if that is meaningful.

Plaintiffs conveniently forget that the collapse of the Bubble and the market price occurred in March 2000. The drop that plaintiffs point to and would rely on eight months later from $4.64 to $2.94 on November 9, 2000 reached there as a result of an extremely long decline occasioned months before and the November drop is not the situation considered in Martino in respect of the stock there involved. Plaintiffs' proposed amendment is a meaningless distraction proffered by plaintiffs and does not support or make out any semblance of a cause of action whatever.

Any flaws charged following long after an intervening market collapse do not deprive the defendants of the doctrine of loss causation, which operated herein in March 2000. By force of statute and as interpreted by the Court of Appeals in Castellano v. Young & Rubicam[9]:

> The loss causation requirement is intended to "fix a legal limit on a person's responsibility, even for wrongful acts."

CONCLUSION

Plaintiffs' motions are denied in their entirety for the previous reasons and this supplement thereto.

So ordered.

Dated: August 12, 2003

MILTON POLLACK
SENIOR UNITED STATES DISTRICT JUDGE

[9] 257 F.3d 171, 186 (2d Cir. 2001) (quoting First Nationwide Bank v. Gelt Funding Corp., 27 F. 3d 763, 769 (2d Cir. 1994)).