UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE CONVERIUM HOLDING AG SECURITIES LITIGATION	:	MASTER FILE 04 Civ. 7897 (DLC)
This Document Relates to: All Cases.	:	

MEMORANDUM OF LAW IN OPPOSITION TO
LEAD PLAINTIFFS' MOTION FOR RECONSIDERATION

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PRELIMINARY STATEMENT

Defendants Converium Holding AG ("Converium" or the "Company"), Dirk Lohmann, Martin Kauer, Richard Smith (the "Officer Defendants"), Terry G. Clarke, Peter C. Columbo, Georg F. Mehl, Jürgen Förterer, Anton K. Schnyder, Derrell J. Hendrix, and George G.C. Parker (the "Director Defendants"), UBS AG and Merrill Lynch International (the "Underwriter Defendants"), and Zurich Financial Services ("ZFS") submit this memorandum in opposition to Lead Plaintiffs' Motion for Reconsideration of certain portions of the Court's ruling on defendants' motion to dismiss the Consolidated Amended Class Action Complaint (the "Amended Complaint" or "Am. Compl.") in In re Converium Holding AG Securities Litigation, No. 04 Civ. 7897 (DLC), 2006 WL 3804619 (S.D.N.Y. Dec. 28, 2006) (the "Order").

Plaintiffs' motion challenges only two aspects of the Court's ruling: (*i*) the dismissal of all claims under the Securities Act of 1933 (the "Securities Act") as time-barred under the one-year inquiry-notice statute of limitations and (*ii*) the dismissal of the claims under § 10(b) and § 20(a) of the Securities Exchange Act of 1934 (the "Exchange Act") based on statements made in connection with Converium's December 11, 2001 initial public offering. Plaintiffs also ask the Court to reconsider the denial of their motion for leave to amend if the Court reconsiders its dismissal.

The Court should deny Plaintiffs' motion because it does not meet the standards for reconsideration -- and because the Court's rulings were entirely correct. The Court properly held that Plaintiffs had failed to assert -- or even investigate -- their Securities Act claims within one year of when inquiry notice arose and that Plaintiffs had not pled any cognizable allegations that could support a "fraud on the market" presumption of reliance under § 10(b) of the Exchange Act with respect to the IPO-related claims. Dismissal was thus entirely appropriate, and there is no reason for the Court to reconsider its rulings.

ARGUMENT

The standards governing motions for reconsideration are well established:

> A motion for reconsideration should be granted only where the moving party demonstrates that the Court has overlooked factual matters or controlling precedent that were presented to it on the underlying motion and that would have changed its decision. See S.D.N.Y. Local Civil Rule 6.3; In Re BDC 56 LLC, 330 F.3d 111, 123 (2d Cir. 2003); Chang v. United States, 250 F.3d 79, 86 n. 2 (2d Cir. 2001); Shrader v. CSX Transp. Inc., 70 F.3d 255, 257 (2d Cir. 1995). Reconsideration "should not be granted where the moving party seeks solely to relitigate an issue already decided." Shrader, 70 F.3d at 257. Thus, Rule 6.3 "is to be narrowly construed and strictly applied in order to discourage litigants from making repetitive arguments on issues that have been thoroughly considered by the court." Zoll v. Jordache Enterprises, Inc., No. 01 Civ. 1339 (CSH), 2003 WL 1964054, at *2 (S.D.N.Y. April 24, 2003) (citation omitted). In addition, the moving party may not "advance new facts, issues or arguments not previously presented to the Court." Geneva Pharmaceuticals Technology Corp. v. Barr Laboratories, Inc., No. 988 Civ. 3607 (RWS), 2002 WL 1933881, at *1 (S.D.N.Y. Aug. 21, 2002) (citation omitted).

In re WorldCom, Inc. Sec. Litig., 308 F. Supp. 2d 214, 224 (S.D.N.Y. 2004). Additionally, courts narrowly construe Local Civil Rule 6.3 "to prevent the practice of a losing party examining a decision and then plugging the gaps of a lost motion with additional matters." Takeda Chem. Indus., Ltd. v. Mylan Labs., Inc., No. 03 Civ. 8253 (DLC), 2005 WL 2092920, at *4 (S.D.N.Y. Aug. 31, 2005) (internal quotation and citation omitted).

As set forth below, Plaintiffs are not entitled to reconsideration under these standards, and the arguments presented provide no basis to change or reverse the Court's dismissal rulings.

I. LEAD PLAINTIFFS HAVE NOT SHOWN ANY BASIS FOR THIS COURT TO RECONSIDER ITS DECISION THAT THE SECURITIES ACT CLAIMS ARE TIME-BARRED.

The Court's Order dismissed Plaintiffs' Securities Act claims against all Defendants as barred by the applicable one-year inquiry-notice statute of limitations. The Court

held that LC Capital Partners, LP v. Frontier Insurance Group, Inc., 318 F.3d 148, 155 (2d Cir. 2003), "presented facts strikingly similar to those at issue in this action and governs the outcome here." In re Converium, 2006 WL 3804619, at *16.

In LC Capital, storm warnings -- primarily "three reserve charges taken by the insurer within four years" -- "were evident more than a year prior to the filing of the Complaint." In re Converium, 2006 WL 3804619, at *16. The Second Circuit concluded that "a series of three charges in substantial and increasing amounts for the same purpose within four years should alert any reasonable investor that something is seriously wrong." LC Capital, 318 F.3d at 155. In the present case, as the Court noted, Converium and its North American subsidiary booked an even "larger number of reserve-related charges over an even shorter period of time" than had occurred in LC Capital. In re Converium, 2006 WL 3804619, at *17. Specifically, Converium announced four reserve increases within ten months of the IPO totaling $165.9 million, while Converium North America booked a similar number of increases totaling even more -- $177.1 million. Id. Together, these adjustments, which "'relate[d] directly to the misrepresentations and omissions' alleged in the amended complaint," amounted to approximately 75% of the reserve deficiency that Plaintiffs claim Converium was carrying as of the time of the IPO. Id. (quoting Newman v. Warnaco Group, Inc., 335 F.3d 187, 193 (2d Cir. 2003)).

The Court concluded that Plaintiffs were "on notice of Converium's alleged under-reserving practices no later than November 17, 2002 -- the date on which the company announced its fourth reserve increase within a year." Id. In so holding, the Court rejected Plaintiffs' contention that their Securities Act claims were timely because "Converium's management was reassuring investors that the company's business remained strong and that its

problems had been addressed" and "that these statements were followed by 'record earnings over the course of two years and even a decrease of loss reserves.'" Id. The Court held that the issue "is not whether the reserve adjustments made Converium unprofitable," as Plaintiff argued, "but whether they put investors on notice that the Company was likely to have ongoing problems with reserving" and that "Converium's charges were both large and frequent enough to do so." Id.

A. **The Court Did Not Overlook Any Factual Matter or Controlling Precedent.**

Plaintiffs have not shown any basis for the Court to reconsider its Order dismissing the Securities Act claims as untimely. Plaintiffs' motion does not demonstrate, as it must, that the Court overlooked any factual matter or controlling precedent that would have changed its decision.

Plaintiffs have not shown that the Court overlooked any controlling precedent. Nor could they. The three Second Circuit decisions that Plaintiffs cite, LC Capital, Newman v. Warnaco Group, Inc., 335 F.3d 187 (2d Cir. 2003), and Lentell v. Merrill Lynch & Co., 396 F.3d 161 (2d Cir. 2005), were all addressed in the Order.

Nor have Plaintiffs shown that the Court overlooked any factual matter that would have changed the result. Plaintiffs seem to contend that the Court overlooked statements made by Defendant Lohmann in an October 28, 2002 conference call that "the reserve increases are driven by new information that we have received over the last nine to twelve months" and that the reserve increases reflected new developments that were not previously known by Tillinghast or the Company. (Pls. Mem.[1] at 7-8 (quotations omitted).) Plaintiffs also claim that the Court did not consider statements in a November 19, 2002 press release that the third- and fourth-quarter 2002 reserve increases reflected "management's determination to confront emerging

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[1] Lead Plaintiffs' Memorandum of Law in Support of their Motion for Reconsideration shall be cited as "Pls. Mem."

reserve issues" and in the Company's 2002 Form 20-F (filed in April 2003) that the additional provisions were "the result of the continued emergence of increased reported losses versus expected losses related to prior years." (Pls. Mem. at 10 (quotations omitted).) These matters do not entitle Plaintiffs to reargument or a different result for several reasons.

First, the Company statements on which Plaintiffs base their motion do not change the facts that Converium announced four reserve strengthenings in increasing amounts totaling more than $165 million within ten months of the public offering and that Plaintiffs took no steps to commence an inquiry. In re Converium, 2006 WL 3804619, at *17. As the Court held, the facts in LC Capital were "strikingly similar to those at issue in this action and govern[] the outcome here." Id. at *16. In LC Capital, the Second Circuit held that "a series of three charges in substantial and increasing amounts for the same purpose within four years should alert any reasonable investor that something is seriously wrong." 318 F.3d at 155 (emphasis added). Converium's four reserve increases, which "together amount[ed] to approximately three quarters of the reserve deficiency that plaintiffs claim Converium was carrying as of the time of its IPO," In re Converium, 2006 WL 3804619, at *17, present an even more compelling case for the application of the inquiry notice bar held applicable on the facts in LC Capital. Plaintiffs' failure to commence an inquiry in the face of these facts required dismissal of their Securities Act claims.

Second, Plaintiffs base their reconsideration effort to evade the LC Capital ruling on a fundamentally inaccurate premise. According to Plaintiffs, "investors were never on notice that the financial statements in the Registration Statement were inaccurate" because, Plaintiffs claim, Converium stated that the "reserve increases taken in 2002 did not relate to a reserve deficiency that existed either at the time of the IPO or when the 2000 financial statements

contained in the Registration Statement were first issued." (Pls. Mem. at 7.) But even Plaintiffs' own allegations demonstrate the contrary. The Amended Complaint alleges that the announcements of the reserve strengthenings stated that they related to adverse development with respect to business written in prior years, for which reserves were reflected in the 2000 financial statements. For example, in its press release announcing the fourth quarter 2002 reserve strengthening, Converium reported that it was making "[a]dditional provisions of US $70.3 million net for liability business written by Converium North America in 1997 to 2000." (Am. Compl. ¶ 165 (quoting Converium press release, dated Nov. 19, 2002, at 1) (emphasis added).) Converium's Form 20-F for 2002 similarly made clear that the reserve strengthening undertaken in 2002 "primarily related to underwriting years 1997 through 2000." (Am. Compl. ¶ 175 (quoting Converium Form 20-F, filed April 18, 2003, at 45) (emphasis added).) Plaintiffs thus were clearly on notice, more than one year before they sued, that the reserve strengthenings related to pre-IPO business.

Third, this Court has already carefully addressed Plaintiffs' contention that the statute of limitations did not begin to run because the Company's public disclosures, including the October 28, 2002 analyst conference call, purportedly reassured investors that the Company remained strong and that its problems had been addressed. See In re Converium, 2006 WL 3804619, at *17. Not satisfied with the Court's ruling, Plaintiffs now shift gears and claim that slightly different language in the same October 28, 2002 conference call -- statements that Plaintiffs concede they had not relied upon in their original papers -- supposedly threw them off the scent.[2] Plaintiffs now claim that Converium's statements that the 2002 reserve increases

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[2] Plaintiffs "acknowledge that they could have better assisted the Court by illuminating these particular statements more clearly and forcefully in the papers opposing the motions to dismiss." (Pls. Mem. at 8 n.5.) This Court has made clear that reconsideration is not a

reflected new developments caused them not to begin their investigation sooner. Aside from the fact that Plaintiffs have not provided -- and obviously cannot provide -- a credible explanation for their belated attempt to rely on different language from the very same conference call, the language they now cite could not excuse their failure to begin an investigation sooner any more than could the allegedly reassuring statements that Converium's business remained strong.[3] This shift in emphasis provides no basis to evade the holding of LC Capital. Nothing in LC Capital suggests that the Company's alleged attribution of the 2002 reserve increases to new developments could have negated Plaintiffs' clear inquiry obligations in any way.

Plaintiffs' argument boils down to the contention that they could not have been on inquiry notice of the need to investigate unless Converium explicitly confessed that it had misrepresented its reserve position in the Prospectus. But the statute of limitations in Section 13 of the Securities Act runs "one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence." 15 U.S.C. § 77m (emphasis added). The one-year limitations period thus begins to run once a plaintiff is on notice of the need to inquire; it does not depend on a plaintiff's actual knowledge, based upon a defendant's admissions, that she has been defrauded. Such a contention would simply eliminate the inquiry-notice branch of the statute. See Dodds v. Cigna Sec., Inc., 12 F.3d 346, 352 (2d Cir. 1993) (the issue is "whether [a plaintiff] had constructive notice of facts sufficient to create a duty to inquire"; "[a]n investor does not to have to have notice of the entire

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proper means by which to improve upon arguments inadequately made the first time. Takeda Chem. Indus., 2005 WL 2092920, at *4.

[3] The Second Circuit in LC Capital expressly noted that "[u]nder-reserving is obviously a serious problem for an insurance company" and focused on the critical importance of reserves to an insurance company when the Court ruled that investors of ordinary intelligence could not have reasonably relied on the assuring statements in that case to "allay [their] concern." 318 F.3d at 155.

fraud being perpetrated to be on inquiry notice") (emphasis added). Clearly, the duty to inquire can arise even though, and is not suspended merely because, wrongdoing is not admitted. In re Merrill Lynch & Co. Research Reports Sec. Litig., 289 F. Supp. 2d 429, 433 (S.D.N.Y. 2003) (holding that a "plaintiff's duty to inquire is not dissipated merely because of a defendant's denial of wrongdoing"); In re Integrated Res. Real Estate Ltd. P'ships Sec. Litig., 815 F. Supp. 620, 640 (S.D.N.Y. 1993) ("[N]either reassurances accompanying the relevant notice nor the continued failure to disclose the facts allegedly misrepresented in the first place relieves the plaintiff of his duty to undertake reasonable inquiry or tolls the statute of limitations."); see also In re Merrill Lynch Ltd. P'ships Litig., 7 F. Supp. 2d 256, 274-75 (S.D.N.Y. 1997) ("The plaintiff may not avoid her duty to inquire merely by relying on . . . management's continued failure to disclose the truth behind the allegedly misrepresented facts"; "[t]o permit a claim of fraudulent concealment to rest on no more than an alleged failure to own up to illegal conduct upon [a] . . . timid inquiry would effectively nullify the statute of limitations") (internal citations omitted).

Fourth, in attempting to avoid the statute of limitations, Plaintiffs continue to ignore the fact that they have previously acknowledged their explicit understanding that the October 28, 2002 press release partially disclosed the alleged misrepresentations in the Prospectus. The Amended Complaint alleges that the October 28, 2002 announcement of the third of the four 2002 reserve increases "caused the price of Converium stock and ADSs to fall dramatically." (Am. Compl. ¶ 158 (emphasis added).) Named plaintiff LASERS admittedly realized the import of the reserve increases -- and sold nearly one-third of its holdings of Converium stock, as Plaintiffs explained in a letter to the Court:

> [I]n an October 28, 2002 press release, Converium disclosed that it would need to strengthen its reserve to resolve a reserve deficiency

> in North America related to the 1997-2000 policy years. The price of Converium's stock and ADSs fell in response to that disclosure. LASERS sold 16,800 ADSs on October 30, and sold an additional 21,900 ADSs between November 1 and November 8. Thus, LASERS sold more than a third of the ADSs purchased on the IPO at a loss following the partial disclosure of Converium's true reserve position, which was misrepresented in the registration statement and prospectus.

(Ex. A (Letter to the Court from Bernstein Litowitz Berger & Grossman LLP, dated August 22, 2005), at 2 n.1 (emphasis added).) This conduct completely undermines Plaintiffs' contention that Converium management's statements somehow dissuaded them from commencing an inquiry into Converium's loss-reserve situation. It is in fact a concession that Plaintiffs believed no later than October 28, 2002 that Converium's statement of its reserve position in the Prospectus was not accurate.

Fifth, aside from the concession in their August 22, 2005 letter to the Court, Plaintiffs also appear to have conceded in their motion for reconsideration that they were on inquiry notice of their claims in 2002. Plaintiffs acknowledge that the four 2002 "reserve increases may have placed aftermarket purchasers who bought Converium stock in 2002 on notice of possible Exchange Act claims," even though they contend that IPO purchasers were not on inquiry notice. (Pls. Mem. at 9-10) (emphasis added).[4] But there is no reason to distinguish between "aftermarket purchasers" and all other purchasers -- or between Exchange Act claims and Securities Act claims -- for purposes of inquiry notice. If sufficient information was available to the public to put aftermarket purchasers on inquiry notice of any Exchange Act

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[4] Even if the Court were to reconsider and reverse its ruling that the IPO purchasers' claims are time-barred, it still should adhere to its ruling as to any aftermarket purchasers, because -- as discussed above -- plaintiffs effectively have conceded that the 2002 reserve increases put aftermarket purchasers in 2002 on inquiry notice of alleged securities-law violations.

claims, the very same information also was available to all other purchasers -- including IPO purchasers -- as to any claims under the Securities Act.[5]

In sum, Plaintiffs have not demonstrated that the Court overlooked anything in dismissing their Securities Act claims. Rather, Plaintiffs are contending in essence that the Court incorrectly applied LC Capital and reached the wrong result. In other words, Plaintiffs attempt to do what they may not -- "'relitigate an issue already decided.'" India.com, Inc. v. Dalal, No. 02 Civ. 111 (DLC), 2006 WL 2883249, at *1 (S.D.N.Y. Oct. 10, 2006) (quoting Shrader, 70 F.3d at 257); see also Croton Watch Co. v. Nat'l Jeweler Magazine, Inc., No. 06 Civ. 662, 2006 WL 2996449, at *2 (S.D.N.Y. Oct. 16, 2006); McAllan v. Von Essen, No. 01 Civ. 5281, 2004 WL 1907752, at *2 (S.D.N.Y. Aug. 25, 2004).

B. The Motion Should Be Denied Because Plaintiffs Advance New Arguments Not Previously Presented to the Court.

Plaintiffs admit that "they could have better assisted the Court by illuminating [the October 28, 2002 conference call and Defendant Lohmann's statement therein] more clearly and forcefully in the papers opposing the motion to dismiss." (Pls. Mem. at 8 n.5.) In fact, as noted above, Plaintiffs did refer to the October 28, 2002 conference call in opposing the motion to dismiss but did not argue that Converium's statement that reserve increases were driven by

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[5] In fact, under Plaintiffs' theory of the case, inquiry notice should be easier to establish for Securities Act claims than for Exchange Act claims, because Plaintiffs maintain they do not need to plead and prove scienter in connection with their Securities Act claims. (Defendants have argued otherwise, because loss reserves are estimates or opinions that cannot be actionable unless they were not believed when made. See, e.g., ZFS Mem. in Supp. of Mot. to Dismiss ("ZFS Br.") at 26-27; Converium Mem. in Supp. of Mot. to Dismiss ("Converium Br.") at 29-30; Underwriter Mem. in Supp. of Mot. to Dismiss ("Underwriter Mem.") at 35-36.)

new information excused their failure to have commenced an investigation.[6] Seizing upon a different sentence in a previously cited document is clearly an attempt to try a new argument -- one that could have been raised earlier -- in response to an adverse ruling. It is fundamental that a party may not advance a new argument in seeking reconsideration. See Snype v. New York City, No. 04 Civ. 8268 (DLC), 2006 WL 1441013, at *1 (S.D.N.Y. May 23, 2006) (citing Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Stroh Cos., 265 F.3d 97, 115-16 (2d Cir. 2001)); JSMS Rural LP v. GMG Capital Partners III, LP, No. 04 Civ. 8591, 2006 WL 2239681, at *1 (S.D.N.Y. Aug. 4, 2006); Kara Holding Corp. v. Getty Petroleum Mktg., Inc., No. 99 Civ. 0275, 2005 WL 53266, at *1 (S.D.N.Y. Jan. 10, 2005).[7]

For this reason as well, the Court should deny Plaintiffs' motion to reargue the dismissal of their Securities Act claims.[8]

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6 At the conference on November 16, 2006, Plaintiffs' counsel expressly informed the Court that the statute of limitations issue was fully briefed. (Ex. B (Tr. of conference, dated Nov. 16, 2006), at 52.)

7 In support of their Motion, Plaintiffs ask the Court to consider the transcript of the October 28, 2002 conference call. As Plaintiffs acknowledge, "no party previously submitted the full text of that conference call for the Court's consideration." (Pls. Mem. at 8 n.5.) Factual material that was available to the parties at the time of the original motion -- as was the October 28, 2002 transcript -- may not be submitted for the first time in connection with a motion for reconsideration. See, e.g., India.com, 2006 WL 2883249, at *2; JSMS Rural LP, 2006 WL 2239681, at *1; McAllan, 2004 WL 1907752, at *2.

8 If the Court grants reconsideration of the dismissal of the Securities Act claims and reinstates them, the Court then will need to consider a number of other issues it previously did not need to address, including (*i*) whether the Registration Statement and Prospectus contained any material misrepresentations or omissions, (*ii*) whether Converium and/or ZFS can be held liable as offerors or sellers under § 12(a)(2) of the Securities Act, (*iii*) whether the Amended Complaint adequately pleads control-person liability as to ZFS, and (*iv*) whether the Complaint contains sufficient allegations showing personal jurisdiction over Defendants Clarke, Colombo, Mehl, Förterer and Schnyder.

II. THERE IS NO REASON TO RECONSIDER THE "AFTERMARKET PURCHASERS'" EXCHANGE ACT CLAIMS IN CONNECTION WITH THE IPO.

The Court dismissed Plaintiffs' Exchange Act § 10(b) claim against Converium and the Officer Defendants "[t]o the extent plaintiffs' Exchange Act claims are based on statements made in connection with the IPO," because plaintiffs had "failed to allege adequately their reliance on the statements in the Prospectus and Registration Statement." In re Converium, 2006 WL 3804619, at *12-*13. The Court held that "as a matter of law . . . 'the market for IPO shares is not efficient,'" id. at *13 (quoting In re Initial Public Offering Securities Litigation, 471 F.3d 24, 42 (2d Cir. 2006)), and it therefore ruled that the fraud-on-the-market presumption of reliance -- which was all that plaintiffs had pled to try to satisfy § 10(b)'s reliance requirement -- does not apply, id. at *12-*13.[9] Having dismissed the § 10(b) claim based on the IPO, the Court also dismissed the § 20(a) claims based such alleged conduct. Id. at *14.

Additionally, because the Court's dismissal of the newly added Underwriter Defendants was based on the one-year statute of limitations, the ruling did not need to address numerous additional bases for dismissal asserted in their dismissal motion. The long-expired Rubin tolling letter never did apply to this claim brought by other plaintiffs nearly four years after the IPO (Underwriter Mem. at 13-17; Underwriter Reply in Supp. of Mot. to Dismiss at 4-14); Plaintiffs concede they fully understood, and had sued other parties on, the claimed misstatements more than a year before suing the underwriters (Underwriter Mem. at 24); the alleged misstatements concededly were expertized estimates provided by two independent experts, and there were no "red flags" for the underwriters (id. at 25-30); and the allegedly misstated estimates were neither material nor false (id. at 31-35). Moreover, Plaintiffs' recent proposal to add Mr. Rubin as a named plaintiff in this action still has not occurred and would come far too late to solve retroactively Plaintiffs' clear failure to sue before the three-year statute of repose. Should Plaintiffs' motion for reconsideration be successful, these additional and legally sufficient grounds for dismissal of the Underwriter Defendants will then require judicial resolution.

[9] The Second Circuit's In re IPO decision did not change controlling law in this Circuit, and Plaintiffs' reconsideration motion does not contend otherwise. The Second Circuit based its decision on two well-established cases cited in ZFS's motion to dismiss: Freeman v. Laventhol & Horwath, 915 F.2d 193, 199 (6th Cir. 1990), and Berwecky v.

Plaintiffs wisely have not sought reconsideration of the Court's ruling that the Converium IPO market was inefficient as a matter of law. Instead, Plaintiffs contend only that "the Court did not distinguish between investors who purchased shares in Converium's IPO and those who purchased in the aftermarket." (Pls. Mem. at 4.)

The Court, however, did not overlook anything on this (or any other) issue. To the contrary, the Court based its ruling on Plaintiffs' inadequate pleading -- a deficiency that still remains in the Complaint and that Plaintiffs did not attempt to cure in either of the two versions of their proposed Second Amended Complaint, even after ZFS's motion to dismiss and reply brief had identified the pleading defect. There is no reason for the Court to reconsider its ruling on a pleading that was and is defective as a matter of law -- and that Plaintiffs have repeatedly refused to try to cure.[10]

As the Court observed in its decision, the Complaint "pleads reliance by asserting that the plaintiffs and class members are 'entitled to the presumption of reliance established by the fraud-on-the-market doctrine.'" In re Converium, 2006 WL 3804619, at *12 (quoting Am. Compl. ¶ 45). The Complaint alleges that, "[a]t all times relevant to this Complaint, the markets

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Bear, Stearns & Co., 197 F.R.D. 65, 68 n.5 (S.D.N.Y. 2000) (fraud-on-the-market "presumption can not logically apply when plaintiffs allege fraud in connection with an IPO, because in an IPO there is no well-developed market in the offered securities"). See In re IPO Sec. Litig., 471 F.3d at 56.

[10] Defendants showed in their motion papers that Plaintiffs must plead all elements of their Exchange Act claims -- including reliance -- with the particularity required by Fed. R. Civ. P. 9(b). See, e.g., Pfeiffer v. Goldman, Sachs & Co., No. 02 Civ. 6912, 2003 WL 21505876, at *4 (S.D.N.Y. July 1, 2003) (plaintiff "must allege particular facts for each of the elements of the claim") (emphasis added), aff'd sub nom. Weinstein v. Goldman, Sachs & Co., 93 Fed. Appx. 326 (2d Cir. 2004); Salzman v. Kuris, No. 84 Civ. 8287 (PNL), 1990 U.S. Dist. LEXIS 188, at *3-*4 (S.D.N.Y. Jan. 9, 1990) ("A complaint stating a claim for securities fraud must specifically allege facts in support of each element of the claim.") (emphasis added).

for Converium shares and ADSs were efficient markets," and it then lists six reasons that purportedly support the broad assertion of market efficiency. (Am. Compl. ¶ 45 (emphasis added).)

However, Plaintiffs' blanket allegation of market efficiency "at all times relevant to this Complaint" is incorrect as a matter of law. The Court held -- and Plaintiffs do not dispute -- that the market for Converium securities was inefficient "as a matter of law" at the beginning of the putative class period. In re Converium, 2006 WL 3804619, at *13. Thus, the sole allegation that Plaintiffs offer to satisfy their burden of pleading reliance is indisputably wrong. It is impossible for a market to be allegedly efficient throughout an entire putative class period when that period begins with an IPO, which is inefficient as a matter of law. There is no rational basis for the Court to accept such a legally flawed allegation -- even at the pleading stage.[11]

Plaintiffs have consciously elected not to plead that the legally inefficient IPO market somehow became efficient at some unspecified later time. Markets do not move instantly or automatically from inefficiency to efficiency. If the shift ever occurs, it does so through an evolving process, and Plaintiffs do not attempt to plead any facts showing how and when (if ever) such a process evolved and the inefficient market even arguably became efficient.[12]

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[11] See, e.g., First Nationwide Bank v. Gelt Funding Corp., 27 F.3d 763, 771 (2d Cir. 1994) (even if "well-pleaded material allegations of the complaint are taken as admitted" under Fed. R. Civ. P. 12(b)(6), "conclusions of law or unwarranted deductions of fact are not admitted") (emphasis added; internal quotation marks omitted).

[12] The purported market-efficiency facts pled in the Amended Complaint did not address any transition from inefficiency to efficiency. As noted above, Plaintiffs simply alleged -- incorrectly -- that the market was efficient for the entire period. But in any event, as ZFS showed in its reply brief on its motion to dismiss, the Amended Complaint's allegations would not have established market efficiency even if the putative class period had not begun with a legally inefficient market. (See ZFS Reply in Supp. of Mot. to Dismiss ("ZFS Reply") at 30 (noting Amended Complaint's failure to allege "turnover measured as a percentage of outstanding shares," extent of market makers' and

Instead of pointing to allegations in the Amended Complaint that would satisfy their pleading burden, Plaintiffs resort (Pls. Mem. at 6 n.4) to a footnote citing two cases purportedly holding that "the question of when the market became efficient . . . presents a factual issue that cannot be resolved under Rule 12(b)(6)."[13] Plaintiffs cited those same two cases in opposing ZFS's motion to dismiss. (Pls. Mem. in Opp'n to Defs' Mots. To Dismiss at 56-57.) And as ZFS previously responded in its reply brief (ZFS Reply at 29 n.19), neither of those cases involved an IPO or any other situation where the court recognized that the relevant market was inefficient as a matter of law. Thus, those cases did not purport to address a factual scenario where the plaintiffs (*i*) had alleged market efficiency even though the market was inefficient as a matter of law and (*ii*) had repeatedly failed to plead facts alleging when and how (if ever) the legally inefficient market even arguably became efficient.[14]

A court might conclude in appropriate circumstances that questions of market efficiency cannot be resolved at the pleading stage when a plaintiff has pled some purported facts creating a debatable issue about whether a market might have been efficient. But no such factual issue can exist where, as here, a plaintiff's allegations of market efficiency are wrong as a matter

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arbitrageurs' trading, market capitalization, bid-ask spread for stock sales, float, and trading volume excluding insiders' shares) (quoting Bell v. Ascendant Solutions, Inc., 422 F.3d 307, 315 (5th Cir. 2005)).)

13 See RMED Int'l, Inc. v. Sloan's Supermarkets, Inc., No. 94 Civ. 5587, 2002 WL 31780188, at *4 (S.D.N.Y. Dec. 11, 2002); In re Laser Arms Corp. Sec. Litig., 794 F. Supp. 475, 490 (S.D.N.Y. 1989), aff'd, 969 F.2d 15 (2d Cir. 1992).

14 Moreover, to the extent that In re Laser Arms saw a question of fact in whether an efficient market existed when the issuer's stock was listed in the "NQB pink sheets" (or even when the issuer applied for listing in the pink sheets), see 794 F. Supp. at 479, 490, the decision might no longer be good law in light of the Second Circuit's In re IPO decision.

of law for at least part of the putative class period, and the plaintiff has not made the slightest effort to plead facts alleging when and how (if ever) the situation changed.[15]

The need to plead basic facts also promotes the efficient use of judicial resources. In a related context, the Supreme Court recently required plaintiffs to plead facts about another element of § 10(b)-- loss causation -- because "[a]llowing a plaintiff to forgo giving any indication of the economic loss and proximate cause would bring about the very sort of harm the securities statutes seek to avoid." Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 347 (2005). This Court thus correctly refused to allow this case to proceed as to the Registration Statement and Prospectus in the absence of any such cognizable allegations of reliance based on purported market efficiency.

The Court therefore should deny this element of Plaintiffs' reconsideration motion. To grant such a motion at this time -- especially after Plaintiffs refused, in the face of ZFS's fully briefed motion to dismiss, to amend their legally deficient allegations in both

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[15] Plaintiffs also do not explain how an efficient market for Converium securities -- if it ever came into existence -- could have been affected throughout the entire 3½-year putative class period by any alleged misrepresentations of the loss reserve estimates in the December 2001 IPO documents. The fraud-on-the-market theory presumes that an efficient, well-developed market "transmits information to the investor in the processed form of a market price," Basic Inc. v. Levinson, 485 U.S. 224, 244 (1988), which supposedly incorporates the most current information about the issuer. See, e.g., Wielgos v. Commonwealth Edison Co., 892 F.2d 509, 516 (7th Cir. 1989) ("Prompt incorporation of news into stock price is the foundation for the fraud-on-the-market doctrine"). Converium provided new reserve information in its 2001 Form 20-F filed in May, 2002. And as the Court noted, Converium increased its loss reserves four times in 2002. See In re Converium, 2006 WL 3804619, at *4; see also Decl. of Alyson L. Redman, dated Dec. 23, 2005, Ex. O at 47; Ex. P at 11. Accordingly, as soon as Converium began disclosing new loss-reserves figures after the IPO, the pre-IPO reserves estimates were superseded, and the "market" would have to be "relying" on Converium's more up-to-date post-IPO loss reserves estimates, not the outdated pre-IPO disclosures. For this reason as well, aftermarket purchasers at later times cannot plead reliance on the allegedly misstated IPO estimates even under an efficient-market theory.

versions of their proposed Second Amended Complaint -- would fly in the face of the Second Circuit's caution that, "where litigants have once battled for the court's decision, they should neither be required, nor without good reason permitted, to battle for it again." Official Comm. of Unsecured Creditors of Color Tile, Inc., v. Coopers & Lybrand, LLP, 322 F.3d 147, 167 (2d Cir. 2003) (internal quotation marks omitted).[16]

III. THE COURT SHOULD NOT GRANT RECONSIDERATION OF ITS DENIAL OF PLAINTIFFS' MOTION FOR LEAVE TO AMEND.

Plaintiffs ask that, if the Court grants reconsideration of its dismissal of the Securities Act claims or the Exchange Act claims based on the IPO, it also should grant Plaintiffs leave to file their proposed Second Amended Complaint. For the reasons discussed above, there is no reason for the Court to reconsider its December 28, 2006 Order, so Plaintiffs' contingent request for leave to amend is moot. Moreover, Defendants previously provided many other reasons why the Court should not grant leave to amend, and Defendants respectfully refer the Court to their previously filed papers if the Court wishes to see a fuller explanation of those

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[16] If the Court reconsiders and reinstates the § 10(b) claim relating to the IPO, however, the Court will need to consider the other arguments that Defendants advanced in their motion papers and that the Court did not have to reach, including, for example, (*i*) whether the Registration Statement and Prospectus contained any actionable material misrepresentation or omission, (*ii*) whether the Amended Complaint adequately pleads particularized facts creating a strong inference of scienter as to Converium and the Individual Defendants in connection with alleged pre-IPO conduct, (*iii*) whether the Amended Complaint adequately pleads loss causation as to the IPO documents – an issue that, contrary to Plaintiffs' assertion in their reconsideration motion (Pls. Mem. at 6), Defendants did raise on the motion to dismiss (see ZFS Br. at 40-46; ZFS Reply at 32-33), (*iv*) whether the Amended Complaint adequately pleads control-person liability as to ZFS, and (*v*) whether the Amended Complaint contains sufficient allegations showing personal jurisdiction over defendants Colombo, Mehl, Förterer and Schnyder.

reasons. (Of course, Defendants are prepared to address those issues again, if the Court so desires.)[17]

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[17] If the Court does allow Plaintiffs leave to file another amended complaint, Defendants reserve their rights to move to dismiss that complaint to the extent it contains allegations relating to Converium's March 1, 2006 restatement.

CONCLUSION

The Court therefore should deny Plaintiffs' motion for reconsideration.

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Respectfully submitted,

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