IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

IN RE DIGITAL ISLAND SECURITIES LITIGATION	)	Civil Action No. 02-57-GMS

MEMORANDUM AND ORDER

I. INTRODUCTION

This securities class action suit arises from Cable & Wireless plc's acquisition of Digital Island, Inc. Individual plaintiffs filed complaints on January 22, 2002, January 31, 2002, and February 22, 2002. The plaintiffs filed a joint motion for consolidation, appointment of lead plaintiff, and appointment of lead counsel on March 25, 2002. The court granted that motion on April 16, 2002. On May 15, 2002, the plaintiffs filed their Consolidated Amended Class Action Complaint. In this complaint, the plaintiffs contend that the defendants defrauded the Digital Island shareholders into approving the sale of the company to Cable & Wireless for less than fair value.[1]

On July 1, 2002, the defendants filed a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) and the Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u-4 (the "PSLRA"). On September 10, 2002, the court issued a Memorandum Opinion dismissing the plaintiffs' Consolidated Amended Class Action Complaint in its entirety, with prejudice.

Presently before the court is the plaintiffs' timely motion to alter the final judgment and for

[1]The defendants are Ruann F. Ernst, Charlie Bass, Christos Cotsakos, Mary Cirillo-Goldberg, G. Bradford Jones, Robert Marbut, Shahan Soghikian, Graham Wallace, Don Reed, Mike McTighe, Robert Drolet, Avery Duff, Marc Lefar, Digital Island, Inc. ("Digital Island"), Dali Acquisition Corp., and Cable & Wireless plc ("Cable & Wireless").

leave to file an amended complaint.[2] For the following reasons, the court will deny this motion.

II. DISCUSSION

The decision of whether to grant leave to amend under Rule 15(a) "rest[s] within the sound discretion of the trial court under [Federal Rule of Civil Procedure] 15." *Massarsky v. GM Corp.*, 706 F.2d 111, 125 (3d Cir. 1983). In exercising this discretion, courts do not read Rule 15(a) as providing an unlimited right to amend complaints. *See e.g. Lorenz v. CSX, Corp.*, 1 F.3d 1406, 1413 (3d Cir. 1993). Indeed, a motion to amend may be denied for any of the following reasons: undue delay, bad faith, failure to cure previous deficiencies, dilatory motive, prejudice, or futility. *See Foman v. Davis*, 371 U.S. 178, 182 (1962).

In the present case, the court is troubled by the plaintiffs' decision to file this motion not only after the motion to dismiss had been filed, but *after* the court had decided this motion and dismissed their claims. When faced with the defendants' motion to dismiss, the plaintiffs would have been well within their rights to request leave to amend. Instead, they chose to oppose the motion, in its entirety, without seeking such relief. Such an approach is highly suspect as the plaintiffs were aware of the facts which they now seek to add at the time the original pleading was filed. Thus, there is no excuse for failure to plead them before the case was dismissed.

Additionally, in their briefs on the present motion, the plaintiffs essentially concede that their complaint was deficient, but that they nevertheless did not seek leave to amend it. *See e.g.*, Plaintiff's Motion to Alter Judgment at 5 (recognizing that they had failed to address certain

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[2]On October 21, 2002, the defendants filed a motion to strike the plaintiffs' reply brief in support of their motion to alter judgment. In so moving, the defendants reasoned that Local Rule 7.1.5 does not permit the filing of reply briefs in motions for reargument or reconsideration. However, as the plaintiffs' motion to replead is neither a motion for reargument, nor a motion for reconsideration, the court will deny the defendants' motion to strike.

arguments and facts in their complaint, but that they "believe if such arguments had been considered, the [c]omplaint might have survived the motion to dismiss."); Plaintiffs' Reply Brief at 2 (noting that the proposed amendments "alter substantially the particularity of the [c]omplaint's allegations); Plaintiffs' Reply Brief at 6 (stating that "virtually all," but not all, of the required allegations were contained in the original complaint).

The plaintiffs further suggest that "the nature of [their] Opposition Brief [to the Motion to Dismiss] also signaled to this [c]ourt that, in the event it agreed with defendants' argument concerning pleading deficiencies, plaintiffs could adequately and easily replead to cure any such deficiencies." Plaintiffs' Reply Brief at 4. Unfortunately, however, in making this statement, the plaintiffs have apparently forgotten that it is their duty, not the court's, to request leave to amend. Had the plaintiffs been as interested in amending as they claim to have been, the appropriate response would have been a request for leave to amend, *before* the court dismissed their case.[3] The court does not, and will not, make its decisions based on covert "signals" from counsel.

Indeed, the only reason the plaintiffs offer for having not sought to amend their complaint earlier amounts to an argument that the case moved too quickly for them to do so.[4] *See* Plaintiffs' Reply Brief at 4. To the contrary, however, the plaintiffs filed three individual complaints and then

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[3]This is especially true in light of the fact that, in their motion to dismiss, the defendants requested that any dismissal be with prejudice. Thus, the plaintiffs cannot now argue that they were unaware of the possibility of such a dismissal.

[4]In making this argument, the plaintiffs appear not to understand that they could have fully defended their original consolidated amended complaint, as well as alternatively asked for permission to amend. Rather, the plaintiffs argue that, because they could not be certain an amended pleading would be required, they chose to file their "rapidly coming due" opposition brief. This tactical decision was clearly within their discretion. However, having chosen not to ask for alternative relief, they cannot now be heard to complain about the consequences of their actions.

a subsequent consolidated amended complaint. They had time to more carefully craft their complaint at any one of those stages. They chose not to. Moreover, while it is true that the consolidated amended complaint was only filed approximately two months prior to the defendants' motion to dismiss, that motion to dismiss, regardless of whether it was filed two months or two years after the complaint, was enough to put the plaintiffs on notice of the deficiencies. Additionally, the fast pace of this litigation was dictated by the PSLRA's requirement that a motion to dismiss be decided before a case may proceed. Thus, the court looks with great disfavor on the plaintiffs attempt to use this sensible requirement as a shield to ward off accusations of undue delay.

III. CONCLUSION

The plaintiffs chose to oppose the defendants' motion to dismiss based upon facts and theories not reflected in their consolidated amended complaint. In so doing, they clearly recognized the complaint's deficiencies. Nevertheless, they did not seek the alternative relief of requesting leave to amend prior to the court's extensive ruling on the motion to dismiss. In this way, they apparently assumed that they would be granted another bite at the apple. Unfortunately, they will not have this opportunity.

For the foregoing reasons, IT IS HEREBY ORDERED that:

1. The Plaintiffs' Motion to Alter Judgment (D.I. 71) is DENIED.

2. The Defendants' Motion to Strike the Plaintiffs' Reply Brief (D.I. 75) is DENIED.

Dated: November 25, 2002

Gregory M. Sleet
UNITED STATES DISTRICT JUDGE