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21 UNITED STATES DISTRICT COURT
 22
 23 NORTHERN DISTRICT OF CALIFORNIA
 24
 25 SAN JOSE DIVISION

26	In re IMPAX LABORATORIES, INC.)	Master File No. C-04-4802-JW
	SECURITIES LITIGATION)	
27	_____)	<u>CLASS ACTION</u>
)	
28	This Document Relates To:)	PLAINTIFFS' REPLY IN SUPPORT OF
)	PLAINTIFFS' MOTION TO STRIKE
	ALL ACTIONS.)	
	_____)	DATE: October 30, 2006
)	TIME: 9:00 a.m.
)	COURTROOM: The Honorable James Ware

1 **I. INTRODUCTION**

2 This case is at its earliest stage – a motion to dismiss the pleadings. Plaintiffs have not had
3 the benefit of any discovery, pursuant to an automatic stay under the Private Securities Litigation
4 Reform Act of 1995. Rather than accepting plaintiffs’ allegations as true, in contesting plaintiffs’
5 pleadings, defendants have raised numerous factual arguments and requested judicial notice of a
6 number of documents not referenced in the Complaint¹ to support these factual arguments. The
7 Federal Rules of Civil Procedure are clear, however, where “matters outside the pleading are
8 presented to and not excluded by the court, the motion [to dismiss] shall be treated as one for
9 summary judgment . . . and all parties shall be given reasonable opportunity to present all material
10 made pertinent to such a motion.” Fed. R. Civ. P. 12(b)(7).

11 Because this is a motion to dismiss, and not a motion for summary judgment, this Court
12 cannot consider materials outside the Complaint. For this reason, this Court cannot take judicial
13 notice of Exhibits P-U, Y, and Z, and all references to them in defendants’ motion to dismiss must be
14 stricken.

15 **II. ARGUMENT**

16 **A. The Complaint Does Not Quote or Reference Certain Analysts’**
17 **Reports (Exhibits P-U)**

18 Plaintiffs have moved to strike all references to certain analyst reports (Exhibits P-U) that
19 were not quoted, referenced, or relied upon in the Complaint. Nor were these analyst reports
20 attached to the Complaint as exhibits. At the motion to dismiss stage, this Court cannot consider
21 analyst reports that are “neither mentioned nor incorporated by reference” in the complaint. *See In*
22 *re Juniper Networks, Inc.*, No. C 02-0749 SI, 2004 U.S. Dist. LEXIS 4025, at *9 n.3 (N.D. Cal. Mar.
23 10, 2004), *aff’d*, No. 04-15670, 2005 U.S. App. LEXIS 28253 (9th Cir. Dec. 16, 2005); *see also In*
24 *re Healthsouth Corp. Sec. Litig*, Master File No. CV 98-J-2634-S, 2000 U.S. Dist. LEXIS 20650, at

25
26 ¹ “Complaint” refers to the Second Amended Consolidated Complaint for Violation of
27 Sections 10(b) and 20(a) of the Securities Exchange Act of 1934. All “¶” references are to the
28 Complaint.

1 **27-31 (N.D. Ala. Sept. 13, 2000) (granting plaintiffs’ motion to strike two analyst reports that
2 were not specifically cited by the plaintiffs in the amended complaint).

3 Defendants weakly assert that because the Complaint alleges that plaintiffs’ counsel, in
4 investigating the Complaint, reviewed “securities analysts reports” and that Impax “was followed by
5 eight Wall Street analyst firms,” these allegations are sufficient to incorporate the offending analyst
6 reports. Defs’ Opp. at 4-5;² ¶¶22, 190(d). Defendants are grasping at straws. By this logic, all
7 possible analyst reports would be at issue at the pleading stage. Such a broad-sweeping policy
8 would clearly violate the requirements of Fed. R. Civ. P. 12(b)(7), which prevents the consideration
9 of matters outside the pleading. Nor does case law support such defendants’ sweeping inclusion of
10 all analyst reports. Case law clearly holds that the complaint must attach or expressly reply on the
11 *specific* analysts’ reports, for them to be considered at the motion to dismiss stage. *See, e.g., In re*
12 *Acterna Corp. Sec. Litig.*, 378 F. Supp. 2d 561 (D. Md. 2005). Otherwise, defendants’ reliance on
13 these reports is subject to a motion to strike. *Id.* General allegations regarding plaintiffs’ counsels’
14 investigation are not sufficient to incorporate by reference all analyst reports at the motion to dismiss
15 stage.

16 The vast majority of the unpublished decisions cited by defendants do not hold otherwise.
17 *See, e.g., In re Gilead Scis. Sec. Litig.*, No. C 03-4999 MJJ, 2005 U.S. Dist. LEXIS 3170, at **11-12
18 (N.D. Cal. Jan. 26, 2005) (taking judicial notice of documents explicitly referenced or implicitly
19 relied upon in the complaint); *In re Splash Tech. Holdings Sec. Litig.*, Case No. No. C 99-00109
20 SBA, 2000 U.S. Dist. LEXIS 15369, at *80 n.14 (N.D. Cal. Sept. 29, 2000) (taking judicial notice of
21 the boilerplate allegations in publicly filed court documents, not the truth of any matters asserted
22 therein); *In re Syntex Corp. Sec. Litig.*, Civil No. 92-20548 SW, 1993 U.S. Dist. LEXIS 20420, at
23 **12-13 (N.D. Cal. Sept. 1, 1993) (stating that a court may consider, at the motion to dismiss stage,
24 only documents attached to the complaint, incorporated by reference to the complaint or integral to
25 the complaint where a party had notice of the documents and relied upon them in bringing suit).

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27 ² “Defs’ Opp.” refers to Defendants’ Opposition to Plaintiffs’ Motion to Strike and Reply
28 Memorandum in Support of Request for Judicial Notice.

1 Moreover, unlike in *Padnes v. Scios Nova Inc.*, No. C95-1693 MHP, 1996 U.S. Dist. LEXIS
2 22858 (N.D. Cal. Sept. 18, 1996), here plaintiffs have not made a broad statement that “no analyst
3 apprised the market” of certain facts. Instead, in regard to the application for Concerta, plaintiffs
4 plead that on November 9, 2004, defendants stated for the first time that they had received approval
5 for the drug Concerta. Opp. MTD at 23;³ ¶206. Although analysts before that time may have
6 discussed such an application, the analysts reports at issue here reflect uncertainty and guesswork
7 over the content, status, and timeframe for the Concerta application. Opp. MTD at 24. It is the
8 certainty of information that came with defendants’ announcement on November 9, 2004 that had an
9 impact on defendants’ stock price. And it is this positive impact that plaintiffs have pled. ¶206.
10 Defendants’ insertion of facts at the motion to dismiss stage is not only improper, it wrongly
11 misconstrues plaintiffs’ allegations. *See also Heliotrope Gen., Inc. v. Ford Motor Co.*, 189 F.3d 971,
12 981 n.18 (9th Cir. 1999) (allowing consideration of news articles, where plaintiffs had broadly
13 alleged that the market was not aware of the implications of defendants’ tax strategies).

14 **B. Factual Assertions of a Third-Party’s Website (Exhibit Y) Are Not**
15 **Properly Considered at the Motion to Dismiss Stage**

16 Defendants continue to ask that this Court take judicial notice of a third party’s website to
17 demonstrate that the maximum recommended dosage for Wellbutrin SR is 400 mg per day. Defs’
18 Opp. at 6-7. First, this website is essentially expert testimony from a third party. Plaintiffs’ Mtn to
19 Strike at 8.⁴ There is no indicia of reliability from this website that makes appropriate this Court’s
20 acceptance of these statements for the truth of the matters asserted therein. The record contains no
21 information regarding the author of this website, any expertise in pharmacology or medicine, or any
22 basis upon which this website might have the expertise to opine on the maximum recommended dose
23 of any medications.

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25 ³ “Opp. MTD” refers to Plaintiffs’ Opposition to Defendants’ Motion to Dismiss Second Amended Consolidated Complaint.

26 ⁴ “Plaintiffs’ Mtn to Strike” refers to Plaintiffs’ Motion to Strike and Opposition to
27 Defendants’ Request for Judicial Notice in Support of Defendants’ Motion to Dismiss the Second Amended Consolidated Class Action Complaint.

1 In addition, however, regardless of the actual maximum recommended dosage of Wellbutrin,
2 these facts do not change defendants' false statements. As plaintiffs explained in their opposition to
3 the motion to dismiss, it is clear that defendant B. Edwards stated on November 9, 2004, that Impax
4 "received two final approvals in the quarter. These are for generic versions of Wellbutrin SR, which
5 is Metformin, Hydrochloride Extended Release tablets the *500 mg strength*." Opp. MTD at 23.
6 Even if no 500 mg version of Wellbutrin exists, the record is clear that defendant B. Edwards falsely
7 stated that some version of Wellbutrin was approved in 3Q04.

8 An additional question of fact has arisen in defendants' reply in support of their motion to
9 dismiss. In the version of the November 9, 2004 transcript available to plaintiffs on Lexis and used
10 by plaintiffs in drafting the complaint and their opposition to the motion to dismiss, defendant B.
11 Edwards states: "BARRY EDWARDS: Thank you, Cornel. As I mentioned earlier in the call, we
12 received two final approvals in the quarter. These are for generic versions of *Wellbutrin SR*, which
13 is Metformin, Hydrochloride Extended Release tablets the 500 mg strength and a generic version of
14 Oxycontin 80 mg, which is Oxycontin on Hydrochloride Extended Release tablet." Declaration of
15 Shana Scarlett in Support of Plaintiffs' Reply in Support of Plaintiffs' Motion to Strike, Ex. A at 3,
16 filed herewith. As defendants point out in Defendants' Reply Memorandum in Support of Motion to
17 Dismiss Second Amended Consolidated Complaint ("Reply MTD"), the text "Wellbutrin SR" has
18 been changed to "Glucophage XR." Defs' RJN, Ex. J at 9;⁵ Reply MTD at 14. Without further
19 information as to when and how these critical changes were made, this Court must accept plaintiffs'
20 allegations as true at the motion to dismiss stage, that is, that the transcript as published on
21 November 9, 2004, contained reference to the drug Wellbutrin. *See Lee v. City of Los Angeles*, 250
22 F.3d 668, 688-89 (9th Cir. 2001).

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27 ⁵ "Defs' RJN" refers to Defendants' Request for Judicial Notice in Support of Defendants'
28 Motion to Dismiss the Second Amended Consolidated Class Action Complaint.

1 **C. This Court Cannot Take Judicial Notice of Facts Asserted in a Report**
2 **Filed in California Superior Court that Is Unauthenticated and Not**
3 **Referenced in the Complaint**

4 Lastly, plaintiffs have moved to strike a Report of Investigation of the Special Litigation
5 Committee of the Board of Directors of Impax Laboratories, Inc. (“Report”) (Defs’ RJN, Ex. Z).
6 Defendants do not refute that they rely on this exhibit for the truth of the matter asserted therein.
7 Defendants cite to the Report to suggest that this Court should not grant leave to amend because an
8 internal investigation “found no evidence of scienter or wrongdoing.” Defs’ Mem. at 12 n.6; *see*
9 *also id.* at 13, n.7.⁶

10 Rule 201 “does not permit the Court to take judicial notice of . . . documents for the truth of
11 the matters asserted therein.” *Tercica, Inc. v. Insmad Inc.*, No. C 05-5027 SBA, 2006 U.S. Dist.
12 LEXIS 41804, at *29 (N.D. Cal. Jun. 9, 2006); *see also Lovelace v. Software Spectrum*, 78 F.3d
13 1015, 1017-18 (5th Cir. 1996) (“[s]uch documents should be considered only for the purpose of
14 determining what statements the documents contain, not to prove the truth of the documents’
15 contents.”). This Court cannot abrogate its responsibility to examine the allegations in any
16 complaint or even deny plaintiffs leave to amend – especially, where, as here, defendants’ stock
17 remains delisted, defendants have failed to file any financial statements with the Securities and
18 Exchange Commission (“SEC”) in almost two years, and a restatement has yet to be filed with the
19 SEC for the class period – merely because an internal investigation of two board members allegedly
20 found no wrongdoing.

21 Moreover, as described by plaintiffs in their opening memorandum, not only is this Report
22 not referenced in the Complaint, the Report introduced by defendants does not even provide the most
23 superficial marks of authenticity. Defendants have not attached affidavits attesting to the
24 authenticity of the document. *See Berk v. Ascott Inv. Corp.*, 759 F. Supp. 245, 249 (E.D. Pa. 1991).
25 The date defendants suggest the document was submitted to the court is not the date reflected on the

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27 ⁶ “Defs’ Mem.” refers to Defendants’ Notice of Motion and Motion to Dismiss Second
28 Amended Consolidated Complaint and Memorandum of Points and Authorities in Support Thereof.

1 state court docket. Scarlett Decl., Ex. A⁷; Plaintiffs’ Mtn to Strike at 7. The Report is not a pleading
2 filed in the state court, which would require verification by counsel, or some affirmation that any
3 “factual contentions have evidentiary support.” Plaintiffs’ Mtn to Strike at 7-8; Cal. Civ. P. Code
4 §128.7(b)(3). In short, the document is lacking in exactly those indicia of reliability that make
5 judicial notice appropriate of court records. It is for this reason that this Court may only take judicial
6 notice of the fact that a report was filed in California Superior Court on April 27, 2005, and not the
7 truth of the matters asserted within this report.

8 **III. CONCLUSION**

9 For the foregoing reasons, plaintiffs respectfully request that the Court strike all references to
10 Exhibits P-U, Y and Z, in addition to all defendants’ arguments which attempt to rely on these
11 exhibits for the truth asserted in them from defendants’ motion to dismiss, including footnotes 6-7,
12 14, and 17 as well as page 24, lines 4-6.

13 DATED: October 20, 2006

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27 ⁷ “Scarlett Decl.” refers to the Declaration of Shana E. Scarlett in Support of Plaintiffs’ Motion
28 to Strike and Opposition to Defendants’ Request for Judicial Notice.

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CERTIFICATE OF SERVICE

I hereby certify that on October 20, 2006, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I have mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

I further certify that I caused this document to be forwarded to the following designated Internet site at: <http://securities.lerachlaw.com/>.

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