

JUDGE KNAPP

UNITED STATES DISTRICT COURT
DISTRICT OF NEW YORK

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BARRY PINKOWITZ, on Behalf of Himself
and All Others Similarly Situated,

Plaintiff,

v.

ELAN CORPORATION, PLC, DONALD
GEANEY, JOHN GROOM, THOMAS
LYNCH, SHANE COOKE, WILLIAM CLARK,
and KPMG LLP,

Defendants.

CLASS ACTION COMPLAINT

JURY TRIAL DEMANDED

ORIGINAL

Plaintiff Barry Pinkowitz, individually and on behalf of all other persons similarly situated, by his undersigned attorneys, alleges upon personal knowledge as to himself and his own acts, and information and belief as to all other matters, based upon, *inter alia*, the investigation conducted by and through his attorneys, which included, among other things, a review of the public documents and announcements made by defendants, and Securities and Exchange Commission ("SEC") filings, and press releases regarding Elan Corporation, PLC ("Elan" or the "Company") as follows:

NATURE OF THE ACTION

1. This is a class action on behalf of all persons who purchased the securities of Elan during the period December 21, 2000, through and including February 1, 2002 (the "Class Period"), to recover damages caused by defendants' violation of the federal securities laws. During the Class Period, defendants issued to the investing public false and misleading financial statements and press releases concerning the Company's publicly reported revenues.

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and earnings. Moreover, the Company omitted to state material information necessary in order to make prior statements not misleading. Also, the Company engaged in improper accounting practices that artificially inflated the Company's reported revenues; artificially increasing the asset side of its balance sheet; and the improperly reduced its reported expenses. The result of this conduct is that members of the class purchased shares of Elan at artificially inflated prices and have suffered damages.

2. Elan has not been forthcoming with respect to its violations of generally accepted accounting standards. Instead, the Company's conduct has been revealed to the markets through a January 30, 2001, *The Wall Street Journal* report.

3. As discussed below in detail, *The Wall Street Journal* reported that Elan participated in over fifty (50) research and development ventures. In the context of each venture, Elan invested money in the venture and then took back large chunks of the invested cash in the form of licensing fees, which Elan then improperly booked as revenues.

4. The result of this practice is that the Company was able to report inflated financial results during the Class Period and avoid the inclusion on its balance sheets of certain research and development expenses. Moreover, as detailed below, Elan utilized other improper accounting methods to avoid including on its profit and loss statement, losses incurred by these ventures.

5. This information unearthed by *The Wall Street Journal* report contradicted much of the information provided by defendants to the market during the Class Period concerning the Company's reported earnings. Once the market fully digested the truth concerning Elan's accounting practices, Elan's Company's common plummeted \$5.95 per

share – nearly 17% in one day on volume of 37 million shares - more than 20 times its average daily volume! The Company's stock price has not recovered and Elan continues to refuse to fully address the circumstances surrounding its accounting practices. Moreover, defendant KPMG LLP, Elan's auditor, has declined comment.

JURISDICTION AND VENUE

6. The claims asserted herein arise under and pursuant to sections 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b) (the "Exchange Act") and the rules and regulations promulgated thereunder by the SEC, including Rule 10b-5, 17 C.F.R. 240.10b-5.

7. This Court has jurisdiction over the subject matter of this action pursuant to section 27 of the Exchange Act, 15 U.S.C. 78aa and 28 U.S.C. Sec. 1331.

8. Venue is proper in this Judicial District pursuant to section 27 of the Exchange Act and 28 U.S.C. 1391(b). Many of the acts and transactions constituting the violations of law alleged herein, including the preparation and dissemination to the investing public of false and misleading information, occurred in substantial part in this Judicial District. The Company engages in substantial business and maintains an office within this jurisdiction and its stock trades on the New York Stock Exchange in ADR form. Moreover, defendant KPMG LLP maintains its executive offices in this District.

9. In connection with the acts, transactions and conduct alleged herein, defendants, directly and indirectly, used the means and instrumentalities of interstate commerce, including the United States mails, interstate telephone communications and the facilities of the national securities exchanges.

THE PARTIES

10. Plaintiff purchased shares of Elan common stock during the Class Period as per the annexed certificate.

11. Defendant Elan is an Irish entity and maintains its principal place of business at Lincoln House, Lincoln Place, Dublin 2, Ireland. The Company maintains an office at 345 Park Avenue, New York, New York 10154.

12. Elan purports to be a worldwide pharmaceutical concern that is primarily engaged in the discovery, development, and marketing of products in diverse therapeutic areas. As of February 1, 2002, Elan had approximately 322 million shares outstanding with a public float of 270.4 million shares. During the Class Period, Elan's common stock was actively traded on the New York Stock Exchange under the symbol "ELN" as an ADR. According to published reports, approximately 70% of all of Elan's stock is owned by Americans or American entities. Elan's fiscal year ends on December 31.

13. Elan had a duty to promptly disseminate truthful and accurate information with respect to Elan and to promptly correct any public statements issued by or on behalf of the Company which had become false or misleading.

14. Defendant Donald Geaney is Chairman and Chief Executive Officer of the Company.

15. Defendant John Groom is President and Chief Operating Officer of the Company.

16. Defendant Thomas Lynch is Vice Chairman of the Company.

17. Defendant Shane Cooke is the Chief Financial Officer of the Company.

18. Defendant William Clark is President of Elan's pharmaceutical operations.

19. Messrs. Geancy, Groom, Lynch, Cooke, and Clark are referred to herein as the "Individual Defendants".

20. The Individual Defendants, by reason of their direct and substantial management positions and responsibilities during the time relevant to this Complaint, were "controlling persons" of Elan within the meaning of section 20 of the Exchange Act and had the power and influence to control Elan and exercised such control to cause the Company to engage in the violations and improper practices complained of herein. The Individual Defendants, because of their positions as officers and directors of Elan had access to adverse non-public information about the Company's financial condition and future prospects.

21. The statements made by defendants as outlined below were materially false and misleading when made. Defendants had no reasonable or adequate basis to justify or support their earnings forecasts. The true financial and operating condition of the Company, which was known or recklessly disregarded by the defendants, remained concealed from the investing public. Defendants, who were under a duty to disclose those facts, instead misrepresented or concealed them during the relevant period herein.

22. Defendant KPMG LLP ("KPMG") maintains its Chairman's office in New York City at 345 Park Avenue, New York, New York 10154. KPMG is a limited liability partnership with offices throughout the U.S. and numerous other countries. It has 1,900 partners and a U.S. staff of 26,900.

23. Defendant KPMG is a worldwide firm of certified public accountants, auditors and consultants that provides a variety of accounting, auditing and consulting

services. KPMG, through its New York office, served as Elan's auditor and principal accounting firm commencing prior to the Class Period herein and continuing at all relevant times. KPMG acted in that capacity pursuant to the terms of contracts it had with Elan which required, *inter alia*, KPMG to audit Elan's financial statements in accordance with generally accepted auditing standards ("GAAS") and to report the results of those audits to Elan, its board of directors and to plaintiffs and the class. With knowledge of Elan's true financial condition, as alleged below, or in reckless disregard thereof, KPMG certified the false and misleading financial statements of Elan described below and provided unqualified Independent Auditors' Reports which were included in various of the Company's SEC filings and public disseminations. These unqualified audit opinions and reports greatly enhanced and facilitated the fraud alleged below and violated GAAS and generally accepted auditing principles ("GAAP"), which KPMG was obliged to observe. In addition, pursuant to defendants' scheme, KPMG jointly with defendants, arranged for and facilitated the fraudulent accounting practices utilized by Elan during the Class Period. In return for providing these services, KPMG received substantial compensation from Elan, while still failing to properly perform its contractual, disclosure and other obligations owed to Elan and its public investors.

24. Defendant KPMG, by virtue of its position as independent accountant and auditor of Elan, had access to the files and key employees of the Company at all relevant times. As a result of the auditing services it provided to Elan, KPMG had continual access to and knowledge of Elan's confidential, corporate, financial, operating and business information. KPMG knew or recklessly disregarded Elan's true financial and operating

situation, and intentionally or recklessly failed to take steps which, as Elan's auditor, KPMG could and should have been taken to fully and fairly disclose that situation to the investing public. Elan falsely represented that its audits of Elan financial statements had been conducted in accordance with GAAS and wrongfully issued "clean" or unqualified opinions or certifications that those financial statements fairly presented Elan's financial condition and results of operations in conformity with GAAP.

25. As the Company's principle accounting firm and auditor, KPMG frequently and regularly met with Company personnel, had access to internal corporate data and reports and had the opportunity to observe the Company's business and business practice and to test the Company's internal and publicly reported financial statements as well as the Company's internal controls structure.

26. KPMG knowingly participated in and acquiesced in the presentation by its audit client of false and misleading financial information to the investing public which did not adequately account for, among other things, the Company's revenues. As a result of KPMG's knowing misconduct, KPMG is jointly and severally liable to plaintiffs and the other members of the Class.

27. Defendants knew or recklessly disregarded that the misleading statements and omissions complained of herein would adversely affect the integrity of the market for the Company's stock and would cause the price of the Company's common stock to become artificially inflated. Defendants acted knowingly or in such a reckless manner as to constitute a fraud and deceit upon plaintiff and the other members of the Class.

SUBSTANTIVE ALLEGATIONS

28. On December 21, 2000, the first day of the Class Period, *Dow Jones Business News* published a report stating that Elan's management "remains comfortable with the high end of analysts' estimates for the fourth quarter [1999] as well as fiscal 2000 and 2001, and knows of no reason for the recent fall in its share price." The Company further reported to *Dow Jones* that all of its major development programs and product introduction was on track.

29. On January 4, 2001, it was announced over the *PRNewswire* that Generex Biotechnology Corporation and Elan had entered into a joint venture to develop "products for the treatment of prostate cancer." The press release, in part, stated:

TORONTO, Jan. 4/PRNewswire/ Generex Biotechnology Corporation (Nasdaq: GNBT) today announced that it has signed an agreement to form a joint venture with Elan Corporation. The joint venture will pursue the application of certain proprietary drug delivery technologies of Generex and Elan to pharmaceutical products for the treatment of prostate cancer, endometriosis and/or the suppression of testosterone and estrogen. Under the terms of the agreement, Elan will also make an initial \$5 million equity investment in Generex. The transaction will close later this month.

The joint venture will have non-exclusive licenses to utilize Generex's proprietary buccal delivery technology and certain of Elan's proprietary drug delivery technologies. Generex and Elan will each contribute to the funding of the joint venture and will each provide clinical development, regulatory, project development and business development guidance to the venture.

30. On April 23, 2001, Elan released its first quarter 2001 results wherein it was reported over *Dow Jones Business News* that:

DUBLIN – Elan Corp. swung to a first-quarter profit amid a 27% increase in revenue.

The Irish pharmaceutical concern Monday reported net income of \$76.4 million, or 22 cents a diluted share, compared to a year-earlier loss of \$267.5 million, or 89 cents a share.

Results in the latest quarter included charges of about \$68 million, from severance, asset write-offs and integration and rationalization primarily related to the company's merger with Dura Pharmaceuticals Inc. Excluding items, earnings from continuing operations came to \$144.4 million, or 41 cents a share, a penny better than analysts' estimates, according to Thomson Financial/First Call.

Year-earlier results included a charge of about \$344 million from the effects of a change related to a new accounting rule. Excluding that item, Elan said earnings from continuing operations came to \$76.5 million, or 24 cents a share.

Revenue grew 27% to \$429.3 million from \$337.9 million, driven by a 39% increase in product revenue, which accounted for 75% of total revenue.

In fiscal 2001, the pharmaceutical company said it expects to record \$100 million in revenue for its three largest products - Zanaflex, which treats central nervous system disorders, skeletal-muscle pain reliever Skelaxin and antifungal drug Abelcet.

31. On July 24, 2001, Elan reported over the *PRNewswire* "Record Second Quarter 2001 Financial Results . . ." Specifically, the Company reported:

DUBLIN, Ireland, July 24/PRNewswire/ - Elan Corporation, plc (NYSE: ELN) ("Elan") today announced net income for the second quarter of 2001 of \$163.7 million and \$0.45 per diluted share, excluding other charges, compared to net income of \$102.9 million and \$0.31 per diluted share, excluding other charges, for the second quarter of 2000, representing increases of 59% and 45%, respectively.

Revenue increased from \$368.8 million in the second quarter of 2000 to \$461.2 million in the second quarter of 2001, an increase of 25%, reflecting an increase of 48% in product revenue to \$356.3 million. Contract revenue for the second quarter of 2001 of \$104.9 million was 18% lower than the comparable quarter of 2000, mainly reflecting the termination of a research and development arrangement in the third quarter of 2000 (Spiros Development Corp II Inc.). Product revenue accounted for 77% of total revenue in the second quarter of 2001 compared to 65% in the comparable quarter of 2000. The gross margin on product revenue improved to 72% in the second quarter of 2001 compared to 68% in the comparable quarter of 2000.

* * *

Research and development expenses were \$78.4 million in the second quarter of 2001, compared to \$83.1 million in the second quarter of 2000. This reflects lower expenditure on terminated drug delivery programs previously funded by Dura. Selling, general and administrative expenses increased by 19% to \$148.7 million in the second quarter of 2001, reflecting the consolidation of The Liposome Company, Inc. (acquired in May 2000), the acquisition of certain dermatology products in the fourth quarter of 2000, and increased marketing expenses associated with the launches of Zonegran and Myobloc.

Operating income in the second quarter of 2001 increased 62% to \$135.6 million compared to \$83.5 million in 2000. Net income after taxes and before other charges in the second quarter of 2001 increased 59% to \$163.7 million compared to \$102.9 million in the second quarter of 2000, primarily reflecting growth in product revenue and the improved gross margin on product revenue.

32. On October 25, 2001, Elan reported third quarter 2001 results. As reported over the *Dow Jones International News*:

DUBLIN - (Dow Jones) - Irish pharmaceuticals group Elan Corp. PLC (ELN) said Thursday that third-quarter net income rose 37% to \$183.5 million from \$133.6 million for the same period last year.

Elan said third-quarter 2001 diluted earnings per share before other charges and a non-recurring investment gain rose 24% to 50 cents from 38 cents for the third quarter in 2000.

It posted a third-quarter sales increase of 24% to \$484.3 million from \$390.3 million for the same period last year, which reflects a 44% increase in product sales to \$381 million.

These results matched or came in marginally above analysts' expectations. Dublin-based NCB Stockbrokers forecast third-quarter total sales of \$480 million and third-quarter EPS of 50 cents.

33. On January 28, 2002, Elan confirmed consensus estimates for 2001, over the *Dow Jones News Service*.

NEW YORK - (Dow Jones) - Elan Corp. (ELN) said in a statement Monday that it can't cite any reason for a recent drop in its stock price, adding that it remains comfortable with consensus estimates for the fourth quarter and year.

A Thomson Financial/First Call survey of analysts produced a consensus earnings estimate of 56 cents a share for the quarter and \$1.92 a share for full-year 2001.

For the 2000 fourth quarter, Elan reported income before its items of \$158.4 million, on revenue of \$424.4 million. For 2000, the company earned \$495.2 million, or \$1.45 a share, on revenue of \$1.52 billion.

The Irish pharmaceutical company said it plans to report 2001 results next Monday.

The stock traded recently at \$34.15, down \$2.70, or 7.3% on heavy Nasdaq volume of 11.6 million shares. Average daily volume is about 2.4 million shares.

34. Elan's reported Class Period earnings, presented above, were false and misleading and failed to disclose that the Company's seemingly strong earnings were a fiction created by improper and misleading accounting practices.

35. As detailed in the January 30, 2002, edition of *The Wall Street Journal*, Elan is a partner in approximately 50 research and development ventures that enable Elan to shift R&D costs off Elan's backs and allow Elan to book revenue well before the venture has even developed a product.

36. *The Wall Street Journal* offered an example. Elan will invest \$20 million in a partner and the joint venture, and the venture immediately pays Elan \$15 million for a medical technology license needed to engage in the development project. Elan then books the \$15 million as revenues, books the \$20 million on its books as an asset, and does not book any type of corresponding expense, namely an R&D charge. Essentially, Elan books

\$15 million in revenues on \$20 million it already had in its accounts, and converts the \$20 million to a \$20 million investment asset.

37. Elan, in a number of situations, leaves the joint venture cash poor following the transfer. It then loans money to the venture which the venture repays to Elan in exchange for Elan doing much, if not all, of the work. This allows Elan to generate interest income on the loan and revenues associated with the contractual relationship to do the research project.

38. *The Wall Street Journal* further reported that:

In one case, a joint venture with a small North Carolina biotech firm designed to find a treatment for ulcerative colitis, Elan booked revenue even though no cash appears to have changed hands when the venture was set up. In another joint venture, with a Canadian biotech firm, the partners hadn't decided what research the venture would pursue before it paid all of its funds to Elan for a license.

39. With respect to Elan's dealings with a company named Incara, Elan appears to have engaged in what is known as "round-trip revenue":

Though Elan doesn't announce the joint ventures' financial results or much else about them, some details can be gleaned from SEC filings by the company or its partners, such as Incara Pharmaceuticals Corp. of Research Triangle Park, North Carolina. According to a securities-purchase agreement filed by Incara with the SEC last January, Elan invested \$2.985 million into the joint venture, bringing the venture's funding to \$15 million.

The SEC filing said Elan would pay Incara the \$16.015 million by wire transfer. But in Incara's subsequent quarterly filings with the SEC, its statements of cash flow don't show a receipt of this cash in financing activities, nor do they show any payment from Incara to the joint venture in investing activities. Yet SEC filings say the joint venture bought a \$15 million technology license from Elan.

Asked why the quarterly filings showed no payments of cash, Elan says in a written response that "cash was transferred by way of a cross receipt," which it calls a "legal mechanism under which amounts owing under different contracts are amalgamated with the resulting amount being settled by wire

transfer.” Elan says it is “not aware of how Incara disclosed the movement in cash.” Incara declines to comment on its accounting for the transaction.

Assuming Elan did pay the \$16 million to Incara, it would still seem that all the money the joint venture used to pay a license fee to Elan had come from Elan itself. Asked if this doesn't amount to what accountants call “round-trip revenue,” Elan's Mr. Lynch rejects the characterization, noting that “we end up owning equity” in the majority partner. Incara says its venture with Elan has started a late-stage clinical trial in ulcerative colitis patients.

40. Further, according to a September 17, 2001, article that appeared in *Forbes*

Magazine:

On Dec. 31, 1999 Elan bought Axogen for \$268 million. A month later it picked up Neuralab for \$76 million. Now those R&D costs are flowing onto Elan's profit and loss statement, but Elan is using other means to bolster revenues and keep some of its research outlays out of the P&L, through “strategic collaborations,” says Teeters.

In these deals Elan joins another drug company in a joint venture, makes a cash investment in the venture, then gets some or all of the cash back in the form of a license or contract fee for Elan technology spread over the agreement. In 1999 Elan invested \$285 million in strategic collaborators and took in \$194 million in licensing fees from these ventures. Last year it put \$378 million into these ventures and booked \$169 million in license fees.

Elan typically takes equity stakes of less than 20% in the companies or joint ventures, so it's not required to consolidate these deals in its own financial statements, Teeters says. Instead, it books the investment as an asset and the license fee as revenue. But are these really arm's-length deals? For instance, Amarin, a British company that makes headache remedies, among other things, agreed to buy \$25 million worth of drug licenses and inventory from Elan in 1999. Later that year Elan took a \$23 million stake in Amarin. Shortly after, Thomas Lynch, who is Elan's executive vice chairman, became “non-executive” chairman of Amarin.

41. *The Wall Street Journal* also detailed Elan's dealing with a Company called

Generex:

One joint venture brought revenue to Elan 12 months before the partners had even mapped out a research program. Formed a year ago, it involved

Generex Biotechnology Corp. of Toronto. Generex's CEO, Anna Gluskin, says the venture paid Elan a \$15 million license fee for drug-delivery technology. Yet the partners didn't know which chemical compound they would develop or even which disease they would target. In an SEC filing at the time, Generex said the "parties intend to select at least one pharmaceutical product for research and development under the joint venture within one year's time."

How could they decide a year in advance that the medical technology was worth \$15 million – all the money the joint venture had? Elan says the price of its licenses is based on what the technology is worth, not on the use of it. Ms. Gluskin says the joint venture – which, like Incara's, is based in Bermuda – could afford to pay that much for a license "based on the potential for coming to market sooner than other" competing drugs. She says the partners estimated that the market for whatever drug was eventually developed would be at least \$500 million a year.

42. Moreover, according to *The Wall Street Journal*, Elan has not been forthcoming with respect to whether it is advantaged by the losses experienced by the joint ventures. Elan admits that all of the ventures operate at a loss. Standard accounting practices require that where a company's stake in a joint venture is below 20% (as Elan's are), it may use "cost accounting" and have to reflect share of the investment's losses on its own profit and loss statements. If, however, a company in the position of Elan, exercises significant influence over the investment, it should use the "equity" method of accounting and record its share of the loss in the joint venture in a line on its (Elan's) P&L statement, thereby reducing earnings.

43. Here, as reported in *Journal*:

In Elan's typical arrangement with joint ventures, it has veto power over research, 50% board representation and a right to raise its 19.9% financial stake to 50%. Yet Elan's P&L statements don't break out any losses from the ventures. The Center for Financial Research & Analysis Inc. in Rockville, Maryland, a firm that analyzes companies' books for big investors, has said in a report that Elan appears to be using cost accounting.

44. In response, however, Elan states:

Elan says it uses the equity method "where appropriate." It adds in a written statement that it "expenses its share of the operating losses of all business ventures regardless of whether the equity method or cost method is used. Such amounts are included, in full, in net interest expense."

45. Nevertheless:

Why in the world would they put this in interest expense? That doesn't make any sense at all," said J. Edward Ketz, an associate professor of accounting at Pennsylvania State University, when told of Elan's statement. "What they are doing is not consistent with either cost-method or equity-method accounting. I don't see how, under U.S. GAAP, that would be." In addition, the interest-expense table in Elan's SEC filings doesn't seem to show such losses.

46. Elan's auditor, defendant KPMG, according to the *Journal* refuses to comment:

Elan's auditor, KPMG, declines to comment, citing client confidentiality. Elan is managed by a former KPMG partner, Donald Geaney, who has been at Elan for 14 years and chief executive since 1995. Mr. Lynch, the executive vice chairman, came over from KPMG in 1993, and Elan's chief financial officer, Shane Cooke, also is a former KPMG partner.

47. The market's response to these revelations in *The Wall Street Journal* was severe. As detailed above, the Company's stock fell nearly 17% and investors have lost millions of dollars.

48. On February 4, 2002, before the markets opened, the Company released results for the 4Q and Fiscal Year 2001. The Company revealed that "in light of current market concerns relating to off-balance sheet arrangements" it was providing information about two "qualified special purpose entities", or QSPEs, which it said were not consolidated in its final results as presented under U.S. accounting principles. It is said that the value of

the investment of the two QSPEs was "insufficient to pay the indebtedness of the entities"

A CSFB analyst, David Maris, was quoted by Reuters "This is an unmitigated disaster – we think when investors get through the details you'll find out shenanigans have accounted for the majority of Elan's earnings." The stock dropped nearly an additional \$14 or 46% by noon on February 4, 2002.

ADDITIONAL SCIENTER

49. As alleged herein, defendants acted with scienter in that defendants, by and through their employee(s), knew or recklessly disregarded that the public documents and statements issued or disseminated in the name of Elan were materially false and misleading; knew or recklessly disregarded that such statements or documents would be issued or disseminated to the investing public; and knowingly and substantially participated or acquiesced in the issuance or dissemination of such statements or documents as primary violations of the federal securities laws.

50. Defendants knew at all relevant times that Elan's accounting methods did not conform with standard procedures and were designed to artificially inflate the Company's reported results. For example, in 1999, the SEC investigated Elan's accounting practices with respect to transactions with third parties. The result of the investigation was that the SEC compelled Elan to restate downward its 1997 earnings by approximately \$.02 per share.

COUNT I

Violation of Section 10(b) of the Exchange Act and Rule 10b-5

51. Plaintiff repeats and realleges each and every allegation contained in the foregoing paragraphs as if fully set forth herein.

52. This Count is asserted against the Defendants and is based upon Section 10(b) of the 1934 Act, 15 U.S.C. § 78j(b), and Rule 10b-5 promulgated thereunder.

53. During the Class Period, the Defendants directly engaged in a common plan, scheme, and unlawful course of conduct, pursuant to which it knowingly or recklessly engaged in acts, transactions, practices, and courses of business which operated as a fraud and deceit upon plaintiff and the other members of the Class, and made various deceptive and untrue statements of material facts and omitted to state material in order to make the statements made, in light of the circumstances under which they were made, not misleading to plaintiff and the other members of the Class. The purpose and effect of said scheme, plan, and unlawful course of conduct was, among other things, to induce plaintiff and the other members of the Class to purchase Elan common stock during the Class Period at artificially inflated prices.

54. During the Class Period, the Defendants, pursuant to said scheme, plan, and unlawful course of conduct, knowingly and recklessly issued, caused to be issued, participated in the issuance of, the preparation and issuance of deceptive and materially false and misleading statements to the investing public as particularized above.

55. As a result of the dissemination of the false and misleading statements set forth above, the market price of Elan common stock was artificially inflated during the

Class Period. In ignorance of the false and misleading nature of the statements described above and the deceptive and manipulative devices and contrivances employed by said Defendants, plaintiff and the other members of the Class relied, to their detriment, on the integrity of the market price of the stock in purchasing Elan common stock. Had plaintiff and the other members of the Class known the truth, they would not have purchased said shares or would not have purchased them at the inflated prices that were paid.

56. Plaintiff and the other members of the Class have suffered substantial damages as a result of the wrongs herein alleged in an amount to be proved at trial.

57. By reason of the foregoing, Defendants directly violated Section 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder in that it: (a) employed devices, schemes, and artifices to defraud; (b) made untrue statements of material facts or omitted to state material facts in order to make the statements made, in light of the circumstances under which they were made, not misleading; or (c) engaged in acts, practices, and a course of business which operated as a fraud and deceit upon plaintiff and the other members of the Class in connection with their purchases of Elan common stock during the Class Period.

COUNT II
For Violation of Section 20(a) of The Exchange Act
(Against the Individual Defendants)

58. Plaintiff repeats and realleges each and every allegation contained above as if fully set forth herein.

59. The Individual Defendants acted as controlling persons of the Company within the meaning of section 20(a) of the Exchange Act as alleged herein. By virtue of their high-level positions, participation in and/or awareness of the Company's operations, and/or intimate knowledge of the Company's expansion plans and implementation thereof, the individual defendants had the power to influence and control and did influence and control, directly or indirectly, the decision-making of the Company, including the content and dissemination of the various statements that plaintiff contends are false and misleading. The Individual Defendants was provided with or had unlimited access to copies of the Company's reports, press releases, public filings and other statements alleged by plaintiff to be misleading prior to and/or shortly after these statements were issued and had the ability to prevent the issuance of the statements or cause the statements to be corrected.

60. In particular, the Individual Defendant had direct and supervisory involvement in the day-to-day operations of the Company and, therefore, is presumed to have had the power to control or influence the particular transactions giving rise to the securities violations as alleged herein, and exercised the same.

61. By virtue of his position as a controlling person, the Individual Defendants are liable pursuant to section 20(a) of the Exchange Act. As a direct and proximate result of the wrongful conduct, plaintiff and other members of the Class suffered damages in connection with their purchases of the Company's securities during the Class Period.

WHEREFORE, plaintiff, on his own behalf and on behalf of the Class, prays for judgment as follows:

- A. Declaring this action to be a proper class action and certifying plaintiff as class representative under Rule 23 of the Federal Rules of Civil Procedure;
- B. Awarding compensatory damages in favor of plaintiff and the other members of the Class against the Defendants for the damages sustained as a result of the wrongdoings of the Defendants, together with interest thereon;
- C. Awarding plaintiff the fees and expenses incurred in this action, including reasonable allowance of fees for plaintiff's attorneys, and experts;
- D. Granting extraordinary equitable and/or injunctive relief as permitted by law, equity and federal and state statutory provisions sued on hereunder, including attaching, impounding, imposing a constructive trust upon or otherwise restricting the proceeds of Defendants' trading activities or their other assets so as to assure that plaintiff has an effective remedy; and
- E. Granting such other and further relief as the Court may deem just and proper.

PLAINTIFF DEMANDS A TRIAL BY JURY

Dated: February 4, 2002

**WOLF HALDENSTEIN ADLER
FREEMAN & HERZ LLP**

By: 

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