



from the Class are Defendants, all partners, officers and/or directors of any of Defendants or their subsidiaries, members of Defendants' immediate families, any entity in which any Defendant has a controlling interest, and the legal representatives, heirs, successors or assigns of any such excluded person (the "Class").

### **Jurisdiction and Venue**

2. This Court has jurisdiction over this action pursuant to Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. §78aa (the "Exchange Act") and 28 U.S.C. §§ 1331 and 1337. The claims asserted in the Complaint arise under and pursuant to Sections 10(b) and 20 of the Exchange Act (15 U.S.C. §§78j(b), 78t) and Rule 10b-5 (17 C.F.R. §240.10b-5) promulgated by the SEC. Pursuant to the "effects test" of extraterritorial jurisdiction, this Court has subject matter jurisdiction over the claims of: (a) all investors who purchased or acquired Biovail securities traded on U.S. markets and (b) all investors based in the United States who purchased or acquired Biovail securities regardless of where those securities traded. Pursuant to the "conduct test," this Court also has subject matter jurisdiction over the claims of foreign class members who purchased or acquired Biovail securities traded on the Toronto Stock Exchange. There was, and still is, but a single market for Biovail securities, which traded in tandem on the New York Stock Exchange and the Toronto Stock Exchange. That market was defrauded by defendants' conduct, causing extensive effects both in this country and abroad.

3. Venue is proper in this District pursuant to Section 27 of the Exchange Act and 28 U.S.C. § 1391(b) because a substantial part of the events or omissions giving rise to the claims complained of herein occurred in this District.

4. In connection with the wrongs alleged herein, Defendants used the instrumentalities of interstate commerce, including the United States mails, interstate wire and telephone facilities, and the facilities of the national securities markets. Defendants' false and misleading statements all were disseminated within the United States through the means and instrumentalities of interstate commerce, including, but not limited to, the mails, interstate telephone communications and the facilities of a national securities exchange. Biovail regularly filed false and misleading reports and financial statements with the SEC in the United States, including Form 20-F annual reports and Form 6-K quarterly reports, and issued press releases concerning its business, operations and financial results.

#### **The Parties**

5. Plaintiff purchased Biovail common shares during the Class Period, as set forth in the Certification of Named Plaintiff attached hereto.

6. At all times relevant to this action, Defendant Biovail was a corporation organized under the laws of the province of Ontario, Canada. The Company's principal executive offices are located at 7150 Mississauga Road, Mississauga, Ontario, Canada, and the Company's agent for service in the United States is CT Corporation System, 111 Eighth Avenue, New York, New York 10219. .

7. At all times relevant to this Complaint, Defendant Eugene N. Melnyk ("Melnyk") was employed by Biovail as its Chief Executive Officer, was a member of Biovail's Board of Directors and served as the Chairman of Biovail's Board of Directors.

8. At all times relevant to this Complaint, Defendant Brian H. Crombie ("Crombie") was employed by Biovail as its Senior Vice President and Chief Financial Officer.

9. Defendants Melnyk and Crombie are sometimes hereinafter collectively referred to as the "Individual Defendants."

10. As a result of the Individual Defendants' positions with the Company, they possessed the adverse undisclosed information more particularly described herein from internal corporate documents, communications with other corporate officers and employees, attendance at management and Board of Directors meetings and committees thereof and reports and other information provided to them in connection therewith.

11. It is appropriate to treat the Individual Defendants as a group for pleading purposes and to presume that the information conveyed in the Company's public filings, press releases and other publications as alleged herein are the collective actions of this narrowly defined group of defendants. Throughout the Class Period, each of the Individual Defendants participated in the conference calls with stock market analysts that took place immediately after the issuance of the Company's press releases announcing the Company's financial results. Each of the above officers and directors of the Company, by virtue of his high-level position with the Company, was directly involved in the day-to-day operations of the Company at the highest levels and was privy to confidential proprietary information concerning the Company and its business, operations, and financial condition and performance, as alleged herein. The Individual Defendants were involved in drafting, producing, reviewing, and/or disseminating the false and misleading statements and information alleged herein, were aware or recklessly disregarded that the false and misleading statements were being issued by the Company and approved or ratified these statements, in violation of the federal securities laws. As officers and directors and controlling persons of a publicly-held company whose securities were, and are, registered with the SEC pursuant to the Exchange Act, traded on the New York Stock Exchange, and governed by the provisions of the federal securities laws, the Individual Defendants each had a duty to disseminate promptly accurate and truthful information with respect to the Company's business, operations and financial condition and performance and to correct any previously issued statements that had become materially misleading

or untrue, so that the market price of the Company's publicly-traded securities would be based upon truthful and accurate information. The Individual Defendants' misrepresentations and omissions during the Class Period violated these specific requirements and obligations. The Individual Defendants participated in the drafting, preparation, and approval of the various public and shareholder and investor reports and other communications complained of herein and were aware of or recklessly disregarded the misstatements contained therein and omissions therefrom, and were aware of their materially false and misleading nature. Due to their positions of control and authority as officers and/or directors of the Company, the Individual Defendants were able to control and did control the Company and the content of the various SEC filings, press releases and other public statements pertaining to the Company during the Class Period. Accordingly, each of the Individual Defendants is responsible for the accuracy of the public reports and releases detailed herein and is therefore liable for the representations contained therein.

12. Each of the Individual Defendants is liable as a participant in the fraudulent scheme and course of business that operated as a fraud or deceit on purchasers of the Company's securities, by disseminating materially false and misleading statements and/or concealing material adverse facts. The scheme deceived the investing public regarding the Company's business and financial results, and caused Plaintiff and other members of the Class to purchase Biovail securities at artificially inflated prices.

### **Fraud on the Market and the Presumption of Reliance**

13. Plaintiff and the members of the Class are entitled to the presumption of reliance established by the fraud-on-the-market doctrine. At all times relevant to this Complaint, the markets

for Biovail's publicly traded securities were efficient markets for the following reasons, among others:

a. Biovail's securities met the requirements for listing and were traded on the New York Stock Exchange and the Toronto Stock Exchange, highly efficient and automated markets;

b. As a regulated issuer, Biovail filed periodic public reports with the SEC;

c. Biovail was followed by numerous securities analysts employed by major brokerage firms, which wrote reports that were distributed to their sales forces and certain customers of their respective brokerage firms. Each of these reports was publicly available and entered the public marketplace;

d. Biovail regularly issued press releases, which were carried by national and international news wires. Each of these releases was publicly available and entered into the public marketplace;

e. The market for Biovail securities digested current information regarding the Company from the publicly available sources described above and the market price of Biovail securities reflected the effect of such information.

14. Under these circumstances, all purchasers of the Company's securities during the Class Period suffered similar injury through their purchase of common shares at artificially inflated prices and a presumption of reliance applies. Plaintiff and the Class relied upon the representations by Defendants or upon the integrity of the market system in setting the price of the securities based upon the misrepresentations made by Defendants.

### **Class Action Allegations**

15. Plaintiff brings this action on their own behalf and as a class action, pursuant to Rule 23(a) and Rule 23(b)(3) of the Federal Rules of Civil Procedure, on behalf of a class (the “Class”) of all persons who purchased the publicly traded common shares of Biovail from February 7, 2003 through and including October 30, 2003 (the “Class Period”), and who suffered damages as a result of the violations of the federal securities laws alleged herein..

16. The members of the Class are so numerous that joinder of all members of the Class is impractical. While the exact number of Class Members is unknown to the Plaintiff at this time and can only be ascertained through appropriate discovery, Plaintiff reasonably believes that there are hundreds, if not thousands, of members of the Class located throughout the United States. As of December 31, 2002, approximately 158,120,144 Biovail common shares were issued and outstanding.

17. Plaintiff’s claims are typical of the claims of the other members of the Class because the damages suffered by Plaintiff and all Class Members arise from and were caused by the same or similar misrepresentations and omissions made by or chargeable to Defendants as alleged herein. Plaintiff does not have interests antagonistic to, or in conflict with, the Class.

18. Common questions of law and fact exist as to all members of the Class and predominate over any questions affecting solely individual members of the Class. Among the questions of law and fact common to the Class are:

- a. whether the federal securities laws were violated by Defendants’ acts as alleged herein;
- b. whether Defendants misrepresented and/or failed to disclose material facts in the Company’s press releases, annual reports, quarterly reports, and conference calls, as more particularly described below;

c. whether the market price of the Company's securities were artificially inflated during the Class Period due to the material misrepresentations and/or nondisclosures complained of herein; and

d. whether the members of the Class have sustained damages, and, if so, the proper measure of such damages.

19. Plaintiff will fairly and adequately protect the interests of the other members of the Class, and Plaintiff has retained counsel competent and experienced in class and securities litigation to further ensure such protection and intend to prosecute this action vigorously.

20. A class action is superior to other available methods for the fair and efficient adjudication of this controversy. The Class is so numerous and geographically dispersed that it would be impracticable for each member of the Class to bring a separate action or to be joined in an individual action. The individual damages of any member of the Class may be relatively small when measured against the potential costs of bringing this action, and thus make the expense and burden of this litigation unjustifiable for individual actions. In this class action, the Court can determine the rights of all members of the Class with judicial economy.

21. There will be no difficulty in the management of this litigation which would preclude its maintenance as a class action. The names and addresses of the record owners of the securities purchased during the Class Period are available from the Company's transfer agent. Notice can be provided to such record owners and all Class Members by a combination of published notice and first-class mail, using techniques and a form of notice similar to those customarily used in class actions arising under the federal securities laws.

### **Factual Background**

22. Biovail is a pharmaceutical company that is engaged in the formulation of pharmaceutical products utilizing advanced oral drug delivery techniques, clinical testing,

registration, manufacturing, sale and promotion of pharmaceutical products targeting the cardiovascular, central nervous system, pain management and niche therapeutic areas.

23. In a press release dated December 11, 2002, the Company announced that it had acquired Pharma PASS LLC, an Irvine, California company, and Pharma PASS SA, a company based in France (collectively, “Pharma PASS Purchase”). In the December 11, 2002 press release, the Company stated that, as part of the Pharma PASS Purchase, Biovail was acquiring “an immediate, material economic interest in . . . a recently launched generic version of Prilosec (omeprazole). . . . Pharma PASS, the inventor and developer of this product, developed the only generic version of Prilosec found not to infringe the original product’s patent.”

#### **Defendants’ Material Misrepresentations During The Class Period**

24. On February 7, 2003, Defendants issued a press release entitled, “Biovail Corporation Provides 2003 Guidance.” In the February 7, 2003 press release, Defendants stated that total revenue for 2003 (including royalty and co-promote revenue) was expected to grow approximately 30%, and that fully diluted earnings per share were “expected to increase by 30% or more in 2003 versus 2002 and be in the range of \$2.25 and \$2.35.” The February 7, 2003 press release was issued by Defendants prior to the opening of the securities markets.

25. On March 4, 2003, Defendants issued a press release announcing Biovail’s financial results for the fourth quarter ended December 31, 2002. In the press release, Defendants reported total revenues for the fourth quarter of \$238.7 million (a 34% increase from the revenues reported for the fourth quarter of 2001), fourth quarter diluted earnings per share (excluding certain extraordinary items) of \$.60 per share, and represented that “[t]hese favorable results are primarily driven by,” *inter alia*, the Company’s “participating interest in the gross profit of sales of a generic version of Prilosec.” In the press release, Defendants further reported that the Company’s reported results included co-promotion, royalty and license revenue of \$45.6 million for the fourth quarter

(reflecting an \$29.4 million increase from the fourth quarter of 2001), and further represented that the increase was primarily “due to the Company’s interest in the gross profit of the sales of a generic version of Prilosec during the fourth quarter of 2002.” In commenting on these financial results, Defendant Melnyk was quoted as stating that “Biovail continues to achieve earnings growth in excess of \$30%.”

26. On April 29, 2003, Defendants issued a press release announcing Biovail’s financial results for the first quarter ended March 31, 2003. In the press release, Defendants reported total revenues for the first quarter of \$ 191.4 million (a 23% increase from the revenues reported for the first quarter of 2002), first quarter net income of \$ \$63.0 million (an increase of 19% from the net income reported for the first quarter of 2002), and first quarter diluted earnings per share of \$.39 (an increase of 22% from the \$.32 per share for the first quarter of 2002). In the press release, Defendants attributed the Company’s increased revenues to “the Company’s interest in the gross profit on the sales of a generic version of Prilosec acquired in the 2002 fourth quarter,” and reported that the Company’s first quarter co-promotion, royalty and licensing revenue was \$61,876,000. Defendant Melnyk further represented in the press release that the Company’s first quarter performance provided the Company with “confidence that we will meet or exceed our objective of 30% earnings per share growth for 2003.”

27. On or about May 21, 2003, Biovail filed its annual report for the year ended December 31, 2002 with the SEC on Form 20-F. In the 20-F, Defendants stated, *inter alia*:

a. “In December 2002, we acquired two of a group of PharmaPASS companies for approximately \$178 million. . . . Through this agreement, we acquired . . . . an economic interest in two currently marketed products, omeprazole (Prilosec) for the treatment of depression, and Tricor.”

b. “Royalty revenue is recognized in accordance with the contractual agreements

and when the Company has no future obligations pursuant to the royalty fee,” and “[r]oyalties primarily arise on sales of the products we developed or acquired and from our interests in certain licensed products of Pharma PASS.”

c. “Royalty revenue increased in 2002 compared to 2001 due to the contribution from our interest in the gross profit on sales of a bioequivalent version of Prilosec. . . . We expect the level of co-promotion, royalty and licensing revenue in 2003 to be higher than 2002 due to the contribution from our interest in the gross profit on sales of a bioequivalent version of Prilosec;”

d. “Royalty revenue increased in the first quarter of 2003 compared to the first quarter of 2002 due to the contribution from our interest in the gross profit on sales by a third party of a bioequivalent version of Prilosec;”

28. On or about May 30, 2003, Biovail filed its report for the first quarter ended March 31, 2003 on Form 6-K with the SEC, which repeated the Company’s revenue, royalty revenue, net income, and earnings per share financial results contained in the Company’s April 29, 2003 press release.

29. On July 29, 2003, Defendants issued a press release announcing Biovail’s financial results for the second quarter ended June 30, 2003. In the press release, Defendants reported total revenues for the second quarter of \$217.3 million (a 17% increase from the revenues reported for the second quarter of 2002), second quarter net income \$83 million (a 33% increase from the net income reported for the second quarter of 2002), and second quarter diluted earnings of \$.52 per share (a 33% increase from the second quarter of 2002). Defendants further represented in the press release that co-promotion, royalty and licensing revenue increased over 150% to \$55.9 million for the second quarter, and that “[t]he increase in this revenue line item is due to Biovail’s on-going economic interest in the sales of a generic version of Prilosec.”

30. Following the issuance of the press release, Defendants conducted a conference call on July 29, 2003 with stock market analysts and investors. During the July 29, 2003 conference call, Defendants also repeated and reiterated the total revenue and earnings per share estimates for 2003 that were originally made on February 7, 2003, and reconfirmed on April 29, 2003. Defendants further represented during the conference call that Biovail was upwardly revising its previously issued royalty and co-promotion revenue financial guidance by \$20 million due to the fact that “our economic interest and the gross profits associated with the sales of the generic version of Prilosec continue to exceed our expectations.”

31. On or about August 29, 2003, Biovail filed its report for the second quarter ended June 30, 2003 on Form 6-K with the SEC, which (i) repeated the Company’s revenue, net income, and earnings per share financial results contained in the Company’s July 29, 2003 press release, (ii) represented that “[r]oyalty revenue increased in the second quarter of 2002 compared to the corresponding periods of 2003 due to the added contribution from our participating interest in the gross profit on sales by a third party of a bioequivalent version of Prilosec (omeprazole),” and (iii) stated that “third party sales of omeprazole are exceeding our previous expectations. As a result, for the balance of 2003 we anticipate that our co-promotion, royalty and licensing revenue will be approximately \$20 million above our previous expectations.”

32. On October 3, 2003, Defendants made a partial, but still materially incomplete, disclosure by issuing a press release entitled, “Biovail Provides Guidance on 2003 Third Quarter Results.” In the press release, Defendants announced that Biovail would not meet the revenue and earnings estimates that had been previously issued by Defendants, and disclosed for the first time that – contrary to Defendants’ representations during the Class Period – the distributor of the generic version of Prilosec had the contractual right to impose price reductions on a retroactive basis, and was a primary factor that had caused the Company to be unable to meet the revenue and earnings

estimates:

Biovail has an economic interest in the gross profits derived from the sales of a generic version of omeprazole. The distributor of this generic version of omeprazole product has announced that it will provide significant price reductions on a retroactive basis to wholesalers. . . . Biovail's second half 2003 financial guidance assumed that additional competition for generic omeprazole would seriously erode the financial benefit to the Company's interest in the gross profits of this product. However, since Biovail shares in a percentage of the gross profit of this product, significant credits issued by the distributor during the third quarter 2003 could have a negative effect on Biovail's participating interest of up to \$15 million in net income. As well, it can be anticipated that there could be a fourth quarter 2003 negative income impact of up to \$15 to \$20 million."

33. On October 3, 2003, following the issuance of the October 3, 2003 press release, Defendants conducted a conference call with stock market analysts and investors, in which Defendants further reported that the third quarter 2003 impact of the lost royalty revenue in connection with the retroactive price reductions was approximately \$20 million, which would reduce net income by \$7 million (or between \$.04 to \$.05 of earnings per share).

34. On October 30, 2003, the Company issued a press release entitled, "Biovail Reports Third Quarter 2003 Financial Results." In the press release, Defendants reported co-promotion, royalty and licensing revenue of \$30.8 million for the third quarter 2003, and stated that:

The Company has an economic interest in the Gross Margin of a generic version of Prilosec that is distributed under license in the U.S. In the third quarter, additional generic competition entered the market. Due to the additional competition, the licensee offered rebates to wholesalers. These rebates have the effect of reducing Gross Margin and had a negative impact to Biovail's third quarter 2003 relative to Biovail's prior expectations. Biovail does not know if further rebates will be offered or if the licensee has processed all rebates.

35. Following the issuance of the October 30, 2003 press release, the price of Biovail common shares closed at prices significantly less than the closing price on October 29, 2003.

36. Defendants' representations during the Class Period referred to in paragraphs 24 – 33 were materially false and misleading for at least the following reasons:

a.. Defendants failed to disclose the fact that the royalty agreement concerning

sales of the generic version of Prilosec was contingent in nature, in violation of ARB No. 50 and FASB Statement No. 5;

b. Defendants falsely represented that the Company's royalty revenue was recognized only "when the Company has no future obligations pursuant to the royalty fee," because the royalty agreement concerning sales of the generic version of Prilosec was contingent in nature;

c. Biovail's reported revenue improperly included a material amount of contingent royalty revenue in violation of ARB No. 50 (which states that "contingencies that might result in gains usually are not reflected in the accounts since to do so might be to recognize revenue prior to its realization");

d. Defendants' representation in the August 29, 2003 6-K that "[t]hird party sales of omeprazole are exceeding are previous expectations [and that] [a]s a result, fo rthe balance of 2003 we anticipate that our co-promotion, royalty and licensing revenue will be approximately \$20 million above our previous expectations," was false and misleading because, as Defendants admitted (i) significant price reductions were made during August 2003 as a result of significant competition for the generic version of omeprazole and (ii) Defendants expected the significant competition for the generic version of omeprazole (that caused the retroactive price reductions) to begin approximately two months earlier than August 2003.

37. In addition to the facts alleged above, the following facts strongly infer that Defendants' misrepresentations described above were made knowingly or recklessly:

a. Throughout the Class Period, Defendants knew that the terms of the agreement with the distributor of the generic version of Prilosec provided the distributor with the contractual right to impose price reductions on a retroactive basis, and accordingly, knew

that revenue recognized attributable to generic version of Prilosec was in violation of the Company's stated revenue recognition policy;

b. On August 6, 2003, Defendant Melnyk sold 100,000 shares of Biovail at prices ranging between C\$ 52.30 and C\$ 53.0, and, on August 7, 2003, Defendant Melnyk sold 150,000 shares of Biovail at prices ranging between C\$ 52.50 and C\$ 53.40.

c. During the Defendants' October 3, 2003 conference call with securities analysts, Defendants admitted that during the second quarter of 2003 (i.e., before July 29, 2003) they had expected Biovail's royalties attributable to generic version of Prilosec "to decline precipitously" beginning in the third and fourth quarter of 2003 due to their expectation of increased generic competition and because of the approval of a similar over-the-counter drug.

## **CLAIMS FOR RELIEF**

### **First Claim For Relief (Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 Promulgated Thereunder)**

38. Plaintiff incorporates by reference all preceding paragraphs as if set forth fully herein.

39. In connection with the purchase or sale of Biovail common shares, each of the Defendants knowingly or recklessly used and employed devices, schemes or artifices to defraud, made untrue statements of material fact or omitted to state facts necessary to make the statements made, in the light of the circumstances under which they were made, not misleading, or engaged in acts, practices or a course of business which operated as a fraud or deceit upon the Plaintiff, all as further set forth herein, in violation of Section 10 (b) of the Securities Exchange Act of 1934 (15

U.S.C. §78j(b)) and Rule 10b-5 promulgated thereunder by the SEC (17 C.F.R. §240.10b-5).

**Second Claim For Relief**  
**(Section 20 of the Securities Exchange Act of 1934)**

40. In addition to the liability of the Individual Defendants as set forth above, by reason of their positions as senior management and as directors, the Individual Defendants had the power to control, and did control, Biovail, and the Individual Defendants are therefore liable jointly and severally for the violations by Biovail of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78j, pursuant to Section 20 of the Exchange Act, 15 U.S.C. §78t.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiff herein demands judgment:

A. Declaring this action to be a proper class action maintainable pursuant to Rule 23 of the Federal Rules Of Civil Procedure and declaring Plaintiff to be a proper Class representative;

B. Awarding damages against each Defendant, jointly and severally, and in favor of Plaintiff and all other members of the Class, in an amount determined to have been sustained by them, awarding rescission and/or money damages as appropriate, plus pre-judgment interest;

C. Awarding equitable and/or injunctive relief as permitted by law, equity and federal statutory provisions, including but not limited to, attaching, impounding, imposing a constructive trust upon or otherwise restricting Defendants' assets so as to assure that Plaintiff and the Class have an effective remedy;

D. Awarding Plaintiff and the Class the costs and other disbursements of this suit, including, without limitation, reasonable fees for attorneys, accountants and experts; and

E. Granting Plaintiff and the Class such other and further relief as the Court may deem just and proper.

**JURY DEMAND**

Plaintiff demands a trial by jury.

Dated: November 13, 2003

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