

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEW SEARCHLAND**

ANDREW MELLON, On Behalf of Himself	)	Civ. No.
and All Others Similarly Situated,	)	
	)	<u>CLASS ACTION</u>
Plaintiff,	)	
	)	COMPLAINT FOR VIOLATION OF
vs.	)	THE FEDERAL SECURITIES LAWS
	)	
ECHINODERM CIGARETTES, INC., and JIM	)	
JONES,	)	<u>DEMAND FOR JURY TRIAL</u>
	)	
Defendants.	)	
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Plaintiff, Andrew Mellon, individually and on behalf of all other persons and entities similarly situated, by his undersigned attorneys, for his complaint against the above-captioned defendants, alleges upon personal knowledge as to himself and his own acts, and upon information and belief as to all other matters, based upon, *inter alia*, the investigation made by and through his attorneys, which investigation included, among other things, a review of the public documents, Federal Securities Commission (“FSC”) filings, analyst reports, news releases and media reports concerning Echinoderm Cigarettes, Inc. (“Echinoderm” or the “Company”), as follows:

**NATURE OF THE ACTION**

1. This is a federal securities class action on behalf of all persons and entities, other than defendants, who purchased or otherwise acquired the securities of Echinoderm between January 1, 1992 and September 1, 2002, inclusive, seeking to pursue remedies under the Securities Exchange Act of 1934 (the “Exchange Act”).

## **JURISDICTION AND VENUE**

2. The claims alleged herein arise under Sections 10(b) and 20(a) of the Exchange Act, 15 U.S.C. §§ 78j(b) and 78t, and Rule 10b-5, 17C.F.R. § 240.10b-5 promulgated thereunder.

3. The jurisdiction of this Court is based on Section 27 of the Exchange Act, 15 U.S.C. § 78aa and 28 U.S.C. § 1331 (federal question jurisdiction).

4. Venue is proper in this judicial district pursuant to Section 27 of the Exchange Act. Many of the acts and transactions giving rise to the violations of law complained of herein, including the preparation and dissemination to the investing public of materially false and misleading information, occurred in this judicial district. The Company is incorporated and maintains its principal place of business in New Searchland.

5. In connection with the acts, conduct and other wrongs alleged in this complaint, defendants, directly or indirectly, used the means and instrumentalities of interstate commerce, including but not limited to, the United States mails, interstate telephone communications and the facilities of the national securities exchange.

## **PARTIES**

6. Plaintiff, Andrew Mellon, purchased Echinoderm common stock during the Class Period, as set forth in the certification attached hereto and incorporated herein by reference, and was damaged thereby. Plaintiff is a citizen of New Searchland.

7. Defendant Echinoderm is a New Searchland corporation and maintains its principal executive offices in New Searchland. Echinoderm is a major manufacturer of tobacco products, including cigarettes.

8. Defendant Jim Jones (“Jones”) was Senior Vice President and Chief Financial Officer of the Company at all relevant times. Jones participated in making the false and misleading statements referred to herein.

9. During the Class Period, Defendant Jones was privy to non-public information concerning the Company’s finances, markets and present and future business prospects via access to internal corporate documents, conversations and connections with other corporate officers and employees, and information provided to him in connection therewith. Because of his possession of such information, Defendant Jones knew or recklessly disregarded the fact that adverse facts specified herein had not been disclosed to, and were being concealed from, the investing public. Defendant Jones, by virtue of his high-level position with the Company, directly participated in the management of 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, growth, financial statements, and financial condition, as alleged herein. Defendant Jones was involved in drafting, producing, reviewing and disseminating the false and misleading statements and information alleged herein. Defendant Jones was aware, or recklessly disregarded, that the statements made concerning the Company during the Class Period were false and misleading, in violation of the federal securities laws.

10. As an officer and controlling person of a publicly held Company whose securities were and are registered with the FSC pursuant to the Exchange Act, and are traded on the New Searchland Stock Exchange (“NSSE”) and governed by the provisions of the federal securities laws, Defendant Jones had a duty to disseminate accurate and truthful information promptly with respect to the Company’s financial condition and performance, growth, operations, financial

statements, business, markets, management, earnings and present and future business prospects, 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. Defendant Jones's misrepresentations and omissions during the Class Period violated these specific requirements and obligations.

11. Both of the defendants are liable as participants in a fraudulent scheme and course of business that operated as a fraud or deceit on purchasers of Echinoderm securities by disseminating materially false and misleading statements and/or concealing material adverse facts. The scheme (i) deceived the investing public regarding Echinoderm's business, operations, management and the intrinsic value of Echinoderm securities; and (ii) caused Plaintiff and other members of the Class to purchase Echinoderm securities at artificially inflated prices.

### **SUBSTANTIVE ALLEGATIONS**

12. On January 1, 2002, Echinoderm announced record results for the prior year, primarily attributed to strong demand growth in overseas markets, particularly China, for its products. The announcement also touted the fact that Echinoderm was unique among U.S. tobacco companies in that it had seen no decline in domestic sales during the prior three years.

13. Unbeknownst to shareholders at the time of the January 1, 2002 announcement, defendants had failed to disclose the following facts which they knew at the time, or should have known:

a. The Company's success in overseas markets resulted in large part from bribes paid to foreign government officials to gain access to their respective markets;

b. The Company knew that this conduct was in violation of the Foreign Corrupt Practices Act and therefore was likely to result in enormous fines and penalties;

c. The Company intentionally misrepresented that its success in overseas markets was due to superior marketing.

d. Domestic demand for the Company's products was dependent on pervasive and ubiquitous advertising, including outdoor, transit, point of sale and counter top displays of the Company's products, in key markets. Such advertising violated the marketing and advertising restrictions to which the Company was subject as a party to the Attorneys General Master Settlement Agreement ("MSA").

e. The Company knew that it could be ordered at any time to cease and desist from advertising practices that were not in compliance with the MSA and that the inability to continue such practices would likely have a material impact on domestic demand for its products.

### **THE TRUTH REVEALED**

14. On June 17, 2002, the Company announced that it was the subject of a U.S. Department of Justice ("DOJ") investigation concerning bribes paid by tobacco companies to foreign governmental officials and of a related inquiry by the FSC concerning Echinoderm's financial statements for the years 1992 through 2000. The Company denied that it had engaged in any wrongful activity or that its financial statements were in any way false and misleading.

15. On August 1, 2002, the Wall Street Journal ("WSJ") published an article detailing tobacco industry advertising practices. The article specifically described Echinoderm's pervasive advertising campaigns and noted that aspects of these campaigns likely violated restrictions included in the MSA.

16. On September 1, 2002, Echinoderm announced that Defendant Jones had been indicted by the DOJ for violations of the Foreign Corrupt Practices Act, and that the FSC inquiry had been upgraded to a formal investigation. The Company also revealed that, on August 2, the Company had been notified by the Attorneys General of the states in which it was conducting the advertising campaigns described in the August 1, WSJ article that they believed that many of the practices described were in violation of the MSA. The Company revealed that the Attorneys General had threatened to sue for specific performance if the Company did not amend its practices to comply with the MSA within thirty days. In order to comply, the Company had been forced to cease several of its most effective marketing campaigns.

17. This news shocked the market. Echinoderm's stock price suffered a one-day drop of \$11.94, from \$43.14 to \$31.20, to hit a two-year low, on exceptionally heavy trading volume.

18. As a result of defendants' false and misleading statements on January 1, 2002, and June 17, 2002, the financial results of Echinoderm were artificially and materially inflated during the Class Period. Defendants' illegal activities had the intended effect of boosting Echinoderm's financial results and maintaining Echinoderm stock at artificially inflated levels during the Class Period. As the truth was revealed, the artificial inflation came out of Echinoderm's stock price and the stock price plummeted precipitously. As a result of their purchases of Echinoderm securities during the Class Period, plaintiff and other members of the Class suffered damages.

### **PLAINTIFF'S CLASS ACTION ALLEGATIONS**

19. Plaintiff brings this action as a class action pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(3) on behalf of himself and all persons and entities other than defendants who purchased or otherwise acquired the securities of Echinoderm between January

1, 1992, and September 1, 2002, inclusive (the “Class”). Excluded from the Class are defendants herein, members of the immediate family of each of the defendants, any person, firm, trust, corporation, officer, director or other individual or entity in which any defendant has a controlling interest or which is related to or affiliated with any of the defendants, and the legal representatives, agents, affiliates, heirs, successors-in-interest or assigns of any such excluded party.

20. The members of the Class are so numerous that joinder of all members is impracticable. As of September 1, 2002, Echinoderm had more than 300 million shares outstanding. The precise number of Class members is unknown to plaintiff at this time but is believed to be in the thousands. In addition, the names and addresses of the Class members can be ascertained from the books and records of Echinoderm. Notice can be provided to such record owners 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.

21. The members of the Class are located in geographically diverse areas and are so numerous that joinder of all members 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 believes there are, at a minimum, thousands of members of the Class.

22. 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 defendants engaged in acts or conduct in violation of the securities laws as alleged herein;

- (b) Whether defendants had a duty to disclose certain information;
- (c) Whether defendants knowingly or recklessly made materially false and misleading statements or failed to correct such statements upon learning that they were materially false and misleading during the Class Period;
- (d) Whether the market price of the Company's securities during the Class Period was artificially inflated because of defendants' conduct complained of herein; and
- (e) Whether members of the Class have sustained damages and, if so, the proper measure of damages.

23. Plaintiff's claims are typical of the claims of the members of the Class because plaintiff and members of the Class sustained damages arising out of defendants' wrongful conduct in violation of federal law as complained of herein.

24. Plaintiff will fairly and adequately protect the interests of the members of the Class and has retained counsel competent and experienced in class and securities litigation. Plaintiff has no interests antagonistic to or in conflict with those of the Class.

25. A class action is superior to other available methods for the fair and efficient adjudication of this controversy since joinder of all members of the Class is impractical. Furthermore, because the damages suffered by individual Class members may be relatively small, the expense and burden of individual litigation make it impossible for the Class members individually to redress the wrongs done to them. There will be no difficulty in the management of this action as a class action.

#### **Fraud on the Market Presumption**

26. Plaintiff will rely, in part, upon the presumption of reliance established by the fraud-on-the-market doctrine in that:



- (a) Defendants made public misrepresentations or failed to disclose material facts regarding Echinoderm's financial situation during the Class Period;
- (b) the omissions and misrepresentations were material;
- (c) the securities of the Company were actively traded at all relevant times on the NSSE, an efficient and open market;
- (d) the misrepresentations and omissions alleged would tend to induce a reasonable investor to misjudge the value of the Company's securities; and
- (e) Plaintiff and the members of the Class, without knowledge of the misrepresented facts, purchased their Echinoderm securities between the time defendants failed to disclose and/or misrepresented material facts and the time the truth was disclosed.

27. Echinoderm trades on the NSSE. The price of Echinoderm's stock reflects the effect of news disseminated in the market.

28. Based upon the foregoing, plaintiff and the members of the Class are entitled to a presumption of reliance upon the integrity of the market

**The Safe Harbor Provision is Inapplicable**

29. The statutory safe harbor provided for forward-looking statements under certain circumstances does not apply to any of the allegedly false statements pleaded in this complaint. The statements alleged to be false and misleading herein all relate to then-existing facts and conditions. In addition, to the extent certain of the statements alleged to be false may be characterized as forward-looking, they were not adequately identified as "forward-looking statements" when made, and there were no meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the purportedly forward-looking statements. Alternatively, to the extent that the statutory safe harbor is intended to apply to any forward-looking statements pleaded herein, defendants are liable for those false

forward-looking statements because at the time each of those forward-looking statements was made, the defendants had actual knowledge that the particular forward-looking statement was materially false or misleading.

### **FIRST CLAIM FOR RELIEF**

#### **For Violations of Sections 10(b) and Rule 10b-5 Thereunder**

30. Plaintiff incorporates by reference and realleges each of the foregoing paragraphs.

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

32. During the Class Period, defendants carried out a plan, scheme and course of conduct which was intended to and, throughout the Class Period, did: (i) deceive the investing public, including Plaintiff and other Class members, as alleged herein; and (ii) cause Plaintiff and other members of the Class to purchase Echinoderm securities at artificially inflated prices. In furtherance of this unlawful scheme, plan and course of conduct, defendants, and each of them, took the actions set forth herein.

33. Defendants (a) employed devices, schemes, and artifices to defraud; (b) made untrue statements of material fact and/or omitted to state material facts necessary to make the statements not misleading; and (c) engaged in acts, practices, and a course of business which operated as a fraud and deceit upon the purchasers of the Company's securities in an effort to maintain artificially high market prices for Echinoderm securities in violation of Section 10(b) of the Exchange Act and Rule 10b-5. Defendants are sued either as primary participants in the wrongful and illegal conduct charged herein or as controlling persons as alleged below.

34. Defendants directly and indirectly, by the use, means or instrumentalities of interstate commerce and/or of the mails, engaged and participated in a course of conduct to

conceal adverse material information about the business, operations and future prospects of Echinoderm as specified herein.

35. Defendants employed devices, schemes, and artifices to defraud, while in possession of material adverse non-public information and engaged in acts, practices, and a course of conduct as alleged herein in an effort to assure investors of Echinoderm's value and performance and continued substantial growth, which included the making of, or the participation in the making of, untrue statements of material facts and omitting to state material facts necessary in order to make the statements made about Echinoderm and its business operations and future prospects in the light of the circumstances under which they were made, not misleading, as set forth more particularly herein, and engaged in transactions, practices and a course of business which operated as a fraud and deceit upon the purchasers of Echinoderm securities during the Class Period.

36. Defendant Jones's primary liability, and controlling person liability, arises from the following facts: (i) Defendant Jones was a high-level executive at the Company during the Class Period and a member of the Company's management team; (ii) by virtue of his responsibilities and activities as a senior officer of the Company, he was privy to and participated in the creation, development and reporting of the Company's internal budgets, plans, projections and/or reports; (iii) he enjoyed significant personal contact and familiarity with other members of the Company's management team, internal reports and other data and information about the Company's finances, operations, and sales at all relevant times; and (iv) he was aware of the Company's dissemination of information to the investing public which he knew or recklessly disregarded was materially false and misleading.

37. The defendants had actual knowledge of the misrepresentations and omissions of material facts set forth herein, or acted with reckless disregard for the truth in that they failed to ascertain and to disclose such facts, even though such facts were available to them. Such defendants' material misrepresentations and/or omissions were done knowingly or recklessly and for the purpose and effect of concealing Echinoderm's operating condition and future business prospects from the investing public and supporting the artificially inflated price of its securities. As demonstrated by defendants' misstatements of the Company's business, operations and earnings throughout the Class Period, defendants, if they did not have actual knowledge of the misrepresentations and omissions alleged, were reckless in failing to obtain such knowledge by deliberately refraining from taking those steps necessary to discover whether those statements were false or misleading.

38. As a result of the dissemination of the materially false and misleading information and failure to disclose material facts, as set forth above, the market price of Echinoderm securities was artificially inflated during the Class Period. In ignorance of the fact that market prices of Echinoderm's publicly traded securities were artificially inflated, and relying directly or indirectly on the false and misleading statements made by defendants, or upon the integrity of the market in which the securities trade, and/or on the absence of material adverse information that was known to or recklessly disregarded by defendants but not disclosed in public statements by defendants during the Class Period, Plaintiff and the other members of the Class acquired Echinoderm securities during the Class Period at artificially high prices and were damaged thereby.

39. At the time of said misrepresentations and omissions, Plaintiff and other members of the Class were ignorant of their falsity, and believed them to be true. Had Plaintiff and the

other members of the Class and the marketplace known the truth regarding Echinoderm's activities, which was not disclosed by defendants, Plaintiff and other members of the Class would not have purchased or otherwise acquired their Echinoderm securities, or, if they had acquired such securities during the Class Period, they would not have done so at the artificially inflated prices which they paid.

40. By virtue of the foregoing, defendants have violated Section 10(b) of the Exchange Act, and Rule 10b-5 promulgated thereunder.

41. As a direct and proximate result of defendants' wrongful conduct, Plaintiff and the other members of the Class suffered damages in connection with their respective purchases and sales of the Company's securities during the Class Period.

## **SECOND CLAIM FOR RELIEF**

### **Violation Of Section 20(a) Of The Exchange Act Against Defendant Jones**

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

43. Defendant Jones acted as a controlling person of Echinoderm within the meaning of Section 20(a) of the Exchange Act as alleged herein. By virtue of his high-level position, and his participation in and/or awareness of the Company's operations and/or intimate knowledge of the financial condition of the Company, Defendant Jones 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 which Plaintiff contend are false and misleading.

44. As set forth above, Echinoderm violated Section 10(b) and Rule 10b-5 by its acts and omissions as alleged in this Complaint. By virtue of his positions as controlling person,

Defendant Jones is similarly liable pursuant to Section 20(a) of the Exchange Act. As a direct and proximate result of defendants' 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 prays for relief and judgment, as follows:

- A. Determining that this action is a proper class action, designating Plaintiff as Lead Plaintiff and certifying Plaintiff as a class representative under Rule 23 of the Federal Rules of Civil Procedure and Plaintiffs counsel as Lead Counsel;
- B. Awarding compensatory damages in favor of Plaintiff and the other Class members against all defendants, jointly and severally, for all damages sustained as a result of defendants' wrongdoing, in an amount to be proven at trial, including interest thereon;
- C. Awarding Plaintiff and the Class their reasonable costs and expenses incurred in this action, including counsel fees and expert fees; and
- D. Such other and further relief as the Court may deem just and proper.

### **JURY TRIAL DEMANDED**

Plaintiff hereby demands a trial by jury.

Dated: July 1, 2008

### **PLAINTIFF'S REQUESTS FOR PRODUCTION OF DOCUMENTS**

Pursuant to Rule 34 of the Federal Rules of Civil Procedure, plaintiffs Andrew Mellon, et al., request that defendants Echinoderm Cigarettes and Jim Jones produce all responsive documents requested herein at the office of undersigned counsel as soon as practicable.

### **INSTRUCTIONS**

1. These requests require the production of all responsive documents within the sole or joint possession, custody or control of the Defendants, including their agents, departments,

attorneys, directors, officers, employees, consultants, investigators, insurance companies, or other persons subject to Defendants' custody or control.

2. All documents that respond, in whole or in part, to any portion of these Requests must be produced in their entirety, including all attachments and enclosures.
3. For purposes of these requests, the words used are considered to have, and should be understood to have, their ordinary, everyday meanings. Plaintiffs refer Defendants to any dictionary in the event Defendants asserts that the wording of a request is vague, ambiguous, unintelligible, or confusing.

## DEFINITIONS

4. The words "and," "or," "each," "any," "all," "refer," and "discuss," shall be construed in their broadest form and the singular shall include the plural and the plural shall include the singular whenever necessary so as to bring within the scope of these Requests all documents (defined below) that might otherwise be construed to be outside their scope.
5. The phrase "advertising, marketing or promotion" of cigarettes includes public relations activities involving smoking and health.
6. Solely for the purpose of the TREC 2008 legal track, the term "defendant" includes the named company above as well as all other companies whose records are found in the IIT CDIP v. 1.0/TREC Legal Track collection database ("TREC legal database").
7. Solely for the purpose of the TREC 2008 legal track, "document" means all data, information or writings stored in the TREC legal database, including without limitation: any written, electronic or computerized files, data or software; memoranda; emails; correspondence; OCR scanned images; communications; reports; summaries; studies; analyses; evaluations; notes or notebooks; indices; spreadsheets; logs; books; pamphlets; binders; calendar or diary entries; ledger entries; press clippings; graphs; tables; charts; printouts; drawings; maps; meeting minutes; transcripts. The term "document" encompasses all metadata associated with the document. The term also includes all drafts associated with any particular document.
8. "Person" or "individual" means natural persons, corporations, firms, partnerships, unincorporated associations, trusts, and any other legal entity.
9. The term "plans" means tentative and preliminary proposals, recommendations, or considerations, whether or not finalized or authorized, as well as those that have been adopted.
10. The term "relating to" means in whole or in part constituting, containing, concerning, discussing, describing, analyzing, identifying or stating.

FIRST SET OF REQUESTS FOR PRODUCTION:

Plaintiffs request that Defendants produce all responsive documents on the following topics:

102. Documents referring to marketing or advertising restrictions proposed for inclusion in, or actually included in, the Master Settlement Agreement (“MSA”), including, but not limited to, restrictions on advertising on billboards, stadiums, arenas, shopping malls, buses, taxis, or any other outdoor advertising.
103. All documents which describe, refer to, report on, or mention any “in-store,” “on-counter,” “point of sale,” or other retail marketing campaigns for cigarettes.
104. All documents discussing or referencing payments to foreign government officials, including but not limited to expressly mentioning “bribery” and/or “payoffs.”