

JUDGE GRIESA  
UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

09 CIV 2255

\_\_\_\_\_ X  
[REDACTED] Individually and On :  
Behalf of All Others Similarly Situated, :

Plaintiff, :

vs. :

PERRIGO COMPANY, JOSEPH C. PAPA,  
JUDY L. BROWN, MOSHE ARKIN, JOHN  
T. HENDRICKSON, SHARON KOCHAN,  
REFAEL LEBEL and JAMES C.  
TOMSHACK, :

Defendants. :

Civil Action No. :

CLASS ACTION :

COMPLAINT FOR VIOLATION OF THE  
FEDERAL SECURITIES LAWS

DEMAND FOR JURY TRIAL X

FILED  
U.S. DISTRICT COURT  
2600 MAR 11 PM 2:49  
S.D. OF N.Y.

## INTRODUCTION AND OVERVIEW

1. This is a securities class action on behalf of all persons who purchased or otherwise acquired the common stock of Perrigo Company (“Perrigo” or the “Company”) between November 6, 2008 and February 2, 2009 (the “Class Period”), against Perrigo and certain of its officers and/or directors for violations of the Securities Exchange Act of 1934 (“1934 Act”).

2. Perrigo develops, manufactures, and distributes over-the-counter and prescription pharmaceuticals, nutritional products, active pharmaceutical ingredients, and consumer products worldwide. Perrigo is headquartered in Allegan, Michigan.

3. During the Class Period, defendants misled investors regarding \$18 million of Auction Rate Securities (“ARS”) held by the Company. ARS are securities initially sold as long-term bonds but are effectively turned into short-term securities through auctions typically held every seven, 28 or 35 days. At the auctions, purchasers pay par value for the securities, *i.e.*, \$1 for \$1 in face value ARS, but bid against one another for the interest rate they are willing to accept. The lowest interest rate that will clear an auction establishes what the issuer of the ARS – generally a closed-end fund, corporation, municipal authority or student loan organization – will have to pay for the following seven, 28, or 35 days before the next auction.

4. Generally, there is a cap on the maximum interest issuers can pay. If an auction does not clear at or below that rate, it “fails” and the holders of the ARS must wait until the next auction. There are few secondary markets for ARS. For many years before 2008, there were virtually no failed ARS auctions. Then, in January and February of 2008, several auctions began to fail. Soon, the entire ARS market seized up and all holders of ARS were essentially unable to sell.

5. Eventually, it came to light that the investment banks that collected lucrative fees for underwriting the issuance of ARS and conducting the auctions had secretly been buying ARS in their own auctions whenever necessary to keep auctions from failing. By early 2008, however, the banks’

balance sheets were stretched too thin for the practice to continue and the market for ARS collapsed. Auctions have continued to fail since.

6. Perrigo was left holding \$18 million of ARS when the market froze. Under the terms of the securities, the issuers were under no obligation to redeem the ARS, even as the auctions failed, although they were required to continue paying interest. With few secondary markets and virtually no liquidity, the value of most ARS plummeted, even though the issuers were not in default.

7. All hope was not lost, however, because the Attorneys General for New York and Massachusetts, as well as the U.S. Securities and Exchange Commission (“SEC”), initiated investigations and/or proceedings against many of the banks that underwrote ARS and conducted the auctions. These law enforcement entities alleged, *inter alia*, that the banks misled investors about the liquidity of ARS, often calling them equivalent to money markets or cash. As a result of these enforcement actions, one bank after another began to redeem the ARS their clients had purchased. For example, on August 8, 2008, UBS Securities LLC and UBS Financial Services, Inc. announced that they would buy back \$22 billion in ARS from their individual and institutional clients.

8. Perrigo had a reasonable expectation of redeeming its \$18 million in ARS until September 15, 2008. On that date, Lehman Brothers Holdings, Inc. (“Lehman”) declared bankruptcy. Lehman was the bank that underwrote and sold the ARS to Perrigo. The ARS Perrigo purchased were designed and marketed by Lehman’s headquarters in New York. When Lehman disappeared, so did Perrigo’s chance to redeem its ARS at anywhere near face value. Defendants’ fraud consisted of concealing this from investors. On November 6, 2008, defendants reported the “fair value” of Perrigo’s ARS as \$14,500,000. They did not disclose that Lehman had underwritten and sold the ARS to Perrigo.

9. Just three months later, on February 3, 2009, defendants disclosed, for the first time, that Lehman had underwritten and sold the ARS to Perrigo. They also announced that the Company was writing off the entire value of its ARS, wiping out over a third of Perrigo's earnings in the quarter *because of the diminished credit ratings of the ARS underwriter, i.e., Lehman*. As a result of this disclosure, the stock price plunged 18% that day, causing massive losses to investors.

#### **JURISDICTION AND VENUE**

10. Jurisdiction is conferred by §27 of the 1934 Act. The claims asserted herein arise under §§10(b) and 20(a) of the 1934 Act and SEC Rule 10b-5.

11. Venue is proper in this District pursuant to §27 of the 1934 Act. Many of the false and misleading statements were derived from the ARS designed and marketed from this District.

#### **PARTIES**

12. Plaintiff [REDACTED] purchased Perrigo common stock as described in the attached certification and was damaged thereby.

13. Defendant Perrigo is a global healthcare supplier that develops, manufactures and distributes OTC and Rx pharmaceuticals, nutritional products, API and consumer products.

14. Defendant Joseph C. Papa ("Papa") is, and at all relevant times was, President and Chief Executive Officer ("CEO") and Chairman of the Board of Perrigo.

15. Defendant Judy L. Brown ("Brown") is, and at all relevant times was, Chief Financial Officer ("CFO") and Executive Vice President of Perrigo.

16. Defendant Moshe Arkin ("Arkin") is, and at all relevant times was, a director of the Company.

17. Defendant John T. Hendrickson ("Hendrickson") is, and at all relevant times was, Perrigo's Executive Vice President, Global Operations and Supply Chain.

18. Defendant Sharon Kochan (“Kochan”) is, and at all relevant times was, Perrigo’s Executive Vice President U.S. Generics.

19. Defendant Refael Lebel (“Lebel”) is, and at all relevant times was, Executive Vice President of Perrigo and President of Perrigo Israel.

20. Defendant James C. Tomshack (“Tomshack”) is, and at all relevant times was, Perrigo’s Senior Vice President, Consumer Healthcare Sales.

21. The defendants named in ¶¶14-20 above (the “Individual Defendants”), because of their positions with the Company, possessed the power and authority to control the contents of Perrigo’s quarterly reports, press releases and presentations to securities analysts, money and portfolio managers and institutional investors, *i.e.*, the market. They were provided with copies of the Company’s reports and press releases alleged herein to be misleading prior to or shortly after their issuance and had the ability and opportunity to prevent their issuance or cause them to be corrected. Because of their positions with the Company, and their access to material non-public information available to them but not to the public, the Individual Defendants knew that the adverse facts specified herein had not been disclosed to and were being concealed from the public and that the positive representations being made were then materially false and misleading. The Individual Defendants are liable for the false statements pleaded herein.

#### **FRAUDULENT SCHEME AND COURSE OF BUSINESS**

22. Defendants are liable for: (i) making false statements; or (ii) failing to disclose adverse facts known to them about Perrigo. Defendants’ fraudulent scheme and course of business that operated as a fraud or deceit on purchasers of Perrigo common stock was a success, as it: (i) deceived the investing public regarding Perrigo’s prospects and business; (ii) artificially inflated the price of Perrigo common stock; and (iii) caused plaintiff and other members of the Class to purchase Perrigo common stock at inflated prices.

## PRE-CLASS PERIOD EVENTS

23. On May 6, 2008, the Company filed a Form 10-Q with the SEC setting forth Perrigo's financial results for the quarter ended March 29, 2008. The Form 10-Q stated in part:

### Investment Securities

The Company maintains a portfolio of auction rate securities totaling approximately \$18,000 in par value. Auction rate securities are private placement variable rate debt instruments whose interest rates are reset within a contractual range, approximately every 7 to 35 days. Typically, the carrying value of auction rate securities approximates their fair value due to the frequent resetting of the interest rates at auction. Auction rate securities have recently failed to settle at auction resulting in an illiquid market for these types of securities. Although the Company continues to earn interest on these investments at the maximum contractual rate, the estimated fair value of auction rate securities can no longer be determined by the auction process until liquidity is restored to these markets.

At March 29, 2008, the Company continued to record these securities as available-for-sale, at a fair value of approximately \$14,600, based on estimates provided by the firm managing these investments, and recorded an unrealized loss of approximately \$3,400 in other comprehensive income. The Company also reclassified the securities from current assets to other non-current assets due to the unpredictable nature of the illiquidity of the market for the securities.

As of March 29, 2008, the Company concluded that no other-than-temporary impairment loss has occurred. The Company has the ability and intent to hold these securities for a period of time sufficient to allow for a recovery of market value. In addition, the companies underwriting these securities continue to maintain their AAA counter party credit rating and pay the maximum interest contractually required. Although the Company cannot reasonably predict when liquidity to the auction rate securities market will be restored, the Company will continue to monitor the credit worthiness of the companies underwriting these securities.

24. On August 18, 2008, the Company filed a Form 10-K with the SEC setting forth Perrigo's financial results for the fiscal year ended June 28, 2008. The Form 10-K stated in part:

### Investment Securities

The Company currently maintains a portfolio of auction rate securities with a total par value of approximately \$18,000 and an estimated fair value of approximately \$14,500. With the tightening of the U.S. credit markets over the last several quarters, there is no liquid market for these securities at this time. The Company has the ability and intent to hold these securities until the market recovers and does not anticipate having to sell these securities in order to operate its business.

As a result, the Company has reclassified these securities from current assets to other non-current assets as the Company does not reasonably expect to sell the securities in the near term. See Note D of the Notes to Consolidated Financial Statements for additional information.

25. On September 15, 2008, Lehman, which underwrote and sold the ARS to Perrigo, declared bankruptcy.

**DEFENDANTS' FALSE AND MISLEADING  
STATEMENTS ISSUED DURING THE CLASS PERIOD**

26. On November 6, 2008, Perrigo issued a press release entitled "Perrigo Reports Record First Quarter Sales and Income," which stated in part:

Perrigo Company today announced results for its fiscal year 2009 first quarter that ended September 27, 2008.

\* \* \*

Net sales for the first quarter of fiscal 2009 were \$480.2 million, an increase of 25 percent. Reported net income was \$37.9 million, or \$0.40 per share, compared with \$34.0 million, or \$0.36 per share, a year ago, an increase of 12 percent. Excluding a loss on the exchange of property of the Company's UK vitamin business, first quarter fiscal 2009 adjusted net income was \$38.6 million, or \$0.41 per share.

\* \* \*

Perrigo Chairman and CEO Joseph C. Papa stated, "Fiscal 2009 is off to the strong start we had anticipated. In the first quarter, we achieved both record sales and record earnings, with our new products contributing \$71 million to top line growth. This past quarter, the over-the-counter (OTC) category grew more than 4% versus first quarter last year. In the same period, store brands grew nearly 13%. We believe that store brand offerings will continue to perform well as consumers realize the value of Perrigo's product offering in this challenging economy."

27. On November 6, 2008, the Company filed a Form 10-Q with the SEC setting forth Perrigo's financial results for the quarter ended September 27, 2008. The Form 10-Q stated in part:

The Company's investment securities include auction rate securities totaling approximately \$18,000 in par value. Auction rate securities are privately placed variable rate debt instruments whose interest rates are reset within a contractual range, approximately every 7 to 35 days. Typically, the carrying value of auction rate securities approximates their fair value due to the frequent resetting of the interest

rates at auction. With the tightening of the credit markets over the last several quarters, auction rate securities have failed to settle at auction resulting in an illiquid market for these types of securities. Although the Company continues to earn and collect interest on these investments at the maximum contractual rate, the estimated fair value of auction rate securities can no longer be determined by the auction process until liquidity is restored to these markets.

At September 27, 2008, the Company continued to record these securities as available-for-sale, at a fair value of approximately \$14,500, based on, among other things, estimates provided by the firm managing these investments, and recorded an unrealized loss of approximately \$2,550, net of tax, in other comprehensive income (loss) in fiscal 2008. Beginning in the third quarter of fiscal 2008, the Company reclassified the securities from current assets to other non-current assets due to the unpredictable nature and the illiquidity of the market for the securities.

As of September 27, 2008, the Company concluded that no other-than-temporary impairment loss has occurred. The Company has the ability and intent to hold these securities for a period of time that the Company believes will be sufficient to allow for a recovery of market value. The companies underwriting these securities continue to pay the maximum interest contractually required. Although the Company cannot predict when liquidity to the auction rate securities market will be restored, the Company will continue to monitor the credit worthiness of the companies underwriting these securities.

28. The Form 10-Q was accompanied by certifications signed by defendants Papa and Brown, which stated:

I, [Joseph C. Papa/Judy L. Brown], certify that:

1. I have reviewed this report on Form 10-Q of Perrigo Company;
2. Based on my knowledge, this report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this report;
3. Based on my knowledge, the financial statements, and other financial information included in this report, fairly present in all material respects the financial condition, results of operations and cash flows of the registrant as of, and for, the periods presented in this report;
4. The registrant's other certifying officer and I are responsible for establishing and maintaining disclosure controls and procedures (as defined in Exchange Act Rules 13a-15(e) and 15d-15(e)) and internal control over financial reporting (as defined in Exchange Act Rules 13a-15(f) and 15d-15(f)) for the registrant and have:

a. designed such disclosure controls and procedures, or caused such disclosure controls and procedures to be designed under our supervision, to ensure that material information relating to the registrant, including its consolidated subsidiaries, is made known to us by others within those entities, particularly during the period in which this report is being prepared;

b. designed such internal control over financial reporting, or caused such internal control over financial reporting to be designed under our supervision, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles;

c. evaluated the effectiveness of the registrant's disclosure controls and procedures and presented in this report our conclusions about the effectiveness of the disclosure controls and procedures, as of the end the period covered by this report based on such evaluation; and

d. disclosed in this report any change in the registrant's internal control over financial reporting that occurred during the registrant's most recent fiscal quarter that has materially affected, or is reasonably likely to materially affect, the registrant's internal control over financial reporting; and

5. The registrant's other certifying officer and I have disclosed, based on our most recent evaluation of internal control over financial reporting, to the registrant's auditors and the audit committee of the registrant's board of directors:

a. all significant deficiencies and material weaknesses in the design or operation of internal control over financial reporting, which are reasonably likely to adversely affect the registrant's ability to record, process, summarize and report financial information; and

b. any fraud, whether or not material, that involves management or other employees who have a significant role in the registrant's internal control over financial reporting.

29. Defendants' statements above were materially false and misleading because they failed to disclose that Lehman underwrote and sold the ARS to Perrigo, that Lehman had declared bankruptcy, and that, as a result, Perrigo was unlikely to redeem its ARS for anywhere near face value.

### **THE TRUTH BEGINS TO COME TO LIGHT**

30. Then, on February 3, 2009, before the market opened, Perrigo issued a press release entitled "Perrigo Reports Record Second Quarter Sales," which stated in part:

Perrigo Company today announced results for its fiscal year 2009 second quarter and six months that ended December 27, 2008.

\* \* \*

### Second Quarter Results

Net sales for the second quarter of fiscal 2009 were a record \$561.5 million, an increase of 29%. Reported net income was \$25.0 million, or \$0.27 per share, compared with \$34.3 million, or \$0.36 per share, a year ago, a decrease of 27%. Excluding charges as outlined in Table II at the end of this release, second quarter fiscal 2009 adjusted net income was \$42.7 million, or \$0.46 per share.

*The Company incurred a charge of \$15.1 million, or \$0.16 per share, related to the write-down of auction rate securities purchased in Israel from Lehman Brothers.* These assets were written down from a face value of \$18.0 million and continue to be held in non-current assets. The market for these securities has been illiquid for over 12 months, and the credit worthiness of underlying issuers has continued to deteriorate significantly. As a result, per Financial Accounting Standard 115 "Accounting for Certain Investments in Debt and Equity Securities," the impairment of these securities can no longer be considered to be temporary.

31. Also on February 3, 2009, the Company filed a Form 10-Q with the SEC setting forth Perrigo's financial results for the quarter ended December 27, 2008. The Form 10-Q stated in part:

The Company's investment securities include auction rate securities totaling \$18,000 in par value. Auction rate securities are privately placed variable rate debt instruments whose interest rates are reset within a contractual range, approximately every 7 to 35 days. Typically, the carrying value of auction rate securities approximates their fair value due to the frequent resetting of the interest rates at auction. With the tightening of the credit markets over the last several quarters, auction rate securities have failed to settle at auction resulting in an illiquid market for these types of securities. As a result, the estimated fair value of auction rate securities cannot be determined by the auction process until liquidity is restored to these markets.

During the third quarter of fiscal 2008, the Company recorded an unrealized loss of \$3,453, net of tax, in other comprehensive income (loss). *The amount of the write-down was based on, among other things, estimates provided by Lehman Brothers, the firm managing these investments, which subsequently filed for bankruptcy.* The companies underwriting these securities continued to maintain their AAA counterparty credit rating and pay the maximum interest contractually required. In addition, beginning in the third quarter of fiscal 2008, the Company reclassified the securities from current assets to other non-current assets due to the unpredictable nature and the illiquidity of the market for the securities.

\* \* \*

*[T]he Company concluded that an other-than-temporary impairment loss had occurred as a result of diminished credit ratings of the companies underwriting these securities.* Accordingly, the Company recorded an other-than-temporary impairment loss of \$15,104 within other expense in its condensed consolidated statement of income for the second quarter of fiscal 2009. With the tightening of the credit markets over the last several quarters, there is no liquid market for these securities at this time.

32. On this news, Perrigo's stock dropped \$5.21 per share to close at \$23.88 per share on February 3, 2009, a one-day decline of 18% as artificial inflation came out of the stock price.

### **LOSS CAUSATION/ECONOMIC LOSS**

33. Defendants' false and misleading statements had the intended effect and caused Perrigo stock to trade at artificially inflated levels throughout the Class Period, reaching as high as \$34.45 per share on November 13, 2008.

34. As a direct result of defendants' admissions and the public revelations regarding the truth about Perrigo's ARS, Perrigo's stock price plummeted 18%, falling from \$29.09 per share to on February 2, 2009 to \$23.88 per share on February 3, 2009, a decline of \$5.21 per share.

35. This drop removed the inflation from Perrigo's stock price, causing real economic loss to investors who had purchased the stock during the Class Period.

### **NO SAFE HARBOR**

36. Perrigo's verbal "Safe Harbor" warnings accompanying its oral forward-looking statements ("FLS") issued during the Class Period were ineffective to shield those statements from liability.

37. The defendants are also liable for any false or misleading FLS pleaded because, at the time each FLS was made, the speaker knew the FLS was false or misleading and the FLS was authorized and/or approved by an executive officer of Perrigo who knew that the FLS was false. None of the historic or present tense statements made by defendants were assumptions underlying or

relating to any plan, projection or statement of future economic performance, as they were not stated to be such assumptions underlying or relating to any projection or statement of future economic performance when made, nor were any of the projections or forecasts made by defendants expressly related to or stated to be dependent on those historic or present tense statements when made.

**APPLICABILITY OF PRESUMPTION OF  
RELIANCE: FRAUD ON THE MARKET**

38. Plaintiff will rely upon the presumption of reliance established by the fraud-on-the-market doctrine in that, among other things:

- (a) Defendants made public misrepresentations or failed to disclose material facts during the Class Period;
- (b) The omissions and misrepresentations were material;
- (c) The Company's stock traded in an efficient market;
- (d) The misrepresentations alleged would tend to induce a reasonable investor to misjudge the value of the Company's stock; and
- (e) Plaintiff and other members of the Class purchased Perrigo stock between the time defendants misrepresented or failed to disclose material facts and the time the true facts were disclosed, without knowledge of the misrepresented or omitted facts.

39. At all relevant times, the market for Perrigo stock was efficient for the following reasons, among others:

- (a) As a regulated issuer, Perrigo filed periodic public reports with the SEC; and
- (b) Perrigo regularly communicated with public investors via established market communication mechanisms, including through regular disseminations of press releases on the major news wire services and through other wide-ranging public disclosures, such as communications with the financial press, securities analysts and other similar reporting services.

## CLASS ACTION ALLEGATIONS

40. Plaintiff brings this action as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of all persons who purchased or otherwise acquired Perrigo common stock during the Class Period (the “Class”). Excluded from the Class are defendants.

41. The members of the Class are so numerous that joinder of all members is impracticable. The disposition of their claims in a class action will provide substantial benefits to the parties and the Court. Perrigo has over 92 million shares of stock outstanding, owned by hundreds if not thousands of persons.

42. There is a well-defined community of interest in the questions of law and fact involved in this case. Questions of law and fact common to the members of the Class which predominate over questions which may affect individual Class members include:

- (a) whether the 1934 Act was violated by defendants;
- (b) whether defendants omitted and/or misrepresented material facts;
- (c) whether defendants’ statements omitted material facts necessary to make the statements made, in light of the circumstances under which they were made, not misleading;
- (d) whether defendants knew or deliberately disregarded that their statements were false and misleading;
- (e) whether the price of Perrigo’s common stock was artificially inflated; and
- (f) the extent of damage sustained by Class members and the appropriate measure of damages.

43. Plaintiff’s claims are typical of those of the Class because plaintiff and the Class sustained damages from defendants’ wrongful conduct.

44. Plaintiff will adequately protect the interests of the Class and has retained counsel who are experienced in class action securities litigation. Plaintiff has no interests which conflict with those of the Class.

45. A class action is superior to other available methods for the fair and efficient adjudication of this controversy.

### **COUNT I**

#### **For Violation of §10(b) of the 1934 Act and Rule 10b-5 Against All Defendants**

46. Plaintiff incorporates ¶¶1-45 by reference.

47. During the Class Period, defendants disseminated or approved the false statements specified above, which they knew or deliberately disregarded were misleading in that they contained misrepresentations and failed to disclose material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.

48. Defendants violated §10(b) of the 1934 Act and Rule 10b-5 in that they:

(a) employed devices, schemes and artifices to defraud;

(b) made untrue statements of material facts or omitted to state material facts necessary 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 that operated as a fraud or deceit upon plaintiff and others similarly situated in connection with their purchases of Perrigo common stock during the Class Period.

49. Plaintiff and the Class have suffered damages in that, in reliance on the integrity of the market, they paid artificially inflated prices for Perrigo common stock. Plaintiff and the Class would not have purchased Perrigo common stock at the prices they paid, or at all, if they had been

aware that the market prices had been artificially and falsely inflated by defendants' misleading statements.

## **COUNT II**

### **For Violation of §20(a) of the 1934 Act Against All Defendants**

50. Plaintiff incorporates ¶¶1-49 by reference.

51. The Individual Defendants acted as controlling persons of Perrigo within the meaning of §20(a) of the 1934 Act. By reason of their positions with the Company, and their ownership of Perrigo stock, the Individual Defendants had the power and authority to cause Perrigo to engage in the wrongful conduct complained of herein. Perrigo controlled the Individual Defendants and all of its employees. By reason of such conduct, defendants are liable pursuant to §20(a) of the 1934 Act.

### **PRAYER FOR RELIEF**

WHEREFORE, plaintiff prays for judgment as follows:

- A. Declaring this action to be a proper class action pursuant to Fed. R. Civ. P. 23;
- B. Awarding plaintiff and the members of the Class damages, including interest;
- C. Awarding plaintiff reasonable costs and attorneys' fees; and
- D. Awarding such equitable/injunctive or other relief as the Court may deem just and

proper.

**JURY DEMAND**

Plaintiff demands a trial by jury.

DATED: March 11, 2009