



## **I. NATURE OF THE ACTION**

1. This is a federal securities class action against PhotoMedex and certain of its officers for violations of the federal securities laws. Plaintiff brings this action on behalf of all persons or entities who purchased or otherwise acquired shares of PhotoMedex common stock between November 7, 2012 and November 14, 2013, inclusive (the "Class Period"), seeking to pursue remedies under §§10(b) and 20(a) of the Securities Exchange Act of 1934 (the "Exchange Act"). The Exchange Act claims allege that Defendants engaged in a fraudulent scheme to artificially inflate the Company's stock price. As a result of the fraud described below, the Company has lost a substantial portion of its value.

2. Defendant PhotoMedex maintains principal executive offices in Montgomeryville, Pennsylvania. PhotoMedex is a global skin health company providing integrated disease management and aesthetic solutions to dermatologists, professional aestheticians and consumers. The Company provides proprietary products and services that address skin diseases and conditions including psoriasis, vitiligo, acne, actinic keratosis and photo damage. As a result of its December 2011 merger with Radiancey Inc., PhotoMedex has added a range of home-use devices under the no!no! brand, for various indications including hair removal, acne treatment and skin rejuvenation.

3. Plaintiff alleges that Defendants have fraudulently inflated PhotoMedex's stock price during the Class Period by disseminating materially false and misleading statements, and failing to disclose material information known or recklessly disregarded by Defendants, concerning the Company's true financial condition, operation and business prospects.

4. Specifically, throughout the Class Period, Defendants made false and misleading statements and/or failed to disclose that: (i) the effectiveness of the Company's key product, the

no!no! device, rested on flimsy, weak studies; (ii) a more credible study raised serious doubts as to the touted effectiveness of the Company's key product, and in fact showed that no!no! works no better than shaving; (iii) the Company materially overstated the prospects for the no!no! device in the Japanese market; and (iv) as a result of the above, the Company's financial statements, assurances and expectations with regard to the Company's growth, operations and business prospects were false and misleading at all relevant times.

5. In order to obtain financial gains from these manipulations, various Company officers and insiders disposed over \$22.3 million of their PhotoMedex shares into an unsuspecting market.

6. On the morning of October 17, 2013, TheStreetSweeper.org published a report raising serious risks and concerns regarding, among other things, the ineffectiveness and decreasing sales of the Company's key product the no!no! device.<sup>1</sup>

7. On this news, PhotoMedex shares declined \$0.50 per share or 3.24%, to close at \$14.91 per share on October 17, 2013 on heavy trading volume.

8. On November 6, 2013, the Company issued a press release, reporting the Company's third quarter financial and operating results for the quarter ending September 30, 2012, in which it confirmed TheStreetSweeper's allegations that the Company had overstated its prospects for the no!no! device in the Japanese market. Specifically, PhotoMedex admitted that there were "no consumer sales to the Company's distributor in Japan."

9. On this news, PhotoMedex shares fell \$1.13 per share or 8.84%, from a close price of \$12.78 per share on November 5, 2013 to a close price of \$11.65 per share on November 6, 2013 on heavy trading volume.

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<sup>1</sup> Sonya Colberg, *PhotoMedex: Just saw No!No!*, THE STREETSWEEPER, (Oct. 17, 2013) available at [http://thestreetsweeper.org/undersurveillance/PhotoMedex\\_Just\\_say\\_No\\_No](http://thestreetsweeper.org/undersurveillance/PhotoMedex_Just_say_No_No)

10. Finally, on November 14, 2013, TheStreetSweeper.org published another report reiterating some of the previous issues mentioned in its October 17, 2013 article while raising additional significant concerns about the effectiveness and sales of the no!no! device.<sup>2</sup>

11. As a result of the series of disclosures regarding the true state of the Company's business and operations, the Company's shares have declined \$2.65 or 17.2% from its close price of \$15.41 per share on October 16, 2013, to its close price of \$12.76 on November 15, 2013. PhotoMedex's stock price continues to decline—closing at \$11.53 per share on November 20, 2013.

12. Due to the Defendants' wrongful acts, false and misleading statements and omissions, and the precipitous decline in the market value of the Company's securities, Plaintiff and other Class members have suffered significant losses and damages.

## **II. JURISDICTION AND VENUE**

13. This action arises under Sections 10(b) and 20(a) of the Exchange Act (15 U.S.C. §§ 78j(b) and 78t(a)) and Rule 10b-5 promulgated thereunder (17 C.F.R. § 240.10b 5).

14. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§1331 and Section 27 of the Exchange Act (15 U.S.C. § 78aa).

15. 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 conduct complained of herein, including the preparation and dissemination of materially false and misleading information to the investing public, occurred in substantial part in this District.

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<sup>2</sup> Sonya Colberg, *No!no! doesn't cut it*, THE STREETSWEEPER, (Nov. 14, 2013) *available at* [http://thestreetsweeper.org/undersurveillance/PhotoMedex PHMD No no doesn t cut it](http://thestreetsweeper.org/undersurveillance/PhotoMedex_PHMD_No_no_doesn_t_cut_it)

16. In connection with the acts and omissions alleged in this complaint, Defendants, directly or indirectly, used the means and instrumentalities of interstate commerce, including, but not limited to, the mails, interstate telephone communications, and the facilities of the national securities markets.

### **III. PARTIES**

#### **A. Plaintiff**

17. Plaintiff ██████████ as set forth in the accompanying certification and incorporated by reference herein, purchased the publicly traded PhotoMedex securities at artificially inflated prices during the Class Period and has been damaged thereby.

#### **B. Defendants**

##### **i. The Company**

18. Defendant PhotoMedex is a global skin health company incorporated under the laws of the state of Nevada with headquarters in Montgomeryville, Pennsylvania. During the Class Period, PhotoMedex maintained executive offices in Montgomeryville at 147 Keystone Drive, Montgomeryville, Pennsylvania 18936. PhotoMedex common stock is listed on the NASDAQ Global Select Market (“NASDAQ”) stock market under the ticker “PHMD.”

##### **ii. The Individual Defendants**

19. Defendant Dolev Rafaeli, Ph.D (“Rafaeli”) has served as the Chief Executive Officer (“CEO”) of PhotoMedex since December 2011. Previously, Rafaeli served as President and CEO of Radiancy, Inc. from 2006 until Radiancy’s merger with PhotoMedex in 2011. Defendant Rafaeli sold 1,425,314 of the Company’s shares during the Class Period.

20. Defendant Dennis M. McGrath (“McGrath”) reassumed his roles of Chief Financial Officer (“CFO”), President and Director of PhotoMedex, in July 2009. Previously,

McGrath served as CFO and Vice president, Finance and Administration of PhotoMedex from January 2000 through June 2009. Defendant McGrath sold 101,795 of the Company's shares during the Class Period.

21. Defendants Rafaeli and McGrath are collectively referred to as the "Individual Defendants."

22. The Company and the Individual Defendants are collectively referred to herein as the "Defendants."

23. During the Class Period, the Individual Defendants, as senior executive officers of PhotoMedex, were privy to confidential, proprietary and material adverse non-public information concerning PhotoMedex, its operations, finances, financial condition and present and future business prospects via access to internal corporate documents, conversations and connections with other corporate officers and employees, attendance at management and/or board of directors meetings and committees thereof, and via reports and other information provided to them in connection therewith. Because of their possession of such information, the Individual Defendants knew or recklessly disregarded that the adverse facts specified herein had not been disclosed to, and were being concealed from, the investing public.

24. The Individual Defendants are liable as direct participants in the wrongs complained of herein. In addition, the Individual Defendants, by reason of their status as senior executive officers and/or directors, were "controlling persons" within the meaning of §20(a) of the Exchange Act and had the power and influence to cause the Company to engage in the unlawful conduct complained of herein. Because of their positions of control, the Individual Defendants were able to and did, directly or indirectly, control the conduct of PhotoMedex's business.

25. The Individual Defendants, because of their positions with the Company, controlled and/or possessed the authority to control the contents of its reports, press releases and presentations to securities analysts and, through such analysts, to the investing public. The Individual Defendants were provided with copies of the Company's reports and publicly disseminated documents 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. Thus, the Individual Defendants had the opportunity to commit the fraudulent acts alleged herein.

26. As senior executive officers and/or directors and as controlling persons of a publicly traded company whose securities were, and are, registered with the SEC pursuant to the Exchange Act, and are traded on NASDAQ and governed by the federal securities laws, the Individual Defendants had a duty to disseminate promptly accurate and truthful information with respect to PhotoMedex's financial condition and performance, growth, operations, financial statements, business, products, markets, management, earnings, and present and future business prospects, to correct any previously issued statements that had become materially misleading or untrue, so the market price of PhotoMedex's securities would be based on truthful and accurate information. The Individual Defendants' misrepresentations and omissions during the Class Period violated these specific requirements and obligations.

27. The Individual Defendants are liable as participants in a fraudulent scheme and course of business that operated as a fraud or deceit on purchasers of PhotoMedex's publicly traded securities by disseminating materially false and misleading statements and/or concealing material adverse facts.

#### **IV. SUBSTANTIVE ALLEGATIONS**

##### **A. Background of PhotoMedex**

28. PhotoMedex is a global skin health company providing integrated disease management and aesthetic solutions to dermatologists, professional aestheticians and consumers. The Company provides proprietary products and services that address skin diseases and conditions including psoriasis, vitiligo, acne and photo damage. The Company was originally formed in Delaware in 1980 and was re-incorporated in Nevada on December 30, 2010.

29. As a result of its December 2011 merger with Radiancy Inc., PhotoMedex has added a range of home-use devices under the no!no! brand, for various purposes including hair removal, acne treatment and skin rejuvenation.

##### **B. Defendants' Scheme to Artificially Inflate the Company's Stock and Insider Selling**

30. Defendants devised a scheme to inflate the Company's stock price through a series of false and misleading statements regarding: (i) the effectiveness of the Company's key product, the no!no! device—with results resting on weak studies; (ii) the fact that a more credible study raised serious doubts as to the touted effectiveness of the Company's key product, and in fact showed that the product works no better than shaving; (iii) the Company materially overstating the prospects for the no!no! device in the Japanese market—all of which in turn led to Defendants' presenting a misleading picture of the Company's financial condition, growth, operations and business prospects.

31. The Individual Defendants repeatedly misrepresented to investors the true condition of the Company's finances, business and operations in furtherance of their scheme to inflate the Company's stock price and dump their stocks on unsuspecting investors, reaping hefty financial gains for themselves and Company insiders as indicated in the chart below.

Date	Insider	Position	Shares	Value
Dec. 17, 2012	Dennis M. McGrath	CFO	50,500	\$724,170
Jan. 10, 2013	Dolev Rafaeli	CEO	805	\$12,075
Jan. 15, 2013	Dennis M. McGrath	CFO	17,699	\$265,485
Jan. 15, 2013	Dolev Rafaeli	CEO	172,516	\$2,587,740
Jan. 22, 2013	Dennis M. McGrath	CFO	33,596	\$510,995
Feb. 6, 2013	Dolev Rafaeli	CEO	45,214	\$678,210
Feb. 7, 2013	Dolev Rafaeli	CEO	9,240	\$138,600
Mar. 1, 2013	Dolev Rafaeli	CEO	50,000	\$751,000
Mar. 4, 2013	Dolev Rafaeli	CEO	75,000	\$1,131,000
Mar. 5, 2013	Dolev Rafaeli	CEO	432,539	\$6,531,338
Mar. 13, 2013	Dolev Rafaeli	CEO	140,000	\$2,139,200
Jun. 19, 2013	Dolev Rafaeli	CEO	10,200	\$168,402
Jun. 20, 2013	Dolev Rafaeli	CEO	50,000	\$784,500
Jun. 21, 2013	Dolev Rafaeli	CEO	52,600	\$813,722
Jun. 28, 2013	Dolev Rafaeli	CEO	7,104	\$113,664
Jul. 1, 2013	Dolev Rafaeli	CEO	100,000	\$1,559,000
Jul. 23, 2013	Dolev Rafaeli	CEO	37,600	\$607,616
Jul. 25, 2013	Dolev Rafaeli	CEO	42,202	\$676,076
Jul. 29, 2013	Dolev Rafaeli	CEO	10,198	\$163,575
Jul. 31, 2013	Dolev Rafaeli	CEO	15,600	\$249,912
Aug. 1, 2013	Dolev Rafaeli	CEO	21,800	\$347,056
Aug. 2, 2013	Dolev Rafaeli	CEO	7,500	\$117,075
Aug. 5, 2013	Dolev Rafaeli	CEO	11,771	\$186,334
Aug. 6, 2013	Dolev Rafaeli	CEO	10,400	\$164,424

Aug. 8, 2013	Dolev Rafaeli	CEO	44,800	\$672,896
Aug. 19, 2013	Dolev Rafaeli	CEO	3,729	\$55,562
Aug. 21, 2013	Dolev Rafaeli	CEO	13,008	\$208,258
Sep. 3, 2013	Dolev Rafaeli	CEO	61,488	\$995,490

**C. False and Misleading Statements**

32. In regular press releases, conference calls and filings with the SEC, PhotoMedex and the Individual Defendants repeatedly made false and misleading statements and/or failed to disclose material adverse facts concerning the state and expectation of PhotoMedex's growth, operations, business prospects and finances, all of which raise significant concerns about the Company's future stability and have caused the stock price to steadily decline.

33. On November 7, 2012, the Company issued a press release reporting its financial and operating results for the third quarter ending September 30, 2012. The Company stated in pertinent part as follows:

Dr. Dolev Rafaeli, PhotoMedex CEO, commented, "We are pleased to deliver another quarter of strong financial results with revenues increasing 63% over last year, gross profit increasing 71% and net income increasing 79%. Revenues for the first nine months of 2012 exceed revenues for all of 2011. Our consumer marketing programs continue to deliver outstanding results, while the steps we have taken to reduce costs, such as using ocean freight more often to deliver products and consolidating manufacturing, have contributed to margin expansion as well.

"Yesterday we reported that sales of no!no! Hair™ once again broke home television shopping sales records in the U.S. at a 24-hour beauty event held this past weekend despite the fact that the Northeast, a major target market, was still suffering from the effects of the recent hurricane. We beat our own record, which was established over this past Fourth of July holiday. The products for this event were shipped in the fourth quarter, while the products for the Fourth of July holiday were shipped in the second quarter."

Dr. Rafaeli concluded, "In the coming months we are looking forward to expanding our consumer marketing in the U.S. for XTRAC® for the treatment of

psoriasis and Neova® to help reverse the effects of sun-damaged skin, and to expanding our international market for the no!no! family of products."

34. On November 13, 2012, the Company filed its quarterly report for the period ended September 30, 2012 on Form 10-Q with the SEC, that was signed by Defendants Rafaeli and McGrath, and repeated the Company's previously announced quarterly financial results. With regard to the no!no! brand expansion in Japan, the Form 10-Q stated, "*[e]ven at this level of sales, we believe we have ample opportunity for further expansion, as Japan's 2010 population was over 127 million people...far greater than the more than three million who have already purchased our products.*"

35. In addition, the Form 10-Q contained signed certifications pursuant to SOX by Defendants Rafaeli and McGrath, stating that the financial information contained in the Form 10-Q was accurate, fairly presented, in all material respects, the financial condition and results of operations of the Company, and disclosed all material changes in the Company's internal control over financial reporting.

36. On December 17, 2012, the Company issued a press release announcing the extension of its agreement with the Company's exclusive distributor of the no!no! brand in Japan. The press release states in pertinent part as follows:

PhotoMedex, Inc. (NASDAQ and TASE: PHMD) announces the signing of a two-year extension with Ya-Man, the exclusive distributor of its no!no! brand in Japan. The new agreement calls for minimum order quantities and advertising budgets consistent with the existing agreement, which was due to expire on December 31, 2012. *Independent research shows that no!no! Hair is the leading women's hair removal device in Japan, accounting for more than 50% of all retail sales.*

Commenting on the renewal of the agreement with Ya-Man, Dr. Dolev Rafaeli, chief executive officer of PhotoMedex, said, "Ya-Man has been a strong distribution partner for the no!no! brand for the past three years and we are delighted to renew the agreement and our partnership, *which further advances*

*our market-leading position in Japan. We expect continued growth of no!no! products there through our finely honed consumer marketing program and the excellent work Ya-Man is doing, supported by brand extensions into other categories including the no!no! line for men."*

37. On March 13, 2013, the Company issued a press release reporting its financial and operating results for fourth quarter and fiscal year ended December 31, 2012. The Company stated in pertinent part as follows:

Dr. Dolev Rafaeli, PhotoMedex CEO, commented, "We are very pleased with the progress we made in 2012, our first year of PhotoMedex and Radiancy operating as a single company. Not only did we deliver excellent growth in revenues and profits, but the integration of operations and culture went smoothly as a result of the dedicated effort and commitment of our people worldwide. Furthermore, the quality of growth, realized in all major product lines of our business, positions us well for further revenue gains in 2013."

"Our consumer engine, with our world-class and efficient marketing platform, continues to outpace all competition. We also have proven out our premise that marketing lessons learned in the consumer segment are transportable to the medical side of our business. This includes success in offering our Neova<sup>®</sup> skin care line to no!no!<sup>™</sup> consumers and creating awareness of XTRAC<sup>®</sup> among psoriasis patients through the message that the safest and most effective therapy for their disease is available at their local dermatologist. We are pleased that our efforts transformed the pre-merged PhotoMedex into a profitable business unit for 2012," he added.

#### **Reported Financial Results**

Revenues for the fourth quarter of 2012 were \$54.8 million, an increase of 91% over the same period in the prior year. Included in this amount is \$7.2 million in revenues from pre-merged PhotoMedex. This compares with revenues for the fourth quarter of 2011 of \$28.8 million, which included \$1.5 million of revenues from pre-merged PhotoMedex.

Net income for the fourth quarter of 2012 was \$5.9 million or \$0.27 per diluted share, which included \$1.4 million in stock-based compensation expense and \$1.4 million in depreciation and amortization expenses. This compares with a net loss for the fourth quarter of 2011 of \$3.0 million or \$0.22 per share, which included \$5.2 million in stock-based compensation expense and \$0.3 million in depreciation and amortization expenses.

Revenues for the year ended December 31, 2012 were \$220.7 million, an increase of 67% over the same period in 2011. Included in this amount is \$27.8 million in revenues from pre-merged PhotoMedex. This compares with revenues for the

year ended December 31, 2011 of \$132.1 million, which included \$1.5 million revenues from pre-merged PhotoMedex.

Net income for the year ended December 31, 2012 was \$22.5 million or \$1.08 per diluted share, which included \$6.2 million in stock-based compensation expense, \$5.6 million in depreciation and amortization expenses, \$5.4 million in expenses for past litigation and \$0.7 million in other one-time charges. This compares with a net loss for the year ended December 31, 2011 of \$0.7 million or \$0.06 per share, which included \$21.6 million in stock-based compensation expense, \$0.6 million in depreciation and amortization expenses, \$3.8 million in expenses for past litigation and \$14.5 million in merger-related expenses.

As of December 31, 2012, the Company had cash, cash equivalents and short-term investments of \$62.4 million. During the 2012 fourth quarter the Company repurchased 418,717 shares of its common stock in the open market at an average price of \$12.93 per share, for a total of \$5.4 million.

On a pro forma basis, had the merger been completed on January 1, 2011, revenues for the three months ended December 31, 2011 would have been \$34.3 million, gross profit would have been \$23.9 million and the net loss would have been \$8.1 million. On a pro forma basis, had the merger been completed on January 1, 2011, revenues for the year ended December 31, 2011 would have been \$162.3 million, gross profit would have been \$118.5 million and the net loss would have been \$13.1 million.

Management expects revenues for the first quarter of 2013 to be more than \$57 million.

38. On March 18, 2013, the Company filed its annual report for the year ended December 31, 2012 on Form 10-K with the SEC, that was signed by, among others, Defendants Rafaeli and McGrath, and repeated the Company's previously reported financial results. With regard to the effectiveness of the no!no! brand as compared to other existing hair removal products such as shaving, the Form 10-K stated as follows:

Our no!no!® hair removal products are built upon our proprietary heat-based Thermicon® brand technology to address consumer concerns over perceived limitations of existing hair removal products, including safety and pain, and to overcome inherent limitations of light-based hair removal solutions. Unlike other products that use methods that are painful, have side effects, are limited in body areas that can be treated or that emanate from the principle of selective thermolysis, the Thermicon® brand devices are based on heat only and are therefore applicable for all hair colors and skin types, can be used on all body

areas, and if used per instructions – do not have adverse events, and are virtually painless. Thermicon® brand devices utilize a high-temperature thermodynamic wire filament that is activated when the devices are moved in contact with and across the treatment area. *We believe that the no!no!® brand hair removal products have several advantages over existing products for both the consumer and professional hair removal market, including:*

*Broad Applicability. Where other hair removal products such as shavers, waxing, threading and laser-based and intense pulsed light-based products are either limited by body area treated, are only effective at treating certain hair colors and skin types or are limited by the age of the consumer, products employing the Thermicon® brand devices technology, which do not rely upon light, are virtually painless and without side-effects and are equally effective across all hair colors and all skin types. Therefore, we believe that unlike other hair removal methods (such as shaving, threading and waxing), including light based devices, Thermicon® brand devices effectively remove hair on people with light hair or dark skin.*

39. In addition, the Form 10-K contained signed certifications pursuant to SOX by Defendants Rafaeli and McGrath, stating that the financial information contained in the Form 10-K was accurate, fairly presented, in all material respects, the financial condition and results of operations of the Company, and disclosed all material changes in the Company's internal control over financial reporting.

40. On May 8, 2013 the Company issued a press release reporting its financial and operating results for the first quarter ending March 31, 2013. The Company stated in pertinent part as follows:

- Revenues of \$57.2 million, an increase of 14% compared with the prior-year first quarter and an increase of 4% sequentially
- Consumer revenues of \$49.0 million, an increase of 16% compared with the prior-year first quarter and an increase of 6% sequentially
- Direct-to-consumer channel revenues of \$31.7 million, an increase of 1% compared with the prior-year first quarter and an increase of 6% sequentially
- Global retail and home shopping channel revenues of \$12.0 million, an increase of 101% compared with the prior-year first quarter and a decrease of 3% sequentially
- Distributor consumer channel revenues of \$5.3 million, an increase of 13% compared with the prior-year first quarter and an increase of 41% sequentially

- XTRAC® adjusted treatment revenues of \$3.2 million, an increase of 73% compared with the prior-year first quarter and an increase of 22% sequentially
  - XTRAC® recurring revenue U.S. installed base of 401 at quarter end, an increase of 51 placements during the quarter, including 27 on the Comeback program of previously sold systems
  - NEOVA® skin care revenues of \$2.2 million, an increase of 3% compared with the prior-year first quarter and an increase of 14% sequentially
  - Gross profit of \$45.4 million, an increase of 16% compared with the first quarter of 2012
  - Gross margin of 79.3% compared with 77.7% in the prior-year first quarter
  - Pre-tax income of \$9.7 million, an increase of 91% compared with the prior-year first quarter and an increase of 45% sequentially
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- Earnings per diluted share of \$0.34, an increase of 31%, compared with the prior-year first quarter and an increase of 21% sequentially
  - Non-GAAP adjusted income of \$12.5 million or \$0.59 per diluted share, representing increases of 49% and 34%, respectively, compared with the prior-year first quarter and increases of 31% and 31%, respectively, sequentially

### **Reported Financial Results**

Revenues for the first quarter of 2013 were \$57.2 million, an increase of 14% compared with revenues for the first quarter of 2012 of \$50.3 million.

Net income for the first quarter of 2013 was \$7.2 million, or \$0.34 per diluted per share, which included \$1.3 million in stock-based compensation expense and \$1.4 million in depreciation and amortization expenses. This compares with net income for the first quarter of 2012 of \$4.9 million, or \$0.26 per diluted share, which included \$1.8 million in stock-based compensation expense and \$1.3 million in depreciation and amortization expenses.

PhotoMedex repurchased no shares of its common stock during the first quarter of 2013.

As of March 31, 2013 the Company had cash and cash equivalents of \$63.5 million or \$3.00 per diluted share, compared with \$62.3 million as of December 31, 2012. Current assets included \$24.3 million in accounts receivable, compared with \$19.1 million as of December 31, 2012. The increase in accounts receivables was largely related to the impact of the timing of shipments related to a television home shopping special event in the first quarter, which were collected in the second quarter.

Management expects revenues for the second quarter of 2013 to exceed \$59 million.

Dr. Dolev Rafaeli, PhotoMedex CEO, commented, "The rapid growth we have achieved the past few years continued during the first quarter and, importantly, featured an improvement in gross margin led by a 16% increase in consumer revenues, particularly from our no!no!™ products. No!no! is now available in most every Bed Bath and Beyond store across the U.S. and we are pleased with the initial sales ramp. We have also had strong responses to our Spanish-language advertisements in the U.S. and our marketing of no!no! Men. In addition we achieved substantial sales increases in Neova® skin care products from upselling no!no! customers at our call centers.

"Geographic expansion holds particular promise for PhotoMedex as we prepare to launch no!no! in Brazil and further develop the German and Korean markets. We are very excited about the sales potential in these geographies going into the second half of the year."

Dr. Rafaeli added, "XTRAC adjusted treatment revenues were up 73% compared with the first quarter of 2012 as our direct-to-patient advertising is having a clear impact. We've initiated television and radio advertising in six new areas of the country and we plan additional rollouts of advertising in new markets throughout the year."

41. On May 10, 2013, the Company filed its quarterly report for the period ended March 31, 2013 on Form 10-Q with the SEC, that was signed by Defendants Rafaeli and McGrath, and repeated the Company's previously announced quarterly financial results. With regard to the no!no! brand expansion in Japan, the Form 10-Q stated, *"[e]ven at this level of sales, we believe we have ample opportunity for further expansion, as Japan's 2012 population was over 127 million people...far greater than the more than four million who have already purchased our products."*

42. In addition, the Form 10-Q contained signed certifications pursuant to SOX by Defendants Rafaeli and McGrath, stating that the financial information contained in the Form 10-Q was accurate, fairly presented, in all material respects, the financial condition and results of operations of the Company, and disclosed all material changes in the Company's internal control over financial reporting.

43. On August 7, 2013, the Company issued a press release reporting its financial and operating results for the second quarter ending June 30, 2013. The Company stated in pertinent part as follows:

- Consumer revenues of \$48.7 million, a decrease of 3.5% compared with the prior-year second quarter and a decrease of 0.8% sequentially
- Direct-to-consumer channel revenues of \$30.3 million, a decrease of 10.0% compared with the prior-year second quarter and a decrease of 4.4% sequentially
- Global retail and home shopping channel revenues of \$9.9 million, an increase of 1.6% compared with the prior-year second quarter and a decrease of 17.7% sequentially
- Distributor consumer channel revenues of \$8.4 million, an increase of 20.4% compared with the prior-year second quarter and an increase of 59.4% sequentially
- Gross profit of \$46.7 million, an increase of 0.3% compared with the prior-year second quarter
- Gross margin of 80.4%, compared with 79.0% in the prior-year second quarter
- Pre-tax income of \$9.0 million, an increase of 77.0% compared with the prior-year second quarter
- Earnings per diluted share of \$0.34, an increase of 70.0% compared with the prior-year second quarter
- Net income of \$7.1 million, an increase of 68.4% compared with the prior-year second quarter
- Non-GAAP adjusted income of \$11.8 million or \$0.56 per diluted share, an increase of 43.6%, compared with the prior-year second quarter
- Board of Directors authorized an additional \$30 million common stock share repurchase program

#### **Reported Financial Results**

Revenues for the second quarter of 2013 were \$58.1 million, a decrease of 1.4% compared with revenues for the second quarter of 2012 of \$58.9 million.

Net income for the second quarter of 2013 was \$7.1 million or \$0.34 per diluted per share, which included \$1.3 million in stock-based compensation expense and \$1.5 million in depreciation and amortization expense. This compares with net income for the second quarter of 2012 of \$4.2 million or \$0.20 per diluted share, which included \$1.5 million in stock-based compensation expense and \$1.4 million in depreciation and amortization expense.

Revenues for the six months ended June 30, 2013 were \$115.3 million, an increase of 5.6% compared with revenues for the six months ended June 30, 2012 of \$109.2 million.

Net income for the six months ended June 30, 2013 was \$14.3 million or \$0.68 per diluted per share, which included \$2.6 million in stock-based compensation expense and \$3.0 million in depreciation and amortization expense. This compares with net income for the six months ended June 30, 2012 of \$9.1 million or \$0.45 per diluted share, which included \$3.3 million in stock-based compensation expense and \$2.8 million in depreciation and amortization expense.

As of June 30, 2013 the Company had cash and cash equivalents of \$62.5 million or \$2.97 per diluted share, compared with \$62.3 million as of December 31, 2012. During the second quarter the Company repurchased 324,758 shares of its common stock in the open market at an average price of \$16.53 per share, for a total of \$5.4 million. Current assets included \$28.6 million in accounts receivable, compared with \$19.1 million as of December 31, 2012. The increase in accounts receivables was largely due to the timing of \$5.2 million of second quarter shipments related to television home shopping special events in Europe and North America, as well as a \$5.3 million site letter of credit not collected until after the quarter had ended.

Management expects revenues for the third quarter of 2013 to be in line with second quarter 2013 revenues.

Dr. Dolev Rafaeli, PhotoMedex CEO, commented, "We are pursuing the next major phase of our growth strategy through expansion of the no!no! brand into Brazil and continued ramp-up in Germany, while building the domestic XTRAC business to critical mass by expanding our patient marketing campaigns and installed base of systems. XTRAC advertising has now been rolled out nationally. Our second quarter XTRAC revenues, which more than doubled over the prior year, show the successful execution of our plan."

Dr. Rafaeli added, "We are very pleased with the earnings and cash flow we have been consistently generating, and with our ability to increase or decrease our media spend as warranted by market conditions and with a focus on driving profitability. During the quarter our U.S. consumer revenues were impacted by the attack during the Boston Marathon and by the tornados in Oklahoma, which muted the response to our domestic consumer advertising programs as our target customers were engaged with these events yet our advertising expenditures had already been committed. Our efforts to cross-sell the Neova skincare line to the consumer market have been very successful, with sales of more than \$1.0 million this quarter representing a 10-fold increase in one year."

### **Share Repurchase Expanded**

Last year on August 18, 2012 the Company announced that its Board of Directors authorized the repurchase of its common shares on the open market during the ensuing 12 months. It is expected that by the 2013 anniversary date of this program, the Company will have fulfilled the \$25 million limit under this program. Consequently, the Board of Directors has authorized an additional \$30

million share repurchase program of its common shares in the open market over the next 12 months, at such times and prices as determined appropriate by the Company's management in collaboration with the Board of Directors. The shares will be purchased with cash on hand.

"The expansion of our share repurchase program by a further \$30 million is reflective of the confidence we have in the growth of PhotoMedex, our ability to generate free cash flow and our commitment to building shareholder value," Dr. Rafael concluded.

44. On August 9, 2013, the Company filed its quarterly report for the period ended June 30, 2013 on Form 10-Q with the SEC, that was signed by Defendants Rafaeli and McGrath, and repeated the Company's previously announced quarterly financial results. With regard to the no!no! brand expansion in Japan, the Form 10-Q stated, *"[e]ven at this level of sales, we believe we have ample opportunity for further expansion, as Japan's 2012 population was over 127 million people...far greater than the more than four million who have already purchased our products."*

45. In addition, the Form 10-Q contained signed certifications pursuant to SOX by Defendants Rafaeli and McGrath, stating that the financial information contained in the Form 10-Q was accurate, fairly presented, in all material respects, the financial condition and results of operations of the Company, and disclosed all material changes in the Company's internal control over financial reporting.

46. The Company's aforementioned statements are false and misleading because Defendants misrepresented and failed to disclose adverse facts, which were known to Defendants or recklessly disregarded by them, including that (i) the effectiveness of the Company's key product, the no!no! device rested on flimsy, weak studies; (ii) a more credible study raised serious doubts as to the touted effectiveness of the Company's key product, and in fact showed that the product works no better than shaving; (iii) the Company had materially overstated the

prospects for the no!no! device in the Japanese market; and (iv) as a result of the above, the Company's financial statements, assurances and expectations with regard to the Company's growth, operations, and business prospects were false and misleading at all relevant times.

**D. The Truth Comes to Light**

47. On October 17, 2013, TheStreetSweeper.org published a report entitled "PhotoMedex: Just say No!No!" raising serious risks and concerns regarding, among other things, the ineffectiveness of the no!no! device. The report stated in pertinent part as follows:

Here are six key PHMD issues that we believe pose risks for investors:

**Clinical study: No!no! no more effective**

*One of the biggest issues that could ultimately upset investors revolves around PHMD's biggest product.* It's a hot-wire device designed to burn the hair and damage the hair follicle - similar to laser, light devices - or epilation which a medical doctor described to TheStreetSweeper as a small wire that delivers heat into a single hair follicle, that thermally destroys or damages the follicle so the hair doesn't grow or can't be seen.

PHMD also makes products for psoriasis and other skin disorders sold to dermatologists, aestheticians and consumers. But its top product is the no!no! device designed for longterm hair removal in the home.

*But it just doesn't work any better than shaving.*

That's right. Vanderbilt University Medical Center clinical assistant professor Dr. Brian Biesman conducted an eye-opening study, including a statistical analysis of hair counts on 22 test subjects who used no!no!. Subjects shaved an area of a leg with a razor blade and an adjacent area of the leg with the no!no! device.

Even longterm the no!no! was no more effective than shaving, Dr. Biesman said in an interview with TheStreetSweeper.

*"Our study found it was comparable to shaving. It was no better and no worse in terms of the number of hairs in the treated area, the color of the hair and the thickness of hair," said Biesman, Nashville Center for Laser and Facial Surgery director and past president of the American Society for Laser Medicine and Surgery.*

The medical journal "Lasers in Surgery and Medicine" published the study. Sponsored by Tria Beauty, the study underwent peer review among experts who disclosed no conflict of interest. Dr. Biesman said he got feedback from experts who endorsed the study methodology.

Dr. Biesman said nurses performed the study treatments. Though some consumers have reported no!no! burned them, test subjects had no such problems.

As for long-term hair removal effectiveness "... it seems unlikely that, if 16 treatments produce no effect whatsoever, 24 or 48 or some other number would deliver the profound results claimed by the manufacturer," Dr. Biesman wrote in the report published in July 2013.

### **PHMD's odd studies**

*Even the studies PHMD uses on its own web site contain some rather spooky revelations.*

"Adverse events were limited to mild erythema with crusting" in three of the 12 subjects who completed the study, plus another one whose erythema and crusting were severe enough to cause the person to withdraw, according to a 2007 study published in the Journal of Drugs in Dermatology.

Apparently, instead of smooth, cover-girl legs, 30 percent of subjects were plagued with quite the opposite - a crusty rash.

Unlike the other two studies listed on PHMD's web site, at least this one appears to be published in a peer-reviewed journal and discloses that Radiancy funded the research. In our opinion, this is the only study of much substance released by PHMD.

*Unfortunately, though, study subjects tried only no!no! so there was no control or alternative treatment studied. Unlike the typical study, results were simply compared to other studies on laser hair removal adverse effects.*

Results also show that no!no! got rid of just 48 percent of leg hair initially and 43.5 percent at 12 weeks. The bikini area fared worse at 5 percent and 15 percent.

The study compared results from other studies on long-pulsed laser and ruby laser use. But results appear meaningless because the no!no! was not tested in the same areas - lips, necks, chins and armpits.

*PHMD also includes a third study paper that apparently was not published in a peer-reviewed scientific publication and appears to lack the conventional statement of funding. It's peculiar that it contains a large photo of the no!no!*

*product at the bottom of the study, looking for all the world like an advertisement.*

Also, results showed a rather disappointing 27 percent cut in hair count after one week, then about 45 percent at 28 weeks. So, even after about seven months, subjects still were stuck with more than half-way hairy legs.

*All three studies are interesting but simply lack the data to tell us that the no!no! actually works, said Dr. Theresa Pacheco, a physician and associate professor in the dermatology department at the University of Colorado Anschutz Medical Campus.*

“Dr. Brian Biesman’s study is much more detailed and objective and published in a peer-reviewed journal, which means that other hair experts vetted this study before publication,” she added. She has no conflict of interest and no connections to PHMD, Tria or Dr. Biesman.

Dr. Pacheco said in an email that the US Food and Drug Administration doesn’t require in-depth studies for hair removal devices to enter the market place and be sold to consumers. So the company is taking the path of least resistance.

“The no!no! device is taking the ‘first to market advantage’ to sell the devices,” Dr. Pacheco added.

“Save your money,” she said. “Buy a razor.”

Dr. Pacheco added that consumers should seek expert advice to find the best solutions among many treatments ranging from bleaching and prescription products like Vaniqa to various shaving/waving type methods to home devices like Tria’s Silk’n flash lamp to professional laser/light based devices.

“The no!no! device per Dr. Biesman’s study,” she said, “did not remove hair or reduce or delay hair regrowth when compared to shaving.”

### **Consumer complaints**

Some consumers report disappointing results, too, even saying they have been burned by no!no!, though we admit these could have been caused by a malfunctioning unit or misuse. Online reviews noted troubles included stinky hair, burned hair, more luxuriant hair, clueless customer service reps and difficulty getting money refunded.

Here are a few samples:

Under the title “False advertisement, ineffective product,” a consumer wrote that her calls requesting a refund kept getting disconnected:

"I was sucked in and bought your completely ineffective product ... I tried it for a 2 wks and it does NOT WORK ON thick, coarse African-American hair, despite (their) false advertisements to the contrary."

Here's another one from Amazon.com, where nearly 61 percent of no!no! ratings were one star: "When my hair started growing back it was thicker and more abundant than before. You can only imagine the stress!"

This customer was among those who had trouble getting a refund.  
"...the representative was rude and argumentative ...

I would highly recommend NOT TO BUY THIS PRODUCT - DOESN'T WORK AND CAN'T GET A REFUND!!!"

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### **Main product peaking?**

*The future of PHMD's no!no! is also uncertain, we believe.*

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Most of PHMD's sales are made in America, which provided 72 percent of total revenue last quarter and in Japan, which accounted for 16 percent from its sole distributor there, according to filings.

*Yet PHMD contends it's looking for more growth in Japan. We believe PHMD overstates the prospects for no!no! there.*

Why? Hair removal probably isn't a huge concern in Japan, one might extrapolate from a Nagoya University School of Medicine study of more than 600 women. University researchers' clinical assessment determined a lower level of body hair among the Japanese.

*Meanwhile, we think PHMD also may be seeing its key U.S. market product peaking.*

To keep sales up, PHMD is busy spending millions running no!no! ads on everything from short commercials on broadcast stations to hour-long infomercials on cable to the web to Plus-TV commercials shown on JetBlue Airways flights. Execs recently said PHMD backed off on some no!no! product direct-to-consumer marketing in North America because cost per media increased.

The 2Q direct-to-consumer revenue fell to \$30.3 million from \$33.7 million for the prior year. Yet the overall media buying and advertising expenses rose to 27.5 percent of revenue in 2Q from 25.7 percent the prior year.

*So the company's blowing through a higher percentage of ad dollars to sell the products.*

### **Insider selling precedes huge buyback**

If selling signifies lack of confidence in the company, as we believe it does, PHMD must suffer from an inferiority complex.

*Insiders have gone on a huge selling spree since October 2012, especially CEO Rafaeli. He owned nearly 2 million shares as of June 11, 2013. But he's shaved those shares in trust down to about 966,700 in a short time, records show.*

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Director Katsumi Oneda also trimmed roughly 1.5 million shares down to a million, while President McGrath chopped his shares from about 323,000 to about 200,000, records indicate.

We submit that this selling indicates what's wrong with the stock buybacks - another \$30 million repurchase is planned this year. The company appears to be using shareholders' cash to benefit just a few select insiders from whom stock is bought. We think it helps rich insiders rather than smaller investors as large investors buy blocks sold by insiders.

### **Key consumer segment: falling revenue**

*Consumer sales fell to \$48.7 million in 2Q, a .8 percent sequential decline but a more concerning 3.5 percent drop from the year before.*

Execs inexplicably blamed the drop on the Boston Marathon shootings and the Oklahoma tornadoes.

Blaming shootings and the weather for a sales drop is a stretch of monstrous proportions. But TheStreetSweeper believes the more likely explanation is that PHMD's top product, no!no!, is losing popularity in its key location of the U.S. and could continue to decline.

Here are three related financial factors that support the point.

*\* First, PHMD had to pour nearly \$2 million extra into selling, general and administrative in 2Q. That's a chunk of change, especially since the company's most popular category still dropped behind the same quarter the previous year.*

*\* Second, direct-to-consumer sales not only plummeted compared with the prior year 2Q, it also dropped 4.4 percent sequentially, too.*

*\* Third, consumer revenue the year before increased 19.6 percent from 1Q to 2Q (\$42.2 million v. \$50.5 million). This compares with the comparative revenue decline to \$48.7 million already noted in the same time period this year.*

*Adding to this witch's brew of financials, consumer revenue historically dropped 23 percent and 7 percent sequentially in the last quarters of 2011 and 2012 - so this increases the chances of disappointing numbers boiling up in coming quarters. Even normally optimistic analysts are expecting a slight (more than 1 percent) sequential fall.*

Analysts' annoyance with PHMD came out loud and clear during the last earnings call.

*"...2013 was supposed to be a growth year and it's now looking like it's going to be a flattish revenue kind of performance," said an unidentified analyst. "... so all those frustrations here, the stock it hasn't performed at all. And I'm just trying to figure out if there was a misstep at all on your end as far as assuming what kind of expectations we should have?"*

*President McGrath responded in part that the history is that before it jumps, "this business moves sideways for a quarter or two ..."*

48. On this news, PhotoMedex shares declined \$0.50 per share or 3.24%, to close at \$14.91 per share on October 17, 2013 on heavy trading volume.

49. On November 6, 2013, the Company issued a press release, reporting the Company's third quarter financial and operating results for the quarter ending September 30, 2012, in which it confirmed TheStreetSweeper's allegations that the Company had overstated its prospects for the no!no! device in the Japanese market. The press release states in pertinent part as follows:

Revenues for the third quarter of 2013 were \$45.9 million, a decrease of 19.0% compared with revenues for the third quarter of 2012 of \$56.7 million. *The decline in revenues was primarily due to no consumer sales to the Company's distributor in Japan in the third quarter of 2013 as this distributor implemented a change to its business model that affected most of the manufacturers it represents to retail channels, and determined to reduce inventory levels to mitigate investment risk during this transition.* According to third-party data,

no!no! product sales in Japan at the retail level during the third quarter of 2013 were comparable to the third quarter of 2012. Also contributing to the decline in revenues was the scheduling of a Home Shopping Network 24-hour event in the fourth quarter of 2013 that occurred in the third quarter of 2012. Had the revenue contributions from these two events remained at the second quarter levels, the third quarter revenues would have been approximately \$13 million higher.

Management expects revenues for the fourth quarter of 2013 to be more than \$55 million *without any expected contribution from Japan*.

Net income for the third quarter of 2013 was \$0.9 million or \$0.04 per diluted per share, which included \$1.2 million in stock-based compensation expense and \$1.6 million in depreciation and amortization expense. This compares with net income for the third quarter of 2012 of \$7.5 million or \$0.35 per diluted share, which included \$1.5 million in stock-based compensation expense and \$1.4 million in depreciation and amortization expense.

Revenues for the nine months ended September 30, 2013 were \$161.2 million, a decrease of 2.8% compared with revenues for the nine months ended September 30, 2012 of \$165.9 million.

Net income for the nine months ended September 30, 2013 was \$15.2 million or \$0.74 per diluted per share, which included \$3.8 million in stock-based compensation expense and \$4.5 million in depreciation and amortization expense. This compares with net income for the nine months ended September 30, 2012 of \$16.6 million or \$0.83 per diluted share, which included \$4.8 million in stock-based compensation expense and \$4.2 million in depreciation and amortization expense.

As of September 30, 2013 the Company had cash and cash equivalents of \$49.0 million or \$2.39 per diluted share, compared with \$62.3 million as of December 31, 2012. During the third quarter of 2013 the Company repurchased 846,924 shares of its common stock under its Share Repurchase program at an average price of \$16.05 per share, for a total of \$13.6 million. Since the beginning of the year, the Company has repurchased 1,171,682 shares of its common stock for a total of \$19.0 million, and has \$25.2 million remaining available to repurchase shares under the \$55 million board authorized program.

Dr. Dolev Rafaeli, PhotoMedex CEO, commented, "While a change in business model at our distributor in Japan impacted orders for the no!no! during the quarter, we are pleased that product demand from Japanese consumers held steady. In addition, a major beauty event on HSN that occurred in last year's third quarter will take place this year in the fourth quarter. At this event last year, we sold a record number of no!no! products and we are looking forward to a similarly strong reception in December when we will offer the no!no! Pro, which has a higher average selling price.

"During the quarter we acquired a Brazilian distributor and subsequently launched the no!no! brand and recorded our first sales. Retail advertising in Brazil began last week, and we are excited to begin ramping up this next major phase of our growth strategy," Dr. Rafaeli continued. "We continued to make progress in Germany with our no!no! brand and are on track to meet our expectations for 2014. Sales to Bed Bath & Beyond in the U.S. were as expected and in the coming months they will be upgrading from the no!no! Plus to the higher-priced 8800. Neova® consumer revenues were up more than five-fold over the prior year as testament to the success of our marketing platform."

50. On this news, PhotoMedex shares fell \$1.13 per share or 8.84%, from a close price of \$12.78 per share on November 5, 2013 to a close price of \$11.65 per share on November 6, 2013 on heavy trading volume.

51. Finally, on November 14, 2013, TheStreetSweeper.org published a report reiterating some of its previous concerns meanwhile raising additional significant concerns about the effectiveness and sales of the no!no! device and the Company's business and operations, among other things. The report states in pertinent part as follows:

**Japan loss jeopardizes multi-millions**

PHMD reported revenue of only \$45.9 million last quarter. That is the lowest revenue since the PhotoMedex-Radiancy reverse merger in December 2011 and about \$10 million below expectations.

*The primary excuse? A failure to sell virtually any product in Japan, as the distributor's orders lurch to a complete stop.*

How much inventory is sitting around the Japanese distributor's warehouse while everyone tries to figure out what to do? An astounding 160,000 units. These units typically sell for about \$270 apiece.

That means *\$43.2 million worth of product is at risk.* That's obviously terrible news for a company with revenue of only \$45.9 million.

*"From the Japan standpoint it's a complete zero," said an analyst who covers the company.*

*"I don't care what the company says," he added. "It's a zero."*

And that \$46 million-worth is only a fraction of the no!no! units in limbo in Japan, the company's second-biggest market. PHMD executives admitted under analysts' grilling that they really didn't know how many units are in the possession of a middleman distributor between the key distributor, Ya-Man, and the retailer. They also don't know how many are gathering dust on Japanese retail store shelves. Those two unknowns together could be a million bucks or upwards of \$50 million – no one knows. Even if the monetary loss to PHMD turns out to be more controllable than we anticipate, the damage to PHMD's reputation could spin out of control.

The Japan distributor, Ya-Man, suddenly changed its business plan, PHMD executives explained, and stopped orders of no!no!, in both the third and fourth quarters, so Ya-Man could conserve cash.

But TheStreetSweeper is skeptical. PHMD said the distributor wants to eliminate its middleman distributor and go directly to retailers.

Yet, Ya-Man is *seeking* distributors.

The company website FAQs feature this question: "How can I become your international distributor?" Interested parties may then submit a request through the online form. So this part of PHMD's claims makes no sense.

Ya-Man's website also contains many products but surprisingly it does not appear to contain PHMD's no!no! hair removal products.

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### **Distributor reports less income than the likely cost of the no!no!**

Fred Russell of Fredric E. Russell Investment Management pointed out another important question about the Japanese distributor that recently signed a two-year extension on its exclusive contract with PHMD.

"Why does this company have only one distributor in a big market like Japan?" Russell asked. "That situation makes this company very vulnerable,"

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### **Write-down fears**

"My biggest fear is there could be a write-down because they're telling The Street they're transitioning from the (older no!no! model) 8800 to the no!no! pro," said the analyst who requested anonymity.

"When you're transitioning to products and your biggest customers are also selling other products, newer products and you have inventory built up, you usually have some sort of write-down," he said. Write-downs can be big trouble and have been at the heart of company failures.

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TheStreetSweeper had already warned in the Oct. 17 PHMD article – click on the link here – that PHMD may be overstating the prospects for no!no! in Japan. Extrapolating from a Nagoya University School of Medicine study, we found that researchers' clinical assessment determined a lower level of body hair among the Japanese. So the interest in hair removal there would logically be limited.

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### **Flawed stock buyback timing**

Multiple questions revolve around the timing of Japan and other events.

PHMD boasted that it continued the second half of its stock buyback program, a roughly \$13 million effort this past quarter that would normally please investors. But two issues sully this program.

First, the company conducted the purchases close to when the Japan distribution problems began to drive down the stock price.

The company's president and financial officer, Dennis McGrath, explained that the stock price seemed inexpensive at the time and that the buying stopped on Sept. 16, just before the end of the month when executives say they discovered the distribution problem.

Russell pointed out that the stock price was very high at that time. It was over \$16 on Sept. 16, very near this year's high of \$17 and change.

Second, just before the stock repurchase program ended, CEO Rafaeli and a director, Katsumi Oneda, were happily selling thousands upon thousands of shares of stock. Rafaeli said he retains about 1.5 million shares and the sales occurred under an automatic sales plan, a 10b-5.

"I have nothing to do with the execution of the plan and I don't control it. I set up the formula a long time ago and I let it roll and it happens and reports when it does," Rafaeli said.

Regardless, Russell said, "The timing was not wise."

So who would blame investors if they felt the company threw around their hard-earned dollars to repurchase stock at exorbitant prices that unfairly benefited some insiders?

"This company is really good at removing women's wrinkles," Russell said, referring to the company's heat-and-light anti-aging treatment. "But I'm not sure they are good at removing the wrinkles in their business strategy."

52. As a result of the series of disclosures regarding the true state of the Company's business and operations, the Company's shares have declined \$2.65 or 17.2% from its close price of \$15.41 per share on October 16, 2013, to its close price of \$12.76 on November 15, 2013. PhotoMedex's stock price continues to decline—closing at \$11.53 per share on November 20, 2013.

53. Due to the Defendants' wrongful course of conduct, PhotoMedex shareholders have lost millions of dollars in their investment in the Company.

#### V. UNDISCLOSED ADVERSE INFORMATION

54. The market for PhotoMedex's securities was an open, well-developed and efficient market at all relevant times. As a result of the materially false and misleading statements and failures to disclose described herein, PhotoMedex's securities traded at artificially inflated prices during the Class Period. Plaintiff and the other members of the Class purchased or otherwise acquired PhotoMedex's securities relying upon the integrity of the market price of PhotoMedex's securities and market information related to PhotoMedex, and have been damaged thereby.

55. During the Class Period, Defendants materially misled the investing public, thereby inflating the price of PhotoMedex's securities, by publicly issuing false and misleading statements and omitting to disclose material facts necessary to make Defendants' statements, as set forth herein, not false and misleading. Such statements and omissions were materially false and misleading in that they failed to disclose material adverse non-public information and misrepresented the truth about the Company, its business and operations, as alleged herein.

56. At all relevant times, the material misrepresentations and omissions particularized herein directly or proximately caused or were a substantial contributing cause of the damages

sustained by Plaintiff and the other members of the Class. As described herein, during the Class Period, Defendants made or caused to be made a series of materially false and misleading statements about PhotoMedex's business, prospects and operations.

57. These material misstatements and omissions had the cause and effect of creating in the market an unrealistically positive assessment of PhotoMedex and its business, prospects and operations, thus causing the Company's securities to be overvalued and artificially inflated at all relevant times. Defendants' false and misleading statements during the Class Period resulted in Plaintiff and other members of the Class purchasing the Company's securities at artificially inflated prices, thus causing the damages complained of herein.

#### **VI. NO SAFE HARBOR**

58. The federal statutory safe harbor provided for forward-looking statements under certain circumstances does not apply to any of the allegedly false statements pleaded herein. Furthermore, many of the statements pleaded herein were not identified as "forward-looking statements" when made, or indicated that actual results "could differ materially from those projected." Nor were there any meaningful cautionary statements identifying important factors that could cause actual results to differ materially from the statements made therein.

59. Alternatively, to the extent that the statutory safe harbor does 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 particular speaker knew that the particular forward-looking statement was false, and/or the forward-looking statement was authorized and/or approved by an executive officer of PhotoMedex who knew that those statements were false when made.

## **VII. SCIENTER ALLEGATIONS**

60. As alleged herein, the Individual Defendants acted with scienter in that the Individual Defendants knew that the public documents and statements issued or disseminated in the name of the Company during the Class Period were materially false and misleading; knew 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.

61. As set forth herein, the Individual Defendants, by virtue of their receipt of information reflecting the true facts regarding PhotoMedex, their control over, receipt and/or modification of PhotoMedex's allegedly materially misleading statements and omissions, and/or their positions with the Company which made them privy to confidential information concerning PhotoMedex, participated in the fraudulent scheme alleged herein.

62. The ongoing fraudulent scheme described herein could not have been perpetrated over a substantial period of time, as has occurred, without the knowledge and complicity of the personnel at the highest level of the Company, including the Individual Defendants.

## **VIII. LOSS CAUSATION**

63. During the Class Period, as detailed herein, Defendants engaged in a scheme to deceive the market and a course of conduct that artificially inflated the prices of PhotoMedex's securities and operated as a fraud or deceit on Class Period purchasers of PhotoMedex's securities by failing to disclose to investors that the Company's financial results were materially misleading and misrepresented material information. When Defendants' misrepresentations and fraudulent conduct were disclosed and became apparent to the market, the prices of PhotoMedex's securities fell precipitously as the prior inflation came out of the Company's stock

price. As a result of their purchases of PhotoMedex's securities during the Class Period, Plaintiff and the other Class members suffered economic loss, *i.e.* damages, under the federal securities law.

64. By failing to disclose the true state of the Company's business prospects and operations, investors were not aware of the true state of the Company's financial status. Therefore, Defendants presented a misleading picture of PhotoMedex's business and prospects. Thus, instead of truthfully disclosing during the Class Period the true state of the Company's business, Defendants caused PhotoMedex to conceal the truth.

65. Defendants' false and misleading statements caused PhotoMedex's common stock to trade at artificially inflated levels throughout the Class Period. However, as a direct result of the Company's problems coming to light, PhotoMedex's common stock price fell precipitously from its Class Period high. The stock price drop discussed herein caused real economic loss to investors who purchased the Company's securities during the Class Period.

66. The decline in the price of PhotoMedex's common stock after the truth came to light was a direct result of the nature and extent of Defendants' fraud finally being revealed to investors and the market. The timing and magnitude of PhotoMedex's common stock price decline negates any inference that the loss suffered by Plaintiff and the other Class members was caused by changed market conditions, macroeconomic or industry factors or Company-specific facts unrelated to the Defendants' fraudulent conduct. The economic loss suffered by Plaintiff and the other Class members was a direct result of Defendants' fraudulent scheme to artificially inflate the prices of PhotoMedex's securities and the subsequent decline in the value of PhotoMedex's securities when Defendants' prior misrepresentations and other fraudulent conduct were revealed.

**IX. APPLICABILITY OF PRESUMPTION OF RELIANCE: FRAUD ON THE MARKET DOCTRINE**

67. At all relevant times, the market for PhotoMedex stock was an efficient market for the following reasons, among others:

a. PhotoMedex securities met the requirements for listing, and were listed and actively traded on NASDAQ, a highly efficient market;

b. As a regulated issuer, PhotoMedex filed periodic public reports with the SEC and NASDAQ;

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

d. PhotoMedex regularly issued press releases which were carried by national newswires. Each of these releases was publicly available and entered the public marketplace.

68. As a result, the market for PhotoMedex securities promptly digested current information with respect to the Company from all publicly-available sources and reflected such information in PhotoMedex's stock price. Under these circumstances, all purchasers of PhotoMedex securities during the Class Period suffered similar injury through their purchase of stock at artificially inflated prices and a presumption of reliance applies.

**X. CLASS ACTION ALLEGATIONS**

69. Plaintiff brings this action as a class action pursuant to Federal Rule of Civil Procedure 23(a) and (b)(3) on behalf of all persons who purchased or otherwise acquired PhotoMedex securities during the Class Period and who were damaged thereby (the "Class"). Excluded from the Class are Defendants, members of the immediate family of each of the

Individual Defendants, any subsidiary or affiliate of PhotoMedex and the directors, officers and employees of the Company or its subsidiaries or affiliates, or any entity in which any excluded person has a controlling interest, and the legal representatives, heirs, successors and assigns of any excluded person.

70. The members of the Class are so numerous that joinder of all members is impracticable. While the exact number of Class members is unknown to Plaintiff at this time and can only be ascertained through appropriate discovery, Plaintiff believes that there are thousands of members of the Class located throughout the United States. Throughout the Class Period, PhotoMedex securities were actively traded on NASDAQ (an open and efficient market) under the symbol "PHMD". Record owners and other members of the Class may be identified from records maintained by PhotoMedex and/or its transfer agents and may be notified of the pendency of this action by mail, using a form of notice similar to that customarily used in securities class actions.

71. Plaintiff's claims are typical of the claims of the other members of the Class as all members of the Class were similarly affected by Defendants' wrongful conduct in violation of federal law that is complained of herein.

72. Plaintiff will fairly and adequately protect the interests of the members of the Class and have retained counsel competent and experienced in class and securities litigation.

73. Common questions of law and fact exist as to all members of the Class and predominate over any questions solely affecting 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 and omissions as alleged herein;

b. whether Defendants participated in and pursued the common course of conduct complained of herein;

c. whether documents, press releases, and other statements disseminated to the investing public and the Company's shareholders during the Class Period misrepresented material facts about the business, finances, financial condition and prospects of PhotoMedex;

d. whether statements made by Defendants to the investing public during the Class Period misrepresented and/or omitted to disclose material facts about the business, finances, value, performance and prospects of PhotoMedex;

e. whether the market price of PhotoMedex common stock during the Class Period was artificially inflated due to the material misrepresentations and failures to correct the material misrepresentations complained of herein; and

f. the extent to which the members of the Class have sustained damages and the proper measure of damages.

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

## **XI. COUNTS AGAINST DEFENDANTS UNDER THE EXCHANGE ACT**

### **COUNT I**

#### **For Violations of §10(b) of the Exchange Act and Rule 10b-5 Promulgated Thereunder Against Defendants**

75. Plaintiff repeats and realleges the allegations set forth above as though fully set forth herein. This claim is asserted against all Defendants.

76. During the Class Period, PhotoMedex and the Individual Defendants, and each of them, 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; (ii) artificially inflate and maintain the market price of PhotoMedex common stock; and (iii) cause Plaintiff and other members of the Class to purchase PhotoMedex stock 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.

77. These 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 PhotoMedex securities in violation of §10(b) of the Exchange Act and Rule 10b-5. Defendants are sued as primary participants in the wrongful and illegal conduct charged herein. The Individual Defendants are also sued herein as controlling persons of PhotoMedex, as alleged herein.

78. In addition to the duties of full disclosure imposed on Defendants as a result of their making of affirmative statements and reports, or participation in the making of affirmative statements and reports to the investing public, they each had a duty to promptly disseminate

truthful information that would be material to investors in compliance with the integrated disclosure provisions of the SEC as embodied in SEC Regulation S X (17 C.F.R. § 210.01 et seq.) and S-K (17 C.F.R. § 229.10 et seq.) and other SEC regulations, including accurate and truthful information with respect to the Company's operations, financial condition and performance so that the market prices of the Company's publicly traded securities would be based on truthful, complete and accurate information.

79. PhotoMedex and the Individual Defendants, individually and in concert, directly and indirectly, by the use of means or instrumentalities of interstate commerce and/or of the mails, engaged and participated in a continuous course of conduct to conceal adverse material information about the business, business practices, performance, operations and future prospects of PhotoMedex as specified herein. These 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 PhotoMedex's value and performance and 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 PhotoMedex and its business, operations and future prospects, in 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 PhotoMedex's securities during the Class Period.

80. Each of the Individual Defendants' primary liability, and controlling person liability, arises from the following facts: (i) each of the Individual Defendants was a high-level executive and/or director at the Company during the Class Period; (ii) each of the Individual

Defendants, by virtue of his responsibilities and activities as a senior executive officer and/or director of the Company, was privy to and participated in the creation, development and reporting of the Company's operational and financial projections and/or reports; (iii) the Individual Defendants enjoyed significant personal contact and familiarity with each other and were advised of and had access to other members of the Company's management team, internal reports, and other data and information about the Company's financial condition and performance at all relevant times; and (iv) the Individual Defendants were aware of the Company's dissemination of information to the investing public which they knew or recklessly disregarded was materially false and misleading.

81. These 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 readily available to them. Such Defendants' material misrepresentations and/or omissions were done knowingly or recklessly and for the purpose and effect of concealing PhotoMedex's operating condition, business practices and future business prospects from the investing public and supporting the artificially inflated price of its stock. As demonstrated by their overstatements and misstatements of the Company's financial condition and performance throughout the Class Period, the Individual Defendants, if they did not have actual knowledge of the misrepresentations and omissions alleged, were severely reckless in failing to obtain such knowledge by deliberately refraining from taking those steps necessary to discover whether those statements were false or misleading.

82. 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 PhotoMedex

securities was artificially inflated during the Class Period. In ignorance of the fact that the market price of PhotoMedex shares was artificially inflated, and relying directly or indirectly on the false and misleading statements made by Defendants, 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 these Defendants during the Class Period, Plaintiff and the other members of the Class acquired PhotoMedex securities during the Class Period at artificially inflated high prices and were damaged thereby.

83. 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 of the true performance, business practices, future prospects and intrinsic value of PhotoMedex, which were not disclosed by Defendants, Plaintiff and other members of the Class would not have purchased or otherwise acquired PhotoMedex securities during the Class Period, 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.

84. By virtue of the foregoing, PhotoMedex and the Individual Defendants each violated §10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder.

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

**COUNT II**  
**For Violations of §20(a) of the Exchange Act**  
**Against the Individual Defendants**

86. Plaintiff repeats and realleges the allegations set forth above as if set forth fully herein. This claim is asserted against all the Individual Defendants.

87. The Individual Defendants were and acted as controlling persons of PhotoMedex within the meaning of §20(a) of the Exchange Act as alleged herein. By virtue of their high-level positions with the Company, participation in and/or awareness of the Company's operations and/or intimate knowledge of the Company's actual performance, 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 which Plaintiff contends are false and misleading. Each of 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.

88. In addition, each of the Individual Defendants had direct 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.

89. As set forth above, PhotoMedex and the Individual Defendants each violated §10(b) and Rule 10b-5 by their acts and omissions as alleged in this Complaint. By virtue of their controlling positions, the Individual Defendants are liable pursuant to §20(a) of the Exchange Act. As a direct and proximate result of these 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.

**XII. PRAYER FOR RELIEF**

WHEREFORE, Plaintiff, individually and on behalf of the Class, prays for judgment as follows:

- a) Declaring this action to be a class action pursuant to Rule 23(a) and (b)(3) of the Federal Rules of Civil Procedure on behalf of the Class defined herein;
- b) Awarding Plaintiff and the other members of the Class damages in an amount which may be proven at trial, together with interest thereon;
- c) Awarding Plaintiff and the members of the Class pre-judgment and post-judgment interest, as well as their reasonable attorneys' and experts' witness fees and other costs; and
- d) Awarding such other relief as this Court deems appropriate.

**XIII. JURY DEMAND**

Plaintiff demands a trial by jury.

Dated: November 22, 2013