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**UNITED STATES DISTRICT COURT  
 NORTHERN DISTRICT OF CALIFORNIA**

<p>FRANK DECARLO, DOMINICK F. IMPRESCIA, PAUL KNASIN, LYNNE A. IPPOLITO - IRA, IRWIN J. ANGER and BENJAMIN D. COOPER, on Behalf of Themselves and all Others Similarly Situated,</p> <p style="text-align: center;">Plaintiffs,</p> <p style="text-align: center;">vs.</p> <p>VIVUS INC., VIRGIL A. PLACE, LELAND F. WILSON, DAVID C. YNTEMA, JULIAN S. GANGOLLI, NEIL GESUNDHEIT, WILLIAM L. SMITH, and SAMUEL D. COLELLA,</p> <p style="text-align: center;">Defendants.</p>	<p>CASE NO.</p> <p><u>CLASS ACTION</u></p> <p><b>COMPLAINT FOR VIOLATION OF FEDERAL SECURITIES LAWS</b></p> <p><u>JURY TRIAL DEMANDED</u></p>
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Plaintiffs individually and on behalf of all others similarly situated, by and through their

attorneys, allege the following upon information and belief, except those allegations concerning themselves, which are alleged upon personal knowledge. Plaintiffs' information and belief are based upon the investigation made by and through plaintiffs' counsel.

### SUMMARY OF THE ACTION

1. This is a class action brought against defendants as a result of their fraudulent activities in violation of the federal securities laws. These claims are brought on behalf of all persons (the "Class") who purchased the common stock of Vivus, Incorporated ("Vivus" or the "Company") between May 2, 1997 and December 9, 1997, inclusive (the "Class Period"), seeking to pursue remedies under the Securities Exchange Act of 1934 (the "Exchange Act").
2. From the beginning of the Class Period through December 9, 1997, Vivus was a strong performing stock trading on the NASDAQ National Market System ("NASDAQ") under the ticker symbol VVUS. Fueled by repeated bullish statements by top officers of the corporation, including the reporting of the purportedly outstanding success and market acceptance of the Company's primary product, MUSE, the price of Vivus stock soared to a Class Period high of \$41 7/8 on October 6, 1997.<sup>1</sup> The Company's reports include press releases and financial statements contained in the Company's quarterly reports filed with the Securities Exchange Commission ("SEC") and disseminated to the public.
3. On December 10, 1997, the investment community was shocked by the announcement that the Company would miss fourth quarter revenue goals by as much as 25%, and by the announcement by Asensio & Company the same day that not only did their study of MUSE not yield the same favorable results that Vivus was reporting, but that there were concerns about the accuracy of the product sales figures Vivus had been reporting.
4. In response to the December 10, 1997 announcements, the price of Vivus common stock plummeted from December 9, 1997's high of \$21 1/2 per share to close at \$13 13/16, trading as low as \$12 per share and losing over 30% of its value in one day.
5. The Company's bullish statements during the Class Period were part of a plan by defendants to artificially inflate and maintain the price of Vivus common stock. Defendants' plan included the making of publicly-disseminated false and misleading statements about Vivus, its financial performance and condition and its business prospects. The Company's false and misleading statements regarding its financial performance and prospects were repeated in Vivus press releases disseminated throughout the Class Period.
6. Defendants, however, knew or recklessly disregarded the fact that the Company's reported product sales were overstated and did not fairly represent Vivus' results of operations, and that Vivus' projected earnings could not reasonably be achieved in light of the Company's systematic portrayal of its primary product, MUSE, as being far more successful in the marketplace than it actually was.
7. Defendants' plan, scheme and common course of conduct to inflate the price of Vivus stock was successful. When the Company's failure to meet revenue projections and the problems disclosed by the Asensio & Company study were finally disclosed, the price of Vivus stock plummeted. As a result, Vivus shareholders suffered millions of dollars in damages.

8. At all relevant times, Vivus was a California based company whose business was to develop advanced therapeutic systems for the treatment of erectile dysfunction. .

### **JURISDICTION AND VENUE**

9. This court has jurisdiction over this action pursuant to §22 of the Securities Exchange Act of 1933, 15 U.S.C. §77v; §27 of the Securities Exchange Act of 1934, 15 U.S.C. §78aa, and 28 U.S.C. §1331 and §1337. The claims asserted herein arise under §§10(b) and 20(a) of the Exchange Act, 15 U.S.C. §§78j(b) and 78t(a) and Rule 10b-5, 17 C.F.R. §240.10b-5 promulgated thereunder.

10. Venue is proper in this Northern District of California pursuant to §27 of the Exchange Act and 28 U.S.C. §1391(b). Many of the acts giving rise to the violations complained of, including the dissemination of false and misleading information, occurred in this District. Vivus maintains its principal place of business at 545 Middlefield Road, Suite 200, Menlo Park, California 94025.

11. In connection with the wrongs complained of herein, the defendants used the instrumentalities of interstate commerce, including, but not limited to, the U.S. mails, telephones and the facilities of the national securities markets.

### **THE PARTIES**

12. Plaintiff Frank DeCarlo purchased 700 shares of Vivus common stock on January 27, 1998 at \$15 5/16.

13. Plaintiff Dominick F. Imprescia's purchases of Vivus common stock were as follows:

Purchased 1,000 shares of Vivus, Inc. on October 9, 1997 at \$36 7/8.

Purchased 1,000 shares of Vivus, Inc. on October 13, 1997 at \$34 1/4.

Purchased 1,000 shares of Vivus, Inc. on October 14, 1997 at \$32.

Purchased 1,000 shares of Vivus, Inc. on October 22, 1997 at \$28 3/8.

Purchased 1,000 shares of Vivus, Inc. on October 22, 1997 at \$28 3/4.

Purchased 1,000 shares of Vivus, Inc. on November 13, 1997 at \$34 1/2.

14. Plaintiff Paul Knasin's purchases of Vivus common stock were as follows:

Purchased 70 shares of Vivus, Inc. on October 14, 1997 at \$33.

Purchased 500 shares of Vivus, Inc. on October 17, 1997 at \$30.

Purchased 500 shares of Vivus, Inc. on November 22, 1997 at \$27 7/8.

15. Plaintiff Lynne A. Ippolito purchased 288 shares of Vivus common stock through her Individual Retirement Account on August 11, 1997 at \$28 1/4.

16. Plaintiff Irwin J. Anger purchased 1000 shares of Vivus common stock on October 9, 1997 at \$35 15/16 and 500 shares on October 13, 1997 at \$33 15/16.

17. Plaintiff Benjamin D. Cooper purchased 50 shares of Vivus common stock on September 26, 1997 at \$37.625.

18. Defendant Vivus is a Delaware corporation, originally incorporated in California in 1991 to develop products for the treatment of erectile dysfunction. The Company's headquarters are located at 545 Middlefield Road, Suite 200, Menlo Park, California 94025. The Company received FDA marketing clearance for MUSE, its primary product, in November, 1997. MUSE is a urethral suppository used in the treatment of erectile

dysfunction. As of September 30, 1997, there were over thirty three million shares of Vivus stock outstanding and actively traded on the NASDAQ National Market System ("NASDAQ").

19. Defendant Virgil A. Place ("Place") is the founder of the Company and has been the Company's Chairman of the Board and Chief Scientific Officer at all relevant times.

20. Defendant Leland F. Wilson ("Wilson") was, at all relevant times, President, Chief Executive Officer and a director of the Company.

21. Defendant David C. Yntema ("Yntema") was, at all relevant times, Vice President, Finance and Chief Financial Officer of the Company. During the Class Period, and based on inside information, defendant Yntema sold 30,000 shares of his Vivus stock.

22. Defendant Julian S. Gangolli ("Gangolli") was, at all relevant times, Vice President, Marketing, of the Company. During the Class Period, and based on inside information, defendant Gangolli sold over 24,000 shares of Vivus stock.

23. Defendant Neil Gesundheit ("Gesundheit") was, at all relevant times, Vice President, Clinical and Regulatory Affairs, of the Company. During the Class Period, and based on inside information, defendant Gesundheit sold 8,000 shares of Vivus stock.

24. Defendant William L. Smith ("Smith") was, at all relevant times, Vice President, Research and Development, of the Company. During the Class Period, and based on inside information, defendant Smith sold 10,000 shares of Vivus stock.

25. Defendant Samuel D. Colella ("Colella") was a director of the Company until his resignation in July, 1997. During the Class Period, and based on inside information, defendant Colella sold over 36,000 shares of Vivus stock.

26. The defendants identified in paragraphs 20 through 26 herein will be referred to collectively hereafter as the "Individual Defendants".

27. The Individual Defendants were at relevant times during the Class Period controlling persons of Vivus within the meaning of Section 20(a) of the Exchange Act. In addition, the Individual Defendants had the power and influence, and exercised such power and influence, to cause Vivus to engage in the unlawful practices complained of herein. Because of their executive, managerial and/or directorial positions with Vivus, the Individual Defendants had access to the adverse, non-public information about the business, finances and future business prospects of Vivus as particularized herein and acted to misrepresent, misstate or conceal such information from plaintiff, class members and the investing public.

28. The Individual Defendants participated in the wrongdoing complained of herein in order to, among other things, inflate and maintain the price of the common stock of the Company, and conceal the adverse facts concerning the Company's operations, business, management, financial condition and future prospects, so that they could, among other things, (i) protect and enhance their positions as officers and/or directors of Vivus and the substantial compensation and prestige they obtained thereby and (ii) enhance the value of their personal holdings of Vivus common stock.

29. Defendants are liable, jointly and severally, as direct participants in the wrongs complained of herein. Defendants had a duty to promptly disseminate accurate and truthful information with respect to Vivus' business, operations, financial condition and future prospects or to cause and direct that such information be disseminated so that the market price of Vivus stock would be based on truthful and accurate information.

30. Each of the defendants knew of and recklessly disregarded the fact that the illegal acts and practices and misleading financial statements and omissions described herein would adversely affect the integrity of the market for Vivus common stock and would artificially inflate or maintain the price of those securities. Each of the defendants, by

acting as herein described, did so knowingly or in such a reckless manner as to constitute a fraud and deceit upon plaintiff and members of the Class plaintiff seeks to represent.

### **FRAUD ON THE MARKET DOCTRINE**

31. The market for Vivus stock is an efficient market for the following reasons, among others:

- (a) Vivus met the requirements for listing, and was listed on the NASDAQ, a highly efficient and automated market, during the Class Period;
- (b) As a regulated issuer, the Company filed periodic public reports with the SEC; and
- (c) The Company's trading volume was substantial, reflecting numerous trades each day.

### **PLAINTIFFS' CLASS ALLEGATIONS**

32. Plaintiffs bring this case as a class action pursuant to Rule 23(a) and (b)(3) of the Federal Rules of Civil Procedure on behalf of a Class consisting of all persons and entities who purchased Vivus common stock from May 2, 1997 through December 9, 1997, inclusive. Excluded from the Class are the defendants herein, any subsidiaries or affiliates of Vivus, members of any

defendant's immediate family, the officers and directors of Vivus during the Class Period, and each of their heirs, successors and assigns.

33. During the Class Period, thousands of shares of common stock of Vivus were traded on an efficient and developed securities market. Thousands of brokers nationwide have access to trading information about Vivus through the system. Within minutes of any transaction taking place, this system displays the most recent trades and prices.

34. The members of the Class are so numerous that joinder of all members is impracticable. Vivus has approximately 33,150,000 shares outstanding. During the Class Period, millions of shares of Vivus stock were purchased by hundreds of persons located throughout the United States. The exact number of Class members can be determined through appropriate discovery.

35. Plaintiffs' claims are typical of the claims of the members of the Class. Plaintiffs and all members of the Class sustained damages as a result of defendants' wrongful conduct complained of herein.

36. Plaintiffs 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. Plaintiffs have no interests that are adverse or antagonistic to those of the Class.

37. A class action is superior to other available methods for the fair and efficient adjudication of this controversy. Because the damages suffered by many individual Class members may be relatively small, the expense and burden of individual litigation make it virtually impossible for the Class members to individually seek redress for the wrongful conduct alleged herein.

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

- i. whether the federal securities laws were violated by defendants' acts as alleged herein;
- ii. whether statements disseminated to the investing public and securities markets by the defendants misrepresented and/or omitted material facts about Vivus, its business and its prospects;
- iii. whether defendants failed to correct prior statements when subsequent events rendered those prior statements untrue or inaccurate;
- iv. whether defendants acted willfully or recklessly in misrepresenting and/or omitting to state material facts;
- v. whether the market price of Vivus' common stock during the Class Period was artificially inflated due to the misrepresentations and/or non-disclosures complained of herein; and
- vi. whether the members of the Class have sustained damages, and, if so, what is the proper measure thereof.

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

- i. defendants made public misrepresentations or omitted material facts during the Class Period, as alleged herein;
- ii. the misrepresentations and/or omissions were material;
- iii. Vivus' common stock was traded in an efficient market;
- iv. the misrepresentations and/or omissions alleged tended to induce reasonable investors to misjudge the value of Vivus shares; and
- v. plaintiffs and members of the Class acquired their shares between the time defendants made the misrepresentations and/or omissions and the time the truth was revealed, without knowledge of the falsity of the misrepresentations.

40. Based upon the foregoing, plaintiffs and members of the Class are entitled to a presumption of reliance upon the integrity of the market for, at least, the purposes of class certification, as well as for ultimate proof of the claims on their merit. Similarly, plaintiffs and members of the Class are entitled to a presumption of reliance with respect to the omissions alleged herein.

41. Plaintiffs envision no difficulty in the management of this litigation as a class action.

#### **COMMON COURSE OF CONDUCT, SCHEME, PLAN AND CONCERTED ACTION ALLEGATIONS**

42. Each of the defendants is liable as a direct or indirect participant in a scheme to commit the wrongs complained of herein. In committing the wrongful acts alleged herein, all of the defendants pursued a common course of conduct in furtherance of their common plan and scheme. The scheme was designed to and did:

- (a) deceive the investing public, including plaintiffs and the other Class members, regarding Vivus, its financial condition and present and future business prospects;
- (b) artificially inflate the market price of Vivus' common stock;
- (c) cause plaintiffs and other members of the Class to purchase Vivus stock at

inflated prices; and

(d) permit Vivus insiders to sell their Vivus stock at inflated prices. In furtherance of the scheme and course of conduct, defendants, each of them, took the actions alleged herein.

43. Defendants' scheme and course of conduct commenced by at least the beginning of the Class Period. Defendants falsely presented the Company's current and future business prospects and prolonged the illusion of revenue, profit and net income per share growth by making it appear that the Company's product sales, the efficacy of the product and acceptance of it by customers, and therefore revenues and net income per share were strong and would continue. The defendants engaged in such a scheme so that they could inflate the price of the Company's stock in order to, inter alia:

(a) protect and enhance their executive positions and the substantial compensation benefits and prestige they obtained thereby;

(b) enhance the value of their personal holdings and options in Vivus and indirectly gain additional benefits; and

(c) sell shares of Vivus common stock they owned at inflated prices to obtain large amounts of cash and large profits and/or to avoid significant losses.

### **BACKGROUND ALLEGATIONS**

44. Prior to receiving FDA marketing clearance for its primary product, MUSE, Vivus was a company in development. Consequently, it had no sales or revenue prior to 1996, and its financing came primarily from the sale of stock. As Vivus released news of MUSE's pending availability and initial strong sales, the price of Vivus stock increased through much of 1996 and early 1997, reaching a pre-Class Period high of \$39 1/16 on February 19, 1997.

45. Starting in February, 1997, negative reports began appearing regarding MUSE. A report in the San Francisco Chronicle disclosed that ". . . as many as 42 percent of men who used Vivus' product reported pain as the drug took effect." Further, it was reported in the same article that Charles Olsziewski ("Olsziewski"), a PaineWebber analyst following the company, stated that,

due to Vivus' reliance on European manufacturers, ". . . nobody knows whether they can consistently manufacture the product in high quantities."

46. Additionally, in late February, 1997, it was also reported in the San Francisco Chronicle and elsewhere that competing products and products in development by competitors were possibly more effective than MUSE and would be easier to administer than Vivus' primary product, which requires the insertion of the stem of the applicator approximately one inch into the urethra, where the medication is released.

47. Additionally, a February 20, 1997 Reuters report stated that Credit Suisse First Boston Corporation ("First Boston") had downgraded Vivus stock to hold from buy.

48. On March 31, 1997, Reuters reported that Vivus had announced a temporary reduction in shipments of MUSE to customers due to diversion of manpower during the first FDA inspection of Vivus' manufacturing facility. The decline in Vivus' stock price continued despite a follow up report clarifying the news and denying that the reduction in shipments was due to deficiencies found in the course of the FDA inspection.

49. Vivus' stock price rallied briefly upon the release of first quarter earnings reports on April 8, 1997, but the decline had resumed by late April, 1997.

50. By the beginning of May, the defendants embarked upon their campaign to increase the price of Vivus stock.

### FALSE AND MISLEADING STATEMENTS

51. On May 2, 1997, the San Francisco Business Times, relying on false and misleading information provided by the defendants, reported that MUSE's sales were exceeding expectations and that "Vivus' biggest short-term problem has been a continuing inability to meet demand for its sole product. Vivus . . . still needs to boost capacity another 20 percent by June." The article quoted CEO Leland Wilson: "(MUSE) is now one of the most prescribed treatments for erectile dysfunction" and further represented that the product was successfully competing with penile implants, vacuum-constriction devices and injectable drugs.

52. The same article quoted analyst Olsziewski as saying "Demand has been outstanding" and further, "By 2000, profits could approach \$89 million, (Olsziewski) predicts. Analyst Wole Fayemi of San Francisco's Genesis Merchant Group Securities, meanwhile, expects the stock to rebound to as much as \$150 a share by next year as 'misinformed short sellers' disinformation is diffused."

53. Vivus stock closed at \$20 per share on May 2, 1997, up \$2 3/4 from the previous day's closing price in response to the positive news released by the Company. The stock resumed its decline, however, on May 5, 1997, closing at \$18 7/16, and once again fell below its May 1, 1997 price on May 8, 1997.

54. On May 15, 1997, in a more aggressive bid to raise the price of Vivus stock, the Company announced approval by its Board of Directors of a stock repurchase program to purchase up to one million shares of its currently outstanding 16.5 million shares of common stock, which it claimed were undervalued:

Lee Wilson, president and CEO of the company, stated, "VIVUS views our shares to be an undervalued investment opportunity given the company's outstanding financial performance and growth potential. The implementation of a stock repurchase program reflects our continued confidence in the company, our management team, and our long-term growth prospects."<sup>2</sup>

55. In a May 22, 1997 PaineWebber report, Charles Olsziewski reported, based on false and misleading information provided by the defendants, that "Based on the first-quarter results, we are now looking for fully taxed 1997 and 1998 earnings of \$1.20 (up from \$1.00) and \$2.45 (up from \$2.15) per share, respectively." Olsziewski elaborated upon the information provided by Vivus management in its quarterly conference call thus:

Capacity. Market demand for the MUSE has continued to be higher than the company's current capacity. Although Vivus has been able to increase its production capability from 450,000 units per month at the beginning of 1997 to 600-650,000 units by the end of the March quarter, it has become clear that significant additional capacity is required. Aside from the company's plan to increase current capacity 20% by June, it has leased and initiated construction of an additional 90,000 square feet of production space in the same business park where its current manufacturing facility is presently located. This much-needed production capacity should come on line by the end of 1997. Vivus is also evaluating a number of sites in Ireland for the future construction of a European manufacturing facility, slated to begin

production by mid-1998.

56. Vivus announced in a June 25, 1997 press release over the PR Newswire that MUSE ". . . has been shown to restore erections and sexual intercourse in diabetic men regardless of the duration of their diabetes."

57. In a July 9, 1997 press release disseminated over Business Wire, Vivus announced net income of \$10 million, or \$0.28 per share, for the second quarter ended June 30, 1997:

"The numbers reported today reflect the vitality of the erectile dysfunction market and the fact that MUSE and the concept of transurethral delivery have been well accepted by erectile dysfunction specialists and patients," stated Leland F. Wilson, President and CEO of VIVUS. "In the six months since product launch, we believe MUSE has become the number one product ranked by sales in the erectile dysfunction market place. Within this first six months, MUSE has also achieved rapid formulary acceptance with approximately 67% of retail prescriptions reimbursed through third party insurance coverage."

58. In a July 11, 1997 First Boston Company Report, based on false and misleading information provided the by the defendants, R. A. Yarchover rated Vivus a Buy, stating:

Second quarter earnings of \$0.28 blew away our \$0.17 estimates. (Our estimate had even included \$0.04 for a milestone payment that has been delayed until the third quarter.) The company outperformed in all areas; higher product sales and lower expenses accounted for the majority of the difference from our estimate. Based on second quarter results and continued near-term positives, we have raised our estimates for 1997 and 1998 to \$1.00 and \$1.42 from \$0.90 and \$1.22, respectively. In addition, we are raising our price target to \$35.

59. Further, Yarchover discussed the Company's conference call with analysts, and highlighted the Company's deceptive representations that "The company continues to sell everything it can produce, yet the product backlog continues to grow"; ". . . (management) believes product efficacy has been increasing over the past six months. . ." and further that

[t]he additional 20% capacity we expected came on line in the quarter, and we think the company is running at approximately 750,000 units per month (625,000 units at the end of the first quarter x1.2). The company hopes to squeeze additional capacity increases out of the existing facility over the remainder of the year. The new facility the company is building should be on line by the end of the fourth quarter and will have four times more manufacturing lines than the current facility. Additionally, the company continues to examine sites in Ireland for an international manufacturing facility.

60. The following was disseminated over PR Newswire in a July 28, 1997 press release:

VIVUS, Inc. (Nasdaq: VVUS) today announced the U.S. commercial launch of ACTIS(R) (Venous Flow Controller), a new innovative treatment for erectile dysfunction, more commonly known as impotence. ACTIS is a fully adjustable penile band which is placed around the base of the penis to impede blood flow out of the penis. ACTIS was cleared by the U.S. Food and Drug Administration in December of 1996.

61. In an October 8, 1997 press release disseminated over Business Wire, Vivus

announced ". . . net income of \$11.3 million or \$0.31 per share for the third quarter ended September 30, 1997" and product sales for the third quarter of \$39.1 million, ". . . an increase of \$5.7 million or 16.9 percent over the second quarter of 1997."

62. As a result of defendants' false and misleading statements, the price of Vivus' stock increased to a high of \$41 7/8 during the Class Period.

### DISCLOSURE OF THE TRUTH

63. On December 10, 1997, Vivus shocked the investment community with the announcement that it would not meet its revenue goals for the fourth quarter:

[T]he Company will be unable to meet its production goals for the fourth quarter. This shortfall results primarily from the Company's efforts to expand its production capacity into its new 90,000 square foot plant. In an effort to complete construction and focus on international and US regulatory approvals for the new plant, VIVUS has shifted existing equipment and personnel to the new facility. In addition, because the existing manufacturing facility has run at full capacity since the product was launched, VIVUS plans to suspend production from Christmas to New Year's in order to complete needed maintenance. Because the Company continues to be capacity constrained, the impact of these factors is likely to result in approximately a 25% decrease in product revenues for the fourth quarter as compared with the third quarter.

64. Also on December 10, 1997, Asensio & Company issued a press release detailing its difficulties in verifying Vivus' product performance and sales claims:

A study of 123 impotent men treated with Vivus' Muse product at the Centre for Impotence and Fertility in Rome, Italy found that Muse failed to make 121 of the penises rigid. This test's endpoint was very different than Vivus' 1996 study, which used an "Erection Assessment Scale." The Italian study actually measured the rigidity of each penis and concluded that the penises were not hard.

In letters dated October 10, 1997 and October 17, 1997 Asensio & Company, Inc. advised Vivus, Inc. (Nasdaq: VVUS) that it had reviewed certain of IMS America's Pharmaceutical Industry Research Data pertaining to the sales of Vivus' Muse product. In particular, Asensio & Company reviewed IMS' National Prescription Audit ("NPA") data for new and refill Muse prescriptions for the six (6) months period ended September 30, 1997 and compared Vivus' reported sales for the same period to the IMS prescription data. As a result, Asensio & Company found that a very significant portion of Vivus' Muse product sales were allegedly sold through outlets not monitored by IMS' NPA service. NPA is the recognized industry leader providing a complete and precise view of the prescription marketplace. Asensio & Company requested a description of Vivus customers not tracked by IMS' NPA audit or other information that could explain the discrepancy. Vivus failed to provide any of the requested information. Asensio & Company believes Vivus' 25% sales drop is a result of poor product performance and early nonrecurring sales to undisclosed sources.

65. In response to these announcements, the reaction of the market was swift and severe. On December 10, 1997 the price of Vivus stock dropped to \$13 13/16, trading as low as \$12 per share, from the previous day's closing price of \$20 1/8, a decrease of over 30%.

66. Each of the positive statements about Vivus' products and business during the Class

Period was materially false or misleading for misrepresenting or otherwise failing to disclose, inter alia, the following adverse information:

- (a) Defendants had no reasonable basis for a belief that sales of MUSE would continue to increase because of low repeat usage of the product;
- (b) MUSE was significantly less effective than Vivus represented it to be;
- (c) Vivus was not capacity constrained and, to the contrary, an excess of product was the reason for the Company shutting down production for the latter part of December, 1997;
- (d) The data relied upon by the Company for public releases was unreliable due to the fact that a significant portion of the sales of MUSE were sold through outlets not monitored by IMS America's National Prescription Audit, and prescriptions were not increasing, as claimed; and
- (e) There was no reasonable basis for making positive representations about Vivus' revenues and future growth, as defendants knew that the market for repeat users was not as big as represented and that competing products would soon severely diminish MUSE's market.

### **SCIENTER ALLEGATIONS**

67. As alleged herein, each defendant acted with scienter in that each defendant knew or recklessly disregarded that the public documents and statements issued or disseminated in the name of the Company were materially false and misleading; knew or recklessly disregarded that such statements would be issued or disseminated to the investing public; and knowingly or recklessly and substantially participated or acquiesced in the issuance or dissemination of such statements or documents as primary violators of the federal securities laws. As set forth in detail elsewhere herein, defendants, by virtue of their knowledge or receipt of information reflecting the true facts regarding Vivus, their control over, and/or receipt and/or modification of Vivus' materially misleading misstatements and/or their association with the Company which made them privy to confidential proprietary information concerning Vivus, participated in the fraudulent scheme alleged herein.

68. Defendants engaged in such a scheme and course of conduct to artificially inflate the price of Vivus common stock in order to: (i) protect and enhance their executive positions and the substantial compensation and prestige they obtained thereby; (ii) enhance the value of their holdings of Vivus stock; and (iii) facilitate the insider sales of Vivus stock at artificially inflated prices during the Class Period while in possession of material non-public information.

69. The following chart details insider trading by the Individual Defendants during the Class Period:

Defendant Date Activity

Yntema 10/13/97 Sold 15,000 shares at \$35.63 each;

11/3/97 Acquired 630 shares through plan at \$14.66 each; 11/21/97  
Exercised options for 15,000 shares at \$7.00 each;  
11/21/97 Sold 15,000 shares at \$24.81 each.

Gangolli 10/13/97 Exercised options for 5,000 shares at \$6.75;

10/13/97 Sold 5,000 shares at \$36.08 each;  
11/3/97 Acquired 340 shares through plan at \$14.66 each;  
11/3/97 Sold 340 shares at \$26.88 each;

11/21/97 Exercised options for 9,500 shares at \$7.25 each;  
11/21/97 Sold 9,500 shares at \$24.92 each;  
11/21/97 Exercised options for 500 shares at \$6.75 each;  
11/21/97 Sold 500 shares at \$24.91 each;  
11/21/97 Exercised options for 3,900 shares at \$6.75 each;  
11/21/97 Sold 3,900 shares at \$24.91 each;  
11/21/97 Exercised options for 6,000 shares at \$6.56 each;  
11/21/97 Sold 6,000 shares at \$24.91 each.

Gesundheit 8/29/97 Sold 8,000 shares at \$26.75 each.

Smith 11/3/97 Acquired 770 shares through plan at \$14.66 each;

11/20/97 Exercised options for 10,000 shares at \$19.00 each;  
11/20/97 Sold 10,000 shares at \$25.00 each.

Colella 7/16/97 Sold 5,000 shares at \$30.19 each;

7/31/97 Exercised options for 20,833 shares at \$3.75 each;  
7/31/97 Sold 20,833 shares at \$29.58 each;  
7/31/97 Exercised options for 5,000 shares at \$5.63 each;  
7/31/97 Exercised options for 5,000 shares at \$14.88 each;  
7/31/97 Sold 10,000 shares at \$29.58 each;  
7/31/97 Exercised options for 1,000 shares at \$16.31 each;  
7/31/97 Sold 1,000 shares at \$29.58 each.

70. The market for Vivus' stock was open, well-developed and efficient at all relevant times. As a result of the above-described false and misleading statements and failure to disclose the full truth about Vivus, its business and future prospects, the Company's stock traded at artificially inflated prices during the Class Period until the time the adverse information described above was finally provided to and digested by the securities market. Plaintiffs and other members of the Class purchased Vivus stock relying on the integrity of the market price of Vivus stock and market information related to the Company, or in the alternative, upon Defendants' false and misleading statements and in ignorance of the adverse, undisclosed information and false financial statements known to defendants, and have been damaged thereby. Had plaintiffs and other members of the Class known of the materially adverse information not disclosed by defendants, they would not have purchased or acquired Vivus stock at the artificially inflated prices they did.

71. At all relevant times, the misrepresentations and omissions particularized in this complaint directly or proximately caused or were a substantial contributing cause of the damages sustained by plaintiffs and other members of the Class. As described herein, during the Class Period, defendants made or caused to be made a series of false statements about Vivus' product acceptance and sales, revenues and future business prospects. These misstatements and omissions had the cause and effect of creating in the market an unrealistically positive assessment of Vivus, its product acceptance and sales, its revenues and its future business prospects, thus causing the Company's stock to be overvalued and artificially inflated at all relevant times. Defendants' false portrayal of Vivus, its business operations and future prospects during the Class Period resulted in plaintiffs and other members of the Class purchasing the Company's stock at a disparity

between their market price and their actual value, thus causing the damage complained of herein.

### **COUNT I**

#### **FOR VIOLATIONS OF §10(b) OF THE EXCHANGE ACT AND RULE 10b-5 PROMULGATED THEREUNDER AGAINST ALL DEFENDANTS**

72. Plaintiffs incorporate by reference and reallege the preceding paragraphs as though fully set forth herein. This Count is asserted against all defendants.

73. The defendants knew, or were reckless in failing to know, of the material omissions from, and material misrepresentations contained in the statements as set forth above. The defendants also knew, or were reckless in failing to know, at the time of these material omissions and misrepresentations, that they caused a false and misleading presentation of Vivus. Because of their Board membership and/or their executive and managerial positions with Vivus and/or their personal and/or professional relationships, each of the defendants: (a) knew or had access to the material, adverse non-public information about Vivus' adverse financial outlook and adverse then-existing business conditions which were not disclosed; and (b) drafted, reviewed, ratified and/or approved the misleading statements, releases, reports and other public representations of and about Vivus.

74. Throughout the Class Period, defendants, with knowledge of or reckless disregard for the truth, disseminated or approved releases, statements and reports, referred to above, which 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. Defendants also failed to correct previous statements when, as a result of subsequent events, those statements were rendered inaccurate or untrue.

75. During the Class Period, defendants, individually and in concert, directly and indirectly, engaged in and employed acts and a fraudulent scheme to conceal material adverse information regarding Vivus' then-existing business conditions and financial outlook of Vivus as specified herein and pursued a course of business that operated as a fraud or deceit on the purchasers of Vivus stock. Defendants employed devices, schemes and artifices to defraud and engaged in acts, practices and a course of conduct as herein alleged to commit a fraud on the integrity of the market for the Company's stock and to maintain artificially high market prices for the common stock of Vivus. This included the formulation, making of and/or participation in the making of untrue statements of material facts and the omission to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, and engaging in acts, practices and a course of conduct which operated as a fraud and deceit upon plaintiffs and the Class, all of the above in connection with the purchase of Vivus common stock by plaintiffs and members of the Class.

76. By reason of the conduct alleged herein, defendants knowingly and/or recklessly, directly and indirectly, have violated §10(b) the Exchange Act and Rule 10b-5 promulgated thereunder in that they: (a) employed devices, schemes and artifices to defraud; made untrue statements of material facts or omitted to state material facts necessary in order to make statements made, in light of the circumstances under which they were made, not misleading; or (b) engaged in acts, practices and a course of business that operated as a fraud or deceit upon plaintiffs and others similarly situated in

connection with their purchases of Vivus common stock during the Class Period.

77. Plaintiffs and the Class have suffered substantial damages in that, in reliance on the integrity of the market, they paid artificially inflated prices for Vivus common stock as a result of defendants' violations of §10(b) of the Exchange Act and Rule 10b-5. Plaintiffs and the Class would not have purchased Vivus 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 and concealment.

## COUNT II

### **VIOLATIONS OF §20(a) OF THE EXCHANGE ACT AGAINST THE INDIVIDUAL DEFENDANTS**

78. Plaintiffs repeat and reallege each of the allegations set forth in the foregoing paragraphs, as though fully set forth herein.

79. The Individual Defendants were controlling persons of the Company within the meaning of §20 of the Exchange Act during the Class Period. By reason of their positions as directors, officers and insiders throughout the Class Period, the Individual Defendants had the power and authority to cause the Company to engage in the wrongful conduct complained of herein.

80. By reason of their positions of control over the Company, and/or their personal and/or professional relationships, as alleged above, the Individual Defendants are liable jointly and severally with and to the same extent as Vivus is liable to plaintiffs and the members of the Class as a result of the wrongful conduct alleged herein.

WHEREFORE, plaintiffs pray for relief and judgment, as follows:

1. Determining that this action is a proper class action, certifying plaintiffs as class representatives under Rule 23 of the Federal Rules of Civil Procedure and their counsel as class counsel;
2. Awarding compensatory damages in favor of plaintiffs and the other class members against all defendants, jointly and severally, for all damages sustained as a result of the defendants' wrongdoing, in an amount to be proven at trial, including interest thereon;
  
3. Awarding plaintiffs and the Class their reasonable costs and expenses incurred in this action, including counsel fees and expert fees; and
4. Such other and further relief as the Court may deem just and proper.

DATED: April 3, 1998

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1 All amounts are adjusted to reflect a 2-for-1 stock split effective June, 1997.

2 Emphasis added throughout, unless otherwise noted.

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