

JUDGE BATTS

UNITED STATES DISTRICT COURT

Southern

District of

New York

ELAN PHARMA INTERNATIONAL LIMITED,

Plaintiff,

SUMMONS IN A CIVIL ACTION

- against -

CASE NUMBER:

BIOGEN, INC., N/K/A BIOGEN IDEC INC., Defendant.

'09 CIV 6928

TO: (Name and address of Defendant)

Biogen Idec Inc. Corporate Headquarters 14 Cambridge Center Cambridge, MA 02142

YOU ARE HEREBY SUMMONED and required to serve on PLAINTIFF'S ATTORNEY

Charles A. Gilman Cahill Gordon & Reindel LLP 80 Pine Street New York, NY 10005

an Answer to the Complaint which is served on you with this Summons, within 20 days after service of this Summons on you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the Complaint. Any Answer that you serve on the parties to this action must be filed with the Clerk of this Court within a reasonable period of time after service.

J. MICHELLE HARRINGTON

CLERK

DATE

[Handwritten signature]

(By) DEPUTY CLERK

JUDGE BATTY

09 CIV 6928

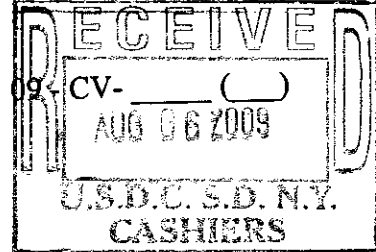
UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

ELAN PHARMA INTERNATIONAL LIMITED,  
Plaintiff,

- against -

BIOGEN, INC., N/K/A BIOGEN IDEC INC.,  
Defendant.

Case No. 09-CV-



**COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF**

Plaintiff, Elan Pharma International Limited ("Elan" or "Plaintiff"), by its undersigned counsel, as and for its Complaint against Defendant Biogen, Inc., n/k/a Biogen Idec Inc. ("Biogen" or "Defendant"), alleges as follows:

**NATURE OF LAWSUIT AND NEED FOR EXPEDITED PROCEEDINGS**

1. Plaintiff Elan is a party to a Development and Marketing Collaboration Agreement dated August 15, 2000 with Defendant Biogen (the "Elan-Biogen Collaboration Agreement"). The Elan-Biogen Collaboration Agreement relates to the development, regulatory approval and commercialization of a therapeutic biologic formerly known as Antegren, and currently marketed as Tysabri®, which is on track for \$1 billion in annual sales and has blockbuster potential in treating multiple disease conditions. Discovered and developed in Elan's labs, Tysabri® is a treatment approved for relapsing forms of multiple sclerosis ("MS") in the United States and relapsing remitting MS in the European Union and approved (with limitations) in the treatment of Crohn's Disease. While Elan discovered Tysabri® and the benefits it brings to patients, it sought out a large and financially strong collaborative party with

expertise in MS in order to spread the expense and risk associated with the research and marketing of Tysabri®. A complete copy of the Elan-Biogen Collaboration Agreement is deemed attached hereto and incorporated herein.

2. As has been reported in the press, after a long and thorough process to consider strategic alternatives, Plaintiff Elan and its parent company, Elan Corporation, plc (“Elan PLC”) have recently entered into a set of agreements with Janssen Pharmaceutical (“JNJ”), a subsidiary of Johnson & Johnson (“J&J”), whereby, among other things, JNJ will acquire a significant minority ownership in Elan PLC. Part of the transaction involves a strategic financing and collaboration agreement made and entered into as of July 2, 2009 between Elan and JNJ (the “Elan-JNJ Financing Agreement”). A complete copy of the Elan-JNJ Financing Agreement is deemed attached hereto and incorporated herein.

3. The Elan-Biogen Collaboration Agreement and the Elan-JNJ Financing Agreement each concerns competitively sensitive information and has confidentiality provisions. Upon entry of an appropriate order governing confidentiality and permitting their filing with the Court under seal, Elan will submit complete copies of both contracts.

4. By letter dated July 28, 2009 (the “July 28, 2009 Notice”), Biogen has asserted that, by entering into the Elan-JNJ Financing Agreement, Elan has assigned or delegated rights attendant to the Elan-Biogen Collaboration Agreement without Biogen’s consent. Biogen has declared that “Elan is in material breach” of the Elan-Biogen Collaboration Agreement, and has triggered the running of a sixty (60) day period following which Biogen threatens to terminate the Elan-Biogen Collaboration Agreement.

5. Elan believes that Biogen's declaration of breach is without merit and that Elan is in compliance with its obligations under the Elan-Biogen Collaboration Agreement. It is Elan's position that the Elan-JNJ Financing Agreement does not constitute any assignment or delegation of rights under the Elan-Biogen Collaboration Agreement.

6. There is an actual case and controversy between the parties.

7. The 60 day period triggered by Biogen's July 28, 2009 Notice is running. Sixty days from July 28, 2009 is September 26, 2009. Biogen's threat to terminate the Elan-Biogen Collaboration Agreement presents serious and irreparable injury to Elan, and is interfering with the upcoming closing of the Elan PLC-J&J transaction. Money damages are not an adequate remedy.

8. The Elan PLC-J&J transaction, which is substantial, is expected to close in early September 2009.

9. The Elan-JNJ Financing Agreement and the Elan-Biogen Collaboration Agreement each provides that it is an entire, fully integrated agreement that is to be construed and enforced in accordance with the laws of the State of New York. As Elan admits being party to both contracts, there are no disputed issues of fact. It is for the Court to construe the two contracts as a matter of law, and determine whether one constitutes an assignment or delegation of rights under the other. The language of the two agreements relevant to a determination of the singular issue presented by Biogen's July 28, 2009 Notice is plain and unambiguous, and thus consideration of extrinsic evidence beyond the face of the two agreements is neither necessary nor appropriate in the resolution of the singular legal issue presented.

10. Elan is prepared to proceed forthwith to facilitate a determination of this controversy so that the Elan PLC-J&J transaction can close without the overhang of Biogen's notice of breach.

11. Elan asks this Court to: (i) set an expedited schedule for the filing, briefing and hearing of a motion for preliminary injunction staying the 60 day period; (ii) order a consolidated hearing on the preliminary injunction motion and the hearing on the merits of Elan's declaratory judgment action seeking a ruling that the Elan-JNJ Financing Agreement does not constitute any assignment or delegation of rights under the Elan-Biogen Collaboration Agreement; and (iii) permit the filing under seal of complete copies of the two agreements and papers that quote therefrom.

**PARTIES, JURISDICTION AND VENUE**

12. Plaintiff Elan is an Irish private limited company with its principal place of business located in Athlone, Ireland. Plaintiff is a subsidiary of Elan PLC, an Irish public limited company.

13. Defendant Biogen is a Delaware corporation with its principal place of business located in Cambridge, Massachusetts.

14. This is an action for declaratory judgment pursuant to 28 U.S.C. § 2201.

15. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1332 because the citizenship of the parties is diverse and the amount in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs.

16. This Court has jurisdiction over the person of Defendant Biogen and venue is proper in this district pursuant to the Elan-Biogen Collaboration Agreement, which

provides that disputes asserting breach of the agreement will be submitted exclusively to the federal court in New York, and that the parties consent to the jurisdiction and venue of this Court.

**IRREPARABLE INJURY**

17. Biogen's July 28, 2009 Notice and threat to terminate the Elan-Biogen Collaboration Agreement presents serious and irreparable injury to Elan, and is interfering with the upcoming closing of the Elan PLC-J&J transaction.

18. It is vitally important to Elan, Elan PLC, and Elan PLC's thousands of shareholders, that this Court determine expeditiously whether or not the Elan-JNJ Financing Agreement constitutes an assignment or delegation of rights under the Elan-Biogen Collaboration Agreement so that Elan PLC can proceed to close its transaction with J&J, or restructure it. The Elan PLC-J&J transaction, of which the Elan-JNJ Financing Agreement is but a piece, is scheduled to close as soon as Hart-Scott clearance is obtained and the other customary closing conditions are satisfied. It is expected that the Elan PLC-J&J transaction will close in early September 2009. It is important for Elan and Elan PLC that closing not be delayed.

19. If Biogen is permitted to run the clock and terminate the Elan-Biogen Collaboration Agreement, Elan will be irreparably injured and money damages will not be an adequate remedy. A termination would put Biogen in charge of all decisions regarding the development, regulatory approval and commercialization of Tysabri®, and decisions made and courses of action taken, once made and taken, cannot be undone. A termination would cause forfeiture of all of Elan's rights to Tysabri®, which it invented and helped bring to the global market, while at the same time saddling Elan with draconian penalties including ongoing

expense and risk-sharing obligations as to which Elan would be unable to protect itself. A termination would deprive Elan of the ability to acquire Biogen's interests in the event of a Biogen change of control, depriving Elan of a unique asset. A termination could constitute the failure of a representation and covenant in the Elan-JNJ Financing Agreement and could expose Elan and Elan PLC to claims by JNJ.

20. In comparison, Biogen suffers little or no injury by the requested stay or expedited proceedings. If Elan is correct, Biogen will avoid the monumental exposure of a wrongful termination of the Elan-Biogen Collaboration Agreement. A stay and expedited determination of the singular legal issue presented in this action so that the Elan PLC-J&J transaction can close as scheduled will also go far to minimizing the monumental risk to Biogen of tortious interference with the Elan PLC-J&J transaction. Even if Biogen is correct (and it is not), the stay requested will be of short duration and would not present any significant injury to Biogen.

21. Elan has no adequate remedy at law.

22. The Court should maintain the status quo and order an expedited hearing on Elan's preliminary injunction motion. Pursuant to Rule 65 of the Federal Rules of Civil Procedure, the Court should also consolidate Elan's motion for preliminary injunctive relief with the determination of the merits of its request for a declaratory judgment.

### **PRAYER FOR RELIEF**

**WHEREFORE**, Plaintiff Elan prays for the following relief:


- i. An Order staying any effect of Biogen's July 28, 2009 Notice, temporarily and preliminarily enjoining Defendant Biogen from terminating the Elan-Biogen Collaboration Agreement during the pendency of this action and ordering the consolidation of the preliminary injunction hearing with trial

on the merits of the declaratory judgment action pursuant to Fed. R. Civ. P. 65(a)(2);

- ii. Judgment declaring that the Elan-JNJ Financing Agreement does not constitute an assignment or delegation of rights attendant to the Elan-Biogen Collaboration Agreement;
- iii. Judgment declaring that Biogen's consent is not required for Elan to enter into and consummate the Elan-JNJ Financing Agreement;
- iv. Judgment declaring that Elan's entry into and performance of the Elan-JNJ Financing Agreement without Biogen's consent does not constitute a material breach of the Elan-Biogen Collaboration Agreement;
- v. Judgment permanently enjoining Defendant Biogen from terminating the Elan-Biogen Collaboration Agreement based on its July 28, 2009 Notice;
- vi. Judgment declaring that the Biogen July 28, 2009 Notice is without force or effect, and ordering Biogen to withdraw the July 28, 2009 Notice;
- vii. Judgment ordering such other and further relief as this Court deems just and proper.

Dated: August 6, 2009

CAHILL GORDON & REINDEL LLP

By   
Charles A. Gilman  
Mary Cait Curran

80 Pine Street  
New York, New York 10005  
(212) 701-3000

Attorneys for Plaintiff  
ELAN PHARMA INTERNATIONAL  
LIMITED

No.

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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ELAN PHARMA INTERNATIONAL LIMITED,

Plaintiff,

- *against* -

BIOGEN, INC., N/A BIOGEN IDEC INC.,

Defendant.

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**COMPLAINT**

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CAHILL GORDON & REINDEL LLP

Attorneys for Plaintiff

Eighty Pine Street, New York, N. Y. 10005-1702  
(212) 701-3000

All communications should be referred  
to Charles A. Gilman

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

ELAN PHARMA INTERNATIONAL LIMITED,

Plaintiff,

- *against* -

BIOGEN, INC., n/k/a BIOGEN IDEC INC.,

Defendant.

Case No. 09 - CV- \_\_\_\_ ( )

**ORDER TO SHOW CAUSE**

Upon the reading and the filing of the Complaint and the Affidavit of Charles A. Gilman, and good and sufficient cause appearing therefor, it is hereby:

**ORDERED** that Defendant Biogen, Inc., n/k/a Biogen Idec Inc. ("Biogen") show cause before this honorable Court, in Courtroom \_\_\_\_ at the United States District Courthouse for the Southern District of New York, 500 Pearl Street, New York, New York, on August \_\_, 2009, at \_\_\_\_ o'clock \_\_.m., why an Order should not be entered: (i) setting an expedited schedule for the filing, briefing and hearing of a motion for a preliminary injunction staying any effect of Biogen's July 28, 2009 Notice and temporarily and preliminarily enjoining Biogen from terminating the Elan-Biogen Collaboration Agreement during the pendency of this action; and (ii) ordering the consolidation of the preliminary injunction hearing with trial on the merits of the declaratory judgment action pursuant to Fed. R. Civ. P. 65(a)(2);

**ORDERED** that the parties shall promptly present to the Court a proposed protective order to govern the confidentiality of the two contracts at issue;

**ORDERED** that the parties may file under seal copies of contracts containing non-public and commercially sensitive terms the public disclosure of which might place one or the other of them, or their contract parties, at commercial or competitive disadvantage;

**ORDERED** that the parties may file under seal their affidavits and memoranda of law referencing provisions in contracts containing non-public and commercially sensitive terms the public disclosure of which might place one or the other of them, or their contract parties, at commercial or competitive disadvantage; and it is further

**ORDERED** that service of a copy of this Order to Show Cause and a copy of the papers upon which it is granted by personal service upon Defendant Biogen on or before August \_\_, 2009, shall be deemed sufficient service.

Dated: August \_\_, 2009

Entered: \_\_\_\_\_  
U.S.D.J.

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

ELAN PHARMA INTERNATIONAL LIMITED,  
Plaintiff,

- against -

BIOGEN, INC., N/K/A BIOGEN IDEC INC.,  
Defendant.

Case No. 09 - CV- \_\_\_\_ ( )

**AFFIDAVIT IN SUPPORT OF ORDER TO SHOW CAUSE**

CHARLES A. GILMAN, being duly sworn deposes and says:

1. I am a member of the Bar of this Court and of the law firm of Cahill Gordon & Reindel LLP, counsel for Plaintiff Elan Pharma International Limited ("Elan").
2. I make this affidavit upon my own personal knowledge in support of Plaintiff Elan's application for an Order to Show Cause.
3. The Elan-JNJ Financing Agreement. As has been reported in the press, after a long and thorough process to consider strategic alternatives, Plaintiff Elan and its parent company, Elan Corporation, plc ("Elan PLC"), have recently entered into a set of agreements with Janssen Pharmaceutical ("JNJ"), a subsidiary of Johnson & Johnson ("J&J"), whereby, among other things, JNJ will acquire a significant minority ownership in Elan PLC. The transaction, which is substantial, is expected to close in early September 2009. Part of the transaction involves a strategic financing and collaboration agreement made and entered into as of July 2, 2009 between Elan and JNJ (the "Elan-JNJ Financing Agreement").
4. The Elan-Biogen Collaboration Agreement. Plaintiff Elan is also party to a Development and Marketing Collaboration Agreement dated August 15, 2000 with Defendant

Biogen, Inc., n/k/a Biogen Idec Inc. (“Biogen”) (the “Elan-Biogen Collaboration Agreement”). The Elan-Biogen Collaboration Agreement relates to the development, regulatory approval and commercialization of a therapeutic biologic formerly known as Antegren, and currently marketed as Tysabri®, which is on track for \$1 billion in annual sales and has blockbuster potential in treating multiple disease conditions. Discovered and developed in Elan’s labs, Tysabri® is a treatment approved for relapsing forms of multiple sclerosis (“MS”) in the United States and relapsing remitting MS in the European Union and approved (with limitations) in the treatment of Crohn’s Disease. While Elan discovered Tysabri® and the benefits it brings to patients, it sought out a large and financially strong collaborative party with expertise in MS in order to spread the expense and risk associated with the research and marketing of Tysabri®. Thus, the Elan-Biogen Collaboration Agreement.

5. Confidentiality; The Need To File The Agreements Under Seal. The Elan-Biogen Collaboration Agreement and the Elan-JNJ Financing Agreement each concerns competitively sensitive information and has confidentiality provisions. The proposed Order to Show Cause presented herewith contains provisions (i) providing for entry of an agreed upon protective order governing the confidentiality of the two contracts and (ii) permitting the parties to file copies of the two contracts, and documents that quote from them, under seal.

6. Biogen’s July 28, 2009 Notice of Breach. By letter dated July 28, 2009 (the “July 28, 2009 Notice”), Biogen asserts that, by entering into the Elan-JNJ Financing Agreement, Elan has assigned or delegated rights attendant to the Elan-Biogen Collaboration Agreement without Biogen’s consent. Biogen declares that “Elan is in material breach” of the Elan-Biogen Collaboration Agreement, and has triggered the running of a sixty (60) day period following which Biogen threatens to terminate the Elan-Biogen Collaboration Agreement.

7. Elan's Position That There Has Been No Breach. Elan believes that it is in compliance with its obligations under the Elan-Biogen Collaboration Agreement. It is Elan's position that the Elan-JNJ Financing Agreement does not constitute any assignment or delegation of rights under the Elan-Biogen Collaboration Agreement.

8. The Existing Case and Controversy. There is a live case and controversy between the parties.

9. The Sixty (60) Day Clock Triggered by Biogen's July 28, 2009 Notice. Biogen's July 28, 2009 Notice has begun a sixty day clock. Sixty days from July 28, 2009 is September 26, 2009. Biogen's threat to terminate the Elan-Biogen Collaboration Agreement presents serious and irreparable injury to Elan as set forth below.

10. The Two Contracts Are For The Court To Construe As A Matter Of Law. The Elan-JNJ Financing Agreement and the Elan-Biogen Collaboration Agreement each provides that it is an entire, fully integrated agreement that is to be construed and enforced in accordance with the laws of the State of New York. As Elan admits being party to both contracts, there are no disputed issues of fact. It is for the Court to construe the two contracts as a matter of law. I believe that the Court will find that the language of the two agreements relevant to a determination of the singular issue presented by Biogen's July 28, 2009 Notice is plain and unambiguous, and thus that consideration of extrinsic evidence beyond the face of the two agreements is neither necessary nor appropriate in the resolution of the singular legal issue presented.

11. Elan Faces Irreparable Injury. If Biogen is permitted to run the clock and terminate the Elan-Biogen Collaboration Agreement, Elan will be irreparably injured and money damages will not be an adequate remedy. A termination would put Biogen in charge of all decisions regarding the development, regulatory approval and commercialization of Tysabri®, and

decisions made and courses of action taken, once made and taken, cannot be undone. A termination would cause forfeiture of all of Elan's rights to Tysabri®, which it invented and helped bring to the global market, while at the same time saddling Elan with draconian penalties including ongoing expense and risk-sharing obligations as to which Elan would be unable to protect itself. A termination would deprive Elan of the ability to acquire Biogen's interests in the event of a Biogen Change of Control, depriving Elan of a unique asset. Biogen's threat to terminate the Elan-Biogen Collaboration Agreement also presents serious and irreparable injury to Elan, in that it is interfering with the upcoming closing of the Elan PLC-J&J transaction. It is vitally important to Elan, Elan PLC, and Elan PLC's thousands of shareholders, that this Court determine expeditiously whether or not the Elan-JNJ Financing Agreement constitutes an assignment or delegation of rights under the Elan-Biogen Collaboration Agreement so that Elan PLC can proceed to close its transaction with J&J, or restructure it. The Elan PLC-J&J transaction, of which the Elan-JNJ Financing Agreement is but a piece, is scheduled to close as soon as Hart-Scott clearance is obtained and the other customary closing conditions are satisfied. It is expected that the Elan PLC-J&J transaction will close in early September 2009. It is critical for Elan and Elan PLC that closing not be delayed. A termination could constitute the failure of a representation and covenant in the Elan-JNJ Financing Agreement and could expose Elan and Elan PLC to claims by JNJ.

12. Elan Is Prepared To Proceed Forthwith. Elan is prepared to proceed forthwith to facilitate a determination of this controversy so that the Elan PLC-J&J transaction can close without the overhang of Biogen's notice of breach. Elan intends promptly to move for entry of a preliminary injunction, pursuant to Rule 65 of the Federal Rules of Civil Procedure: (i) staying the running of the sixty (60) day clock triggered by Defendant Biogen's July 28, 2009 Notice to Elan of default under the Elan-Biogen Collaboration Agreement; (ii) temporarily and prelimi-

narily enjoining Defendant Biogen from terminating the Elan-Biogen Collaboration Agreement during the pendency of this action; and (iii) ordering, pursuant to Fed. R. Civ. P. 65(a)(2), the consolidation of the preliminary injunction hearing with the trial on the merits of the singular legal issue presented for decision in the declaratory judgment action.

13. Prayer For Relief. Elan respectfully requests that the Court enter the proposed Order to Show Cause.



Charles A. Gilman

Sworn to before me this 6<sup>th</sup> day of August, 2009



Notary Public

NICOLE DELUTRI  
Notary Public, State of New York  
No. 01DE8160981  
Qualified in Richmond County  
Commission Expires Feb. 12, 2011

No.

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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ELAN PHARMA INTERNATIONAL LIMITED,

Plaintiff,

- *against* -

BIOGEN, INC., N/K/A BIOGEN IDEC INC.,

Defendant.

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**ORDER TO SHOW CAUSE**

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CAHILL GORDON & REINDEL LLP

Attorneys for Plaintiff

Eighty Pine Street, New York, N. Y. 10005-1702  
(212) 701-3000

All communications should be referred

to Charles A. Gilman