

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

IN RE K-DUR ANTITRUST LITIGATION	Civil Action No. 2:01-cv-1652(SRC)(CLW) MDL No. 1419
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SETTLEMENT AGREEMENT

THIS SETTLEMENT AGREEMENT (the “Settlement Agreement”) is made and entered into on May 15, 2017, by and among:

Merck & Co., Inc. (formerly known as Schering-Plough Corp.) and Upsher-Smith Laboratories, Inc. (jointly, “Defendants”); and Co-Lead Counsel for Louisiana Wholesale Drug Co. (the “Named Plaintiff”) and the Direct Purchaser Class (defined in Paragraph 1 below) (jointly, “Plaintiffs,” the “Class,” or the “Direct Purchaser Class”).

WHEREAS Plaintiffs and Defendants are parties to *In re K-Dur Antitrust Litigation*, Civil Action No. 2:01-cv-1652(SRC)(CLW)(D.N.J.) (the “Action”);

WHEREAS, the parties acknowledge that the United States District Court for the District of New Jersey (the “Court”) has jurisdiction over the Action, each of the parties hereto, and all members of the Direct Purchaser Class for all manifestations of this case, including this Settlement;

WHEREAS, Plaintiffs allege that Defendants entered into agreements to resolve patent litigation that had the effect of delaying the introduction of generic versions of the prescription drug K-Dur 20 (potassium chloride), a drug indicated for the treatment of potassium deficiency, in violation of the Sherman Act, 15 U.S.C. § 1, as detailed in the Amended Complaint and other papers filed with the Court, and that the Named Plaintiff and other members of the Direct

Purchaser Class incurred significant damages as a result;

WHEREAS, Defendants deny each and every one of Plaintiffs' allegations of unlawful conduct, deny that any conduct challenged by Plaintiffs caused any damage whatsoever, and have asserted a number of defenses to Plaintiffs' claims;

WHEREAS, Plaintiffs and Defendants agree that this Settlement Agreement shall not be deemed or construed to be an admission or evidence of any violation of any statute or law or of any liability or wrongdoing by Defendants or of the truth of any of the claims or allegations alleged in the Action or a waiver of any defenses thereto; or the lack of merit of any of the claims or allegations of Plaintiffs;

WHEREAS, arm's-length settlement negotiations have taken place between counsel for Plaintiffs and Defendants, respectively, including in mediation before Judge Garrett Brown (Ret.), and this Settlement Agreement, which embodies all of the terms and conditions of settlement between and among Defendants and Plaintiffs, both individually and on behalf of the Direct Purchaser Class, has been reached, subject to the final approval of Court;

WHEREAS, Plaintiffs' counsel have concluded, after extensive fact and expert discovery and investigation of the facts, and after carefully considering the circumstances of the Action, including the claims asserted, and the possible legal and factual defenses thereto, that it would be in the best interests of the Direct Purchaser Class to enter into this Settlement Agreement in order to avoid the uncertainties of litigation, particularly complex litigation such as this, and to assure a benefit to the Direct Purchaser Class, and, further, that Plaintiffs' counsel consider the Settlement set forth herein to be fair, reasonable, and adequate compensation, and in the best interests of the Direct Purchaser Class; and

WHEREAS, Defendants have concluded, despite their belief that they are not liable for

the claims asserted and that they have strong defenses thereto, that it would be in their best interests to enter into this Settlement Agreement to avoid the uncertainties of litigation, particularly complex litigation such as this; and

WHEREAS, Defendants (or any employee or agent or representative thereof, including any counsel) agree to refrain from contacting or communicating with any member of the Direct Purchaser Class (as defined in paragraph 1 below), and/or attempting to effectuate any individual settlement with any member of the Direct Purchaser Class, regarding the subject matter of this litigation or the settlement thereof, except as provided in Paragraph 7 hereof;

NOW THEREFORE, it is agreed by the undersigned, on behalf of Defendants, the Named Plaintiff, and the Direct Purchaser Class, that all claims of Plaintiffs and the Direct Purchaser Class against Defendants in the Action be settled, compromised and dismissed with prejudice and, except as hereinafter provided, without costs as to Defendants or Plaintiffs, subject to the approval of the Court, on the following terms and subject to the following conditions:

1. **Class Definition.** This settlement is made on behalf of the Direct Purchaser Class, which is defined as follows:

All persons or entities who have purchased K-Dur 20 directly from Schering-Plough Corporation at any time during the period November 20, 1998, through September 1, 2001

Excluded from the Class are: (a) Defendants and their officers, directors, management and employees, subsidiaries and affiliates; (b) federal government entities; (c) persons or entities who did not purchase generic versions of K-Dur 20 after the introduction of generic versions of K-Dur 20; and (d) CVS Pharmacy, Inc., Rite Aid Corporation, Walgreen Co., Eckerd Corporation, The Kroger Co., Albertson's, Inc., Safeway, Inc., Hy-Vee, Inc., and Maxi Drug, Inc., and their officers, directors, management and employees, predecessors, successors, subsidiaries and affiliates, in their own right and as assignees of Class members (collectively, "Retailer Plaintiffs").

2. **Memorandum of Understanding Superseded.** This Settlement Agreement supersedes in all respects the Memorandum of Understanding executed by the parties on April 13, 2017.

3. **Best Efforts to Effectuate This Settlement.** Counsel for the parties to this Settlement Agreement agree to recommend approval of this Settlement by the Court and to undertake their best efforts, including all steps and efforts contemplated by this Settlement Agreement and any other steps and efforts that may be necessary or appropriate, by order of the Court or otherwise, to secure approval and to carry out the terms of this Settlement.

4. **Motion for Preliminary Approval.** Promptly following the execution of this Settlement Agreement by all parties hereto, Plaintiff shall file with the Court a motion for preliminary approval of the Settlement. The motion for preliminary approval shall request the entry of a preliminary approval order substantially in the form of Exhibit A hereto (the “Preliminary Approval Order”), including: (i) the preliminary approval of the Settlement set forth in this Settlement Agreement as fair, reasonable, and adequate, and in the best interests of the Direct Purchaser Class; (ii) approval of the notice and proposed notice plan; (iii) a schedule for a hearing by the Court after the notice period has expired to approve the Settlement and to consider Plaintiffs’ counsel’s applications for attorneys’ fees, reimbursement of costs and expenses, and any incentive award for the Named Plaintiff; (iv) a stay of all proceedings in the Action until such time as the Court renders a final decision regarding the approval of the Settlement, as described below in paragraph 19; and (v) approval of an escrow agreement regarding the Settlement consideration described below in paragraph 10. After the Court preliminarily approves the Settlement, Plaintiff shall, in accordance with the Preliminary Approval Order, provide Direct Purchaser Class members with notice of the Settlement pursuant

to Rule 23 of the Federal Rules of Civil Procedure substantially in the form attached hereto as Exhibit B. Plaintiffs' counsel will recommend notice to the Direct Purchaser Class by means of direct first class mail.

5. **Class Certification.** The Direct Purchaser Class (defined in paragraph 1) has been certified. Defendants will not contest the certification of the Direct Purchaser Class for purposes of settlement.

6. **No Back-End Opt-Outs and Representations and Warranties by National Wholesalers.**

Because the Direct Purchaser Class has already been certified, Plaintiffs and Defendants agree that there should be no second opt-out opportunity or period. In seeking preliminary approval of the Settlement, Plaintiffs shall request that the Court not order a second opt-out opportunity or period. In addition Berger & Montague, P.C. and Garwin, Gerstein & Fisher, LLP ("Co-Lead Counsel") represent and warrant that Class Members AmerisourceBergen Corporation, Cardinal Health, Inc., and McKesson Corporation (collectively, the "National Wholesalers") endorse the Settlement, will not seek permission to opt-out of the Class, and will not object to the Class Settlement. Should one or more of the National Wholesalers nonetheless seek permission to opt-out of the Settlement or object to the Class Settlement, Defendants will have the right (but not the obligation) to terminate the Settlement and all funds paid into the Settlement Fund not previously spent on administrative costs (including costs of notice) will be returned to Defendants with interest.

7. **Contingency in the Event the Settlement is Not Approved for Reasons Other Than Fairness**

(a) In the event that the Settlement is not approved by the Court or if, on appeal, the Court's order approving the Settlement is reversed, for any reason other than the Settlement is not fair, reasonable or adequate, Defendants agree to offer, as soon as practical and after

conferring with Co-Lead Counsel, each entity falling within the definition of “Direct Purchaser Class” (as defined in Paragraph 1) (“K-Dur Direct Purchaser”) its *pro rata* share of the Settlement Fund, exclusive of funds previously spent on administrative costs (including costs of notice), and net of all known assignments to the Retailer Plaintiffs, after conferring with Co-Lead Counsel, in exchange for a release substantively equivalent to the one set out in Paragraph 16, below. In such event, each National Wholesaler agrees to accept such offer, including the terms described below.

(b) Any offer to an individual K-Dur Direct Purchaser under Paragraph (a) above shall be expressly subject to the condition that the K-Dur Direct Purchaser(s) receiving the offer(s) submit to the jurisdiction of the United States District Court for the District of New Jersey regarding the issue of its obligation to pay its proportionate share of Plaintiffs’ counsels’ attorneys’ fees, costs and expenses, and any incentive award to the Named Plaintiff. Each K-Dur Direct Purchaser that chooses to accept an offer from Defendants shall be given written notice by Defendants (the content of which is to be agreed to by Co-Lead Counsel) of Plaintiffs’ counsels’ intent to apply for their attorneys’ fees, costs, expenses, and any incentive award and to seek the awards out of the escrowed funds (described below), and an opportunity to respond to the application. Defendants shall inform Co-Lead Counsel of any subsequent private offers made to, and accepted by, K-Dur Direct Purchasers within five (5) days of the acceptance of the offer by the K-Dur Direct Purchaser.

(c) For any offer accepted by a K-Dur Direct Purchaser under Paragraph 7(a), Defendants agree to place 40% of the accepted offer into escrow to cover the K-Dur Direct Purchaser’s proportionate share of Plaintiffs’ counsels’ attorneys’ fees, costs and expenses, and any incentive award. The amount of any such attorneys’ fees, costs, expenses, and incentive

award awarded shall be determined by the Court. Any funds placed into escrow pursuant to this provision that exceed the amount of attorneys' fees, costs, expenses, and/or incentive award awarded by the Court shall be paid out to the K-Dur Direct Purchaser.

(d) The amount of each K-Dur Direct Purchaser's *pro rata* share of the Settlement Fund shall be based on the schedule prepared by Dr. Jeffrey J. Leitzinger, which Co-Lead Counsel represents was prepared in a manner consistent with the Plan of Allocation described in Paragraph 10(d) below. The schedule has been provided to counsel for Defendants.

8. **Motion for Final Approval and Entry of Final Judgment.** If the Court preliminarily approves the Settlement, Plaintiff shall submit a motion for final approval of this Settlement by the Court, after appropriate notice to the Direct Purchaser Class, and shall seek entry of a Final Judgment and Order substantially in the form attached hereto as Exhibit C, with any additional findings of fact and conclusions of law (the "Final Judgment and Order"), among other things:

- a. finding this Settlement Agreement and its terms to be a fair, reasonable, and adequate settlement as to Plaintiff and the members of the Direct Purchaser Class within the meaning of Rule 23 of the Federal Rules of Civil Procedure and directing its consummation pursuant to its terms;
- b. directing that the Action be dismissed with prejudice as to Defendants and, except as expressly provided for herein, without attorney's fees recoverable under 15 U.S.C. §15(a) or costs;
- c. reserving exclusive jurisdiction over the Settlement and this Settlement Agreement, including the provisions of paragraph 7, the administration and consummation of this Settlement, the award of attorneys' fees and reimbursement of costs and expenses, and the payment of any incentive award to the Named Plaintiff, if allowed by the Court; and
- d. directing that the judgment of dismissal of all Direct Purchaser Class claims against Defendants shall be final and appealable pursuant to Fed. R. Civ. P. 54(b), there being no just reason for delay.

9. **Finality of Settlement.** This Settlement Agreement shall become final upon the

occurrence of the following:

- a. it is approved by the Court as required by Rule 23(e) of the Federal Rules of Civil Procedure;
- b. entry, as provided for in paragraph 8 herein, is made of the Final Judgment and Order of dismissal with prejudice against the Named Plaintiff and the members of the Direct Purchaser Class; and
- c. the time for appeal from the Court's approval of this Settlement and entry of the Final Judgment and Order has expired or, if appealed, either such appeal shall have been dismissed prior to resolution by the Court or approval of this Settlement and the Final Judgment and Order has been affirmed in its entirety by the court of last resort to which such appeal has been taken and such affirmance has become no longer subject to further appeal or review.

10. Settlement Fund.

(a) Subject to the terms and conditions of this Settlement Agreement and the Escrow Agreement (as defined below), within ten (10) business days after entry by the Court of the Preliminary Approval Order without material change and the receipt by Defendants of the appropriate tax and wire transfer information, Defendants shall deposit the Settlement Fund Amount (as defined below) into an escrow account (the "Escrow Account") held and administered by Berdon Claims Administration LLC (the "Escrow Agent" or "Berdon"). The Settlement Fund Amount shall be Sixty Million, Two Hundred Thousand Dollars and no/100 (\$60,200,000.00). The Settlement Fund Amount deposited by Defendants into the Escrow Account and any accrued interest after deposit shall become part of and shall be referred to as the "Settlement Fund."

(b) If the Settlement is approved by the Court and becomes final as provided for in Paragraph 9, but the Court orders an opt-out period notwithstanding the agreement of the parties set forth in paragraph 6 above, and one or more K-Dur Direct Purchaser(s) has excluded itself (themselves) from the Direct Purchaser Class (other than a Retailer Plaintiff) prior to the

expiration of the opt-out period prescribed by the Court, then the Settlement Fund shall be reduced by the *pro rata* share for that K-Dur Direct Purchaser, as calculated pursuant to Paragraph 7(d), plus any accrued interest attributable to that *pro rata* share and less any taxes attributable to that *pro rata* share, and the *pro rata* share shall be returned to Defendants within eight (8) business days of the Settlement becoming final as provided for in Paragraph 9. Nothing herein will preclude a K-Dur Direct Purchaser from seeking leave of Court to rescind its (their) decision(s) to opt-out of the Settlement until such time as the Settlement becomes final pursuant to paragraph 9. Nothing precludes Co-Lead Counsel from contacting such K-Dur Direct Purchaser concerning its (their) decision(s) to opt-out of the Settlement. Except as provided in paragraph 6 above with respect to any National Wholesaler seeking permission to opt out of the Settlement, a decision by one or more K-Dur Direct Purchaser(s) to opt-out of the Settlement will have no impact on the validity and enforceability of this Settlement Agreement as to the remaining members of the Direct Purchaser Class, including the release provisions in paragraph 16.

(c) The Escrow Account shall be established and administered pursuant to the Escrow Agreement attached hereto as Exhibit D (the “Escrow Agreement”). It is intended that the Escrow Account be treated as a “qualified settlement fund” for federal income tax purposes pursuant to Treas. Reg. § 1.468B-1 and that any taxes due as a result of income earned by the Settlement Fund will be paid from the Settlement Fund. Except as otherwise expressly permitted by paragraph 3(d)(4) of the Escrow Agreement, the Escrow Agent shall disburse funds from the Escrow Account only pursuant to and consistent with the express terms of this Settlement Agreement, the Preliminary Approval Order, the Final Judgment and Order, the Escrow Agreement, and as expressly authorized by any other applicable order of the Court. Interest

earned by the Settlement Fund shall become part of the Settlement Fund, less any taxes imposed on such interest.

(d) The Settlement Fund shall be available for distributions to members of the Direct Purchaser Class upon the Settlement becoming final pursuant to paragraph 9 of this Settlement Agreement, subject to the following Plan of Allocation under which the Settlement Fund shall be reduced by payments for: (1) reasonable attorneys' fees, costs and expenses approved by the Court (and any interest awarded thereon based upon interest accrued from the time the Settlement Fund was deposited in escrow); (2) any Court-approved incentive award to the Named Plaintiff; (3) taxes payable on the Settlement Fund; and (4) any and all administrative and notice expenses associated with this litigation or the Settlement. The resulting amount (the "Net Settlement Fund") shall be distributed to eligible Class members making claims ("Claimants") in proportion to each Claimant's actual purchases of branded K-Dur 20 during the period from January 1, 1999 through March 31, 2002, which is the time period used by Plaintiffs' expert, Dr. Leitzinger, to calculate damages. To calculate the *pro rata* share for each Claimant of the Net Settlement Fund, the Claims Administrator, working with Dr. Leitzinger, will (1) take the total net purchases of K-Dur for each Claimant (net of any returns and/or assignments to the Retailer Plaintiffs) and (2) divide it by the total purchases of branded K-Dur 20 for all Claimants. If any Class member fails to submit a claim or documents and submits an alternative amount of purchases (based on the Claimant's own data) that is approved by the Claims Administrator, the shares will be re-calculated accordingly. The final calculations will then be applied to the Net Settlement Fund to determine each Claimant's allocated share. After preliminary approval of the Settlement, Co-Lead Counsel will file with the Court a document more specifically setting forth the Plan of Allocation along with any necessary supporting

documents.

(e) The total consideration that Defendants will pay for this Settlement shall be the Settlement Fund Amount only. No portion of the Settlement consideration shall constitute, or shall be construed as constituting, a payment in lieu of treble damages, fines, penalties, punitive damages or forfeitures.

11. **No Injunctive Relief.** This Settlement does not include any provision for injunctive relief, and Plaintiff and the Class waive any such claim as to any of the matters released or discharged in paragraph 16.

12. **Full Satisfaction; Limitation of Interest and Liability.** Members of the Direct Purchaser Class shall look solely to the Settlement Fund for settlement and satisfaction against Defendants of any and all Released Claims as defined in paragraph 16 herein, including any costs, fees or expenses of any of the Settling Plaintiff or their attorneys, experts, advisors, agents and representatives, including with respect to the negotiation, execution and performance of their obligations under this Settlement Agreement. In the event that the Settlement becomes final pursuant to paragraph 9 herein, the Settlement Fund will fully satisfy the Released Claims as defined in paragraph 16 herein. Except as provided by order of the Court, no Direct Purchaser Class member shall have any interest in the Settlement Fund or any portion thereof. Defendants shall have no liability with respect to disbursements from the Settlement Fund pursuant to any Court-approved plan of allocation. It is expressly understood that any settlement agreement entered into between Defendants and the Retailer Plaintiffs is not part of this Settlement, and that any payments in any settlement agreement between Defendants and the Retailer Plaintiffs will not in any way reduce the payments made to the Direct Purchaser Class or to the Direct Purchasers pursuant to this Settlement.

13. **Reimbursement of Costs and Expenses.** Plaintiff and its counsel will be reimbursed and indemnified solely out of the Settlement Fund for all costs, fees, and expenses including, but not limited to, the costs of notice of this Settlement to Direct Purchaser Class members, administration of the Settlement Fund, escrow administration, and taxes. Defendant shall not be liable for any costs, fees or expenses of any of Plaintiffs' respective attorneys, experts, advisors, agents and representatives, or for any costs, fees or expenses for notice, administration or other costs of implementing this Settlement, but all such costs, fees and expenses as approved by the Court shall be paid out of the Settlement Fund.

14. **Disbursement of the Settlement Fund.** If this Settlement Agreement becomes final pursuant to the provisions of paragraph 9 herein, the Settlement Fund shall be distributed to Direct Purchaser Class members as ordered by the Court. Prior to the Settlement becoming final pursuant to the provisions of paragraph 9, disbursements for the costs and expenses of the notice to the Direct Purchaser Class and for administration of the Settlement Fund, up to \$10,000.00, may be made from the Settlement Fund only upon written notice from Co-Lead Counsel to the Escrow Agent in the manner provided in the Escrow Agreement, with a copy provided to counsel for Defendants. Defendants shall have no liability or responsibility with respect to disbursements from or administration of the Settlement Fund. To the extent that there is any ambiguity or inconsistency concerning disbursements when this Settlement Agreement and the Escrow Agreement are read together, the terms of this Settlement Agreement shall control.

15. **Attorneys' Fees, Expenses/Costs and Incentive Award to the Named Plaintiff.** Plaintiffs' counsel intend to seek, solely from the Settlement Fund, attorneys' fees of 33 $\frac{1}{3}$ % of the Settlement Fund plus the reimbursement of reasonable costs and expenses incurred in the prosecution of the Action against Defendants plus interest thereon (based upon interest accrued

from the time the Settlement Fund was deposited into escrow), and an incentive award of one hundred thousand dollars (\$100,000.00) for the Named Plaintiff. Defendants take no position with respect to the application by Plaintiffs' counsel for attorneys' fees, and the incentive award, in the amounts set forth above, and for the reimbursement of reasonable costs and expenses. Any attorneys' fees, expenses, costs and incentive awards approved by the Court shall be payable at the time of or after final approval solely out of the Settlement Fund, and the Named Plaintiff, members of the Direct Purchaser Class, and their respective counsel shall not seek payment of any attorneys' fees, expenses, costs or incentive award from any source other than the Settlement Fund, except as provided for in paragraph 7. The Released Parties (as defined in paragraph 16 hereof) shall have no responsibility for, and no liability whatsoever with respect to, any payment or disbursement of attorneys' fees, expenses, costs or incentive awards, any allocation of attorneys' fees, expenses, costs, or incentive awards among Plaintiffs' counsel and/or Plaintiff, or with respect to any allocation of attorneys' fees, expenses, costs, or incentive awards to any other person or entity who may assert any claim thereto.

16. **Releases and Covenant Not to Sue.** (a) Upon this Settlement Agreement becoming final in accordance with paragraph 9 hereof, the Named Plaintiff and the Direct Purchaser Class shall unconditionally, fully and finally release and forever discharge Defendants, any past, present, and future parents, subsidiaries, divisions, affiliates, joint ventures, shareholders, officers, directors, management, supervisory boards, insurers, general or limited partners, employees, agents, trustees, associates, attorneys and any of their legal representatives, or any other representatives thereof (and the predecessors, heirs, executors, administrators, successors and assigns of each of the foregoing) (the "Released Parties") from any and all manner of claims, rights, debts, obligations, demands, actions, suits, causes of

action, damages whenever incurred, liabilities of any nature whatsoever, known or unknown, suspected or unsuspected, fixed or contingent, including costs, expenses, penalties and attorneys' fees, accrued in whole or in part, in law or equity, that the Named Plaintiff or any member or members of the Direct Purchaser Class (including any of their past, present, or future officers, directors, management, supervisory boards, insurers, general or limited partners, divisions, shareholders, agents, attorneys, employees, legal representatives, trustees, parents, associates, affiliates, joint ventures, subsidiaries, heirs, executors, administrators, predecessors, successors and assigns, acting in their capacity as such) (the "Releasers"), whether or not they object to the Settlement, ever had, now has, or hereafter can, shall or may have, directly, representatively, derivatively or in any other capacity, arising out of or relating in any way to: any claims, known or unknown, that were alleged, or could have been brought against Defendants in the Action, as of the date of final approval of the Settlement that arise out of, in whole or in part, or relate in any way to the subject matter of or conduct alleged in the Action, any prior complaints filed by anyone in the Action, or any other related action, or to the subject matter of pre-trial proceedings in the Action. This includes, but is not limited to, claims related to: (1) the alleged delayed entry of generic K-Dur 20; and (2) the sale, marketing or distribution of K-Dur 20 or generic K-Dur 20, except as provided for in paragraph 17 herein (the "Released Claims"). Releasers hereby covenant and agree that each shall not sue or otherwise seek to establish or impose liability against any Released Party based, in whole or in part, on any of the Released Claims.

(b) In addition, the Named Plaintiff, on behalf of itself and all other Releasers, hereby expressly waives, releases and forever discharges, upon the Settlement becoming final, any and all provisions, rights and benefits conferred by §1542 of the California Civil

Code, which reads:

Section 1542. General Release; extent. A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor;

or by any law of any state or territory of the United States or other jurisdiction, or principle of common law, which is similar, comparable or equivalent to § 1542 of the California Civil Code. The Named Plaintiff and Releasors may hereafter discover facts other than or different from those which he, she or it knows or believes to be true with respect to the claims which are released by this paragraph 16, but the Named Plaintiff and Releasors hereby expressly waive and fully, finally and forever settle, release and discharge, upon this Settlement becoming final, any known or unknown, suspected or unsuspected, asserted or unasserted, contingent or non-contingent claim that would otherwise fall within the definition of Released Claims, whether or not concealed or hidden, without regard to the subsequent discovery or existence of such different or additional facts. The Named Plaintiff and each Releasor also hereby expressly waives and fully, finally and forever settles, releases and discharges any and all claims it may have against any Released Party under § 17200, *et seq.*, of the California Business and Professions Code or any similar comparable or equivalent provision of the law of any other state or territory of the United States or other jurisdiction, which claims are expressly incorporated into the definition of Released Claims.

17. **Reservation of Claims.** This Settlement Agreement does not release claims arising: (a) out of any breach of this Settlement Agreement; (b) under Article 2 of the Uniform Commercial Code (pertaining to Sales); (c) under the laws of negligence or product liability or implied warranty; (d) for breach of contract, breach of express warranty, or personal injury; or

(e) other claims unrelated to the allegations in the Action.

18. **Dismissal of the Litigation.** Upon this Settlement Agreement becoming final in accordance with paragraph 9 hereof, all claims asserted against Defendants in the Action shall be dismissed with prejudice.

19. **Stay of Proceedings.** Pending Court approval of the Settlement embodied in this Settlement Agreement, the parties agree to stay any and all proceedings in the Direct Purchaser Class Action other than those incident to the settlement process, and agree to extensions of time with respect to any court filings necessary to effectuate such stays.

20. **Effect of Disapproval.** If the Court declines to finally approve this Settlement, or if the Court does not enter the Final Judgment and Order in substantially the form provided for in paragraph 8, or if the Court enters the Final Judgment and Order and appellate review is sought, and on such review, the Final Judgment and Order is set aside or is affirmed with material modification, then this Settlement Agreement and the Settlement, with the exception of the parties' obligations under paragraph 7 herein which shall remain in full force and effect, shall be terminated upon the election of any of Defendants or Co-Lead Counsel by providing written notice to the parties designated to receive such notice hereunder in accordance with paragraph 27 hereof and the Escrow Agent within ten (10) business days following the occurrence of any such event. An Order by the Court awarding attorneys' fees, costs, expenses, and/or incentive awards from the Settlement Fund in any amount lower than requested by Plaintiff's counsel pursuant to this Settlement Agreement (including paragraph 15) shall not be deemed a modification of all or a part of the terms of this Settlement Agreement or the Final Judgment and Order and shall not give rise to any right of termination. A modification or reversal on appeal of any amount of Plaintiffs' counsel's fees, costs and expenses awarded by the Court from the Settlement Fund, or

the amount of an incentive award from the Settlement Fund to the Named Plaintiff, shall not be deemed a modification of all or a part of the terms of this Settlement Agreement or the Final Judgment and Order and shall not give rise to any right of termination.

21. **Termination.**

(a) In the event this Settlement is terminated pursuant to paragraph 20 hereof, then (a) this Settlement Agreement, with the exception of paragraph 7, shall be of no force or effect, (b) any amount of the Settlement Fund attributable to this Settlement, including any and all interest earned thereon, but less fifty percent (50%) of the costs expended for notice of the Settlement, settlement administration, escrow administration, and taxes paid on the Settlement Fund shall be paid to Defendants, as soon as practicable after the Escrow Agent receives notice of termination as provided for in paragraph 20 hereof, and any release pursuant to paragraph 16 above shall be of no force or effect.

(b) In the event this Settlement is not finally approved within four years of April 13, 2017 (the execution date of the parties' Memorandum of Understanding), then Defendants may, at their sole discretion, terminate the Settlement and this Settlement Agreement shall be of no force or effect.

22. **Preservation of Rights.** The parties hereto agree that if this Settlement Agreement does not become final, any and all negotiations, documents and discussions associated with it shall be without prejudice to the rights of any party; shall not be deemed or construed to be an admission or evidence of any violation of any statute or law, of any liability or wrongdoing by Defendants, or of the truth of any of the claims or allegations contained in the complaint or any other pleading or document; or the lack of merit of any of Plaintiffs' claims or allegations; and evidence thereof shall not be discoverable, admissible, or otherwise used directly

or indirectly, in any way (except in accordance with the terms of this Settlement; and that the provisions of this Settlement Agreement can be used by the parties to enforce the provisions of the Settlement Agreement), whether in the Action or in any other action or proceeding. The parties expressly reserve all of their rights if the Settlement does not become final in accordance with the terms of this Settlement Agreement. Upon the Settlement becoming final, nothing in this paragraph shall prevent Defendants from asserting any release or using this Settlement Agreement to offset any liability to any other parties.

23. **Resumption of Litigation.** The parties agree, subject to approval of the Court, that in the event that the Settlement Agreement is not approved by the Court or the Settlement does not become final pursuant to paragraph 9 and Defendants do not perform under paragraph 7 herein, litigation of the Action against Defendants will resume in a reasonable manner to be approved by the Court upon joint application by the parties hereto.

24. **Confidentiality.** The terms of this Settlement Agreement shall remain confidential until the filing of the motion for preliminary approval of the Settlement. However, this provision does not apply to a request by the Court to be informed of the terms of the Settlement Agreement and/or statements made in judicial filings necessary to obtain preliminary approval of the Settlement. Further, Defendants shall be entitled to make such disclosures of the terms of the Settlement Agreement as they, in their sole discretion, determine are appropriate under applicable federal, state or other laws.

25. **Binding Effect.** This Settlement Agreement shall be binding upon, and inure to the benefit of, the parties hereto, the Released Parties, the Releasers, and the successors and assigns of each of them. Without limiting the generality of the foregoing, each and every covenant and agreement herein by the Named Plaintiff and its counsel shall be binding upon all

members of the Direct Purchaser Class and the Releasers and their respective successors and assigns upon approval of the Court.

26. **Names of Parties.** The undersigned counsel for the Named Plaintiff warrant that their client in the Action is a party to this Settlement Agreement even if it is inadvertently identified in this Settlement Agreement by an incorrect name (for example, if “Louisiana Wholesale Drug Company” were actually “Louisiana Wholesale, Inc.”).

27. **Notice.** Any and all notices, requests, consents, directives, or communications by any party intended for any other party shall be in writing and shall, unless expressly provided otherwise herein, be given personally, or by express courier, or by electronic transmission (such as e-mail) followed by postage prepaid mail, to the following persons, and shall be addressed as follows:

To Plaintiff and the Direct Purchaser Class:

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Co-Lead Counsel for the Named Plaintiff and the Direct Purchaser Class

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*Counsel for Defendant Merck & Co.,
Inc. (f/k/a Schering-Plough Corp.)*

Any of the parties may, from time to time, change the address to which such notices, requests, consents, directives, or communications are to be delivered, by giving the other parties prior written notice of the changed address, in the manner hereinabove provided, ten (10) calendar days before the change is effective.

28. **Integrated Agreement.** This Settlement Agreement (including the exhibits hereto) contains an entire, complete, and integrated statement of each and every term and provision agreed to, by and among the parties. This Settlement Agreement shall not be modified in any respect except by a writing executed by all the parties hereto.

29. **Headings.** The headings used in this Settlement Agreement are intended for the convenience of the reader only and shall not affect the meaning or interpretation of this Settlement Agreement.

30. **No Party is the Drafter.** None of the parties hereto shall be considered to be the drafter of this Settlement Agreement or any provision hereof for the purpose of any statute, case law or rule of interpretation or construction that would or might cause any provision to be construed against the drafter hereof.

31. **Choice of Law.** All terms of this Settlement Agreement shall be governed by and

interpreted according to the substantive laws of the State of New Jersey without regard to its choice of law or conflict of laws principles.

32. **Consent to Jurisdiction.** Defendants and each member of the Direct Purchaser Class hereby irrevocably submit to the exclusive jurisdiction of the United States District Court for the District of New Jersey, for any suit, action, proceeding or dispute arising out of or relating to this Settlement Agreement or the applicability of this Settlement Agreement. Nothing in this paragraph shall prohibit (a) the assertion in any forum in which a claim is brought that any release herein is a defense, in whole or in part, to such claim or (b) in the event that such a defense is asserted in such forum, the determination of its merits in that forum.

33. **No Admission of Liability.** Nothing in this Settlement Agreement shall be construed as an admission in any action or proceeding of any kind whatsoever, civil, criminal or otherwise, before any court, administrative agency, regulatory body or any other body or authority, present or future, by Defendants including, without limitation, that Defendants have engaged in any conduct or practices that violates any antitrust statute or other law. This Settlement Agreement shall not be admissible for any purpose except in an action to enforce its terms or as otherwise provided in paragraphs 7, 22 and 32 hereof.

34. **Warranty of Authority.** Co-Lead Counsel represent and warrant that they are authorized to enter into this Settlement by Plaintiff and the Class. Defendants represent and warrant that the undersigned counsel are authorized to enter into this Settlement on behalf of each respective Defendant.

35. **Execution in Counterparts.** This Settlement Agreement may be executed in counterparts. Signatures transmitted by facsimile or other electronic means shall be considered as valid signatures as of the date hereof, although the original signature pages shall thereafter be

appended to this Settlement Agreement and filed with the Court.

[The remainder of this page is intentionally left blank.]

IN WITNESS WHEREOF, the parties hereto through their fully authorized
representatives have agreed to this Settlement Agreement as of May 15, 2017.

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*Counsel for Defendant Upsher-Smith
Laboratories, Inc.*

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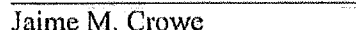
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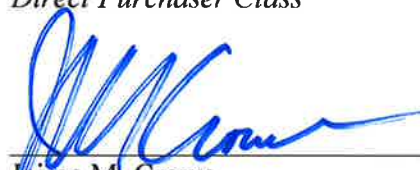
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