

CAUSE NO. GV002327

THE STATE OF TEXAS	§	IN THE DISTRICT COURT OF
	§	
<i>ex rel.</i>	§	
	§	
VEN-A-CARE OF THE	§	
FLORIDA KEYS, INC.	§	
	§	
Plaintiffs,	§	TRAVIS COUNTY, TEXAS
v.	§	
	§	
WARRICK PHARMACEUTICALS	§	
CORPORATION; SCHERING-	§	
PLOUGH CORPORATION; and	§	
SCHERING CORPORATION,	§	
	§	
Defendants.	§	53 rd JUDICIAL DISTRICT

SETTLEMENT AGREEMENT AND RELEASE

Part I: Parties

This Settlement Agreement (the “Agreement”) is entered into by and between the STATE of TEXAS (“STATE”), Ven-A-Care of the Florida Keys, Inc. (“Relator”), (collectively referred to as “Plaintiffs”); and Warrick Pharmaceuticals Corporation (“Warrick”), Schering-Plough Corporation (“SPC”), and Schering Corporation (“Schering”), (collectively referred to as “Defendants”) (the Plaintiffs and Defendants shall be collectively referred to as the “Parties”), through their authorized representatives.

Part II: Preamble

As a preamble to this Agreement, the Parties agree to the following:

A. Warrick is a corporation organized under the laws of Delaware. Warrick is wholly owned by Schering. Schering is a corporation organized under the laws of New Jersey. Schering is wholly owned by SPC. SPC is a corporation organized under the laws of New Jersey.

B. Plaintiffs contend that the STATE has civil claims against Defendants under the Texas Medicaid Fraud Prevention Act, TEX. HUM. RES. CODE ANN. chapter 36, and under common law for unlawful actions taken by Defendants through the date this Agreement is executed, pertaining to the inclusion of certain of Defendants' drugs on the Texas Drug Code Index ("TDCI"). Defendants' drugs that are the subject of the captioned lawsuit are collectively referred to hereafter as the Covered Drugs, and are listed on **Exhibit A**, attached hereto and incorporated herein for all purposes. Specifically, Plaintiffs contend that Defendants have committed unlawful acts, as defined by Tex. Hum. Res. Code Ann. § 36.002, in connection with the submission of pricing information to the Texas Vendor Drug Program ("VDP") for the purpose of including certain of Defendants' Covered Drugs on the TDCI. Plaintiffs also make alter ego contentions against Defendants. The acts and omissions sued upon and which are subject to the release language in this Agreement are set forth in Cause No. GV002327, *State of Texas, ex. rel. Ven-A-Care of the Florida Keys, Inc., vs. Warrick Pharmaceuticals Corporation, et.al.*, (the "Lawsuit"), and are alleged in the SEVENTH AMENDED PETITION filed in the Lawsuit on or about June 4, 2003.

C. Defendants' alleged conduct and transactions referenced in Paragraph II(B) are hereinafter referred to as the "Covered Conduct." The Covered Conduct is expressly limited to: (i) conduct which has occurred prior to the date of the execution of this Agreement; and (ii) conduct as expressly alleged in the SEVENTH AMENDED PETITION in the Lawsuit as though such conduct had been alleged with respect to all of the Covered Drugs. At the time of the execution of this Agreement, the Office of the Attorney General of Texas and the Relator represent to Defendants that they are not aware of any other filed *qui tam* lawsuit against the Defendants' Released Parties under the Texas Medicaid Fraud Prevention Act.

D. Defendants deny all of the Plaintiffs' claims and allegations and deny that they have any liability relating to such claims and allegations. Defendants have asserted various defenses to the Plaintiffs' claims.

E. In order to avoid the delay, uncertainty, inconvenience and expense of protracted litigation of these claims, and as a result of a mutual desire to settle their disputes, the Parties have reached a full and final settlement as set forth in this Agreement.

F. This Agreement does not constitute an admission of fault or liability by Defendants, nor does it constitute evidence of any liability or unlawful conduct on the part of Defendants, and the Plaintiffs will not urge or seek to admit this Agreement as

evidence of any fault or liability of Defendants' Released Parties in any investigation, administrative proceeding, or federal or state court or arbitration proceeding.

G. Plaintiffs represent to Defendants, subject only to the Relator's rights as a *qui tam* plaintiff under applicable state and federal law to participate in this Agreement and to receive a percentage of the Settlement Amount, and to the rights possessed by the United States, that no interest in any claim herein released has been assigned by them to any third party.

H. The STATE has concluded that this settlement is in the public interest.

I. Concurrent with this Agreement, Defendants are entering into a separate release agreement with the United States of America regarding the Covered Conduct in the STATE. Defendants' agreement with the United States of America is attached hereto and incorporated herein for all purposes as **Exhibit B**. The use of capitalized terms in the agreement attached as **Exhibit B** shall refer to and have the same meaning as the identical terms defined herein, unless otherwise expressly defined in **Exhibit B**.

Part III: Terms and Conditions

NOW, THEREFORE, in consideration of the mutual promises, covenants, and obligations set forth below, and for good and valuable consideration as stated herein, the Parties agree as follows:

Incorporation of Representations

1) The foregoing Preamble is incorporated herein.

The Settlement Payment

2) (a) Defendants agree to pay the STATE, the Relator, and the United States of America the collective sum of **TWENTY-SEVEN MILLION DOLLARS (\$27,000,000)** (the “Settlement Amount”) in full payment of restitution and compensatory damages related to the Covered Conduct. Defendants shall make payment of the Settlement Amount by check or wire transfer as follows:

(1) The amount of **\$9,238,000** payable to the State of Texas for the STATE’s attorneys’ fees and costs, and for the State’s share;

(2) The amount of **\$5,362,000** payable to the Relator for the Relator’s attorneys’ fees and costs, and for the Relator’s share;

(3) The amount of **\$12,400,000** payable to the United States of America for the share due the United States of America in accordance with the agreement attached hereto as **Exhibit B**.

(b) **THIS PARAGRAPH CONTAINS AN INDEMNITY AND HAS BEEN READ CAREFULLY BY RELATOR.** The payment for the Relator’s attorneys’ fees and costs and for the Relator’s share (**\$5,362,000**) shall be distributed in accordance with instructions delivered by Relator’s counsel, James J. Breen to counsel for Defendants. The payment for the STATE’s attorneys’ fees and costs and the STATE’s share (**\$9,238,000**) shall be delivered in accordance with instructions from Patrick J. O’Connell, Chief, Civil Medicaid Fraud Section, at the Office of the Attorney General of Texas. The

payment for the United States' share (\$12,400,000) shall be made in accordance with instructions delivered to Defendants by counsel for the United States Department of Justice. In the event payments are made by wire transfer the Parties will cooperate to exchange wiring and routing instructions so that such payments can be promptly made.

The Relator expressly INDEMNIFIES and holds Defendants' Released Parties harmless from and against any claims by persons or entities who have represented the Relator in connection with the claims released herein for: (1) attorneys fees, costs, and expenses; or (2) any portion of the Settlement Amount.

(c) Defendants shall make payment to Plaintiffs and the United States, in accordance with paragraph 2(b) above, not later than 5:00 p.m. (Central Daylight Time) of the second business day after this Agreement is signed by all parties and the United States.

Plaintiffs: Release of Defendants

3) Subject to the exceptions in Paragraph III(7) below, in consideration of the obligations of Defendants set forth in this Agreement, and conditioned upon Defendants' payment in full of the Settlement Amount specified herein, the STATE (on behalf of itself, its officers, agents, agencies and departments), and the Relator (on behalf of itself, its officers, agents, employees, servants, and its attorneys) fully and finally release Defendants, their predecessors, successors and assigns as well as their respective current and former directors, officers, employees, agents, shareholders and attorneys

(collectively, the “Defendants Released Parties”) from any civil or administrative claim, action, suit or proceeding (including attorneys fees, penalties, punitive damages, costs, and expenses of every kind and however denominated) the STATE and Relator have or may have or could assert in the future under any source of law for the Covered Conduct. The payment of this Settlement Amount fully discharges Defendants from any civil or administrative obligation to the STATE for the Covered Conduct. The Office of the Attorney General of Texas shall not initiate or prosecute litigation against Defendants on behalf of the United States based on the Covered Conduct.

4) In consideration of the obligations of Defendants set forth in this Agreement, conditioned upon Defendants’ payment in full of the Settlement Amount specified herein, the STATE agrees to release and refrain from instituting, directing or maintaining any action seeking exclusion from the VDP or any other Texas Medicaid program against Defendants their predecessors, successors and assigns for the Covered Conduct as it relates to the Texas Medicaid program, except as reserved in Paragraph III(7), below.

Defendants: Release of the STATE and the Relator

5) Defendants fully and finally release the STATE, its agencies, employees, servants, attorneys and agents from any claims based on events occurring prior to the date of this Agreement (including attorneys fees, costs, and expenses of every kind and however denominated) which Defendants have asserted, could have asserted, or may assert in the future against the STATE, its agencies, employees, servants, attorneys and agents, related

to the Covered Conduct and the Plaintiffs' investigation and prosecution thereof. This release shall not release any accounts receivable unrelated to the Covered Conduct due from the STATE, or any agency or instrumentality of the STATE.

6) Defendants fully and finally release the Relator, its employees, officers, servants, attorneys and agents from any claims based on events occurring prior to the date of this Agreement (including attorneys fees, costs, and expenses of every kind and however denominated) which Defendants have asserted, could have asserted, or may assert in the future against the Relator, its employees, officers, servants, attorneys and agents, related to the Covered Conduct and the Plaintiffs' investigation and prosecution thereof. This provision is not intended to release claims unrelated to conduct in Texas.

Limitations on Release

7) Notwithstanding any other terms of this Agreement, including the release provisions in paragraphs III(3), (4), (5), and (6) above, specifically reserved and excluded from the scope and terms of this Agreement, and from the scope and terms of the releases, as to any entity or person (including Defendants), are any and all of the following:

- (a) Any claims based upon such obligations as are created by this Agreement;
- (b) Any express or implied product or service warranty claims or other claims for defective or deficient products or services, including quality of goods and services, provided by Defendants;

- (c) The subrogation rights to claims for personal injury or property damage arising from usage by a participant in the Medicaid program of any of the Covered Drugs;
- (d) Any claims based on a failure to deliver products or services due;
- (e) Any claims arising from Defendants's obligations to report and/or to pay rebates to the STATE under any law or contract, including, but not limited to under the provisions of the Omnibus Budget Reconciliation Act of 1990 ("OBRA 90");
- (f) Any claims that the Relator may have under any provision of 31 U.S.C.A. §§ 3729-3733 (the federal False Claims Act), excluding any claim related to any recovery attributable to the impact on Texas Medicaid of the Covered Conduct; or
- (g) Any claims that the Relator may have under the *qui tam* provisions of the laws of any state other than Texas.

Corporate Integrity Agreement

8) Should Defendants enter into a Corporate Integrity Agreement with the Office of the Inspector General of the United States Department of Health and Human Services ("OIG"), relating to the Covered Conduct, Defendants acknowledge that the OIG may share information provided under the Corporate Integrity Agreement with the STATE.

No Waiver or Release of Claims Against Other Persons

9) This Agreement is intended to be solely for the benefit of the Parties and persons and entities released (including those released in **Exhibit B** attached), and except as stated herein, the Parties do not by this instrument release any claims against any other person or entity, including any individual or entity that purchased drugs or pharmaceutical products from Defendants. No word, term, phrase or definition in this Agreement is or may be used for the benefit of any person, entity or litigant who is not a signatory to, or released by this Agreement.

Claims for Physician Services, Medicare, and other Warrick Drugs

10) The STATE and the Relator covenant not to sue or take any other civil or administrative action against Defendants: (i) for claims relating to reimbursement by Texas Medicaid for all Warrick Drugs administered by physicians or incident to physicians' services based upon any conduct, including the reporting of average wholesale price ("AWP") to national data reporting services; (ii) for co-payments for Covered Drugs made under Medicare Part B; or (iii) for claims relating to reimbursement by Texas Medicaid or administered by the Texas Vendor Drug Program for all Warrick Drugs, including the Covered Drugs, occurring prior to the date of this Agreement. Notwithstanding anything stated herein to the contrary: 1) the State and the Relator shall not be precluded from participating or recovering in any federal action or national settlement that results in a Texas recovery other than of the damages to the Texas

Medicaid Program expressly arising from Defendants' price or cost representations used for determining reimbursement paid by the Texas Medicaid Program to pharmacies for the Covered Drugs, 2) The Relator shall not be precluded from participating or recovering in any action brought pursuant to the federal False Claims Act or a similar state statute, of a state other than Texas, that seeks recovery of damages other than damages to the Texas Medicaid Program expressly arising from Defendants' price or cost representations used for determining reimbursement paid by the Texas Medicaid Program to pharmacies for the Covered Drugs.

Dismissal of Action

11) Simultaneously with the execution of this Agreement and payment of the Settlement Amount, the STATE and the Relator will execute agreed motion(s) to dismiss and agreed order(s) (in the forms collectively attached hereto as **Exhibit C**) dismissing with prejudice any lawsuit (including the Lawsuit) against Defendants based on the Covered Conduct, but only as to Defendants. The dismissal order in the Lawsuit shall provide that the Amended Protective Order entered in the Lawsuit shall remain enforceable in accordance with its terms, as same may be modified pursuant to paragraph 14 thereof.

No Impairment or Creation of Rights

12) Nothing in this Agreement shall be construed to abrogate or alter any future obligation of Defendants pursuant to the law of the STATE.

Withdrawal of Pending Motion for Contempt

13) Upon receipt of payment from Defendants, as provided for herein, Plaintiffs will withdraw their Motion to Hold Defendants in Contempt and for Relief from Discovery Abuse.

Plaintiffs will not oppose Defendants' Motion to Modify Order of October 28, 2002

14) Plaintiffs agree that they will not oppose a motion by Defendants to modify the Court's Order of October 28, 2002, to clarify that they were not sanctioned for discovery abuse.

No Waiver of Sovereign Immunity

15) Nothing in this Agreement shall be construed to create a waiver of the STATE's Sovereign Immunity.

Exclusive Venue for Enforcement of Agreement

16) Any party shall be entitled to enforce the terms of this Agreement in the District Courts of Travis County, Texas, which shall have exclusive jurisdiction and venue over any such action.

Complete Agreement

17) This Agreement, including all exhibits, constitutes the complete agreement between the Parties and may not be amended except by written consent of the Parties.

Costs

18) Except as otherwise provided herein, each Party to this Agreement will bear its own legal and other costs incurred in connection with this matter, including the preparation and performance of this Agreement.

Choice of Law

19) This Agreement is governed by the laws of the State of Texas, except to the extent otherwise governed by federal law.

Notification

20) Unless otherwise stated in writing subsequent to the Effective Date of this Agreement, all notifications and communications made pursuant to this Agreement shall be submitted to the entities listed below:

(a) STATE for all purposes:

OFFICE OF THE ATTORNEY GENERAL
Civil Medicaid Fraud Section
Antitrust and Civil Medicaid Fraud Division
P O Box 12548
Austin, Texas 78711-2548

(b) RELATOR for all purposes:

James J. Breen, Esq.
The Breen Law Firm, P.A.
3562 Old Milton Parkway
Alpharetta, GA 30005

- (c) Defendants, Warrick Pharmaceuticals Corporation, Schering-Plough Corporation, and Schering Corporation, for all purposes:

C. Michael Moore
Locke Liddell & Sapp LLP
2200 Ross Avenue
Suite 2200
Dallas, Texas 75201-6776

Office of the General Counsel
Schering-Plough Corporation
2000 Galloping Hill Road
Kenilworth, New Jersey 07033

Defendants: No Duress

21) Defendants represent that this Agreement is freely and voluntarily entered into without any degree of duress or compulsion whatsoever.

Relator: Agreement Reasonable

22) The Relator agrees that this Agreement is fair, adequate, and reasonable.

Authorization

23) The Parties have read the foregoing Agreement and accept and agree to the provisions contained herein and hereby have caused this Agreement to be signed as of the day and date adjacent to their respective signatures. The undersigned individuals signing this Agreement on behalf of Defendants represent and warrant that they are authorized by Defendants to execute this Agreement. The undersigned STATE signatories represent that they are signing this Agreement in their official capacities and that they are authorized to execute this Agreement. The Relator's attorney, James J. Breen, and its president, T.

Mark Jones represent that they are duly authorized to sign this Agreement on behalf of the Relator.

No Other Representations or Promises

24) The Parties represent and acknowledge that in entering into this Agreement they are not relying on any promises or representations other than those expressly set forth in this Agreement and its exhibits.

Counterparts

25) This Agreement may be executed in counterparts, each of which shall constitute an original and all of which shall be deemed to constitute one and the same Agreement.

Acts Necessary to Effectuate Agreement

26) Each Party agrees to perform such further acts and to execute and to deliver such further documents as may reasonably be necessary to carry out this Agreement.

Captions Are for Convenience Only

27) The bold-face paragraph captions in this Agreement are for convenience only and do not add to, detract from or change the substantive language or terms of this Agreement.

Effective Date

28) The Effective Date of this Agreement shall be the date upon which all of the Parties below have executed this Agreement.

**STATE of TEXAS
Office of the Attorney General**

By: _____

Date: _____

Edward D. Burbach, Esq.
Deputy Attorney General for Litigation
Office of the Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548

**Texas Health & Human Services
Commission**

By: _____

Date: _____

Printed Name: _____

Title: _____

**Relator, Ven-A-Care of the Florida
Keys, Inc.**

By: _____

Date: _____

James J. Breen, Esq.
The Breen Law Firm, P.A.
3562 Old Milton Parkway
Alpharetta, GA 30005

**Defendant Warrick Pharmaceuticals
Corporation**

By: _____

Date: _____

Printed Name: _____

Title: _____

**Defendant Schering-Plough
Corporation**

By: _____

Date: _____

Printed Name: _____

Title: _____

Defendant Schering Corporation

By: _____

Date: _____

Printed Name: _____

Title: _____

**Relator, Ven-A-Care of the Florida
Keys, Inc.**

By: _____

Date: _____

T. Mark Jones
Title: President

EXHIBIT "A"
COVERED DRUGS