

## SETTLEMENT AGREEMENT AND RELEASE

### Part I: Parties

This Settlement Agreement (the “Agreement”) is entered into by and between (i) the State of California (the “State” or “California”) and Ven-A-Care of the Florida Keys, Inc. (the “Qui Tam Plaintiff” or “Relator”) (together, “Plaintiffs”), and (ii) Schering-Plough Corporation, Schering Corporation, and Warrick Pharmaceutical Corporation (collectively, “Settling Defendants”). Plaintiffs and the Settling Defendants are hereinafter referred to as the “Parties”.

### Part II: Preamble

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

A. Plaintiffs are pursuing relief in an action styled *State of California ex. rel. Ven-A-Care of the Florida Keys, Inc. v. Abbott Laboratories Inc., et al.*, Case No. 722855, Filed In Camera Under Seal, Superior Court of the State of California, removed to the United States District Court for the Central District of California, Case No. 03-CV-2238, and transferred to the United States District Court for the District of Massachusetts, Case No. 03-cv-11226-PBS, MDL 1456, Master File No. 01-12257-PBS. The First Amended Complaint in Intervention alleges various violations of law with respect to drug reimbursement and price reporting (the “Litigation”).

B. To the extent that Plaintiffs may have civil claims against the Settling Defendants under the State of California False Claims Act, Cal. Gov. Code §§ 12651(a) and 12652(c)(1) *et seq.* (“CFCA”), or other statutory or common law provisions, whether sealed or unsealed, for conduct alleged in the Litigation pertaining to drug price reporting and to the reimbursement price paid by the State for drugs, from January 1, 1994, through the date this Agreement is executed by all Parties (such period is referred to as the “Relevant Period”), this Agreement applies to any and all such claims. Drugs that were manufactured or sold by the Settling Defendants during the Relevant Period and which are the subject of this Agreement are those marketed under the Labeler Codes 00085, 59930, 00052, and 11523. These drugs are collectively referred to herein as the “Subject Drugs.”

C. Specifically, the Litigation charges that the Settling Defendants engaged in conduct that allegedly resulted in the reporting of inflated and false claims in connection with drugs, which caused excessive reimbursement by Medi-Cal for those drugs. This reporting, the Litigation further charges, included the publication of Average Wholesale Price, Wholesale Acquisition Cost, and/or Direct Price by national data reporting services, upon which the Medi-Cal program allegedly relied for determining drug reimbursement rates. Any such conduct that was or that could have been alleged against the Settling Defendants with respect to the Subject Drugs in the Litigation is referred to herein as the "Covered Conduct." "Covered Conduct" is expressly limited to conduct that occurred during the Relevant Period and that: (i) is alleged or that could have been alleged in the Litigation; or (ii) relates to any claim regarding the reimbursement price paid by the State for any of the Subject Drugs that could have been asserted under other statutory or common law theories of liability.

D. The Settling Defendants deny all claims and allegations and deny any wrongdoing or that they have any liability relating to the Covered Conduct.

E. In order to avoid the delay, uncertainty, inconvenience, and expense of protracted litigation of these disputed 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 is the result of a compromise of disputed issues of law and fact, and the execution and delivery of this Agreement shall not constitute or be construed as an admission of fault, liability, or wrongdoing by any of the Released Parties (as hereinafter defined), nor does it constitute evidence of any liability or unlawful conduct on the part of the Released Parties, and the Plaintiffs will not urge or seek to admit this Agreement as evidence of any fault or liability of the Released Parties in any investigation, administrative claim, action, suit, or proceeding, or federal or state court or arbitration proceeding. The parties agree that this Agreement is not punitive in purpose or effect.

G. The State has concluded that this Agreement is in the public interest.

H. At the time of the execution of this Agreement, the Office of the Attorney General of California and the Qui Tam Plaintiff each represent to the Settling Defendants that (i) it is not



aware of any other filed or threatened *qui tam* lawsuit against the Settling Defendants in connection with the Covered Conduct, and (ii) no interest in any Claim (as hereinafter defined) or allegation herein released has been assigned by it, in whole or in part, to any third party.

### **Part III: Terms and Conditions**

NOW, THEREFORE, in consideration of the mutual promises, covenants, and obligations set forth below, and for other good and valuable consideration as stated herein, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

#### **Incorporation of Representations**

1) The foregoing Preamble is incorporated herein and the parties agree that the matters set forth therein are true and accurate in all stated respects.

#### **Settlement Amount/Confidentiality**

2) In full and final settlement of the Plaintiffs' claims, the Settling Defendants have agreed to pay Sixty-Nine Million Dollars (\$69,000,000) to resolve this and other matters as set forth more fully in Paragraph III.1 of the Settlement Agreement between the United States of America by Ven-A-Care of the Florida Keys, Inc.; the attorneys for the Relators; the State of California; the State of Florida; and Schering-Plough Corporation, Schering Corporation, and Warrick Pharmaceuticals Corporation (hereinafter, the "Federal Share Settlement Agreement") (the terms of which are expressly incorporated by reference herein). That portion of the \$69 million that the United States, California, the State of Florida, the Relators, and the Relators' attorneys shall agree represents California's share, among themselves and without input from the Settling Defendants, and distributed pursuant to the Plaintiffs' arrangements with the court-appointed mediator (the "Settlement Amount"), is intended to fully resolve all of the Plaintiffs' claims that were asserted or that could have been asserted in the Litigation with regard to the Covered Conduct as further explained in the section governing Releases below.

3) The Qui Tam Plaintiff is entitled under California Government Code Section 12652 *et seq.* to a statutory percentage of the Settlement Amount. The statutory percentage for the Qui Tam Plaintiff's share is to be handled separately at a later time between the State and the Qui

Tam Plaintiff and its attorneys, and is not to be paid by the Settling Defendants. The Qui Tam Plaintiff expressly agrees to indemnify and hold the Released Parties harmless from and against any Claims by persons or entities who have represented (or claim to have represented) the Qui Tam Plaintiff in connection with the Claims released herein for: (1) attorneys' fees, costs, and expenses; and (2) any portion of the Settlement Amount.

4) The United States is entitled to a portion of the Settlement Amount, and that allocation is to be handled separately via the Plaintiffs' apportionment arrangements with the court-appointed mediator. If the State fails to ensure that the federal portion of California's allocation of the Settlement Amount is remitted to the United States, then the State expressly agrees to indemnify and hold the Released Parties harmless for any Claim by the United States for the federal portion attributable to California's allocation of the Settlement Amount. If the United States claims that California has failed to remit in full the federal portion of the Settlement Amount, the Released Parties will promptly advise the State in writing, and the State agrees to take whatever steps may be necessary to obtain the written agreement of an appropriate officer of the United States that the State has paid in full the federal portion of the Settlement Amount.

#### **Settlement Amount/Escrow Account**

5) The Settling Defendants shall pay the Settlement Amount into an escrow account in accordance with the terms and conditions of Paragraph III.2 of the Federal Share Settlement Agreement.

6) The Escrow Agent (as the term is defined in the Federal Share Settlement Agreement) shall pay the funds held in escrow in accordance with the terms and conditions of Paragraph III.2 of the Federal Share Settlement Agreement.

#### **Releases by Plaintiffs**

7) Subject to the exceptions in Paragraph III(12) below, in consideration of the obligations of the Settling Defendants set forth in this Agreement, including payment of the Settlement Amount in accordance with Paragraph III(2) through III(6) above, the State (on behalf of itself, its officers, agents, agencies, political subdivisions, departments, boards, and commissions) fully and finally releases, acquits, and forever discharges the Settling Defendants, as well as each of



their predecessors, successors, parents, subsidiaries, assigns, and affiliates and any shareholders, current or former directors, officers, employees, agents, and attorneys (collectively, “Released Parties”) from any claim, action, suit, or proceeding, whether sealed or unsealed, whether civil or administrative (including attorneys’ fees, penalties, punitive damages, costs, liabilities, obligations, and expenses of every kind and however denominated) (collectively, “Claims”) the State has for the Covered Conduct related to the Subject Drugs. Payment of the Settlement Amount fully discharges the Released Parties from any Claims the State has asserted, may have asserted, or could have asserted for the Covered Conduct.

8) Subject to the exceptions in Paragraph III(12) below, in consideration of the obligations of the Settling Defendants set forth in this Agreement, and conditioned upon payment of the Settlement Amount in accordance with Paragraphs III(2) through III(6) above, the Qui Tam Plaintiff (on behalf of itself, its predecessors, successors, subsidiaries, parents, assigns, and affiliates and any shareholders, current or former directors, officers, agents, employees, servants, and attorneys) fully and finally releases, acquits, and forever discharges the Released Parties from any Claims the Qui Tam Plaintiff has asserted, may have asserted, or could have asserted, for the Covered Conduct related to the Subject Drugs. Payment of the Settlement Amount fully discharges the Released Parties from any such civil obligation to the Qui Tam Plaintiff, including any fees and costs associated with the Litigation to which it was entitled pursuant to California Government Code Section 12652 *et seq.*

9) Subject to the exceptions in Paragraph III(12) below, in consideration of the obligations of the Settling Defendants set forth in this Agreement, conditioned upon payment of the Settlement Amount in accordance with Paragraphs III(2) through III(6) above, the State agrees to release and refrain from instituting, directing, or maintaining any action or other proceeding seeking permissive suspension from the California Medical Assistance Program (“Medi-Cal program”) against the Released Parties for the Covered Conduct.

#### **Dismissal of Litigation**

10) In consideration of the obligations of the Settling Defendants set forth in this Agreement, the State and the Qui Tam Plaintiff agree that, (1) upon execution of this Agreement by all Parties, (2) upon confirmation that parallel settlement agreements related to the same \$69 million

settlement amount have been executed between Florida, Ven-A-Care, and the Settling Defendants; and (3) the Settling Defendants deposit of the funds in escrow pursuant to Paragraph III(5), they shall cause the Litigation to be dismissed with prejudice as to the Settling Defendants.

#### **Release by the Settling Defendants**

11) Subject to the exceptions in Paragraph III(12) below, the Settling Defendants fully and finally release the State, as well as its officers, agents, agencies, political subdivisions, departments, boards, commissions, employees, servants, and attorneys and the Qui Tam Plaintiff, as well as its predecessors, successors, subsidiaries, assigns, and affiliates and any shareholders, current or former directors, officers, agents, employees, servants, and attorneys from any claims relating to the Covered Conduct, or the investigation or litigation of claims relating to the Covered Conduct for the Relevant Period through the Effective Date of this Agreement, which the Settling Defendants could have asserted. This release shall not, however, release any accounts receivable or rebate offset amount related to the Covered Conduct due from the State, or any agency or instrumentality of the State, and is not intended to release claims unrelated to conduct in the State.

#### **Limitations on Release**

12) Notwithstanding any other terms of this Agreement, including the release provisions in Paragraphs III(7), III(8), III(9), and III(11) 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 the Released Parties), are any and all of the following:

- (a) Any claims based upon such obligations as are created by this Agreement;
- (b) The subrogation rights to claims for personal injury or injury to real or personal property arising from usage by a participant in the Medicaid program of any of the Subject Drugs covered thereunder;
- (c) Any claims based on a failure to deliver products or services due;

- (d) Any civil, criminal, or administrative liability arising under Title 26, U.S. Code Internal Revenue Code or its California equivalent;
- (e) Any liability to the State of California for any conduct other than the Covered Conduct;
- (f) Any criminal liability not specifically released by this Agreement;
- (g) Any civil or administrative liability that Settling Defendants have or may have under any state statute, regulation, or rule not covered by the release provisions in Paragraphs III(7), III(8), and III(9);
- (h) Except as explicitly stated in this Agreement, any administrative liability which would result in mandatory suspension from the State's Medi-Cal program based on the Covered Conduct;
- (i) Any express or implied warranty claims or other claims for defective or deficient products and services provided by Settling Defendants; or
- (j) Any claims arising from the Settling Defendants' obligations to report and/or 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, for any conduct other than the Covered Conduct.

### **AMP Reporting**

13) In the event that at any time during a period of five years following the Effective Date of this Agreement the State is unable to obtain the Settling Defendants' Average Manufacturer Prices ("AMPs") as reported by the Settling Defendants to the federal Centers for Medicare and Medicaid Services ("CMS"), the Settling Defendants will, upon request, provide their AMPs to the State under the same terms of confidentiality as it was previously provided to CMS. The reporting of AMPs consistent with this Paragraph 13, from the Effective Date forward, shall satisfy in full any presently existing legal obligation that Schering or Warrick may have to disclose, directly or indirectly, to the State of California, the pricing for the pharmaceutical products to which that reporting pertains.



### **No Waiver or Release of Claims Against Other Persons**

14) Except as stated herein, the Parties do not by this Agreement release any claims against any other person or entity, including any individual or entity that purchased drugs or pharmaceutical products from the Settling 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.

### **No Impairment or Creation of Rights**

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

### **Exclusive Venue for Enforcement of Agreement**

16) The exclusive venue to enforce the terms of this Agreement shall be in the United States District Court for the Central District of California or, should that Court decline jurisdiction for any reason, in any court of competent jurisdiction.

### **Costs**

17) Except as otherwise provided herein, each Party 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**

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

### **Qui Tam Plaintiff: Agreement Reasonable**

19) The Qui Tam Plaintiff agrees that this Agreement is fair, adequate, and reasonable, and that it will not take any action to challenge this Agreement, or any provision hereof, in any court.



### **Authorization**

20) The Parties have read the foregoing Agreement and accept and agree to the provisions and representations contained herein, and hereby make those representations and have caused this Agreement to be signed as of the day and date adjacent to their respective signatures. The undersigned individual signing this Agreement on behalf of the Settling Defendants represent and warrant that he is authorized by the Settling Defendants to execute this Agreement. The undersigned State signatory represents and warrants that he is signing this Agreement in his official capacity and that he is authorized to execute this Agreement on behalf of the State. The Qui Tam Plaintiff's attorney, James J. Breen, represents and warrants that he is duly authorized to execute this Agreement on behalf of the Qui Tam Plaintiff.

### **Counterparts**

21) This Agreement may be executed in multiple original, facsimile, or .pdf counterparts, each of which is equally admissible in evidence and shall constitute an original, and all of which shall be deemed to constitute one and the same agreement.

### **Acts Necessary to Effectuate Agreement**

22) Each Party agrees to provide such cooperation, to perform such further acts, and to execute and deliver such further documents as may reasonably be necessary to carry out the purpose and intent of this Agreement or to evidence anything contained herein.

### **Notices/Dispute Resolution**

23) The Parties each agree that, in the event of any dispute regarding the interpretation of or performance by the Parties under this Agreement, each Party shall give notice to the other Parties at the addresses below of such dispute as soon as practicable, and in no event less than twenty (20) business days prior to the commencement of legal or administrative proceedings with respect to the dispute.

### **Amendments**

24) Neither this Agreement nor any term set forth herein may be changed, waived, discharged, or terminated except by a writing signed by all affected Parties.

### **Interpretation**

25) This Agreement has been negotiated at arm's length and between and among persons sophisticated and knowledgeable in the matters dealt with in this Agreement. In addition, this Agreement was drafted by experienced and knowledgeable legal counsel for each of the Parties. Accordingly, none of the Parties shall be presumptively entitled to have any provisions of the Agreement construed against any of the other Parties in accordance with any rule of law, legal decision, or doctrine. The provisions of this Agreement shall be interpreted in a reasonable manner to effect the purpose of the Parties and this Agreement, which is to effect a full and final settlement of all claims related to the Covered Conduct.

### **Entire and Integrated Agreement**

26) This Agreement, together with the Federal Share Settlement Agreement, is intended by the Parties as their final expression of their agreement and is intended to be a complete and exclusive statement of the agreement and understanding of the Parties with respect to the subject matters contained herein. This Agreement, together with the Federal Share Settlement Agreement, supersedes any and all prior promises, representations, warranties, and agreements, including, but not limited to, understandings and undertakings between or among the Parties with respect to such subject matters, and there are no promises, representations, warranties, agreements, understandings, or undertakings with respect to such subject matters other than those set forth or referred to herein and the Federal Share Settlement Agreement.

### **Severability**

27) If any provision of this Agreement, or the application thereof, shall for any reason or to any extent be construed by a court of competent jurisdiction to be invalid or unenforceable, the remainder of this Agreement, and application of such provision to other circumstances, shall remain in effect and be interpreted so as best reasonably to effect the intent of the Parties.

Notwithstanding the foregoing, if either the payment or any of the release provisions hereof are found to be unenforceable or invalid by a court of competent jurisdiction, then such invalidity or unenforceability shall be cause for voiding the entire Agreement at the election of the Party the interests of which are injured by the finding of invalidity or unenforceability.

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 California  
Office of the Attorney General

By: [Signature]  
Date: 11/16/09

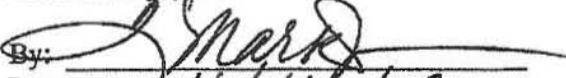
Nicholas Paul  
Supervising Deputy Attorney General  
Bureau of Medi-Cal Fraud & Elder Abuse  
Office of the Attorney General  
1455 Frazee Road, Suite 315  
San Diego, CA 92108

~~Schering-Plough Corporation~~ Merck & Co., Inc.  
(Formerly known as Schering-Plough Corporation)  
By: John Bueker  
Date: 12/7/09

John Bueker  
Ropes & Gray LLP  
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Boston, MA 02118  
Counsel for Schering-Plough Corporation

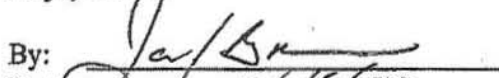


**Qui Tam Plaintiff Ven-A-Care of the  
Florida Keys, Inc.**

By:   
Date: 11/16/09

T. Mark Jones, President  
Ven-A-Care of the Florida Keys, Inc.  
615 1/2 Duval Street  
Key West, FL 33040

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

By:   
Date: 11/16/09

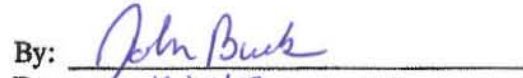
James J. Breen, Esq.  
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5755 North Point Parkway, Suite 260  
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**California Department of Health Care  
Services**

By: \_\_\_\_\_  
Date: \_\_\_\_\_


Toby Douglas  
Chief Deputy Director  
CA Department of Health Care Services  
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**Schering Corporation**

By:   
Date: 12/4/09

John Bueker  
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Counsel for Schering Corporation

**Warrick Pharmaceutical Corporation**

By:   
Date: 12/4/09

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Counsel for Warrick Pharmaceutical  
Corporation

**Qui Tam Plaintiff Ven-A-Care of the  
Florida Keys, Inc.**

By: \_\_\_\_\_  
Date: \_\_\_\_\_

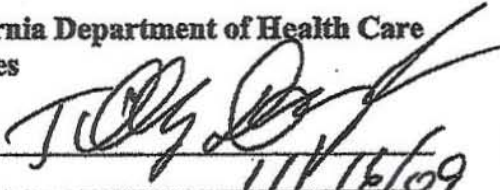
T. Mark Jones, President  
Ven-A-Care of the Florida Keys, Inc.  
615 1/2 Duval Street  
Key West, FL 33040

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

By: \_\_\_\_\_  
Date: \_\_\_\_\_

James J. Breen, Esq.  
The Breen Law Firm, P.A.  
5755 North Point Parkway, Suite 260  
Alpharetta, GA 30022

**California Department of Health Care  
Services**

By:   
Date: 11/16/09

Toby Douglas  
Chief Deputy Director  
CA Department of Health Care Services  
1501 Capitol Avenue, Suite 71.6001  
MS 0003  
Sacramento, CA 95814

**Schering Corporation**

By: \_\_\_\_\_  
Date: \_\_\_\_\_

John Bueker  
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Counsel for Schering Corporation

**Warrick Pharmaceutical Corporation**

By: \_\_\_\_\_  
Date: \_\_\_\_\_

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