

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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In re: RELAFEN ANTITRUST LITIGATION : MASTER FILE
: NO. 01-12239-WGY
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THIS DOCUMENT RELATES TO: :
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Louisiana Wholesale Drug Co., Inc., v. :
Smithkline Beecham Corporation, d/b/a :
GlaxoSmithKline, and Smithkline Beecham PLC, :
No. 02-11242; *Meijer, Inc., v. Smithkline Beecham* :
PLC, et al., No. 01-12239. :
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SETTLEMENT AGREEMENT

THIS SETTLEMENT AGREEMENT is made and entered into on January 9, 2004, by and between Smithkline Beecham Corporation, d/b/a/ GlaxoSmithKline and Smithkline Beecham PLC (collectively, "Defendants" or "GSK"), and plaintiff Louisiana Wholesale Drug Co., Inc. ("Plaintiff" or "LWD"), and the Direct Purchaser Class (or the "Class", as defined below) in the class actions *Louisiana Wholesale Drug Co., Inc., v. Smithkline Beecham Corporation, et al.*, D. Mass. No. 02-11242-WGY and *Meijer, Inc., v. Smithkline Beecham Corporation, et al.*, D. Mass. No. 01-12239-WGY (the "Class Actions").¹

WHEREAS, Plaintiff has claimed, among other things, that GSK violated Section 2 of the Sherman Act, 15 U.S.C. §2, by allegedly (1) enforcing a fraudulently obtained and invalid patent for its nabumetone product known as Relafen, and (2) engaging in sham litigation to unlawfully maintain its alleged monopoly over nabumetone, thereby allegedly causing Plaintiff and members of the Direct Purchaser Class to incur significant damages;

WHEREAS, Defendants deny each and every one of Plaintiff's allegations of unlawful conduct and have asserted a number of defenses to Plaintiff's claims;

¹Meijer, Inc. withdrew as a class representative as of July 11, 2003.

WHEREAS, Plaintiff 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 Class Actions;

WHEREAS, arm's-length settlement negotiations have taken place between counsel for Plaintiff and Defendants, and this Settlement Agreement, which embodies all of the terms and conditions of the settlement between Defendants and Plaintiff, both individually and on behalf of the Direct Purchaser Class, has been reached, subject to the final approval of the Court;

WHEREAS, Plaintiff's counsel have concluded, after extensive discovery and investigation of the facts, and after carefully considering the circumstances of the Class Actions, including the claims asserted in the complaints filed in the Class Actions, 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 Plaintiff's counsel consider the settlement set forth herein to be fair, reasonable, and adequate 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 good defenses thereto, that it would be in their best interests to enter into this Settlement Agreement to avoid the uncertainties and additional costs of further litigation, and thereby avoid the risks inherent in complex litigation;

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

1. **Class Certification.** The Court, in its Order dated October 29, 2003 and Opinion dated November 10, 2003 (218 F.R.D. 317) certified a class of direct purchasers defined as follows:

All persons or entities in the United States or its territories who purchased Relafen directly from defendants at any time during the period of September 1, 1998 through December 31, 2002 . Excluded from the Class are governmental entities, and SmithKline and its officers, directors, management, employees, subsidiaries and affiliates ("the Class" or "the Direct Purchaser Class").

Also excluded from the Class are the claims brought by and/or assigned to entities which already independently sued GSK in the actions styled CVS Meridian, Inc., and Rite Aid Corp., v. SmithKline Beecham Corp., et al., No. 03-10040-WGY and Walgreen Co., et al., v. SmithKline Beecham Corp., et al., No. 02-10588-WGY ("the CVS and Walgreen Actions").

2. **Reasonable Best Efforts to Effectuate This Settlement.** Counsel for the undersigned agree to recommend approval of this Settlement Agreement 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 carry out the terms of this Settlement Agreement.

3. **Motion for Preliminary Approval.** Promptly following the transfer of funds to an escrow account by GSK pursuant to paragraph 6 below, Plaintiff shall file with the Court a motion for preliminary approval of the settlement. In the event that the Court preliminarily approves the settlement, Plaintiff shall, in accord with the order of preliminary approval, provide Class members with notice of the settlement pursuant to Rule 23 of the Federal Rules of Civil Procedure in the form attached hereto as Exhibit "A."

4. **Motion for Final Approval and Entry of Final Judgment.** If the Court preliminarily approves this Settlement Agreement, Plaintiff shall submit a motion for final

approval of this Settlement Agreement by the Court, after appropriate notice to the Class, and shall seek entry of an order and final judgment:

- a. finding this Settlement Agreement and its terms as being a fair, reasonable and adequate settlement as to Plaintiff and the Class within the meaning of Rule 23 of the Federal Rules of Civil Procedure and directing its consummation pursuant to its terms;
- b. providing for payment of reasonable attorneys' fees and reimbursement of costs and expenses from the Settlement Fund as described herein;
- c. providing for an incentive payment to LWD, the Class representative, of \$25,000 in addition to whatever monies it will receive from the Settlement Fund pursuant to a Court-approved plan of allocation;
- d. directing that the Class Actions be dismissed with prejudice and, except as provided for herein, without costs;
- e. reserving exclusive jurisdiction over the settlement and this Settlement Agreement, including the administration and consummation of this settlement; and
- f. directing that the judgment of dismissal shall be final and appealable.

5. **Finality of Settlement.** This Settlement Agreement shall become final upon the occurrence of all of the following:

- (i) it is approved by the Court as required by Rule 23(e) of the Federal Rules of Civil Procedure;
- (ii) entry, as provided for in paragraph 4 herein, is made of the final judgment of dismissal with prejudice against Plaintiff and the members of the Class who have not timely excluded themselves from the Class Actions;
- (iii) the time for appeal from the Court's approval of this Settlement Agreement as described in (ii) hereof and entry of a final judgment as described in (iii) hereof has expired or, if appealed, either such appeal shall have been dismissed prior to resolution by the Court or approval of this Settlement Agreement and the final judgment 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, provided, however, a modification or reversal on appeal of any amount of Class counsel's fees and expenses awarded by the Court from the Settlement Fund, or the amount of incentive fees to the Class representative, shall not by itself prevent this Settlement Agreement from becoming final if all other aspects of the final judgment have been affirmed; and

- (iv) Defendants have not withdrawn from the settlement pursuant to paragraphs 12 or 13 below.

6. **Settlement Consideration: Cash.** Subject to the provisions hereof, and in full, complete and final settlement of the Class Actions, GSK shall transfer, on behalf of all Defendants, one hundred seventy-five million dollars (\$175,000,000) in cash, by January 12, 2004, into an escrow account (the "Settlement Fund"), held and administered by an escrow agent to be selected by Plaintiff's Co-Lead Counsel. The escrow account shall be established and administered pursuant to an escrow agreement in a form satisfactory to the parties. It is intended that the escrow account shall be at all times 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 imposed upon and paid from the Settlement Fund. Interest earned by the Settlement Fund (less any tax imposed upon such interest) shall be for the benefit of the Class, less reasonable attorneys' fees and expenses approved by the Court (and any interest awarded thereon), any Court-approved award to Plaintiff for acting as Class representative, and payment of any and all administrative and notice expenses associated with this litigation or settlement. GSK's transfer of the Settlement Fund to the escrow account described above shall constitute full and complete satisfaction of its obligations under this paragraph. GSK shall not have any liabilities, obligations or responsibilities with respect to the payment, disposition or distribution of the Settlement Fund after such transfer.

7. **Full Satisfaction; Limitation of Interest and Liability.** Members of the Class who have not timely excluded themselves from the Class Actions shall look solely to the Settlement Fund for settlement and satisfaction against Defendants of all claims that are released hereunder. Except as provided by order of the Court, no Class member shall have any interest in the Settlement Fund or any portion thereof.

8. **Reimbursement of Costs, Fees 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 Class members and administration of the Settlement Fund. Defendants shall not be liable for any costs, fees or expenses of any kind, including but not limited to the costs, fees or expenses of any of Plaintiff's respective attorneys, experts, advisors, agents and representatives, but all such costs, fees and expenses as approved by the Court shall be paid out of the Settlement Fund.

9. **Disbursement of the Settlement Fund.** If this Settlement Agreement becomes final pursuant to the provisions of paragraph 5 herein, the Settlement Fund shall be distributed to Class members as ordered by the Court. Prior to the settlement becoming final pursuant to the provisions of paragraph 5, disbursements for the costs and expenses of Class notice, distribution and administration of the Settlement Fund, attorneys' fees and reasonable expenses awarded by the Court, and any incentive award for the Plaintiff, may be made from the Settlement Fund. 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 dated January 9, 2004 are read together, the terms of this Settlement Agreement shall control.

10. **Attorneys' Fees, Expenses and Costs.** Class counsel intend to seek, solely from the Settlement Fund, attorneys' fees in an amount up to 33 $\frac{1}{3}$ % of the Settlement Fund (plus interest thereon) plus reimbursement of reasonable costs and expenses incurred in the

prosecution of these actions. Defendants agree to take no position with respect to the application by Class counsel for the attorneys' fees and expense payments set forth above. Any attorneys' fees and expenses awarded by the Court shall be disbursed only to Co-Lead Class Counsel, Garwin, Bronzaft, Gerstein & Fisher, L.L.P., and Cohen Milstein Hausfeld & Toll, P.L.L.C., for allocation among the various Class counsel which have participated in this litigation. Subject to any order of the Court, Class counsel will be paid approved attorneys' fees and expenses within five (5) business days after entry of the Court's order finally approving the settlement and awarding attorneys' fees and expenses. Disbursement of Class counsel's attorneys' fees shall not be delayed by reason of any appeal of the final judgment. However, if a final judgment by the District Court approving the settlement is reversed on appeal, Co-Lead Class Counsel, Garwin, Bronzaft, Gerstein & Fisher, L.L.P., and Cohen Milstein Hausfeld & Toll, P.L.L.C., shall within five (5) business days after receiving written notice from counsel for GSK, cause a refund to be made to the Settlement Fund in the amount of the disbursement paid to Class counsel, plus interest that would have accrued on that amount had it remained in the Settlement Fund.

11. **Releases.**

(a) Upon this Settlement Agreement becoming final in accord with paragraph 5 hereof, Defendants and their present and former parents, subsidiaries, divisions, affiliates, stockholders, officers, directors, employees, agents, attorneys and any of their legal representatives (and the predecessors, heirs, executors, administrators, successors and assigns of each of the foregoing) (the "Released Parties") shall be released and forever discharged from all manner of claims, demands, actions, suits, causes of action, damages whenever incurred, liabilities of any nature whatsoever, including costs, expenses, penalties and attorneys' fees, known or unknown, suspected or unsuspected, in law or equity, that Plaintiff or any member or members of the Class who have not timely excluded themselves from the Class Actions (as used throughout this paragraph 11, references to the "Class," "members of the Class" or "Class

members” includes any of their past, present or future officers, directors, stockholders, agents, attorneys, employees, legal representatives, trustees, parents, associates, affiliates, subsidiaries, partners, heirs, executors, administrators, purchasers, predecessors, successors and assigns, acting in their capacity as such), whether or not they object to the settlement and whether or not they make a claim upon or participate in the Settlement Fund, ever had, now has, or hereafter can, shall or may have, directly, representatively, derivatively or in any other capacity, arising out of any conduct, events or transactions, prior to the date hereof, alleged or which could have been alleged in the Class Actions relating to the marketing, sale, manufacture, pricing or purchase of, or the enforcement of intellectual property related to, the drug Relafen® or any form of nabumetone (the "Released Claims"). Each member of the Class hereby covenants and agrees that it shall not, hereafter, seek to establish liability against any Released Party based, in whole or in part, on any of the Released Claims.

(b) In addition, each Class member hereby expressly waives and releases, upon the Settlement Agreement becoming final, any and all provisions, rights, 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 favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor;

or by any law of any state or territory of the United States, or principle of common law, which is similar, comparable or equivalent to § 1542 of the California Civil Code. Each Class member 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 the subject matter of this paragraph 11, but each Class member hereby expressly waives and fully, finally and forever settles and releases, upon this Settlement Agreement becoming final, any known or unknown, suspected or

unsuspected, contingent or non-contingent claim with respect to the subject matter of the provisions of this paragraph 11 whether or not concealed or hidden, without regard to the subsequent discovery or existence of such different or additional facts. Each Class member also hereby expressly waives and fully, finally and forever settles and releases any and all claims it may have against Defendants under § 17200, *et seq.*, of the California Business and Professions Code, which claims are expressly incorporated into this paragraph 11.

(c) Notwithstanding the above, the Class members intend by this Settlement Agreement to settle with and release only the Released Parties that such Class members have released pursuant to this paragraph 11, and the parties do not intend this Settlement Agreement, any part hereof or any other aspect of the proposed settlement or release, to release or otherwise affect in any way any rights a Class member has or may have against any other party or entity whatsoever other than the Released Parties with respect to the Released Claims pursuant to this paragraph 11. In addition, the releases set forth in this paragraph 11 shall not release any claims arising in the ordinary course of business between Class members and the Released Parties concerning product liability, breach of contract, breach of warranty, or personal injury.

12. **Modification of the Settlement Fund.**

(a) Pursuant to the Court's Order dated October 29, 2003, a "Notice of Pending Class Action" in a form approved by the Court, was sent to putative class members. As of the date of this Settlement Agreement, no parties have elected to opt-out of the Direct Purchaser Class other than those prosecuting the *CVS* and *Walgreen* Actions. In the event of any additional opt-outs from the Direct Purchaser Class pursuant to the October 29, 2003 Notice of Pending Class Action – *i.e.*, requests for exclusion postmarked on or before December 18, 2003 (the latest date requests for exclusion could be postmarked) but not yet received by the claims administrator – GSK shall be entitled to modify the settlement and receive a reduction of the Settlement Funds in an amount equal to the proportionate share of the non-trebled

overcharges (relative to the aggregate overcharge damages of the Direct Purchaser Class) attributable to the party or parties that is/are determined to have validly opted out of the Direct Purchaser Class, other than, and exclusive of, the parties prosecuting the *CVS* and *Walgreen* Actions. For purposes of this paragraph, the proportionate share of the non-trebled overcharges of any additional party deemed to have validly opted out of the Class shall be calculated in the first instance pursuant to the plan of allocation class counsel will prepare and submit to the Court based upon the methodology set out in the Expert Reports of Jeffrey J. Leitzinger (dated August 20, 2003, September 2003, and November 20, 2003). If GSK disputes the calculation of the the proportionate share of the non-trebled overcharges attributable to any additional opt-out(s) under the plan of allocation and/or the methodology used to perform such calculation (and thus there exists a dispute as to the appropriate amount by which the Settlement Fund should be reduced under this paragraph), Plaintiff and GSK agree to submit the dispute to a mutually agreed upon third-party for binding arbitration.

(b) The parties agree that there is no need for an additional opt-out period pursuant to Rule 23(e)(3), but should the Court order such an additional opportunity for Class members to opt-out, in the event of any additional opt-outs from the Direct Purchaser Class pursuant to such procedure, GSK shall be entitled to modify the settlement and receive a reduction of the Settlement Funds in an amount equal to the proportionate share of the non-trebled overcharges (relative to the aggregate overcharge damages of the Direct Purchaser Class) attributable to the party or parties that is/are determined to have validly opted out of the Direct Purchaser Class, other than, and exclusive of, the parties prosecuting the *CVS* and *Walgreen* Actions, provided, however, that if Class members with aggregate purchases of nabumetone exceeding a certain amount (as specified in a confidential letter agreement between the parties) (the “Opt-Out Purchase Threshold”) exclude themselves from the Class, GSK shall be entitled to withdraw from or modify the settlement pursuant to the terms of the letter

agreement if such election is made by GSK within 10 business days following any deadline for Class members to exclude themselves from the Class. Plaintiff agrees to provide GSK with all requests for exclusion from the Class within three business days of receipt. For purposes of this paragraph, the proportionate share of the non-trebled overcharges of any additional party deemed to have validly opted out of the Class shall be calculated in the first instance pursuant to the plan of allocation class counsel will prepare and submit to the Court based upon the methodology set out in the Expert Reports of Jeffrey J. Leitzinger (dated August 20, 2003, September 2003, and November 20, 2003). If GSK disputes the calculation of the the proportionate share of the non-trebled overcharges attributable to any additional opt-out(s) under the plan of allocation and/or the methodology used to perform such calculation (and thus there exists a dispute as to the appropriate amount by which the Settlement Fund should be reduced under this paragraph), Plaintiff and GSK agree to submit the dispute to a mutually agreed upon third-party for binding arbitration.

13. **Effect of Disapproval.** If the Court declines to finally approve this Settlement Agreement, or if such approval is set aside on appeal or materially modified, or if the Court does not enter the final judgment in substantially the form provided for in paragraph 4, or if the Court enters the final judgment and appellate review is sought, and on such review, such final judgment is not affirmed or is affirmed with material modification, then this Settlement Agreement shall be terminated upon the election of Defendants' counsel or, collectively, all of the Plaintiff's Co-Lead Counsel. A modification or reversal on appeal of any amount of Class counsel's fees and expenses awarded by the Court from the Settlement Fund, or the amount of incentive fees to the Class representative, shall not be deemed a modification of all or a part of the terms of this Settlement Agreement or such final judgment and shall not give rise to any right of termination.

14. **Termination.** In the event that the settlement is terminated pursuant to paragraphs 12 or 13, or for any reason does not become final in accordance with the terms of paragraph 5 hereof, then: (a) this Settlement Agreement shall be of no force or effect, except for payment of notice and administrative fees and costs from the Settlement Fund; (b) the Settlement Fund, including any and all interest earned thereon, shall be returned to GSK less only the costs incurred in giving notice to the Class and administering the settlement; and (c) any release pursuant to paragraph 11 above shall be of no force or effect.

15. **Preservation of Rights.** The parties hereto agree that this Settlement Agreement, whether or not it shall become final, and 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, and evidence thereof shall not be discoverable or used directly or indirectly, in any way, whether in the Class Actions 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.

16. **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 5, litigation of the Class Actions will resume in a reasonable manner to be approved by the Court.

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

18. **Integrated Agreement.** Except as expressly set forth herein in paragraph 12, this Settlement Agreement 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.

19. **Independent Settlement** This settlement of the Class Actions is entirely independent of all other cases and is not conditioned on approval by any other plaintiff or settlement of any other case.

20. **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.

21. **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.

22. **Choice of Law.** All terms of this Settlement Agreement shall be governed by and interpreted according to the substantive laws of the Commonwealth of Pennsylvania without regard to its choice of law or conflict of laws principles.

23. **Consent to Jurisdiction.** GSK and each member of the Class hereby irrevocably submit to the exclusive jurisdiction of the United States District Court for the District of Massachusetts, for any suit, action, proceeding or dispute arising out of or relating to this Settlement Agreement or the applicability of this Settlement Agreement, including, without limitation any suit, action, proceeding or dispute relating to the release provisions herein.

24. **No Admission.** 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 violate any antitrust statute or other law.

25. **Execution in Counterparts.** This agreement may be executed in counterparts. Facsimile signatures shall be considered as valid signatures as of the date hereof, although the original signature pages shall thereafter be appended to this agreement and filed with the Court.

IN WITNESS WHEREOF, the parties hereto through their fully authorized representatives have agreed to this Settlement Agreement of the date first herein above written.

By: _____

Bruce E. Gerstein

Stephen H. Schwartz

Joseph Opper

Archana Tamoshunas

GARWIN, BRONZAFT, GERSTEIN
& FISHER, L.L.P.

1501 Broadway, Suite 1416

New York, NY 10036

Tel: (212) 398-0055

Co-Lead Counsel for Plaintiff and the Direct Purchaser Class

By: _____

Linda P. Nussbaum

Jacqueline Bryks

COHEN MILSTEIN HAUSFELD & TOLL PLLC

150 East 52nd Street

New York, NY 10022

Tel: (212) 838-7797

Co-Lead Counsel for Plaintiff and the Direct Purchaser Class

By: _____
Bernard J. Bonn, III (BBO#049140)
Matthew A. Porter (BBO#630625)
DECHERT LLP
200 Clarendon Street
Boston, MA 02116-5021
Tel: (617) 728-7100

By: _____
Joseph A. Tate
George G. Gordon
DECHERT LLP
1717 Arch Street
Philadelphia, PA 19103-2793825

Counsel For Defendants

Timothy C. Hester
Christopher C. Sipes
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Tel: (202) 662-6000
Counsel for Defendants