

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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In re: Buspirone Antitrust Litigation : MDL Docket No. 1413 (JGK)
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Louisiana Wholesale Drug Company, Inc. v. : This Document Relates To:
Bristol-Myers Squibb Co., Watson Pharma, Inc., : 01-CV-7951 (JGK)
and Danbury Pharmacal, Inc. :
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SETTLEMENT AGREEMENT
(CORRECTED)

THIS SETTLEMENT AGREEMENT is made and entered into on January 28, 2003, by and between defendants Bristol-Myers Squibb Company (“BMS”), Watson Pharma, Inc. (“Watson”) and Danbury Pharmacal, Inc. (“Danbury”) (collectively, “Defendants”), and plaintiff Louisiana Wholesale Drug Co., Inc. (“Plaintiff”) and the Direct Purchaser Class (or the “Class”, as defined below) in the class action Louisiana Wholesale Drug Co., Inc. v. Bristol-Myers Squibb Company, Inc., et. al., S.D.N.Y. No. 01-CV-7951 (the “Class Action”).

WHEREAS, Plaintiff has alleged, among other things, that (1) BMS’s agreement with Schein Pharmaceutical, Inc., now known as Watson Pharma, Inc., and Danbury Pharmacal, Inc., dated December 2, 1994, was illegal under Section 1 of the Sherman Act, 15 U.S.C. §1; (2) BMS made false and misleading representations to the FDA to obtain the listing of its ‘365 patent in the FDA’s Orange Book in a wrongful manner, in violation of Section 2 of the Sherman Act, 15 U.S.C. §2; and (3) BMS filed and prosecuted sham patent litigation against its generic competitors in violation of Section 2 of the Sherman Act, 15 U.S.C. §2; and Plaintiff alleges that these acts caused it and 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;

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 Action;

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 Action, including the claims asserted in the complaints filed in this Action, 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 of 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 Action 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 Opinion and Order dated August 26, 2002 (210 F.R.D. 43, 55-56) granted Plaintiff's motion for class certification and the parties agree to the certification of a settlement class defined as follows:

All persons who have directly purchased Buspar® from defendant Bristol-Myers Squibb Company any time during the period November 9, 1997 through January 28, 2003 ("Direct Purchaser Class" or the "Class"). Excluded from the Class are the defendants in this lawsuit, and their officers, directors, management and employees, subsidiaries and affiliates, and federal government entities.

Also excluded from the Class are the claims brought by and/or assigned to entities which independently sued BMS in the actions styled *CVS Meridian, Inc. and Rite Aid Corp. v. Bristol-Myers Squibb Co., et. al.*, No. 01-CV-10223, and *Walgreen Co., et. al. v. Bristol-Myers Squibb Co., et. al.*, No. 02-CV-2952, as well as claims asserted by certain States in the action styled *State of Alabama et. al. v. Bristol-Myers Squibb Co., et. al.*, No. 01 CV 11401.

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 deposit of funds into escrow by BMS 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 Exhibits “A” and “B”. Plaintiff’s counsel will recommend notice to the Class by means of (i) direct mail and (ii) publication in an industry trade publication.

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 an incentive payment to 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;
- c. directing that the Class Action be dismissed with prejudice and, except as provided for herein, without costs;
- d. reserving exclusive jurisdiction over the settlement and this Settlement Agreement, including the administration and consummation of this settlement;
- e. directing that the judgment of dismissal shall be final and appealable; and
- f. directing that, for a period of five years, the Clerk of the Court shall maintain the record of those members of the Class who have timely excluded themselves from the Class and that a certified copy of such records shall be provided to Defendants.

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

- (i) Defendants have not availed themselves of any right to withdraw from the settlement pursuant to paragraphs 13 or 14 hereof;
- (ii) it is approved by the Court as required by Rule 23(e) of the Federal Rules of Civil Procedure;
- (iii) 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 Action; and
- (iv) 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.

6. **Settlement Consideration: Cash.** Subject to the provisions hereof, and in full, complete and final settlement of the Class Action, BMS shall pay, on behalf of all Defendants, two hundred twenty million dollars (\$220,000,000) in cash, by January 21, 2003, 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 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. Interest earned by the Settlement Fund 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.

7. **Full Satisfaction; Limitation of Interest and Liability.** Members of the Class who have not timely excluded themselves from the Class Action 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 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 21, 2003 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 and reimbursement of reasonable costs and expenses incurred in the prosecution of this action in an amount up to 33 $\frac{1}{3}$ % of the Settlement Fund (plus interest thereon). Defendants agree to take no position with respect to the application by Class counsel for the attorneys' fees and expense payments set forth above. Defendants agree that any attorney fees and expenses awarded by the Court shall be disbursed only to Co-Lead Class Counsel, Garwin, Bronzaft, Gerstein & Fisher, L.L.P., and Boies, Schiller & Flexner LLP, for allocation among the various Class counsel which have participated in this litigation. Defendants agree, subject to any order of the Court, that 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 Boies, Schiller & Flexner LLP, shall within five (5) business days after receiving written notice from counsel for BMS, 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. This paragraph 10 is subject to the terms of a confidential letter agreement entered into between Plaintiff and its counsel and Defendants concerning the means of ensuring prompt repayment pursuant to the previous sentence.

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 Action (including 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 alleged or which could have been alleged in the Class Action relating to the purchase of the drug BuSpar® or its generic equivalents, prior to the date hereof (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.

12. **Reservation of Claims.** 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 paragraph 11 hereof, 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 paragraph 11 hereof. In addition, the releases set forth in paragraph 11 hereof 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.

13. **Withdrawal From or Modification of the Settlement Fund.** If, after notice of the Settlement is sent to the Class, Class members with aggregate purchases exceeding a certain amount (as specified in a confidential letter agreement between the parties) exclude themselves from the Class, then BMS may, under certain circumstances provided in the letter agreement, be entitled to withdraw from or modify the settlement, provided however, that any such election must be made by BMS in writing within 10 business days following the deadline for Class members to exclude themselves from the Class. Plaintiff agrees to provide BMS with all exclusions within three business days of receipt. If BMS withdraws from the settlement under these circumstances, the Settlement Agreement shall be cancelled and terminated.

14. **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 any of Defendants or 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.

15. **Termination.** In the event that the settlement is terminated pursuant to paragraph 13 or 14, 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 BMS 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.

16. **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 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.

17. **Stay and Resumption of Discovery.** The parties agree, subject to approval of the Court, that discovery shall be stayed. In the event that the Settlement Agreement is not approved by the Court or the settlement does not become final pursuant to paragraph 5, discovery will resume in the Class Action, in a reasonable manner to be approved by the Court.

18. **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.

19. **Integrated Agreement.** Except as set forth in paragraphs 10 and 13 above, 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.

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

21. **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.

22. **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.

23. **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 York without regard to its choice of law or conflict of laws principles.

24. **Consent to Jurisdiction.** BMS, Watson, and Danbury, and each member of the Class hereby irrevocably submit to the exclusive jurisdiction of the United States District Court for the Southern District of New York, 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.

25. **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.

26. 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.

27. This Settlement Agreement (Corrected) supercedes the previous Settlement Agreement between the parties, signed on January 28, 2003, in its entirety.

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

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