

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY**

STEVEN BRODY, CHAIM HIRSCHFELD, and  
SUZANNE GRUNSTEIN, on behalf of  
themselves and all others similarly situated,

Plaintiffs,

vs.

**Civil Action No. 12-cv-4774-PGS-DEA**

MERCK & CO., INC., f/k/a  
SCHERING-PLOUGH CORPORATION,  
MSD CONSUMER CARE, INC., f/k/a  
SCHERING-PLOUGH HEALTHCARE  
PRODUCTS, INC., MERCK SHARP &  
DOHME CORP., AS SUCCESSOR IN  
INTEREST TO SCHERING  
CORPORATION, SCHERING-PLOUGH  
HEALTHCARE PRODUCTS SALES  
CORPORATION, AND SCHERING-PLOUGH  
HEALTHCARE PRODUCTS  
ADVERTISING CORPORATION,

Defendants.

**SETTLEMENT AGREEMENT**

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The Settlement Agreement is made and entered into by and between Plaintiffs Steven Brody, Chaim Hirschfeld and Suzanne Grunstein, individually, and as representative of the Settlement Class defined below, and Defendants Merck & Co., Inc., MSD Consumer Care, Inc., and Merck Sharp & Dohme Corp. (collectively the “Parties”). The Settlement Agreement is intended by the Parties to fully, finally, and forever resolve, discharge, and settle all released rights and claims, subject to the terms and conditions set forth herein.

**I. INTRODUCTION**

**A.** On or about October 31, 2003, plaintiff Joseph Goldstein filed an action against Merck in the Superior Court for the State of California, County of Los Angeles, in which he asserted claims on behalf of a putative class of consumers relating to alleged misrepresentations concerning the nature and extent of the benefits provided by the Eligible Coppertone Sunscreen Products, as defined below.

**B.** On or about November 13, 2003, plaintiffs Christopher Rovere and Rhonda Mason filed an action against Merck in the Superior Court for the State of California, County of Alameda, in which they asserted claims on behalf of a putative class of consumers relating to alleged misrepresentations concerning the nature and extent of the benefits provided by the Eligible Coppertone Sunscreen Products, as defined below.

**C.** On or about November 25, 2003, plaintiffs Cristina Williams and Jessica Mulhearn filed an action against Merck in the Superior Court for the State of California, County of Los Angeles, in which they asserted claims on behalf of a putative class of consumers relating to alleged misrepresentations concerning the nature and extent of the benefits provided by the Eligible Coppertone Sunscreen Products, as defined below.

**D.** On or about November 25, 2003, plaintiff Glynis Lowd filed an action against Merck in the Superior Court for the State of California, County of Alameda, in which she

asserted claims on behalf of a putative class of consumers relating to alleged misrepresentations concerning the nature and extent of the benefits provided by the Eligible Coppertone Sunscreen Products, as defined below.

**E.** On or about February 10, 2004, plaintiff Robert Gaston (“Gaston” or “Mr. Gaston”) filed an action captioned Gaston v. Schering-Plough Corporation, et al., Case No. BC310407 (the “Gaston Action”) in the Superior Court for the State of California, County of Los Angeles, in which he asserted claims on behalf of a putative class of consumers relating to alleged misrepresentations concerning the nature and extent of the benefits provided by the Eligible Coppertone Sunscreen Products, as defined below.

**F.** Similar actions were filed in 2003, 2004, and 2005 in the Superior Court for the State of California, County of Los Angeles, against four other sunscreen manufacturers making similar claims.

**G.** On April 26, 2004, the actions set forth in Sections I.A-D above were coordinated in the Superior Court for the State of California, County of Los Angeles, in a Judicial Council Coordination Proceeding styled SUNSCREEN CASES, JCCP No. 4352 (the “Coordinated Proceeding”). On August 23, 2004, the Gaston Action was added to the Coordinated Proceeding. Pursuant to an Order Granting Plaintiffs’ Petition to Add Cases for Coordination with JCCP No. 4352, entered February 3, 2006, the actions referenced in Section I.F above were added to the Coordinated Proceeding.

**H.** Pursuant to a Minute Order dated October 13, 2004, the Superior Court appointed Abraham, Fruchter & Twersky, LLP as lead counsel for the plaintiffs in the Coordinated Proceeding.

**I.** The individual claims and causes of action asserted by plaintiffs identified in

Sections I.A-D above were dismissed in summary judgment proceedings in 2008. At that time, Mr. Gaston's breach of warranty claims were also dismissed via summary adjudication but his claims for violations of California's Unfair Competition Law ("UCL"); violations of California's Consumer Legal Remedies Act ("CLRA") and common law fraud survived summary judgment.

**J.** On May 30, 2008, Mr. Gaston filed a motion in the Coordinated Proceeding seeking to certify a California state-wide class of purchasers of Coppertone Sport SPF 30 manufactured by Merck. The trial court denied Mr. Gaston's motion based upon the predominance of individual questions of fact regarding reliance, causation, deception and injury. The trial court acknowledged its decision was the result of confusion about the impact of California's Proposition 64 on the elements of proof for UCL class action claims. The trial court stated that it did not believe that California voters intended Proposition 64 to require absent class members to prove actual reliance and damages and that no class would ever be certified under such a rigorous standard. The trial court did find that Mr. Gaston satisfied the other criteria for class certification, which were numerosity, ascertainability, typicality, and adequacy of representation. Mr. Gaston appealed the decision to the California Court of Appeals.

**K.** On appeal, Mr. Gaston posited that the touchstone of the trial court's ruling with respect to his UCL claim was that the UCL, as amended by Proposition 64, required a plaintiff to ultimately prove that all class members had relied upon, were deceived by and suffered damages as a result of the alleged misrepresentations and that consequently the trial court incorrectly determined that individual questions of fact predominated. Mr. Gaston argued that in light of the California Supreme Court's holding in In re Tobacco II, 46 Cal. 4th 298 (2009), the trial court's ruling should be reversed as it was grounded on erroneous legal assumptions.

**L.** The Court of Appeals agreed with Mr. Gaston and found that, inter alia, Mr.

Gaston had shown that there were common questions of law and fact with respect to his UCL, CLRA and common law fraud causes of action. As such, the Court of Appeals held that the trial court's ruling should be reversed as it was grounded on erroneous legal assumptions and the case should be remanded with directions for the trial court to enter an order certifying the class. Merck's Petition for Writ of Certiorari to the California Supreme Court was denied, without reasons specified, on November 2, 2011.

**M.** On July 31, 2012, Mr. Gaston, who is also represented by Proposed Settlement Class Counsel in this Action, and Merck submitted a settlement agreement in the Coordinated Proceeding that provides injunctive relief to a California class of purchasers of Eligible Coppertone Sunscreen Products purchased in that state (the "California State Settlement"). The parties to the California State Settlement have agreed to stay the non-injunctive relief claims raised against Merck in the Coordinated Proceeding pending the final determination by this Court of the Settlement Agreement in this Action.

**N.** On July 31, 2012, Plaintiffs, Steven Brody, Chaim Hirschfeld and Suzanne Grunstein, through Proposed Settlement Class Counsel, filed the above-captioned action against Merck in which they asserted claims on behalf of a putative nationwide class of purchasers of Eligible Coppertone Sunscreen Products, which are substantially similar to those alleged by plaintiffs against Merck in the Coordinated Proceeding.

**O.** During the past eight years, Mr. Gaston and other plaintiffs in the Coordinated Proceeding, through Proposed Settlement Class Counsel, and Merck, through its counsel, have conducted a thorough examination and investigation of the facts and law relating to the matters set forth in the operative complaints and the claims set forth therein and have undertaken substantial investigation and formal discovery in the litigation.

**P.** Mr. Gaston and other plaintiffs asserting claims against Merck in the Coordinated Proceeding, through Proposed Settlement Class Counsel, and Merck, through Defendants' Counsel, have also engaged in extensive briefing in the Coordinated Proceeding, including motions for early determination of threshold legal issues regarding preemption, primary jurisdiction and damages, a motion for preliminary injunction, motions for summary judgment, motions for class certification, and an appeal of the ruling on class certification to the California Court of Appeals and California Supreme Court.

**Q.** Based upon their extensive discovery, investigation, and evaluation of the facts and law relating to the matters alleged in the pleadings in this Action and the claims asserted against Merck in the Coordinated Proceeding, the Parties seek to resolve any and all claims raised in the Action on a nationwide basis pursuant to the terms of the Settlement Agreement.

**R.** Plaintiffs have agreed to a settlement pursuant to the provisions of the Settlement Agreement, after considering, among other things: (1) the substantial benefits to Plaintiffs and the proposed Settlement Class under the terms of the Settlement Agreement; (2) the risks, costs and uncertainty of protracted litigation, especially in complex actions such as these, as well as the difficulties and delays inherent in such litigation; and (3) the desirability of consummating the Settlement Agreement promptly in order to provide effective relief to Plaintiffs and the Settlement Class.

**S.** Defendants have agreed to class action treatment of the claims alleged solely for the purpose of affecting the compromise and settlement of those claims on a class basis as set forth herein.

**T.** The Parties are willing to enter into the Settlement Agreement to settle the claims of the Settlement Class because of, among other reasons, the attendant expense, risks,



difficulties, delays, and uncertainties of continued litigation.

U. Plaintiffs and Proposed Settlement Class Counsel believe that the Settlement Agreement provides fair, reasonable, and adequate relief to the Settlement Class, and is in the best interests of the Settlement Class as a whole.

V. Merck expressly denies all claims asserted against Merck, denies that class certification is appropriate if the Action is litigated rather than settled, denies all allegations of wrongdoing and liability, and denies that anyone was harmed by the conduct alleged against Merck in the Action and/or the Coordinated Proceeding, but nevertheless desires to settle the claims of Plaintiffs and the Settlement Class on the terms and conditions set forth in the Settlement Agreement solely for the purpose of avoiding the burden, expense, risk and uncertainty of continuing to litigate those issues, and for the purpose of putting to rest the controversies engendered.

IT IS HEREBY AGREED, by and among the Parties that certain claims of the Settlement Class be settled, compromised, and dismissed on the merits and with prejudice on the terms set forth below, subject to the approval of the Court.

## II. DEFINITIONS

A. As used in the Settlement Agreement, the following terms have the following meanings, unless the Settlement Agreement specifically provides otherwise:

1. “Action” means the above-captioned lawsuit filed in the United States District Court for the District of New Jersey alleging substantially similar claims as asserted against Merck in the Coordinated Proceeding (defined below).

2. “Attorneys’ Fees and Expenses” means such funds as may be awarded by the Court for payment to Settlement Class Counsel to compensate Plaintiffs’ counsel for their attorneys’ fees, costs, and litigation expenses in connection with the filing, negotiations, and

settlement of the Action, the filing and related procedures regarding the Settlement, and the prosecution, negotiation and settlement of the claims against Merck in the Coordinated Proceeding.

3. “Claim” means the claim of a Settlement Class Member or his or her representative submitted on a Claim Form as provided in the Settlement Agreement.

4. “Claimant” means a proposed Settlement Class Member who submits a Claim pursuant to the Settlement Agreement.

5. “Claim Form” means a document agreed to by the Parties substantially in the form attached hereto as Exhibit 1, which must be submitted by any eligible Settlement Class Member to the Notice and Settlement Administrator as part of the Claim Process.

6. “Claim Period” shall mean the time period during which Settlement Class Members may submit a Claim as part of the Claim Process. The Claim Period shall run for one hundred fifty (150) days from the date of the establishment of the Settlement Website.

7. “Claim Process” means the process for submitting Claims as described in the Settlement Agreement.

8. “Coordinated Proceeding” means the Judicial Council Coordination Proceeding styled SUNSCREEN CASES, JCCP No. 4352, pending in the Superior Court of the State of California, County of Los Angeles.

9. “Court” means the United States District Court for the District of New Jersey.

10. “Declaration of Notice and Settlement Administrator” means the Declaration of Jeanne C. Finegan, APR, Concerning Proposed Class Member Notification Program, which is attached hereto as Exhibit 6.

11. “Defendants” or “Merck” means Merck & Co., Inc., formerly known as Schering-Plough Corporation; MSD Consumer Care, Inc., formerly known as Schering-Plough Healthcare Products, Inc. and Merck Sharp & Dohme Corp., formerly known as Schering Corporation which was successor in interest to Schering-Plough Healthcare Products Sales Corporation and Schering-Plough Healthcare Products Advertising Corporation.

12. “Defendants’ Counsel” means Reed Smith LLP.

13. “Depository Bank” means JP Morgan Chase as the bank jointly selected by Settlement Class Counsel and Merck to receive, hold, invest, and disburse the Escrow Account, subject to instructions provided by the Parties to the Notice and Settlement Administrator and subject to the terms of the Escrow Agreement.

14. “Eligible Coppertone Sunscreen Products” means any and all sunscreen products sold in the United States of America, its territories and possessions under the brand name “Coppertone,” which were labeled and/or advertised to provide protection against the sun’s UVA and/or UVB rays.

15. “Escrow Account” means the custodial or investment account with the Depository Bank administered by the Notice and Settlement Administrator in which the funds to be deposited will be held, invested, administered, and disbursed pursuant to the Settlement Agreement.

16. “Escrow Agreement” means the agreement by and among Settlement Class Counsel, Defendants’ Counsel and the Notice and Settlement Administrator (as defined below) with respect to the escrow of the funds to be deposited into the Escrow Account pursuant to the Settlement Agreement substantially in the form attached hereto as Exhibit 2.

17. “Final Approval Hearing” or “Final Fairness Hearing” means the hearing

at which the Court will consider and finally decide whether to approve the Settlement Agreement, enter the Final Approval Order and Final Judgment, and make such other rulings as are contemplated by the Settlement Agreement.

18. “Final Approval Order and Final Judgment” means a final order and judgment entered by the Court giving Final Approval of the Settlement Agreement and dismissing with prejudice Plaintiffs’ claims in the forms respectively attached hereto as Exhibits 3 and 4.

19. “Final Settlement Date” is the date on which the Final Approval Order and Final Judgment approving the Settlement Agreement become final. For purposes of the Settlement Agreement:

a. if no appeal has been taken from the Final Approval Order and Final Judgment, “Final Settlement Date” means the date on which the time to appeal therefrom has expired; or

b. if any appeal has been taken from the Final Approval Order and Final Judgment, “Final Settlement Date” means the date on which all appeals therefrom, including petitions for rehearing or reargument, petitions for rehearing en banc and petitions for certiorari or any other form of review, have been finally disposed of in a manner that affirms the Final Approval Order and Final Judgment; or

c. if Settlement Class Counsel and Defendants agree in writing, the “Final Settlement Date” can occur on any other agreed date.

20. “Long Form Notice” means the notice in a form substantially similar to the form attached hereto as Exhibit 5, and as approved by the Court.

21. “Named Plaintiffs” or “Plaintiffs” means Steven Brody, Chaim Hirschfeld

and Suzanne Grunstein.

22. “Notice and Settlement Administrator” shall mean GCG, Inc. which has been jointly designated by Settlement Class Counsel and Merck and is sought to be approved by the Court to administer the Settlement Agreement and the funds deposited into the Escrow Account pursuant to the terms of the Settlement Agreement and orders of the Court.

23. “Notice Plan” means the plan for disseminating notice to the Settlement Class Members as described herein and as described in the Declaration of the Notice and Settlement Administrator, which is attached hereto as Exhibit 6.

24. “Parties” means Named Plaintiffs and Merck and “Party” means any one of them.

25. “Plaintiffs’ Counsel” means Abraham, Fruchter & Twersky, LLP, Westrup Klick LLP and any and all other attorneys representing Plaintiffs in this Action.

26. “Preliminary Approval Order” means the order preliminarily approving the Settlement Agreement, conditionally certifying the Settlement Class, and issuing related orders, which is to be substantially in the form attached hereto as Exhibit 7.

27. “Proposed Settlement Class Counsel” or “Settlement Class Counsel” means Abraham, Fruchter & Twersky, LLP.

28. “Publication Notice” means the summary notice in a form substantially similar to that attached hereto as Exhibit 8.

29. “Released Defendants” means and refers to: Merck & Co., Inc., MSD Consumer Care, Inc., Merck Sharp & Dohme Corp., and their present, former and future officers, directors, partners, employees, agents, attorneys, servants, heirs, administrators, executors, members, member entities, shareholders, predecessors, successors, reorganized successors, spin-

offs, holding companies, related companies, joint-ventures, divisions, affiliates, subsidiaries, parents, representatives, trustees, principals, insurers, suppliers, sellers, resellers, distributors, vendors and assigns, authorized retailers of Eligible Coppertone Sunscreen Products, authorized wholesalers of Eligible Coppertone Sunscreen Products, as well as other third party retailers or wholesalers of Eligible Coppertone Sunscreen Products, individually, jointly, and severally.

30. “Settlement” means the Settlement Agreement between Plaintiffs, on behalf of themselves and as proposed representatives of the Settlement Class and Defendants to settle and compromise all of Plaintiffs’ and the Settlement Class’ claims fully, finally and forever, as memorialized in the Settlement Agreement.

31. “Settlement Agreement” or “Agreement” means the Settlement Agreement and all exhibits thereto.

32. “Settlement Class” and “Settlement Class Members” include all natural persons who purchased Eligible Coppertone Sunscreen Products in the United States of America, its territories and possessions up to the date notice is first disseminated pursuant to the Notice Plan. Provided, however, that the “Settlement Class” and “Settlement Class Members” shall exclude: (a) all persons who timely and validly request exclusion from the Settlement Class; (b) natural persons who purchased Eligible Coppertone Sunscreen Products for purposes of resale; (c) Defendants’ officers, directors, and employees; (d) Defendants’ Counsel; (e) Plaintiffs’ Counsel; (f) the Honorable Peter G. Sheridan and the members of his or her staff and immediate family; (g) the Honorable John Shepard Wiley, Jr. and the members of his or her staff and immediate family; (h) the Honorable Carl West and the members of his staff and immediate family and (i) any Judge to which the case is subsequently assigned and the members of his or her staff and immediate family, if applicable.

33. "Settlement Fund" means a minimum amount of \$3 million and a maximum amount of \$10 million that Merck is obligated to pay under the Settlement Agreement for (a) payments to Claimants for timely, valid, and approved Claims from the Escrow Account; (b) claims administration costs, including, but not limited to, any escrow, administrative and/or bank-related fees and costs associated with and/or related to the Escrow Account; (c) payments to Named Plaintiffs for incentive awards as ordered by the Court; (d) the guaranteed cy pres awards and (e) residual payments, if any, to the cy pres recipients as further specified in the Settlement Agreement.

34. "Settlement Website" means [www.suncreensettlement.com](http://www.suncreensettlement.com), the Internet website established by the Notice and Settlement Administrator for purposes of facilitating notice to and communicating with the Settlement Class.

**B.** Other capitalized terms used in the Settlement Agreement but not defined in this Section shall have the meanings ascribed to them elsewhere in the Settlement Agreement.

**C.** The terms "he or she" and "his or her" include "it" or "its" where appropriate.

### **III. RELIEF TO THE SETTLEMENT CLASS**

The relief provided pursuant to this Settlement shall consist of three primary components: (1) injunctive relief relating to label and advertising changes for the Eligible Coppertone Sunscreen Products for the benefit of all Settlement Class Members; (2) refunds to Settlement Class Members who submit valid and timely Claims; and (3) guaranteed cy pres awards, as discussed herein.

#### **A. Injunctive Relief**

1. Merck agrees that all Coppertone sunscreen products manufactured on or after June 22, 2012 for sale in the United States, its territories and possessions, will not use the terms "sunblock," "waterproof," "sweatproof," "all day" and/or "all day protection" in the

labeling, advertising, marketing or promotion of these products. Merck further agrees that any Coppertone sunscreen product manufactured on or after June 22, 2012 for sale in the United States, its territories and possessions, will contain labels that comply with the requirements set forth in the Final Rule styled “Labeling and Effectiveness Testing; Sunscreen Drug Products for Over-the-Counter Human Use” and codified at 76 FR 35620 (“Final Rule”), except with respect to one (1) ounce Coppertone sunscreen products, as to which Merck represents it is still determining how to comply with the Final Rule given the limited space on these products. Merck will also comply with any subsequent enforcement rulings under the Final Rule as they become effective.

2. No term or provision of the Settlement Agreement shall be in effect or otherwise enforceable against Merck if such term or provision is in conflict or inconsistent with the Final Rule or subsequent enforcement rulings under the Final Rule, it being understood by the Parties that in such conflicting circumstances the Final Rule shall govern and Merck shall be required to comply therewith. In the event the Parties dispute whether there is such a conflict or inconsistency, such dispute shall be resolved by the Court upon application by either Party.

3. Nothing in the Settlement Agreement shall preclude Merck from making any claim that is consistent with applicable law, regulations, or policies promulgated by the Food and Drug Administration.

**B. Monetary Relief**

1. Upon the attainment of the Final Settlement Date and as further specified in the Settlement Agreement regarding the timing of payments, Merck shall pay a minimum of \$3 million and a maximum of \$10 million to be used for: (a) payments from the Escrow Account to Claimants for timely, valid, and approved Claims; (b) claim administration and



associated costs; (c) payments to Named Plaintiffs for incentive awards as ordered by the Court; (d) the guaranteed cy pres awards and (e) residual payments, if any, to the cy pres recipients as further specified in the Settlement Agreement. All payments identified in the prior sentence shall constitute the Settlement Fund and Defendants shall not be required to contribute any more funds to the Settlement Fund, except as otherwise specified in the Settlement Agreement.

Merck shall also separately pay, in addition to the Settlement Fund: (a) notice and related notice administration costs, as further specified in Section III.B.3 below (the “Notice Payment”); and (b) any Attorneys’ Fees and Expenses, as awarded by the Court, as further specified in Section IX below.

2. Within thirty (30) days after the attainment of the Final Settlement Date, Merck will make the guaranteed cy pres payments of \$333,333.33 each to the Legal Aid Foundation of Los Angeles (“LAFLA”) and Legal Services of New York City (“LSNYC”), and \$333,333.34 to Legal Services of New Jersey (“LSNJ”) (hereinafter the “guaranteed cy pres awards”).

3. Within twenty (20) days of the issuance of the Preliminary Approval Order, Merck will make an initial payment of \$1.5 million into the Escrow Account with the Depository Bank, pursuant to the terms of the Escrow Agreement. Of this \$1.5 million initial payment amount, up to \$1 million shall be used for notice and related notice administration costs and expenses, and not less than \$500,000 shall be used as an advance (and credited as a payment towards the Settlement Fund) to pay Claims and claims administration and associated costs, as indicated in Section III.B.4, with any remainder from the \$1 million Notice Payment to be used for the payment of Claims and claims administration and associated costs and credited as a payment towards the Settlement Fund. The Parties agree to appoint the Notice and Settlement

Administrator as Escrow Agent for the purpose of administering the Escrow Account and the monies deposited therein in accordance with the terms of the Settlement Agreement and the Escrow Agreement.

4. The Notice and Settlement Administrator shall pay from the Escrow Account awards to Claimants for timely, valid, and approved Claims and notice, escrow, banking, and administration costs. All notice, claims and administration costs shall be invoiced by the Notice and Settlement Administrator and paid promptly from the funds deposited into the Escrow Account after review and approval by Settlement Class Counsel and Defendants.

5. The Notice and Settlement Administrator shall be responsible for obtaining a Federal Tax Identification Number, preparing the necessary tax returns for the Escrow Account, if applicable, and paying from the Escrow Account any applicable taxes due on income generated in the Escrow Account. Neither Defendants nor Plaintiffs or their counsel, including, but not limited to, Settlement Class Counsel, shall have any responsibility for or liability whatsoever with respect to the investment, allocation or distribution of the Escrow Account, or the processing of claims, or any loss incurred by the Notice and Settlement Administrator or the Depository Bank in connection therewith.

**C. Submission of Claims to the Notice and Settlement Administrator**

1. A Settlement Class Member shall be eligible for monetary relief provided that the Settlement Class Member (a) purchased one or more Eligible Coppertone Sunscreen Products on or after July 31, 2006 up to the date that notice is first disseminated; (b) completes and timely submits the Claim Form during the Claim Period to the Notice and Settlement Administrator; and (c) does not opt out from the Settlement Agreement.

2. Each Settlement Class Member who purchased an Eligible Coppertone Sunscreen Product from July 31, 2006 up to the date that notice is first disseminated shall be entitled to submit a Claim in either hard copy or electronically to the Notice and Settlement Administrator during the Claim Period. The payment for each Eligible Coppertone Sunscreen Product shall be up to \$1.50, subject to the adjustments and other procedures discussed in the Settlement Agreement. No Claimant may submit more than one Claim for each Eligible Coppertone Sunscreen Product for which the Claimant is seeking payment from monies in the Escrow Account that are a part of the Settlement Fund. Claimants may seek reimbursement for purchases of up to six (6) Eligible Coppertone Sunscreen Products without proof of purchase. Merck shall have the right to request that the Notice and Settlement Administrator request and require proof of purchase for each unit from Claimants who seek reimbursement for between seven (7) and nine (9) Eligible Coppertone Sunscreen Products. Claimants who seek reimbursement for purchases of ten (10) or more Eligible Coppertone Sunscreen Products will be required to provide proof of purchase for each unit with the submission of the Claim. Each individual unit purchased shall constitute one (1) Eligible Coppertone Sunscreen Product. Acceptable proof of purchase includes a photocopy of the label(s) on the tube(s), spray(s), bottle(s), and/or similar container(s), cash register receipt(s), credit card receipt(s), credit card statement(s) or similar document(s) that sufficiently indicate the purchase of Eligible Coppertone Sunscreen Products. Each proof of purchase submitted must be clearly and uniquely numbered and the originals of such proofs of purchase must be available for inspection upon request by the Notice and Settlement Administrator. Claimants submitting multiple proofs of purchase using a photocopy of the label(s) on the tube(s), spray(s), bottle(s), and/or similar container(s) must provide such copies on the same photocopy sheet, with at least four (4) copies to a page.

Claimants may provide less than four (4) copies to a page only if: (i) less than four (4) copies are being submitted or (ii) less than four (4) copies remain after placing all other copies on photocopy sheets with no less than four (4) to a page.

3. The electronic and hard copy Claim Form, in a form substantially similar to Exhibit 1, shall require only the Settlement Class Member's name, current postal address, current telephone number, the last four digits of the Settlement Class Member's Social Security number, information and/or documentation relating to the Eligible Coppertone Sunscreen Products, and an affirmative acknowledgement that the Claimant is submitting his or her Claim Form under penalty of perjury. Settlement Class Members may request a hard copy Claim Form from the Notice and Settlement Administrator. Once that request has been received by the Notice and Settlement Administrator, the Notice and Settlement Administrator will have no more than three (3) business days to mail the Claim Form to the requesting Settlement Class Member.

**D. Claim Form Review**

1. Claim Forms, whether submitted electronically via the Settlement Website or by U.S. Mail, that do not meet the requirements as set forth in the Settlement Agreement shall be rejected by the Notice and Settlement Administrator pursuant to the terms of the Settlement Agreement. The Notice and Settlement Administrator shall administer the process of receiving, handling, processing, rejecting (if warranted), and/or paying Claims in addition to the other duties identified in the Settlement Agreement and those that are usual and customary in class action settlement administration. Merck has the right to waive any of the Claim Form requirements as set forth above.

2. The Notice and Settlement Administrator shall have the authority to determine whether registration by any Settlement Class Member is complete and timely. The

Notice and Settlement Administrator's determinations in this regard shall be final and non-appealable by any Party, including, but not limited to, the Settlement Class Member.

3. Pursuant to Section III.C.2 above, for those Claims submitted by Settlement Class Members for which Merck seeks to have the Notice and Settlement Administrator request and require proof of purchase of the Eligible Coppertone Sunscreen Products, the Notice and Settlement Administrator shall mail out letters that advise Settlement Class Members that they must submit acceptable proofs of purchase of the Eligible Coppertone Sunscreen Products to validate their Claims and the failure to do so shall result in the rejection of their Claims. Settlement Class Members shall have thirty-five (35) days from the date of the postmarked letter from the Notice and Settlement Administrator to respond. If the requested proof of purchase documentation is timely provided, the Claim shall be deemed validated by the Notice and Settlement Administrator. If the requested proof of purchase documentation is not provided and/or not timely provided, and/or is not provided for all Eligible Coppertone Sunscreen Products listed, the Claim shall be deemed rejected with respect to the proof of purchase not provided and/or not timely provided.

4. The Notice and Settlement Administrator shall notify, in a timely fashion, any Claimant whose Claim has been rejected, setting forth the reasons therefore, including, but not limited to, failure to provide the requested documentation. The Notice and Settlement Administrator shall timely provide copies of all rejection notices to Settlement Class Counsel and to Defendants' Counsel.

5. Any Settlement Class Member whose claim is rejected in its entirety shall be barred from receiving any payment under the Settlement Agreement, but shall in all other respects be bound by the terms of the Settlement Agreement and by the Final Approval Order

and Final Judgment entered in the Action, unless such Settlement Class Member has submitted a timely request to opt out pursuant to Section V. Similarly, any Settlement Class Member whose Claim is approved in part and rejected in part shall be barred for that portion of the Claim that is rejected from receiving any payment under the Settlement Agreement, but shall in all other respects be bound by the terms of the Settlement Agreement and by the Final Approval Order and Final Judgment entered in the Action, unless such Settlement Class Member has submitted a timely request to opt out pursuant to Section V.

6. The Notice and Settlement Administrator shall exercise, in its reasonable discretion, all usual and customary steps to prevent fraud and abuse and take any reasonable steps to prevent fraud and abuse in the Claim Process. The Notice and Settlement Administrator may, in its discretion, deny in whole or in part any Claim to prevent actual or possible fraud or abuse.

7. The Notice and Settlement Administrator shall identify any Claims that appear to seek relief on behalf of the same Claimant. The Notice and Settlement Administrator shall determine whether there is any duplication of Claims. The Notice and Settlement Administrator shall designate any such duplicative claims as rejected Claims to the extent they seek payment for the same Eligible Coppertone Sunscreen Products.

8. No person shall have any claim against Defendants, Named Plaintiffs, the Settlement Class, Settlement Class Counsel, Defendants' Counsel, or the Notice and Settlement Administrator based on any eligibility determinations made in accordance with the Settlement Agreement.

**E. Payment of Claims**

1. Within thirty (30) days after the occurrence of the Final Settlement Date or

within thirty (30) days of the last day of the Claim Period, whichever date is later, the Notice and Settlement Administrator will provide to Settlement Class Counsel and Defendants a detailed statement of the costs that will be incurred in generating and disbursing checks to Claimants. Within fourteen (14) days of the deadline in the prior sentence and subject to Defendants' and Settlement Class Counsel's approval, the Notice and Settlement Administrator shall request that Merck deposit funds into the Escrow Account in the amount necessary to pay timely, valid and approved Claims plus related administrative costs and Merck shall have thirty (30) days to fund the Escrow Account with the amount requested by the Notice and Settlement Administrator.

2. Unless otherwise ordered by the Court, the Notice and Settlement Administrator shall distribute funds from the Escrow Account to Settlement Class Members who timely returned a complete Claim Form that has been verified and approved for payment by the Notice and Settlement Administrator within one hundred twenty (120) days of the last day of the Claim Period, provided that this provision can be triggered no earlier than forty five (45) days from the occurrence of the Final Settlement Date, subject to any adjustments discussed in the Settlement Agreement.

**F. Adjustments to Payments from the Settlement Fund**

1. The Settlement Fund shall be used to make all of the following payments, to the extent such payments do not exceed \$10 million: (a) all timely, valid and approved Claims; (b) the guaranteed cy pres awards; (c) claim administration and associated costs; and (d) payments to Named Plaintiffs for incentive awards as ordered by the Court.

2. If the amounts required to pay (a) all timely, valid and approved Claims; (b) the guaranteed cy pres awards; (c) claim administration and associated costs; and (d)

payments to Named Plaintiffs for incentive awards as ordered by the Court, exceed the \$10 million maximum, the balance of the Settlement Fund (i.e., the balance of the \$10 million maximum) remaining following payment of the amounts to be paid as specified in sections (b)-(d) of this paragraph, shall be distributed among all timely, valid and approved Claims such that the cash payment for each Eligible Coppertone Sunscreen Product shall be the amount resulting from dividing the amount remaining in the Settlement Fund after payments have been made for the items specified in sections (b)-(d) of this paragraph, by the number of Eligible Coppertone Sunscreen Products for which timely, valid and approved Claims have been submitted.

3. Any amount of the \$3 million minimum not used to pay (a) all timely, valid and approved Claims; (b) claim administration and associated costs; (c) payments to Named Plaintiffs for incentive awards as ordered by the Court; and (d) the guaranteed *cy pres* awards, shall be paid in equal amounts as cy pres to LAFLA, LSNYC, and LSNJ. Any such residual amounts to be paid as cy pres to LAFLA, LSNYC, and LSNJ shall be paid no later than thirty (30) days after the expiration of the last uncashed check issued to Claimants.

#### **IV. NOTICE TO THE SETTLEMENT CLASS**

##### **A. Duties of the Notice and Settlement Administrator**

1. The Parties shall jointly recommend and retain GCG Inc. to be the Notice and Settlement Administrator to help implement the terms of the Settlement Agreement, the Notice Plan and the terms outlined in the Declaration of the Notice and Settlement Administrator. Following the Court's issuance of the Preliminary Approval Order and the Court's appointment of the proposed Notice and Settlement Administrator, the Notice and Settlement Administrator shall disseminate notice to the Settlement Class as provided for in the Declaration of the Notice and Settlement Administrator, to be substantially in the form attached as Exhibit 6 to the Settlement Agreement, as specified in the Preliminary Approval Order and the



Settlement Agreement, and in order to comply with all applicable laws, including, but not limited to, the Due Process Clause of the Constitution.

2. The Notice and Settlement Administrator shall be responsible for, without limitation: (a) printing, mailing or arranging for the mailing of the Long Form Notice, if/when requested; (b) arranging for the publication of the Publication Notice; (c) handling returned mail not delivered to Settlement Class Members; (d) attempting to obtain updated address information for any Long Form Notice returned without a forwarding address; (e) making any additional mailings required under the terms of the Settlement Agreement; (f) receiving and maintaining on behalf of the Court any Settlement Class Member correspondence regarding requests for exclusion and objections to the Settlement Agreement; (g) forwarding written inquiries to Settlement Class Counsel or their designee for a response, if warranted; (h) establishing a post office box for the receipt of any correspondence; (i) responding to requests from Settlement Class Counsel and/or Defendants' Counsel; (j) establishing a Settlement Website; and (k) otherwise implementing and/or assisting with the dissemination of the notice of the Settlement. The Notice and Settlement Administrator shall be responsible for, without limitation, implementing the terms of the Claim Process and related administrative activities.

3. If the Notice and Settlement Administrator makes a material or fraudulent misrepresentation to, or conceals requested material information from, Settlement Class Counsel, Merck or Defendants' Counsel, then the Party to whom the misrepresentation is made shall, in addition to any other appropriate relief, have the right to demand that the Notice and Settlement Administrator immediately be replaced. If the Notice and Settlement Administrator fails to perform adequately on behalf of Merck or the Settlement Class, the Parties may agree to remove the Notice and Settlement Administrator. None of the Parties shall unreasonably withhold

consent to remove the Notice and Settlement Administrator, but this shall occur only after Merck and Settlement Class Counsel have attempted to resolve any disputes regarding the retention or dismissal of the Notice and Settlement Administrator in good faith, and, if they are unable to do so, the matter shall be referred to the Court for resolution.

4. The Notice and Settlement Administrator may retain one or more persons to assist in the completion of his or her responsibilities.

5. Not later than ten (10) days before the date of the Final Approval Hearing, the Notice and Settlement Administrator shall file with the Court: (a) a list of those persons who have opted out or excluded themselves from the Settlement Agreement; and (b) the details outlining the scope, methods and results of the notice program.

6. The Notice and Settlement Administrator shall promptly after receipt provide copies of any requests for exclusion, objections, and/or related correspondence to Settlement Class Counsel and Defendants' Counsel.

**B. Dissemination of Notice**

a. **Dissemination of the Long Form Notice:** The Long Form Notice shall be disseminated as follows:

i. The Notice and Settlement Administrator shall send the Long Form Notice by First-Class U.S. Mail, proper postage prepaid, to each Settlement Class Member who requests it, provided that the Settlement Class Member makes the request prior to the deadline to opt out and/or submit an objection. The Notice and Settlement Administrator shall also send the applicable documents to each appropriate State and Federal official, as specified in 28 U.S.C. § 1715. The Notice and

Settlement Administrator shall otherwise comply with Rule 23 of the Federal Rules of Civil Procedure and any other applicable statute, law, or rule, including, but not limited to, the Due Process Clause of the United States Constitution.

ii. The Notice and Settlement Administrator shall: (a) re-mail any notices returned by the United States Postal Service with a forwarding address that are received by the Notice and Settlement Administrator; (b) by itself or using one or more address research firms, as soon as practicable following receipt of any returned notices that do not include a forwarding address, conduct research with respect to any such returned mail for better addresses and promptly mail copies of the Long Form Notice to the better addresses so found.

b. **Contents of the Long Form Notice and Claim Form:** The Long Form Notice and the Claim Form shall be in a form substantially similar to the documents attached to the Settlement Agreement as Exhibits 5 and 1, respectively, and shall advise Settlement Class Members of the following:

i. **General Terms:** The Long Form Notice shall contain a plain and concise description of the nature of the Action, the history of the litigation of the claims, the preliminary certification of the Settlement Class, and the proposed Settlement, including information on the identity of Settlement Class Members, how the proposed Settlement would provide relief to the Settlement Class Members, what claims are released under the proposed Settlement and other relevant terms and conditions.

ii. Opt-Out Rights: The Long Form Notice shall inform Settlement Class Members that they have the right to opt out of the Settlement Agreement. The Long Form Notice shall provide the deadlines and procedures for exercising this right.

iii. Objections to Settlement Agreement: The Long Form Notice shall inform Settlement Class Members of their right to object to the proposed Settlement and appear at the Final Approval Hearing. The Long Form Notice shall provide the deadlines and procedures for exercising these rights.

iv. Fees and Expenses: The Long Form Notice shall inform Settlement Class Members about the amounts being sought by Settlement Class Counsel as Attorneys' Fees and Expenses and the incentive awards being sought for the Named Plaintiffs.

v. Claim Form: The Long Form Notice shall include the Claim Form. The Claim Form shall also be available to be completed and submitted electronically on the Settlement Website. The Claim Form shall provide the Settlement Class Member with the terms, deadlines, and requirements to submit a Claim, including but not limited to, that he or she must fully complete and timely return the Claim Form within the Claim Period to be eligible to obtain relief pursuant to the Settlement Agreement.

c. The Publication Notice: The Notice and Settlement Administrator shall have the publication of the Publication Notice substantially completed no later than forty (40) days before the Final Approval Hearing as described in

the Declaration of the Notice and Settlement Administrator and in such additional newspapers, magazines and/or other media outlets as shall be agreed upon by Settlement Class Counsel and Merck. The form of Publication Notice shall be in a form substantially similar to the one attached to the Agreement as Exhibit 8.

d. **Internet Website:** No later than ten (10) days after the entry of the Preliminary Approval Order, the Notice and Settlement Administrator shall establish an Internet website, [www.sunscreensettlement.com](http://www.sunscreensettlement.com), that will inform Settlement Class Members of the terms of the Settlement Agreement, their rights, dates and deadlines, and related information. The Settlement Website shall include, in .pdf format, the following: (i) the Settlement Agreement; (ii) the Long Form Notice; (iii) the Claim Form, (iv) the Preliminary Approval Order; (v) Frequently Asked Questions in a form substantially similar to the one attached to the Agreement as Exhibit 9, which will reference the Website and the toll-free telephone number, (vi) the toll-free telephone number; and (vii) as agreed, other relevant orders of the Court. Nationwide access to the Settlement Website will be ensured via the following methods: (x) the Settlement Website will be registered by the Notice and Settlement Administrator with Google so that appropriate queries on Google will yield a link to the Settlement Website; (y) the Publication Notice will reference the Settlement Website and the toll-free telephone number; and (z) the Long Form Notice will reference the Settlement Website and the toll-free telephone number.

e. **Press Release:** The Notice and Settlement Administrator shall issue a neutral press release no later than forty (40) days before the Final Approval Hearing as further discussed in the Declaration of the Notice and Settlement

Administrator. The Parties and their counsel shall not issue any other notice, press release, and/or similar statement relating to the Settlement of the Action, and/or the claims against Merck in the Coordinated Proceeding, unless otherwise ordered by the Court in this Action or in the Coordinated Proceeding, or as agreed to by the Parties.

f. **Notice to Counsel:** Merck shall provide to the Notice and Settlement Administrator, within ten (10) business days of the entry of the Preliminary Approval Order, a list of all counsel for anyone who has litigation against Defendants that involves claims pertaining to the Eligible Coppertone Sunscreen Products that are subject to the Plaintiffs' Release set forth in Section VII below. The Notice and Settlement Administrator shall mail copies of the Long Form Notice to all such legal counsel. Defendants will promptly direct the Notice and Settlement Administrator to serve the Long Form Notice on counsel for any Settlement Class Members who subsequently initiate litigation, arbitration, or other proceedings against Merck that involve claims pertaining to the Eligible Coppertone Sunscreen Products that are subject to Plaintiffs' Release set forth in Section VII below.

g. **Toll-Free Telephone Number:** Within ten (10) days after the entry of the Preliminary Approval Order, the Notice and Settlement Administrator shall establish a toll-free telephone number that will provide Settlement-related information in English, with an option for Spanish, to Settlement Class Members.

**V. REQUESTS FOR EXCLUSION**

A. Any Settlement Class Member who wishes to be excluded from the Settlement Class must mail a written request for exclusion to the Notice and Settlement Administrator at the address provided in the Long Form Notice, postmarked no later than twenty (20) days before the Final Approval Hearing, or as the Court otherwise may direct, and specifying that he or she

wants to be excluded. The Notice and Settlement Administrator shall forward copies of any written requests for exclusion to Settlement Class Counsel and Defendants' Counsel. A list reflecting all requests for exclusion shall be filed with the Court by the Notice and Settlement Administrator no later than ten (10) days before the Final Approval Hearing.

**B.** Any potential Settlement Class Member who does not mail a timely written request for exclusion as provided in the preceding Section V.A shall be bound by all subsequent proceedings, orders, and judgments, including, but not limited to, Plaintiffs' Release in the Action, even if he or she has litigation pending or subsequently initiates litigation against Merck relating to the claims and transactions released in the Action.

## **VI. OBJECTIONS TO SETTLEMENT AGREEMENT**

**A.** Any Settlement Class Member who has not filed a timely written request for exclusion and who wishes to object to the fairness, reasonableness, or adequacy of the Settlement Agreement or the proposed Settlement, or to the award of Attorneys' Fees and Expenses, or the Named Plaintiffs' incentive awards, must deliver to the Settlement Class Counsel identified in the Long Form Notice and to Defendants' Counsel, and file with the Court, no later than twenty (20) days before the Final Approval Hearing, or as the Court otherwise may direct, a written statement of the objections, as well as the specific reason(s), if any, for each objection, including any legal support the Settlement Class Member wishes to bring to the Court's attention, any evidence or other information the Settlement Class Member wishes to introduce in support of the objections, a statement of whether the Settlement Class Member intends to appear and argue at the Final Approval Hearing, and list the Settlement Class Member's purchase(s) of the Eligible Coppertone Sunscreen Products. Settlement Class Members may do so either on their own or through an attorney retained at their own expense. The objection must include proof of purchase of the Eligible Coppertone Sunscreen Products and/or a representation and warranty, submitted

under penalty of perjury, that the objector purchased an Eligible Coppertone Sunscreen Product. Acceptable proof of purchase includes a photocopy of the label(s) on the tube(s), spray(s), bottle(s), and/or similar container(s), cash register receipt(s), credit card receipt(s), credit card statement(s) or similar document(s) that sufficiently indicates purchase of Eligible Coppertone Sunscreen Products.

**B.** Any Settlement Class Member who files and serves a written objection, as described in the preceding Section VI.A, may appear at the Final Approval Hearing, either in person or through personal counsel hired at the Settlement Class Member's expense, to object to the fairness, reasonableness, or adequacy of the Settlement Agreement or the proposed Settlement, or to the award of Attorneys' Fees and Expenses or incentive awards to the Plaintiffs. Settlement Class Members or their attorneys who intend to make an appearance at the Final Approval Hearing must deliver a notice of intention to appear to Settlement Class Counsel identified in the Long Form Notice and to Defendants' Counsel, and file said notice with the Court, no later than twenty (20) days before the Final Approval Hearing, or as the Court may otherwise direct.

**C.** Any Settlement Class Member who fails to comply with the provisions of Sections VI.A and B above shall waive and forfeit any and all rights he or she may have to appear separately and/or to object, and shall be bound by all the terms of the Settlement Agreement and by all proceedings, orders, and judgments, including, but not limited to, Plaintiffs' Release, in the Action

**D.** Any Settlement Class Member who objects to the proposed Settlement shall be entitled to all of the benefits of the Settlement if the Settlement Agreement and the terms contained therein are approved, as long as the objecting Settlement Class Member complies with



all requirements of the Settlement Agreement applicable to Settlement Class Members, including the timely submission of Claim Forms and other requirements discussed herein.

**VII. RELEASE AND WAIVER OF PLAINTIFFS AND SETTLEMENT CLASS CLAIMS**

A. The Parties agree to the following release and waiver (“Plaintiffs’ Release”), which shall take effect upon entry of the Final Approval Order and Final Judgment.

B. In consideration for the settlement benefits described in the Settlement Agreement, all Settlement Class Members who have not validly excluded themselves from the Settlement Class pursuant to Section V of the Settlement Agreement, on behalf of themselves, their heirs, guardians, assigns, executors, administrators, predecessors, and/or successors, fully, finally, and forever release, discharge, relinquish, acquit, and hold harmless the Released Defendants from any and all claims, demands, suits, petitions, liabilities, causes of action, costs, expenses, interest, obligations, reckonings, rights, judgments, contracts, agreements, executions, promises and liens, whether past, present or future, mature or not yet mature, known or unknown, suspected or unsuspected, anticipated or unanticipated, foreseen or unforeseen, liquidated or unliquidated, contingent or non-contingent, derivative or direct, asserted or unasserted, concealed or hidden, whether based on federal, state or local law, Constitution, statute, ordinance, regulation, code, contract, common law, or equity or any other source, by any Settlement Class Member against any or all of the Released Defendants in the Action, the Coordinated Proceeding and/or in any other court action, tribunal, arbitration, commission, agency, or before any governmental and/or administrative body (including any action or proceeding brought on behalf of any state Attorney General or regulatory entity or organization) or any other adjudicatory body, on the basis of, connected with, arising from, or in any way whatsoever related to, except as otherwise specified below, the marketing, promotion,

advertising, sale, distribution, and/or purchase of Eligible Coppertone Sunscreen Products and/or the claims alleged in the Action. More particularly, but without in any way limiting the generality of the foregoing, the Parties agree that Plaintiffs' Release applies to claims arising from, directly or indirectly, or in any way whatsoever pertaining or relating to the claims alleged in the Action, including but not limited to, in whole or in part, any and all acts, communications, affirmations, publications, omissions, impressions, disclosures, nondisclosures, facts, circumstances, matters, transactions, occurrences, oral or written statements, representations, portrayals, depictions, claims, messaging, or misrepresentations, on the internet or otherwise, that have been, may have been, could have been and/or were allegedly made, directly or indirectly, in connection with, arising out of, relating to or connected in any way with any labeling, warranties, practices, advertising, marketing, campaigning, development, packaging, promotion, displays, brochures, manufacturing, operation, performance, functionality, notification, providing, offering, dissemination, sale/resale and/or distribution of Eligible Coppertone Sunscreen Products, which have been asserted or which could have been asserted in this Action and/or the Coordinated Proceeding, including, but not limited to, the claim that Eligible Coppertone Sunscreen Products misrepresented the nature, extent, amount and/or effectiveness of UVA and/or UVB protection provided by these products. Settlement Class Members shall not now or hereafter institute, maintain, prosecute, assert or cooperate in the institution, commencement, filing, or prosecution of any suit or proceeding against the Released Defendants, either directly or indirectly, on their own behalf, on behalf of the Settlement Class or on behalf of any other person or entity with respect to the claims, causes of action and any other matters released under the Settlement Agreement.

C. Notwithstanding any other language in the Settlement Agreement, including

Section VII thereof, Plaintiffs and the other members of the Settlement Class are not, by virtue of the Agreement, releasing any claims of or relating to personal injury, including personal injury claims relating to or arising from product liability.

**D.** Plaintiffs represent and warrant that they are the sole and exclusive owners of all claims that they personally are releasing under the Settlement Agreement. Plaintiffs further acknowledge that they have not assigned, pledged, or in any manner whatsoever, sold, transferred, assigned or encumbered any right, title, interest or claim arising out of or in any way whatsoever pertaining to the Action, including without limitation, any claim for benefits, proceeds or values, and that Plaintiffs are not aware of anyone other than themselves claiming any interest, in whole or in part, in their rights and interests in the Action or in any benefits, proceeds or values due them under the Action. Settlement Class Members submitting a Claim Form shall represent and warrant therein that they are the sole and exclusive owner of all claims that they personally are releasing under the Settlement and that they have not assigned, pledged, or in any manner whatsoever, sold, transferred, assigned or encumbered any right, title, interest or claim arising out of or in any way whatsoever pertaining to the Action, including without limitation, any claim for benefits, proceeds or values under the Action, and that such Settlement Class Member(s) are not aware of anyone other than themselves claiming any interest, in whole or in part, in their rights and interests in the Action or in any benefits, proceeds or value due them in connection therewith.

**E.** Without in any way limiting its scope, Plaintiffs' Release covers by example and without limitation, any and all claims for attorneys' fees, costs, expert fees, or consultant fees, interest, or litigation fees, costs or any other fees, costs, and/or disbursements incurred by Settlement Class Counsel and/or any other counsel representing Plaintiffs in this Action, or by

Plaintiffs or the Settlement Class Members with respect to the claims, causes of action and any other matters released under Plaintiffs' Release, except to the extent otherwise specified in the Settlement Agreement, including without limitation, the provisions of Section IX of the Settlement Agreement.

**F.** Plaintiffs and all Settlement Class Members expressly agree that Plaintiffs' Release will be, and may be raised as, a complete defense to and will preclude any action or proceeding encompassed by Plaintiffs' Release.

**G.** Plaintiffs and all Settlement Class Members expressly understand and acknowledge that certain principles of law, including, but not limited to, Section 1542 of the Civil Code of the State of California, provide that "a general release does not extend to claims which a creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor." To the extent that anyone might argue that these principles of law are applicable – notwithstanding that the Settlement Class and Defendants have chosen New Jersey law to govern the Settlement Agreement – Plaintiffs and the Settlement Class Members agree that the provisions of all such principles of law or similar federal or state laws, rights, rules, or legal principles, to the extent they are found to be applicable herein, are hereby knowingly and voluntarily waived, relinquished and released by Plaintiffs and the Settlement Class Members.

**H.** In connection with Plaintiffs' Release, Plaintiffs and the Settlement Class Members acknowledge that they are aware that they may hereafter discover claims presently unknown or unsuspected, or facts in addition to or different from those which they now know or believe to be true with respect to the released claims. Nevertheless, it is the intention of Plaintiffs and the Settlement Class Members in executing Plaintiffs' Release to fully, finally, and

forever settle, release, discharge, and hold harmless all such matters, and all claims relating thereto, which exist, hereafter may exist, or might have existed that in any way relate to the Eligible Coppertone Sunscreen Products purchased prior to the date notice is first disseminated pursuant to the Notice Plan and/or the claims alleged in the Action with respect to such products (whether or not previously or currently asserted in any action or proceeding), except as otherwise specified in the Settlement Agreement, including as stated in subsection C of Section VII of the Settlement Agreement.

**I.** Nothing in Plaintiffs' Release shall preclude any action to enforce the terms of the Agreement, including participation in any of the processes detailed therein.

**J.** Plaintiffs and the Settlement Class Members hereby agree and acknowledge that the provisions of Plaintiffs' Release discussed in Section VII of the Settlement Agreement and Defendants' Release discussed in Section VIII of the Settlement Agreement together constitute essential and material terms of the Settlement Agreement and shall be included in any Final Approval Order and Final Judgment entered by the Court.

**K.** The Settlement Agreement reflects, among other things, the compromise and settlement of disputed claims among the Parties, neither the Settlement Agreement nor the releases given in the Settlement Agreement, nor any consideration therefor, nor any actions taken to carry out the Settlement Agreement are intended to be, nor may they be deemed or construed to be, an admission or concession of liability, or the validity of any claim, or defense, or of any point of fact or law (including but not limited to matters respecting class certification) on the part of any of the Released Defendants, Plaintiffs or Plaintiffs' Counsel. Defendants deny the allegations of the complaint in the Action. Neither the Settlement Agreement, nor the fact of settlement, nor the settlement proceedings, nor settlement negotiations, nor any related

document, shall be used as an admission of any fault or omission by the Released Defendants, Plaintiffs or Plaintiffs' Counsel, or be offered or received in evidence as an admission, concession, presumption, or inference of any wrongdoing by the Released Defendants, Plaintiffs or Plaintiffs' in any proceeding, other than such proceedings as may be necessary to consummate, interpret, or enforce the Settlement Agreement.

L. Plaintiffs and Merck shall seek and obtain from the Court, as a condition of Settlement, a Final Approval Order and Final Judgment as further described in the Settlement Agreement.

#### **VIII. DEFENDANTS' RELEASE OF CLAIMS**

Upon entry of the Final Approval Order and Final Judgment, Defendants hereby fully, finally, and forever release and discharge any and all claims, whether known or unknown, which Defendants may have against Steven Brody, Chaim Hirschfeld, Suzanne Grunstein and Mr. Gaston and/or their counsel, including Settlement Class Counsel, for damages, penalties, fines or sanctions arising out of or pertaining to the prosecution or conduct of the Action or the Coordinated Proceeding (the "Defendants' Release"); and such settled claims shall be fully, finally and forever compromised, settled, discharged, dismissed with prejudice, and released pursuant to the terms and conditions set forth herein; provided however that nothing contained herein shall release any right or preclude any action to enforce the terms of the Settlement Agreement.

#### **IX. ATTORNEYS' FEES AND EXPENSES AND INDIVIDUAL PLAINTIFFS' AWARDS**

A. After agreeing to the principal terms set forth above and the settlement consideration in the Action, Settlement Class Counsel and Defendants' Counsel negotiated the amount of Attorneys' Fees and Expenses that, subject to Court approval, upon application would

be paid to Plaintiffs' Counsel. As a result of the negotiations, Settlement Class Counsel agrees to make, and Merck agrees not to oppose, an application for an award of Attorneys' Fees and Expenses in the Action that will not exceed \$2 million in fees and expenses incurred prior to the Final Approval Hearing in the Action and/or the Coordinated Proceeding with respect to claims brought against Merck prior to the Final Approval Hearing. This award shall be the sole aggregate compensation paid by Merck in the Action for all Settlement Class Counsel and/or other counsel representing Plaintiffs or the Settlement Class.

**B.** Merck shall pay to Settlement Class Counsel the entire Attorneys' Fees and Expenses awarded by the Court not later than twenty (20) days after the occurrence of the Final Settlement Date. The Attorneys' Fees and Expenses awarded by the Court and payable to Settlement Class Counsel shall not be paid from the Settlement Fund.

**C.** The Attorneys' Fees and Expenses paid by Merck as provided for in the Settlement Agreement shall be allocated by Settlement Class Counsel among Plaintiffs' Counsel in a manner that Settlement Class Counsel in good faith believes reflects the contributions of Plaintiffs' Counsel to the prosecution and settlement of the claims against Merck in the Action and the Coordinated Proceeding. Settlement Class Counsel agrees to make, and Merck agrees not to oppose, an application for an award of Attorneys' Fees and Expenses in the Action that will not exceed \$2 million in fees and expenses incurred prior to the Final Approval Hearing in the Action and/or the Coordinated Proceeding with respect to claims brought against Merck prior to the Final Approval Hearing.

**D.** Settlement Class Counsel may petition the Court for incentive awards of up to \$2,500 per Plaintiff. The purpose of such awards shall be to compensate the Plaintiffs for efforts and risks taken by them on behalf of the Settlement Class. Any incentive awards made by the

Court shall be paid from the Settlement Fund, as instructed by Settlement Class Counsel, within thirty (30) days after the occurrence of the Final Settlement Date.

E. Merck shall not be liable for or obligated to pay any fees, expenses, costs, or disbursements to, or incur any expense on behalf of, any person or entity, either directly or indirectly, in connection with this Action or the Settlement Agreement, other than the amount or amounts expressly provided for in the Settlement Agreement.

F. Notwithstanding any other language or provision contained in the Settlement Agreement, Plaintiffs' Counsel shall not be precluded from seeking from the Superior Court for the State of California an award of attorneys' fees and expenses incurred in prosecuting the actions brought against defendants other than Merck in the Coordinated Proceeding, or an award of attorneys' fees and expenses incurred in prosecuting the claims asserted against Merck as contemplated in the California State Settlement.

**X. PRELIMINARY APPROVAL ORDER, FINAL APPROVAL ORDER, FINAL JUDGMENT AND RELATED ORDERS**

A. The Parties shall seek from the Court, within thirty (30) days after the execution of the Settlement Agreement, a Preliminary Approval Order in a form substantially similar to Exhibit 7. The Preliminary Approval Order shall, among other things:

1. Certify a nationwide settlement-only class, approve Named Plaintiffs as class representatives and appoint Proposed Settlement Class Counsel as counsel for the class, pursuant to Rule 23 of the Federal Rules of Civil Procedure;
2. Preliminarily approve the Settlement Agreement;
3. Require the dissemination of the notices and the taking of all necessary and appropriate steps to accomplish this task;
4. Determine that the notices and Notice Plan comply with all legal



requirements, including, but not limited to, the Due Process Clause of the United States Constitution;

5. Schedule a date and time for a Final Approval Hearing to determine whether the Preliminary Approval Order should be finally approved by the Court;

6. Require Settlement Class Members who wish to exclude themselves to submit an appropriate and timely written request for exclusion as directed in the Agreement and Long Form Notice and that a failure to do so shall bind those Settlement Class Members who remain in the Settlement Class;

7. Require Settlement Class Members who wish to object to the Agreement to submit an appropriate and timely written statement as directed in the Agreement and Long Form Notice;

8. Require Settlement Class Members and/or attorneys representing Settlement Class Members, at the Settlement Class Members' expense, to file a notice of appearance as directed in the Agreement and Long Form Notice;

9. Issue a preliminary injunction;

10. Appoint the Notice and Settlement Administrator;

11. Require Merck to take all necessary and appropriate steps to establish the means necessary to implement the Agreement;

12. Issue a protective order requiring the execution of a Confidentiality Agreement, attached hereto as Exhibit 10, for those Settlement Class Members or their counsel that seek to review the documents produced in this Action; and

13. Issue other related orders to effectuate the preliminary approval of the Settlement Agreement.

**B.** After the Final Approval Hearing, the Parties, through their counsel, shall seek to obtain from the Court a Final Approval Order and Final Judgment in the forms substantially similar to Exhibits 3 and 4, respectively. The Final Approval Order and Final Judgment shall, among other things:

1. Find that the Court has personal jurisdiction over all Settlement Class Members, the Court has subject matter jurisdiction over the claims asserted in the complaint in the Action, and that venue is proper.
2. Finally approve the Settlement Agreement, pursuant to Rule 23 of the Federal Rules of Civil Procedure;
3. Finally certify the Settlement Class for settlement purposes only;
4. Find that the notices and the notice dissemination methodology complied with all laws, including, but not limited to, the Due Process Clause of the United States Constitution;
5. Dismiss the Action with prejudice;
6. Incorporate the Plaintiffs' Release and Defendants' Release set forth in the Agreement and make these releases effective as of the date of the Final Approval Order and Final Judgment;
7. Issue permanent injunctions;
8. Authorize the Parties to implement the terms of the Agreement;
9. Award Attorney's Fees and Expenses;
10. Award incentive fees to the Named Plaintiffs;
11. Retain jurisdiction relating to the administration, consummation, enforcement, and interpretation of the Agreement, the Final Approval Order and Final Judgment,

and for any other necessary purpose; and

12. Issue related Orders to effectuate the final approval of the Agreement and its implementation.

**XI. MODIFICATION OR TERMINATION OF THE SETTLEMENT AGREEMENT**

**A.** The terms and provisions of the Settlement Agreement may be amended, modified, or expanded by written agreement of the Parties and approval of the Court; provided, however that, after entry of the Final Approval Order and Final Judgment, the Parties may by written agreement effect such amendments, modifications, or expansions of the Settlement Agreement and its implementing documents (including all exhibits hereto) without further notice to Settlement Class Members or approval by the Court if such changes are consistent with the Court's Final Approval Order and Final Judgment and do not limit the rights of Settlement Class Members under the Settlement Agreement.

**B.** The Settlement Agreement shall terminate at the discretion of either Party if: (1) the Court, or any appellate court(s), rejects, modifies, or denies approval of any portion of the Settlement Agreement or the proposed Settlement that the terminating Party in its (or their) sole judgment and discretion reasonably determine(s) is material, including, without limitation, the terms of relief, the findings, or conclusions of the Court, the provisions relating to notice, the definition of the Settlement Class, and/or the terms of the Plaintiffs' Release and Defendants' Release; or (2) the Court, or any appellate court(s), does not enter or completely affirm, or alters or expands, any portion of the Final Approval Order and Final Judgment, or any of the Court's findings of fact or conclusions of law, that the terminating Party in its (or their) sole judgment and discretion reasonably determine(s) is material. The terminating Party must exercise the option to withdraw from and terminate the Settlement Agreement, as provided in this Section XI, by a signed writing served on the other Party, no later than twenty (20) days after receiving

notice of the event prompting the termination. Following a Party's exercise of this option, all Parties will be returned to their positions status quo ante, except as otherwise provided in the Settlement Agreement.

**C.** In addition to Defendants' termination rights under Section B, no later than twenty (20) days after receiving notice of the event prompting the termination, Defendants may unilaterally withdraw from and terminate the Settlement Agreement if:

1. prior to the Court issuing a Final Order and Final Judgment, any state attorney general, federal agency, or regulatory or administrative authority institutes a proceeding against Defendants arising out of or otherwise related to the Plaintiffs' Release and any of the terms or conditions of the Settlement Agreement; or

2. prior to the Court issuing a Final Order and Final Judgment, any federal or state regulator or agency: (a) objects either to any aspect or term of the Settlement Agreement; or (b) requires any modification to the Settlement Agreement, including without limitation, a constriction or expansion of the scope of the contemplated relief that Merck in its sole discretion deems reasonably material.

**D.** If an option to withdraw from and terminate the Settlement Agreement arises under Sections XI.B or XI.C above, neither Named Plaintiffs nor Defendants are required for any reason or under any circumstance to exercise that option and any exercise of that option shall be in good faith.

**E.** If the Settlement Agreement is terminated pursuant to Sections XI.B or XI.C, above, then:

1. the Settlement Agreement shall be null and void and shall have no force or effect, and no Party to the Settlement Agreement shall be bound by any of its terms, except for

the terms of this Sections XI.E and the confidentiality provisions of Section XII.L;

2. the Parties will petition to have any stay orders entered pursuant to the Settlement Agreement lifted;

3. all of its provisions, and all negotiations, statements, and proceedings relating to it shall be without prejudice to the rights of Plaintiffs, Defendants or any Settlement Class Member, all of whom shall be restored to their respective positions existing immediately before the execution of the Settlement Agreement, except that the Parties shall cooperate in requesting that the Court set a new scheduling order such that neither Party's substantive or procedural rights is prejudiced by the attempted settlement;

4. Defendants expressly and affirmatively reserve all defenses, arguments, and motions as to all claims that have been or might later be asserted in the Action, including, without limitation, the argument that the Action may not be litigated as a class action.

5. Plaintiffs and all Settlement Class Members, on behalf of themselves and their heirs, assigns, executors, administrators, predecessors, and successors, expressly and affirmatively reserve and do not waive all motions as to, and arguments in support of, all claims, causes of actions or remedies that have been or might later be asserted against Merck in the Action and/or the Coordinated Proceeding, including without limitation, any argument concerning class certification, consumer fraud, and treble or other damages;

6. neither the Settlement Agreement, the fact of its having been made, nor the negotiations leading to it, nor any discovery or action taken by a Party or Settlement Class Member pursuant to the Settlement Agreement shall be admissible or entered into evidence for any purpose whatsoever;

7. any Settlement-related order(s) or judgment(s) entered in this Action after

the date of execution of the Settlement Agreement shall be deemed vacated and shall be without any force or effect. All costs incurred in connection with the Settlement, including, but not limited to, notice, publication, and customer communications, will be paid by Merck as specified in the Settlement Agreement. Neither Plaintiffs nor Settlement Class Counsel shall be responsible for any of these costs or other Settlement-related costs;

8. notwithstanding the terms of this subsection, if the Settlement is not consummated, Settlement Class Counsel or any counsel representing Named Plaintiffs may include any time spent in Settlement efforts as part of any statutory fee petition filed at the conclusion of the case, and Defendants reserve the right to object to the reasonableness of such requested fees.

## **XII. MISCELLANEOUS PROVISIONS**

### **A. Admissibility of Settlement Agreement**

The Settlement Agreement shall not be offered or be admissible in evidence in any action or proceeding except (1) the hearings necessary to obtain and implement Court approval of the Settlement Agreement; (2) any hearing to enforce the terms of the Settlement Agreement or any related order by the Court; and/or (3) the proceedings pertaining to the settlement of the claims against Merck in the Coordinated Proceeding.

### **B. Successors and Assigns**

The terms of the Settlement Agreement shall apply to and bind the Parties as well as their heirs, successors and assigns.

### **C. Communications Relating to Settlement Agreement**

All notices or other formal communications under the Settlement Agreement shall be in writing and sent by e-mail or facsimile and next-day (excluding Saturdays, Sundays and Federal Holidays) express delivery service to counsel for the Party to whom the notice is directed at the

following addresses:

Defendants:

John P. Hooper  
David E. Stanley  
Reed Smith LLP  
599 Lexington Avenue, 22nd Floor  
New York, New York 10022  
jhooper@reedsmith.com  
Telephone: (212) 205-6125  
Facsimile: (212) 521-5450

Plaintiffs:

Mitchell M.Z. Twersky  
Abraham, Fruchter & Twersky, LLP  
One Penn Plaza  
Suite 2805  
New York, NY 10119  
mtwersky@aftlaw.com  
Telephone: (212) 279-5050  
Facsimile: (212) 279-3655

Any Party may, by written notice to all the other Parties, change its designated recipient(s) or notice address provided above.

**D. Procedures for Disputes Between Parties Relating to the Settlement Agreement**

To the extent any disputes or issues arise with respect to documenting or affecting the Settlement Agreement, the Parties agree to use their best efforts to informally resolve any such disputes or issues; but in the event any such dispute or issue cannot be resolved informally, to bring any such dispute or issue to the Court for resolution.

**E. Extensions of Time**

The Parties reserve the right, subject to the Court's approval, to agree to any reasonable extensions of time that might be necessary to carry out any of the provisions of the Settlement Agreement.

**F. Entire and Voluntary Agreement**

The Parties intend the Settlement Agreement to be a final and complete resolution of all disputes between them, except for those disputes relating to the Settlement. The Parties agree that the terms of the Settlement Agreement were negotiated at arm's length and in good faith and were reached voluntarily after consultation with competent legal counsel. The Settlement Agreement contains the entire agreement and understanding concerning the subject matter between the Parties, and supersedes all prior negotiations and proposals, whether written or oral. No other party or any agent or attorney of any other party has made any promise, representation or warranty whatsoever not contained in the Settlement Agreement and the other documents referred to in the Settlement Agreement to induce them to execute the same. The Parties represent that they have not executed this instrument or the other documents in reliance on any promise, representation or warranty not contained in the Settlement Agreement and the other documents referred to in the Settlement Agreement.

**G. Headings for Convenience Only**

The headings in the Settlement Agreement are for the convenience of the reader only and shall not affect the meaning or interpretation of the Settlement Agreement.

**H. Settlement Agreement Controls**

All of the exhibits attached hereto are hereby incorporated by reference as though fully set forth. To the extent that there is any conflict between the terms of the Settlement Agreement and the exhibits attached hereto, the Settlement Agreement shall control.

**I. Amendments**

The Settlement Agreement may be amended or modified only by a written instrument signed by Defendants and Settlement Class Counsel, or their respective successors-in-interest.



**J. Authorization of Counsel**

Each attorney executing the Settlement Agreement on behalf of any Party hereto hereby warrants that such attorney has the full authority to do so.

**K. Confidentiality**

All agreements made between and Orders pertaining to the Parties entered during the course of the Action and the Coordinated Proceeding relating to the confidentiality of information shall survive the Settlement Agreement.

**L. Confidential Information**

Plaintiffs and Settlement Class Counsel agree that the confidential information made available to them solely through the Settlement process was made available, as agreed to, on the condition that neither Plaintiffs nor Settlement Class Counsel may disclose it to third parties (other than experts or consultants retained by Plaintiffs in connection with this case); that it not be the subject of public comment; that it not be used by Plaintiffs or Settlement Class Counsel in any way in this litigation should the Settlement not be achieved, and that it is to be returned if a Settlement is not concluded; provided, however, that nothing contained herein shall prohibit Plaintiffs from seeking such information through formal discovery and using information obtained from such formal discovery in litigating the Action and/or the claims against Merck in the Coordinated Proceeding or from disclosing the confidential information made available to Settlement Class Counsel through the settlement process in court filings seeking approval of the Settlement and/or an Award of Attorneys' Fees and Expenses and to the Court in any hearings in connection with the Settlement. Furthermore, Settlement Class Counsel may disclose to Settlement Class Members and/or their attorneys such information as well as documents and information obtained through discovery in this Action or the Coordinated Proceeding subject to

the execution of a Confidentiality Agreement by such persons in the form attached hereto as Exhibit 10.

**M. Construction**

Each of the Parties has cooperated in the drafting and preparation of the Settlement Agreement. Hence, in any construction to be made of the Settlement Agreement, the same shall not be construed against any of the Parties. Before declaring any provision of the Settlement Agreement invalid, a court should first attempt to construe the provision valid to the fullest extent possible consistent with applicable precedent so as to find all provisions of the Settlement Agreement valid and enforceable.

**N. Choice of Forum**

All judicial proceedings regarding the Settlement Agreement shall be brought only in the Court, except as necessary to effectuate the settlement of the claims against Merck in the Coordinated Proceeding.

**O. Choice of Law**

The Settlement Agreement and any amendments thereto shall be governed by and interpreted according to the law of the State of New Jersey, notwithstanding its conflict of laws provisions.

**P. Counterparts**

The Settlement Agreement may be executed in one or more counterparts and by facsimile. All executed counterparts and each of them shall be deemed to be one and the same instrument. Counsel for the Parties shall exchange among themselves signed counterparts and a complete set of executed counterparts shall be filed with the Court.

**Q. Cooperation**

The Parties agree that they will cooperate to effectuate and implement all terms and conditions of the Settlement Agreement, and exercise good faith efforts to accomplish the terms and conditions of the Settlement Agreement. The parties agree to accept non-material and procedural changes to the Settlement Agreement if so required by the Court in connection with final approval of the Settlement Agreement, but are not obligated to accept any changes in the monetary amount of relief provided for herein, or any other substantive change.

**R. Representations and Warranties**

Named Plaintiffs represent and certify that: (1) they have agreed to serve as representatives of the Settlement Class proposed to be certified herein; (2) they are willing, able, and ready to perform all of the duties and obligations of a representative of the Settlement Class, including, but not limited to, being involved in discovery and fact finding; (3) they have read the pleadings in this Action, including the operative complaints, or have had the contents of such pleadings described to them; (4) they are familiar with the results of the fact-finding undertaken by Settlement Class Counsel; (5) they have been kept apprised of settlement negotiations among the Parties, and have either read the Settlement Agreement, including the exhibits annexed hereto, or have received a detailed description of it from Settlement Class Counsel and have agreed to its terms; (6) they have consulted with Settlement Class Counsel about the Action and the obligations imposed on the representatives of the Settlement Class; (7) they have authorized Settlement Class Counsel to execute the Settlement Agreement on their behalf; and (8) they shall remain and serve as representatives of the Settlement Class until the terms of the Settlement Agreement are effectuated, the Settlement Agreement is terminated in accordance with its terms, or the Court at any time determines that said Named Plaintiffs cannot represent the Settlement Class.

Merck represents that (1) the execution, delivery and performance by Defendants of the Settlement Agreement and the consummation by it of the actions contemplated hereby have been duly authorized by all necessary corporate action on the part of Defendants; and (2) the Settlement Agreement has been duly and validly executed and delivered by Defendants and constitutes their legal, valid and binding obligation.

**S. Waiver of Breach**

The waiver by one Party of any breach of the Settlement Agreement by another Party shall not be deemed a waiver of any prior or subsequent breach of the Settlement Agreement.

**T. Written Notice for Alleged Breach**

If one Party to the Settlement Agreement considers another Party to be in breach of its obligations under the Settlement Agreement, that Party must provide the breaching Party with written notice of the alleged breach and provide a reasonable opportunity to cure the breach before taking any action to enforce any rights under the Settlement Agreement.

**U. Class Certification for Settlement Purposes Only**

Merck is agreeing to certification of the proposed Settlement Class solely for purposes of facilitating the Settlement and does not, by doing so, in any way agree or concede that a litigation class would meet the requirements of Rule 23 of the Federal Rules of Civil Procedure or otherwise be appropriate for certification. Merck has previously filed an opposition to Plaintiffs' motion for class certification in the Coordinated Proceeding and does not abandon or modify its position regarding certification of a litigation class by entering into the Settlement Agreement. To the contrary, Merck reserves its rights to assert all available arguments against certification of a class in the event that the Settlement does not attain final approval and become effective. Plaintiffs and Settlement Class Counsel acknowledge that Defendants' reservation of

right to contest the propriety of class certification is of the essence to Defendants' entering into the Settlement Agreement and that Defendants would not have entered into the Settlement Agreement if it prejudiced its ability to oppose certification if the Settlement Agreement should be terminated.

**V. Tax Consequences**

No opinion concerning the tax consequences of the proposed Settlement to Settlement Class Members is given or will be given by the Parties, nor are any representations or warranties in this regard made by virtue of the Settlement Agreement. Each Settlement Class Member's tax obligations, and the determination thereof, are the sole responsibility of the Settlement Class Member, and it is understood that the tax consequences may vary depending on the particular circumstances of each individual Settlement Class Member.

**W. Return of Defendants' Documents**

All documents produced by Defendants to Plaintiffs during the litigation, copies thereof, and any and all handwritten notes summarizing, describing or referring to such documents shall be returned to Defendants or destroyed with verification within forty-five (45) days of the Final Settlement Date, provided, however, that this Section shall not apply to any documents made part of the record in connection with a Claim, nor to any documents made part of a filing in this Action or in the Coordinated Proceeding, nor to Settlement Class Counsel's work product.

**X. PDF or Facsimile Signature**

The Settlement Agreement may be signed with a pdf or facsimile signature and in counterparts, each of which shall constitute a duplicate original.

Dated: September 21, 2012

Merck & Co., Inc.  
MSD Consumer Care, Inc.  
Merck Sharp & Dohme Corp.

By: Bruce Koblitz  
Name: Bruce Koblitz  
Title: KVP and General Counsel

Dated: \_\_\_\_\_, 2012

\_\_\_\_\_  
Steven Brody

Dated: \_\_\_\_\_, 2012

\_\_\_\_\_  
Suzanne Grunstein

Dated: \_\_\_\_\_, 2012

\_\_\_\_\_  
Chaim Hirschfeld

APPROVED AS TO FORM AND CONTENT:

Dated:

ABRAHAM, FRUCHTER & TWERSKY,  
LLP

By: \_\_\_\_\_  
Mitchell M.Z. Twersky

Settlement Class Counsel

Dated: \_\_\_\_\_, 2012

Merck & Co., Inc.  
MSD Consumer Care, Inc.  
Merck Sharp & Dohme Corp.

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

Name:  
Title:

Dated: 9/21, 2012

Steven Brody  
Steven Brody

Dated: \_\_\_\_\_, 2012

\_\_\_\_\_  
Suzanne Grunstein

Dated: \_\_\_\_\_, 2012

\_\_\_\_\_  
Chaim Hirschfeld

APPROVED AS TO FORM AND CONTENT:

Dated:

ABRAHAM, FRUCHTER & TWERSKY,  
LLP

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

Mitchell M.Z. Twersky

Settlement Class Counsel

Dated: \_\_\_\_\_, 2012

Merck & Co., Inc.  
MSD Consumer Care, Inc.  
Merck Sharp & Dohme Corp.

By: \_\_\_\_\_  
Name:  
Title:

Dated: \_\_\_\_\_, 2012

\_\_\_\_\_  
Steven Brody

Dated: September 21, 2012

  
\_\_\_\_\_  
Suzanne Gunstein

Dated: \_\_\_\_\_, 2012

\_\_\_\_\_  
Chaim Hirschfeld

APPROVED AS TO FORM AND CONTENT:

Dated:

ABRAHAM, FRUCHTER & TWERSKY,  
LLP

By: \_\_\_\_\_  
Mitchell M.Z. Twersky

Settlement Class Counsel



Dated: \_\_\_\_\_, 2012

Merck & Co., Inc.  
MSD Consumer Care, Inc.  
Merck Sharp & Dohme Corp.

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

Name:

Title:

Dated: \_\_\_\_\_, 2012

\_\_\_\_\_  
Steven Brody

Dated: \_\_\_\_\_, 2012

\_\_\_\_\_  
Suzanne Grunstein

Dated: 9/21/12, 2012

  
\_\_\_\_\_  
Chaim Hirschfeld

APPROVED AS TO FORM AND CONTENT:

Dated:

ABRAHAM, FRUCHTER & TWERSKY,  
LLP

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

Mitchell M.Z. Twersky

Settlement Class Counsel

Dated: \_\_\_\_\_, 2012

Merck & Co., Inc.  
MSD Consumer Care, Inc.  
Merck Sharp & Dohme Corp.

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

Name:  
Title:

Dated: \_\_\_\_\_, 2012

\_\_\_\_\_  
Steven Brody

Dated: \_\_\_\_\_, 2012

\_\_\_\_\_  
Suzanne Grunstein

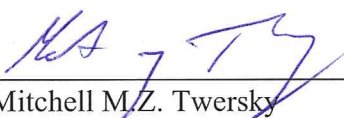
Dated: \_\_\_\_\_, 2012

\_\_\_\_\_  
Chaim Hirschfeld

APPROVED AS TO FORM AND CONTENT:

Dated: 9/21/12

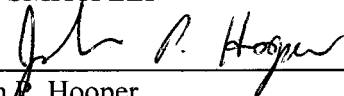
ABRAHAM, FRUCHTER & TWERSKY,  
LLP

By:  \_\_\_\_\_  
Mitchell M.Z. Twersky

Settlement Class Counsel

Dated: 9/21/12

REED SMITH LLP

By:   
\_\_\_\_\_  
John P. Hooper  
David E. Stanley  
Eric F. Gladbach

Counsel for Defendants