

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS**

IN RE PHARMACEUTICAL INDUSTRY  
AVERAGE WHOLESAL PRICE  
LITIGATION

MDL No. 1456

CIVIL ACTION: 01-CV-12257-PBS

Judge Patti B. Saris

THIS DOCUMENT RELATES TO:  
BMS

**SETTLEMENT AGREEMENT AND RELEASE  
OF THE BMS GROUP**

Subject to the approval of the Court, this Settlement Agreement and Release (the “Agreement”) is entered into between and among the Class Plaintiffs in the above-captioned action and Defendants Bristol-Myers Squibb Company (“BMS”), Oncology Therapeutics Network Corporation and Apothecon, Inc. (herein referred to collectively as the “BMS Group”);

WHEREAS, there is pending in the United States District Court for the District of Massachusetts a multi-district litigation captioned *In re Pharmaceutical Industry Average Wholesale Price Litigation*, MDL 1456, comprised of putative class actions that were transferred to and/or coordinated with or consolidated in MDL 1456 (the “MDL Class Actions”);

WHEREAS, the complaints filed in the MDL Class Actions, including the consolidated complaints filed by the Plaintiffs in MDL 1456 (“MDL Class Complaints”), allege, *inter alia*, that the BMS Group (among others) engaged in unlawful inflation and misrepresentation of the published Average Wholesale Prices (“AWPs”) for Blenoxane, Cytosan, Etopophos, Paraplatin, Rubex, Taxol and Vepesid (herein referred to collectively as the “BMS Subject Drugs”), and the unlawful use of AWP in the marketing of the BMS Subject Drugs;

WHEREAS, the BMS Group has asserted a number of legal and factual defenses to the claims alleged in the MDL Class Actions and denies any liability to the Class Plaintiffs;

WHEREAS, the Class Plaintiffs and the BMS Group agree that this Agreement shall not be deemed or construed to be an admission or evidence of any violation of any statute or law or of any liability or wrongdoing by the BMS Group or of the truth of any of the claims or allegations alleged in the MDL Class Actions or as a waiver of any defenses thereto;

WHEREAS, Class Plaintiffs and Lead Class Counsel have concluded, after extensive discovery and investigation of the facts and after carefully considering the circumstances of the MDL Class Actions, including the claims asserted in the complaints filed in the MDL Class Actions and the possible legal and factual defenses thereto, and the trial of claims involving the Massachusetts Classes (as defined herein), and the Court's June 21, 2007 Findings of Fact and Conclusions of Law, that it would be in the best interests of the Class Plaintiffs to enter into this Agreement in order to avoid the uncertainties of trial and to assure that the benefits reflected herein are obtained for the members of the Classes herein defined; and, further, that counsel representing the Class Plaintiffs consider the settlement set forth in this Agreement to be fair, reasonable and adequate and in the best interests of Classes;

WHEREAS, the BMS Group, through its counsel, and the Class Plaintiffs, through their counsel, after vigorous, arms'-length negotiations, have conditionally agreed herein to payment by BMS on behalf of the BMS Group of Nineteen Million Dollars (\$19,000,000) (the "Settlement Amount") to settle the claims of the Classes on a nationwide basis;

NOW, THEREFORE, it is agreed by and between the undersigned on behalf of the BMS Group and the Class Plaintiffs that the Class claims be settled, compromised, released and dismissed on the merits and with prejudice, subject to the approval of the MDL Court, on the following terms and conditions:

1. Class Definitions.

a. Medicare Part B Co-Payment Class ("Class 1"): All natural persons nationwide who made, or were liable for all or any portion of, a Medicare Part B co-payment based on AWP for any BMS Subject Drug during the period from January 1, 1991 through December 31, 2004. Excluded from Class 1 are those who made flat co-payments, who were reimbursed fully for their payments, or who have the right to be fully reimbursed, as well as officers, directors, management, and employees of the BMS Group or of any of their subsidiaries and affiliates.

b. Third-Party Payor MediGap Supplemental Insurance Class ("Class 2"): All TPPs nationwide that, from January 1, 1991 through December 31, 2004, made, or incurred an obligation to make, reimbursements for any portion of a Medicare Part B co-payment based on AWP for a BMS Subject Drug. Excluded from Class 2 are the officers, directors, management, and employees of the BMS Group or of any of their subsidiaries and affiliates.

c. Consumer and Third-Party Payor Class for Payments Made Outside the Medicare Context ("Class 3"): All natural persons nationwide who made, or were liable for all or any portion of, a non-Medicare Part B payment based on AWP for any BMS Subject Drug during the period from January 1, 1991 through December 31, 2004, and all TPPs nationwide that, from January 1, 1991 through December 31, 2004, made, or incurred an obligation to make, non-Medicare Part B reimbursements based on AWP for any BMS Subject Drug. Excluded from Class 3 are those consumers who made flat co-payments, who were reimbursed fully for their payments, or who have the right to be fully reimbursed, as well as the officers, directors, management, and employees of the BMS Group or of any of their subsidiaries and affiliates.

Also excluded from all Classes are all federal, state, and local government entities in the United States, except any such governmental agencies or programs that made or incurred an obligation to make a reimbursement for a Class Drug as part of a health benefit plan for their employees, but only with respect to such payment.

2. Definitions. As used in this Agreement, the following terms shall have the indicated meanings:

- (a) "Lead Class Counsel" means the law firms of Hagens Berman Sobol Shapiro LLP; Spector Roseman Kodroff & Willis, P.C.; Wexler Wallace LLP; and Hoffman & Edelson LLC.
- (b) "Class Member" means any natural person or TPP falling within the definitions of the Classes as defined in Paragraph 1 above.
- (c) "Class Period" means January 1, 1991 through December 31, 2004, inclusive.
- (d) "Class 1 Representative" means Agnes Swayze.
- (e) "Class 2 Representatives" means United Food and Commercial Workers Unions and Employees Midwest Health Benefits Fund and Sheet Metal Workers National Health Fund.
- (f) "Class 3 Representatives" means Cheryl Barreca, Anna Choice, Joyce Dison, Donna Kendall, Sandra Leef, Gerald Miller, Constance Nelson, Andrea Palenica, Scott Tell, Pauline Vernick, Mardolyn Vescovi, United Food and Commercial Workers Unions and Employees Midwest Health Benefits Fund, Pirelli Armstrong Tire Corporation Retiree Medical Benefits Trust, Board of Trustees of Carpenters and Millwrights of Houston and Vicinity Welfare Trust Fund, and Teamsters Health & Welfare Fund of Philadelphia and Vicinity.

(g) "Class Releasers" means each Class Member, including a Class Member's successors, heirs, executors, trustees, administrators, legal representatives and assigns.

(h) "Claims Administrator" means the entity chosen by Lead Class Counsel for the purpose of processing and paying proofs of claim under this Settlement.

(i) "CMS" means the Centers for Medicare and Medicaid Services of the United States Department of Health and Human Services.

(j) "Consumer" means any individual falling within the definition of Class 1 or Class 3 who is a natural person and not a TPP.

(k) "Consumer Class Member" means a Consumer who has not opted-out.

(l) "Effective Date" is the date defined in Paragraph 9 below.

(m) "The BMS Group" means Bristol-Myers Squibb Company, Oncology Therapeutics Network Corporation and Apothecon, Inc.

(n) "The BMS Group Releasees" means the BMS Group and its present and former direct and indirect parents, subsidiaries, divisions, partners and affiliates, and their respective present and former stockholders, officers, directors, employees, managers, agents, attorneys and any of their legal representatives, and their predecessors, successors, heirs, executors, trustees, administrators and assigns. As used in this Paragraph, "affiliates" means entities controlling, controlled by or under common control with the BMS Group.

(o) "Massachusetts Classes" means the two classes that, after a bench trial, obtained a judgment of the MDL Court dated November 20, 2007 against members

of the BMS Group, which judgment is, as of the date of this Agreement, on appeal to the United States Court of Appeals for the First Circuit.

(p) “MDL Court” means the Honorable Patti B. Saris, or if she is unavailable, another judge of the United States District Court for the District of Massachusetts, presiding over *In re Pharmaceutical Industry Average Wholesale Price Litigation*, MDL 1456 (D. Mass.).

(q) “MDL Class Actions” means all putative class actions in which any BMS Group Releasees are named as defendants and which have been transferred to and/or coordinated with or consolidated in *In re Pharmaceutical Industry Average Wholesale Price Litigation*, MDL 1456 (D. Mass.).

(r) “MDL Class Complaints” means all of the putative class action complaints filed in MDL Class Actions, including all of the Master Consolidated Class Action Complaints (through and including the Fifth Amended Master Consolidated Class Action Complaint) filed in the MDL Class Actions, including all counts of such complaints that were previously dismissed by the MDL Court (e.g. putative class RICO claims).

(s) “MDL Mediator” means Eric Green of Resolutions, LLC of Boston, Massachusetts.

(t) “Named Plaintiffs” means all persons that have been named plaintiffs in the Fifth Amended Master Consolidated Class Action Complaint filed with the MDL Court.

(u) “Other Classes” means classes or subclasses certified in the MDL Class Actions other than Class 1 and the Massachusetts Classes as defined herein.

(v) “Released Class Claims” means any and all claims, demands, actions, suits, causes of action, damages whenever incurred, liabilities of any nature whatsoever, including costs, expenses, penalties and attorneys’ fees, known or unknown, suspected or unsuspected, in law or equity, that any Class Releasor who has not timely excluded himself, herself or itself from the Classes, whether or not s/he or it objects to the Settlement and whether or not s/he or it makes a claim upon or participates in the Settlement Fund, ever had, now has, or hereafter can, shall or may have, directly or indirectly, representatively, derivatively or in any capacity, arising out of any conduct, events or transactions relating to the marketing, sale, purchase, cost, reimbursement amount or price of any BMS Subject Drug during the Class Period. “Released Class Claims” shall not include any claim against any person or entity that is not a BMS Group Releasee, any claim arising out of this Agreement, or any claim between any Class Member and any BMS Group Releasee that is unrelated to the allegations of the MDL Complaints and/or the marketing, sale, purchase, cost, reimbursement amount or price of the BMS Subject Drugs, and any claim relating to the efficacy or safety of the BMS Subject Drugs.

(w) “Released Claims” means any and all claims released by this Agreement.

(x) “Settlement Amount” means the sum of Nineteen Million Dollars (\$19,000,000).

(y) “Settlement Notices” means the Notices of Proposed Settlement of Class Action, Motion for Attorneys’ Fees and Settlement Hearing and summary notices for publication substantially in the forms annexed hereto as Exhibit B, as the same may

be modified in accordance with the Court's rulings with respect to the motion for preliminary approval of this settlement.

(z) "TPP" means a third-party payor falling within the definition of Class 2 or Class 3 that is not a natural person.

(aa) "TPP Class Member" means a TPP that has not opted-out.

3. Settlement Consideration.

(a) Settlement Amount for Class Members. Subject to the provisions hereof and to the Distribution Plan and Claims Process approved by the MDL Court, and in full, complete and final settlement of the claims of the Class Members as provided herein, BMS shall pay \$19,000,000 in the aggregate to satisfy valid claims submitted pursuant to this Agreement (the "Settlement Fund"). BMS agrees to transfer the Settlement Fund, and other funds in connection with notice to the Classes, into an Escrow Account designated by Lead Class Counsel as follows: (i) after Preliminary Approval, one half of the cost of notice to the Classes up to a maximum of \$1,000,000; and (ii) \$19,000,000 within ten (10) business days after the Effective Date. The Escrow Account shall be established and administered pursuant to an Escrow Agreement in a form substantially in accord with Exhibit D hereto. The Settlement Fund shall be invested by the Escrow Agent (as defined in the Escrow Agreement) in short term United States Agency or Treasury Securities (or a mutual fund invested solely in such instruments) or other similar short-term United States government obligations such as repurchase agreements backed by United States obligations, and any interest earned thereon shall become part of the Settlement Fund. BMS shall not have any liabilities, obligations or responsibilities with respect to the investment, payment, disposition or distribution of the Settlement Fund after such transfer.

(b) Qualified Settlement Fund. The Escrow Account is intended by the parties hereto to be treated as a single "qualified settlement fund" for federal income tax

purposes pursuant to Treas. Reg. § 1.468B-1, and to that end the parties hereto shall cooperate with each other and shall not take a position in any filing or before any tax authority that is inconsistent with such treatment. Whether or not the Escrow Account qualifies as a qualified settlement fund within the meaning of Treas. Reg. § 1.468B-1, the Escrow Agent shall cause to be paid from the Escrow Account any taxes or estimated taxes due on any income earned on the funds in the Escrow Account and all related costs and expenses. The parties elect that the Escrow Account should be treated as a qualified settlement fund from the earliest possible date and agree to make any "relation back" election that may be available. If amounts received by the Class Members are construed to be income, it is the recipient's sole responsibility to pay taxes on the amount construed to be income, plus any penalties or interest.

(c) Settlement Notice Costs. The BMS Group shall pay one-half of the reasonable costs of notice to the Class of this Settlement up to a maximum payment of \$1,000,000 separately from, and in addition to, the \$19,000,000. The BMS Group shall have the right of prior approval for any costs relating to settlement notice and shall be entitled to proof of the reasonableness of such costs. The remaining costs of notice and settlement administration shall be paid from the Settlement Fund.

(d) Attorneys' Fees and Costs. The BMS Group shall have no liability for any attorneys' fees, costs, or expenses of Class Counsel or of any Class Member in connection with this Settlement or the trial relating to the Massachusetts Classes. The payment of Class attorneys' fees and costs will come from the Settlement Amount. The MDL Court will determine whether and the extent to which such fees and costs should be approved. BMS will otherwise take no position on the payment of Class attorneys' fees and costs. Any fee and expense award to Class Counsel as ordered by the Settlement Court in connection with final

approval of this Agreement may be distributed from the Settlement Fund within ten (10) business days after the Effective Date.

4. Distribution of the Settlement Amount. The proposed Distribution Plan and Claims Process is annexed hereto as Exhibit F. The BMS Group shall not be entitled to comment upon the proposed Distribution Plan and Claims Process. The Distribution Plan and Claims Process adopted by the Court in its Order concerning the Motion for Preliminary Approval shall become part of this Agreement and the Settlement Notices exhibited hereto shall, to the extent necessary to conform with the Distribution Plan and Claims Process, be modified accordingly.

5. Motion for Preliminary Approval. Concurrent with the submission of this Agreement for consideration by the MDL Court, Lead Class Counsel shall submit to the MDL Court a motion for preliminary approval of the Settlement set forth in this Agreement, which requests entry of a Preliminary Approval Order substantially in the form annexed hereto as Exhibit A, and which includes a provision that enjoins Class Members from litigating Released Claims pending final approval of the settlement.

6. Settlement Fairness Hearing; Report of the MDL Mediator. In connection with the Settlement Fairness Hearing, the MDL Mediator shall provide to the Court his opinion regarding the arms'-length nature of the settlement negotiations and process, the fairness of the settlement and the zealouslyness of Class Counsel in representing the Classes.

7. Entry of Final Judgment. If, following the Settlement Fairness Hearing scheduled by the MDL Court pursuant to the Preliminary Approval Order, the MDL Court approves this Agreement, then counsel for the parties shall request that the MDL Court enter an Order and Final Judgment substantially in the form annexed hereto as Exhibit C.

8. Notice to Class Members.

(a) In the event the MDL Court preliminarily approves the Settlement set forth in this Agreement, Lead Class Counsel shall, in accordance with Rule 23 of the Federal Rules of Civil Procedure and the Preliminary Approval Order, provide all those members of the Classes who can be identified by reasonable means with the best notice practicable under the circumstances, as ordered by the MDL Court, in substantially the forms annexed hereto as Exhibit B or as otherwise ordered by the MDL Court, which shall include publication on a web site established by Lead Class Counsel or the Claims Administrator. The Proposed Settlement Notice Plan is set forth in Exhibit G.

(b) As part of the class notice program referenced above, Lead Class Counsel will seek, through the MDL Court if necessary, information from CMS concerning the identity, contact (including last known address) and payment information of individuals who made co-payments as part of the Medicare Part B program and may be members of the Consumer Class as defined in Paragraph 1 above. This information will be utilized to provide notice to such individuals during the class notice period and to assist in the class claims administration process.

9. Effective Date. The settlement detailed in this Agreement shall be effective on the first date after all of the following events have occurred:

(a) entry of the Preliminary Approval Order substantially in the form annexed hereto as Exhibit A, or entry of a Preliminary Approval Order not substantially in the form of annexed hereto with respect to which neither party invokes any rights of termination pursuant to Paragraph 10 below;

(b) final approval by the MDL Court of this Class Settlement, following notice to members of the Classes and a hearing, as prescribed by Rule 23 of the Federal Rules of Civil Procedure; and

(c) entry by the MDL Court of an Order and Final Judgment, substantially in the form set forth in Exhibit C annexed hereto, and the expiration of any time for appeal or review of such Order and Final Judgment, or, if any appeal is filed and not dismissed, after such Order and Final Judgment is upheld on appeal in all material respects and is no longer subject to review upon appeal or review by writ of certiorari, or, in the event that the MDL Court enters an order and final judgment in form other than that provided above (“Alternative Judgment”) and none of the parties hereto elect to terminate this Class Settlement as permitted by Paragraph 10, the date that such Alternative Judgment becomes final and no longer subject to appeal or review.

10. Termination.

(a) By either BMS or Class Plaintiffs: BMS and the Classes shall each have the right to terminate the Settlement and this Agreement by providing written notice of their election to do so (“Termination Notice”) to counsel for the other party within thirty (30) days of: (a) the MDL Court declining to enter the Preliminary Approval Order substantially in the form annexed hereto as Exhibit A; (b) a decision by the MDL Court declining to approve this Agreement or any material part of it; (c) the MDL Court declining to enter the Order and Final Judgment substantially in the form annexed hereto as Exhibit C; (d) the date upon which the Order and Final Judgment is modified or reversed in any material respect by the U.S. Court of Appeals or the U.S. Supreme Court; or (e) the date upon which an Alternative Judgment is modified or reversed in any material respect by the U.S. Court of Appeals or the U.S. Supreme Court.

(b) By BMS only: In addition to the rights to terminate pursuant to subparagraph (a), BMS shall have the right to terminate depending on the number of insured lives represented by TPPs and/or potential members of the Other Classes that opt-

out of the Settlement. The number of opt-outs/insured lives that shall give rise to BMS's termination rights under this subparagraph shall be specified in Exhibit E to this Agreement, which shall be filed under seal.

11. All Class Claims Satisfied by Settlement. Each Class Member shall look solely to the Settlement Amount for settlement and satisfaction, as provided herein, of all Released Class Claims.

12. Class Releases. Upon the Effective Date of this Agreement in accordance with Paragraph 9 above, the BMS Group Releasees (as defined in Paragraph 2(n) above) shall be released and forever discharged by the Class Releasors from all Released Class Claims, as defined in Paragraph 2(v) above. All Class Releasors hereby covenant and agree that they shall not hereafter seek to establish liability against any BMS Group Releasee based, in whole or in part, on any of the Released Class Claims. In addition, each Class Releasor hereby expressly waives and releases, upon the Settlement Agreement's becoming effective, any and all provisions, rights and benefits conferred by § 1542 of the California Civil Code, which reads:

Section 1542. General Release; extent. A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor;

or by any law or any state or territory of the United States, or principle of common law, which is similar, comparable or equivalent to § 1542 of the California Civil Code. Each Class Releasor may hereafter discover facts other than or different from those which he, she or it knows or believes to be true with respect to the claims which are the subject matter of this Paragraph 12, but each Class Releasor hereby expressly waives and fully, finally and forever settles and releases, upon this Agreement's becoming effective, any known or unknown, suspected or unsuspected, contingent or non-contingent Released Class Claims with respect to the subject matter of this Paragraph 12 whether or not concealed or hidden, without regard to the subsequent

discovery or existence of such different or additional facts. Each Class Releasee also hereby expressly waives and fully, finally and forever settles and releases any and all Released Class Claims it may have against Defendants under § 17200, *et seq.*, of the California Business and Professions Code relating to the marketing, sale, purchase, cost, reimbursement amount or price of the BMS Subject Drugs during the Class Period, which claims are expressly incorporated into this Paragraph 12.

13. Reservation of Claims. Notwithstanding Paragraph 12 above, "Released Class Claims" shall not include any claim against any person or entity that is not a BMS Group Releasee, any claim arising out of this Agreement, any claim between any Class Member and any BMS Group Releasee that is unrelated to the allegations of the MDL Complaints and/or the marketing, sale, purchase, cost, reimbursement amount or price of BMS Subject Drugs, and any claim relating to the efficacy or safety of BMS Subject Drugs.

14. Preservation of Rights. The parties hereto agree that this Agreement, whether or not the Effective Date occurs, and any and all negotiations, documents and discussions associated with it shall be without prejudice to the rights of any party (other than those that have been compromised herein), and shall not be deemed or construed to be an admission or evidence of any violation of any statute or law, of any liability or wrongdoing by the BMS Group or of the truth of any of the claims or allegations contained in any complaint or any other pleading, whether in the MDL Class Actions or in any other action or proceeding. The parties expressly reserve all their rights if this Agreement does not become final and effective substantially in accordance with the terms of this Agreement.

15. Effect of Termination. If this Agreement is terminated pursuant to Paragraph 10 hereto, or the Effective Date is prevented from occurring for any reason, then (a) this Agreement shall be of no force or effect, except for incurred payment of notice costs as referenced herein;

(b) any release by Class Members or Named Plaintiffs pursuant hereto shall be of no force or effect; and (c) the parties shall be returned to their original positions as if this Agreement had not existed. The parties expressly reserve all of their rights if this Agreement is terminated or does not become final and effective.

16. No Admission. Nothing in this Agreement shall be construed as an admission in any action or proceeding of any kind whatsoever, civil, criminal or otherwise, before any court, administrative agency, regulatory body or any other body or authority present or future, by any BMS Group Releasee including, without limitation, that any BMS Group Releasee has engaged in any conduct or practice that violates any unfair and deceptive trade practices statute or other law. Neither this Agreement, nor any negotiations preceding it, nor any proceedings undertaken in accordance with the terms set forth herein, shall be construed as or deemed to be evidence of or an admission or concession by any BMS Group Releasee as to the validity of any claim that the Named Plaintiffs or Class Members have or could have asserted against them or as to any liability by them, which liability is hereby expressly denied and disclaimed by the BMS Group Releasees. Neither this Agreement, nor any of its provisions, nor any statement or document made or filed in connection herewith nor the fact of this Agreement, shall be filed, offered, received in evidence or otherwise used in any action or proceeding or any arbitration, except in connection with (a) settlement discussions in other MDL Class Actions; (b) the parties' application for approval or enforcement of this Agreement and all proceedings incident thereto, including requests for attorneys' fees, costs and disbursements and compensation to the Class; and (c) any other disputes arising from this Agreement.

17. Stay and Resumption of Proceedings. The parties agree, subject to the preliminary approval of the MDL Court of the Settlement, that all Class proceedings in the MDL Class Actions as relate to any BMS Group Releasee, other than proceedings relating to the

Settlement contemplated herein, shall be stayed. In the event that this Agreement is not approved by the MDL Court or the Settlement is terminated or the Effective Date is prevented from occurring, all such stayed proceedings in the MDL Class Actions as relate to any BMS Group Releasee will resume in a reasonable manner to be approved by the MDL Court.

18. Dismissal of Claims. The parties agree that upon the Effective Date of this Agreement in accordance with Paragraph 9 above, all Released Class Claims shall be released pursuant to the terms of this Agreement and shall be dismissed with prejudice pursuant to the Final Order of Approval. The parties further agree that upon the Effective Date, they will take all steps necessary under the Federal Rules of Appellate Procedure and the rules of the United States Court of Appeals for the First Circuit to dismiss with prejudice and without costs to any party BMS's pending appeal relating to the Massachusetts Classes.

19. Consent to Jurisdiction. The BMS Group and the Class Plaintiffs hereby irrevocably submit to the exclusive jurisdiction of the MDL Court only for the specific purpose of any suit, action, proceeding or dispute arising out of or relating to this Agreement.

20. Resolution of Disputes; Retention of Jurisdiction. Any disputes between or among the BMS Group and any Class Members concerning matters contained in this Agreement shall, if they cannot be resolved by negotiation and agreement, be submitted to the MDL Mediator, and then, if they cannot be resolved by the MDL Mediator, to the MDL Court. The MDL Court shall retain jurisdiction over the implementation and enforcement of this Agreement.

21. Enforcement of Agreement. Notwithstanding Paragraph 16 above, this Agreement may be pleaded as a full and complete defense to any action, suit or other proceeding that has been or may be instituted, prosecuted or attempted with respect to any of the Released Class Claims and may be filed, offered and received into evidence and otherwise used for such defense.

22. Binding Effect. This Agreement shall be binding upon, and inure to the benefit of, the successors and assigns of the parties hereto.

23. Authorization to Enter Agreement. The undersigned representative of BMS Group represents that s/he is fully authorized to enter into and to execute this Agreement on behalf of the BMS Group. Lead Class Counsel represent that they are fully authorized to conduct settlement negotiations with defense counsel on behalf of the Class Representatives and Class Members and to enter into, and to execute, this Agreement on behalf of the Class Representatives and Class Members, subject to Court approval pursuant to Fed. R. Civ. P. 23(e).

24. No Party Is the Drafter. None of the parties hereto shall be considered to be the drafter of this Agreement or any provision hereof for the purpose of any statute, case law or rule of construction that would or might cause any provision to be construed against the drafter hereof.

25. Choice of Law. All terms of this Agreement shall be governed by and interpreted according to the substantive laws of the State of Massachusetts without regard to its choice of law or conflict of laws principles.

26. Amendment or Waiver. This Agreement shall not be modified in any respect except by a writing executed by all the parties hereto, and the waiver of any rights conferred hereunder shall be effective only if made by written instrument of the waiving party. The waiver by any party of any breach of this Agreement shall not be deemed or construed as a waiver of any other breach, whether prior, subsequent or contemporaneous, of this Agreement.

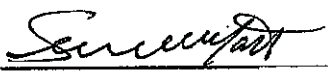
27. Execution in Counterparts. This Agreement may be executed in counterparts. Facsimile or PDF signatures shall be considered as valid signatures as of the date thereof, although the original signature pages shall thereafter be appended to this Agreement and filed with the MDL Court.

28. Integrated Agreement. This Agreement, including the exhibits hereto, contains an entire, complete, and integrated statement of each and every term and provision agreed to by and between the parties hereto. All prior settlement negotiations are merged herein.

29. Construction. This Agreement shall be construed and interpreted to effectuate the intent of the parties, which is to provide, through this Agreement, for a complete resolution of the Released Claims with respect to the BMS Group Releasees.

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

DATED: August 4, 2009

By   
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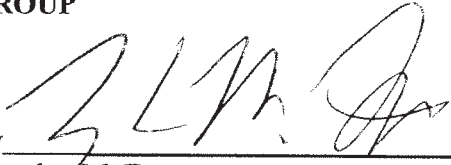
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