



IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

\_\_\_\_\_) )  
 IN RE VITAMINS ANTITRUST LITIGATION ) )  
 This filing relates to: ) )  
 LIVENGOOD FEEDS, INC., et al., ) )  
 Plaintiffs. ) )  
 - against - ) )  
 MERCK KGaA., et al., ) )  
 Defendants. ) )  
 \_\_\_\_\_)

Misc. No. 99-197 (TFH)  
MDL No. 1285

SETTLEMENT AGREEMENT

This Settlement Agreement (hereinafter, "Agreement") is made and entered into as of the 9<sup>th</sup> day of August 2002, by and between E. Merck, Merck KGaA and EM Industries, Inc. (jointly referred to as "Merck Defendants") and the Vitamin Products Class (as defined herein) in the above-captioned action (the "Class Action"):

WHEREAS, there is pending in the United States District Court for the District of Columbia a multidistrict consolidated proceeding comprised of actions, including the Class Action, brought on behalf of direct purchasers of various vitamins and vitamin products captioned as In re Vitamins Antitrust Litigation, Misc. No. 99-0197, M.D.L. No.1285 (hereinafter, the "MDL Proceedings"), in which plaintiffs have alleged violations of law, including the existence of unlawful conspiracies to fix, raise, maintain, or stabilize the prices of



certain Vitamin Products (as defined herein) in the United States and elsewhere in violation of Section 1 of the Sherman Antitrust Act, and other wrongful anti-competitive conduct in violation of various federal and state laws;

WHEREAS, the Merck Defendants have asserted a number of defenses to the claims by the Class Plaintiffs (as defined herein);

WHEREAS, the Class Plaintiffs and the Merck Defendants agree that neither this Agreement nor any statement made in the negotiation thereof shall be deemed or construed to be an admission by or evidence against the Merck Defendants, any Releasees (as defined herein), or any of their alleged co-conspirators or evidence of the truth of any of the Class Plaintiffs' allegations;

WHEREAS, arm's length settlement negotiations have taken place between Class Plaintiffs' Co-Lead Counsel and the Merck Defendants, and this Agreement, including its exhibits, which embodies all of the terms and conditions of the settlement between the Merck Defendants and the Vitamin Products Class, has been reached subject to the approval of the Court and Final Approval as provided herein and is intended to supercede any prior agreements between the parties;

WHEREAS, Class Plaintiffs' Co-Lead Counsel have concluded, after due investigation and after carefully considering the relevant circumstances, including, without limitation, the claims asserted in the Second Consolidated Amended Class Action Complaint filed in the Class Action, the legal and factual defenses thereto and the applicable law, that it



would be in the best interests of the Vitamin Products Class to enter into this Agreement in order to avoid the uncertainties of litigation and to assure that the benefits reflected herein are obtained for the Vitamin Products Class and, further, that Class Plaintiffs' Co-Lead Counsel consider the settlement set forth herein to be fair, reasonable and adequate and in the best interests of Class Plaintiffs and all members of the Vitamin Products Class:

WHEREAS, the Class Action will continue against those Defendants that are not Releasees (as defined herein); and

WHEREAS, the Merck Defendants, despite their belief that they and the Releasees (as defined herein) that have been separately named as defendants have good defenses to the claims asserted against them in the MDL Proceedings, including the Class Action, have nevertheless agreed to enter into this Agreement to avoid further expense, inconvenience, and the distraction of burdensome and protracted litigation, and thereby to put to rest this controversy with respect to the Vitamin Products Class;

NOW, THEREFORE, it is agreed by and between the undersigned on behalf of the Merck Defendants and the Vitamin Products Class, that the Class Action be settled, compromised and dismissed on the merits and with prejudice as to the Merck Defendants and all other Releasees and, except as hereafter provided, without costs against the Vitamin Products Class or the Merck Defendants, subject to the approval of the Court, on the following terms and conditions:

1. Class Definition. The Vitamins Products Class is the class certified in this



Court's Order of February 25, 2002, with the inclusion of B9, and defined as:

All persons or entities who directly purchased vitamins A, C, E, B1, B2, B3, B5, B6, B9, B12, H, beta carotene, astaxanthin, canthaxanthin and vitamins premixes for delivery in the United States from any of the Defendants or their co-conspirators from January 1, 1990 through September 30, 1998. Excluded from the class are all governmental entities, Defendants, their co-conspirators, and their respective subsidiaries and affiliates.

2. Definition. As used in this Agreement, the following terms shall be defined as indicated:

(a) "The Merck Defendants" means E. Merck, Merck KGaA and EM Industries, Inc.

(b) "Vitamin Products Class Member" means any person falling within the definition of the Vitamin Products Class defined in Paragraph 1 hereof that has not timely and validly excluded itself from the Vitamin Products Class in accordance with the procedure to be established by the Court.

(c) "Class Counsel" means both (i) those attorneys or law firms retained as counsel for any Class Plaintiff and (ii) those attorneys or law firms that receive any portion of the attorneys' fee awarded by the Court in connection with this Settlement.

(d) "Class Plaintiffs" means the named plaintiffs in the Class Action.

(e) "Court" means the United States District Court for the District of Columbia.



(f) "Defendant" means any person or entity named as a defendant in the Class Action.

(g) "Escrow Account" means the account established pursuant to Paragraph 7 herein.

(h) "Final Approval" means the first date upon which each of the following three conditions shall have been satisfied:

- a) The Settlement has been approved in all respects by the Court pursuant to Rule 23(e) of the Federal Rules of Civil Procedure;
- b) Entry has been made, as provided in Paragraph 6 hereof, of the final judgment of dismissal in substantially the form of Exhibit D hereto; and
- c) Either (i) the time to appeal, or to seek permission to appeal, the Court's approval of the Settlement as described in Paragraph 2(h)(a) hereof and entry of final judgment as described in Paragraph 2(h)(b) hereof has expired with no appeal having been taken or permission to appeal having been sought; or (ii) such approval and final judgment have been affirmed in their entirety by the court of last resort to which any appeal has been taken or petition for review has



been presented and such affirmance has become no longer  
subject to the possibility of further appeal or review.

(i) "Released Claims" shall have the meaning set forth in Paragraph 14  
hereof.

(j) "Releasees" means the Merck Defendants and their direct and indirect  
parents, subsidiaries, and affiliates, and their respective present and former officers,  
directors, employees, managers, agents, and legal representatives, and the predecessors,  
successors, heirs, executors, administrators and assigns of each of the foregoing. As used  
in this Paragraph, "affiliates" means entities controlling, controlled by or under common  
control with a Releasee.

(k) "Releasers" means each Vitamin Products Class Member on its own  
behalf and on behalf of its respective direct and indirect parents, subsidiaries and  
affiliates, their present and former officers, directors, employees, agents, and legal  
representatives, and the predecessors, successors, heirs, executors, administrators and  
assigns of each of the foregoing.

(l) "Settlement" means the settlement of the Released Claims set forth  
herein.

(m) "Settlement Fund" means the payment made by the Merck  
Defendants pursuant to Paragraph 7 herein, including any interest accrued on such  
payment after it is made by the Merck Defendants.



(n) "Settlement Hearing" shall have the meaning set forth in Paragraph 5 hereof.

(o) "United States" means the United States of America and its territories and possessions.

(p) "Vitamin Product(s)" means (i) the following vitamins and carotenoids: vitamin A, astaxanthin, vitamin B 1 (thiamin), vitamin B2 (riboflavin), vitamin B3 (niacin), vitamin B4 (choline chloride), vitamin B5 (calpan), vitamin B6, vitamin B9 (folic acid), vitamin B12 (cyanocobalamine pharma), betacarotene, vitamin C, canthaxanthin, vitamin E and vitamin H (biotin), as well as all blends and forms of the foregoing, and (ii) premix, which is defined to mean any product that contains one or more Vitamin Products in combination with other substances (such as other active ingredients or dilution agents) and is sold as a premixed formulation.

3. Reasonable Best Efforts to Effectuate This Settlement. Class Plaintiffs' Co-Lead Counsel and counsel for the Merck Defendants agree to undertake their reasonable best efforts, including all steps and efforts contemplated by this Agreement and any other steps and efforts that may be necessary or appropriate, by order of the Court or otherwise, to carry out the terms of this Agreement.

4. Motion for Preliminary Approval. As soon as is possible and in no event later than thirty (30) business days after execution of this Agreement, Class Plaintiffs' Co-Lead Counsel shall submit to the Court a motion for preliminary approval of the Settlement and for a



stay of all proceedings in the Class Action against the Releasees until the Court renders a final decision regarding the approval of the Settlement and, if it approves the Settlement, enters the final judgment. The motion shall include (a) the proposed form of order preliminarily approving this Agreement attached as Exhibit A hereto, (b) the proposed forms of mail notice and publication notice of the Settlement to members of the Vitamin Products Class attached as Exhibits B and C hereto and (c) the proposed form of order and final judgment attached as Exhibit D hereto. The parties hereto shall request that a decision be made promptly on the papers or that a hearing on Class Plaintiffs' motion for preliminary approval of the Settlement be held at the earliest date available to the Court.

5. Notice to Vitamin Products Class. In the event that the Court preliminarily approves the Settlement, Class Plaintiffs' Co-Lead Counsel shall, in accordance with Rule 23 of the Federal Rules of Civil Procedure and the Court's order, provide those members of the Vitamin Products Class who have been identified by reasonable means with notice by first class mail of the date of the hearing scheduled by the Court to consider the fairness, adequacy and reasonableness of the proposed settlement (the "Settlement Hearing"). Such notice shall provide that, if the Court approves this Settlement following the Settlement Hearing, Class Plaintiffs' Co-Lead Counsel shall propose a plan for distribution of the Settlement Fund among Vitamin Products Class Members. Class Plaintiffs' Co-Lead Counsel, subject to approval of the Court, shall provide Court-approved supplemental notice to Vitamin Products Class Members describing the plan of distribution, affording Vitamin Products Class Members an opportunity to be heard with respect to such plan of distribution, and providing Vitamin Products Class Members with a Court-approved Claim Form.



Class Plaintiffs shall take all necessary and appropriate steps to ensure that notice of the Settlement Hearing is provided in accordance with the order of the Court. Notice of the Settlement Hearing shall also be given by publication one day a week for two consecutive weeks in the national edition of THE WALL STREET JOURNAL and once in FEEDSTUFFS and the CHEMICAL MARKET REPORTER, as soon after preliminary approval by the Court of the Settlement as is reasonably practicable. Notice shall also be given by publication on the web sites of Class Plaintiffs' Co-Lead Counsel and subject to Court approval, on the Court's web site.

To the extent possible, Notice of this Settlement shall be consolidated with the Notice of Class Certification or Notice of any other Settlement.

In no event shall the Merck Defendants be responsible for giving notice of this Settlement to members of the Vitamin Products Class, or for any of the cost or expense associated with such notice, except as provided in Paragraph 19 below.

6. Motion for Entry of Final Judgment. Not less than 115 days following the entry of the Court's order granting preliminary approval, Class Plaintiffs' Co-Lead Counsel shall submit a motion for final approval of the Settlement by the Court, after notice to the members of the Vitamin Products Class of the Settlement Hearing, pursuant to Paragraph 5 above. If the Court approves the Settlement, the parties hereto shall jointly seek entry of an order and final judgment, in substantially the form attached hereto as Exhibit D:

(a) fully and finally approving the Settlement contemplated by this Agreement and its terms as being a fair, reasonable and adequate settlement within the meaning of Rule 23 of the Federal Rules of Civil Procedure and directing its



consummation pursuant to its terms and conditions;

(b) directing that the Class Action be dismissed with prejudice as to the Merck Defendants and any of the Releasees named as defendants in the Class Action and, except as provided for herein, without costs;

(c) discharging and releasing the Releasees from all Released Claims;

(d) reserving continuing and exclusive jurisdiction over the Settlement, including its administration;

(e) determining pursuant to Fed. R. Civ. P. 54(b) that there is no just reason for delay and directing that the judgment of dismissal of the Class Action as to the Merck Defendants and any of the Releasees named as defendants in the Class Action shall be final and appealable; and

(f) identifying those members of the Vitamin Products Class that have timely and validly excluded themselves from the Settlement.

7. Settlement Consideration. Subject to the provisions hereof, and in full, complete, and final settlement of the Class Action as provided herein, the Merck Defendants have deposited the sum of fifty million dollars (\$50,000,000) into an escrow account established by Class Plaintiffs' Co-Lead Counsel solely for the purposes of effectuating this Agreement (the "Escrow Account"). These funds shall not be co-mingled with any other funds. These funds may be invested at the direction of Class Plaintiffs' Co-Lead Counsel in United States Treasury bills, Treasury Notes, or other instruments insured or guaranteed by the full faith and credit of the



United States, and any interest earned thereon shall become part of the Settlement Fund. Upon Final Approval of the Agreement, the funds in the Escrow Account may be distributed to Vitamin Products Class Members and for payment of any attorneys' fees, costs, expenses or other disbursements, all subject to Court approval; provided, however, that prior to Final Approval, Class Plaintiffs' Co-Lead Counsel are authorized and directed to make disbursements of up to \$30,000 for the costs of distributing notice of the Agreement to the Vitamin Products Class, as authorized by the Court.

8. Qualified Settlement Fund. The Escrow Account is intended by the parties hereto to be treated as a "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. At the request of the Merck Defendants, a "relation back election" as described in Treas. Reg. § 1.468B-1(j) shall be made so as to enable the Escrow Account to be treated as a qualified settlement fund from the earliest date possible, and the parties hereto shall take all actions as may be necessary or appropriate to this end. The Claims Administrator previously approved by the Court in this litigation shall pay taxes or estimated taxes on any income earned on the funds in the Escrow Account and all related costs and expenses from the Escrow Account, after approval by the Court and whether or not Final Approval has occurred. In the event federal or state income tax liability is finally assessed against and paid by the Merck Defendants as a result of any income earned on the funds in the Escrow Account, the Merck Defendants shall be entitled to reimbursement of such payment from the funds in the Escrow Account, whether or not Final Approval has occurred. The Merck Defendants will use reasonable efforts to resist any



such assessment or payment.

9. Exclusion From the Vitamin Products Class. Class Plaintiffs' Co-Lead Counsel shall, within twenty (20) business days after the Court-ordered deadline for timely requests for exclusion from the Vitamin Products Class, cause to be provided to counsel for the Merck Defendants a list of those members of the Vitamin Products Class who have timely excluded themselves from the Vitamin Products Class. Class Plaintiffs' Co-lead Counsel also shall cause counsel for the Merck Defendants to be provided with a copy of each request for exclusion from the Vitamin Products Class if the Merck Defendants so request.

10. All Claims Satisfied by Settlement Fund. Each Vitamin Products Class Member shall look solely to the Settlement Fund for settlement and satisfaction, as provided herein, of all claims released by the Vitamin Products Class pursuant to Paragraph 14 hereof. Except as provided by order of the Court pursuant to this Agreement, no Vitamin Products Class Member shall have any interest in the Settlement Fund or any portion thereof.

11. Payment of Expenses.

The Merck Defendants shall not be liable for any of the costs or expenses of the litigation of the Class Action, including without limitation attorneys' fees; fees and expenses associated with the provision of notice to the members of the Vitamin Products Class; fees and expenses of expert witnesses and consultants; and costs and expenses associated with discovery, motion practice, hearings before the Court or the Special Master, appeals, trials or the negotiation of other settlements, except as provided in paragraph 19 below; provided, however, that the Merck Defendants shall pay a pro rata share of any fees or expenses of the Special Master



incurred to consider a dispute involving the Merck Defendants concerning this Agreement. After Final Approval, all such costs and expenses as are approved by the Court may be paid out of the Settlement Fund. Reimbursement of Class Plaintiffs' Counsel shall be limited to the amount of any costs and expenses properly allocated to the Settlement Fund, on a proportional basis, taking into account such other settlement funds obtained from other Defendants then available to Class Plaintiffs.

12. Distribution of Settlement Funds Conditioned Upon Final Approval. After Final Approval and subject to prior Court order, disbursements may be made from the Settlement Fund to pay, on an interim basis, any reasonable costs and expenses as provided in Paragraph 11 above. Such interim disbursements may be made prior to the time when the balance of the Settlement Fund, less all taxes, costs and expenses payable therefrom, is distributed to the members of the Vitamin Products Class pursuant to a plan of distribution approved by the Court.

13. Court Approval of All Distributions. Court approval shall be required prior to any disbursement or any distribution from the Settlement Fund. The parties hereto agree that Final Approval and the release of the Merck Defendants as provided for in this Agreement may occur prior to, and shall not depend upon, Court approval of any disbursement or distribution from the Settlement Fund.

14. Releases. In addition to the effect of any final judgment entered in accordance with this Agreement, in the event that the Court gives Final Approval to this Agreement, each Releasee shall be released and forever discharged from all manner of claims, demands, actions, suits, causes of action, whether class, individual or otherwise in nature, damages whenever incurred, and liabilities of any nature whatsoever, including without limitation costs, expenses,



penalties and attorneys' fees, known or unknown, suspected or unsuspected, asserted or unasserted, in law or in equity, which Releasors or any of them, whether directly, representatively, derivatively, or in any other capacity, ever had, now have or hereafter can, shall or may have, relating in any way to any conduct prior to the date of this Agreement, concerning the purchase, sale, or pricing of Vitamin Products and any and all other vitamins or relating to any conduct alleged in the Class Action including, without limitation, any such claims that have been asserted or could have been asserted in the Class Action against the Releasees or any of them, except that this release shall not affect the rights of the Releasors or any of them (i) to seek damages or other relief from any person with respect to any Vitamin Products or vitamins purchased directly from the manufacturer (or any subsidiary or affiliate thereof) outside the United States for delivery to a destination outside the United States or (ii) to participate in or benefit from any relief or other recovery as part of a settlement or judgment on behalf of a class of indirect purchasers of Vitamin Products (such reservation by the Releasors of any right to participate in any relief or other recovery as part of a settlement or judgment on behalf of a class of indirect purchasers of Vitamin Products shall under no circumstances be construed to constrain the Releasees from asserting any defense or opposing the certification of any putative class of indirect purchasers of Vitamin Products ). The claims covered by the foregoing release are referred to herein collectively as the "Released Claims".

15. Waiver of Rights. In addition to the provisions of Paragraph 14, each Vitamin Products Class Member hereby expressly agrees that, upon Final Approval, it waives and releases with respect to the Released Claims, to the fullest extent permitted by law, any and all provisions, rights and benefits conferred by (a) § 1542 of the California Civil Code, which



provides:

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.

and (b) any similar state, federal, or other law, rule or regulation or principle of common law.

Each Releasor may hereafter discover facts other than or different from those that Releasor knows or believes to be true with respect to the subject matter of the Released Claims, but each Releasor hereby expressly agrees that, upon Final Approval, it shall have waived and fully, finally and forever settled and released any known or unknown, suspected or unsuspected, asserted or unasserted, contingent or non-contingent claim with respect to the Released Claims, whether or not concealed or hidden, without regard to the subsequent discovery or existence of such other or different facts.

16. Reservation of Claims. The members of the Vitamin Products Class intend by this Agreement to settle with and release only the Releasees that such Vitamin Products Class Members have released pursuant to Paragraphs 14 and 15 hereof, and the parties do not intend this Agreement, any part hereof or any other aspect of the proposed settlement or release, to release or otherwise affect in any way any rights any Vitamin Products Class Member has or may have against any other party or entity whatsoever other than the Releasees released by such Vitamin Products Class Member pursuant to Paragraphs 14 and 15 hereof. More particularly, the fact or terms of this Settlement with the Merck Defendants and the releases contained herein shall not be construed to release or limit in any manner whatsoever the joint or several liability or damage responsibility of any Defendant or alleged co-conspirator other than the Releasees for the



alleged conspiracies, sales or other acts alleged in these actions, including, but not limited to, any alleged damage or responsibility for any of the acts of the Releases. In addition, the releases set forth in Paragraphs 14 and 15 hereof shall not release any product liability or breach of contract claims unrelated to the subject matter of the Class Action.

17. Cooperation. The Merck Defendants will cooperate with the Vitamin Products Class in the prosecution of its claims in the Class Action. Nothing herein shall require the Merck Defendants to waive or breach any attorney-client or other privilege or protection, including without limitation attorney work-product.

18. Discovery. Neither counsel for the Merck Defendants nor Class Counsel shall seek discovery from the class or the Merck Defendants, respectively, except as mutually agreed-upon or until 30 days after this Agreement is terminated pursuant to Paragraph 19 below.

19. Effect of Disapproval. If the Court does not approve this Agreement in its entirety, or if such approval is modified or set aside on appeal, or if the Court does not enter the final judgment provided for in Paragraph 6 hereof, or if the Court enters the final judgment and appellate review is sought and, on such review, such final judgment is not affirmed in its entirety, then this Agreement (excepting Paragraphs 11, 18, 19, and 25 hereof) shall be canceled and terminated and shall become null and void. If this Agreement is canceled or terminated as set forth above, then the Settlement Fund (including any and all income earned thereon, net of federal taxes paid or due to be paid on the Fund by the Escrow Agent, and net of actual expenses of notice to the Vitamin Products Class (but in no event to exceed \$30,000)) shall be returned to the Merck Defendants. The Escrow Agent shall disperse the Settlement Fund to the Merck Defendants in accordance with this paragraph within ten (10) business days after receipt of either



(i) written notice signed by counsel for the Merck Defendants and Plaintiffs' Co-Lead Counsel stating that the Agreement has been canceled or terminated or (ii) an order of the Court so directing. The parties expressly reserve all of their rights if the Settlement does not become final in accordance with the terms of this Agreement.

20. Consent to Jurisdiction: The Merck Defendants and each Vitamin Products Class Member hereby irrevocably submit to the exclusive jurisdiction of the Court only for the specific purpose of any suit, action, proceeding or dispute arising out of or relating to this agreement or the applicability of this Agreement and its exhibits. Without limiting the generality of the foregoing, it is hereby agreed that any dispute concerning the provisions of Paragraphs 14 or 15 hereof, including but not limited to any suit, action or proceeding in which the provisions of Paragraphs 14 or 15 hereof are asserted as a defense in whole or in part to any claim or cause of action or otherwise raised as an objection, constitutes a suit, action or proceeding arising out of or relating to this Agreement and its exhibits. In the event that the provisions of Paragraphs 14 or 15 hereof are asserted by any Releasee as a defense in whole or in part to any claim or cause of action or otherwise raised as an objection in any suit, action or proceeding, it is hereby agreed that such Releasee shall be entitled to a stay of that suit, action or proceeding until the Court has entered a final judgment no longer subject to any appeal or review determining any issues relating to the defense or objection based on such provisions. Solely for purposes of such suit, action or proceeding, to the fullest extent that they may effectively do so under applicable law, the Vitamin Products Class Members and the Merck Defendants irrevocably waive and agree not to assert, by way of motion, as a defense or otherwise, any claim or objection that they are not subject to the jurisdiction of the Court or that the Court is in any way an improper venue



or an inconvenient forum. Nothing herein shall be construed as a submission to jurisdiction for any purpose other than enforcement of this Agreement.

21. Resolution of Disputes: Retention of Jurisdiction. Any disputes between or among the Merck Defendants and any Vitamin Products Class Member or Members concerning matters contained in this Agreement shall, if they cannot be resolved by negotiation and agreement, be submitted to the Court. The Court shall retain jurisdiction over the implementation and enforcement of this Agreement.

22. Binding Effect. This Agreement shall be binding upon, and inure to the benefit of, the successors and assigns of the parties hereto. Without limiting the generality of the foregoing, each and every covenant and agreement herein by Class Plaintiffs and their counsel shall be binding upon all Vitamin Products Class Members.

23. Authorization to Enter Settlement Agreement. The undersigned representatives of the Merck Defendants represent that they are fully authorized to enter into and to execute this Agreement on behalf of the Merck Defendants. Class Plaintiffs' Co-Lead Counsel represent that they are fully authorized to conduct settlement negotiations with defense counsel on behalf of Class Plaintiffs and Class Counsel and to enter into, and to execute, this Agreement on behalf of the Vitamin Products Class and Class Counsel, subject to Court approval pursuant to Fed. R. Civ. P. 23(e).

24. Notices. All notices under this Agreement shall be in writing. Each such notice shall be given either by (a) hand delivery; (b) registered or certified mail, return receipt requested, postage pre-paid; (c) Federal Express or similar overnight courier; or (d) facsimile and



first class mail, postage pre-paid and, in the case of either (a), (b), (c) or (d) shall be addressed, if directed to any Class Plaintiff or Vitamin Products Class Member, to Class Plaintiffs' Co-Lead Counsel at their addresses set forth on the signature pages hereof, and if directed to the Merck Defendants, to their representatives at the addresses set forth on the signature pages hereof or such other address as Class Plaintiffs Co-Lead Counsel or the Merck Defendants may designate, from time to time, by giving notice to all parties hereto in the manner described in this Paragraph.

25. No Admission and Confidentiality. Whether or not this Agreement becomes final or is terminated pursuant to Paragraph 19 hereof, the parties expressly agree that this Agreement and its contents, including its exhibits, and any and all statements, negotiations, documents and discussions associated with it, 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 or of the truth of any of the claims or allegations contained in the complaint in the Class Action or any other pleading, and evidence thereof shall not be discoverable or used, directly or indirectly, in any way, whether in the Class Action or in any other action or proceeding. Further, any confidential information imparted to Class Counsel in connection with this Agreement shall be kept confidential and shall not be disclosed to any persons other than Class Counsel. Should Class Counsel determine that disclosure to other parties or publicly of such confidential information is required by Court order, Class Counsel shall provide reasonable notice to counsel for the Merck Defendants and shall join with the Merck Defendants, at the Merck Defendants' option, in seeking a superceding Court order preventing such disclosure.

26. No Conflict Intended. Any inconsistency between this Agreement and the



exhibits attached hereto shall be resolved in favor of this Agreement. The headings used in this Agreement are intended for the convenience of the reader only and shall not affect the meaning or interpretation of this Agreement.

27. 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 interpretation or construction that would or might cause any provision to be construed against the drafter hereof.

28. Choice of Law. All terms of this Agreement and the exhibits hereto shall be governed by and interpreted according to the substantive laws of the District of Columbia without regard to its choice of law or conflict of laws principles.

29. Amendment; 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.

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

31. Integrated Agreement. This Agreement and a side letter dated as of the date of this Agreement contain an entire, complete, and integrated statement of each and every term and provision agreed to by and between the parties hereto.



32. 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 Releasees.



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

E. Merck  
Merck KGaA  
EM Industries, Inc.

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

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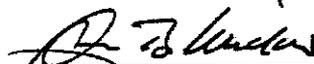
By: \_\_\_\_\_

Professor Dr. Christian Flaemig  
on behalf of E. Merck and Merck KGaA



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Merck KGaA  
EM Industries, Inc.

By: 

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Counsel for  
E. Merck  
Merck KGaA  
EM Industries, Inc.

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

Professor Dr. Christian Flaemig  
on behalf of E. Merck and Merck KGaA



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Merck KGaA  
EM Industries, Inc.

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

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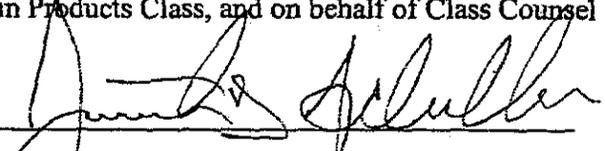
By: \_\_\_\_\_ *Flaemig*

Professor Dr. Christian Flaemig  
on behalf of E. Merck and Merck KGaA

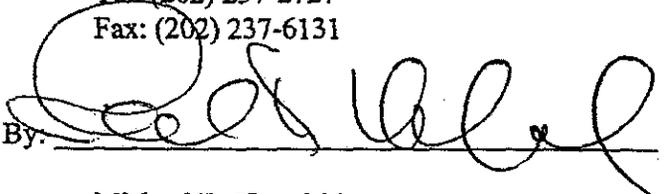


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on behalf of Class Plaintiffs individually, on behalf of the  
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