

UPSHER-SMITH LABORATORIES, INC.
SETTLEMENT AGREEMENT AND RELEASE

I. PARTIES

This Settlement Agreement and Release (“Agreement”) is entered into as of the “Effective Date”, defined in paragraph 23 below, by and among the STATE of TEXAS (“STATE”), and Upsher-Smith Laboratories, Inc. (“UPSHER”). The STATE and UPSHER are each individually referred to as a “Party” and collectively referred to as the “Parties” in this Agreement.

II. PREAMBLE

As a preamble to this Agreement, the Parties agree to the following:

A. Upsher-Smith Laboratories, Inc. develops, manufactures, markets, and sells pharmaceutical products in the United States. Unless otherwise noted, Upsher-Smith Laboratories, Inc. and all of its affiliates and subsidiaries, including but not limited to USL Pharma, Inc. and Upsher-Smith International Limited, are collectively referred to herein as “UPSHER.”

B. The pharmaceutical products UPSHER manufactured, marketed, distributed, and/or sold using the Labeler Codes **00245** and **00832** are referred to as the “Covered Drugs.”

C. The STATE contends that between September 1, 1995 and the Effective Date, UPSHER knowingly set, reported, and/or maintained, or otherwise caused to be set, reported, and/or maintained false, fraudulent, and/or inflated prices for certain of the Covered Drugs, including the prices reported directly to the Texas Vendor Drug Program (“VDP”). The STATE further contends that UPSHER submitted or caused to be submitted, false claims to the VDP for

certain of the Covered Drugs based on those false and/or inflated reported prices. The STATE further contends that while UPSHER submitted false prices for certain of the Covered Drugs to VDP, UPSHER withheld or failed to submit accurate acquisition costs for certain of the Covered Drugs to VDP. The STATE contends that UPSHER has committed unlawful acts, as defined by Tex. Hum. Res. Code Ann. § 36.002, in connection with the submission or withholding of pricing information to the VDP, including for the purpose of including certain of UPSHER's Covered Drugs on the Texas Drug Code Index ("TDCI"). The conduct described in this paragraph is hereinafter referred to as the "Covered Conduct";

D. This Agreement is the result of a compromise of disputed issues of law and fact and is neither an admission of facts or liability by UPSHER, nor a concession by the STATE that the STATE's claims are not well-founded.

E. UPSHER has a number of defenses to the STATE's claims, and has denied and continues to deny the STATE's allegations or any wrongdoing as may be alleged by the STATE.

F. As a result of a mutual desire to settle their disputes, and to avoid the delay, expense, inconvenience and uncertainty of protracted litigation of the STATE's claims, the Parties have reached a full and final settlement of the STATE's claim, as set forth in this Agreement;

G. The Parties understand acknowledge and agree that (i) they have each performed an independent investigation of the fact and law surrounding this matter, and (ii) they each may hereafter discover facts in addition to, or different from, those that they now know or believe to be true. Nevertheless it is the Parties' intention to resolve this matter pursuant to the terms of this Agreement, which shall remain in full force and effect notwithstanding the discovery of

additional facts or law, or changes in the law, and the Settlement Agreement shall not be subject to rescission or modification by reason of any such discovery. and

H. The STATE has concluded that this settlement is in the public interest.

III. AGREEMENT

NOW, THEREFORE, in reliance on the representations contained herein and in consideration of the mutual promises, covenants, and obligations set forth below in this Agreement, and for good and valuable consideration as stated herein, the Parties agree as follows:

1. The foregoing Preamble is incorporated herein.
2. Within four (4) business days of the Effective Date, UPSHER agrees to pay the STATE the aggregate sum of **SEVEN MILLION NINE HUNDRED THOUSAND DOLLARS (\$7,900,000)** (the "Final Settlement Payment"), and in accordance with the wire instructions to be provided by the STATE. The Parties further agree that all amounts payable to the State, including attorneys' fees, or to the United States, shall be paid out of the Final Settlement Payment, and that UPSHER will have no liability or obligation to make any other payment relating to the Covered Conduct to the STATE or any other entity in connection with this Agreement. In no way does entering into this Agreement entitle a Party to direct or influence the treatment or allocation of the Settlement Amount by the other Party. UPSHER expressly acknowledges that it is not entitled to direct or influence the manner in which the Settlement Amounts is allocated by the STATE. The STATE expressly acknowledges that it is not entitled to direct or influence the manner in

which the Settlement Amount is treated by UPSHER for any purposes, including but not limited to federal or state taxes. Texas acknowledges that UPSHER contends that the Settlement Amount is compensatory and that no portion of the Settlement Amount consists of fines, penalties, other punitive damages. Each Party will allocate the Settlement Amount in accordance with state and federal law. The STATE agrees that the money paid by UPSHER will be used, in part, to cover any and all claims the United State has as it pertains to the Covered Conduct

3. Subject to the exceptions in Paragraph 6 below, in consideration of the obligations of UPSHER set forth in this Agreement, and conditioned upon UPSHER's payment in full of the Final Settlement Payment, the STATE (on behalf of (i) itself, its past and present officers, agents, entities, divisions, agencies and departments and (ii) any insurers and reinsurers of those identified in sub-clause (i) (collectively the "STATE")), fully and finally, and to the greatest extent allowed by law, releases UPSHER and (i) its past and present holding companies, predecessors, successors, parents, affiliates, subsidiaries, entities and divisions; (ii) all past and present officers, directors, members, partners and/or limited partners, principals, assigns, representatives, employees, agents, servants, shareholders and attorneys of UPSHER and those identified in sub-clause (i); (iii) all heirs, executors, administrators, spouses, agents and assigns of those identified in sub-clauses (i) and (ii); and (iv) any insurers and reinsurers of UPSHER and those identified in sub-clauses (i) and (ii) (collectively, the "UPSHER Released Parties") from any civil or administrative claim, action, suit or proceeding (including attorneys' fees, penalties, costs, and expenses of every kind and however denominated) the STATE has or may have or could assert in the future under any source of law against the UPSHER Released Parties related to the Covered Conduct. In addition, the Parties agree that the payment of the Final

Settlement Payment fully discharges the UPSHER Released Parties from any civil or administrative obligation to the STATE to pay restitution, damages, penalties or fines to the STATE for the Covered Conduct. In addition, the Office of the Attorney General of Texas agrees that it shall not initiate or prosecute litigation or any other civil or administrative action, including by way of example and not limitation, civil investigative demands, against the UPSHER Released Parties, related to the Covered Conduct, on behalf of itself or the United States.

4. In consideration of the obligations of UPSHER set forth in this Agreement, conditioned upon UPSHER's payment in full of the Final Settlement Payment, the STATE agrees to release and refrain from instituting, directing or maintaining any action seeking exclusion from the VDP or any other Texas Medicaid program against the UPSHER Released Parties for the Covered Conduct. The STATE further agrees that it will not urge or encourage the United States to institute any exclusion or suspension action against the UPSHER Released Parties based on the Covered Conduct.

5. UPSHER fully and finally releases the STATE, its agencies, employees, servants, attorneys and agents from any claims based on events occurring prior to the date of this Agreement (including attorney's fees, costs, and expenses of every kind and however denominated) which UPSHER has asserted, could have asserted, or may assert in the future against the STATE, its agencies, employees, servants, attorneys and agents, related to the Covered Conduct and the STATE's investigation thereof.

6. Notwithstanding any other terms of this Agreement, including the release provisions in Paragraphs 3, 4, and 5 above, specifically reserved and excluded from the definition of Covered Conduct, and thus the scope and terms of this Agreement, and from the

scope and terms of the releases, as to any entity or person (including UPSHER, and the STATE), are the following:

- (a) Any claims based upon such obligations created by this Agreement;
- (b) Any express or implied product or service warranty claims or other claims for defective or deficient products or services, including quality of goods and services, provided by UPSHER;
- (c) The subrogation rights to claims for personal injury or property damage arising from usage by a participant in the Medicaid program of any of the Covered Drugs;
- (d) Any claims based on a failure to deliver products or services due;
- (e) Any claims arising from UPSHER's obligations to report and/or to pay rebates to the STATE under any law or contract, including, but not limited to, the Omnibus Budget Reconciliation Act of 1990 ("OBRA 90");
- (f) Any civil, criminal, or administrative liability arising under Title 26, U.S. Code (Internal Revenue Code) or any state tax or revenue law;
- (g) Any criminal liability;
- (h) Any claims the STATE may have against UPSHER related to off-label marketing conduct for the Covered Drugs; and
- (i) Any liability to the State for conduct other than the Covered Conduct.

7. The STATE hereby agrees that this Agreement, and any and all negotiations, documents and discussions associated with this Agreement shall be without prejudice to the rights of any Party, shall not be deemed or construed to be an admission or evidence of any violation of any statute or law, of any liability or wrongdoing by the UPSHER Released Parties or of the truth or the infirmity of any of the claims or allegations of the STATE, and evidence

thereof shall not be discoverable or used directly or indirectly by the STATE in any way (except that the provisions of this Agreement may be used by the Parties to enforce its terms), whether in Texas or in any other forum. The STATE agrees it will not urge or seek to admit this Agreement as evidence of any fault or liability of the UPSHER Released Parties in any investigation, administrative claim, action, suit or proceeding, or federal or state court or arbitration proceeding unless ordered to do so by a state court, federal court, or arbitration panel.

8. The STATE represents to UPSHER, subject only to the rights possessed by the United States, that no interest in any claim herein released has been assigned by them to any third party.

9. Nothing in this Agreement shall be construed to create a waiver of the STATE's Sovereign Immunity.

10. Any Party shall be entitled to enforce the terms of this Agreement in the District Courts of Travis County, Texas, which shall have exclusive jurisdiction and venue over any such action.

11. This Agreement, including all exhibits, constitutes the complete agreement between the Parties with regard to the settlement and dismissal of the Covered Conduct as defined herein. This Agreement may not be amended except by a writing signed by all Parties.

12. Each Party will bear its own legal and other costs incurred in connection with this matter, including the preparation and performance of this Agreement.

13. This Agreement shall be governed by the laws of the State of Texas.

14. This Agreement shall be construed and interpreted to effectuate the Parties' intent, which is to resolve completely the STATE's claims and allegations in connection with the Covered Conduct with respect to UPSHER.

15. None of the Parties to this Agreement shall be considered the drafter of this Agreement or of any included provision 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.

16. The Parties each represent that this Agreement is freely and voluntarily entered into without any degree of duress whatsoever.

17. Unless otherwise stated in writing subsequent to the Effective Date of this Agreement, all notifications and communications made pursuant to this Agreement shall be submitted to the entities listed below:

(a) STATE for all purposes:

OFFICE OF THE ATTORNEY GENERAL
Civil Medicaid Fraud Division
P O Box 12548
Austin, Texas 78711-2548

(b) UPSHER, for all purposes:

James P. Ellison
Hyman, Phelps & McNamara, P.C.
700 13th St., NW, Suite 1200
Washington, DC

18. The Parties have read the foregoing Agreement and accept and agree to the provisions contained herein and hereby have caused this Agreement to be signed as of the day and date adjacent to their respective signatures. The individual signing this Agreement on behalf of UPSHER represents and warrants that he is authorized by UPSHER to execute this

Agreement. The undersigned STATE signatories represent that they are signing this Agreement in their official capacities and that they are authorized to execute this Agreement and to compromise the claims of the STATE. The Texas Health and Human Services Commission ("HHSC") Executive Commissioner concurs with the aspects of the agreement that are within his authority and that he is authorized to sign this Agreement on behalf of HHSC.

19. The Parties represent and acknowledge that in entering into this Agreement they are not relying on any promises or representations other than those expressly set forth in this Agreement and its exhibits.

20. The waiver of any rights conferred by this Agreement shall be effective only if made in writing by the waiving Party. The waiver of any Party of any breach of this Agreement shall not be deemed or construed as a waiver of any other breach, whether prior to, subsequent to, or contemporaneously with this Agreement.

21. This Agreement may be executed in counterparts, each of which shall constitute an original and all of which shall constitute one and the same Agreement.

22. Each Party agrees to perform such further acts and to execute and to deliver such further documents as may reasonably be necessary to carry out this Agreement.

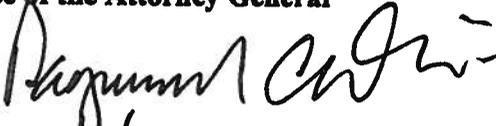
23. The Effective Date of this Agreement shall be the date of signature of the last signatory to this Agreement.

EXECUTION OF RELEASE

**STATE of TEXAS
Office of the Attorney General**

Upsher-Smith Laboratories, Inc,

By:



By:

Date:

2/8/13

Date:

Raymond C. Winter
Chief, Civil Medicaid Fraud Division
Assistant Attorney General
Office of the Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548

James P. Ellison
Hyman, Phelps & McNamara, P.C.
700 13th St., NW, Suite 1200
Washington, DC

Texas Health & Human Services Commission

By:



Date:

1.29.13

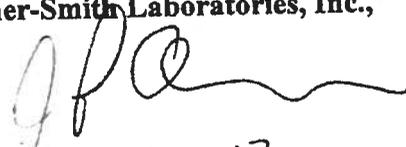
Kyle L. Janek, M.D.
Executive Commissioner
Texas Health & Human Services Commission
Brown-Heatley Building
4900 N.Lamar Blvd.
Austin, Texas 78751-2316

EXECUTION OF RELEASE

**STATE of TEXAS
Office of the Attorney General**

Upsher-Smith Laboratories, Inc.,

By:

By: 

Date:

Date: 1-24-2013

Raymond C. Winter
Chief, Civil Medicaid Fraud Division
Assistant Attorney General
Office of the Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548

James P. Ellison
Hyman, Phelps & McNamara, P.C.
700 13th St., NW, Suite 1200
Washington, DC

Texas Health & Human Services Commission

By:

Date:

Kyle L. Janek, M.D.
Executive Commissioner
Texas Health & Human Services Commission
Brown-Heatley Building
4900 N.Lamar Blvd.
Austin, Texas 78751-2316