JOSHUA B. EATON (CSBN 196887)
Attorney for the United States

J. DOUGLAS WILSON (DCBN 412811)
Acting Chief, Criminal Division

JONATHAN SCHMIDT (CSBN 230646)
Assistant United States Attorneys

450 Golden Gate Avenue, Box 36055
San Francisco, California 94102
Telephone: 415 436 6776
E-Mail: jonathan.schmidt@usdoj.gov

MICHAEL S. BLUME
Director

JILL FURMAN
Assistant Director

CAROL WALLACK
Trial Attorney

Consumer Protection Branch
Civil Division
U.S. Department of Justice

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

SCIOS, INC.,

Defendant.

No. CR 11-0461 CRB

VIOLATION: 21 U.S.C. §§ 331(a) and 333(a)(1) - Causing the introduction of a misbranded drug into interstate commerce.

SAN FRANCISCO VENUE

**PLEA AGREEMENT**

Scios, Inc. (hereinafter "Scios"), by its undersigned officer, and the United States of America, by and through the United States Attorney's Office for the Northern District of California and the Department of Justice's Consumer Protection Branch (hereinafter the "government"), by the undersigned counsel, enter into this written plea agreement (the "Agreement") pursuant to Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure:

1. As set forth below, Scios agrees to enter a guilty plea to the sole count of an Information charging it with causing the introduction and delivery for introduction into interstate commerce of the drug Natrecor®, which drug was misbranded within the meaning of Title 21, United States Code, Section 352(f)(l), in that its labeling lacked adequate directions for use, in violation of Title 21, United States Code, Sections 331(a) and 333(a)(1). Scios agrees that the elements of this offense are as follows:

a. For purposes of the Federal Food, Drug, and Cosmetic Act ("FDCA"), Title 21, United States Code, Section 301 *et seq*., Nesiritide, under the brand name Natrecor®, was a "drug," as defined at 21 U.S.C. § 321(g);

b. Natrecor® was misbranded within the meaning of 21 U.S.C. § 352(f)(1), in that the drug's labeling lacked "adequate directions for use," pursuant to 21 C.F.R. §§ 201.5 and 201.128.

c. Scios introduced, and caused the introduction of, the misbranded drug Natrecor® into interstate commerce, from the state of Kansas to various places throughout the United States.

2. Scios agrees that by entering this guilty plea it hereby waives all objections to the form of the charging documents; admits that it is in fact guilty of the offense to which it is pleading guilty as set forth in the Information, which offense was committed by its agents or employees while acting within the scope of their agency and employment and for Scios' benefit; and that the Joint Factual Statement set forth as Attachment A to this Agreement is a true and accurate statement of Scios' criminal conduct and that it provides a sufficient basis for its guilty

plea.

3. Scios agrees to appear at the plea and/or sentencing hearings through a duly authorized corporate representative.

4. Scios agrees that the statutory penalties applicable to a corporate defendant for the offense to which it is pleading guilty are as follows:

a. Maximum fine: A maximum fine of either two hundred thousand dollars ($200,000.00), or twice the gross gain or loss resulting from the unlawful conduct pursuant to 18 U.S.C. § 3571(c) and (d);

b. Maximum probation: a term of probation of five (5) years, pursuant to 18 U.S.C. § 3561(c)(2);

c. Special assessment: a special assessment of one hundred twenty-five dollars ($125.00), pursuant to 18 U.S.C. § 3013(a)(1)(B)(iii); and

d. Restitution: an amount for restitution to victims of the offense.

5. Waiver of Rights: Scios knowingly and voluntarily waives the following rights through its guilty plea: (a) the right to plead not guilty; (b) the right to a speedy and public trial before a jury; (c) the right to effective assistance of counsel at trial; (d) the right to be presumed innocent until guilt has been established at trial beyond a reasonable doubt; (e) the right to confront and cross-examine government witnesses at trial; (f) the right to compel or subpoena witnesses to appear on Scios' behalf at trial; (g) the right to move to suppress evidence or raise any other Fourth or Fifth Amendment claims; (h) the right to any discovery from the government and to pursue any affirmative defenses and present evidence; and (I) the right to appeal a finding of guilt. Scios also agrees to waive venue, if necessary, based on the charge filed in this case.

6. Sentencing Agreement: Pursuant to Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure, the parties agree that a total monetary assessment of eighty-five million one hundred and twenty-five dollars ($85,000,125.00) is both a reasonable and appropriate disposition of this case.

a. Fine: Scios shall pay to the United States a total criminal fine of eighty-five million dollars ($85,000,000.00). The parties agree that the agreed-upon fine of $85 million is authorized by 18 U.S.C. § 3571(d). Scios shall make full payment of this criminal fine within seven (7) business days from the date of sentencing.

b. Mandatory Special Assessment: Pursuant to 18 U.S.C. § 3013, Scios shall pay a special assessment of one hundred twenty-five dollars ($125.00) at the time of sentencing.

c. Restitution: The parties agree that there should be no restitution ordered in this case to federal program payors because of the pending civil action *United States ex rel. Strom v. Scios, Inc. et al.*, CV 05-3004 CRB (NDCA). The parties further agree that the complication and prolongation of the sentencing process resulting from the fashioning of an order of restitution outweighs the need to provide restitution to any other victims pursuant to U.S.S.G. § 8B1.1(b)(2) and 18 U.S.C. § 3663(a)(1)(B)(ii).

d. Probation: Scios will be placed on organizational probation for a period of three (3) years from the date of sentencing pursuant to 18 U.S.C. § 3561(c)(1) and U.S.S.G. §§ 8D1.1 and 8D1.2. During this term of probation, Scios agrees that it shall not commit or attempt to commit any crimes and, specifically, that it shall comply with all applicable FDCA laws.

7. No further violations: Scios agrees not to commit or attempt to commit any crimes before sentence is imposed; not to intentionally provide false information or testimony to the Court, the Probation Office, Pretrial Services, or the government; and agrees to comply with any of the other promises it has made in this Agreement. Scios agrees that, if it fails to comply with any promises made in this Agreement, then the government will be released from all of its promises, but Scios will not be released from its guilty plea.

8. Probation Office: Scios understands that the sentencing disposition agreed upon by the parties is not binding upon the United States Probation Office. Scios agrees that it will provide all information requested by the United States Probation Office.

9. Waiver: If Scios is prosecuted after failing to comply with any promises made in this Agreement, then (a) Scios agrees that any statements made to any law enforcement or other government agency or in Court may be used in any way; (b) Scios waives any and all claims under the United States Constitution, Rule 11(f) of the Federal Rules of Criminal Procedure, Rule 410 of the Federal Rules of Evidence, or any other federal statute or rule, to suppress or restrict the use of any statements, or any leads derived from those statements; and (c) Scios waives any defense to any prosecution that it is barred by a statute of limitations, if the limitations period has run between the date Scios signed the Plea Agreement and the date Scios is charged.

10. Non-Prosecution of Additional Offenses: As part of this Agreement and solely because of the promises made by Scios in this Agreement, the U.S. Attorney's Office for the Northern District of California and the Consumer Protection Branch of the U.S. Department of Justice agree to forgo additional criminal prosecution against Scios or its parent company, Johnson & Johnson, Inc., for any other related FDCA offenses or related offenses related to the marketing and sale of Natrecor® committed before the date of this Agreement and which are known to the government at the time of the signing of this Agreement.

Scios understands and agrees that this Agreement does not bind the Tax Division of the U.S. Department of Justice or the Internal Revenue Service of the U.S. Department of the Treasury. Scios further understands that this Agreement does not bind any state or local prosecutive authorities. Furthermore, this Plea Agreement does not provide or promise any waiver of any civil or administrative actions, sanctions, or penalties that may apply, including but not limited to any False Claims Act liability or any sanctions or penalties that may be undertaken by the Department of Health and Human Services.

11. Rejection of Plea Agreement by the Court: Scios' plea will be tendered pursuant to Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure. If a sentencing judge rejects this Plea Agreement, then it shall be null and void at the option of either the government or Scios.

12. Corporate Authorization: Scios represents that it is authorized to enter into this Plea Agreement. At the time of signing this Agreement, Scios shall provide to the government a written statement in the form of notarized legal documents certifying that Scios is authorized to enter into and comply with all of the provisions of this Plea Agreement. The resolutions further shall certify that Scios' Board of Directors has authorized these actions, and that all corporate formalities for such authorizations have been observed.

13. Appellate Rights: Scios, through its authorized representatives, is aware that 18 U.S.C. § 3742 gives Scios the right to appeal the sentence to be imposed, and that other federal statutes give a Defendant the right to appeal other aspects of the conviction. In consideration of the Agreement with the United States as set forth herein, Scios knowingly and voluntarily agrees to waive the following rights: (a) the right, conferred by 18 U.S.C. § 3742, to appeal any sentence imposed by the Court for the conviction of this offense, and community service; (b) the right to appeal any aspect of Scios' conviction or the judgment rendered in this case, including any pre-charge or pre-trial dispositions of motions or other issues; and (c) the right to bring any collateral attack against Scios' conviction or sentence, including a petition under 28 U.S.C. §§ 2255, 2241, or motion under 18 U.S.C. § 3582, at any time in the future after Scios is sentenced, except as it may relate to the effectiveness of legal representation. This Agreement, however, does not affect in any way the right of the government to appeal the sentence imposed by the Court.

14. No Withdrawal of Plea: Scios agrees not to ask the Court to withdraw its guilty plea at any time after it is entered, unless the Court declines to accept the sentence agreed to by the parties. Scios agrees that the government may withdraw from this Agreement if the Court does not accept the agreed upon sentence set out above. Scios agrees that if the Court does not accept the agreed upon sentence set out above, the statute of limitations shall be tolled from the date Scios signed the Plea Agreement until the date the Court does not accept the Plea Agreement.

15. Voluntariness of the Plea: Scios, through its authorized representatives,

acknowledges that it has entered into this Plea Agreement freely and voluntarily and that it has been fully advised by counsel, and that no threats or promises were made to induce it to enter the guilty plea called for by this Plea Agreement.

16. Statements: The parties are free to advise the Court or speak at the time of the plea, at sentencing or in connection with the pre-sentence investigation and to provide the Court or the United States Probation Office with evidence of all relevant conduct and related information.

17. Completeness of Agreement: This Agreement is the complete and only agreement between the parties. No promises, agreements, or conditions have been entered into other than those set forth in this Agreement. This Agreement supersedes prior understandings, whether written or oral. This Agreement cannot be modified other than in a written memorandum signed by the parties or by a modification made on the record in court. This Plea Agreement is not final until such time as it is signed by the United States and filed in Court.

On Behalf of the United States Department of Justice:

10-5-11
DATE

Jonathan Schmidt
Assistant United States Attorney
Northern District of California

10-5-11
DATE

Carol Wallack
Trial Attorney
Consumer Protection Branch
Civil Division
U.S. Department of Justice

On Behalf of Scios, Inc.

DATE

John Potter
CORPORATE REPRESENTATIVE

DATE

John Potter
Counsel to Scios, Inc.

**Attachment A - Joint Factual Statement**

**The Defendant**

1. Defendant Scios, INC. ("Scios") was a publicly traded company on the New York Stock Exchange. Scios was organized under the laws of Delaware with its principal place of business in the Northern District of California. Scios developed, promoted, and sold a drug, nesiritide, under the brand name Natrecor®. In August 2001, the United States Food and Drug Administration ("FDA") approved Natrecor® solely for the treatment of patients experiencing acutely decompensated congestive heart failure with dyspnea (shortness of breath) at rest or with minimal activity.

**The Food, Drug, and Cosmetic Act**

2. The Federal Food, Drug, and Cosmetic Act ("FDCA") governed the interstate distribution of drugs for human use as codified in Title 21, United States Code, Section 301 *et seq*. The FDCA required, among other things, that before a drug company began distribution in interstate commerce of a "new drug," defined at 21 U.S.C. § 321(p), it had to submit a New Drug Application ("NDA") to the FDA. 21 U.S.C. § 355. As part of its NDA, the drug company had to submit proposed labeling setting forth conditions and directions for each proposed use of the drug and credible scientific data generated by well controlled clinical trials demonstrating that the drug was safe and effective for each proposed use. 21 U.S.C. § 355(b).

3. Pursuant to the FDCA, a drug company was legally permitted to distribute a "new drug" in interstate commerce only after its NDA, including its proposed labeling, was reviewed

and approved by FDA. 21 U.S.C. § 355(a). The approved use or uses for the drug were specified in the labeling approved by FDA. Any use of an approved drug not specified in its approved labeling was referred to as an unapproved or "off-label" use.

4. The FDCA provided that a "prescription drug" was a drug (a) that because of its toxicity or other potential for harmful effect, the method of its use, or the collateral measures necessary for its use, was not safe for use except under the supervision of a practitioner licensed by law to administer such drug, or (b) that was limited by an approved NDA to use under the supervision of a practitioner licensed to administer such drug. 21 U.S.C. § 353(b)(1).

5. Under the FDCA, the term "labeling" meant "all labels and other written, printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article." 21 U.S.C. § 321(m). No physical attachment of the labeling to the drug was necessary.

6. The FDCA prohibited the introduction, delivery for introduction, or causing the introduction or delivery for introduction into interstate commerce of any misbranded drug. 21 U.S.C. § 331(a). Natrecor® was manufactured in Kansas and shipped to other states, including California, from Kansas.

7. Under the FDCA, a drug could be "misbranded" in numerous ways. For example, a drug was "misbranded" if the labeling did not bear "adequate directions for use." 21 U.S.C. § 352(f)(1). "Adequate directions for use" meant directions under which a layperson could use a drug safely and effectively for the purposes for which it was intended. 21 C.F.R. § 201.5. "Intended use," as defined by 21 C.F.R. § 201.128, referred to the objective intent of the persons

responsible for the labeling of the drugs A prescription drug, by definition, could not bear adequate directions for use by a layperson. Natrecor® was a prescription drug as described in 21 U.S.C. § 353(b). An FDA-approved prescription drug, bearing the FDA-approved labeling, was exempt from 21 U.S.C. § 352(f)(1) if and only if its intended use was the FDA-approved use. However, if the drug manufacturer's intended use of the drug was for non-approved, off-label uses, it did not meet the requirements of the regulatory exemption from the application of 21 U.S.C. § 352(f)(1), and was therefore misbranded. 21 C.F.R. §§ 201.5, 201.100.

8. Scios was legally responsible for the labeling of Natrecor®.

**Approval of Natrecor® for Acutely Decompensated Congestive Heart Failure**

9. According to the American Heart Association, congestive heart failure ("CHF") is a medical condition in which the heart cannot pump enough blood to the body's other organs. In CHF, the "failing" heart keeps working but not as efficiently as it should. Some CHF patients experience acutely decompensated heart failure ("ADHF").

10. In early 2001, Scios submitted an NDA to FDA seeking approval to market Natrecor®. Natrecor® was a recombinant form of the naturally occurring hormone known as human B-type natriuretic peptide. Natrecor® was a vasodilator, *i.e.*, it opened the blood vessels and reduced filling pressure in the heart. Natrecor® was administered intravenously.

11. In August 2001, FDA approved Natrecor® solely for the treatment of patients experiencing ADHF with dyspnea (shortness of breath) at rest or with minimal activity. The approved labeling for Natrecor® did not list any other use, and the drug was never approved by FDA for any other use.

**The Misbranding of Natrecor®**

12. Infusing chronic (non-acute) CHF patients with Natrecor® on a scheduled or serial basis was an unapproved, off-label use of the drug. The approved labeling of Natrecor® did not contain any directions for this use of Natrecor®.

13. Scios understood that the approved use of Natrecor® for treating ADHF did not include infusing chronic (non-acute) CHF patients with Natrecor® on a scheduled or serial basis.

14. Between August 2001, and April 1, 2003, commencing after the approval of Natrecor®, one of Scios's "intended uses" for Natrecor® was for infusing chronic (non-acute) CHF patients on a scheduled or serial basis, thereby causing the introduction and delivery for introduction into interstate commerce of the prescription drug Natrecor®, which was misbranded in that its labeling lacked adequate directions for use. The parties disagree about whether this conduct continued after April 2003; the United States maintains that this conduct continued to at least June 2005, and Scios maintains that no such conduct occurred after April 1, 2003.