

2010 DEC -7 AM 9:29

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA,

v.

KOS PHARMACEUTICALS, INC.

Defendant.

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:  
:  
:  
:

NO. 10-158-RET-SCR

DEFERRED PROSECUTION  
AGREEMENT

SIGN BY DEPUTY CLERK 

Defendant Kos Pharmaceuticals, Inc. ("Kos"), by its undersigned attorneys, pursuant to authority granted by Kos' Board of Directors, and the United States Department of Justice, Criminal Division, Fraud Section and the United States Attorney 's Office for the Middle District of Louisiana (collectively, the "Department of Justice" or the "Department") enter into this Deferred Prosecution Agreement (the "Agreement"). The terms and conditions of this Agreement are as follows:

**Criminal Information and Acceptance of Responsibility**

1. Kos acknowledges that the United States will file the attached, one-count criminal Information charging Kos with conspiracy to commit an offense against the United States in violation of 18 U.S.C. § 371, that is, to violate the Anti-Kickback Statute, 42 U.S.C. § 1320a-7b. In so doing, Kos knowingly waives: (a) its right to indictment on these charges, as well as all rights to a speedy trial pursuant to the Sixth Amendment to the United States Constitution, Title 18, United States Code, Section 3161, and Federal Rule of Criminal Procedure 48(b); and (b) any objection with respect to venue, and consents to the filing of the Information, as provided under the terms of this Agreement, in the United States District Court for the Middle District of Louisiana.

2. Kos admits, accepts, and acknowledges that it is responsible for the acts of its employees, directors, officers, subsidiaries, and agents as set forth in the Statement of Facts attached hereto as Attachment A, and incorporated by reference into this Agreement, and that the

RET(2)

facts described in Attachment A are true and accurate. Should the Department initiate the prosecution that is deferred by this Agreement, Kos agrees that it will neither contest the admissibility of, nor contradict, in any such proceeding, the Statement of Facts.

### **Term of the Agreement**

3. This Agreement is effective for a period beginning on the date on which the criminal Information is filed, and ending six (6) months from that date (the "Initial Term"). Prior to the conclusion of the Initial Term, Kos and the Department agree that they shall meet and confer regarding the appropriateness and necessity of an extension of the Initial Term, in light of all the facts and circumstances existing at that time. If the Department determines that an extension of the Initial Term is appropriate and necessary in light of all the facts and circumstances, in particular if there has been any material change in Kos' business activities with respect to the type of conduct at issue here, the Initial Term shall be extended for an additional six (6) months. If the Department determines that an extension of the Initial Term is not appropriate and necessary, in light of all the facts and circumstances, in particular if there has been no material change in Kos' business activities with respect to the type of conduct at issue here, the Agreement shall expire at the conclusion of the Initial Term. However, Kos agrees that, in the event that the Department determines, in its sole discretion, that Kos has knowingly violated any provision of this Agreement, an extension or extensions of the term of the Agreement may be imposed by the Department, in its sole discretion, for up to a total additional time period of one year, without prejudice to the Department' s right to proceed as provided in paragraphs 10-13 below. Any extension of the Agreement, including a six (6) month extension of the Initial Term, extends all terms of this Agreement for an equivalent period.

### **Relevant Considerations**

4. The Department enters into this Agreement based on the individual facts and circumstances presented by this case and Kos. Among the facts considered were that Kos: (a) voluntarily, upon learning about allegations made by a former employee, disclosed information to the Department of Justice regarding the misconduct described in the Information and

Statement of Facts; (b) conducted a thorough internal investigation of that and other misconduct; (c) reported its findings to the Department on a regular basis; (d) cooperated in the Department's investigation of this matter; (e) undertook remedial measures; and (f) agreed to continue to cooperate with the Department in any ongoing investigation of the conduct of Kos and its directors, officers, employees, agents, consultants, contractors, subcontractors, and subsidiaries relating to violations of the Anti-Kickback Statute.

5. Kos shall continue to cooperate with the Department. At the request of the Department, and consistent with applicable law and regulation, Kos shall also continue to cooperate fully with such other law enforcement authorities and agencies in any investigation of Kos, or any of its former directors, officers, employees, agents, consultants, contractors, subcontractors, and subsidiaries, or any other party, in any and all matters relating to violations of the Anti-Kickback Statute and other improper sales and marketing practices. Kos agrees that its cooperation shall include, but is not limited to, the following:

a. Kos shall truthfully disclose all factual information, that is not protected by a valid claim of attorney-client privilege or work product doctrine, with respect to its activities and those of its former directors, officers, employees, agents, consultants, contractors, subcontractors, and subsidiaries concerning all matters relating to violations of the Anti-Kickback Statute and other improper sales and marketing practices, about which Kos has any knowledge and about which the Department may inquire. This obligation of truthful disclosure includes the obligation of Kos to use its best efforts to provide to the Department, upon request, any document, record or other tangible evidence relating to such violations of the Anti-Kickback Statute or other improper sales and marketing practices about which the Department may inquire of Kos.

b. Upon request of the Department, with respect to any issue relevant to its investigation of violations of the Anti-Kickback Statute or other improper sales and marketing practices in connection with the operations of Kos, Kos shall use its best efforts to designate knowledgeable employees, agents or attorneys to provide to the Department the information and

materials described in Paragraph 5(a) above, on behalf of Kos. It is further understood that Kos must at all times provide complete, truthful and accurate information.

c. With respect to any issue relevant to the Department's investigation of violations of the Anti-Kickback Statute or other improper sales and marketing practices in connection with the operations of Kos, or any of its present or former subsidiaries or affiliates, Kos shall use its best efforts to make available for interviews or testimony, as requested by the Department, present or former directors, officers, employees, agents and consultants of Kos as well as the directors, officers, employees, agents and consultants of contractors and subcontractors. This obligation includes, but is not limited to, sworn testimony before a federal grand jury or in federal trials, as well as interviews with federal law enforcement authorities. Cooperation under this Paragraph will include identification of witnesses who, to the knowledge of Kos, may have material information regarding the matters under investigation.

d. With respect to any information, testimony, documents, records or other tangible evidence provided to the Department pursuant to this Agreement, Kos consents to any and all disclosures consistent with applicable law and regulation to other governmental authorities of such materials as the Department, in its sole discretion, shall deem appropriate. The Department agrees to notify Kos of its intent to make such disclosure.

**Payment of Monetary Penalty**

6. The Department and Kos agree that an application of the United States Sentencing Guidelines ("USSG" or "Sentencing Guidelines") to determine the applicable fine range yields the following analysis:

- a. The 2004 USSG are applicable to this matter.
- b. Offense Level. Based upon USSG § 2B4.1, the total offense level is 22, calculated as follows:

(a) Base Offense Level	8
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(b)(1) Value of the improper benefit to be conferred was 14  
greater than \$400,000 and less than \$1,000,000  
(See USSG § 2B1.1)

TOTAL 22

c. Base Fine. Based upon USSG § 8C2.4(a)(1), the base fine is \$1,200,000 (fine corresponding to the Base Offense level as provided in Offense Level Table).

d. Culpability Score. Based upon USSG § 8C2.5, the culpability score is 7, calculated as follows:

(a) Base Culpability Score 5

(b)(2) The organization had 1,000 or more employees and an individual within high-level personnel of the organization participated in, condoned, or was willfully ignorant of the offense, or tolerance of the offense by substantial authority personnel was pervasive throughout the organization; +4

(g) The organization fully cooperated in the investigation and clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct - 2

TOTAL 7

e. Calculation of Fine Range:

Base Fine	\$1,200,000
Multipliers	1.4(min)/2.8(max)
Fine Range	\$1,680,000 / \$3,360,000

Kos agrees to pay a monetary penalty in the amount of \$3,360,000. The Department and Kos agree that such a penalty is appropriate given the nature of the conduct at issue, as well as the extent of Kos' cooperation in this matter, including sharing information with the Department regarding evidence obtained as a result of Kos' investigation of violations of the Anti-Kickback

Statute and other improper sales and marketing practices. Kos agrees to pay this monetary penalty to the United States Treasury within ten days of the execution of this Agreement. The \$3,360,000 penalty is final and shall not be refunded. Furthermore, nothing in this Agreement shall be deemed an agreement by the Department that the \$3,360,000 amount is the maximum penalty that may be imposed in any future prosecution, and the Department is not precluded from arguing in any future prosecution that the Court should impose a higher fine, although the Department agrees that under those circumstances, it will recommend to the Court that the amount paid under this Agreement should be offset against any fine the Court imposes as part of a future judgment. Finally, Kos acknowledges that no tax deduction may be sought in connection with the payment of any part of this \$3,360,000 fine.

**Conditional Release from Criminal Liability**

7. In return for the full and truthful cooperation of Kos as described above, and its compliance with the terms and conditions of this Agreement, the Department agrees not to use any information related to the conduct described in the attached Statement of Facts against Kos in any criminal or civil case, except: (a) in a prosecution for perjury or obstruction of justice; (b) in a prosecution for making a false statement; (c) in a prosecution or other proceeding relating to any crime of violence; or (d) in a prosecution or other proceeding relating to a violation of any provision of Title 26 of the United States Code (Internal Revenue Code). In addition, the Department agrees, except as provided herein, that it will not bring any criminal case against Kos, its current parent, or any of its wholly owned or controlled subsidiaries related to the conduct of present and former directors, officers, employees, agents, consultants, contractors and subcontractors, as described in the attached Statement of Facts, or relating to information Kos disclosed to the Department prior to the date on which this Agreement was signed, or relating to undisclosed, unknown conduct involving Kos of a similar scale and nature that took place prior to the signing of this Agreement.

a. This Paragraph does not provide any protection against prosecution for any future violations of the Anti-Kickback Statute or other future improper sales and marketing

practices, if any, by Kos, or by any of its directors, officers, employees, agents, consultants, contractors, subcontractors, and subsidiaries irrespective of whether disclosed by Kos.

b. In addition, this Paragraph does not provide any protection against prosecution of any individuals, including present or former directors, officers, employees, shareholders, agents, consultants, contractors, or subcontractors of Kos for any violations committed by them.

#### **Deferred Prosecution**

8. In consideration of: (a) the past and future cooperation of Kos described above; and (b) Kos' payment of a monetary penalty of \$3,360,000, the Department agrees that any prosecution of Kos for the conduct set forth in the attached Statement of Facts, and for the conduct that Kos disclosed to the Department prior to the signing of this Agreement, be and hereby is deferred for the Initial Term of this Agreement.

9. The Department further agrees that if Kos fully complies with all of its obligations under this Agreement, the Department will not continue the criminal prosecution against Kos described in Paragraph 1 and, within thirty (30) days after the Initial Term, or if extended within thirty (30) days after such extension(s), the Department agrees to seek dismissal of the Information described in Paragraph 1. Thereafter, this Agreement shall expire.

#### **Breach of the Agreement**

10. If, during the Term of this Agreement, the Department determines, in its sole discretion, that Kos has committed any felony under federal law subsequent to the signing of this Agreement, has, at any time, provided deliberately false, deliberately incomplete or deliberately misleading information, or has otherwise breached the Agreement, Kos shall thereafter be subject to prosecution for any federal criminal violation of which the Department has knowledge. Any such prosecutions may be premised on information provided by Kos. Any such prosecution that is not time-barred by the applicable statute of limitations on the date of the signing of this Agreement may be commenced against Kos notwithstanding the expiration of the statute of limitations between the signing of this Agreement and the expiration of the Initial Term plus one



year. Thus, by signing this Agreement, Kos agrees that the statute of limitations with respect to any prosecution that is not time-barred on the date of this Agreement shall be tolled for the Initial Term plus one year.

11. In the event that the Department determines that Kos has breached this Agreement, the Department agrees to provide Kos with written notice of such breach prior to instituting any prosecution resulting from such breach. Within thirty (30) days of receipt of such notice, Kos shall have the opportunity to respond to the Department in writing to explain the nature and circumstances of such breach, as well as the actions Kos has taken to address and remediate the situation, which explanation the Department shall consider in determining whether to institute a prosecution.

12. In the event that the Department determines that Kos has breached this Agreement: (a) all statements made by or on behalf of Kos to the Department or to the Court, including the attached Statement of Facts, and any testimony given by any representative or agent of Kos before a grand jury or any tribunal, at any legislative hearings, whether prior or subsequent to this Agreement, or any leads derived from such statements or testimony, shall be admissible in evidence in any and all criminal proceedings brought by the Department against Kos; and (b) Kos shall not assert any claim 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 rule, that statements made by or on behalf of Kos prior or subsequent to this Agreement, and any leads derived therefrom, should be suppressed. The decision whether conduct or statements of any individual will be imputed to Kos for the purpose of determining whether Kos has violated any provision of this Agreement shall be in the sole discretion of the Department.

13. Kos acknowledges that the Department has made no representations, assurances or promises concerning what sentence may be imposed by the Court if Kos breaches this Agreement and this matter proceeds to judgment. Kos further acknowledges that any such sentence is solely within the discretion of the Court and that nothing in this Agreement binds or restricts the Court in the exercise of such discretion.



**Sale or Merger of Kos**

14. Kos agrees that in the event it sells, merges, or transfers all or substantially all of its business operations as they exist as of the date of this Agreement, whether such sale is structured as a stock or asset sale, merger or transfer, it shall maintain its existence and its ability to complete its obligations under this Agreement or include in any contract for sale, merger or transfer a provision binding the purchaser, or any successor in interest thereto, to the obligations described in this Agreement.

**Public Statements by Kos**

15. Kos expressly agrees that it shall not, through present or future attorneys, directors, officers, employees, agents or any other person authorized to speak for Kos, make any public statement, in litigation or otherwise, contradicting the acceptance of responsibility by Kos set forth above or the facts described in the attached Statement of Facts. Any such contradictory statement shall, subject to cure rights of Kos described below, constitute a breach of this Agreement and Kos thereafter shall be subject to prosecution as set forth in Paragraphs 10-13 of this Agreement. The decision whether any public statement by any such person contradicting a fact contained in the Statement of Facts will be imputed to Kos for the purpose of determining whether they have breached this Agreement shall be at the sole discretion of the Department. If the Department determines that a public statement by any such person contradicts in whole or in part a statement contained in the Statement of Facts, the Department shall so notify Kos, and Kos may avoid a breach of this Agreement by publicly repudiating such statement(s) within five (5) business days after notification. Consistent with the obligations of Kos as set forth above, Kos shall be permitted to raise defenses and to assert affirmative claims in civil and regulatory proceedings relating to the matters set forth in the Statement of Facts. This Paragraph does not apply to any statement made by any present or former employee of Kos in the course of any criminal, regulatory, or civil case initiated against such individual, unless such individual is speaking on behalf of Kos.

16. Kos agrees that if it or any of its direct or indirect affiliates or subsidiaries issues a press release in connection with this Agreement, Kos shall first consult the Department to determine whether (a) the text of the release is true and accurate with respect to matters between the Department and Kos; and (b) the Department has no objection to the release. Statements at any press conference concerning this matter shall be consistent with this press release.

**Limitations on Binding Effect of Agreement**

17. This Agreement is binding on Kos and the Department but specifically does not bind any other federal agencies, or any state, local or foreign law enforcement or regulatory agencies, or any other authorities, although the Department will bring the cooperation of Kos and its compliance with its other obligations under this Agreement, to the attention of such agencies and authorities, if requested to do so by Kos.

**Notice**

18. Any notice to the Department under this Agreement shall be given by personal delivery, overnight delivery by a recognized delivery service, or registered or certified mail, in each case, for the Department, addressed to Hank Bond Walther (or his successor), Acting Deputy Chief, Fraud Section, Criminal Division, U.S. Department of Justice, Third Floor, 1400 New York Avenue, N.W., Washington, D.C. 20005 and, for Kos Pharmaceuticals, Inc., addressed to Daniel E. Reidy, Jones Day, 77 West Wacker, Chicago, Illinois 60601, and the Divisional Vice President of Commercial Litigation, 100 Abbott Park Road, Dept. 033C Building AP6A, Abbot Park, Illinois, 60064. Notice shall be effective upon actual receipt by Kos.

**Complete Agreement**

19. This Agreement sets forth all the terms of the agreement between Kos and the Department. No amendments, modifications or additions to this Agreement shall be valid unless they are in writing and signed by the Department, the attorneys for Kos and a duly authorized representative of Kos.

AGREED:

**FOR KOS PHARMACEUTICALS, INC.:**

By:  
[to be inserted]

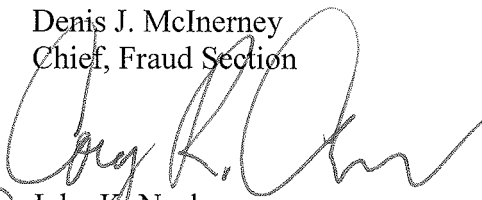
*See following page*

Daniel E. Reidy  
Jones Day  
Counsel for Kos Pharmaceuticals, Inc.

**FOR THE DEPARTMENT OF JUSTICE:**

Denis J. McInerney  
Chief, Fraud Section

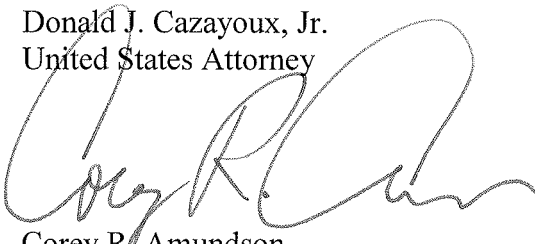
By:

  
John K. Neal  
Assistant Chief, Fraud Section

United States Department of Justice  
Criminal Division  
1400 New York Ave., N.W.  
Washington, D.C. 20005  
(202) 616-9468

Donald J. Cazayoux, Jr.  
United States Attorney

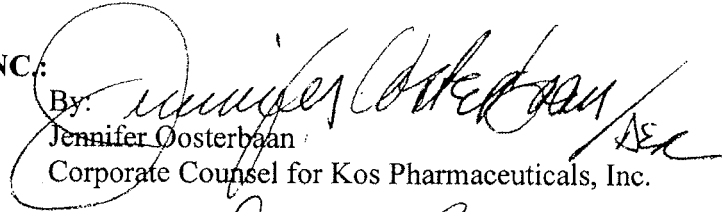
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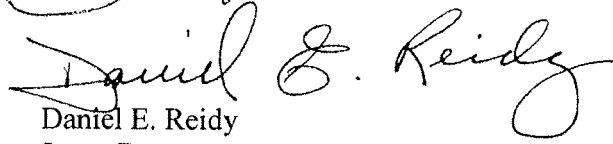
  
Corey R. Amundson  
Assistant United States Attorney

Russell B. Long Federal Building  
777 Florida Street, Suite 208  
Baton Rouge, LA 70801  
(225) 336-8877

AGREED:

FOR KOS PHARMACEUTICALS, INC.:

By:   
Jennifer Oosterbaan  
Corporate Counsel for Kos Pharmaceuticals, Inc.

  
Daniel E. Reidy  
Jones Day  
Counsel for Kos Pharmaceuticals, Inc.

## CORPORATE COUNSEL'S CERTIFICATE

I have read this Agreement and carefully reviewed every part of it with outside counsel for Kos Pharmaceuticals, Inc. ("Kos"). I understand the terms of this Agreement and voluntarily agree, on behalf of Kos, to each of its terms. Before signing this Agreement, I consulted outside counsel for Kos. Counsel fully advised me of the rights of Kos, of possible defenses, of the Sentencing Guidelines' provisions, and of the consequences of entering into this Agreement.

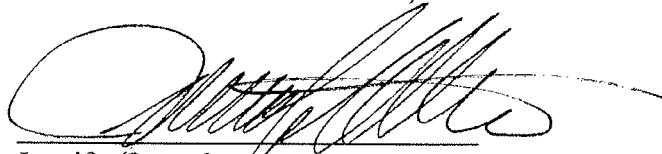
I have carefully reviewed the terms of this Agreement with the Board of Directors of Kos. I have advised and caused outside counsel for Kos to advise the Board fully of the rights of Kos, of possible defenses, of the Sentencing Guidelines' provisions, and of the consequences of entering into the Agreement.

No promises or inducements have been made other than those contained in this Agreement. Furthermore, no one has threatened or forced me, or to my knowledge any person authorizing this Agreement on behalf of Kos, in any way to enter into this Agreement. I am also satisfied with outside counsels' representation in this matter. I certify that I am Corporate Counsel for Kos Pharmaceuticals, Inc. and that I have been duly authorized by Kos to execute this Agreement on behalf of Kos.

Date: 11/16, 2010

**KOS PHARMACEUTICALS, INC.**

By:

  
Jennifer Oosterbaan

**ATTACHMENT A**  
**STATEMENT OF FACTS**

The following Statement of Facts is incorporated by reference as part of the Deferred Prosecution Agreement ("the Agreement") between the United States Department of Justice, Criminal Division, Fraud Section and the United States Attorney's Office for the Middle District of Louisiana (collectively, the "Department of Justice" or the "Department"), and Kos Pharmaceuticals, Inc., and the parties hereby agree and stipulate that the following information is true and accurate. As set forth in Paragraph 2 of the Agreement, Kos Pharmaceuticals, Inc. admits, accepts, and acknowledges that it is responsible for the acts of its subsidiaries, employees, and agents as set forth below.

Should the Department initiate the prosecution that is deferred by this Agreement, Kos Pharmaceuticals, Inc. agrees that it will neither contest the admissibility of, nor contradict, the following Statement of Facts in any proceeding brought by the United States Department of Justice, Criminal Division, Fraud Section or the United States Attorney's Office for the Middle District of Louisiana:

**Background**

1. Kos Pharmaceuticals, Inc. ("Kos"), originally incorporated in Florida and with its principal place of business in New Jersey, was a company engaged in the development, manufacture, and marketing of pharmaceuticals.
2. In general, because its products required a physician's prescription, Kos' business and marketing strategy involved identifying and targeting leading prescribing physicians in specialties such as cardiology and cardiothoracic surgery, endocrinology, and internal medicine. As stated in its 2001 annual report issued on the SEC's Form 10-K, Kos focused on products "where a relatively concentrated group of specialist physicians account[ed] for a significant portion of the prescriptions for the therapeutic indication addressed by the Company's products." Kos believed "that significant market gains [could] be achieved . . . through the use of a relatively small, well-trained sales force concentrating its detailing efforts on informing such

specialist physicians about the scientific basis for the therapeutic advantages of the Company's products."

3. Kos employed its own nationwide sales force that called on, and promoted Kos' pharmaceutical products to, these physicians. Over time, Kos expanded the number of employees in its sales force, which the Company believed would "allow Kos to reach a greater physician audience while, at the same time, increase the amount of repeat visits made to its physician target list."

#### ***Kos Employees***

4. At the corporate level, Kos' sales force included Executive A, the vice president in charge of Kos' nation-wide sales force. At the regional level, Kos' sales force included Executive B, the director in charge of sales for the southeastern region. At the district level, Kos' sales force included Executive C, the manager in charge of the New Orleans district, which included all of Louisiana. Members of the Kos sales force in Louisiana reported to Executive C, who in turn reported to Executive B, who in turn reported to Executive A.

#### ***Kos Products***

5. Kos' products included Niaspan, a prescription drug developed by Kos and approved by the U.S. Food and Drug Administration ("FDA") for the treatment of cholesterol disorders. Specifically, Niaspan was a pharmaceutical designed to increase HDL, so called "good cholesterol."

6. Kos' products also included Advicor, another prescription drug developed by Kos and approved by the FDA for the treatment of cholesterol disorders. Specifically, Advicor was a combination pharmaceutical designed both to increase HDL, as Niaspan did, as well as to decrease LDL, so-called "bad cholesterol."

#### **Kos' Improper Marketing Practices**

7. Kos began marketing Advicor in January 2002. Consistent with its general business and marketing strategy, Kos marketed Advicor directly to specialist physicians within the



cardiovascular market who specialized in treating patients with high cholesterol and who were among the leading prescribers of cholesterol medications.

8. Prior to the launch of Advicor, members of Kos' sales force – including but not limited to Executive A, Executive B, and Executive C – met with two cardiothoracic surgeons, Physician A and Physician B, for dinner in Houma, Louisiana. Physician A and Physician B were cardiothoracic surgeons who practiced in multiple locations in the state of Louisiana. Executive C and other members of the Kos sales force had known Physician A and Physician B previously, and had called on them in connection with the marketing of other Kos products, including Niaspan. In addition, Physician B was selected to be a national spokesman as part of the Advicor marketing campaign.

9. Following this meeting, Physician A mailed a letter dated January 7, 2002, to Executive A and others, with a copy to Executive C. In that letter, Physician A proposed that, in exchange for payments totaling approximately \$100,000, which included sponsorship of Physician A's and Physician B's continuing education classes, Physician A and Physician B would endorse the use of Kos products, including Advicor, for the treatment of cholesterol. Specifically, Physician A and Physician B, through their practice group, ran a series of continuing medical education classes. At the time of the January 2002 letter, it was anticipated that there would be approximately 50 such classes in 2002. Physician A's letter proposed that Kos become a "secondary sponsor" of these classes by paying Physician A and Physician B an honorarium of \$1,000 each, per class, for a total of approximately \$100,000. According to Physician A's letter, in exchange for this sponsorship, Kos would be "entitled" to, among other things, the following:

- (a) [Physician B] and [Physician A] endorsing the use of Niaspan-Advicor for lipid management and prevention and both physicians giving testimonials of the impact it has made upon the clinical care given at [their practice]. Presentations to all our . . . [practice 's] physicians and nurses and labs statewide by Kos, Physician B and Physician A disseminating the use of Niaspan-Advicor statewide.

\* \* \*

- (f) The participant list [for the continuing medical education classes] would be provided to Kos so follow up could be obtained by the appropriate Kos reps and personnel to get the participant [in the classes] incorporating Niaspan-Advicor into their own practice. I would strongly suggest that those local [sales] reps visit the physicians within a week or so after the . . . course as we have found this to be highly successful with other secondary and primary sponsors . . . through the years.

Further, Physician A stated that he and Physician B "would work to further the Niaspan-Advicor market in each of our [practice's] markets."

10. Physician A also met with another member of Kos' sales force to discuss, among other things, the different departments within Kos that could be used as a source of the \$100,000 in payments to Physician A and Physician B. During this meeting, these payment sources were diagramed on stationary with the heading "From the desk of [Physician A]."

11. Kos launched Advicor on January 28, 2002, three weeks after Physician A's letter. In 2002, Kos made three separate payments to Physician A and Physician B totaling approximately \$89,500 in connection with its "sponsorship" of their continuing medical education classes. In addition, in 2002 Kos made 16 separate payments to Physician A and Physician B totaling approximately \$48,000 for purported speaker fees. In 2002, Physician A alone wrote approximately 1,165 prescriptions for Kos products, including Advicor.

12. In 2003, Kos made two separate payments totaling approximately \$77,000 in connection with its sponsorship of Physician A's and Physician B's continuing medical education classes. One \$52,000 payment was made to a third-party entity purportedly used by Physician A and Physician B to assist in putting on their classes.

13. In addition, in 2003, Executive C arranged to conduct a "chart pull" in Physician A's office, whereby a member of Physician A's staff would review or "pull" charts for the purpose of identifying patients who were candidates for being put on drugs manufactured by Kos.

Executive C agreed to pay Physician A's employee in cash for this chart pull. On February 23, 2003, Physician A's employee reported to Executive C that she had reviewed 202 charts over the

weekend and had identified "50-60" that would be "change[d] to Advicor" or would "add Niaspan" to the patient's existing medications.

14. In 2003, Physician A wrote approximately 1,059 prescriptions for Kos products, including Advicor.

15. Notwithstanding a change in Kos' policy that precluded direct payments to physicians for educational grants, Kos continued to engage in improper marketing practices with respect to Physician A and Physician B. For example, on May 3, 2004, Physician A contacted Executive C about the possibility of Kos again sponsoring the practice's continuing medical education classes, and expressed his frustration that payments from Kos in 2004 were lagging. In an e-mail, Physician A informed Executive C that "[w]e are nearing the halfway point for 2004 already." Regarding the method of payment, Physician A wrote that "[w]e can go through whichever vehicle you would like."

16. On May 12, 2004, Executive C e-mailed Physician A, saying "Hi Doc." Executive C wrote that "[w]e can support you as much as last year, I just have to talk to you on the vehicle we need to use." Executive C continued, "I also have something else to talk to you about in which I may be able to get you some support from another company but it would be up to you and . . . [Physician B]."

17. On May 13, 2004, Physician A responded to Executive C, saying "I have a vehicle in mind to facilitate support." Physician A again expressed his frustration, writing "[B]oth . . . [Physician B] and I would like to see something soon as half of the year is already gone."

18. In or about November 2004, Executive C met with Executive A to discuss, among other things, further payment to Physician A's and Physician B's practice. In a conversation with another member of the Kos sales force, Executive C reported that Executive A agreed at this meeting to "get us set." Executive C reported that, regarding Executive A, "he's gonna get us something to where we get a vehicle – We gonna call it whatever we gonna call it." Executive C further stated, "I need to do it down here and nobody cares about the merits of your products down here. You got . . . scripts coming from [Physician A's and Physician B's practice group]

cause we gave them money." Executive C stated that "we're gonna go back to the old ways of doing business at Kos."

19. On December 13, 2004, Kos made a payment of approximately \$57,200 to another third-party entity purportedly used by Physician A and Physician B to assist in the logistics of putting on their continuing medical education classes. In 2004, Physician A wrote approximately 1,201 prescriptions for Kos products, including Advicor.

20. Consistent with the agreement outlined in Physician A's January 2002 letter, on June 15, 2005, Physician A's assistant e-mailed a member of the Kos sales force a list of all the physicians who had attended Physician A's and Physician B's continuing medical education classes from November 1997 through March 2005.

21. Between January 2002 and June 2006, Physician A wrote 4,130 prescriptions for Kos products, including Advicor.

**ATTACHMENT B**  
**CERTIFICATE OF CORPORATE RESOLUTIONS**  
**BY THE BOARD OF DIRECTORS**

WHEREAS, Kos Pharmaceuticals, Inc. ("Kos" or the "Company") has been engaged in discussions with the United States Department of Justice, Criminal Division, Fraud Section and the United States Attorney's Office for the Middle District of Louisiana (collectively, the "Department of Justice" or the "Department") in connection with issues relating to improper sales and marketing practices by its sales force to facilitate the writing of prescriptions for the Company's products; and

WHEREAS, in order to resolve such discussions, it is proposed that the Company enter into a certain agreement with the Department; and

WHEREAS the Company's Corporate Counsel, Jennifer S Oosterbaan, together with outside counsel for the Company, have advised the Board of Directors of the Company of its rights, possible defenses, the Sentencing Guidelines' provisions, and the consequences of entering into such agreement with the Department;

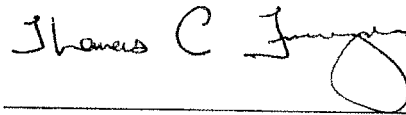
Therefore, this Board has RESOLVED that:

1. The Company (i) acknowledges that the United States will file the one-count Information charging Kos with conspiracy to commit an offense against the United States, in violation of 18 U.S.C. § 371, that is, to violate the Anti-Kickback Statute, 42 U.S.C. § 1320a-7b(b); (ii) waives indictment on such charges and enters into a Deferred Prosecution Agreement with the Department; and (iii) agrees to accept a monetary penalty against Kos of \$3,360,000, and to pay \$3,360,000 to the United States Treasury with respect to the conduct described in the Information;

2. The Corporate Counsel of Kos, Jennifer S. Oosterbaan, is hereby authorized, empowered and directed, on behalf of the Company, to execute the Deferred Prosecution Agreement substantially in such form as reviewed by this Board of Directors at this meeting with such changes as the Corporate Counsel of Kos, Jennifer S Oosterbaan, may approve;

3. The Corporate Counsel of Kos, Jennifer S. Oosterbaan, is hereby authorized, empowered and directed to take any and all actions as may be necessary or appropriate and to approve the forms, terms or provisions of any agreement or other documents as may be necessary or appropriate, to carry out and effectuate the purpose and intent of the foregoing resolutions; and

4. All of the actions of the Corporate Counsel of Kos, Jennifer S. Oosterbaan, which actions would have been authorized by the foregoing resolutions except that such actions were taken prior to the adoption of such resolutions, are hereby severally ratified, confirmed, approved and adopted as actions on behalf of the Company.



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Thomas C. Freyman  
Sole Director

Done at Abbott Park, Illinois  
October 22, 2010