

## **SETTLEMENT AND RELEASE AGREEMENT**

This Settlement and Release Agreement ("Agreement") is entered into by the State of California by and through the California Insurance Commissioner, Dave Jones ("the Commissioner"), in his capacity as California Insurance Commissioner, Plaintiff-Relators Dr. Monte Schwartz and Ryan Tinsley ("Relators"), and Allergan, Inc. ("Allergan"), (hereinafter collectively referred to as "the Parties"), through their authorized representatives.

### **I. RECITALS**

A. Allergan is a Delaware corporation with its principal place of business in Parsippany, New Jersey. At all relevant times, Allergan distributed, sold, and marketed medical devices in the State of California. Until December 2013, Allergan distributed, marketed, and sold the LAP-BAND Adjustable Gastric Banding System® ("LAP-BAND"), a device approved by the U.S. Food and Drug Administration ("FDA") and indicated for weight reduction for adult patients with obesity who have failed more conservative weight reduction alternatives, such as supervised diet, exercise, and behavior modification programs. The LAP-BAND consists of a silicone band that is placed around the top portion of the patient's stomach during a surgical procedure. The silicone band is inflatable and is connected by tubing to an access port placed on the rectus muscle or fixed in an accessible subcutaneous space. The LAP-BAND's inflation can be adjusted by using a needle to pierce the access port through the patient's skin and then adding or removing saline fluid.

B. On October 8, 2010, the Relators filed a *qui tam* action in the United States District Court for the District of Maryland captioned *United States of America, et al. ex rel. Monte Schwartz & Ryan Tinsley v. Allergan, Inc.*, Case No. CCB-10-2796 (D. Md.) (the "Civil Action")

pursuant to the Federal False Claims Act (31 U.S.C. § 3729, *et seq.*), numerous state false claims statutes, the Illinois Insurance Claims Fraud Prevention Act, 740 ILCS 92, and the California Insurance Frauds Prevention Act (“CIFPA”), California Insurance Code section 1871.7.<sup>1</sup> This Agreement settles only the claims under California Insurance Code section 1871.7 (“California Private Insurance Settlement Agreement”).

C. On or about December 22, 2011, Relators filed a First Amended Complaint in the Action captioned *United States of America, et al. ex rel. Monte Schwartz & Ryan Tinsley v. Allergan, Inc.* under the same case number.

D. The First Amended Complaint (the “Complaint”) sets forth the pending allegations in the Civil Action.

E. By a separate civil settlement with the United States of America and Relators (the “Federal Settlement Agreement”), Allergan is resolving allegations that Allergan caused false or fraudulent claims for LAP-BAND procedures to be submitted to Medicare, Medicaid, the CHAMPUS / TRICARE Program, and the Federal Employees Health Benefits Program; the terms of that civil settlement are memorialized in a separate agreement to be executed simultaneously with this Agreement.

F. By separate civil settlements with the Medicaid Participating States as defined in Paragraph E of the Federal Settlement Agreement, including the State of California (the “State Medicaid Settlement Agreements”), Allergan is resolving allegations that Allergan caused false or fraudulent claims for LAP-BAND procedures to be submitted to state Medicaid programs including California’s Medicaid Program (under California Government Code section 12650 *et seq.*); the terms of those civil settlements are memorialized in separate agreements.

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<sup>1</sup> Unless otherwise specified, all statutory references in this Agreement are to the California Insurance Code.

G. By a separate civil settlement with the State of Illinois and Relators ("Illinois Private Insurance Settlement Agreement"), Allergan is resolving allegations that Allergan caused false or fraudulent claims for LAP-BAND procedures to be submitted to private insurers in Illinois in violation of the Illinois Insurance Claims Fraud Prevention Act, 740 ILCS 92; the terms of that civil settlement are memorialized in a separate agreement to be executed simultaneously with this Agreement.

H. By a separate civil settlement with Relators, Allergan is resolving allegations that Allergan retaliated against Tinsley in violation of 31 U.S.C. § 3730(h) and resolving claims for attorneys' fees, costs and expenses under federal and state statutes including the claim for attorneys' fees, costs and expenses under 31 U.S.C. § 3730(d) (the "Employment and Attorneys' Fee and Expense Settlement Agreement"); the terms of that civil settlement are memorialized in a separate agreement to be executed simultaneously with this Agreement.

I. Count III of the Complaint alleges that Allergan caused false or fraudulent claims for LAP-BAND procedures to be submitted to private insurers in the State of California in violation of the California Insurance Frauds Prevention Act, California Insurance Code section 1871.7 ("CIFPA Claim").

J. Relators and the Commissioner contend that they have certain civil claims against Allergan for allegedly engaging in the following conduct (hereinafter referred to as the "Covered Conduct"):

- (1) Allergan knowingly advertised, marketed, and distributed the LAP-BAND for use in: (a) the so-called "band-over-bypass" or "banded bypass" procedure, in which the surgeon implanted a LAP-BAND (in patients who had previously undergone gastric bypass surgery) during the time period from January 1, 2008, to August 31,

2012, and (b) the so-called "banded plication" (or "plicated band" or "banded imbrication" or "iLap" or "iBand") procedure in which the surgeon folds (i.e., plicates or imbricates) the stomach, sutures the stomach to maintain the fold, and then implants the LAP-BAND from October 1, 2010, to August 31, 2012. Some of the procedures described above were not reasonable and necessary for the diagnosis or treatment of an illness or injury. To market and distribute the LAP-BAND for these uses and to induce health care professionals to use the LAP-BAND for these uses, Allergan provided remuneration to health care professionals in connection with their participation in proctoring events, reverse proctoring events, surgeon workshops, advisory boards, and training events in which these two uses were discussed and/or demonstrated, and from May 1 to May 31, 2012, an icon related to band-over-bypass on surgeon-specific pages on its website.

(2) From January 1, 2008, to November 1, 2010, Allergan knowingly sold LAP-BANDs with defective or flawed access ports that were inserted into patients. To conceal the defect or flaw and to induce health care professionals to continue using the LAP-BAND despite issues with access ports, Allergan misrepresented facts concerning the cause of access port leaks to the public, health care professionals, and the FDA, among others; failed to collect or maintain required data and complaint files; and offered and provided remuneration to health care professionals who reported access port leaks in the form of: discounted (or free) LAP BANDs, access ports, and related components; preferred pricing on LAP-BANDs, monetary settlements; research funding; consulting fees, proctoring and reverse proctoring fees, speaking fees, meals, and travel-related expenses.

(3) Relators and the Commissioner further contend that, as a result of the foregoing alleged conduct, Allergan knowingly caused health care providers to submit false or fraudulent claims for reimbursement for the LAP-BAND procedures to commercial insurers in California.

K. Relators claim entitlement under California Insurance Code section 1871.7(g)(2)(A) to a share of the proceeds of this Agreement.

L. This Agreement is not an admission of facts or liability by Allergan. Allergan expressly denies any and all wrongdoing, including but not limited to the allegations set forth herein and in the Civil Action.

M. To avoid the delay, uncertainty, inconvenience, and expense of protracted litigation of the CIFPA Claim, the Parties have reached a full, fair, and final settlement as set forth below.

## **II. TERMS AND CONDITIONS**

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

1. Allergan shall pay the sum of \$500,000.00 (five hundred thousand dollars) (the "Settlement Amount"), to be distributed as follows:

- (a) by electronic funds transfer in the amount of \$250,000.00 (two hundred fifty thousand dollars) to the California Department of Insurance within twenty (20) business days of the Effective Date of this Agreement pursuant to written instructions to be provided by the California Department of Insurance; and
- (b) by electronic funds transfer in the amount of \$250,000.00 (two hundred fifty thousand dollars) to Relators' Counsel's client trust account within twenty

(20) business days of the Effective Date of this agreement pursuant to written instructions provided by Phillips & Cohen LLP, Counsel for Relators.

2. Subject to the exceptions in Paragraph 3 below, in consideration of the obligations of Allergan set forth in this Agreement, and conditioned upon Allergan's payment in full of the Settlement Amount as set forth in Paragraph 1, Dave Jones in his capacity as Insurance Commissioner for the State of California, for himself, and for the California Department of Insurance, and its employees, servants, and agents, in their capacity as such, (the "California Entities"), hereby fully and finally releases, acquits, covenants not to sue, and forever discharges Allergan, its current and former direct and indirect parent corporations and limited liability companies; its and their affiliates, direct and indirect subsidiaries, brother and sister corporations, and divisions; its and their respective current and former corporate owners; the predecessors, successors, transferees, heirs, and assigns of any of them; and Allergan's and any of their past, present and future owners, shareholders, officers, directors, supervisors, members, managers, employees, agents, attorneys and representatives (collectively, "the Allergan Released Entities") for all time and to the fullest extent allowed by law, from any and all suits, arbitrations, claims, demands, actions, rights, obligations, limitations, claims, claims for relief, charges, actions, rights, and causes of actions, of any kind, character, or nature whatsoever that the California Entities have standing to bring or may now have or claim to have against the Allergan Released Entities, arising in any way out of or connected in any way with the facts, claims and circumstances alleged in, arising under, or arising from the allegations in the Civil Action or the Covered Conduct, whether known or unknown, fixed or contingent, in law or in equity, or in contract or tort, including but not limited to any and all penalties, fines, assessments, trebling,

disgorgements, overcharges, costs, fees, expenses, or general or special damages of any kind or nature.

3. Notwithstanding the releases given in Paragraph 2 of this Agreement, or any other terms of this Agreement, the following claims of the State of California are specifically reserved and are not released:

(a) any criminal, civil, or administrative liability arising under the State of California's Revenue and Taxation Code;

(b) any criminal liability not specifically released by this Agreement;

(c) any civil or administrative liability that any person or entity, including the Allergan Released Entities, has or may have to the State or to individual consumers or state program payors under any statute, regulation or rule not expressly covered by the release in Paragraph 2 of this Agreement, including but not limited to, any and all of the following claims: (i) state or federal antitrust violations; and (ii) claims involving unfair and/or deceptive acts and practices and/or violations of consumer protection laws;

(d) any liability to the State of California for any conduct other than the Covered Conduct;

(e) any liability based upon obligations created by this Agreement;

(f) except as explicitly stated in this Agreement, any administrative liability;

(g) any liability for express or implied warranty claims or other claims for defective or deficient products and services, including quality of goods and services, except for claims relating to the allegedly defective or flawed access ports described in the Covered Conduct;

(h) any liability for personal injury or property damage or for other consequential damages arising from the Covered Conduct;

(i) any liability for failure to deliver goods or services due; or

(j) except as explicitly stated in this Agreement, any liability of individuals.

4. Conditioned upon Allergan's payment in full of the Settlement Amount set forth in Paragraph 1, and execution of the Federal Settlement Agreement, the Illinois Private Insurance Settlement Agreement, and the Employment and Attorney Fee and Expense Settlement Agreement, Relators, for themselves and for their respective heirs, successors, attorneys, agents, and assigns, hereby fully and finally release, acquit, covenant not to sue, and forever discharge the Allergan Released Entities from any and all claims, claims for relief, actions, rights, causes of actions, suits, debts, obligations, liabilities, demands, losses, damages (including treble damages and any civil penalties), punitive damages, penalties, and costs including, but not limited to, attorneys' fees and court costs, and expenses of any kind, character or nature whatsoever, known or unknown, fixed or contingent, in law or in equity, in contract or tort, or under any state or federal statute or regulation or otherwise which Relators would have standing to bring, including claims Relators asserted against the Allergan Released Entities, arising in any way out of or connected in any way with the facts, claims, and circumstances alleged in, arising under, or arising from the Complaint's CIFPA claim or the Covered Conduct. This release does not apply to claims arising from conduct after the date of this Settlement Agreement, including but not limited to claims arising out of breach or performance of this Settlement Agreement.

5. Allergan fully and finally releases, waives and discharges the California Entities for all time and to the fullest extent allowed by law, from any and all suits, arbitrations, claims, demands, actions, rights, obligations, limitations, claims, claims for relief, charges, actions, rights, and causes of actions, of any kind, character, or nature whatsoever that Allergan has standing to bring or may now have or claim to have against the California Entities, arising in any



way out of or connected in any way with the facts, claims and circumstances alleged in, arising under, or arising from the CIFPA claim in the Civil Action or the Covered Conduct, whether known or unknown, fixed or contingent, in law or in equity, or in contract or tort, including but not limited to any and all penalties, fines, assessments, trebling, disgorgements, overcharges, costs, fees, expenses, or general or special damages of any kind or nature. This release does not apply to claims arising from conduct after the date of this Settlement Agreement, including but not limited to claims arising out of breach or performance of this Settlement Agreement.

6. Conditioned upon Allergan's full payment of the Settlement Amount, the California Entities and Relators covenant and agree that they, individually and collectively, will not sue, sue further, pursue any appeal or writ, or otherwise prosecute in any way, or pursue claims of any nature, against any Allergan Released Entities with respect to any of their own respective released claims in Paragraph 4. It is expressly agreed, intended, and understood by the Parties that this Agreement is a complete accord and satisfaction of any and all of the claims that the California Entities and Relators may have or may have had against the Allergan Released Entities with respect to any of their own respective released claims in Paragraph 4.

7. Allergan fully and finally releases Relators, and their respective heirs, successors, assigns and agents, from any claims for all time and to the fullest extent allowed by law, from any and all suits, arbitrations, claims, demands, actions, rights, obligations, limitations, claims, claims for relief, charges, actions, rights, and causes of actions, of any kind, character, or nature whatsoever that Allergan has standing to bring or may now have or claim to have against Relators, and their respective heirs, successors, assigns and agents, arising in any way out of or connected in any way with the facts, claims and circumstances alleged in, arising under, or arising from the CIFPA claim in the Civil Action or the Covered Conduct, whether known or

unknown, fixed or contingent, in law or in equity, or in contract or tort, including but not limited to any and all penalties, fines, assessments, trebling, disgorgements, overcharges, costs, fees, expenses, or general or special damages of any kind or nature. This release does not apply to claims arising from conduct after the date of this Settlement Agreement, including but not limited to claims arising out of breach or performance of this Settlement Agreement.

8. The Parties have conducted their own due diligence regarding their respective Released Claims and all matters relating to their respective Released Claims. This Agreement is expressly intended to release known and unknown claims arising out of the California Entities' Released Claims and the Relators' Released claims respectively, and to the extent it applies, the Parties expressly waive application of Section 1542 of the Civil Code of the State of California, which provides as follows:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.

9. The Parties agree that the Settlement Amount is inclusive of any and all attorneys' fees and/or costs recoverable under CIFPA. The Employment and Attorney's Fee and Expense Settlement Agreement memorializes the agreement between Relators and Allergan to resolve Relators' claim for payment of Relators' reasonable attorneys' fees, costs, and expenses in the Civil Action.

10. The agencies and officials of the State of California, including but not limited to the California Department of Insurance, shall have no liability for a breach, implied or actual, of this Agreement by Relators, and/or their counsel, or by Allergan, with respect to duties they may

owe each other under this Agreement. In the event of a breach of this Agreement by either Allergan or Relators or their counsel with respect to duties owed to each other under this Agreement, such breach will not affect the duties owed to the California Entities by Allergan and/or Relators under this Agreement.

11. Conditioned upon Relators' receipt of the payment set forth in Paragraph 1, Relators and their Counsel agree to hold the Allergan Released Entities free and harmless from any claims relating to, resulting or arising from any failure by Relators to make any payment of any kind to their Counsel or any disputes involving the allocation of payments among Counsel.

12. Upon receipt of Allergan's payment of the Settlement Amount as provided in Paragraph 1 of this Agreement and payment in full in accordance with the Federal Settlement Agreement, the Employment and Attorney's Fee and Expense Settlement Agreement, and the Illinois Private Insurance Settlement Agreement, the California Entities and Relators shall dismiss the Civil Action with prejudice as to themselves and with prejudice as to the California Insurance Commissioner and the California Department of Insurance in accordance with the process memorialized in the Federal Settlement Agreement.

13. This Agreement constitutes the entire understanding and agreement between the Parties as to the final settlement of any civil claims the California Entities and Relators assert they have arising out of the Covered Conduct under CIFPA or their respective Released Claims under this Agreement.

14. Except as expressly provided to the contrary in this Agreement, each Party to this Agreement shall bear its own legal and other costs incurred in connection with this matter, including the preparation and performance of this Agreement.

15. The Parties to this Agreement agree that no particular Party shall be deemed to be the author of this Agreement or any particular term, provision or condition of this Agreement. The Parties further agree that any ambiguities in this Agreement shall be resolved, and the terms, provisions, and conditions of this Agreement shall be construed and interpreted without regard to which Party may have suggested, drafted, revised, or otherwise authorized this Agreement or any of its particular terms, provisions, or conditions. For purposes of construing this Agreement, this Agreement shall be deemed to have been drafted by all Parties to this Agreement and shall not be construed against any Party for that reason in any subsequent dispute.

16. Each Party to this Agreement represents and warrants that such Party has the full right and authority to execute this Agreement. The signatories for the Parties hereto represent and warrant that they have been granted specific authority by their respective principals to execute the Agreement on behalf of the Party. Where applicable, all corporate, partnership, or other organizational action necessary to authorize such execution has been taken and completed. The signatory of each Party to this Agreement has the full right and authority to commit and bind each respective Party to the fullest extent of the law. The undersigned State signatories represent that they are signing this Agreement in their official capacities and that they are authorized to execute this Agreement on behalf of the State through their respective agencies and departments.

17. The Parties acknowledge that they have obtained the advice of legal counsel before signing this Agreement. The Parties acknowledge that they made the decision to execute this Agreement freely and without any duress or coercion by any person, party or individual. The Parties acknowledge that, in entering into this Agreement, each of them has been fully advised by its own counsel of the meaning and effect of this Agreement, and expressly warrants

that it has not relied on any statements, promises, interpretations, facts, or opinions, provided by any other Party or its counsel.

18. This Agreement is a settlement of disputed claims. By executing this Agreement, no Party admits any liability or fault in relation to the matters identified in or subject to this Agreement, and neither the execution of this Agreement nor the consideration therefore shall be construed as an admission as to the merits of any claim released herein.

19. In the event any portion of this Agreement is declared void by a court, such portion shall be severed from this Agreement, and the remaining provisions shall remain in effect, unless the effect of such severance would be to substantially alter the Agreement or obligations of the Parties, in which case the Agreement may be immediately terminated.

20. This Agreement is governed by the laws of California. The exclusive jurisdiction and venue for any dispute relating to this Agreement is the United States District Court for the District of Maryland, which shall retain jurisdiction of this matter for the purpose of enforcing this Agreement.

21. This Agreement may be executed in counterparts, each of which constitutes an original and all of which constitute one and the same Agreement, and each Party shall provide a copy of the signature page with the signature of its authorized representative to the other Parties.

22. This Agreement is binding on Allergan's successors, transferees, heirs, and assigns.

23. This Agreement is binding on Relators' successors, transferees, heirs, and assigns.

24. This Agreement is effective on the date of signature and transmittal to the other Parties, of the last signatory to the Agreement (the "Effective Date" of the Agreement). It is the intention of the Parties that this Agreement will be executed contemporaneously with the

execution of the Federal Settlement Agreement, the Illinois Private Insurance Settlement Agreement, and the Employment and Attorneys' Fee Agreement.

25. Facsimiles and scanned pdfs of physical (as opposed to typed) signatures shall constitute acceptable, binding signatures for purposes of this Agreement.

IN WITNESS WHEREOF, the Parties have executed this Agreement as noted below.

THE CALIFORNIA DEPARTMENT OF INSURANCE

DATED: 4/4/18

BY:   
MICHAEL J. LEVY  
Deputy General Counsel for Dave Jones in his  
Capacity As Insurance Commissioner  
for the California Department of Insurance

ALLERGAN, INC.

DATED: April 4, 2018

BY: 

ROBERT D. BAILEY  
Chief Legal Officer  
On Behalf of Allergan, Inc.

DATED: April 5, 2018

BY: 

STEPHEN C. PAYNE  
Gibson, Dunn & Crutcher LLP  
Counsel for Allergan, Inc.



RELATORS MONTE SCHWARTZ, M.D. AND RYAN TINSLEY

DATED: 04/04/2018

BY:   
MONTE SCHWARTZ, M.D., Relator

DATED: \_\_\_\_\_

BY: \_\_\_\_\_  
RYAN TINSLEY, Relator

DATED: \_\_\_\_\_

BY: \_\_\_\_\_  
COLETTE G. MATZZIE  
Phillips & Cohen LLP  
Counsel for Relators

RELATORS MONTE SCHWARTZ, M.D. AND RYAN TINSLEY

DATED: \_\_\_\_\_

BY: \_\_\_\_\_  
MONTE SCHWARTZ, M.D., Relator

DATED: 4-4-18

BY: Ryan Tinsley  
RYAN TINSLEY, Relator

DATED: \_\_\_\_\_

BY: \_\_\_\_\_  
COLETTE G. MATZZIE  
Phillips & Cohen LLP  
Counsel for Relators

RELATORS MONTE SCHWARTZ, M.D. AND RYAN TINSLEY

DATED: \_\_\_\_\_

BY: \_\_\_\_\_  
MONTE SCHWARTZ, M.D., Relator

DATED: \_\_\_\_\_

BY: \_\_\_\_\_  
RYAN TINSLEY, Relator

DATED: 4/3/18

BY: Colette G. Matzzie  
COLETTE G. MATZZIE  
Phillips & Cohen LLP  
Counsel for Relators