

## SETTLEMENT AGREEMENT

This Settlement Agreement (Agreement) is entered into among the United States of America, acting through the United States Department of Justice and on behalf of the Office of Inspector General (OIG-HHS) of the Department of Health and Human Services (HHS) (collectively, the “United States”), Omnicare, Inc. (“Omnicare”) and James Banigan and Richard Templin (“Relators”) (hereafter collectively referred to as “the Parties”), through their authorized representatives.

### RECITALS

A. Omnicare, directly and through its affiliates and subsidiaries, provides pharmacy goods and services to patients and providers in the United States, including skilled nursing, assisted living, and other institutional care facilities. Throughout the period referenced in this Agreement, certain of Omnicare’s pharmacy goods were reimbursed by federal healthcare programs, including Medicaid.

B. On September 13, 2007, Relators filed a *qui tam* action in the United States District Court for the Southern District of Texas, captioned *United States ex rel. Banigan & Templin v. Omnicare, Inc., et al.*, No. H-07-2953, pursuant to the *qui tam* provisions of the False Claims Act, 31 U.S.C. § 3730(b) (the Civil Action). On November 14, 2007, the Civil Action was transferred to the District of Massachusetts, captioned *United States ex rel. Banigan & Templin v. Omnicare, Inc., et al.*, No. 07-12153. On November 10, 2008, Relators filed an amended complaint. On March 18, 2010, Relators filed a second amended complaint, and alleged, *inter alia*, that Omnicare entered into purchase agreements with Organon USA Inc. in violation of the Anti-Kickback statute, 42 U.S.C. § 1320-7b(b), with respect to Remeron and Remeron SolTab (collectively, “Remeron”), an Organon drug. The United States declined to

intervene in the second amended complaint on September 7, 2010, and the case was unsealed on October 29, 2010. On March 25, 2011, Relators filed a revised third amended complaint.

C. Relators contend that Omnicare submitted or caused to be submitted claims for payment to the Medicaid Program, 42 U.S.C. §§ 1396-1396w-5 (“Medicaid”).

D. In order to resolve claims asserted against Omnicare pursuant to state law in the Civil Action, Omnicare will be entering into separate settlement agreements (the “Medicaid State Settlement Agreements”) with certain states, which will receive settlement funds from Omnicare pursuant to paragraph 2 below.

E. Relators contend that they have certain civil claims against Omnicare arising from the purchase agreements entered into by Omnicare and Organon with respect to Remeron between approximately October 1, 2001 through December 31, 2004, and Omnicare’s alleged agreement to recommend the prescription of Remeron to Medicaid patients in return for monetary payments disguised as rebates or discounts, in violation of the Anti-Kickback statute, 42 U.S.C. 1320a-7b(b). That conduct is referred to below as the “Covered Conduct.”

F. This Settlement Agreement is neither an admission of liability by Omnicare nor a concession by the Relators that their claims are not well founded. Omnicare expressly denies the allegations in Relators’ complaint and in Paragraph E above.

G. Relators claim entitlement under 31 U.S.C. § 3730(d) to a share of the proceeds of this Settlement Agreement and to Relators’ reasonable expenses, attorneys’ fees and costs. Relators claim entitlement pursuant to various state statutes to a share of the proceeds of the Medicaid State Settlement Agreements and to Relators’ reasonable expenses, attorneys’ fees and costs. Relators’ share is addressed by separate agreement between Relators and the states.

To avoid the delay, uncertainty, inconvenience, and expense of protracted litigation of the above claims, and in consideration of the mutual promises and obligations of this Settlement Agreement, the Parties agree and covenant as follows:

#### TERMS AND CONDITIONS

1. Omnicare shall pay to the United States \$12,849,761.35, plus interest at the rate of 1.64% beginning on October 26, 2016 (Settlement Amount) no later than seven (7) business days after the Effective Date of this Agreement by electronic funds transfer pursuant to written instructions to be provided by the Civil Division of the United States Department of Justice.
2. Omnicare shall pay a total of \$10,150,238.65 pursuant to the Medicaid State Settlement Agreements.
3. Conditioned upon the United States receiving the Settlement Amount from Omnicare and as soon as feasible after receipt, the United States shall pay \$3,726,430.79, plus pro rata interest, to Relators by electronic funds transfer.
4. Relators' claim under 31 U.S.C. § 3730(d) for expenses, attorney's fees and costs shall be resolved either by the Court or through a separate agreement between Relators and Omnicare.
5. Subject to the exceptions in Paragraph 7 (concerning excluded claims) below, and conditioned upon Omnicare's full payment of the Settlement Amount, the United States releases Omnicare, together with its current and former parent corporations; direct and indirect subsidiaries; brother or sister corporations; divisions; predecessors; current or former corporate owners; and the corporate successors and assigns of any of them from any civil or administrative monetary claim the United States has for the Covered Conduct under the False Claims Act, 31 U.S.C. §§ 3729-3733; the Civil Monetary Penalties Law, 42 U.S.C. § 1320a-7a; the Program



Fraud Civil Remedies Act, 31 U.S.C. §§ 3801-3812; or the common law theories of payment by mistake, unjust enrichment, and fraud.

6. Subject to the exceptions in Paragraph 7 below, and conditioned upon Omnicare's full payment of the Settlement Amount and the payment set forth in Paragraph 2, Relators, for themselves and for their heirs, successors, attorneys, agents, and assigns, and any other person acting on his or their behalf or asserting his or their rights, agree to dismiss with prejudice any currently pending claims against Omnicare in any federal or state court pertaining to the Civil Action, and hereby fully and finally release, waive and forever discharge Omnicare from any and all federal or state claims or allegations that Relators have standing to bring as of the date of this Agreement or which Relators may have against Omnicare from any and all claims for relief, actions, rights, causes of action, suits debts, obligations, liabilities, demands, losses, damages (including treble damages), all pertaining to the Civil Action, and any civil penalties, punitive damages, 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 federal or state statute or regulation or 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 filing of the Civil Action or from any past activities and actions of Omnicare related to the Civil Action, or from any civil monetary claim the Relators have or may have on behalf of the United States for the Covered Conduct under the False Claims Act, 31 U.S.C. §§ 3729-3733, except that Relators do not waive or release their entitlement under 31 U.S.C. § 3730(d) or any state statute for expenses, attorney's fees and costs, which claim shall be resolved either by the Court or through a separate agreement between Relators and Omnicare.

7. Notwithstanding the releases given in paragraphs 5 and 6 of this Agreement, or any other term of this Agreement, the following claims of the United States are specifically reserved and are not released:

- a. Any liability arising under Title 26, U.S. Code (Internal Revenue Code);
- b. Any criminal liability;
- c. Except as explicitly stated in this Agreement, any administrative liability, including mandatory or permissive exclusion from Federal health care programs;
- d. Any liability to the United States (or its agencies) for any conduct other than the Covered Conduct;
- e. Any liability based upon obligations created by this Agreement;
- f. Any liability of individuals;
- g. Any liability for express or implied warranty claims or other claims for defective or deficient products or services, including quality of goods and services;
- h. Any liability for failure to deliver goods or services due; or
- i. Any liability for personal injury or property damage or for other consequential damages arising from the Covered Conduct;

8. Relators and their heirs, successors, attorneys, agents, and assigns shall not object to this Agreement but agree and confirm that this Agreement is fair, adequate, and reasonable under all the circumstances, pursuant to 31 U.S.C. § 3730(c)(2)(B). Conditioned upon Relators' receipt of the payment described in Paragraph 3, Relators and their heirs, successors, attorneys, agents, and assigns fully and finally release, waive, and forever discharge the United States, its agencies, officers, agents, employees, and servants, from any claims arising from the filing of the

Civil Action or under 31 U.S.C. § 3730, and from any claims to a share of the proceeds of this Agreement and/or the Civil Action.

9. Omnicare waives and shall not assert any defenses Omnicare may have to any criminal prosecution or administrative action relating to the Covered Conduct that may be based in whole or in part on a contention that, under the Double Jeopardy Clause in the Fifth Amendment of the Constitution, or under the Excessive Fines Clause in the Eighth Amendment of the Constitution, this Agreement bars a remedy sought in such criminal prosecution or administrative action. Nothing in this paragraph or any other provision of this Agreement constitutes an agreement by the United States concerning the characterization of the Settlement Amount for purposes of the Internal Revenue laws, Title 26 of the United States Code.

10. Omnicare fully and finally releases the United States, its agencies, officers, agents, employees, and servants, from any claims (including attorney's fees, costs, and expenses of every kind and however denominated) that Omnicare has asserted, could have asserted, or may assert in the future against the United States, its agencies, officers, agents, employees, and servants, related to the Covered Conduct and the United States' investigation and prosecution thereof.

11. Omnicare fully and finally releases the Relators and their attorneys from any claims (including attorney's fees, costs, and expenses of every kind and however denominated) that Omnicare has asserted, could have asserted, or may assert in the future against the Relators and their attorneys, related to the Covered Conduct, the Complaints and the Relators' investigation and prosecution thereof. This provision does not preclude Omnicare from making any arguments in connection with any proceeding to resolve Relators' entitlement to expenses, attorney's fees and costs under 31 U.S.C. § 3730(d).

12. The Settlement Amount shall not be decreased as a result of the denial of claims for payment now being withheld from payment by any state payer, related to the Covered Conduct; and Omnicare agrees not to resubmit to any state payer any previously denied claims related to the Covered Conduct, agrees not to appeal any such denials of claims, and agrees to withdraw any such pending appeals.

13. Omnicare agrees to the following:

a. Unallowable Costs Defined: All costs (as defined in the Federal Acquisition Regulation, 48 C.F.R. § 31.205-47; and in Titles XVIII and XIX of the Social Security Act, 42 U.S.C. §§ 1395-1395kkk-1 and 1396-1396w-5; and the regulations and official program directives promulgated thereunder) incurred by or on behalf of Omnicare, its present or former officers, directors, employees, shareholders, and agents in connection with:

- (1) the matters covered by this Agreement;
- (2) the United States' audit(s) and civil investigation(s) of the matters covered by this Agreement;
- (3) Omnicare's investigation, defense, and corrective actions undertaken in response to the United States' audit(s) and civil investigation(s) in connection with the matters covered by this Agreement (including attorney's fees);
- (4) the negotiation and performance of this Agreement; and
- (5) the payment Omnicare makes to the United States pursuant to this Agreement and any payments that Omnicare may make to Relators, including costs and attorneys fees;



are unallowable costs for government contracting purposes and under the Medicare Program, Medicaid Program, TRICARE Program, and Federal Employees Health Benefits Program (FEHBP) (hereinafter referred to as Unallowable Costs).

b. Future Treatment of Unallowable Costs: Unallowable Costs shall be separately determined and accounted for by Omnicare, and Omnicare shall not charge such Unallowable Costs directly or indirectly to any contracts with the United States or any State Medicaid program, or seek payment for such Unallowable Costs through any cost report, cost statement, information statement, or payment request submitted by Omnicare or any of its subsidiaries or affiliates to the Medicare, Medicaid, TRICARE, or FEHBP Programs.

c. Treatment of Unallowable Costs Previously Submitted for Payment: Omnicare further agrees that within 90 days of the Effective Date of this Agreement it shall identify to applicable Medicare and TRICARE fiscal intermediaries, carriers, and/or contractors, and Medicaid and FEHBP fiscal agents, any Unallowable Costs (as defined in this Paragraph) included in payments previously sought from the United States, or any State Medicaid program, including, but not limited to, payments sought in any cost reports, cost statements, information reports, or payment requests already submitted by Omnicare or any of its subsidiaries or affiliates, and shall request, and agree, that such cost reports, cost statements, information reports, or payment requests, even if already settled, be adjusted to account for the effect of the inclusion of the Unallowable Costs. Omnicare agrees that the United States, at a minimum, shall be entitled to recoup from Omnicare any overpayment plus applicable interest and penalties as a result of the inclusion of such Unallowable Costs on previously-submitted cost reports, information reports, cost statements, or requests for payment.

Any payments due after the adjustments have been made shall be paid to the United States pursuant to the direction of the Department of Justice and/or the affected agencies. The



United States reserves its rights to disagree with any calculations submitted by Omnicare or any of its subsidiaries or affiliates on the effect of inclusion of Unallowable Costs (as defined in this Paragraph) on Omnicare or any of its subsidiaries or affiliates' cost reports, cost statements, or information reports.

d. Nothing in this Agreement shall constitute a waiver of the rights of the United States to audit, examine, or re-examine Omnicare's books and records to determine that no Unallowable Costs have been claimed in accordance with the provisions of this Paragraph.

14. This Agreement is intended to be for the benefit of the Parties only. The Parties do not release any claims against any other person or entity, except to the extent provided for in Paragraph 15 (waiver for beneficiaries paragraph), below.

15. Omnicare agrees that it waives and shall not seek payment for any of the health care billings covered by this Agreement from any health care beneficiaries or their parents, sponsors, legally responsible individuals, or third party payors based upon the claims defined as Covered Conduct.

16. Upon receipt of the payment described in Paragraph 1, above, the Parties shall promptly sign and file in the Civil Action a Joint Stipulation of Dismissal of the claims asserted against Omnicare on behalf of the United States in the Civil Action pursuant to Rule 41(a)(1). The Joint Stipulation of Dismissal shall provide that the claims against Omnicare are being dismissed subject to the terms of the Agreement, with prejudice as to the United States as to the Covered Conduct released in the Settlement Agreement, and without prejudice as to any other claims, and with prejudice as to all claims against Omnicare as to the Relators only, excluding Relators' claim under 31 U.S.C. § 3730(d) for expenses, attorney's fees and costs, which shall be resolved either by the Court or through a separate agreement between Relators and Omnicare.

17. Each Party shall bear its own legal and other costs incurred in connection with this matter, including the preparation and performance of this Agreement, except as provided otherwise herein.

18. Each party and signatory to this Agreement represents that it freely and voluntarily enters in to this Agreement without any degree of duress or compulsion.

19. This Agreement is governed by the laws of the United States. The exclusive jurisdiction and venue for any dispute relating to this Agreement is the United States District Court for the District of Massachusetts. For purposes of construing this Agreement, this Agreement shall be deemed to have been drafted by all Parties to this Agreement and shall not, therefore, be construed against any Party for that reason in any subsequent dispute.

20. This Agreement constitutes the complete agreement between the Parties. This Agreement may not be amended except by written consent of the Parties.

21. The undersigned counsel represent and warrant that they are fully authorized to execute this Agreement on behalf of the persons and entities indicated below.

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

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

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

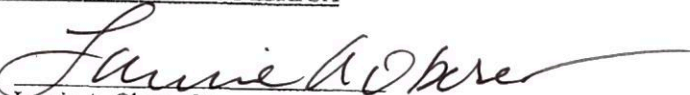
25. All parties consent to the United States' disclosure of this Agreement, and information about this Agreement, to the public.

26. This Agreement is effective on the date of signature of the last signatory to the Agreement (Effective Date of this Agreement). Facsimiles and electronic transmissions of signatures shall constitute acceptable, binding signatures for purposes of this Agreement.

DATED: 5/15/17

THE UNITED STATES OF AMERICA

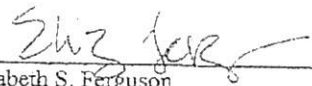
BY:

  
Laurie A. Oberembt  
Senior Trial Counsel  
Commercial Litigation Branch  
Civil Division  
United States Department of Justice

Omnicare, Inc. - DEFENDANT

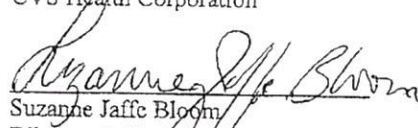
DATED: 5-10-17

BY:

  
Elizabeth S. Ferguson  
Deputy General Counsel  
CVS Health Corporation

DATED: 5-10-17

BY:

  
Suzanne Jaffe Bloom  
Winston & Strawn  
Counsel for Omnicare, Inc.




James Banigan and Richard Templin - RELATORS

DATED:

5/4/17

BY:

  
Richard Templin

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

BY: \_\_\_\_\_

James Banigan

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

BY: \_\_\_\_\_

Joel Androphy  
David Berg  
Sarah Frazier  
Berg & Androphy  
Houston, Texas  
Counsel for Relators Templin and Banigan

**Omnicare, Inc. - DEFENDANT**

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

BY: \_\_\_\_\_

Elizabeth S. Ferguson  
Deputy General Counsel  
CVS Health Corporation

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

BY: \_\_\_\_\_

Suzanne Jaffe Bloom  
Winston & Strawn  
Counsel for Omnicare, Inc.

**James Banigan and Richard Templin - RELATORS**

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

BY: \_\_\_\_\_

**Richard Templin**

DATED: 5/4/17

BY: \_\_\_\_\_

**James Banigan**

DATED: 5/5/17

BY: \_\_\_\_\_

**James Banigan and Richard Templin - RELATORS**

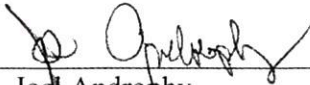
DATED: \_\_\_\_\_

BY: \_\_\_\_\_  
**Richard Templin**

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

BY: \_\_\_\_\_  
**James Banigan**

DATED: 5-10-17

BY:  \_\_\_\_\_  
Joel Androphy  
David Berg  
Sarah Frazier  
Berg & Androphy  
Houston, Texas  
Counsel for Relators Templin and Banigan