

## Co-Funded Marketing Program Terms & Conditions Agreement

Please review. At the end of this page you will receive a link to the submission form. When you click on the button, you are agreeing to the terms and conditions of the co-funded marketing program.

- A. EGS is in the business of providing EsophyX for the treatment of GERD using the TIF (Transoral Incisionless Fundoplication) procedure.
- B. Healthcare Provider is interested in increasing patient awareness of the TIF procedure for treating GERD.
- C. EGS and Healthcare Provider each have an identified need for the other party's assistance in marketing the EsophyX TIF procedure as a treatment for GERD.
- D. EGS and Healthcare Provider agree to collaborate in order to advance their mutual business objectives and identified needs as set forth in this Agreement.

### **1. Joint Marketing Activities and Expense Sharing Arrangements.**

**1.1** From time to time during the Term of this Agreement, Healthcare Provider may submit requests for a co-funded marketing campaign (CFMR) via the EGS online processing system at [e.g. <http://www.SURVEYMONKEY.COM/S/EGSCO-FUNDREQUEST> or current link] (each, a "CFMR") and if approved and accepted by EGS, such CFMR will be attached to this Agreement as Exhibit A (each, an "Approved Campaign").

**1.2** EGS and Healthcare Provider agree to use diligent efforts to conduct the activities set forth in the Approved Campaign on the timeline set forth therein. The parties will meet from time to time (in person or by telephone) as appropriate to discuss the Approved Campaign, its implementation activities and schedule.

**1.3** All expenses for the Approved Campaign will be estimated in good faith in the CFMR and will be allocated between EGS and Healthcare Provider (the "Allocated Expenses"). The apportionment of all Allocated Expenses shall correspond to the fair market value of each party's contribution to the Approved Campaign and no activity may be approved without a written representation by each party that the Allocated Expenses reflect the fair market value of the items and services to be furnished by that party.

**1.4** Approved Campaign limit: **EGS' reimbursement for Allocated Expenses under each Approved Campaign will not exceed the lesser of (i) 50% of the total expenses for the Approved Campaign or (ii) \$10,000 per calendar year as EGS corporate budget allows. .**

**1.5** Except as set forth in an Approved Campaign, all expenses, including Allocated Expenses, shall be paid directly by Healthcare Provider. Healthcare Provider shall be responsible for submitting all Allocated Expenses (including appropriate documentation) payable by EGS in accordance with the Approved Campaign and guidelines set forth in this Agreement. EGS will pay properly approved and submitted Allocated Expenses on a net thirty (30) day basis. EGS may contract with a third party service provider to assist with the estimation, tactical execution, expense allocations and reimbursements associated with an Approved Campaign in conjunction with a Healthcare Provider.

**1.6** Healthcare Provider agrees that it will obtain EGS's prior approval for all promotional activities that it performs and any marketing materials that it employs pursuant to this Agreement that make reference to EGS and/or any of its products or the TIF procedures.

## **2. Term and Termination.**

**2.1** This Agreement shall commence on the Effective Date and shall continue for a period of 12 months, unless earlier terminated pursuant to Section 2.2. Thereafter, this Agreement will automatically renew for additional 12 month periods unless either party gives notice of its intent not to renew at least 30 days prior to the expiration of the then current 12 month period.

**2.2** This Agreement may be terminated at any time with or without cause by either party upon thirty (30) days written notice of its intent to terminate this Agreement. In addition, either party may terminate this Agreement immediately upon written notice if the other party materially breaches this Agreement. Termination shall not affect the obligations of the parties to reimburse or otherwise share the Allocated Expenses to the extent such expenses were approved pursuant to an Approved Campaign and were accrued prior to the effective date of termination. The obligations under Sections 3, 4, 5, 6 and 8 shall survive any expiration or termination of this Agreement.

## **3. Legal and Regulatory Requirements.**

**3.1** All activities under the Approved Campaign shall be subject to reconciliation of the apportionment of costs, and any over- or underpayments by either party, at the end of the Approved Campaign, or at least annually, whichever occurs sooner.

**3.2** No payments or costs contemplated hereunder shall be conditioned upon referrals from one party to the other, nor shall such payments or costs be based upon the volume or value of referrals between the parties. This Agreement is neither intended to reward or induce nor conditioned upon, and shall not be construed as requiring, any referrals of business between the parties. Healthcare Provider and any Healthcare Provider-affiliated physicians shall remain free to exercise independent medical judgment in selecting treatment options for patients with GERD and determining where to furnish any treatment. Healthcare Provider and EGS further agree that as a material term of this Agreement, if either party's compliance officer or compliance committee receives a credible allegation of noncompliance with any applicable law related to the performance of this Agreement, it shall promptly notify the other party as provided in Section 9.7. If Healthcare Provider or EGS determines or receives notice of any change in a statute or regulation governing the performance of this Agreement (including binding caselaw or published opinions of government regulatory agencies) that would have the effect of subjecting either EGS or the Healthcare Provider to criminal, civil, or administrative liability under federal or state laws, the parties shall attempt in good faith to amend this Agreement to the absolute minimum extent necessary in order to comply with the change in the law as applicable. If the parties hereto acting in good faith are unable to mutually agree upon and make amendments or alterations to conform to any changes in the law, then either party may terminate this Agreement upon thirty (30) days' notice, unless any change in the law requires a shorter time period to avoid liability.

**3.3** For the purpose of entering into this Agreement and/or for any joint marketing activities that Healthcare Provider performs pursuant to this Agreement, Healthcare Provider shall obtain and maintain any and all authorizations from individuals to the extent required by state and/or federal law, including the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), as amended by the Health Information Technology for Economic and Clinical Health Act of 2009 ("HITECH"), comparable state laws, and their respective implementing regulations issued prior or subsequent to the Effective Date (collectively the "HIPAA Rules"), and including, to the extent required by state and/or federal law and/or the HIPAA Rules, authorizations containing specifications from individuals that Healthcare Provider may further exchange their protected health information for direct or indirect remuneration from the entity receiving protected health information of that individual.

**3.4** With respect to all activities related to this Agreement, Healthcare Provider agrees to comply with EGS's Corporate Compliance Program (<http://www.endogastricsolutions.com/corpCompliance.htm>) and all of EGS's applicable compliance policies and procedures as they pertain to the marketing activities contemplated by this Agreement. Without limiting the foregoing, Healthcare Provider agrees that (a) all joint marketing content shall be consistent

with the FDA cleared Indications For Use and Instructions for Use for the EsophyX technology (i.e., on-label) and consistent with all other applicable regulations and requirements of the Food & Drug Administration; (b) any discussion of EGS products must be balanced by a discussion of potential risks; and (c) any in-person events shall disclose EGS's involvement as a co-sponsor and shall be conducted in settings that are conducive to the effective transmission of knowledge and shall not include recreation or entertainment. Items b and c are covered in EGS supplied disclaimer.

**3.5** Healthcare Provider agrees that EGS may disclose certain information relating to this Agreement, including Healthcare Provider's name, payment amounts, the nature of payments made by EGS, and any other information that may be required by applicable federal and state laws, including the federal "Sunshine Act" transparency reporting requirements set forth in 42 C.F.R. Part 403, and that Healthcare Provider will cooperate with all reasonable requests for information necessary for EGS to meet its transparency reporting obligations.

#### **4. Indemnification.**

**4.1** Each party ("**Indemnitor**") agrees to indemnify, defend and hold harmless the other party and its affiliated companies and their officers, agents, and employees ("**Indemnitees**") from any and all losses, liabilities, damages, claims, costs or expenses (including reasonable attorney's fees) they may suffer as the result of third party claims, demands, actions or judgments against them ("**Losses**") arising out of (i) any breach of this Agreement or violation of applicable law by, or (ii) the negligence or willful misconduct of, the Indemnitor, its officers, employees, agents or independent contractors in the course of activities carried out under this Agreement, except to the extent that the other party is required to indemnify the Indemnitor and its Indemnitees from such Losses.

**4.2** In the event that an Indemnitee seeks indemnification under this Section 5, it shall inform the Indemnitor of a claim within 30 days after receiving notice of the claim, shall permit the Indemnitor to assume direction and control of the defense of the claim (including the right to settle the claim solely for monetary consideration), and shall reasonably cooperate at the request and expense of the Indemnitor in the defense and settlement of the claim.

#### **5. Disclaimers; Limitations.**

**5.1** In no event shall either party be liable to the other or responsible for any indirect, incidental or consequential loss or damage of any nature whatsoever, including without limitation, any actual or anticipated profits, loss of time, inconvenience, commercial loss or any other damages.

**5.2** EACH PARTY PROVIDES ALL MATERIALS AND SERVICES TO THE OTHER PARTY "AS IS." EACH PARTY DISCLAIMS ALL WARRANTIES AND CONDITIONS, EXPRESS OR IMPLIED OR STATUTORY. EACH PARTY ACKNOWLEDGES THAT IT HAS NOT ENTERED INTO THIS AGREEMENT IN RELIANCE UPON ANY WARRANTY OR REPRESENTATION EXCEPT THOSE SET FORTH HEREIN.

#### **6. Confidentiality.**

**6.1** "As used herein, "**Confidential Information**" shall mean any and all technical and non-technical information provided by a party to the other party (the "**Recipient**"), including but not limited to (a) patent and patent applications; (b) trade secret; and (c) proprietary information – ideas, samples, techniques, sketches, drawings, works of authorship, models, inventions, know-how, processes, apparatuses, equipment, algorithms, software programs, software source documents, and formulae related to the current, future, and proposed products and services of each of the parties, including, without limitation, their respective information concerning research, experimental work, development, design details and specifications, engineering, financial information, procurement requirements, purchasing, manufacturing, customer lists, investors, employees, business and contractual relationships, business forecasts, sales and merchandising, marketing plans and information the disclosing party provides regarding

third parties.

**6.2** Each party agrees always to hold in strict confidence and not to disclose to any person or entity any Confidential Information (as defined below), except approved in writing by the other party to this Agreement. Notwithstanding the immediately preceding sentence, a party shall not be in violation of this Section 6 about a disclosure that was in response to a valid order by a court or other governmental body, if the Recipient provides the other party with written notice of such disclosure promptly enough to permit the other party to seek confidential treatment of such information and that the Recipient reasonably cooperates with such efforts at the other party's expense. Each party shall permit access to Confidential Information of the other party only to those of its employees, agents or authorized representatives having a need to know for purposes of this Agreement and who have signed confidentiality agreements or are otherwise bound by confidentiality obligations at least as restrictive as those contained herein. Each Recipient agrees that it will not in any way attempt to obtain, either directly or indirectly, any information regarding the Confidential Information of the other party from any third party who has been employed by, provided consulting services to, or received Confidential Information from, the other party.

**6.3** Each party shall immediately notify the other upon discovery of any loss or unauthorized disclosure of the Confidential Information of the other party.

**6.4** Each party's obligations under this Agreement with respect to any portion of the other party's Confidential Information shall terminate when the Recipient can document by competent proof that: (a) it was in the public domain at the time it was communicated to the Recipient by the other party; (b) it entered the public domain subsequent to the time it was communicated to the Recipient by the other party though no act or omission of the Recipient, its employees or agents; (c) it was in the Recipient's possession free of any obligation of confidence at the time it was communicated to the Recipient by the other party, as shown by contemporaneous written records; (d) it was rightfully communicated to the Recipient free of any obligation of confidence subsequent to the time it was communicated to the Recipient by the other party; or (e) it was independently developed by the Recipient without any use of the Confidential Information by personnel who did not have access to the Confidential Information, as shown by independent, contemporaneous, written records.

**6.5** Upon expiration of this Agreement, or upon written request of the other party, each Recipient shall promptly return to the other party all documents and other tangible materials representing the other party's Confidential Information and all copies thereof.

**7. Use of Trademarks.** The parties acknowledge and agree that the EndoGastric Solutions trademark and all EGS product and procedure names, including but not limited to EsophyX device, TIF procedure and any and all products and procedures that EGS develops after the Effective Date, are registered trademarks of and proprietary to EGS. If any arrangements involve the use of intellectual property rights proprietary to EGS, this Agreement is not a conveyance, license, or lease and no right, title, or interest in the intellectual property or proprietary rights of EGS shall pass to any physicians or Healthcare Provider parties. All intellectual property of EGS as well as any changes, deviations, additions, and goodwill associated therewith shall remain the property of EGS. Healthcare Provider agrees that it will not at any time do or cause to be done any act or thing contesting or impairing EGS's right, title, or interest in the intellectual property of EGS. Any use of the intellectual property of EGS, including all goodwill associated with it, shall inure to the benefit of EGS.

**8. Representations and Warranties.** Each party hereby represents and warrants as follows:

**8.1** Such party is duly organized, validly existing and has full corporate power and authority to enter into this Agreement and to carry out the provisions hereof.

**8.2** The execution, delivery and performance of this Agreement by such party do not conflict with any agreement to which it is a party.

**9. Miscellaneous.**

**9.1** Neither party shall lose any rights hereunder or be liable to the other party for damages or losses on account of failure of performance by the defaulting party if the failure is occasioned by government action, war, fire, earthquake, explosion, flood, strike, lockout, embargo, act of God, or any other similar or dissimilar cause beyond the control of the defaulting party, provided that the party claiming force majeure has exerted and continues to exert all reasonable efforts to avoid or remedy such force majeure.

**9.2** The parties shall perform their obligations under this Agreement as independent contractors.

**9.3** Any waiver by either party of any of its rights or failure to exercise any remedy shall not operate as a continuing waiver of same or of any other rights or remedies.

**9.4** This Agreement, together with all Exhibits hereto, represents the entire understanding between the parties as of the Effective Date with respect to the subject matter hereof, and supersedes all prior agreements, negotiations, understandings, representations, statements and writings between the parties relating thereto. Any amendment or modification of the terms of this Agreement shall be in a writing signed by each party.

**9.5** Except for assignments about any merger, acquisition, or sale of substantially all a party's business, this Agreement shall not be assignable in whole or in part by either party without the prior written consent of the other party, and any assignment or attempted assignment not in compliance with this sentence shall be void. This Agreement shall be binding upon and inure to the benefit of the successors and permitted assigns of the parties.

**9.6** This Agreement shall be construed under, and its performance shall be governed by, the laws of the State of California, except for its conflicts of laws principles.

**9.7** Any notice shall be delivered in writing and either personally delivered or sent by facsimile transmission (with telephonic follow-up) or overnight courier, and will be deemed given as of the date it is received by the receiving party, as shown by personal delivery, confirmed facsimile transmission or acknowledgment of receipt of the courier delivery.

18109 NE 76<sup>th</sup>  
Suite100  
Redmond, WA 98052  
Fax: 425-307-9201  
Attn: Marketing Department

I have read and understand the terms and conditions of this EndoGastric® Solutions Co-Funded Marketing Agreement, and agree to enter into a Co-Funded Marketing program.



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