

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"), and Beth Israel Deaconess Medical Center (“BIDMC”) (hereafter collectively referred to as "the Parties"), through their authorized representatives.

RECITALS

- A. BIDMC is a non-profit, acute care teaching hospital located in Boston, Massachusetts which submits claims to Medicare for inpatient and outpatient care provided to Medicare beneficiaries.
- B. The United States contends that BIDMC submitted or caused to be submitted claims for payment to the Medicare Program (Medicare), Title XVIII of the Social Security Act, 42 U.S.C. §§ 1395-1395kkk-1.
- C. The United States contends that it has certain civil claims against BIDMC arising from the submission of Medicare claims described in paragraph B during the period from June 1, 2004 through March 31, 2008 for the conduct described as follows:
1. From June 1, 2004 through March 31, 2008, BIDMC submitted claims to Medicare for less than one day (zero-day) stay inpatient admissions that were inappropriate for reimbursement as inpatient services and should have been billed as outpatient or observation services.
 2. From June 1, 2004 through March 31, 2008, BIDMC submitted claims to Medicare for one-day stay inpatient admissions for the following

Diagnostic Related Groups (“DRGs”) that were inappropriate for reimbursement as inpatient services and should have been billed as outpatient or observation services:

- From June 1, 2004 through September 30, 2007, DRGs 127 (congestive heart failure); 143 (chest pain); 182 and 183 (gastroenteritis); and 296 and 297 (nutritional and metabolic disorders); and
- From October 1, 2007 through March 31, 2008, MS-DRGs 291, 292, and 293 (heart failure); 313 (chest pain); 391 and 392 (gastroenteritis); 640 and 641 (nutritional and metabolic disorders).¹

The conduct described in paragraph C shall hereinafter be referred to as the “Covered Conduct.”

D. This Settlement Agreement is neither an admission of liability by BIDMC nor a concession by the United States that its claims are not well founded.

E. 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. BIDMC shall pay to the United States five million, three hundred fifteen thousand dollars (\$5,315,000) together with interest accrued thereon at the rate of 1.375%

¹ On October 1, 2007, CMS changed from a system that assigned DRGs to Inpatient Prospective Payment System (IPPS) claims to a system that assigned Medical Severity DRGs (MS-DRGs) to IPPS claims. The MS-DRG codes listed in this section map to the DRG codes listed above for the period of June 1, 2004 through September 30, 2007.

beginning on May 30, 2013, and continuing until and including the date of payment (hereinafter, the "Settlement Amount"). BIDMC shall make payment of the Settlement Amount as provided by this paragraph by wire transfer no later than 10 days after the Effective Date of this Agreement (as defined by paragraph 18, below). The office of the United States Attorney for the District of Massachusetts will provide written instructions for that wire transfer within five days of the Effective Date of this Agreement.

2. Subject to the exceptions in Paragraph 3 (concerning excluded claims) below, and conditioned upon BIDMC's full payment of the Settlement Amount, the United States releases BIDMC, as well as its current and former officers, directors, employees, trustees, affiliates, agents, servants, parent corporations, brother and sister corporations, divisions, subsidiaries, 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.

3. Notwithstanding the release given in paragraph 2 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 for express or implied warranty claims or other claims for defective or deficient products or services, including quality of goods and services;
- g. Any liability for failure to deliver goods or services due;
- h. Any liability for personal injury or property damage or for other consequential damages arising from the Covered Conduct;
- i. Any liability of individuals.

4. BIDMC waives and shall not assert any defenses BIDMC 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.

5. BIDMC 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 BIDMC has asserted, could have asserted, or may assert in the future against the United States, and its agencies, employees, servants, and agents, related to the Covered Conduct and the United States' investigation and prosecution thereof.

6. The Settlement Amount shall not be decreased as a result of the denial of claims for payment now being withheld from payment by any Medicare contractor (e.g., Medicare Administrative Contractor, fiscal intermediary, carrier) or any state payer, related to the Covered Conduct; and BIDMC agrees not to resubmit to any Medicare contractor or any state payer any previously denied claims related to the Covered Conduct, and agrees not to appeal any such denials of claims.

7. BIDMC 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 BIDMC, 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 and civil investigation of the matters covered by this Agreement;

- (3) BIDMC'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 BIDMC makes to the United States pursuant to this Agreement

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 in non-reimbursable cost centers by BIDMC, and BIDMC 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 BIDMC or any of its subsidiaries or affiliates to the Medicare, Medicaid, TRICARE, or FEHBP Programs.

c. Treatment of Unallowable Costs Previously Submitted for Payment: BIDMC 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 BIDMC 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. BIDMC agrees that the United States, at a minimum, shall be entitled to recoup from BIDMC 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 BIDMC or any of its subsidiaries or affiliates on the effect of inclusion of Unallowable Costs (as defined in this Paragraph) on BIDMC 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 BIDMC's books and records to determine that no Unallowable Costs have been claimed in accordance with the provisions of this Paragraph.

8. 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 9 (waiver for beneficiaries paragraph), below.

9. BIDMC 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.

10. Each Party shall bear its own legal and other costs incurred in connection with this matter, including the preparation and performance of this Agreement.

11. 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.

12. 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.

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

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

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


16. This Agreement is binding on BIDMC's successors, transferees, heirs, and assigns.

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

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

THE UNITED STATES OF AMERICA

DATED: 7/25/2013

BY: 
JENNIFER A. CARDELLO
Assistant United States Attorney

DATED: 7/24/13

BY: 
JOHN W. O'BRIEN
Special Assistant United States Attorney

DATED: _____

BY: _____
ROBERT K. DECONTI
Assistant Inspector General for Legal Affairs
Office of Counsel to the Inspector General
Office of Inspector General
United States Department of Health and Human
Services

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

THE UNITED STATES OF AMERICA

DATED: _____

BY: _____

JENNIFER A. CARDELLO
Assistant United States Attorney

DATED: _____

BY: _____

JOHN W. O'BRIEN
Special Assistant United States Attorney


DATED: 7/24/13

BY: _____

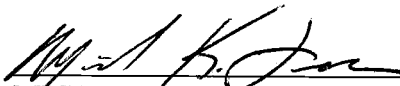
Robert K. DeConti
ROBERT K. DECONTI
Assistant Inspector General for Legal Affairs
Office of Counsel to the Inspector General
Office of Inspector General
United States Department of Health and Human
Services

BETH ISRAEL DEACONESS MEDICAL CENTER

DATED: 7/22/13

BY: 
KEVIN TABB, M.D.
President and CEO
Beth Israel Deaconess Medical Center

DATED: July 23, 2013

BY: 
MICHAEL K. FEE
Ropes & Gray LLP
Counsel for Beth Israel Deaconess Medical Center

DATED: _____

BY: _____
WILLIAM T. MATHIAS
Ober Kaler
Counsel for Beth Israel Deaconess Medical Center

BETH ISRAEL DEACONESS MEDICAL CENTER

DATED: _____

BY: _____

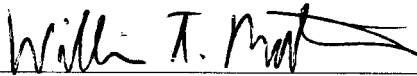
KEVIN TABB, M.D.
President and CEO
Beth Israel Deaconess Medical Center

DATED: _____

BY: _____

MICHAEL K. FEE
Ropes & Gray LLP
Counsel for Beth Israel Deaconess Medical Center

DATED: 7/22/13

BY: 

WILLIAM T. MATHIAS
Ober Kaler
Counsel for Beth Israel Deaconess Medical Center