

## **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”); DaVita Inc. (“DaVita”); and Relator Dennis Kogod (hereafter collectively referred to as “the Parties”), through their authorized representatives.

### **RECITALS**

A. Defendant DaVita Inc. is a Delaware corporation with its corporate headquarters located in Denver, Colorado. DaVita is a provider of dialysis services for patients suffering from chronic kidney failure, also known as End Stage Renal Disease (“ESRD”).

B. Defendant DaVita Rx, LLC, (“DaVita Rx”) was a wholly owned subsidiary of DaVita Inc. that provided pharmacy services to patients with ESRD. DaVita Rx ceased business operations in August 2018.

C. Defendant RMS Lifeline Inc. d/b/a Lifeline Vascular Access (“Lifeline”) was a wholly owned subsidiary of DaVita Inc., that managed vascular access centers. DaVita Inc. sold Lifeline in May 2020.

D. On October 31, 2017, Kogod filed a *qui tam* action in the United States District Court for the District of Colorado captioned *United States ex rel. Kogod v. DaVita, Inc., et al.*, No. 17-cv-02611-PAB, pursuant to the *qui tam* provisions of the False Claims Act, 31 U.S.C. § 3730(b) (“the Civil Action”).

E. The United States contends that DaVita submitted or caused to be submitted

claims for payment to Medicare Parts B and D, Title XVIII of the Social Security Act, 42 U.S.C.

§§ 1395-1395lll. The United States contends that it has certain civil claims against DaVita

arising from the conduct described below. That conduct is referred to below as the “Covered

Conduct.”:

1. On November 27, 2012, DaVita and one of its competitors in the outpatient dialysis and renal pharmacy markets (“Competitor”) entered into a Pharmacy Services and Master Licensing Agreement (“Pharmacy Agreement”).
  - a. Pursuant to the Pharmacy Agreement, Competitor paid prescription, dispensing, and shipping fees to DaVita Rx to serve as Competitor’s “central fill pharmacy,” or prescription fulfillment provider. DaVita Rx was responsible for processing, fulfilling, dispensing, and shipping prescription drugs to Competitor’s Medicare dialysis patients, either at the patients’ home or Competitor’s dialysis clinics. The United States contends that Competitor referred its Medicare dialysis patients’ prescriptions to DaVita Rx. Competitor submitted claims to Medicare for the drugs that DaVita Rx dispensed and the services it provided to Competitor’s patients from November 2013 to mid-August 2018. Those claims were reimbursed by the Medicare Part B ESRD Prospective Payment Services bundle or through Medicare Part D.
  - b. The United States contends that, in exchange for Competitor entering into the Pharmacy Agreement for the referral of its Medicare patients’ prescriptions, DaVita agreed to purchase nine dialysis clinics in Portugal and Poland from Competitor on November 27, 2012. The United States further contends that DaVita would not have entered into the European clinic purchase at the price it paid without Competitor’s return agreement to enter into the Pharmacy Agreement.
  - c. The United States contends that, in exchange for Competitor entering into the Pharmacy Agreement for the referral of its Medicare patients’ prescriptions, DaVita also agreed in November 2012 to extend an existing agreement under which it purchased certain products from Competitor’s subsidiary. The United States further contends that DaVita would not have entered into the Product Agreement extension at the purchase commitment levels without Competitor’s return agreement to enter into the Pharmacy Agreement.
  - d. The United States contends that DaVita’s purchase of Competitor’s European clinics and the extension of the Products Agreement constituted remuneration paid by DaVita to induce the referral of Competitor’s Medicare patients’ prescriptions and business to DaVita Rx in violation of

the Anti-Kickback Statute, 42 U.S.C. § 1320a-7b(b) (“the AKS”), which caused Competitor to submit false and fraudulent claims for reimbursement of prescription drugs and services to Medicare in violation of the False Claims Act, 31 U.S.C. §§ 3729-33.

2. DaVita, through Lifeline, provided management services to physician owners of vascular access centers and ambulatory surgical centers (collectively, “centers”). In exchange for these services, Lifeline charged centers a management fee.
  - a. The United States contends that certain of the centers Lifeline managed were owned by practices in a position to refer patients to DaVita dialysis clinics.
  - b. During the course of the Government’s investigation, DaVita identified a portion of uncollected management fees for the period from 2007 through October 31, 2018.
  - c. The United States contends that DaVita’s failure to collect the portion of management fees was improper, that it constituted remuneration to induce patient referrals in violation of the AKS, and that through these arrangements DaVita submitted false and fraudulent Medicare claims for dialysis services.
3. On March 31, 2006, DaVita entered into an agreement with a large nephrology practice (“Practice”) to provide medical director services at certain DaVita dialysis clinics. The agreement contained a provision whereby DaVita was required to pay Practice \$50,000 for any newly established dialysis clinics within a specified service radius in which it did not contract with Practice to serve as medical director.
  - a. Pursuant to this provision of the agreement, DaVita paid Practice \$50,000 on September 22, 2006, and again on October 22, 2012.
  - b. The United States contends this provision was improper, that the remuneration paid thereunder violated the AKS, and that through this arrangement DaVita submitted false and fraudulent claims for dialysis services administered at the Practice-staffed dialysis clinics to Medicare for reimbursement.

F. This Settlement Agreement is neither an admission of liability by the DaVita nor a concession by the United States that its claims are not well founded. DaVita denies the United States’ and Kogod’s allegations.

- G. Kogod claims entitlement under 31 U.S.C. § 3730(d) to a share of the proceeds of

this Settlement Agreement and to Kogod's reasonable expenses, attorneys' fees, and costs.

H. 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. DaVita shall pay to the United States a total of \$34,487,390 ("Settlement Amount") plus interest on the Settlement Amount at a rate of 4.00 percent per annum from March 25, 2024 through the date of payment, of which \$17,243,695 is restitution, no later than 10 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 Department of Justice.

2. Conditioned upon the United States receiving the Settlement Amount and as soon as feasible after receipt, the United States shall pay \$6,370,000 plus a proportionate share of interest to Relator by electronic funds transfer ("Relator's Share").

3. Relator claims entitlement to attorney's fees, costs, and expenses allowable under 31 U.S.C. § 3730(d). DaVita reserves the right to challenge Relator's entitlement to such attorney's fees, costs, and expenses on all available grounds. DaVita and Relator, through their legal counsel, shall separately resolve, either through negotiated resolution or through proceedings before the Court, Relator's entitlement to attorney's fees, costs, and expenses allowable under 31 U.S.C. § 3730(d).

4. Subject to the exceptions in Paragraph 7 (concerning excluded claims) below, and conditioned upon DaVita's full payment of the Settlement Amount, the United States releases DaVita together with its current or former parent corporations; direct and indirect subsidiaries; brother or sister corporations; divisions; current or former corporate owners; 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.

5. Subject to the exceptions in Paragraph 7 below, and conditioned upon DaVita's full payment of the Settlement Amount, Kogod, for himself and for his heirs, successors, attorneys, agents, and assigns, releases DaVita, together with its current or former parent corporations; direct and indirect subsidiaries; brother or sister corporations; divisions; current or former corporate owners; and the corporate successors and assigns; and its past, present and future officers, directors, agents, attorneys, and employees, in their individual and official capacities, from any civil monetary claim Kogod has on behalf of the United States for the Covered Conduct under the False Claims Act, 31 U.S.C. §§ 3729-3733, and from any and all claims for relief, actions, rights, causes of action, suits, debts, obligations, liabilities, demands, losses, damages (including treble damages and any civil penalties), punitive damages, costs and expenses of any kind, character, or nature whatsoever, whether known or unknown, fixed or contingent, in law or in equity, in contract or in tort, under any federal or state statute or regulation, or in common law, that Kogod, his heirs, successors, attorneys, agents and assigns asserted or could have asserted against DaVita, except to the extent provided under 31 U.S.C. § 3730(d) for expenses, attorneys' fees, and costs.

6. DaVita, for itself and for its officers and agents (the "Company Releasees"), fully and finally releases Kogod, together with his respective heirs, successors, assigns, agents and attorneys, from any claims (including attorney's fees, costs, and expenses of every kind and

however denominated) that DaVita or the Company Releasees have asserted, could have asserted, or may assert in the future against Kogod, related to the Covered Conduct and Kogod's investigation and prosecution thereof, and from any and all claims, complaints, causes of action, demands, damages and suits that DaVita or the Company Releasees have or may have for any reason whatsoever, in law or in equity, against Kogod arising out of or in connection with any event, transaction or matter occurring or existing on or before the date Kogod executes this Agreement, whether based upon statutory claim, common law, contract, tort, or other legal basis, whether known or unknown, direct or indirect, absolute or contingent, including without limitation any claims related to Kogod's employment and consulting arrangement 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, or relating to the claims Kogod asserted or could have asserted in the Civil Action.

7. Notwithstanding the releases given in Paragraphs 4 and 5 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; and
- i. Any liability for personal injury or property damage or for other consequential damages arising from the Covered Conduct.

8. Kogod and his 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 Kogod's receipt of the payment described in Paragraph 2, Kogod and his 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 settlement of the Covered Conduct as alleged in 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. Relator, for himself, and for his heirs, successors, attorneys, agents, and assigns, releases DaVita, and its officers, agents, and employees, from any liability to Relator arising from the filing of the Civil Action, other than liability under 31 U.S.C. § 3730(d) for expenses or attorneys' fees and costs.

10. DaVita waives and shall not assert any defenses it 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.

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

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 Medicare contractor (e.g., Medicare Administrative Contractor, fiscal intermediary, carrier) related to the Covered Conduct; and DaVita agrees not to resubmit or to cause any other person or entity to resubmit to any Medicare contractor 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. DaVita 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 DaVita's, their 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) DaVita'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 attorneys' fees);

- (4) the negotiation and performance of this Agreement; and
- (5) the payment DaVita 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 by DaVita, and DaVita 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 the Settling Parties or any of their subsidiaries or affiliates to the Medicare, Medicaid, TRICARE, or FEHBP Programs.

c. Treatment of Unallowable Costs Previously Submitted for Payment: DaVita 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 DaVita or any of their 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. DaVita agrees that the United States, at a minimum, shall be entitled to recoup from DaVita 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 DaVita or any of its subsidiaries or affiliates on the effect of inclusion of Unallowable Costs (as defined in this Paragraph) on DaVita 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 DaVita'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 Paragraphs 4 and 15 (waiver for beneficiaries paragraph), below.

15. DaVita 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 United States and Relator shall promptly sign and file in the Civil Action a Joint Stipulation of Dismissal of the Civil Action pursuant to Rule 41(a)(1).

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.

18. Each Party and signatory to this Agreement represents that it freely and voluntarily enters into 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 Colorado. 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 DaVita's successors, transferees, heirs, and assigns.

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

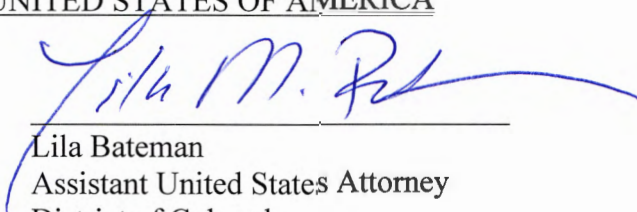
25. All Parties consent to the United States' disclosure of this Agreement, and information about this Agreement, to the public.

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.

THE UNITED STATES OF AMERICA

DATED: 5/6/2024

BY:

  
\_\_\_\_\_  
Lila Bateman  
Assistant United States Attorney  
District of Colorado  
United States Department of Justice

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

BY:

\_\_\_\_\_  
Gary Newkirk  
Trial Attorney  
Commercial Litigation Branch  
Civil Division  
United States Department of Justice

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

BY:

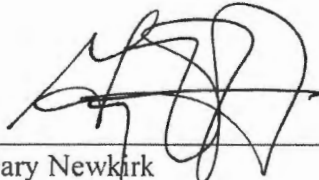
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Susan Gillin  
Assistant Inspector General for Legal Affairs  
Office of Counsel to the Inspector General  
Office of Inspector General  
United States Department of Health and Human Services

THE UNITED STATES OF AMERICA

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

BY: \_\_\_\_\_  
Lila Bateman  
Assistant United States Attorney  
District of Colorado  
United States Department of Justice

DATED: 5/6/24

BY:  \_\_\_\_\_  
Gary Newkirk  
Trial Attorney  
Commercial Litigation Branch  
Civil Division  
United States Department of Justice

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

BY: \_\_\_\_\_  
Susan Gillin  
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

THE UNITED STATES OF AMERICA

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

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

Lila Bateman  
Assistant United States Attorney  
District of Colorado  
United States Department of Justice

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

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

Gary Newkirk  
Trial Attorney  
Commercial Litigation Branch  
Civil Division  
United States Department of Justice

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

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

**SUSAN  
GILLIN**

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Susan Gillin  
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

For purposes of settlement only  
Not admissible for any other purpose  
FRE 408, 410 Exempt

**DaVita Inc. - SETTLING PARTY**

DATED: 5/6/24

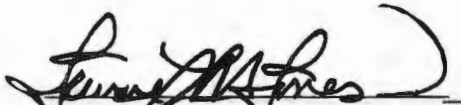
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DaVita Inc.

DATED: 5/6/24

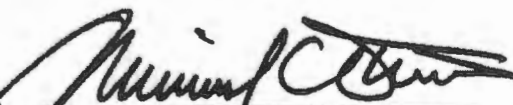
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Jaime L.M. Jones  
Counsel for DaVita Inc.

DATED: 5/6/24

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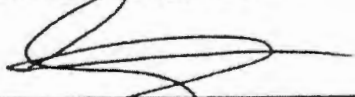


Michael Theis  
Counsel for DaVita Inc.

**Dennis Kogod- RELATOR**

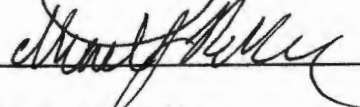
DATED 05/26/2024

BY:

  
\_\_\_\_\_  
Dennis Kogod

DATED: 5/6/24

BY:

  
\_\_\_\_\_  
Michael Ronickher  
Counsel for Dennis Kogod