

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); and the Office of Personnel Management (OPM), which administers the Federal Employees Health Benefits Program (FEHBP) (collectively, the “United States”), and Rajendra Bhayani (“Bhayani”) and N.Y. Otolaryngology & Aesthetic Surgery, P.C. (“Defendants”), through their authorized representatives. The United States and Defendants are hereafter collectively referred to as “the Parties”).

RECITALS

A. Bhayani is an otolaryngologist in the Eastern District of New York. He is the sole owner of New York Otolaryngology & Aesthetic Surgery, P.C.

B. The United States contends that Defendants submitted or caused to be submitted claims for payment to the Medicare Program, Title XVIII of the Social Security Act, 42 U.S.C. §§ 1395-1395kkk-1 (“Medicare”), and the FEHBP, 5 U.S.C. §§ 8901-8914.

C. The United States contends that it has certain civil claims against Defendants arising from their submission of false claims to Medicare and FEHBP for services provided on site from 2012 to 2016 to residents of certain adult homes¹ identified in Exhibit A to this Agreement (the “Adult Homes”). Specifically, Defendants submitted these false claims: (1) to Medicare and FEHBP for services purportedly provided by Bhayani to residents of the Adult Homes (the “Residents”), when a nurse practitioner actually provided the services; (2) to Medicare and FEHBP for services purportedly provided to the Residents that were medically

¹ Adult homes are privately-owned residential facilities licensed by the State of New York to provide long-term care and supervision to adults with disabilities and/or mental illness. *Disability Advocates, Inc. v. Paterson*, 598 F. Supp. 2d 289, 292 (E.D.N.Y. 2009).

unnecessary; and (3) to Medicare for allergy testing and related physician services provided by Defendants to the Residents where Defendants paid cash tips, rent, and other improper remuneration to lessees in the Adult Homes, in violation of the Anti-Kickback Statute, 42 U.S.C. 1320a-7b(b), to induce the lessees to arrange for Defendants' exclusive access to provide the allergy testing, otolaryngology examinations, and related physician services to the Residents on-site at the Adult Homes. The conduct described in this paragraph is referred to below as the "Covered Conduct."

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

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. Defendants shall pay to the United States \$1,109,000.00 ("Settlement Amount"), of which \$554,500 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 Office of the United States Attorney for the Eastern District of New York.

2. Subject to the exceptions in Paragraph 5 (concerning excluded claims) below, and conditioned upon Defendants' full payment of the Settlement Amount, the United States releases Defendants 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. In consideration of the obligations of Defendants in this Agreement and the Integrity Agreement (IA) entered into between OIG-HHS and Defendants, and conditioned upon Defendants' full payment of the Settlement Amount, the OIG-HHS agrees to release and refrain from instituting, directing, or maintaining any administrative action seeking exclusion from Medicare, Medicaid, and other Federal health care programs (as defined in 42 U.S.C. § 1320a-7b(f)) against Defendants under 42 U.S.C. § 1320a-7a (Civil Monetary Penalties Law) or 42 U.S.C. § 1320a-7(b)(7) (permissive exclusion for fraud, kickbacks, and other prohibited activities) for the Covered Conduct, except as reserved in this Paragraph and in Paragraph 5 (concerning excluded claims), below. The OIG-HHS expressly reserves all rights to comply with any statutory obligations to exclude Defendants from Medicare, Medicaid, and other Federal health care programs under 42 U.S.C. § 1320a-7(a) (mandatory exclusion) based upon the Covered Conduct. Nothing in this Paragraph precludes the OIG-HHS from taking action against entities or persons, or for conduct and practices, for which claims have been reserved in Paragraph 5, below.

4. In consideration of the obligations of Defendants in this Agreement, and conditioned upon Defendants' full payment of the Settlement Amount, OPM agrees to release and refrain from instituting, directing, or maintaining any administrative action seeking exclusion from the FEHBP against Defendants under 5 U.S.C. § 8902a or 5 C.F.R. Part 890 Subpart J or Part 919 for the Covered Conduct in Paragraph C(1), except as reserved in this Paragraph and in Paragraph 5 (concerning excluded claims), below, and except if excluded by the OIG-HHS pursuant to 42 U.S.C. § 1320a-7(a). OPM expressly reserves all rights to comply with any statutory obligation to debar Defendants from the FEHBP under 5 U.S.C. § 8902a(b) (mandatory exclusion) based upon the Covered Conduct in Paragraph C(1). Nothing in this

Paragraph precludes OPM from taking action against entities or persons, or for conduct and practices, for which claims have been reserved in Paragraph 5, below.

5. Notwithstanding the releases given in paragraphs 2, 3 and 4 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 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 that are not parties to this Agreement; and
- g. Any liability to New York State (or its agencies) and to the United States (or its agencies) for claims to the Medicaid program.

6. Defendants waive and shall not assert any defenses Defendants 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.

7. Defendants fully and finally release 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 Defendants have 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.

8. 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), FEHBP, or any state payer, related to the Covered Conduct; and Defendants agree not to resubmit to any Medicare contractor, FEHBP, or 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.

9. Defendants agree 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 Defendants, 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 and any criminal investigation(s) of the matters covered by this Agreement;
- (3) Defendants' investigation, defense, and corrective actions undertaken in response to the United States' audit(s) and civil and any criminal investigation(s) in connection with the matters covered by this Agreement (including attorney's fees);
- (4) the negotiation and performance of this Agreement;

- (5) the payment Defendants make to the United States pursuant to this Agreement; and
- (6) the negotiation of, and obligations undertaken pursuant to the IA to: (i) retain an independent review organization to perform reviews, as described in Section III of the IA; and (ii) prepare and submit reports to the OIG-HHS,

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). However, nothing in paragraph 9.a.(6) that may apply to the obligations undertaken pursuant to the IA affects the status of costs that are not allowable based on any other authority applicable to Defendants.

b. Future Treatment of Unallowable Costs: Unallowable Costs shall be separately determined and accounted for by Defendants, and Defendants 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 Defendants or any of its subsidiaries or affiliates to the Medicare, Medicaid, TRICARE, or FEHBP Programs.

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

10. Defendants agree to cooperate fully and truthfully with the United States' investigation of individuals and entities not released in this Agreement. Upon reasonable notice, Defendants shall encourage, and agree not to impair the cooperation of its directors, officers, and employees, and shall use its best efforts to make available, and encourage, the cooperation of former directors, officers, and employees for interviews and testimony, consistent with the rights and privileges of such individuals. Defendants further agree to furnish to the United States, upon request, complete and unredacted copies of all non-privileged documents, reports, memoranda of interviews, and records in its possession, custody, or control concerning any investigation of the Covered Conduct that it has undertaken, or that has been performed by another on its behalf.

11. 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 12 (waiver for beneficiaries paragraph), below.

12. Defendants agree to waive and not to 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.

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

14. 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.

15. 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 Eastern District of New York. 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.

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

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

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

19. This Agreement is binding on Defendants' successors, transferees, heirs, and assigns.

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

21. 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: 12/19/19

BY: _____

LISA M. OUTLIN
Assistant United States Attorney
Eastern District of New York

DATED: _____

BY: _____

LISA M. RE
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

DATED: _____

BY: _____

EDWARD M. DEHARDE
Assistant Director of Federal Employee
Insurance Operations
Healthcare and Insurance
United States Office of Personnel Management

DATED: _____

BY: _____

PAUL ST. HILLAIRE
Assistant Inspector General
for Legal & Legislative Affairs
Office of the Inspector General
United States Office of Personnel Management

DEFENDANTS

DATED: 12/18/19

BY:

RAJENDRA BHAYANI

DATED: 12/18/19

BY:

Aesthetic Surgery

GEOFFREY KAISER, Esq.
RIVKIN RADLER
Counsel for Defendants

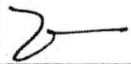
Exhibit A

Facility Name	Address	City	Zip
Belle Harbor Manor	209 Beach 125th Street	Belle Harbor	11694
Brooklyn Terrace aka Surf Manor	2316 Surf Avenue	Brooklyn	11224
Bronxwood Home for the Aged	799 East Gun Hill Road	Bronx	10467
Central Assisted Living, LLC	1509 Central Avenue	Far Rockaway	11691
Elm York Home for Adults	100-30 Ditmars Boulevard	East Elmhurst	11369
Garden of Eden Assisted Living Program	1608-1620 Stillwell Avenue	Brooklyn	11223
Harbor Terrace Adult Home and Assisted Living	110 Henderson Avenue	Staten Island	10301
Island Assisted Living	800-820 Front Street	Hempstead	11550
Kings Adult Care Center	2255 Cropsy Avenue	Brooklyn	11214
Long Beach Assisted Living	274 West Broadway	Long Beach	11561
Mermaid Manor Home for Adults	3602 Mermaid Avenue	Brooklyn	11224
New Haven Manor	1526 New Haven Avenue	Far Rockaway	11691
Oceanview Manor Home for Adults	3010 West 33rd Street	Brooklyn	11224
Park Inn Home	115-02 Ocean Promenade	Rockaway Park	11694
Sanford Home	140-40 Sanford Avenue	Flushing	11355
Surfside Manor Home for Adults, LLC	95-02 Rockaway Beach Boulevard	Rockaway Beach	11693
Westchester Center Home for Adults	78 Stratton Street	Yonkers	10701

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THE UNITED STATES OF [REDACTED]

[REDACTED] BY: [REDACTED] 
Assistant United States Attorney
Eastern District of New York

DATED: 01/08/2020 BY: [REDACTED]
LISA M. RE
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

DATED: _____ BY: _____
EDWARD M. DEHARDE
Assistant Director of Federal Employee
Insurance Operations
Healthcare and Insurance
United States Office of Personnel Management

DATED: _____ BY: _____
PAUL ST. HILLAIRE
Assistant Inspector General
for Legal & Legislative Affairs
Office of the Inspector General
United States Office of Personnel Management

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THE UNITED STATES OF AMERICA

DATED: _____



LISA D. KUTLIN
Assistant United States Attorney
Eastern District of New York

DATED: _____



LISA M. RE
Assistant Inspector General for Legal Affairs
Office of Counsel to the Inspector General

Health and Human _____

9



DEHARDE
Director of Federal Employee
Insurance Operations
Healthcare and Insurance
United States Office of Personnel Management



PAUL ST. HILLAIRE
Assistant Inspector General
for Legal & Legislative Affairs
Office of the Inspector General
United States Office of Personnel Management

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THE UNITED STATES OF AMERICA

DATED: _____

BY: _____
LISA D. KUTLIN
Assistant United States Attorney
Eastern District of New York

DATED: _____

BY: _____
LISA M. RE
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

DATED: _____

BY: _____
EDWARD M. DEHARDE
Assistant Director of Federal Employee
Insurance Operations
Healthcare and Insurance
United States Office of Personnel Management

DATED: _____

BY: _____
PAUL ST HILLAIRE
PAUL ST. HILLAIRE
Assistant Inspector General
for Legal & Legislative Affairs
Office of the Inspector General
United States Office of Personnel Management

Digitally signed by PAUL ST HILLAIRE
DN: c=US, o=U.S. Government, ou=Office of
Personnel Management, cn=PAUL ST HILLAIRE,
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