

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 New Oaklawn Investments, LLC d/b/a Oaklawn Health and Rehabilitation Center (“Oaklawn”) and Elmcroft Senior Living, Inc. (“Elmcroft”) (hereafter collectively referred to as “the Parties”), through their authorized representatives.

RECITALS

- A. Oaklawn is a for-profit skilled nursing facility with 128 beds located in Louisville, Kentucky, that at all times relevant hereto, was managed by Elmcroft.
- B. The United States contends that Oaklawn and Elmcroft 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”).
- C. The United States contends that it has certain civil claims against Oaklawn and Elmcroft arising from Oaklawn improperly billing Medicare for resource utilization group (“RUG”) Code Series Rehabilitation Ultra High (“RU”) and Rehabilitation Very High (“RV”) during the period from February 26, 2007 through February 26, 2010, for certain services that were either not reasonable or medically necessary. That conduct is referred to below as the “Covered Conduct.”
- D. Elmcroft and Oaklawn deny the allegations set forth in Paragraph C.
- E. This Settlement Agreement is neither an admission of liability by Oaklawn and Elmcroft 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. Oaklawn and Elmcroft shall, jointly and severally, pay to the United States FIVE MILLION ONE-HUNDRED NINETY-ONE THOUSAND FOUR-HUNDRED SEVENTY DOLLARS AND ZERO CENTS (\$5,191,470) (“Settlement Amount”) 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 United States Attorney’s Office for the Western District of Kentucky.

2. Subject to the exceptions in Paragraph 3 (concerning excluded claims) below, and conditioned upon Oaklawn’s and Elmcroft’s full payment of the Settlement Amount, the United States releases Oaklawn and Elmcroft 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; and
- f. Any liability of individuals;

4. Oaklawn and Elmcroft waive and shall not assert any defenses Oaklawn and Elmcroft 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. Oaklawn and Elmcroft 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 Oaklawn and Elmcroft 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.

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 Oaklawn and Elmcroft agree not to resubmit to any Medicare contractor 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.

7. Oaklawn and Elmcroft 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 Oaklawn and Elmcroft, 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) Oaklawn's and Elmcroft'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 Oaklawn and Elmcroft make 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 nonreimbursable cost centers by Oaklawn and

Elmcroft, and Oaklawn and Elmcroft 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 Oaklawn and Elmcroft or any of their subsidiaries or affiliates to the Medicare, Medicaid, TRICARE, or FEHBP Programs.

c. Treatment of Unallowable Costs Previously Submitted for Payment:

Oaklawn and Elmcroft 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 Oaklawn and Elmcroft 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. Oaklawn and Elmcroft agrees that the United States, at a minimum, shall be entitled to recoup from Oaklawn and Elmcroft 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 Oaklawn and Elmcroft or any of their subsidiaries or affiliates on the effect of inclusion of Unallowable Costs

(as defined in this Paragraph) on Oaklawn and Elmcroft or any of their 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 Oaklawn's and Elmcroft's books and records to determine that no Unallowable Costs have been claimed in accordance with the provisions of this Paragraph.

7. 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 8 (waiver for beneficiaries paragraph), below.

8. Oaklawn and Elmcroft agree that they waive 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.

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

10. 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.

11. 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 Western District of Kentucky. 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.

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

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

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

15. This Agreement is binding on Oaklawn's and Elmcroft's successors, transferees, heirs, and assigns.

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

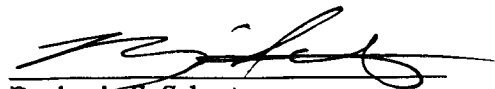
17. This Agreement is effective on the date of signature of the last signatory to the Agreement (Effective Date of this Agreement). Facsimiles and electronic transmissions of signatures shall constitute acceptable, binding signatures for purposes of this Agreement.

THE UNITED STATES OF AMERICA

RUSSELL M. COLEMAN
United States Attorney, WDKY

DATED: 3/27/18

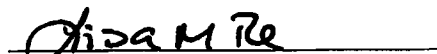
BY:



Benjamin S. Schechter
Assistant United States Attorney

DATED: 3/26/18

BY:

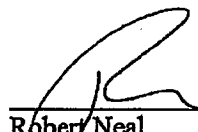


LISA M. RE
Assistant Inspector General for Legal Affairs
Office of Counsel to the Inspector General
Office of Inspector General
United States Department of Health and Human Services

**NEW OAKLAWN INVESTMENTS, LLC
D/B/A OAKLAWN HEALTH AND REHABILITATION CENTER**

DATED: March 16/18

BY:



Robert Neal
President New Oaklawn Investments, LLC.
*For New Oaklawn Investments, LLC.
d/b/a Oaklawn Nursing and Rehabilitation Hospital.*

ELMCROFT SENIOR LIVING, INC.

DATED: _____

BY:

Robin L. Barber
Executive Vice President and General Counsel Elmcroft
Senior Living, Inc.
For Elmcroft Senior Living, Inc.

DATED: _____

BY:

Robert J. Benvenuti, III
BARNETT BENVENUTI & BUTLER PLLC
*Counsel for New Oaklawn Investments, LLC d/b/a Oaklawn
Nursing and Rehabilitation Hospital and Elmcroft Senior
Living, Inc.*

NEW OAKLAWN INVESTMENTS, LLC
D/B/A OAKLAWN HEALTH AND REHABILITATION CENTER

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*For New Oaklawn Investments, LLC.
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BARNETT BENVENUTI & BUTLER PLLC
*Counsel for New Oaklawn Investments, LLC d/b/a Oaklawn
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BY: _____

Robin L. Barber
Executive Vice President and General Counsel Elmcroft
Senior Living, Inc.
For Elmcroft Senior Living, Inc.

DATED: 3/17/2018

BY: 

Robert F. Benvenuti, III
BARNETT, BENVENUTI & BUTLER PLLC
*Counsel for New Oaklawn Investments, LLC d/b/a Oaklawn
Nursing and Rehabilitation Hospital and Elmcroft Senior
Living, Inc.*