

USDC SDNY  
DOCUMENT  
ELECTRONICALLY FILED  
DOC #:  
DATE FILED: 5/4/2012

Buchwald, T

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

v.

LENOX HILL HOSPITAL,

Defendant.

12 Civ. 3451

**STIPULATION AND ORDER OF  
SETTLEMENT AND DISMISSAL**

ECF Case

**I. PARTIES**

This Stipulation and Order of Settlement and Dismissal (“Stipulation and Order”) is entered into by the United States of America (the “United States”), by its attorney, Preet Bharara, the United States Attorney for the Southern District of New York, and Lenox Hill Hospital (“Lenox Hill”) (collectively referred to as “the Parties”), through their authorized representatives.

**II. PREAMBLE**

As a preamble to this Stipulation and Order, the Parties agree to the following:

A. Lenox Hill is a New York not-for-profit corporation that operates an acute care hospital located on Manhattan’s Upper East Side. Together with certain other affiliate hospitals, Lenox Hill is part of the North Shore-Long Island Jewish Health System (the “System”). Lenox Hill became affiliated with the System in May 2010, subsequent to the time period at issue in this action.

B. Lenox Hill 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, and 1395hhh; and the TRICARE Program (“TRICARE”), 10 U.S.C. §§ 1071-11 (the “Government Health Care Programs”).

C. Lenox Hill also submitted annual institutional cost reports to the United States as required by Medicare.

D. The United States alleges that, with respect to inpatient discharges, starting on February 21, 2002, and continuing through August 7, 2003, Lenox Hill submitted or caused to be submitted false claims to the Government Health Care Programs for inpatient outlier payments by increasing its charges for patient care such that, when adjusted to costs pursuant to the outlier statute and regulations, these charges no longer reasonably reflected or approximated Lenox Hill’s actual costs, resulting in increased inpatient outlier payments. Hereinafter, the conduct described in this Paragraph is referred to as the “Covered Conduct.”

E. Lenox Hill hereby appears and consents to the entry of this Stipulation and Order.

F. Lenox Hill admits, acknowledges and accepts responsibility for the following conduct:

- (i) From 2002 to 2003, to increase its revenue, Lenox Hill increased its inpatient charges based on revenue models that did not directly take into account the costs of the services provided. Lenox Hill increased its charges during this period to all third-party payors, and the charge increases had a larger impact on Medicare outlier payments as compared to any other single payor.
- (ii) As a result, Lenox Hill received Medicare outlier payments that it would not have received if it had not implemented these charge increases.

G. The Parties have reached a full and final settlement and compromise of the claims that the United States asserts in Paragraph D above and agree and covenant as follows:

### III. TERMS AND CONDITIONS

NOW, THEREFORE, upon the Parties' agreement, IT IS HEREBY ORDERED that:

1. The Parties hereto consent to this Court's exercise of subject matter jurisdiction over this action and personal jurisdiction over each of them.
2. Lenox Hill agrees to the entry of a judgment against it and in favor of the United States (in the form attached as Exhibit A), in full compromise and satisfaction of the allegations against it set forth in a complaint that the United States is filing simultaneously (the "Complaint"), for the sum of eleven million seven hundred fifty thousand dollars (\$11,750,000) (the "Settlement Amount").
3. The Settlement Amount shall constitute a debt due and owing to the United States upon the Effective Date of this Stipulation and Order and is to be discharged by payment to the United States within ten days of the Effective Date. Lenox Hill shall make such payment by electronic funds transfer pursuant to written instructions to be provided by the United States Attorney's Office for the Southern District of New York.
4. Subject to the exceptions in Paragraphs 7 and 16 below, and conditioned upon Lenox Hill's timely payment in full of the Settlement Amount, the United States releases Lenox Hill, its predecessors, successors, affiliates, parents, subsidiaries, members, current and former officers, directors, trustees, employees, agents and representatives, including the System (collectively "the released persons and entities") from any civil or administrative monetary claim the United States has against the released persons and entities 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, and the common law theories of payment by mistake, unjust enrichment and fraud.

5. Lenox Hill agrees to release the United States, its agencies, departments, employees, servants and agents from any claims (including attorneys' fees, costs, and expenses of every kind and however denominated) which Lenox Hill has asserted, could have asserted, or may assert in the future against the United States, its agencies, departments, officers, employees, servants, and agents related to the matters covered by the Complaint, and the United States' investigation and prosecution thereof and this Stipulation and Order.

6. This Stipulation and Order is intended to be for the benefit of the parties to this Stipulation and Order only, and by this instrument the parties to this Stipulation and Order do not release any claims against any other person or entity, except as expressly provided by this Stipulation and Order.

7. Notwithstanding any term of this Stipulation and Order, including the release provided in Paragraphs 4 above, the following are specifically reserved and excluded from the scope and terms of this Stipulation and Order as to any entity or person:

- (a) Any liability arising under Title 26, U.S. Code (Internal Revenue Code);
- (b) Any criminal liability;
- (c) Except as explicitly stated in this Stipulation and Order, any administrative liability, including permissive and 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 such obligations as are created by this Stipulation and Order;

- (f) Any liability to the United States of any entity or person, including but not limited to any joint tortfeasor, that or who is not released by the terms of this Stipulation and Order; and
- (g) Any civil or administrative liability of individuals (including current or former directors, trustees, officers, employees, agents, or representatives of Lenox Hill) who receive written notification that they are the target of a criminal investigation (as defined in the United States Attorneys' Manual), are indicted or charged, or who enter into a plea agreement, related to the Covered Conduct.

8. Lenox Hill waives and shall not assert any defenses Lenox Hill 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 Stipulation and Order bars a remedy sought in such criminal prosecution or administrative action.

9. Nothing in this Stipulation and Order 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.

10. Lenox Hill shall be in default of this Stipulation and Order if it fails to make the payment set forth in Paragraph 2 on or before its due date. The United States shall provide written notice of any default, to be sent by email and first-class mail to the undersigned attorney for Lenox Hill. If Lenox Hill fails to cure the default within ten (10) business days, interest shall accrue at the rate of 12% per annum compounded daily on the remaining unpaid principal balance, beginning seven (7) days after delivery of the notice of default. If the Settlement Amount, with all accrued interest, is not paid in full within seven (7) days after delivery of the notice of default, Lenox Hill shall consent to a Consent Judgment in the amount of the unpaid

balance, and the United States, at its option, may: (i) rescind this Stipulation and Order and reinstate the Complaint filed in this action; (ii) seek specific performance of the Stipulation and Order; (iii) offset the remaining unpaid balance from any amounts due and owing Lenox Hill by any department, agency or agent of the United States at the time of default; or (iv) exercise any other rights granted by law, or under the terms of this Stipulation and Order, or recognizable at common law or in equity. Lenox Hill agrees not to contest any offset imposed and not to contest any collection action undertaken by the United States pursuant to this paragraph, either administratively or in any State or Federal court. In addition, Lenox Hill shall pay the United States all reasonable costs of collection and enforcement under this Paragraph, including attorney's fees and expenses.

11. In the event that the United States opts to rescind this Stipulation and Order pursuant to this Paragraph and/or Paragraph 10, Lenox Hill expressly agrees not to plead, argue or otherwise raise any defenses under the theories of statute of limitations, laches, estoppel or similar theories, to any claims released under Paragraph 4 above, except to the extent these defenses were available on the date of entry of this Stipulation and Order and taking into account any tolling agreement entered into by the United States and Lenox Hill.

12. The Settlement Amount that Lenox Hill must pay pursuant to Paragraph 2 of this Stipulation and Order shall not be decreased as a result of the denial of claims for payment now being withheld by any Medicare or Medicaid carrier or intermediary or any State payor, related to the Covered Conduct; and Lenox Hill agrees not to resubmit to any Medicare or Medicaid carrier or intermediary or any State payor any previously denied claims related to the Covered Conduct, and shall not appeal any such denials of claims.

13. Lenox Hill agrees that it waives and shall not seek payment for any health care services covered by this Stipulation and Order from any health care beneficiaries or their parents, sponsors or legally responsible individuals, or third party payors based upon the claims defined as Covered Conduct.

14. Lenox Hill agrees to the following:

a. Unallowable Costs Defined: Unallowable Costs are all costs (as defined in the Federal Acquisition Regulation § 31.205-47, and in Titles XVIII and XIX of the Social Security Act, 42 U.S.C. §§ 1395-1395ggg and 1396-1396v, and the regulations and official program directives promulgated thereunder) incurred by or on behalf of Lenox Hill or its current or former officers, directors, trustees, employees, representatives and agents in connection with:

- (1) the matters covered by this Stipulation and Order;
- (2) the United States' audit(s) and civil investigation(s) of the matters covered by Complaint in this action, and this Stipulation and Order;
- (3) Lenox Hill's investigation, audit, defense, and corrective actions undertaken in response to the United States' audit(s) and civil investigations in connection with the matters covered by the Complaint, and this Stipulation and Order (including attorney's fees);
- (4) the negotiation and performance of this Stipulation and Order; and
- (5) the payment of the Settlement Amount by Lenox Hill to the United States.

b. Future Treatment of Unallowable Costs: Unallowable Costs shall be separately determined and accounted for by Lenox Hill, and Lenox Hill will 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 Lenox Hill or any of its subsidiaries, or affiliates to the Medicare, Medicaid, TRICARE, the Veterans Administration, or the Federal Employee Health Benefits (FEHBP) Programs.

c. Treatment of Unallowable Costs Previously Submitted for Payment: Lenox Hill further agrees that within ninety (90) days of the Effective Date of this Stipulation and Order, it will identify to applicable Medicare and TRICARE fiscal intermediaries, carriers, and/or contractors, VA and FEHBP fiscal agents, any Unallowable Costs 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 Lenox Hill or any of its subsidiaries or affiliates, and will 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. Lenox Hill agrees that the United States, at a minimum, will be entitled to recoup from Lenox Hill 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

Lenox Hill on the effect of inclusion of Unallowable Costs on Lenox Hill's or any of its parent's, subsidiaries', or affiliates' cost reports, cost statements, or information reports.

d. Nothing in this Stipulation and Order shall constitute a waiver of the rights of the United States to examine Lenox Hill's books and records to determine that no Unallowable Costs have been claimed in accordance with the provisions of this Paragraph.

15. Lenox Hill expressly warrants that it has reviewed its financial situation and that it currently is solvent within the meaning of 11 U.S.C. §§ 547(b)(3) and 548(a)(1)(A) and 548(a)(1)(B)(ii)(I), and will remain solvent following its payment of the Settlement Amount to the United States hereunder. Further, the Parties expressly warrant that, in evaluating whether to execute this Stipulation and Order, they (i) have intended that the mutual promises, covenants, and obligations set forth in this Stipulation and Order constitute a contemporaneous exchange for new value given to Lenox Hill, within the meaning of 11 U.S.C. § 547(c)(1); and (ii) have concluded that these mutual promises, covenants, and obligations do, in fact, constitute such a contemporaneous exchange.

16. In the event that Lenox Hill or a third party commences, within 91 days of any payment under this Stipulation and Order, any case, proceeding, or other action (i) under any law relating to bankruptcy, insolvency, reorganization, or relief of debtors, seeking to have any order for relief of Lenox Hill's debts, or seeking to adjudicate Lenox Hill as bankrupt or insolvent; or (ii) seeking appointment of a receiver, trustee, custodian, or other similar official for Lenox Hill or for all or any substantial part of Lenox Hill's assets, Lenox Hill agrees as follows:

a. Lenox Hill's obligations under this Stipulation and Order may not be avoided pursuant to 11 U.S.C. §§ 547 or 548, and Lenox Hill will not argue or otherwise take the position in any such case, proceeding, or action that: (i) Lenox Hill's obligations under this

Stipulation and Order may be avoided under 11 U.S.C. §§ 547 or 548; (ii) Lenox Hill was insolvent at the time this Stipulation and Order was entered into, or became insolvent as a result of the payment made to the United States hereunder; or (iii) the mutual promises, covenants, and obligations set forth in this Stipulation and Order do not constitute a contemporaneous exchange for new value given to Lenox Hill.

b. If Lenox Hill's obligations hereunder are avoided for any reason, including, but not limited to, through the exercise of a trustee's avoidance powers under the Bankruptcy Code, the United States, at its sole option, may rescind its agreement to this Stipulation and Order, and bring any civil and/or administrative claim, action, or proceeding against Lenox Hill for the claims that would otherwise be covered by the releases provided in Paragraph 4, above. If the United States chooses to do so, Lenox Hill agrees that (i) it will not contend that any such claims, actions or proceedings brought by the United States (including any proceedings to exclude Lenox Hill from participation in Medicare, Medicaid, or other Federal health care programs) are subject to an automatic stay pursuant to 11 U.S.C. § 362(a) as a result of the action, case, or proceeding described in the first clause of this Paragraph; (ii) it will not plead, argue or otherwise raise any defenses under the theories of statute of limitations, laches, estoppel, or similar theories, to any such civil or administrative claims, actions, or proceedings which are brought by the United States within thirty (30) calendar days of written notification to Lenox Hill that the releases herein have been rescinded pursuant to this Paragraph, except to the extent such defenses were available on the date of entry of this Stipulation and Order and taking into account any tolling agreement entered into by the United States and Lenox Hill; and (iii) the United States has a valid claim against Lenox Hill and may pursue its claim, inter alia, in the

case, action, or proceeding referenced in the first clause of this Paragraph, as well as in any other case, action, or proceeding.

c. Lenox Hill acknowledges that its agreements as set forth in this Paragraph are provided in exchange for valuable consideration provided in this Stipulation and Order.

17. Each Party to this Stipulation and Order shall bear its own legal and other costs incurred in connection with this matter, including the preparation and performance of this Stipulation and Order.

18. This Stipulation and Order is governed by the laws of the United States. The Parties agree that the exclusive jurisdiction and venue for any dispute arising between and among the Parties under this Stipulation and Order as it relates to this action shall be the United States District Court for the Southern District of New York. For purposes of construing this Stipulation, the Stipulation shall be deemed to have been drafted by all Parties to this Stipulation and shall not, therefore, be construed against any Party for that reason in any subsequent dispute.

19. This Stipulation and Order constitutes the complete agreement between the Parties. This Stipulation and Order may not be amended except by written consent of the Parties.

20. Subject to the exceptions in Paragraph 7, in consideration of the obligations of Lenox Hill in this Stipulation and Order, conditioned upon Lenox Hill's timely full payment of the Settlement Amount, this action shall be dismissed with prejudice as to Lenox Hill. Provided, however, that the Court shall retain jurisdiction over this Stipulation and Order and each party to the extent the obligations herein remain unsatisfied by that party.

21. The individuals signing this Stipulation and Order on behalf of Lenox Hill represent and warrant that they are authorized by Lenox Hill to execute this Stipulation and

Order. The undersigned United States signatories represent that they are signing this Stipulation and Order in their official capacities.

22. This Stipulation and Order may be executed in counterparts, each of which constitutes an original and all of which constitute one and the same Stipulation and Order. Facsimiles of signatures shall constitute acceptable, binding signatures for purposes of this Stipulation and Order.

23. Each party and signatory to this stipulation represents that it freely and voluntarily enters into this Stipulation and Order without any degree of duress or compulsion.

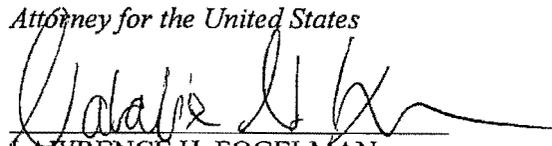
24. This Agreement is binding on the successors, transferees, heirs, and assigns of Lenox Hill.

25. The "Effective Date" of this Stipulation and Order is the date on which this Stipulation and Order is entered by this Court.

Dated: New York, New York  
May 1, 2012

PREET BHARARA  
United States Attorney for the  
Southern District of New York  
*Attorney for the United States*

By:



LAWRENCE H. FOGELMAN  
NATALIE N. KUEHLER  
Assistant United States Attorneys  
86 Chambers Street, 3<sup>rd</sup> Floor  
New York, NY 10007  
Telephone: (212) 637-2719/2741  
Facsimile: (212) 637-2650

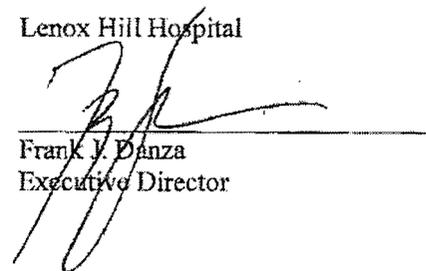
Dated: New York, N.Y.  
May 1, 2012

ROPES & GRAY LLP  
*Attorneys for Lenox Hill Hospital*

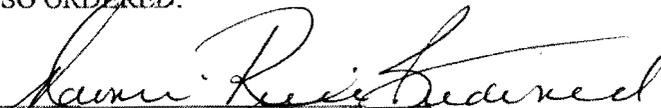
By:   
Stephen A. Warnke  
Michael G. McGovern  
Brett R. Friedman  
Sydney R. Nash  
1211 Avenue of the Americas  
New York, New York 10036-8704

Dated: New York, New York  
May 1, 2012

Lenox Hill Hospital

By:   
Frank J. Danza  
Executive Director

SO ORDERED:

  
UNITED STATES DISTRICT JUDGE

5/4/12