

ORIGINAL

SETTLEMENT AGREEMENT

I. PARTIES

This Settlement Agreement ("Agreement") is entered into between 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"), the TRICARE Support Office ("TSO") (formerly the Office of Civilian Health and Medical Program of the Uniformed Services), a field activity of the Office of the Secretary of Defense, the United States Department of Defense, through its General Counsel (collectively, the "United States"); Health Outcomes Technologies, Inc. ("Relator"); and Sharp Memorial Hospital ("Sharp Memorial") (hereafter collectively, "the Parties"), through their authorized representatives.

II. PREAMBLE

As a preamble to this Agreement, the Parties agree to the following:

A. Sharp Memorial is a health care provider that provides inpatient hospital treatment of Medicare and TRICARE beneficiaries.

B. The United States contends that Sharp Memorial 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. §§ 1395-1395ddd (1997) and the TRICARE Program (also known as the Civilian Health and Medical Program of the Uniformed Services ("CHAMPUS")), 10 U.S.C. §§ 1071-1106.

C. Medicare and TRICARE payments to a hospital for inpatient treatment rendered to a beneficiary generally are based upon the beneficiary's "principal diagnosis," as set forth by the hospital.

D. The Medicare and TRICARE programs rely upon participating hospitals to properly indicate the principal diagnosis through the use of standard diagnosis codes.

E. The United States conducted an investigation into inpatient payment claims submitted to Medicare and TRICARE by Sharp Memorial with the principal diagnosis code of 482.89 (pneumonia due to "other specified bacteria").

F. The United States contends that it has certain civil claims against Sharp Memorial under the False Claims Act, 31 U.S.C. §§ 3729-3733, and other federal statutes and/or common law doctrines as more specifically defined in paragraph 5 below, for engaging in the following alleged conduct: during the period from October, 1992 through April, 1998, Sharp Memorial submitted or caused to be submitted claims with the 482.89 principal diagnosis code that were not supported by the corresponding medical records (hereinafter referred to as the "Covered Conduct"). The United States alleges that, as a result of the Covered Conduct, Sharp Memorial received payments to which it was not entitled.

G. The United States also contends that it has certain administrative claims against Sharp Memorial under the provision for permissive exclusion from the Medicare, Medicaid and other federal health care programs, 42 U.S.C. § 1320a-7(b), and the provisions for civil monetary penalties, 42 U.S.C. § 1320a-7a, for the Covered Conduct.

H. Sharp Memorial has provided documents and information to the United States in response to the government's investigation of the Covered Conduct, including patient files for which claims were submitted to Medicare and TRICARE with the principal diagnosis code of 482.89, and Sharp Memorial represents that such response has been truthful, accurate, and complete.

I. Sharp Memorial does not admit the contentions of the United States as set forth in Paragraphs F and G above and as set forth in United States ex rel. Health Outcomes

Technologies, Inc. v. Sharp Memorial Hospital, et al., Civil Action No. 96-1552 (UNDER SEAL), in the United States District Court for the Eastern District of Pennsylvania.

J. In order to avoid the delay, uncertainty, inconvenience and expense of protracted litigation of these claims, the Parties reach a full and final settlement as set forth below.

III. TERMS AND CONDITIONS

NOW, THEREFORE, in consideration of the mutual promises, covenants, and obligations set forth below, and for good and valuable consideration as stated herein, the Parties agree as follows:

1. Sharp Memorial agrees to pay to the United States the sum of Eight Hundred and Sixty-Three Thousand, Seven Hundred and Eleven Dollars and Fifty-Six Cents (\$863,711.56) (the "Settlement Amount"), as follows: Sharp Memorial agrees to make payment of the Settlement Amount by electronic funds transfer pursuant to written instructions provided by the United States Attorney's Office for the Southern District of California. Receipt of such instructions is hereby acknowledged. Sharp Memorial agrees to make this electronic funds transfer no later than five (5) business days from the effective date of this Agreement.

2. Sharp Memorial agrees to cooperate fully and in good faith with the United States in the civil or criminal prosecution of any person concerning the Covered Conduct, and concerning similar matters involving other hospitals and others, by providing accurate, truthful, and complete information whenever, wherever, to whomever and in whatever form the United States reasonably may request. Nothing in this Paragraph, however, affects any privilege that might be available to Sharp Memorial or any statutory or regulatory obligation of Sharp Memorial, or Sharp Memorial's ability to object to the request on the grounds of such privilege or

obligation; the United States reserves its right to contest the assertion of any such privilege or obligation by Sharp Memorial. Sharp Memorial agrees to the following specific representations and undertakings:

a. Sharp Memorial will use its best efforts to provide such information, and related documents, within ten (10) working days of receipt of a request. If necessary, Sharp Memorial will notify the United States of any difficulty in timely complying with any such request, and will advise the United States of the additional amount of time estimated to be needed to respond to such request.

b. Sharp Memorial understands that it has undertaken an obligation to provide truthful and accurate information and testimony by itself and through its employees. Sharp Memorial agrees that it shall take no action which could cause any person to fail to provide such testimony (other than the assertion of a privilege or statutory or regulatory obligation), or could cause any person to believe that the provision of truthful and accurate testimony could adversely affect such person's employment or any contractual relationship.

c. Should it be judged by the United States that Sharp Memorial has failed to cooperate fully or has intentionally given false, misleading, or incomplete information or testimony, Sharp Memorial thereafter shall be subject to prosecution for a criminal violation of which the United States has knowledge, including, but not limited to, perjury, obstruction of justice, and false statements.

3. Sharp Memorial has entered into a Corporate Integrity Agreement with the OIG-HHS, attached as Exhibit A, which is incorporated into this Agreement by reference. Sharp

Memorial will immediately upon execution of this Agreement implement its obligations as set forth in the Corporate Integrity Agreement.

4. Sharp Memorial releases the United States, HHS and TSO and each of their agencies, officers, agents, employees, and contractors and their employees from any and all claims, causes of action, adjustments, and set-offs of any kind arising out of or pertaining to the Covered Conduct, including the investigation of the Covered Conduct and this Agreement.

5. Subject to the exceptions in Paragraph 8 below, in consideration of the obligations of Sharp Memorial set forth in this Agreement, conditioned upon Sharp Memorial's payment in full of the Settlement Amount, and subject to Paragraph 15 below (concerning bankruptcy proceedings commenced within 91 days of the effective date of this Agreement), the United States (on behalf of itself, its officers, agents, agencies and departments) and Relator agree to release Sharp Memorial, including its current and former parent corporations, each of its direct and indirect subsidiaries, brother or sister corporations, divisions, current or former owners, officers, directors, affiliates, and the successors and assigns of any of them (collectively, the "Released Parties") from any civil or administrative monetary claim the United States has or may have 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, breach of contract and fraud, for the Covered Conduct.

6. Subject to the exceptions in Paragraph 8 below, in consideration of the obligations of Sharp Memorial set forth in this Agreement and the Corporate Integrity Agreement attached as Exhibit A, conditioned upon Sharp Memorial's payment in full of the Settlement Amount, and

subject to paragraph 15 below (concerning bankruptcy proceedings commenced within 91 days of the effective date of this Agreement), the OIG-HHS agrees to release and refrain from instituting, directing or maintaining any administrative claim or any action seeking exclusion from the Medicare, Medicaid or other Federal health care program (as defined in 42 U.S.C. § 1320a-7b(f)) against the Released Parties under 42 U.S.C. § 1320a-7a (Civil Monetary Penalties Law), or 42 U.S.C. § 1320a-7(b) (permissive exclusion), for the Covered Conduct. The OIG-HHS expressly reserves all rights and obligations to exclude any of the Released Parties from Medicare, Medicaid, or other Federal health care programs under 42 U.S.C. § 1320a-7(a)(mandatory exclusion).

7. In consideration of the obligations of Sharp Memorial set forth in this Agreement, conditioned upon Sharp Memorial's payment in full of the Settlement Amount, and subject to Paragraph 15 below (concerning bankruptcy proceedings commenced within 91 days of the effective date of this Agreement), the TSO agrees to release and refrain from instituting, directing, or maintaining any administrative claim or action under 32 C.F.R. § 199.9 for the Covered Conduct, except as reserved in Paragraph 8 below, and as reserved in this Paragraph against the Released Parties. The TSO expressly reserves authority to exclude Sharp Memorial together with its current and former parent corporations, each of its direct and indirect subsidiaries, brother or sister corporations, divisions, current or former owners, officers, directors, affiliates, and the successors and assigns of any of them from the TRICARE program under 32 C.F.R. §§ 199.9 (f)(1)(i)(A), (f)(1)(i)(B), (f)(1)(i)(D), and (f)(1)(iii), based upon the Covered Conduct. Nothing in this Paragraph precludes the TRICARE program from taking

action against entities or persons, or for conduct and practices, for which civil claims have been reserved in Paragraph 8 below.

8. Notwithstanding any term of this Agreement, specifically reserved and excluded from the scope and terms of this Agreement as to any entity or person (including Sharp Memorial) are any and all of the following:

- (1) Any civil, criminal or administrative claims arising under Title 26, U.S. Code (Internal Revenue Code);
- (2) Any criminal liability;
- (3) Except as explicitly stated in this Agreement, any administrative liability, including mandatory exclusion from Federal health care programs pursuant to 42 U.S.C. § 1320a-7(a);
- (4) Any liability to the United States (or its agencies) for any conduct other than the Covered Conduct;
- (5) Any claims based upon such obligations as are created by this Agreement;
- (6) Any express or implied warranty claims or other claims for defective or deficient products or services, including quality of goods and services, provided by Sharp Memorial; and
- (7) Any claims based on a failure to deliver items or services due.
- (8) Any claims against individuals, including officers and employees; however, if such individuals are legally entitled to repayment from Sharp Memorial, by claim for indemnification, contribution, reimbursement or otherwise as the result of a claim brought by the

United States, the releases provided in Paragraphs 5, 6 and 7 above shall apply to such individuals with respect to that claim.

9. The Settlement Amount that Sharp Memorial must pay pursuant to this Agreement by electronic wire transfer pursuant to Paragraph 1 above, will not be decreased as a result of the denial of claims for payment now being withheld from payment by any Medicare or TRICARE carrier or intermediary related to the Covered Conduct, if any; and Sharp Memorial agrees not to resubmit to any Medicare or TRICARE carrier or intermediary any previously denied claims related to the Covered Conduct, and agrees not to appeal any such denials of claims.

10. Sharp Memorial agrees that all costs (as defined in the Federal Acquisition Regulations ("FAR") § 31.205-47 and in Titles XVIII and XIX of the Social Security Act, 42 U.S.C. §§ 1395-1395ddd (1997) and 1396-1396v (1997), and the regulations promulgated thereunder) incurred by or on behalf of the Released Parties in connection with: (1) the matters covered by this Agreement, (2) the Government's audit(s) and civil and any criminal investigation(s) of the matters covered by this Agreement, (3) Sharp Memorial's investigation, defense, and corrective actions undertaken in response to the Government's audit(s) and civil and any criminal investigation(s) in connection with the matters covered by this Agreement (including attorney's fees and including the obligations undertaken pursuant to the Corporate Integrity Agreement incorporated in this Agreement), (4) the negotiation of this Agreement, and (5) the payment made pursuant to this Agreement, are unallowable costs on Government contracts and under the Medicare program, the Medicaid program, the Veterans Affairs program ("VA"), the Federal Employee Health Benefits program ("FEHBP"), and the TRICARE program

(hereafter, "unallowable costs"). These unallowable costs will be separately estimated and accounted for by Sharp Memorial and Sharp Memorial 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 Sharp Memorial or any of its subsidiaries to the Medicare, Medicaid, VA, FEHBP, or TRICARE programs.

Sharp Memorial further agrees that within 60 days of the effective date of this Agreement it will identify to applicable Medicare and TRICARE fiscal intermediaries, carriers and/or contractors and Medicaid, VA, and FEHBP fiscal agents, any unallowable costs (as defined in this Paragraph 10) 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 Sharp Memorial or any of its subsidiaries, 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. Sharp Memorial agrees that the United States will be entitled to recoup from Sharp Memorial any overpayment 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 Sharp Memorial or any of its subsidiaries on the effect of inclusion of unallowable costs (as defined in this Paragraph 10) on Sharp Memorial or any of its subsidiaries' cost reports, cost

statements or information reports. Nothing in this Agreement shall constitute a waiver of the rights of the United States to examine or reexamine the unallowable costs described in this Paragraph.

11. Sharp Memorial waives and will not assert any defenses Sharp Memorial may have to any criminal prosecution or administrative action relating to the Covered Conduct, which defenses may be based in whole or in part on the Double Jeopardy or Excessive Fines Clause of the Constitution. Sharp Memorial agrees that the Settlement Amount is not punitive in nature or effect for purposes of 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.

12. This Agreement is intended to be for the benefit of the Parties and the Released Parties only, and by this instrument the Parties do not release any claims against any other person or entity.

13. Sharp Memorial agrees that it will not seek payment for any of the health care billings covered by this Agreement from any health care beneficiaries or their parents or sponsors. Sharp Memorial waives any causes of action against these beneficiaries or their parents or sponsors based upon the claims for payment covered by this Agreement.

14. Sharp Memorial 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 will remain solvent following its payment to the United States hereunder. Further, the Parties expressly warrant that, in evaluating whether to execute this Agreement, the Parties (a) have intended that the mutual

promises, covenants and obligations set forth herein constitute a contemporaneous exchange for new value given to Sharp Memorial, within the meaning of 11 U.S.C. § 547(c)(1), and (b) have concluded that these mutual promises, covenants and obligations do, in fact, constitute such a contemporaneous exchange.

15. In the event Sharp Memorial commences, or a third party commences, within 91 days of the effective date of this Agreement, any case, proceeding, or other action (a) under any law relating to bankruptcy, insolvency, reorganization or relief of debtors, seeking to have any order for relief of Sharp Memorial's debts, or seeking to adjudicate Sharp Memorial as bankrupt or insolvent, or (b) seeking appointment of a receiver, trustee, custodian or other similar official for Sharp Memorial or for all or any substantial part of Sharp Memorial's assets, Sharp Memorial agrees as follows:

a. Sharp Memorial's obligations under this Agreement may not be avoided pursuant to 11 U.S.C. § 547, and Sharp Memorial will not argue or otherwise take the position in any such case, proceeding or action that: (i) Sharp Memorial's obligations under this Agreement may be avoided under 11 U.S.C. § 547; (ii) Sharp Memorial was insolvent at the time this Agreement 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 Agreement do not constitute a contemporaneous exchange for new value given to Sharp Memorial.

b. In the event that Sharp Memorial's obligations hereunder are avoided pursuant to 11 U.S.C. Section 547, the United States, at its sole option, may rescind the releases in this Agreement, and bring any civil and/or administrative claim, action or proceeding against

Sharp Memorial for the claims that would otherwise be covered by the releases provided in Paragraphs 5 - 8, above. If the United States chooses to do so, Sharp Memorial agrees that (i) any such claims, actions or proceedings brought by the United States (including any proceedings to exclude Sharp Memorial from participation in Medicare or other federal health care programs) are not 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, and that Sharp Memorial will not argue or otherwise contend that the United States' claims, actions or proceedings are subject to an automatic stay; (ii) that Sharp Memorial 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 proceeding which are brought by the United States within 180 calendar days of written notification to Sharp Memorial that the releases herein have been rescinded pursuant to this Paragraph, except to the extent such defenses were available on the effective date of this agreement; and (iii) the United States has a valid claim against Sharp Memorial in the amount of \$3.35 million, and the United States 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. Sharp Memorial acknowledges that its agreements in this Paragraph are provided in exchange for valuable consideration provided in this Agreement.

16. Each party to this Agreement will bear its own legal and other costs incurred in connection with this matter, including the preparation and performance of this Agreement.

17. Sharp Memorial represents that this Agreement is freely and voluntarily entered into without any degree of duress or compulsion whatsoever.

18. This Agreement 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 Agreement will be the United States District Court for the Southern District of California, except that disputes arising under the Corporate Integrity Agreement shall be resolved exclusively pursuant to the means set forth in the Corporate Integrity Agreement.

19. This Agreement, including Exhibit A, constitutes the complete agreement between the Parties. This Agreement may not be amended except by written consent of the Parties, except that only Sharp Memorial and the OIG-HHS must agree in writing to modification of the Corporate Integrity Agreement attached as Exhibit A, as provided in the Corporate Integrity Agreement.

20. After this Agreement is executed and the Settlement Amount is received by the United States, the United States and Relator will notify the Court that the parties stipulate and request that Sharp Memorial be dismissed with prejudice from the action captioned United States ex rel. Health Outcomes Technologies, Inc. v. Sharp Memorial Hospital, et al., Civil Action No. 96-1552 (UNDER SEAL), in the United States District Court for the Eastern District of Pennsylvania.

21. By this Agreement, the Relator and Relator's counsel will release and will be deemed to release Sharp Memorial from any claim that the Relator, and/or Relator's counsel may have under 31 U.S.C. §§ 3730(d) and 3730(c)(5) to pay Relator's or Relator's counsel attorneys' fees, expenses and costs.

22. Conditioned on Sharp Memorial's payment in full of the Settlement Amount, Relator shall receive from the United States the amount of One Hundred and Twenty Thousand

Four Hundred and Fifty-Two Dollars and Thirty-Eight Cents (\$120,452.38) ("Relator's Share"). The United States shall pay Relator this amount within a reasonable time after receipt by the United States from Sharp Memorial of the Settlement Amount. It is expressly understood and agreed that the United States in no way promises or guarantees nor is liable to Relator for the collection or payment of any funds pursuant to this Agreement or the payment of the Relator's Share except as provided herein for funds actually collected and received by the United States.

23. On receipt of the payment described in Paragraph 22 above, Relator will release and will be deemed to have released and forever discharged the United States, its officers, agents, and employees from any liability arising from the filing of the action captioned United States ex rel. Health Outcomes Technologies, Inc. v. Sharp Memorial Hospital, et al., Civil Action No. 96-1552 (UNDER SEAL), as against Sharp Memorial, including any claim pursuant to 31 U.S.C. § 3730(d) to a share of any settlement proceeds received from Sharp Memorial. Relator agrees that receipt of the Relator's Share fully satisfies and settles all claims Relator may have under this Agreement. Relator further agrees that the settlement evidenced by this Agreement is fair, adequate and reasonable, and Relator will not challenge the settlement pursuant to 31 U.S.C. § 3730(e)(2)(B).

24. Relator and Sharp Memorial hereby warrant, represent and agree that each of them is fully aware of the provisions of California Civil Code § 1542, which provides that "[a] general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor." Relators and Sharp Memorial voluntarily waive the provisions of California Civil Code § 1542, and any similar law, as to any and all claims,


HEALTH OUTCOMES TECHNOLOGIES, INC.

DATED: 7/14/99

BY: 
DR. RICHARD NEWBOLD
Health Outcomes Technologies, Inc.
Chief Executive Officer

APPROVED AS TO FORM AND CONTENT:

DATED: 7/14/99

BY: 
DRINKER, BIDDLE & REATH
Attorneys for Relator
Health Outcomes Technologies, Inc.