

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”), Watermark Retirement Communities, LLC (“Watermark”), and David Freedman (“Relator”) (hereafter collectively referred to as “the Parties”), through their authorized representatives.

RECITALS

A. Watermark is a senior living community operator based in Tucson, Arizona, that manages approximately 79 communities providing a combination of assisted living, independent living, memory care, and skilled nursing services in 22 states. Prior to January 2014, Watermark (directly or via affiliates) also owned and operated two home health care agencies (“HHAs”) in Scottsdale and Tucson, Arizona under the business name, “Watermark At Home” (“WAH”).

B. BAYADA is a 501(c)(3) corporation that is registered in Delaware and has its headquarters in Moorestown, New Jersey. BAYADA is the sole member of BAYADA Health, LLC, which is the sole member of BAYADA Home Health Care, Inc. (these entities are collectively referred to as “the Bayada Companies”). The Bayada Companies operate HHAs nationwide, providing nursing, rehabilitative, therapeutic, hospice, and assistive care services to patients at home and in residential facilities. The Bayada Companies rely on a network of referrals to secure patients for their services, including referrals of patients at residential facilities like those managed by Watermark.

C. On August 18, 2017, Relator filed a qui tam action in the United States District Court for the District of New Jersey, captioned United States ex rel. Freedman v. Bayada Home Health Care, Inc., No. 17-cv-06267-NLH-KMW (D.N.J.), pursuant to the qui tam provisions of

the False Claims Act, 31 U.S.C. § 3730(b) (the “Civil Action”). Relator filed an amended complaint on June 6, 2018 and a second amended complaint on June 30, 2021 (“Second Amended Complaint”). In his complaints, Relator alleged, *inter alia*, that the Bayada Companies purchased the Watermark HHAs in Arizona in order to induce patient referrals from Watermark in violation of the False Claims Act, 31 U.S.C. § 3730 (the “FCA”), and the Anti-Kickback Statute, 42 U.S.C. § 1320a-7b(b) (the “AKS”).

D. On September 8, 2021, the United States executed a settlement with the Bayada Companies and intervened in part in the Civil Action for the purpose of that settlement.

E. The United States contends that the Bayada Companies submitted or caused to be submitted claims for payment to the Medicare Program, Title XVIII of the Social Security Act, 42 U.S.C. §§ 1395-1395lll (“Medicare”) (the “Medicare claims”) and that Watermark caused the submission of certain of the Medicare claims.

F. The United States contends that from January 1, 2014 through October 31, 2020, Watermark caused the submission of false claims for payment to Medicare for services provided to beneficiaries Watermark referred to the Bayada Companies from Watermark residential communities, including the following locations: The Fountains at La Cholla, Arizona; Thunderbird Senior Living, Arizona; The Watermark at 3030 Park, Connecticut; Rockland Place, Delaware; The Fountains at Boca Ciega, Florida; Rose Tree Place, Pennsylvania; Blue Bell Place, Pennsylvania; and The Watermark at Logan Square, Pennsylvania. The United States further contends that these claims were false because in early 2014, in violation of the AKS, Watermark knowingly and willfully solicited the Bayada Companies to purchase WAH in order to induce referrals of Medicare beneficiaries living in Watermark residential communities to HHAs operated by the Bayada Companies. This conduct is referred to below as the “Covered Conduct.”

G. This Settlement Agreement is neither an admission of liability by Watermark nor a concession by the United States that its claims are not well founded. Defendant expressly denies the allegations of the United States and the Relator set forth herein and in the Civil Action.

H. Relator claims entitlement under 31 U.S.C. § 3730(d) to a share of the proceeds of this Settlement Agreement and to Relator's reasonable expenses, attorneys' fees and costs.

I. 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. Watermark shall pay to the United States four million two-hundred and fifty thousand dollars (\$4,250,000) ("Settlement Amount"), of which \$1,900,000 is restitution, plus interest on the Settlement Amount at an annual rate of 3.625%, to accrue from June 1, 2023, through the date of payment, no later than 14 days after the Effective Date of this Agreement by electronic funds transfer pursuant to written instructions to be provided by the U.S. Attorney's Office for the District of New Jersey.

2. Conditioned upon the United States receiving the Settlement Amount and as soon as feasible after receipt, the United States shall pay \$765,000 plus accrued interest to Relator by electronic funds transfer ("Relator's Share").

3. Subject to the exceptions in Paragraph 5 (concerning reserved claims) below, and upon the United States' receipt of the Settlement Amount, the United States releases Watermark, and any and all entities in which Watermark or its subsidiaries or corporate affiliates are or were members, owners, or shareholders, together with their current and former parent companies; direct and indirect subsidiaries; brother or sister companies; 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.

4. Subject to the exceptions in Paragraph 5 below, and upon the United States' receipt of the Settlement Amount, Relator, for himself and for his heirs, successors, attorneys, agents, and assigns, releases David J. Freshwater, David N. Barnes, Watermark and any and all entities in which Watermark or its subsidiaries or corporate affiliates are or were members, owners, or shareholders, together with their current and former parent companies; direct and indirect subsidiaries; brother or sister companies; divisions; current or former owners; the corporate successors and assigns of any of them; and the officers, directors and employees thereof, from any civil claims the Relator has on behalf of himself or on behalf of the United States under the False Claims Act, 31 U.S.C. §§ 3729-3733, and any claims Relator has asserted, could have asserted, or may assert in the future, related to the Covered Conduct or related to the allegations in the Civil Action, except as provided for in this Agreement. Notwithstanding the release provided by Relator in this paragraph, or any other release provided in this Settlement Agreement, Relator expressly reserves and does not release the following claims:

- a. Claims Relator has asserted pursuant to 31 U.S.C. § 3730(d) for reasonable expenses and reasonable attorneys' fees and costs.
- b. Notwithstanding the release provided by Relator in this Paragraph 4, Relator is not releasing in this Settlement Agreement any claims he has against any entity named as a defendant in the Second Amended Complaint filed in the Civil Action other

than Watermark. (An unredacted copy of the Second Amended Complaint has been provided to Watermark.)

5. Notwithstanding the releases given in Paragraphs 3 and 4 of this Agreement, or any other term of this Agreement, the following claims and rights 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 or enforcement right, 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.

6. Relator 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 Relator's receipt of the Relator's Share, Relator 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 against Watermark arising from the Covered Conduct, and from any claims to a share of the proceeds of this Agreement.

7. Watermark waives and shall not assert any defenses Watermark 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.

8. Watermark 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 Watermark has asserted, could have asserted, or may assert in the future against the United States, its agencies, officers, agents, employees, and servants, related to the Covered Conduct or the United States' investigation or prosecution thereof.

9. Watermark fully and finally releases the Relator from any claims (including attorneys' fees, costs, and expenses of every kind and however denominated) that Watermark has asserted, could have asserted, or may assert in the future against the Relator, related to the Covered Conduct and the Relator's investigation and prosecution thereof.

10. 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 Watermark agrees 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.

11. Watermark 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. §§ 1395-1395lll and 1396-1396w-5; and the regulations and official program directives promulgated thereunder) incurred by or on behalf of

Watermark, its 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) Watermark'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 Watermark makes to the United States pursuant to this Agreement and any payments that Watermark may make to Relator, including costs and attorneys' fees

are unallowable costs for government contracting purposes and under the Medicare Program (hereinafter referred to as "Unallowable Costs"); and

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

c. Treatment of Unallowable Costs Previously Submitted for Payment:

Watermark 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 Watermark 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. Watermark agrees that the United States, at a minimum, shall be entitled to recoup from Watermark 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 Watermark or any of its subsidiaries or affiliates on the effect of inclusion of Unallowable Costs (as defined in this paragraph) on Watermark 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 Watermark's books and records to determine that no Unallowable Costs have been claimed in accordance with the provisions of this paragraph.

12. Except as otherwise expressly provided in the release provisions of this Agreement, 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 15 (waiver for beneficiaries paragraph), below.

13. Watermark 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.

14. 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 all claims against Watermark in the Civil Action pursuant to Rule 41(a)(1), with the exception of any claims for reasonable expenses and reasonable attorneys' fees and costs recoverable under 31 U.S.C. § 3730(d).

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

16. Each party and signatory to this Agreement represents that it freely and voluntarily enters into this Agreement without any degree of duress or compulsion.

17. 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 New Jersey. 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.

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

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

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

21. This Agreement is binding on Watermark's successors, transferees, heirs, and assigns.

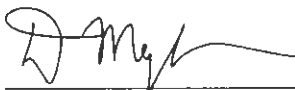
22. This Agreement is binding on Relator's successors, transferees, heirs, and assigns.

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

24. 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: 8/22/2023

BY: 

DANIEL MEYLER
SAMSON O. ASIYANBI
Trial Attorneys
Commercial Litigation Branch
Civil Division
United States Department of Justice

DATED: 8/22/2023

BY: 

JORDANN R. CONABOY
Assistant United States Attorney
District of New Jersey

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

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THE UNITED STATES OF AMERICA

DATED: _____

BY: _____
DANIEL MEYLER
SAMSON O. ASIYANBI
Trial Attorneys
Commercial Litigation Branch
Civil Division
United States Department of Justice

DATED: _____

BY: _____
JORDANN R. CONABOY
Assistant United States Attorney
District of New Jersey

DATED: _____

BY: **LISA RE** Digitally signed by LISA RE
Date: 2023.08.08 16:02:39
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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

Watermark Retirement Communities, LLC

DATED: _____

BY: _____
Signatory for Watermark

DATED: _____

BY: _____
John C. Richter
King & Spalding LLP
Counsel for Watermark


DAVID FREEDMAN - RELATOR

DATED: 8/9/23

BY: 

DAVID FREEDMAN

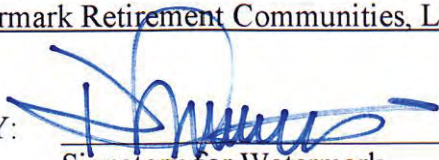
DATED: 8/9/23

BY: 

DAVID CHIZEWER
Counsel for DAVID FREEDMAN

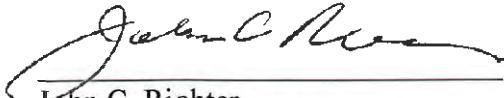
Watermark Retirement Communities, LLC

DATED: 8/18/23

BY: 

Signatory for Watermark

DATED: 08/18/23

BY: 

John C. Richter
King & Spalding LLP
Counsel for Watermark

DAVID FREEDMAN - RELATOR

DATED: _____

BY: _____
DAVID FREEDMAN

DATED: _____

BY: _____
DAVID CHIZEWER
Counsel for DAVID FREEDMAN