

SETTLEMENT AGREEMENT

I. PARTIES

This Settlement Agreement ("Agreement") is entered into between the United States of America ("United States"), acting through the Civil Division of the United States Department of Justice, the United States Attorney for the Middle District of Tennessee, and the Office of Inspector General of the Department of Health and Human Services ("OIG-HHS"); BJC Medical Center ("BJC"); and the qui tam relator, Barry Steeley ("Relator") (the United States and all of the foregoing persons or entities are hereafter collectively referred to as "the Parties"), through their authorized representatives.

II. PREAMBLE

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

- A. BJC is provider of hospital services located at 70 Medical Center Drive, Commerce, Georgia 30529.
- B. The United States contends that BJC 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. §§ 1395-1395ggg and to the Medicaid program (codified in 42 U.S.C. §§ 1396-1396v, Title XIX of the Social Security Act, as amended) for the inpatient treatment of Medicare beneficiaries.
- C. On or around August 25, 1997, Barry Steeley (the "Relator") filed a qui tam complaint under seal alleging violations of the False Claims Act by BJC in the case styled United States ex rel. Barry Steeley v. Birman Managed Care, Inc., et al., Civil Action No. 3:97-0893 (M.D. Tenn.) (the "Qui Tam Action").

D. Medicare payments to a hospital for inpatient treatment rendered to a beneficiary generally are based upon the beneficiary's "principal diagnosis," as determined by the hospital.

E. The Medicare Program relies upon participating hospitals to properly indicate the principal diagnosis through the use of standard diagnosis codes.¹

F. The United States investigated the allegations in the Qui Tam Action regarding inpatient payment claims submitted to Medicare by BJC for patients with the principal diagnosis codes of 482.4 (pneumonia due to staphylococcus); 482.89 (pneumonia other specified bacteria); and 507.0 (food/vomit pneumonitis).

G. This Agreement governs the Relator's claims against BJC based on the conduct alleged in the Qui Tam Action, and the civil claims the United States contends that it has against BJC under the False Claims Act, 31 U.S.C. §§ 3729-3733, and other federal statutes and/or common law doctrines as more specifically identified in Paragraph 4 below, for engaging in the following alleged conduct during the period from December 15, 1995 through July 30, 1998 (the "Covered Period"): BJC submitted or caused to be submitted claims to Medicare with the principal diagnosis codes 482.4 (pneumonia due to staphylococcus); 482.89 (pneumonia other specified bacteria); and 507.0 (food/vomit pneumonitis) 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 these claims, BJC received payments from Medicare to which it was not entitled.

H. BJC has provided documents and information in response to the United States' investigation of the Covered Conduct, including patient files for which claims

¹ International Classification of Diseases, 9th Revision, Clinical Modification ("ICD-9-CM").

were submitted to the Medicare Program with the principal diagnosis codes of 482.4 (pneumonia due to staphylococcus); 482.89 (pneumonia other specified bacteria); and 507.0 (food/vomit pneumonitis). BJC represents that such response has been truthful, accurate, and complete to the best of its knowledge and ability.

I. BJC does not admit the contentions of the United States as set forth in Paragraph G above and as set forth in the Qui Tam Action.

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. Immediately upon execution of this Agreement by all Parties, BJC shall pay to the United States \$124,000 (the "Settlement Amount") by electronic funds transfer pursuant to written instructions to be provided by the Civil Division of the United States Department of Justice.

2. BJC shall cooperate reasonably, truthfully and in good faith with the United States in the administrative, civil or criminal investigation or prosecution of any person not specifically released in this Agreement concerning the Covered Conduct, and concerning similar matters involving other hospitals and others in connection with the Qui Tam Action. Upon reasonable notice, BJC shall make reasonable efforts to facilitate access to, and encourage the cooperation of, its directors, officers, and employees for

interviews and testimony, consistent with the rights and privileges of such individuals, and will make available to the United States, upon reasonable request, all non-privileged documents and records in its possession, custody or control relating to the Covered Conduct.

3. BJC releases the United States, the Department of Health and Human Services (HHS), and each of their agencies, officers, agents, employees, and contractors and their employees and Relator 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.

4. Subject to the exceptions in Paragraph 6 below, in consideration of the obligations of BJC set forth in this Agreement, conditioned upon BJC's payment in full of the Settlement Amount, the United States (on behalf of itself, its officers, agents, and its agencies and departments referenced above in Paragraph 3), agrees to release BJC, and each of its predecessors, successors, assigns, and affiliates (all of the foregoing collectively referred to as the "BJC 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. The United States expressly reserves any claims against any entities and individuals other than the BJC Released Parties.

5. The OIG-HHS expressly reserves all rights to institute, direct, or to maintain any administrative action seeking exclusion against the BJC Released Parties

from Medicare, Medicaid and other federal health care programs (as defined in 42 U.S.C. § 1320a-7b(f)), under 42 U.S.C. § 1320a-7(a) (mandatory exclusion), or 42 U.S.C. § 1320a-7(b) (permissive exclusion).

6. 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 BJC and the Relator) 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 or permissive exclusion from Federal health care programs;

(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 BJC; and

(7) Any claims based on a failure to deliver items or services billed.

7. BJC waives and will not assert any defenses it 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 a contention that, under the Double Jeopardy Clause in the Fifth Amendment or Excessive Fines Clause in the Eighth Amendment of the Constitution, this Agreement bars a remedy sought in such criminal prosecution or administrative action. BJC agrees that this Agreement is not punitive in purpose or effect. 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.

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

9. BJC agrees to the following:

(a) Unallowable Costs Defined: that all costs (as defined in the Federal Acquisition Regulation (FAR) 48 C.F.R. § 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 BJC, its present or former officers, directors, employees, shareholders, and agents in connection with the following:

(1) the matters covered by this Agreement,

- (2) the United States' audit(s) and investigations(s) of the matters covered by this Agreement,
- (3) BJC's investigation, defense, and any corrective actions undertaken in direct response to the United States' audit(s) and investigation 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 BJC makes to the United States pursuant to this Agreement and any payments that BJC may make to Relator, including costs and attorneys fees,

are unallowable costs on Government contracts and under the Medicare Program, Medicaid Program, TRICARE Program, Veterans Affairs Program (VA), and Federal Employees Health Benefits Program (FEHBP).

(All costs described or set forth in this Paragraph 9(a) are hereafter, "unallowable costs").

(b) Future Treatment of Unallowable Costs: These unallowable costs shall be separately determined and accounted for by BJC, and BJC 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 BJC or any of its subsidiaries to the Medicare, Medicaid, TRICARE, VA, or FEHBP Programs.

(c) Treatment of Unallowable Costs Previously Submitted for Payment: BJC 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, VA, 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 BJC or any of its subsidiaries, 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. BJC agrees that the United States, at a minimum, shall be entitled to recoup from BJC any overpayment plus applicable interest as a result of the inclusion of such unallowable costs on previously-submitted cost reports, information reports, cost statements, or request for payment.

Any payment 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 BJC or any of its subsidiaries on the effect of inclusion of unallowable costs (as defined in this Paragraph) on BJC 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.

10. This Agreement is intended to be for the benefit of the Parties, and their successors and assigns, only and by this instrument the Parties do not release any claims against any other person or entity (other than the BJC Released Parties). This agreement is not intended to be for the benefit of Birman Managed Care, Inc., Birman & Associates,

Inc., and David N. Birman, M.D., and by this instrument the United States does not release any claims against Birman Managed Care, Inc., Birman & Associates, Inc., and David N. Birman, M.D.

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

12. After this Agreement is executed and the Settlement Amount is received by the United States, the United States and Relator will notify the United States District Court for the Middle District of Tennessee that (a) the Parties have reached a settlement; and (b) pursuant to this settlement the Parties have stipulated that: (i) the Relator dismisses all claims in the Qui Tam Action with prejudice as to him, and (ii) the United States dismisses with prejudice only those claims in the Qui Tam Action related to the Covered Conduct against BJC, and the claims in the Qui Tam Action unrelated to the Covered Conduct are dismissed without prejudice as to the United States.

13. In consideration of the obligations of BJC set forth in this Agreement, conditioned upon BJC's payment in full of the Settlement Amount, Relator, and/or Relator's Counsel, agrees to release the BJC 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. Relator expressly reserves any claims against any entities and individuals other than the BJC Released Parties.

14. Conditioned on BJC's payment in full of the Settlement Amount, Relator shall receive from the United States a payment amounting to 17.7% of the Settlement

Amount. The United States shall pay Relator this amount within a reasonable time after BJC pays the Settlement Amount. It is expressly understood and agreed that the United States in no way promises, guarantees, nor is liable to Relator for the collection or payment of any funds pursuant to this Agreement or the payment or any Relator's share payments except as provided herein for funds actually collected and received by the United States.

15. On receipt of the payment described in Paragraph 14 above, Relator shall release and shall 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 complaint in the Qui Tam Action as against BJC, including any claim pursuant to 31 U.S.C. § 3730(d) to a share of any settlement proceeds received from BJC, and in full satisfaction and settlement of claims under this Agreement. The Relator agrees and confirms that this Agreement is fair, adequate, and reasonable under all the circumstances, pursuant to 31 U.S.C. § 3730(c)(2)(B).

16. The Parties shall bear their own legal and other costs incurred in connection with this matter, including the preparation and performance of this Agreement. In addition, the Relator, for himself and for his heirs, successors, attorneys, agents and assigns, agrees to release the BJC Released Parties from any liability to Relator arising from the filing of the Qui Tam Action, or under 31 U.S.C. § 3730(d), for expenses and attorney's fees and costs.

17. BJC 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 shall be the United States District Court for the Middle District of Tennessee.

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

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

21. The undersigned individuals signing this Agreement on behalf of BJC represent and warrant that they are authorized to execute this Agreement on behalf of BJC. The undersigned United States signatories represent that they are signing this Agreement in their official capacities and that they are authorized to execute this Agreement. The Relator represents that he has the capacity to execute this Agreement, and that he has read it in its entirety.

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

23. This Agreement is binding on the successors, transferees, and assigns of the Parties.

24. This Agreement is effective on the date of signature of the last signatory to the Agreement.

THE UNITED STATES OF AMERICA

DATED: _____

BY: _____
ELLEN BOWDEN MCENTYRE
Assistant United States Attorney
Office of the
United States Attorney
Middle District of Tennessee

DATED: _____

BY: _____
ROBERT J. MCAULIFFE
Trial Attorney
Civil Division
U.S. Department of Justice

DATED: _____

BY: _____
LARRY J. GOLDBERG
Assistant Inspector General
Office of Counsel to the Inspector General
Office of Inspector General
United States Department of Health and
Human Services

BJC MEDICAL CENTER

DATED: _____

BY: _____

SHANNON THYME KLINGER, Esq.
Alston & Bird LLP
One Atlantic Center
1201 West Peachtree Street
Atlanta, GA 30309-3424

Counsel for BJC Medical Center

DATED: 12-15-03

BY: 

CHARLES BLAIR
Governing Authority Chairman
BJC Medical Center

RELATOR BARRY STEELEY

DATED: _____

BARRY STEELEY


DATED: _____

BY: _____
W. CHARLES BAILEY, JR.
Simms Showers LLP.
Twenty South Charles Street
Baltimore, Maryland 21201

Counsel for Relator
Barry Steeley

BJC MEDICAL CENTER

DATED: 12/11/2003

BY: 
SHANNON THYME KLINGER, Esq.
Alston & Bird LLP
One Atlantic Center
1201 West Peachtree Street
Atlanta, GA 30309-3424

Counsel for BJC Medical Center

DATED: _____

BY: _____
CHARLES BLAIR
Governing Authority Chairman
BJC Medical Center

THE UNITED STATES OF AMERICA

DATED: _____

BY: Ellen Bowden McEntyre
ELLEN BOWDEN MCENTYRE
Assistant United States Attorney
Office of the
United States Attorney
Middle District of Tennessee

DATED: 12/17/03

BY: Robert McAuliffe
ROBERT J. MCAULIFFE
Trial Attorney
Civil Division
U.S. Department of Justice

DATED: _____

BY: _____
LARRY J. GOLDBERG
Assistant Inspector General
Office of Counsel to the Inspector General
Office of Inspector General
United States Department of Health and
Human Services

THE UNITED STATES OF AMERICA


DATED: _____

BY: _____
ELLEN BOWDEN MCENTYRE
Assistant United States Attorney
Office of the
United States Attorney
Middle District of Tennessee

DATED: _____

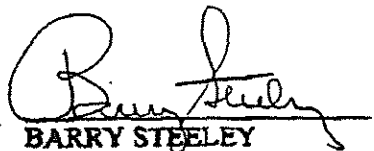
BY: _____
ROBERT J. MCAULIFFE
Trial Attorney
Civil Division
U.S. Department of Justice

DATED: 12/12/03

BY: 
LARRY J. GOLDBERG
Assistant Inspector General
Office of Counsel to the Inspector General
Office of Inspector General
United States Department of Health and
Human Services


RELATOR BARRY STEELEY

DATED: 12/10/03


BARRY STEELEY

DATED: 12-10-2003

BY:


W. CHARLES BAILEY, JR.
Simms Showers LLP.
Twenty South Charles Street
Baltimore, Maryland 21201

Counsel for Relator
Barry Steeley