

SETTLEMENT AGREEMENT

This Settlement Agreement is entered into among the United States of America, acting through the United States Department of Justice (“DOJ”) and on behalf of the Office of the Inspector General (“OIG-HHS”) of the Department of Health and Human Services (“HHS”) (collectively the “United States”), the District of Columbia, The Washington Home and Community Hospice (“The Washington Home”), Berta Gomez, the Executor for the Estate of Carlos Gomez, and Rita Thomas, (hereafter collectively referred to as “the Parties”), through their authorized representatives.

RECITALS

A. The Washington Home is a skilled nursing facility and hospice located at 3720 Upton Street, N.W., Washington, D.C. 20016.

B. On August 17, 2009, Carlos Gomez and Rita Thomas filed a *qui tam* action in the United States District Court for the District of Columbia captioned *United States and the District of Columbia ex rel. Carlos Gomez and Rita Thomas (“Relators”) vs. The Washington Home, et al.*, Civil Action No. 09-1549(RJL)(DDC), pursuant to the *qui tam* provisions of the False Claims Act, 31 U.S.C. § 3730(b) (the “Civil Action”) and the District of Columbia False Claims Act, D.C. Code § 2-381.03(b). Relators contend that The Washington Home violated the False Claims Act, 31 U.S.C. §§ 3729-3733, and the District of Columbia False Claims Act, D.C. Code § 2-381.02(a), by submitting or causing to be submitted, claims for payment for inadequate skilled nursing and hospice services that evidenced a failure to care for certain residents of The Washington Home.

C. The United States contends that The Washington Home 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 the Medicaid Program (Medicaid), 42 U.S.C. §§ 1396-1396w-5.

D. The United States and the District of Columbia contend that they have certain civil claims against The Washington Home based on The Washington Home submitting or causing to be submitted, claims for payment for inadequate skilled nursing and hospice services that were rendered to certain residents of The Washington Home during certain time periods: Resident A for the time period from August 21, 2008 to September 16, 2008; Resident B for the time period from July 28, 2008 to July 29, 2008, and from April 2, 2010 to May 2, 2010; Resident C for the time period from May 7, 2008 to August 23, 2008, and from September 1, 2008 to November 14, 2008; Resident D for the time period from January 18, 2009 to June 18, 2009; Resident E for the time period from July 7, 2008 to April 1, 2009; and Resident F for the time period from June 16, 2008 to October 15, 2008.¹ The United States and the District of Columbia contend that these services were inadequate because they evidenced a failure of care in the areas of: psychotropic drug use and related behavior monitoring, medication administration and documentation, infection control, fall prevention, and inaccurate Minimum Data Set (MDS) 3.0 documentation. The foregoing conduct in this Paragraph D is hereinafter referred to as the “Covered Conduct.”

E. This Settlement Agreement is neither an admission of liability by The

¹ Residents A through F are specifically identified in a letter dated December 10, 2012 from Susan C. Lynch, Esq. to Brad Kelley, Esq.

Washington Home nor a concession by the United States and the District of Columbia that their claims are not well founded.

F. Relators claim entitlement under 31 U.S.C. § 3730(d) to a share of the proceeds of this Settlement Agreement and to Relators' reasonable expenses, attorneys' fees and costs. Relators and The Washington Home have not agreed on the amount of Relators' reasonable expenses, attorneys' fees, and costs.

G. 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. The Washington Home agrees to pay the United States and the District of Columbia a total of \$400,000 plus interest (interest) as set forth in Paragraph 1.a & b. below (the "Total Settlement Amount"), \$307,465 plus interest of which shall constitute the "Federal Settlement Amount" and \$92,535 plus interest of which shall constitute the "District of Columbia Settlement Amount." The foregoing Total Settlement Amount payment and other payments to be made pursuant to this Agreement shall be made as follows:

- a. The Washington Home agrees to pay \$307,465 plus interest to the United States by electronic funds transfer pursuant to written instructions to be provided by the United States. The Washington Home agrees to make

this electronic funds transfer within seven (7) business days after the Effective Date of this Agreement. Interest shall accrue at a simple rate of 2.5% from December 3, 2012, until The Washington Home pays the Federal Settlement Amount.

- b. The Washington Home agrees to pay \$92,535 plus interest to the District of Columbia by electronic funds transfer pursuant to written instructions to be provided by the District of Columbia. The Washington Home agrees to make this electronic funds transfer within seven (7) business days after the Effective Date of this Agreement. Interest shall accrue at a simple rate of 2.5% from December 3, 2012, until the Washington Home pays the District of Columbia Settlement Amount.
- c. Contingent upon the United States receiving the Federal Settlement Amount from the Washington Home and as soon as feasible after receipt, the United States agrees to pay \$52,269 plus 17% interest it has received to the Relators by electronic funds transfer, as the Relators' share of the federal settlement amount, pursuant to 31 U.S.C. Section 3730(d); accordingly, this Relators' share constitutes 17% of the Federal Settlement Amount. Contingent upon the District of Columbia receiving the District of Columbia Settlement Amount from the Washington Home and as soon as feasible after receipt, the District of

Columbia agrees to pay \$15,731 plus 17% of the interest it has received to the Relators by electronic funds transfer, as Relators' share of the District of Columbia Settlement Amount, pursuant to D.C. Official Code Section 2-308.15(f)(I); accordingly, this Relators' share constitutes 17% of the District of Columbia Settlement Amount. Payment to the Relators under this Agreement shall be made by electronic funds transfer in accordance with the written instruction of Relators' Counsel, Max Maccoby, Esq..

- d. The Parties agree that the United States is in no way responsible to pay the Relators any portion of the \$15,731 plus interest that is the 17% share of the District of Columbia Settlement Amount. Nor is the District of Columbia responsible to pay the Relators any portion of the \$52,269 plus interest that is the 17% share of the Federal Settlement Amount.

2. As part of its settlement of this matter, within 30 days of the Effective Date of this Agreement:

- a. The Washington Home agrees to retain a Compliance Facilitator ("Facilitator") approved by the United States after consultation with The Washington Home. The Facilitator should be retained for a period of two years unless the United States determines, based on the monitors' reports or other information regarding the quality of care at The Washington Home, that an

additional year is necessary. The Facilitator shall report to the United States on a quarterly basis. The Facilitator may retain additional personnel, including, but not limited to, independent consultants, if needed to help meet the Facilitator's obligations under this Agreement. The Washington Home shall be responsible for all costs incurred by the Facilitator, including, but not limited to, travel costs and additional consultants associated with fulfilling its obligations set forth in Paragraph 2 of this Agreement. The Facilitator shall charge a reasonable amount for his or her fees and expenses. Failure to pay the Facilitator within 30 calendar days of submission of his or her invoices for services previously rendered shall constitute a breach of this Agreement. The Facilitator may be removed solely at the discretion of the United States. If the Facilitator resigns or is removed for any reason prior to the termination of the Agreement, The Washington Home shall retain another Facilitator approved by the United States, with the same functions and authorities. The Facilitator may confer and correspond with The Washington Home and the United States on an ex parte basis.

b. The Facilitator shall be responsible for assessing the effectiveness, reliability and thoroughness of the following:

(i) The Washington Home's internal quality control systems, including, but not limited to: whether the systems in place to promote quality of care and to respond to quality of care issues are functioning in a timely and effective

manner, which includes The Washington Home's training programs, whether the communication system is effective, allowing for accurate information, decisions, and results of decisions to be transmitted to the proper individuals in a timely fashion; and

(ii) The Washington Home's response to quality of care issues, which shall include an assessment of: The Washington Home's ability to identify each problem; The Washington Home's ability to determine the scope of the problem, including, but not limited to whether the problem is isolated or systemic; The Washington Home's ability to create a corrective action plan to respond to the problem; The Washington Home's ability to execute the corrective action plan; and The Washington Home's ability to evaluate whether the assessment, corrective action plan, and execution of that plan was effective, reliable, and thorough.

(iii) The Washington Home's development and implementation of corrective action plans and the timeliness of such actions;

(iv) The Washington Home's proactive steps to ensure that each resident receives care in accordance with: basic care, treatment and protection from harm standards; the rules and regulations set forth in 42 C.F.R. Parts 482 and 483; state and local statutes, regulations, and other directives or guidelines; and the policies and procedures adopted by The Washington Home and

reviewed by the Facilitator.

c. The Facilitator shall have:

(i) immediate access to The Washington Home and its facilities, at any time and without prior notice, to assess the matters set forth in Paragraph 2.b. above, to assess the effectiveness of the internal quality assurance mechanisms, and to ensure that the data being generated is accurate;

(ii) immediate access to: the CMS quality indicators and quality measures; internal or external surveys or reports; hotline complaints; resident satisfaction surveys; staffing data in the format requested by the Facilitator, including reports of any time more than 10 percent of the staff are hired on a temporary basis; reports of abuse, neglect, or an incident that required hospitalization or emergency room treatment; reports of any falls; reports of any incident involving a patient or resident that prompts a full internal investigation; patient or resident records; documents in the possession or control of any quality assurance committee, peer review committee, medical review committee, or other such committee; and any other data in the format the Facilitator determines relevant to fulfilling the duties required under this Agreement; and

(iii) immediate access to patients, residents, and employees for interviews outside the presence of The Washington Home supervisory staff or counsel,

provided such interviews are conducted in accordance with all applicable laws and the rights of such individuals. The Facilitator shall give full consideration to an individual's clinical condition before interviewing a resident.

d. The Washington Home shall:

(i) ensure the Facilitator's immediate access to The Washington Home and its facilities, individuals, and documents, and assist in obtaining full cooperation by its current employees, contractors and agents; and

(ii) ensure that each resident receives care in accordance with: basic care, treatment and protection from harm standards; the rules and regulations set forth in 42 C.F.R. Parts 482 and 483; state and local statutes, regulations, and other directives or guidelines.

(iii) in the event that the Washington Home fails to meet its obligations under Paragraphs 2(a) and 2(d) of this Agreement such that has a significant impact on the quality of care rendered to any resident or residents, the United States, may, at its option reinstate the Civil Action or move to enforce this Settlement Agreement.

e. The Facilitator shall:

(i) respect the legal rights, privacy, and dignity of all employees, residents, and patients;

(ii) where independently required to do so by applicable law or professional licensing standards, report any finding to an appropriate regulatory or law enforcement authority, and simultaneously submit copies of such reports to the United States and to The Washington Home;

(iii) at all times act reasonably in connection with its duties under this Agreement, including when requesting information from The Washington Home;

(iv) abide by the legal requirements of The Washington Home to maintain the confidentiality of each resident's personal and clinical records. Nothing in this subsection, however, shall limit or affect the Facilitator's obligation to provide information, including information from patient and resident clinical records, to the United States, and, when legally or professionally required, reporting to other agencies;

(v) abide by the provisions of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") to the extent required by law;

(vi) except to the extent required by law, maintain the confidentiality of any proprietary financial and operational information, processes, procedures and forms obtained in connection with its duties under this Agreement and not comment publicly concerning its findings except to the extent authorized by the United States.

3. Subject to the exceptions in Paragraph 5 (concerning excluded claims) below, and conditioned upon The Washington Home's full payment of the Total Settlement Amount, and compliance with the terms of Paragraph 2, the United States and the District of Columbia release The Washington Home 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 District of Columbia False Claims Act, D.C. Code § 2-381.01 *et seq.*; 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 7 below, and conditioned upon The Washington Home's full payment of the Settlement Amount, Relators for themselves and for their heirs, successors, attorneys, agents, and assigns, release The Washington Home from any civil monetary claim the Relators have or may have on behalf of the United States or the District of Columbia for the covered conduct under the False Claims Act, 31 U.S.C. §§ 3729-3733 and the District of Columbia False Claims Act, D.C. Code § 2-381.02.

5. Notwithstanding the releases given in Paragraph 3 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 and permissive exclusion from Federal health care programs;
- d. Any liability to the United States (or its agencies) and the District of Columbia for any conduct other than the Covered Conduct;
- e. Any liability based upon obligations created by this Agreement;
- f. Any liability for personal injury or property damage or for other consequential damages arising from the Covered Conduct; or
- i. Any liability of individuals.

6. Relators and their 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) and D.C. Code § 2-381.03(d)(2)(B). Conditioned upon Relators' receipt of the payment described in Paragraph 1, Relators and their heirs, successors, attorneys, agents, and assigns fully and finally release, waive, and forever discharge the United States and the District of Columbia, their agencies, officers, agents, employees, and servants, from any claims arising from the filing of claims for the Covered Conduct in the Civil Action or under 31 U.S.C. § 3730 and D.C. Code § 2-381.02, and from any claims to a share of the proceeds of this Agreement.

7. Relators, for themselves, and for their heirs, successors, attorneys, agents, and assigns, release The Washington Home, and its officers, agents, and employees, from any liability to Relators arising from the filing of the Civil Action for the Covered Conduct, but reserve the right to pursue matters in the Civil Action that are not included in the Covered Conduct, including their claim in this action for reasonable attorney fees and costs pursuant to 31 U.S.C. § 3730(d) and D.C. Code § 2-381.03(f)(5), and Relators' retaliation claim under 31 U.S.C. § 3730(h).

8. The Washington Home waives and shall not assert any defenses The Washington Home 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.

9. The Washington Home fully and finally releases the United States and the District of Columbia, their agencies, officers, agents, employees, and servants, from any claims (including attorneys' fees, costs, and expenses of every kind and however denominated) that The Washington Home has asserted, could have asserted, or may assert

in the future against the United States and the District of Columbia, their agencies, officers, agents, employees, and servants, related to the Covered Conduct and the United States' and the District of Columbia's investigation and prosecution thereof.

10. The Washington Home, for themselves, and for their heirs, successors, attorneys, agents, and assigns fully and finally release, waive, and forever discharge The Relators, and their executors, heirs, successors, attorneys, agents, and assigns, from any claims arising from the filing of claims for the Covered Conduct in the Civil Action under the False Claims Act, 31 U.S.C. §§ 3729-3733 and the District of Columbia False Claims Act, D.C. Code § 2-381.02, but reserve the right to raise any counterclaims and/or defenses to the Relators' and/or their attorneys' claim for reasonable attorney fees and costs pursuant to 31 U.S.C. § 3730(d) and D.C. Code § 2-381.03(f)(5), and Relators' retaliation claim under 31 U.S.C. § 3730(h).

11. 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 carrier or intermediary or any state payer, related to the Covered Conduct; and The Washington Home 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.

12. The Washington Home 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. §§ 1395-1395kkk and 1396-1396w-5; and the regulations and

official program directives promulgated thereunder) incurred by or on behalf of The Washington Home, its present or former officers, directors, employees, shareholders, and agents in connection with:

- (i) the matters covered by this Agreement;
- (ii) the United States' audit(s) and civil investigation(s) of the matters covered by this Agreement;
- (iii) The Washington Home'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);
- (iv) the negotiation and performance of this Agreement;
- (v) the payment The Washington Home makes to the United States and the District of Columbia pursuant to this Agreement and any payments that The Washington Home may make to Relators, including costs and attorneys' fees; and
- (vi) the negotiation of, and obligations undertaken pursuant to the Facilitator arrangement described in Paragraph 2 above.

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

c. Treatment of Unallowable Costs Previously Submitted for Payment:

The Washington Home 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 The Washington Home 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. The Washington Home agrees that the United States, at a minimum, shall be entitled to recoup from The Washington Home 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.

d. 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 The Washington Home or any of its subsidiaries or affiliates on the effect of inclusion of Unallowable Costs (as defined in this Paragraph) on The Washington Home or any of its subsidiaries or affiliates' cost reports, cost statements, or information reports.

e. Nothing in this Agreement shall constitute a waiver of the rights of the United States to audit, examine, or re-examine The Washington Home's books and records to determine that no Unallowable Costs have been claimed in accordance with the provisions of this Paragraph.

13. The Washington Home agrees to cooperate fully and truthfully with the United States' investigation of individuals and entities not released in this Agreement. Upon reasonable notice, The Washington Home shall encourage, and agrees not to impair, the cooperation of its directors, officers, and employees, and shall use its best efforts to make available, and encourage, the cooperation of former directors, officers, and employees for interviews and testimony, consistent with the rights and privileges of such individuals. The Washington Home further agrees to furnish to the United States, upon request, complete and unredacted copies of all non-privileged documents, reports, memoranda of interviews, and records in its possession, custody, or control concerning any investigation of the Covered Conduct that it has undertaken, or that has been performed by another on its behalf, except that which has been created at the direction of legal counsel.

The Washington Home shall not and does not waive its attorney-client privilege or work-product doctrine protections.

14. 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.

15. The Washington Home 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.

16. Pursuant to Rule 41(a)(1), upon receipt of the payment described in Paragraph 1, above, the Parties shall promptly sign and file, a joint stipulation of dismissal dismissing claims for the Covered Conduct in this Civil Action with prejudice as to the United States, the District of Columbia, and the Relator, and dismissing the remaining claims in this action with prejudice to the Relator but without prejudice to the United States and the District of Columbia, except for Relators' claim in this action for reasonable attorney fees and costs under 31 U.S.C. § 3730(d) and D.C. Code § 2-381(f)(5), and the Relators' retaliation claim under 31 U.S.C. § 3730(h).

17. Subject to paragraphs 7 and 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.

18. 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.

19. 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 Columbia. 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.

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

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

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 Washington Home's successors, transferees, heirs, and assigns.

24. This Agreement is binding on Relators' successors, transferees, heirs, and assigns.

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

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

THE UNITED STATES OF AMERICA

DATED: _____

BY: _____

DANIEL R. ANDERSON
SARA McLEAN
SUSAN C. LYNCH
Attorneys, Civil Division Commercial Litigation
Branch
U.S. Department of Justice
Post Office Box 261
Washington, D.C. 20044

DATED: _____

BY: _____

RONALD MACHEN JR.
U.S. Attorney for the District of Columbia
DANIEL F. VAN HORN
Acting Chief, Civil Division
BEVERLY M. RUSSELL, D.C. Bar #454257
Assistant United States Attorney
U.S. Attorney's Office for the District of Columbia,
Civil Division
555 4th Street, N.W.
Washington, D.C. 20530

THE DISTRICT OF COLUMBIA

IRVIN B. NATHAN
Attorney General for the District of Columbia

DATED: _____

BY: _____
BENNETT RUSHKOFF
Chief, Public Advocacy Section

DATED: _____

BY: _____
JANE DRUMMEY
Assistant Attorney General
Office of the Attorney General
441 4th Street, N.W., Suite 650-North
Washington, D.C. 20001

Attorneys for the District of Columbia

THE WASHINGTON HOME & COMMUNITY HOSPICE

DATED: _____

BY: _____

TIMOTHY COX
Chief Executive Officer
The Washington Home & Community Hospice
3720 Upton Street, N.W.
Washington, D.C. 20016

DATED: _____

BY: _____

BRADLEY L. KELLY
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RELATORS

DATED: 12/10/12

BY: Berta M Gomez
BERTA GOMEZ, EXECUTOR FOR ESTATE OF
CARLOS GOMEZ

DATED: 12/17/2012

BY: Rita Thomas
RITA THOMAS

DATED: 12/17/12

BY: Thomas Earl Patton
THOMAS EARL PATTON
MAX MACCOBY
JOSEPH COSBY
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