

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 the Inspector General of the United States Department of Health and Human Services (“OIG-HHS”) (collectively, the “United States”); athenahealth, Inc. (“Athena”); and Geordie Sanborn, Cheryl Lovell, and William McKusick (collectively, the “Relators”) through their authorized representatives (together, “the Parties”).

RECITALS

A. Athena is a medical software company based in Watertown, Massachusetts that offers electronic health record (“EHR”) services, among other cloud-based products. Athena was founded in 1997 and was a publicly traded company from September 20, 2007 through February 11, 2019. Athena is currently a privately held corporation.

B. On October 27, 2017, Geordie Sanborn filed a *qui tam* action in the United States District Court for the District of Massachusetts captioned *United States ex rel. Sanborn v. Athenahealth, Inc.*, Case No. 17-CV-12125-ADB (“Sanborn Action”). On December 21, 2017, Cheryl Lovell and William McKusick filed a *qui tam* action in the same court captioned *United States ex rel. Lovell v. Athenahealth, Inc.*, Case No. 17-CV-12543-GAO (“Lovell Action”) (collectively, the Sanborn Action and the Lovell Action shall be referred to as the “Civil Actions”). The Civil Actions were later administratively consolidated. The United States filed a Complaint in Intervention against Athena on January 22, 2021.

C. Under the Health Information Technology for Economic and Clinical Health Act (“HITECH Act”), the Department of Health and Human Services (“HHS”) established EHR incentive programs under Medicare and Medicaid for healthcare providers (the “EHR Incentive

Programs”). With the passage of the Medicare Access and CHIP Reauthorization Act of 2015 (“MACRA”), Congress replaced the Medicare EHR Incentive Program with the Merit-based Incentive Payment System (“MIPS”) for certain types of clinicians.

D. The United States contends that, between January 1, 2014 and September 22, 2020, Athena offered and provided, and agreed to provide, illegal remuneration, in cash and in kind, under three programs in order to generate sales of its EHR products, each in violation of the Anti-Kickback Statute, 42 U.S.C. § 1320a-7b(b). The United States contends that such violations of the Anti-Kickback Statute render claims false under the False Claims Act, 31 U.S.C. § 3729 *et seq.*, and the common law. In particular, the United States contends:

- i. First, between June 2014 and March 2019, Athena provided existing and potential clients with all-expense-paid trips to sporting, entertainment, and recreational events, which Athena referred to as “Concierge Events.” These events included, among other things, trips to the Masters golf tournament and the Kentucky Derby.
- ii. Second, from January 2014 through September 2020, Athena entered into “Client Lead Generation” agreements with current clients under which it paid for referrals of potential new clients.
- iii. Third, between January 2014 and October 2017, Athena entered into agreements with Health Information Technology (“HIT”) companies that had decided to discontinue their HIT products. Pursuant to those agreements, which Athena referred to as “Conversion Deals,” the other companies agreed to recommend that their clients transition to Athena’s products. Under these arrangements, Athena paid the HIT company based on the number and value of the clients who converted to the use of Athena’s products.

The United States' contentions as described in this Recital D are referred to below as the "Covered Conduct," and are described in further detail in the United States' Complaint in Intervention.

E. Athena has discontinued the three programs identified in the Covered Conduct.

F. Relators claim or reserve the right to claim entitlement under 31 U.S.C. § 3730(d) and/or its state analogs to a share of the proceeds of this Agreement and to Relators' reasonable expenses, attorneys' fees, and costs incurred in connection with any claims released herein. Athena reserves the right to contest Relators' entitlement to expenses, attorneys' fees and costs under 31 U.S.C. § 3730(d) and its state analogs incurred in connection with any claims, including any claims released herein, as well as to challenge any of Relators' claims for expenses, attorneys' fees and costs on any and all grounds, including but not limited to reasonableness and/or any other basis on which such claims may be challenged under 31 U.S.C. § 3730(d) and its state analogs.

In consideration of the mutual promises and obligations of this Settlement Agreement, the Parties agree and covenant as follows:

TERMS AND CONDITIONS

1. Athena shall pay to the United States \$18,250,000, plus interest accruing at an annual rate of 0.75% per annum from September 22, 2020, and continuing until and including the day of payment (the "Settlement Amount"). Athena shall pay the Settlement Amount no later than 10 calendar days after the Effective Date of this Agreement by electronic funds transfer pursuant to written instructions to be provided by the Office of the United States Attorney for the District of Massachusetts. Of the Settlement Amount, \$9,125,000 is restitution to the United States.

2. Subject to the exceptions in Paragraph 4 below (concerning excluded claims), and conditioned upon Athena's full payment of the Settlement Amount, the United States releases Athena, together with its current or past corporate parents, its direct and indirect subsidiaries, and the predecessors, 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. §§ 3729-33; the Civil Monetary Penalties Law, 42 U.S.C. § 1320a-7a; the Program Fraud Civil Remedies Act, 31 U.S.C. §§ 3801-12; or the common law theories of payment by mistake, unjust enrichment, and fraud.

3. Subject to the exceptions in Paragraph 4 below (concerning excluded claims) and conditioned upon the full payment of the Settlement Amount, Relators, for themselves and for their heirs, successors, attorneys, agents, and assigns, release Athena, together with its current and former direct or indirect corporate parents, its current and former direct and indirect subsidiaries, divisions and affiliates, the predecessors, successors, and assigns of any of them, as well as all of its current and former officers, directors, employees, attorneys, and other agents from any and all liability, claims, allegations, demands, actions and causes of action whatsoever, known or unknown, in law or equity, that Relators have against Athena, including but not limited to any civil monetary claim that Relators have on behalf of the United States for the Covered Conduct and the allegations in the Civil Actions; except that Relators' claims for reasonable attorney's fees, expenses, and costs pursuant to 31 U.S.C. § 3730(d)(1) and/or its state analogs are not released.

4. Notwithstanding the releases given in Paragraphs 2 and 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 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;
- f. Any liability of individuals;
- g. Any liability for express or implied warranty claims or other claims for defective or deficient products or services, including quality of goods and services;
- h. Any liability for failure to deliver goods or services due; and
- i. Any liability for personal injury or property damage or for other consequential damages arising from the Covered Conduct.

5. Relators and their respective 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). In connection with this Agreement and the Civil Actions, Relators and their respective heirs, successors, attorneys, agents, and assigns agree that neither this Agreement, any intervention by the United

States in the Civil Actions in order to dismiss the Civil Actions, nor any dismissal of the Civil Actions, shall waive or otherwise affect the ability of the United States to contend that provisions in the False Claims Act, including 31 U.S.C. §§ 3730(d)(3) and 3730(e), bar Relators from sharing in the proceeds of this Agreement. Moreover, the United States and Relators and their respective heirs, successors, attorneys, agents, and assigns agree that they each retain all of their rights pursuant to the False Claims Act on the issue of the share percentage, if any, that Relators should receive of any proceeds of the settlement of their claims. It is understood by all the Parties that Relator Sanborn and Relators Lovell and McKusick have reached their own agreement regarding their respective shares of any funds paid by the United States to Relator Sanborn.

6. Athena waives and shall not assert any defenses it 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.

7. Athena fully and finally releases the United States, and its agencies, officers, agents, employees, and servants, from any claims (including for attorneys' fees, costs, and expenses of every kind and however denominated) that Athena has asserted, could have asserted, or may assert in the future against the United States, and its agencies, officers, agents, employees, and servants related to the Covered Conduct and the United States' investigation and prosecution thereof.

8. Athena fully and finally releases the Relators and their heirs, successors, attorneys, agents, and assigns from any claims (including attorney's fees, costs, and expenses of

every kind and however denominated) that Athena has asserted, could have asserted, or may assert in the future against the Relators and their heirs, successors, attorneys, agents, and assigns, related to the Civil Actions and the Relators' investigation and prosecution thereof.

9. 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 Athena 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.

10. Athena 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 Athena, its employees, and its agents in connection with:

- (1) the matters covered by this Agreement;
- (2) the United States' audit(s) and civil and any criminal investigation(s) of the matters covered by this Agreement;
- (3) Athena's investigation, defense, and corrective actions undertaken in response to the United States' audit(s) and civil and any criminal investigation(s) 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 Athena makes to the United States pursuant to this Agreement

are unallowable costs for government contracting purposes and under the Medicare Program, Medicaid Program, TRICARE Program, and Federal Employees Health Benefits Program (FEHBP) (hereinafter referred to as Unallowable Costs).

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

c. Treatment of Unallowable Costs Previously Submitted for Payment: Athena 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 Athena or any of its employees or agents, 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. Athena agrees that the United States, at a minimum, shall be entitled to recoup from Athena 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 Athena on the effect of inclusion of Unallowable Costs (as defined in this Paragraph) on Athena's 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 Athena's books and records to determine that no Unallowable Costs have been claimed in accordance with the provisions of this Paragraph.

11. 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 12 below (waiver for beneficiaries paragraph).

12. Athena 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.

13. Upon receipt of the payment described in Paragraph 1, above, the Relators and the United States shall promptly sign and file in the Civil Actions a Stipulation of Dismissal pursuant to Rule 41(a)(1) and subject to the terms of this Agreement (the "Stipulation"). The Stipulation shall state that the allegations described in the United States' Complaint in Intervention shall be dismissed with prejudice as to the United States. Any remaining claims in the Civil Actions shall be dismissed without prejudice as to the United States. All claims shall

be dismissed with prejudice as to the Relators, except that Relators' claims for reasonable attorneys' fees, expenses, and costs pursuant to 31 U.S.C. § 3730(d)(1) and/or its state analogs shall not be dismissed until they are settled, adjudicated, or otherwise resolved, and the Court is so informed, and the Relators' claims for a share of the proceeds of this Agreement under the provisions of the False Claims Act, including 31 U.S.C. § 3730(d)(1), shall not be dismissed until they are settled, adjudicated, or otherwise resolved. The Parties agree that the United States District Court shall have continuing jurisdiction to issue orders with regard to any disputes over the amounts for expenses, attorneys' fees and costs, and Relators' share. Relators and Athena agree to meet and confer regarding the issue of Relators' attorney's fees, costs, and expenses, in an effort to settle that issue, and stipulate that any petition(s) for Relators' attorney's fees, costs, and expenses, shall not be due until 60 days after the Court enters judgment.

14. Except as otherwise provided herein, each Party shall bear its own legal and other costs incurred in connection with this matter, including the preparation and performance of this Agreement.

15. 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.

16. 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 Massachusetts. 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.

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

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

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

20. This Agreement is binding on Athena's successors, transferees, heirs, and assigns.

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

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

23. This Agreement is effective on the date of signature of the last signatory to the Agreement (the "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: 01/27/2021

BY: NICHOLAS PERROS Digitally signed by NICHOLAS PERROS
Date: 2021.01.27 12:16:43 -05'00'

NICHOLAS C. PERROS
ANDREW JACO
Trial Attorneys
Commercial Litigation Branch
Civil Division
United States Department of Justice

DATED: 01/27/2021

BY: JESSICA WEBER Digitally signed by JESSICA WEBER
Date: 2021.01.27 18:28:22 -05'00'

JESSICA J. WEBER
DAVID J. DERUSHA
Assistant United States Attorneys
United States Attorney's Office
District of Massachusetts

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

THE UNITED STATES OF AMERICA

DATED: _____

BY: _____

NICHOLAS C. PERROS
ANDREW JACO
Trial Attorneys
Commercial Litigation Branch
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United States Department of Justice

DATED: _____

BY: _____

JESSICA J. WEBER
DAVID J. DERUSHA
Assistant United States Attorneys
United States Attorney's Office
District of Massachusetts

DATED: 01/27/2021

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

DEFENDANT ATHENAHEALTH, INC.

DATED: 1/27/2021

BY:


JESSICA COLLINS

Senior Vice President, General Counsel, and Secretary
athenahealth, Inc.

DATED: 1/27/2021

BY:


MARK W. PEARLSTEIN

SARAH E. WALTERS

Counsel for athenahealth, Inc.

RELATOR GEORDIE SANBORN

DATED: 01/26/21

BY:



GEORDIE SANBORN

DATED: 01/27/21

BY:

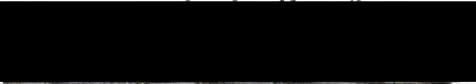


ANDREW D. SCHLICHTER
Counsel for Relator Sanborn

RELATORS LOVELL & MCKUSICK

DATED: 1/24/2021

BY:



CHERYL LOVELL

DATED: _____

BY:

WILLIAM MCKUSICK

DATED: _____

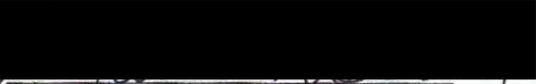
BY:

ROBERT W. LILES

Counsel for Relators Lovell and McKusick

DATED: 1/27/2021

BY:



SUZANNE E. DURRELL

Counsel for Relators Lovell and McKusick

RELATORS LOVELL & MCKUSICK

DATED: _____

BY: _____
CHERYL LOVELL

DATED: 1/26/2021

BY: 
WILLIAM MCKUSICK

DATED: 0/27/21

BY: 
ROBERT W. LILES
Counsel for Relators Lovell and McKusick

DATED: _____

BY: _____
SUZANNE E. DURRELL
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