

**SETTLEMENT AGREEMENT BETWEEN
THE UNITED STATES OF AMERICA
AND
NEW ENGLAND ORTHOPEDIC SURGEONS, INC.
UNDER THE AMERICANS WITH DISABILITIES ACT
USAO# 2019V00192 & DJ# 202-36-319**

I. BACKGROUND

1. The parties to this Settlement Agreement (“Agreement”) are the United States Department of Justice (“United States”) and New England Orthopedic Surgeons, Inc. (“NEOS”).
2. This matter is based on a complaint filed with the United States Department of Justice, in which a complainant alleged that NEOS discriminated against the complainant on the basis of her disability in violation of Title III of the Americans with Disabilities Act (“ADA”), 42 U.S.C. §§ 12181, et seq. Specifically, the complainant alleges that NEOS refused to perform a total joint replacement surgery on her because she was prescribed buprenorphine, a medication used to treat Opioid Use Disorder (“OUD”).
3. NEOS expressly denies that it discriminated against complainant because she was prescribed buprenorphine. However, to avoid further litigation of this matter, the parties agree that it is in their best interests, and the United States believes that it is in the public interest, to resolve this dispute. The parties have therefore voluntarily entered into this Agreement, agreeing as follows:

II. TITLE III COVERAGE

4. The Attorney General of the United States is responsible for administering and enforcing the ADA, 42 U.S.C. §§ 12101-12213, and the relevant regulations implementing Title III, 28 C.F.R. Part 36.
5. NEOS is a medical practice registered to do business in Massachusetts, located at 300 Birnie Ave #201, Springfield, MA 01107.
6. NEOS is a private entity that owns, operates, leases (or leases to) places of public accommodation within the meaning of 42 U.S.C. § 12182(a), and is thus is a public accommodation subject to the requirements of Title III of the ADA.
7. Under Title III of the ADA, no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation. 42 U.S.C. § 12182(a); 28 C.F.R. § 36.201(a). Specifically, discrimination includes the imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any good, services, facilities, privileges, advantages, or accommodations, unless such criteria can be shown to be necessary. 42 U.S.C. § 12182(b)(2)(A)(i).

8. OUD is a physical or mental impairment that substantially limits one or more major life activities, which include the operation of major bodily functions. 28 C.F.R. § 36.105(b)(2) (defining physical or mental impairment to include “drug addiction”). OUD substantially limits major life activities, including caring for oneself, learning, concentrating, thinking, and communicating. 42 U.S.C. § 12102(2)(A). OUD also limits the operation of major bodily functions, such as neurological and brain functions. 42 U.S.C. § 12102(2)(B). The determination whether an impairment substantially limits a major life activity is made without regard to the effect that ameliorating measures—including medication—may have on the impairment. 42 U.S.C. § 12102(4)(E)(i). Accordingly, persons with OUD are individuals with a disability within the meaning of 42 U.S.C. § 12102 and 28 C.F.R. § 36.104, and covered by the ADA’s protections.

9. Under the ADA, the term “individual with a disability” does not include an individual who is “currently engaging in the illegal use of drugs when the covered entity acts on the basis of such use.” 42 U.S.C. § 12210(a). This exclusion does not apply to individuals who are no longer using illegal drugs and who (1) have successfully completed drug rehabilitation, (2) are participating in a supervised rehabilitation program, or (3) are erroneously regarded as using illegal drugs. 42 U.S.C. § 12210(b).

10. Ensuring that rehabilitation centers, hospitals, and other service and social service establishments do not discriminate on the basis of disability is an issue of general public importance. Additionally, ensuring that individuals in treatment for OUD do not face discrimination is also an issue of general public importance. The United States is authorized (1) to investigate alleged violations of Title III of the ADA and initiate compliance reviews, (2) to use alternative means of dispute resolution, where appropriate, including settlement negotiations, (3) to resolve disputes, and (4) to bring a civil action in federal court in any case that raises issues of general public importance, as well as in cases where the United States has reasonable cause to believe that a group of persons is engaged in a pattern or practice of discrimination in violation of the ADA. 42 U.S.C. §§ 12188(b), 12212; 28 C.F.R. §§ 36.502, 503, 506.

III. DETERMINATIONS

11. Following an investigation, the United States substantiated the allegations of the complaint, and determined that NEOS maintained a practice that violated the ADA. Specifically, the United States determined:

a. NEOS doctors perform operative procedures at Baystate Medical Center (“Baystate”), where they must comply with Baystate’s policies and procedures. During these surgeries, NEOS surgeons are assisted by Baystate’s Acute Pain Services and Anesthesia Department, which creates Baystate’s protocols for managing the surgery of buprenorphine patients undergoing total joint replacement surgeries.

b. In 2019, Baystate protocol changed such that it required that patients prescribed buprenorphine be maintained on buprenorphine before, during, and after their surgeries.

c. Though the new Baystate protocol would have allowed NEOS to accommodate total joint replacement surgery for patients who were prescribed buprenorphine treatment

who otherwise qualified for the surgery, the United States found that NEOS denied two individuals a total joint replacement surgery because they were prescribed Suboxone.

12. NEOS asserts that it had safety concerns about managing post-operative pain under Baystate's protocol, and, therefore, for a five-month period, while it was consulting with professionals regarding Baystate's new protocol, it did not perform total joint replacement surgeries on individuals who were prescribed buprenorphine. After research and consultation with Baystate, its new protocol was not implemented. Further, Baystate's Acute Pain Services plays no role in providing pain management after a surgery, and pain post-surgery pain management is managed by NEOS.

13. By maintaining a practice of refusing to perform total joint replacement surgeries on patients who take prescribed Suboxone for OUD because of its concerns regarding the management of post-operative pain, NEOS imposed eligibility criteria that screened out individuals with disabilities on the basis of their disability in violation of the ADA, specifically 42 U.S.C. § 12182(b)(2)(A)(i) and 28 C.F.R. § 36.301. NEOS also denied these patients the opportunity to equally participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations being offered, on the basis of disability, in violation of 42 U.S.C. § 12182(b)(1)(A)(i) and 28 C.F.R. § 36.201.

III. ACTIONS TO BE TAKEN BY NEOS

14. NEOS will not discriminate against any individual on the basis of disability, including on the basis of OUD, in the full and equal enjoyment of its goods, services, facilities, privileges, advantages, or accommodations, or impose eligibility criteria that screen out or tend to screen out individuals with disabilities on the basis of OUD in violation of Title III of the ADA, 42 U.S.C. § 12182, et seq., and its implementing regulation, 28 C.F.R. Part 36.

15. Within 30 days of the effective date of this Agreement, NEOS will submit a draft non-discrimination policy to the United States for its review and approval. The non-discrimination policy will state that NEOS does not discriminate in the provision of services to persons with disabilities, including persons with OUD who are on medications to treat OUD. The non-discrimination policy will also direct those with questions, concerns, or complaints on how to make contact with NEOS regarding any issues. Once approved by the United States, NEOS will adopt and enforce the non-discrimination policy for the duration of this Agreement. NEOS will conspicuously post the non-discrimination policy in the reception area of NEOS and as a link on the company's main webpage or "homepage," currently located at <https://www.neortho.com/>, as well as on the homepage of any current or future NEOS website, for the duration of this Agreement.

16. After NEOS receives written approval by counsel for the United States, as described under paragraph 15 of this Agreement, it will within 30 days of receiving that approval, and every year thereafter for the duration of this Agreement, provide training on Title III of the ADA to NEOS employees and contractors who are involved with clinical decisions for NEOS medical

activities, including training about OUD, medications used to treat OUD, and disability discrimination in general.

17. NEOS will ensure that all new employees and contractors who are involved with admissions receive the training referenced in paragraph 16 as a component of new employee training and orientation through the duration of this Agreement. NEOS shall provide the training to such new employees and contractors as a part of their standard training for new employees and contractors.

18. All training manuals or written or electronic materials that address NEOS's policies and practices used in the trainings required in paragraphs 16 and 17 or created or substantively revised after the effective date of this Agreement shall be consistent with the provisions of this Agreement and approved in advance by counsel for the United States.

19. NEOS shall create and maintain a log that documents the name of each individual who participates in the trainings required in paragraphs 16 and 17, his or her title, and the date he or she participated in the training(s). This log may be kept in electronic format. Copies of such log shall be provided to the United States within 21 days of any written request for it.

20. Within 60 days of the effective date of this agreement, NEOS shall create and maintain a log that documents each patient or prospective patient receiving full-joint replacement surgeries from NEOS, when the patient is on medication used to treat OUD and is denied any form of care. The log shall the name of the medication used to treat OUD and a description of the reason for denial. This log should not include the name of the patient and should be maintained in accordance with privacy requirements afforded to individuals in treatment for substance use disorder. 42 C.F.R. Part 2. This log may be kept in electronic format. Copies of such log shall be provided to the United States within 21 days of any written request for it.

21. For the duration of this Agreement and within 21 days of receipt of any written or oral complaint made to NEOS alleging a failure to provide a total joint replacement on the basis of physician-approved OUD treatments, including medication used to treat OUD, NEOS shall send written notification to counsel for the United States with a copy of any such written complaint (or, if an oral complaint was made, a description of the oral complaint) and a complete copy of NEOS's response.

22. Within twenty (20) days of the effective date of this Agreement, NEOS shall wire the amount of \$30,000 to the United States to establish a settlement fund. This payment is compensation to aggrieved persons pursuant to 42 U.S.C. § 12188(b)(2)(B). The United States shall disburse payment from this fund to eligible aggrieved parties.

23. NEOS will notify the United States in writing when it has completed the actions described in paragraphs 15-20. If any issues arise that affect the anticipated completion dates set forth in paragraphs 14-22, NEOS will immediately notify the United States of the issue(s), and the parties will attempt to resolve those issues in good faith.

IV. OTHER PROVISIONS

24. In consideration for this Agreement, the United States will close its investigation of USAO# 2019V00192 and DJ# 202-36-319 and will not institute a civil action alleging discrimination based on the findings set forth in paragraphs 11-12. The United States, however, may review NEOS's compliance with this Agreement and/or Title III of the ADA at any time. If the United States believes that Title III of the ADA, this Agreement, or any portion of it has been violated, it may institute a civil action in the appropriate U.S. District Court to enforce this Agreement and/or Title III of the ADA.

25. Failure by the United States to enforce any provision of this Agreement is not a waiver of its right to enforce any provision of this Agreement.

26. If any term of this Agreement is determined by any court to be unenforceable, the other terms of this Agreement shall nonetheless remain in full force and effect, provided, however, that if the severance of any such provision materially alters the rights or obligations of the parties, the United States and NEOS shall engage in good faith negotiations to adopt mutually agreeable amendments to this Agreement as may be necessary to restore the parties as closely as possible to the initially agreed upon relative rights and obligations.

27. This Agreement is binding on NEOS, including all principals, agents, executors, administrators, representatives, employees, and beneficiaries. In the event that NEOS seeks to sell, transfer, or assign substantially all of its assets or a controlling membership position in NEOS during the term of this Agreement, then, as a condition of such sale, transfer, or assignment, NEOS will obtain the written Agreement of the successor, buyer, transferee, or assignee to all obligations remaining under this Agreement for the remaining term of this Agreement.

28. The signatory for NEOS represents that he or she is authorized to bind NEOS to this Agreement. Further, NEOS acknowledges that it has been advised by competent legal counsel in connection with the execution of this Agreement, has read each and every paragraph of this Agreement, and understands the respective obligations set forth herein, and represents that the commitments, acknowledgments, representations, and promises set forth herein are freely and willingly undertaken and given.

29. This Agreement constitutes the entire agreement between the United States and NEOS on the matters raised herein, and no prior or contemporaneous statement, promise, or agreement, either written or oral, made by any party or agents of any party, that is not contained in this written agreement, including any attachments, is enforceable. This Agreement can only be modified by mutual written agreement of the parties.

30. This Agreement does not constitute a finding by the United States that NEOS is in full compliance with the ADA. This Agreement is not intended to remedy any other potential violations of the ADA or any other law that is not specifically addressed in this Agreement, including any other claims for discrimination on the basis of disability. Nothing in this Agreement relieves NEOS of its obligation to fully comply with the requirements of the ADA.

31. NEOS shall not discriminate or retaliate against any person because of his or her participation in this matter.

V. EFFECTIVE DATE/TERMINATION DATE

32. The effective date of this Agreement is the date of the last signature below.

33. The duration of this Agreement will be two years from the effective date.

THE UNITED STATES

NEW ENGLAND ORTHOPEDIC
SURGEONS, INC.

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Acting United States Attorney
District of Massachusetts

/s/ 

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/s/ 

Name: Anthony
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Date Signed: 5/17/2

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