

## **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”), and American Access Care Holdings, LLC (“AAC”) (hereafter collectively referred to as “the Parties”), through their authorized representatives.

### **RECITALS**

A. Prior to its merger with Fresenius Vascular Care, Inc. (“Fresenius”) effective October 3, 2011 (the “Merger”), AAC operated a number of vascular access centers in the United States, including one in Providence, Rhode Island (“Center”).

B. The United States contends that AAC improperly 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 for certain medical procedures performed at the Center.

C. The United States contends that it has certain civil claims against AAC arising from AAC’s conduct prior to the Merger during the time period from July 2, 2007 through September 30, 2011, namely that AAC: (1) improperly submitted, or caused to be submitted, certain claims for multiple percutaneous transluminal angioplasties (“PTAs”) performed during the same patient encounter at the Center; (2) improperly submitted, or caused to be submitted, certain claims for procedures performed in connection with follow-up visits at the Center that the United States asserts were not medically necessary; and (3) improperly submitted, or caused to be submitted, certain

claims for PTA procedures performed at the Center which the United States asserts were medically unnecessary based upon the patient's degree of stenosis, which was less than required for Medicare coverage. The conduct set forth in this paragraph is referred to below as the "Covered Conduct."

D. AAC disputes the United States' allegations in Recital Paragraph C.

E. This Settlement Agreement is neither an admission of liability by AAC nor a concession by the United States that its claims are not well founded. Rather, 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. AAC shall pay to the United States the sum of TWO MILLION SIX HUNDRED FIVE THOUSAND SIX HUNDRED AND SIXTY ONE DOLLARS AND ZERO CENTS (\$2,605,661.00) (the "Settlement Amount") no later than twenty (20) days after the Effective Date of the Agreement by electronic funds transfer pursuant to written instructions to be provided by the United States Attorney's Office for the District of Rhode Island.

2. Subject to the exceptions in Paragraph 3 (concerning excluded claims) below, and conditioned upon AAC's full payment of the Settlement Amount, the United States releases AAC, together with its present and former affiliates, subsidiaries, officers, directors, employees, shareholders, owners and agents, and the 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.

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

4. AAC waives and shall not assert any defenses 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.

5. AAC fully and finally releases the United States, its agencies, officers, agents, employees, and servants, from any claims (including attorney's fees, costs, and expenses of every kind and however denominated) that AAC 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 and the United States' investigation and prosecution thereof.

6. 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 AAC agrees not to resubmit to any Medicare contractor or any state payer any previously denied claims related to the Covered Conduct, and agrees not to appeal any such denials of claims.

7. AAC 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-1 and 1396-1396w-5; and the

regulations and official program directives promulgated thereunder) incurred by or on behalf of AAC, 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) AAC'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);
- (4) the negotiation and performance of this Agreement; and
- (5) any payment made to the United States pursuant to this Agreement.

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

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

8. 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 Paragraphs 2 (release by United States paragraph) and 9 (waiver for beneficiaries paragraph), below.

9. AAC 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.

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

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

12. 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 Rhode Island. 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.

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

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

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

16. This Agreement is binding on AAC's successors, transferees, heirs, and assigns.

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

18. 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.

[Signatures appear on following pages]

THE UNITED STATES OF AMERICA

PETER F. NERONHA  
United States Attorney

DATED: \_\_\_\_\_

By: \_\_\_\_\_  
ZACHARY A. CUNHA  
MARY ROGERS  
Assistant United States Attorneys  
District of Rhode Island

DATED: \_\_\_\_\_

BY: \_\_\_\_\_  
ROBERT K. DECONTI  
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

AMERICAN ACCESS CARE HOLDINGS, LLC

DATED: \_\_\_\_\_

BY: \_\_\_\_\_

DOUGLAS G. KOTT  
Senior Vice Pres. of American Access Care Holdings,  
LLC

DATED: \_\_\_\_\_

BY: \_\_\_\_\_

MARIA R. DURANT, ESQ.  
Counsel for American Access Care Holdings, LLC