

STATE SETTLEMENT AGREEMENT

I. PARTIES

This Settlement Agreement (“Agreement”) is entered into between the State of Colorado (“the State”) and DaVita HealthCare Partners Inc. (“DaVita”), hereinafter collectively referred to as “the Parties.”

II. PREAMBLE

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

A. At all relevant times, DaVita, a Delaware corporation with its principal place of business in Denver, Colorado, is a provider of kidney dialysis services in the United States for patients suffering from chronic kidney failure or end stage renal disease (ESRD) through a network of approximately 2,074 outpatient dialysis centers in 45 states and the District of Columbia.

B. On September 11, 2009, David Barbetta ("Relator") filed a *qui tam* action in the United States District Court for the District of Colorado captioned *United States of America et al., ex rel. David Barbetta v. DaVita, Inc., and Total Renal Care, Inc.*, Civil Action No. 09 CV 02175 WEM-KMT, asserting state claims on behalf of the following plaintiff states: California, Florida, Georgia, Illinois, Indiana, Louisiana, Michigan, Nevada, New York, Oklahoma, Tennessee, Texas, Virginia, and Wisconsin. Subsequently, on December 23, 2011 Relator filed a First Amended Complaint adding state claims on behalf of the following plaintiff states: Colorado, Connecticut, Iowa, Maryland, and North Carolina. This *qui tam* action will be referred to as the “Civil Action.”

C. DaVita has entered into a separate civil settlement agreement (the “Federal Settlement Agreement”) with the United States of America (as that term is defined in the Federal Settlement Agreement) hereinafter referred to as the "United States."

D. The State contends that it has certain civil and administrative causes of action against DaVita for engaging in the following conduct (the “Covered Conduct”):

From March 1, 2005 to February 1, 2014, DaVita used, and conspired to use, various forms of financial and contractual arrangements to induce nephrologists and nephrology practices to refer patients to DaVita’s dialysis centers in order to maintain and increase DaVita’s market share of ESRD dialysis patients. These arrangements consist of partial divestitures of existing DaVita dialysis centers and partial acquisitions of existing physician-owned dialysis centers as follows:

1. Joint venture arrangements offered exclusively to specific physicians or physician groups that were created through partial divestiture of existing DaVita dialysis operations to nephrologists or nephrology practices at unreasonably favorable prices; and/or
2. Joint venture arrangements offered exclusively to specific physicians or physician groups that were created through partial acquisitions of dialysis operations owned by nephrologists or a nephrology practice at prices that exceeded fair market value; and/or
3. Joint venture arrangements offered exclusively to specific physicians or physician groups at values that resulted from using inappropriate and inconsistent manipulations of DaVita’s internal economic transaction modeling to ensure that the arrangements were likely to result in unreasonably favorable rates of return to the referring nephrologists or nephrology practice partners.

The State contends that these arrangements were improper, that the remuneration paid thereunder was improper and/or unlawful, and that through these arrangements DaVita knowingly caused the dialysis centers which were part of the joint venture transactions to submit false and fraudulent claims for dialysis services to Medicaid and other health care programs. The Covered Conduct is more specifically described in the United States’ Complaint in Intervention in the *qui tam* case filed on October 22, 2014.

E. As a result of the “Covered Conduct,” the State contends that DaVita knowingly submitted or caused to be submitted false or fraudulent claims to the State’s Medicaid Program (see 42 U.S.C. §§ 1396-1396(v)).

F. This Agreement is neither an admission of facts or liability by DaVita, nor a concession by the State that its allegations are not well founded. DaVita expressly denies the allegations of the State as set forth herein and in the Civil Action and denies that it engaged in any wrongful conduct in connection with the Covered Conduct.

G. This Agreement is made in compromise of disputed claims. It constitutes neither an admission of liability by DaVita nor a concession by the State that its claims are not well founded. Neither this Agreement, nor the performance of any obligation arising under it, including any payment, nor the fact of settlement, is intended to be or shall be understood as an admission of liability or wrongdoing, or other expression reflecting on the merits of the dispute by DaVita.

To avoid the delay, expense, inconvenience, and uncertainty of protracted litigation of these causes of action, the Parties mutually desire to reach a full and final settlement as set forth below.

III. TERMS AND CONDITIONS

NOW, THEREFORE, in reliance on the representations contained herein and in consideration of the mutual promises, covenants and obligations set forth in this Agreement, and for good and valuable consideration as stated herein, the Parties agree as follows:

1. DaVita agrees to pay to the United States and the Medicaid Participating States (as defined in sub-paragraph (c) below), collectively, the sum of \$361,500,000.00

plus accrued interest as specified in sub-paragraphs (a) and (b) below (collectively, the “Settlement Amount”). The Settlement Amount shall constitute a debt immediately due and owing to the United States and the Medicaid Participating States on the Effective Date of the Federal Settlement Agreement and subject to the terms of this Agreement. The debt shall forever be discharged by payments to the United States and the Medicaid Participating States, under the following terms and conditions:

(a) DaVita shall pay to the United States the sum of \$350,000,000.00, plus accrued interest on that amount at the rate of 2.25% per annum commencing on February 8, 2014, (“Federal Settlement Amount”). The Federal Settlement Amount shall be paid pursuant to the terms of the Federal Settlement Agreement.

(b) DaVita shall pay to the Medicaid Participating States the sum of \$11,500,000.00, plus accrued interest on that amount of 2.25% per annum commencing on October 8, 2014 and continuing and including the day payment is made under this Agreement (“Medicaid State Settlement Amount”), subject to the non-participating state deduction provision of sub-paragraph (d) below (“Medicaid Participating State Settlement Amount”), no later than ten (10) business days after the expiration of the 45 day opt-in period for Medicaid Participating States described in sub-paragraph (c) below. The Medicaid Participating State Settlement Amount shall be paid by electronic funds transfer to the New York State Attorney General’s National Global Settlement Account pursuant to written instructions from the State Negotiating Team (“State Team”), which written instructions shall be delivered to counsel for DaVita.

(c) DaVita shall execute a State Settlement Agreement with any State that executes such an Agreement in the form to which DaVita and the State Team have

agreed, or in a form otherwise agreed to by DaVita and an individual State. The State shall constitute a Medicaid Participating State provided the Agreement is fully executed by the State and delivered to DaVita's attorneys within 45 days of receiving this Agreement. If this condition is not satisfied within 45 days, DaVita's offer to resolve this matter with the individual State shall become null and void absent written agreement between counsel for DaVita and the State Team to extend the 45 day period.

(d) The total portion of the amount paid by DaVita in settlement for the Covered Conduct for the State is \$3,146,113.07, consisting of a portion paid to the State under this Agreement and another portion paid to the United States as part of the Federal Settlement Agreement. The amount allocated to the State under this Agreement is the sum of \$1,785,823.45, plus applicable interest (the "State Amount"). If the State does not execute this Agreement within 45 days of receiving this Settlement Agreement, the State Amount shall be deducted from the Medicaid State Settlement Amount and shall not be paid by DaVita absent written agreement between counsel for DaVita and the State Team to extend the time period for executing this Agreement.

2. Within 14 days of its receipt of the State Amount described above, the State agrees to dismiss with prejudice any state law claims which the State has the authority to dismiss currently pending against DaVita in State or Federal Courts for the Covered Conduct, including any supplemental state law claims asserted in the Civil Action. Contingent upon the receipt of their respective State Amounts, the State, if served with the Civil Action and liable to pay a Relator's share, agrees to pay the Relator(s) the amount of \$331,627.41, plus applicable interest. This amount is to be paid through the

State Team and has been addressed via side letter(s) with the Relator(s) in the Civil Action(s).

3. Subject to the exceptions in Paragraph 4 below, in consideration of the obligations of DaVita set forth in this Agreement, and conditioned upon receipt by the State of its share of the Medicaid State Settlement Amount, the State agrees to release DaVita, together with its current and former parent corporations; wholly-owned, partially-owned, direct and indirect subsidiaries, and current and former affiliates including any joint ventures included in the Covered Conduct involving the operation of dialysis clinic(s) in which DaVita or its subsidiaries have or had an ownership interest; and the predecessors, successors, and assigns of any of them; and, except as reserved in Paragraph 4 below (concerning excluded claims), all of DaVita's current and former directors, officers, and employees, from any civil or administrative monetary claim the State has or may have for any claims submitted or caused to be submitted to the State Medicaid Program as a result of the Covered Conduct.

4. Notwithstanding any term of this Agreement, the State specifically does not release any person or entity from any of the following liabilities:

(a) any criminal, civil, or administrative liability arising under state revenue codes;

(b) any criminal liability not specifically released by this Agreement;

(c) any civil or administrative liability that any person or entity, including any Released Entities, has or may have to the State or to individual consumers or state program payors under any statute, regulation or rule not expressly covered by the release in Paragraph 3 above, including but not limited to, any and all of the following claims: (i)

State or federal antitrust violations; (ii) Claims involving unfair and/or deceptive acts and practices and/or violations of consumer protection laws;

(d) any liability to the State for any conduct other than the Covered Conduct;

(e) any liability which may be asserted on behalf of any other payors or insurers, including those that are paid by the State's Medicaid program on a capitated basis;

(f) any liability based upon obligations created by this Agreement;

(g) except as explicitly stated in this Agreement, any administrative liability, including mandatory exclusions from the State's Medicaid program;

(h) any liability for expressed or implied warranty claims or other claims for defective or deficient products and services provided by DaVita;

(i) any liability for personal injury or property damage or for other consequential damages arising from the Covered Conduct; or

(j) any liability based on a failure to deliver goods or services due.

5. In consideration of the obligations of DaVita set forth in this Agreement, and the Corporate Integrity Agreement ("CIA") that DaVita has entered into with the Office of the Inspector General of the United States Department of Health and Human Services ("HHS-OIG") in connection with this matter, and conditioned on receipt by the State of its share of the State Medicaid Settlement Amount, the State agrees to release and refrain from instituting, recommending, directing, or maintaining any administrative action seeking exclusion from the State's Medicaid program against DaVita for the Covered Conduct, except as reserved in Paragraph 4 above. Nothing in this Agreement

precludes the State from taking action against DaVita in the event that DaVita is excluded by the federal government, or for conduct and practices other than the Covered Conduct.

6. DaVita waives and shall not assert any defenses it may have to criminal prosecution or administrative action for the Covered Conduct, which defenses may be based in whole or in part on a contention, under the Double Jeopardy Clause of the Fifth Amendment of the Constitution or the Excessive Fines Clause of the Eighth Amendment of the Constitution, that this Agreement bars a remedy sought in such criminal prosecution or administrative action.

7. In consideration of the obligations of the State set forth in this Agreement, DaVita waives and discharges the State, its agencies, political subdivisions, employees, servants, and agents from any causes of action (including attorneys' fees, costs, and expenses of every kind and however denominated) which DaVita has asserted, could have asserted, or may assert in the future against the State, its agencies, political subdivisions, employees, servants, and agents, arising from the State's investigation and prosecution of the Covered Conduct.

8. The amount that DaVita must pay to the State pursuant to Paragraph III.1. above will not be decreased as a result of the denial of claims for payment now being withheld from payment by the State's Medicaid program, or any other state payor, for the Covered Conduct; and DaVita agrees not to resubmit to the State's Medicaid program or any other state payor, any previously denied claims, which denials were based on the Covered Conduct, and agrees not to appeal or cause the appeal of any such denials of claims.

9. DaVita shall not seek payment for any claims for reimbursement to the State's Medicaid Program covered by this Agreement from any health care beneficiaries or their parents, sponsors, legally responsible individuals, or third party payors.

10. DaVita expressly warrants that it has reviewed its financial condition and that it is currently solvent within the meaning of 11 U.S.C. §§ 547(b)(3) and 548(a)(B)(ii)(I), and shall remain solvent following payment of the Settlement Amount and compliance with this Agreement.

11. The Parties each represent that this Agreement is freely and voluntarily entered into without any degree of duress or compulsion whatsoever.

12. DaVita agrees to cooperate fully and truthfully with any State investigation of individuals or entities not released in this Agreement. Upon reasonable notice, DaVita shall facilitate, and agrees not to impair, the cooperation of its directors, officers, employees or agents, for interviews and testimony, consistent with the rights and privileges of such individuals and of DaVita. Upon request, DaVita agrees to furnish to the State complete and unredacted copies of all non-privileged documents including, but not limited to, reports, memoranda of interviews, and records in their possession, custody or control, concerning the Covered Conduct. DaVita shall be responsible for all costs it may incur in complying with this paragraph.

13. Except as expressly provided to the contrary in this Agreement, each Party to this Agreement shall bear its own legal and other costs incurred in connection with this matter, including the preparation and performance of this Agreement.

14. Except as otherwise stated in this Agreement, this Agreement is intended to be for the benefit of the Parties only, and by this instrument the Parties do not release any liability against any other person or entity.

15. Nothing in this Agreement constitutes an agreement by the State concerning the characterization of the amounts paid hereunder for purposes of the State's revenue code.

16. In addition to all other payments and responsibilities under this Agreement, DaVita agrees to pay all reasonable expenses and travel costs of the State Team, including reasonable consultant fees and expenses. DaVita will pay this amount by separate check made payable to the National Association of Medicaid Fraud Control Units, after the Medicaid Participating States execute their respective Agreements, or as otherwise agreed by the Parties.

17. This Agreement is governed by the laws of the State, and venue for addressing and resolving any and all disputes relating to this Agreement shall be the state courts of appropriate jurisdiction of the State.

18. The undersigned DaVita signatories represent and warrant that they are authorized as a result of appropriate corporate action to execute this Agreement. The undersigned State signatories represent that they are signing this Agreement in their official capacities and that they are authorized to execute this Agreement on behalf of the State through their respective agencies and departments.

19. The Effective Date of this Agreement shall be the date of signature of the last signatory to this Agreement. Facsimiles of signatures shall constitute acceptable binding signatures for purposes of this Agreement.

20. This Agreement shall be binding on all successors, transferees, heirs, and assigns of the Parties.

21. This Agreement constitutes the complete agreement between the Parties with respect to this matter and shall not be amended except by written consent of the Parties.

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

STATE OF COLORADO

JOHN SUTHERS, ATTORNEY GENERAL
STATE OF COLORADO

By: 

Timothy X. Sokas
First Assistant Attorney General
Director, Medicaid Fraud Control Unit

Dated: 11-18-2014

FOR THE STATE OF COLORADO MEDICAID PROGRAM:

COLORADO DEPARTMENT OF HEALTH
CARE POLICY & FINANCING

By: 

Susan E. Birch, MBA, BSN, RN
Executive Director

Dated: 12/2/14

DAVITA HEALTHCARE PARTNERS, INC.

By: _____ Dated: _____

[Name]
[Title]

By: _____ Dated: _____

Counsel to