

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”), the Defense Health Agency (“DHA”) on behalf of TRICARE, through its General Counsel (collectively the “United States”), DaVita HealthCare Partners Inc. and Total Renal Care, Inc. (collectively “DaVita”) and David Barbetta (“Relator”) (hereafter collectively referred to as “the Parties”), through their authorized representatives.

RECITALS

A. Defendant DaVita is a Delaware corporation with its corporate headquarters located in Denver, Colorado. DaVita is a provider of dialysis services for patients suffering from chronic kidney failure, also known as end stage renal disease or ESRD. As of December 31, 2013, DaVita operated or provided administrative services to approximately 2,074 outpatient dialysis centers located in 44 states and the District of Columbia, serving approximately 163,000 patients. DaVita also provides acute inpatient dialysis services in approximately 1,000 hospitals and related laboratory services. Its dialysis and related lab services businesses account for approximately 66% of its consolidated revenues.

B. Defendant Total Renal Care, Inc. (“TRC”) is a California corporation and a wholly-owned subsidiary of DaVita. DaVita, through TRC and other subsidiaries, buys, sells and holds interests in various dialysis centers and dialysis-related joint ventures.

C. Since 1972, the Federal Government has provided health care coverage for ESRD patients under the Medicare ESRD program regardless of age or financial circumstances. ESRD is one of only two disease states eligible for Medicare coverage both for dialysis and dialysis-related services and for all benefits available under the Medicare program. Approximately 79% of DaVita's dialysis patients are under Medicare and Medicare-assigned plans and on average 66% of DaVita's income for its dialysis centers is reimbursement for the care of Medicare and other Federal health care program patients.

D. On September 11, 2009, Relator filed a *qui tam* action in the United States District Court for the District of Colorado captioned *United States ex rel. Barbetta, Plaintiffs v. DaVita, Inc. and Total Renal Care, Inc., Defendants*, No. 09-cv-02175-WJM-KMT (D. Colo.), pursuant to the *qui tam* provisions of the False Claims Act, 31 U.S.C. § 3730(b) (the "Civil Action"). Relator's amended *qui tam* complaint in the Civil Action, filed on December 23, 2011, is summarized in Paragraph E. below.

E. The Relator's amended complaint alleges that DaVita violated the False Claims Act by intentionally paying illegal remuneration to physicians in exchange for patient referrals to DaVita's dialysis centers. Specifically, the complaint alleges that, as a financial inducement to generate referrals for DaVita, the company gave physicians exclusive economic opportunities to enter into joint venture agreements with DaVita on unreasonably favorable terms. The Relator's complaint alleged that the scheme allowed physicians to buy into existing DaVita dialysis centers and receive shares in new joint

ventures in excess of the value of the physician's actual contribution. At times, DaVita paired a divestiture transaction with another transaction in which it paid physicians above fair-market value for shares in dialysis centers owned by the physicians. In other words, as a financial inducement to capture physician referrals, DaVita sold shares in its existing centers low, and bought shares in physician-owned centers high. Through the resulting joint venture, reinforced with covenants not to compete, physicians were induced to refer their patients to DaVita. When claims for payment were submitted to Medicare and/or Medicaid for the treatment of patients referred to the joint ventures, the illegal remuneration paid in exchange for the referrals rendered the claims for payment ineligible for reimbursement under the federal Anti-Kickback Statute, 42 U.S.C. § 1320a-7b(b)(2)(A), thereby giving rise to liability under the False Claims Act.

F. The United States intervened in the Civil Action on October ____, 2014 and filed the United States' Complaint on October ____, 2014.

G. The United States contends that DaVita 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; the TRICARE Program, 10 U.S.C. §§ 1071-1110a; and the Medicaid Program (Medicaid), 42 U.S.C. §§ 1396-1396w-5.

H. The United States contends that it has certain civil claims against DaVita, as specified in Paragraph I, below, for engaging in the following conduct during the period from March 1, 2005 to February 1, 2014 (hereinafter the "Covered Conduct"):

I. 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 United States 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 Medicare, Medicaid and other Federal 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 ____, 2014 which is attached hereto.

J. Notwithstanding the foregoing, the “Covered Conduct” does not include any claims made by any party in the case *DaVita Healthcare Partners Inc. (f/k/a DaVita Inc., f/k/a Total Renal Care Holdings, Inc., f/k/a Total Renal Care, Inc., f/k/a Medical Ambulatory Care Delaware, Inc.), and Physicians Dialysis, Inc., and Physicians Dialysis Ventures, Inc., and 175 Dialysis Center Owners (d/b/a 1,462 Dialysis Centers) v. United States*, Case No. 11-297C (Ct. Fed. Cl.).

K. DaVita expressly denies the allegations of the United States and Relator as set forth herein and in the Civil Action and the Complaint in Intervention and denies that it engaged in any wrongful conduct in connection with the Covered Conduct.

L. This Agreement is made in compromise of disputed claims. It constitutes neither an admission of liability by DaVita nor a concession by the United States 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.

M. Relator claims entitlement under 31 U.S.C. § 3730(d) to a share of the proceeds of this Agreement and to Relator’s reasonable expenses, attorneys’ fees and costs.

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 Agreement, the Parties agree and covenant as follows:

TERMS AND CONDITIONS

1. No later than Thirty (30) days after the Effective Date of this Agreement, DaVita shall pay to the United States **\$350,000,000** (Settlement Amount) and interest on the Settlement Amount at a rate of 2.25% per annum (the Medicare trust fund rate) from February 8, 2014 to the date of payment by electronic funds transfer pursuant to written instructions to be provided by the United States Attorney for the District of Colorado.

2. Relator and his/her 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). The United States and Relator and his/her 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 that Relator should receive of any proceeds of the settlement of his/her claim(s), and that no agreements concerning Relator share have been reached to date.

3. The Settlement Amount does not include the Relator's fees and costs, pursuant to 31 U.S.C. § 3730(d), which are to be negotiated separately by DaVita and the Relator, and will be the subject of a separate agreement.

4. Subject to the exceptions in Paragraphs 6 and 8 below, and conditioned upon DaVita's full payment of the Settlement Amount, the United States releases 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 8 below (concerning excluded claims), all of DaVita's current and former directors, officers, and employees, from any civil or administrative monetary claim the United States has or may have 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; any statutory provisions creating a cause of action for civil damages or civil penalties which the Civil Division of the Department of Justice has actual or present authority to assert and compromise pursuant to 28 C.F.R. Pt. O, Subpart I, § 0.45(d); or the common law theories of payment by mistake, unjust enrichment, and fraud.

5. Subject to the exceptions in Paragraph 8 below (concerning excluded claims), and in consideration of the obligations of the Defendants in this Agreement and conditioned upon DaVita's full payment of the Settlement Amount, Relator, for himself and for his heirs, successors, attorneys, agents, and assigns, releases DaVita from any civil monetary claim the relator has on behalf of the United States for the Covered Conduct under the False Claims Act, 31 U.S.C. §§ 3729-3733.

6. In consideration of the obligations of DaVita in this Agreement and the Corporate Integrity Agreement (CIA), entered into between OIG-HHS and DaVita, conditioned upon DaVita's full payment of the Settlement Amount, the OIG-HHS agrees to release and refrain from instituting, directing, or maintaining any administrative action seeking exclusion from Medicare, Medicaid, and other Federal health care programs (as defined in 42 U.S.C. § 1320a-7b(f)) against DaVita under 42 U.S.C. § 1320a-7a (Civil Monetary Penalties Law) or 42 U.S.C. § 1320a-7(b)(7) (permissive exclusion for fraud,

kickbacks, and other prohibited activities) for the Covered Conduct, except as reserved in Paragraph 8 (concerning excluded claims) below and as reserved in this Paragraph. The OIG-HHS expressly reserves all rights to comply with any statutory obligations to exclude DaVita from Medicare, Medicaid, and other Federal health care programs under 42 U.S.C. § 1320a-7(a) (mandatory exclusion) based upon the Covered Conduct. Nothing in this Paragraph precludes the OIG-HHS from taking action against entities or persons, or for conduct and practices, for which claims have been reserved in Paragraph 8, below.

7. In consideration of the obligations of DaVita set forth in this Agreement, conditioned upon DaVita's full payment of the Settlement Amount, DHA agrees to release and refrain from instituting, directing, or maintaining any administrative action seeking exclusion from the TRICARE Program against DaVita under 32 C.F.R. § 199.9 for the Covered Conduct, except as reserved in Paragraph 8 (concerning excluded claims) below and as reserved in this Paragraph. DHA expressly reserves authority to exclude DaVita from the TRICARE Program under 32 C.F.R. §§ 199.9(f)(1)(i)(A), (f)(1)(i)(B), and (f)(1)(iii), based upon the Covered Conduct. Nothing in this Paragraph precludes DHA or the TRICARE Program from taking action against entities or persons, or for conduct and practices, for which claims have been reserved in Paragraph 8, below.

8. Notwithstanding the releases given in Paragraphs 4 through 7 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 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; and,
- f. Any claims at issue in *DaVita Healthcare Partners Inc. (f/k/a DaVita Inc., f/k/a Total Renal Care Holdings, Inc., f/k/a Total Renal Care, Inc., f/k/a Medical Ambulatory Care Delaware, Inc.), and Physicians Dialysis, Inc., and Physicians Dialysis Ventures, Inc., and 175 Dialysis Center Owners (d/b/a 1,462 Dialysis Centers) v. United States*, Case No. 11-297C (Ct. Fed. Cl.).

9. In consideration of the obligations of DaVita in this Agreement, and conditioned upon DaVita's full payment of the Settlement Amount, Relator, for himself, and for his heirs, successors, attorneys, agents, and assigns, hereby fully and finally releases and forever discharges DaVita, together with its current and former parent corporations; wholly-owned, partially-owned, direct and indirect subsidiaries, and current and former affiliates including joint ventures 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 all of DaVita's current and former directors, officers, employees and agents, from any and all claims of any nature

whatsoever, whether known or unknown, fixed or contingent, in law or in equity, in contract or in tort, or under any federal or state statute or regulation or otherwise, that Relator has standing to bring or which Relator may now have or claim to have against DaVita or any related entities, arising in any way out of or connected in any way with the facts, claims and circumstances alleged in, arising under, or arising from the filing of the Civil Action, except for claims under 31 U.S.C. § 3730(d) for expenses or attorney's fees and costs, which are being separately negotiated and will be the subject of a separate agreement.

10. In consideration of the obligations of Relator set forth in this Agreement, DaVita, together with its current and former parent corporations; wholly-owned, partially-owned, direct and indirect subsidiaries, current and former affiliates, successors, attorneys, agents, and assigns, hereby fully and finally releases, waives, and forever discharges the Relator, together with his respective heirs, successors, assigns, agents and attorneys from any claims or allegations DaVita has asserted or could have asserted, arising from the Covered Conduct and from all liability, claims, demands, actions or causes of action whatsoever, whether known or unknown, fixed or contingent, in law or in equity, in contract or in tort, under any federal or state statute or regulation or otherwise, or in common law, that it would have standing to bring or which DaVita may now have or claim to have against Relator (together and for his respective heirs, successors, assigns, agents, and attorneys) as of the date of this Agreement, including any liability to DaVita arising in any way out of or connected in any way with the facts, claims and circumstances alleged in, arising under, or arising from the filing of, or relating to the claims Relator asserted or could have asserted in, the Civil Action.

Provided, however, that DaVita expressly reserves any defenses or claims as to Relator and Relator's counsel's claims for reasonable attorneys' fees, expenses and costs pursuant to 31 U.S.C. §3730(d).

11. DaVita waives and shall not assert any defenses DaVita 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.

12. DaVita 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 DaVita 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.

13. 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), TRICARE, or any state payer, related to the Covered Conduct; and DaVita agrees not to resubmit to any

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

14. DaVita 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 DaVita, 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 and any criminal investigation(s) of the matters covered by this Agreement;
- (3) DaVita'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;
- (5) the payment DaVita makes to the United States pursuant to this Agreement and any payments that DaVita may make to Relator, including costs and attorney's fees; and
- (6) the negotiation of, and obligations undertaken pursuant to the CIA to:
 - (i) retain an Independent Monitor to perform the responsibilities set forth in Appendix C to the CIA; and

(ii) prepare and submit reports to the OIG-HHS

are unallowable costs for government contracting purposes and under the Medicare Program, Medicaid Program, and TRICARE Program (hereinafter referred to as Unallowable Costs). However, nothing in Paragraph 14.a.(6) that may apply to the obligations undertaken pursuant to the CIA affects the status of costs that are not allowable based on any other authority applicable to DaVita.

b. Future Treatment of Unallowable Costs: If applicable, Unallowable Costs shall be separately determined and accounted for in non-reimbursable cost centers by DaVita, and DaVita 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 DaVita or any of its subsidiaries or affiliates to the Medicare, Medicaid, or TRICARE Programs.

c. Treatment of Unallowable Costs Previously Submitted for Payment: If applicable, DaVita 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, 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 DaVita 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. DaVita

agrees that the United States, at a minimum, shall be entitled to recoup from DaVita 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 DaVita or any of its subsidiaries or affiliates on the effect of inclusion of Unallowable Costs (as defined in this Paragraph) on DaVita 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 DaVita's books and records to determine that no Unallowable Costs have been claimed in accordance with the provisions of this Paragraph.

15. DaVita agrees to cooperate fully and truthfully with the United States' investigation of individuals and entities not released in this Agreement. Upon reasonable notice, DaVita 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. DaVita further agrees to furnish to the United States, upon request, complete and un-redacted 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.

16. 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 17 (waiver for beneficiaries paragraph), below.

17. DaVita 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 payers based upon the claims defined as Covered Conduct.

18. Upon receipt of the payment described in Paragraph 1, above, the United States and Relator shall promptly sign and file in the Civil Action, and any Complaint in Intervention filed by the United States, and a Voluntary Dismissal of the Civil Action pursuant to Rule 41(a)(1) except for claims on behalf of any “Plaintiff States,” as defined in the Civil Action (as amended). Said dismissal shall be with prejudice to the Relator as to all allegations in the Relator’s complaint, except for claims on behalf of any “Plaintiff States,” and as to the allegations in the Complaint in Intervention; and with prejudice to the United States as to the Complaint in Intervention and with prejudice to the United States as to Relator’s complaint only to the extent that the allegations correspond to the Covered Conduct.

19. Each Party shall bear its own legal and other costs incurred in connection with this matter, including the preparation and performance of this Agreement except for Relator’s claims against DaVita under 31 U.S.C. § 3730(d) for expenses or attorneys’

fees and costs, which are being separately negotiated and will be the subject of a separate agreement.

20. 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.

21. 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 Colorado. 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.

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

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

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

25. This Agreement is binding on DaVita's successors, transferees, heirs, and assigns.

26. This Agreement is binding on Relator's successors, transferees, heirs, and assigns.

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

28. 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: _____

JOHN HENEBERY
Trial Attorney
Commercial Litigation Branch
Civil Division
United States Department of Justice

BY: _____

EDWIN G. WINSTEAD
J. CHRIS LARSON
Assistant United States Attorneys
District of Colorado

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

DATED: _____

BY: _____

PAUL J. HUTTER
General Counsel
Defense Health Agency
United States Department of Defense

DAVITA - DEFENDANT

DATED: _____ BY: _____
KIM RIVERA
Chief Legal Officer
DaVita Healthcare Partners Inc.

DATED: _____ BY: _____
MICHAEL C. THEIS
Hogan Lovells US LLP
Counsel for Defendants

RELATOR

DATED: _____ BY: _____
DAVID BARBETTA - Relator

DATED: _____ BY: _____
ERIC R. HAVIAN
JESSICA T. MOORE
Phillips & Cohen, LLP
Counsel for Relator