

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”), eClinicalWorks, LLC (ECW), and Brendan Delaney (“Relator”), through their authorized representatives.

RECITALS

A. ECW is a privately held electronic health record (EHR) software limited liability company headquartered in Westborough, Massachusetts. Girish Navani, Rajesh Dharampuriya, M.D., and Mahesh Navani are founders of ECW and serve as executives at the company.

B. On May 1, 2015, Relator filed a *qui tam* action against ECW in the United States District Court for the District of Vermont captioned *United States ex rel. Delaney v. eClinicalWorks, LLC*, Case No. 15-CV-00095 (D. Vt.), pursuant to the *qui tam* provisions of the False Claims Act, 31 U.S.C. § 3730(b) (“the Civil Action”). The United States intervened in the Civil Action on January 13, 2017, and filed the United States’ Complaint in Intervention against ECW on May 12, 2017.

C. The United States contends that it has certain civil claims against ECW as set forth in the United States’ Complaint in Intervention for claims submitted to Medicare and Medicaid for federal incentives during the period August 2008 through February 1, 2017 (the “Covered Conduct”).

D. This Agreement is neither an admission of liability by ECW, nor a concession by the United States that its claims are not well founded. ECW denies the allegations in the Civil Action and the United States’ allegations in Paragraph C of this Agreement and the Complaint in Intervention.

E. 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. ECW, Girish Navani, Rajesh Dharampuriya, M.D., and Mahesh Navani (collectively, the "ECW Parties") shall pay to the United States a total of \$154,920,000.00, plus interest accruing at an annual rate of 2 percent from February 1, 2017 and continuing until and including the date of payment (collectively, the "Settlement Amount"), no later than 10 days after the Effective Date of this Agreement by electronic funds transfer pursuant to written instructions to be provided by the Civil Division of the United States Department of Justice.

2. Conditioned upon the United States receiving the Settlement Amount, and as soon as feasible after receipt, the United States shall pay \$30,000,000.00, plus interest accrued on that amount, to Relator by electronic funds transfer. No other payments shall be made by the United States with respect to matters covered by this Agreement.

3. Subject to the exceptions in Paragraph 6 (concerning excluded claims) below, and conditioned upon the ECW Parties' full payment of the Settlement Amount, the United States releases the ECW Parties together with ECW's current and former parent corporations; direct and indirect subsidiaries; brother or sister corporations; divisions; current and former owners; and the corporate 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.

4. Subject to the exceptions in Paragraph 6 below (concerning excluded claims) and in Paragraph 16 below (concerning reasonable fees, expenses, and costs) and conditioned upon the full payment of the Settlement Amount, Relator, for himself and for his heirs, successors, attorneys, agents, and assigns, releases ECW, and its current and former owners, officers, agents, and employees, from any civil monetary claim that Relator has on behalf of the United States for the Covered Conduct and the allegations in the Civil Action under the False Claims Act, 31 U.S.C. §§ 3729-3733.

5. In consideration of the obligations of ECW in the Corporate Integrity Agreement (CIA), entered into between OIG-HHS and ECW and this Agreement, and conditioned upon full payment of the Settlement Amount by ECW, 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 ECW 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 this Paragraph and in Paragraph 6 (concerning excluded claims), below. The OIG-HHS expressly reserves all rights to comply with any statutory obligations to exclude ECW 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 6, below.

6. Notwithstanding the releases given in Paragraphs 3, 4, and 5 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 other than the liability of Girish Navani, Rajesh Dharampuriya, M.D., Mahesh Navani, and ECW's owners for civil or administrative monetary claims released in Paragraph 3 of this Agreement;
- g. Any liability for failure to deliver goods or services due; and
- h. Any liability for personal injury or property damage or for other consequential damages arising from the Covered Conduct.

7. Relator and his 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). Conditioned upon Relator's receipt of the payment described in Paragraph 2, Relator and his heirs, successors, attorneys, agents, and assigns fully and finally release, waive, and forever discharge the United States, its agencies, officers, agents, employees, and servants, from any claims arising from the filing of the Civil Action or under 31 U.S.C. § 3730, and from any claims to a share of the proceeds of this Agreement and/or the Civil Action.

8. The ECW Parties waive and shall not assert any defenses they 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.

9. The ECW Parties fully and finally release 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 the ECW Parties have 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 of the ECW Parties.

10. The ECW Parties fully and finally release Relator and his heirs, successors, attorneys, and agents from any claims (including attorney's fees, costs, and expenses of every kind and however denominated) that the ECW Parties have asserted, could have asserted, or may assert in the future against Relator or his heirs, successors, attorneys, and agents, related to the Civil Action, the Covered Conduct, or the United States' investigation and prosecution of the ECW Parties.

11. 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 Defendants agree not to resubmit to any Medicare contractor or any state payer any

previously denied claims related to the Covered Conduct, agree not to appeal any such denials of claims, and agree to withdraw any such pending appeals.

12. The ECW Parties agree 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 the ECW Parties or ECW's present or former officers, directors, employees, shareholders, and agents, or incurred, in connection with:

- (1) the matters covered by this Agreement;
- (2) the United States' audits and civil and criminal investigations of the matters covered by this Agreement;
- (3) the ECW Parties' investigations, defenses, and corrective actions undertaken in response to the United States' audits and civil and criminal investigations in connection with the matters covered by this Agreement (including attorney's fees);
- (4) the negotiation and performance of this Agreement;
- (5) the payments the ECW Parties make to the United States pursuant to this Agreement and any payment that ECW may make to Relator, including costs and attorneys fees; and
- (6) the negotiation of, and obligations undertaken pursuant to the CIA to: (i) retain a Software Quality Oversight Organization and an independent review organization to perform reviews as described in Section III of 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, TRICARE Program, and Federal Employees Health Benefits Program (FEHBP) (hereinafter referred to as Unallowable Costs). However, nothing in Paragraph 12(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 the ECW Parties.

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

c. Treatment of Unallowable Costs Previously Submitted for Payment: The ECW Parties further agree that within 90 days of the Effective Date of this Agreement, they 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 the ECW Parties, or any 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. The ECW Parties agree that the United States, at a minimum, shall be entitled to recoup from the ECW Parties 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 the ECW Parties, or any subsidiaries or affiliates, on the effect of inclusion of Unallowable Costs (as defined in this Paragraph) on the ECW Parties, or any 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 the ECW Parties' books and records to determine that no Unallowable Costs have been claimed in accordance with the provisions of this Paragraph.

13. The ECW Parties agree to cooperate fully and truthfully with the United States' investigation of individuals and entities not released in this Agreement. Upon reasonable notice, ECW shall encourage, and agrees not to impair, the cooperation of its directors, officers, and employees, and shall make requested documents and evidence available 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. The ECW Parties further agree to furnish to the United States, upon request, complete and unredacted copies of all non-privileged documents, reports, memoranda of interviews, and records in their possession, custody, or control concerning any investigation of the Covered Conduct that the ECW Parties have undertaken, or that has been performed by another on their behalf.

14. This Agreement is intended to be for the benefit of the United States, the ECW Parties, and Relator only. The United States, the ECW Parties, and Relator do not release any claims against any other person or entity, except to the extent provided for in Paragraph 15 (waiver for beneficiaries paragraph), below.

15. The ECW Parties agree that they waive 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.

16. Upon receipt of the payment described in Paragraph 1, above, the Relator and United States shall promptly sign and file in the Civil Action a Joint Stipulation of Dismissal of the Civil Action 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 action shall be dismissed without prejudice as to the United States. All claims shall be dismissed with prejudice as to Relator, provided that Relator’s claims for reasonable attorneys’ fees, expenses, and costs pursuant to 31 U.S.C. § 3730(d)(1) shall not be dismissed until they are settled, adjudicated, or otherwise resulted, and the Court is so informed.

17. Each Party, other than as described in Paragraph E and Paragraph 16, shall bear its own legal and other costs incurred in connection with this matter, including the preparation and performance of this Agreement.

18. 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.

19. 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 Vermont. For purposes of construing this Agreement, this Agreement shall be deemed to have been drafted by the United States, the ECW Parties and Relator and shall not, therefore, be construed against any of them for that reason in any subsequent dispute.

20. This Agreement constitutes the complete agreement between the United States, the ECW Parties, and Relator. This Agreement may not be amended except by written consent of the United States, the ECW Parties, and Relator.

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

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

23. This Agreement is binding on the ECW Parties' successors, transferees, heirs, and assigns.

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

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

26. This Agreement is effective on the date of signature of the last signatory to the Agreement (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: 5-30-17

BY: 

OWEN FOSTER
Assistant United States Attorney
United States Attorney's Office
District of Vermont

DATED: 5/30/17

BY: 

NIKOLAS KEREST
Assistant United States Attorney
United States Attorney's Office
District of Vermont

DATED: _____

BY: _____

KELLEY HAUSER
Trial Attorney
Commercial Litigation Branch
Civil Division
United States Department of Justice

DATED: _____

BY: _____

EDWARD CROOKE
Assistant Director
Commercial Litigation Branch
Civil Division
United States Department of Justice

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: _____
OWEN FOSTER
Assistant United States Attorney
United States Attorney's Office
District of Vermont


DATED: _____

BY: _____
NIKOLAS KEREST
Assistant United States Attorney
United States Attorney's Office
District of Vermont

DATED: 5/31/17

BY: 
KELLEY HAUSER
Trial Attorney
Commercial Litigation Branch
Civil Division
United States Department of Justice

DATED: 5-30-17

BY: 
EDWARD CROOKE
Assistant Director
Commercial Litigation Branch
Civil Division
United States Department of Justice

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: _____
OWEN FOSTER
Assistant United States Attorney
United States Attorney's Office
District of Vermont

DATED: _____

BY: _____
NIKOLAS KEREST
Assistant United States Attorney
United States Attorney's Office
District of Vermont

DATED: _____

BY: _____
KELLEY HAUSER
Trial Attorney
Commercial Litigation Branch
Civil Division
United States Department of Justice


DATED: _____

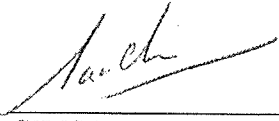
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EDWARD CROOKE
Assistant Director
Commercial Litigation Branch
Civil Division
United States Department of Justice

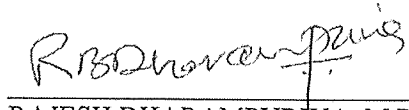
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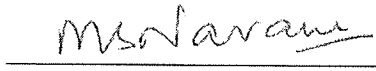
BY: Lisa M. Re
LISA M. RE
Assistant Inspector General for Legal Affairs
Office of Counsel to the Inspector General
Office of Inspector General
United States Department of Health and Human Services

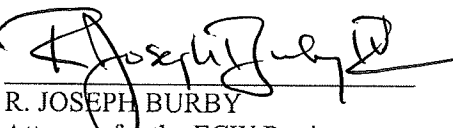
THE ECW PARTIES

DATED: 5/26/2017 BY: 
ECLINCIALWORKS, LLC
Girish Navani, CEO

DATED: 5/26/2017 BY: 
GIRISH NAVANI

DATED: 5/26/2017 BY: 
RAJESH DHARAMPURIYA, M.D.

DATED: 5/26/2017 BY: 
MAHESH NAVANI

DATED: 5/26/17 BY: 
R. JOSEPH BURBY
Attorney for the ECW Parties

RELATOR BRENDAN DELANEY

DATED: 5-26-17

BY: Brendan Delaney
BRENDAN DELANEY

DATED: 5/26/17

BY: Colette G. Matzzie
COLETTE G. MATZZIE
Attorney for Relator