

AMENDED SETTLEMENT AGREEMENT

This Amended Settlement Agreement (“Agreement”) is entered into among the *qui tam* relator Edward Lacey (“Relator”) and the Visiting Nurse Service of New York (“VNSNY”), both through their authorized representatives. Collectively, Relator and VNSNY will be referred to as “the Parties.” This Agreement amends and supersedes that certain Settlement Agreement between and among the Parties with an Effective Date of April 20, 2020, in accordance with the terms of Paragraph 15 of that Settlement Agreement.

RECITALS

A. VNSNY is a New York not-for-profit corporation, organized to provide home and community-based health care and supportive services. VNSNY maintains its principal place of business in New York, New York. VNSNY Home Care, a Certified Home Health Agency, provides home health services to patients covered by government health plans.

B. On or around July 28, 2014, Relator filed a *qui tam* action in the United States District Court for the Southern District of New York, captioned *United States, et al., ex rel. Lacey v. Visiting Nurse Service of New York*, Case No. 1:14-cv-05739-AJN, pursuant to the *qui tam* provisions of the False Claims Act, 31 U.S.C. § 3730(b), and the New York False Claims Act, New York State Finance Law § 190(2), and thereafter an amended complaint on or about July 28, 2016 (the “Relator’s Action”).

C. The United States and the State of New York declined to intervene in the Relator’s Action.

D. As fully described in Relator’s Amended Complaint, Relator has alleged (and VNSNY has denied) the following conduct during the period of January 1, 2004 through the

Effective Date (defined below in Paragraph 21) (hereinafter referred to as the “Covered Conduct”):

VNSNY accepted patients when it did not have the capacity or ability, or without regard to whether it had the capacity or ability (i) to start nursing or therapy care on the date specified by the patients’ referring or treating physician, or within the period of time required by law, regulation, or otherwise; (ii) to provide the number of visits and services for nursing and therapy ordered in patients’ Plans of Care, or (iii) to provide nursing and therapy visits and services in accordance with patients’ Plans of Care. Relator further claims that VNSNY did not disclose its incapacity or inability timely to start care or to follow the number and type of visits and services ordered in patients’ Plans of Care to the referring or treating physicians, to hospitals and referral sources, to patients, or to the government.

VNSNY submitted Requests for Anticipated Payment to the government seeking payment without disclosing to the government that VNSNY (i) did not intend to or did not have the capacity or ability to provide the number of visits and services ordered in patients’ Plans of Care; or (ii) did not intend to or did not have the capacity or ability to provide the visits and services in accordance with the Plans of Care.

VNSNY did not provide the number of nursing or therapy visits and services prescribed in its patients’ Plans of Care; did not provide nursing or therapy visits and services in accordance with patients’ Plans of Care; or did not disclose its failures to follow the Plan of Care to the government.

VNSNY did not follow the Plan of Care or otherwise deviated from or made changes to its patients’ Plans of Care, VNSNY did not notify or obtain approval from the patients’ treating or referring physicians; did not comply with regulations relating to modifications to patients’ Plans of Care; or did not document physician notification or approval of Plan of Care modification or non-compliance.

VNSNY and its nursing or therapy clinicians created, retained, or submitted to the government inaccurate records relating to the number of visits delivered by nursing and therapy clinicians, the length of visits delivered to patients (*i.e.*, patient service time) delivered by nursing and therapy clinicians, or the type or quantity of services delivered to patients during visits.

VNSNY created inaccurate patient service records for home health aide personal care and custodial care visits. Relator contends that VNSNY used inaccurate codes for services provided by home health aides to obtain payment for non-covered services. Relator further claims that VNSNY improperly billed Medicaid for home health services to dually-eligible patients.

VNSNY failed to comply with home health aide supervision requirements by failing to have nurses or therapists accompany home health aides to their field visits as required by Medicare and Medicaid.

E. As a result of the foregoing alleged conduct, Relator alleges that VNSNY knowingly submitted or caused the submission of false or fraudulent claims to Medicare and New York State Medicaid in violation of the False Claims Act and New York False Claims Act.

F. Under 31 U.S.C. § 3730(d) and N.Y. Fin. Law § 190(6), Relator is entitled to receive between 25 and 30 percent of the proceeds of the Relator's Action, and to Relator's reasonable expenses, attorneys' fees, and costs in bringing and litigating the Relator's Action.

G. VNSNY denies the contentions in Paragraphs D and E above, and the allegations in the Relator's Action.

H. This Agreement is not an admission of any of the foregoing allegations or liability by VNSNY.

TERMS AND CONDITIONS

NOW, THEREFORE, 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:

1. VNSNY shall pay to the government the total sum of \$57,000,000 (the "Total Settlement Amount"). VNSNY shall make payments as follows:

(a) To resolve the allegations in the Covered Conduct, VNSNY shall pay to the United States the total sum of \$50,160,000 (the "Federal Settlement Amount") by electronic funds transfer pursuant to written instructions to be provided by the Office of the United States Attorney for the Southern District of New York. Of the Federal Settlement Amount, \$45,600,000 represents the settlement amount for the Medicare-

related claims and \$4,560,000 represents the federal share of the settlement amount for the Medicaid-related claims.

(b) To resolve the allegations in the Covered Conduct, VNSNY shall pay to the State of New York the total sum of \$6,840,000 (the “State Settlement Amount”) by electronic funds transfer pursuant to written instructions to be provided by the State. The State Settlement Amount represents the state share of the settlement amount for the Medicaid-related claims.

(c) VNSNY shall pay the Total Settlement Amount in installments in accordance with the following schedule:

- (1) \$10,000,000 by no later than two business days following the filing of this Agreement with the Court, with \$8,800,000 of such payment to be allocated to the Federal Settlement Amount and \$1,200,000 to be allocated to the State Settlement Amount;
- (2) \$10,000,000 by October 15, 2020, with \$8,800,000 of such payment to be allocated to the Federal Settlement Amount and \$1,200,000 to be allocated to the State Settlement Amount;
- (3) \$10,000,000 by February 15, 2021, with \$8,800,000 of such payment to be allocated to the Federal Settlement Amount and \$1,200,000 to be allocated to the State Settlement Amount;
- (4) \$10,000,000 by June 15, 2021, with \$8,800,000 of such payment to be allocated to the Federal Settlement Amount and \$1,200,000 to be allocated to the State Settlement Amount; and
- (5) \$17,000,000 by October 15, 2021, with \$14,960,000 of such payment to be allocated to the Federal Settlement Amount and \$2,040,000 to be allocated to the State Settlement Amount.

2. Relator’s share of the Total Settlement Amount shall be paid by the United States and the State of New York, and not directly by VNSNY to Relator. Relator’s share will

be determined by a separate process between Relator and the United States and the State of New York pursuant to 31 U.S.C. § 3730(d) and N.Y. Fin. Law § 190(6). The Total Settlement Amount does not include Relator's expenses, attorneys' fees and costs pursuant to 31 U.S.C. § 3730(d) and N.Y. Fin. Law § 190(6). VNSNY agrees to pay Relator reasonable expenses, attorneys' fees, and costs pursuant to 31 U.S.C. § 3730(d) and N.Y. Fin. Law § 190(6).

3. Conditioned upon VNSNY's full payment of the Total Settlement Amount to the United States and the State of New York, Relator, for himself and for his heirs, executors, administrators, estates, successors, attorneys, agents, and assigns (together, the "Relator Releasing Parties"), hereby fully, finally, and irrevocably release VNSNY and all of its predecessors, successors, direct and indirect subsidiaries, affiliates and assigns, together with their respective current and former officers, directors, trustees, servants, employees, agents, affiliates, and assigns (collectively, the "VNSNY Released Parties"), from any and all rights, claims, expenses, debts, liabilities, demands, obligations, costs, damages, injuries, actions, and causes of action of every nature, from the beginning of time to and including the Effective Date, whether known or unknown, fixed or contingent, suspected or unsuspected, in law or in equity, in contract or in tort, under any federal or state statute or regulation or in common law, including but not limited to any liability to the Relator Releasing Parties arising from or relating to the claims Relator asserted or could have asserted in the Relator's Action; provided, however, that the Relator Releasing Parties' release of the VNSNY Released Parties does not extend to Relator's claim for reasonable expenses, attorneys' fees and costs in connection with the Relator's Action pursuant to 31 U.S.C. § 3730(d) and N.Y. State Fin. Law § 190(6)(b).

4. The Parties to this Agreement shall not object to this Agreement and 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).

5. In consideration of the execution of this Agreement by Relator and conditioned upon Relator's release as set forth in Paragraph 3 above, VNSNY and all of its predecessors, successors, direct and indirect subsidiaries, affiliates and assigns (collectively, the "VNSNY Releasing Parties") hereby fully, finally, and irrevocably release Relator and all his heirs, executors, administrators, estates, successors, attorneys, agents, and assigns ("Relator Released Parties") from any and all rights, claims, expenses, debts, liabilities, demands, obligations, costs, damages, injuries, actions, and causes of action of every nature, from the beginning of time to and including the Effective Date, whether known or unknown, fixed or contingent, suspected or unsuspected, in law or in equity, in contract or in tort, under any federal or state statute or regulation or in common law, including but not limited to any liability to the VNSNY Releasing Parties arising from or relating to the claims Relator asserted or could have asserted in the Relator's Action, including, but not limited to, Relator's investigation, litigation, and settlement thereof.

6. Except as indicated herein with respect to the VNSNY Released Parties and the Relator Released Parties, 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.

7. Two business days after receipt by the United States and by the State of New York of the last installment payment of the Total Settlement Amount described in Paragraph 1 above, Relator shall sign and file a Joint Notice of Dismissal of the Relator's Action pursuant to Rule 41(a)(1), in the form of Exhibit A, attached hereto. The Parties' obligations

under this Agreement are on the condition that the Court enters a final Order dismissing the Relator's Action. If the Court refuses to order dismissal of the Relator's Action, this Agreement will be null and void in its entirety, and the Total Settlement Amount paid by VNSNY shall be repaid to VNSNY within ten (10) business days.

8. Relator represents and warrants that he has not assigned any of the claims in the Relator's Action, or any other claims he has or may have in the future against any VNSNY Released Party, to any person or entity.

9. No later than ten (10) business days after (a) the Court enters a final Order dismissing the Relator's Action, as described in Paragraph 7 above; (b) final resolution of any dispute concerning the amount of Relator's share of the Settlement under Paragraph 2; or (c) final resolution of any dispute concerning the amount of Relator's expenses, attorneys' fees and costs under Paragraphs F and 2 above; whichever occurs last in time, Relator and his counsel (i) shall destroy, or shall return to VNSNY, any VNSNY materials in connection with the Relator's Action, including but not limited to documents, portions of documents, answers to interrogatories, requests for admission, and transcripts or recordings of deposition testimony, and any data, summaries, and compilations derived therefrom (collectively, "VNSNY Materials") within the possession of Relator, Relator's counsel, or third parties other than the United States Department of Justice with whom Relator or Relator's counsel consulted in connection with the Relator's Action, and (ii) shall certify in writing to VNSNY that all VNSNY Materials have been so destroyed or returned by Relator and his counsel. Relator and his counsel shall at all times maintain the confidentiality of the information in such VNSNY Materials pursuant to the Stipulated Protective Order entered in the Relator's Action. Notwithstanding the foregoing, this provision does not apply to information already publicly disclosed, and does not prohibit

Relator's counsel from maintaining a confidential preservation copy of its work product in this Action.

10. The Parties agree not to defame, disparage, or demean any other Party in any manner whatsoever.

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. Except as provided in Paragraph 2 above, each Party shall bear its own legal and other costs incurred in connection with this matter, including the preparation and performance of this Agreement.

13. 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 Southern District of New York.

14. 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.

15. This Agreement constitutes the complete agreement between the Parties with respect to the subject matter hereof. This Agreement may not be amended except by written consent of the Parties.

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

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

delivered by facsimile transmission or as .pdf attachments to emails shall constitute acceptable, binding signatures for purposes of this Agreement.

18. Any notices pursuant to this Agreement shall be in writing and shall, unless expressly provided otherwise herein, be given by hand delivery, express courier, or email followed by postage prepaid first class mail, and shall be addressed as follows:

TO RELATOR:

Gordon Schnell
Marlene Koury
Constantine Cannon
335 Madison Avenue, 9th Floor
New York, NY 10017
Telephone: (212) 350-2700
Email: GSchnell@constantinecannon.com
MKoury@constantinecannon.com

TO VNSNY:

Stephen A Warnke, Esq.
Ropes & Gray LLP
1211 Avenue of the Americas
New York, NY 10036
Telephone: (212) 841-0681
Email: Stephen.Warnke@ropesgray.com

19. This Agreement is binding on VNSNY's successors, transferees, heirs, executors, administrators, estates, and assigns.

20. This Agreement is binding on Relator's successors, transferees, heirs, executors, administrators, estates, and assigns.

21. This Agreement is effective on the date of signature of the last signatory to the Agreement (the "Effective Date").

[SIGNATURE PAGES FOLLOW]

RELATOR EDWARD LACEY

Dated: 6/25/2020
New York, New York

Edward Lacey
EDWARD LACEY, Relator

Dated: June 25, 2020
New York, New York

CONSTANTINE CANNON, Attorneys for Relator
EDWARD LACEY

By: Marlene Koury
2020.06.25 17:09:16 -04'00'
Gordon Schnell
Marlene Koury
Constantine Cannon
335 Madison Avenue, 9th Floor
New York, NY 10017
Telephone: (212) 350-2700
Email: GSchnell@constantinecannon.com
MKoury@constantinecannon.com

VISITING NURSE SERVICE OF NEW YORK

Dated: June 25, 2020
New York, New York

VISITING NURSE SERVICE OF NEW YORK

By: 
Kerry Parker
Executive Vice President and General Counsel and
Chief Risk Officer

Dated: June 25, 2020
New York, New York

ROPES & GRAY LLP, Attorneys for VISITING
NURSE SERVICE OF NEW YORK

By: 
Stephen A. Warnke
Christopher P. Conniff
Ropes & Gray LLP
1211 Avenue of the Americas
New York, NY 10036
Telephone: (212) 841-0681
Email: Stephen.Warnke@ropesgray.com
Christopher.Conniff@ropesgray.com

Kirsten V. Mayer
Ropes & Gray LLP
800 Boylston Street
Boston, MA 02199-3600
Telephone: (617) 951-7753
Email: Kirsten.Mayer@ropesgray.com