

## SETTLEMENT AGREEMENT

This Settlement Agreement (“Agreement”) is entered into among: (a) the United States of America, acting through the United States Department of Justice and on behalf of the Department of Health and Human Services, Office of Inspector General (“HHS-OIG”) (collectively, “United States”); (b) the State of California, acting through the California Department of Justice, Office of the Attorney General, Bureau of Medi-Cal Fraud and Elder Abuse, and through the California Department of Health Care Services (“DHCS”) (collectively, “California”) (the United States and California are collectively referred to as “the Governments”); and (c) Memorial Health Services, operating as MemorialCare Health System, and its related entities, Long Beach Memorial Medical Center, Miller Children’s and Women’s Hospital, Orange Coast Memorial Medical Center, Infusion Care North, Long Beach Memorial Medical Center – Retail Pharmacy, Long Beach Memorial Medical Center – Home Care Pharmacy, Miller Children’s and Women’s Hospital Long Beach – Outpatient Pharmacy (collectively, “Memorial Health”) (hereinafter the United States, California, and Memorial Health are collectively referred to as “the Parties” and each is a “Party”) through their authorized representatives.

### RECITALS

A. Memorial Health operates various entities that participate in the California Medicaid program (“Medi-Cal”), and these entities provide Medi-Cal patients with outpatient prescription drugs. Memorial Health purchases drugs under the federal 340B Drug Pricing Program (“340B Program”), pursuant to California Welfare and Institutions Code § 14105.46.

B. Prior to 2009, Medi-Cal generally reimbursed 340B Program providers, including Memorial Health, for outpatient drugs provided to a Medi-Cal beneficiary at the lower of the provider's "usual and customary" ("U&C") rates or rates established by DHCS. That year, California enacted a statute requiring 340B Program providers to submit claims for drugs they dispensed at rates not to exceed the covered entity's "actual acquisition cost" ("AAC"). *See* California Welfare and Institutions Code § 14105.46.

C. Following its enactment in 2009, the statute was challenged on multiple grounds, including that Medi-Cal had not received approval from the federal Centers for Medicare & Medicaid Services for the change in the billing requirement and associated reimbursement. Although the United States District Court for the Central District of California preliminarily issued an injunction preventing implementation of the AAC requirement, that injunction was later vacated by the United States Court of Appeals for the Ninth Circuit, effective December 1, 2016. *See AHF v. Douglas*, Nos. 14-56333, 14-56368 (9th Cir. 2016).

D. Memorial Health, however, continued to bill Medi-Cal for outpatient prescription drugs at U&C rates, rather than AAC rates. The use of U&C rates resulted in higher reimbursement to Memorial Health than if it had billed Medi-Cal using AAC rates.

E. By letter dated October 31, 2019, Memorial Health submitted a voluntary self-disclosure report to HHS-OIG regarding Memorial Health's billing practice under the 340B Program. By letter dated January 29, 2020, Memorial Health supplemented this disclosure with additional information.

F. Memorial Health's voluntary self-disclosure revealed, among other things, the

following (hereinafter referred to as “the Covered Conduct”):

From December 1, 2016 through October 23, 2019, Memorial Health entities, to wit, Long Beach Memorial Medical Center, Miller Children’s and Women’s Hospital, Orange Coast Memorial Medical Center, Infusion Care North, Long Beach Memorial Medical Center – Retail Pharmacy, Long Beach Memorial Medical Center – Home Care Pharmacy, Miller Children’s and Women’s Hospital Long Beach – Outpatient Pharmacy, improperly billed Medi-Cal by charging higher U&C prices, rather than the lower AAC that was required, for drugs purchased by Memorial Health under the 340B Program and reimbursed by Medi-Cal. During this time period, the amount of Memorial Health’s overcharge was \$21,021,786.

G. As noted, Memorial Health voluntarily self-disclosed the Covered Conduct to the United States. Memorial Health furthermore has cooperated fully with the Governments’ investigation.

H. This Agreement is neither an admission of liability or wrongdoing by Memorial Health nor a concession by the Governments that their claims are not well founded.

I. To avoid the delay, uncertainty, inconvenience, and expense of protracted litigation of the foregoing dispute, and in consideration of the mutual promises and obligations of this Agreement, the Parties agree and covenant as follows:

TERMS AND CONDITIONS

1. Payment to the Governments. Not later than ten (10) days after the Effective Date of this Agreement, Memorial Health shall pay the Governments \$31,532,679, plus interest on

that amount at a rate of 0.75 percent per year starting ten (10) calendar days from the receipt of written payment instructions from the Governments (“handshake interest”) (the “Settlement Amount”) as follows: (a) \$12,613,071.60, plus any handshake interest, to the United States by electronic funds transfer pursuant to written instructions to be provided by the United States Attorney for the Central District of California (\$8,408,714.40 of this amount is restitution); and (b) \$18,919,607.40, plus any handshake interest, to California pursuant to written instructions to be provided by the California Attorney General’s Office (\$12,613,071.60 of this amount is restitution).

2. The Governments’ Releases of Memorial Health

a. Release of Memorial Health by the United States. Subject to the exceptions in Paragraph 4 (concerning excluded claims) below, and conditioned upon Memorial Health’s full payment of the Settlement Amount, the United States releases Memorial Health and its current and former subsidiaries and parents, successors and assigns 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, both pre-amendment and as amended by the Fraud Enforcement and Recovery Act of 2009, Pub. L. 111-21, 123 Stat. 1617 (2009); 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.

b. Release of Memorial Health by California. Subject to the exceptions in Paragraph 4 (concerning excluded claims) below, and conditioned upon Memorial Health’s full payment of the Settlement Amount, California releases Memorial Health and its current and

former subsidiaries and parents, successors and assigns from any civil or administrative monetary claim California has for the Covered Conduct under the California False Claims Act, Cal. Government Code §§ 12650-12656; or the common law theories of payment by mistake, unjust enrichment, and fraud.

3. Administrative Actions

a. HHS-OIG. In consideration of the obligations of Memorial Health in this Agreement, and conditioned upon Memorial Health's full payment of the Settlement Amount, HHS-OIG 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 Memorial Health 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 4 (concerning excluded claims), below. HHS-OIG expressly reserves all rights to comply with any statutory obligations to exclude Memorial Health 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 HHS-OIG from taking action against entities or persons, or for conduct and practices, for which claims have been reserved in Paragraph 4, below.

b. California. In consideration of the obligations of Memorial Health in this Agreement and Memorial Health's full payment of the Settlement Amount, California agrees to release Memorial Health from, and to refrain from instituting, directing, or maintaining against

Memorial Health, any administrative action seeking permissive exclusion from Medi-Cal for the Covered Conduct. California expressly reserves all rights to comply with any mandatory statutory obligations to suspend or exclude Memorial Health from Medi-Cal or any other program based upon the Covered Conduct.

4. Exceptions to the Governments' Releases. Notwithstanding the releases given in this Agreement, or any other term of this Agreement, the following claims of the Governments are specifically reserved and are not released:

- a. Any liability arising under Title 26, U.S. Code ("Internal Revenue Code") or under California's Taxation and Revenue Code;
- b. Any criminal liability;
- c. Except as explicitly stated in this Agreement, any administrative liability, including mandatory exclusion from federal or state health care programs;
- d. Any liability to the United States (or its agencies) or to California (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;
- h. Any liability for personal injury or property damage or for other consequential damages arising from the Covered Conduct; and
- i. Any liability of individuals.

5. Release of the Governments by Memorial Health. Memorial Health fully and finally releases the Governments and their respective agencies, officers, agents, employees, and servants from any claims (including attorneys' fees, costs, and expenses of every kind and however denominated) that Memorial Health has asserted, could have asserted, or may assert in the future against the Governments and their respective agencies, officers, agents, employees, and servants related to, or arising out of, the Covered Conduct, the Governments' review of the Covered Conduct, and any ensuing civil prosecution.

6. Double Jeopardy and Excessive Fines Clauses. Memorial Health waives and shall not assert any defenses it 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 United States Constitution, the Excessive Fines Clause in the Eighth Amendment of the United States Constitution, or under Article 1, §§ 15 and 24 of the California Constitution, this Agreement bars a remedy sought in such criminal prosecution or administrative action.

7. No Characterization of Settlement Amount for the Purpose of Internal Revenue Laws. Nothing in 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 U.S. Code.

8. Denial of Claims. 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 carrier or intermediary or Medi-Cal, related to the Covered Conduct; and Memorial Health agrees not to resubmit to any Medicare carrier or intermediary or Medi-Cal any previously denied claims

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

9. Unallowable Costs. Memorial Health 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 Memorial Health, and/or by its respective present or former officers, directors, employees, shareholders, and agents in connection with:

- (1) the matters covered by this Agreement;
- (2) the Governments' audit(s) and civil and any criminal investigation(s) of any of the matters covered by this Agreement;
- (3) Memorial Health's investigation, defense, and corrective actions undertaken in response to the Governments' audit(s) and civil and any criminal investigation(s) in connection with the matters covered by this Agreement (including attorneys' fees);
- (4) the negotiation and performance of this Agreement; and
- (5) the payment Memorial Health makes to the Governments pursuant to this Agreement,

are unallowable costs for government contracting purposes and under the Medicare Program, Medicaid Program, TRICARE Program, and Federal Employees Health Benefits Program ("FEHBP"), or any other federal or state program (hereinafter referred to as Unallowable Costs).

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b. Future Treatment of Unallowable Costs: Unallowable Costs shall be separately determined and accounted for in nonreimbursable cost centers by Memorial Health, and Memorial Health shall not charge such Unallowable Costs directly or indirectly to any contracts with the United States, California, 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 Memorial Health or any of its respective subsidiaries or affiliates to the Medicare, Medicaid, TRICARE, or FEHBP Programs, or to any other federal or state program.

c. Treatment of Unallowable Costs Previously Submitted for Payment: Memorial Health 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 included in payments previously sought from the United States, California, 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 Memorial Health or any of its respective 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. Memorial Health agrees that the Governments, at a minimum, shall be entitled to recoup from them 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

Governments pursuant to the direction of the United States Department of Justice and/or the affected agencies. The Governments reserve their rights to disagree with any calculations submitted by Memorial Health or any of its respective subsidiaries or affiliates on the effect of inclusion of Unallowable Costs (as defined in this Paragraph) on Memorial Health or any of its respective subsidiaries or affiliates' cost reports, cost statements, or information reports.

d. Nothing in this Agreement shall constitute a waiver of the rights of the Governments to audit, examine, or re-examine Memorial Health's books and records to determine that no Unallowable Costs have been claimed in accordance with the provisions of this Paragraph.

10. Benefit of the 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, except to the extent provided for in the Paragraph immediately below (waiver for beneficiaries).

11. Waiver for Health Care Beneficiaries. Memorial Health agrees that it 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.

12. Financial Condition. Memorial Health warrants that it has reviewed its financial situation and that it currently is solvent within the meaning of 11 U.S.C. §§ 547(b)(3) and 548(a)(1)(B)(ii)(I), and shall remain solvent following payment to the Governments of the Settlement Amount. Further, the Parties warrant that, in evaluating whether to execute this Agreement, they (a) have intended that the mutual promises, covenants, and obligations set forth constitute a contemporaneous exchange for new value given to Memorial Health, within the

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meaning of 11 U.S.C. § 547(c)(1), and (b) conclude that these mutual promises, covenants, and obligations do, in fact, constitute such a contemporaneous exchange. Further, the Parties warrant that the mutual promises, covenants, and obligations set forth herein are intended to and do, in fact, represent a reasonably equivalent exchange of value that is not intended to hinder, delay, or defraud any entity to which Memorial Health was or became indebted to on or after the date of this transfer, within the meaning of 11 U.S.C. § 548(a)(1).

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

14. Voluntary Agreement. Each Party and signatory to this Agreement represents that it and she/he freely, voluntarily, knowingly, and deliberately enters into this Agreement without any degree of duress, compulsion, or misconduct by any of the Parties.

15. Governing Law. 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 Central District of California.

16. Complete Agreement. This Agreement constitutes the entire agreement of the Parties with respect to the subject matter of this Agreement and may not be modified, amended, or terminated except by a written agreement signed by the Parties specifically referring to this Agreement and its relevant portions. Each of the Parties acknowledges that, except as expressly set forth in this Agreement, no representations of any kind or character have been made by any other party or that party's agents, representatives, or attorneys to induce execution or delivery of this Agreement.

17. Agreement Drafted by All Parties. This Agreement shall be deemed to have been drafted by all Parties to this Agreement and therefore shall not be construed against any Party for reasons of drafting.

18. Memorial Health's Successors. This Agreement is binding on Memorial Health's successors, transferees, and assigns.

19. Disclosure. All Parties consent to the Governments' disclosure of this Agreement, and information about this Agreement, to the public.

20. Headings. The headings in this Agreement are for convenience only, do not constitute a part of this Agreement, and shall not limit or affect any of its provisions.

21. Capacity to Execute. The undersigned counsel represent and warrant that they are fully authorized to execute this Agreement on behalf of the persons and entities indicated below. Each signatory represents that he or she has the full power, authority, and competence necessary to enter into this Agreement.

22. Counterparts and Facsimiles. This Agreement may be executed in counterparts, each of which constitutes an original and all of which constitute one and the same Agreement. Facsimiles and electronic versions of signatures shall constitute acceptable, binding signatures for purposes of this Agreement.

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


In Witness Whereof, the Parties, through their duly authorized representatives, hereunder set their hands.

THE UNITED STATES OF AMERICA

DATED: 10/30/2020

BY:  \_\_\_\_\_  
ABF  
Assistant United States Attorney  
Deputy Chief, Civil Fraud Section  
Central District of California

DATED: 10/30/20 \_\_\_\_\_

BY:  \_\_\_\_\_  
JOHN E. LEE  
Assistant United States Attorney  
Central District of California

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 STATE OF CALIFORNIA

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

BY: \_\_\_\_\_  
NICHOLAS PAUL  
Supervising Deputy Attorney General  
California Department of Justice

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

BY: \_\_\_\_\_  
ERIKA SPERLOCK  
Chief Deputy Director  
California Department of Health Care Services

THE UNITED STATES OF AMERICA

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

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

ABRAHAM C. MELTZER  
Assistant United States Attorney  
Deputy Chief, Civil Fraud Section  
Central District of California

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

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

JOHN E. LEE  
Assistant United States Attorney  
Central District of California

DATED: 10/02/2020

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 STATE OF CALIFORNIA

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

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

NICHOLAS PAUL  
Supervising Deputy Attorney General  
California Department of Justice

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

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

ERIKA SPERLOCK  
Chief Deputy Director  
California Department of Health Care Services

THE UNITED STATES OF AMERICA

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

BY: \_\_\_\_\_  
ABRAHAM C. MELTZER  
Assistant United States Attorney  
Deputy Chief, Civil Fraud Section  
Central District of California

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


BY: \_\_\_\_\_  
JOHN E. LEE  
Assistant United States Attorney  
Central District of California

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 STATE OF CALIFORNIA

DATED: 11/2/2020

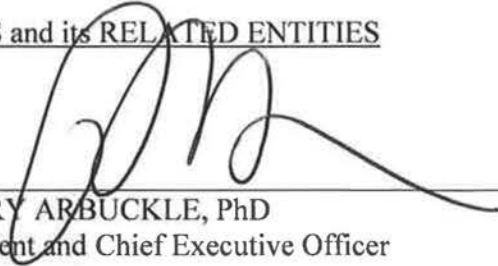
BY:   
NICHOLAS PAUL  
Supervising Deputy Attorney General  
California Department of Justice

DATED: 11/2/2020

BY:   
WILL LIGHTBOURNE  
Director  
California Department of Health Care Services

MEMORIAL HEALTH SERVICES and its RELATED ENTITIES

DATED: 9/21/2020

BY:   
BARRY ARBUCKLE, PhD  
President and Chief Executive Officer

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

BY: \_\_\_\_\_  
MARY CARTER ANDRUES  
Andrues/Podberesky  
Counsel for Memorial Health Services and Related  
Entities

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

BY: \_\_\_\_\_  
MARK FITZGERALD  
Powers Pyles Sutter & Verville, PC  
Counsel for Memorial Health Services and Related  
Entities

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

BY: \_\_\_\_\_  
CHRISTINA HUGHES  
Powers Pyles Sutter & Verville, PC  
Counsel for Memorial Health Services and Related  
Entities




MEMORIAL HEALTH SERVICES and its RELATED ENTITIES

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

BY: \_\_\_\_\_  
BARRY ARBUCKLE, PhD  
President and Chief Executive Officer

DATED: 9/17/2020

BY:   
MARY CARTER ANDRUES  
Andruess/Podberesky  
Counsel for Memorial Health Services and Related  
Entities

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

BY: \_\_\_\_\_  
MARK FITZGERALD  
Powers Pyles Sutter & Verville, PC  
Counsel for Memorial Health Services and Related  
Entities

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

BY: \_\_\_\_\_  
CHRISTINA HUGHES  
Powers Pyles Sutter & Verville, PC  
Counsel for Memorial Health Services and Related  
Entities

MEMORIAL HEALTH SERVICES and its RELATED ENTITIES

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

BY: \_\_\_\_\_  
BARRY ARBUCKLE, PhD  
President and Chief Executive Officer

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

BY: \_\_\_\_\_  
MARY CARTER ANDRUES  
Andrues/Podberesky  
Counsel for Memorial Health Services and Related  
Entities

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

BY: Mark Fitzgerald  
MARK FITZGERALD  
Powers Pyles Sutter & Verville, PC  
Counsel for Memorial Health Services and Related  
Entities

DATED: September 17, 2020

BY: Christina S Hughes  
CHRISTINA HUGHES  
Powers Pyles Sutter & Verville, PC  
Counsel for Memorial Health Services and Related  
Entities