

STATE SETTLEMENT AGREEMENT

I. PARTIES

This Settlement Agreement (the “Agreement”) is entered into between the State of California (“the State”) and Apria Healthcare Group Inc. and Apria Healthcare LLC, (“Apria”), collectively, “the Parties.”

II. PREAMBLE

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

A. At all relevant times, Apria, a Delaware corporation, has its principal place of business in Lake Forest, California.

B. On or about February 13, 2017, Benjamin Martinez, Jr., Connie Morgan, and Christopher Negrete (“Relators”) filed a *qui tam* action in the United States District Court for the Southern District of New York captioned *United States of America et al., ex. rel Martinez, et al. v. Apria Healthcare Group, Inc., et al.*, Civil Action No. 17-cv-1059 (ER) (“Civil Action”).

Relators thereafter filed an amended complaint, which was followed by the filing of a corrected second amended complaint on or about March 18, 2018. Collectively, these *qui tam* filings will be referred to as the “Civil Action.”

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

D. The State contends that Apria caused claims for payment to be submitted to the State's Medicaid Program (42 U.S.C. Chapter 7 Subchapter XIX), including "managed care entities" as defined by 42 U.S.C. § 1396u-2.

E. The State contends that it has certain civil and administrative causes of action against Apria for engaging in the following conduct (the "Covered Conduct"): that from January 1, 2014 through December 31, 2019 (the "Covered Period"), Apria violated the FCA by submitting false claims to State Medicaid programs to seek reimbursement for NIV rentals (*i*) when the NIVs were not medically necessary or reasonable due to the lack of continued use or continued need by the beneficiaries; or (*ii*) when certain Astral NIVs, which were only to be used in a bi-level pressure support setting called Pressure Assist Control mode ("PAC mode"), were not medically necessary or reasonable.

F. Defendants admit, acknowledge and accept responsibility for the following conduct:

- a. Apria is a DME supplier and operates approximately 300 branch locations throughout the United States.
- b. In early 2014, Apria selected growing the NIV rental business as one of its key business priorities. Specifically, Apria's internal analysis indicated that NIV rentals would be profitable because of, among other things, the expected Medicare or Medicaid reimbursement rate of approximately \$1,400 per month.
- c. During the Covered Period, and through many of its branch locations, Apria leased NIVs to a substantial number of patients covered by the State Medicaid programs pursuant to prescriptions written by physicians and submitted claims to those programs to obtain reimbursements for those NIV rentals.
- d. During the Covered Period, Apria understood that the claims submitted to the State Medicaid programs seeking reimbursement for NIV rentals must comply with the applicable billing requirements.

NIV Continued Use Conduct

- e. During the Covered Period, Apria maintained internal guidelines on Medicare's billing rules called "Reimbursement Updates." As relevant here, Reimbursement

Update 470, which was issued in 2013 and remained in effect until 2017, stated that “Apria is responsible for monitoring the utilization of DME[] rental items and supplies” and that “Medicare requires that providers discontinue billing when rental items [] are no longer being used by the beneficiary.” Apria understood that the State Medicaid programs had similar expectations.

- f. Starting in or about August 2014, Apria implemented a series of marketing programs to encourage physicians to order NIVs for their patients. As part of these programs, Apria trained its sales staff to explain that NIVs could yield significant clinical benefits to patients.
- g. Apria knew that patients need to use their NIVs to receive the benefits of NIV therapy. During the Covered Period, while Medicare and Medicaid recognized several means for DME suppliers to monitor patients’ usage of NIVs and similar devices, Apria relied on the respiratory therapists (“RTs”) in its branches to monitor patients’ usage of their NIV devices. Further, Apria’s NIV promotional materials indicated that Apria’s RTs would regularly visit NIV patients to assess whether they used their NIV devices in accordance with their physicians’ instructions.
- h. The RTs at Apria’s branches, however, often did not conduct regular visits to NIV patients to confirm that patients were using their NIVs as directed by their physicians.
- i. A January 2017 internal analysis, for example, found that in December 2016, Apria’s RTs failed to complete more than half of the visits to NIV patients mandated by Apria’s NIV clinical procedures at all three of Apria’s operational zones. Later that year, an Apria executive informed a member of Apria’s executive leadership that the NIV clinical team believed that a meaningful proportion of the RT home visits that need to be done as part of Apria’s baseline clinical policy are not being done.
- j. Apria continued to seek payments from the State Medicaid programs for NIV rentals each month even though its RTs frequently failed to conduct in-home visits to verify that patients were still using their NIVs.
- k. In addition, when it had information from the RT visits indicating that patients had stopped using their NIVs, Apria often did not take steps to stop seeking payments from State Medicaid programs or to determine if the NIV rentals were still medically necessary.
- l. In June 2017, Apria promulgated an internal policy that, for the first time, directed RTs to take a series of steps — including potentially to “cease billing and begin the discharge process” — if they encountered “no device usage” patients. Due to inconsistent training, however, a number of Apria’s branches did not meaningfully implement this policy and failed to consistently “cease billing” for NIVs that were no longer being used by patients.

PAC Mode Conduct

- m. Throughout the Covered Period, Apria offered a type of rental respiratory assist device – the VPAP S9 (the “VPAP RAD”) – that provided, among other therapy settings, a bi-level pressure support setting called PAC mode.
 - n. PAC mode was also a therapy setting available on the Astral NIV offered by Apria, which cost significantly more to rent than the VPAP RAD.
 - o. In 2015, Apria encouraged Apria’s sales staff to actively urge physicians to order the Astral NIVs in the PAC mode setting. When they urged physicians to order the Astral NIVs in PAC mode, Apria’s salespeople frequently did not tell the physicians that PAC mode therapy was also available through the VPAP RAD at a lower monthly cost.
 - p. On a number of occasions, this resulted in Apria renting the more expensive Astral NIVs to patients with the PAC mode therapy orders, including patients covered by State Medicaid programs, even though the less expensive VPAP RADs may have met those patients’ medical needs. Specifically, while the Astral NIV had several features that were not available on the VPAP RAD, the Astral orders in question typically did not prescribe that patients use such features.
- * * *
- q. As a result of the conduct described in paragraphs 2.a through 2.p, Apria received reimbursements from the State Medicaid programs for some NIV rental claims that did not comply with all of those programs’ billing rules and guidance.
- G. The Parties mutually desire to reach a full and final settlement as set forth below.

III. TERMS AND CONDITIONS

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

- 1. Apria agrees to pay to the United States and the Medicaid Participating States (as defined in sub-paragraph (c) and subject to the non-participating state deduction provision of sub-paragraph (d) below), collectively, the sum of \$40,000,000 plus accrued interest (the “Settlement Amount”). The Settlement Amount shall constitute a debt immediately due and owing to the United States and the Medicaid Participating States on the “effective date” of the Federal

Settlement Agreement, as defined therein and subject to the terms of this Agreement. The debt shall forever be discharged by payments to the United States and the Medicaid Participating States under the following terms and conditions:

(a) Apria shall pay to the United States the sum of \$37,632,789.89 plus accrued interest pursuant to the terms of the Federal Settlement Agreement.

(b) The total Medicaid recovery for the Covered Conduct is \$4,812,000 consisting of \$2,367,210.11 for the states pursuant to this Agreement and \$2,444,789.89 for the United States pursuant to the Federal Settlement Agreement. Apria shall pay to the Medicaid Participating States the sum of \$2,367,210.11 plus accrued interest on that amount of 1.25% per annum commencing on September 24, 2020 and continuing to and including the day payment is made to the Federal Government for its share of the settlement, subject to the non-participating state deduction provision of sub-paragraph (d) below (the “Medicaid Participating State Settlement Amount”). Apria will make payment no later than the later of seven (7) business days after all participating States’ Settlement Agreements have been signed or the expiration of the 60-day opt-in period for Medicaid Participating States described in sub-paragraph (c) below. The Medicaid Participating State Settlement Amount shall be deposited by electronic funds transfer to the New York State Attorney General’s National Global Settlement Account pursuant to written instructions from the state negotiating team (the “State Team”), which written instructions shall be delivered to counsel for Apria. This electronic funds transfer shall constitute tender and negotiation of the State Amount as defined in Paragraph III. 1. (d) below. Of the States’ Settlement Amount (assuming all States join the settlement), \$1,183,605.06 plus applicable interest, constitutes restitution to the States.

(c) Apria shall execute a State Settlement Agreement with any State that executes such an Agreement in the form to which Apria and the State Team have agreed, or in a form otherwise

agreed to by Apria and an individual State. The State shall constitute a “Medicaid Participating State” provided this Agreement is fully executed by the State and delivered to Apria’s attorneys within 60 days of the State having received this Agreement. If this Agreement is not signed by all parties within said 60-day period, Apria’s offer to resolve this matter with the State shall become null and void absent written agreement between counsel for Apria and the State Team to extend the 60-day period.

(d) The total portion of the amount paid by Apria in settlement for the Covered Conduct for the State is \$343,897.17, consisting of a portion paid to the State under this Agreement and another portion paid to the United States as part of the Federal Settlement Agreement. The amount allocated to the State under this Agreement is the sum of \$206,338.30 plus applicable interest (the “State Amount”), of which \$103,169.15 is restitution. If the State does not execute this Agreement within 60 days of receiving this Agreement, the State Amount shall be deducted from the Medicaid State Settlement Amount and shall not be paid by Apria absent written agreement between counsel for Apria and the State Team to extend the time period for executing this Agreement.

2. Contingent upon receipt of the State Amount, the State agrees to a voluntary dismissal with prejudice of any state law claims which the State has the authority to dismiss currently pending against Apria in State or Federal Courts for the Covered Conduct. Contingent upon receipt of the State Amount, the State, if served in the Civil Action and liable to pay a relator’s share, agrees to pay the relators, as soon as feasible after such receipt, such amounts as have been or will be negotiated with the relators in the Civil Action, which shall be set forth in a side letter(s) issued to and executed by the relators in the Civil Action.

3. Subject to the exceptions in Paragraph 4 below, in consideration of the obligations of Apria set forth in this Agreement, and conditioned upon tender and negotiation of the State

Amount, the State agrees to release Apria, its predecessors and current and former parents, divisions, subsidiaries, affiliates, successors, transferees, heirs, and assigns (collectively, the “Defendant Released Entities”), from any civil or administrative monetary cause of action that the State has for any claims submitted or caused to be submitted to the State’s Medicaid Program as a result of the Covered Conduct.

4. Notwithstanding the releases given in Paragraph 3 of this Agreement, or any other term of this Agreement, the following claims of the State are specifically reserved and are not released:

- (a) any criminal, civil, or administrative liability arising under state revenue codes;
- (b) any criminal liability;
- (c) any civil or administrative liability that any person or entity, including the Apria Released Entities, has or may have to the State or to individual consumers or state program payors under any statute, regulation, or rule not expressly covered by the release in Paragraph 3 above, including, but not limited to, any and all of the following claims: (i) State or federal antitrust violations; and (ii) claims involving unfair and/or deceptive acts and practices and/or violations of consumer protection laws;
- (d) any liability to the State for any conduct other than the Covered Conduct;
- (e) any liability based upon obligations created by this Agreement;
- (f) except as explicitly stated in this Agreement, any administrative liability, including mandatory exclusions from the State’s Medicaid Program;
- (g) any liability for expressed or implied warranty claims or other claims for defective or deficient products and services, including quality of goods and services;

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

(i) any liability for failure to deliver goods or services due; or

(j) any liability of individuals.

5. In consideration of the obligations of Apria set forth in this Agreement, and the Corporate Integrity Agreement (the "CIA") that Apria has entered into with the Office of the Inspector General of the United States Department of Health and Human Services in connection with this matter, and conditioned on receipt by the State of the State Amount, the State agrees to release and refrain from instituting, recommending, directing, or maintaining any administrative action seeking exclusion from the State's Medicaid Program against Apria for the Covered Conduct, except as reserved in Paragraph 4 above. Nothing in this Agreement precludes the State from taking action against Apria in the event that Apria is excluded by the federal government, or for conduct and practices other than the Covered Conduct.

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

7. In consideration of the obligations of the State set forth in this Agreement, the Apria Released Entities waive and discharge the State and any of its agencies, departments, and personnel including, but not limited to, officials, employees, and agents, whether current or former in their official and individual capacities from any causes of action (including attorneys' fees, costs, and expenses of every kind and however denominated) which the Apria Released Entities

have against the State and any of its agencies, departments, and personnel as previously referenced arising from the State's investigation and prosecution of the Covered Conduct.

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

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

10. Apria expressly warrants that it has reviewed its financial condition and that it is currently solvent, meaning that a fair valuation of its property (exclusive of exempt property) exceeds the sum of its debts.

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

12. Apria agrees to cooperate fully and truthfully with any State investigation of individuals or entities not released in this Agreement. Upon reasonable notice of such an investigation, Apria 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 and of Apria. Upon request, Apria agrees to

furnish to the State complete and unredacted copies of all non-privileged documents including, but not limited to, reports, memoranda of interviews, and records in 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, as well as complete and unredacted copies of any other non-privileged documents in its possession, custody, or control relating to the Covered Conduct. Apria shall be responsible for all costs it may incur in complying with this paragraph.

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

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

15. Nothing in this Agreement constitutes an agreement by the State concerning the characterization of the amounts paid hereunder for purposes of the State's revenue code, but nothing in this Agreement precludes Apria from taking any reporting position regarding treatment of the amounts paid pursuant to the Agreement.

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

17. This Agreement is governed by the laws of the State, except disputes arising under the CIA shall be resolved exclusively under the dispute resolution provisions of the CIA, and venue

for addressing and resolving any and all disputes relating to this Agreement shall be the state courts of appropriate jurisdiction of the State.

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

19. The Effective Date of this Agreement shall be the date of signature of the last signatory to this Agreement. The facsimile, email or other electronically delivered signatures of the parties shall be deemed to constitute acceptable binding signatures for purposes of this Agreement, and facsimile or electronic copies shall be deemed to constitute duplicate originals.

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

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

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

23. For purposes of construing this Agreement, this Agreement shall be deemed to have been drafted by the Parties to this Agreement and shall not, therefore, be construed against any of the Parties for that reason.

STATE OF CALIFORNIA

Dated: 1/14/21

By: 
Elizabeth Voorhies
Deputy Attorney General
Office of the Attorney General

Dated: 1/11/2021

By: 
Will Lightbourne, Director
CA Dept. of Health Care Services

APRIA HEALTHCARE GROUP INC., APRIA HEALTHCARE LLC

By: _____

Dated: _____

Name

Title

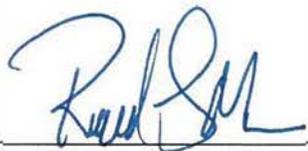
Organization

By: _____

Dated: _____

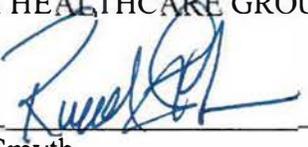
Counsel to

APRIA HEALTHCARE GROUP INC., APRIA HEALTHCARE LLC

By: 

Raoul Smyth
Executive Vice President, General Counsel
APRIA HEALTHCARE GROUP INC.

Dated: December 14, 2020

By: 

Raoul Smyth
Executive Vice President, General Counsel
APRIA HEALTHCARE LLC

Dated: December 14, 2020

By: 

Robert Fabrikant
MANATT, PHELPS & PHILLIPS LLP

Counsel to APRIA HEALTHCARE GROUP INC. and
APRIA HEALTHCARE LLC

Dated: December 14, 2020

By: 

Sara L. Shudofsky
ARNOLD & PORTER KAYE SCHOLER LLP

Counsel to APRIA HEALTHCARE GROUP INC. and
APRIA HEALTHCARE LLC

Dated: December 14, 2020