

SETTLEMENT AGREEMENT

This Settlement Agreement (Agreement) is entered into among (i) the United States of America, acting through the United States Department of Justice (DOJ) and on behalf of the Office of Inspector General (OIG-HHS) of the Department of Health and Human Services (HHS) (collectively, the “United States”); (ii) the Florida Birth-Related Neurological Injury Compensation Association (the “Association”) and the Florida Birth-Related Neurological Injury Compensation Plan (the “Plan”) (collectively, “NICA”); and (iii) Relators Veronica N. Arven and the Estate of Theodore Arven III (collectively, “Relators”) (the United States, NICA, and Relators, collectively, “the Parties”), through their authorized representatives.

RECITALS

A. In 1988, the Florida Legislature enacted legislation to create NICA, a not-for-profit entity, to stabilize and reduce malpractice insurance premiums for obstetrician medical services in Florida (the “Act”). Fla. Stat. § 766.300, *et seq.* The Plan provides compensation, irrespective of fault, for certain birth-related neurological injuries. The Association administers the Plan. The Plan reimburses qualified claimants for “medically necessary and reasonable” expenses resulting from birth-related neurological injuries subject to the terms and conditions of the Act, applicable regulations, and guidance documents. Fla. Stat. § 766.31(1)(a). The Plan is funded by, among other sources, assessments paid by participating and non-participating physicians and hospitals licensed in Florida. The rights and remedies granted under the Plan exclude all other rights and remedies of the claimant arising out of or related to a medical negligence claim with respect to a birth-related neurological injury, except for certain cases as delineated in the Act. While all of NICA’s participants were born in Florida, they have also resided in other states, including Alabama, California, Delaware, Florida, Georgia, Indiana, Massachusetts, Mississippi, Missouri, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Texas, Utah, Virginia, Washington, West Virginia, and Wisconsin.

B. Medicaid is a joint federal-state health program that provides coverage and benefits to low-income and disabled individuals. 42 U.S.C. §§ 1396 to 1396w-5. Both federal and Florida Law generally establish Medicaid as the payer of last resort—meaning, subject to various exceptions, Medicaid pays

claims for covered health care services only after other responsible third parties have met their burden of costs. 42 U.S.C. § 1396a(a)(25); Fla. Stat. § 409.910(1).

C. Under the federal Medicaid statute, third parties are defined to include “health insurers, self-insured plans, group health plans . . . or other parties that are, by statute, contract, or agreement, legally responsible for payment of a claim for a health care item or service.” 42 U.S.C. § 1396a(a)(25)(A).

D. NICA was established by Florida statute to reimburse “[a]ctual expenses for medically necessary and reasonable” health care items and services. NICA is not required to pay “[e]xpenses for items or services that the infant has received, or is entitled to receive, under the laws of any state or the Federal Government, except to the extent such exclusion may be prohibited by federal law.” Fla. Stat. § 766.31(1)(b)(1).

E. On April 25, 2019, Relators filed an action under the *qui tam* provisions of the False Claims Act (“FCA”), 31 U.S.C. §§ 3729-3733, in the United States District Court for the Southern District of Florida captioned *United States ex rel. Arven, et al. v. Florida Birth-Related Neurological Injury Compensation Ass’n, et al.*, Case No. 19-61053-CIV-Dimitrouleas (the “Civil Action”). On September 9, 2019, Relators filed an amended complaint, alleging that NICA violated the FCA by (1) declaring itself as payer of last resort and causing its Plan participants to submit false claims to Medicaid, and (2) avoiding its obligations to repay Medicaid for Plan participants’ medical costs prior to acceptance into the Plan.

F. On January 30, 2020, the United States filed a notice informing the Court that it was not intervening in Relators’ case at that time.

G. Based on its review of the Civil Action and its investigation undertaken therefrom, the United States contends that it has certain civil claims against NICA arising from the following alleged conduct, which occurred from April 25, 2013 through August 30, 2021 (the “Relevant Time Period”). Specifically, the United States contends that despite federal and Florida laws establishing Medicaid as the payer of last resort, NICA held itself out as the payer of last resort and (i) submitted, or caused to be submitted, claims for payment to Medicaid, and (ii) avoided or decreased obligations for payment of money to Medicaid. The United States further contends that:

- i. NICA published literature, instructional materials, and other documents, including the Benefits Handbook, that declared itself as payer of last resort;
- ii. NICA required Plan participants to report their Medicaid eligibility before benefits could be paid from the Plan;
- iii. Through its Benefit Handbook, NICA instructed Plan participants that the Plan may not reimburse, or may reimburse at a lower amount for, Medicaid-eligible benefits if the parent or legal guardian refused to seek those benefits from Medicaid first;
- iv. NICA refused to pay claims for health care items and services for Medicaid-eligible Plan participants if the claim was not submitted to Medicaid first;
- v. NICA caused Plan participants' parents or guardians to submit claims to Medicaid for payment before the Plan paid them and did not prevent Plan participants' parents or guardians from submitting, and did not advise such parents or guardians not to submit, claims to Medicaid first;
- vi. During the Relevant Time Period, an individual determined to be eligible to participate in the Plan was entitled to "the immediate payment of expenses previously incurred." Fla. Stat. § 766.31(2);
- vii. Despite this, NICA refused to reimburse Medicaid for expenses incurred by its Plan participants prior to their acceptance into the Plan, even though federal and state law provide that Medicaid is entitled to reimbursement from third parties for the amount of medical assistance paid by Medicaid where third-party benefits become available after medical assistance has been provided by Medicaid. 42 U.S.C. § 1396a(a)(25)(B), Fla. Stat. § 409.910(4)(b);
- viii. NICA made false statements when it represented that it was not a third party in response to issuance of Medicaid liens for amounts paid by Medicaid for expenses incurred by Plan participants; and
- ix. NICA decreased or avoided its obligations to pay money to Medicaid and/or made a false

record or statement material to an obligation to pay money to Medicaid.

The conduct alleged in this Paragraph G is hereinafter referred to as the “Covered Conduct.”

H. The Settlement Agreement is neither an admission of liability by NICA nor a concession by the United States that its claims are not well founded. NICA denies the United States’ allegations in Paragraph G.

I. NICA represents to the United States that, with respect to NICA participants who also qualify for Medicaid benefits, it: (i) will act as primary to Medicaid for medical expenses that are covered by Fla. Stat. § 766.31; however, the Parties do not intend for the foregoing representations to prohibit NICA from acting as the payer of last resort in the future should there be a change in the law; (ii) has revised its handbook, the current version of which is posted on its website and is available to the public, to indicate it is primary to Medicaid; (iii) informed the Florida Agency for Health Care Administration (“AHCA”), including, most recently on September 23, 2022, of NICA’s change of position as primary to Medicaid and provided a contact for inquiries on issues of third-party liability; (iv) retained a consultant to assist with the foregoing transition; and (v) set aside a financial reserve, effective August 31, 2021, to pay for claims it will be responsible for as the primary payer but AHCA pays for while a transition plan is developed and implemented by NICA and AHCA.

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

K. 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. NICA shall pay the United States the total sum of fifty-one million dollars (\$51,000,000.00) (the “Settlement Amount”), plus, interest on the Settlement Amount at a rate of 3.375% per annum from September 13, 2022, no later than thirty (30) days after the Effective Date of this Agreement by electronic funds transfer pursuant to written instructions to be provided by the Office of the

United States Attorney for the Southern District of Florida.

2. Conditioned upon the United States receiving the Settlement Amount and as soon as feasible after receipt, the United States shall pay \$12,750,000.00 to Relators by electronic funds transfer (“Relators’ Share”).

3. Following the Effective Date of this Agreement and receipt of written instructions from counsel for Relators, NICA agrees to pay Relators’ counsel an agreed sum pursuant to 31 U.S.C. § 3730(d) for expenses and attorneys’ fees and costs arising from the filing of the Civil Action (“Attorneys’ Fees Payment”).

4. Subject to the exceptions in Paragraph 7 (concerning reserved claims) below, and upon the United States’ receipt of the Settlement Amount, plus interest due under Paragraph 1, the United States releases NICA and its successors and assigns (which does not include individuals) 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.

5. Subject to the exceptions in Paragraph 3 (concerning Relators’ expenses, attorneys’ fees, and costs under 31 U.S.C. § 3730(d)) and upon the United States’ receipt of full payment of the Settlement Amount, plus interest due under Paragraph 1, Relators, for themselves and for their heirs, successors, attorneys, agents, and assigns, release NICA and its predecessors, successors, and assigns, including, but not limited to, its current or former employees, officers, directors, attorneys, agents, and representatives from any action, in law or in equity, suits, debts, liens, contracts, agreements, covenants, promises, liability, obligations, claims, demands, rights of subrogation, contribution and indemnity, damages, loss, cost or expenses, direct or indirect, of any kind or nature whatsoever (including without limitation any civil monetary claim the Relators have on behalf of the United States for the Covered Conduct and any issue regarding, referring or relating thereto under the False Claims Act, 31 U.S.C. §§ 3729-3733, and all civil monetary claims asserted in the Civil Action), known or unknown, fixed or contingent, foreign, state or

federal, under common law, statute or regulation, liquidated or unliquidated, claimed or concealed, and without regard to the date of occurrence, which Relators ever had, now have, may assert, or may in the future claim to have, against NICA by reason of any act, cause, matter, or thing whatsoever from the beginning of time to the date hereof.

6. The OIG-HHS expressly reserves all rights to comply with any statutory obligations to exclude NICA from Medicare, Medicaid, and other Federal health care programs under 42 U.S.C. § 1320a-7(a) (mandatory exclusion) or 42 U.S.C. § 1320a-7(b)(7) (permissive exclusion for fraud, kickbacks, and other prohibited activities) 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 7 below.

7. Notwithstanding the releases given in Paragraph 4 of this Agreement, or any other term of this Agreement, the following claims and rights 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 or enforcement right, 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;
- f. Any liability of individuals;
- g. Any liability for express or implied warranty claims or other claims for defective or deficient products or services, including quality of goods and services;
- h. Any liability for failure to deliver goods or services due; and
- i. Any liability for personal injury or property damage or for other consequential damages arising from the Covered Conduct.

8. Relators and their 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 Relators' receipt of the Relators' Share, Relators and their 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.

9. Subject to Paragraph 3 (concerning Relators' expenses, attorneys' fees, and costs under 31 U.S.C. § 3730(d)), Relators, for themselves, and for their heirs, successors, attorneys, agents, and assigns, release NICA, and its officers, agents, and employees, from any liability to Relators arising from the filing of the Civil Action, or under 31 U.S.C. § 3730(d) for expenses or attorneys' fees and costs.

10. NICA waives and shall not assert any defenses NICA 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.

11. NICA fully and finally releases the United States, its agencies, officers, agents, employees, and servants, from any claims (including attorneys' fees, costs, and expenses of every kind and however denominated) that NICA 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 or the United States' investigation or prosecution thereof.

12. NICA fully and finally releases the Relators from any claims (including attorneys' fees, costs, and expenses of every kind and however denominated) that NICA has asserted, could have asserted, or may assert in the future against the Relators, related to the allegations contained in the *qui tam* complaint and the Relators' 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) or any state payer, related to the Covered Conduct; and NICA agrees not to resubmit or cause the resubmission to any Medicare contractor or any state payer any previously denied claims related to the Covered Conduct, agrees not to appeal or cause the appeal of any such denials of claims, and agrees to withdraw any such pending appeals.

14. NICA 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. §§ 1395-1395lll and 1396-1396w-5; and the regulations and official program directives promulgated thereunder) incurred by or on behalf of NICA, its present or former officers, directors, employees, shareholders, and agents in connection with:

- i. the matters covered by this Agreement;
- ii. the United States' audit(s) and civil investigation(s) of the matters covered by this Agreement;
- iii. NICA's investigation, defense, and corrective actions undertaken in response to the United States' audit(s) and civil investigation(s) in connection with the matters covered by this Agreement (including attorneys' fees);
- iv. the negotiation and performance of this Agreement; and
- v. the payment NICA makes to the United States pursuant to this Agreement and any payments that NICA may make to Relators, including costs and attorneys' fees

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).

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

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

15. NICA agrees to cooperate fully and truthfully with the United States' investigation of individuals and entities not released in this Agreement. Upon reasonable notice, NICA shall encourage, and agrees not to impair, the cooperation of its board, 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. NICA further agrees to furnish to the United States, upon request, complete and unredacted 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. From the Effective Date until June 30, 2024, NICA agrees to cooperate in any inspection or audit conducted by the United States relating to the payment of claims for Medicaid-eligible Plan participants and agrees to provide the United States access to any and all of its respective books, records, and documents to facilitate such an inspection or audit.

17. 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 18 (waiver for beneficiaries paragraph) below.

18. NICA 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.

19. Upon receipt of the payments described in Paragraph 1 above, the Parties shall promptly sign and file in the Civil Action a Joint Stipulation of Dismissal of the Civil Action pursuant to Rule 41(a)(1). The Joint Stipulation of Dismissal will dismiss all claims against NICA subject to the terms of this Agreement, with prejudice to the Relators, and with prejudice to the United States as to the Covered Conduct released in this Agreement, and otherwise without prejudice to the United States.

20. Except to the extent provided for in Paragraph 3, each Party shall bear its own legal and other costs incurred in connection with this matter, including the preparation and performance of this

Agreement.

21. Each Party and signatory to this Agreement represents that it freely and voluntarily enters into this Agreement without any degree of duress or compulsion.

22. 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 Florida. 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.

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

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

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

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

27. This Agreement is binding on Relators' successors, transferees, heirs, and assigns.

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

29. This Agreement is effective on the date of signature of the last signatory to the Agreement (Effective Date). Facsimiles and electronic transmissions of signatures shall constitute acceptable, binding signatures for purposes of this Agreement.

THE UNITED STATES OF AMERICA

DATED: 11/14/2022

BY: Rosaline Chan

Rosaline Chan
Assistant United States Attorney
United States Attorney's Office
Southern District of Florida

DATED: 11/14/2022

BY: Seth W. Greene

Seth W. Greene
Trial Attorney
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

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United States Attorney's Office
Southern District of Florida

DATED: _____

BY: _____

Seth W. Greene
Trial Attorney
Commercial Litigation Branch
Civil Division
United States Department of Justice

DATED: 11/10/22 _____

BY: Lisa M. Re /seg _____

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

NICA

DATED: 10 Nov 2022

BY: 

Melissa Jaacks
Interim Executive Director, NICA

DATED: _____

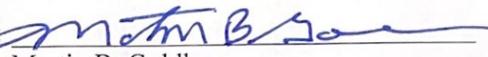
BY: _____
Martin B. Goldberg
Steve Ecenia
Daryl L. Saylor
Counsel for NICA

NICA

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BY: _____
Melissa Jaacks
Interim Executive Director, NICA

DATED: 11/10/22

BY: 
Martin B. Goldberg
Steve Ecenia
Daryl L. Saylor
Counsel for NICA

RELATORS

DATED: 11/11/22

BY: Veronica N. Arven
Veronica N. Arven

DATED: _____

BY: _____
Mary Pearson Arven
Executor, Estate of Theodore Arven III

DATED: _____

BY: _____
E. Scott Austin
Evans G. Edwards
Michael J. Finney
Parker D. Eastin
Counsel for Relators

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