

STATE SETTLEMENT AGREEMENT

I. PARTIES

This Settlement Agreement (“Agreement”) is entered into between the State of New York (“the State”) and Omnicare, Inc., hereinafter collectively referred to as “the Parties.”

II. PREAMBLE

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

A. At all relevant times, Omnicare was a Delaware corporation with its principal place of business in Covington, Kentucky, that specialized in providing pharmacy services to long term care facilities.

B. On June 14, 2011, Frank Kurnik (“Relator”) filed a *qui tam* action in the United States District Court for the District of South Carolina captioned *United States of America ex rel. Frank Kurnik et al., v. Amgen, Inc. et al.*, Civil Action No. 3:11-cv-01464 (hereinafter the “Civil Action”). Omnicare is a named defendant in the Civil Action.

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

D. The State contends that Omnicare caused claims for payment to be submitted to the State’s Medicaid Program (see 42 U.S.C. §§ 1396-1396(v)).

E. The State contends that it has certain civil and administrative causes of action against Omnicare for engaging in the following conduct (the “Covered Conduct”):

The State alleges that from the period between September 1, 2003 and June 30, 2005, Omnicare solicited and received remuneration from Amgen, Inc. in the form of purported discounts, purported market-share rebates, grants, honoraria, speaker fees, consulting services, dinners, travel or fees for the purchase of data, and that this remuneration was solicited and received in exchange for influencing health care providers' selection and utilization of Aranesp within long term care settings, and for implementing "Therapeutic Interchange" programs (also known as "switching" programs) intended to identify patients who were taking a competitor drug and to switch those patients to Aranesp. The State alleges that as a result of the foregoing Covered Conduct, Omnicare knowingly caused false and/or fraudulent claims for Aranesp to be submitted to the State's Medicaid Program.

F. This Settlement Agreement is made in compromise of disputed claims. This Agreement is neither an admission of facts or liability by Omnicare, nor a concession by the State that its allegations are not well founded. Omnicare expressly denies the allegations of the State as set forth herein and in the Civil Action. Neither this Agreement or its execution, nor the performance of any obligations arising under it, including any payment, nor the fact of settlement is intended to be, or shall be understood as, an admission of liability or wrongdoing, or other expression reflecting on the merits of the dispute by any party to this Agreement.

G. To avoid the delay, expense, inconvenience, and uncertainty of protracted litigation of these causes of action, 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. Omnicare agrees to pay to the United States and the Medicaid Participating States (as defined in sub-paragraph (c) below), collectively, the sum of FOUR MILLION ONE HUNDRED AND NINETY THOUSAND DOLLARS (\$4,190,000.00), plus accrued interest on that amount of 2.125 percent per annum commencing on November 20, 2013 and continuing and including the day before payment is made under this Agreement (collectively, 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 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) Omnicare shall pay to the United States the sum of TWO MILLION THREE HUNDRED AND FORTY-THOUSAND SEVEN HUNDRED AND THIRTY-SEVEN DOLLARS AND FORTY-FOUR CENTS (\$2,340,737.44), plus accrued interest on that amount at the rate of 2.125 percent per annum commencing on November 20, 2013 ("Federal Settlement Amount"). The Federal Settlement Amount shall be paid pursuant to the terms of the Federal Settlement Agreement.

(b) Omnicare shall pay to the Medicaid Participating States the sum of ONE MILLION EIGHT HUNDRED AND FORTY NINE THOUSAND TWO HUNDRED AND SIXTY-TWO DOLLARS AND FIFTY-SIX CENTS (\$1,849,262.56), plus accrued

interest of 2.125 percent per annum commencing on November 20, 2013 (“Medicaid State Settlement Amount”). The Medicaid Participating State Settlement Amount shall be paid 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 (“State Team”), which written instructions shall be delivered to counsel for Omnicare.

(c) Omnicare shall execute a State Settlement Agreement with any State that executes such an Agreement in the form to which Omnicare and the State Team have agreed, or in a form otherwise agreed to by Omnicare and an individual State. The State shall constitute a Medicaid Participating State provided the Agreement is fully executed by the State and delivered to Omnicare’s attorneys within 30 days of receiving this Agreement. If this condition is not satisfied within 30 days, Omnicare’s offer to resolve this matter with the individual State shall become null and void absent written agreement between counsel for Omnicare and the State Team to extend the 30 day period.

(d) The total portion of the amount paid by Omnicare in settlement for the Covered Conduct for the State is \$664,137.09, 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 \$397,331.96, plus applicable interest (the “State Amount”). If the State does not execute this Agreement within 30 days of receiving this Settlement Agreement, the State Amount shall be deducted from the Medicaid State Settlement Amount and shall be returned to Omnicare pursuant to written instruction given to the Office of the New York Attorney General’s Medicaid Fraud Control Unit, absent written agreement between counsel for Omnicare and the State Team to extend the time period for executing this Agreement.

2. The State agrees to dismiss with prejudice any state law claims which the State has the authority to dismiss currently pending against Omnicare in State or Federal Courts for the Covered Conduct

3. Subject to the exceptions in Paragraph 4 below, in consideration of the obligations of Omnicare set forth in this Agreement, and conditioned upon receipt by the State of its share of the Medicaid State Settlement Amount, the State agrees to release Omnicare, its predecessors and current and former parents, divisions, subsidiaries, successors, transferees, heirs, and assigns, and their current and former directors, officers, and employees, individually and collectively (collectively, the "Omnicare 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 any term of this Agreement, the State specifically does not release any person or entity from any of the following liabilities:

(a) any criminal, civil, or administrative liability arising under state revenue codes;

(b) any criminal liability not specifically released by this Agreement;

(c) any civil or administrative liability that any person or entity, including any 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; (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 which may be asserted on behalf of any other payors or insurers, including those that are paid by the State's Medicaid Program on a capitated basis;
- (f) any liability based upon obligations created by this Agreement;
- (g) except as explicitly stated in this Agreement, any administrative liability, including mandatory exclusions from the State's Medicaid Program;
- (h) any liability for express or implied warranty claims or other claims for defective or deficient products and services provided by Omnicare;
- (i) any liability for personal injury or property damage or for other consequential damages arising from the Covered Conduct; or
- (j) any liability based on a failure to deliver goods or services due.

5. Omnicare 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 Constitution or the Excessive Fines Clause of the Eighth Amendment of the Constitution, that this Agreement bars a remedy sought in such criminal prosecution or administrative action.

6. In consideration of the obligations of the State set forth in this Agreement, Omnicare waives and discharges the State, its agencies, political subdivisions, employees, servants, and agents from any causes of action (including attorneys' fees, costs, and expenses of every kind and however denominated) which Omnicare has asserted, could have asserted, or may assert in the future against the State, its agencies, political subdivisions, employees,

servants, and agents, arising from the State's investigation and prosecution of the Covered Conduct.

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

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

9. Omnicare expressly warrants that it has reviewed its financial condition and that it is currently solvent within the meaning of 11 U.S.C. §§ 547(b)(3) and 548(a)(B)(ii)(I), and shall remain solvent following payment of the Settlement Amount and compliance with this Agreement.

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

11. Omnicare agrees to cooperate fully and truthfully with any State investigation of individuals or entities not released in this Agreement, stemming from the Covered Conduct. Upon reasonable notice, Omnicare shall facilitate, and agrees not to impair, the cooperation of its directors, officers, employees or agents, for interviews and testimony, consistent with the rights and privileges of such individuals and of Omnicare. Upon request, Omnicare agrees to furnish to the State complete and unredacted copies of all non-privileged

documents including, but not limited to, reports and records in its possession, custody or control, concerning the Covered Conduct. Omnicare shall be responsible for all costs it may incur in complying with this paragraph.

12. 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.

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

14. 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.

15. In addition to all other payments and responsibilities under this Agreement, Omnicare agrees to pay all reasonable expenses and travel costs of the State Team, including reasonable consultant fees and expenses. Omnicare 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 otherwise agreed by the Parties.

16. This Agreement is governed by the laws of the State 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.

17. The undersigned Omnicare 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.

18. The Effective Date of this Agreement shall be the date of signature of the last signatory to this Agreement. Facsimiles of signatures shall constitute acceptable binding signatures for purposes of this Agreement.

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

20. 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.

21. 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.

State of NEW YORK

By: 

Dated: January 29, 2014

Name: Amy Held
Title: Acting Director
OFFICE OF THE ATTORNEY GENERAL

OMNICARE, INC.

By: _____ Dated: _____

[Name]

[Title]

By: _____ Dated: _____

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