

## SETTLEMENT AGREEMENT

### I. Parties

This Settlement Agreement (“Agreement”) is entered into between the State of Texas and Omnicare, Inc. (“Omnicare”), acting through their authorized representatives (hereafter referred to as “the Parties”).

### II. Preamble

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

A. Omnicare is a corporation that owns and operates various entities that are or were participating providers of pharmacy services in the Medicaid Program (“Medicaid”) of the State of Texas, pursuant to Medicaid Provider Agreements entered into with the State of Texas. Omnicare is currently the largest provider of pharmacy services to long-term care facilities in the United States, operating in 45 states and the District of Columbia.

B. Relator Bernard Lisitza is an individual resident of the State of Illinois. On September 26, 2001, Relator filed a *qui tam* action in the United States District Court for Northern District of Illinois captioned *United States et al. ex rel. Bernard Lisitza, v. Omnicare, Inc.*, No. 01 C 7433 (hereinafter “the Civil Action”). During a portion of the relevant time period, Relator worked for an Omnicare-owned facility in Illinois.

C. Relator David Kammerer is an individual resident of the state of Ohio. Relator Kammerer has a *qui tam* case pending under seal in the Northern District of Illinois captioned *United States ex rel. David Kammerer v. Omnicare, Inc.*, No. 04 C 2074. During a portion of the time period, Kammerer was an employee of Omnicare.

D. The State of Texas contends that Omnicare submitted or caused to be submitted claims for payment to the State of Texas's Medicaid Program ("Medicaid"), 42 U.S.C. §§ 1396-1396v.

E. The State of Texas contends that it has certain civil claims, as specified in subparagraphs i., ii., and iii below, against Omnicare for engaging in the following conduct (hereinafter referred to as the "Covered Conduct"):

i. From April 1, 2000 through December 31, 2005, Omnicare improperly switched its Medicaid patients who were prescribed ranitidine (generic Zantac) 150 mg or 300 mg tablets to the capsule form of the drug. This switch occurred because of Federal Upper Limits ("FULs") that had been placed on the tablet form of Ranitidine by the Centers for Medicare and Medicaid Services ("CMS"). As a result of engaging in this switching behavior, Omnicare received reimbursement amounts from Medicaid that were higher than it was entitled to receive.

ii. From January 1, 2002 through December 31, 2005, Omnicare improperly switched its Medicaid patients who were prescribed fluoxetine (generic Prozac) 10 mg or 20 mg capsules to the tablet form of the drug. As a result of engaging in this switching behavior, Omnicare received reimbursement amounts from Medicaid that were higher than it was entitled to receive.

iii. From April 1, 2001 through December 31, 2005, Omnicare improperly switched its Medicaid patients who were prescribed buspirone (generic Buspar) 15 mg dosage strength to two 7.5 mg dosages. As a result of engaging in this switching behavior, Omnicare received reimbursement amounts from Medicaid that were higher than it was entitled to receive.

F. Omnicare has entered into or will be entering into a separate settlement agreement (hereinafter referred to as the "Federal Settlement Agreement and Release") with The United States

Department of Justice (hereinafter referred to as the "United States") which will be receiving settlement funds from Omnicare pursuant to Paragraph 1(a) below for the Covered Conduct described in Paragraph E above.

G. This Agreement is not an admission of liability by Omnicare, nor is it evidence of any valid claim. Omnicare denies the State of Texas's contentions. The Parties agree that no provision of this Agreement nor any consideration exchanged pursuant to this Agreement constitutes an admission by Omnicare that it engaged in, or violated any law in connection with, the Covered Conduct described above or otherwise.

H. To avoid the delay, uncertainty, inconvenience, and expense of protracted litigation of the above claims, the Parties reach a full and final settlement pursuant to the Terms and Conditions below.

I. This Preamble is an integral part of this Agreement and is binding on the Parties in the same way as the remainder of this Agreement.

### **III. Terms and Conditions**

I. Omnicare agrees to pay to the United States and the states which will be receiving settlement funds pursuant to this paragraph ("the Participating States"), collectively a total of \$49.5 million (the "Settlement Amount"). The Settlement Amount is to be paid to the United States and the Participating States, as follows:

a. Omnicare and the United States agree that the sum of \$29,641,217.36 represents the Federal Share (the "Federal Settlement Amount"). Omnicare agrees to pay the Federal Settlement Amount to the United States by electronic funds transfer pursuant to written instructions to be provided by the U.S. Attorney's Office for the Northern District of Illinois. Omnicare agrees to

make this electronic funds transfer no later than 10 business days from the Effective Date of the Federal Settlement Agreement and Release.

b. Omnicare and the Participating States agree that the sum of \$19,858,782.63 represents the Participating States' share (the "State Settlement Amount") under terms and conditions agreed upon by Omnicare and the Participating States (the "State Settlement Agreements"). Upon execution of the State Settlement Agreements by the Participating States, or at any earlier date as otherwise agreed in writing between Omnicare and the Negotiating Team of the National Association of Medicaid Fraud Control Units, ("NAMFCU"), Omnicare shall transfer the State Settlement Amount to an account designated by NAMFCU for distribution to the Participating States.

c. The total portion of the Settlement Amount paid by Omnicare in settlement for the Covered Conduct to the State of Texas is \$2,246,634.66, consisting of a portion paid to the State of Texas under this agreement and another portion paid to the federal government as part of the Federal Settlement Agreement and Release. The individual portion of the State Settlement Amount allocable to the State of Texas under this agreement is the sum of \$779,028.06.

d. Contingent upon the Participating States receiving the State Settlement Amount from Omnicare and as soon as feasible after receipt, the Participating States agree to pay \$1,164,327.83 to Relator Lisitza by electronic funds transfer pursuant to instructions provided by Counsel for the Relator, Michael I. Behn of Behn & Wyetzner, Chartered, ("Counsel for Relator Lisitza"), and to pay \$143,226.61 to Relator Kammerer by electronic funds transfer pursuant to instructions provided by Shelley Slade of Vogel & Slade, LLP, ("Counsel for Relator Kammerer").

2. Subject to the exceptions in Paragraph 3 below, in consideration of the obligations of Omnicare in this Agreement, conditioned upon Omnicare's full payment of the Federal and State Settlement Amounts, the State of Texas on behalf of itself, its officers, agents, agencies, and departments, agrees to release Omnicare, its subsidiaries, divisions, affiliates (including any entity in which Omnicare has at least a 50% ownership interest) as set forth in Attachment A from any civil or administrative monetary claim the State of Texas has or may have for any claim submitted or caused to be submitted to the State Medicaid Program for the Covered Conduct.

3. Notwithstanding any term of this Agreement, the State of Texas specifically does not release any person or entity from any of the following claims or liabilities: a. any civil, criminal, or administrative liability arising under State of Texas revenue codes; b. any criminal liability; c. any civil or administrative liability that Omnicare has or may have under any state statute, regulation, or rule not covered by this release; d. any liability to the State of Texas (or its agencies) for any conduct other than the Covered Conduct; e. any liability based upon such obligations as are created by this Agreement; f. except as explicitly stated in this agreement, any administrative liability, including mandatory exclusion from the State of Texas's Medicaid Program; g. except as explicitly stated in this agreement, any liability resulting from disciplinary action relating to licensure; h. any liability for express or implied warranty claims or other claims for defective or deficient products or services, including quality of goods and services; i. any claims for personal injury or property damage or for other consequential damages arising from the Covered Conduct; j. any liability for failure to deliver goods or services due; k. any liability of individuals, including officers and employees.

4. In consideration of the obligations of Omnicare in this Agreement and the Corporate Integrity Agreement (“CIA”) entered into between the Office of the Inspector General of the United States Department of Health and Human Services (“OIG-HHS”) and Omnicare, conditioned upon Omnicare’s full payment of the Federal and State Settlement Amounts, the State of Texas agrees to release and refrain from instituting, directing, or maintaining any administrative action seeking exclusion from the State of Texas’s Medicaid Program, except as reserved in Paragraph 3, for the Covered Conduct. Nothing in this Agreement precludes the State of Texas from taking action against Omnicare in the event that Omnicare is excluded by the federal government, or for conduct and practices other than the Covered Conduct. The State of Texas does not have the authority to release Omnicare from any claims or actions which may be asserted by private payers or insurers, including those that are paid by a state’s Medicaid Program on a capitated basis.

5. Omnicare waives and shall not assert any defenses Omnicare 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. Omnicare is specifically not waiving any other defenses it may have. Nothing in this Paragraph or any other provision of this Agreement constitutes an agreement by the State of Texas concerning the characterization of the Settlement Amount for purposes of state revenue laws.

6. Omnicare fully and finally releases the State of Texas, its agencies, employees, servants, and agents from any claims (including attorney’s fees, costs, and expenses of every kind and however denominated) that Omnicare has asserted, could have asserted, or may assert in the

future against the State of Texas, its agencies, employees, servants, and agents, related to the Covered Conduct and the State of Texas's investigation and prosecution thereof.

7. The Settlement Amount shall not be decreased as a result of the denial of claims for payment now being withheld from payment by the State of Texas's Medicaid Program or other state payer related to the Covered Conduct; and Omnicare shall not resubmit to the State of Texas's Medicaid Program, or any state payer any previously denied claims related to the Covered Conduct, and shall not appeal any such denials of claims.

8. Omnicare agrees to the following:

a. Unallowable Costs Defined: if applicable, that 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. §§ 1395-1395ggg and 1396-1396v; and the regulations and official program directives promulgated there under) incurred by or on behalf of Omnicare, its present or former officers, directors, employees, shareholders, and agents in connection with the following shall be "unallowable costs" to the State of Texas's Medicaid Program:

- (1) the matters covered by this Agreement;
- (2) the State of Texas's audit(s) and civil and/or criminal investigation(s) of the matters covered by this Agreement;
- (3) Omnicare's investigation, defense, and corrective actions undertaken in response to the State of Texas's audit(s) and civil and/or any criminal investigation(s) in connection with the matters covered by this Agreement (including attorney's fees);
- (4) the negotiation and performance of this Agreement;

(5) the payment Omnicare makes to the State of Texas pursuant to this Agreement and any payments that Omnicare may make to Relator, including costs and attorneys fees; and

(6) the negotiation of, and obligations undertaken pursuant to the CIA to:

(i) retain an independent review organization to perform annual reviews as described in Section III of the CIA; and

(ii) prepare and submit reports to the OIG-HHS.

However, nothing in this Paragraph 8.a.(6) that may apply to the obligations undertaken pursuant to the CIA affects the status of costs that are not allowable based on any other authority applicable to Omnicare. (All costs described or set forth in this Paragraph 8.a. are hereafter “unallowable costs.”)

b. Future Treatment of Unallowable Costs: If applicable, these unallowable costs shall be separately determined and accounted for by Omnicare, and Omnicare shall not charge such unallowable costs directly or indirectly to the State of Texas’s Medicaid Program, or seek payment for such unallowable costs through any cost report, cost statement, information statement, or payment request submitted by Omnicare or any of its subsidiaries or affiliates to the State of Texas’s Medicaid Program.

c. Treatment of Unallowable Costs Previously Submitted for Payment: If applicable, Omnicare further agrees that within 90 days of the Effective Date of this Agreement it shall identify to the State of Texas’s Medicaid Program any unallowable costs (as defined in this Paragraph) included in payments previously sought from the State of Texas, including, but not limited to, payments sought in any cost reports, cost statements, information reports, or payment



requests already submitted by Omnicare 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. Omnicare agrees that the State of Texas, at a minimum, shall be entitled to recoup from Omnicare 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.

If applicable, any payments due after the adjustments have been made, shall be paid to the State of Texas pursuant to the direction of the affected agencies. The State of Texas reserves its rights to disagree with any calculations submitted by Omnicare or any of its subsidiaries or affiliates on the effect of inclusion of unallowable costs (as defined in this Paragraph) on Omnicare 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 State of Texas to audit, examine, or re-examine Omnicare's books and records to determine that no unallowable costs have been claimed in accordance with the provisions of this Paragraph.

9. Omnicare agrees to cooperate fully and truthfully with the State of Texas's investigation of individuals and entities not released in this Agreement. Upon reasonable notice, Omnicare 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.

10. 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 11, below.

11. Omnicare 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.

12. Omnicare 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 United States and the Participating States 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 Omnicare, within the 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 that Omnicare 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. In addition to all other payments and responsibilities under this agreement, Omnicare agrees to pay all reasonable travel costs and expenses for the NAMFCU Team. Omnicare will pay this amount by separate check or wire transfer made payable to the National Association of Medicaid

Fraud Control Units after the Participating States execute this agreement or as otherwise agreed by the parties.

14. Omnicare represents that this Agreement is freely and voluntarily entered into without any degree of duress or compulsion whatsoever.

15. This Agreement is governed by the laws of the State of Texas. This Agreement constitutes the complete agreement between the Parties. This Agreement may not be amended except by written consent of the Parties.

16. The individuals signing this Agreement on behalf of Omnicare represent and warrant that they are authorized by Omnicare to execute this Agreement, both on behalf of Omnicare and on behalf of the various entities that Omnicare owns and/or operates that are or were participating providers of pharmacy services in the Medicaid Program of the State of Texas, pursuant to Medicaid Provider Agreements entered into with the State of Texas. The individuals signing this Agreement on behalf of the State of Texas represent and warrant that they are signing this Agreement in their official capacities and are authorized by the State of Texas to execute this Agreement.

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

18. This Agreement is binding on Omnicare's successors, transferees, heirs, and assigns.

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

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

THE STATE OF TEXAS

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

BY: \_\_\_\_\_  
State of Texas  
Office of the Attorney General  
Medicaid Fraud Control Unit

DATED: 11/13/06

BY:   
\_\_\_\_\_  
State of Texas  
Medicaid Program

Omnicare, Inc.

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

BY: \_\_\_\_\_  
Omnicare Representative

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

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