

## **SETTLEMENT AGREEMENT**

### **I. PARTIES**

This Settlement Agreement (“Agreement”) is entered into among the following:

- (1) the Texas Attorney General’s Office (“OAG”) and the Texas Department of Aging and Disability Services (“DADS”), collectively referred to herein as “Texas”; and
- (2) Emeritus Corporation, referred to herein as “Emeritus”,

collectively referred to herein as “the Parties”, through their authorized representatives.

### **II. PREAMBLE**

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

A. Emeritus is a publicly traded company with over 180 Assisted Living Facilities nationwide, headquartered in Seattle, Washington, and has approximately 36 facilities in Texas, 19 of which have Medicaid contracts with The Texas Department of Aging and Disabilities (“DADS”), formerly known as the Texas Department of Human Services.

B. Texas contends that Emeritus made false claims and false statements to Texas in connection with reimbursement claims that Emeritus submitted to Texas under the Medicaid program (Title XIX of the Social Security Act, 42 U.S.C. § 1396 *et seq.*) in violation of the Texas Medicaid Fraud Prevention Act, Tex. Hum. Res. Code Ann. §36.001 *et seq.* in that from May 19, 2003 through June 30, 2005, Emeritus routinely submitted false claims to the Texas Medicaid program for reimbursement based on specific housing options that were not provided as outlined in the Texas Administration Code. (40 T.A.C. §§ 46.13 (a)(1)(B), (a)(2)(B). Specifically, Emeritus failed to provide a kitchen area as required by the housing options for which it billed. Further, Texas contends that from September 1, 2003 through September 21, 2005, Emeritus

submitted false claims for reimbursement rates based on single occupancy units when it should have submitted claims for double occupancy units as outlined in the Texas Administration Code. (40 T.A.C. §§ 46.13(a)(1), (2)). As a result of this billing practice, the State, via the Medicaid program, paid claims to Emeritus at a much higher rate than it should have. The conduct described in this paragraph is hereinafter referred to as the “Covered Conduct.”

C. This Agreement is neither an admission of liability by Emeritus nor a concession by Texas that its claims are not well founded. Emeritus denies any and all allegations of wrongdoing and any improper or wrongful conduct associated with the Covered Conduct.

D. To avoid the delay, uncertainty, inconvenience, and expense of protracted litigation of the above claims, the Parties have reached a full and final settlement pursuant to the Terms and Conditions set forth below.

### **III. TERMS AND CONDITIONS**

1. Emeritus agrees to pay Texas a total of \$1,857,612.91 (the “Settlement Amount”). Emeritus agrees to pay the Settlement Amount to Texas by electronic funds transfer pursuant to written instructions to be provided to Emeritus by the Attorney General of Texas Civil Medicaid Fraud Section within five business days of the Effective Date of this Agreement.

2. Subject to the exceptions in Paragraph 4 below, in consideration of the obligations of Emeritus in this Agreement, conditioned upon Emeritus’s full payment of the Settlement Amount, and subject to Paragraph 13, below (concerning bankruptcy proceedings commenced within 91 days of the Effective Date of this Agreement or any payment made under this Agreement), Texas (on behalf of itself, its officers, agents, agencies, and departments) agrees to release Emeritus, its subsidiaries, directors, officers, and employees from any civil or administrative monetary claim

Texas has or may have for the Covered Conduct under the Texas Medicaid Fraud Prevention Act, Tex Hum. Res. Code Ann. §36.001 *et seq.* or the common law theories of payment by mistake, unjust enrichment, and fraud.

3. In consideration of the obligations of Emeritus in this Agreement and conditioned upon Emeritus's full payment of the Settlement Amount, and subject to Paragraph 13 below (concerning bankruptcy proceedings commenced within 91 days of the Effective Date of this Agreement or any payment made under this Agreement), DADS agrees to release and refrain from instituting, directing, or maintaining any administrative action seeking exclusion from Medicaid, under Chapter 32 of the Texas Human Resources Code, for the Covered Conduct except as reserved in this Paragraph. DADS expressly reserves all rights to comply with any statutory obligations to exclude Emeritus from Medicaid, under Chapter 32 and/or Chapter 36 of the Texas Human Resources Code and Chapter 531 of the Texas Government Code, based upon the Covered Conduct. Nothing in this Paragraph precludes DADS from taking action against entities or persons, or for conduct and practices, for which claims have been reserved in Paragraph 4 below.

4. Notwithstanding any term of this Agreement, specifically reserved and excluded from the scope and terms of this Agreement as to any entity or person (including Emeritus) are the following claims of Texas:

- a. Any liability to Texas (or its agencies) for any conduct other than the Covered Conduct;
- b. Any liability based upon such obligations as are created by this Agreement;

5. Emeritus waives and shall not assert any defenses Emeritus 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. Nothing in this paragraph or any other provision of this Agreement constitutes an agreement by Texas concerning the characterization of the Settlement Amount for purposes of the Internal Revenue laws, Title 26 of the United States Code.

6. Emeritus fully and finally releases Texas, its agencies, employees, servants, and agents from any claims (including attorney's fees, costs, and expenses of every kind and however denominated) that Emeritus has asserted, could have asserted, or may assert in the future against the Texas, its agencies, employees, servants, and agents, related to the Covered Conduct and 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 any Medicaid carrier or intermediary or any state payer, related to the Covered Conduct; and Emeritus agrees not to resubmit to any Medicaid carrier or intermediary or any state payer any previously denied claims for the period prior to June 30, 2005 related to the Covered Conduct, and agrees not to appeal any such denials of claims..

8. Notwithstanding any other provision of this Agreement, the parties agree that all issues relating to Emeritus' conduct for the period of July 1, 2005 through March 1, 2006, will be resolved through those specific administrative appeals pending before the State Office of Administrative Hearings, cause nos. 05-383 through 05-388 and 06-308 through 313, inclusive. Texas agrees to forego all claims against Emeritus for the period of July 1, 2005 through March 1, 2006, except for the above-listed claims currently pending before the State Office of Administrative Hearings.

9. Emeritus agrees to the following:

a. Unallowable Costs Defined: 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 thereunder) incurred by or on behalf of Emeritus, its present or former officers, directors, employees, shareholders, and agents in connection with the following shall be “unallowable costs” on government contracts and under the Medicaid Program:

- (1) the matters covered by this Agreement;
- (2) the negotiation and performance of this Agreement; and
- (3) the payment Emeritus makes to Texas pursuant to this Agreement.

b. Future Treatment of Unallowable Costs: These unallowable costs shall be separately determined and accounted for by Emeritus and Emeritus shall not charge such unallowable costs directly or indirectly to any contracts with any State Medicaid program, or seek payment for such unallowable costs through any cost report, cost statement, information statement, or payment request submitted by Emeritus or any of its subsidiaries or affiliates to the Medicaid Program.

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 (15) below.

11. Emeritus agrees that it shall not in the future 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. Emeritus warrants that it has reviewed its financial situation and that it is currently solvent within the meaning of 11 U.S.C. §§ 547(b)(3) and 548(a)(1)(B)(ii)(I), and that it shall remain solvent following payment of the Settlement Amount to Texas. 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 Emeritus, 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 to which Emeritus 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. If within 91 days of the Effective Date of this Agreement or of any payment made under this Agreement, Emeritus commences, or a third party commences, any case, proceeding, or other action under any law relating to bankruptcy, insolvency, reorganization, or relief of debtors (a) seeking to have any order for relief of Emeritus's debts, or seeking to adjudicate Emeritus as bankrupt or insolvent; or (b) seeking appointment of a receiver, trustee, custodian, or other similar official for Emeritus or for all or any substantial part of Emeritus's assets, Emeritus agrees as follows:

a. Emeritus's obligations under this Agreement may not be avoided pursuant to 11 U.S.C. § 547, and Emeritus shall not argue or otherwise take the position in any such case, proceeding, or action that:

(i) Emeritus's obligations under this Agreement may be avoided under 11 U.S.C. § 547;

(ii) Emeritus was insolvent at the time this Agreement was entered into, or became insolvent as a result of the payment made to Texas; or

(iii) the mutual promises, covenants, and obligations set forth in this Agreement do not constitute a contemporaneous exchange for new value given to Emeritus.

b. If Emeritus's obligations under this Agreement are avoided for any reason, including, but not limited to, through the exercise of a trustee's avoidance powers under the Bankruptcy Code, Texas, at its sole option, may rescind the releases in this Agreement, and bring any civil and/or administrative claim, action, or proceeding against Emeritus for the claims that would otherwise be covered by the releases provided in Paragraphs 2, 3, and 9(14) above. Emeritus agrees that

(i) any such claims, actions, or proceedings brought by Texas (including any proceedings to exclude Emeritus from participation in Medicaid) are not subject to an "automatic stay" pursuant to 11 U.S.C. § 362(a) as a result of the action, case, or proceedings described in the first clause of this Paragraph, and Emeritus shall not argue or otherwise contend that Texas's claims, actions, or proceedings are subject to an automatic stay;

(ii) Emeritus shall not plead, argue, or otherwise raise any defenses under the theories of statute of limitations, laches, estoppel, or similar theories, to any such civil or administrative claims, actions, or proceeding that are brought by Texas's within 30 calendar days of written notification to Emeritus that the releases have been rescinded pursuant to this Paragraph and,

c. Emeritus acknowledges that its agreements in this Paragraph are provided in exchange for valuable consideration provided in this Agreement.

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

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

16. This Agreement is governed by the law of the State of Texas. The Parties agree that the exclusive jurisdiction and venue for any dispute arising between and among the Parties under this Agreement is in the district court of Travis County.

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

18. The individuals signing this Agreement on behalf of the Emeritus represent and warrant that they are authorized by Emeritus to execute this Agreement. The signatories for Texas represent that they are signing this Agreement in their official capacities and that they are authorized to execute this Agreement.

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

20. This Agreement is binding on Emeritus, its successors, transferees, heirs, and assigns.

21. All parties consent to Texas's disclosure of this Agreement, and information about this Agreement, to the public.

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

**THE STATE OF TEXAS**

GREG ABBOTT  
Texas Attorney General

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

BY: \_\_\_\_\_  
RAYMOND C. WINTER  
Acting Chief, Civil Medicaid Fraud Section  
Texas Attorney General's Office

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

BY: \_\_\_\_\_  
ADELAIDE HORN  
Commissioner  
Texas Department of Aging and Disability Services

**EMERITUS CORPORATION**

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

BY: \_\_\_\_\_  
MARK J. BIROS  
Attorney for Emeritus Corporation

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

BY: \_\_\_\_\_  
DANIEL R. BATY  
Chairman and CEO  
Emeritus Corporation