

## **SETTLEMENT AND RELEASE**

This Settlement and Release Agreement (“Agreement”) is made as of this 10th day of August, 2023, between and among the New Mexico State Ethics Commission (“Releasor”), and Michelle Lujan Grisham, Governor of the State of New Mexico, and the New Mexico Human Services Department (“HSD”) (collectively, “Releasees” or “Released Parties”). Each of the Releasor or Releasees may be referred to herein as a “Party” and collectively as the “Parties.”

**WHEREAS**, on April 20, 2023, Releasor State Ethics Commission authorized its attorney staff to commence a civil enforcement action that includes claims that run against the Released Parties.

**WHEREAS**, Releasor State Ethics Commission alleges on September 30, 2022, HSD issued a Request for Proposals for Managed Care Organization Contractors for Turquoise Care RFP # 23-630-8000-0001 (Sept. 30, 2022) (“RFP”). Five offerors submitted responsive proposals, and HSD employees evaluated those proposals based on the evaluation criteria set forth in the RFP. Releasor State Ethics Commission further alleges that based on those evaluations, HSD officials selected four offerors for managed care organization (“MCO”) contract awards and decided not to award a contract to Western Sky Community Care. Finally, Releasor State Ethics Commission alleges that on January 30, 2023, acting HSD Secretary Kari Armijo, following instructions communicated by Governor’s Office employees, sent the five offerors the Notice of Termination of Turquoise Care Medicaid Managed Care Request for Proposals (RFP # 23-630-8000-0001) (Jan. 30, 2023) (“Notice of Termination”).

**WHEREAS**, Releasor State Ethics Commission contends that this cancellation of this RFP violated the New Mexico Procurement Code.

**WHEREAS**, Releasee Governor Lujan Grisham denies Releasor's allegations as stated herein and all claims of wrongdoing, damages, and any liability whatsoever, including but not limited to violations of the Procurement Code, and states in particular:

(a) The scores for all applicants raised significant concerns as to whether any of the bidders would be able to provide seamless, robust, and high-quality healthcare to New Mexicans.

(b) The decision was made to cancel the RFP and re-advertise the contracts with more stringent requirements and benchmarks for service providers in reliance on HSD's assessment that the Procurement Code did not apply to the RFP process.

**WHEREAS**, Releasee HSD denies Releasor's allegations as stated herein and all claims of wrongdoing, damages, and any liability whatsoever, including but not limited to violations of the Procurement Code.

**WHEREAS**, From May 16, 2023, to the Execution Date of this Agreement, the Parties participated in a settlement conference with the Honorable Judith K. Nakamura (Ret.), as Mediator. The Parties reached an agreement to amicably resolve any and all issues, claims, demands, and/or damages, of whatever nature, that exist, or could exist, by and among them, relating in any way to claims made or which could have been made in a lawsuit.

**WHEREAS**, Without conceding the merit or lack of merit of any claim or defense or the existence of any liability whatsoever, the Parties wish to settle, compromise, and finally and forever resolve all matters, controversies, disputes, and claims that may exist between the Parties relating to the RFP and Notice of Termination, including any claims with

respect to the RFP and the Notice of Termination that could have been asserted by Releasor.

**WHEREAS**, Releasor State Ethics Commission approved this Agreement at a duly convened meeting on August 10, 2023, and authorized the Commission's Executive Director to enter the Agreement on the Commission's behalf.

**NOW, THEREFORE**, in consideration of the foregoing recitals and the mutual promises hereinafter set forth, the Parties agree as follows:

**1. Execution Date.** As used in this Agreement, the "Execution Date" shall mean the date as of which the Agreement is fully executed.

**2. Consideration.** In consideration for Releasor State Ethics Commission's Release of claims against the Released Parties as set forth herein, within seven (7) days after the Execution Date:

(a) Releasee HSD, through the acting HSD Secretary, or her successor or assign in office, shall rescind the January 30, 2023 Notice of Termination, and send notices of that rescission to the five offerors who submitted proposals in response to the RFP, with a copy to the Releasor State Ethics Commission.

(b) Releasee HSD, through the acting HSD Secretary, or her successor or assign in office, shall instruct the procurement manager for the RFP, Charles Canada, or his successor or assign, to issue the four notices of intent to award that Canada previously drafted and addressed, and which Nicole Comeaux, the former state Medicaid director approved, to the four offerors that HSD had selected for MCO contracts—namely, Health Care Service Corporation d/b/a Blue Cross and Blue Shield of New Mexico, UnitedHealthcare of New Mexico, Molina Healthcare of New Mexico, Inc., and Presbyterian Health Plan, Inc; *provided that*, if any of

the four offerors is not eligible for an MCO contract award for the managed-care part of New Mexico's Medicaid plan as of the Execution Date because of a decision by the Center for Medicare & Medicaid Services ("CMS"), then Releasee HSD, through the acting HSD Secretary, or her successor or assign in office, shall amend the notice of intent to award letter to that offeror to address that offeror's ineligibility to enter an MCO contract with the State of New Mexico, despite the notice of intent to award. The letter to Presbyterian Health Plan, Inc., as Canada had originally drafted, shall notify Presbyterian Health Plan, Inc., that HSD had also selected Presbyterian Health Plan, Inc., for the award of the contract to provide managed care for children in state custody ("CISC"). Releasee HSD, through the acting HSD Secretary, or her successor or assign in office, shall also instruct the procurement manager for the RFP, Charles Canada, or his successor or assign, to issue the letter he drafted and addressed, and which Nicole Comeaux, the former New Mexico Medicaid director approved, to Western Sky Community Care, informing Western Sky Community Care that HSD did not select Western Sky Community Care for an MCO contract award following HSD's evaluation process. Releasee HSD, through the acting HSD Secretary, or her successor or assign in office, shall ensure that the procurement manager for the RFP, Charles Canada, or his successor or assign, sends those five letters within seven (7) days after the Execution Date of this Agreement, with a copy to the Releasor State Ethics Commission.

(c) After the procurement manager for the RFP, Charles Canada, or his successor or assign, sends notice of intent to award letters to Health Care Service Corporation d/b/a Blue Cross and Blue Shield of New Mexico, UnitedHealthcare of New Mexico, Molina Healthcare of New Mexico, Inc., and Presbyterian Health Plan, Inc., Releasee HSD, through the acting HSD Secretary, or her successor or assign in office, with the assistance of any appropriate HSD staff, shall commence with the negotiation and award of MCO contracts with these four offerors, pursuant to the process set forth by the RFP, the procurement process set

forth in New Mexico's Procurement Code, and all applicable state procurement regulations as stated in the New Mexico Administrative Code; *provided that*, this Agreement does not impose any obligation on Releasee HSD, through the acting HSD Secretary, or her successor or assign in office, to commence with the negotiation and award of an MCO contract to any of the four offerors to which a notice of intent to award letter is sent that, as of the Execution Date of this Agreement, is not eligible for an MCO contract award for the managed-care part of New Mexico's Medicaid plan because of a CMS decision.

(d) The duties that this Agreement imposes upon Releasee HSD, acting through the acting HSD Secretary, or her successor or assign in office and in her official capacity as interim acting HSD secretary, are binding on her successor and assign at HSD or any other agency, authority, subdivision, instrumentality, or other agent of the State of New Mexico authorized to procure MCO contracts for New Mexico's Medicaid plan.

**3. Release.** In consideration of satisfaction of the conditions set forth in Paragraph 2 and more fully contained herein, Releasor hereby releases, acquits, and forever discharges Releasees from any and all claims, demands, and damages, of whatever nature, actions and causes of action of any kind whatsoever, known or unknown, suspected or unsuspected, which Releasor could have asserted as part of a lawsuit against the Released Parties, or any other current or former employee of the State of New Mexico, regarding the RFP or the Notice of Termination ("Released Claims"); *provided, however*, that the Released Claims shall not include claims to enforce this Agreement.

**4. Final Settlement and Adequate Consideration.** The Parties agree that Releasees' satisfaction of the conditions set forth in Paragraph 2 of this Agreement shall represent final and full satisfaction and

settlement of the Released Claims. It is the intent of the Parties to fully and effectively release the Released Claims. This Settlement Agreement is intended to have the broadest possible effect so that the allegations arising from the Released Claims be finally and forever put to rest. The Parties agree that the consideration noted in Paragraph 2 represents adequate consideration for this Settlement Agreement.

**5. No Admission of Wrongdoing.** This Agreement (whether or not consummated), the settlement reflected herein, and all communications or other actions relating to this settlement, shall not be offered or construed as, or received against any of the Parties in a lawsuit between the Parties, or in any other civil, criminal, administrative, or other action or proceeding, as evidence of: (a) an admission by any of the Parties with respect to the truth or falsity of any fact alleged in this Agreement or the deficiency of any allegation or defense that has been or could have been asserted, or of any liability, negligence, fault, misrepresentation, omission, or other wrongdoing or actionable conduct of any of the Parties; or (b) any liability, negligence, fault, misrepresentation, omission, or other wrongdoing or actionable conduct with respect to any statement or written document approved or made by the Released Parties. Notwithstanding the foregoing, the Parties may refer to this Agreement to enforce this Agreement.

**6. Mutual Non-Disparagement.** As further consideration for this Agreement, the Parties agree not to make any disparaging comments about one another. "Disparaging comments" are (1) any denigrating or derogatory statement about one another or the services provided, or (2) comments or representations intended to bring any Releasee or the Releasor into disrepute. The Releasees and Releasor agree not to make disparaging comments in any written or verbal form, including in print or electronically, including but not limited to statements on social media or

other websites. This provision does not preclude the parties from discussing the facts and resolution of the Released Claims in a manner that does not disparage the Parties. Moreover, it is expressly agreed that this provision does not constrain the Parties from publicly expressing any opinion on the interpretation of the Campaign Reporting Act, Procurement Code, the Governmental Conduct Act, and any federal or state statute, regulation, judicial opinion, administrative opinion, guidance or other law or regulation that might pertain to the procurement of contracts relating to the administration of New Mexico's Medicaid plan, and further does not preclude the Parties from discussing this Agreement and the Parties' dispute in the course of official business (*e.g.* training, legislative testimony, press events, and board or commission meetings) in a manner that does not disparage any of the Parties.

**7. Construction.** The terms, provisions, and conditions of this Agreement are the result of negotiations in good faith and at arm's length between the Releaser State Ethics Commissions and the Released Parties, each of which has been represented by legal counsel of their own choosing. Accordingly, the terms, provisions and conditions of this Agreement shall be interpreted and construed in accordance with their usual and customary meanings, without application of any rule of interpretation or construction suggesting that ambiguous or conflicting terms, conditions, or provisions shall be interpreted or construed against the Party whose legal counsel prepared the executed version of any prior drafts of the Agreement.

**8. Warranty of Capacity to Execute Settlement Agreement.** The Parties represent and warrant that each has the right and authority to execute this Agreement. Further, the Parties represent and warrant that the execution of this Agreement violates no law, rule, agreement or instrument by which it may be bound or to which they are a party.

9. **Compromise of a Disputed Claim.** The Parties agree that this Agreement represents a compromise of disputed rights, demands, claims, actions and causes of action, taking into account, among other things, the costs and risks associated with litigation. It is further agreed that nothing contained within this Agreement shall be considered an admission for any such claims, demands, damages, actions, or causes of action, such liability or wrongdoing being expressly denied. Nothing in this Agreement constitutes an admission of liability or wrongdoing by Releasees.

10. **Entire Agreement.** The Parties acknowledge and agree that: (a) no promises, representations, or agreements have been made in connection with this Agreement other than those set forth herein, and that they intend this to be the final and binding settlement and release of all of Releasor State Ethics Commission's Released Claims against the Released Parties, on the terms set forth herein, whether or not they have been previously asserted or articulated; and (b) except as expressly stated in this Agreement, none of the Parties has made any promise, statement, or representation of law or fact that has been relied upon by any of the other such signatories in entering into this Agreement.

11. **Termination Provisions.** Releasor State Ethics Commission may terminate or enforce this Agreement in the event that the Releasing Parties fail to perform in accordance with Paragraph 2 of this Agreement.

12. **Governing Law.** This Agreement shall be construed and interpreted in accordance with the laws of the State of New Mexico.

13. **Severability.** If, after the effective date hereof, any provision of this Agreement is held to be illegal, invalid or unenforceable, such provision shall be fully severable and shall be unenforceable between the



Parties only to the extent of such prohibition or ineffectiveness without invalidating the remainder of the provision or of this Agreement.

**14. Amendment.** This Agreement shall not be modified or amended except in writing signed by the Parties.

**15. Effective Date.** This Agreement shall become effective on the Execution Date, immediately upon execution by the Parties.

**16. Effective in Counterparts.** To expedite the conclusion of this matter, the Parties agree that this Agreement may be executed by electronic signature and further may be executed in counterparts, each of which shall be deemed an original, but all of which shall constitute one and the same instrument. By so proceeding, the Parties further agree that the Agreement shall be and is binding upon each of them, just as if the Agreement had been executed otherwise. Faxed or scanned and emailed copies of manually executed signature pages to this Agreement shall be enforceable without the need for delivery of an original signature.

**17. Fees and Costs.** Each Party agrees to pay its own mediation fees, attorneys' fees, and costs.

**18. Notices.** All notices, requests, demands or other communications required or contemplated hereunder or relating hereto shall be in writing and forwarded by overnight delivery or by hand, with a copy by email, and addressed as follows:

(a) If to Releasor State Ethics Commission:

Executive Director  
State Ethics Commission

August 10, 2023

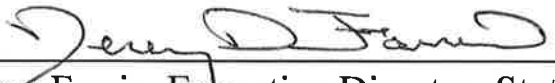
800 Bradbury Dr. Ste. 215  
Albuquerque, NM 87106  
jeremy.farris@sec.nm.gov

(b) If to Released Parties:

Chief General Counsel to the Governor  
Office of the Governor  
490 Old Santa Fe Trail, Ste. 400  
Santa Fe, New Mexico 87501  
holly.agajanian@state.nm.us

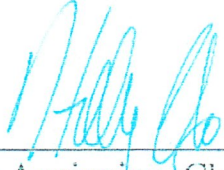
and

Chief General Counsel  
Human Services Department  
1474 Rodeo Rd.  
Santa Fe, NM 87505  
paul.ritzma@hsd.nm.gov

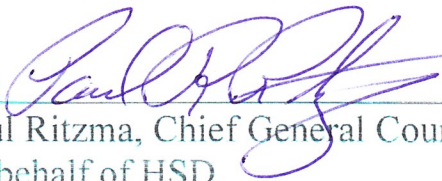
By:   
Jeremy Farris, Executive Director, State Ethics Commission,  
on behalf of the New Mexico State Ethics Commission

10 August 2023  
\_\_\_\_\_  
(Date)

August 10, 2023

By:   
Holly Agajanian, Chief General Counsel, Office of the Governor,  
on behalf of Governor Michelle Lujan Grisham

8/10/23  
(Date)

By:   
Paul Ritzma, Chief General Counsel, HSD,  
on behalf of HSD.

8/10/23  
(Date)