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COUNTY OF ERIE

MARK C. POLONCARZ
COUNTY EXECUTIVE

October 15, 2012

The Honorable
Erie County Legislature
92 Franklin Street – Fourth Floor
Buffalo, NY 14202

RE: Ratification of First Amendment to the Settlement Agreement Between the County and Erie County Medical Center Corporation

Dear Honorable Members:

Enclosed please find a resolution and accompanying memorandum requesting ratification by the Legislature of a certain "First Amendment to the 2010 Settlement Agreement Between Erie County Medical Center Corporation and the County of Erie, State of New York" ("First Amendment") entered into by the undersigned, on behalf of the County of Erie (the "County"), and the Erie County Medical Center Corporation ("ECMCC") as of the 15th day of October, 2012.

The First Amendment resolves certain financial requirements of the County to ECMCC associated with 2013-2015 Disproportionate Share and Upper Payment Limit payments and clarifies the 2010 Settlement Agreement.

Should your Honorable Body require further information, I encourage you to contact County Attorney Michael R. Siragusa or Director of Budget and Management Robert W. Keating. Thank you for your consideration on this matter.

Sincerely yours,

Mark C. Poloncarz, Esq.
Erie County Executive

MCP/tcc
Encl.

cc: Erie County Fiscal Stability Authority

MEMORANDUM

To:	Honorable Members of the Erie County Legislature
From:	Erie County Executive
Re:	Ratification of First Amendment to the Settlement Agreement Between the County and Erie County Medical Center Corporation
Date:	October 15, 2012

SUMMARY

This resolution requests the County Legislature to ratify a "First Amendment to the 2010 Settlement Agreement Between Erie County Medical Center Corporation and the County of Erie, State of New York" entered into by for the County Executive, on behalf of the County of Erie (the "County"), as of the 15th day of October, 2012 (the "First Amendment").

FISCAL IMPLICATIONS

The First Amendment is fiscally advantageous to Erie County. The First Amendment addresses certain 2013, 2014 and 2015 payment obligations of the County to ECMCC associated with Disproportionate Share ("DSH") and Upper Payment Limit ("UPL") payments.

Under the First Amendment, ECMCC has recognized that since January 1, 2004 the County made $29.75 million in workers compensation payments associated with employees at ECMCC. In recognition of this, ECMCC has agreed to create and provide the County with a $28 million "credit" which it may use to settle County obligations as set out in the 2010 Settlement Agreement, including chiefly, any DSH and UPL payments above $16.2 million annually in 2013, 2014 and 2015. The County has agreed in return to pay ECMCC a reimbursement for certain retiree healthcare costs. The County has agreed to repay any utilized credits starting in 2015 with a $2 million annual repayment to ECMCC. If the county does not utilize credits it shall not be responsible for any repayment.

The First Amendment will even-out any unexpected financial obligations associated with the Settlement Agreement and help the County to remain within the $16.2 million subsidy amount for 2013 and 2014.

REASONS FOR RECOMENDATION

The First Amendment addresses projected significant 2013-2015 DSH and UPL payment obligations by the County.

BACKGROUND INFORMATION

The County has experienced significant financial obligations associated with DSH and UPL for which a prior credit ("EOS Credit") helped alleviate higher than budgeted County costs in 2010 and 2011. The EOS Credit expired in 2011 and given projected significant DSH and UPL obligations in 2013-2015, ECMCC and the County agreed to a new credit mechanism.

CONSEQUENCES OF NEGATIVE ACTION

Erie County will be unable to execute this agreement and will face significant unbudgeted expense in 2013, 2014 and 2015.

STEPS FOLLOWING APPROVAL

Following approval of this resolution, the County Executive will execute such related and ancillary documents and agreements that the Erie County Attorney deems necessary or appropriate to effectuate the terms of the negotiated first amendment to the Settlement Agreement.

A RESOLUTION SUBMITTED BY:
THE COUNTY EXECUTIVE

RE: Approval of First Amendment to the Settlement Agreement Between the County and Erie County Medical Center Corporation

WHEREAS, the County has provided financial support to the Erie County Medical Center Corporation (ECMCC) since its creation as a public benefit corporation in 2004, and provided financial support to the Erie County Medical Center Healthcare Network before 2004, all of which has been essential to the mission of providing health services to the residents of Erie County regardless of their ability to pay; and

WHEREAS, the County and ECMCC entered into a Sale, Purchase and Operation Agreement effective January 1, 2004, as amended August 1, 2004 (the "SPOA"), providing for the ECMCC's purchase of certain buildings and improvements owned by the County and for the financial independence, increased flexibility, additional and alternate revenue streams and independent decision-making of ECMCC while intending that ECMCC continue as a general, municipal hospital serving the health care needs of the residents of Western New York, including those of the underinsured and uninsured; and

WHEREAS, to resolve certain issues between the County and ECMCC that had given rise to litigation between the two, while leaving certain other issues to be resolved in the future, the Parties entered into a Consent Decree on February 24, 2006 as ordered by the Supreme Court of the State of New York, County of Erie (the "Consent Decree"); and

WHEREAS, over time, the County and ECMCC have developed a complex fiscal relationship requiring, among other things, that the County provide various supplemental Medicaid payments to ECMCC, which are matched dollar for dollar by the federal government called Disproportionate Share ("DSH") and Upper Payment Limit ("UPL"); and

WHEREAS, the 2006 Consent Decree acknowledged, among other things, (a) that certain issues relating to the Parties' fiscal relationship after January 1, 2010 that arose in the underlying litigation were left unresolved; (b) that the Parties were obligated by the Consent Decree to negotiate those issues in good faith with the intent of reaching an agreement; and (c) that the Parties were free to seek further judicial intervention to reach an agreement; and

WHEREAS, in 2009 and 2010 the County and ECMCC conducted extended negotiations and met with the New York State Supreme Court, County of Erie, as a part of the negotiation process to resolve and settle certain issues between them in accordance with law; and

WHEREAS, on March 25, 2010 the Erie County Legislature unanimously approved a Settlement Agreement between the County and ECMCC codifying and establishing certain County financial obligations, including a requirement that the County would pay ECMCC an annual subsidy payment totaling $16.2 million, or make annual required DSH and UPL payments, whichever was higher; and

WHEREAS, these DSH and UPL payments have grown significantly, and the County and ECMCC have cooperated and developed a First Amendment to the Settlement Agreement to help relieve the pressure on the County's budget in 2013, 2014 and 2015.

NOW, THEREFORE, BE IT

RESOLVED, that the County Legislature does hereby ratify the First Amendment and authorizes the County to execute and deliver the negotiated First Amendment to the Settlement Agreement, subject to any necessary approvals; and be it further

RESOLVED, that the County Executive is hereby authorized to execute such related and ancillary documents and agreements that the Erie County Attorney deems necessary or appropriate to effectuate the terms of the First Amendment to the Settlement Agreement, subject to any necessary approvals; and be it further

RESOLVED, that certified copies of this resolution shall be forwarded to the County Executive, County Attorney, Director of Budget and Management, the Comptroller and the Chief Executive Officer of the Erie County Medical Center Corporation.

FIRST AMENDMENT TO THE SETTLEMENT AGREEMENT BETWEEN ERIE COUNTY MEDICAL CENTER CORPORATION AND THE COUNTY OF ERIE, NEW YORK

This First Amendment to the Settlement Agreement Between Erie County Medical Center Corporation ("ECMCC") and the County of Erie, New York ("County") is entered as of the 15th day of October, 2012 (the "First Amendment").

WHEREAS, ECMCC and the County entered into a Settlement Agreement dated December 30, 2009 (the "Settlement Agreement") to resolve the then-remaining issues between them and to set forth their respective future obligations; and

WHEREAS, ECMCC and the County have identified additional matters that require their mutual cooperation in order to effectively and efficiently manage these matters to the benefit of the Western New York community, and especially the citizens of the County; and

WHEREAS, Section 2.2 of the Sale, Purchase and Operation Agreement (the "SPOA") dated as of January 1, 2004 between the County of Erie and the Erie County Medical Center Corporation (the "Corporation") provides for the assumption by the ECMCC of liabilities of the Erie County Medical Center Healthcare Network (the "Network") and its programs which arise, are incurred or accrue after January 1, 2004, other than Excluded Liabilities, and Section 2.3 of the SPOA sets forth the understanding that the County shall remain obligated to pay and satisfy obligations or liabilities of the Network which arose, were incurred or accrued prior to January 1, 2004, and claims which arise after January 1, 2004 based upon actions or omissions of the County prior to January 1, 2004 and defines excluded liabilities as encompassing "... all payments claims, costs, settlement amounts, expenses, fines, charges, judgments and liabilities (including, but not limited to worker's compensation ... "); and

WHEREAS, Section 2.4 of the SPOA provides that in the event both ECMCC and the County are potentially liable under a claim, the County and ECMCC will reasonably cooperate to determine how the claim, contingency and/or liability will be shared by them, if at all; and

WHEREAS, the County has been paying all worker's compensation claims that initially arose before January 1, 2004, including payment for disabilities that continued after January 1, 2004; and

WHEREAS, ECMCC has incurred expenses relating to post-retirement healthcare payments made or realized by ECMCC since January 1, 2004 for certain employees who were employed by the County for some time period before January 1, 2004; and

WHEREAS, the County and ECMCC intend to clarify their understanding of these provisions of the SPOA as they relate to worker's compensation claims paid by the County, and post-retirement healthcare payments made by or realized by ECMCC, as described above,

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which is acknowledged by ECMCC and the County, ECMCC and the County agree as follows:

1. In accordance with Section 2.3 of the SPOA, the County is responsible for satisfying and paying all worker's compensation claims that arose, were incurred or accrued prior to January 1, 2004, even if the award to the claimant was or is made after January 1, 2004.

2. Recognition of Worker's Compensation Expenses. ECMCC acknowledges that post-January 1, 2004, the County has incurred expenses amounting to $29,749,947 related to worker's compensation benefit payments made by the County for persons that were employed in the Network before January 1, 2004. ECMCC agrees to create a credit in the amount of $28,000,000 in favor of the County which credit may be used by the County in the manner described in section 4.5.1 of the Settlement Agreement, beginning, if necessary, in 2012. The County agrees that this amount shall satisfy all obligations, past and future, owed by ECMCC for these payments. ECMCC and the County agree that use of this credit will be handled in the same manner as the EOS Credit described in section 4.5 of the Settlement Agreement.

3. ECMCC is responsible for all post-retirement healthcare expenses and liabilities accruing since January 1, 2004 for certain employees who were employed by the County in the Network before January 1, 2004, whether or not those employees continue to be employed by ECMCC.

4. Recognition of Post-Retirement Healthcare Expenses. The County acknowledges that ECMCC has incurred expenses amounting to $34,733,432 related to post-retirement health care since January 1, 2004 for certain employees who were employed by the County for some time period before January 1, 2004. The County agrees to repay ECMCC an amount up to $28,000,000 in annual payments of $2,000,000 each year, commencing with the calendar year 2015. ECMCC agrees that this amount shall satisfy all obligations, past and future, owed by the County for these payments. The annual payments shall be due and payable (the "Due Date") no later than December 15 of each calendar year without notice from or request by ECMCC. Payment shall be made by wire transfer on or before the Due Date.

5. In the event the County does not use the full amount of the $28,000,000 credits referenced in paragraph 2 of this First Amendment on or before December 31, 2015, then the parties agree that the County's obligation to repay ECMCC the $28,000,000 relating to recognition of post-retirement healthcare expenses shall be reduced by the corresponding amount of unused credits and the remaining credit amount shall be extinguished. The obligation to repay ECMCC at least $2.0 million annually shall continue until the total of annual payments equal the used credit.

6. No Waiver of Other Rights. Both the County and ECMCC acknowledge that there are other documents containing rights, duties and obligations of each of them. In entering into this First Amendment, neither Party intends to waive or modify any right, duty or obligation set forth in any other document which is not specifically described in this First Amendment.

7. Warranty of Capacity. The County and ECMCC each represents and warrants to the other that it has undertaken all actions required to bind itself to the terms of this First Amendment or covenants that it will undertake or cause to be undertaken all such actions in a reasonably timely manner and before January 1, 2013. In the event that any signatory to this

First Amendment shall be found to have been lacking the capacity to bind itself to this First Amendment or the Settlement Agreement, in addition to any other rights or remedies available to the other Party, the other Party shall have the right to recover all consideration paid or granted and any incidental expense or consequential damage incurred.

8. No Other Modifications. The County and ECMCC agree that, except to the extent expressly modified by this First Amendment, the terms and conditions of the Settlement Agreement remain in full force and effect. ECMCC and the County acknowledge the binding nature of the Settlement Agreement and this First Amendment.

9. Miscellaneous.

9.1 Headings. Subject headings are included for convenience only and shall not affect the interpretation of any provisions of this First Amendment.

9.2 Assignment and Successors. Neither ECMCC nor the County shall assign any rights or delegate any duties hereunder without the prior written consent of the other.

9.3 Counterparts. This First Amendment and the other related transaction documents may be executed in counterparts, each of which shall be deemed an original, and all of which together shall constitute a single agreement.

9.4 No Prejudice. This First Amendment has been jointly prepared by the parties and the terms shall not be construed in favor of or against any party on account of its participation in such preparation.

9.5 Amendment and Modification. This First Amendment may be amended only by written agreement executed by the parties.

9.6 Non-Liability for Breach. Notwithstanding anything contained to the contrary in this First Amendment, whether express or implied, no director, officer, partner, advisor, attorney, agent, employee, subcontractor, or representative of either party shall be charged personally or held contractually liable by or to the other party under any term or provision of this First Amendment or of any supplement, modification or amendment to this First Amendment or any other related transaction document, because of any breach thereof, or because of his, her or their execution or attempted execution of the same.

9.7 Indemnity. The County agrees to indemnify ECMCC for the transactions contemplated by and described in this First Amendment to the same extent as the County is obligated to indemnify ECMCC as described in section 4.5.4 of the Settlement Agreement.

9.8 Governing Law. This First Amendment and any related transaction document, and all exhibits, schedules and other documents delivered pursuant to this First Amendment and made a part hereof, shall be governed by and construed and enforced in accordance with the laws of the State of New York applicable to contracts made and to be performed therein.

IN WITNESS WHEREOF, ECMCC and the County have executed this First Amendment below intending to be bound thereby, effective as of the date first written above.

Erie County Medical Center Corporation

By:

Jody L. Lomeo
Chief Executive Officer

Approved as to Form:

Anthony J. Colucci, III
General Counsel

The County of Erie, New York

By:

Mark Poloncarz
Erie County Executive

Approved as to Form:

Michael A. Siragusa
Erie County Attorney

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