

## SETTLEMENT AGREEMENT

### I. PARTIES

This Settlement Agreement (Agreement) is entered into between the United States of America, acting through the United States Department of Justice and on behalf of the Office of Inspector General (OIG-HHS) of the Department of Health and Human Services (HHS) (collectively the “United States”); and Cocco Brothers and Carlo A. Cocco (Cocco), hereafter referred to as “the Parties”, through their authorized representatives.

### II. PREAMBLE

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

- A. Cocco Brothers, which was owned, managed and controlled by Carlo A. Cocco was engaged in the business of selling diabetic shoes, inserts and orthotics.
- B. The United States contends that Cocco submitted or caused to be submitted claims for payment to the Medicare Program (Medicare), Title XVIII of the Social Security Act, 42 U.S.C. §§ 1395-1395hhh.
- C. The United States contends that it has certain civil claims, as specified in Paragraph 2, below, against Cocco for engaging in the following conduct during the period from May 4, 2002 to April 21, 2007: Cocco placed a small piece of plastic on the heel area of the diabetic shoe insert which it supplied to correct the patient’s varus/valgus. The correct method of billing Medicare for that modification is to use code A-5507. Instead, Cocco billed Medicare under the code L-2275 three hundred forty four (344) times for the modification. At all times the L-2275 code paid more than the A-5507 code (hereinafter referred to as the “Covered Conduct”).

D. This Agreement is neither an admission of liability by Cocco nor a concession by the United States that its claims are not well founded.

E. 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.

### III. TERMS AND CONDITIONS

- i. Cocco agrees to pay to the United States \$ 130,000.00 (the “Settlement Amount”). Cocco agrees to pay the Settlement Amount to the United States by electronic funds transfer pursuant to written instructions to be provided. Cocco agrees to make this electronic funds transfer no later than 30 days after the Effective Date of this Agreement.
- ii. Subject to the exceptions in Paragraph 3 (concerning excluded claims), below, in consideration of the obligations of Cocco in this Agreement, conditioned upon Cocco’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), the United States (on behalf of itself, its officers, agents, agencies, and departments) agrees to release Cocco from any civil or administrative monetary claim the United States has or may have for the Covered Conduct under the False Claims Act, 31 U.S.C. §§ 3729-3733; the Civil Monetary Penalties Law,

42 U.S.C. § 1320a-7a; the Program Fraud Civil Remedies Act, 31 U.S.C. §§ 3801-3812; or the common law theories of payment by mistake, unjust enrichment, and fraud.

iii. 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 Cocco) are the following claims of the United States:

a. Any civil, criminal, or administrative liability arising under Title 26, U.S. Code (Internal Revenue Code);

b. Any criminal liability;

c. Except as explicitly stated in this Agreement, any administrative liability, including mandatory exclusion from Federal health care programs;

OIG-HHS expressly reserves all rights to institute, direct, or to maintain any administrative action seeking exclusion against Cocco, and/or its officers, directors, and employees from Medicare, Medicaid, or other Federal health care programs (as defined in 42 U.S.C. § 1320a-7b(f)) under 42 U.S.C. § 1320a-7(a) (mandatory exclusion), or 42 U.S.C. § 1320a-7(b) (permissive exclusion).

d. Any liability to the United States (or its agencies) for any conduct other than the Covered Conduct;

e. Any liability based upon such obligations as are created by this Agreement;

iv. In the event that the United States opts to rescind this Agreement within

30 days of the date it becomes Effective (see paragraph Exxiii) , Cocco agrees not to plead, argue, or otherwise raise any defenses under the theories of statute of limitations, laches, estoppel, or similar theories, to any civil or administrative claims that (a) are filed by the United States within 180 calendar days of written notification to Cocco that this Agreement has been rescinded, and (b) relate to the Covered Conduct, except to the extent these defenses were available on January 7, 2008.

v. Cocco waives and shall not assert any defenses Cocco 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 the United States concerning the characterization of the Settlement Amount for purposes of the Internal Revenue laws, Title 26 of the United States Code.

vi. Cocco fully and finally releases the United States, its agencies, employees, servants, and agents from any claims (including attorney's fees, costs, and expenses of every kind and however denominated) that Cocco has asserted, could have asserted, or may assert in the future against the United States, its agencies, employees, servants, and agents, related to the Covered Conduct and the United States' investigation and prosecution thereof.

vii. The Settlement Amount shall not be decreased as a result of the denial of claims for payment now being withheld from payment by any Medicare carrier or intermediary

or any state payer, related to the Covered Conduct; and Cocco agrees not to resubmit to any Medicare carrier or intermediary or any state payer any previously denied claims related to the Covered Conduct, and agrees not to appeal any such denials of claims.

viii. Cocco 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. §§ 1395-1395hhh and 1396-1396v; and the regulations and official program directives promulgated thereunder) incurred by or on behalf of Cocco, 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 Medicare Program, Medicaid Program, TRICARE Program, and Federal Employees Health Benefits Program (FEHBP):

- (1) the matters covered by this Agreement;
- (2) the United States’ audit(s) and civil investigation(s) of the matters covered by this Agreement;
- (3) Cocco’s investigation, defense, and corrective actions undertaken in response to the United States’ audit(s) and civil 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 Cocco makes to the United States pursuant to this Agreement, including costs and attorneys fees; and

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

c. Treatment of Unallowable Costs Previously Submitted for Payment: Cocco further agrees that within 90 days of the Effective Date of this Agreement it shall identify to applicable Medicare and TRICARE fiscal intermediaries, carriers, and/or contractors, and Medicaid and FEHBP fiscal agents, any Unallowable Costs (as defined in this Paragraph) included in payments previously sought from the United States, or any State Medicaid program, including, but not limited to, payments sought in any cost reports, cost statements, information reports, or payment requests already submitted by Cocco 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. Cocco agrees that the United States, at a minimum, shall be entitled to recoup from Cocco 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.

Any payments due after the adjustments have been made shall be paid to the United States pursuant to the direction of the Department of Justice and/or the affected agencies.

The United States reserves its rights to disagree with any calculations submitted by Cocco or any of its subsidiaries or affiliates on the effect of inclusion of Unallowable Costs (as defined in this Paragraph) on Cocco 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 United States to audit, examine, or re-examine Cocco's books and records to determine that no Unallowable Costs have been claimed in accordance with the provisions of this Paragraph.

ix. Cocco agrees to cooperate fully and truthfully with the United States' investigation of individuals and entities not released in this Agreement. Upon reasonable notice, Cocco 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. Cocco agrees to furnish to the United States, upon request, complete and unredacted copies of all non-privileged documents, reports, memoranda of interviews, and records in its possession, custody, or control concerning any investigation of the Covered Conduct that it has undertaken, or that has been performed by its counsel or other agent.

x. 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 16 (waiver for beneficiaries paragraph), below.

xi. Cocco agrees that it 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 payors based upon the claims defined as Covered Conduct.

xii. Cocco 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 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 Cocco, 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 Cocco was or became indebted to on or after the date of this transfer, within the meaning of 11 U.S.C. § 548(a)(1).

xiii. If within 91 days of the Effective Date of this Agreement or of any payment made under this Agreement, Cocco 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 Cocco's debts, or seeking to adjudicate Cocco as bankrupt or insolvent; or (b) seeking appointment of a receiver, trustee, custodian, or other similar official for Cocco or for all or any substantial part of Cocco's assets, Cocco agrees as follows:

a. Cocco's obligations under this Agreement may not be avoided pursuant to 11 U.S.C. § 547, and Cocco shall not argue or otherwise take the position in any such case, proceeding, or action that: (i) Cocco's obligations under this Agreement may be avoided under 11 U.S.C. § 547; (ii) Cocco was insolvent at the time this Agreement was entered into, or became insolvent as a result of the payment made to the United States; or (iii) the mutual promises, covenants, and obligations set forth in this Agreement do not constitute a contemporaneous exchange for new value given to Cocco.

b. If Cocco'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, the United States, at its sole option, may rescind the releases in this Agreement and bring any civil and/or administrative claim, action, or proceeding against Cocco for the claims that would otherwise be covered by the releases provided in Paragraphs 2 - 3, above. Cocco agrees that (i) any such claims, actions, or proceedings brought by the United States (including any proceedings to exclude Cocco from participation in Medicare, Medicaid, or other Federal health care programs) 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 Cocco shall not argue or otherwise contend that the United States' claims, actions, or proceedings are subject to an automatic stay; (ii) Cocco 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 the United States within 180 calendar days of written notification to Cocco that the releases have

been rescinded pursuant to this Paragraph, except to the extent such defenses were available on January 7, 2008; and (iii) the United States has a valid claim against Cocco in the amount of \$3,919,086.84, and the United States may pursue its claim in the case, action, or proceeding referenced in the first clause of this Paragraph, as well as in any other case, action, or proceeding.

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

xiv. 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.

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

xvi. This Agreement is governed by the laws of the United States. The Parties agree that the exclusive jurisdiction and venue for any dispute arising between and among the Parties under this Agreement is the United States District Court for the Eastern District of Pennsylvania.

xvii. For purposes of construction, this Agreement shall be deemed to have been drafted by all Parties to this Agreement and shall not, therefore, be construed against any Party for that reason in any subsequent dispute.

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

xix. The individuals signing this Agreement on behalf of Cocco represent and

warrant that they are authorized by Cocco to execute this Agreement. The United States signatories represent that they are signing this Agreement in their official capacities and that they are authorized to execute this Agreement.

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

xxi. This Agreement is binding on Cocco's successors, transferees, heirs, and assigns.

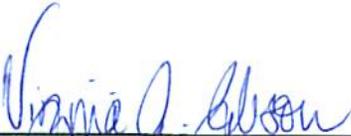
xxii. All parties consent to the United States' disclosure of this Agreement, and information about this Agreement, to the public.

xxiii. 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 UNITED STATES OF AMERICA

PATRICK L. MEEHAN  
United States Attorney  
Eastern District of Pennsylvania

DATED: 3.28.08 BY:

  
\_\_\_\_\_  
Virginia A. Gibson  
Assistant United States Attorney  
Chief, Civil Division

DATED: 3/25/08 BY:

  
\_\_\_\_\_  
Susan Dein Bricklin  
Assistant United States Attorney

THE U. S. DEPARTMENT OF HEALTH AND HUMAN SERVICES

DATED: 3/21/08 BY:

  
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Gregory E. Demske  
Assistant Inspector General for Legal Affairs  
Office of Counsel to the Inspector General  
Office of Inspector General  
United States Department of Health and Human Services

Cocco - DEFENDANT

DATED: 3/4/08 BY: Carlo A. Cocco for Cocco Brothers  
Cocco Brothers and Carlo A. Cocco

DATED: 3/4/08 BY: Taras M. Wochok  
Taras M. Wochok, Esq.  
Counsel for Cocco Brothers and Carlo A. Cocco