

SETTLEMENT AGREEMENT

This Settlement Agreement (Agreement) is entered into among 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), TRICARE Management Activity (TMA), through its General Counsel, and the Railroad Retirement Board (collectively, the United States), American Sleep Medicine, LLC (ASM), and Daniel Purnell (Relator) (hereafter collectively referred to as the Parties), through their authorized representatives.

RECITALS

A. ASM is headquartered in Jacksonville, Florida, and operates 19 sleep diagnostic centers throughout the United States.

B. On February 4, 2010, Daniel Purnell filed a *qui tam* action in the United States District Court for the Northern District of California, captioned *United States ex rel. Purnell v. Am. Sleep Medicine, LLC*, No. CV-10-510, pursuant to the *qui tam* provisions of the False Claims Act, 31 U.S.C. § 3730(b). Purnell filed an Amended Complaint on July 2, 2010. On April 12, 2011, the case was transferred to the Western District of Kentucky, and assigned docket number 3:11-CV-235-S (the Civil Action). In the Civil Action, the Relator alleges, in general, that ASM violated the False Claims Act by submitting claims to Medicare and other federal healthcare programs for sleep diagnostic services that were not eligible for payment because the diagnostic tests were performed by individuals who lacked the required license, certification, or credentials.

C. The United States contends that ASM 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. §§ 1395-1395kkk-1, the TRICARE Program, 10 U.S.C. §§ 1071-1110a, and the Railroad Retirement Medicare Program, administered under the Railroad Retirement Act of 1974, 45 U.S.C. §§ 231-231v, by the United States Railroad Retirement Board.

D.

1. The United States contends that it has certain civil claims against ASM arising from claims for sleep diagnostic testing services that ASM submitted or caused to be submitted to Medicare Part B, TRICARE, and the Railroad Retirement Medicare Program during the period from January 1, 2004 through December 31, 2011. The United States contends that claims submitted during this period were false because the diagnostic testing services were performed by technicians who lacked the license, certification, or credentials required under 42 C.F.R. § 410.33(c), TRICARE Policy Manual 6010.57-M (Feb. 1, 2008), § 19.1, and TRICARE Policy Manual, 6010.54-M, Chap. 11, § 12.1(II)(C)(3) (Aug. 1, 2002). The conduct in this Paragraph is referred to below as the Covered Conduct.
2. The Covered Conduct does not include claims submitted by the Rancho Cucamonga Sleep Lab beginning on or after October 4, 2007.

E. This Settlement Agreement is neither an admission of liability by ASM nor a concession by the United States that its claims are not well-founded.

F. Relator claims entitlement under 31 U.S.C. § 3730(d) to a share of the proceeds of this Settlement Agreement and to Relator's reasonable expenses, attorneys' fees and costs.

To avoid the delay, uncertainty, inconvenience, and expense of protracted litigation of the above claims, and in consideration of the mutual promises and obligations of this Settlement Agreement, the Parties agree and covenant as follows:

TERMS AND CONDITIONS

1. ASM shall pay to the United States fifteen million, three hundred one thousand, three hundred forty-one dollars (\$15,301,341) (the Settlement Amount), by electronic funds transfer, pursuant to written instructions to be provided to ASM's undersigned counsel by the Department of Justice or the U.S. Attorney's Office for the Western District of Kentucky. ASM shall pay two million, three hundred seventy thousand dollars (\$2,370,000) of the Settlement Amount not later than five (5) business days after the Effective Date of this Agreement. The remainder of the Settlement Amount (twelve million, nine hundred thirty-one thousand, three hundred forty-one dollars (\$12,931,341)) must be paid not later than the sooner of either: (1) 60 days after the Effective Date of this Agreement; or (2) 10 days after the date ASM receives funds from a financial institution pursuant to a loan made for the purpose of fulfilling ASM's payment obligations under this Agreement.

2. Conditioned upon the United States receiving the Settlement Amount payments from ASM, the United States agrees that it shall pay to Relator by electronic funds transfer 17 percent of each such payment received under the Settlement Agreement as soon as feasible after receipt of the payment.

3. In full and final settlement of Relator's claims pursuant to 31 U.S.C. § 3730(h), ASM shall pay to the Relator fifty thousand dollars (\$50,000) by electronic funds transfer, pursuant to written instructions to be provided by Counsel for Relator. The \$50,000 must be paid not later than five (5) business days after the Effective Date of this Agreement. ASM also

shall pay to the Relator eighty thousand, eight hundred fifty dollars (\$80,850) for Relator's Expenses and Attorneys' Fees and Costs pursuant to 31 U.S.C. § 3730(d)(1). The \$80,850 shall be paid by electronic funds transfer, pursuant to written instructions to be provided by Counsel for Relator, and shall be paid not later than five (5) business days after the Effective Date of this Agreement.

4. Subject to the exceptions in Paragraph 8 (concerning excluded claims) below, and conditioned upon ASM's full payment of the Settlement Amount, the United States releases ASM from any civil or administrative monetary claim the United States has 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.

5. Subject to the exceptions in Paragraph 8 below, and conditioned upon ASM's full payment of the Settlement Amount, Relator, for himself and for his heirs, successors, attorneys, agents, and assigns, releases ASM from any civil monetary claim the relator has on behalf of the United States for the Covered Conduct under the False Claims Act, 31 U.S.C. §§ 3729-3733.

6. In consideration of the obligations of ASM in this Agreement and the Corporate Integrity Agreement (CIA), entered into between OIG-HHS and ASM, conditioned upon ASM's full payment of the Settlement Amount, the OIG-HHS agrees to release and refrain from instituting, directing, or maintaining any administrative action seeking exclusion from Medicare, Medicaid, and other Federal health care programs (as defined in 42 U.S.C. § 1320a-7b(f)) against ASM under 42 U.S.C. § 1320a-7a (Civil Monetary Penalties Law) or 42 U.S.C. § 1320a-7(b)(7) (permissive exclusion for fraud, kickbacks, and other prohibited activities) for the Covered Conduct, except as reserved in Paragraph 8 (concerning excluded claims), below, and as reserved

in this Paragraph. The OIG-HHS expressly reserves all rights to comply with any statutory obligations to exclude ASM from Medicare, Medicaid, and other Federal health care programs under 42 U.S.C. § 1320a-7(a) (mandatory exclusion) based upon the Covered Conduct. Nothing in this Paragraph precludes the OIG-HHS from taking action against entities or persons, or for conduct and practices, for which claims have been reserved in Paragraph 8, below.

7. In consideration of the obligations of ASM set forth in this Agreement, conditioned upon ASM's full payment of the Settlement Amount, TMA agrees to release and refrain from instituting, directing, or maintaining any administrative action seeking exclusion from the TRICARE Program against ASM under 32 C.F.R. § 199.9 for the Covered Conduct, except as reserved in Paragraph 8 (concerning excluded claims), below, and as reserved in this Paragraph. TMA expressly reserves authority to exclude ASM from the TRICARE Program under 32 C.F.R. §§ 199.9 (f)(1)(i)(A), (f)(1)(i)(B), and (f)(1)(iii), based upon the Covered Conduct. Nothing in this Paragraph precludes TMA or the TRICARE Program from taking action against entities or persons, or for conduct and practices, for which claims have been reserved in Paragraph 8, below.

8. Notwithstanding the releases given in paragraphs 4 through 7 of this Agreement, or any other term of this Agreement, the following claims of the United States are specifically reserved and are not released:

- a. Any 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;

- d. Any liability to the United States (or its agencies) for any conduct other than the Covered Conduct;
- e. Any liability based upon obligations created by this Agreement;
- f. Any liability for express or implied warranty claims or other claims for defective or deficient products or services, including quality of goods and services;
- g. Any liability for failure to deliver goods or services due;
- h. Any liability for personal injury or property damage or for other consequential damages arising from the Covered Conduct; and
- i. Any liability of individuals.

9. Relator and his heirs, successors, attorneys, agents, and assigns shall not object to this Agreement but agree and confirm that this Agreement is fair, adequate, and reasonable under all the circumstances, pursuant to 31 U.S.C. § 3730(c)(2)(B). Conditioned upon Relator's receipt of the payment described in Paragraph 2, Relator and his heirs, successors, attorneys, agents, and assigns fully and finally release, waive, and forever discharge the United States, its agencies, officers, agents, employees, and servants, from any claims arising from the filing of the Civil Action or under 31 U.S.C. § 3730, and from any claims to a share of the proceeds of this Agreement and/or the Civil Action.

10. Relator, for himself, and for his heirs, successors, attorneys, agents, and assigns, releases ASM, and its officers, agents, and employees, from any liability to Relator arising from the filing of the Civil Action, or under 31 U.S.C. § 3730(d) for expenses or attorney's fees and costs.

11. ASM waives and shall not assert any defenses ASM 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.

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

13. 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, TRICARE, or Railroad Retirement Medicare Program or any state payer, related to the Covered Conduct; and ASM agrees not to resubmit to any Medicare carrier or intermediary, TRICARE, or Railroad Retirement Medicare Program or any state payer any previously denied claims related to the Covered Conduct, and agrees not to appeal any such denials of claims.

14. ASM agrees to the following:

- a. Unallowable Costs Defined: 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. §§ 1395-1395kkk-1 and 1396-

1396w-5; and the regulations and official program directives promulgated thereunder) incurred by or on behalf of ASM, its present or former officers, directors, employees, shareholders, and agents in connection with:

- (1) the matters covered by this Agreement;
- (2) the United States' audit(s) and civil and any criminal investigation(s) of the matters covered by this Agreement;
- (3) ASM's investigation, defense, and corrective actions undertaken in response to the United States' audit(s) and civil and 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 ASM makes to the United States pursuant to this Agreement and any payments that ASM may make to Relator, including costs and attorney's 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, are unallowable costs for government contracting purposes and under the Medicare Program, Medicaid Program, TRICARE Program, and Federal Employees Health

Benefits Program (FEHBP) (hereinafter referred to as Unallowable Costs). However, nothing in this paragraph 14.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 ASM.

b. Future Treatment of Unallowable Costs: Unallowable Costs shall be separately determined and accounted for by ASM, and ASM 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 ASM or any of its subsidiaries or affiliates to the Medicare, Medicaid, TRICARE, or FEHBP Programs.

c. Treatment of Unallowable Costs Previously Submitted for Payment: ASM 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 ASM 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. ASM agrees that the United States, at a minimum, shall be entitled to recoup from ASM 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 ASM or any of its subsidiaries or affiliates on the effect of inclusion of Unallowable Costs (as defined in this Paragraph) on ASM 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 ASM's books and records to determine that no Unallowable Costs have been claimed in accordance with the provisions of this Paragraph.

15. ASM agrees to cooperate fully and truthfully with the United States' investigation of individuals and entities not released in this Agreement. Upon reasonable notice, ASM 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. ASM further 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 another on its behalf.

16. 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 17 (waiver for beneficiaries paragraph), below.

17. ASM 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.

18. Upon receipt of the payment described in Paragraph 1, above, the Relator and United States shall promptly sign and file a Joint Stipulation of Dismissal in the Civil Action pursuant to Rule 41(a)(1), with prejudice as to the Relator with respect to all claims against ASM, and with prejudice to the United States as to the Covered Conduct and without prejudice to the United States as to all other claims.

19. Each Party shall bear its own legal and other costs incurred in connection with this matter, including the preparation and performance of this Agreement.

20. Each party and signatory to this Agreement represents that it freely and voluntarily enters in to this Agreement without any degree of duress or compulsion.

21. This Agreement is governed by the laws of the United States. The exclusive jurisdiction and venue for any dispute relating to this Agreement is the United States District Court for the Western District of Kentucky. For purposes of construing this Agreement, 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.

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

23. The undersigned counsel represent and warrant that they are fully authorized to execute this Agreement on behalf of the persons and entities indicated below.

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

25. This Agreement is binding on ASM's successors, transferees, and assigns.

26. This Agreement is binding on Relator's successors, transferees, heirs, and assigns.

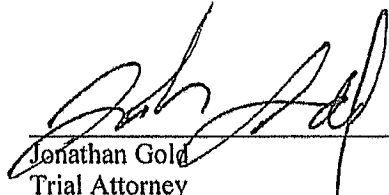
27. All parties consent to the United States' disclosure of this Agreement, and information about this Agreement, to the public.

28. 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

DATED: 12/17/12

BY: _____


Jonathan Gold
Trial Attorney
Commercial Litigation Branch
Civil Division
United States Department of Justice

DATED: _____

BY: _____

L. Jay Gilbert
Assistant United States Attorney
Western District of Kentucky

DATED: _____

BY: _____

Robert K. DeConti
Chief Counsel to the Assistant Inspector General
Office of Counsel to the Inspector General
Office of Inspector General
United States Department of
Health and Human Services

DATED: _____

BY: _____

Paul J. Hutter
General Counsel
TRICARE Management Activity
United States Department of Defense

DATED: _____

BY: _____

Martin J. Dickman
Inspector General
Railroad Retirement Board

THE UNITED STATES OF AMERICA

DATED: _____

BY: _____

Jonathan Gold
Trial Attorney
Commercial Litigation Branch
Civil Division
United States Department of Justice

DATED: 17 Dec. 2012

BY: _____

L. Jay Gilbert
L. Jay Gilbert
Assistant United States Attorney
Western District of Kentucky

DATED: _____

BY: _____

Robert K. DeConti
Chief Counsel to the Assistant Inspector General
Office of Counsel to the Inspector General
Office of Inspector General
United States Department of
Health and Human Services

DATED: _____

BY: _____

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General Counsel
TRICARE Management Activity
United States Department of Defense

DATED: _____

BY: _____

Martin J. Dickman
Inspector General
Railroad Retirement Board

THE UNITED STATES OF AMERICA

DATED: _____

BY: _____

Jonathan Gold
Trial Attorney
Commercial Litigation Branch
Civil Division
United States Department of Justice

DATED: _____

BY: _____

L. Jay Gilbert
Assistant United States Attorney
Western District of Kentucky

DATED: 12/17/12

BY: Robert K. DeConti

Robert K. DeConti
Chief Counsel to the Assistant Inspector General
Office of Counsel to the Inspector General
Office of Inspector General
United States Department of
Health and Human Services

DATED: _____

BY: _____

Paul J. Hutter
General Counsel
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United States Department of Defense

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Inspector General
Railroad Retirement Board

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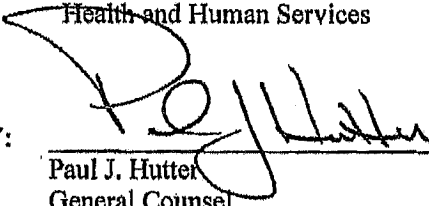
DATED: _____

BY: _____

Robert K. DeConti
Chief Counsel to the Assistant Inspector General
Office of Counsel to the Inspector General
Office of Inspector General
United States Department of
Health and Human Services

DATED: 12/11/12

BY: _____


Paul J. Hutter
General Counsel
TRICARE Management Activity
United States Department of Defense

DATED: _____

BY: _____

Martin J. Dickman
Inspector General
Railroad Retirement Board

THE UNITED STATES OF AMERICA

DATED: _____

BY: _____

Jonathan Gold
Trial Attorney
Commercial Litigation Branch
Civil Division
United States Department of Justice

DATED: _____

BY: _____

L. Jay Gilbert
Assistant United States Attorney
Western District of Kentucky

DATED: _____

BY: _____

Robert K. DeConti
Chief Counsel to the Assistant Inspector General
Office of Counsel to the Inspector General
Office of Inspector General
United States Department of
Health and Human Services


DATED: _____

BY: _____

Paul J. Hutter
General Counsel
TRICARE Management Activity
United States Department of Defense

DATED: 7 Dec 2012

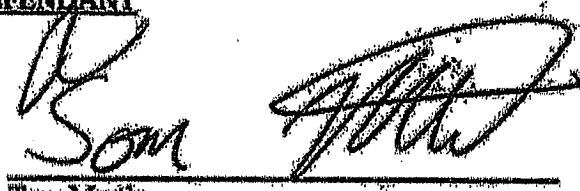
BY: _____


Martin J. Dickman
Inspector General
Railroad Retirement Board

DEFENDANT

DATED: 12-7-12

BY:



Tom Martin
President of ASM

DATED: 12-7-2012

BY:



Robert J. Benvenuti III
Barnett Benvenuti & Butler
Attorneys at Law
489 East Main Street
Suite 300
Lexington, Kentucky 40507

Counsel for ASM

RELATOR


DATED: 2012 DEC 06

BY:


Daniel Purnell

DATED: 12/6/12

BY:


Elaine Stromgren
James, Hoyer, Newcomer & Smiljanich, P.A.
4830 West Kennedy Boulevard
One Urban Centre, Suite 550
Tampa, Florida 33609

Counsel for Daniel Purnell