

SETTLEMENT AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND ORTHOPAEDICS, SPINE, AND SPORTS MEDICINE, LLC D/B/A TOTAL ORTHOPEDICS & SPORTS MEDICINE

BACKGROUND

1. The parties to this settlement agreement (the “Settlement Agreement”) are the United States of America and Orthopaedics, Spine, and Sports Medicine, LLC, d/b/a Total Orthopedics & Sports Medicine (“Total Orthopedics”).

2. Total Orthopedics owns and operates medical centers that provide orthopedic and sports medicine services, including sports medicine, pain management, joint replacement surgery, and spinal surgery, with multiple office locations in the Eastern District of New York.

3. This matter was initiated by the United States Attorney’s Office for the Eastern District of New York (“U.S. Attorney’s Office”), a component of the Department of Justice, after receiving a complaint in 2020 from an individual, S.W.¹, who is deaf, alleging that Total Orthopedics violated Title III of the Americans with Disabilities Act of 1990 (“Title III” of the “ADA”), 42 U.S.C. §§ 12181-89, as amended, by failing to provide her with effective communication, including a qualified sign-language interpreter, during a medical appointment in January 2020.

INVESTIGATION AND DETERMINATIONS

4. The U.S. Attorney’s Office is authorized to investigate alleged violations of Title III of the ADA. 42 U.S.C. § 12188(b)(1)(A); 28 C.F.R. § 36.502. It also has the authority to, where appropriate, negotiate voluntary settlements, and to bring civil actions enforcing Title III of the ADA should the terms of the settlement be breached. 42 U.S.C. § 12188(b)(1)(B); 28 C.F.R. § 36,503.

¹ S.W. is identified by initials only in this Settlement Agreement to protect her confidentiality.

5. Complainant S.W. is deaf and is an individual with a “disability” within the meaning of 42 U.S.C. § 12102; 28 C.F.R. § 36.104, and uses American Sign Language as her preferred method of communication.

6. Total Orthopedics is a “public accommodation” within the meaning of Title III of the ADA, 42 U.S.C. § 12181(7)(F), and its implementing regulations, 28 C.F.R. § 36.104, as it owns and operates places of public accommodation, including medical centers and professional offices of healthcare providers.

7. Title III of the ADA prohibits public accommodations from discriminating on the basis of disability in the full and equal employment of their goods, services, facilities, privileges, advantages, or accommodations, at places of public accommodation, including medical centers. 42 U.S.C. § 12182(a); 28 C.F.R. § 36.201(a). Discrimination includes failing to take such steps necessary to ensure that no individual with a disability is excluded, denied services, segregated, or otherwise treated differently than any other individual because of the absence of Auxiliary Aids and Services, unless the public accommodation can demonstrate that taking those steps would fundamentally alter the nature of the goods and services being offered, or would result in an undue burden. 42 U.S.C. § 12182(b)(2)(A)(iii); 28 C.F.R. § 36.303.

8. The United States commenced its investigation after receiving a complaint from S.W. alleging that Total Orthopedics failed to provide S.W. with a qualified sign-language interpreter necessary for effective communication during a medical appointment on January 14, 2020. The United States received and reviewed documentation regarding Total Orthopedics’ policies, training, and implementation of services for individuals who are deaf or hard-of-hearing, and interviewed three Total Orthopedics employees.

9. Total Orthopedics fully cooperated with the United States’ investigation in this

matter. The United States has concluded that Total Orthopedics failed to provide appropriate Auxiliary Aids and Services to ensure effective communication with S.W., in violation of 42 U.S.C. § 12182(b)(2)(A)(iii); 28 C.F.R. § 36.303.

10. Total Orthopedics denies these allegations in their entirety. This Settlement Agreement does not constitute an admission of any liability, wrongdoing, or unlawful conduct any party. The parties expressly understand and agree that they have entered into this Settlement Agreement to avoid the costs and uncertainty of litigation.

DEFINITIONS

11. Auxiliary Aids and Services means: (1) Qualified Interpreters on-site or through video remote interpreting (VRI) services; notetakers; real-time computer-aided transcription services; written materials; exchange of written notes; telephone handset amplifiers; assistive listening devices; assistive listening systems; telephones compatible with hearing aids; closed caption decoders; open and closed captioning, including real-time captioning; voice, text, and video-based telecommunications products and systems, including text telephones (TTYs), videophones, and captioned telephones, or equally effective telecommunications devices; videotext displays; accessible electronic and information technology; or other effective methods of making aurally delivered information available to individuals who are deaf or hard-of-hearing; ... (3) Acquisition or modification of equipment devices; and (4) Other similar services and actions.” 28 C.F.R. § 36.303(b).

12. Qualified Interpreter means “an interpreter who, via a video remote interpreting (VRI) service or an on-site appearance, is able to interpret effectively, accurately, and impartially, both receptively and expressively, using any necessary specialized vocabulary. Qualified interpreters include, for example, sign language interpreters, oral transliterators, and cued-

language transliterators.” 28 C.F.R. § 36.104.

13. Patient shall be broadly construed to include any individual who is seeking or receiving the goods, services, facilities, privileges, advantages, or accommodations of Total Orthopedics.

14. Total Orthopedics Personnel means all employees, both full and part-time, and employees of independent contractors with contracts to work for or with Total Orthopedics, including nurses, physicians, social workers, activities department employees, administrative staff, technicians, admitting personnel, billing staff, security staff, therapists, and volunteers, who have or are likely to have, direct contact with Patients.

15. Effective Date means the date that this Settlement Agreement becomes fully executed.

DURATION OF AGREEMENT

16. This Settlement Agreement will be in effect for three (3) years from the Effective Date.

EQUITABLE RELIEF

Prohibition of Discrimination

17. Nondiscrimination: Pursuant to 42 U.S.C. § 12182(a), Total Orthopedics shall continue to provide Patients who are deaf or hard-of-hearing with the full and equal enjoyment of the services, privileges, facilities, advantages, and accommodations of Total Orthopedics as required by this Settlement Agreement and Title III of the ADA. Total Orthopedics shall also continue to provide appropriate Auxiliary Aids and Services, including Qualified Interpreters, where such Aids and Services are necessary to ensure effective communication with Patients.

Effective Communication

18. Appropriate Auxiliary Aids and Services: Consistent with 42 U.S.C. § 12182(b)(2)(A)(iii), Total Orthopedics will continue to provide appropriate Auxiliary Aids and Services necessary for effective communication with Patients after conducting the assessment described in the next Paragraph of this Settlement Agreement. When Total Orthopedics determines, in consultation with a particular Patient, that the Patient requires Auxiliary Aids and Services, Total Orthopedics will provide appropriate Auxiliary Aids and Services as soon as practicable.

19. Assessment for Effective Communication: The determination of appropriate Auxiliary Aids and Services will be made by Total Orthopedics Personnel in consultation with the Patient who is deaf or hard-of-hearing. The determination will consider all relevant facts and circumstances, including, for example, the Patient's communication skills and abilities, the nature and complexity of the communication and the timing, duration, and frequency with which the Auxiliary Aids and Services will be needed for effective communication throughout the Patient's visit. The assessment will include consideration of how Patient needs will be met given the reasonable possibility of delays and/or anticipated needs for flexibility based on Total Orthopedics' typical operations.

20. In-Person Qualified Interpreters: Some circumstances may require that Total Orthopedics provide an In-Person Qualified Interpreter to Patients who are deaf or hard-of-hearing. Such circumstances typically arise when the communication is particularly complex or lengthy. In such circumstances, Total Orthopedics will presume that an In-Person Qualified Interpreter is necessary for effective communication with a Patient when:

- a. discussing a Patient's symptoms for diagnostic purposes, and discussing medical

- conditions, medications, and medical history;
- b. explaining medical conditions, treatment options, tests, medications, surgery, and other procedures;
- c. providing a diagnosis or recommendation for treatment;
- d. communications immediately preceding, during, and immediately after a surgery or procedure and during physician's rounds;
- e. obtaining informed consent for treatment, surgery, or procedures;
- f. providing instructions for medications, post-treatment activities, and follow-up treatments; or
- g. discussing complex billing and insurance matters.

21. Video Remote Interpreting ("VRI"): In certain circumstances, it may be appropriate for Total Orthopedics to use VRI to communicate with a Patient who is deaf or hard-of-hearing. However, VRI shall not be used as a substitute when an In-person Qualified Interpreter is necessary or requested by a Patient. When using a VRI service, Total Orthopedics shall ensure that it provides real-time, full-motion video and audio with an uninterrupted connection; a sharply delineated image; a clear, audible transmission of voices; and adequate training to users of the technology so that they may quickly and efficiently set up and operate the VRI.

22. Restricted Use of Certain Persons to Facilitate Communication: Total Orthopedics will not rely on a minor friend or minor family member of the Patient to interpret in any circumstance. Total Orthopedics will not rely on an adult friend or adult family member of the Patient to interpret except in an emergency involving an imminent threat to the safety of an individual or the public where there is no interpreter available; or where the Patient specifically requests that the adult friend or adult family member interpret, the accompanying adult agrees to

provide such assistance, and reliance on that adult for such assistance is appropriate under the circumstances. In such circumstances, the Patient's request that an adult friend or adult family member interpret must be documented in the Refusal of Interpreter Services Form, appended to the Total Orthopedics administrative policy.

Policies

23. Provision of Total Orthopedics Administrative Policy: Within four (4) months of the Effective Date, Total Orthopedics will disseminate a copy to all Total Orthopedics Personnel of an administrative policy which reflects the terms of this Settlement Agreement. All Total Orthopedics Personnel who receive a copy of the policy will acknowledge receipt in writing. Total Orthopedics must maintain copies of the written acknowledgement in writing and make them available to the U.S. Attorney's Office for inspection, if requested, for the duration of the Settlement Agreement.

24. Provision of Total Orthopedics Administrative Policy to New Total Orthopedics Personnel: Within fourteen (14) days after new Total Orthopedics Personnel commences employment, Total Orthopedics will issue them a copy of its administrative policy, reflecting the terms of this Settlement Agreement. All Total Orthopedics Personnel who receive a copy of the Total Orthopedics administrative policy will acknowledge receipt in writing. Total Orthopedics must maintain copies of the written acknowledgement in writing and make them available to the U.S. Attorney's Office for inspection, if requested, for the duration of the Settlement Agreement.

25. Maintenance of Appropriate Policies: Total Orthopedics will maintain an appropriate set of policies that ensures compliance with the requirements of Title III of the ADA for provision of Auxiliary Aids and Services to Patients who are deaf or hard-of-hearing to ensure effective communication.

26. Designation of Staff Member: Within four (4) months of the Effective Date, Total Orthopedics will designate a specific staff member who will have overall supervisory responsibility to ensure deaf or hard-of-hearing Patients are provided with Auxiliary Aids and Services necessary to ensure effective communication and reflect that designation in its administrative policy.

Training

27. Revision of Total Orthopedics' Training Materials: Within four (4) months of the Effective Date, Total Orthopedics will revise its training materials to include all training topics to incorporate the requirements of this Settlement Agreement, including:

- a. the various degrees of hearing impairment, language, and cultural diversity in the deaf community;
- b. prompt identification of communication needs of persons who are deaf or hard-of-hearing;
- c. procedures for documenting requests for and provision of Auxiliary Aids and Services in Patient charts;
- d. types of Auxiliary Aids and Services available and how to secure them in a timely manner;
- e. the proper use and role of Qualified Interpreters;
- f. criteria to be used in order to select a Qualified Interpreter;
- g. the proper use and role of VRI;
- h. making and receiving calls through TTYs and the relay service;
- i. securing Qualified Interpreter or VRI services as quickly as possible when necessary;
- j. the restricted use of certain persons, such as minor friends and minor family members

of Patients, to communicate with deaf and hard-of-hearing Patients; and

k. any other applicable requirements of the ADA.

28. Annual Training: Within four (4) months of the Effective Date, and annually during the term of this Settlement Agreement, Total Orthopedics will provide training to all Total Orthopedics Personnel regarding the provision of Auxiliary Aids and Services to deaf and hard-of-hearing Patients, consistent with the requirements of Title III of the ADA. The training will include the topics set forth in this Settlement Agreement.

29. Initial Training to New Total Orthopedics Personnel: Within thirty (30) days of commencing employment, all new Total Orthopedics Personnel will receive training regarding the provision of Auxiliary Aids and Services to deaf and hard-of-hearing Patients consistent with the requirements of Title III of the ADA. The training will include the topics set forth in this Settlement Agreement.

30. Training Records: Total Orthopedics will maintain attendance sheets for the trainings described in this Settlement Agreement. Those attendance sheets will include the names, signatures, and job titles of the attendees, as well as the date and time of the training session. Total Orthopedics will provide copies of the attendance sheets to United States, upon request, consistent with the requirements of this Settlement Agreement during the term of this Settlement Agreement.

Notice To Patients

31. Signs and Postings: Within four (4) months of the Effective Date, Total Orthopedics will prominently post and maintain signs of conspicuous size and print in all Total Orthopedics admitting areas and where a Patient's Bill of Rights is required by law to be posted. Such signs will inform Patients of their right to Auxiliary Aids and Services, inform Total Orthopedics Personnel of the requirement to provide Auxiliary Aids and Services, and provide information

about how to secure a Qualified Interpreter.

32. Website: Within four (4) months of the Effective Date, Total Orthopedics will include on its website its administrative policy, or a substantially similar policy statement, informing Patients who are deaf or hard-of-hearing of their right to request and obtain Auxiliary Aids and Services and how to file a complaint with Total Orthopedics and through ada.gov if Total Orthopedics does not provide requested Auxiliary Aids and Services.

Reporting, Monitoring, and Violations

33. Initial Calls with Patients: Within four (4) months of the Effective Date, Total Orthopedics will begin implementing the following protocol. On the first call with any new Patient, the Total Orthopedics Personnel taking the call will ask: "Do you have a communication disability that requires an Auxiliary Aid or Service, like a qualified sign language interpreter?" If the response is in the affirmative, the employee will ask follow-up questions to determine the needed accommodation. The response will be reflected in the Patient's medical chart.

34. Database: Within four (4) months of the Effective Date, Total Orthopedics will maintain a database that records any offer Total Orthopedics makes to deaf and hard-of-hearing Patients for Auxiliary Aids and Services, as well as the Patients' responses, including acceptances and declinations of those Auxiliary Aids and Services. During the term of this Settlement Agreement, Total Orthopedics will monitor and assess that information regularly (at least annually) to ensure that Total Orthopedics is providing the requisite services.

35. Initial Materials to the United States Attorney's Office: Within four (4) months of the Effective Date, Total Orthopedics will provide the United States Attorney's Office for the Eastern District of New York with:

- a. a copy of the administrative policy incorporating the requirements set forth in this

Settlement Agreement.

- b. a copy of all training materials used to train Total Orthopedics Personnel as required in this Settlement Agreement;
- c. a copy of all training attendance sheets required by this Settlement Agreement;
- d. photographs of the signs posted in its offices required by this Settlement Agreement; and
- e. a link to the portion of the Total Orthopedics website posting its policies for deaf and hard-of-hearing Patients.

36. Additional Materials to the United States Attorney's Office: Beginning six (6) months after the Effective Date, and annually thereafter for a period of three (3) years after the Effective Date, Total Orthopedics will provide the U.S. Attorney's Office for the Eastern District of New York with:

- a. a copy of all training attendance sheets required by this Settlement Agreement; and
- b. the data collected about deaf and hard-of-hearing Patients who either accept or decline Auxiliary Aids and Services required by this Settlement Agreement;
- c. information on any changes Total Orthopedics makes to its policies (including its administrative policy) and/or practices regarding the provision of Auxiliary Aids and Services to deaf and hard-of-hearing Patients; and
- d. information about any lawsuit, complaint, or formal charge alleging that Total Orthopedics failed to provide Auxiliary Aids and Services to deaf and hard-of-hearing Patients.

37. Breach of Settlement Agreement: In the event Total Orthopedics breaches this Settlement Agreement, the U.S. Attorney's Office for the Eastern District of New York shall

provide written notice to counsel for Total Orthopedics as specified in Paragraph 38 below, and Total Orthopedics shall have ten (10) business days from the date of such notice to cure said breach, to the extent such breach is curable. No action or proceeding shall be initiated to enforce the terms of this Settlement Agreement unless notice is provided and the breach is not timely cured in accordance with this Paragraph.

38. Notices: All notices, requests, demands, and other communications hereunder shall be in writing and shall be delivered by e-mail and overnight mail, and deemed delivered the following business day after mailing, duly addressed as indicated below, or to such other changed address as the party may subsequently designate.

To the U.S. Attorney's Office:

Ekta R. Dharia, Esq.
United States Attorney's Office
Eastern District of New York
271-A Cadman Plaza East
Brooklyn, New York 11201
ekta.dharia@usdoj.gov

To Total Orthopedics:

Anthony Rossano
Chief Financial Officer
115 Eileen Way
Syosset, New York 11791
arossano@tosmny.com

With a copy to

Andrew L. Zwerling, Esq.
Nicholas M. Summo, Esq.
111 Great Neck Road, 6th Floor
Great Neck, New York 11021
azwerling@garfunkelwild.com
nsummo@garfunkelwild.com

39. Representation by Counsel: Total Orthopedics acknowledges that it has retained legal counsel to review this Settlement Agreement, and has consulted said counsel concerning the terms and conditions of the Settlement Agreement. Total Orthopedics further acknowledges that it knowingly and voluntarily enters into this Agreement. As such, the parties acknowledge and agree that they participated jointly in the arms-length negotiation and preparation of this Settlement Agreement.

MONETARY RELIEF

40. Monetary Relief: Within thirty (30) days of the Effective Date, Total Orthopedics will pay Complainant S.W. One-Thousand Five-Hundred Dollars and Zero Cents (\$1,500.00). This payment is compensation to S.W. pursuant to 42 U.S.C. § 12188(b)(2)(B), for the effects of the discrimination alleged by S.W.

Dated: March 28, 2023
Brooklyn, New York

BREON PEACE
United States Attorney
Eastern District of New York
Counsel for the United States of America
271-A Cadman Plaza East
Brooklyn, New York 11201

By: 

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Dated: March 23, 2023

GARFUNKEL WILD, P.C.
111 Great Neck Road, 6th Floor
Great Neck, New York 11021
Counsel for Total Orthopedics
(As to form of Settlement Agreement)

By: 

~~Andrew L. Zwerling~~
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aswerling@garfunkelwild.com
nsummo@garfunkelwild.com

Dated: March 23, 2023
Syosset Neck, New York

ORTHOPAEDICS, SPINE, AND SPORTS
M 

By: 

~~Anthony Rosano~~
CFO

Title: _____