

SETTLEMENT AGREEMENT

I. PARTIES

This Settlement Agreement ("Agreement") is entered into between the United States of America ("United States"), acting through the Civil Division of the United States Department of Justice, the United States Attorney for the Middle District of Tennessee, and the Office of Inspector General of the Department of Health and Human Services ("OIG-HHS"), and the TRICARE Management Activity ("TMA") (formerly the Office of Civilian Health and Medical Program of the Uniformed Services ("OCHAMPUS")), through its General Counsel; Southeast Volusia Hospital District ("SEVHD") and Bert Fish Medical Center, Inc ("BFMC") (collectively referred to as "Bert Fish"); and the qui tam relator, Barry Steeley ("Relator") (the United States and all of the foregoing persons or entities are hereafter collectively referred to as "the Parties"), through their authorized representatives.

II. PREAMBLE

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

A. SEVHD is a special hospital tax district created by Special Act of the Florida Legislature in 1947. SEVHD owns Bert Fish Medical Center, an acute care hospital located at 401

*Civil Settlement Between United States
and Bert Fish*

Palmetto Street, New Smyrna Beach, Florida 32168.

B. Bert Fish Medical Center is managed and operated by BFMC, a Florida not-for-profit corporation whose sole member is SEVHD.

C. Bert Fish is a health care provider, and 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. §§1395-1395ggg (1999), and the TRICARE Program (also known as the Civilian Health and Medical Program of the Uniformed Services ("CHAMPUS")), 10 U.S.C. §§ 1071-1110, for the inpatient treatment of Medicare and CHAMPUS beneficiaries.

D. On or around August 25, 1997, the Relator filed a qui tam complaint under seal alleging violations of the False Claims Act by Bert Fish in the case styled United States ex rel. Barry Steeley v. [UNDER SEAL], et al., Civil Action No. 3:97-0893 (M.D. Tenn.) (UNDER SEAL) (the "Qui Tam Action").

E. The United States has investigated the allegations in the Qui Tam Action. Based on its investigation, the United States contends that Bert Fish submitted or caused to be submitted claims for payment to Medicare and CHAMPUS.

F. Medicare and CHAMPUS payments to a hospital for inpatient treatment rendered to a beneficiary generally are based upon the beneficiary's "principal diagnosis," as set forth by the hospital.

G. The Medicare and CHAMPUS Programs rely upon participating hospitals to properly indicate the principal diagnosis through the use of standard diagnosis codes.¹

H. The United States conducted an investigation into inpatient payment claims submitted to Medicare by Bert Fish for patients with the principal diagnosis codes of 482.83 (pneumonia due to gram negative bacteria); 482.89 (pneumonia other specified bacteria); and 507.0 (food/vomit pneumonitis). The United States also investigated the allegations in the Qui Tam Action regarding inpatient payment claims submitted to CHAMPUS by Bert Fish for patients with the principal diagnosis codes for Diagnostic Related Groups (DRG) 014 (specific cerebrovascular disorders except TIA), 121 (circulatory disorders w/ AMI & major comp, discharged alive), 127 (heart failure and shock), and 132 (atherosclerosis w/ cc).

I. Based on its investigation, the United States contends that it has certain civil claims against Bert Fish under the False Claims Act, 31 U.S.C. §§ 3729-3733, and other federal statutes and/or common law doctrines as more specifically identified in paragraph 4 below, for engaging in the following alleged conduct during the period from September 1, 1994 through September 30, 1998 with regard to the Medicare claims and January

¹ International Classification of Diseases, 9th Revision, Clinical Modification ("ICD-9-CM").

1, 1993 through December 31, 1997 with regard to the CHAMPUS claims (the "Covered Period"): Bert Fish submitted or caused to be submitted claims to Medicare with the principal diagnosis codes of 482.83 (pneumonia due to gram negative bacteria); 482.89 (pneumonia other specified bacteria); and 507.0 (food/vomit pneumonitis) that were not supported by the corresponding medical records, and Bert Fish submitted or caused to be submitted claims to CHAMPUS for patients with the principal diagnosis codes for Diagnostic Related Groups (DRG) 014 (specific cerebrovascular disorders except TIA), 121 (circulatory disorders w/ AMI & major comp, discharged alive), 127 (heart failure and shock), and 132 (atherosclerosis w/ cc) that were not supported by the corresponding medical records. The United States alleges that, as a result of these claims, Bert Fish received payments from Medicare and CHAMPUS to which it was not entitled. The conduct referenced in this paragraph is hereinafter referred to as the "Covered Conduct."

J. The United States also contends that it has certain administrative claims against Bert Fish under the provisions of permissive exclusion from Medicare, Medicaid and other federal health care programs, 42 U.S.C. § 1320a-7(b), and the provisions for civil monetary penalties, 42 U.S.C. § 1320a-7a, for the Covered Conduct.

K. Bert Fish has provided documents and information r

United States in response to the government's investigation of the Covered Conduct, including patient files for which claims were submitted to the Medicare Program with the principal diagnosis codes of 482.83 (pneumonia due to gram negative bacteria); 482.89 (pneumonia other specified bacteria); and 507.0 (food/vomit pneumonitis), and to CHAMPUS for patients with the principal diagnosis codes for Diagnostic Related Groups (DRG) 014 (specific cerebrovascular disorders except TIA), 121 (circulatory disorders w/ AMI & major comp, discharged alive), 127 (heart failure and shock), and 132 (atherosclerosis w/ cc). Bert Fish represents that such response has been truthful, accurate, and complete to the best of its knowledge and ability.

L. Bert Fish does not admit the contentions of the United States as set forth in Paragraphs I and J above and as set forth in the Qui Tam Action.

M. To avoid the delay, uncertainty, inconvenience and expense of protracted litigation of these claims, the Parties reach a full and final settlement as set forth below.

III. TERMS AND CONDITIONS

NOW, THEREFORE, in consideration of the mutual promises, covenants, and obligations set forth below, and for good and valuable consideration as stated herein, the Parties agree as follows:

1. Bert Fish agrees to pay to the United States \$293,334

(the "Settlement Amount"). The Settlement Amount shall be reduced by \$164,289, which reflects a payment for the Covered Period made by Bert Fish to the Medicare fiscal intermediary, First Coast Service Options, in March 2001. Bert Fish agrees to make an additional payment of \$129,045 (the "Additional Payment") which equals the difference between the Settlement Amount (\$293,334) and the amount it has already paid to the fiscal intermediary (\$164,289). Bert Fish shall make the Additional Payment as follows: Bert Fish shall make the Additional Payment by electronic funds transfer pursuant to written instructions to be provided by the Civil Division of the United States Department of Justice. Bert Fish agrees to make this electronic funds transfer no later than December 7, 2001.

2. Bert Fish agrees to cooperate fully and in good faith with the United States in the administrative, civil or criminal investigation or prosecution of any person concerning the Covered Conduct, and concerning similar matters involving other hospitals and others in connection with the Qui Tam Action, by providing accurate, truthful, and complete information whenever, wherever, to whomever and in whatever form the United States reasonably request. Upon reasonable notice, Bert Fish shall make reasonable efforts to facilitate access to, and encourage the cooperation of, its directors, officers, and employees for interviews and testimony, consistent with the rights and privileges of such

individuals, and shall furnish to the United States, upon reasonable request, all non-privileged documents and records in its possession, custody or control relating to the Covered Conduct.

3. Bert Fish releases the United States, HHS, TMA and each of their agencies, officers, agents, employees, and contractors and their employees and Relator from any and all claims, causes of action, adjustments, and set-offs of any kind arising out of or pertaining to the Covered Conduct, including the investigation of the Covered Conduct and this Agreement.

4. Subject to the exceptions in Paragraph 5 below, in consideration of the obligations of Bert Fish set forth in this Agreement, conditioned upon Bert Fish's payment in full of the Additional Payment, the United States (on behalf of itself, its officers, agents, and its agencies and departments referenced above in paragraph 3), agrees to release Bert Fish, and each of its predecessors, successors, assigns, and affiliates and all of its current or former employees, officers, directors, and commissioners (all of the foregoing collectively referred to as the "Bert Fish Released Parties") from any civil or administrative monetary claim the United States has or may have 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, breach of contract and fraud, for the Covered Conduct. The United States expressly reserves any claims against any entities and individuals other than the Bert Fish Released Parties.

5. 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 Bert Fish and the Relator) are any and all of the following:

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

(2) Any criminal liability;

(3) Except as explicitly otherwise stated in this Agreement, any administrative liability, including mandatory exclusion from Federal health care programs;

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

(5) Any claims based upon such obligations as are created by this Agreement;

(6) Any express or implied warranty claims or other claims for defective or deficient products or services, including quality of goods and services, provided by Bert Fish; and

(7) Any claims based on a failure to deliver items or services billed.

6. Bert Fish waives and will not assert any defenses it may have to any criminal prosecution or administrative action relating to the Covered Conduct, which defenses may be based in whole or in part on a contention that, under the Double Jeopardy or Excessive Fines Clause of the Constitution, this Agreement bars a remedy sought in such criminal prosecution or administrative action. Bert Fish agrees that this Agreement is not punitive in purpose or effect. 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.

7. The Additional Payment that Bert Fish must pay pursuant to this Agreement by electronic wire transfer pursuant to Paragraph 1 above, 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 Bert Fish 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.

8. Bert Fish agrees to the following:

(a) Unallowable Costs Defined: that all costs (as defined in the Federal Acquisition Regulations (FAR) § 31.20

and in Titles XVIII and XIX of the Social Security Act, 42 U.S.C. §§ 1395-1395ggg and 1396-1396v, and the regulations and official program directives promulgated thereunder) incurred by or on behalf of Bert Fish, 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 investigations(s) of the matters covered by this Agreement,

(3) Bert Fish's investigation, defense, and any corrective actions undertaken in direct response to the United States' audit(s) and investigation in connection with the matters covered by this Agreement (including attorney's fees),

(4) the negotiation and performance of this Agreement, and

(5) the payment Bert Fish makes to the United States pursuant to this Agreement and any payments that Bert Fish may make to Relator, including costs and attorneys fees,

are unallowable costs on Government contracts and under the Medicare Program, Medicaid Program, TRICARE Program, Veterans Affairs Program (VA), and Federal Employees Health Benefits Program (FEHBP).

(All costs described or set forth in this Paragraph 8(a) are hereafter, "unallowable costs").

(b) Future Treatment of Unallowable Costs: These unallowable costs will be separately estimated and accounted for

by Bert Fish, and Bert Fish will 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 Bert Fish or any of its subsidiaries to the Medicare, Medicaid, TRICARE, VA, or FEHBP Programs.

(c) Treatment of Unallowable Costs Previously Submitted for Payment: Bert Fish further agrees that within 90 days of the effective date of this Agreement, it will identify to applicable Medicare and TRICARE fiscal intermediaries, carriers, and/or contractors, and Medicaid, VA, 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 Bert Fish or any of its subsidiaries, and will 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. Bert Fish agrees that the United States, at a minimum, will be entitled to recoup from Bert Fish any overpayment plus applicable interest as a result of the inclusion of such unallowable costs on

previously-submitted cost reports, information reports, cost statements, or request for payment.

Any payment 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 Bert Fish or any of its subsidiaries on the effect of inclusion of unallowable costs (as defined in this Paragraph) on Bert Fish or any of its subsidiaries' cost reports, cost statements, or information reports. Nothing in this Agreement shall constitute a waiver of the rights of the United States to examine or reexamine the unallowable costs described in this Paragraph.

9. This Agreement is intended to be for the benefit of the Parties, and their successors and assigns, only and by this instrument the Parties do not release any claims against any other person or entity (other than the Bert Fish Released Parties). This agreement is not intended to be for the benefit of Birman Managed Care, Inc., Birman & Associates, Inc., and David N. Birman, MD, and by this instrument the United States does not release any claims against Birman Managed Care, Inc., Birman & Associates, Inc., and David N. Birman, MD.

10. Bert Fish agrees that it shall not seek payment for any of the health care billings covered by this Agreement from any

health care beneficiaries or their parents or sponsors. Bert Fish waives any causes of action against these beneficiaries or their parents or sponsors based upon the claims for payment covered by this Agreement.

11. After this Agreement is executed and the Additional Payment is received by the United States, the United States and Relator promptly will notify the United States District Court for the Middle District of Tennessee that (a) the United States is partially intervening in the Qui Tam Action with respect to claims against Bert Fish related to the Covered Conduct; (b) notwithstanding such intervention, the Parties have reached a settlement; and (c) pursuant to this settlement the Parties have stipulated that: (i) the Relator dismisses all claims in the Qui Tam Action with prejudice as to him, and (ii) the United States dismisses with prejudice only those claims in the Qui Tam Action related to the Covered Conduct against Bert Fish, and the claims in the Qui Tam Action unrelated to the Covered Conduct are dismissed without prejudice as to the United States.

12. In consideration of the obligations of Bert Fish set forth in this Agreement, conditioned upon Bert Fish's payment in full of the Additional Payment, Relator, and/or Relator's Counsel, agrees to release the Bert Fish Released Parties from any civil or administrative monetary claim the United States has or may have under the False Claims Act, 31 U.S.C. §§ 3729-3733.

Relator expressly reserves any claims against any entities and individuals other than the Bert Fish Released Parties.

13. Conditioned on Bert Fish's payment in full of the Additional Payment, Relator shall receive from the United States a payment amounting to 17% of the Settlement Amount. The United States shall pay Relator this amount within a reasonable time after Bert Fish makes the Additional Payment. It is expressly understood and agreed that the United States in no way promises or guarantees nor is liable to Relator for the collection or payment of any funds pursuant to this Agreement or the payment or any Relator's share payments except as provided herein for funds actually collected and received by the United States.

14. On receipt of the payment described in Paragraph 13 above, Relator shall release and shall be deemed to have released and forever discharged the United States, its officers, agents, and employees from any liability arising from the filing of the complaint in the Qui Tam Action as against Bert Fish, including any claim pursuant to 31 U.S.C. § 3730(d) to a share of any settlement proceeds received from Bert Fish, and in full satisfaction and settlement of claims under this Agreement.

15. Bert Fish and the United States shall bear their own legal and other costs incurred in connection with this matter, including the preparation and performance of this Agreement. Conditioned upon receipt of \$8,470 from Bert Fish on or before:

December 17, 2001, in addition to the settlement amount described in Paragraph 13, the Relator, for himself and for his heirs, successors, attorneys, agents and assigns, agrees to release the Bert Fish Released Parties from any liability to Relator arising from the filing of the Qui Tam Action, or under 31 U.S.C. § 3730(d), for expenses and attorney's fees and costs.

16. Bert Fish represents that this Agreement is freely and voluntarily entered into without any degree of duress or compulsion whatsoever.

17. 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 shall be the United States District Court for the Middle District of Tennessee.

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

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

20. The undersigned individuals signing this Agreement on behalf of SEVHD and BFMC represent and warrant that they are authorized to execute this Agreement on behalf of those entities. The undersigned United States signatories represent that they are

signing this Agreement in their official capacities and that they are authorized to execute this Agreement. The Relator represents that he has the capacity to execute this Agreement, and that he has read it in its entirety.

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

22. This Agreement is binding on the successors, transferees, and assigns of the Parties.

23. This Agreement is effective on the date of signature of the last signatory to the Agreement.

THE UNITED STATES OF AMERICA

DATED: December 12, 2001

BY: William L. Deneke
WILLIAM L. DENEKE
Assistant United States
Attorney
Office of the
United States Attorney
Middle District of Tennessee

DATED: _____

BY: _____
ROBERT J. MCAULIFFE
Trial Attorney
Civil Division
U.S. Department of Justice

DATED: _____

BY: _____
LEWIS MORRIS
Assistant Inspector General
Office of Counsel to the
Inspector General
Office of Inspector General
United States Department of
Health and Human Services

DATED: _____

BY: _____
ROBERT L. SHEPHERD
Deputy General Counsel
TRICARE Management Activity
United States Department of
Defense

THE UNITED STATES OF AMERICA

DATED: _____

BY: _____
WILLIAM L. DENEKE
Assistant United States
Attorney
Office of the
United States Attorney
Middle District of Tennessee

DATED: 12/17/01

BY: Robert McAuliffe
ROBERT J. MCAULIFFE
Trial Attorney
Civil Division
U.S. Department of Justice

DATED: _____

BY: _____
LEWIS MORRIS
Assistant Inspector General
Office of Counsel to the
Inspector General
Office of Inspector General
United States Department of
Health and Human Services

DATED: _____

BY: _____
ROBERT L. SHEPHERD
Deputy General Counsel
TRICARE Management Activity
United States Department of
Defense

THE UNITED STATES OF AMERICA

DATED: _____

BY: _____

WILLIAM L. DENEKE
Assistant United States
Attorney
Office of the
United States Attorney
Middle District of Tennessee

DATED: _____

BY: _____

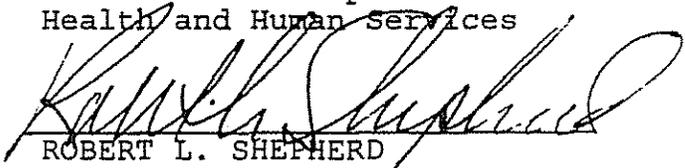
ROBERT J. MCAULIFFE
Trial Attorney
Civil Division
U.S. Department of Justice

DATED: _____

BY: _____

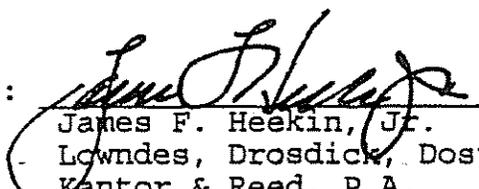
LEWIS MORRIS
Assistant Inspector General
Office of Counsel to the
Inspector General
Office of Inspector General
United States Department of
Health and Human Services

DATED: DEC 14 2001

BY:  _____

ROBERT L. SHEPHERD
Deputy General Counsel
TRICARE Management Activity
United States Department of
Defense

BERT FISH MEDICAL CENTER

DATED: December 14, 2001 BY: 
James F. Heekin, Jr.
Lowndes, Drosdick, Doster,
Kantor & Reed, P.A.
215 North Eola Drive
Orlando, Florida 32801
407-843-4600

Counsel for
Bert Fish Medical Center, Inc.

Southeast Volusia Hospital
District

DATED: _____ BY: _____
Arden W. Kelley
Chairman of the Board

Bert Fish Medical Center, Inc.

DATED: _____ BY: _____
James R. Foster
President

BERT FISH MEDICAL CENTER

DATED: _____

BY: _____

James F. Heekin, Jr.
Lowndes, Drosdick, Doster,
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215 North Eola Drive
Orlando, Florida 32801
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Counsel for
Bert Fish Medical Center, Inc.

Southeast Volusia Hospital
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BY: Arden W. Kelley

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215 North Eola Drive
Orlando, Florida 32801
407-843-4600

Counsel for
Bert Fish Medical Center, Inc.

Southeast Volusia Hospital
District

DATED: _____

BY: _____

Arden W. Kelley
Chairman of the Board

Bert Fish Medical Center, Inc.

DATED: Dec. 14, 2001

BY: _____


James R. Foster
President

RELATOR BARRY STEELEY

DATED: 12/12/01


BARRY STEELEY

DATED: 12/21/01

BY: 
W. CHARLES BAILEY, JR.
Greber & Simms
Suite 702
Twenty South Charles
Street
Baltimore, Maryland 21201

Counsel for Relator
Barry Steeley