

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NOV 30 2005

-----X
UNITED STATES OF AMERICA ex rel. :
NAJMUDDIN PERVEZ,

Plaintiff,

- against -

BETH ISRAEL MEDICAL CENTER,

Defendant.
-----X

:
: STIPULATION AND ORDER OF
: SETTLEMENT AND DISMISSAL

:
: 01 Civ. 2745 (LAK)

I. PARTIES

This Stipulation and Order of Settlement and Dismissal ("Stipulation and Order") is entered into by the United States of America, by its attorney, Michael J. Garcia, the United States Attorney for the Southern District of New York, and on behalf of the Office of Inspector General of the Department of Health and Human Services ("OIG-HHS") (collectively the "United States"), and Beth Israel Medical Center ("Beth Israel") (hereafter referred to as "the Parties"), through their authorized representatives.

II. PREAMBLE

As a preamble to this Stipulation and Order, the Parties agree to the following:

A. Beth Israel is a New York not-for-profit corporation that operates a teaching hospital and other health care facilities, and provides medical care and related services to persons in New York City.

B. During the period 1992 through 2001, Beth Israel annually submitted to the United States institutional cost

reports as required by the Medicare program ("Medicare"), Title XVIII of the Social Security Act, 42 U.S.C. §§ 1395-1395ggg. A cost report is the final claim that a hospital files with the Medicare program's fiscal intermediary identifying its costs for services rendered to Medicare beneficiaries and stating the amount of reimbursement the hospital believes it is due for the year.

C. The United States contends that, during the time period referenced in Paragraph B above, in connection with Beth Israel's submission of its cost reports and its claims for payment under Medicare, Beth Israel, in violation of the False Claims Act, 31 U.S.C. §§ 3729-3733 (the "False Claims Act"), knowingly presented or caused to be presented to the United States false or fraudulent claims for payment, and/or submitted false statements or reports to the United States to get a false or fraudulent claim paid as more specifically described in the United States' Complaint-In-Intervention (the "Federal Complaint").

D. Alternatively, the United States contends that it has certain civil claims against Beth Israel based on common law theories of payment of mistake of fact, fraud and unjust enrichment, for engaging, during the period 1992 through 2001, in the conduct described in Paragraph C above, and as described in more detail in the Federal Complaint. Hereinafter, the conduct

outlined in Paragraph C and the Federal Complaint shall be referred to as the "Covered Conduct."

E. The United States also contends that it has certain administrative claims, as specified in Paragraph 5 below, against Beth Israel for the Covered Conduct.

F. Beth Israel hereby appears and consents to the entry of this Stipulation and Order, without admitting any wrongdoing or liability under the False Claims Act, any other statute, and/or the common law.

G. To avoid the delay, uncertainty, inconvenience, and expense of protracted litigation of the above claims, the Parties desire to reach a full and final settlement and compromise of the claims that the United States asserts in the Federal Complaint in this action;

NOW, THEREFORE, the parties hereto, in consideration of the mutual promises, obligations, undertakings and commitments hereinafter set forth, do hereby covenant and agree as follows:

III. TERMS AND CONDITIONS

1. The parties hereto consent to this Court's exercise of subject matter jurisdiction over this action and personal jurisdiction over each of them.

2. Beth Israel agrees to the entry of a judgment against it and in favor of the United States (in the form attached hereto as Exhibit A), in full compromise and

satisfaction of the allegations against it set forth in the Federal Complaint, for the sum of seventy-two million nine hundred and ninety-seven thousand four hundred and eighty-one dollars (\$72,997,481) (the "Settlement Amount").

This Settlement Amount shall constitute a debt due and owing to the United States upon the Effective Date of this Stipulation and Order and is to be discharged by installment payments to the United States in accordance with the following schedule:

- (a) Ten million dollars (\$10,000,000) within five (5) business days of the Effective Date of this Stipulation and Order (the "initial installment payment");
- (b) Five million dollars (\$5,000,000) within six months of the Effective Date;
- (c) Seven million, five hundred thousand dollars (\$7,500,000) within eighteen months of the Effective Date;
- (d) Ten million dollars (\$10,000,000) within thirty months of the Effective Date;
- (e) Fifteen million dollars (\$15,000,000) within forty-two months of the Effective Date;
- (f) Fifteen million dollars (\$15,000,000) within fifty-four months of the Effective Date; and
- (g) Ten million, four hundred and ninety-seven thousand, four hundred and eighty one dollars (\$10,497,481) within sixty-six months of the Effective Date.

Except for the initial installment payment, interest must be paid on each installment payment at the rate of 7.25% and must be paid at the time each installment payment is due.

Each installment payment shall be made by electronic funds transfer pursuant to written instructions to be provided by the United States Attorney's Office for the Southern District of New York.

Nothing in this Stipulation and Order shall preclude Beth Israel from prepaying without penalty any or all of the Settlement Amount.

3. Beth Israel agrees that the United States shall have a first position security interest on the real property owned by Beth Israel located at 3201 Kings Highway, Brooklyn, New York and 317 East 17th Street, New York, New York, and that the United States may place a lien on such property until such time as Beth Israel has paid the total Settlement Amount.

4. Subject to the exceptions in Paragraph 8 below, in consideration of the obligations of Beth Israel as set forth in this Stipulation and Order, and conditioned upon Beth Israel's payment in full of the Settlement Amount, and subject to Paragraph 19 below (concerning bankruptcy proceedings commenced within 91 days of any payment under this Stipulation and Order), the United States (on behalf of itself, its officers, agents, agencies and departments) agrees to release Beth Israel, its predecessors, successors, member, parent, and subsidiaries, and its current and former officers, trustees, employees, agents and representatives (collectively "the released persons and

entities") from any civil or administrative monetary claim the United States has or may have against the released persons and entities 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 under the common law or equitable theories of payment by mistake, unjust enrichment and fraud.

5. In consideration of the obligations of Beth Israel set forth in this Stipulation and Order, including the Corporate Integrity Agreement ("CIA") attached as Exhibit B and incorporated herein by reference, conditioned upon Beth Israel's payment in full of the Settlement Amount, and subject to Paragraph 19 below (concerning bankruptcy proceedings commenced within 91 days of any payment under this Stipulation and Order), the OIG-HHS agrees to release and refrain from instituting, directing, or maintaining any administrative action seeking exclusion from the Medicare, Medicaid, or other Federal health care programs (as defined in 42 U.S.C. § 1320a-7b(f)) against Beth Israel under 42 U.S.C. § 1320a-7a (Civil Monetary Penalties Law), or 42 U.S.C. § 1320a-7(b)(7) (permissive exclusion for fraud, kickback and other prohibited activities), for the Covered Conduct. The OIG-HHS expressly reserves all rights to comply with any statutory obligations to exclude Beth Israel from the Medicare, Medicaid or other Federal health care program under 42

U.S.C. § 1320a-7(a) (mandatory exclusion) based on the Covered Conduct... Nothing in this Paragraph precludes the OIG-HHS from taking action against any entities or persons, or for conduct and practices, for which claims have been reserved in Paragraph 8, below.

6. Beth Israel agrees to release the United States, its agencies, departments, employees, servants and agents from any claims (including attorneys' fees, costs, and expenses of every kind and however denominated) which Beth Israel has asserted, could have asserted, or may assert in the future against the United States, its agencies, departments, employees, servants, and agents related to the matters covered by the Federal Complaint, and the United States' investigation and prosecution thereof and this Stipulation and Order.

7. This Stipulation and Order is intended to be for the benefit of the parties to this Stipulation and Order only, and by this instrument the parties to this Stipulation and Order do not release any claims against any other person or entity, except as expressly provided by this Stipulation and Order.

8. Notwithstanding any term of this Stipulation and Order, including the releases provided in Paragraphs 4 and 5 above, any and all of the following are specifically reserved and excluded from the scope and terms of this Stipulation and Order as to any entity or person:

- (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 Stipulation and Order, 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 claims based upon such obligations as are created by this Stipulation and Order; and
- (f) Any liability to the United States of any entity or person, including but not limited to any joint tortfeasor, that or who is not released by the terms of this Stipulation and Order.

9. In the event of a criminal prosecution or administrative action relating to the Covered Conduct, Beth Israel waives and will not assert any defenses it may have 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 Stipulation and Order bars a remedy sought in such criminal prosecution or administrative action.

Nothing in this Stipulation and Order 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.

10. Beth Israel has entered into a CIA with OIG-HHS.

Beth Israel shall immediately upon execution of the CIA implement its obligations under that CIA, subject to the timelines set forth in the CIA.

11. Beth Israel has provided sworn financial disclosure statements and other financial information ("Financial Statements") to the United States, and the United States has relied on the accuracy and completeness of those Financial Statements in agreeing to this Stipulation and Order. Beth Israel warrants that the Financial Statements are thorough, accurate, and complete. Beth Israel further warrants that it does not own or have an interest in any assets which have not been disclosed in the Financial Statements, except for certain assets that have been sold or acquired in the ordinary course of business, and that Beth Israel has made no intentional misrepresentations on, or in connection with, the Financial Statements. In the event the United States learns of (a) asset(s) in which Beth Israel had an interest at the time of this Stipulation and Order that would change the estimated net worth of Beth Israel set forth in the Financial Statements by ten million dollars (\$10,000,000) or more, and which were not disclosed in such Financial Statements, or (b) a misrepresentation by Beth Israel in connection with the Financial Statements, and in the event such non-disclosure or misrepresentation changes the estimated net worth of Beth Israel

set forth on the Financial Statements by ten million dollars (\$10,000,000) or more, the United States may at its option: (1) rescind this Stipulation and Order and reinstate its Federal Complaint in this action; or (2) let the Stipulation and Order stand and collect the full Settlement Amount plus one hundred percent (100%) of the value of the net worth of Beth Israel previously undisclosed or concealed or dissipated, if such latter amounts can be determined. To the extent that the government discovers the occurrence of an event(s) encompassed by subparts (a) through (b) of this Paragraph, Beth Israel agrees not to contest any collection action undertaken by the United States pursuant to this provision.

12. Beth Israel shall be in default of this Stipulation and Order if it fails to make each payment set forth in Paragraph 2 on or before its due date. The United States will provide written notice of the default, and Beth Israel shall have an opportunity to cure such default within seven (7) business days from the date of its receipt of the notice. Notice of default will be sent by fax and overnight mail to the undersigned attorneys for Beth Israel. If Beth Israel fails to cure the default within seven (7) business days, the Settlement Amount shall be immediately due and payable, and interest shall accrue at the rate of 12% per annum compounded daily from the date of default on the remaining unpaid principal balance. Beth Israel

shall consent to a Consent Judgment in the amount of the unpaid balance, and the United States, at its option, may: (i) rescind this Stipulation and Order and reinstate the Federal Complaint filed in this action; (ii) seek specific performance of the Stipulation and Order; (iii) offset the remaining unpaid balance from any amounts due and owing Beth Israel by any department, agency or agent of the United States at the time of default; or (iv) exercise any other rights granted by law, or under the terms of this Stipulation and Order, or recognizable at common law or in equity. Beth Israel agrees not to contest any offset imposed and not to contest any collection action undertaken by the United States pursuant to this paragraph, either administratively or in any State or Federal court. In addition, Beth Israel shall pay the United States all reasonable costs of collection and enforcement under this Paragraph, including attorney's fees and expenses.

In the event that the United States opts to rescind this Stipulation and Order pursuant to this Paragraph and/or Paragraph 11, Beth Israel expressly 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 which relate to the Covered Conduct, except to the extent these defenses were available on the date of entry of this Stipulation and Order.

13. The Settlement Amount that Beth Israel must pay pursuant to Paragraph 2 of this Stipulation and Order shall not be decreased as a result of the denial of claims for payment now being withheld by any Medicare or Medicaid carrier or intermediary or any State payer, related to the Covered Conduct; and Beth Israel agrees not to resubmit to any Medicare or Medicaid carrier or intermediary or any State payer any previously denied claims related to the Covered Conduct, and shall not appeal any such denials of claims.

14. Beth Israel agrees to retain Clifton Gunderson LLP, Certified Public Accountants & Consultants, with respect to the settlement of its Medicare cost reports for any remaining years for the period 1996 through 2001 that are not yet finally settled with the Centers for Medicare and Medicaid Services (CMS). Beth Israel agrees to pay the standard fees and expenses incurred by Clifton Gunderson LLP in connection with Beth Israel's retention.

15. Notwithstanding Paragraph 9, and if applicable, Beth Israel agrees that it will not seek payment for any health care services covered by this Stipulation and Order from any health care beneficiaries or their parents or sponsors. Beth Israel hereby waives any causes of action against these beneficiaries or their parents or sponsors based upon the claims for payment relating to the Covered Conduct.

16. 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. §§ 1395-1395ggg and 1396-1396v, and the regulations and official program directives promulgated thereunder) incurred by or on behalf of Beth Israel, its predecessors, successors, parents, affiliates, divisions and subsidiaries in connection with the following shall be "unallowable costs" on all Government contracts and under the Medicare Program, Medicaid Program, the TRICARE Program and Federal Employees Health Benefits Program ("FEHBP"):

- (a) the matters covered by this Stipulation and Order;
- (b) the United States' audit(s) and civil and criminal investigation(s) of the matters covered by Federal Complaint in this action, and this Stipulation and Order;
- (c) Beth Israel's investigation, audit, defense, and corrective actions undertaken in response to the United States' audit(s) and civil and criminal investigations in connection with the matters covered by the Federal Complaint, and this Stipulation and Order (including attorney's fees and the CIA);
- (d) the negotiation and performance of this Stipulation and Order;
- (e) the payments of the Settlement Amount by Beth Israel to the United States and payments that Beth Israel shall make to the Relator Najmuddin Pervez, including costs and attorneys fees; and
- (f) the negotiation of, and obligations undertaken pursuant to the CIA to: retain an independent review organization to perform annual reviews

described in Section III of CIA, and prepare and submit reports to the OIG-HHS. However, nothing in this subparagraph that may apply to the obligations undertaken pursuant to the CIA affects the status of costs that are not allowable based on any authority applicable to Beth Israel.

Future Treatment of Unallowable Costs: These unallowable costs will be separately determined and accounted for by Beth Israel, and Beth Israel 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 Beth Israel or any of its predecessors, successors, parents, affiliates, divisions or subsidiaries to the Medicare, Medicaid, TRICARE, or FEHBP Programs.

Treatment of Unallowable Costs Previously Submitted for Payment: Beth Israel further agrees that within ninety (90) days of the Effective Date of this Stipulation and Order, it will identify to applicable Medicare and TRICARE fiscal intermediaries, carriers, and/or contractors 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 Beth Israel and any of its predecessors, successors, parents, affiliates,

divisions or 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. Beth Israel agrees that the United States, at a minimum, will be entitled to recoup from Beth Israel 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. If applicable, 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 Beth Israel on the effect of inclusion of unallowable costs (as defined in this Paragraph) on Beth Israel's or any of its parent's, subsidiaries', or affiliates' cost reports, cost statements, or information reports.

Nothing in this Stipulation and Order shall constitute a waiver of the rights of the United States to examine, or re-examine Beth Israel's books and records to determine the unallowable costs described in this Paragraph.

17. Beth Israel covenants to cooperate fully and truthfully with the United States' continuing investigation of

individuals or other entities for the Covered Conduct. Upon reasonable notice, Beth Israel will make reasonable efforts to facilitate access to, and encourage the cooperation of, its current or former officers and employees for interviews and testimony, consistent with the rights and privileges of such individuals, and will 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.

Beth Israel will retain all material records relating to the Covered Conduct in their original form for five (5) years from the effective date of this Stipulation and Order. Before the expiration of the five-year period and before disposing of any records covered by this Paragraph, Beth Israel will consult with the United States Attorney's Office, Southern District of New York, concerning the continuing need for preserving such records.

18. Beth Israel expressly 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)(A) and 548(a)(1)(B)(ii)(I), and will remain solvent following its payment of the Settlement Amount to the United States hereunder. Further, the Parties expressly warrant that, in evaluating whether to execute this Stipulation and Order, they (i) have

intended that the mutual promises, covenants, and obligations set forth in this Stipulation and Order constitute a contemporaneous exchange for new value given to Beth Israel, within the meaning of 11 U.S.C. § 547(c)(1); and (ii) have concluded 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 which is not intended to hinder, delay, or defraud any entity to which Beth Israel was or became indebted to on or after the date of the payment of the Settlement Amount, within the meaning of 11 U.S.C. § 548(a)(1).

19. In the event that Beth Israel commences, or a third party commences, within 91 days of any payment under this Stipulation and Order, any case, proceeding, or other action (i) under any law relating to bankruptcy, insolvency, reorganization, or relief of debtors, seeking to have any order for relief of Beth Israel's debts, or seeking to adjudicate Beth Israel as bankrupt or insolvent; or (ii) seeking appointment of a receiver, trustee, custodian, or other similar official for Beth Israel or for all or any substantial part of Beth Israel's assets, Beth Israel agrees as follows:

(a) Beth Israel's obligations under this Stipulation

and Order may not be avoided pursuant to 11 U.S.C. §§ 547 or 548, and Beth Israel will not argue or otherwise take the position in any such case, proceeding, or action that: (i) Beth Israel's obligations under this Stipulation and Order may be avoided under 11 U.S.C. §§ 547 or 548; (ii) Beth Israel was insolvent at the time this Stipulation and Order was entered into, or became insolvent as a result of the payment made to the United States hereunder; or (iii) the mutual promises, covenants, and obligations set forth in this Stipulation and Order do not constitute a contemporaneous exchange for new value given to Beth Israel.

(b) If Beth Israel's obligations hereunder 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 its agreement to this Stipulation and Order, and bring any civil and/or administrative claim, action, or proceeding against Beth Israel for the claims that would otherwise be covered by the releases provided in Paragraphs 4 and 5, above. If the United States chooses to do so, Beth Israel agrees that (i) it will not contend that any such claims, actions or proceedings brought by the United States (including any proceedings to exclude Beth Israel from participation in Medicare, Medicaid, or other Federal health care programs) are subject to an automatic stay pursuant

to 11 U.S.C. § 362(a) as a result of the action, case, or proceeding described in the first clause of this Paragraph; (ii) it will 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 proceedings which are brought by the United States within thirty (30) calendar days of written notification to Beth Israel that the releases herein have been rescinded pursuant to this Paragraph, except to the extent such defenses were available on the date that the Relator Najmuddin Pervez filed his qui tam complaint in this action; and (iii) it will not contest the validity of a claim filed by the United States against Beth Israel in the amount of seventy-two million nine hundred ninety-seven thousand four hundred and eighty-one dollars (\$72,997,481) as a priority unsecured claim, and the United States may pursue its claim, inter alia, 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) Beth Israel acknowledges that its agreements as set forth in this Paragraph are provided in exchange for valuable consideration provided in this Stipulation and Order.

20. Each Party to this Stipulation and Order shall bear its own legal and other costs incurred in connection with this matter, including the preparation and performance of this

Stipulation and Order.

21. This Stipulation and Order 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 Stipulation and Order as it relates to this action shall be the United States District Court for the Southern District of New York. Notwithstanding the above, the Parties agree that disputes arising under the CIA shall be resolved exclusively under the dispute resolution provisions in the CIA.

22. This Stipulation and Order and CIA, attached hereto, constitute the complete agreement between the Parties. This Stipulation and Order may not be amended except by written consent of the Parties, except that only Beth Israel and OIG-HHS must agree in writing to modification of the CIA.

23. Subject to the exceptions in Paragraph 8, in consideration of the obligations of Beth Israel in this Stipulation and Order, conditioned upon Beth Israel's timely full payment of the Settlement Amount, this action shall be dismissed with prejudice as to Beth Israel as to all claims upon which the United States has intervened against Beth Israel, as described with particularity in the Federal Complaint, and to the extent of, as governed by, this Stipulation and Order. This is provided, however, that the Court shall retain jurisdiction over

this Stipulation and Order and each party to the extent the obligations herein remain unsatisfied by that party, and to determine the appropriate award to be made to the Relator Najmuddin Pervez from the proceeds of the settlement between the United States and Beth Israel, pursuant to 31 U.S.C. § 3730(d).

24. The dismissal of this action shall be subject to Paragraphs 8 and 18 herein.

25. The undersigned persons signing this Stipulation and Order on behalf of Beth Israel represent and warrant that they are authorized by Beth Israel to execute this Stipulation and Order. The undersigned United States signatories represent that they are signing this Stipulation and Order in their official capacities.

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

27. The "Effective Date" of this Stipulation and Order is the date on which this Stipulation and Order is entered by this Court.

Dated: New York, New York
November 30, 2005

MICHAEL J. GARCIA
United States Attorney

By: Sheila M. Gowan
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Dated: Washington, D.C.
November 25, 2005

By: Lewis Morris
LEWIS MORRIS
Chief Counsel to the Inspector
General
Office of Counsel to the
Inspector General
Office of Inspector General
United States Department of
Health and Human Services

Dated: New York, New York
November 29, 2005

PROSKAUER ROSE LLP
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Dated: New York, New York
November 29, 2005

Beth Israel Medical Center

By: Gail Donovan
Gail Donovan
Senior Executive Vice
President for Continuum
Services

SO ORDERED:

 s/
UNITED STATES DISTRICT JUDGE

11/20/05