

SETTLEMENT AGREEMENT

I. PARTIES

This Settlement Agreement ("Agreement") is made between the United States of America, acting through the Department of Justice (the "Department of Justice"), and on behalf of the Office of Inspector General ("OIG-HHS") of the Department of Health and Human Services ("HHS"); the TRICARE Management Activity ("TMA") (formerly the Office of the Civilian Health and Medical Program of the Uniformed Services ("OCHAMPUS")), through its General Counsel; the United States Office of Personnel Management ("OPM"), which administers the Federal Employees Health Benefits Program ("FEHBP") (collectively, the "United States"); the Personal Representative of the Estate of Relator Theresa Semtner ("Relator"); and William H. Bernauer, M.D., Inc., d/b/a Deaconess Emergency Medicine Associates, including its former shareholder William H. Bernauer, M.D. ("DEMA"); (collectively in all, the "Parties"), through their authorized representatives.

II. PREAMBLE

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

A. The United States contends that DEMA 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, the TRICARE Program, 10 U.S.C. §§ 1071-1106; the FEHBP, 5 U.S.C. §§ 8901-8914, and the Medicaid Program, 42 U.S.C. §§ 1396-1396v.

B. This Agreement addresses the United States' civil claims against DEMA based on the conduct alleged in the sealed action pending in the Western District of Oklahoma (the "Sealed Action"), and in Paragraphs C and D of this Agreement, involving the coding by

Emergency Physicians Billing Service ("EPBS") of emergency room services on behalf of DEMA through October 4, 1999 (the "Covered Conduct").

C. The United States contends that the Covered Conduct may have resulted in the submission of claims that are actionable under the False Claims Act, 31 U.S.C. §§ 3729-3733, and common law.

D. The United States also contends that it may have certain administrative claims against DEMA under the provisions for permissive exclusion from the Medicare, Medicaid and other Federal health care programs, 42 U.S.C. § 1320a-7(b), the provisions for exclusion from the TRICARE program, 32 C.F.R. § 199.9, the provisions for exclusion from the FEHBP, 5 U.S.C. § 8902a or 5 C.F.R. Part 970, and the provisions for civil monetary penalties, 42 U.S.C. § 1320a-7a, for the Covered Conduct.

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

F. The Parties mutually desire to settle these disputes.

III. TERMS AND CONDITIONS

NOW, THEREFORE, in reliance on the representations contained herein and 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. Payment Terms. DEMA agrees to pay the United States and the state of Oklahoma (the "State") the collective sum of \$125,000.00 (the "Total Amount"). DEMA agrees to make separate payments aggregating up to the Total Amount as follows: \$120,458.24 to the United States (the "United States' Settlement Share") and \$4,541.76 to the State (the "State's

Settlement Share"). Payment of the United States' Settlement Share will be made within ten business days of execution of the Agreement. Payment of the United States' Settlement Share shall be governed by this Agreement and payments will be made by electronic funds transfer in accordance with instructions to be provided by the United States. A separate settlement agreement will be negotiated and executed between DEMA and the State (the "State Agreement"), with payment instructions as to the State's Settlement Share to be provided on behalf of the State.

DEMA acknowledges that all claims that TMA may have suspended have been fully processed, and waives and releases any appeal, dispute, or challenge it may have had with respect to any previously suspended claims.

2. Corporate Integrity Agreement. DEMA has provided a certification, attached hereto as Exhibit A, that it has not furnished services under any Federal health care program (as defined in 42 U.S.C. § 1320a-7b(f)) since June 2002 and that it has no plans to resume furnishing services. DEMA recognizes that if within the next three years, it furnishes services under any Federal health care program, it will be subject to certain integrity obligations required by the HHS-OIG. DEMA represents that it will immediately contact the HHS-OIG in the event it furnishes services under any Federal health care program within the next three years.

3. Dismissal and Release. Subject to the exceptions in Paragraph 8 below, in consideration of the obligations set forth in this Agreement and conditioned upon DEMA's payment in full of the United States' Settlement Share: (i) within five days after the Relator's receipt of the payment set forth in Paragraph 6 hereof, the United States and Relator will move to dismiss with prejudice the claims against DEMA in the Sealed Action subject to the terms of this

Agreement and as described more fully in Paragraph 9 of this Agreement; and (ii) the United States hereby releases and discharges DEMA from any and all civil or administrative monetary claims the United States now 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.

4. Administrative Waiver. (a) Subject to the exceptions in Paragraph 8 below and as reserved in this Subparagraph, in consideration for the obligations of DEMA under this Agreement and conditioned upon DEMA's payment in full of the United States' Settlement Share and the State's Settlement Share, the OIG-HHS agrees to release and refrain from instituting, directing or maintaining any administrative claim or any action seeking permissive exclusion of DEMA from the Medicare, Medicaid or other Federal health care programs (as defined in 42 U.S.C. § 1320a-7b(f)), pursuant to 42 U.S.C. § 1320a-7a (Civil Monetary Penalties Law), or 42 U.S.C. § 1320a-7(b) (permissive exclusion), for the Covered Conduct. The OIG-HHS expressly reserves all rights to comply with any statutory obligations to exclude DEMA from the Medicare, Medicaid or other Federal health care programs under 42 U.S.C. § 1320a-7(a) (mandatory exclusion) for the Covered Conduct. Nothing in this Paragraph precludes OIG-HHS from taking action against entities or persons, or for conduct and practices, for which civil claims have been reserved in Paragraph 8, below.

(b) In consideration of the obligations of DEMA under this Agreement, and conditioned upon DEMA's payment in full of the United States' Settlement Share, the TMA agrees to refrain from instituting, directing, or maintaining any administrative claims or any

action seeking exclusion from the TRICARE Program against DEMA under 32 C.F.R. § 199.9 for the Covered Conduct, except as reserved in Paragraph 8 below and as reserved in this Subparagraph. The TMA expressly reserves authority to exclude DEMA from the TRICARE program under 32 C.F.R. §§ 199.9(f)(1)(i)(A) and (f)(1)(iii) (mandatory exclusion), based upon the Covered Conduct. Nothing in this Paragraph precludes the TMA from taking action against entities or persons, or for conduct and practices, for which civil claims have been reserved in Paragraph 8, below.

(c) In consideration of the obligations of DEMA set forth in this Agreement, and conditioned upon DEMA's payment in full of the United States' Settlement Share, OPM agrees to release and refrain from instituting, directing, or maintaining any administrative claim or any action seeking exclusion from the FEHBP against DEMA under 5 U.S.C. § 8902a or 5 C.F.R. Part 970 for the Covered Conduct, except if excluded by the OIG-HHS pursuant to 42 U.S.C. § 1320a-7(a). Nothing in this Subparagraph precludes OPM from taking action against entities or persons, or for conduct and practices, for which civil claims have been reserved in Paragraph 8, below.

5. Fairness of Settlement. Relator agrees that the settlement between the United States and DEMA in this action is fair, adequate and reasonable pursuant to 31 U.S.C. § 3730(c)(2)(B).

6. Relator's Share. Pursuant to 31 U.S.C. § 3730, the United States will pay to Relator a 20% share (the "Relator's share"), within a reasonable time after the United States' receipt of the United States' Settlement Share from DEMA. Relator will provide the United States with wire transfer information to allow the Relator's share to be paid by wire transfer. The

United States shall not be obligated to pay Relator unless and until the United States receives payment of the United States' Settlement Share from DEMA.

7. Release and Discharge of United States. In exchange for the United States' payment to Relator of the Relator's share, Relator hereby releases and discharges any and all claims Relator might bring against the United States relating to the Covered Conduct, and this Agreement, under 31 U.S.C. § 3730(d).

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

8. Exceptions to the Releases. Notwithstanding any term of this Agreement, specifically reserved and excluded from the scope and terms of this Agreement and the releases provided herein are:

- a. any civil, criminal, or administrative claims arising under Title 26, United States Code (Internal Revenue Code), or under securities laws;
- b. claims for defective or deficient services;
- c. claims relating to obligations created by this Agreement;
- d. claims against entities or persons other than DEMA, including those currently named as defendants in the Sealed Action, and any named defendants in *United States ex rel. Semtner v. EPBS*, No. 94-671-(C) (W.D. Okla.), and other clients of EPBS;
- e. except as explicitly stated in this Agreement, any other administrative

liability, including claims for any action seeking exclusion from the Medicare program or other Federal health care programs (as defined in Title 42 U.S.C. §1320a-7b(f)) pursuant to 42 U.S.C. § 1320a-7(a) (mandatory exclusion);

f. any liability to the United States or its agencies for any conduct other than the Covered Conduct; and

g. any criminal liability.

9. Stipulation of Dismissal. Concurrent with the execution of this Settlement Agreement, the United States and Relator shall execute a Stipulation of Dismissal to be filed with the Court within five days after Relator's receipt of the Relator's share described in Paragraph 6 of this Agreement. The Stipulation will request that the Court enter an order to dismiss with prejudice the claims against DEMA in the Sealed Action, subject to the terms of this Agreement and to any order by the Court with respect to the seal. The Parties will exert all best efforts to obtain the dismissal with prejudice of the claims against DEMA consistent with this Agreement.

10. Release and Discharge of DEMA. In consideration of the mutual promises and obligations of this Agreement, Relator hereby releases and discharges DEMA from any claims, known or unknown, which Relator asserts or could have asserted under the False Claims Act or any other statute or common law theory of any kind whatsoever creating causes of action for the Covered Conduct.

11. Unallowable Costs. DEMA agrees that all costs (as defined in the Federal Acquisition Regulations ("FAR") 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

promulgated thereunder) incurred by or on behalf of DEMA, its present or former directors, officers, employees, shareholders, partners and agents in connection with: (a) the matters covered by this Agreement and the State Agreement, including attorney's fees; (b) the government's audits and civil and criminal investigations of the allegations which are the subject of this Agreement; (c) any of DEMA's investigation, defense and corrective actions undertaken in response to the Government's audits and civil and criminal investigations in connection with matters specifically covered by this Agreement and the State Agreement; (d) the negotiation of this Agreement and the State Agreement (including attorney's fees); and (e) the payments made to the United States, the State and the Relator pursuant to this Agreement and the State Agreement, shall be Unallowable Costs on Government contracts and under the Medicare, Medicaid, TRICARE, Veterans Affairs (VA) and FEHBP Programs (hereinafter "Unallowable Costs"). These Unallowable Costs will be separately estimated and accounted for by DEMA and DEMA 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 DEMA or any of its subsidiaries to the Medicare, Medicaid, TRICARE, VA or FEHBP programs.

DEMA further agrees that within 60 days of the effective date of this Agreement it will identify to applicable Medicare, VA, and TRICARE fiscal intermediaries, carriers and/or contractors, and Medicaid and FEHBP fiscal agents, any Unallowable Costs (as defined in this Paragraph 11) 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 DEMA 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. DEMA agrees that the United States, at a minimum, will be entitled to recoup from DEMA 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 DEMA or any of its subsidiaries on the effect of inclusion of Unallowable Costs (as defined in this Paragraph 11) on DEMA 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.

12. Waiver of Beneficiary Payment. DEMA agrees that it will not seek payment for any of the health care billings covered by this Agreement from any Federal health care beneficiaries or their parents or sponsors. DEMA waives any causes of action against these beneficiaries or their parents or sponsors based upon the claims for payment covered by this Agreement.

13. Waiver of Double Jeopardy Defense. With respect to the Covered Conduct, DEMA hereby 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 Clause in the Fifth Amendment of the Constitution, or under the Excessive Fines Clause in the Eighth Amendment of the Constitution, this Settlement bars a remedy sought in such criminal prosecution or administrative action.

DEMA further agrees that this Settlement is not punitive in purpose or effect.

14. Internal Revenue Code. Nothing in this Paragraph or any other provision of this Agreement constitutes an agreement by the United States concerning the characterization of the amounts paid hereunder for purposes of the Internal Revenue Code, Title 26 of the United States Code.

15. Voluntary Agreement. DEMA represents that this Agreement is freely and voluntarily entered into without any degree of duress or compulsion whatsoever.

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

17. Venue for Enforcement, Interpretation or Dispute Resolution. Should any action to enforce or interpret this Agreement, or to resolve any dispute hereunder be required, the Parties acknowledge the jurisdiction of the federal courts and agree that venue for any such action shall be in the United States District Court for the Western District of Oklahoma.

18. Entire Agreement. This Agreement constitutes the entire agreement between the Parties with respect to the matters contained herein, and may not be modified except by a writing signed by all Parties hereto.

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

20. Binding Nature of Agreement. This Agreement is binding on all successors, heirs,

assigns and transferees of the Parties.

21. Effective Date. This Agreement is effective on the date of signature of the last signatory to the Agreement. Facsimiles of signatures shall constitute acceptable, binding signatures for purposes of this settlement agreement.

22. Authorized Representatives. The individuals signing this Agreement on behalf of DEMA represent and warrant that they are authorized by DEMA to execute this Agreement. The United States signatories represent that they are signing this Agreement in their official capacities and that they are authorized to execute this Agreement.

UNITED STATES OF AMERICA

Rebecca Rohr Dated: Dec. 5, 2002
REBECCA ROHR
Trial Attorney
Commercial Litigation Branch
Civil Division
United States Department of Justice

Lewis Morris Dated: 12/4/02
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

for Laurel C. Gillespie Dated: Nov. 29, 2002
LAUREL C. GILLESPIE *Acting Deputy General Counsel*
Deputy General Counsel
TRICARE Management Activity
United States Department of Defense

_____ Dated: _____
E. JEREMY HUTTON
Assistant Inspector General for Legal Affairs
Office of the Inspector General
United States Office of Personnel Management

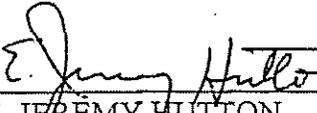
_____ Dated: _____
ABBY L. BLOCK
Assistant Director for Insurance Programs
United States Office of Personnel Management

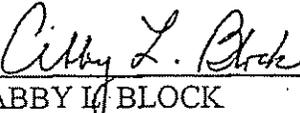
RELATOR

_____ Dated: _____
CHERYL A. VAUGHT
Vaught & Conner, P.L.L.C.
Attorneys for Relator

_____ Dated: _____

LAUREL C. GILLESPIE
Deputy General Counsel
TRICARE Management Activity
United States Department of Defense

 Dated: 11/29/02
E. JÉRÉMY HUTTON
Assistant Inspector General for Legal Affairs
Office of the Inspector General
United States Office of Personnel Management

 Dated: 12/02/02
ABBY L. BLOCK
Assistant Director for Insurance Programs
United States Office of Personnel Management

RELATOR

_____ Dated: _____
CHERYL A. VAUGHT
Vaught & Conner, P.L.L.C.
Attorneys for Relator

_____ Dated: _____
LAUREL C. GILLESPIE
Deputy General Counsel
TRICARE Management Activity
United States Department of Defense

_____ Dated: _____
E. JEREMY HUTTON
Assistant Inspector General for Legal Affairs
Office of the Inspector General
United States Office of Personnel Management

_____ Dated: _____
ABBY L. BLOCK
Assistant Director for Insurance Programs
United States Office of Personnel Management

RELATOR

Cheryl A. Vaught Dated: 11/27/02
CHERYL A. VAUGHT
Vaught & Conner, P.L.L.C.
Attorneys for Relator

WILLIAM H. BERNAUER, M.D., INC., d/b/a
DEACONESS EMERGENCY MEDICINE ASSOCIATES

Terr C Bernauer Dated: 12-05-02
TERRI C. BERNAUER

Exhibit A

On behalf of William H. Bernauer, M.D., Inc., d/b/a Deaconess Emergency Medicine Associates (DEMA) (Medicare Group Provider No. 700522011), I hereby certify that since June 2002, DEMA has not furnished services under any federal health care program, as defined in 42 U.S.C. § 1320a-7b(f), that were billed under provider numbers issued to DEMA, and that it has no plans to resume furnishing and billing for such services.

WILLIAM H. BERNAUER, M.D., INC., d/b/a
DEACONESS EMERGENCY MEDICINE ASSOCIATES

TERRI C. BERNAUER Dated: 12-05-02
TERRI C. BERNAUER