

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 Evergreen Emergency Physicians, P.C. ("Evergreen"); (collectively in all, the "Parties"), through their authorized representatives.

II. PREAMBLE

WHEREAS:

A. The United States contends that Evergreen 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 (1997), 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 (1997).

B. This Agreement addresses the United States' civil and administrative claims, as set forth in Paragraphs C and D of the Agreement, against Evergreen based on the conduct alleged in the sealed action pending in the Western District of Oklahoma (the "Sealed Action"), involving the coding by Emergency Physicians Billing Service ("EPBS") of emergency room services on behalf of Evergreen through September 24, 1999 (the "Covered Conduct").

C. The United States contends that the Covered Conduct has 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 has certain administrative claims against Evergreen 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. Evergreen contests and disputes the contentions of the United States.

F. The Parties mutually desire to settle these disputes, recognizing the costs and risks of litigation.

G. The Parties agree that no provision of this Agreement,

nor any consideration exchanged pursuant to this Agreement, constitutes any admission by any person or entity with respect to any issue of law or fact.

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. Evergreen agrees to pay the United States and the state of Oregon (the "Affected State") the collective sum of \$120,000 (the "Total Amount"). Evergreen agrees to make separate payments aggregating up to the Total Amount as follows: \$106,428 to the United States (the "United States' Settlement Share") and \$13,572 to the Affected State (the "Affected State's Settlement Share"). Payment of the United States' Settlement Share and the Affected State's 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, unless the entity lacks the legal capacity to transfer funds electronically, in which case payment will be made by certified check made payable to the United States Department of Justice. A separate

settlement agreement will be negotiated and executed between Evergreen and the Affected State (the "State Agreement"), with payment instructions as to the Affected State's Settlement Share to be provided by Ellyn Sternfield, Esq. on behalf of the Affected State. The TMA has or will process claims that have been suspended by TMA, with the amount to be paid by TMA to Evergreen to equal 88% of the amount that would have been paid by TMA had it processed the suspended claims without review of the coding, and with respect to the suspended claims, for claims for care prior to fiscal year 1999, TMA has or will waive application of edits concerning deductibles, third party liability and other health insurance, and will process based on 1998 profiles.

TMA has or may further adjust its payments to implement the provisions of the above paragraph for any of the suspended claims that were inadvertently processed prior to the effective date of this Agreement. Further, Evergreen waives any administrative appeal rights for any of the suspended claims. For suspended TMA claims submitted by EPBS on behalf of Evergreen, payments will be issued in the normal course of business which means the payment will normally be issued to EPBS.

2. Corporate Integrity Agreement. Evergreen 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 the date set forth in

Exhibit A, and that it has no plans to resume furnishing services. Evergreen 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. Evergreen 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 Evergreen'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 Evergreen 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 Evergreen and all of its current or former shareholders, officers, directors, employees, partners, physician contractors, subsidiaries, predecessors, successors, affiliates and assigns (collectively, the "Releasees") from any civil or administrative monetary claims, including recoupment 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, the Social Security Act at 42 U.S.C. § 1395l(e), 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 Evergreen under this Agreement, conditioned upon Evergreen's payment in full of the United States' Settlement Share and the Affected 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 any Releasees 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 the Evergreen from the Medicare, Medicaid or other Federal health care programs under 42 U.S.C. § 1320a-7(a) (mandatory exclusion) for the Covered Conduct.

(b) In consideration of the obligations of Evergreen under this Agreement, conditioned upon Evergreen'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 any Releasees 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 any Releasees from the TRICARE program under 32 C.F.R. §§ 199.9(f)(1)(i)(A) and (f)(1)(iii), based upon the Covered Conduct. Nothing in this Subparagraph 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 Evergreen set forth in this Agreement, conditioned upon Evergreen'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 any Releasees 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. Relator agrees that the settlement between the United States and Evergreen in this action is fair, adequate and

reasonable pursuant to 31 U.S.C. § 3730(c)(2)(B).

6. Pursuant to 31 U.S.C. § 3730, the United States will pay to Relator a share of 20% (the "Relator's share"), within a reasonable time after the United States' receipt of the United States' Settlement Share from Evergreen. 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 Evergreen.

7. 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).

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 that may arise under Title 26, United States Code (Internal Revenue Code), or under securities laws;

b. claims for defective or deficient services, for services not provided or for medically unnecessary services, to

the extent such claims are based on conduct other than the Covered Conduct;

c. claims relating to obligations created by this Agreement;

d. claims against entities or persons other than the Releasees, 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 administrative liability to agencies other than OIG-HHS, TMA, and OPM, including claims for any action seeking exclusion from the Medicare program or 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. The consideration set forth in this Agreement is accepted by all Parties in full compromise and settlement of the claims and causes of action for injuries and damages asserted in the Sealed Action pursuant and subject to the releases set forth in Paragraphs 3 and 4 and the exceptions set forth in Paragraph 8. 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 Evergreen in the Sealed Action, pursuant and 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 Evergreen consistent with this Agreement.

10. In consideration of the mutual promises and obligations of this Agreement, Relator hereby releases and discharges all Releasees 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, including claims against Evergreen for attorneys' fees, costs and expenses incurred by Relator in connection with the Sealed Action or any related litigation.

11. Unallowable Costs. Evergreen agrees that all costs (as defined in the Federal Acquisition Regulations (FAR) § 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 Evergreen in connection

with the following matters covered by this Agreement and the agreement with the Affected State: (a) the Government's audits and civil and criminal investigations of the allegations which are the subject of this Agreement; (b) any of Evergreen's investigation, defense and corrective actions (including attorney's fees) undertaken in response to the Government's audits and civil and criminal investigations in connection with matters specifically covered by this Agreement and the agreement with the Affected State; (c) the negotiation of this Agreement and the agreement with the Affected State (including attorney's fees); and (d) the payments made to the United States, the Affected State and the Relator pursuant to this Agreement and the agreement with the Affected State, are 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 Evergreen and Evergreen 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 Evergreen or any of its subsidiaries to the Medicare, Medicaid, TRICARE, VA or FEHBP programs.

Evergreen further agrees that, if Evergreen currently is

participating in, or previously has participated, or becomes a participant in the Federal health care programs (as defined in 42 U.S.C. § 1320a-7b(f)) as a provider that is reimbursed in whole or in part on the basis of the provider's costs, or if Evergreen has or acquires an ownership interest in such an entity, within 60 days of the effective date of this Agreement, Evergreen will identify to applicable Medicare and TRICARE fiscal intermediaries, carriers and/or contractors, and Medicaid and FEHBP fiscal agents, any unallowable costs (as defined in this Paragraph 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 Evergreen 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. Evergreen agrees that the United States will be entitled to recoup from Evergreen any overpayment 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 Evergreen or any of its subsidiaries on the effect of inclusion of unallowable costs (as defined in this Paragraph 11) on Evergreen 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 11.

12. Subsequent to the execution of this Agreement, Evergreen agrees that it will not seek payment for any of the health care billings related to the Covered Conduct from any Federal health care beneficiaries or their parents or sponsors. Evergreen 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. Evergreen waives and will not assert any defenses Evergreen 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. Evergreen agrees that this settlement is

not punitive in purpose or effect.

14. 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. Evergreen represents that this Agreement is freely and voluntarily entered into without any degree of duress or compulsion whatsoever.

16. 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.

17. 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.

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

19. Binding Nature of Agreement. This Agreement is binding on all successors, heirs, assigns and transferees of the Parties.

20. Effective Date. This Agreement is effective on the date of signature of the last signatory to the Agreement.

UNITED STATES OF AMERICA

 Dated: 12/21/00

LAURIE A. OBEREMBT
Trial Attorney
Commercial Litigation Branch
Civil Division
United States Department of Justice,

_____ Dated: _____

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: _____

ROBERT L. SHEPHERD
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

20. Effective Date. This Agreement is effective on the date of signature of the last signatory to the Agreement.

UNITED STATES OF AMERICA

 Dated: 12/21/00

LAURIE A. OBEREMBT
Trial Attorney
Commercial Litigation Branch
Civil Division
United States Department of Justice,

_____ Dated: _____

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: 12-28-00

ROBERT L. SHEPHERD
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

20. Effective Date. This Agreement is effective on the date of signature of the last signatory to the Agreement.

UNITED STATES OF AMERICA

Laurie A. Oberembt Dated: 12/21/00
LAURIE A. OBEREMBT
Trial Attorney
Commercial Litigation Branch
Civil Division
United States Department of Justice,

L. Morris Dated: 12/26/00
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: _____
ROBERT L. SHEPHERD
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

20. Effective Date. This Agreement is effective on the date of signature of the last signatory to the Agreement.

UNITED STATES OF AMERICA

Laurie A. Oberembt Dated: 12/21/00
LAURIE A. OBEREMBT
Trial Attorney
Commercial Litigation Branch
Civil Division
United States Department of Justice,

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

E. Jeremy Hutton Dated: 1/8/01
E. JEREMY HUTTON
Assistant Inspector General for Legal
Affairs
Office of the Inspector General
United States Office of Personnel
Management

Frank D. Titus
FRANK D. TITUS

Dated: 1/9/01

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

Evergreen Emergency Physicians, P.C.

_____ Dated: _____
Nancy Karsten, M.D.
President

_____ Dated: _____
FRANK D. TITUS
Assistant Director for Insurance
Programs
United States Office of Personnel
Management

RELATOR

Cheryl A. Vaught Dated: 12/27/00
Cheryl A. Vaught
Vaught & Conner, P.L.L.C.
Attorneys for Relator

Evergreen Emergency Physicians, P.C.

_____ Dated: _____
Nancy Karsten, M.D.
President

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Dated: _____

FRANK D. TITUS
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

Evergreen Emergency Physicians, P.C.

 Dated: 12/27/00

Nancy Karsten, M.D.
President