

## SETTLEMENT AGREEMENT

### I. Parties

This Settlement Agreement ("Agreement") is entered into by and among the United States of America, acting through the United States Department of Justice ("DOJ") and the Office of Inspector General of the United States Department of Health and Human Services ("HHS-OIG"), (collectively, the "United States"), Pamela A. Tomczak, 907 Rue Grande Vue, Pittsburgh, PA 15220 ("Relator"); and Jay Herman, M.D., 532 South Aiken Avenue, Suite 210, Pittsburgh, PA 15232 ("Defendant"). All of the persons and entities listed above shall be referred to collectively in the Agreement as the "Parties."

### I. Preamble

A. Defendant owns and manages a practice specializing in urology. The United States alleges that Defendant improperly billed the Medicare program, 42 U.S.C. 1395 *et seq.*, for several services during the period of January 1, 1992 through December 31, 1995. The United States alleges that, among other things, between the years 1992 and 1995, inclusive, Defendant did improperly bill the Medicare program for a portion of the billings for which he sought reimbursement from Medicare under CPT Codes 81000, 87086 and 87184.

B. The United States contends that, based on the conduct set forth in the preceding paragraphs, it has or may have certain claims and causes of action against Defendant predicated upon the False Claims Act, 31 U.S.C. §§ 3729 -3733, as amended; the Civil Monetary Penalties Law, 42 U.S.C. § 1320a-7a; the Program Fraud Civil Remedies Act, 31 U.S.C. § 3801-3812; and the provisions for exclusion from the Medicare and State health care programs, 42 U.S.C. § 1320a-7(b), 42 U.S.C. § 1320a-7a and 42 U.S.C. § 1320a-7(d); as well as under common law theories, for damages and penalties arising out of the claims for reimbursement described in the preceding paragraph A and Count 1 of the complaint filed by the Relator at Civil Action No. 96-762 (W.D. Pa.), for the period of January 1, 1992 through December 31, 1995.

C. The Relator filed under seal a qui tam complaint on behalf of the United States, which inter alia, alleges the same conduct and causes of action set forth in the preceding paragraphs. See Pamela Tomczak, on her own behalf and on behalf of the United States of America v. Jay Herman, M.D., Civil Action No. 96-762 (W.D. Pa.), at Count 1.

D. Defendant Jay Herman, M.D., denies that he has falsely billed the Medicare program as alleged by the United States and by the Relator in the action filed at Civil Action No. 96-762 (W.D. Pa.).

E. In order to avoid the uncertainty and expense of litigation, the Parties hereby reach a full and final settlement of all issues and disputes between them based upon the conduct set forth in paragraphs A-C of this Agreement, and all of the allegations contained in Count 1 of the qui tam complaint filed at Civil Action No. 96-762, for alleged false billings to the Medicare program for the period of January 1, 1992 through December 31, 1995 .

## II. Terms and Conditions

In accordance with the mutual covenants and agreements herein, and with full authority to enter into this Agreement and to be bound thereby, the Parties agree as follows:

1. In settlement of the claims and causes of action that the United States has or may have against Defendants, as described in paragraphs A-C of this Agreement and in the qui tam complaint, Defendant agrees to pay to the United States the sum of Twenty-Five Thousand Dollars (\$25,000.00) ("Settlement Amount"). Defendant will pay the Settlement Amount in full to the United States upon execution of this Agreement.

2. Defendant will satisfy the obligations set forth in paragraph 1 by electronic funds transfer to the "Department of Justice," as arranged through the Financial Litigation Unit, U.S. Attorney's Office, Western District of Pennsylvania or by cashier's or certified check made payable to "The United States Department of Justice," and delivered to Robert L. Eberhardt, Assistant United States Attorney, United States Attorney's Office.

3. Immediately upon execution of this Agreement, Defendant will implement the Corporate Integrity Plan ("CIP") summarized and set forth in Exhibit 1 to this Agreement and incorporated herein by reference.

4. Out of the Settlement Amount, the United States will pay the Relator the sum of Two Thousand Five Hundred Dollars (\$2,500.00). Upon receipt of this sum, the Relator will move the Court to dismiss the qui tam complaint with prejudice.

5. Subject to the exceptions in paragraph 6 and in consideration of Defendant's obligations under this Agreement, upon receipt of the Settlement Amount, the United States, on behalf of itself, its officers, agents, agencies, and departments, will release Defendant from any civil or administrative monetary claim or cause of action for the conduct described in paragraphs A-C above and in Count 1 of the complaint filed at Civil Action No. 96-762, relating to the period of January 1, 1992 through December 31, 1995, that the United States has or may have under the False Claims Act, 31 U. S. C. § § 3729-3733 (as amended); at common law; under the Program Fraud Civil Remedies Act, 31 U.S.C. § 3801-3812; the Civil Monetary Penalties Law, 42 U.S.C. § 1320a-7a; and from any action seeking exclusion from the Medicare and State health care programs, pursuant to 42 U.S.C. § 1320a-7a, 42 U.S.C. § 1320a-7(b), or 42 U.S.C. § 1320a-7(d). Neither the OIG nor HHS agrees to waive any claims, actions, demands, or causes of action they may have against Defendants for conduct other than that described in paragraphs A-C above. This Agreement is intended for the benefit of the Parties only, and by this instrument the Parties do not waive, compromise or release any claims or causes of action against any other person or entity.

7. Notwithstanding any term of this Agreement, specifically reserved and excluded from the scope and terms of this Agreement are any and all:

- (a) criminal liability that may arise from the conduct described in paragraphs A-C and/or the qui tam complaint; and any related administrative action for mandatory exclusion from the Medicare and State health care programs, which may be based upon

criminal liability, pursuant to 42 U. S.C. § 1320a-7(a);

- (b) claims that may arise under Title 26, United States Code (Internal Revenue Code) or under securities laws;
- (c) liability to the United States (or any agencies thereof) for any conduct other than that described in paragraphs A-C;
- (d) claims against any individuals, including officers and employees of Defendant who are criminally indicted or convicted, or who enter into criminal plea agreements, if such claims are based on the conduct described in paragraphs A-C;
- (e) claims related to Medicare billings other than those specified in paragraph A-C for the period of January 1, 1992 through December 31, 1995;
- (f) claims related to obligations created by this Agreement, including those created by the CIP;
- (g) any claims for defective or deficient services.

8. Nothing in any provision of this Agreement constitutes an agreement by the United States concerning the characterization of the amounts paid hereunder for purposes of any proceeding under Title 26, United States Code (Internal Revenue Code).

9. All costs (as defined in the Federal Acquisition Regulations ("FAR") 31.205-47 and as defined in Titles XVIII and XIX of the Social Security Act, 42 U.S.C. § 1395 *et seq.* and § 1396 *et seq.* and the regulations promulgated thereunder) incurred by or on behalf of Defendant, and his present or former officers, directors, employees, shareholders, and agents, in connection with 1) the matters covered by this Agreement, 2) the Government's audit and investigation of the matters covered by this Agreement, 3) Defendant's investigation, defense, and the obligations undertaken pursuant to the Corporate Integrity Plan incorporated by reference herein, 4) the negotiation of this Agreement, and 5) the payments made to the United States pursuant to this Agreement shall be unallowable costs for government contracting purposes and for Medicare and Medicaid purposes. Defendant will account for these amounts separately, and Defendant will not

charge such costs directly or indirectly to any contracts with the United States, or to any cost report submitted to the Medicare or Medicaid program or any other government health insurance program. Any sums owed by Defendant to the United States for payments made to Defendant by Medicare and/or Medicaid (federal share) for costs that are unallowable (as defined in this paragraph) shall be paid by Defendant to HHS at its direction.

10. Defendant fully and finally releases, dismisses, and forever discharges the United States, its agencies, employees, servants, and agents from any and all claims, causes of action, liens, lawsuits, liabilities, losses and damages, including attorney's fees, costs, and expenses, of every kind and every nature whatsoever, regardless of legal theory and however denominated, whether known or unknown, suspected or unsuspected, past or future, which Defendant has asserted or could have asserted against the United States, its agencies, employees, servants, and agents, related to or arising from the facts described in paragraphs A-C above and/or in the qui tam complaint.

11. The Relator acknowledges that the Settlement Amount and the amount paid from the Settlement Amount by the United States to the Relator are in full compromise of the allegations contained in Count 1 of the qui tam complaint and are fair and reasonable under all of the circumstances.

12. This Settlement Agreement and the Corporate Integrity Plan incorporated by reference herein constitute the entire agreement between the Parties. This Agreement may not be altered except by written consent of the Parties, except to the extent that Defendant and HHS/OIG agree to modification of the Corporate Integrity Plan, pursuant to provisions of the CIP. No other additional promises, conditions or agreements have been entered into other than those stated in this Agreement.

13. Except as provided for herein, each party to this Agreement will bear its own costs incurred in connection with this case and the qui tam action, including the preparation and performance of this Agreement.

14. It is understood and agreed that this Settlement Agreement is in compromise of disputed claims and that it shall not be construed as an admission or evidence of liability or wrongdoing on the part of Defendant.

15. The Parties represent that the Agreement is entered into with knowledge of the events described herein and upon advice of counsel. The Parties further represent that this Agreement is freely and voluntarily entered into without any degree of duress or compulsion whatsoever, in order to avoid litigation.

16. The undersigned signatories represent and warrant that they are fully authorized and empowered to execute this Agreement.

17. The Parties have executed identical copies of this Agreement, each of which will be deemed an original.

18. The provisions of this Agreement will be binding upon the Parties and their heirs, successors, assigns and transferees.

19. The effective date of this Agreement is the last date listed among the signature lines at the end of the Agreement.

IN WITNESS WHEREOF, the parties hereto affix their signatures:

FOR THE UNITED STATES OF AMERICA, U.S. DEPARTMENT OF JUSTICE:

Dated: 8/28/97

Robert L. Eberhardt  
ROBERT L. EBERHARDT  
Assistant United States Attorney

FOR THE U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES:

Dated: 8/14/97

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

FOR THE RELATOR:

Dated: 08-29-97

Pamela Tomczak  
PAMELA A. TOMCZAK

Dated: 8/29/97

Scott Michael Hare  
SCOTT MICHAEL HARE, Esquire  
Counsel for Relator

FOR THE DEFENDANT:

Dated: 8/28/97

Jay Bermon, M.D.  
JAY BERMON, M.D.

Dated: 8/28/97

Susan A. Yohe  
SUSAN A. YOHE, Esquire  
Counsel for Defendant