

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 Kern Emergency Physicians, a California partnership ("Kern"); (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 Kern 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 claims against Kern 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 Kern 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 Kern 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. Kern denies the contentions of the United States in paragraphs C and D above.

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. Kern agrees to pay the United States and the state of California (the "State") the collective sum of \$178,199.00 plus interest accruing at a rate of 7% per annum for a total amount of \$179,803.30 (the "Total Amount"). Kern agrees to make separate payments aggregating up to the Total Amount as follows:

\$147,449.17 to the United States (the "United States' Settlement Share") and \$32,354.13 to the State (the "State's Settlement Share"). Payment of the Total Amount shall be made according to the following schedule:

a. Within ten business days of execution of this agreement (the "First Payment Date"), Kern will pay \$100,000.00, with \$32,354.13 to be paid to the State and \$67,645.87 to be paid to the United States.

b. The remaining portion of the Total Amount will be made in "Installment Payments" according to the following schedule:

i. Within thirty days of the First Payment Date, Kern will pay the United States \$13,300.55.

ii. Within sixty days of the First Payment Date, Kern will pay the United States an additional \$13,300.55.

iii. Within ninety days of the First Payment Date, Kern will pay the United States an additional \$13,300.55.

iv. Within one hundred twenty days of the First Payment Date, Kern will pay the United States an additional \$13,300.55.

v. Within one hundred fifty days of the First Payment Date, Kern will pay the United States an additional \$13,300.55.

vi. Within one hundred eighty days of the First Payment Date, Kern will pay the United States an additional \$13,300.55.

Payment to the United States 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 Kern and the State (the "State Agreement"), with payment instructions as to the State's Settlement Share to be provided by Ellyn Sternfield, Esq. on behalf of the State.

TMA has already begun to process claims that have been suspended by TMA, with the amount to be paid by TMA to Kern to equal 88% of the amount that would have been paid by TMA had it processed the suspended claims without review of the coding.

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

2. Corporate Integrity Agreement. Kern has entered into a Corporate Integrity Agreement ("CIA") with OIG-HHS, attached as Exhibit A, which is incorporated into this Agreement by reference. Kern will implement its obligations under the CIA in accordance with the terms of the CIA.

3. Dismissal and Release. Subject to the exceptions in paragraph 8 below, in consideration of the obligations set forth in this Agreement (including the CIA and paragraph 14 below concerning bankruptcy proceedings commenced within 91 days of this Agreement) and conditioned upon Kern'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 Kern in the Sealed Action subject to the terms of this Agreement and as described more fully in paragraph ten of this Agreement; and (ii) the United States hereby releases and discharges Kern from any 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 Kern under this Agreement, (including the CIA and paragraph 14 below concerning bankruptcy proceedings commenced within 91 days of this Agreement), conditioned upon Kern'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 Kern 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 Kern 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 Kern under this Agreement (including the CIA and paragraph 14 below concerning bankruptcy proceedings commenced within 91 days of this Agreement), conditioned upon Kern'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 Kern 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 Kern 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 Kern set forth in this Agreement (including paragraph 14 below concerning bankruptcy proceedings commenced within 91 days of this Agreement), conditioned upon Kern'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 Kern 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 Kern 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 Kern, in *pro rata* payments, plus *pro rata* interest at the rate specified in Paragraph 1. 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 her respective *pro rata* share unless and until the United States receives payment of the United States' First and Installment Payments of the United States' Settlement Share from Kern.

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 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 Kern, 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. 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 first share payment described in Paragraph 6 of this Agreement. The Stipulation will request that the Court enter an order to dismiss with prejudice the claims against Kern 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 Kern consistent with this Agreement.

10. In consideration of the mutual promises and obligations of this Agreement, Relator hereby releases and discharges Kern 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. Kern 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. §§ 1395-1395ddd (1997) and § 1396-1396v (1997), and the regulations promulgated thereunder) incurred by or on behalf of Kern in connection with: (a) the matters covered by this Agreement and the agreement with the State, including attorney's

fees and the obligations undertaken pursuant to the CIA; (b) the government's audits and civil and criminal investigations of the allegations which are the subject of this Agreement; (c) any of Kern'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 agreement with the State; (d) the negotiation of this Agreement, the CIA 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 Kern and Kern 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 Kern or any of its subsidiaries to the Medicare, Medicaid, TRICARE, VA or FEHBP programs.

Kern 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 Kern 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. Kern agrees that the United States will be entitled to recoup from Kern 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 Kern or any of its subsidiaries on the effect of inclusion of unallowable costs (as defined in this Paragraph 11) on Kern 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. Kern 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. Kern waives any causes of action against these beneficiaries or their parents or sponsors based upon the claims for payment covered by this Agreement.

13. Kern expressly warrants that it has reviewed its financial situation and that it currently is solvent within the meaning of 11 U.S.C. Section 547(b)(3), and will remain solvent following its payment to the United States hereunder. Further, the Parties expressly warrant that, in evaluating whether to execute this Agreement, the Parties (i) have intended that the mutual promises, covenants and obligations set forth herein constitute a contemporaneous exchange for new value given to Kern, within the meaning of 11 U.S.C. Section 547(c)(1), and (2) have concluded that these mutual promises, covenants and obligations do, in fact, constitute such a contemporaneous exchange.

14. In the event Kern commences, or a thirty party commences, within 91 days of the effective date of this Agreement, any case, proceeding, or other action (a) under any law relating to bankruptcy, insolvency, reorganization or relief of debtors, seeking to have any order for relief of Kern's debts, or seeking to adjudicate Kern as bankrupt or insolvent, or (b)

seeking appointment of a receiver, trustee, custodian or other similar official for Kern or for all or any substantial part of Kern's assets, Kern agrees as follows:

a. Kern's obligations under this Agreement may not be avoided pursuant to 11 U.S.C. Section 547, and Kern will not argue or otherwise take the position in any such case, proceeding or action that: (i) Kern's obligations under this Agreement may be avoided under 11 U.S.C. Section 547; (ii) Kern was insolvent at the time this Agreement 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 Agreement do not constitute a contemporaneous exchange for new value given to Kern.

b. In the event that Kern'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 the releases in this Agreement, and bring any civil and/or administrative claim, action or proceeding against Kern for the claims that would otherwise be covered by the releases provided in Paragraphs 3-4, above. If the United States chooses to do so, Kern agrees that (i) any such claims, actions or proceedings brought by the United States (including any proceedings to exclude Kern from participation in Medicare, Medicaid, or other

federal health care programs) are not subject to an "automatic stay" pursuant to 11 U.S.C. Section 362(a) as a result of the action, case or proceeding described in the first clause of this Paragraph, and that Kern will not argue or otherwise contend that the United States' claims, actions or proceedings are subject to an automatic stay; (ii) that Kern 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 proceeding which are brought by the United States within 15 calendar days of written notification to Kern that the releases herein have been rescinded pursuant to this Paragraph, except to the extent such defenses were available on the filing date of the Sealed Action¹; and (iii) the United States has a valid claim against Kern in the amount of \$1,534,597.00, 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. Kern acknowledges that its agreements in this Paragraph are provided in exchange for valuable consideration provided in this Agreement.

15. Waiver of Double Jeopardy Defense. With respect to the Covered Conduct, Kern hereby waives and will not assert any

defenses it may have to any criminal prosecution, 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. Kern further agrees that this Settlement is not punitive in purpose or effect.

16. 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.

17. Kern represents that this Agreement is freely and voluntarily entered into without any degree of duress or compulsion whatsoever, and that Kern understands its right to advice of counsel concerning this Agreement.

18. 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, except that any disputes arising out of the CIA shall be resolved

in the manner set forth in the CIA.

19. 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, except that only Kern and OIG-HHS must agree in writing to modification of the CIA, pursuant to the terms of the CIA.

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

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

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

UNITED STATES OF AMERICA

 Dated: 4/12/01
LAURIE A. OBEREMBT
REBECCA ROHR
Trial Attorney
Commercial Litigation Branch
Civil Division
United States Department of Justice,

 Dated: 4/12/01
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: 3-22-01
ROBERT L. SHEPHERD
Deputy General Counsel
TRICARE Management Activity
United States Department of Defense

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Assistant Inspector General for Legal
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Office of the Inspector General
United States Office of Personnel
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_____ Dated: _____
ABBY L. BLOCK
Assistant Director for Insurance
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United States Office of Personnel
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RELATOR

_____ Dated: _____
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Kern Emergency Physicians

Inspector General
Office of Inspector General
United States Department of
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ROBERT L. SHEPHERD
Deputy General Counsel
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United States Department of Defense

E. Jeremy Hutton Dated: April 3, 2001
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Assistant Inspector General for Legal
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Assistant Director for Insurance
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RELATOR

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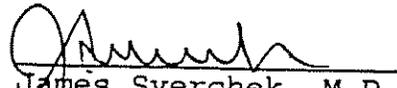
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RELATOR

Cheryl A. Vaught Dated: 3/23/01

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James Sverchek, M.D.
Managing Partner

Dated: 3-11-01