

SETTLEMENT AGREEMENT

This Settlement Agreement (“Agreement”) is entered into among the United States of America, acting through the United States Department of Justice and on behalf of the Office of Inspector General (“OIG-HHS”) of the Department of Health and Human Services (“HHS”); the Commonwealth of Massachusetts, acting through the Massachusetts Attorney General’s Office and on behalf of the Executive Office of Health and Human Services (“EOHHS”) (collectively, the “Commonwealth”), Massachusetts Eye and Ear Infirmary, Massachusetts Eye and Ear Associates, Inc., the Foundation of the Massachusetts Eye and Ear Infirmary, Inc. (collectively, the “Defendants” or “MEE”), and Benjamin Schwarz (the “Relator”) (hereafter collectively referred to as the “Parties”), through their authorized representatives.

RECITALS

A. Massachusetts Eye and Ear Infirmary, a not-for-profit teaching hospital, and Massachusetts Eye and Ear Associates, Inc. (“Associates”), a physicians’ medical group, operate clinical practices in the Commonwealth of Massachusetts that focus on the treatment of diseases and conditions affecting the eye, ear, nose, throat, and adjacent regions of the head and neck. The Foundation of Massachusetts Eye and Ear Infirmary, Inc. (“Foundation”), is the parent corporation for a group of controlled organizations including Massachusetts Eye and Ear Infirmary and Associates. All three entities are located at 243 Charles Street, Boston, Massachusetts 02114.

B. On April 6, 2018, Benjamin Schwarz filed a qui tam action in the United States District Court for the District of Massachusetts captioned *United States, et al., ex rel. John Doe v. Massachusetts Eye and Ear Infirmary, et al.*, 18-cv-10692-GAO, pursuant to the qui tam provisions of the False Claims Act, 31 U.S.C. § 3730(b) and the Massachusetts False Claims Act, M.G. L. c. 12, § 5A, *et seq.* (the “Civil Action”). He alleges that MEE billed Federal health

care programs, including Medicare and Massachusetts Medicaid (“MassHealth”) for nasal endoscopies not performed. Otolaryngologists use nasal endoscopies to examine a patient’s nasal and sinus passages by inserting an endoscope, a medical device consisting of a thin rigid tube connected to a light source and a small video camera, through the patient’s nose. An otolaryngologist is a physician that specializes in the treatment and management of diseases and disorders affecting the ear, nose, throat, and other related bodily structures.

C. The United States and the Commonwealth contend that MEE submitted or caused to be submitted claims for payment to the Medicare Program, Title XVIII of the Social Security Act, 42 U.S.C. §§ 1395-1395lll (“Medicare”), and the Medicaid Program, 42 U.S.C. §§ 1396-1396w-5 (“Medicaid”). Medicare Part B and MassHealth will pay a claim for a medically necessary nasal endoscopy or laryngoscopy (an endoscopy of the larynx) in an outpatient setting. Medicare Part B and MassHealth also will pay a hospital for an office visit during which an otolaryngologist performs a medically necessary nasal endoscopy or laryngoscopy, but only if, in conjunction with the procedure, the otolaryngologist also performs a significant and separately identifiable evaluation and management service. To signify an otolaryngologist’s provision of a significant and separately identifiable evaluation and management service, a hospital’s claim must contain a Modifier 25 code, in addition to a Current Procedural Terminology evaluation and management service code.

D. The United States and the Commonwealth contend that they have certain civil claims against MEE arising from MEE’s submission of fee-for-service claims to Medicare Part B and MassHealth for office visits in conjunction with claims for nasal endoscopies and laryngoscopies, when otolaryngologists did not actually perform significant and separately identifiable evaluation and management services during the period from January 1, 2012 through February 1, 2020. That conduct is referred to below as the “Covered Conduct.”

E. Relator claims entitlement under 31 U.S.C. § 3730(d) and M.G.L. c.12, § 5F, to a share of the proceeds of this Settlement Agreement and to Relator's reasonable expenses, attorneys' fees, and costs.

F. MEE agrees not to make or permit to be made any public statement denying, directly or indirectly, any of the Covered Conduct or creating the impression that the Covered Conduct is without factual basis. Nothing in this paragraph affects MEE's: (i) testimonial obligations; or (ii) right to take legal or factual positions in litigation or other legal proceedings in which the United States and/or the Commonwealth is not a party.

In consideration of the mutual promises and obligations of this Settlement Agreement, the Parties agree and covenant as follows:

TERMS AND CONDITIONS

1. MEE shall pay to the United States and the Commonwealth a total of \$2,678,013, plus interest at a rate of 0.875% from January 12, 2021, through the day before full payment (the "Settlement Amount"), no later than 14 days after the Effective Date of this Agreement. Of the Settlement Amount, \$1,339,006.50 is restitution. MEE shall pay the Settlement Amount as follows: MEE shall pay the United States \$2,560,716.03 plus interest by electronic funds transfer pursuant to written instructions to be provided by the United States Attorney for the District of Massachusetts; and MEE shall pay the Commonwealth \$117,296.97 plus interest by electronic funds transfer pursuant to written instructions to be provided by the Massachusetts Attorney General's Office.

2. Conditioned upon the United States and the Commonwealth receiving the Settlement Amount and as soon as feasible after receipt, the United States and the Commonwealth shall respectively pay the Relator by electronic funds transfer 15% of the Settlement Amount ("Relator's Share").

3. MEE shall pay to Relator's counsel a total of \$78,000 for expenses, attorneys' fees and costs no later than 14 days after the Effective Date of this Agreement. Relator's counsel agrees that this amount constitutes all expenses and reasonable attorneys' fees and costs pursuant to 31 U.S.C. § 3730 (d) and M.G.L. c. 12, § 5B(a). MEE shall pay the \$78,000 via electronic funds transfer pursuant to written instructions to be provided by Relator's counsel.

4. Subject to the exceptions in Paragraph 6 (concerning excluded claims) below, and conditioned upon the United States' receipt of its portion of the Settlement Amount, the United States releases MEE from any civil or administrative monetary claim the United States has for the Covered Conduct under the False Claims Act, 31 U.S.C. §§ 3729-33, the Civil Monetary Penalties Law, 42 U.S.C. § 1320a-7a, the Program Fraud Civil Remedies Act, 31 U.S.C. §§ 3801-12, or the common law theories of payment by mistake, unjust enrichment, and fraud.

5. Subject to the exceptions in Paragraph 6 (concerning excluded claims) below, and conditioned upon the Commonwealth's receipt of its portion of the Settlement Amount, the Commonwealth releases MEE from any civil or administrative monetary claim the Commonwealth has for the Covered Conduct under the Massachusetts False Claims Act, M.G.L. c.12, § 5B – 5O, or the common law theories of payment by mistake, unjust enrichment, and fraud.

6. Notwithstanding the releases given in Paragraphs 4, 5 and 8 of this Agreement, or any other term of this Agreement, the following claims and rights of the United States and the Commonwealth are specifically reserved and are not released:

- a. Any liability arising under Title 26, U.S. Code (Internal Revenue Code);
- b. Any criminal liability;

- c. Except as explicitly stated in this Agreement, any administrative liability or enforcement right, including mandatory or permissive 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 liability based upon obligations created by this Agreement; and
- f. Any liability of individuals.

7. Relator and his heirs, successors, attorneys, agents, and assigns shall not object to this Agreement but agrees and confirms that this Agreement is fair, adequate, and reasonable under all the circumstances, pursuant to 31 U.S.C. § 3730(c)(2)(B) and M.G.L. c.12, § 5D(3). Conditioned upon Relator's receipt of the Relator's Share, Relator and his heirs, successors, attorneys, agents, and assigns fully and finally release, waive, and forever discharge the United States, its agencies, officers, agents, employees, and servants from any claims arising from the filing of the Civil Action or under 31 U.S.C. § 3730, and from any claims to a share of the proceeds of this Agreement and/or the Civil Action. Conditioned upon Relator's receipt of the Relator's Share, Relator and his heirs, successors, attorneys, agents, and assigns fully and finally release, waive, and forever discharge the Commonwealth, its agencies, officers, agents, employees, and servants from any claims arising from the filing of the Civil Action or under M.G.L. c.12, § 5B(a), and from any claims to a share of the proceeds of this Agreement and/or the Civil Action.

8. Subject to the exceptions in Paragraph 6 above (concerning excluded claims) and conditioned upon MEE's full payment of the Settlement Amount, Relator, for himself, and for his heirs, successors, attorneys, agents, and assigns, releases MEE, and its officers, agents, and employees, from any liability to Relator arising from the filing of the Civil Action, or for any

civil monetary claim the Relator has on behalf of the United States or the Commonwealth for the Covered Conduct under the False Claims Act, 31 U.S.C. § 3729-33, or the Massachusetts False Claims Act, M.G.L. c.12, § 5B(a), or under 31 U.S.C. § 3730(d) and/or M.G.L. c. 12, § 5B(a) for expenses or attorneys' fees and costs.

9. MEE waives and shall not assert any defenses MEE may have to any criminal prosecution or administrative action relating to the Covered Conduct that 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 Agreement bars a remedy sought in such criminal prosecution or administrative action.

10. MEE waives and shall not assert any defenses MEE may have to any criminal prosecution or administrative action relating to the Covered Conduct that may be based in whole or in part on a contention that, under the Massachusetts common law and statutory guarantee against double jeopardy, *see* M.G.L. c. 263, § 7, or under the excessive fines clause of Article XXVI of the Massachusetts Declaration of Rights, this Agreement bars a remedy sought in such criminal prosecution or administrative action.

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

12. MEE fully and finally releases the Commonwealth, its agencies, officers, agents, employees, and servants, from any claims (including for attorneys' fees, costs, and expenses of every kind and however denominated) that MEE has asserted, could have asserted, or may assert

in the future against the Commonwealth, its agencies, officers, agents, employees, and servants, related to the Covered Conduct or the Commonwealth's investigation or prosecution thereof.

13. MEE fully and finally releases the Relator from any claims (including for attorneys' fees, costs, and expenses of every kind and however denominated) that MEE has asserted, could have asserted, or may assert in the future against the Relator, related to the Covered Conduct and the Relator's investigation and prosecution thereof.

14. The Settlement Amount shall not be decreased as a result of the denial of claims for payment now being withheld from payment by any Medicare contractor (e.g., Medicare Administrative Contractor, fiscal intermediary, carrier) or any state payer, including MassHealth, related to the Covered Conduct; and MEE agrees not to resubmit to any Medicare contractor or any state payer, including MassHealth, any previously denied claims related to the Covered Conduct, agrees not to appeal any such denial of claims, and agrees to withdraw any such pending appeal.

15. MEE agrees to the following:

a. 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. §§ 1395-1395lll and 1396-1396w-5; and the regulations and official program directives promulgated thereunder) incurred by or on behalf of MEE, its present or former officers, directors, employees, shareholders, and agents in connection with:

- (1) the matters covered by this Agreement;
- (2) the United States' and the Commonwealth's audit(s) and civil investigation(s) of the matters covered by this Agreement;
- (3) MEE's investigation, defense, and corrective actions undertaken in response to the United States' and Commonwealth's audit(s) and civil

investigation(s) in connection with the matters covered by this Agreement
(including attorneys' fees);

- (4) the negotiation and performance of this Agreement; and
- (5) the payment MEE makes to the United States and the Commonwealth pursuant to this Agreement and any payments that MEE may make to Relator, including costs and attorneys' fees

are unallowable costs for government contracting purposes and under the Medicare Program, Medicaid Program, TRICARE Program, and Federal Employees Health Benefits Program ("FEHBP") (hereinafter referred to as Unallowable Costs).

b. Future Treatment of Unallowable Costs: Unallowable Costs shall be separately determined and accounted for by MEE, and MEE shall not charge such Unallowable Costs directly or indirectly to any contracts with the United States or any State Medicaid program, including MassHealth, or seek payment for such Unallowable Costs through any cost report, cost statement, information statement, or payment request submitted by MEE or any of its subsidiaries or affiliates to the Medicare, Medicaid, TRICARE, or FEHBP Programs.

c. Treatment of Unallowable Costs Previously Submitted for Payment: MEE further agrees that within 90 days of the Effective Date of this Agreement it shall 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) 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 MEE or any of its subsidiaries or affiliates, and shall 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. MEE agrees that the United States and the Commonwealth, at a minimum, shall be entitled to recoup from MEE 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 and Commonwealth pursuant to the direction of the Department of Justice and/or the affected agencies. The United States and Commonwealth reserve their rights to disagree with any calculations submitted by MEE or any of its subsidiaries or affiliates on the effect of inclusion of Unallowable Costs (as defined in this paragraph) on MEE's or any of its subsidiaries' or affiliates' cost reports, cost statements, or information reports.

d. Nothing in this Agreement shall constitute a waiver of the rights of the United States or the Commonwealth to audit, examine, or re-examine MEE's books and records to determine that no Unallowable Costs have been claimed in accordance with the provisions of this paragraph.

16. This Agreement is intended to be for the benefit of the Parties only. The Parties do not release any claims against any other person or entity, except to the extent provided for in Paragraph 17 (waiver for beneficiaries paragraph), below.

17. MEE agrees that it waives and shall not seek payment for any of the health care billings covered by this Agreement from any health care beneficiaries or their parents, sponsors, legally responsible individuals, or third party payors based upon the claims defined as Covered Conduct.

18. Upon receipt of the Settlement Amount, the United States of America, the Commonwealth, and the Relator shall promptly sign and file in the Civil Action a Joint Stipulation of Dismissal of the Civil Action pursuant to Rule 41(a)(1).

19. Each Party shall bear its own legal and other costs incurred in connection with this matter, including the preparation and performance of this Agreement.

20. Each Party and signatory to this Agreement represents that it freely and voluntarily enters into this Agreement without any degree of duress or compulsion.

21. This Agreement is governed by the laws of the United States. The exclusive jurisdiction and venue for any dispute relating to this Agreement is the United States District Court for the District of Massachusetts. For purposes of construing this Agreement, this Agreement shall be deemed to have been drafted by all Parties to this Agreement and shall not, therefore, be construed against any Party for that reason in any subsequent dispute.

22. This Agreement constitutes the complete agreement between the Parties. This Agreement may not be amended except by written consent of the Parties.

23. The undersigned counsel represent and warrant that they are fully authorized to execute this Agreement on behalf of the persons and entities indicated below.

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

25. This Agreement is binding on MEE's successors, transferees, heirs, and assigns.

26. This Agreement is binding on Relator's successors, transferees, heirs, and assigns.

27. All Parties consent to the United States' and the Commonwealth's disclosure of this Agreement, and information about this Agreement, to the public.

28. This Agreement is effective on the date of signature of the last signatory to the Agreement ("Effective Date of this Agreement"). Facsimiles and electronic transmissions of signatures shall constitute acceptable, binding signatures for purposes of this Agreement.

THE UNITED STATES OF AMERICA

DATED: 04/19/2021

BY:



Digitally signed by STEVEN
SHAROBEM
Date: 2021.04.19 11:57:13
-04'00'

STEVEN SHAROBEM
CHARLES WEINOGAD
Assistant United States Attorneys
District of Massachusetts

DATED: 04/08/2021

BY:



LISA M. RE
Assistant Inspector General for Legal Affairs
Office of Counsel to the Inspector General
Office of Inspector General
United States Department of Health and Human Services

THE COMMONWEALTH OF MASSACHUSETTS

DATED: _____

BY:

TOBY UNGER
Assistant Attorney General and Division Chief
Commonwealth of Massachusetts
Office of the Attorney General
Medicaid Fraud Division

DATED: _____

BY:

MARY LOU SUDDERS
Secretary
Commonwealth of Massachusetts
Executive Office of Health and Human Services

THE UNITED STATES OF AMERICA

DATED: _____

BY: _____

STEVEN SHAROBEM
CHARLES WEINOGAD
Assistant United States Attorneys
District of Massachusetts

DATED: _____

BY: _____

LISA M. RE
Assistant Inspector General for Legal Affairs
Office of Counsel to the Inspector General
Office of Inspector General
United States Department of Health and Human Services

THE COMMONWEALTH OF MASSACHUSETTS

DATED: 4/16/21

BY: *Toby R. Unger*

TOBY UNGER
Assistant Attorney General and Division Chief
Commonwealth of Massachusetts
Office of the Attorney General
Medicaid Fraud Division

DATED: _____

BY: _____

MARY LOU SUDDERS
Secretary
Commonwealth of Massachusetts
Executive Office of Health and Human Services

THE UNITED STATES OF AMERICA

DATED: _____

BY: _____

STEVEN SHAROBEM
CHARLES WEINOGRA
Assistant United States Attorneys
District of Massachusetts

DATED: _____

BY: _____

LISA M. RE
Assistant Inspector General for Legal Affairs
Office of Counsel to the Inspector General
Office of Inspector General
United States Department of Health and Human Services

THE COMMONWEALTH OF MASSACHUSETTS


DATED: _____

BY: _____

TOBY UNGER
Assistant Attorney General and Division Chief
Commonwealth of Massachusetts
Office of the Attorney General
Medicaid Fraud Division


DATED: 4.15.21

BY: _____



MARYLOU SUDDERS
Secretary
Commonwealth of Massachusetts
Executive Office of Health and Human Services

MASSACHUSETTS EYE AND EAR INFIRMARY

DATED: 9/1/21


BY: 
JOHN FERNANDEZ
President for Massachusetts Eye and Ear Infirmary

DATED: 4-5-2021


BY: 
LISA SCHLATZ
Counsel for Massachusetts Eye and Ear Infirmary

MASSACHUSETTS EYE AND EAR ASSOCIATES, INC.

DATED: 9/1/21


BY: 
JOHN FERNANDEZ
President for Massachusetts Eye and Ear Infirmary

DATED: 4-5-2021


BY: 
LISA SCHLATZ
Counsel for Massachusetts Eye and Ear Associates, Inc.

THE FOUNDATION FOR MASSACHUSETTS EYE AND EAR INFIRMARY, INC.

DATED: 9/1/21

BY: 
JOHN FERNANDEZ
President for Massachusetts Eye and Ear Infirmary

DATED: 4-5-2021

BY: 
LISA SCHLATZ
Counsel for The Foundation of the Massachusetts Eye and Ear Infirmary, Inc.

BENJAMIN SCHWARZ - RELATOR

DATED: 4/13/2021

BY: Benjamin Schwarz
Benjamin Schwarz

DATED: 4/13/2021

BY: David Koenigsberg
DAVID KOENIGSBERG
Counsel for Benjamin Schwarz