

## 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 Workers’ Compensation Programs of the United States Department of Labor (the “DOL-OWCP”), through its General Counsel (collectively, the “United States”), Phillip B. Klapper, M.D., Patricia Klapper, and Phillip B. Klapper, P.S.C. (collectively, “the Defendants”), and Kimberly Cummings (“Relator”) (hereinafter collectively referred to as “the Parties”), through their authorized representatives.

### RECITALS

A. Defendant Phillip B. Klapper, M.D., is a physician licensed to practice in Kentucky. During the period at issue in the Civil Action (defined below), he practiced as an otolaryngologist in Murray, Kentucky. Dr. Klapper offered hearing testing services and hearing aids to his patients, many of whom were current or former federal employees entitled to benefits under the Federal Employees’ Compensation Act. Defendant Patricia Klapper is Dr. Klapper’s wife, and they worked together in Dr. Klapper’s otolaryngology practice. Defendant Phillip B. Klapper, P.S.C., was a professional service corporation that Dr. Klapper formed, and through which he practiced as an otolaryngologist.

B. On December 18, 2013, Relator filed a *qui tam* action in the United States District Court for the Western District of Kentucky, captioned *United States, ex rel. Kimberly Cummings v. Phillip B. Klapper, P.S.C., Phillip B. Klapper, M.D., and Patricia Klapper*, Civil Action No. 5:13CV-216-TBR, pursuant to the *qui tam* provisions of the False Claims Act, 31 U.S.C. § 3730(b) (the “Civil Action”). In the Civil Action, the Relator alleges that the Defendants violated the False Claims Act by knowingly submitting, or knowingly causing to be submitted, false or fraudulent claims seeking governmental reimbursement pursuant to the Federal

Employees' Compensation Act (5 U.S.C. §§ 8101, *et seq.*) (hereinafter "FECA"). FECA is the workers' compensation program for federal employees. The program pays disability benefits to, and medical benefits for, employees who become injured or ill in the course of their federal employment. The FECA program is administered by the DOL-OWCP, which pays medical service providers' reimbursement claims submitted under the program.

C. The United States intervened in the Civil Action on January 9, 2018.

D. The United States contends that it has certain civil claims against the Defendants arising from false or fraudulent claims for audiological services and hearing aids that the Defendants knowingly submitted, or knowingly caused to be submitted, seeking governmental reimbursement under FECA from December 1, 2007 through August 20, 2014. The United States contends that the reimbursement claims submitted during that period were false or fraudulent because the claims falsely indicated that the subject audiological tests were performed by licensed and certified personnel when, in fact, the tests were performed by personnel lacking such credentials, and/or audiology testing results were altered to enable some claimants to appear to have ratable hearing losses.

The conduct described in this paragraph is referred to below as the "Covered Conduct."

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

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

To avoid the delay, uncertainty, inconvenience, and expense of protracted litigation of the above claims, and in consideration of the mutual promises and obligations of this Settlement Agreement, the Parties agree and covenant as follows:

## TERMS AND CONDITIONS

1. The Defendants shall pay to the United States two million, seven hundred ninety-one thousand, seven hundred fifty-eight dollars (\$2,791,758.00) (the "Settlement Amount"), by electronic funds transfer, pursuant to written instructions to be provided to the Defendants' undersigned counsel by the United States Attorney's Office for the Western District of Kentucky. The Defendants shall pay the United States the entire Settlement Amount not later than five (5) business days after the Effective Date of this Agreement.

2. Conditioned upon the United States' receipt of the Settlement Amount from the Defendants, and as soon as feasible after such receipt, the United States shall pay four hundred seventy-four thousand, five hundred ninety-eight dollars and eighty-six cents (\$474,598.86) to Relator by electronic funds transfer.

3. The Defendants shall pay to the Relator sixty-five thousand, four hundred fifty-three dollars and sixty-two cents (\$65,453.62) for Relator's expenses and attorneys' fees and costs, pursuant to 31 U.S.C. § 3730(d)(1). That amount shall be paid by electronic funds transfer, pursuant to written instructions to be provided by the undersigned counsel for Relator, and shall be paid not later than five (5) business days after the Effective Date of this Agreement.

4. Subject to the exceptions in Paragraph 7 (concerning excluded claims) below, and conditioned upon the Defendants' full payment of the Settlement Amount, the United States releases the Defendants from any civil or administrative monetary claim the United States has for the Covered Conduct under the False Claims Act, 31 U.S.C. §§ 3729-3733; 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, and fraud.

5. Subject to the exceptions in Paragraph 7 below, and conditioned upon the Defendants' full payment of the Settlement Amount, Relator, for herself and for her heirs,

successors, attorneys, agents, and assigns, releases the Defendants from any civil monetary claim the Relator has on behalf of the United States for the Covered Conduct under the False Claims Act, 31 U.S.C. §§ 3729-3733.

6. In compromise and settlement of the rights of DOL-OWCP to exclude Phillip B. Klapper, M.D., pursuant to 20 C.F.R. § 10.815-826 and 5 U.S.C. § 8103, based upon the Covered Conduct, Phillip Klapper, M.D. agrees to be permanently excluded under this statutory provision from participation in the Federal Employees' Compensation Act program. The permanent exclusion shall be effective upon the Effective Date of this Agreement.

7. Notwithstanding the releases given in paragraphs 4 and 5 of this Agreement, or any other term of this Agreement, the following claims of the United States 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, 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;
- f. Any liability of individuals other than Phillip B. Klapper, M.D., and Patricia Klapper;
- g. Any liability for express or implied warranty claims or other claims for defective or deficient products or services, including quality of goods and services;

- h. Any liability for failure to deliver goods or services due; and
- i. Any liability for personal injury or property damage or for other consequential damages arising from the Covered Conduct.

8. Relator and her heirs, successors, attorneys, agents, and assigns shall not object to this Agreement but agree and confirm that this Agreement is fair, adequate, and reasonable under all the circumstances, pursuant to 31 U.S.C. § 3730(c)(2)(B). Conditioned upon Relator's receipt of the payment described in Paragraph 2, Relator and her 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.

9. Relator, for herself, and for her heirs, successors, attorneys, agents, and assigns, releases the Defendants and their agents and employees from any liability to Relator arising from the filing of the Civil Action, or under 31 U.S.C. § 3730(d) for expenses or attorneys' fees and costs.

10. The Defendants waive and shall not assert any defenses they 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. Nothing in this paragraph or any other provision of this Agreement constitutes an agreement by the United States concerning the characterization of the Settlement Amount for purposes of the Internal Revenue laws, Title 26 of the United States Code.

11. The Defendants fully and finally release the United States, its agencies, officers, agents, employees, and servants, from any claims (including attorneys' fees, costs, and expenses of every kind and however denominated) that the Defendants have 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 and the United States' investigation and prosecution thereof.

12. The Defendants fully and finally release the Relator from any claims (including attorneys' fees, costs, and expenses of every kind and however denominated) that the Defendants have 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.

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

14. The Defendants agree 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. §§ 1395-1395kkk-1 and 1396-1396w-5; and the regulations and official program directives promulgated thereunder) incurred by or on behalf of Defendants, their present or former officers, directors, employees, shareholders, and agents in connection with:

(1) the matters covered by this Agreement;

- (2) the United States' audit(s) and civil investigation(s) of the matters covered by this Agreement;
- (3) the Defendants' investigation, defense, and corrective actions undertaken in response to the United States' 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 the Defendants make to the United States pursuant to this Agreement and any payments that the Defendants may make to Relator, including costs and attorneys' fees.

b. Future Treatment of Unallowable Costs: Unallowable Costs shall be separately determined and accounted for by the Defendants, and the Defendants shall 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 the Defendants or any of their subsidiaries or affiliates to the FECA, Medicare, Medicaid, TRICARE, or FEHBP Programs.

c. Treatment of Unallowable Costs Previously Submitted for Payment: The Defendants further agree that within 90 days of the Effective Date of this Agreement it shall identify to applicable FECA, 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 the Defendants or any of their 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. The Defendants agree that the United States, at a minimum, shall be entitled to recoup from the Defendants 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 the Defendants or any of their subsidiaries or affiliates on the effect of inclusion of Unallowable Costs (as defined in this Paragraph) on the Defendants or any of their 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 to audit, examine, or re-examine the Defendants' books and records to determine that no Unallowable Costs have been claimed in accordance with the provisions of this Paragraph.

15. The Defendants agree to cooperate fully and truthfully with the United States' investigation of individuals and entities not released in this Agreement. Upon reasonable notice, the Defendants shall encourage, and agree not to impair, the cooperation of its directors, officers, and employees, and shall use their best efforts to make available, and encourage, the cooperation of former directors, officers, and employees for interviews and testimony, consistent with the rights and privileges of such individuals. The Defendants further agree to furnish to the United States, upon request, complete and unredacted copies of all non-privileged documents, reports, memoranda of interviews, and records in its possession, custody, or control concerning any



investigation of the Covered Conduct that it has undertaken, or that has been performed by another on its behalf.

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. The Defendants agree that they waive 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 payment described in Paragraph 1, above, the United States and the Relator shall promptly sign and file in the Civil Action a Joint Notice of Dismissal of the Civil Action pursuant to Federal Rule of Civil Procedure 41(a)(1).

19. Except as set forth in paragraph 3 of this Agreement, 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 Western District of Kentucky. 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 the Defendants' 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' 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: 18 Jan. 2018 BY: L. Jay Gilbert  
L. Jay Gilbert  
Assistant United States Attorney  
Western District of Kentucky  
717 West Broadway  
Louisville, Kentucky 40202

DATED: \_\_\_\_\_ BY: \_\_\_\_\_  
Jennifer Valdivieso  
Deputy Director for Program and System Integrity  
United States Department of Labor  
Office of Workers' Compensation Programs'  
Division of Federal Employees' Compensation

DEFENDANTS

DATED: \_\_\_\_\_ BY: \_\_\_\_\_  
Phillip B. Klapper, M.D.

DATED: \_\_\_\_\_ BY: \_\_\_\_\_  
Patricia Klapper

DATED: \_\_\_\_\_ BY: \_\_\_\_\_  
Phillip B. Klapper, P.S.C.

BY: \_\_\_\_\_,

its \_\_\_\_\_  
(Title/Position)

DATED: \_\_\_\_\_ BY: \_\_\_\_\_  
Gorman Bradley, Jr.  
David T. Riley  
Bradley, Freed & Grumley, P.S.C.  
1634 Broadway  
P.O. Box 1655  
Paducah, Kentucky 42002-1655  
Counsel for Defendants

**THE UNITED STATES OF AMERICA**

DATED: \_\_\_\_\_

BY: \_\_\_\_\_

L. Jay Gilbert  
Assistant United States Attorney  
Western District of Kentucky  
717 West Broadway  
Louisville, Kentucky 40202

DATED: 1-18-18

BY: 

Jennifer Valdivieso  
Deputy Director for Program and System Integrity  
United States Department of Labor  
Office of Workers' Compensation Programs'  
Division of Federal Employees' Compensation

**DEFENDANTS**

DATED: \_\_\_\_\_

BY: \_\_\_\_\_

Phillip B. Klapper, M.D.

DATED: \_\_\_\_\_

BY: \_\_\_\_\_

Patricia Klapper

DATED: \_\_\_\_\_

BY: \_\_\_\_\_

Phillip B. Klapper, P.S.C.

BY: \_\_\_\_\_,

its \_\_\_\_\_  
(Title/Position)

DATED: \_\_\_\_\_

BY: \_\_\_\_\_

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1634 Broadway  
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Counsel for Defendants

**THE UNITED STATES OF AMERICA**

DATED: \_\_\_\_\_

BY: \_\_\_\_\_

L. Jay Gilbert  
Assistant United States Attorney  
Western District of Kentucky  
717 West Broadway  
Louisville, Kentucky 40202

DATED: \_\_\_\_\_

BY: \_\_\_\_\_

Jennifer Valdivieso  
Deputy Director for Program and System Integrity  
United States Department of Labor  
Office of Workers' Compensation Programs'  
Division of Federal Employees' Compensation

**DEFENDANTS**

DATED: 1/17/2018

BY: P B Klapper  
Phillip B. Klapper, M.D.

DATED: 1/17/2018

BY: Patricia Klapper  
Patricia Klapper

DATED: 1/17/2018

BY: P B Klapper  
Phillip B. Klapper, P.S.C.

BY: PKlapper

its President  
(Title/Position)

DATED: \_\_\_\_\_

BY: \_\_\_\_\_

Gorman Bradley, Jr.  
David T. Riley  
Bradley, Freed & Grumley, P.S.C.  
1634 Broadway  
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Paducah, Kentucky 42002-1655  
Counsel for Defendants

**THE UNITED STATES OF AMERICA**

DATED: \_\_\_\_\_

BY: \_\_\_\_\_

L. Jay Gilbert  
Assistant United States Attorney  
Western District of Kentucky  
717 West Broadway  
Louisville, Kentucky 40202

DATED: \_\_\_\_\_

BY: \_\_\_\_\_

Jennifer Valdivieso  
Deputy Director for Program and System Integrity  
United States Department of Labor  
Office of Workers' Compensation Programs'  
Division of Federal Employees' Compensation

**DEFENDANTS**

DATED: \_\_\_\_\_

BY: \_\_\_\_\_

Phillip B. Klapper, M.D.

DATED: \_\_\_\_\_

BY: \_\_\_\_\_

Patricia Klapper

DATED: \_\_\_\_\_

BY: \_\_\_\_\_

Phillip B. Klapper, P.S.C.

BY: \_\_\_\_\_,

its \_\_\_\_\_  
(Title/Position)

DATED: 01/18/2018

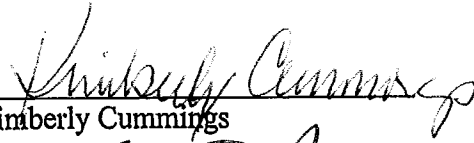
BY:  \_\_\_\_\_

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RELATOR

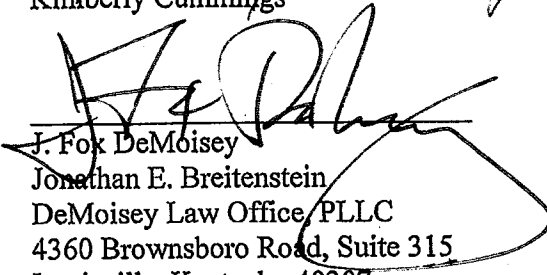
DATED: 1/17/18

BY:

  
Kimberly Cummings

DATED: 1-18-18

BY:

  
J. Fox DeMoisey  
Jonathan E. Breitenstein  
DeMoisey Law Office, PLLC  
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