

## SETTLEMENT AGREEMENT AND RELEASE

This SETTLEMENT AGREEMENT AND RELEASE is entered into among the following parties (collectively, the "Parties"): the United States of America, acting through the Civil Division of the Department of Justice and the Office of Inspector General ("OIG-HHS") of the United States Department of Health and Human Services ("HHS") (collectively, the "United States" or the "Government"); American Business Innovations, Inc. ("ABI"); Infusion Management Systems, Inc. ("IMS") d/b/a Concepts of Care ("Concepts"); HomeCare Concepts of America ("HCCA"); Jennifer Thomas; Brupbacher & Associates ("Brupbacher"); and Michael C. Freeman ("Freeman").

### PREAMBLE

As a preamble to this Agreement, the Parties agree to the following recital of facts:

A. ABI is an inactive Texas corporation that was headquartered in Dallas, Texas.

ABI previously performed accounting, payroll, quality assurance and other administrative functions for IMS.

B. IMS is a Texas corporation with headquarters in Dallas, Texas. IMS is a subsidiary of HCCA. IMS supplies Intravenous ("IV") drugs, equipment, supplies and services to skilled nursing facilities throughout Texas, Louisiana and Oklahoma. IMS owns and operates a Medicare approved home health care agency doing business as Concepts.

C. HCCA is a New Jersey corporation with headquarters in Cherry Hill, New Jersey. HCCA is the parent corporation of IMS and ABI. HCCA, ABI, IMS and Concepts are collectively referred to herein as "the IMS Parties."

D. At all relevant times prior to June 27, 1996, IMS and ABI were owned and controlled, either directly or indirectly, by Mr. Stephen F. Maberry, Mr. A.B. Jones, and Mrs. C. Louise Maberry (collectively, the "Maberrys").

E. Jennifer Thomas (also referred to as the "Thomas Relator") is an individual who resides in Texas. Jennifer Thomas filed a civil False Claims Act qui tam action in the United States District Court for the Northern District of Texas, Dallas Division, entitled United States ex rel. Jennifer Thomas v. Infusion Management Systems, Inc. et al., Civil No. 3:96-CV-0684-T, on or about March 8, 1996 (the "Thomas Action"). Pursuant to 31 U.S.C. § 3730(b), the United States declined to intervene in the Thomas Action. Jennifer Thomas amended her complaint on several occasions. The most recent amendment, or Fourth Amended Original Complaint, is dated March 13, 1998. The Thomas Action names IMS and ABI as defendants.<sup>1</sup> The Thomas Action alleges that during the period 1992 through June 27, 1996, IMS and ABI filed false claims with the Government in violation of 31 U.S.C. § 3729 ("Count One"), and retaliated against Jennifer Thomas in violation of 31 U.S.C. § 3730(h) ("Court Two").

F. Jennifer Thomas also filed a civil action against IMS in Texas state court entitled Jennifer Thomas v. Texas Employment Commission and Infusion Management Systems, Inc. d/b/a Concepts of Care, Cause No. 96-10806-I, 162nd District Court of Dallas County, Texas

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<sup>1</sup> The Thomas Action also named Thera-Kinetics Enterprises, Inc. ("TKE") (now known as HCCA) and Thera-Kinetics, Inc. ("TKI") as defendants. The court dismissed with prejudice all claims against TKE and TKI.

("Thomas Wrongful Termination Action"). The Thomas Wrongful Termination Action was a de novo appeal of a decision of the Texas Workforce Commission, formerly the Texas Employment Commission, denying Ms. Thomas unemployment benefits after her termination from employment at IMS in June, 1996, as well as a suit for damages against IMS for allegedly providing false statements to the Commission that purportedly caused her to suffer a denial of benefits and other damages.

G. On or about November 3, 1998, Jennifer Thomas and IMS executed a settlement agreement and release, which, inter alia, settled with prejudice the Thomas Wrongful Termination Action, Count Two of the Thomas Action, and any and all claims for attorneys' fees that Jennifer Thomas had in relation to either the Thomas Wrongful Termination Action or the Thomas Action.

H. Freeman is an individual residing in Louisiana. Brupbacher is an accounting firm with its principal place of business located in Rayne, Louisiana. Freeman is an employee of Brupbacher. Brupbacher and Freeman (collectively, the "Brupbacher Relators") filed a civil False Claims Act qui tam action in the United States District Court for the Northern District of Texas, Dallas Division, entitled United States ex rel. Brupbacher & Associates, Inc., et al. v. Infusion Management Systems, Inc. et al., Civil No. 3-98CV1057-G, on or about April 30, 1998 (the "Brupbacher Action"). IMS is named as a defendant in the Brupbacher Action. The Brupbacher Action also names as defendants John Does 1-500 ("John Doe defendants"). This Settlement Agreement and Release is not intended to affect any rights the United States or the IMS Parties may have with respect to any person or entity that claims to be or is otherwise identified as one of the John Doe defendants, except to the extent, if any, that any of the John Doe defendants is identified to be one of the IMS Parties.

I. This Agreement addresses certain civil and administrative claims the United States has or may have against the IMS Parties for the conduct described in the Thomas Action, the Brupbacher Action and paragraphs J through R of the Preamble to this Agreement and all claims Jennifer Thomas and the Brupbacher Relators (collectively, the "Relators") have or may have against the IMS Parties for (a) the conduct described in paragraphs J through R of the Preamble to this Agreement, (b) the conduct alleged in the complaints, amended complaints and other pleadings, including any motions for sanctions or other relief, in the Thomas Action and the Brupbacher Action, and (c) attorneys' fees and a share of the proceeds of the Thomas Action and the Brupbacher Action.

J. At all times relevant to this Agreement, IMS and ABI submitted claims for payment to the Medicare program, Title XVIII of the Social Security Act, 42 U.S.C. §§ 1395 - 1395ddd (1997) (hereinafter "the Medicare program"), which is administered by HHS.

K. The United States contends that during the period 1991 through June 27, 1996, ~~IMS and ABI violated the False Claims Act, 31 U.S.C. §§ 3729-3733, and other federal statutes,~~ regulations, and/or common law doctrines by improperly charging the Medicare program:

1. for salaries that were not allowable under the Medicare program;
2. for salaries incurred in connection with services that were not supported by documentation showing that such services were reimbursable as Medicare home health services; and
3. for other nonreimbursable costs, including, travel, legal fees, personal expenses and other items that were not related to patient care.

L. The United States contends that the practices described in Preamble paragraph K above resulted in the submission of false claims to the Medicare program.

M. The United States also contends that during the time period January 1, 1994, through October 1, 1998, IMS violated the False Claims Act, 31 U.S.C. §§ 3729-3733, and other federal statutes, regulations, and/or common law doctrines by:

1. selling IV drugs, supplies, equipment and nursing services to skilled nursing facilities, which in turn provided IV therapy to Medicare patients at costs that exceeded prevailing rates or rates that were otherwise allowable under the Medicare program;
  2. providing IV drugs, supplies, equipment and nursing services to Medicare patients when such IV drugs, supplies, equipment or nursing services were not medically necessary; and
  3. aiding, abetting, conspiring with and/or causing skilled nursing facilities to bill Medicare for "ancillary" services that were, in fact, "routine" services.
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N. The United States contends that the practices described in Preamble paragraph M above resulted in the submission of false claims to the Medicare program.

O. Jennifer Thomas contends that during the period 1992 through June 4, 1996, IMS and ABI violated the False Claims Act, 31 U.S.C. §§ 3729-3733, and other federal statutes, regulations, and/or common law doctrines by:

1. making and or using false or fictitious documents and records, including backdating certain records, to qualify for payment, to maintain licenses and

- certifications for participation, and to obtain reimbursement for claims made under the Medicare program;
2. unbundling of services or intentionally reassigning services to different but related corporate entities to increase the number of claims that were presented to the United States for payment under the Medicare program;
  3. providing substandard care to Medicare patients; and
  4. misrepresenting the corporate structure of IMS to increase the reimbursement of costs by the United States under the Medicare program.

P. Jennifer Thomas contends that the practices described in Preamble paragraph O above resulted in the submission of false claims to the Medicare program.

Q. The Brupbacher Relators contend that prior to April 30, 1998, IMS violated federal statutes, regulations, and/or common law doctrines by aiding, abetting, conspiring with, and/or causing skilled nursing facilities to bill Medicare for "ancillary" IV therapy services which were, in fact, "routine" services.

R. The Brupbacher Relators contend that the practices described in Preamble paragraph Q above resulted in the submission of false claims to the Medicare program.

S. The United States and the Relators contend that the IMS Parties are liable 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 (Supp. 1992), and under the common law doctrines of unjust enrichment, payment by mistake, breach of contract, and fraud, for damages and penalties for the conduct set forth in paragraphs J through R of the

Preamble to this Agreement and in the complaints, amended complaints, and other pleadings in the Thomas Action and the Brupbacher Action.

T. The United States also contends that it has certain administrative claims against the IMS Parties under the provisions for permissive exclusion from the Medicare, Medicaid and other federal health care programs, 42 U.S.C. § 1320a-7(b), and the provisions for civil monetary penalties, 42 U.S.C. § 1320a-7a, for the conduct described in paragraphs J through R of the Preamble.

U. The IMS Parties deny the contentions of the United States and the Relators as set forth above and in the complaints, amended complaints, and other pleadings in the Thomas Action and the Brupbacher Action.

V. Wishing to avoid the delay, expense, inconvenience and uncertainty of protracted litigation, the Parties hereby reach a full and final settlement and release of claims as set forth below.

#### **TERMS AND CONDITIONS**

In reliance on the representations contained herein, in consideration of the mutual promises, covenants and obligations in this Agreement and the resolution of the claims set forth below, and for good and valuable consideration, receipt of which is hereby acknowledged, the Parties agree as follows:

## ARTICLE I

(a) In full and final settlement of the Thomas Action and the Brupbacher Action, the IMS Parties agree to pay the United States the total principal sum of ten million dollars (\$10,000,000), together with interest, as described below. The United States agrees that, pursuant to 31 U.S.C. § 3730(d)(1), Jennifer Thomas' share of this settlement amount is 11.75% of the principal and interest payments received by the United States and the Brupbacher Relators' share of this settlement amount is 1.25% of the principal and interest payments received by the United States.

(b) The IMS Parties will pay the total settlement amount set out in paragraph (a) as follows:

(1) The IMS Parties collectively will pay \$2,000,000 to the United States within ten (10) days of the date this Settlement Agreement is accepted by the Courts and the Thomas Action and the Brupbacher Action are dismissed with prejudice as provided for under the terms of this Agreement. This initial \$2,000,000 payment is hereinafter referred to as the "\$2,000,000 down payment." The date on which the \$2,000,000 down payment is received by the United States constitutes what is hereinafter referred to as the "anniversary date."

(2) Within a reasonable time of receiving the \$2,000,000 down payment, the United States will pay Jennifer Thomas the sum of \$235,000 (11.75% of \$2,000,000) and will pay the Brupbacher Relators the sum of \$25,000 (1.25% of \$2,000,000).

(3) Beginning exactly one month after the anniversary date and continuing for a period of 24 months after the anniversary date, the IMS Parties collectively shall pay the



United States installments of \$190,458.44 per month. The amount of each of the monthly payments set forth in this paragraph is calculated by amortizing the sum of \$8,000,000 over a 48 month time period at an interest rate of 6.7%.

Each monthly payment required by this paragraph is to be received by no later than the 20th day of the calendar month during which such payment is due.

(4) Within a reasonable time of receiving each of the monthly installments described in subparagraph (3) above, the United States will pay Jennifer Thomas a sum equal to 11.75% of the amount paid by the IMS Parties pursuant to subparagraph (3) and will pay the Brupbacher Relators a sum equal to 1.25% of the amount paid by the IMS Parties pursuant to subparagraph (3). Monthly payments by the IMS Parties in the amount of \$190,458.44 would result in monthly payments to Jennifer Thomas in the amount of \$22,378.87 (11.75% of \$190,458.44) and to the Brupbacher Relators in the amount of \$2,380.73 (1.25% of \$190,458.44). Each of these payments to the Relators shall be made only after the United States receives the \$190,458.44 monthly installment from the IMS Parties. Under no circumstance is the United States liable to the Relators for Relators' share of payments the United States has not received from the IMS Parties.

(5) The IMS Parties collectively will pay \$2,000,000 to the United States, which must be received by the United States no later than two (2) years from the anniversary date. This second \$2,000,000 payment is hereinafter referred to as the "\$2,000,000 balloon payment."

(6) Within a reasonable time of receiving the \$2,000,000 balloon payment, the United States will pay Jennifer Thomas the sum of \$235,000 (11.75% of \$2,000,000) and will pay the Brupbacher Relators the sum of \$25,000 (1.25% of \$2,000,000).

(7) Beginning exactly twenty five (25) months after the anniversary date and continuing for a second twenty four (24) month period ("second 24 month period"), the IMS Parties collectively shall pay the United States installments of \$102,248.44 per month. The amount of each monthly payment that is due and payable during the second 24 month period is calculated by amortizing the principal balance remaining from the initial settlement figure of \$10,000,000 after subtracting the \$2,000,000 down payment, the \$2,000,000 balloon payment, and the principal amount of the monthly payments made during the first twenty four (24) months after the anniversary date, over a 24 month time period at an interest rate of 6.7%.

Each monthly payment required by this paragraph is to be received by no later than the 20th day of the calendar month during which such payment is due.

(8) Within a reasonable time of receiving each of the monthly installments described in subparagraph (7) above, the United States will pay Jennifer Thomas a sum equal to 11.75% of the amount paid by the IMS Parties pursuant to subparagraph (7) and will pay the Brupbacher Relators a sum equal to 1.25% of the amount paid by the IMS Parties pursuant to subparagraph (7). Monthly payments by the IMS Parties in the amount of \$102,248.44 would result in monthly payments to Jennifer Thomas in the amount of \$12,014.19 (11.75% of \$102,248.44) and to the Brupbacher Relators in the amount of \$1,278.11 (1.25% of \$102,248.44). Each of these payments to the Relators

shall be made only after the United States receives the \$102,248.44 monthly installment from the IMS Parties. Under no circumstance is the United States liable to the Relators for Relators' share of payments the United States has not received from the IMS Parties.

(c) The payments described in paragraph (b) shall be made as follows:

(1) to the United States by electronic transfer according to instructions given to the IMS Parties by Michael F. Hertz or his designated representative on or before the dates set forth in this Agreement;

(2) to Jennifer Thomas by electronic transfer made payable to "Jennifer Thomas and Smyser Kaplan & Veselka, L.L.P. client trust account"; and

(3) to the Brupbacher Relators by sending two separate checks as follows:

(a) one check for 60% of any amounts to be paid to the Brupbacher Relators made payable to Brupbacher & Associates, and mailed to P.O. Box 34, 801 The Boulevard, Suite B, Rayne, Louisiana 70578;

(b) and a second check for the remaining 40% of any amounts to be paid to the Brupbacher Relators made payable to Michael C. Freeman, and mailed to P.O. Box 34, 801 The Boulevard, Suite B, Rayne, Louisiana 70578.

(d) No party is entitled to receive any payments for any fees, costs, expenses or other item other than those payments specified in paragraphs (a) and (b) above, except as set out in Article I, paragraph (f) and Article IV below.

(e) To secure payment to the United States and the Relators, as specified in paragraphs (a) and (b), the IMS Parties will execute a promissory note in favor of the United

States (attached hereto as Exhibit 2). The IMS Parties acknowledge that their obligations under the promissory note are not dischargeable in bankruptcy.

(f) Default is defined as: (1) lack of payment within ten (10) days of the date the payment is due; (2) voluntary or involuntary filing for bankruptcy protection under the Bankruptcy Code; and (3) failure to perform any obligation under this Agreement other than those obligations set forth in the Corporate Integrity Agreement. If the IMS Parties default by missing a payment (see definition (f)(1), above), by the filing of a petition for bankruptcy protection (see definition (f)(2), above), or by failing to perform any obligation under this Agreement other than those obligations set forth in the Corporate Integrity Agreement (see definition (f)(3), above), any party to this Agreement may provide written notice of such default to the IMS Parties. Such notice shall be made by registered mail or facsimile followed by overnight delivery addressed to the following:

Richard W. Beckler, Esq.  
Fulbright & Jaworski, L.L.P.  
801 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004-2604  
(202) 662-4643 (facsimile)

and

Craig W. Porter  
Chief Executive Officer  
HomeCare Concepts of America, Inc.  
55 Carnegie Plaza  
Cherry Hill, NJ 08003  
(609) 470-2330 (facsimile)

The IMS Parties shall have ten (10) calendar days following the written notice of default to cure the default. After the expiration of the ten-day cure period, the principal remaining outstanding on the date of default shall become accelerated and immediately due and payable with interest at

the rate of 9.5% per annum from the date of default, and the United States may, at its sole option, exercise one or more of the following rights, as applicable: (a) take any lawful action to collect such accelerated amounts including, but not limited to, bringing suit to enforce the Promissory Note executed at the time of the signing of this Agreement; (b) file an action for specific performance of the Agreement (excluding the Corporate Integrity Agreement which will be separately enforced by OIG-HHS pursuant to its own terms); (c) offset the remaining unpaid balance, inclusive of interest, from any amounts due and owing to any of the IMS Parties by any department, agency, or agent of the United States at the time of default; (d) to the extent not released herein, exercise any other right granted by law, or under the terms of this Agreement, and the Corporate Integrity Agreement, or recognizable at common law or in equity. In addition, the IMS Parties will pay the United States all reasonable costs of collection and enforcement of this Agreement, including attorney's fees and expenses. The United States reserves the option of referring such matters for private collection.

Upon default, OIG-HHS may, at its option, exclude the IMS Parties from participation in the Medicare, Medicaid, and all other federal health care programs (as defined in 42 U.S.C. § 1320a-7b(f)) pursuant to 42 U.S.C. § 1320a-7(b). Any exclusion imposed by OIG-HHS will have national effect and will also apply to all other federal procurement and non-procurement programs. The IMS Parties agree not to contest such exclusion either administratively or in any state or federal court. Upon curing said default, the IMS Parties may apply for reinstatement after the date specified in the notice of exclusion, in accordance with 42 C.F.R. § 1001.3001. This provision does not affect the rights, obligations, or causes of action the OIG-HHS or HHS may

have under the Corporate Integrity Agreement or any authority other than that specifically referred to in this paragraph.

Jennifer Thomas shall receive 11.75% of any money collected by the United States under this paragraph and the Brupbacher Relators shall receive 1.25% of any money collected by the United States under this paragraph.

Notwithstanding anything in this paragraph, the parties agree that timely payment of the \$2,000,000 down payment (Art. I, paragraph (b)(1) above) is of the essence, and that any delay in that payment shall constitute a default for which neither notice nor a ten-day cure period need be given.

## ARTICLE II

(a) In consideration of the obligations of the IMS Parties set forth in this Agreement, and subject to Article I, Paragraph (f) (default), Article II, paragraph (d) (exceptions to the release), and Article XIII (concerning bankruptcy proceedings commenced within 91 days of the effective date of this Agreement) below, on the date the United States receives the \$2,000,000 down payment described in Article I, paragraph (b)(1) above, the United States will release and will be deemed to have released the IMS Parties, their divisions, subsidiaries, successors and assigns, and their present and former directors, officers, employees and shareholders from any civil or administrative monetary claims that the United States has or may have under the False Claims Act, 31 U.S.C. §§ 3729-3733; the Program Fraud Civil Remedies Act, 31 U.S.C. §§ 3801-3812; the Civil Monetary Penalties Law, 42 U.S.C. § 1320a-7a; or the common law doctrines of unjust enrichment, payment by mistake, breach of contract and fraud, for the conduct

described in paragraphs J through R of the Preamble of this Agreement, up to and including October 1, 1998.

(b) In consideration of the obligations of the IMS Parties set forth in this Agreement, and subject to Article I, Paragraph (f) (default), Article II, paragraph (d) (exceptions to the release), and Article XIII (concerning bankruptcy proceedings commenced within 91 days of the effective date of this Agreement) below, on the date the United States receives the \$2,000,000 down payment described in Article I, paragraph (b)(1) above, the OIG-HHS will release and will refrain from instituting, directing or maintaining any administrative claim or any action seeking exclusion from the Medicare, Medicaid or other Federal health care programs (as defined in 42 U.S.C. § 1320a-7b(f)) against the IMS Parties, their divisions, subsidiaries, successors and assigns, and their present and former directors, officers, employees and shareholders, under 42 U.S.C. § 1320a-7a (Civil Monetary Penalties Law), or 42 U.S.C. § 1320a-7(b) (permissive exclusion), for the conduct described in paragraphs J through R of the Preamble of this Agreement. Upon default as defined in Article I, paragraph (f) above, the OIG-HHS may, at its option, rescind this release and pursue any administrative remedies identified in this paragraph, including, but not limited to, the right to exclude the IMS Parties as provided for in Article I, paragraph (f) above. Nothing in this paragraph precludes the OIG-HHS from taking action against entities or persons, or for conduct and practices, for which civil claims have been reserved in this paragraph or in paragraph (d) below.

(c) Upon receipt by the United States of the down payment described in Article I, paragraph (b)(1), Jennifer Thomas, the Brupbacher Relators, and the Relators' attorneys, for themselves, their heirs, successors and assigns, will release and will be deemed to have released:

(1) the IMS Parties, their divisions, subdivisions, successors and assigns, and their present and former directors, officers, employees, shareholders, and attorneys, from any claims the Relators have or may have that arise under or relate to any of the allegations in the complaints, amended complaints or other pleadings, including any motions for sanctions or other relief, in the Thomas Action, the Brupbacher Action and/or the facts or conduct described in paragraphs J through R of the Preamble of this Agreement including, all claims for attorneys' fees, expenses and costs; and

(2) the United States from any claims arising from or relating to the filing of the Thomas Action and/or the Brupbacher Action, or, pursuant to 31 U.S.C. § 3730(d)(1), for a share of the proceeds of this settlement beyond that expressly provided for in this Agreement. Under no circumstance is Jennifer Thomas entitled to claim from the United States more than 11.75% of the total amounts received by the United States from the IMS Parties pursuant to this Agreement. Under no circumstance are the Brupbacher Relators entitled to claim from the United States more than 1.25% of the total amounts received by the United States from the IMS Parties pursuant to this Agreement.

(d) The United States specifically does not release the IMS Parties or any other entity or individual under this Agreement from (1) any criminal liability that may arise from the conduct described in the Thomas Action, the Brupbacher Action and/or the facts or conduct described in paragraphs J through R of the Preamble of this Agreement; (2) any criminal, civil or administrative claims arising under Title 26, U.S. Code (Internal Revenue Code); (3) any liability to the United States (or any agencies thereof) for conduct other than that identified in the Thomas Action, the Brupbacher Action and/or the facts or conduct described in paragraphs J through R of



the Preamble of this Agreement; (4) claims against any individuals, including the former officers and directors of the IMS Parties, who are criminally indicted or convicted, or who enter into criminal plea agreements, if such claims are based on the conduct alleged in the Thomas Action, the Brupbacher Action and/or the facts or conduct described in paragraphs J through R of the Preamble of this Agreement; (5) except as explicitly stated in this Agreement, any administrative liability, including mandatory exclusion from Federal health care programs pursuant to 42 U.S.C. § 1320a-7(a); (6) any obligations created by this Agreement; (7) any express or implied warranty claims or other claims for defective or deficient products or services, including quality of goods and services, provided by the IMS Parties; and (8) any claims for Medicaid payments or, except as explicitly stated in this Agreement, other payments to Federal health care programs as defined in the Health Insurance Portability Act, P.L. 104-191, § 204(f). Notwithstanding any of the foregoing, the United States specifically reserves its ability to pursue any and all claims, whether civil, administrative or criminal, against any individual who, prior to June 27, 1996, was an officer, director, agent, owner, shareholder, or employee of IMS, ABI or Concepts, including the following individuals: Stephen F. Maberry, C. Louise Maberry, A. B. Jones, and Harry Mishra.

(e) On the date the United States receives the \$2,000,000 down payment described in Article I, paragraph (b)(1), the IMS Parties, their divisions, subdivisions, successors and assigns, and their present and former directors, officers, employees, shareholders, and attorneys will release and will be deemed to have released 1) the United States, its agencies, employees, servants, and agents, 2) Jennifer Thomas, her agents and representatives, and 3) the Brupbacher Relators, their officers, directors, employees, agents and representatives, from any claims (including attorneys' fees, costs, and expenses of every kind and however denominated and any

claims made in connection with any motions for sanctions or other relief) which the IMS Parties have asserted, could have asserted, or may assert in the future against the United States, its agencies, employees, servants, and agents, Jennifer Thomas, her agents and representatives, and the Brupbacher Relators, their officers, directors, employees, agents and representatives related to the conduct described in the Thomas Action, the Brupbacher Action and/or the facts or conduct described in paragraphs J through R of the Preamble of this Agreement and the United States' investigation and prosecution thereof.

### ARTICLE III

The IMS Parties have entered into a Corporate Integrity Agreement with HHS, attached as Exhibit 1, which is incorporated into this Agreement by reference. A breach of the Corporate Integrity Agreement shall not constitute a default under this Agreement, and matters arising under the Corporate Integrity Agreement are to be resolved pursuant to Section VIII of the Corporate Integrity Agreement.

### ARTICLE IV

The IMS Parties have provided to the United States and the United States has relied on certain historic financial information concerning IMS, a list of which is attached as Exhibit 3 (hereinafter referred to as "historic financial information"). The IMS Parties warrant, covenant and agree that, to the best of their knowledge, the historic financial information provided to the United States fairly and accurately presents the financial condition of IMS as of the respective dates of the documents that constitute the historic financial information. The Parties agree that any potential claims the IMS Parties have against the Maberrys, the other former owners of IMS'

stock, Mr. Harry Mishra, and/or their respective agents or affiliates, are not considered assets of IMS for purposes of the historic financial information.

In the event the United States discovers previously undisclosed assets of IMS which existed at the time of execution of this Agreement, which were not included in the historic financial information, and which, had they been disclosed in the historic financial information, would have materially affected the net worth of IMS according to GAAP principles by an amount greater than or equal to \$100,000, the United States may, at its option, collect One Hundred percent (100%) of any asset previously undisclosed in addition to the amounts paid or due and owing to the United States, Jennifer Thomas and the Brupbacher Relators under the terms of this Agreement. In the event the United States discovers previously undisclosed assets of IMS which existed at the time of execution of this Agreement, which were not included in the historic financial information, and which, had they been disclosed in the historic financial information,

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would have materially affected the net worth of IMS according to GAAP principles by an amount greater than or equal to \$500,000, the United States may, at its option, rescind this Agreement and its Release (Article II, paragraphs (a) and (b)) and reinstate its suit upon the underlying claims set forth in the Thomas Action, the Brupbacher Action, and/or the facts or conduct described in paragraphs J through R of the Preamble of this Agreement that are not alleged in either the Thomas Action or the Brupbacher Action. In the event that the United States opts to rescind this Agreement pursuant to this paragraph, the IMS Parties expressly agree not to plead, argue or otherwise raise any defenses under the theories of statute of limitations, waiver, laches or estoppel, to any civil or administrative claims which (1) are filed by the United States within ninety (90) calendar days of written notification to IMS, its successor, agent or representative,

that this Agreement has been rescinded, and (2) relate to the conduct described in the Thomas Action, the Brupbacher Action and/or the facts or conduct described in paragraphs J through R of the Preamble of this Agreement, except to the extent these defenses were available on March 8, 1996.

Jennifer Thomas shall receive 11.75% of any money collected by the United States under this Article and the Brupbacher Relators shall receive 1.25% of any money collected by the United States under this Article.

#### ARTICLE V

Upon reasonable notice, the IMS Parties will make reasonable efforts to facilitate access to, and encourage the cooperation of, their directors, officers, and employees for interviews and testimony, consistent with the rights and privileges of such individuals, and will furnish to the United States, upon reasonable request, all non-privileged documents and records in their possession, custody or control relating to the conduct alleged in the Thomas Action, the Brupbacher Action and/or paragraphs J through R of the Preamble of this Agreement.

#### ARTICLE VI

With respect to the conduct alleged in the Thomas Action, the Brupbacher Action and/or paragraphs J through R of the Preamble of this Agreement, the IMS Parties hereby waive and will not assert any defenses they may have to any criminal prosecution or administrative action that are based in whole or in part on the Double Jeopardy Clause in the Fifth Amendment of the Constitution or the Excessive Fines Clause in the Eighth Amendment of the Constitution, and they agree that this settlement is not punitive in purpose or effect.

## ARTICLE VII

Nothing in this Article 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 any proceeding under Title 26 of the United States Code.

## ARTICLE VIII

Pursuant to 31 U.S.C. § 3730(c)(2)(B), the Relators assert that the settlement of claims in the Civil Action is fair, adequate and reasonable under all the circumstances.

## ARTICLE IX

Promptly after this Agreement is executed, the Parties will notify the Court in the Thomas Action and the Brupbacher Action that they have reached a settlement and that all Parties have stipulated that the last amended complaints filed in the Thomas Action and the Brupbacher Action be dismissed with prejudice as to the IMS Parties and all pending motions filed in either the Thomas Action or the Brupbacher Action be denied as moot, with each party to bear its own costs and attorneys' fees.

## ARTICLE X

The amount that the IMS Parties must pay pursuant to this Agreement will not be decreased as a result of the denial of any claims for payment now being withheld from payment by any Medicare carrier or intermediary or any State payer, related to the conduct described in paragraphs J through R of the Preamble of this Agreement; and the IMS Parties agree not to resubmit to any Medicare carrier or intermediary or any State payer any previously denied claims

related to the conduct described in paragraphs J through R of the Preamble of this Agreement, and agree not to appeal any such denials of claims.

#### ARTICLE XI

The IMS Parties agree that they will not seek payment for any of the health care billings covered by this Agreement from any health care beneficiaries or their parents or sponsors. The IMS Parties waive any causes of action against these beneficiaries or their parents or sponsors based upon the claims for payment covered by this Agreement.

#### ARTICLE XII

The IMS Parties expressly warrant that they have reviewed their financial situation and that they currently are solvent within the meaning of 11 U.S.C. § 547(b)(3), and will remain solvent following their 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 the IMS Parties, within the meaning of 11 U.S.C. §§ 547(c)(1) and (ii) have concluded that these mutual promises, covenants and obligations do, in fact, constitute such a contemporaneous exchange.

#### ARTICLE XIII

In the event the IMS Parties commence, or a third 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 the IMS Parties' debts, or seeking to adjudicate the IMS Parties as bankrupt or insolvent, or (b)

seeking appointment of a receiver, trustee, custodian or other similar official for the IMS Parties or for all or any substantial part of the IMS Parties' assets, the IMS Parties agree, to the maximum extent they lawfully may do so, as follows:

(a) The IMS Parties' obligations under this Agreement may not be avoided pursuant to 11 U.S.C. § 547, and the IMS Parties will not argue or otherwise take the position in any such case, proceeding or action that: (i) the IMS Parties' obligations under this Agreement may be avoided under 11 U.S.C. § 547; (ii) the IMS Parties were 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 the IMS Parties.

(b) In the event that the IMS Parties' 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 the IMS Parties for the claims that would otherwise be covered by the releases provided in Article II, above. If the United States chooses to do so, the IMS Parties agree that (i) any such claims, actions or proceedings brought by the United States (including any proceedings to exclude the IMS Parties from participation in Medicare, Medicaid, or other federal health care programs) are not subject to an "automatic stay" pursuant to 11 U.S.C. § 362(a) as a result of the action, case or proceeding described in the first clause of this paragraph, and that the IMS Parties will not argue or otherwise contend that the United States' claims, actions or proceedings are subject to an automatic stay; and (ii) that the IMS Parties 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 that are brought by the United States within 90 calendar days of written notification to the IMS Parties that the releases herein have been rescinded pursuant to this paragraph, except to the extent such defenses were available on March 8, 1996.

c. The IMS Parties acknowledge that their agreements in this paragraph are provided in exchange for valuable consideration provided in this Agreement.

#### ARTICLE XIV

(a) The IMS Parties agree that all costs (as defined in the Federal Acquisition Regulations ("FAR") §31.205-47(a) and as defined in Titles XVIII and XIX of the Social Security Act, 42 U.S.C. §§ 1395-1395ddd and 1396-1396v (1997), and the regulations promulgated thereunder), incurred by or on behalf of the IMS Parties, and/or their current or former officers, directors, shareholders, employees, subsidiaries, divisions, predecessors or successors, in connection with (a) the matters covered by this Agreement, (b) the Government's audit and investigation of the matters covered by this Agreement, (c) the IMS Parties' investigation and defense of the matters covered by this Agreement (including attorneys' fees), and any corrective actions undertaken in response to the Government's investigation of the matters covered by this Agreement (including actions required by the Corporate Integrity Agreement), (d) the negotiation of this Agreement and the Corporate Integrity Agreement (Article III, Ex. 1), and (e) all payments made to the United States or to the Relators pursuant to this Agreement shall be unallowable costs for government contract accounting and Medicare, Medicaid, TRICARE, Veterans Affairs (VA) and Federal Employee Health Benefits Program (FEHBP) reimbursement purposes. These



costs shall be separately estimated and accounted for by the IMS Parties, and the IMS Parties will not charge such costs directly or indirectly to any contracts with the United States, or to any costs report submitted to the Medicare Program, Medicaid Program, TRICARE Program, VA Program or FEHBP. Any sums owed by the IMS Parties to the United States for payments made to the IMS Parties by Medicare and/or Medicaid for costs (as defined in this paragraph) which are unallowable shall be paid by the IMS Parties to the affected agencies. The IMS Parties agree to take all reasonable and necessary steps not to resubmit any claim to a Medicare carrier or intermediary that was submitted or described in paragraphs J through R of the Preamble.

#### ARTICLE XV

The Parties acknowledge that this document effects a settlement of disputed matters, and that nothing in this Agreement constitutes evidence or an admission by any person or entity and shall not be construed to be an admission by any person or entity.

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#### ARTICLE XVI

This Agreement shall be binding upon the Parties, their successors, assigns and heirs. This Agreement is intended to be for the benefit of the Parties only, and by this instrument the Parties do not release any claims against any other person or entity.

## ARTICLE XVII

This Agreement is governed by the laws of the United States. The Parties agree that the exclusive jurisdiction and venue for any dispute arising between and among the Parties under this Agreement will be the United States District Court for the Northern District of Texas, where the Thomas Action and Brupbacher Action were filed.

Notwithstanding this Article, matters arising under the Corporate Integrity Agreement (Exhibit 1) are to be resolved pursuant to Section VIII of the Corporate Integrity Agreement.

## ARTICLE XVIII

A finding that any term or condition of this Agreement is void or unenforceable shall not render any other term or condition of this Agreement void or unenforceable.

## ARTICLE XIX

An agreement by the parties to waive any term or condition of this Agreement, including a default under Article I or acceptance of a late payment, shall not constitute a waiver of any other term or condition of this Agreement including any future default or the timing of any future payments.

## ARTICLE XX

This Agreement, the Corporate Integrity Agreement and the Promissory Note constitute the complete agreement between the Parties. This Agreement may not be amended except by written consent of the Parties. The IMS Parties and OIG-HHS must agree in writing to modification of the Corporate Integrity Agreement, pursuant to Section XIII of the Corporate Integrity Agreement.

**ARTICLE XXI**

Each party to this Agreement will bear its own legal and other costs incurred in connection with this matter, including the preparation and performance of this Agreement.

**ARTICLE XXII**

The Parties represent that this Agreement is freely and voluntarily entered into without any degree of duress or compulsion whatsoever.

**ARTICLE XXIII**

The Signatories represent and warrant that they are fully authorized and empowered to execute this Agreement.

**ARTICLE XXIV**

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

**ARTICLE XXV**

This Agreement is effective on the date that it is signed by the final signatory to it.

**ARTICLE XXVI**

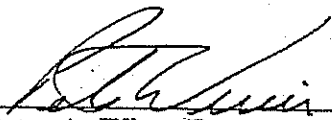
The Parties hereby consent to the disclosure of this Agreement, and information about this Agreement, to the public.

THE UNITED STATES OF AMERICA

By: 

Dated: 2/4/99

George C. Vitelli, Esq.  
Trial Attorney  
Commercial Litigation Branch  
Civil Division  
U.S. Department of Justice  
P.O. Box 261  
Ben Franklin Station  
Washington, D.C. 20044

By: 

Dated: 3/15/99

Peter A. Winn, Esq.  
Assistant United States Attorney  
Northern District of Texas  
1100 Commerce Street  
3rd Floor  
Dallas, TX 75242-1699

By: 

Dated: 3/12/99

Lewis Morris  
Assistant Inspector General for  
Legal Affairs  
Office of Counsel to the Inspector General  
U.S. Department of Health and Human Services  
330 Independence Avenue, S.W.  
Washington, D.C. 20201

AMERICAN BUSINESS INNOVATIONS, INC.

By: [Signature]

Dated: 2/25/99

CONCEPTS OF CARE

By: [Signature]

Dated: 2/25/99

HOMECARE CONCEPTS OF AMERICA

By: [Signature]

Dated: 2/25/99

INFUSION MANAGEMENT SYSTEMS, INC.

By: [Signature]

Dated: 2/25/99

RELATOR JENNIFER THOMAS

By: Jennifer Thomas  
Jennifer Thomas

Dated: 030899

ATTORNEYS FOR JENNIFER THOMAS

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SMYSER KAPLAN & VESELKA, L.L.P.  
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Dated: 3/5/99

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Christopher Davis, Esq.  
William Funk, Esq.  
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900 Jackson Street  
Dallas, TX 75202

Dated: 3/8/99

RELATOR BRUPBACHER & ASSOCIATES

By: *Aron Brupbacher*

Dated: 2-10-99

RELATOR MICHAEL C. FREEMAN

By: *M.C. Freeman*

Dated: 2-10-99

ATTORNEYS FOR BRUPBACHER & ASSOCIATES AND MICHAEL C. FREEMAN

*Robert L. Vogel*

Dated: 3-10-99

Robert L. Vogel, Esq.  
Mark D. Polston, Esq.  
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Dated: \_\_\_\_\_

Albon Head, Esq.  
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REV  
3/10/99