

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-IHS") of the Department of Health and Human Services ("HHS") (collectively the "United States"), Fairfax Nursing Center, Inc. ("FNC"), Robert Bainum, and Charmaine Bainum (collectively the "Defendants"), and Christine Ribik, Nadine Kelly, and Stephanie Beauregard (collectively the "Relators") (hereafter collectively referred to as "the Parties"), through their authorized representatives.

RECITALS

A. FNC, a Virginia corporation, is a Medicare- and Medicaid-enrolled skilled nursing facility located at 10701 Main Street, Fairfax, Virginia 22030. During the period between January 1, 2007 and December 31, 2010, Robert Bainum and Charmaine Bainum were the owners, shareholders, and directors of FNC, and Robert Bainum was also an operator of FNC.

B. On May 10, 2011, Relators filed an action in the United States District Court for the Eastern District of Virginia captioned *United States ex rel. Christine Ribik, Nadine Kelly, and Stephanie Beauregard v. Fairfax Nursing Center, Inc., Robert Bainum, and Charmaine Bainum*. ~~No. 1:11-cv-743~~ ^{No. 1:11-cv-00496} [UNDER SEAL], pursuant to the *qui tam* provisions of the False Claims Act, 31 U.S.C. § 3730(b) ("the Civil Action"). Relators' *qui tam* complaint alleges, *inter alia*, that FNC fraudulently billed Medicare by: performing medically unnecessary, potentially harmful therapy procedures on patients; billing for patients who did not qualify for the Medicare Part A skilled nursing benefit;

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and systematically recording and billing for skilled therapy services while actually providing unskilled services.

C. The United States contends that Defendants 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. §§ 1395-1395kkk-1.

D. The United States contends that it has certain civil claims against FNC, and against Robert and Charmaine Bainum as owners of FNC, for conduct occurring between January 1, 2007 and December 31, 2010. The United States contends that during that period FNC provided excessive, medically unnecessary, or otherwise non-reimbursable therapy services to 37 patients who were enrolled as beneficiaries in the Medicare Part A Program. *See* List of Patients in Attachment A. The United States further contends that FNC submitted or caused to be submitted to the United States claims for reimbursement for excessive, medically unnecessary, or otherwise non-reimbursable therapy services provided to those 37 patients. That conduct is referred to below as the Covered Conduct.

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

F. Relators claim entitlement under 31 U.S.C. § 3730(d) to a share of the proceeds of this Agreement and to Relators' reasonable expenses, attorney's 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 Agreement, the Parties agree and covenant as follows:

TERMS AND CONDITIONS

1. Defendants shall pay to the United States \$700,000.00 (Settlement Amount) by electronic funds transfer to the United States Attorney's Office for the Eastern District of Virginia, in care of the Financial Litigation Unit of the United States Attorney's Office located at 101 West Main Street, Suite 8000, Norfolk, Virginia 23510, pursuant to written instructions to be provided by the Financial Litigation Unit, United States Attorney's Office for the Eastern District of Virginia, within thirty (30) business days of the Effective Date in this Agreement, as defined in paragraph 26.
2. Conditioned upon the United States receiving the Settlement Amount from the Defendants and as soon as feasible after receipt, the United States shall pay \$122,500.00 to Relators by electronic funds transfer.
3. Defendants shall pay the sum of \$94,898.18, by check, to Froshin & Barger, LLC, and the sum of \$7,042.50, by check, to Stephen R. Pickard, PC, for expenses, costs and attorney's fees in representation of Relators.
4. Subject to the exceptions in Paragraph 7 (concerning excluded claims) below, and conditioned upon Defendants' full payment of the Settlement Amount, the United States releases Defendants and each of its current and former officers, directors, employees, agents, shareholders and attorneys 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 Defendants' full payment of the Settlement Amount, Relators, for themselves and for their heirs, successors, attorneys, agents, and assigns, release Defendants and each of its current and former officers, directors, employees, agents, shareholders and attorneys from any civil monetary claim the Relators have on behalf of the United States for the Covered Conduct under the False Claims Act, 31 U.S.C. §§ 3729-3733.

6. OIG-HHS expressly reserves all rights to institute, direct, or to maintain any administrative action seeking exclusion against Defendants and/or FNC's officers, directors, and employees from Medicare, Medicaid, and all other Federal health care programs (as defined in 42 U.S.C. § 1320a-7b(f)) under 42 U.S.C. § 1320a-7(a) (mandatory exclusion), or 42 U.S.C. § 1320a-7(b) or 42 U.S.C. § 1320a-7a (permissive exclusion).

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 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 for failure to deliver goods or services due;
- g. Any liability for personal injury or property damage or for other consequential damages arising from the Covered Conduct; or
- h. Any liability of individuals (including current or former directors, officers, employees, agents, or shareholders of FNC) who receive written notification that they are the target of a criminal investigation (as defined in the United States Attorneys' Manual), are indicted or charged, or who enter into a plea agreement, related to the Covered Conduct.

8. Relators and their heirs, successors, attorneys, agents, and assigns shall not object to this Agreement and 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 Relators' receipt of the payment described in Paragraph 2, Relators and their 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 the Civil Action.

9. Relators, for themselves, and for their heirs, successors, attorneys, agents, and assigns, release Defendants and each of its current and former officers, directors, employees, agents, shareholders and attorneys from any liability to Relators arising from the filing of the Civil Action, or under 31 U.S.C. § 3730(d) for expenses or attorney's fees and costs.

10. Defendants waive and shall not assert any defenses Defendants 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. Defendants fully and finally release the United States, its agencies, officers, agents, employees, and servants, from any claims (including attorney's fees, costs, and expenses of every kind and however denominated) that 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 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, related to the Covered Conduct; and Defendants agree not to resubmit to any Medicare contractor or any state payer any previously denied claims related to the Covered Conduct, and agree not to appeal any such denials of claims.

13. 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, FNC's 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) Defendants' investigation, defense, and corrective actions undertaken in response to the United States' audit(s) and civil investigation in connection with the matters covered by this Agreement (including attorney's fees);

(4) the negotiation and performance of this Agreement; and

(5) the payment Defendants make to the United States pursuant to this Agreement and any payments that Defendants may make to Relators, including costs and attorney's fees.

b. Future Treatment of Unallowable Costs: Unallowable Costs shall be separately determined and accounted for by Defendants, and 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

Defendants or any of FNC's subsidiaries or affiliates to the Medicare, Medicaid, TRICARE, or FEHBP Programs.

c. Treatment of Unallowable Costs Previously Submitted for Payment:

Defendants further agree 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 Defendants or any of FNC's 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. Defendants agree that the United States, at a minimum, shall be entitled to recoup from 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 Defendants or any of FNC's subsidiaries or affiliates on the effect of inclusion of Unallowable Costs (as defined in this Paragraph) on Defendants or any of FNC's 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 Defendants' books and records to determine that no Unallowable Costs have been claimed in accordance with the provisions of this Paragraph.

14. 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 15 (waiver for beneficiaries paragraph), below.

15. 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.

16. Upon receiving notice of the United States' receipt of the payment described in Paragraph 1, above, Relators shall promptly move to voluntarily dismiss the Civil Action pursuant to Rule 41(a)(1) with prejudice to Relators only. The United States shall consent to such dismissal of the Civil Action without prejudice to the United States and shall move to unseal the Civil Action.

17. Except as stated in paragraph 3, each Party shall bear its own legal and other costs incurred in connection with this matter, including the preparation and performance of this Agreement.

18. Each party and signatory to this Agreement represents that it freely and voluntarily enters in to this Agreement without any degree of duress or compulsion.

19. 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 Eastern District of Virginia. 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.

20. This Agreement constitutes the complete agreement between the Parties.

This Agreement may not be amended except by written consent of the Parties.

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

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

23. This Agreement is binding on Defendants' successors, transferees, heirs, and assigns.

24. This Agreement is binding on Relators' successors, transferees, heirs, and assigns.

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

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

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SIGNATURE PAGES FOLLOW

THE UNITED STATES OF AMERICA

DATED: 2/4/13

BY: M. McMahon

Michael J. McMahon
Trial Attorney
Commercial Litigation Branch
Civil Division
United States Department of Justice

THE UNITED STATES OF AMERICA

DATED: 1/14/13

BY:



Gerard Mene
Assistant United States Attorney
Eastern District of Virginia

THE UNITED STATES OF AMERICA

DATED: 2/5/13

BY: Robert K. DeConti
Robert K. DeConti
Assistant Inspector General for Legal Affairs
Office of Inspector General
U.S. Department of Health and Human Services

FAIRFAX NURSING CENTER, INC. - DEFENDANT

DATED: 1/16/13

BY: Renee Bainum
Renee Bainum, Chief Operating Officer

DATED: 1/22/13

BY: Carol C. Loepere
Carol C. Loepere
Counsel for Fairfax Nursing Center, Inc.

ROBERT BAINUM - DEFENDANT

DATED: 1.13.13 BY: Robert Bainum
Robert Bainum

DATED: 1/22/13 BY: Carol C. Loepere
Carol C. Loepere
Counsel for Robert Bainum

CHARMAINE BAINUM – DEFENDANT

DATED: 1.13.13

BY: Charmaine Bainum
Charmaine Bainum

DATED: 1/22/13
~~1/13/12~~

BY: Carol C. Loepere
Carol C. Loepere
Counsel for Charmaine Bainum

CHRISTINE RIBIK - RELATOR

DATED: 2/5/2013

BY: Christine Ribik, OTR/L, COT
Christine Ribik

DATED: _____

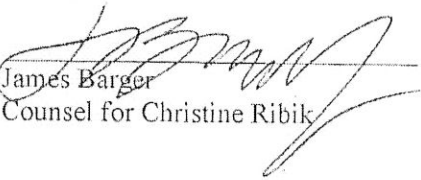
BY: _____
James Barger
Counsel for Christine Ribik

CHRISTINE RIBIK - RELATOR

DATED: _____

BY: _____
Christine Ribik

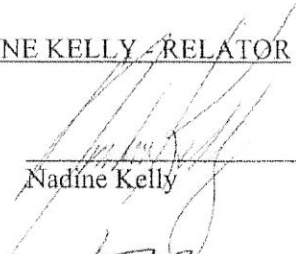
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BY: 
James Barger
Counsel for Christine Ribik

NADINE KELLY - RELATOR

DATED: 1-15-13

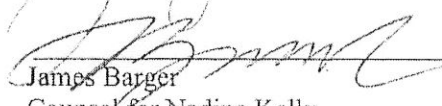
BY:



Nadine Kelly

DATED: 1-17-13

BY:



James Barger
Counsel for Nadine Kelly

STEPHANIE BEAUREGARD - RELATOR

DATED:

1/18/13

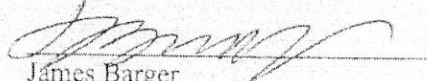
BY:


Stephanie Beauregard

DATED:

4/18/13

BY:


James Barger
Counsel for Stephanie Beauregard