

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 Defense Health Agency (DHA), acting on behalf of the TRICARE program; the Office of Personnel Management (OPM), which administers the Federal Employees Health Benefits Program (FEHBP) (collectively, the “United States”); and Sutter Health, a California nonprofit public benefit corporation, and Sutter Bay Hospitals, as successor in interest to Sutter East Bay Hospitals dba Alta Bates Summit Medical Center (collectively, “Sutter”) (hereafter collectively referred to as “the Parties”), through their authorized representatives.

RECITALS

A. Sutter is a nonprofit, public benefit health system in California comprised of hospitals, medical foundations, and other medical service entities. Sutter is headquartered in Sacramento, California. Sutter and its affiliates provide healthcare services in the States of California, Oregon, and Hawaii.

B. The United States contends that Sutter has 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”); the Medicaid Program, 42 U.S.C. §§ 1396-1396w-5 (“Medicaid”); the TRICARE Program, 10 U.S.C. §§ 1071-1110b (“TRICARE”); and the FEHBP, 5 U.S.C. §§ 8901-8914.

C. The United States contends that it has certain civil claims against Sutter arising from the following conduct during the period from August 1, 2016 through June 30, 2017: Sutter entered into a Laboratory Services Agreement (“LSA”) with Navigant Network Alliance, LLC, under which Navigant referred to Sutter urine toxicology specimens from physicians and

laboratories across the country, and Sutter submitted or caused to be submitted bills for reimbursement to commercial insurers (including FEHBP carriers) and government payors (including Medicare, Medicaid, and TRICARE) for all qualitative and quantitative testing performed on such specimens. The United States contends that Sutter did not perform the quantitative testing on certain specimens referred under the LSA, but still sought reimbursement for such tests, which were performed by third-party labs. The United States thus contends that Sutter knowingly billed and was paid by Medicare, Medicaid, TRICARE, and the FEHBP for tests Sutter did not perform. The conduct described in this Paragraph is referred to below as the “Covered Conduct.”

D. Sutter previously repaid to OPM \$6,437,928 of claims submitted to FEHBP for the Covered Conduct. In addition, Sutter previously repaid \$100,963 of claims submitted to Medicare for the Covered Conduct.

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

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 total settlement amount is Thirteen Million Ninety-One Thousand Four Hundred Fifty-Two Dollars (\$13,091,452), plus applicable accrued interest (“Settlement Amount”), of which Six Million Five Hundred Forty-Five Thousand Seven Hundred Twenty-Six (\$6,545,726) is restitution. Six Million Five-Hundred Thirty-Eight Thousand Eight Hundred Ninety-One Dollars (\$6,538,891) of the Settlement Amount has already been paid by Sutter to the United States as described in Paragraph D. Interest will accrue only on the Six Million Five

Hundred Fifty-Two Thousand Five Hundred Sixty-One Dollars (\$6,552,561) remaining to be paid (“Outstanding Settlement Amount”), at a rate of 2.94% per annum from August 26, 2022, until the date payment in full is made under this Paragraph. The payment of the \$6,552,561 Outstanding Settlement Amount plus interest shall be made by Sutter no later than thirty (30) days after the Effective Date of this Agreement pursuant to written instructions to be provided by the Office of the United States Attorney for the Northern District of California.

2. Subject to the exceptions in Paragraph 3 (concerning reserved claims) below, and upon the United States’ receipt of the Settlement Amount plus interest due under Paragraph 1, the United States releases Sutter 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.

3. Notwithstanding the release given in Paragraph 2 of this Agreement, or any other term of this Agreement, the following claims and rights 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 or enforcement right, including mandatory or permissive exclusion from Federal health care programs or the FEHBP;
- 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;

4. Sutter waives and shall not assert any defenses Sutter 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.

5. Sutter fully and finally releases 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 Sutter has asserted, could have asserted, or may assert in the future against the United States, and its agencies, officers, agents, employees, and servants related to the Covered Conduct and the United States' investigation and prosecution thereof.

6. 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), TRICARE carrier or payer, FEHBP carrier or payer, or any state payer, related to the Covered Conduct; and Sutter agrees not to resubmit to any Medicare contractor, TRICARE carrier or payer, FEHBP carrier or payer, or any state payer any previously denied claims related to the Covered Conduct, agrees not to appeal any such denials of claims, and agrees to withdraw any such pending appeals.

7. Sutter 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 Sutter, its 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 and any criminal investigation(s) of the matters covered by this Agreement;
- (3) Sutter's investigation, defense, and corrective actions undertaken in response to the United States' audit(s) and civil and any criminal investigation(s) in connection with the matters covered by this Agreement (including attorneys' fees);
- (4) the negotiation and performance of this Agreement;
- (5) the payment Sutter makes to the United States pursuant to this Agreement;

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 Sutter, and Sutter 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 Sutter or any of its subsidiaries or affiliates to the Medicare, Medicaid, TRICARE, or FEHBP Programs.

c. Treatment of Unallowable Costs Previously Submitted for Payment: Sutter 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 Sutter 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. Sutter agrees that the United States, at a minimum, shall be entitled to recoup from Sutter 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 Sutter or any of its subsidiaries or affiliates on the effect of inclusion of Unallowable Costs (as defined in this paragraph) on Sutter 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 to audit, examine, or re-examine Sutter's books and records to determine that no Unallowable Costs have been claimed in accordance with the provisions of this paragraph.

8. 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 9 (waiver for beneficiaries paragraph), below.

9. Sutter 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.

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

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

12. This Agreement is governed by the laws of the United States. The exclusive venue for any dispute relating to this Agreement is the United States District Court for the Northern District of California. 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.

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

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

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

16. This Agreement is binding on Sutter's successors, transferees, heirs, and assigns.

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

18. 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

STEPHANIE M. HINDS
United States Attorney

DATED: _____

BY: _____

DAVID M. DEVITO
Assistant United States Attorney
Northern District of California

DATED: _____

BY: **LISA RE** Digitally signed by LISA RE
Date: 2022.10.17 11:01:38 -04'00'

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

SUTTER HEALTH AND ITS AFFILIATES

DATED: 10/11/2022

BY:  _____

FLORENCE L. DI BENEDETTO
Senior Vice President and General Counsel for
Sutter Health
Authorized Agent of Sutter Bay Hospitals, as successor in
interest to Sutter East Bay Hospitals dba Alta Bates
Summit Medical Center

DATED: 10/11/22

BY:  _____

JASON M. OHTA
Latham & Watkins LLP
Counsel for Sutter Health and Sutter Bay Hospitals, as
successor in interest to Sutter East Bay Hospitals dba Alta
Bates Summit Medical Center