

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) (collectively, the “United States”), Select Medical Corporation and Encore GC Acquisition, LLC, the parent company of Encore Rehabilitation Services, LLC and Encore Preakness, Inc., the successor-in-interest to Select Medical Rehabilitation Services, Inc., and Melissa Vail (hereafter collectively referred to as “the Parties”), through their authorized representatives.

RECITALS

A. Select Medical Corporation, a wholly-owned subsidiary of Select Medical Holdings Corporation, operates specialty hospitals and outpatient rehabilitation facilities throughout the United States. In 2003, Select Medical Corporation acquired Kessler Institute for Rehabilitation, Inc. (Kessler), a provider of inpatient rehabilitation services at specialty hospitals and outpatient rehabilitation services at therapy clinics. Hereinafter, Select Medical Corporation, Select Medical Holdings Corporation, and Kessler are collectively referred to as “Select Medical.” From 1997 through March 31, 2016, Select Medical Corporation owned Select Medical Rehabilitation Services, Inc. (SMRS), a wholly-owned direct subsidiary that offered contract rehabilitation therapy services to skilled nursing facilities (SNFs) across the country. On March 31, 2016, Select Medical Corporation sold all of the stock of SMRS to Encore GC Acquisition, LLC, the parent company of Encore Rehabilitation Services, LLC and Encore Preakness, Inc. (collectively “Encore”). Hereinafter, Select Medical and Encore are collectively referred to as the “Companies.”

B. On June 17, 2016, Melissa Vail (formerly Sharrino) filed a *qui tam* action in the United States District Court for the District of New Jersey captioned *United States ex rel. Doe v.*

Select Medical Corp., Select Medical Holdings Corp., Kessler Institute for Rehabilitation, Inc., and Encore Rehabilitation Services, LLC, No. 2:16-cv-03569 (D.N.J.), pursuant to the *qui tam* provisions of the False Claims Act, 31 U.S.C. § 3730(b) (hereinafter the “Civil Action”). Relator alleged that since 2010, defendants Select Medical Corporation, Select Medical Holdings Corporation, Kessler Institute for Rehabilitation, Inc., and Encore Rehabilitation Services, LLC caused the submission of false claims to Medicare Part A for medically unnecessary, unreasonable, and/or unskilled rehabilitation therapy services at twelve skilled nursing facilities in New York and New Jersey. As noted herein, Encore was the successor-in-interest to SMRS, and the Covered Conduct as defined below and in Attachment A hereto occurred prior to Encore’s acquisition of SMRS. Concurrent with this Agreement, the United States is intervening in the Civil Action for settlement purposes.

C. The United States contends that SMRS submitted or caused to be submitted false claims for payment to the Medicare Program, Title XVIII of the Social Security Act, 42 U.S.C. §§ 1395-1395III (Medicare).

D. The United States contends that it has certain civil claims against Select Medical, as the prior parent company of SMRS, and Encore, as the successor-in-interest to SMRS, based on allegations that SMRS caused the submission of false claims to Medicare Part A for the provision of unreasonable, unnecessary, and/or unskilled rehabilitation therapy services provided to patients at twelve SNFs located in New Jersey and New York that contracted with SMRS during the relevant time periods identified in Attachment A (hereinafter referred to as the “Contracted SNFs”), all of which occurred prior to Encore’s acquisition of SMRS. During the relevant time periods, the Medicare Part A daily reimbursement rate depended in part on the Resource Utilization Group (RUG) classification to which a patient was assigned. The highest reimbursement level was Ultra High or RU. The United States contends that SMRS’ corporate

policies and practices encouraged the provision of such unnecessary rehabilitation therapy at the Contracted SNFs by, *inter alia*: (1) setting RU benchmarks as high as 65% to 90%; (2) setting an expectation that Medicare Part A patients be scheduled for RU levels of therapy upon admission; (3) exerting corporate pressure on Directors of Rehabilitation (DORs) and therapists to increase the RUG levels of the Medicare Part A patients; (4) marketing its ability to increase RU billing to meet SMRS benchmarks and increase facility profitability in its responses to Requests for Proposals; (5) aggressively monitoring RU levels at each facility and placing DORs who were not meeting expectations on “Action Plans” where they had to justify on a daily basis why certain patients were not receiving Ultra High therapy minutes; and (6) tying RU expectations to salary increases and bonus eligibility. The United States contends this conduct resulted in SMRS causing the submission of claims for Ultra High RUG therapy levels by the Contracted SNFs despite evidence that (1) the frequency and duration of physical or occupational therapy were not reasonable or necessary for the patient; (2) the intensity of the physical or occupational therapy was inappropriate for the patient, not reasonable or necessary, and at times, more than the patient could tolerate; (3) speech therapy was medically unnecessary; and (4) the services did not require the skills of a therapist to perform them. This conduct occurred prior to Encore’s acquisition of SMRS. The conduct referred to in this Paragraph is referred to below as the “Covered Conduct.”

E. This Settlement Agreement is neither an admission of liability by the Companies 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. Payment shall be made to the United States on behalf of the Companies in the amount of \$8,400,000.00 (Settlement Amount) and accrued interest on the Settlement Amount at a rate of 1.625% per annum from June 8, 2021 through the Effective Date of this Agreement (as defined in Paragraph 26 below), of which \$4,200,000.00 is restitution, no later than thirty (30) days after the Effective Date of this Agreement by electronic funds transfer pursuant to written instructions to be provided by the Civil Division of the United States Department of Justice.

2. Conditioned upon the United States receiving the Settlement Amount and as soon as feasible after receipt, the United States shall pay \$1,512,000.00 to Relator by electronic funds transfer pursuant to written instructions provided by Relator's counsel (Relator's Share).

3. The terms of any payments by or on behalf of the Companies to Relator or her counsel for expenses and attorneys' fees and costs due under 31 U.S.C. § 3730(d) shall be made in accordance with a side letter agreement between one or more of the Companies, Relator, and their counsel.

4. Subject to the exceptions in Paragraph 6 (concerning reserved claims) below, and upon the United States' receipt of the Settlement Amount, plus interest due under Paragraph 1, the United States releases the Companies, together with their current and former parent corporations; direct and indirect subsidiaries; brother or sister corporations; divisions; current or former corporate or institutional owners; and the corporate or institutional successors and assigns of any of them 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 6 below, and upon the United States' receipt of the Settlement Amount, plus interest due under Paragraph 1, Relator, for herself and for her heirs, successors, attorneys, agents, and assigns, releases the Companies from any claim the Relator has individually or on behalf of the United States pertaining to or arising from the Covered Conduct or the allegations in the Civil Action, in law or in equity, in contract or tort, or under any statute or regulation, including under the False Claims Act, 31 U.S.C. §§ 3729-3733.

6. Notwithstanding the releases given in Paragraph 4 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;
- 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.

7. 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 Relator's Share, 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.

8. Relator, for herself, and for her heirs, successors, attorneys, agents, and assigns, releases the Companies, and their officers, agents, and employees, from any liability to Relator arising from the filing of the Civil Action.

9. The Companies waive and shall not assert any defenses the Companies may have to any criminal prosecution or administrative action relating to the Covered Conduct that may be based in whole or in part on a contention that, under the Double Jeopardy Clause in the Fifth Amendment of the Constitution, or under the Excessive Fines Clause in the Eighth Amendment of the Constitution, this Agreement bars a remedy sought in such criminal prosecution or administrative action.

10. The Companies 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 Companies 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 or the United States' investigation or prosecution thereof.

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

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 the Companies agree not to resubmit to any 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.

13. The Companies 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. §§ 1395-1395lll and 1396-1396w-5; and the regulations and official program directives promulgated thereunder) incurred by or on behalf of the Companies, 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 Companies' 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 Companies make to the United States pursuant to this Agreement and any payments that the Companies may make to Relator, including costs and attorneys' fees

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

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

c. Treatment of Unallowable Costs Previously Submitted for Payment: The Companies further agree that within 90 days of the Effective Date of this Agreement they 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 the Companies 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 Companies agree that the United States, at a minimum, shall be entitled to recoup from the Companies 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 Companies or any of their subsidiaries or affiliates on the effect of inclusion of Unallowable Costs (as defined

in this paragraph) on the Companies 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 Companies' 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 and any released parties pursuant to the terms of this Agreement 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. The Companies 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 receipt of the payment described in Paragraph 1, above, the United States and Relator shall promptly sign and file in the Civil Action a Joint Stipulation of Dismissal of the Civil Action pursuant to Rule 41(a)(1).

17. Each Party shall bear its own legal and other costs incurred in connection with this matter, including the preparation and performance of this Agreement, except as set forth in any separate written agreements between or among any of the Companies, Relator, and/or Relator's counsel.

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 District of New Jersey. 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 with the exception of any agreements referenced in Paragraphs 3 and 17 above. 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 the Companies' successors, transferees, heirs, and assigns.

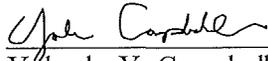
24. This Agreement is binding on Relator's successors, transferees, heirs, and assigns.

25. All Parties consent to any other party's disclosure of this Agreement, and information about this Agreement, to the public following the unsealing of the Civil Action.

26. 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

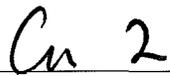
DATED: 7/1/2021

BY: 
Yolonda Y. Campbell
Trial Attorney
Commercial Litigation Branch
Civil Division
United States Department of Justice

DATED: 7/2/2021

BY: 
Marihug P. Cedeño
Assistant United States Attorney
United States Attorney's Office
District of New Jersey

DATED: 7/2/21

BY: 
Cari Fais
Chief, Opioid Abuse Prevention & Enforcement Unit
United States Attorney's Office
District of New Jersey

DATED: _____

BY: _____
GREGORY DEMSKE Digitally signed by GREGORY
DEMSKE
Date: 2021.06.28 16:47:15 -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

COMPANIES

DATED: 6/24/2021

ENCORE GC ACQUISITION, LLC
(Parent Company of Encore Rehabilitation Services, LLC and
Encore Preakness, Inc.)

BY: 
Andrew Welch
Secretary

DATED: _____

BY: _____
Brad Vaiana
WINSTON & STRAWN LLP
200 Park Avenue
New York, NY 10166-4193
Counsel for Encore GC Acquisition, LLC

DATED: _____

BY: _____
Suzannè Jaffe Bloom
WINSTON & STRAWN LLP
200 Park Avenue
New York, NY 10166-4193
Counsel for Encore GC Acquisition, LLC

COMPANIES

DATED: _____

ENCORE GC ACQUISITION, LLC
(Parent Company of Encore Rehabilitation Services, LLC and
Encore Preakness, Inc.)

BY: _____

Andrew Welch
Secretary

DATED: 6/24/2021

BY:  _____

Brad Vaiana
WINSTON & STRAWN LLP
200 Park Avenue
New York, NY 10166-4193

Counsel for Encore GC Acquisition, LLC

DATED: 6/24/2021

BY:  _____

Suzanne Jaffe Bloom
WINSTON & STRAWN LLP
200 Park Avenue
New York, NY 10166-4193

Counsel for Encore GC Acquisition, LLC

DATED: 6/24/21

SELECT MEDICAL CORPORATION

BY: Michael E. Tarvin

Michael E. Tarvin
Executive Vice President, General Counsel and Secretary

DATED: 6/24/21

BY: Thomas H. Suddath, Jr.

Thomas H. Suddath, Jr.
REED SMITH LLP
Three Logan Square
Suite 3100
1717 Arch Street
Philadelphia, PA 19103

DATED: 6/24/21

BY: Karl A. Thanner, Jr.

Karl A. Thanner, Jr.
REED SMITH LLP
Three Logan Square
Suite 3100
1717 Arch Street
Philadelphia, PA 19103

Counsel for Select Medical Corporation

RELATOR

DATED: 07/01/2021

BY: Melissa A. Vail
Melissa Vail

DATED: 6/29/2021

BY: Joy Clairmont
Joy Clairmont
Berger Montague, PC
1818 Market Street, Suite 3600
Philadelphia, PA 19103

Counsel for Relator, Melissa Vail

ATTACHMENT A

Skilled Nursing Facility of Interest	Relevant Time Period
Abingdon Care & Rehabilitation Center 303 Rock Avenue Green Brook, NJ CCN: 315141	January 1, 2010 – March 31, 2016
Ashbrook Care & Rehabilitation Center 1610 Raritan Road Scotch Plains, NJ CCN: 315064	January 1, 2010 – March 31, 2016
Buckingham at Norwood 100 McClellan Street Norwood, NJ CCN: 315290	January 1, 2010 – March 31, 2016
Crouse Community Center 101 South Street Morrisville, NY CCN: 335068	May 3, 2013 – June 3, 2015
Franklin County Nursing Home 184 Finney Boulevard Malone, NY CCN: 335293	June 20, 2011 – March 20, 2015
Green Hill 103 Pleasant Valley Way West Orange, NJ CCN: 315416	September 9, 2013 – March 31, 2016
The Jewish Home at Rockleigh 10 Link Drive Rockleigh, NJ CCN: 315473	January 1, 2010 – August 31, 2015
Llanfair House Care & Rehabilitation Center 1140 Black Oak Ridge Road Wayne, NJ CCN: 315142	January 1, 2010 – March 31, 2016
Merwick Care & Rehabilitation Center 100 Plainsboro Road Plainsboro, NJ CCN: 315001	September 1, 2010 – March 31, 2016
Ramapo Manor Center for Rehab & Nursing 30 Cragmere Road Suffern, NY CCN: 335148	January 1, 2010 – March 31, 2016
Venetian Care & Rehabilitation Center 275 John T O'Leary Boulevard South Amboy, NJ CCN: 3155188	June 1, 2014 – March 31, 2016
Windsor Gardens Care & Rehabilitation Center 140 Park Avenue East Orange, NJ CCN: 315178	January 1, 2010 – March 31, 2016