

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”) and the Defense Health Agency (“DHA”), acting on behalf of the TRICARE Program (collectively, the “United States”), the State of Texas (“Texas”), Brannon Frank, M.D. (“Dr. Frank”), and Jennifer Nuessner, John Patrick Lowe in his capacity as Chapter 7 trustee for the bankruptcy estate of Jennifer Nuessner, and Robert Hoffman (“Relators”) (hereafter collectively referred to as “the Parties”), through their authorized representatives.

RECITALS

A. Dr. Frank, a citizen and resident of the State of Texas, is a pain management physician practicing in Austin, Texas. During the period referenced in this Agreement, Dr. Frank was Vice President, Medical Director, and part-owner of Robert P. Wills, M.D., P.A., d/b/a Austin Pain Associates (“Austin Pain Associates”), a professional association organized under the laws of the State of Texas, and he provided health care services that were reimbursed by federal and state health care programs. Austin Pain Associates is no longer in operation. Dr. Frank is currently an employee at an entity that has no connection to the Covered Conduct, as defined in Paragraph D of this Settlement Agreement.

B. On November 8, 2016, Relators Jennifer Nuessner and Robert Hoffman filed a qui tam action in the United States District Court for the Western District of Texas captioned *United States and the State of Texas ex rels. Nuessner and Hoffman v. Austin Pain Associates, LLC, et al.*, 5:16-CV-1125-FB, pursuant to the qui tam provisions of the False Claims Act, 31 U.S.C. § 3730(b) and the Texas Medicaid Fraud Prevention Act, Tex. Hum. Res. Code § 36.101 (the “Civil Action”). Relators allege that Austin Pain Associates and Dr. Frank, *inter alia*,

ordered and billed federal and state health care programs for medically unnecessary urine drug tests.

C. The United States contends that Dr. Frank 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”); and the TRICARE Program, 10 U.S.C. §§ 1071-1110b (“TRICARE”). Texas contends that Dr. Frank submitted or caused to be submitted claims for payment to the Texas Medicaid Program, Tex. Hum. Res. Code §§ 32.001 *et seq.*

D. The United States contends that it has certain civil claims against Dr. Frank arising from Dr. Frank knowingly causing false claims to be submitted to Medicare, Medicaid, and TRICARE during the period from January 1, 2011 to December 31, 2015 by ordering excessive and unnecessary urine drug testing, which was billed using the Current Procedural Terminology codes listed in Exhibit A, without an individualized assessment of patient need. The United States alleges that such claims were not “reasonable and necessary for the diagnosis or treatment of an illness or injury,” as required by 42 U.S.C. § 1395y(a)(1)(A). Starting in 2011, all urine drug tests ordered by Austin Pain Associates’ physicians, including Dr. Frank, were performed at Austin Pain Associates’ in-house laboratory. The United States alleges that Dr. Frank was involved in the opening of the in-house lab and the drafting of Austin Pain Associates’ urine drug testing protocols, which dictated how frequently Austin Pain Associates’ patients would receive urine drug tests and the substances for which the in-house lab would test. The United States contends Dr. Frank was aware that the in-house laboratory was testing urine samples for an excessive number of metabolites, and that Austin Pain Associates could not survive without the income generated from such testing. The United States alleges that as a part-owner of Austin Pain Associates, Dr. Frank benefited financially from the urine drug tests

performed by the in-house laboratory, including those the United States believes were medically unnecessary. During this time period and for the same conduct described above, Texas contends that it has certain civil causes of action, including violations of the Texas Medicaid Fraud Prevention Act (“TMFPA”), against Dr. Frank. This conduct is collectively referred to below as the “Covered Conduct.”

E. This Settlement Agreement is neither an admission of liability by Dr. Frank nor a concession by the United States or Texas that their claims are not well founded. Dr. Frank denies the United States’ and Texas’s allegations in Paragraph D.

F. Relators claim entitlement under 31 U.S.C. § 3730(d) and Tex. Hum. Res. Code § 36.110(a-1) to a share of the proceeds of this Settlement Agreement and to Relators’ 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. Dr. Frank shall pay to the United States and Texas \$1,800,000 (the “Settlement Amount”). Of the Settlement Amount, \$1,679,247 will be allocated to resolution of the United States’ claims discussed herein, \$839,623 of which constitutes restitution to the United States; and \$120,753 will be allocated to resolution of Texas’s claims discussed herein (the “Texas Allocation”), \$60,377 of which is paid to come into compliance with the TMFPA. Dr. Frank will pay the Settlement Amount to the United States no later than 30 days after the Effective Date of this Agreement by electronic funds transfer pursuant to written instructions to be provided by the Office of the United States Attorney for the Western District of Texas. The United States will then disburse such funds to Texas and Relators as described below.

2. Conditioned upon the United States receiving the Settlement Amount from Dr. Frank and as soon as feasible after receipt, the United States shall pay \$285,471.99 to Relators.

3. Conditioned upon the United States receiving the Settlement Amount from Dr. Frank and as soon as feasible after receipt, the United States shall pay \$120,753 to Texas. Within a reasonable amount of time after receipt of this sum from the United States, Texas shall pay \$20,528.01 to Relators.

4. Dr. Frank shall pay \$37,500 to Relators as a portion of Relators' expenses, attorney's fees, and costs no later than 30 days after the Effective Date of this Agreement pursuant to written instructions to be provided by Relators' counsel.

5. Subject to the exceptions in Paragraph 8 (concerning excluded claims) below, and conditioned upon Dr. Frank's full payment of the Settlement Amount, the United States releases Dr. Frank 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; any statutory provision creating a cause of action for civil damages or civil penalties for which the Civil Division of the Department of Justice has actual or present authority to assert or compromise pursuant to 28 C.F.R. Part 0, Subpart I, 0.45(d); or the common law theories of payment by mistake, unjust enrichment, and fraud.

6. Subject to the exceptions in Paragraph 8 (concerning excluded claims) below, in consideration of the obligations of Dr. Frank as set forth in this Settlement Agreement, and conditioned upon receipt of the Texas Allocation, Texas releases Dr. Frank from any civil or administrative monetary claim Texas has for the Covered Conduct under the Texas Medicaid Fraud Prevention Act, Tex. Hum. Res. Code §§ 36.001 *et seq.*; any other statutory or regulatory

cause of action for the Covered Conduct that Texas has authority to assert or compromise; or the common law theories of payment by mistake, unjust enrichment, and fraud.

7. Subject to the exceptions in Paragraph 8 below, and conditioned upon Dr. Frank's full payment of the Settlement Amount and the payment of relators' fees described in paragraph 4 above, Relators, for themselves and for their heirs, successors, attorneys, agents, and assigns, release Dr. Frank from any claims, losses, demands, causes of action, obligations, damages, fees, liens, judgments, and liabilities of any kind, whether in law or equity, fixed or contingent, presently known or unknown, suspected or unsuspected contingent or non-contingent (including but not limited to attorneys' fees, costs, and expenses of every kind and however denominated), that the Relators have or may have in the future in Relators' individual and/or collective capacities or on behalf of the United States under the False Claims Act, 31 U.S.C. §§ 3729-3733, violations of 42 U.S.C. § 1320a(1)(G), violations of the Texas Medicaid Fraud Prevention Act, Texas Human Resources Code § 36.001-132, arising from or related to the Covered Conduct, including any claims under 31 U.S.C. § 3730 (d) for expenses or attorneys' fees and costs incurred in the Civil Action. This release includes any civil monetary claim the Relators have on behalf of the United States or Texas for the Covered Conduct under the False Claims Act, 31 U.S.C. §§ 3729-3733 or Texas Medicaid Fraud Prevention Act, Tex. Hum. Res. Code § 36.

8. Notwithstanding the releases given in paragraphs 4-7 of this Agreement, or any other term of this Agreement, the following claims of the United States and Texas are specifically reserved and are not released:

- a. Any liability arising under Title 26, U.S. Code (Internal Revenue Code) or any Texas tax or revenue law;
- b. Any criminal liability;

- c. Except as explicitly stated in this Agreement, any administrative liability, including mandatory or permissive exclusion from Federal health care programs;
- d. Except as explicitly stated in this Agreement, any administrative liability, including mandatory or permissive exclusion from the Texas Medicaid Program;
- e. Any liability to the United States or Texas (or its agencies) for any conduct other than the Covered Conduct;
- f. Any liability based upon obligations created by this Agreement;
- g. Any liability of individuals other than Dr. Frank;
- h. Any liability for express or implied warranty claims or other claims for defective or deficient products or services, including quality of goods and services;
- i. Any liability for failure to deliver goods or services due;
- j. Any liability for personal injury or property damage or for other consequential damages arising from the Covered Conduct; and
- k. Any liability to Texas or to individual consumers or state payers for claims involving unfair and/or deceptive acts and practices and/or violations of Texas's consumer protection laws.

9. Relators and their 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) and Tex. Hum. Res. Code § 36.107(c). 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: (a) the United States, its agencies, officers, agents, employees, and servants, from any claims related to Dr. Frank arising from the filing of the Civil Action or under 31 U.S.C. § 3730; (b) Texas, its agencies, officers, agents, employees, and servants, from any claims relating to Dr. Frank arising from the filing of the Civil Action or under the Texas Medicaid Fraud Prevention Act, Tex. Hum. Res. Code §§ 36.001 *et seq.*; and (c) the United States and Texas from any claims to a share of the proceeds of this Agreement and/or the Civil Action as it relates to Dr. Frank.

10. Relators, for themselves, and for their heirs, successors, attorneys, agents, and assigns, release Dr. Frank from any liability to Relators arising from the filing of the Civil Action, or under 31 U.S.C. § 3730(d) and Tex. Hum. Res. Code § 36.110 for expenses or attorney's fees and costs.

11. Dr. Frank waives and shall not assert any defenses he 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.

12. Dr. Frank 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 he has 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.

13. Dr. Frank fully and finally releases Texas, its agencies, officers, agents, employees, and servants, from any claims (including attorney's fees, costs, and expenses of every kind and however denominated) that he has asserted, could have asserted, or may assert in

the future against Texas, its agencies, officers, agents, employees, and servants, related to the Covered Conduct and Texas' investigation and prosecution thereof.

14. Dr. Frank fully and finally releases the Relators from any claims (including attorney's fees, costs, and expenses of every kind and however denominated) that Dr. Frank has asserted, could have asserted, or may assert in the future against the Relators, related to the Covered Conduct and the Relators' investigation and prosecution thereof.

15. 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 or Medicaid contractor (e.g., Medicare Administrative Contractor, fiscal intermediary, carrier), TRICARE, or any state payer, including Medicaid, related to the Covered Conduct; and Dr. Frank agrees not to resubmit to any Medicare or Medicaid contractor, TRICARE, 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.

16. Dr. Frank 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 Dr. Frank in connection with:

- (1) the matters covered by this Agreement;
- (2) the United States' and Texas' audit(s) and civil investigation(s) of the matters covered by this Agreement;
- (3) Dr. Frank's investigation, defense, and corrective actions undertaken in response to the United States' and Texas' audit(s) and civil

investigation(s) 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 Dr. Frank makes to the United States and Texas pursuant to this Agreement and any payments that Dr. Frank may make to Relators, including costs and attorney's 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 Dr. Frank, and Dr. Frank 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 Dr. Frank or any of its subsidiaries or affiliates to the Medicare, Medicaid, TRICARE, or FEHBP Programs.

c. Treatment of Unallowable Costs Previously Submitted for Payment: Dr. Frank further agrees that within 90 days of the Effective Date of this Agreement he 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 Dr. Frank for the Covered Conduct, 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. Dr. Frank agrees that the United States and Texas, at a minimum, shall be entitled to recoup from Dr. Frank 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 and Texas pursuant to the direction of the Department of Justice and/or the affected agencies. The United States and Texas reserve their rights to disagree with any calculations submitted by Dr. Frank on the effect of inclusion of Unallowable Costs (as defined in this Paragraph) on Dr. Frank's cost reports, cost statements, or information reports.

d. Nothing in this Agreement shall constitute a waiver of the rights of the United States or Texas to audit, examine, or re-examine Dr. Frank's books and records to determine that no Unallowable Costs have been claimed in accordance with the provisions of this Paragraph.

17. Dr. Frank agrees to cooperate fully and truthfully with the United States' and Texas' investigation of individuals and entities not released in this Agreement. Dr. Frank further agrees to furnish to the United States and Texas, upon request, complete and unredacted copies of all non-privileged documents, reports, memoranda of interviews, and records in his possession, custody, or control concerning any investigation of the Covered Conduct that he has undertaken, or that has been performed by another on his behalf.

18. 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 19 (waiver for beneficiaries paragraph), below.

19. Dr. Frank agrees that he 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.

20. Upon receipt of the payment described in Paragraphs 1-3, above, the Parties shall promptly sign and file in the Civil Action a Joint Stipulation of Dismissal of the Civil Action as it relates to Dr. Frank pursuant to Rule 41(a)(1). The dismissal shall be: (a) with prejudice to the United States and Texas for the Covered Conduct; (b) without prejudice to the United States and Texas for all other conduct; and (c) with prejudice to the Relators as to all claims or causes of action arising from or related to the conduct alleged in the Civil Action against Dr. Frank.

21. Subject to the exception in Paragraph 4, each Party shall bear its own legal and other costs incurred in connection with this matter, including the preparation and performance of this Agreement.

22. 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.

23. This Agreement is governed by the laws of the United States. The exclusive jurisdiction and venue for any dispute relating to this Agreement is the United States District Court for the Western District of Texas. 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.

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

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

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

27. This Agreement is binding on Dr. Frank's successors, transferees, heirs, and assigns.
28. This Agreement is binding on Relators' successors, transferees, heirs, and assigns.
29. All parties consent to the United States' and Texas' disclosure of this Agreement, and information about this Agreement, to the public. All parties further consent to the disclosure of this Agreement to the extent necessary for trustee John Patrick Lowe to obtain approval by the bankruptcy court presiding over *In re Jennifer D. Nuessner*, Case No. 17-10566 (W.D. Tex.).
30. This Agreement is contingent on approval by the bankruptcy court presiding over *In re Jennifer D. Nuessner*, Case No. 17-10566 (W.D. Tex.) of trustee John Patrick Lowe's compromise and settlement of the bankruptcy estate's claim as reflected by his signature below. This Agreement is effective on the date the bankruptcy court provides such approval (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: 12/7/20

BY: Jonathan T. Thrope
Jonathan T. Thrope
Trial Attorney
Commercial Litigation Branch
Civil Division
United States Department of Justice

DATED: _____

BY: _____
Thomas A. Parnham, Jr.
Assistant United States Attorney
Western District of Texas

DATED: _____

BY: _____
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

DATED: _____

BY: _____
Salvatore M. Maida
General Counsel
Defense Health Agency
United States Department of Defense

THE UNITED STATES OF AMERICA

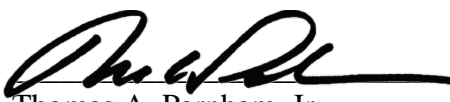
DATED: _____

BY: _____

Jonathan T. Thrope
Trial Attorney
Commercial Litigation Branch
Civil Division
United States Department of Justice

DATED: 12/07/2020

BY: _____


Thomas A. Parnham, Jr.
Assistant United States Attorney
Western District of Texas

DATED: _____

BY: _____

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

DATED: _____

BY: _____

Salvatore M. Maida
General Counsel
Defense Health Agency
United States Department of Defense

THE UNITED STATES OF AMERICA

DATED: _____

BY: _____

Jonathan T. Thrope
Trial Attorney
Commercial Litigation Branch
Civil Division
United States Department of Justice

DATED: _____

BY: _____

Thomas A. Parnham, Jr.
Assistant United States Attorney
Western District of Texas

DATED: 11/16/2020

BY: 

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

DATED: _____

BY: _____

Salvatore M. Maida
General Counsel
Defense Health Agency
United States Department of Defense

THE UNITED STATES OF AMERICA

DATED: _____

BY: _____

Jonathan T. Thrope
Trial Attorney
Commercial Litigation Branch
Civil Division
United States Department of Justice

DATED: _____

BY: _____

Thomas A. Parnham, Jr.
Assistant United States Attorney
Western District of Texas

DATED: _____

BY: _____

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

DATED: 11/09/2020

BY: _____

Digitally signed by
BLEY.PAUL.NICHOLAS.1099873821
Date: 2020.11.09 12:10:04 -05'00'

for Salvatore M. Maida
General Counsel
Defense Health Agency
United States Department of Defense

STATE OF TEXAS

OFFICE OF THE ATTORNEY GENERAL

DATED: 4 December 2020

BY: Raymond Charles Winter
Raymond C. Winter
Chief, Civil Medicaid Fraud Division
P.O. Box 12548
Austin, TX 78711-2548

TEXAS HEALTH & HUMAN SERVICES COMMISSION

DATED: Karen Ray Digitally signed by
Karen Ray
Date: 2020.11.30
13:18:33 -06'00'


BY: _____
Karen Ray
Chief Counsel
Brown-Heatly Building
4900 North Lamar Boulevard
Austin, TX 78751-2361

BRANNON FRANK, M.D.

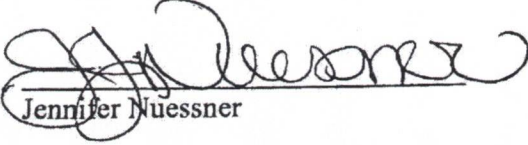
DATED: 11/6/2020

BY: 
Brannon Frank

DATED: 11/23/2020

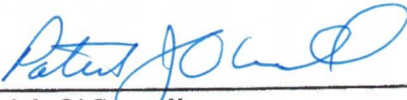
BY: 
Monte James
Counsel for Brannon Frank

RELATORS

DATED: 11/16/2020 BY: 
Jennifer Nuessner

DATED: _____ BY: _____
John Patrick Lowe
Chapter 7 Trustee

DATED: _____ BY: _____
Robert Hoffman

DATED: 11/16/20 BY: 
Patrick O'Connell
Counsel for Relators

RELATORS

DATED: _____

BY: _____
Jennifer Nuessner

DATED: November 18,
2020

BY: _____
John Patrick Lowe
Chapter 7 Trustee

DATED: _____

BY: _____
Robert Hoffman

DATED: _____

BY: _____
Patrick O'Connell
Counsel for Relators

RELATORS

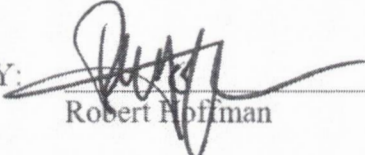
DATED: _____

BY: _____
Jennifer Nuessner

DATED: _____

BY: _____
John Patrick Lowe
Chapter 7 Trustee

DATED: 11/6/2020

BY:  _____
Robert Hoffman

DATED: _____

BY: _____
Patrick O'Connell
Counsel for Relators

Exhibit A

80152
80154
80171
80182
80184
82145
82205
82520
82542
82570
82646
82649
82742
83805
83840
83925
83992
G0431
G0434
G6030
G6031
G6037
G6041
G6042
G6043
G6045
G6046
G6051
G6052
G6053
G6056
G6058