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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA *ex rel.* NINA MARIE
CHAVEZ,

Plaintiff,

-against-

FUSION PHYSICAL THERAPY AND SPORTS
WELLNESS, P.C., and CAROLYN SUE MAZUR,

Defendants.

17 Civ. 9757 (RA)

STIPULATION AND ORDER OF SETTLEMENT AND DISMISSAL

WHEREAS, this Stipulation and Order of Settlement and Dismissal (“Stipulation”) is entered into by and among plaintiff the United States of America (the “United States” or “Government”), by its attorney, Geoffrey S. Berman, United States Attorney for the Southern District of New York; the relator Nina Marie Chavez (“Relator”), by her authorized representatives; and defendants Fusion Physical Therapy and Sports Wellness, P.C. (“Fusion”) and Carolyn Sue Mazur (together “Defendants,” and together with the Government and the Relator, the “Parties”), by its authorized representatives;

WHEREAS, on or about December 13, 2017, the Relator filed a complaint under the *qui tam* provisions of the False Claims Act (“FCA”), 31 U.S.C. § 3729 *et seq.* (the “Relator Complaint”), against Defendants alleging, *inter alia*, that Defendants violated the FCA by submitting or causing to be submitted false claims to Medicare. The Relator specifically alleges that these fraudulent claims were submitted to Medicare for: (1) physical therapy services that were not performed by a provider eligible to perform such services for government healthcare programs; (2) procedures that were excessive and not medically necessary; and (3) services that

were fraudulently provided, because Defendants gave kickbacks to patients through co-payment waivers that were intended to induce patients to seek care at Fusion;

WHEREAS, the Government alleges that from on or about April 15, 2016, to on or about August 11, 2017 (the “Covered Period”), Defendants submitted claims to Medicare for physical therapy services that were not performed by the provider listed in the claim, and in some instances, were actually performed by a provider who was not even eligible to seek reimbursement from Medicare (the “Covered Conduct”);

WHEREAS, contemporaneous with the filing of this Stipulation, the Government is filing a Notice of Election to Intervene and Complaint-In-Intervention in the above-referenced *qui tam* action (“Government Complaint”), in which it is asserting claims against Defendants under the FCA and common law for the Covered Conduct;

WHEREAS, the Parties have, through this Stipulation, reached a mutually agreeable resolution addressing the claims asserted against Defendants in the Government Complaint and the Relator Complaint;

WHEREAS, the Relator’s claim to a share of the proceeds from the settlement between the Parties will be the subject of a separate agreement between the Relator and the United States;

NOW, THEREFORE, upon the Parties’ agreement, IT IS HEREBY ORDERED that:

TERMS AND CONDITIONS

1. The Parties agree that this Court has subject matter jurisdiction over this action and consent to this Court’s exercise of personal jurisdiction over each of them.
2. Defendants admit, acknowledge and accept responsibility for the following conduct:
 - a. During the Covered Period, Fusion submitted claims to the Medicare program for professional services rendered in a physical therapy setting. As

required in order to be reimbursed for these services, each claim that Fusion submitted to the Medicare program included the National Provider Identifier (“NPI”) of the physical therapist or other provider who purportedly rendered the services.

- b. Defendants understood that they were prohibited by Medicare rules from submitting claims for reimbursement for certain professional services provided by a healthcare provider other than the individual associated with the NPI listed on each claim.
- c. Defendants also understood that, in order to receive reimbursement from Medicare for physical therapy services, the physical therapist listed on each relevant claim must be enrolled as a provider in the Medicare program at the time the services are rendered.
- d. During the Covered Period, Defendants submitted to Medicare false claims for services that had been performed by physical therapists other than the physical therapist whose NPI was listed on the claim.
- e. In some cases, the physical therapist who actually provided the claimed services was not enrolled as a Medicare provider at the time the claimed services were rendered.
- f. The Government relied on the false NPI information provided by Defendants in the claims described above, and as a result, reimbursed: (1) claims associated with services not actually provided by the physical therapist identified as the provider in the Medicare claim; and (2) claims rendered by physical therapists who were not Medicare-enrolled providers at the time the services were performed.
- g. As a result of the false claims, the Government paid Defendants substantial monies to which Defendants were not entitled.

3. Defendants shall pay to the Government within fourteen (14) business days of the Effective Date (defined below in Paragraph 28) the sum of \$37,500, (the “Settlement Amount”) in accordance with instructions to be provided by the Financial Litigation Unit of the United States Attorney’s Office for the Southern District of New York. Of the Settlement Amount \$3,854.68 constitutes restitution to the United States.

4. Defendants agree to cooperate fully and truthfully with the United States’ investigation of individuals and entities not released in this Stipulation. Upon reasonable notice,

Defendants shall encourage, and agree not to impair, the cooperation of Fusion's directors, officers, and employees, and shall use their best efforts to make available, and encourage, the cooperation of former directors, officers, and employees for interviews and testimony, consistent with the rights and privileges of such individuals. Defendants further agree to furnish to the United States, upon request, complete and unredacted copies of all non-privileged documents, reports, memoranda of interviews, and records in their possession, custody, or control concerning any investigation of the Covered Conduct that they have undertaken, or that has been performed by another on their behalf.

5. Subject to the exceptions in Paragraphs 9 and 16 below (concerning excluded claims and bankruptcy proceedings), and conditioned upon Defendants' full compliance with the terms of this Stipulation, including full payment of the Settlement Amount to the United States pursuant to Paragraph 3 above, the United States releases Defendants, including their subsidiaries and corporate predecessors, successors and assigns, from any civil or administrative monetary claim that the United States has for the Covered Conduct under the FCA, the Civil Monetary Penalties Law, 42 U.S.C. § 1320a-7a, the Program Fraud Civil Remedies Act, 31 U.S.C. § 3801-3812, and the common law theories of fraud, payment by mistake, and unjust enrichment. For avoidance of doubt, this Stipulation does not release any current or former officer, director, employee, or agent of Defendants from liability of any kind.

6. Defendants fully and finally release the United States, its agencies, officers, employees, servants, and agents from any claims (including attorneys' 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, employees, servants, or

agents related to the Covered Conduct and the United States' investigation, prosecution and settlement thereof.

7. Conditioned on Defendants' timely payment of the full Settlement Amount pursuant to Paragraph 3 above, the Relator, for herself and her heirs, successors, attorneys, agents, and assigns, releases Defendants, including their subsidiaries and corporate predecessors, successors and assigns, as well as all of their current and former officers, directors, employees, attorneys, and other agents, from any and all manner of claims, proceedings, liens, and causes of action of any kind or description that the Relator has against Defendants related to or arising from the Relator Complaint; provided, however, that nothing in this Stipulation shall preclude the Relator from seeking to recover her reasonable expenses and attorneys' fees and costs pursuant to 31 U.S.C. § 3730(d).

8. In consideration of the execution of this Stipulation by the Relator and the Relator's release as set forth in Paragraph 7 above, Defendants, including their subsidiaries, predecessors, and corporate successors and assigns, as well as their current and former officers, directors, employees, attorneys, and other agents, release the Relator and her successors, heirs, assigns, attorneys, and other agents, from any and all manner of claims, proceedings, liens, and causes of action of any kind or description that Defendants have against the Relator related to or arising from the Relator Complaint.

9. Notwithstanding the releases given in Paragraph 5 above, or any other term of this Stipulation, the following claims of the Government are specifically reserved and are not released by this Stipulation:

- a. any liability arising under Title 26, United States Code (Internal Revenue Code);

- b. any criminal liability;
- c. except as explicitly stated in this Stipulation, any administrative liability, including but not limited to the mandatory or permissive exclusion from Federal healthcare 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-7b (permissive exclusion); suspension or debarment pursuant to 2 C.F.R. Part 376; or actions pursuant to, or otherwise consistent with, 42 C.F.R. § 52.9, 45 C.F.R. §§ 75.207- 75.208, or 45 C.F.R. §§ 75.371-75.375];
- 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 Stipulation; and
- f. any liability of individuals.

10. Defendants shall be in default of this Stipulation if Defendants fail to make the required payment set forth in Paragraph 3 above on or before the due date for such payment, or if they fail to comply materially with any other term of this Stipulation that applies to them (“Default”). The Government shall provide written notice to Defendants of any Default in the manner set forth in Paragraph 27 below. Defendants shall then have an opportunity to cure the Default within ten (10) calendar days from the date of delivery of the notice of Default. In the event that a Default is not fully cured within ten (10) calendar days of the delivery of the notice of Default (“Uncured Default”), interest shall accrue at the rate of 12% per annum compounded daily on the remaining unpaid principal balance of the Settlement Amount, beginning ten (10) calendar days after mailing of the notice of Default. In the event of an Uncured Default, Defendants shall agree to the entry of a consent judgment in favor of the United States against Defendants in the

amount of the Settlement Amount, as attached hereto as Exhibit A. The United States may also, at its option, (a) rescind this Stipulation and reinstate the claims asserted against Defendants in the Government Complaint; (b) seek specific performance of this Stipulation; (c) offset the remaining unpaid balance of the Settlement Amount from any amounts due and owing Defendants by any department, agency, or agent of the United States; or (d) exercise any other rights granted by law, or under the terms of this Stipulation, or recognizable at common law or in equity. Defendants shall not contest any offset imposed or any collection undertaken by the Government pursuant to this Paragraph, either administratively or in any Federal or State court. In addition, Defendants shall pay the Government all reasonable costs of collection and enforcement under this Paragraph, including attorneys' fees and expenses. In the event that the United States opts to rescind this Stipulation pursuant to this Paragraph, Defendants shall not plead, argue, or otherwise raise any defenses under the theories of statute of limitations, laches, estoppel, or similar theories, to any civil or administrative claims that relate to the Covered Conduct.

11. The Relator and her heirs, successors, attorneys, agents, and assigns shall not object to this Stipulation; the Relator agrees and confirms that the terms of this Stipulation are fair, adequate, and reasonable under all the circumstances, pursuant to 31 U.S.C. § 3730(c)(2)(B).

12. 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 Stipulation bars a remedy sought in such criminal prosecution or administrative action.

13. Defendants, having truthfully admitted to the conduct set forth in paragraph 2 hereof (the “Admitted Conduct”), agree that they shall not, through their attorneys, agents, officers, or employees, make any public statement, including but not limited to any statement in a press release, social media forum, or website, that contradicts or is inconsistent with the Admitted Conduct or suggests that the Admitted Conduct is not wrongful (a “Contradictory Statement”). Any Contradictory Statement by Defendants, their attorneys, agents, officers, or employees, shall constitute a violation of this Consent Order, thereby authorizing the Government to pursue any of the remedies set forth in paragraph 10 hereof, or seek other appropriate relief from the Court. Before pursuing any remedy, the Government shall notify Defendants that it has determined that Defendants have made a Contradictory Statement. Upon receiving such notice from the Government, Defendants may cure the violation by repudiating the Contradictory Statement in a press release or other public statement within four business days. If Defendants learn of a potential Contradictory Statement by their attorneys, agents, officers, or employees, Defendants must notify the Government of the statement within 24 hours. The decision as to whether any statement constitutes a Contradictory Statement or will be imputed to Defendants for the purpose of this Stipulation, or whether Defendants adequately repudiated a Contradictory Statement to cure a violation of this Stipulation, shall be within the sole discretion of the Government.

14. Defendant Carolyn Sue Mazur agrees that she shall not seek indemnification from any source with respect to any portion of the Settlement Amount.

15. Defendants represent and warrant that they have reviewed their financial situation, that they are currently not insolvent as such term is defined in 11 U.S.C. § 101(32) and that they reasonably believe they shall remain solvent following payment to the Government of the

Settlement Amount. Further, the Parties warrant that, in evaluating whether to execute this Stipulation, they (a) have intended that the mutual promises, covenants, and obligations set forth constitute a contemporaneous exchange for new value given to Defendants, within the meaning of 11 U.S.C. § 547(c)(1); and (b) have concluded that these mutual promises, covenants, and obligations do, in fact, constitute such a contemporaneous exchange. Further, the Parties warrant that the mutual promises, covenants, and obligations set forth herein are intended to and do, in fact, represent a reasonably equivalent exchange of value that is not intended to hinder, delay, or defraud any entity to which Defendants were or became indebted to on or after the date of this Stipulation, within the meaning of 11 U.S.C. § 548(a)(1).

16. If within 91 days of the Effective Date of this Stipulation or any payment made under this Stipulation, Defendants commence any case, action, or other proceeding under any law relating to bankruptcy, insolvency, reorganization, or relief of debtors, or a third party commences any case, action, or other proceeding under any law related to bankruptcy, insolvency, reorganization, or relief of debtors (a) seeking an order for relief of Defendants' debts, or seeking to adjudicate Defendants as bankrupt or insolvent; or (b) seeking appointment of a receiver, trustee, custodian, or other similar official for Defendants or for all or part of Defendants' assets, Defendants agree as follows:

- a. Defendants' obligations under this Stipulation may not be avoided pursuant to 11 U.S.C. § 547, and Defendants shall not argue or otherwise take the position in any such case, action, or proceeding that (i) Defendants' obligations under this Stipulation may be avoided under 11 U.S.C. § 547; (ii) Defendants were insolvent at the time this Stipulation was entered into; or (iii) the mutual promises, covenants, and obligations set forth in this Stipulation do not

constitute a contemporaneous exchange for new value given to Defendants.

- b. If any of Defendants' obligations under this Stipulation are avoided for any reason, including, but not limited to, through the exercise of a trustee's avoidance powers under the Bankruptcy Code, the Government, at its option, may rescind the release in this Stipulation and bring any civil and/or administrative claim, action, or proceeding against Defendants for the claims that would otherwise be covered by the release in Paragraph 5 above. Defendants agree that (i) any such claim, action, or proceeding brought by the Government would not be subject to an "automatic stay" pursuant to 11 U.S.C. § 362(a) as a result of the case, action, or proceeding described in the first sentence of this Paragraph, and Defendants shall not argue or otherwise contend that the Government's claim, action, or proceeding is subject to an automatic stay; (ii) Defendants shall not plead, argue, or otherwise raise any defenses under the theories of statute of limitations, laches, estoppel, or similar theories, to any claim, action, or proceeding that is brought by the Government within 60 calendar days of written notification to Defendants that the release has been rescinded pursuant to this Paragraph, except to the extent such defenses were available on December 13, 2017; and (iii) the Government has a valid claim against Defendants in the amount of the Settlement Amount and the Government may pursue its claim in the case, action, or proceeding described in the first sentence of this Paragraph, as well as in any other case, action, or proceeding.
- c. Defendants acknowledge that the agreements in this Paragraph are provided in

exchange for valuable consideration provided in this Stipulation.

17. Defendants agree to the following:

a. Unallowable Costs Defined: All costs (as defined in the Office of Management and Budget (“OMB”) Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards published at 2 C.F.R. §§ 200 *et seq.*; the Department of Health and Human Services adoption of the OMB Guidance provided at 45 C.F.R. § 75, subpart E *et seq.*; the Federal Acquisition Regulation, 48 C.F.R. § 31.205-47 where applicable; or otherwise as specified by federal statutes, regulations or the terms and conditions of a Federal award) incurred by or on behalf of Defendants, including its present or former officers, directors, employees, and agents in connection with:

- (1) the matters covered by this Stipulation;
- (2) the United States’ audit(s) and civil investigation(s) of matters covered by this Stipulation;
- (3) Defendants’ investigation, defense, and corrective actions undertaken in response to the United States’ audit(s) and civil investigation(s) in connection with matters covered by this Stipulation (including attorneys’ fees);
- (4) the negotiation and performance of this Stipulation; and
- (5) any payment Defendants make to the United States pursuant to this Stipulation and any payment Defendants may make to the Relator, including expenses, 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 Defendants, and Defendants shall not charge such Unallowable Costs directly or indirectly to any contracts with the United States.
- c. Treatment of Unallowable Costs Previously Submitted for Payment: Within 90 days of the Effective Date of this Stipulation, Defendants shall identify and repay by adjustment to future claims for payment or otherwise any Unallowable Costs (as defined in this Paragraph) included in payments previously sought by Defendants from the United States. 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 requests for payment. Any payments due shall be paid to the United States pursuant to the direction of the Department of Justice and/or the affected agencies. The United States, including the Department of Justice and/or the affected agencies, reserves its right to audit, examine, or re-examine Defendants’ books and records and to disagree with any calculation submitted by Defendants or any of their subsidiaries or affiliates regarding any Unallowable Costs included in payments previously sought by Defendants, or the effect of any such Unallowable Costs on the amounts of such payments.

d. Nothing in this Stipulation 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.

18. This Stipulation 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 as otherwise provided herein.

19. Each Party shall bear its own legal and other costs incurred in connection with this matter, including the preparation and performance of this Stipulation; provided, however, nothing in this Stipulation shall preclude the Relator from seeking to recover her expenses or attorneys' fees and costs from Defendants, pursuant to 31 U.S.C. § 3730(d).

20. Any failure by the Government to insist upon the full or material performance of any of the provisions of this Stipulation shall not be deemed a waiver of any of the provisions hereof, and the Government, notwithstanding that failure, shall have the right thereafter to insist upon the full or material performance of any and all of the provisions of this Stipulation.

21. This Stipulation is governed by the laws of the United States. The exclusive jurisdiction and venue for any dispute relating to this Stipulation is the United States District Court for the Southern District of New York. For purposes of construing this Stipulation, this Stipulation shall be deemed to have been drafted by all Parties to this Stipulation and shall not, therefore, be construed against any Party for that reason in any subsequent dispute.

22. This Stipulation constitutes the complete agreement between the Parties with respect to the subject matter hereof. This Stipulation may not be amended except by written consent of the Parties.

23. The undersigned counsel and other signatories represent and warrant that they are fully authorized to execute this Stipulation on behalf of the persons and the entities indicated below.

24. This Stipulation is binding on Defendants' successor entities.

25. This Stipulation is binding on the Relator's successors, transferees, heirs, and assigns.

26. This Stipulation may be executed in counterparts, each of which constitutes an original and all of which constitute one and the same Stipulation. E-mails that attach signatures in PDF form or facsimiles of signatures shall constitute acceptable, binding signatures for purposes of this Stipulation.

27. Any notice pursuant to this Stipulation shall be in writing and shall, unless expressly provided otherwise herein, be delivered by hand, express courier, or e-mail transmission followed by postage-prepaid mail, and shall be addressed as follows:

TO THE UNITED STATES:

Charles S. Jacob
Jessica Jean Hu
Assistant United States Attorneys
United States Attorney's Office
Southern District of New York
86 Chambers Street, Third Floor
New York, New York 10007
Email: charles.jacob@usdoj.gov
Jessica.hu@usdoj.gov

TO DEFENDANT:

Edward V. Sapone, Esq.
Sapone & Petrillo, LLP
One Penn Plaza/53rd Floor/Suite 5315

New York, NY 10119
E-mail:edward@saponelaw.com

TO RELATOR:

Timothy J. McInnis, Esq.
McInnis Law
521 5th Avenue, 17th Floor
New York, NY 10175-0038
E-mail: tmcinnis@McInnis-Law.com

28. The effective date of this Stipulation is the date upon which the Stipulation is approved by the Court (the "Effective Date").

Agreed to by:

THE UNITED STATES OF AMERICA


Dated: New York, New York

~~May~~ 13, 2019

June

GEOFFREY S. BERMAN
United States Attorney for the
Southern District of New York

By:

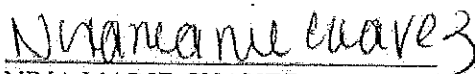


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Attorneys for the United States of America

RELATOR

Dated: New York, New York
May __, 2019

By: 
NINA MARIE CHAVEZ
Relator

Dated: New York, New York
May __, 2019

TIMOTHY J. MCINNIS
By: 
Timothy J. McInnis, Esq.
McInnis Law
521 5th Avenue, 17th Floor
New York, NY 10175-0038
Tel: (212) 292-4573
Fax: (212) 292-4574


Attorney for Relator

DEFENDANTS

Dated: New York New York
June 4, 2019

EDWARD V. SAPONE


By:



Edward V. Sapone, Esq.
Sapone & Petrillo, LLP
One Penn Plaza/53rd Floor/Suite 5315
New York, NY 10119
Tel.: (212) 349-9000

Attorney for Defendants

SO ORDERED:



HON. RONNIE ABRAMS
UNITED STATES DISTRICT JUDGE

Dated: June 26, 2019

EXHIBIT A