

SETTLEMENT AGREEMENT

I. PARTIES

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”); Joseph Mermelstein (“Mermelstein”); and Gerald Astorino (“Relator”), through their authorized representatives. Collectively, all of the above will be referred to as “the Parties.”

II. PREAMBLE

As a preamble to this Agreement, the Parties agree to the following:

A. On or about April 23, 2004, Relator filed a qui tam action in the United States District Court for the Eastern District of New York, captioned United States ex rel Astorino v. Mermelstein, CV-04-1692 (E.D.N.Y.), under the *qui tam* provisions of the False Claims Act, 31 U.S.C. § 3730(b) *et seq.* (the “FCA”) (Relator’s action shall hereinafter be referred to as “the Civil Action”).

B. Mermelstein was indicted in 2005 on charges relating to alleged Medicare fraud. On or about November 20, 2007, Mermelstein pled guilty to conspiracy to make false statements related to healthcare matters. On or about June 3, 2008, Mermelstein was sentenced to sixty months incarceration, which he began serving on or about May 23, 2008.

C. The United States contends that Mermelstein submitted and 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 further contends that it has certain civil claims, as specified in Paragraph 2 below, against Mermelstein for engaging in the following conduct (hereinafter referred to as the “Covered Conduct”):

Between 1999 and 2005, Mermelstein submitted claims to Medicare for ophthalmological services and procedures that were not performed as billed, that were based on falsified patient charts, that were not performed at all, or that were medically unnecessary.

E. This Agreement is neither an admission of liability by Mermelstein 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 Agreement, but Relator and the United States have not agreed on the amount of that award. Relator also claims entitlement under 31 U.S.C. § 3730(d) to Relator’s reasonable expenses, attorneys’ fees, and costs.

G. To avoid the delay, uncertainty, inconvenience, and expense of protracted litigation of the above claims, the Parties reach a full and final settlement pursuant to the Terms and Conditions below.

III. TERMS AND CONDITIONS

1. Mermelstein agrees to pay to the United States \$700,000.00 (the “Settlement Amount”). Mermelstein agrees to pay the full Settlement Amount to the United States by sending by hand delivery or overnight mail a bank or certified check made payable to the United States Treasury no later than ten days after the Effective Date of this Agreement. The

Settlement Amount shall be sent to the United States Attorney's Office, Eastern District of New York, Attn: Brenda Hinkson, Financial Litigation Unit, 271 Cadman Plaza East, Brooklyn, New York 11201.

2. Subject to the exceptions in Paragraph 5 (concerning excluded claims) below, in consideration of the obligations of Mermelstein in this Agreement, conditioned upon Mermelstein's full payment of the Settlement Amount, and subject to Paragraph 14, below, the United States (on behalf of itself, its officers, agents, agencies, and departments) agrees to release Mermelstein and Joseph R. Mermelstein, P.C., M.D., from any civil or administrative monetary claim the United States has or may have 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(b)(7); 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. Conditioned upon Mermelstein's full payment of the Settlement Amount, Relator fully and finally releases Mermelstein and Joseph R. Mermelstein, P.C., M.D., from any claims that Relator has asserted, could have asserted, or may assert in the future against Mermelstein or Joseph R. Mermelstein, P.C., M.D., related to the Covered Conduct and arising from or in connection with the filing of the Civil Action, with the exception of claims under 31 U.S.C. § 3730(d) for expenses or attorney's fees and costs. Mermelstein reserves the right to argue, if applicable, that any costs or expenses paid by third parties should offset any recovery under 31 U.S.C. § 3730(d) with respect to costs or expenses.

4. OIG-HHS expressly reserves all rights to institute, direct, or maintain any

administrative action seeking exclusion against Mermelstein, Joseph R. Mermelstein, P.C., M.D., and/or Mermelstein and Joseph R. Mermelstein, P.C., M.D.'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).

5. Notwithstanding the releases given in Paragraph 2 of this Agreement, or any 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; or
- e. Any liability based upon such obligations as are created by this Agreement.

6. Relator and his 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). In connection with this Agreement and this Civil Action, Relator and his heirs, successors, attorneys, agents,

and assigns agree that neither this Agreement, any intervention by the United States in the Civil Action in order to dismiss the Civil Action, nor any dismissal of the Civil Action, shall waive or otherwise affect the ability of the United States to contend that provisions in the False Claims Act, including 31 U.S.C. §§ 3730(d)(3) and 3730(e), bar Relator from sharing in the proceeds of this Agreement. Moreover, the United States and Relator and his heirs, successors, attorneys, agents, and assigns agree that they each retain all of their rights pursuant to the False Claims Act on the issue of the percentage, if any, that Relator should receive of any proceeds of the settlement of his claim(s).

7. Mermelstein 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. 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.

8. Mermelstein fully and finally releases the United States, its agencies, employees, servants, and agents from any claims (including attorney's fees, costs, and expenses of every kind and however denominated) that Mermelstein has asserted, could have asserted, or may assert in the future against the United States, its agencies, employees, servants, and agents, related to the Covered Conduct and the United States' investigation and prosecution thereof.

9. Mermelstein fully and finally releases the Relator from any claims (including attorney's fees, costs, and expenses of every kind and however denominated) that Mermelstein has 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.

10. 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 carrier or intermediary or any state payer, related to the Covered Conduct; and Mermelstein agrees not to resubmit to any Medicare carrier or intermediary or any state payer any previously denied claims related to the Covered Conduct, and agrees not to appeal any such denials of claims.

11. Mermelstein 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. §§ 1395-1395kkk-1 and 1396-1396w-5; and the regulations and official program directives promulgated thereunder) incurred by or on behalf of Mermelstein, his 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) Mermelstein'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 attorney's fees);

- (4) the negotiation and performance of this Agreement; and
- (5) the payment Mermelstein makes to the United States

pursuant to this Agreement and any payments that Mermelstein 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: If applicable, unallowable Costs shall be separately determined and accounted for by Mermelstein, and Mermelstein 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 Mermelstein or any subsidiaries or affiliates to the Medicare, Medicaid, TRICARE, or FEHBP Programs.

c. Treatment of Unallowable Costs Previously Submitted for Payment: If applicable, Mermelstein 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 Mermelstein or any of

his 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. Mermelstein agrees that the United States, at a minimum, shall be entitled to recoup from Mermelstein 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 Mermelstein or any of his subsidiaries or affiliates on the effect of inclusion of Unallowable Costs (as defined in this Paragraph) on Mermelstein or any of his subsidiaries or affiliates' cost reports, cost statements, or information reports.

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

12. 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 13 (waiver for beneficiaries paragraph), below.

13. Mermelstein 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.

14. Counsel for the United States, Relator and Mermelstein shall promptly sign and file in the Civil Action a Joint Stipulation of Dismissal of the Civil Action upon completion of the following: (a) receipt of the payments described in Paragraph 1 of this Agreement; (b) the resolution of any claims by Relator against the United States pursuant to the FCA for a share of the proceeds of this settlement; and (c) the resolution of any claims by Relator against Mermelstein pursuant to the FCA for Relator's reasonable expenses, attorneys' fees, and costs.

15. Except as expressly provided to the contrary in this Agreement, each Party shall bear its own legal and other costs incurred in connection with this matter, including the preparation and performance of this Agreement.

16. Mermelstein represents that this Agreement is freely and voluntarily entered into without any degree of duress or compulsion whatsoever.

17. Relator represents that this Agreement is freely and voluntarily entered into without any degree of duress or compulsion whatsoever.

18. This Agreement is governed by the laws of the United States. The Parties agree that the exclusive jurisdiction and venue for any dispute arising between and among the Parties under this Agreement is the United States District Court for the Eastern District of New York

19. For purposes of construction, 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 individual signing this Agreement on behalf of Mermelstein represents and warrants that he is authorized by Mermelstein to execute this Agreement. The individual(s) signing this Agreement on behalf of Relator represent and warrant that he is authorized by Relator to execute this Agreement. The United States signatories represent that they are signing this Agreement in their official capacities and that they are authorized to execute this Agreement.

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 Mermelstein's successors, transferees, heirs, and assigns.

24. This Agreement is binding on Relator's 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 (the "Effective Date of this Agreement"). Facsimiles of signatures shall constitute acceptable, binding signatures for purposes of this Agreement.

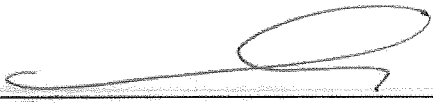
THE UNITED STATES OF AMERICA

LORETTA E. LYNCH
United States Attorney
Eastern District of New York

DATED: 1/14/11

By: 
Paul Kaufman
Assistant United States Attorney
Eastern District of New York
271 Cadman Plaza East
Brooklyn, New York 11201

DATED: 1/13/11

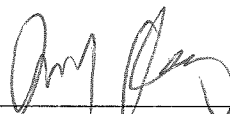
By: 
GREGORY E. DEMSKE
Assistant Inspector General for Legal Affairs
Office of Counsel to the Inspector General
Office of Inspector General
United States Department of
Health and Human Services

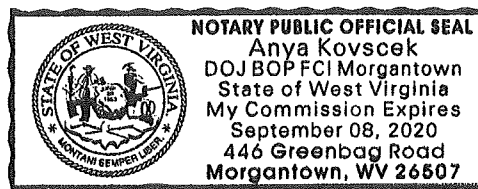
Mermelstein - DEFENDANT

DATED: 1/3/11

By: 
Joseph Mermelstein

DATED: 1/6/11

By: 
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 1/3/11

Astorino - RELATOR

DATED: 1/11/2011

By: 
Gerald Astorino

DATED: 1/11/2011

By: 
Timothy J. McInnis, Esq.
Counsel for Relator
521 Fifth Avenue, Suite 1700
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