

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"), Presbyterian Orthopaedic Hospital, and Relators Charles Bates and Craig Patrick ("Relators"), hereafter referred to as "the Parties", through their authorized representatives.

RECITALS

A. Presbyterian Orthopaedic Hospital's corporate offices are located at 1901 Randolph Road, Charlotte, NC 28207. Presbyterian Orthopaedic Hospital is a non-profit health care provider in the Charlotte, NC metropolitan area that provides patient care at Presbyterian Orthopaedic Hospital and at its clinics and outpatient facilities.

B. Relators Charles Bates and Craig Patrick on May 29, 2008 filed a *qui tam* action in the United States District Court for the Western District of New York, Case Number [Under Seal], captioned United States ex rel. Charles Bates and Craig Patrick v. [Under Seal] (hereinafter "the Civil Action").

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

D. The United States contends that it has certain civil claims against Presbyterian Orthopaedic Hospital for engaging in the following conduct: Presbyterian Orthopaedic Hospital submitted inpatient DRG claims to Medicare for certain kyphoplasty procedures performed

between May 1, 2000 and May 31, 2008, which were correctly billable only as outpatient or observation status procedures due to the absence of medical necessity for an inpatient level of service (hereinafter referred to as the "Covered Conduct").

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

F. Relators claim entitlement under 31 U.S.C. § 3730(d) to a share of the proceeds of this Settlement Agreement and to Relators' reasonable expenses, attorneys' fees and costs.

G. To avoid the delay, uncertainty, inconvenience, and expense of protracted litigation of the above claims, and inconsideration of the mutual promises and obligations of this Settlement Agreement, the Parties agree and covenant as follows:

TERMS AND CONDITIONS

1. Presbyterian Orthopaedic Hospital shall pay to the United States a total of \$637,872.57, plus interest accrued thereon at the rate of 2.5% per annum from August 30, 2010, and continuing until and including the day before payment is made under this Agreement (the "Settlement Amount").

2. Presbyterian Orthopaedic Hospital shall pay the Settlement Amount as described above to the United States by electronic funds transfer pursuant to written instructions to be provided by the Financial Litigation Unit of the United States Attorney's Office for the Western District of New York. Presbyterian Orthopaedic Hospital agrees to make this electronic funds transfer no later than 20 business days after the Effective Date of this Agreement.

3. Conditioned upon the United States receiving the Settlement Amount from Presbyterian Orthopaedic Hospital, and as soon as feasible after receipt, the United States shall pay \$111,627.70 to Relators by electronic funds transfer pursuant to 31 U.S.C. § 3730(d) (“Relator Share”).

4. Following receipt of written instructions from Relators, Presbyterian Orthopaedic Hospital agrees to pay to Relators an aggregate total of \$10,000.00 pursuant to 31 U.S.C. § 3730(d) for expenses and attorney’s fees and costs arising from the filing of the Civil Action.

5. Subject to the exceptions in Paragraph 8 (concerning excluded claims), below, and conditioned upon Presbyterian Orthopaedic Hospital’s full payment of the Settlement Amount, the United States releases Presbyterian Orthopaedic Hospital, together with its current or former parent corporations; direct and indirect subsidiaries; brother or sister corporations; divisions; current or former owners; and officers, directors, and affiliates; agents, servants, and employees; and the successors and assignees 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.

6. Subject to the exceptions in Paragraph 8 (concerning excluded claims), below, and conditioned upon Presbyterian Orthopaedic Hospital’s full payment of the Settlement Amount and the amount specified in Paragraph 4, above, Relators, for themselves and for their heirs, successors, attorneys, agents, and assigns, release Presbyterian Orthopaedic Hospital,

together with its current or former parent corporations; direct and indirect subsidiaries; brother or sister corporations; divisions; current or former owners; and officers, directors, and affiliates; agents, servants, and employees; and the successors and assignees of any of them, from any civil monetary claim the Relators have or may have on behalf of the United States for the Covered Conduct under the False Claims Act, 31 U.S.C. §§ 3729-3733.

7. OIG-HHS expressly reserves all rights to institute, direct, or maintain any administrative action seeking exclusion against Presbyterian Orthopaedic Hospital and/or its 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).

8. Notwithstanding the releases given in Paragraphs 5 and 6 of this Agreement, or any other 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;

- e. Any liability based upon obligations created by this Agreement;
- f. Any liability for express or implied warranty claims or other claims for defective or deficient products or services, including quality of goods and services; and
- g. Any liability for failure to deliver goods or services due.

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). Conditioned upon Relator's receipt of the payment described in Paragraph 3, above, Relators and their heirs, successors, attorneys, agents, and assigns fully and finally release, waive, and forever discharge the United States, its officers, agents, and employees, from any claims arising from the filing of the Civil Action or under 31 U.S.C. § 3730 for the Covered Conduct to the extent it was performed by the settling defendant hospital named in this Agreement; from any claims arising from the filing of the portion of the Civil Action that concerns the Covered Conduct and only to the extent the Covered Conduct was performed by the settling defendant hospital named in this Agreement; and from any other claims for a share of the Settlement Amount; and in full settlement of any claims Relators may have against the United States under this Agreement. This Agreement does not resolve or in any manner affect any claims the United States has or may have against the Relators arising under Title 26, U.S. Code (Internal Revenue Code), or any claims arising under this Agreement.

10. Contingent upon payment by Presbyterian Orthopaedic Hospital of the Settlement Amount and the amount specified in Paragraph 4, above, Relators, individually and for their heirs, successors, attorneys, agents and employees, release Presbyterian Orthopaedic Hospital and its officers, agents and employees from any liability to Relators arising from the filing of the Civil Action, or otherwise under 31 U.S.C § 3730(d), for attorney's fees and costs.

11. Presbyterian Orthopaedic Hospital waives and shall not assert any defenses Presbyterian Orthopaedic Hospital 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.

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

13. Presbyterian Orthopaedic Hospital fully and finally releases the Relators from any claims (including attorney's fees, costs, and expenses of every kind and however denominated) that Presbyterian Orthopaedic Hospital 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.

14. 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 Presbyterian Orthopaedic Hospital 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.

15. Presbyterian Orthopaedic Hospital 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. §§ 1395-1395hhh and 1396-1396v; and the regulations and official program directives promulgated thereunder) incurred by or on behalf of Presbyterian Orthopaedic Hospital, its present or former officers, directors, employees, shareholders, and agents in connection with:

- (1) the matters covered by this Agreement;
- (2) the United States' audit(s) and civil investigation(s) of the matters covered by this Agreement;
- (3) Presbyterian Orthopaedic Hospital's investigation, defense, and corrective actions undertaken in response to the United States' audit(s) and civil investigation 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 Presbyterian Orthopaedic Hospital makes to the United States pursuant to this Agreement and any payments that Presbyterian Orthopaedic Hospital may make to Relators, 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 Presbyterian Orthopaedic Hospital, and Presbyterian Orthopaedic Hospital 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 Presbyterian Orthopaedic Hospital or any of its subsidiaries or affiliates to the Medicare, Medicaid, TRICARE, or FEHBP Programs.

c. Treatment of Unallowable Costs Previously Submitted for Payment: Presbyterian Orthopaedic Hospital further agrees that within 90 days of the Effective Date of this Agreement it shall identify to applicable Medicare and TRICARE fiscal intermediaries, carriers, and/or contractors, and Medicaid and FEHBP fiscal agents, any Unallowable Costs (as defined in this Paragraph) included in payments previously sought from the United States, or any State Medicaid program, including, but not limited to, payments sought in any cost reports, cost statements, information reports, or payment requests already submitted by Presbyterian

Orthopaedic Hospital or any of its subsidiaries or affiliates, and shall request, and agree, that such cost reports, cost statements, information reports, or payment requests, even if already settled, be adjusted to account for the effect of the inclusion of the Unallowable Costs.

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

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

16. 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 17 below concerning waiver for beneficiaries.

17. Presbyterian Orthopaedic Hospital agrees that it waives and shall not seek payment for any of the health care billings covered by this Agreement from any health care beneficiaries or their parents, sponsors, legally responsible individuals, or third party payors based upon the claims defined as the Covered Conduct.

18. Presbyterian Orthopaedic Hospital warrants that it has reviewed its financial situation and that it currently is solvent within the meaning of 11 U.S.C. §§ 547(b)(3) and 548(a)(1)(B)(ii)(I), and shall remain solvent following payment to the United States of the Settlement Amount. Further, the Parties warrant that, in evaluating whether to execute this Agreement, they (a) have intended that the mutual promises, covenants, and obligations set forth constitute a contemporaneous exchange for new value given to Presbyterian Orthopaedic Hospital, within the meaning of 11 U.S.C. § 547(c)(1); and (b) conclude 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 Presbyterian Orthopaedic Hospital was or became indebted to on or after the date of this transfer, within the meaning of 11 U.S.C. § 548(a)(1).

19. Upon receipt of the payment described in Paragraph 1, the United States and Relators shall promptly sign and file in the Civil Action a Notice of Intervention for only Presbyterian Orthopaedic Hospital and a Joint Stipulation of Dismissal with prejudice of the Civil Action for only Presbyterian Orthopaedic Hospital pursuant to Rule 41(a)(1).

20. 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.

21. 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.

22. 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 New York. 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.

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

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

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

26. This Agreement is binding on Presbyterian Orthopaedic Hospital's successors, transferees, heirs, and assigns.

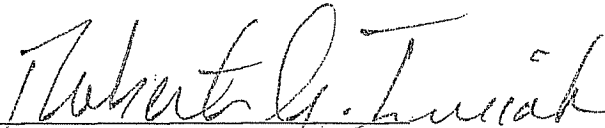
27. This Agreement is binding on Relators' successors, transferees, heirs, and assigns.

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

29. This Agreement is effective on the date of signature of the last signatory to the Agreement (Effective Date of this Agreement). Facsimiles of signatures shall constitute acceptable, binding signatures for purposes of this Agreement.

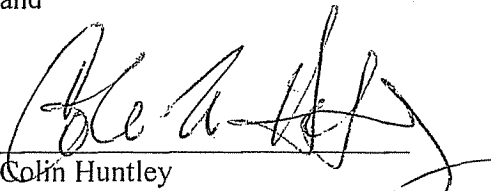
The United States of America

DATED: 9.30.10


Robert G. Trusiak
Assistant U.S. Attorney
Western District of New York

and

DATED: September 7, 2010


Colin Huntley
Trial Attorney
Commercial Litigation Branch
Civil Division
United States Department of Justice

and

DATED: _____

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

The United States of America

DATED: _____

Robert G. Trusiak
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Western District of New York

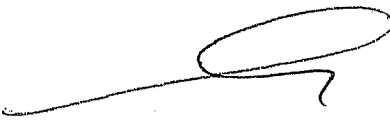
and

DATED: _____

Colin Huntley
Trial Attorney
Commercial Litigation Branch
Civil Division
United States Department of Justice

and


DATED: 9/15/10



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

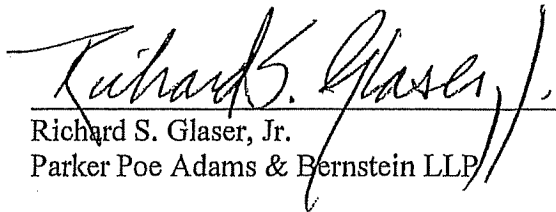
Presbyterian Orthopaedic Hospital

DATED: 9-1-10



Fred M. Hargett
Executive Vice President
Presbyterian Orthopaedic Hospital
1901 Randolph Road
Charlotte, NC 28207

DATED: 9/3/10



Richard S. Glaser, Jr.
Parker Poe Adams & Bernstein LLP

Counsel to Presbyterian Orthopaedic Hospital

Relators

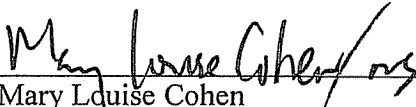
DATED: _____

Charles Bates
Relator

DATED: _____

Craig Patrick
Relator

DATED: 8/31/10



Mary Louise Cohen
Counsel for Relators

Relators

DATED: 8/31/10



Charles Bates
Relator

DATED: _____

Craig Patrick
Relator

DATED: _____

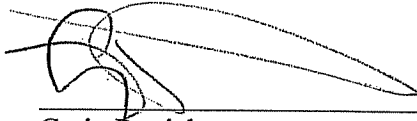
Mary Louise Cohen
Counsel for Relators

Relators

DATED: _____

Charles Bates
Relator

DATED: 8/31/10 _____



Craig Patrick
Relator

DATED: _____

Mary Louise Cohen
Counsel for Relators