

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) which administers TRICARE, the State of North Carolina, by and through the North Carolina Attorney General, and the North Carolina Division of Medical Assistance (collectively "the Government" includes both federal and state entities above), Cape Fear Regional Urological Clinic, P.A., a North Carolina Professional Association, and Garrett M. Franzoni, M.D., (collectively "Cape Fear") , and Relator Christina Borton (Relator), (hereafter collectively referred to as "the Parties"), through their authorized representatives.

RECITALS

A. Cape Fear Regional Urological Clinic, P.A., a North Carolina Professional Association, and Garrett M. Franzoni, M.D., provide medical services primarily to Medicare, Medicaid and TRICARE patients in North Carolina.

B. On November 8, 2013, Christina Borton filed a qui tam action in the United States District Court for the Eastern District of North Carolina, captioned United States ex rel. Christina Borton, bringing this action on behalf of the United States and North Carolina v. Cape Fear Regional Urological Clinic, P.A., a North Carolina Professional Association, and Garrett M. Franzoni, M.D., Case No. 5:13-cv-788-BO, pursuant to the qui tam provisions of the False Claims Act, 31 U.S.C. § 3730(b) (the Civil Action). The Relator alleged that Cape Fear submitted false claims to Medicare, Medicaid, and TRICARE by billing improperly, including billing for services without the

required direct physician supervision or without the requisite medical professional providing the service. The Government intervened in the Civil Action on October 20, 2014.

C. The Government contends that Cape Fear 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. §§ 1395-1395kkk-1, the TRICARE Program, 10 U.S.C. §§ 1071-1110b; and the Medicaid Program (Medicaid), 42 U.S.C. §§ 1396-1396w-5.

D. The Government contends that it has certain civil claims against Cape Fear arising from false claims for Biofeedback Therapy, Testosterone Injections, and Percutaneous Nerve Stimulation (PTNS) Services to Medicare, TRICARE and Medicaid during the period from December 31, 2009, through December 31, 2014. That conduct is referred to below as the Covered Conduct.

E. This Settlement Agreement is neither an admission of liability by Cape Fear nor a concession by the Government that its claims are not well founded.

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

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

TERMS AND CONDITIONS

1. Cape Fear shall pay to the Government the sum of \$470,000 (Settlement Amount), and interest on the Settlement Amount at a rate of 3% compounded daily from February 5, 2015, by electronic funds transfer pursuant to written instructions to be provided by Office of the United States Attorney.

Cape Fear shall pay the Government the sum of \$15,000 within 60 days of the Effective Date of this Agreement. Cape Fear shall pay the Settlement Amount balance and interest in 48 regular installment payments on the 15th of each month, beginning the third month after the Effective Date of this Agreement.

In order to secure this Agreement, Cape Fear Regional Urological Clinic, P.A., and Garrett M. Franzoni, M.D shall both enter a consent order for judgment in the amount of \$470,000, contemporaneously with this Settlement Agreement, holding that they are liable in the full Settlement Amount, plus interest at a rate of 3% compounded daily, and the judgment to be entered by the Court, based upon the consent order of the parties.

In the event that Cape Fear fails to pay any Settlement Amount as provided above within five (5) business days of the date on which such payment is due, Cape Fear shall be in default of its payment obligations ("Default"). The Government will provide written notice of the Default to Defendant and Defendant shall have the opportunity to cure such Default within five (5) business days from the date of receipt of the notice. Notice of Default will be delivered to Defendant's counsel executing this agreement or to such other representative as Defendant shall designate in advance in writing. If Defendant fails to cure such Default within five (5) business days of receiving

the Notice of Default, the remaining unpaid balance of the Settlement Amount shall become immediately due and payable, and interest shall accrue at the rate of 12% per annum compounded daily from the date of Default on the remaining unpaid total (principal and interest balance). Upon default, the Government, at its sole option, may:

- (a) offset or recoup the remaining unpaid balance from any amounts due and owing to Defendant by any department, agency, or agent of the Government at the time of Default;
- (b) collect the entire unpaid balance of the Settlement Amount, plus interest, including 12% interest from the date of Default, and all other amounts due upon the event of Default as specified in this paragraph; (c) file a civil action for the Covered Conduct; or
- (d) exercise any other rights granted by law or in equity, including referral of this matter for private collection. In the event a complaint is filed pursuant to subsection (c) of this paragraph, Defendant agrees not to plead, argue, or otherwise raise any defenses under the theories of statute of limitations, laches, estoppel, or similar theories to the allegations in the complaint, except to the extent such defenses were available to Defendant on the Effective Date. Defendant agrees not to contest any consent judgment, offset, or any collection action undertaken by the Government pursuant to this paragraph, either administratively or in any state or federal court. Defendant shall pay Government all reasonable costs of collection and enforcement under this paragraph, including attorneys' fees and expenses.

2. Conditioned upon the Government receiving the Settlement Amount payments from Cape Fear, the Government agrees that it shall pay to Relator by electronic funds transfer 20 % of each such payment received under the Settlement Agreement as soon as feasible after receipt of the payment.

3. Cape Fear and Relator have a separate agreement regarding payment to Relator for attorney's fees and costs.

4. Subject to the exceptions in Paragraph 9 (concerning excluded claims) below, and conditioned upon Cape Fear's full payment of the Settlement Amount and subject to Paragraph 20, below (concerning bankruptcy proceedings commenced within 91 days of the Effective Date of this Agreement or any payment made under this Agreement), the United States releases Cape Fear, together with current or former owners, and officers, directors, and affiliates, from any civil or administrative monetary claim the United States has for the Covered Conduct under the False Claims Act, 31 U.S.C. §§ 3729-3733; the Civil Monetary Penalties Law, 42 U.S.C. § 1320a-7a; the Program Fraud Civil Remedies Act, 31 U.S.C. §§ 3801-3812; or the common law theories of payment by mistake, unjust enrichment, and fraud.

5. Subject to the exceptions in Paragraph 9 below, and conditioned upon Cape Fear's full payment of the Settlement Amount, Relator, for herself and for her heirs, successors, attorneys, agents, and assigns, releases Cape Fear from any civil monetary claim the Relator has on behalf of the Government for the Covered Conduct under the False Claims Act, 31 U.S.C. §§ 3729-3733.

6. In the event of Default as defined in Paragraph 1, above, OIG-HHS may exclude Cape Fear from participating in all Federal health care programs until Cape Fear pays the Settlement Amount and reasonable costs as set forth in Paragraph 1, above. OIG-HHS will provide written notice of any such exclusion to Cape Fear. Cape Fear waives any further notice of the exclusion under 42 U.S.C. § 1320a-7(b)(7), and agrees not to contest such exclusion either administratively or in any state or federal

court. Reinstatement to program participation is not automatic. If at the end of the period of exclusion Cape Fear wishes to apply for reinstatement, Cape Fear must submit a written request for reinstatement to OIG-HHS in accordance with the provisions of 42 C.F.R. §§ 1001.3001-3005. Cape Fear will not be reinstated unless and until OIG-HHS approves such request for reinstatement.

7. In consideration of the obligations of Cape Fear set forth in this Agreement, and conditioned upon Cape Fear's full payment of the Settlement Amount, DHA agrees to release and refrain from instituting, directing, or maintaining any administrative action seeking exclusion from the TRICARE Program against Cape Fear under 32 C.F.R. § 199.9 for the Covered Conduct, except as reserved in Paragraph 9 (concerning excluded claims), below, and as reserved in this Paragraph. DHA expressly reserves authority to exclude Cape Fear from the TRICARE Program under 32 C.F.R. §§ 199.9 (f)(1)(i)(A), (f)(1)(i)(B), and (f)(1)(iii), based upon the Covered Conduct. Nothing in this Paragraph precludes TMA or the TRICARE Program from taking action against entities or persons, or for conduct and practices, for which claims have been reserved in Paragraph 9, below.

8. In consideration of the obligations of Cape Fear set forth in this Agreement, and Subject to the exceptions in Paragraph 9, below, in consideration of the obligations of Cape Fear set forth in this Agreement, and conditioned upon Cape Fear's full payment of the Settlement Amount, the State of North Carolina (on behalf of itself, its officers, agents, agencies, and departments) releases Cape Fear, together with its employees, officers and directors, from any civil or administrative monetary claim the State of North Carolina has for the Covered Conduct under the North Carolina False

Claims Act, N.C.G.S. § 1-605 et. seq., the North Carolina Medical Assistance Provider False Claims Act, N.C.G.S. § 108A-70.10 et. seq., or the common law theories of payment by mistake, unjust enrichment, and fraud for the Covered Conduct.

9. Notwithstanding the releases given in paragraphs 4, 5, 6, 7, and 8 of this Agreement, or any other term of this Agreement, the following claims of the Government 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 or permissive exclusion from Federal health care programs;
- d. Any liability to the United States (or its agencies) for any conduct other than the Covered Conduct;
- e. Any liability based upon obligations created by this Agreement;
- f. Any liability for express or implied warranty claims or other claims for defective or deficient products or services, including quality of goods and services;
- g. Any liability for failure to deliver goods or services due; and
- h. Any liability for personal injury or property damage or for other consequential damages arising from the Covered Conduct.

10. Relator and her heirs, successors, attorneys, agents, and assigns shall not object to this Agreement but agree and confirm that this Agreement is fair, adequate, and

reasonable under all the circumstances, pursuant to 31 U.S.C. § 3730(c)(2)(B).

Conditioned upon Relator's receipt of the payment described in Paragraph 2, Relator and her heirs, successors, attorneys, agents, and assigns fully and finally release, waive, and forever discharge the Government, its agencies, officers, agents, employees, and servants, from any claims arising from the filing of the Civil Action or under 31 U.S.C. § 3730, and from any claims to a share of the proceeds of this Agreement and/or the Civil Action.

11. Relator, for herself, and for her heirs, successors, attorneys, agents, and assigns, releases Cape Fear, and its officers, agents, and employees, from any liability to Relator arising from the filing of the Civil Action, or under 31 U.S.C. § 3730(d) for expenses or attorney's fees and costs.

12. Cape Fear waives and shall not assert any defenses Cape Fear 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 Government concerning the characterization of the Settlement Amount for purposes of the Internal Revenue laws, Title 26 of the United States Code.

13. Cape Fear fully and finally releases the Government, its agencies, officers, agents, employees, and servants, from any claims (including attorney's fees, costs, and expenses of every kind and however denominated) that Cape Fear has asserted, could have asserted, or may assert in the future against the Government, its agencies, officers,

agents, employees, and servants, related to the Covered Conduct and the Government's investigation and prosecution thereof.

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

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 contractor (e.g., Medicare Administrative Contractor, fiscal intermediary, carrier), or any state payer, related to the Covered Conduct; and Cape Fear agrees not to resubmit to any Medicare contractor or any state payer any previously denied claims related to the Covered Conduct, and agrees not to appeal any such denials of claims.

16. Cape Fear 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 X, its present or former officers, directors, employees, shareholders, and agents in connection with:

- (1) the matters covered by this Agreement;
- (2) the Government's audit(s) and civil investigation(s) of the matters covered by this Agreement;
- (3) Cape Fear's investigation, defense, and corrective actions

undertaken in response to the Government's 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 Cape Fear makes to the Government pursuant to this Agreement and any payments that Cape Fear may make to Relator, including costs and attorneys' fees

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

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

c. Treatment of Unallowable Costs Previously Submitted for Payment: Cape Fear 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 Cape Fear 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. Cape Fear agrees that the United States, at a minimum, shall be entitled to recoup from Cape Fear 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 Cape Fear or any of its subsidiaries or affiliates on the effect of inclusion of Unallowable Costs (as defined in this Paragraph) on Cape Fear 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 Cape Fear's books and records to determine that no Unallowable Costs have been claimed in accordance with the provisions of this Paragraph.

17. 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 18 (waiver for beneficiaries paragraph), below.

18. Cape Fear 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 Covered Conduct.

19. Cape Fear 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 Government 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 Cape Fear, 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 Cape Fear was or became indebted to on or after the date of this transfer, within the meaning of 11 U.S.C. § 548(a)(1).

20. If within 91 days of the Effective Date of this Agreement or of any payment made under this Agreement, Cape Fear commences, or a third party commences, any case, proceeding, or other action under any law relating to bankruptcy, insolvency, reorganization, or relief of debtors (a) seeking to have any order for relief of Cape Fear's debts, or seeking to adjudicate Cape Fear as bankrupt or insolvent; or (b) seeking appointment of a receiver, trustee, custodian, or other similar official for Cape Fear or for all or any substantial part of Cape Fear's assets, Cape Fear agrees as follows:

a. Cape Fear's obligations under this Agreement may not be avoided pursuant to 11 U.S.C. § 547, and Cape Fear shall not argue or otherwise take the position in any such case, proceeding, or action that: (i) Cape Fear's obligations under this Agreement may be avoided under 11 U.S.C. § 547; (ii) Cape Fear was insolvent at the time this Agreement was entered into, or became insolvent as a result of the payment made to the Government; or (iii) the mutual promises, covenants, and obligations set forth in this Agreement do not constitute a contemporaneous exchange for new value given to Cape Fear.

b. If Cape Fear's obligations under this Agreement 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 sole option, may rescind the releases in this Agreement and bring any civil and/or administrative claim, action, or proceeding against Cape Fear for the claims that would otherwise be covered by the releases provided in Paragraphs 4, 5, 6, 7 and 8, above. Cape Fear agrees that (i) any such claims, actions, or proceedings brought by the Government are not subject to an "automatic stay" pursuant to 11 U.S.C. § 362(a) as a result of the action, case, or proceedings described in the first clause of this Paragraph, and Cape Fear shall not argue or otherwise contend that the Government's claims, actions, or proceedings are subject to an automatic stay; (ii) Cape Fear shall not plead, argue, or otherwise raise any defenses under the theories of statute of limitations, laches, estoppel, or similar theories, to any such civil or administrative claims, actions, or proceeding that are brought by the Government within 60 calendar days of written notification to Cape Fear that the releases have been rescinded pursuant to this Paragraph, except to the extent such defenses were

available on November 8, 2013; and (iii) the Government has a valid claim against Cape Fear in the amount of \$695,000, and the Government may pursue its claim in the case, action, or proceeding referenced in the first clause of this Paragraph, as well as in any other case, action, or proceeding.

c. Cape Fear acknowledges that its agreements in this Paragraph are provided in exchange for valuable consideration provided in this Agreement.

21. 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 Eastern District of North Carolina. 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 Cape Fear's successors, transferees, heirs, and assigns.
28. This Agreement is binding on Relator's successors, transferees, heirs, and assigns.
29. All parties consent to the Government's disclosure of this Agreement, and information about this Agreement, to the public.
30. 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: 5-6-15

BY: Thomas G. Walker
THOMAS G. WALKER
United States Attorney
NEAL I. FOWLER
Assistant United States Attorney
Civil Division
310 New Bern Avenue
Suite 800, Federal Building
Raleigh, NC 27601-1461
Telephone: (919) 856-4049
Facsimile: (919) 856-4821
E-mail: neal.fowler@usdoj.gov
NC Bar #27371

DATED: 4/9/15

BY: Robert K. DeConti
ROBERT K. DECONTI
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: _____
PAUL J. HUTTER
General Counsel
Defense Health Agency
United States Department of Defense

THE UNITED STATES OF AMERICA

THOMAS G. WALKER
United States Attorney

DATED: _____

BY: _____

NEAL I. FOWLER
Assistant United States Attorney
Civil Division
310 New Bern Avenue
Suite 800, Federal Building
Raleigh, NC 27601-1461
Telephone: (919) 856-4049
Facsimile: (919) 856-4821
E-mail: neal.fowler@usdoj.gov
NC Bar #27371

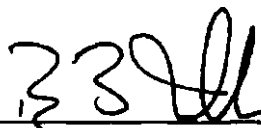
DATED: _____

BY: _____

ROBERT K. DECONTI
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: 4/17/15

BY: _____


BRYAN T. WHEELER
Acting General Counsel
Defense Health Agency
United States Department of Defense

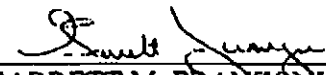
THE STATE OF NORTH CAROLINA


DATED: 5/1/2015

BY: Charles H. Hobbins
CHARLES H. HOBGOOD
Special Deputy Attorney General
Director, North Carolina Medicaid Investigations
Division

CAPE FEAR REGIONAL UROLOGICAL CLINIC
AND GARRETT M. FRANZONI, M.D. - DEFENDANTS

DATED: 4-2-15 BY: 
CAPE FEAR REGIONAL UROLOGICAL CLINIC

DATED: 4-2-15 BY: 
GARRETT M. FRANZONI, M.D.

DATED: 4-3-15 BY: 
RENEE B. CRAWFORD
CRAWFORD & CRAWFORD
Counsel for Defendants Cape Fear Regional
Urological Clinic and Garrett M. Franzoni, M.D.

CHRISTINA BORTON - RELATOR

DATED: 4/6/15 BY: Christina Borton
CHRISTINA BORTON

DATED: 4/7/2015 BY: Charles H. Rabon, Jr.
CHARLES H. RABON, JR.
RABON LAW FIRM, PLLC
Counsel for Relator