

SETTLEMENT AGREEMENT

This Settlement Agreement (Agreement) is entered into among the following parties (Parties): 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, United States); Arthur S. Portnow M.D., P.A., d/b/a Apple Medical and Cardiovascular Group, d/b/a Apple Medical Group, and Arthur S. Portnow, M.D. (collectively, Portnow); and Kathleen M. Siwicki (Relator), all through their authorized representatives.

RECITALS

A. Arthur S. Portnow M.D., P.A., d/b/a Apple Medical and Cardiovascular Group, d/b/a Apple Medical Group (Portnow P.A.) is a medical practice located at 5537 Marquesas Circle in Sarasota, FL. Arthur S. Portnow, M.D. is a physician and the sole owner of Portnow P.A., and practices at Portnow P.A.

B. On April 24, 2015, the Relator filed a *qui tam* action in the United States District Court for the Middle District of Florida, captioned *United States and the State of Florida ex rel. Kathleen M. Siwicki v. Arthur S. Portnow, M.D. and Arthur S. Portnow M.D., P.A. (d/b/a Apple Medical and Cardiology Group)*, Case No. 8:15-cv-987-T-27MAP, pursuant to the *qui tam* provisions of the False Claims Act (FCA), 31 U.S.C. § 3730(b) (the Civil Action). In that action, the Relator alleges that, during the time-period covered by the Complaint, Portnow engaged in a scheme to defraud Federal healthcare programs, including Medicare, by conducting various medically unnecessary ultrasounds, and by falsifying patient records in an effort to justify those ultrasounds.

C. The United States contends that Portnow knowingly submitted and caused to be submitted claims for payment to the Medicare Program, Title XVIII of the Social Security Act, 42 U.S.C. §§ 1395-1395kkk-1 (Medicare).

D. The United States contends that it has certain civil claims against Portnow arising from Portnow's submission of false and fraudulent claims to Medicare during the period from August 24, 2009 through August 7, 2017 (Relevant Period). In particular, the United States contends that, during the Relevant Period, Portnow knowingly (1) presented and caused to be presented false and fraudulent claims for the evaluation and performance of medically unnecessary carotid ultrasounds, lower extremity arterial ultrasounds, abdominal aortic ultrasounds, renal and renal artery ultrasounds, and echocardiograms; and (2) made and used, and caused to be made and used, false records and statements material to such false and fraudulent claims. This conduct is referred to below as the "Covered Conduct."

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

F. The Relator claims entitlement under 31 U.S.C. § 3730(d) to a share of the proceeds of this Agreement. As set forth below, however, the Relator does not claim expenses or attorneys' fees and costs in connection with this settlement of the Civil Action against Portnow.

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 Agreement, the Parties agree and covenant as follows:

TERMS AND CONDITIONS

1. Portnow shall pay to the United States one million, nine hundred and fifty thousand dollars (\$1,950,000) (Settlement Amount) within fourteen (14) calendar days of the Effective Date of this Agreement (as defined in Paragraph 28 of this Agreement) by electronic funds transfer pursuant to written instructions to be provided by the United States Attorney's Office for the Middle District of Florida.

2. Conditioned upon the United States receiving the Settlement Amount from Portnow and as soon as reasonably feasible after its receipt of that amount, the United States shall pay \$351,000 to the Relator by electronic funds transfer.

3. As agreed to by the Relator and Portnow and as noted above, neither the Relator nor her counsel shall claim or be paid expenses or attorneys' fees and costs in connection with this settlement of the Civil Action against Portnow.

4. Subject to the exceptions in Paragraph 7 (concerning excluded claims) below, and conditioned upon Portnow's full and timely payment of the Settlement Amount, the United States releases Portnow from any civil or administrative monetary claim 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 payment by mistake, unjust enrichment and fraud.

5. Subject to the exceptions in Paragraph 7 (concerning excluded claims) below, and conditioned upon Portnow's full and timely payment of the Settlement Amount, the Relator, for herself and for her heirs, successors, attorneys, agents and assigns, releases Portnow (a) from any civil monetary claim the Relator has on behalf of the United States for the Covered Conduct under the FCA; and (b) for any and all claims for relief, actions, rights, causes of action, suits, debts, obligations, liabilities, demands, losses, damages, costs

and expenses of any kind, known or unknown, fixed or contingent, in law or equity, in contract or tort, or under any Federal or state statute or regulation, or otherwise that Relator has standing to bring and that Relator may now have or claim to have against Portnow or Portnow's current and former parent corporations, direct and indirect subsidiaries, brother or sister corporations, divisions, current or former corporate owners, and corporate successors and assigns of any of them (collectively, Portnow and Related Parties), arising out of or connected in any way to the facts, claims and circumstances alleged in, arising under, or arising from the filing of, the Civil Action, or from any other past activities and actions of Portnow and Related Parties.

6. In consideration of the obligations of Portnow set forth in this Agreement and in the Integrity Agreement (IA) entered into between OIG-HHS and Portnow, and conditioned upon Portnow's full and timely payment of the Settlement Amount, the OIG-HHS agrees to release and refrain from instituting, directing or maintaining any administrative action seeking exclusion from Medicare, Medicaid and other Federal healthcare programs (as defined in 42 U.S.C. § 1320a-7b(f)) against Portnow under 42 U.S.C. § 1320a-7a (Civil Monetary Penalties Law) or 42 U.S.C. § 1320a-7(b)(7) (permissive exclusion for fraud, kickbacks and other prohibited activities) for the Covered Conduct, except as reserved in this Paragraph and in Paragraph 7 (concerning excluded claims) below. The OIG-HHS expressly reserves all rights to comply with any statutory obligations to exclude Portnow from Medicare, Medicaid and other Federal healthcare programs under 42 U.S.C. § 1320a-7(a) (mandatory exclusion) based upon the Covered Conduct. Nothing in this Paragraph precludes the OIG-HHS from taking action against entities or persons, or for conduct and practices, for which claims have been reserved in Paragraph 7 (concerning excluded claims) below.

7. Notwithstanding the releases given in Paragraphs 4-6 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, United States Code (Internal Revenue Code);
- b. Any criminal liability;
- c. Except as explicitly stated in this Agreement, any administrative liability, including mandatory exclusion from Federal healthcare 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 of individuals, other than Arthur S. Portnow, M.D.;
- g. Any liability for express or implied warranty claims or other claims for defective or deficient products or services, including quality of goods and services;
- h. Any liability for failure to deliver goods or services due; and
- i. Any liability for personal injury or property damage or for other consequential damages arising from the Covered Conduct.

8. The 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 the Relator's receipt of the payment described in Paragraph 2, the Relator and her heirs, successors, attorneys, agents and assigns fully and finally release, waive and forever

discharge the United States, 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.

9. Conditioned upon the Relator's receipt of the payment described in Paragraph 2, the Relator, for herself and for her heirs, successors, attorneys, agents and assigns, releases Portnow and Portnow's officers, agents and employees from any liability to the Relator arising from the filing of the Civil Action, or under 31 U.S.C. § 3730(d) for expenses or attorneys' fees and costs.

10. Portnow waives and shall not assert any defenses Portnow 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.

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

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

13. 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 or carrier) or any state payer, related to the Covered Conduct; and Portnow agrees not to resubmit to any Medicare contractor or any state payer any previously denied claims related to the Covered Conduct, agrees not to appeal any such denials of claims, and agrees to withdraw any such pending appeals.

14. Portnow 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 Portnow and Portnow's 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) Portnow's investigation, defense and corrective actions undertaken in response to the United States' audit(s) and civil investigation(s) in

connection with the matters covered by this Agreement (including attorneys' fees);

- (4) the negotiation and performance of this Agreement;
- (5) the payment Portnow makes to the United States pursuant to this Agreement and any payments that Portnow may make to the Relator, including costs and attorneys' fees; and
- (6) the negotiation of, and obligations undertaken pursuant to, the IA to:
 - (i) retain an independent review organization to perform annual reviews as described in Section III of the IA; and
 - (ii) prepare and submit reports to the OIG-HHS

are unallowable costs for government contracting purposes and under the Medicare Program, Medicaid Program, TRICARE Program, and Federal Employees Health Benefits Program (FEHBP or FEHB Program) (hereinafter referred to as Unallowable Costs). However, nothing in Paragraph 14.a.(6) that may apply to the obligations undertaken pursuant to the IA affects the status of costs that are not allowable based on any other authority applicable to Portnow.

b. Future Treatment of Unallowable Costs: Unallowable Costs shall be separately determined and accounted for by Portnow, and Portnow 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 Portnow or any of Portnow's subsidiaries or affiliates to the Medicare, Medicaid, TRICARE or FEHB Programs.

c. Treatment of Unallowable Costs Previously Submitted for Payment:

Portnow further agrees that, within ninety (90) days of the Effective Date of this Agreement, Portnow 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 Portnow or any of Portnow's 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. Portnow agrees that the United States, at a minimum, shall be entitled to recoup from Portnow 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 Portnow or any of Portnow's subsidiaries or affiliates on the effect of inclusion of Unallowable Costs (as defined in this Paragraph) on Portnow or any of Portnow's 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 Portnow's books and records to determine that no Unallowable Costs have been claimed in accordance with the provisions of this Paragraph.

15. Portnow agrees to cooperate fully and truthfully with the United States' investigation of individuals and entities not released in this Agreement. Upon reasonable notice, Portnow shall encourage, and agrees not to impair, the cooperation of Portnow's directors, officers and employees, and shall use Portnow's 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. Portnow further agrees to furnish to the United States, upon request, complete and unredacted copies of all non-privileged documents, reports, memoranda of interviews, and records in Portnow's possession, custody or control concerning any investigation of the Covered Conduct that Portnow has undertaken, or that has been performed by another on Portnow's behalf.

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 (waiver for beneficiaries Paragraph) below.

17. Portnow agrees that Portnow 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.

18. Upon receipt of the payment described in Paragraph 1 above, the Parties shall promptly sign and file in the Civil Action a Joint Stipulation of Dismissal of the Civil Action pursuant to Rule 41(a)(1) (Joint Stipulation of Dismissal). The Joint Stipulation of Dismissal shall provide, among other things, that the Civil Action is dismissed (1) subject to the terms of the settlement; (2) with prejudice as to the United States only as to the Covered Conduct and otherwise without prejudice as to the United States; and (3) with prejudice as to all claims as to the Relator.

19. Each Party shall bear its own legal and other costs incurred in connection with this matter, including the preparation and performance of this Agreement.

20. 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.

21. 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 Middle District of Florida. For purposes of construing this Agreement, the Agreement shall be deemed to have been drafted by all Parties to the Agreement and shall not, therefore, be construed against any Party for that reason in any subsequent dispute.

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

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

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

25. This Agreement is binding on Portnow's successors, transferees, heirs and assigns.

26. This Agreement is binding on the Relator's successors, transferees, heirs and assigns.

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

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

THE UNITED STATES OF AMERICA

DATED: _____

BY: _____

CHRISTOPHER P. TUIITE
Assistant U.S. Attorney
U.S. Attorney's Office for the Middle District of Florida

DATED: _____

BY: _____

LISA M. RE
Assistant Inspector General for Legal Affairs
Office of Counsel to the Inspector General
Office of Inspector General
U.S. Department of Health and Human Services

DEFENDANTS

DATED: _____ BY: _____
ARTHUR S. PORTNOW, M.D.
On behalf of Arthur S. Portnow M.D. and Arthur S.
Portnow M.D., P.A., d/b/a Apple Medical and
Cardiovascular Group, d/b/a Apple Medical Group

DATED: _____ BY: _____
BRUCE S. ROSENBERG, ESQ.
Rosenberg Law, P.A.
Counsel for Arthur S. Portnow M.D. and Arthur S.
Portnow M.D., P.A., d/b/a Apple Medical and
Cardiovascular Group, d/b/a Apple Medical Group

RELATOR

DATED: _____ BY: _____
KATHLEEN M. SIWICKI

DATED: _____ BY: _____
JAMES A. YANCHUNIS
JAMES D. YOUNG
Counsel for Relator Kathleen M. Siwicki