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16 **IN THE UNITED STATES DISTRICT COURT**
17 **NORTHERN DISTRICT OF CALIFORNIA**

18 UNITED STATES OF AMERICA,
19 *ex rel.*, KATHY ORMSBY

20 Plaintiff,

21 v.

22 SUTTER HEALTH, a California not-for-
23 profit corporation and PALO ALTO
24 MEDICAL FOUNDATION, a not-for-profit
25 health care organization.

26 Defendants.

CASE NO. 3:15-CV-01062 (LB)

**REQUEST FOR JUDICIAL NOTICE IN
SUPPORT OF RELATOR KATHY
ORMSBY’S OPPOSITION TO MOTION
TO DISMISS (ECF No. 80);
DECLARATION OF MARK KLEIMAN
IN SUPPORT THEREOF**

1 Relator Kathy Ormsby respectfully requests that the Court take judicial notice
 2 pursuant to Rule 201 of the Federal Rules of Evidence of two documents attached to the
 3 accompanying Declaration of Mark Kleiman as Exhibit A and Exhibit B.

Exhibit	Description
A	Press Release from the United States Attorney's Office for the Northern District of California, titled "Medicare Advantage Provider to Pay \$30 Million to Settle Alleged Overpayment of Medicare Advantage Funds," dated April 12, 2019.
B	Settlement Agreement between the United States and Sutter, entered into on or about April 11, 2019.

10
 11 The Settlement Agreement comprising Exhibit B, which is described in Exhibit A,
 12 was explicitly referenced in Relator's First Amended Complaint (ECF No. 52 ¶¶ 7, 166–67).

13 14 **BASIS FOR REQUESTING JUDICIAL NOTICE**

15 Federal Rule of Evidence 201 authorizes this Court to take judicial notice of these
 16 documents. They are "not subject to reasonable dispute because" they "can be accurately and
 17 readily determined from sources whose accuracy cannot reasonably be questioned." Fed.
 18 Rule Evid. 201(b); *Wietschner v. Monterey Pasta Co.*, 294 F. Supp. 2d 1102, 1109 (N.D. Cal.
 19 2003). Further, the Rule mandates that judicial notice be taken where "a party requests it and
 20 the court is supplied with the necessary information," Fed. Rule Evid. at 201(c)(2), and
 21 authorizes judicial notice "at any stage of the proceeding," *id.* at 201(d).

22 Courts regularly take judicial notice of similar documents when considering motions
 23 to dismiss. *See, e.g., Wietschner*, 294 F. Supp. 2d at 1110 (taking judicial notice of
 24 documents, including press releases, alleged in complaint); *MGIC Indem. Corp. v. Weisman*,
 25 803 F.2d 500, 504 (9th Cir. 1986) (taking judicial notice of statements made in court filings
 26 by a party's counsel in another matter).

1 Exhibit A is a press release from a government web site and as such is judicially
2 noticeable as statements that “can be accurately and readily determined from sources whose
3 accuracy cannot reasonably be questioned.” *In re White Elec. Designs Corp. Sec. Litig.* 416
4 F. Supp. 2d 754, 760–61 (D. Ariz. 2006) (taking judicial notice of a press release). The
5 government’s press release describes a settlement between the United States and Sutter in
6 relation to the instant case, which is referred to by name and case number. Further, the Court
7 may take judicial notice of the press release as a matter of public record. *See MGIC Indem.*,
8 803 F.2d at 504.

9 Exhibit B is the settlement agreement referenced in the press release above and in the
10 First Amended Complaint. See Am. Compl. ¶¶ 7, 166–67). It is signed by counsel for the
11 other parties to the lawsuit, Olga Yevtukhova for the Department of Justice, and Florence Di
12 Benedetto and Katherine Lauer for Sutter Health. As such its authenticity can be accurately
13 and readily determined from sources whose accuracy cannot reasonably be questioned.

14 Accordingly, Relator respectfully requests that the Court take judicial notice of the
15 above listed documents in connection with Defendants’ Motion to Dismiss and Relator’s
16 Opposition to the Motion to Dismiss (ECF No. 80).

17 DATED: August 27, 2019

Respectfully submitted,

18 **LAW OFFICE OF MARK ALLEN KLEIMAN**

19
20 By: /s/ Mark Allen Kleiman

Mark Allen Kleiman

21
22 **KELLER GROVER**

Jeffrey F. Keller

Kathleen R. Scanlan

23
24 **CONSTANTINE CANNON**

Gordon Schnell

Sarah P. Alexander

Hamsa Mahendranathan

DECLARATION OF MARK KLEIMAN

I, Mark Kleiman, hereby declare as follows:

1. I am an attorney duly licensed to practice law before all courts in the State of California and am admitted to practice before this Court. I am co-counsel for Relator Kathy Ormsby. If called upon to do so, I could and would testify competently to the following based upon firsthand knowledge.

2. Attached hereto as Exhibit A is a true and correct copy of the press release entitled, “Medicare Advantage Provider to Pay \$30 Million to Settle Alleged Overpayment of Medicare Advantage Funds” published by the United States Attorney’s Office for the Northern District of California on April 12, 2019. The website for the press release is <https://www.justice.gov/usao-ndca/pr/medicare-advantage-provider-pay-30-million-settle-alleged-overpayment-medicare>, last visited by me on August 8, 2019.

3. Attached hereto as Exhibit B is the Settlement Agreement between the United States and Sutter, entered into on or about April 11, 2019. Page eleven of the Agreement bears the signature of Ms. Yevtukhova who is counsel of record for the United States in this case. Page thirteen of the Agreement bears the signature of Ms. Lauer, who is counsel of record for Sutter in this case.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this twenty-seventh day of August 2019, at Venice, California.

/s/ Mark Kleiman
Mark Kleiman

EXHIBIT A



THE UNITED STATES ATTORNEY'S OFFICE
NORTHERN DISTRICT *of* CALIFORNIA

[U.S. Attorneys](#) » [Northern District of California](#) » [News](#)

Department of Justice

U.S. Attorney's Office

Northern District of California

FOR IMMEDIATE RELEASE

Friday, April 12, 2019

Medicare Advantage Provider To Pay \$30 Million To Settle Alleged Overpayment Of Medicare Advantage Funds

SAN FRANCISCO – Sutter Health LLC, a California-based healthcare services provider, and several affiliated entities, Sutter East Bay Medical Foundation, Sutter Pacific Medical Foundation, Sutter Gould Medical Foundation, and Sutter Medical Foundation, have agreed to pay \$30 million to resolve allegations that the affiliated entities submitted inaccurate information about the health status of beneficiaries enrolled in Medicare Advantage Plans, which resulted in the plans and providers being overpaid, the Justice Department announced today. Sutter Health is headquartered in Sacramento, California.

“The Medicare Advantage Program provides benefits to a significant portion of federal health care beneficiaries,” said Assistant Attorney General Jody Hunt of the Department of Justice’s Civil Division. “The Department of Justice will help ensure that accurate information is supplied to the Medicare Advantage Program by plans and providers, and to pursue appropriate remedies when it is not.”

Under Medicare Advantage, also known as the Medicare Part C program,

Medicare beneficiaries have the option of enrolling in managed healthcare insurance plans called Medicare Advantage Plans (“MA Plans”) that are owned and operated by private Medicare Advantage Organizations (“MAOs”). MA Plans are paid a capitated, or per-person, amount to provide Medicare-covered benefits to beneficiaries who enroll in one of their plans. The Centers for Medicare and Medicaid Services (“CMS”), which oversees the Medicare program, adjusts the payments to MA Plans based on demographic information and the health status of each plan beneficiary. The adjustments are commonly referred to as “risk scores.” In general, a beneficiary with more severe diagnoses will have a higher risk score, and CMS will make a larger risk-adjusted payment to the MA Plan for that beneficiary.

Sutter Health, a non-profit public benefit corporation that provides healthcare services through its affiliates, including hospitals and medical foundations, contracted with certain MAOs to provide healthcare services to California beneficiaries enrolled in the MAOs’ MA Plans. In exchange, Sutter received a share of the payments that the MAOs received from CMS for the beneficiaries under Sutter’s care.

Sutter submitted diagnoses to the MAOs for the MA Plan enrollees that they treated. The MAOs, in turn, submitted the diagnosis codes to CMS from the beneficiaries’ medical encounters, such as office visits and hospital stays. The diagnosis codes were used in CMS’ calculation of a risk score for each beneficiary.

The settlement announced today resolves allegations that Sutter and its affiliates submitted unsupported diagnosis codes for certain patient encounters of beneficiaries under their care. These unsupported diagnosis scores inflated the risk scores of these beneficiaries, resulting in the MAO plans being overpaid.

In March 2019, the government filed a separate complaint against Sutter and its affiliated entity, Palo Alto Medical Foundation, alleging that they violated the False Claims Act by knowingly submitting unsupported diagnosis scores. That case is captioned *United States ex rel. Ormsby v. Sutter Health, et al.*, Case No. 15-CV-01062-JD (N.D. Cal.), and is still ongoing.

“Misrepresenting patients’ risk results in higher payments and wasted Medicare funds,” said Steven J. Ryan, Special Agent in Charge with the Office of Inspector General for the U.S. Department of Health and Human Services.

“With some one-third of people in Medicare now enrolled in managed care Advantage plans, large health systems such as Sutter can expect a thorough investigation of claimed enrollees’ health status.”

The settlement was the result of a coordinated effort by the Civil Division’s Commercial Litigation Branch, the United States Attorney’s Office for the Northern District of California, and HHS-OIG.

The claims resolved by the settlement are allegations only, and there has been no determination of liability.

This matter is being handled by Assistant United States Attorney Kimberly Friday and U.S. Department of Justice Trial Attorney Olga Yevtukhova, with assistance from Jonathan Birch and Tina Louie.

Component(s):

USAO - California, Northern

Updated April 12, 2019

EXHIBIT B

SETTLEMENT AGREEMENT

This Settlement Agreement (“Agreement”) is entered into among the United States of America, acting through the United States Department of Justice and the United States Attorney’s Office for the Northern District of California (collectively, the “United States”); and Sutter Health, a California non-profit public benefit corporation; Sutter Bay Medical Foundation, a California non-profit public benefit corporation d/b/a Sutter East Bay Medical Foundation and Sutter Pacific Medical Foundation; and Sutter Valley Medical Foundation, a California non-profit public benefit corporation d/b/a Sutter Gould Medical Foundation and Sutter Medical Foundation (collectively, “Sutter and its Affiliates”), (hereafter collectively referred to as “the Parties”), through their authorized representatives.

RECITALS

A. Medicare beneficiaries may enroll in managed healthcare insurance plans called Medicare Advantage Plans (“MA Plans”) that are owned and operated by private Medicare Advantage Organizations (“MAOs”). The Centers for Medicare & Medicaid Services (“CMS”) pays MAOs a capitated amount for each beneficiary to provide or cover the cost of all Medicare-covered Part A and Part B benefits (except hospice) to those beneficiaries who enroll in their plan under the Medicare Advantage Program (or Medicare Part C), Title XVIII of the Social Security Act, 42 U.S.C. §§ 1395w-21 - 1395w-29.

B. CMS adjusts the payments to MA Plans based on demographic information pertaining to the health status of each plan beneficiary. To calculate the payment amounts, CMS uses a health-based risk adjustment model that takes into

account diagnoses from inpatient hospital stays, outpatient encounters, and physician office visits. The diagnosis codes used in the model are grouped into Hierarchical Conditions Categories (“HCCs”), which are categories of clinically-related medical diagnoses. CMS assigns a relative numerical value to each HCC that correlates with predicted costs of care associated with treating the conditions in the category. In general, the more severe the diagnosis or costly the associated treatment, the higher the risk score. Diagnoses codes submitted by MA Plans materially affect the payments by CMS to MA Plans. CMS makes higher payments to the MA Plan for beneficiaries with higher overall risk scores than for beneficiaries with lower overall risk scores.

C. Sutter Health is a non-profit, community benefit health system in Northern California comprised of hospitals, medical foundations, and other medical services entities. Sutter Health is headquartered in Sacramento, California. Sutter and its Affiliates provide healthcare services in the State of California.

D. Sutter Health contracts with various MAOs to provide health care services to MA Plan enrollees through its Affiliates. As such, Sutter and its Affiliates submit diagnoses to MAOs for MA Plan enrollees that they treat. The MAOs, in turn, submit the diagnoses information to CMS, which adjusts payments to the MAOs accordingly under the HCC model.

E. The United States contends that Sutter and its Affiliates submitted or caused to be submitted claims for payment to the Medicare Program, Title XVIII of the Social Security Act, 42 U.S.C. §§ 1395-1395III (Medicare).

F. The United States contends that it has certain civil claims against Sutter and its Affiliates arising from the following conduct (hereinafter referred to below as the

“Covered Conduct”) for dates of service from January 1, 2010 through and including December 31, 2016. The United States contends that Sutter and its Affiliates submitted or caused to be submitted diagnosis codes that map to the HCCs listed in the Table below, for patient encounters at Sutter East Bay Medical Foundation, Sutter Gould Medical Foundation, Sutter Medical Foundation, and Sutter Pacific Medical Foundation. The United States contends that some of these diagnosis codes, as specified in the Table below, were unsupported, causing CMS to make improperly inflated payments.

Table

<u>HCC Description</u>	<u>For Dates of Service Jan. 1, 2010-Dec. 31, 2012</u> <u>CMS HCC Model v12</u> <u>PY 2011-PY2013</u>	<u>For Dates of Service Jan. 1, 2013-Dec. 31, 2016</u> <u>CMS HCC Model v22</u> <u>PY 2014-2017</u>
Certain cancers	HCC 10: Breast, Prostate, Colorectal and Other Cancers and Tumors	HCC 11: Colorectal, Bladder, and Other Cancers HCC 12: Breast, Prostate, and Other Cancers and Tumors
Ischemic or Unspecified Stroke	HCC 96	HCC 100
Vertebral Fractures without Spinal Cord Injury	HCC 157	HCC 169
Hip Fracture / Dislocation	HCC 158	HCC 170
Unstable Angina and Other Acute Ischemic Heart Disease	HCC 82	HCC 87
Acute Myocardial Infarction	HCC 81	HCC 86

G. This Settlement Agreement is neither an admission of liability by Sutter and its Affiliates nor a concession by the United States that its claims are not well founded.

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. The total Settlement Amount, all of which represents restitution, is thirty million dollars (\$30,000,000) ("Settlement Amount"), plus accrued interest as described below from December 19, 2018 until the date payment is made under this Paragraph. Concurrent with the execution of this Agreement, Sutter and its Affiliates shall receive a credit in the amount of Eight Million Five Hundred Forty Thousand dollars (\$8,540,000) towards the Settlement Amount set forth above, for submission of deletions of all unsupported diagnosis data encompassed by the Covered Conduct for Dates of Service 2015 and Dates of Service 2016 via the Medicare Risk Adjustment Reconciliation process. Sutter represents that it has completed submission of all such deletions. Sutter and its Affiliates shall pay the remainder of Twenty One Million Four Hundred Sixty Thousand dollars (\$21,460,000), plus accrued interest of three percent from December 19, 2018, to the United States by electronic funds transfer no later than thirty (30) days after the Effective Date of this Agreement pursuant to written instructions to be provided by Office of the United States Attorney for the Northern District of California.

2. Subject to the exceptions in Paragraph 3 (concerning excluded claims) below, and conditioned upon Sutter and its Affiliates' fulfillment of all payment obligations in Paragraph 1, the United States releases Sutter and its Affiliates together with its current and former parent corporations; direct and indirect subsidiaries; brother or

sister corporations; divisions; current or former corporate owners; and the corporate successors and assigns of any of them from any civil monetary claim the United States has for the Covered Conduct under the common law theories of payment by mistake and unjust enrichment.

3. Notwithstanding the releases given in Paragraph 2 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 liability arising under 31 U.S.C. §§ 3729-3733 (the False Claims Act);
- b. Any criminal liability;
- c. 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 of individuals;
- 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;

4. Sutter and its Affiliates waive and shall not assert any defenses Sutter and its Affiliates 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.

5. Sutter and its Affiliates fully and finally release the United States, its agencies, officers, agents, employees, and servants, from any claims (including claims for attorney's fees, costs, and expenses of every kind and however denominated) that Sutter and its Affiliates have asserted, could have asserted, or may assert in the future against the United States, its agencies, officers, agents, employees, and servants, arising out of the Covered Conduct and the United States' investigation and prosecution thereof.

6. 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 Advantage Organization, Medicare Advantage Plan, Medicare Administrative Contractor, fiscal intermediary, carrier) or any state payer, related to the Covered Conduct; and Sutter and its Affiliates agree not to resubmit to any Medicare contractor or any state payer any previously denied claims related to the Covered Conduct, agree not to appeal any such denials of claims, and agree to withdraw any such pending appeals.

7. Sutter and its Affiliates agree 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 Sutter and/or its Affiliates, their present or former officers, directors, employees, shareholders, affiliates, 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) Sutter and its Affiliates' 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 attorney's fees);
- (4) the negotiation and performance of this Agreement; and
- (5) the payment Sutter and its Affiliates make to the United States pursuant to this Agreement

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 Sutter and its Affiliates, and Sutter and its Affiliates 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 Sutter and its Affiliates or any of their subsidiaries or affiliates to the Medicare, Medicaid, TRICARE, or FEHBP Programs.

c. Treatment of Unallowable Costs Previously Submitted for

Payment: Sutter and its Affiliates further agree that within 90 days of the Effective Date of this Agreement they 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 Sutter and its Affiliates or any of their 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. Sutter and its Affiliates agree that the United States, at a minimum, shall be entitled to recoup from Sutter and its Affiliates 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 Sutter and its Affiliates or any of their subsidiaries or affiliates on the effect of inclusion of Unallowable Costs (as defined in this Paragraph) on Sutter and its

Affiliates or any of their 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 Sutter and its Affiliates' books and records to determine that no Unallowable Costs have been claimed in accordance with the provisions of this Paragraph.

8. 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 9 (waiver for beneficiaries paragraph), below.

9. Sutter and its Affiliates agree that they waive 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, and third party payors (except for any contractual claims by Sutter and its Affiliates against MA Plans or MAOs), based upon the claims defined as Covered Conduct.

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

11. 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.

12. 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 Northern District of California. 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.

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

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

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

16. This Agreement is binding on Sutter and its Affiliates' successors, transferees, heirs, and assigns.

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

18. 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.

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THE UNITED STATES OF AMERICA

DAVID L. ANDERSON
United States Attorney

DATED: 4/11/19

BY: Kimberly Friday
Kimberly Friday
Assistant United States Attorney
Northern District of California

DATED: 4/11/19

BY: Olga Yevtukhova
Olga Yevtukhova
Trial Attorney
Commercial Litigation Branch
Civil Division
United States Department of Justice

SUTTER HEALTH AND ITS AFFILIATES

DATED: 4/9/2018


BY: 

Florence L. Di Benedetto
Senior Vice President and General Counsel
Sutter Health; Sutter Bay Medical Foundation, d/b/a
Sutter East Bay Medical Foundation and Sutter
Pacific Medical Foundation; Sutter Valley Medical
Foundation, d/b/a Sutter Gould Medical Foundation
and Sutter Medical Foundation

SUTTER HEALTH AND ITS AFFILIATES

DATED: 4/11/19

BY:



Katherine Lauer
Latham & Watkins LLP
Counsel for Sutter Health; Sutter Bay Medical
Foundation, d/b/a Sutter East Bay Medical
Foundation and Sutter Pacific Medical Foundation;
Sutter Valley Medical Foundation, d/b/a Sutter
Gould Medical Foundation and Sutter Medical
Foundation