

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”), Richard Doughty, and the Oregon Health & Science University (the University) (hereafter collectively referred to as “the Parties”), through their authorized representatives.

RECITALS

A. The University is a recipient of Federal grants from the National Institutes of Health (NIH).

B. The Oregon National Primate Research Center (ONPRC) is one of the Nation’s limited number of National Primate Research Centers (NPRC) and an operating component of the University. Because the University hosts a NPRC, it receives from NIH a special type of grant referred to as a “P51 Grant,” which supports the ONPRC. NIH awarded this grant to OHSU under grant number P51 RR000163 and renewed it under the number P51 OD011092. OHSU also operates the Vaccine and Gene Therapy Institute (VGTI), which develops research and teaching programs to respond to infectious disease threats.

C. Richard Doughty was the Associate Director for Administration at the ONPRC from 2006 through February 2013.

D. NIH grants reimburse universities for both the direct and indirect costs of conducting research. “Direct costs” refer to costs that are specifically identified with a particular sponsored research project, such as the salary of a principal investigator or the cost of materials used for the project. “Indirect costs,” which are also referred to as “facilities and administrative

costs” or “F&A costs,” refer to costs “that are incurred for common or joint objectives and, therefore, cannot be identified readily and specifically” with work performed on a particular sponsored research project, such as the costs of operating and maintaining facilities, administrative personnel, utilities, and other overhead expenses. 2 C.F.R. Appendix III to Part 200.

E. To facilitate the reimbursement of indirect costs, the University periodically negotiates “F&A Rate Agreements” with HHS. The University’s F&A Rate Agreements establish one series of F&A rates for the University (University F&A Rates) and a second series of rates for the ONPRC (ONPRC F&A Rates).

F. In addition to reimbursing Direct and Indirect costs, NIH grants sometimes generate “Program Income,” which in this instance means gross income earned that is directly generated by an NIH grant-supported activity or earned as a result of an NIH grant during its period of performance. Because of those Program Income rules, the University maintains program income accounts associated with the P51 Grant (the “Program Income Accounts”).

G. The “Covered Period” shall be the period from January 1, 2005 through November 30, 2017.

H. The “Covered Federal Awards” are the ONPRC P51 Grant and the sponsored projects listed in Attachment A, awarded to the University by HHS through its operating division the NIH, or its awardees, at any tier, on behalf of the ONPRC and/or the VGTL.

I. On July 30, 2013, Doughty filed a *qui tam* action in the United States District Court for the District of Oregon captioned *United States ex rel. John Doe, Plaintiff v. Oregon Health & Science University, Defendant*, No. 3:13-cv-1306-BR, pursuant to the *qui tam* provisions of the False Claims Act, 31 U.S.C. § 3730(b).

J. On October 28, 2016, the United States filed a complaint-in-intervention in this action alleging violations of the False Claims Act, 31 U.S.C. § 3729, as well as payment by mistake of fact, and unjust enrichment.

K. On April 11, 2017, the District Court granted the University's motion to dismiss and entered judgment for the University.

L. The United States and Doughty filed notices of appeal, and their appeals to the Ninth Circuit remain pending. The United States' appeal is No. 17-35544. Doughty's appeal is No. 17-35483.

M. The United States contends that it has certain civil and administrative monetary claims during the Covered Period against the University because the University improperly charged certain costs to the Covered Federal Awards and the Program Income Accounts, in violation of its F&A Rate Agreements. In particular, the United States contends that the University knowingly and improperly: (1) applied higher ONPRC F&A Rates instead of the University F&A Rates to the Covered Federal Awards associated with VGTI and, as a result, received excessive indirect-cost recoveries; (2) charged costs associated with the operation and maintenance of the building that houses VGTI, as well as other VGTI related costs and expenses, to Program Income Accounts associated with the P51 Grant; (3) mischaracterized costs related to equipment and depreciation in its accounting records, thereby calculating erroneous F&A Rates, applied those rates to the Covered Federal Awards, and received excess indirect-cost recoveries; (4) charged an internal overhead cost allocation assessment to the P51 Grant, which ONPRC paid through Program Income Accounts; and (5) by engaging in the preceding conduct, breached the F&A agreements. This conduct is referred to below as the "Covered Conduct."

N. The University expressly denies the allegations of the United States as set forth herein and denies that it engaged in any wrongful conduct in connection with the Covered Conduct.

O. This Agreement is made in compromise of disputed claims. This Settlement Agreement is neither an admission of liability by the University nor a concession by the United States that its claims are not well founded. Neither this Agreement, nor the performance of any obligation arising under it, including any payment, nor the fact of settlement, is intended to be or shall be understood as an admission of liability or wrongdoing, or other expression reflecting on the merits of the dispute by the University.

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 University shall pay to the United States One Million Three Hundred and Twenty Thousand Dollars (\$1,320,000) (Settlement Amount) no later than 14 business days after the Effective Date of this Agreement by electronic funds transfer pursuant to written instructions to be provided by the Civil Division of the United States Department of Justice.

2. Conditioned upon the United States receiving the Settlement Amount from the University and as soon as feasible after receipt, the United States shall pay \$285,000 from the Settlement Amount to Doughty by electronic funds transfer.

3. Subject to the exceptions in Paragraph 4 (concerning excluded claims) below, and conditioned upon the University's payment of the full Settlement Amount, the United States releases the University, its institutions, and centers, including ONPRC and VGTI, 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, 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 breach of contract, payment by mistake, unjust enrichment, and fraud.

4. Notwithstanding the release given in Paragraph 3 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 but not limited to suspension or debarment pursuant to and remedies pursuant to 2 C.F.R. part 376; or administrative actions pursuant to, or otherwise consistent with, 42 C.F.R. § 52.9, 45 C.F.R. §§ 75.207-75.208, or 45 C.F.R. §§ 75.371-375;
- 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.

5. The University waives and shall not assert any defenses the University may have to any criminal prosecution or any 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.

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

7. Conditioned on the University's timely payment of the full Settlement Amount pursuant to Paragraph 1 above, Doughty, for himself and his heirs, successors, attorneys, agents, and assigns, fully releases, waives, and forever discharges the University and all of its current and former officers, directors, employees, assigns, attorneys, and agents from any and all manner of claims, proceedings, liens, and causes of action of any kind or description that Doughty has against the University (a) related to or arising from Doughty's allegations against the University or the Covered Conduct, or (b) related to or arising out of Doughty's employment and relationship with the University or the ONPRC, including any claims under 31 U.S.C. § 3730(h),

and for any claim under 31 U.S.C. §3730(d) for expenses or attorneys' fees or costs arising out of Doughty's *qui tam* lawsuit against the University.

8. In consideration of the execution of this Agreement and the release set forth in Paragraph 7 above, the University and all of its current and former officers, directors, employees, assigns, attorneys, and agents release Doughty and his successors, heirs, attorneys, agents, and assigns from any and all manner of claims, proceedings, liens, and causes of action of any kind or description that the University has against Doughty (a) related to or arising from Doughty's allegations against the University or the Covered Conduct, or (b) related to or arising out of Doughty's employment and relationship with the University or the ONPRC.

9. Doughty and his heirs, successors, attorneys, agents, and assigns shall not object to this Agreement but agree and confirm that this Agreement is fair, adequate, and reasonable under all the circumstances, pursuant to 31 U.S.C. § 3730(c)(2)(B). Conditioned upon Doughty's receipt of the payment described in Paragraph 2, Doughty and his 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 this action or under 31 U.S.C. § 3730, and from any claims to a share of the proceeds of this Agreement and/or this action.

10. The University agrees to the following:

(a) Unallowable Costs Defined: All costs (as defined in the Office of Management and Budget (OMB) Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards published at 2 C.F.R. §§ 200 *et seq.*; the Department of Health and Human Services adoption of the OMB Guidance provided at 45 C.F.R. § 75, subpart E *et seq.*; the Federal Acquisition Regulation, 48 C.F.R. § 31.205-47 where applicable; or otherwise

as specified by federal statutes, regulations or the terms and conditions of a Federal award) incurred by or on behalf of the University, and its present or former officers, directors, employees, shareholders and agents in connection with:

- (1) the matters covered by this Agreement;
- (2) the United States' audits and civil investigation of the matters covered by this Agreement;
- (3) the University's investigation, defense, and corrective action undertaken in response to the United States' audits 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 the University makes 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 in nonreimbursable cost centers by the University, and the University shall not charge such Unallowable Costs directly or indirectly to any contracts with or grants from 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 the University or any of its subsidiaries to the Medicare, Medicaid, TRICARE, or FEHBP Programs.

(c) Treatment of Unallowable Costs Previously Submitted for Payment: The University further agrees that within 90 days of the Effective Date of this Agreement it shall identify any Unallowable Costs (as defined in this Paragraph) included in payments previously sought by the University from the United States. The University agrees that the United States, at a minimum, shall be entitled to recoup from the University any overpayment plus applicable interest and penalties as a result of the inclusion of such Unallowable Costs on previously-submitted requests for payment. Any payments due shall be paid to the United States pursuant to the direction of the Department of Justice and/or the affected agencies. The United States, including the Department of Justice and/or the affected agencies, reserves its rights to audit, examine, or re-examine the University's books and records and to disagree with any calculations submitted by the University or any of its subsidiaries regarding any Unallowable Costs included in payments previously sought by the University, or the effect of any such Unallowable Costs on the amount of such payments.

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

11. The University agrees to cooperate fully and truthfully with the United States' investigation of individuals and entities not released in this Agreement. Upon reasonable notice, the University shall encourage, and agrees not to impair, the cooperation of its directors, officers, and employees, and shall use its 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. The University 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 its possession, custody, or control concerning any investigation of the Covered Conduct that it has undertaken, or that has been performed by another on its behalf.

12. This Agreement is intended to be for the benefit of the Parties and released entities only. The Parties do not release any claims against any other person or entity.

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

14. 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.

15. 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 District of Oregon. 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.

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

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

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

19. This Agreement is binding on the University's successors, transferees, heirs, and assigns.

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

21. 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.

22. Within 15 business days of payment of the full Settlement Amount, the United States and Doughty agree to voluntarily dismiss their pending appeals in the Ninth Circuit.

THE UNITED STATES OF AMERICA

Dated: 8/20/18

By: Lisa M. Re

LISA M. RE
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: _____

WEILI J. SHAW
Civil Division, Appellate Staff
U.S. Department of Justice

Counsel for the United States of America

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THE UNITED STATES OF AMERICA

Dated: _____

By: _____

LISA M. RE

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: 8/20/18

By:  _____

WEILI J. SHAW


Civil Division, Appellate Staff,

U.S. Department of Justice

Counsel for the United States of America

OREGON HEATH & SCIENCE UNIVERSITY

Dated: August 15, 2018

By: 
ALICE CUPRILL-COMAS
Senior Vice President and General Counsel

Dated: _____

By: _____
MICHAEL J. VERNICK
Hogan Lovells US LLP

Counsel for Oregon Health & Science University

OREGON HEALTH & SCIENCE UNIVERSITY

Dated: _____

By: _____
ALICE CUPRILL-COMAS
Senior Vice President and General Counsel

Dated: August 2018

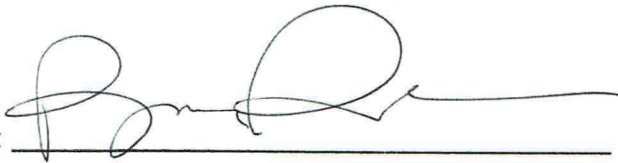
By: _____

MICHAEL J. VERNICK
Hogan Lovells US LLP

Counsel for Oregon Health & Science University

RELATOR

Dated: 8/18/2018

By: 

RICHARD DOUGHTY
Relator

Dated: _____

By: _____
ELIZABETH FARRELL
Counsel for Richard Doughty

RELATOR

Dated: _____

By: _____
RICHARD DOUGHTY
Relator

Dated: 8/17/18

By: *Elizabeth Farrell*
ELIZABETH FARRELL

Counsel for Richard Doughty

Attachment A

Agency Award #
5 P01 AI095985-04 (OHSU subaward # 01025086/95, 01027413)
1UM1AI124377-01 (OHSU subaward # 01028928)
1UMAI124377 (OHSU subaward # 01028924)
5UM1AI124377-02 (OHSU subaward # 01028926)
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2R44AI079898-06 (OHSU subaward # SRA-11-073-F)
5 R44 AI079898-05 (OHSU subaward # SRA-11-073-E)
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2 R44 AI091546-03 (OHSU subaward # PO# 8844 / SRA-14-031)
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1 R43 AI100343-01A1 (OHSU subaward # SRA-13-023 (100343-01-OHSU))
1 R41 AI109927-01A1 (OHSU subaward # SRA-14-108)
2 R44 AI100343-02 (OHSU subaward # SRA-15-018)
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5 U19 AI109680-04 (OHSU subaward # 000502793-003)
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1R01AI120619-01A1 (OHSU subaward # 000510680-001)
R01 DE015517 (OHSU subaward # 2006-1797)
5 R21 AI087382-02 (OHSU subaward # 1560 G NB865)
1R43AI112141-01 (OHSU subaward # S-000735)
7 R01 AG037042-04 (OHSU subaward # S-000600)
5 R21 AI093179-02 (OHSU subaward # 6620sc)

5 U19 AI096109-02 (OHSU subaward # 6751sc)
5 U19 AI096109-03 (OHSU subaward # 6752sc, 7841sc)
5 P30 AI027763-22 (OHSU subaward # 7842sc)
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1 R56 AI105062-01 (OHSU subaward # 147012)
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1 U19 AI109948-01 (OHSU subaward # WU-15-277, WU-18-366)
5 R01 AI089591-04 (OHSU subaward # WU-13-152 PO#2917064W)
5 U19 AI109948-03 (OHSU subaward # WU-16-323)
5R01AI089591-08 Revised (OHSU subaward # WU-15-126 PO# 2922445Y)