

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

U.S. DISTRICT COURT
DISTRICT OF VERMONT
FILED

2005 MAR 21 - PM 8 13

CLERK

BY

DEPUTY CLERK

UNITED STATES OF AMERICA,

Plaintiff,

v.

ERIC T. POEHLMAN,

Defendant.

Civil No. 2:05-cv-66

**SETTLEMENT AGREEMENT AND
STIPULATION FOR ENTRY OF JUDGMENT**

This Settlement Agreement is entered into between 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"), Eric T. Poehlman (Poehlman), and Walter F. DeNino (DeNino) (hereinafter referred to as "the Parties"), through their authorized representatives.

I. PREAMBLE

As a preamble to this Settlement Agreement, the Parties agree to the following:

A. From in or about 1987 to 2001, Poehlman was an academic researcher conducting federally-funded research in the United States on public health matters. From 1987 to 1993, Poehlman was a postdoctoral research fellow and an assistant and associate professor of medicine at the University of Vermont (UVM) College of Medicine in Burlington, Vermont. From 1993 to 1996, Poehlman was an associate professor of medicine at the University of Maryland in Baltimore, Maryland. From 1996 to 2001, Poehlman was an associate and full professor at the UVM College of Medicine. In these academic positions, Poehlman conducted research on human subjects related to

exercise physiology and other topics that was funded primarily by grants from federal public health agencies and departments, including the National Institutes of Health (NIH), the U.S. Department of Agriculture (USDA), and the Department of Defense.

B. Walter F. DeNino is an individual residing in New York, New York. DeNino was a student at UVM prior to 1998, and was employed as a laboratory technician at UVM during the years 1998 to 2000. On May 28, 2004, DeNino filed a *qui tam* action in U.S. District Court in Vermont pursuant to the False Claims Act, 31 U.S.C. § 3730, titled *United States of America, ex rel. Walter F. DeNino v. Eric T. Poehlman, Ph.D.*, No. 1:04-CV-310 (the “Qui Tam Action”). DeNino is represented in the Qui Tam Action by Philip R. Michael, Esq. of the firm Goodkind, Labaton, Rudoff & Sucharow LLP, and Robert Reis of the firm Reis, Urso & Ewald, LLP. The Qui Tam Action pertained to claims and allegations that were already part of an investigation undertaken by the United States, the results of which are described in more detail below and in the Complaint filed herewith by the United States.

C. The United States contends that it has certain claims and causes of action against Poehlman under the False Claims Act, 31 U.S.C. § 3729(a). The United States also contends that it has certain administrative claims against Poehlman under the provisions for permissive exclusion from the Medicare, Medicaid and other Federal health care programs, 42 U.S.C. § 1320a-7(b)(1)(B), and the provisions for civil monetary penalties, 42 U.S.C. § 1320a-7a, for the Covered Conduct. The United States alleges that Poehlman knowingly submitted, or caused to be submitted, false claims in numerous applications submitted to NIH and USDA for research grants.

D. Specifically, the United States contends that from in or about 1992 to 2000, Poehlman falsified and fabricated certain data from his federally-funded research and presented this false and

fabricated research data in grant applications proposing to conduct more federally-funded research on exercise physiology and related topics. During the period of 1996 through 2000, Poehlman submitted fourteen research grant applications to federal agencies or departments that included false and fabricated research data (“the Covered Conduct”). During the period 1997 to 2001, NIH paid out approximately \$1.7 million in research funding based on grant applications that included false and fabricated research data submitted by Poehlman while he was employed at UVM. In most cases, Poehlman falsified and fabricated portions of the “preliminary studies” section in grant applications in order to support the scientific basis for and his expertise in conducting the proposed research. The United States contends that reviewers of these grant applications relied on the “preliminary studies” section to determine if a grant should be awarded.

E. The United States contends that because Poehlman served as the Principal Investigator on these federal grant applications and signed the applications as such, certifying that the information contained in the applications was true and complete, the federal grant applications he submitted to NIH and USDA during the period 1996 through 2000 constitute violations of the False Claims Act, 31 U.S.C. § 3729(a).

F. To avoid the delay, uncertainty, inconvenience, and expense of protracted litigation of the above claims, the Parties have reached a full and final settlement pursuant to the Terms and Conditions below. Poehlman has requested a global settlement of all civil (including the Qui Tam Action), criminal and administrative matters concerning the Covered Conduct and, based upon his financial condition, claims an inability to pay even single damages claimed by the United States to settle the civil matters.

II. TERMS AND CONDITIONS

1. Poehlman agrees that his financial condition allows him to pay to the United States \$180,000 (the "Settlement Amount") in the manner and form and under the terms set forth in Paragraphs 2-3 below.

2. Poehlman agrees to pay an initial payment of \$30,000 to the United States no later than the date of his sentencing in criminal matter captioned *United States v. Eric T. Poehlman* filed herewith in U.S. District Court in the District of Vermont, or no later than 10 days after entry of judgment in this civil case, whichever occurs first. Poehlman agrees to pay this initial payment by electronic funds transfer pursuant to written instructions to be provided by the United States Attorney's Office. In the event of any default in payment described herein, interest on the unpaid balance of the initial payment will accrue at the legal rate beginning on the date judgment is entered, pursuant to 28 U.S.C. § 1961, until paid in full.

3. Poehlman agrees to pay the remaining balance of \$150,000 plus interest over a three-year period by tendering to the United States three installment payments in the amount of \$50,000 each, with each installment of \$50,000 to be paid by electronic funds on or before December 31, 2005, December 31, 2006, and December 31, 2007, pursuant to written instructions to be provided by the United States Attorney's Office. Poehlman agrees to pay interest at the legal rate on the unpaid principal and such interest shall be calculated pursuant to 28 U.S.C. § 1961. Poehlman may pay the balance of the \$150,000, plus whatever interest has accrued up until the date of payment, without penalty for prepayment.

4. Poehlman has provided a sworn financial statement dated June 25, 2004 to the United States and the United States has relied on the accuracy and completeness of that statement in reaching

this Settlement Agreement. Poehlman warrants that at the time he provided it, the statement was complete and accurate. If the United States reasonably determines that Poehlman materially misrepresented the amount of his income or assets in that statement, the United States may demand additional payments or pursue other remedies in satisfaction of the judgment pursuant to the procedures delineated in the Federal Debt Collection Procedures Act, 28 U.S.C. §§ 3001-3008, or any other available remedies authorized by law. In the event that the United States reasonably determines that Poehlman materially misrepresented his financial condition in that statement, the United States may at its option: (a) rescind this Settlement Agreement and reinstate its suit based on the Covered Conduct; or (b) let the Settlement Agreement stand and collect the full Settlement Amount plus 100% of the value of the net worth of Poehlman that was previously undisclosed. Poehlman agrees not to contest any collection action undertaken by the United States pursuant to this provision. In the event that the United States opts to rescind this Settlement Agreement and reinstate its suit under this provision, Poehlman agrees not to plead, argue or otherwise raise any defenses under theories of state of limitations, laches, estoppel or similar theories to any civil claims brought by the United States, except to the extent that these defenses were available on the effective date of this agreement.

5. Subject to the exceptions in Paragraph 11 below, in consideration of the obligations of Poehlman set forth in this Settlement Agreement, conditioned upon Poehlman's full payment of the Settlement Amount, and subject to Paragraph 16 below (concerning bankruptcy proceedings commenced within 91 days of the effective date of this Agreement), the United States, on behalf of itself, its officers, agents, agencies, and departments, agrees to release Poehlman and his employees and agents from any civil or administrative claim the United States has or may have 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, or another state or common law theory, for the Covered Conduct.

6. In compromise and settlement of the rights of OIG-HHS to exclude Poehlman pursuant to 42 U.S.C. § 1320a-7(b)(1)(B), upon conviction in the related criminal case titled *United States v. Eric T. Poehlman* for a false statement related to a Federal grant, Poehlman agrees to be permanently excluded under this statutory provision from Medicare, Medicaid, and all other Federal health care programs as defined in 42 U.S.C. § 1320a-7b(f). Such exclusion shall have national effect and shall also apply to all other federal procurement and nonprocurement programs. Federal health care programs shall not pay anyone, including Poehlman, anyone who employs or contracts with Poehlman, any hospital, or other provider where Poehlman provides services, for items or services, including administrative and management services, furnished, ordered, or prescribed by Poehlman in any capacity while Poehlman is excluded. The exclusion applies regardless of who submits the claims or other request for payment. Poehlman shall not submit or cause to be submitted to any Federal health care program any claim or request for payment for items or services, including administrative and management services, furnished, ordered, or prescribed by Poehlman during the exclusion. Violation of the conditions of the exclusion may result in criminal prosecution, and the imposition of civil monetary penalties and assessments. Poehlman further agrees to hold the Federal health care programs, and all Federal beneficiaries and/or sponsors, harmless from any financial responsibility for items or services furnished, ordered, or prescribed to such beneficiaries or sponsors by Poehlman after the effective date of the exclusion. Poehlman waives any further notice of the

exclusion and agrees not to contest such exclusion either administratively or in any state or federal court. This exclusion shall be effective upon the Effective Date of this Settlement Agreement.

7. The United States further agrees that DeNino shall receive a relator's share of 12% of the Settlement Amount of \$180,000, or \$21,600, which is to be paid from the initial payment of \$30,000 to be paid by Poehlman under the terms set forth in Paragraph 2 above. Payment to DeNino shall be made in a reasonable time after receipt of the Settlement Amount by the United States and shall be made by electronic funds transfer to the client trust account of DeNino's counsel, Philip Michael, Esq., in accordance with written instructions to be provided to the United States Attorney's Office by DeNino. It is expressly understood and agreed that the United States in no way promises or guarantees, nor is liable to DeNino for the relator's share payment except as provided herein for funds actually collected and received by the United States.

8. Conditioned upon receipt of the payment described in Paragraph 7, DeNino, for himself and for his heirs, successors, attorneys, agents, and assigns, agrees to release the United States, its officers, agents, and employees from any claims arising from or relating to 31 U.S.C. § 3730, including 31 U.S.C. §§ 3730(b), (c), (d) and (d)(1), concerning the Covered Conduct and any share of any proceeds of the Settlement Amount. DeNino further agrees that the terms of this Settlement Agreement are "fair, reasonable, and adequate under all the circumstances" pursuant to 31 U.S.C. § 3730(c)(2), and DeNino waives any right to challenge the adequacy of the Settlement Agreement pursuant to 31 U.S.C. § 3730(c)(2)(B) or any other law. Consistent with this release, DeNino agrees to dismissal of the Qui Tam Action titled *United States of America, ex rel. Walter F. DeNino v. Eric T. Poehlman, Ph.D.*, No. 1:04-CV-310. Such dismissal shall be with prejudice. DeNino agrees to file a motion for dismissal in the Qui Tam Action on or before April 29, 2005,

attaching to said motion as an exhibit an executed copy of this Settlement Agreement, which is intended to provide the written consent by the United States and the reasons for such consent as required by 31 U.S.C. § 3730(b)(1).

9. Poehlman agrees to pay DeNino his attorneys fees in the Qui Tam Action in the amount of \$16,000 in full and final satisfaction of any and all claims DeNino and his agents, including attorneys, may have against Poehlman either as a matter of statute or common law for attorneys' fees or other compensation or reimbursement on account of their representation of Denino in the Qui Tam Action. Poehlman shall make such payment at the same time he makes the payment described in paragraph 2, above. Poehlman agrees to provide to DeNino, for informational purposes only, copies of any Letters of Retraction/Correction he agrees to send pursuant to the Voluntary Exclusion and Settlement Agreement with HHS. DeNino agrees not to publish these letters.

10. In consideration of the payment of the Settlement Amount outlined in Paragraph 1, and payment of legal fees referenced in paragraph 9, above, DeNino, for himself, his heirs, assigns, successors, and agents, including his attorneys in the Qui Tam Action, agrees to release Poehlman and his agents and assigns from any and all claims they may have against Poehlman for any and all manner of action and actions, cause and causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extends, executions, claims and demands whatsoever, in law or in equity, which they ever had, now have or which their heirs, executors or administrators hereafter can, shall or may have against Poehlman or his agents for, upon, or by reason of any matter, cause or thing whatsoever from the beginning of the world to the date of these presents, and

particularly, but without in any manner limiting the foregoing, on account of any matters that were, or could have been alleged in the Qui Tam Action.

11. Notwithstanding any term of this Settlement Agreement, specifically reserved and excluded from the scope and terms of this Settlement Agreement as to any entity or person (including Poehlman and DeNino) are the following:

- a. Any civil, criminal or administrative liability arising under Title 26, U.S. Code (Internal Revenue Code);
- b. Any criminal liability;
- c. Any administrative liability, including mandatory exclusion from Federal health care programs and debarment from federal grant programs;
- d. Any liability to the United States (or its agencies) for any conduct other than the Covered Conduct; and
- e. Any liability based upon such obligations as are created by this Settlement Agreement.

12. Poehlman waives and will not assert any defenses he 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 the Excessive Fines Clause in the Eighth Amendment of the Constitution, this Settlement Agreement bars a remedy sought in such criminal prosecution or administrative action. Poehlman agrees that this Settlement Agreement is not punitive in purpose or effect. 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.

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

14. This Settlement 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.

15. Poehlman warrants that he has reviewed his financial situation and that he currently is solvent within the meaning of 11 U.S.C. §§ 547(b)(3) and 548(a)(1)(B)(ii)(I), and will remain solvent following his payment to the United States of the Settlement Amount. Further, the Parties warrant that, in evaluating whether to execute this Settlement Agreement, they have intended that the mutual promises, covenants, and obligations set forth herein constitute a contemporaneous exchange for new value given to Poehlman, within the meaning of 11 U.S.C. § 547(c)(1); and 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 and do, in fact, represent a reasonably equivalent exchange of value not intended to hinder, delay, or defraud any entity to which Poehlman was or became indebted, on or after the date of this transfer, all within the meaning of 11 U.S.C. § 548(a)(1).

16. If, within 91 days of the effective date of this Settlement Agreement, Poehlman 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 Poehlman's debts, or seeking to adjudicate Poehlman as bankrupt or insolvent; or (b) seeking appointment of a receiver, trustee, custodian, or other similar official for Poehlman or for all or any substantial part of Poehlman's assets, Poehlman agrees as follows:

a. Poehlman's obligations under this Settlement Agreement may not be avoided pursuant to 11 U.S.C. §§ 547 or 548, and Poehlman will not argue or otherwise take the position in any case, proceeding, or action that:

(i) Poehlman's obligations under this Settlement Agreement may be avoided under 11 U.S.C. §§ 547 or 548;

(ii) Poehlman was insolvent at the time this Settlement Agreement was entered into, or became insolvent as a result of the payment made to the United States hereunder; or

(iii) the mutual promises, covenants, and obligations set forth in this Settlement Agreement do not constitute a contemporaneous exchange for new value given to Poehlman.

b. If Poehlman's obligations under this Settlement 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 United States, at its sole option, may rescind the releases in this Settlement Agreement, and bring any civil and/or administrative claim, action, or proceeding against Poehlman for the claims that would otherwise be covered by the releases provided in this Settlement Agreement. Poehlman further agrees that:

(i) any such claims, actions, or proceedings brought by the United States (including any proceedings to exclude or debar Poehlman from participation in Federal “covered transactions” as defined in the Government-wide Debarment and Suspension Regulation) are not subject to an “automatic stay” pursuant to 11 U.S.C. § 362(a) as a result of the action, case, or proceeding described in the first clause of this Paragraph, and that Poehlman will not argue or otherwise contend that the United States’ claims, actions, or proceedings are subject to an automatic stay;

(ii) that Poehlman will 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 which are brought by the United States within 100 calendar days of written notification to Poehlman that the releases herein have been rescinded pursuant to this Paragraph; and

(iii) the United States has a claim against Poehlman in the amount of at least \$1,700,000 and the United States 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. Poehlman acknowledges that his agreements in this Paragraph are provided in exchange for valuable consideration provided in this Settlement Agreement.

17. In the event that Poehlman fails to comply with any requirement of this Settlement Agreement, the United States has the right at any time to obtain current financial information from or concerning Poehlman and Poehlman agrees to cooperate in providing such information.

18. Each Party to this Settlement Agreement will bear its own legal and other costs incurred in connection with this matter, including the preparation and performance of this Settlement Agreement.

19. Poehlman and DeNino represent that this Settlement Agreement is freely and voluntarily entered into without any degree of duress or compulsion whatsoever.

20. This Settlement Agreement is governed by the laws of the United States. The Parties agree that the exclusive jurisdiction and venue for any dispute arising between and among the Parties under this Settlement Agreement will be the United States District Court for the District of Vermont.

21. This Settlement Agreement constitutes the complete agreement as to civil claims concerning the Covered Conduct entered into between the Parties who are signatories to this Settlement Agreement. This Settlement Agreement may not be amended except by written consent of the Parties.

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

23. Poehlman agrees, to the full extent of his authority to do so, that this Settlement Agreement is binding on his successors, transferees, heirs, and assigns.

24. Poehlman and DeNino consent to the United States' disclosure of this Settlement Agreement, and information about this Settlement Agreement, to the public.

25. This Settlement Agreement is effective on the date of signature of the last signatory to the Settlement Agreement. Facsimiles of signatures shall constitute acceptable, binding signatures for purposes of this Settlement Agreement.

26. The parties agree to entry of judgment on a civil complaint involving the Covered Conduct and an alleged violation of the False Claims Act, 31 U.S.C. § 3729(a), and entry of this Settlement Agreement as an order of the Court. Poehlman waives service of a summons pursuant to Fed. R. Civ. P. 4(d) and agrees that venue is proper in the District of Vermont.

27. Poehlman is in default of this Agreement if he fails to pay any amount provided for in Section II of this Agreement when such payment is more than ten days late. The United States will send Poehlman notice of default by providing written notice to Poehlman's attorney, Robert B. Hemley, c/o Gravel and Shea, 76 St. Paul Street, P.O. Box 369, Burlington, Vermont 05402-0369, or such other representative as Poehlman may designate. Such designation shall be in writing. The written notice of default will provide Poehlman with ten days from the date of the notice to cure the default before the United States takes any action pursuant to Paragraph 28 below.

28. Default under the terms of this Settlement Agreement will entitle the United States of America to execute on its judgment in this case pursuant to the procedures delineated in the Federal Debt Collection Procedures Act, 28 U.S.C. §§ 3001 - 3308, or any other available remedies authorized by law. Further, upon declaration of default, the United States may exercise, at its sole option, one or more of the following rights, as applicable: (a) declare this Settlement Agreement breached and proceed against Poehlman for any claims, including those to be released by this Settlement Agreement; (b) file an action for specific performance of the Settlement Agreement; or (c) offset the remaining unpaid balance, inclusive of interest, from an amounts due and owing to Poehlman by any department, agency or agent of the United States at the time of default. Poehlman agrees not to contest any offset imposed pursuant to this provision, either administratively or in any state or federal court.

29. Upon satisfaction of the payment obligation of this Settlement Agreement, the United States will file a Satisfaction of Judgment with the Court.

Dated this 17th day of March, 2005 in Burlington, Vermont.

DAVID V. KIRBY
United States Attorney

Carol L. Shea / by SAK
CAROL L. SHEA
Chief, Civil Division
United States Attorney's Office
On Behalf of the United States

Dated this 16 day of March, 2005 in Washington DC

[Signature]
LEWIS MORRIS
Chief Counsel to the Inspector General
Office of Counsel to the Inspector General
Office of Inspector General
U. S. Department of Health and Human Services

Dated this _____ day of _____, 2005 in Burlington, Vermont.

ERIC T. POEHLMAN

Dated this _____ day of _____, 2005 in Burlington, Vermont.

ROBERT B. HEMLEY, ESQ.
Attorney for Eric T. Poehlman

29. Upon satisfaction of the payment obligation of this Settlement Agreement, the United States will file a Satisfaction of Judgment with the Court.

Dated this ____ day of _____, 2005 in Burlington, Vermont.

DAVID V. KIRBY
United States Attorney

CAROL L. SHEA
Chief, Civil Division
United States Attorney's Office
On Behalf of the United States

Dated this ____ day of _____, 2005 in _____.

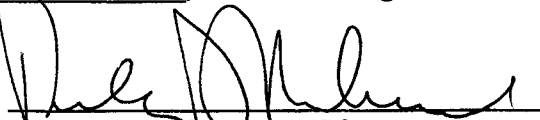
LEWIS MORRIS
Chief Counsel to the Inspector General
Office of Counsel to the Inspector General
Office of Inspector General
U. S. Department of Health and Human Services

Dated this 11th day of March, 2005 in Montreal, Quebec, Canada
~~Burlington, Vermont~~

Eric T. Poehlman
ERIC T. POEHLMAN
Dated this 14th day of March, 2005 in Burlington, Vermont.

Robert B. Hemley
ROBERT B. HEMLEY, ESQ.
Attorney for Eric T. Poehlman

Dated this 7th day of March, 2005 in Burlington, Vermont.


PHILIP R. MICHAEL, ESQ.
Attorney for Walter F. DeNino, Relator


Dated this _____ day of _____, 2005 in Burlington, Vermont.

ROBERT REIS, ESQ.
Attorney for Walter F. DeNino, Relator

Dated this _____ day of _____, 2005 in Burlington, Vermont.

WALTER F. DENINO, Relator

So Ordered:


United States District Judge

Dated this _____ day of _____, 2005 in Burlington, Vermont.

PHILIP R. MICHAEL, ESQ.
Attorney for Walter F. DeNino, Relator

Dated this 11 day of March, 2005 in ^{Burlington} ~~Burlington~~, Vermont.

Robert Reis by file
ROBERT REIS, ESQ.
Attorney for Walter F. DeNino, Relator

Dated this _____ day of _____, 2005 in Burlington, Vermont.

WALTER F. DENINO, Relator

So Ordered:

United States District Judge

Dated this _____ day of _____, 2005 in Burlington, Vermont.

PHILIP R. MICHAEL, ESQ.
Attorney for Walter F. DeNino, Relator

Dated this _____ day of _____, 2005 in Burlington, Vermont.

ROBERT REIS, ESQ.
Attorney for Walter F. DeNino, Relator

Dated this 9th day of March, 2005 in Burlington, Vermont.



WALTER F. DENINO, Relator

So Ordered:

United States District Judge