

1 MELINDA HAAG (CSBN 132612)
 United States Attorney
 2 JOANN M. SWANSON (CSBN 88143)
 Chief, Civil Division
 3 JAMES A. SCHARF (CSBN 152171)
 Assistant United States Attorney

4 150 Almaden Boulevard, Suite 900
 5 San Jose, CA 95113
 Telephone: (408) 535-5044
 6 FAX: (408) 535-5081
 james.scharf@usdoj.gov

7 Attorneys for Defendant

8
 9 UNITED STATES DISTRICT COURT
 10 NORTHERN DISTRICT OF CALIFORNIA
 11 SAN JOSE DIVISION

12 ROBERT MARSILI,
 13 Plaintiff,
 14 v.
 15 UNITED STATES OF AMERICA,
 16 Defendants.
 17

No. C 10-1164 EJD

**STIPULATION FOR COMPROMISE
 SETTLEMENT AND RELEASE;
 [PROPOSED] ORDER**

18
 19
 20 It is hereby stipulated by and between the undersigned Plaintiff and the UNITED STATES
 21 OF AMERICA, by and through their respective attorneys, as follows:

22 WHEREAS, Plaintiff filed the above-captioned action on March 19, 2010;

23 WHEREAS, Plaintiff and Defendant wish to avoid any further litigation and controversy and
 24 to settle and compromise fully any and all claims and issues that have been raised, or could have
 25 been raised in this action, which have transpired prior to the execution of this Settlement
 26 Agreement;

27 WHEREAS, the parties intend this to be a full, final and complete settlement that resolves all
 28 claims and potential claims that Plaintiff may have arising out of the subject matter of this action,

1 including Plaintiff's claims for medical malpractice, elder abuse, medical bills and wage loss,
2 except as expressly noted below.

3 NOW, THEREFORE, in consideration of the mutual promises contained in this Agreement,
4 and other good and valuable consideration, receipt of which is hereby acknowledged, the Parties
5 agree as follows:

6 1. **Agreement to Compromise Claims.** The parties do hereby agree to settle and
7 compromise each and every claim of any kind, whether known or unknown, arising directly or
8 indirectly from the acts or omissions that gave rise to the above-captioned action under the terms
9 and conditions set forth in this Settlement Agreement.

10 2. **Definition of "United States of America."** As used in this Settlement Agreement, the
11 United States of America shall include its current and former agents, servants, employees, and
12 attorneys, as well as the Department of Veterans Affairs, and/or its current and former agents,
13 servants, employees, and attorneys, including Dr. Dan Eisenberg.

14 3. **Settlement Amount.** The United States of America agrees to pay the sum of seventy-five
15 thousand dollars (\$75,000.00) ("Settlement Amount"), which sum shall be in full settlement and
16 satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and
17 nature, arising from, and by reason of any and all known and unknown, foreseen and unforeseen
18 personal injuries, damage to property and the consequences thereof, resulting, and to result, from
19 the subject matter of this settlement, including any claims for wrongful death, for which Plaintiff
20 or his guardians, heirs, executors, administrators, or assigns, and each of them, now have or may
21 hereafter acquire against the United States of America.

22 4. **Release.** Except as noted below, Plaintiff and his guardians, heirs, executors,
23 administrators or assigns hereby agrees to accept the Settlement Amount in full settlement and
24 satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and
25 nature, including claims for wrongful death, arising from, and by reason of any and all known
26 and unknown, foreseen and unforeseen personal injuries, damage to property and the
27 consequences thereof which they may have or hereafter acquire against the United States of
28 America on account of the same subject matter that gave rise to the above-captioned action,

STIPULATION FOR COMPROMISE
C 10-1164 EJD

1 including any future claim or lawsuit of any kind or type whatsoever, whether known or
2 unknown, and whether for compensatory or exemplary damages. Plaintiff and his guardians,
3 heirs, executors, administrators or assigns further agrees to reimburse, indemnify and hold
4 harmless the United States of America from and against any and all such causes of action, claims,
5 liens, rights, or subrogated or contribution interests incident to or resulting from further litigation
6 or the prosecution of claims by Plaintiff or his guardians, heirs, executors, administrators or
7 assigns against any third party or against the United States, including claims for wrongful death.
8 However, this release is without prejudice to Plaintiff's pending administrative claim regarding
9 his dispute with the VA about the amount of co-payments charged by the VA ("the co-payment
10 dispute") and the amount of money withheld from Plaintiff's Social Security checks because of
11 the co-payment dispute. Defendant reserves its rights to assert that a federal district court does
12 not have subject jurisdiction over the co-payment dispute.

13 5. **Dismissal of Action**. In consideration of the payment of the Settlement Amount and the
14 other terms of this Settlement Agreement, Plaintiff shall immediately upon execution of this
15 Settlement Agreement also execute a Stipulation of Dismissal, a copy of which is attached
16 hereto as Exhibit A. The Stipulation of Dismissal shall dismiss, with prejudice, all claims
17 asserted in this action, or that could have been asserted in this action. The fully executed
18 Stipulation of Dismissal will be held by Defendant's attorney and will be filed within five (5)
19 business days of receipt by Plaintiff's attorney of the Settlement Amount.

20 6. **No Admission of Liability**. This stipulation for compromise settlement is not, is in no
21 way intended to be, and should not be construed as, an admission of liability or fault on the part
22 of the United States, and it is specifically denied that it are liable to the Plaintiff. This settlement
23 is entered into by all parties for the purpose of compromising disputed claims and avoiding the
24 expenses and risks of further litigation.

25 7. **Parties Bear Their Own Costs**. It is also agreed, by and among the parties, that the
26 respective parties will each bear their own costs, fees, and expenses and that any attorney's fees
27 owed by the Plaintiff will be paid out of the settlement amount and not in addition thereto.

28

1 8. **Attorney's Fees.** It is also understood by and among the parties that pursuant to Title 28,
2 United States Code, Section 2678, attorney's fees for services rendered in connection with this
3 action shall not exceed 25 per centum of the amount of the compromise settlement.

4 9. **Authority.** The persons signing this Settlement Agreement warrant and represent that
5 they possess full authority to bind the persons on whose behalf they are signing to the terms of
6 the settlement.

7 10. **Waiver of California Civil Code § 1542.** The provisions of California Civil Code
8 Section 1542 are set forth below:

9 "A general release does not extend to claims which the creditor does not know or
10 suspect to exist in his or her favor at the time of executing the release, which if
11 known by him or her must have materially affected his or her settlement with the
12 debtor."

13 Plaintiff having been apprized of the statutory language of Civil Code Section 1542 by his
14 attorney, and fully understanding the same, nevertheless elects to waive the benefits of any and
15 all rights he/she may have pursuant to the provision of that statute and any similar provision of
16 federal law. Plaintiff understands that, if the facts concerning Plaintiff's injury and the liability
17 of the government for damages pertaining thereto are found hereinafter to be other than or
18 different from the facts now believed by them to be true, the Agreement shall be and remain
19 effective notwithstanding such material difference.

20 11. **Payment by Check.** Payment of the settlement amount will be made by check drawn on
21 the Treasury of the United States for seventy-five thousand dollars (\$75,000.00) and made
22 payable to Robert Marsili, Plaintiff, and Ira Leshin and Shelley S. Buchanan, Plaintiff's attorneys.
23 The check will be mailed to attorney ^{Buchanan} Leshin at ^{her} his business address. Plaintiff's attorneys agree to
24 distribute the settlement proceeds to the Plaintiff. Plaintiff and his attorney have been informed
25 that payment of the Settlement Amount may take sixty (60) days or more from the date that the
26 Court "so orders" this Agreement to process.

27 12. **Tax Liability.** If any withholding or income tax liability is imposed upon Plaintiff or
28 Plaintiff's counsel based on payment of the Settlement Amount, Plaintiff or Plaintiff's counsel
shall be solely responsible for paying any such determined liability from any government agency.

1 Nothing in this Settlement Agreement constitutes an agreement by the United States of America
2 concerning the characterization of the Settlement Amount for the purposes of the Internal
3 Revenue Code, Title 26 of the United States Code.

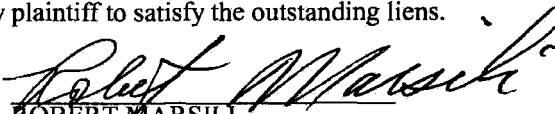
4 13. **Construction.** Each party hereby stipulates that it has been represented by and has relied
5 upon independent counsel in the negotiations for the preparation of this Settlement Agreement,
6 that it has had the contents of the Agreement fully explained to it by such counsel, and is fully
7 aware of and understands all of the terms of the Settlement Agreement and the legal
8 consequences thereof. For purposes of construction, this Agreement shall be deemed to have
9 been drafted by all Parties to this Settlement Agreement and shall not, therefore, be construed
10 against any Party for that reason in any subsequent dispute.

11 14. **Severability.** If any provision of this Settlement Agreement shall be invalid, illegal, or
12 unenforceable, the validity, legality, and enforceability of the remaining provision shall not in
13 any way be affected or impaired thereby.

14 15. **Integration.** This instrument shall constitute the entire Settlement Agreement between
15 the parties, and it is expressly understood and agreed that the Settlement Agreement has been
16 freely and voluntarily entered into by the parties hereto with the advice of counsel, who have
17 explained the legal effect of this Settlement Agreement. The parties further acknowledge that no
18 warranties or representations have been made on any subject other than as set forth in this
19 Settlement Agreement. This Settlement Agreement may not be altered, modified or otherwise
20 changed in any respect except by writing, duly executed by all of the parties or their authorized
21 representatives.

22 16. **Liens.** Plaintiff is responsible for satisfying any and all outstanding liens relating to
23 Plaintiff's medical treatment arising out of the subject matter of this action. Plaintiff shall
24 indemnify and hold harmless Defendant from any liability Defendant may incur from any lien
25 claimant arising out of any failure by plaintiff to satisfy the outstanding liens.

26 Dated: ~~April~~ ^{June} 2 2011


ROBERT MARSILI
Plaintiff

27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

June 21
Dated: April __, 2011

IRA LESHIN

IRA LESHIN
Attorney for Plaintiff

June 2
Dated: April __, 2011

SHELLEY S. BUCHANAN

SHELLEY S. BUCHANAN
Attorney for Plaintiff

June 3
Dated: April __, 2011

MELINDA HAAG
United States Attorney

By: *JAMES A. SCHARF*

JAMES A. SCHARF
Assistant United States Attorney
Attorney for the Federal Defendant
United States of America

**PURSUANT TO THE ABOVE STIPULATION AND AGREEMENT,
APPROVED AND SO ORDERED:**

Dated: June 6, 2011

EDWARD J. DAVILA

Hon. Edward J. Davila
United States District Court Judge