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Description of document: **Ethics Waivers provided at the Department of Veterans Affairs (VA), 2006-2009**

Requested date: 01-August-2010

Released date: 09-December-2010

Posted date: 24-January-2011

Date/date range of documents: 01-September-2006 – 19-August-2009

Source of document: FOIA Request
Department of Veterans Affairs
Office of the General Counsel
810 Vermont Avenue, NW
(026H) VACO
Washington, DC 20420

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**Department of Veterans Affairs
Office of the General Counsel
Washington, DC 20420**

December 9, 2010

In Reply Refer To: FOIA #10-1010463-F

I respond to your Freedom of Information Act (FOIA) request dated August 1, 2010, which I received on August 16, 2010. You asked for "a copy of each Ethics Waiver provided at the Department of Veterans Affairs since January 1, 2005."

I have interpreted your request to refer primarily to waivers under 18 U.S.C. § 208(b). While the statute calls what you refer to as a "waiver", "Determinations granting an exemption," it is essentially a waiver and I am so interpreting it in responding to your request. The other pure "waiver" is the waiver of a conflict of interest that an outside law firm that represents VA is given to continue that representation when they are subsequently retained by a veteran who wishes to litigate against VA to secure VA benefits. In such cases, the waiver resolves conflict of interest issues for the law firm under professional responsibility rules.

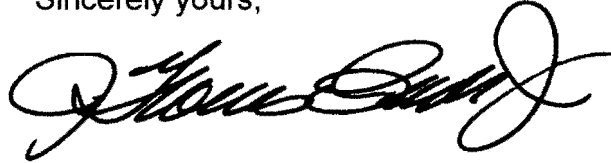
In response to your request, I am enclosing documents which we believe respond to your request for both kinds of "waivers". In certain instances, annotated on the furnished documents, I have redacted information under Exemption 6 of FOIA [5 U.S.C. § 552(b) (6)]. Exemption 6 protects from disclosure information which would constitute a clearly unwarranted invasion of an individual's personal privacy.

I have also redacted information under Exemption 2 of FOIA (5 U.S.C. §552 (b) (2)). This exemption allows an agency to withhold material if it is determined that it is an internal matter of a relatively trivial nature.

I am furnishing the enclosed documents without charge.

I believe the aforesaid is in full response to your request.

Sincerely yours,

A handwritten signature in black ink, appearing to read "J. Thomas Burch, Jr.", written in a cursive style.

J. Thomas Burch, Jr.
Acting OGC FOIA Officer
Office of the General Counsel

Enclosures

Notice of Appeal Rights: If you consider this response to be a denial of any part of your request, you may appeal by writing to the Assistant General Counsel (024), Department of Veterans Affairs, 810 Vermont Avenue, N.W., Washington, DC 20420. Please include your case number in any appeal. If you wish to request additional records or clarification, please write directly to the person signing this letter. Doing this will not change your appeal rights.

MODE = MEMORY TRANSMISSION

START=SEP-18 10:52

END=SEP-18 10:53

FILE NO. = 216

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Department of Veterans Affairs
 Office of General Counsel (02)
 810 Vermont Avenue, N.W.
 Washington, D.C. 20420



Fax Transmission Sheet

ORIGINAL ___ WILL NOT FOLLOW X WILL FOLLOW BY U.S. MAIL

5 U.S.C. 552 (b)(6)

To: [REDACTED] **5 U.S.C. 552 (b)(2)**

From: [REDACTED] for John H. Thompson

Phone No: (202) 273-6667

No. of pages: 3

Fax: (202) 273-6671

Date: 9/18/2006 9:34 AM

Comments: Conflict-of-Interest Waiver

Your waiver has been approved. The original will be mailed to you shortly.

This Message is Intended Only For The Use Of The Person Or Office To Whom It is Addressed And May Contain Information That is Privileged, Confidential Or Protected By Law. All Others Are Hereby Notified That The Receipt Of This Message Does Not Waive Any Applicable Privilege Or Exemption From Disclosure And That Any Dissemination, Distribution, Or Copying Of This Communication Is Prohibited. If You Have Received This Communication In Error, Please Notify Us Immediately By Telephone At The Above Telephone Number, And Return The Original Message To Us At The Above Address Via The United States Postal Service. Thank You

Phone: (202) 772-5963
Fax: (202) 572-8390
Email: wagner@blankrome.com

September 1, 2006




VIA FIRST CLASS MAIL

Mr. John H. Thompson, Esq.
Deputy General Counsel
Office of General Counsel
Department of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, D.C. 20420

Re: Appeal of Denial of Veterans Benefits – U.S. Court of Appeals for Veterans
Claims: Docket No. 05-3193

Dear Mr. Thompson:

Our firm has represented and currently represents the Department of Veterans Affairs (“VA”) in connection with a variety of transactions and other matters, primarily related to intellectual property matters. **5 U.S.C. 552 (b)(6)**

We have been asked to represent Mr.  in connection with his appeal of the denial of Veteran Benefits in which the VA will be the other party. We will represent Mr.  in his appeal to the U.S. Court of Appeals for Veterans Affairs. Our representation of Mr.  will be pro bono and has been referred to us by the Veterans Consortium Pro Bono Program. Since the VA is a current client of our firm, our role in this matter will involve a conflict of interest that I am obliged to fully disclose to both parties and obtain their respective consents. **5 U.S.C. 552 (b)(6)**

Attorneys owe a duty of loyalty to clients, as well as a duty to preserve confidentiality of information relating to the representation. Accordingly, we believe we may proceed with this representation subject to the consent of both parties. Under Rule 1.7 of the Rules of Professional Responsibility of the District of Columbia, which governs situations of this kind, we are permitted to represent a client whose interests are potentially adverse to those of another client if each potentially affected client provides consent to such representation after full disclosure of the existence and nature of the possible conflict and the possible adverse consequences of such representation.

Watergate 600 New Hampshire Ave., NW Washington, DC 20037
www.BlankRome.com

Mr. John H. Thompson, Esq.
September 1, 2006
Page 2


If further developments should warrant renewed consideration of the propriety of our representation, we would promptly contact you. In the meantime, we have no reason to believe that our representation would be adversely affected in any way. If you consent, we would appreciate your confirming your consent by signing below and returning the signed copy to me.

If you have any questions, please call me.

Very truly yours,




5 U.S.C. 552 (b)(6)

I hereby acknowledge that the above-described conflict of interest has been explained to my satisfaction, and I hereby consent to Blank Rome LLP's representation of .

5 U.S.C. 552 (b)(6)

By: 
John H. Thompson

Dated: 9-18-06

Letter of Memorandum Granting a Waiver Request

This letter responds to your request for a waiver pursuant to 18 U.S.C. § 208(b)(1) to allow you to participate personally and substantially in a particular matter affecting a financial interest that you have in the matter, which, in the absence of this waiver, would otherwise disqualify you from such participation in the matter. Specifically, 18 U.S.C. § 208(a) prohibits a Government employee from participating personally and substantially in any particular matter that has a direct and predictable effect on his or her financial interests or those of any other persons whose interests are imputed to him or her, unless he or she first obtains a written waiver pursuant to section 208(b)(1).

For the purposes of Section 208, the interests of the following persons are imputed to the employee: a spouse, minor children, or general partner; any organization in which the employee serves as an officer, director, trustee, general partner or employee; and any person or organization with which the employee is negotiating, or has an arrangement concerning, prospective employment.

This waiver is being issued based upon the information you have provided to me regarding the nature and circumstances of the particular matter involved in your full disclosure of your financial interest in the matter.

Identify Position and Duties. You are [REDACTED]. In your position, you [REDACTED] as well as [REDACTED] provide [REDACTED]. **5 U.S.C. 552 (b)(6)**

Identify particular matter(s). You have been assigned as a part of your duties particular matters in which you will have a financial interest. The particular matters are your identification of patients who require lithotripsy treatment for urinary tract stone disease. You see patients referred to your service and make decisions regarding when the use of lithotripsy is indicated for these patients. Further, you refer each of the patients you identify as needing lithotripsy treatment to [REDACTED]. The [REDACTED] reviews each referral to ensure [REDACTED] treatment is appropriate. You actively participate in the [REDACTED] [REDACTED] [REDACTED]. As the [REDACTED] does not currently have enough resources to provide lithotripsy services at the level required, they contract with a private company to obtain lithotripsy services for veterans. The private contractor is [REDACTED]. If you were not involved in this particular matter, only two VA providers would be available to see patients for referrals and treatment. This would likely result in either some delays in treatment or more referrals to [REDACTED]. You would also be unable to participate in the group review process. **5 U.S.C. 552 (b)(6)**

Describe the role of the employee in the matters. With respect to these particular matters, you are expected to identify patients who require lithotripsy treatment. These patients are then referred to the VA contractor, [REDACTED], for treatment.

5 U.S.C. 552 (b)(6)

Describe disqualifying financial interest in the matters. You previously served on the Board of Directors of [REDACTED] ceased operation on September 15, 2007. All of [REDACTED] assets were acquired by [REDACTED]. As a result of your previous involvement with [REDACTED], when the company was acquired you were provided a lump sum payment and the option to purchase an ownership interest in [REDACTED]. The option cannot be sold and has no value if it is not exercised. Technically, you could exercise the option by purchasing an interest in [REDACTED] and then immediately divesting your interest. However, the practical effect is the same as if you never exercised the option. You would like to exercise this option without immediately divesting your interest and become a partial owner of [REDACTED]. Your interest in [REDACTED] would amount to approximately [REDACTED] of the total ownership interest in the company. [REDACTED] is an equipment ownership company that leases [REDACTED] equipment to [REDACTED]. [REDACTED] holds a 7% ownership interest in [REDACTED]. Neither you nor [REDACTED] has any ownership interest in [REDACTED].

[REDACTED] uses the equipment it leases from [REDACTED] to provide lithotripsy services to VA patients. [REDACTED] then pays a portion of the proceeds received from VA to [REDACTED]. Thus, if you exercised your option to buy an ownership interest in [REDACTED], you would have a financial interest in a company that receives income for each VA patient that you refer to [REDACTED].

Make determination required by 208(b)(1). As the official responsible for appointing you to your position, I have determined that the disqualifying financial interest in the particular matters is not so substantial as to be deemed likely to affect the integrity of your services to the Government.

According to the financial information you provided, you would pay [REDACTED] to secure the 2.65% interest in [REDACTED] that is available to you. The buy-in amount of [REDACTED] represents approximately 2% of your non-real estate assets and approximately [REDACTED] of all your assets.

[REDACTED] currently performs 2-3 lithotripsy cases per month, approximately 30 cases per year. Since there are three urologists on staff at the [REDACTED], you are involved in approximately one-third of these cases. You generally either perform these cases yourself or refer the cases to the VA contractor. [REDACTED] is currently performing 800-900 lithotripsy cases each year. The 30 cases [REDACTED] performs for [REDACTED] amount for approximately 3.5% of the lithotripsy services provided by the company annually. You are directly involved in an estimated 1.2% of the cases performed annually by [REDACTED]. [REDACTED] currently charges \$1,795 for each VA case performed. [REDACTED] uses 7.5% of this fee for indirect costs. An additional 25-35% of the fee is used to cover expenses. The remainder of the fee is paid to [REDACTED] for use of the lithotripsy equipment. Thus, [REDACTED] earns between \$1,030

5 U.S.C. 552 (b)(6)

and \$1,210 per VA case. Assuming [REDACTED] performs 30 VA cases again in 2008, [REDACTED] would receive \$30,900 to \$36,300 in income from VA cases. This amounts to an estimated 2.2-2.6% of [REDACTED] total revenues for 2007, which was \$1,411,099. If you purchase an ownership interest in [REDACTED] you would personally earn 2.65% of the total fee paid to Waveform Lithotripsy for each VA case. Thus, you would earn \$27 to \$32 per VA case, which amounts to an estimated \$900 per year. Essentially one-third of the \$900 annual income would come directly from your referrals of VA patients to [REDACTED]

Given all the facts and circumstances, I find that your disqualifying financial interests in [REDACTED] are not so substantial as to be deemed likely to affect the integrity of your service to the Government. Specifically, your interest in [REDACTED] is relatively small. You have only a 2.65% ownership interest in the company, which equates to less than [REDACTED] of your total assets. Further, your income from these matters equals approximately [REDACTED] of your VA salary for 2008, which will be about [REDACTED]. Additionally, VA referrals account for less than 3% of the revenue generated by [REDACTED] and you personally account for only one-third of the VA referrals.

Further, there are only a few physicians with expertise in this area at [REDACTED]. Because of the workloads assigned to the other physicians in your section, wait times and contractor costs would likely increase if you were not able to evaluate patients for lithotripsy treatment. Therefore, it is in the Department's interest for you to participate in these particular matters.

Finally, this waiver will be reviewed on annual basis in consultation with my Regional Counsel to ensure that, in light of the number of referrals to [REDACTED] in which [REDACTED] has participated in the previous year, that his disqualifying financial interest in those referrals continues to be not so substantial so as to affect the integrity of the service we can expect from him.

5 U.S.C. 552 (b)(6)

OGE Consultation. My Regional Counsel has, through the General Counsel's Office, consulted with the Office of Government Ethics on this waiver and I will provide them with a copy of it.

**Department of
Veterans Affairs**

Memorandum

Date: October 10, 2007

From: [REDACTED]

Subj: See below

To: [REDACTED]

LETTER OF MEMORANDUM GRANTING A WAIVER REQUEST

This Memorandum responds to your request for a waiver pursuant to 18 U.S.C. § 208(b)(1) to allow you to participate personally and substantially in a particular matter(s) affecting a financial interest that you have in the matter(s), which, in the absence of this waiver, would otherwise disqualify you from such participation in the matter[s]. Specifically, 18 U.S.C. § 208(a) prohibits a Government employee from participating personally and substantially in any particular matter that has a direct and predictable effect on his or her financial interests or those of any other persons whose interests are imputed to him or her, unless he or she first obtains a written waiver pursuant to section 208(b)(1).

For the purposes of Section 208, the interests of the following persons are imputed to the employee: a spouse, minor children, or general partner; any organization in which the employee serves as an officer, director, trustee, general partner or employee; and any person or organization with which the employee is negotiating, or has an arrangement concerning, prospective employment.

This waiver is being issued based upon the information you have provided to me regarding the nature and circumstances of the particular matter(s) involved in your full disclosure of your financial interest in the matter(s).
5 U.S.C. 552 (b)(6)

Identify Position and Duties. You are a [REDACTED] [REDACTED] In your position, you are required to conduct research on treatment of PTSD and substance abuse (your area of specialty).

Identify particular matter(s). In conducting research, you are involved in a project titled "PTSD/Substance Abuse Treatment for OEF/OIF Veterans", a particular matter(s) in which you have an imputed financial interest. The project is to train clinicians within the VA on a model of psychotherapy that you developed entirely outside of the VA, titled "seeking safety."

Describe the role of the employee in the matter. You are the [REDACTED] for this project and are responsible for developing the protocol, submitting the research for approval and funding, and making decisions regarding purchasing supplies needed to accomplish the project.

Describe disqualifying financial interest in the matter. To teach clinicians this model of psychotherapy, they will require a book that is published by [REDACTED] on which you receive royalties.

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Additionally, to conduct the research, it will also be necessary to purchase a set of training videos which you privately produced and from which you receive direct funds as they are purchased through your limited liability company [REDACTED]

Make determination required by 208(b)(1). As the official responsible for appointing you to your position, I have determined that the disqualifying financial interest in the particular matter is not so substantial as to be deemed likely to affect the integrity of your services to the Government.

The interests that are creating the disqualification include royalties on your book, "[REDACTED]", and compensation to your privately held company. Royalties on the book are [REDACTED] of the sale price, per the original contract with the publisher. The full set of videos cost \$250, but can be discounted for research studies at a rate of 15%. Profits on the videos are approximately [REDACTED] of the sales price.

You have agreed to waive any royalties to which you would be entitled, however. Also, you have agreed to donate the training videos. The VA does have legal authority to accept donations. 38 U.S.C. § 8301. VHA Handbook 1200.2 describes actions that must be taken when a gift for research purposes is contemplated. For instance, the R&D Committee and the facility Director must approve the gift. Also, the R&D Committee and IRB must approve the research project.

In light of the above, the disqualifying financial interest is essentially eliminated and therefore is not sufficiently substantial to be deemed likely to affect the integrity of your service to the Government.

Identify any limitations on the waiver. This waiver shall apply only to the project titled [REDACTED]

OGE Consultation. My Regional Counsel has consulted with the Office of Government Ethics on this waiver and I will provide them with a copy of it.

[REDACTED SIGNATURE]

10/9/07
Date

5 U.S.C. 552 (b)(6)



Department of Veterans Affairs

[REDACTED]

5 U.S.C. 552 (b)(6)

May 22, 2008

In Reply Refer To:

[REDACTED]

VA Medical Center

[REDACTED]

Dear Dr. [REDACTED]

This letter responds to your request for a waiver pursuant to 18 U.S.C. § 208(b)(1) to allow you to participate personally and substantially in a particular matter affecting a financial interest that you have in the matter which, in the absence of this waiver, would otherwise disqualify you from such participation. Specifically, 18 U.S.C. § 208(a) prohibits a Government employee from participating personally and substantially in any particular matter that has a direct and predictable effect on his or her financial interests or those of any other persons whose interests are imputed to him or her, unless the employee first obtains a written waiver pursuant to section 208(b)(1).

For the purposes of Section 208, the interests of the following persons are imputed to the employee: a spouse, minor children, or general partner; any organization in which the employee serves as an officer, director, trustee, general partner or employee; and any person or organization with which the employee is negotiating, or has an arrangement concerning, prospective employment.

This waiver is being issued based upon the information you have provided to me regarding the nature and circumstances of the particular matter involved and your full disclosure of your financial interest in the matter.

Identification of Position and Duties. You are employed at the [REDACTED] [REDACTED] working as a researcher and scientist. You were hired for your VA position to perform medical research pursuant to VA's Congressional mandate to carry out a program of medical research to contribute to the Nation's knowledge about disease and disability. 38 U.S.C. § 7303. You also have an academic appointment [REDACTED] [REDACTED] and are considered by both VA and the [REDACTED] University to be a dual-appointed personnel ("DAP"). Your research interests are in [REDACTED].

Identification of Particular Matter. As part of your VA duties, you worked with [REDACTED] to develop a method to treat Type 2 Diabetes with a special diet. Your research did not have a large set of study subjects, so more data must be accumulated to support the validity of this research. This additional work is needed to demonstrate to a potential licensing partner that your original research is valid so that the licensing partner will be willing to invest resources to market your diet to the public. The "particular matter" at issue here is the additional research on the diet. You would perform this work as part of your VA research duties in order to have access to your lab and to veterans who can serve as study subjects and who are the ultimate intended beneficiaries of your research.

5 U.S.C. 552 (b)(6)

Description of the Role of the Employee in the Matter. You will be expected to perform medical research, primarily accumulating more data to support the validity of your research. You and [REDACTED] are the best employees to perform this role because you did the original research.

5 U.S.C. 552 (b)(6)

Description of the Disqualifying Financial Interest in the Matter. You reported your invention to VA pursuant to the Determination of Rights procedure at 38 C.F.R. §1.650 *et seq.* VA asserted an ownership right in your part of the invention. VHA #04-075. You also reported your invention to the University pursuant to its policies. The University asserted its own ownership interest. Under a pre-existing agreement between VA and the University, the University bore the responsibility for attempting to market the diet. It was unsuccessful in doing so, and the responsibility for marketing the diet now rests with VA. If VA is successful at marketing the invention and if royalties result, the royalties will be paid to VA and VA will disburse the royalties in accordance with the Federal Technology Transfer Act provision on the distribution of royalties received by Federal Agencies. See 15 U.S.C. § 3710c. These royalty payments to you are capped at \$150,000 annually and are considered part of your VA salary and benefits for purposes of the exemptions of disqualifying financial interests. Therefore the royalty payments are exempt from being a disqualifying financial interest since they arise from federal Government employment. See 5 C.F.R. § 2640.203(d) and the preamble to the interim rule at 60 Fed. Reg. 44,706 (1995).

However, you are an employee of the University by virtue of your academic appointment and the compensatory perks that follow such academic appointment. You earn no salary from the University. You hold this academic appointment in order to accomplish your official VA duties, which include training students from the University at the VA Medical Center in the area of research. Thus, as a University employee, the financial interest of the University in the diet is imputed to you and is a disqualifying financial interest. You may not participate personally and substantially in a particular matter as part of your official duties that would have a direct and predictable effect on your personal financial interests or those financial interests imputed to you. Continued research concerning the diet will have a direct and predictable effect on the value and commercialization potential of the diet and thus on the financial interest of the University, an owner of the diet. The University financial interest is imputed to you as an employee of the University by virtue of your "DAP" status resulting from the academic appointment you hold in order to accomplish your official VA duties.

Determination Required by 208(b)(1). As the Official responsible for appointing you to your position, pursuant to 5 C.F.R. § 2640.301(a)(2) I have determined that the disqualifying financial interest in the particular matter is not so substantial as to be deemed likely to affect the integrity of your service to the Government.

Your role may have little impact on the financial interests at issue here. The University will not obtain any income from the invention until several events occur that are beyond your control. Regardless of the results of your research, it is quite possible that VA will not find a marketing partner. The University has a lot of experience with marketing inventions arising from academic research and was not able to find a partner. We note further that this marketing took place in [REDACTED] of the

5 U.S.C. 552 (b)(6)

██████████ and the headquarters of ██████████ and other major food companies. The failure of the University to find a licensing partner so far suggests that the likelihood of the diet being marketed is speculative at best.

Even if the diet were successfully marketed, the amount that would be received by the University is not likely to be very significant in relation to the overall income of the University. The University is a public, land-grant institution whose total budget is \$2.3 billion.¹ It is among the top five universities in licensing income in the United States.² In 2006, it had 718 active licensing agreements that brought in \$56.1 million of which \$50 million was earned by one license. The remaining 717 active licenses earned, on average, \$8,368 per year (\$6 million divided by 717), an infinitesimal portion of the overall University budget of \$2.3 billion. We can look to averages for a guide to potential royalties. The University's average royalties show that royalties for a typical invention are very insubstantial.

VA's Technology Transfer Program is relatively new and has very few licenses to use as a guide. It had four inventions over the past two years that brought in average gross royalties of \$39,000 per invention, which are then split between the owners. Even if the University earned the full \$39,000 if VA should successfully market this invention, that amount is still an infinitesimal portion of the University's overall budget of \$2.3 billion.

Moreover, your relationship with the University exists due to your work for VA. Your relationship with the University will not be affected due to your work on the particular matter. You earn no salary from the University and successful marketing of your invention will not change this, and therefore given all of the circumstances, the University's financial interest here is not so substantial as to be deemed likely to affect the integrity of your work for VA. Additionally, there is a unity of purpose among VA, the University, you and most importantly, the veteran, all of whom benefit if your research is successful.

Therefore, the disqualifying financial interest is not sufficiently substantial to be deemed likely to affect the integrity of your service to the Government.

Identification of Any Limitations on the Waiver. This waiver applies to you and your work on the particular matter, continuing to research the diet invention. This includes researching the diet invention as well as research related to the diet that could have a direct and predictable effect on the University's financial interest in the diet, which financial interest is imputed to you. This also includes, under the Federal Technology Transfer Act, 15 U.S.C. § 3710a(b)(3)(C), participating in an effort to commercialize your diet invention. This waiver does not apply to anyone else.

OGE Consultation. My Regional Counsel has, through the General Counsel's Office, consulted with the Office of Government Ethics on this waiver and will provide them with a copy of it.

¹ <http://www.budget.umn.edu/answer.htm>; http://www1.umn.edu/twincities/01_about.php

² <http://www.research.umn.edu/techcomm/venturecenter/>



Department of Veterans Affairs

RECEIVED

JUN 23 2008

VA REGIONAL COUNSEL

[REDACTED]

June 19, 2008

In Reply Refer To:

[REDACTED]

5 U.S.C. 552 (b)(6)

VA Medical Center

[REDACTED]

Dear Dr. [REDACTED]:

This letter responds to your request for a waiver pursuant to 18 U.S.C. § 208(b)(1) to allow you to participate personally and substantially in a particular matter affecting a financial interest that you have in the matter which, in the absence of this waiver, would otherwise disqualify you from such participation. Specifically, 18 U.S.C. § 208(a) prohibits a Government employee from participating personally and substantially in any particular matter that has a direct and predictable effect on his or her financial interests or those of any other persons whose interests are imputed to him or her, unless the employee first obtains a written waiver pursuant to section 208(b)(1).

For the purposes of Section 208, the interests of the following persons are imputed to the employee: a spouse, minor children, or general partner; any organization in which the employee serves as an officer, director, trustee, general partner or employee; and any person or organization with which the employee is negotiating, or has an arrangement concerning, prospective employment.

This waiver is being issued based upon the information you have provided to me regarding the nature and circumstances of the particular matter involved and your full disclosure of your financial interest in the matter.

Identification of Position and Duties. You are employed at the [REDACTED] VA Medical Center working as a physician. You also perform medical research pursuant to VA's Congressional mandate to carry out a program of medical research to contribute to the Nation's knowledge about disease and disability. 38 U.S.C. § 7303. You also have an academic appointment at the [REDACTED] "University") and are considered by both VA and the University to be a dual-appointed personnel ("DAP"). Your research interests are in diabetes and nutrition.

5 U.S.C. 552 (b)(6)

Identification of Particular Matter. As part of your VA duties, you worked with [REDACTED] to develop a method to treat Type 2 Diabetes with a special diet. Your research did not have a large set of study subjects, so more data must be accumulated to support the validity of this research. This additional work is needed to demonstrate to a potential licensing partner that your original research is valid so that the licensing partner will be willing to invest resources to market your diet to the public. The "particular matter" at issue here is the diet invention and your participation in the matter through additional research on the diet. You would perform this work as part of your VA research duties in order to have access to your lab and to veterans who can serve as study subjects and who are the ultimate intended beneficiaries of your research.

5 U.S.C. 552 (b)(6)

Description of the Role of the Employee in the Matter. You will be expected to perform medical research, primarily accumulating more data to support the validity of your research. You and [REDACTED] are the best employees to perform this role because you did the original research.

5 U.S.C. 552 (b)(6)

Description of the Disqualifying Financial Interest in the Matter. You reported your invention to VA pursuant to the Determination of Rights procedure at 38 C.F.R. § 1.650 *et seq.* VA did not assert an ownership right in your part of the invention but did assert an ownership interest in [REDACTED]'s interest. VHA #04-075. You also reported your invention to the University pursuant to its policies. The University asserted its own ownership interest. Under a pre-existing agreement between VA and the University, the University bore the responsibility for attempting to market the diet as to [REDACTED]'s interest. To facilitate marketing of the invention, you assigned your interest in the invention to the University. See attached assignment. But the University was unsuccessful in marketing the invention, and the responsibility for marketing the diet now rests with VA. If VA is successful at marketing the invention and if royalties result, the royalties will be paid to VA and VA will disburse the royalties in accordance with the Federal Technology Transfer Act provision on the distribution of royalties received by Federal Agencies. See 15 U.S.C. § 3710c. These royalty payments to you are capped at \$150,000 annually and are considered part of your VA salary and benefits for purposes of the exemptions of disqualifying financial interests. Therefore the royalty payments are exempt from being a disqualifying financial interest since they arise from federal Government employment. See 5 C.F.R. § 2640.203(d) and the preamble to the interim rule at 60 Fed. Reg. 44,706 (1995).

5 U.S.C. 552 (b)(6)

However, you are an employee of the University by virtue of your academic appointment and the compensatory perks that follow such academic appointment. You earn no salary from the University. You hold this academic appointment in order to accomplish your official VA duties, which include training students from the University at the VA Medical Center in the area of research. Thus, as a University employee, the financial interest of the University in the diet is imputed to you and is a disqualifying financial interest. You may not participate personally and substantially in a particular matter as part of your official duties that would have a direct and predictable effect on your personal financial interests or those financial interests imputed to you. Continued research concerning the diet will have a direct and predictable effect on the value and commercialization potential of the diet and thus on the financial interest of the University, an owner of the diet. The University financial interest is imputed to you as an employee of the University by virtue of your "DAP" status resulting from the academic appointment you hold in order to accomplish your official VA duties.

Determination Required by 208(b)(1). As the Official responsible for appointing you to your position, pursuant to 5 C.F.R. § 2640.301(a)(2), I have determined that the disqualifying financial interest in the particular matter is not so substantial as to be deemed likely to affect the integrity of your service to the Government.

Your role may have little impact on the financial interests at issue here. The University will not obtain any income from the invention until several events occur that are beyond your control. Regardless of the results of your research, it is quite possible that VA will not find a marketing partner. The University has a lot of experience with marketing inventions arising from academic research and was not able to find a partner. We note further that this marketing took place in [REDACTED] of the World and the headquarters of [REDACTED] and other major food companies. The failure of the University to find a licensing partner so far suggests that the likelihood of the diet being marketed is speculative at best.

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Even if the diet were successfully marketed, the amount that would be received by the University is not likely to be very significant in relation to the overall income of the University. The University is a public, land-grant institution whose total budget is \$2.3 billion.¹ It is among the top five universities in licensing income in the United States.² In 2006, it had 718 active licensing agreements that brought in \$56.1 million of which \$50 million was earned by one license. The remaining 717 active licenses earned, on average, \$8,368 per year (\$6 million divided by 717), an infinitesimal portion of the overall University budget of \$2.3 billion. We can look to averages for a guide to potential royalties. The University's average royalties show that royalties for a typical invention are very insubstantial.

VA's Technology Transfer Program is relatively new and has very few licenses to use as a guide. It had four inventions over the past two years that brought in average gross royalties of \$39,000 per invention per year, which are then split between the owners. Even if the University earned the full \$39,000 if VA should successfully market this invention, that amount is still an insubstantial portion of the University's overall budget of \$2.3 billion.

Moreover, your relationship with the University exists due to your work for VA. Your relationship with the University will not be affected due to your work on the particular matter. You earn no salary from the University and successful marketing of your invention will not change this, and therefore given all of the circumstances, the University's financial interest here is not so substantial as to be deemed likely to affect the integrity of your work for VA. Additionally, there is a unity of purpose among VA, the University, you and most importantly, the veteran, all of whom benefit if your research is successful.

Therefore, the disqualifying financial interest is not sufficiently substantial to be deemed likely to affect the integrity of your service to the Government.

¹ <http://www.budget.umn.edu/answer.htm>; http://www1.umn.edu/twincities/01_about.php

² <http://www.research.umn.edu/techcomm/venturecenter/>

Identification of Any Limitations on the Waiver. This waiver applies to you and your work on the particular matter, continuing to research the diet invention. This includes researching the diet invention as well as research related to the diet that could have a direct and predictable effect on the University's financial interest in the diet, which financial interest is imputed to you. This also includes, under the Federal Technology Transfer Act, 15 U.S.C. § 3710a(b)(3)(C), your participating in an effort to commercialize your diet invention. This waiver does not apply to anyone else.

OGE Consultation. My Regional Counsel has, through the General Counsel's Office, consulted with the Office of Government Ethics on this waiver and will provide them with a copy of it.

Public Availability. Pursuant to 5 C.F.R. § 2640.304, a copy of this waiver shall be made available upon request to the public in accordance with the procedures described in 5 C.F.R. § 2634.603. In making this waiver publicly available, certain information may be withheld in accordance with 5 C.F.R. § 2640.304(b).

A large black rectangular redaction covers the signature of the Medical Center Director.

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Medical Center Director



VETERANS HEALTHCARE SYSTEM

12 [REDACTED]

March 13, 2008

Dr. [REDACTED] **5 U.S.C. 552 (b)(6)**

[REDACTED]
VA Medical Center
[REDACTED]

Subj: Granting Title 18 USC Section 208(b)(1) Waiver

This letter responds to your request for a waiver pursuant to 18 U.S.C. § 208(b)(1) to allow you to participate personally and substantially in a particular matter affecting your financial interest, which, in the absence of this waiver, would otherwise disqualify you from such participation. Specifically, 18 U.S.C. § 208(a) prohibits a Government employee from participating personally and substantially in any particular matter that has a direct and predictable effect on his financial interests or those of any other persons whose interests are imputed to him, unless he first obtains a written waiver pursuant to section 208(b)(1).

For the purposes of Section 208, the interests of the following persons are imputed to the employee: a spouse, minor children, or general partner; any organization in which the employee serves as an officer, director, trustee, general partner or employee; and any person or organization with which the employee is negotiating, or has an arrangement concerning, prospective employment.

This waiver is being issued based upon the information you have provided to me regarding the nature and circumstances of the particular matter involved in your full disclosure of your financial interest in the matter.

5 U.S.C. 552 (b)(6)

You are [REDACTED] at the Department of Veterans Affairs Medical Center, [REDACTED]. In your position, you are [REDACTED] responsible for the supervision [REDACTED]

5 U.S.C. 552 (b)(6)

As part of your official duties you will be involved in a particular matter in which you have an imputed financial interest. The particular matter involves the review and

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New York, NY 10010
(212) 666-7500

VA Medical Center
79 Middleville Road
NorthPort, NY 11786
(631) 261-4400

VA Hudson Valley Healthcare System
Route 90
Castle Point, NY 12511
(914) 831-2000

P.O. Box 100
Montrose, NY 10548
(914) 737-4400

VA New Jersey Healthcare System
385 Tremont Avenue
East Orange, NJ 07018
(973) 676-1000

151 Knollcroft Road
Lyons, NJ 07939
(908) 647-0850

approval of referrals of VA patients to the [redacted] at [redacted] (affiliate) for treatment. VAMC [redacted] does not have tertiary care capabilities. VA refers patients to a tertiary care facility in emergent (life and death) situations. The only tertiary care facility within a safe enough driving distance to ensure patient well-being is [redacted]. The other local hospitals do not provide tertiary care and the VA tertiary care facility is too far away.

With respect to this particular matter you will be reviewing and approving patient referrals to the affiliate for treatment. The attending physician makes the initial recommendation of whether the patient requires immediate transfer to a tertiary care facility. You work collaboratively with the attending to review the recommendations and to discuss resources to assist the patient. You are the only physician available seven days per week at the facility who can authorize referrals of patients. You would authorize referral if, after discussion with the attending, you find that such referral is in the best interest of the patient. The referral is then reviewed within twenty-four hours by a VA physician who is not affiliated with the University.

Your disqualifying financial interest in the particular matter described above is your part-time employment with the affiliate [redacted] as an Associate Professor [redacted]. This imputed interest as an employee is likely to be affected by the particular matter, because [redacted] benefits each time a patient is referred to their hospital.

As the Government official to whom authority has been given to issue such a waiver, I have determined that the disqualifying financial interest in the particular matter is not so substantial as to be deemed likely to affect the integrity of your service to the Government.

There is no indication that the stipend you receive from the affiliate is contingent on your making referrals, nor that the value of the stipend is based on the number of referrals you make to the affiliate. Therefore, you have no personal financial interest in the referrals. The disqualifying interest is only that which is imputed to you because of your employment at the affiliate.

You have provided information that there were 368 referrals to [redacted] in 2006. The total revenues for the affiliate for 2006 was \$700 million with referrals from the [redacted] accounting for \$700,000.00 making the value of the referrals less than one-tenth of one percent (.1%). The referrals are an insignificant portion of the revenues for the affiliate and thus the disqualifying interest is not so substantial as to be deemed likely to affect the integrity of your service to the Government.

5 U.S.C. 552 (b)(6)

Therefore, it is my opinion that the disqualifying financial interest in this instance is not sufficiently substantial as to be deemed likely to affect the integrity of your service to the Government. In fact, the financial interest is quite insubstantial. Additionally, the

VA Medical Center 130 W. Kengsbridge Road Bronx, NY 10468 (718) 584-9000	VA New York Harbor Healthcare System 800 Poly Place Brooklyn, NY 11209 (718) 636-6600	VA Medical Center 423 East 23 Street New York, NY 10010 (212) 686-7500	VA Medical Center 79 Middleville Road NorthPort, NY 11768 (631) 261-4400	VA Hudson Valley Healthcare System Route 9d Castle Point, NY 12511 (914) 831-2000	VA Hudson Valley Healthcare System P.O. Box 100 Montrose, NY 10548 (914) 737-4400	VA New Jersey Healthcare System 385 Tremont Avenue East Orange, NJ 07018 (973) 676-1000	VA New Jersey Healthcare System 151 Knobcrott Road Lyons, NJ 07938 (908) 647-0850
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referrals do not impact your salary from [REDACTED] nor is your salary contingent on your making referrals

This waiver shall apply to your referral of patients only [REDACTED] and not to any other institution in which you may have an actual or imputed financial interest.

My Regional Counsel has, through the General Counsel's Office, consulted with the Office of Government Ethics on this waiver and will provide them with a copy of it.

In preparing this waiver request it became evident that you had already been participating in particular matters affecting the interests of your outside employer, [REDACTED] by making patient referrals. However, you took this action only after you had been granted the waiver and no one knew that the waiver failed to discuss the imputed interest of the University. This case was discussed with the Inspector General's Office, which in turn discussed it with an Assistant United States Attorney, who declined to prosecute. This waiver replaces the earlier waiver you were granted.

Pursuant to 5 C.F.R. § 2640.304, a copy of this waiver shall be made available upon request to the public in accordance with the procedures described in 5 C.F.R. § 2634.603. In making this waiver publicly available, certain information may be withheld in accordance with 5 C.F.R. § 2640.304(b).

5 U.S.C. 552 (b)(6)

[REDACTED]

Acting Network Director

[REDACTED]

5 U.S.C. 552 (b)(6)

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DEPARTMENT OF VETERANS AFFAIRS
Office of the General Counsel
Washington DC 20420

In Reply Refer To:

024J

5 U.S.C. 552 (b)(6)

[REDACTED]
Locke Lord Bissell & Liddell, LLP
JP Morgan Chase Tower, Ste. 3400
600 Travis Street
Houston, Texas 77002

Re: Potential Conflict of Interest

Dear [REDACTED]

5 U.S.C. 552 (b)(6)

Your colleague [REDACTED] disclosed a potential conflict of interest between Locke Lord Bissell & Liddell, LLP's representation of VA in the patent prosecution of two inventions entitled "Methods for Modeling Infectious Disease and Chemosensitivity in Cultured Cells and Tissues" (VHA 01-066) and "Automated Constraint-Induced Therapy Extension (AutoCITE)" (VHA 05-119) and the proposed pro-bono representation of an individual Veteran by your firm. In the proposed pro-bono representation, your firm would be representing a Veteran who has elected to challenge a Department of Veterans Affairs (VA) decision seeking a refund of benefits paid to the Veteran. Thank you for bringing this issue to our attention.

We have reviewed the disclosed conflict of interest, examined the underlying facts as to VA's involvement in the patent prosecution matters, and reviewed the potential conflicts insofar as VA is concerned.

Our Department is committed to ensuring that Veterans, their dependents, and survivors receive all VA benefits and services to which they are entitled. Accordingly, we consent to a waiver of the representation of the Veteran by your firm. Our consent is expressly conditioned upon your firm's maintenance of a screening wall between those attorneys who prosecute patent matters on behalf of VA and any attorney(s) who represents this Veteran against VA. Please also note that VA recently amended 38 C.F.R. part 14 to implement the accreditation and fee provisions of Public Law 109-461. See 73 Fed. Reg. 29,852-29,880. Your firm's attorneys who represent claimants before the Department must comply with these regulations.

We appreciate your on-going interest in our mutual commitment to serve our nation's Veterans.

Sincerely yours,

Will A. Gunn
General Counsel

5 U.S.C. 552 (b)(2)

08/19/09

Conflict of Interest(s)/gclaws 1

5 U.S.C. 552 (b)(2)



DEPARTMENT OF VETERANS AFFAIRS
Office of the General Counsel
Washington DC 20420

In Reply Refer To: 024J

Ms. [REDACTED] 5 U.S.C. 552 (b)(6)
Dykema Gossett PLLC
2723 South State Street
Suite 400
Ann Arbor, MI 48104

Re: Potential Conflicts of Interest

Dear Ms. [REDACTED] 5 U.S.C. 552 (b)(6)

I apologize for the delay in responding to your April 18, 2008 letter in which you disclosed a potential conflict of interest between Dykema Gossett's representation of VA in the patent prosecution of an invention entitled "Automated Diabetes Control in the ICU" and the proposed representation of individual veterans by your firm in several cases referred to you by the National Veterans Legal Services Program (NVLSP) in Washington, DC. You requested both a blanket waiver for all future representation of veterans referred to your firm by NVLSP as well as a waiver of any conflicts of interest relating to a specific veteran,

[REDACTED]. Thank you for bringing this issue to our attention.
5 U.S.C. 552 (b)(6)

We have reviewed your disclosure, examined the underlying facts as to VA's involvement in each matter, and reviewed the potential conflicts of interest insofar as VA is concerned.

Our Department is committed to ensuring that veterans, their dependents, and survivors receive all VA benefits and services to which they are entitled. Accordingly, we consent to a blanket waiver for all representation of claimants that Dykema Gossett PLLC undertakes before VA, the U.S. Court of Appeals for Veterans Claims, or on appeal of decisions from that court. We are consenting on the condition that, as specified in your letter, your firm will maintain a screening wall between those attorneys who prosecute patent matters on behalf of VA and any attorneys who represent claimants for VA benefits and services. Please also note that VA recently amended 38 C.F.R. part 14 to implement the accreditation and fee provisions of Public Law 109-461. See 73 Fed. Reg. 29,852-29,880. Dykema Gossett attorneys who represent claimants before the Department must comply with these regulations.

2.

Ms. [REDACTED] **5 U.S.C. 552 (b)(6)**

We appreciate your on-going interest in our mutual commitment to serve our nation's veterans.

Sincerely yours,

Paul J. Hutter
General Counsel

cc: [REDACTED]

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[REDACTED] 8

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[REDACTED] 08/12/08 [REDACTED] 2 Conflict of Interest(s)/ [REDACTED]