



State of North Carolina

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August 25, 2014

North Carolina Senate President Pro Tempore Phil Berger
North Carolina House of Representatives Speaker Thom Tillis
Co-Chairs, Joint Legislative Commission on Governmental Operations

Senator Stan Bingham
Senator Buck Newton
Representative Jamie Boles
Representative N. Leo Daughtry
Representative John Faircloth
Representative Pat Hurley
Co-Chairs, Appropriations Subcommittee on Justice and Public Safety

North Carolina General Assembly
Raleigh, North Carolina 27601-1096

RE: G.S. §114-2.5; Report on Settlement Agreement for Duke University
Health System, Inc.

Dear Members:

Section 114-2.5 of the North Carolina General Statutes requires the Attorney General to report to the Joint Legislative Commission on Governmental Operations and the Chairs of the Appropriations Subcommittees on Justice and Public Safety regarding all settlements and court orders which result in more than \$75,000.00 being paid to the State. Pursuant to that statute, I am writing regarding the settlement of claims for Medicaid reimbursement to the state and federal governments in the above-referenced matter. Pursuant to federal law (42 C.F.R. § 433.320) recoveries in these cases are shared on a pro rata basis by the state and federal governments.

A Settlement Agreement has been executed between Duke University Health System, Inc. and the State of North Carolina. Duke is a non-profit corporation that operates three hospitals: (1) Duke University Hospital, (2) Duke Regional Hospital, and (3) Duke Raleigh Hospital.

The settlement resolves allegations that from December 31, 2006 through February 6, 2014, Duke submitted claims for services provided by physician assistants ("PAs") during coronary bypass surgeries when the PAs were acting as surgical assistants (along with graduate medical trainees), which is not allowed under government regulations and (b) services of ancillary personnel involved in psychiatric encounters that did not meet applicable, physician supervision requirements. It was also alleged that Duke unbundled claims by adding Modifier 59 to certain claims when the use of Modifier 59 was not appropriate.

Under the terms of North Carolina's settlement, the State of North Carolina will recover \$1,000,000.00. Of that amount the federal government will receive \$872,703.08 for federal health care programs and North Carolina's federal portion of Medicaid recoveries. Pursuant to G.S. § 1-610, the qui tam plaintiffs whose whistleblower actions brought this matter to the government's attention will receive \$38,000.00 of North Carolina's recovery. The North Carolina Medicaid Program will receive \$29,378.17 as restitution. In addition, pursuant to Article IX, Section 7 of the North Carolina Constitution and G.S. § 115C-457.1, the penalty portion of the settlement in the amount of \$57,079.11 will be paid to the Civil Penalty Forfeiture Fund for the support of North Carolina public schools. Pursuant to G.S. § 115C-457.2 and G.S. § 108A-70.12(b)(3), the North Carolina Department of Justice will receive \$2,839.64 for investigative costs and costs of collection.

We will be happy to respond to any questions you may have regarding this report.

Very truly yours,



Kristi Jones
Chief of Staff

KJ:ng

cc: Kristine Leggett, NCGA Fiscal Research Division
Christy Agner, NCDOJ, Legislative Liaison
Nels Roseland, NCDOJ, Deputy Chief of Staff

SETTLEMENT AGREEMENT

This Settlement Agreement (Agreement) is entered into among the United States of America, acting through the United States Department of Justice, by and through the United States Attorney's Office for the Eastern District of North Carolina, and on behalf of the Office of Inspector General (OIG-HHS) of the Department of Health and Human Services (HHS), the Defense Health Agency (DHA), which administers the TRICARE program, and the State of North Carolina, acting through the North Carolina Attorney General's Office (collectively as the "Government"), Duke University Health System, Inc. (DUHS), and Leslie Johnson ("Relator") (hereafter collectively referred to as "the Parties"), through their authorized representatives.

RECITALS

A. DUHS is a non-profit corporation that operates three hospitals: (1) Duke University Hospital, (2) Duke Regional Hospital (formerly known as Durham Regional Hospital), and (3) Duke Raleigh Hospital (formerly known as Duke Health Raleigh Hospital). DUHS provides medical services to Medicare, Medicaid and TRICARE recipients and bills the Government for payment for said services.

B. On December 31, 2012, Leslie Johnson filed a qui tam action in the United States District Court for the Eastern District of North Carolina (the "Court") captioned United States of America and State of North Carolina ex rel. Leslie Johnson v. Duke University Health System, Inc, et al., Case No. 5:12-CV-822-BO, pursuant to the qui tam provisions of the False Claims Act (FCA), 31 U.S.C. § 3730 and the North Carolina False Claims Act (NCFCA), N.C. General Statutes § 1-605, et. seq., alleging

that Defendants violated the FCA and NCFCA by submitting or causing to submit false claims to the Medicare and Medicaid programs (the Civil Action). Relator also alleges that she was wrongfully terminated from her employment at DUHS in violation of 31 U.S.C. § 3730(h) and N.C. General Statute 1-613. The Government partially intervened in the Civil Action and filed an Amended Complaint on March 14, 2014.

C. The Government contends that DUHS submitted or caused to be submitted claims for payment to the Medicare Program (Medicare), Title XVIII of the Social Security Act, 42 U.S.C. §§ 1395-1395kkk-1, the Medicaid Program (Medicaid), Title XIX of the Social Security Act, 42 U.S.C. §§ 1396, et seq., and the TRICARE Program, 10 U.S.C. §§ 1071-1110b.

D. The Government contends that it has certain civil claims against DUHS arising from the following actions taken during the period from December 31, 2006 through February 6, 2014: (1) submitting claims to the Medicare, North Carolina Medicaid, and TRICARE programs for (a) services provided by physician assistants (“PAs”) during coronary bypass surgeries when the PAs were acting as surgical assistants (along with graduate medical trainees), which is not allowed under government regulations and (b) services of ancillary personnel involved in psychiatric encounters that did not meet applicable, physician supervision requirements; and (2) unbundling claims by adding Modifier 59 to certain claims submitted to the Medicare, North Carolina Medicaid and TRICARE programs when the use of Modifier 59 was not appropriate, specifically the use of Modifier 59 in connection with (a) CPT codes 36000 and/or 90774 or 96374 with cardiac related services performed during the same encounter, (b) CPT codes 36556 and 93503 in anesthesia cases, and (c) CPT code 36000 when the code was

billed in conjunction with anesthesia services. All of the conduct described in this Paragraph is referred to below as the Covered Conduct.

E. This Settlement Agreement is neither an admission of liability by DUHS nor a concession by the Government that its claims are not well founded.

F. Relator claims entitlement under 31 U.S.C. § 3730(d) and N.C. General Statute 1-610 to a share of the proceeds of this Settlement Agreement and to Relator's reasonable expenses, attorneys' fees and costs.

To avoid the delay, uncertainty, inconvenience, and expense of protracted litigation of the above claims, and in consideration of the mutual promises and obligations of this Settlement Agreement, the Parties agree and covenant as follows:

TERMS AND CONDITIONS

1. DUHS shall pay to the United States one million dollars (\$1,000,000.00) (Settlement Amount) no later than 10 business days after the Effective Date of this Agreement by electronic funds transfer pursuant to written instructions to be provided by the United States Attorney's Office for the Eastern District of North Carolina. Said written instructions shall be provided no later than 5 business days of the Effective Date of this Agreement.

2. Conditioned upon the United States receiving the Settlement Amount from DUHS and as soon as feasible after receipt, the United States shall pay Relator an amount agreed upon in a separate agreement between the Government and Relator, or, if no agreement is reached with respect to the Relator's share, the amount ordered by the Court upon Relator's application.

3. Relator's claims against DUHS for expenses, attorney's fees and costs, as well as her wrongful termination claims under subsection 3730(h) and N.C. General Statute 1-613 are not resolved through this Agreement and will be the subject of separate negotiations between Relator and DUHS.

4. Subject to the exceptions in Paragraph 7 (concerning excluded claims) below, and conditioned upon DUHS's full payment of the Settlement Amount, the Government releases DUHS, as well as: (i) Duke University, (ii) Duke University Affiliated Physicians, Inc., (iii) Duke PRMO, LLC d/b/a Patient Revenue Management Organization; (iv) Private Diagnostic Clinic, PLLC, the faculty practice plan of Duke University; and (v) Associated Health Services, Inc. d/b/a James E. Davis Ambulatory Surgical Center, and all of their current and former directors, officers, employees, members, medical staff, and agents (collectively the "DUHS Released Parties"), from any civil or administrative monetary claim the Government has for the Covered Conduct 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; the North Carolina False Claims Act, N.C. General Statutes § 1-605, et. seq., or the common law theories of payment by mistake, unjust enrichment, and fraud.

5. Subject to the exceptions in Paragraph 7 below, and conditioned upon DUHS's full payment of the Settlement Amount, Relator, for herself and for her heirs, successors, attorneys, agents, and assigns, releases the DUHS Released Parties from any civil monetary claim the relator has on behalf of the Government for the Covered

Conduct under the False Claims Act, 31 U.S.C. §§ 3729-3733 and the N.C. False Claims Act, 1-605, et seq.

6. DHA expressly reserves all rights to institute, direct, or to maintain any administrative action seeking exclusion against DUHS from the TRICARE Program under 32 C.F.R. §§ 199.9 (f)(1)(i)(A), (f)(1)(i)(B), and (f)(1)(iii), based upon the Covered Conduct.

7. Notwithstanding the releases given in paragraphs 4 and 5 of this Agreement, or any other term of this Agreement, the following claims of the Government are specifically reserved and are not released:

- a. Any liability arising under Title 26, U.S. Code (Internal Revenue Code);
- b. Any criminal liability;
- c. Except as explicitly stated in this Agreement, any administrative liability, including mandatory or permissive exclusion from Government health care programs;
- d. Any liability to the Government (or its agencies) for any conduct other than the Covered Conduct;
- e. Any liability based upon obligations created by this Agreement;
- f. Any liability for express or implied warranty claims or other claims for defective or deficient products or services, including quality of goods and services;
- g. Any liability for failure to deliver goods or services due;

h. Any liability for personal injury or property damage or for other consequential damages arising from the Covered Conduct; and

i. Any liability of individuals, except as specifically provided herein.

8. Relator and her heirs, successors, attorneys, agents, and assigns shall not object to this Agreement but agree and confirm that this Agreement is fair, adequate, and reasonable under all the circumstances, pursuant to 31 U.S.C. § 3730(c)(2)(B) and North Carolina General Statutes § 1-609(c). In connection with this Agreement and this Civil Action, Relator and her heirs, successors, attorneys, agents, and assigns agree that neither this Agreement, any intervention by the Government in the Civil Action in order to dismiss the Civil Action, nor any dismissal of the Civil Action, shall waive or otherwise affect the ability of the Government to contend that provisions in the False Claims Act, including 31 U.S.C. §§ 3730(d)(3) and 3730(e) and N.C. False Claims Act, North Carolina General Statutes §§ 1-610(f) and 1-611, bar Relator from sharing in the proceeds of this Agreement. Moreover, the Government and Relator and his/her heirs, successors, attorneys, agents, and assigns agree that they each retain all of their rights pursuant to the False Claims Act and the N.C. False Claims Act on the issue of the share percentage, if any, that Relator should receive of any proceeds of the settlement of her claim(s), and that no agreement concerning Relator share has been reached to date.

9. DUHS waives and shall not assert any defenses DUHS may have to any criminal prosecution or administrative action relating to the Covered Conduct that may be based in whole or in part on a contention that, under the Double Jeopardy Clause in the Fifth Amendment of the Constitution, or under the Excessive Fines Clause in the Eighth Amendment of the Constitution, this Agreement bars a remedy sought in such criminal

prosecution or administrative action. Nothing in this paragraph or any other provision of this Agreement constitutes an agreement by the Government concerning the characterization of the Settlement Amount for purposes of the Internal Revenue laws, Title 26 of the United States Code.

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

11. The Settlement Amount shall not be decreased as a result of the denial of claims for payment now being withheld from payment by any Medicare contractor (e.g., Medicare Administrative Contractor, fiscal intermediary, carrier), TRICARE carrier or payer or any state payer, related to the Covered Conduct; and DUHS agrees not to resubmit to any Medicare contractor, TRICARE carrier or payer, or any state payer any previously denied claims related to the Covered Conduct, and agrees not to appeal any such denials of claims.

12. DUHS agrees to the following:

a. Unallowable Costs Defined: All costs (as defined in the Federal Acquisition Regulation, 48 C.F.R. § 31.205-47; and in Titles XVIII and XIX of the Social Security Act, 42 U.S.C. §§ 1395-1395kkk-1 and 1396-1396w-5; and the regulations and official program directives promulgated thereunder) incurred by or on

behalf of DUHS, its present or former officers, directors, employees, shareholders, and agents in connection with:

- (1) the matters covered by this Agreement;
- (2) the Government's audit(s) and civil investigation(s) of the matters covered by this Agreement;
- (3) DUHS's investigation, defense, and corrective actions undertaken in response to the Government's audit(s) and civil investigation(s) in connection with the matters covered by this Agreement (including attorney's fees);
- (4) the negotiation and performance of this Agreement; and
- (5) the payment DUHS makes to the Government pursuant to this Agreement and any payments that DUHS may make to Relator, including costs and attorney's fees.

b. Future Treatment of Unallowable Costs: If applicable, Unallowable Costs shall be separately determined and accounted for by DUHS, and DUHS shall not charge such Unallowable Costs directly or indirectly to any contracts with the Government or any State Medicaid program, or seek payment for such Unallowable Costs through any cost report, cost statement, information statement, or payment request submitted by DUHS or any of its subsidiaries or affiliates to the Medicare, Medicaid, TRICARE, or FEHBP Programs.

c. Treatment of Unallowable Costs Previously Submitted for Payment: If applicable, DUHS further agrees that within 90 days of the Effective Date of this Agreement it shall identify to applicable Medicare and TRICARE fiscal intermediaries,

carriers, and/or contractors, and Medicaid and FEHBP fiscal agents, any Unallowable Costs (as defined in this Paragraph) included in payments previously sought from the Government, or any State Medicaid program, including, but not limited to, payments sought in any cost reports, cost statements, information reports, or payment requests already submitted by DUHS or any of its subsidiaries or affiliates, and shall request, and agree, that such cost reports, cost statements, information reports, or payment requests, even if already settled, be adjusted to account for the effect of the inclusion of the Unallowable Costs. DUHS agrees that the Government, at a minimum, shall be entitled to recoup from DUHS any overpayment plus applicable interest and penalties as a result of the inclusion of such Unallowable Costs on previously-submitted cost reports, information reports, cost statements, or requests for payment.

Any payments due after the adjustments have been made shall be paid to the Government pursuant to the direction of the Department of Justice and/or the affected agencies. The Government reserves its rights to disagree with any calculations submitted by DUHS or any of its subsidiaries or affiliates on the effect of inclusion of Unallowable Costs (as defined in this Paragraph) on DUHS or any of its subsidiaries or affiliates' cost reports, cost statements, or information reports.

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

13. DUHS agrees to cooperate fully and truthfully with the Government's investigation of the Covered Conduct with respect to individuals and entities not released

in this Agreement. Upon reasonable notice, DUHS shall encourage, and agrees not to impair, such cooperation of its directors, officers, and employees, and shall use its best efforts to make available, and encourage, such cooperation of former directors, officers, and employees for interviews and testimony, consistent with the rights and privileges of such individuals. DUHS further agrees to furnish to the Government, upon request, complete and unredacted copies of all non-privileged documents, reports, memoranda of interviews, and records in its possession, custody, or control concerning any investigation of the Covered Conduct that it has undertaken, or that has been performed by another on its behalf.

14. Except as specifically provided herein, this Agreement is intended to be for the benefit of the Parties only. The Parties do not release any claims against any other person or entity, except to the extent provided for in Paragraphs 4 and 5, above, and 15 (waiver for beneficiaries paragraph), below.

15. DUHS agrees that it waives and shall not seek payment for any of the health care billings covered by this Agreement from any health care beneficiaries or their parents, sponsors, legally responsible individuals, or third party payors based upon the claims defined as Covered Conduct.

16. Upon receipt of the payment described in Paragraph 1, above, the Parties shall promptly sign and file in the Civil Action a Joint Stipulation of Dismissal of the Civil Action pursuant to Rule 41(a)(1), which shall provide that the action is being dismissed subject to the terms of this settlement, and that as to the Government the action is being dismissed with prejudice as to the Covered Conduct released in the Settlement

Agreement, and without prejudice as to any other claims and that as to the Relator the entire action is being dismissed with prejudice.

17. Each Party shall bear its own legal and other costs incurred in connection with this matter, including the preparation and performance of this Agreement, except as provided in the separate agreement described in paragraph 3, above.

18. Each Party and signatory to this Agreement represents that it freely and voluntarily enters in to this Agreement without any degree of duress or compulsion.

19. This Agreement is governed by the laws of the United States. The exclusive jurisdiction and venue for any dispute relating to this Agreement is the United States District Court for the Eastern District of North Carolina. For purposes of construing this Agreement, this Agreement shall be deemed to have been drafted by all Parties to this Agreement and shall not, therefore, be construed against any Party for that reason in any subsequent dispute.

20. This Agreement constitutes the complete agreement between the Parties, except for any separate agreements between DUHS and Relator (Leslie Johnson) and between the Government and Leslie Johnson referenced in Paragraphs 2 and 3, above. This Agreement may not be amended except by written consent of the Parties.

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

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

23. This Agreement is binding on DUHS and inures to the benefit of the DUHS Released Parties and DUHS's successors, transferees, heirs, and assigns.

24. This Agreement is binding on Relator's successors, transferees, heirs, and assigns.

25. All Parties consent to the Government's disclosure of this Agreement, and information about this Agreement, to the public.

26. This Agreement is effective on the date of signature of the last signatory to the Agreement (Effective Date of this Agreement). Facsimiles of signatures shall constitute acceptable, binding signatures for purposes of this Agreement.

THE UNITED STATES OF AMERICA

DATED: 3/21/14

THOMAS G. WALKER
United States Attorney

BY: Joshua B. Royster
JOSHUA B. ROYSTER
Assistant United States Attorney
Eastern District of North Carolina

DATED: 3/21/14

BY: [Signature]
ROBERT K. DECONTI
Assistant Inspector General for Legal Affairs
Office of Counsel to the
Inspector General
Office of Inspector General
United States Department of
Health and Human Services

DATED: 17 Mar 14

BY: B. J. Hutten Dep GC
for PAUL J. HUTTER
General Counsel
Defense Health Agency
United States Department of Defense

THE STATE OF NORTH CAROLINA

DATED: _____


ROY COOPER
ATTORNEY GENERAL

BY: _____

STACY M. RACE
Assistant Attorney General
Medicaid Investigations Division

DUKE UNIVERSITY HEALTH SYSTEM, INC.

DATED: 3/17/14

BY: 
William J. Fulkerson, Jr., MD
Executive Vice President

DATED: _____

BY: _____

FREDERICK ROBINSON
MEGAN F. ENGEL
Fulbright & Jaworski LLP
Counsel for Duke University Health System, Inc.

THE STATE OF NORTH CAROLINA

DATED: _____

ROY COOPER
ATTORNEY GENERAL

BY: Executed by Charles H. Hobgood
STACY M. RACE on separate page
Assistant Attorney General
Medicaid Investigations Division

DUKE UNIVERSITY HEALTH SYSTEM, INC.

DATED: _____

BY: _____
William J. Fulkerson, Jr., MD
Executive Vice President

DATED: 3/17/2014

BY: Frederick Robinson
FREDERICK ROBINSON
MEGAN F. ENGEL
Fulbright & Jaworski LLP
Counsel for Duke University Health System, Inc.

THE STATE OF NORTH CAROLINA

DATED: 3/19/2014

ROY COOPER
ATTORNEY GENERAL

BY: Charles H. Hobgood
CHARLES H. HOBGOOD
Special Deputy Attorney General
Medicaid Investigations Division

DUKE UNIVERSITY HEALTH SYSTEM, INC.

DATED: _____

BY: _____
William J. Fulkerson, Jr., MD
Executive Vice President

DATED: _____

BY: _____
FREDERICK ROBINSON
MEGAN F. ENGEL
Fulbright & Jaworski LLP
Counsel for Duke University Health System, Inc.

LESLIE JOHNSON

DATED: 3/14/2014

BY:



LESLIE JOHNSON

Relator

DATED: 3.14.2014

BY:



DAVID P. PARKER

LORRAINE ATER

Liles Parker PLLC

Counsel for Relator