

SETTLEMENT AGREEMENT

This Settlement Agreement ("Agreement") is entered into among the United States of America ("United States"), 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") and the North Carolina Office of the Attorney General (collectively the "Government"); John Shen, M.D.; Gaynelle Brown, R.N. (individually and as an employee and agent of Albemarle Women's Clinic); Albemarle Women's Clinic, P.A., a North Carolina corporation (collectively "AWC"). Each of the above hereafter collectively referred to as "the Parties" through their authorized representatives.

RECITALS

A. AWC provides physician services to clients within the Middle District of North Carolina.

B. The Government contends that during the dates of January 1, 2008 through and including the date of the execution of this Agreement, AWC submitted or caused to be submitted claims for payment to the:

(1) North Carolina Medicaid Program (Medicaid), Title XIX of the Social Security Act, 42 U.S.C. §§ 1396-1396v, in violation of the North Carolina False Claims Act, N.C.G.S. §§ 1-605, *et seq.*, and the Medical Assistance Provider Claims Act, N.C.G.S. §§ 108A-70.10, *et seq.*; and

(2) Medicare Program (Medicare), Title XVIII of the Social Security Act, 42 U.S.C. §§ 1395-1395kkk-1, *et seq.*

C. The Government contends that it has certain civil claims against AWC arising from the following conduct, during the dates of January 1, 2008 through and including the date of the execution of this Agreement:

(1) AWC's submission of claims to the North Carolina Medicaid Program for Detailed Fetal Anatomical Ultrasound Examinations (CPT 76811) for patients who, the Government contends were not at high risk for fetal abnormality. Additionally, the Government contends and AWC denies that the services provided and documented by AWC did not support billing a detailed study;

(2) AWC's submission of claims to the North Carolina Medicaid Program for Biophysical Profile Ultrasounds (CPT 76818 and 76819), which the Government contends, were not medically necessary and which were performed in violation of Division of Medical Assistance Clinical Coverage Policy;

(3) AWC's submission of claims to the North Carolina Medicaid Program for Non-Obstetrical Pelvic Ultrasounds (CPT 76856, 76830, and 76857), which the Government contends were not medically necessary, were over utilized in instances where there may have been indicia of medical necessity, and/or were billed at an inappropriate level (upcoding); and

(4) AWC's submission of claims to the Medicare Program for urinalysis by dip stick or table reagent with and without microscopy (CPT 81000 and 81002), which the Government contends, were not medical necessary and/or there was no evidence that the service was in fact rendered.

This conduct, as recited above in Paragraphs B and C, is referred to below and throughout this Settlement Agreement as the "Covered Conduct."

D. This Settlement Agreement is neither an admission of liability by AWC nor a concession by the Government that its claims are not well founded. Settlement is for the resolution of disputed claims.

Additionally, AWC denies each and every recital set forth above in this Agreement.

E. 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. AWC shall pay to the Government the aggregate principal amount of nine hundred seventy five thousand dollars (\$975,000.00) (the "Settlement Amount") by electronic funds (wire) transfer pursuant to written instructions to be provided by the Office of the United States Attorney for the Middle District of North Carolina. No later than 30 days following the Effective Date of this Agreement, Albemarle Women's Clinic shall pay \$100,000.00 via wire transfer to be credited by the Government towards the Settlement Amount. The remaining principal balance of \$875,000.00 shall be paid by Albemarle Women's Clinic, due by 5:00 pm U.S. Eastern time on the following dates: (a) no later than January 15, 2015, Albemarle Women's Clinic shall pay \$560,000.00 via wire transfer to be credited by the Government toward the Settlement Amount; (b) no later than May 1, 2015, Albemarle Women's Clinic shall pay \$200,000.00 via wire transfer to be credited by the Government toward the Settlement Amount pursuant to the amortization schedule attached as Exhibit A hereto; (c) No later than May 1, 2016, Albemarle Women's Clinic shall pay \$115,000.00 via wire transfer to be credited by the Government toward the Settlement Amount (or if on a weekend or holiday, the next United States business day) (each such day, a "Payment Date") pursuant to the amortization

schedule referenced above until the remaining Settlement Amount is paid in full, (unless the number of payments, final payment date or final payment amount is reduced or the final payment date accelerated by the provisions of this Paragraph 1). Interest payable to the Government shall accrue at an annual rate of 2.75%, and on each Payment Date all interest, computed as 90 days (or, if the first payment, since the Effective Date)/365 (or, 366 during a calendar "leap" year) times 315,000.00 times .0275, shall be deemed immediately due and payable. Prepayment of any portion of the Settlement Amount is allowed. Interest, as computed by the provisions of Paragraph 1, shall also be due and payable on the date of any pre-payment. Upon any default by AWC of the terms contained in Paragraph 1 or any other terms of this Agreement, the Government shall have the unconditioned right to accelerate payment and require that the full Settlement Amount then-outstanding be immediately due and payable.

2. Subject to the exceptions in Paragraph 6 (concerning excluded claims), and conditioned upon AWC's full payment of the Settlement Amount, the United States releases AWC and Gaynelle Brown, R.N. (individually and as an employee and agent of AWC) from any civil or administrative monetary claim the United States has for the Covered Conduct that is described above and more specifically described in the Government's January 28, 2014 correspondence, 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.

Subject to the exceptions in Paragraph 6 (concerning excluded claims) below, and conditioned upon AWC's full payment of the Settlement Amount, the State of North Carolina releases AWC and Gaynelle Brown, R.N. (individually and as an employee and agent of AWC) from the North Carolina Medical Assistance Provider Fraud Claims Act, N.C.G.S. '108A-70.10,

et seq.; the North Carolina False Claims Act, N.C.G.S. '1-605, et seq.; or the common law theories of payment by mistake, unjust enrichment, and fraud.

3. In consideration of the obligations of AWC in this Agreement and the Integrity Agreement (IA), entered into between OIG-HHS and John Shen, M.D. and Albemarle Women's Clinic, P.A. (collectively, "Dr. Shen"), and conditioned upon AWC's full payment of the Settlement Amount, the OIG-HHS agrees to release and refrain from instituting, directing, or maintaining any administrative action seeking exclusion from Medicare, Medicaid, and other Federal health care programs (as defined in 42 U.S.C. § 1320a-7b(f)) against Dr. Shen under 42 U.S.C. § 1320a-7a (Civil Monetary Penalties Law) or 42 U.S.C. § 1320a-7(b)(7) (permissive exclusion for fraud, kickbacks, and other prohibited activities) for the Covered Conduct, except as reserved in Paragraph 6 (concerning excluded claims), below, and as reserved in this Paragraph. The OIG-HHS expressly reserves all rights to comply with any statutory obligations to exclude Dr. Shen from Medicare, Medicaid, and other Federal health care programs under 42 U.S.C. § 1320a-7(a) (mandatory exclusion) based upon the Covered Conduct. Nothing in this Paragraph precludes the OIG-HHS from taking action against entities or persons, or for conduct and practices, for which claims have been reserved in Paragraph 6, below.

4. Default. In the event that AWC, by and through Albemarle Women's Clinic, fails to pay any amount as provided in Paragraph 1, above, within five (5) business days of the date upon which such payment is due, AWC shall be in Default of its payment obligations ("Default"). The United States will provide written notice of the Default, and AWC shall have an opportunity to cure such Default within five (5) business days from the date of the receipt of the notice. Notice of Default will be delivered to AWC, or to such representative as AWC shall designate in advance in writing. If AWC fails to cure the Default within five (5) business days

of receiving the Notice of Default, the remaining unpaid balance of the Settlement Amount shall become immediately due and payable, and interest shall accrue at the rate of 12% per annum compounded daily from the date of Default on the remaining unpaid total (principal, balance and interest due). AWC shall consent to a Consent Judgment in the amount of the unpaid balance, and the United States, at its sole option, may: (a) offset the remaining unpaid balance from any amounts due and owing to AWC by any department, agency, or agent of the United States at the time of the Default; or (b) exercise any other rights granted by law or in equity, including the option of referring such matters for private collection. AWC agrees not to contest any offset imposed and not to contest any collection action undertaken by the United States pursuant to this Paragraph, either administratively or in any state or federal court. AWC shall pay the United States all reasonable costs of collection and enforcement under this Paragraph, including attorney's fees and expenses.

5. Notwithstanding the foregoing, in the event of Default as defined in Paragraph 4, above, OIG-HHS may exclude AWC from participating in all Federal health care programs until AWC pays the Settlement Amount and reasonable costs as set forth in Paragraph 4, above. OIG-HHS will provide written notice of any such exclusion to AWC. AWC waives any further notice of the exclusion under 42 U.S.C. § 1320a-7(b)(7). Reinstatement to program participation is not automatic. If at the end of the period of exclusion AWC wishes to apply for reinstatement, AWC must submit a written request for reinstatement to OIG-HHS in accordance with the provisions of 42 C.F.R. §§ 1001.3001-.3005. AWC will not be reinstated unless and until OIG-HHS approves such request for reinstatement.

6. Notwithstanding the releases given in paragraph 2 and 3 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 exclusion from Federal health care programs;
- d. Any liability to the United States (or its agencies) for any conduct other than the Covered Conduct; or
- e. Any liability based upon obligations created by this Agreement;

7. AWC has provided sworn financial disclosure statements ("Financial Statements") to the Government and the Government has relied on the accuracy and completeness of those Financial Statements in reaching this Agreement. AWC warrants that the Financial Statements were complete and accurate at the time they were provided to the Government. If the Government learns of asset(s) in which AWC had an interest at the time the Financial Statements were provided to the Government that were not disclosed in the Financial Statements, or if the Government learns of any misrepresentation by AWC on, or in connection with, the Financial Statements, and if such nondisclosure or misrepresentation changes the estimated net worth set forth in the Financial Statements by \$50,000 or more, the Government may at its option: (a) rescind this Agreement and file suit based on the Covered Conduct, or (b) let the Agreement stand and collect the full Settlement Amount plus one hundred percent (100%) of the value of the net worth of AWC previously undisclosed. AWC agrees not to contest any collection action undertaken by the Government pursuant to this provision, and immediately to pay the Government all reasonable costs incurred in such an action, including attorney's fees and expenses.

8. In the event that the Government, pursuant to Paragraph 7 (concerning disclosure of assets) above, opts to rescind this Agreement, AWC agrees not to plead, argue, or otherwise raise any defenses under the theories of statute of limitations, laches, estoppel, or similar theories, to any civil or administrative claims that (a) are filed by the Government within 60 calendar days of written notification to AWC that this Agreement has been rescinded, and (b) relate to the Covered Conduct, except to the extent these defenses were available on the date of execution of this Agreement.

9. AWC waives and shall not assert any defenses AWC may have to any criminal prosecution or administrative action relating to the Covered Conduct that are specifically limited to 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 AWC fully and finally releases the United States, its agencies, officers, agents, employees, and servants, from any claims (including attorney's fees, costs, and expenses of every kind and however denominated) that AWC has asserted, could have asserted, or may assert in the future against the United States, and its agencies, employees, servants, and agents, related to the Covered Conduct and the United States' 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 Medicaid carrier or intermediary or any state payor, related to the Covered Conduct; and AWC agrees not to resubmit to any Medicaid carrier or intermediary or any state payor any previously denied claims related to the Covered Conduct, and agrees not to appeal any such denials of claims.

12. AWC 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 AWC 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) AWC'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;

- (5) the payment AWC makes to the Government pursuant to this Agreement, including any costs and attorneys fees; and**
- (6) the negotiation of, and obligations undertaken pursuant to the IA to:
 - (i) Retain an independent review organization to perform quarterly reviews as described in Section III of the IA; and**
 - (ii) Prepare and submit reports to the OIG-HHS, are unallowable costs for government contracting purposes and under the Medicare Program, Medicaid Program, TRICARE Program, and Federal Employees Health Benefits Program (FEHBP) (hereinafter referred to as Unallowable Costs). However, nothing in this paragraph 18.a.(6) that may apply to the obligations undertaken pursuant to the IA affects the status of costs that are not allowable based on any other authority applicable to AWC.****

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

c. Treatment of Unallowable Costs Previously Submitted for Payment: Within 90 days of the Effective Date of this Agreement, and to the extent necessary, AWC agrees to 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 United States, 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 AWC 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. AWC agrees that the Government, at a minimum, shall be entitled to recoup from AWC 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 United States Department of Justice and/or the affected agencies. The Government reserves its rights to disagree with any calculations submitted by AWC or any of its subsidiaries or affiliates on the effect of inclusion of Unallowable Costs (as defined in this Paragraph) on AWC 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 AWC's books and records to determine that no Unallowable Costs have been claimed in accordance with the provisions of this Paragraph.

13. 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.

14. AWC 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.

15. AWC warrants that it 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 shall, to the fullest extent possible, remain solvent during payment to the Government of the Settlement Amount. Further, the Parties warrant that, in evaluating whether to execute this Agreement, they (a) have intended that the mutual promises, covenants, and obligations set forth constitute a contemporaneous exchange for new value given to AWC, within the meaning of 11 U.S.C. § 547(c)(1), and (b) 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 to and do, in fact, represent a reasonably equivalent exchange of value that is not intended to hinder, delay, or defraud any entity to which AWC was or became indebted to on or after the date of this transfer, within the meaning of 11 U.S.C. § 548(a)(1).

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

17. 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.

18. 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 Middle 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.

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

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

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

22. This Agreement is binding on the Parties' successors, transferees, heirs, and assigns.

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

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

[Settlement Agreement – Remainder of Page Intentionally Blank]

THE UNITED STATES OF AMERICA

**Ripley Rand
UNITED STATES ATTORNEY**

DATED: 1-26-15

**BY: Cheryl T. Sloan
Cheryl T. Sloan
United States Attorney
For the Middle District of North Carolina
101 South Edgeworth Street, 4th Floor
Greensboro, NC 27401**

DATED: _____

**BY: _____
Robert K. DeConti
Assistant Inspector General for Legal Affairs
Office of Counsel to the Inspector General
United States Department of
Health and Human Services**

THE STATE OF NORTH CAROLINA

DATED: _____

**BY: _____
CHARLES H. HOBGOOD
Special Deputy Attorney General
Director, North Carolina Medicaid Investigations
Division**

THE UNITED STATES OF AMERICA

**Ripley Rand
UNITED STATES ATTORNEY**

DATED: _____

BY: _____

**Cheryl T. Sloan
United States Attorney
For the Middle District of North Carolina
101 South Edgeworth Street, 4th Floor
Greensboro, NC 27401**

DATED: 2/4/15

BY: Robert K. DeConti

**Robert K. DeConti
Assistant Inspector General for Legal Affairs
Office of Counsel to the Inspector General
United States Department of
Health and Human Services**

THE STATE OF NORTH CAROLINA

DATED: _____

BY: _____

**CHARLES H. HOBGOOD
Special Deputy Attorney General
Director, North Carolina Medicaid Investigations
Division**

THE UNITED STATES OF AMERICA

**Ripley Rand
UNITED STATES ATTORNEY**

DATED: _____

BY: _____

**Cheryl T. Sloan
United States Attorney
For the Middle District of North Carolina
101 South Edgeworth Street, 4th Floor
Greensboro, NC 27401**

DATED: _____

BY: _____

**Robert K. DeConti
Assistant Inspector General for Legal Affairs
Office of Counsel to the Inspector General
United States Department of
Health and Human Services**

THE STATE OF NORTH CAROLINA

DATED: 1/15/2015

BY: _____

**CHARLES H. HOEGOOD
Special Deputy Attorney General
Director, North Carolina Medicaid Investigations
Division**

ALBEMARLE WOMEN'S CLINIC, P.A.

DATED: 4/13/2015

BY: John Shen MD
JOHN SHEN, M.D.
(as Owner and shareholder of Albemarle Women's
Clinic, P.A.)

JOHN SHEN, M.D.

DATED: 4/13/2015

BY: John Shen MD
JOHN SHEN, M.D.
(as an Individual)

GAYNELLE BROWN, R.N.

DATED: 1/13/15

BY: [Signature]
GAYNELLE BROWN, R.N.
(as an Individual, and as an employee or agent of
Albemarle Women's Clinic, P.A.)