



JOSH STEIN
ATTORNEY GENERAL

STATE OF NORTH CAROLINA
DEPARTMENT OF JUSTICE

SETH DEARMIN
CHIEF OF STAFF

July 28, 2020

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

Senator Danny Earl Britt, Jr.
Senator Warren Daniel
Senator Norman W. Sanderson
Representative James Boles, Jr.
Representative Ted Davis, Jr.
Representative Allen McNeill
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 Michael Smith,
MD

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 has been executed between Michael Smith, MD and the State of North Carolina.

The settlement resolves allegations that from January 1, 2013 through September 26, 2017, Smith billed for evaluation and management services that were never rendered and knowingly caused the submission of Medicaid claims for pharmaceuticals that were medically unnecessary.

Under the terms of North Carolina's settlement, the State of North Carolina will recover \$150,000. Of that amount, the federal government will receive \$113,922.04 for North Carolina's federal portion of Medicare and Medicaid recoveries. The North Carolina Medicaid Program will receive \$13,881.14 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 \$20,827.80 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. § 1-608(c), the North Carolina Department of Justice will receive \$1,369.02 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,

A handwritten signature in black ink, appearing to read 'Seth Dearmin', written over a horizontal line.

Seth Dearmin
Chief of Staff

SD:ng

cc: John Poteat, NCGA Fiscal Research Division

SETTLEMENT AGREEMENT

This Settlement Agreement (Agreement) is entered into among the United States of America, acting through the United States Department of Justice and on behalf of the Office of Inspector General (OIG-HHS) of the Department of Health and Human Services and the State of North Carolina, by and through the North Carolina Office of the Attorney General (collectively, the “Government”) and Defendant Michael Smith (collectively the “Parties”).

RECITALS

A. The Government contends that Defendant submitted or caused to be submitted false claims for payment to the Medicare Program (“Medicare”), Title XVIII of the Social Security Act, 42 U.S.C. §§ 1395-1395kkk-1 and the Medicaid Program (“Medicaid”), Title XIX of the Social Security Act, 42 USC §§ 1396-1396w-5.

B. The Government contends that it has certain civil claims against Defendant arising from (1) the knowing submission of Medicare and Medicaid claims, listed on Exhibit A to this Agreement, for evaluation and management services that were never rendered and (2) knowingly causing the submission of Medicare and Medicaid claims, listed on Exhibit A to this Agreement, for pharmaceuticals that were not medically necessary (the “Covered Conduct”).

C. Defendant has entered into a contract for the sale of certain property at 933 Old NC Highway 27 Mount Holly, North Carolina 28210, and that the proceeds from such sale shall be used to satisfy Defendant’s obligations under this agreement in whole, but further acknowledged that Defendant’s obligation to pay the amount provided in paragraph 1 of

this agreement by the date established in this agreement shall not be contingent upon the sale of this property.

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 Agreement, the Parties agree and covenant as follows:

TERMS AND CONDITIONS

1. Defendant agrees to pay the United States the sum of one hundred fifty thousand dollars (\$150,000.00) (the "Settlement Amount") on or before May 15, 2019, by electronic funds transfer pursuant to written instructions to be provided by the United States Attorney's Office for the Western District of North Carolina.

2. Conditioned upon the United States receiving the Settlement Amount from Defendant and as soon as feasible after receipt, the United States shall pay the State of North Carolina an amount determined in accordance with the State share of Medicaid program damages.

3. Subject to the exceptions in paragraph six (6) (concerning excluded claims) below, and conditioned upon Defendant's full payment of all amounts due under this Agreement, the United States releases the Defendant from any civil or administrative monetary claim the United States 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 or the common law theories of payment by mistake, unjust enrichment, and fraud.

4. Subject to the exceptions in paragraph six (6) (concerning excluded claims) below, and conditioned upon Defendant's full payment of the Settlement Amount, the State of North Carolina releases Defendant from any civil or administrative monetary claim that North Carolina has for the Covered Conduct under the North Carolina False Claims Act, N.C.G.S. § 1-605, et seq., the North Carolina Medical Assistance Provider Fraud Claims Act, N.C.G.S. § 108A-70.10, et seq., or the common law theories of payment by mistake, unjust enrichment, and fraud.

5. In compromise and settlement of the rights of OIG-HHS to exclude Defendant pursuant to 42 U.S.C. § 1320a-7(b)(7), based upon the Covered Conduct and the Voluntary Exclusion Agreement entered into by HHS-OIG and Smith on or about July 2018, Defendant agrees to be permanently excluded under this statutory provision from Medicare, Medicaid, and all other Federal health care programs, as defined in 42 U.S.C. § 1320a-7b(f).

6. Notwithstanding the releases given in paragraphs three (3), four (4), and (5) of this Agreement, or any other terms of this Agreement, the following claims of the United States 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;
- 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 or service;
- g. Any liability for failure to deliver goods and service due; and
- h. Any liability for personal injury or property damage or for other consequential damages arising for the Covered Conduct.

7. Notwithstanding the releases given in paragraphs three (3), four (4), and five (5) of this Agreement, or any other terms of this Agreement, the following claims of the State of North Carolina 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 health care programs;
- d. Any liability to the State of North Carolina (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 good or service;

g. Any liability for failure to deliver goods and service due; and

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

8. Defendant waives and shall not assert any defenses Defendant 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 United States and the State of North Carolina concerning the characterization of the Settlement Amount for purposes of the Internal Revenue laws, Title 26 of the United States Code.

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

10. 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 and/or Medicaid contractor (e.g., Medicare Administrative Contractor, fiscal intermediary, carrier or any state payer or state contractor) related to the Covered Conduct; and Defendant agrees not to resubmit to any Medicare/Medicaid contractor or any state payer any previously denied claims related to the Covered Conduct, and agrees not to appeal any such denials of claims and agrees to withdraw any such pending appeals.

11. 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 Paragraph twelve (12) (waiver for beneficiaries paragraph), below.

12. Defendant agrees that he 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.

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

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

15. 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 Western 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.

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

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

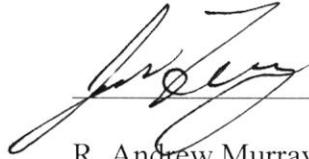
18. This Agreement may be executed in counterparts, each of which constitutes an original and all of which constitute one and the same Agreement.

19. This Agreement is binding on Defendant's successors, transferees, heirs, and assigns.

20. All Parties consent to the United States' and the State of North Carolina's disclosure of this Agreement, and information about this Agreement, to the public.

21. 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.


UNITED STATES OF AMERICA



R. Andrew Murray
United States Attorney
Western District of North Carolina

2-21-19
Date

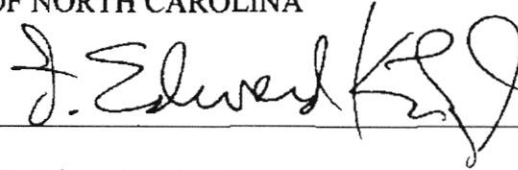
Jonathan H. Ferry
Assistant United States Attorney
Western District of North Carolina



Lisa M. Re
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

2/20/19
Date

STATE OF NORTH CAROLINA



2-21-19
Date

F. Edward Kirby, Jr.
State of North Carolina
Director
Medicaid Investigations Division
Office of the Attorney General

DEFENDANT


_____ 19 FEB '19
Date

Dr. Michael Smith
Defendant


_____ 2/19/19
Date

Noell P. Tin
Counsel for Defendant