



**JOSH STEIN**  
**ATTORNEY GENERAL**

**STATE OF NORTH CAROLINA**  
**DEPARTMENT OF JUSTICE**

**SETH DEARMIN**  
**CHIEF OF STAFF**

January 31, 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 ResMed Corporation

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 ResMed and the State of North Carolina.

The settlement resolves allegations that from October 1, 2009 through April 23, 2019, ResMed induced improper referrals, orders, or purchases of equipment by providing various patient management services furnished by ResMed itself.

Under the terms of North Carolina's settlement, the State of North Carolina will recover \$177,180.75. Of that amount the federal government will receive \$98,671.36 for 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 \$11,103.98 of North Carolina's recovery. The North Carolina Medicaid Program will receive \$63,228.81 as restitution and interest. Pursuant to G.S. § 1-608(c), the North Carolina Department of Justice will receive \$4,176.60 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', with a long horizontal flourish extending to the right.

Seth Dearmin  
Chief of Staff

SD:ng

cc: John Poteat, NCGA Fiscal Research Division

## STATE SETTLEMENT AGREEMENT

### I. PARTIES

This Settlement Agreement (the "Agreement") is entered into between the State of North Carolina ("the State") and ResMed Corp., collectively, "the Parties."

### II. PREAMBLE

As a preamble to this Agreement, the Parties agree to the following:

A. ResMed Corp. (referred to herein as "ResMed") is a Minnesota corporation with its principal place of business in San Diego, California. ResMed provides various health care goods and services, including manufacturing and selling positive airway pressure machines, masks, and related supplies that are designed to treat or diagnose sleep-related respiratory disorders (e.g., sleep apnea).

B. On December 4, 2015, Relator Gibran Ameer, Pharm. D., filed a *qui tam* action in the United States District Court for the District of South Carolina, Charleston Division, captioned *United States of America et al., ex rel. Gibran Ameer Pharm. D., et al. vs. ResMed Inc. and ResMed, Corp.*, Civil Action No. 2:15-CV-04842-PMD; on March 29, 2016, Thomas Baker filed a *qui tam* action in the United States District Court for the District of South Carolina, Columbia Division, captioned *United States of America et al., ex rel. Thomas Baker, et al., vs. ResMed Inc. and ResMed Corp.*, Civil Action No. 3:16-987-PMD; on August 8, 2016, Shawn Ross filed a *qui tam* action in the United States District Court for the Southern District of California captioned *United States of America et al., ex rel. Shawn Ross vs. ResMed, Inc.*, Civil Action No. 16:CV-1988; on February 9, 2017, Craig Meyer filed a *qui tam* action in the United States District Court

for the Northern District of Iowa captioned *United States of America et al., ex rel. Craig Meyer vs. ResMed, Inc., et al.*, Civil Action No. 17-CV-12MWB; and on September 29, 2017, Dr. Peter Ottavio, M.D. filed a *qui tam* action in the United States District Court for the Eastern District of New York captioned *United States of America et al., ex rel. Peter Ottavio, et al. vs. ResMed, Inc.*, Civil Action No. 17-5734. These *qui tam* actions will be referred to collectively as the “Civil Actions.”

C. ResMed has entered into a separate civil settlement agreement (the “Federal Settlement Agreement”) with the United States of America (the “United States” as that term is defined in the Federal Settlement Agreement and as used hereafter in this Agreement).

D. The State contends that ResMed submitted or caused to be submitted claims for payment to the State’s Medicaid Program (42 U.S.C. Chapter 7 Subchapter XIX), including “managed care entities” as defined by 42 U.S.C. § 1396u-2.

E. The State contends that ResMed caused DME suppliers, sleep laboratories, physicians, and other health care providers (collectively, “Health Care Providers”) to submit false claims to the Medicaid program for positive airway pressure machines, masks, and supplies used to treat or diagnose sleep apnea and other sleep-related respiratory disorders (collectively, “Equipment”) and for home sleep tests, when in fact the sale or rental of such Equipment or the performance of such tests was tainted by unlawful remuneration arrangements between ResMed and these Health Care Providers. The State contends that it has certain civil and administrative causes of action against ResMed for engaging in the following conduct (the “Covered Conduct”):

- a) From April 1, 2014 through June 30, 2016, ResMed induced improper referrals, orders, or purchases of Equipment by providing various patient management services furnished by ResMed itself (under the name of “ResMed Resupply”) or through arrangements with

third-party patient management vendors Brightree and CareTouch. The remuneration provided to DMEs and other Health Care Providers included free telephone call center services and other free patient outreach services used to obtain patient authorizations to order resupplies of continuous positive airway pressure (CPAP) masks and other Equipment used to treat sleep apnea and various patient management reports pertinent to the treatment of sleep apnea. In order to induce DME suppliers and other Health Care Providers to purchase ResMed products and sell them to Federal Health Care Program beneficiaries and other patients, ResMed (i) paid for or provided free Brightree patient management services for all patients managed by certain DME suppliers and other Health Care Providers, and (ii) paid for or provided free ResMed Resupply or CareTouch patient management services for certain additional DME suppliers and other Health Care Providers. With respect to the ResMed Resupply and CareTouch programs, ResMed supplied these free services only for those patients whose CPAP masks were manufactured by ResMed;

- b) From January 1, 2013, through July 20, 2018, in order to induce sleep laboratories (including but not limited to sleep laboratories within hospitals) to write referrals or prescriptions for Federal Health Care Program beneficiaries to obtain ResMed-brand Equipment at DME suppliers, ResMed provided remuneration to the sleep laboratories in the form of free and below-cost positive airway pressure masks and accessories to masks, free and below-cost sleep-disordered diagnostic machines, and free installation of sleep-disordered diagnostic machines;
- c) From January 1, 2014 through April 23, 2019, in order to induce DME suppliers to acquire ResMed equipment for Federal Health Care Program beneficiaries, ResMed provided

remuneration in the form of fully guaranteeing (giving the financial institution unlimited recourse to ResMed in the event of defaults by DME suppliers) the payments due on interest-free loans that these DME suppliers acquired from certain third-party financial institutions for the purchase of ResMed equipment; and

- d) From October 1, 2009, through October 1, 2018, ResMed provided remuneration to certain non-sleep specialist physicians (e.g., primary care physicians and cardiologists) in the form of free home sleep testing devices referred to as "ApneaLink" (including but not limited to "Apnea Link Air") and related supplies, which resulted in reimbursement from Federal Health Care Programs for home sleep tests and medical equipment used in the treatment of sleep apnea and other respiratory disorders.

F. This Agreement is neither an admission of liability by ResMed nor a concession by the State that its claims are not well founded.

G. ResMed denies the allegations in Paragraph 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 mutually desire to reach a full and final settlement as set forth below.

### **III. TERMS AND CONDITIONS**

NOW, THEREFORE, in reliance on the representations contained herein and in consideration of the mutual promises, covenants and obligations set forth in this Agreement, and for good and valuable consideration as stated herein, the Parties agree as follows:

1. ResMed agrees to pay to the United States and the Medicaid Participating States (as defined in sub-paragraph (c) and subject to the non-participating state deduction provision of sub-paragraph (d) below), collectively, the sum of \$39,500,000.00 plus accrued interest of one

percent (1%) as of May 1, 2019 (the "Settlement Amount"). The Settlement Amount shall constitute a debt immediately due and owing to the United States and the Medicaid Participating States on the "effective date" of the Federal Settlement Agreement, as defined therein and subject to the terms of this Agreement. The debt shall forever be discharged by payments to the United States and the Medicaid Participating States under the following terms and conditions:

(a) ResMed shall pay to the United States the sum of \$37,461,233.00 plus accrued interest pursuant to the terms of the Federal Settlement Agreement.

(b) The total Medicaid recovery for the Covered Conduct is \$4,470,000.00 consisting of \$2,038,767.00 for the states pursuant to this Agreement and \$2,431,233.00 included in the payment to the United States pursuant to the Federal Settlement Agreement. ResMed shall pay to the Medicaid Participating States the sum of \$2,038,767.00 plus accrued interest on that amount of 1% per annum commencing on May 1, 2019 and continuing to and include the day payment is made under this Agreement (the "Medicaid State Settlement Amount"), subject to the non-participating state deduction provision of sub-paragraph (d) below (the "Medicaid Participating State Settlement Amount"), no later than seven (7) business days after the expiration of the 60-day opt-in period for Medicaid Participating States described in sub-paragraph (c) below. The Medicaid Participating State Settlement Amount shall be paid and immediately deposited by electronic funds transfer to the New York State Attorney General's National Global Settlement Account pursuant to written instructions from the state negotiating team (the "State Team"), which written instructions shall be delivered to counsel for ResMed. This electronic funds transfer shall constitute tender and negotiation of the State Amount as defined in Paragraph 1(d) below.

ResMed has received a guarantee from a third party ("Guarantor") stating that in the event that ResMed does not pay the Settlement Amount, or in the event that within 91 days of its

payments of the Settlement Amount, ResMed's obligations under this Agreement are avoided for any reason, including but not limited to, through the exercise of a trustee's avoidance powers under the Bankruptcy Code, the Guarantor will pay the Settlement Amount to State of North Carolina, plus interest, within ten (10) business days of written notice from State of North Carolina of the occurrence of the event that triggered the applicability of the guarantee. In the event that the conditions triggering the payment by the Guarantor are satisfied, interest on the Settlement Amount shall be paid at a simple rate of 2% per annum beginning on the Effective Date of this Agreement and continuing until the day before full payment of the Settlement Amount plus applicable interest is made on the guarantee to State of North Carolina. Such payments shall be made pursuant to the terms set forth above. State of North Carolina has received the above-referenced guarantee and has relied upon it in entering into this Agreement.

(c) ResMed shall execute a State Settlement Agreement with any State that executes such an Agreement in the form to which ResMed and the State Team have agreed, or in a form otherwise agreed to by ResMed and an individual State. The State shall constitute a Medicaid Participating State provided this Agreement is fully executed by the State and delivered to ResMed's attorneys within 60 days of receiving this Agreement. ResMed's offer to resolve this matter with the State shall become null and void absent written agreement between counsel for ResMed and the State Team to extend the 60-day period.

(d) The total portion of the amount paid by ResMed in settlement for the Covered Conduct for the State is \$176,815.44, consisting of a portion paid to the State under this Agreement and another portion paid to the United States as part of the Federal Settlement Agreement. The amount allocated to the State under this Agreement is the sum of \$78,144.08 plus applicable interest (the "State Amount"), of which \$78,144.08 is restitution. If the State does not execute this

Agreement within 60 days of receiving this Agreement, the State Amount shall be deducted from the Medicaid State Settlement Amount and shall not be paid by ResMed absent written agreement between counsel for ResMed and the State Team to extend the time period for executing this Agreement.

2. Contingent upon receipt of the State Amount, the State agrees to dismiss with prejudice any state law claims which the State has the authority to dismiss currently pending against ResMed in State or Federal Courts for the Covered Conduct, including any supplemental state law claims asserted in the Civil Action. Contingent upon receipt of the State Amount, the State, if served with the Civil Action and otherwise liable to pay a relator's share, agrees to pay the Relator(s) the amount of \$11,103.98 plus applicable interest. This amount is to be paid through the State Team and has been addressed via side letter(s) with the Relator(s) in the Civil Action(s).

3. Subject to the exceptions in Paragraph 4 below, in consideration of the obligations of ResMed set forth in this Agreement, and conditioned upon tender and negotiation of the State Amount, the State agrees to release ResMed, together with its current and former parent corporations, direct and indirect subsidiaries, brother and sister corporations, divisions, current or former corporate owners, and the corporate successors and assigns of any of them (collectively, the "ResMed Released Entities"), from any civil or administrative monetary cause of action that the State has for any claims submitted or caused to be submitted to the State's Medicaid Program as a result of the Covered Conduct.

4. Notwithstanding the releases given in Paragraph 3 of this Agreement, or any other term of this Agreement, the following claims of the State are specifically reserved and are not released:

- (a) any criminal, civil, or administrative liability arising under state revenue codes;

(b) any criminal liability;

(c) any civil or administrative liability that any person or entity, including the ResMed Released Entities, has or may have to the State or to individual consumers or state program payors under any statute, regulation, or rule not expressly covered by the release in Paragraph 3 above, including, but not limited to, any and all of the following claims: (i) State or federal antitrust violations; and (ii) claims involving unfair and/or deceptive acts and practices and/or violations of consumer protection laws;

(d) any liability to the State for any conduct other than the Covered Conduct;

(e) any liability based upon obligations created by this Agreement;

(f) except as explicitly stated in this Agreement, any administrative liability, including mandatory exclusions from the State's Medicaid Program;

(g) any liability for expressed or implied warranty claims or other claims for defective or deficient products and services, including quality of goods and services;

(h) any liability for personal injury or property damage or for other consequential damages arising from the Covered Conduct;

(i) any liability for failure to deliver goods or services due; or

(j) any liability of individuals.

5. In consideration of the obligations of ResMed set forth in this Agreement, and the Corporate Integrity Agreement (the "CIA") that ResMed has entered into with the Office of the Inspector General of the United States Department of Health and Human Services in connection with this matter, and conditioned on receipt by State of North Carolina of the State Amount, the State agrees to release and refrain from instituting, directing, or maintaining any administrative action seeking exclusion from the State's Medicaid Program against ResMed for the Covered

Conduct, except as reserved in Paragraph 4 above. Nothing in this Agreement precludes the State from taking action against ResMed in the event that ResMed is excluded by the federal government, or for conduct and practices other than the Covered Conduct.

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

7. In consideration of the obligations of the State set forth in this Agreement, the ResMed Released Entities waive and discharge the State and any of its agencies, departments, and personnel including, but not limited to, officials, employees, and agents, whether current or former in their official and individual capacities from any causes of action (including attorneys' fees, costs, and expenses of every kind and however denominated) which the ResMed Released Entities have against the State and any of its agencies, departments, and personnel as previously referenced arising from the State's investigation and prosecution of the Covered Conduct.

8. The amount that ResMed must pay to the State pursuant to Paragraph 1(d) above will not be decreased as a result of the denial of any claims for payment now being withheld from payment by the State's Medicaid Program, or any other state program payor, for the Covered Conduct; and ResMed agrees not to resubmit to the State's Medicaid Program or any other state program payor, any previously denied claims, which denials were based on the Covered Conduct, and agrees to withdraw the appeal of, or not to appeal or cause the appeal of, any such denials of claims.

9. ResMed shall not seek payment for any claims for reimbursement to the State's Medicaid Program covered by this Agreement from any health care beneficiaries or their parents, sponsors, legally responsible individuals, or third-party payors.

10. ResMed expressly warrants that it has reviewed its financial condition and that it is currently solvent, meaning that a fair valuation of its property (exclusive of exempt property) exceeds the sum of its debts.

11. The Parties each represent that this Agreement is freely and voluntarily entered into without any degree of duress or compulsion whatsoever.

12. ResMed agrees to cooperate fully and truthfully with any State investigation of individuals or entities not released in this Agreement. Upon reasonable notice of such an investigation, ResMed shall encourage, and agrees not to impair, the cooperation of its directors, officers, and employees, and shall use its best efforts to make available and encourage, the cooperation of former directors, officers, and employees for interviews and testimony, consistent with the rights and privileges of such individuals and of ResMed. ResMed agrees to furnish to the State, 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.

13. Except as expressly provided to the contrary in this Agreement, each Party to this Agreement shall bear its own legal and other costs incurred in connection with this matter, including the preparation and performance of this Agreement.

14. Except as otherwise stated in this Agreement, this Agreement is intended to be for the benefit of the Parties only, and the Parties do not release any liability as to any other person or entity.

15. Nothing in this Agreement constitutes an agreement by the State concerning the characterization of the amounts paid hereunder for purposes of the State's revenue code.

16. In addition to all other payments and responsibilities under this Agreement, ResMed agrees to pay the State Team's reasonable expenses and fees, including travel costs, consultant expenses, and administrative fees. ResMed will pay this amount by separate check made payable to the National Association of Medicaid Fraud Control Units, after the Medicaid Participating States execute their respective Agreements, or as otherwise agreed by the Parties.

17. This Agreement is governed by the laws of the State, except disputes arising under the CIA shall be resolved exclusively under the dispute resolution provisions of the CIA, and venue for addressing and resolving any and all disputes relating to this Agreement shall be the state courts of appropriate jurisdiction of the State.

18. The undersigned ResMed signatories represent and warrant that they are authorized as a result of appropriate corporate action to execute this Agreement. The undersigned State signatories represent that they are signing this Agreement in their official capacities and that they are authorized to execute this Agreement on behalf of the State through their respective agencies and departments.

19. The Effective Date of this Agreement shall be the date of signature of the last signatory to this Agreement. Facsimiles of signatures shall constitute acceptable binding signatures for purposes of this Agreement.

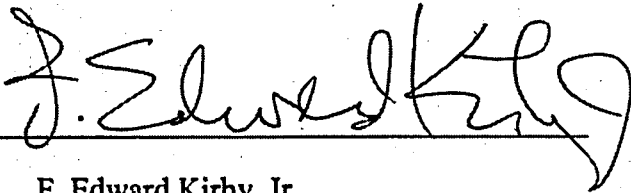
20. This Agreement shall be binding on all successors, transferees, heirs, and assigns of the Parties.

21. This Agreement constitutes the complete agreement between the Parties with respect to this matter and shall not be amended except by written consent of the Parties.

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

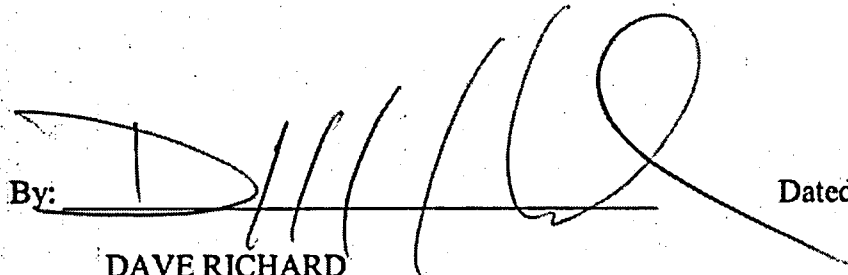
23. For purposes of construing this Agreement, this Agreement shall be deemed to have been drafted by the Parties to this Agreement and shall not, therefore, be construed against any of the Parties for that reason.

STATE OF NORTH CAROLINA

By: 

Dated: 11-18-19


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


By: 

Dated: 11/8/2019

DAVE RICHARD  
Deputy Secretary, NC Medicaid  
Division of Health Benefits

ResMed Corp.

By:   
DAVID PENDARVIS  
Secretary, ResMed Corp. Dated: 12/16/2019

By:   
KAREN PHEWITT  
LAURA F. LAEMMLE-WEIDENFELD  
Jones Day  
Counsel to ResMed Corp. Dated: 12/16/2019