



JOSH STEIN
ATTORNEY GENERAL

STATE OF NORTH CAROLINA
DEPARTMENT OF JUSTICE

SETH DEARMIN
CHIEF OF STAFF

January 7, 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 Santa McKibbins,
DDS/Santa McKibbins Family Dentistry

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 McKibbins/Santa McKibbins Family Dentistry and the State of North Carolina.

The settlement resolves allegations that from January 1, 2013 through April 30, 2018, McKibbins billed for services that were medically unnecessary, had no supporting clinical documentation and were provided in violation of Division of Health Benefits Clinical Coverage policy.

Under the terms of North Carolina's settlement, the State of North Carolina will recover \$379,069.85. Of that amount the federal government will receive \$213,492.14 for North Carolina's federal portion of Medicaid recoveries. The North Carolina Medicaid Program will receive \$155,372.97 as restitution and interest. Pursuant to G.S. § 1-608(c), the North Carolina Department of Justice will receive \$10,204.74 for investigative costs.

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

Very truly yours,



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 North Carolina Office of the Attorney General on behalf of the State of North Carolina ("North Carolina") and Santa Maria McKibbins, DDS, and Santa Maria McKibbins, DDS, PA, d/b/a "Santa McKibbins Family Dentistry," a North Carolina corporation (hereinafter referred collectively as "McKibbins"), and North Carolina Medicaid Providers. Each of the above are hereafter referred to as "the Parties" through their authorized representative.

RECITALS

A. Santa Maria McKibbins, DDS was a Medicaid Provider since 1998 and provides general dentistry services to Medicaid beneficiaries in and around Durham County, North Carolina. Medicaid Providers may submit claims to the North Carolina Medicaid Program for services that are medically necessary for the care of Medicaid beneficiaries and which comply with Medicaid Clinical Dental Policy. The State contends that it has certain civil claims against McKibbins arising from the following conduct, during the dates of January 1, 2013 through April 30, 2018, for McKibbins' submission of claims to the North Carolina Medicaid Program for dental services, to wit, as follows:

(1) CDT D2391 ("Resin-based composite - one surface, posterior"), which the State contends had no supporting clinical documentation, were not medically necessary and which were performed in violation of Division of Medical Assistance Clinical Coverage Policy 4A, et seq.;

(2) CDT D2392 ("Resin-based composite - two surfaces, posterior"), which the State contends had no supporting clinical documentation, were not medically necessary and which were performed in violation of Division of Medical Assistance Clinical Coverage Policy 4A, et seq.;

(3) CDT D2393 (“Resin-based composite - three surfaces, posterior”), which the State contends had no supporting clinical documentation, were not medically necessary and which were performed in violation of Division of Medical Assistance Clinical Coverage Policy 4A, et seq.; and

(4) CDT D2394 (“Resin-based composite - four or more surfaces, posterior”), which the State contends had no supporting clinical documentation, were not medically necessary and which were performed in violation of Division of Medical Assistance Clinical Coverage Policy 4A, et seq.

The conduct referenced in this paragraph is referred below and throughout this Agreement as the “Covered Conduct.”

B. North Carolina contends that McKibbins’ submission of such claims for payment to the North Carolina Medicaid Program (Medicaid), Title XIX of the Social Security Act, 42 U.S.C. §§ 1396-1396v, violates 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.

C. Santa Maria McKibbins, DDS, and Santa Maria McKibbins, DDS, PA, deny the allegations in Paragraphs A. and B.

D. 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. Santa Maria McKibbins, DDS, and Santa Maria McKibbins, DDS, PA, shall pay to North Carolina the aggregate principal amount of three hundred seventy five thousand dollars (\$375,000.00) (the “Settlement Amount”), all of which is restitution. No later than 20 days following the Effective Date of this Agreement, McKibbins shall pay \$250,000.00 to be credited

by the Government towards the Settlement Amount. Thereafter, no later than December 1, 2019, McKibbins shall begin making payments as to the remaining outstanding balance plus interest, as set forth in Exhibit A, every three (3) months for a period of time not to exceed September 1, 2021. At any time prior to 5:00 pm U.S. Eastern time on September 1, 2021, McKibbins may pay the remaining outstanding balance, plus interest, of said Settlement Amount, without any further penalty. All payment(s) shall be made by certified check, payable to the North Carolina Fund for Medical Assistance and **hand delivered** to the Medicaid Investigations Division ("MID"), 5505 Creedmoor Road, Suite 300, Raleigh, NC 27612 ("MID address"). McKibbins shall make payments as set forth above, until all remaining outstanding settlement monies are paid in full, 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 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); (c) to provide security as to the entire \$375,000.00 payment, McKibbins shall sign a Confession of Judgment (Pursuant to N.C.G.S. 68.1, et seq.) for the amount of \$375,000.00 plus interest which may be docketed upon her failure to timely pay the agreed upon payment amounts is reflected herein and her failure to cure such non-payment within 30 days;. 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 375,000.00 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 McKibbins 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 4 (concerning excluded claims) below, and conditioned upon McKibbins' full payment of the Settlement Amount, North Carolina releases Santa Maria McKibbins, DDS, and Santa Maria McKibbins, DDS, PA, 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.; the common law theories of payment by mistake, unjust enrichment, and fraud; and any other right to recoupment or recovery of the Medicaid payments related to the Covered Conduct.

3. In the event that McKibbins 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, McKibbins shall be in Default of their payment obligations ("Default"). North Carolina will provide written notice of the Default, and McKibbins shall have an opportunity to cure such Default within thirty (30) business days from the date of the receipt of the notice. Notice of Default will be delivered via certified mail to counsel for Santa Maria McKibbins, DDS, or to such other representative as McKibbins shall designate in advance in writing. If McKibbins fails to cure the Default within thirty (30) 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). In the event of a Default, the State may, in its sole discretion, choose to set aside the agreement and bring an action against Santa Maria McKibbins, DDS, and/or Santa Maria McKibbins, DDS, PA for the Covered Conduct.

4. Notwithstanding the releases given in paragraph 2 of this Agreement, or any other term of this Agreement, the following claims 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 North Carolina (or its agencies) for any conduct other than the Covered Conduct; or
- e. Any liability based upon obligations created by this Agreement.

5. Santa Maria McKibbins, D.D.S. waives and shall not assert any defenses she may have 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 to any criminal prosecution or administrative action relating to the Covered Conduct. This Agreement bars those remedies in such a criminal prosecution or administrative action. Beyond these defenses, which are specifically waived, McKibbins retains and reserves her rights to assert any other defenses in any criminal prosecution or administrative action that might be brought.

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

7. The Settlement Amount shall not be decreased as a result of the denial of claims for payment and which now being withheld from payment by the Medicaid Program or any Medicaid contractor or intermediary or any state payor on behalf of the Medicaid Program, related to the Covered Conduct; and McKibbins agrees not to resubmit to the Medicaid Program, any state payor

or any of the other above entities acting on behalf of the Medicaid Program, any previously denied claims related to the Covered Conduct, and agrees not to appeal any such denials of claims related to the Covered Conduct.

8. 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 as provided in this paragraph. McKibbins agrees that they waive and shall not seek payment for any of the health care billings related to the Covered Conduct from any health care beneficiaries or their parents, sponsors, legally responsible individuals, or third-party payors based upon the claims defined as Covered Conduct.

9. McKibbins warrants that they have reviewed their financial situation and that they are currently 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 North Carolina 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 McKibbins within the meaning of 11 U.S.C. § 547(c)(1), and (b) conclude that these mutual promises, covenants, and obligations due, 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 McKibbins was or became indebted to on or after the date of this transfer, within the meaning of 11 U.S.C. § 548(a)(1).

10. If within 91 days of the Effective Date of this Agreement or of any payment made under this Agreement, McKibbins commences, or a third party commences, any case, proceeding, or other action under any law relating to bankruptcy, insolvency, reorganization, or relief of debtors (a) seeking to have any order for relief of McKibbins' debts, or seeking to adjudicate McKibbins as

bankrupt or insolvent; or (b) seeking appointment of a receiver, trustee, custodian, or other similar official for McKibbins or for all or any substantial part of McKibbins' assets, McKibbins agrees as follows:

a. Santa Maria McKibbins, DDS' obligations under this Agreement may not be avoided pursuant to 11 U.S.C. § 547, and Santa Maria McKibbins, DDS shall not argue or otherwise take the position in any such case, proceeding, or action that: (i) Santa Maria McKibbins, DDS' obligations under this Agreement may be avoided under 11 U.S.C. § 547; (ii) Santa Maria McKibbins, DDS was insolvent at the time this Agreement was entered into, or became insolvent as a result of the payment made to North Carolina; or (iii) the mutual promises, covenants, and obligations set forth in this Agreement do not constitute a contemporaneous exchange for new value given to Santa Maria McKibbins, DDS.

b. If Santa Maria McKibbins, DDS' 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, North Carolina, at its sole option, may rescind the releases in this Agreement and bring any civil and/or administrative claim, action, or proceeding against Santa Maria McKibbins, DDS for the claims that would otherwise be covered by the releases provided in Paragraph 5 above. Santa Maria McKibbins, DDS agrees that (i) any such claims, actions, or proceedings brought by North Carolina are not subject to an "automatic stay" pursuant to 11 U.S.C. § 362(a) as a result of the action, case, or proceedings described in the first clause of this Paragraph, and Santa Maria McKibbins, DDS shall not argue or otherwise contend that North Carolina's claims, actions, or proceedings are subject to an automatic stay; (ii) Santa Maria McKibbins, DDS shall

not plead, argue, or otherwise raise any defenses under the theories of statute of limitations, laches, estoppel, or similar theories, to any such civil or administrative claims, actions, or proceeding that are brought by North Carolina within sixty (60) calendar days of written notification to Santa Maria McKibbins, DDS that the releases have been rescinded pursuant to this Paragraph, except to the extent such defenses were available on the Effective Date of this Agreement and (iii) North Carolina may pursue its claim in the case, action, or proceeding referenced in the first clause of this Paragraph, as well as in any other case, action, or proceeding.

c. Santa Maria McKibbins. DDS acknowledges that its agreement in this Paragraph is provided in exchange for valuable consideration provided in this Agreement.

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

12. 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.

13. 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.

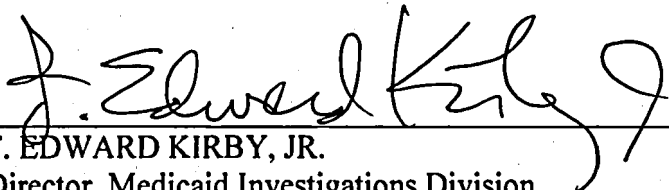
14. This Agreement constitutes the complete agreement between the Parties. This Agreement may not be amended except by written consent of the Parties.

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

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


17. This Agreement is binding on the Parties' successors, transferees, heirs, and assigns.
18. All parties consent to the disclosure by North Carolina or any other disclosure required by law of this Agreement, and information about this Agreement, to the public.
19. This Agreement is effective on the date of signature of the last signatory to the Agreement (the "Effective Date" of this Agreement). Facsimiles, PDFs or similar electronic transmissions of signatures shall constitute acceptable, binding signatures for purposes of this Agreement.

STATE OF NORTH CAROLINA


F. EDWARD KIRBY, JR.
Director, Medicaid Investigations Division
Office of the Attorney General

Dated: 9-4-19

SANTA MARIA MCKIBBINS, DDS, AND SANTA MARIA MCKIBBINS, DDS, PA


SANTA MARIA MCKIBBINS, DDS, and
SANTA MARIA MCKIBBINS, DDS, PA, both as
an individual and as an owner

Dated: 9-2-2011