

STATE SETTLEMENT AGREEMENT

I. PARTIES

This settlement Agreement ("Agreement") is entered into between the State of North Carolina ("the State") and Kmart Corporation ("Kmart"), hereinafter collectively referred to as "the Parties".

II. PREAMBLE

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

A. At all relevant times, Kmart, within its retail stores, operated a national pharmacy chain in 46 states and 3 territories of the United States. Kmart is a Michigan corporation with its principal place of business in Hoffman Estates, Illinois.

B. Mark Kirsch filed a *qui tam* action in the United States District Court for the Eastern District of Michigan on December 17, 2004, captioned *United States of America, ex rel. Mark Kirsch v. Kmart Corporation*, Civil Action No. 04-74909. The lawsuit avers that Kmart violated the federal False Claims Act by returning to stock and failing to delete or re-adjudicate certain prescriptions that had been billed in full to federal health insurance programs and partially dispensed to customers but the balance was not picked up by customers.

C. This *qui tam* action identified in Paragraph B will be referred to as the "Civil Action."

D. Kmart has entered into a separate civil settlement agreement (the "Federal Settlement Agreement") with the United States (as that term is defined in the Federal Settlement Agreement).

E. The State contends that Kmart caused claims for payment to be submitted to the State's Medicaid Program (Medicaid), 42 U.S.C. §§ 1396-1396(v).

F. The State contends that it has certain civil and administrative causes of actions against Kmart for engaging in the following conduct (the "Covered Conduct"): Between January 1, 2004 and October 17, 2005, Kmart knowingly submitted or caused the submission of false and/or fraudulent prescription claims for payment to the Medicaid Programs in Alabama, California, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, New Jersey, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, Puerto Rico, and the Virgin Islands. Between January 1, 2004 and October 17, 2005, these states and territories contend that they sustained damages to their Medicaid programs because Kmart billed them for certain full prescriptions when those prescriptions were only partially dispensed.

G. This Agreement is neither an admission of facts or liability by Kmart nor a concession by the State that its allegations are not well founded. Kmart expressly denies the allegations of the State as set forth herein and in the Civil Action.

H. To avoid the delay, expense, inconvenience, and uncertainty of protracted litigation of these causes of action, 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. Kmart agrees to pay to the United States and the Medicaid Participating States (as defined in III. 1. (c)), collectively, the sum of \$2,550,000.00 (collectively, 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 Agreement 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) Kmart shall pay to the United States the sum of \$1,821,686.06 ("Federal Settlement Amount"). The Federal Settlement Amount shall be paid by electronic funds transfer pursuant to written instructions from the United States Attorney's Office for the Eastern District of Michigan no later than twenty (20) days after the Federal Settlement Agreement is fully executed by the parties to that Agreement and delivered to counsel for Kmart.

(b) Kmart shall pay to the Medicaid Participating States the sum of \$728,313.94, plus accrued interest in the amount not to exceed \$1,892.71 ("Medicaid State Settlement Amount"). Kmart shall pay the Medicaid State Settlement Amount, subject to the non-participating state deduction provision of Sub-paragraph (d) below, no later than twenty (20) business days after the expiration of the 60 day opt-in period for Medicaid Participating States described in Sub-paragraph (c) below. The Medicaid State

Settlement Amount shall be paid by electronic funds transfer to the New York State Attorney General's National Global Settlement Account ("NY State Account") pursuant to written instructions from the State Negotiating Team ("State Team"), which written instructions shall be delivered to counsel for Kmart.

(c) Kmart shall execute a State Settlement Agreement with any State that executes such an Agreement in the form to which Kmart and the State Team have agreed, or in a form otherwise agreed to by Kmart and an individual State. The State shall constitute a Medicaid Participating State in this Settlement Agreement provided this Settlement Agreement is fully executed by the State and delivered to Kmart's attorneys within the period of 60 days immediately following receipt of this Settlement Agreement. If this condition is not satisfied within 60 days, Kmart's offer to resolve this matter with the individual State shall become null and void absent written agreement between counsel for Kmart and the State Team to extend the 60 day period.

(d) The total portion of the Settlement Amount paid by Kmart in settlement for the Covered Conduct for the State is \$99,035.23, consisting of a portion paid to the State under this Agreement and another portion paid to the Federal Government as part of the Federal Settlement Agreement. The individual portion of the Medicaid State Settlement Amount allocated to the State under this Agreement is the sum of \$35,560.25, plus applicable interest (the "State Amount"). If the State does not execute this Agreement within the period of 60 days immediately following receipt of this Settlement Agreement, the State Amount plus interest accrued shall be deducted from the Medicaid State Settlement Amount and shall not be paid by Kmart absent written agreement

between counsel for Kmart and the State Team to extend the time period for executing this Agreement.

2. Subject to the exceptions in Paragraph 3 below, and in consideration of the obligations of Kmart set forth in this Agreement, conditioned upon receipt by the State of its share of the Medicaid State Settlement Amount, and subject to Paragraph 9 below (concerning bankruptcy proceedings commenced within 91 days of the Effective Date of this Agreement or any payment under this Agreement), the State agrees to release Kmart, its predecessors and current and former parents, divisions, subsidiaries, successors, transferees, heirs, and assigns, and their current and former directors, officers, employees, and agents individually and collectively (collectively, the "Kmart 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 Medicaid Program as a result of the Covered Conduct.

3. Notwithstanding any term of this Agreement, the State specifically does not release any person or entity from any of the following liabilities:

- (a) any criminal, civil, or administrative liability arising under state revenue codes;
- (b) any criminal liability not specifically released by this Agreement;
- (c) any civil or administrative liability that any person or entity, including any 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 2 above, including but not limited to, any and all of the following claims: (i)

State or federal antitrust violations; (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 which may be asserted on behalf of any other payors or insurers, including those that are paid by the State's Medicaid program on a capitated basis;

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

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

(h) any expressed or implied warranty claims or other liability for defective or deficient products and services provided by Kmart;

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

(j) any liability based on a failure to deliver items or services due.

4. Kmart waives and shall not assert any defenses it may have to criminal prosecution or administrative action for 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 Constitution or the Excessive Fines Clause of the Eighth Amendment to the Constitution, that this Agreement bars a remedy sought in such criminal prosecution or administrative action.

5. In consideration of the obligations of the State set forth in this Agreement, Kmart waives and discharges the State, its agencies, political subdivisions, employees, servants, and agents from any causes of actions (including attorneys' fees, costs, and expenses of every kind and however denominated) which Kmart has asserted, could have

asserted, or may assert in the future against the State, its agencies, political subdivisions, employees, servants, and agents, arising from the State's investigation and prosecution of the Covered Conduct.

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

7. Kmart shall not seek payment for any of the claims for reimbursement to Medicaid covered by this Agreement from any health care beneficiaries or their parents, sponsors, legally responsible individuals, or third party payors.

8. Kmart expressly warrants that it has reviewed its financial condition and that it is currently solvent within the meaning of 11 U.S.C. §§ 547(b)(3) and 548(a)(B)(ii)(I), and shall remain solvent following payment of the Federal Settlement Amount and compliance with Sub-paragraph 1.(a) of the Federal Settlement Agreement. Further, the Parties expressly warrant that, in evaluating whether to execute this Agreement, the Parties (a) have intended that the mutual promises, covenants, and obligations set forth herein constitute a contemporaneous exchange for new value given to Kmart within the meaning of 11 U.S.C. § 547(c)(1), and (b) have concluded that these mutual promises, covenants and obligations do, in fact, constitute such a contemporaneous exchange.

9. In the event Kmart commences, or another party commences, within 91 days of the Effective Date of this Agreement or any payment made hereunder, 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 Kmart's debts, or seeking to adjudicate Kmart as bankrupt or insolvent, or (b) seeking appointment of a receiver, trustee, custodian or other similar official for Kmart or for all or any substantial part of Kmart's assets, Kmart agrees as follows, to the extent consistent with applicable law:

a. Kmart's obligations under this Agreement may not be avoided pursuant to 11 U.S.C. §§ 547 or 548, and Kmart shall not argue or otherwise take the position in any such case, proceeding or action that: (i) Kmart's obligations under this Agreement may be avoided under 11 U.S.C. §§ 547 or 548; (ii) Kmart was insolvent at the time this Agreement was entered into, or became insolvent as a result of the payment made to the State hereunder; or (iii) the mutual promises, covenants, and obligations set forth in this Agreement do not constitute a contemporaneous exchange for new value given to Kmart.

b. If Kmart'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 State, at its sole option, may rescind the releases provided in this Agreement, and bring any civil and/or administrative action or proceeding against Kmart for the liability that would otherwise be covered by the releases provided in this Agreement. If the State chooses to do so, Kmart agrees that for purposes only of any actions or proceedings referenced in this first clause of this Paragraph, any such actions or proceedings brought by the State (including any proceedings to exclude Kmart from

participation in the State's Medicaid program) are not subject to an "automatic stay" pursuant to 11 U.S.C. § 362(a) as a result of the action, case, or proceeding described in the first clause of this Paragraph, and that Kmart shall not argue or otherwise contend that the State's actions or proceedings are subject to an automatic stay; Kmart 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 actions or proceedings which are brought by the State within 90 calendar days of written notification to Kmart that the releases herein have been rescinded pursuant to this Paragraph, except to the extent such defenses were available before December 17, 2004; and the State has a valid demand against Kmart in the amount of its share of the Medicaid State Settlement Amount plus applicable multipliers and penalties and it may pursue its demand *inter alia*, in the case, action, or proceeding referenced in the first clause of this Paragraph, as well as in any other case, action or proceeding; and Kmart acknowledge(s) that its agreements in this Paragraph are provided in exchange for valuable consideration provided in this Agreement.

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

11. Kmart agrees to cooperate fully and truthfully with any State investigation of individuals or entities not released in this Agreement, stemming from the Covered Conduct. Upon reasonable notice, Kmart shall facilitate, and agree not to impair, the cooperation of their directors, officers, employees or agents, for interviews and testimony, consistent with the rights and privileges of such individuals and of Kmart. Upon request, Kmart agrees to furnish to the State complete and unredacted copies of all

non-privileged documents including, but not limited to, reports, memoranda of interviews, and records in their possession, custody or control, concerning the Covered Conduct. Kmart shall be responsible for all costs it may incur in complying with this paragraph.

12. 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.

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

14. 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.

15. In addition to all other payments and responsibilities under this Agreement, Kmart agrees to pay all reasonable expenses and travel costs of the State Team, including reasonable consultant fees. Kmart 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.

16. This Agreement is governed by the laws of the State, 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.

17. The undersigned Kmart signatory represents and warrants that he is 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.

18. 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.

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

20. This Settlement 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.

21. 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.

STATE OF NORTH CAROLINA

By: Charles H. Hobbgood

CHARLES H. HOBGOOD
Director, Medicaid Investigations Division
Office of the Attorney General

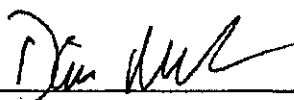
Dated: 6/17/2013

By: Carol H. Steckel

CAROL STECKEL, Director
Division of Medical Assistance

Dated: 6/12/13

KMART CORPORATION

By:  Dated: 8/26/13

Dain Rusk
Vice President and General Manager of Pharmacy