



State of North Carolina

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October 2, 2014

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

Senator Shirley Randleman
Senator Buck Newton
Representative Jamie Boles
Representative N. Leo Daughtry
Representative John Faircloth
Representative Pat Hurley
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 Dr. Calvin Kelly

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 Agreement has been executed between Dr. Calvin Kelly and the State of North Carolina. Calvin Kelly was a licensed professional counselor in the state of North Carolina.

The settlement resolves allegations that from January 3, 2009 through December 14, 2011, Kelly billed for services not rendered.

Under the terms of North Carolina's settlement, the State of North Carolina will recover \$189,584.04. Of that amount the federal government will receive \$123,096.92 for North Carolina's federal portion of Medicaid recoveries. The North Carolina Medicaid Program will receive \$64,372.83 as restitution. Pursuant to G.S. § 108A-70.12(b)(3), the North Carolina Department of Justice will receive \$2,114.29 for investigative costs.

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 "Kristi Jones".

Kristi Jones
Chief of Staff

KJ:ng

cc: Kristine Leggett, NCGA Fiscal Research Division
Christy Agner, NCDOJ, Legislative Liaison
Nels Roseland, NCDOJ, Deputy Chief of Staff

SETTLEMENT AGREEMENT

THIS SETTLEMENT AGREEMENT is entered into between the State of North Carolina, by and through the North Carolina Attorney General ("State"), and Calvin A. Kelly, Ph.D.; Dr. Dr. Calvin A. Kelly, LPC & Associates, business form unknown. (collectively referred to as "Kelly"), (each of the above hereafter collectively referred to as "the Parties") by and through their authorized representatives.

II. PREAMBLE

As a preamble to this Settlement Agreement ("Agreement"), the Parties agree to the following:

1. Kelly is a licensed professional counselor in the state of North Carolina and has participated as a health care provider in the North Carolina Medicaid Program, Title XIX of the Social Security Act, 42 U.S.C. § 1396-1396v ("Medicaid").
2. The State contends that it has civil and administrative claims against Dr. Kelly under North Carolina statutes and/or common law doctrines for submitting claims to the Medicaid program for certain services during the period from January 3, 2009 through December 14, 2011 pertaining to multiple North Carolina Medicaid recipients and CPT Codes 90801, 90806, 90808, and 90847, respectively, ("Covered Conduct"), for which services were billed to Medicaid but not in fact rendered.
3. This Agreement is made in compromise of disputed claims. This Agreement is neither an admission of facts or liability by Kelly, nor a concession by the State that its allegations are not well-founded. Kelly expressly denies the allegations of the State as set forth

herein, and denies that he engaged in any wrongful conduct in connection with the Covered Conduct.

4. To avoid the delay, expense, inconvenience and uncertainty of protracted litigation of these claims, the Parties desire to reach a full and final settlement as set forth below.

II. TERMS AND CONDITIONS

NOW, THEREFORE, in consideration of the mutual promises, covenants, and obligations set forth below, and for good and valuable consideration as stated herein, the Parties agree as follows:

1. Kelly shall pay to the State the aggregate principal amount of one hundred eighty nine thousand five hundred eighty four dollars and four cents (\$189,584.04) (the "Settlement Amount") pursuant to written instructions to be provided by the North Carolina Attorney General's Office. Dr. Kelly agrees to deliver a certified or cashier's check in the amount of \$1,000.00 made payable to the North Carolina Fund for Medical Assistance to the North Carolina Department of Justice, Medicaid Investigations Division, 5505 Creedmoor Road, Suite 300, Raleigh, NC 27612, on or before September 21, 2014.

2. Thereafter, Kelly agrees to deliver a certified or cashier's check in the amount of \$1,000.00 on the fifteenth of every month, made payable to the North Carolina Fund for Medical Assistance to the North Carolina Department of Justice, Medicaid Investigations Division, and continuing for a period of time not to exceed five (5) years.

3. Beginning on June 15, 2018, Kelly agrees to deliver a certified or cashier's check in the amount of \$2,000.00 on the fifteenth of every month, made payable to the North Carolina Fund for Medical Assistance to the North Carolina Department of Justice, Medicaid

Investigations Division, and continuing until the balance of the outstanding monies are paid in full.

4. Any pre-payment of the Settlement Amount, as a result of the foregoing or otherwise, shall be applied toward the final payment(s) then due under the terms of this Agreement, and shall *not* be deemed to reduce the monthly payments pro rata. Upon any default by Kelly of the terms contained in this Paragraph II or any other terms of this Agreement, the State shall have the unconditioned right to accelerate payment and require that the full Settlement Amount then-outstanding be immediately due and payable.

5. Subject to the exceptions in Paragraph 7 (concerning excluded claims) below, and conditioned upon Kelly's full payment of the Settlement Amount, the Government releases Kelly from any civil or administrative monetary claim the Government 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; 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.

6. Default. In the event that Kelly 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, Kelly shall be in Default of its payment obligations ("Default"). The State will provide written notice of the Default, and Kelly 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 Kelly, or to such representative as Kelly shall designate in advance in writing. If Kelly 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. Kelly shall consent to a Consent Judgment in the amount of the unpaid balance, and the State, at its sole option, may: (a) offset the remaining unpaid balance from any amounts due and owing to Kelly by any department, agency, or agent of the State of North Carolina 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. Kelly agrees not to contest any offset imposed and not to contest any collection action undertaken by the State pursuant to this Paragraph, either administratively or in any state or federal court. Kelly shall pay the State of North Carolina all reasonable costs of collection and enforcement under this Paragraph, including attorney's fees and expenses.

7. Notwithstanding any term of this Agreement, specifically reserved and excluded from the scope and terms of this Agreement, are the following:

- a. Any claims arising under any North Carolina revenue laws or regulations;
- b. Any liability to North Carolina for any conduct other than the Covered Conduct;
- c. Any claims based upon obligations created by this Agreement;
- d. Any claims for defective or deficient medical services, including claims as may be brought under North Carolina consumer protection statutes; and
- e. Any claims against any entities or persons other than Kelly and its shareholders, officers, or managers.

8. Nothing in this Agreement constitutes an agreement by the State concerning the characterization of the settlement amount for purposes of the Internal Revenue Code or State revenue laws.

9. In the event that Kelly breaches this Agreement, Kelly expressly agrees not to plead, argue or otherwise raise any defenses under the theories of statute of limitations, laches, estoppel or similar theories, except to the extent that these defenses were available on or before the date this agreement is executed, to any civil claims (a) that are filed by the State within 120 days of written notification to Kelly that this Agreement has been breached and the releases herein have been rescinded and (b) that relate to the Covered Conduct.

10. Kelly fully and finally releases the State, its agencies and employees, from any claims (including attorneys fees, costs, and expenses of every kind and however denominated) which Kelly could have asserted or may assert in the future against the State, its agencies and employees, related to the Covered Conduct and the investigation of the State of the Covered Conduct.

11. Kelly agrees that it will not amend or resubmit any claims already submitted to the Medicaid program for the Covered Conduct unless requested to do so by the Medicaid Program.

12. Kelly agrees that all costs incurred by or on behalf of himself and his corporation in connection with: (1) the matters covered by this Agreement, (2) the State's audit and investigation of the Covered Conduct, (3) Kelly's investigation, defense, and corrective actions undertaken in response to the State's audit and investigation of the Covered Conduct, including

attorney's fees, (4) the negotiation of this Agreement, and (5) the payment made pursuant to this Agreement, are unallowable costs on contracts with the State and United States and for Medicaid and Medicare reimbursement purposes (hereinafter, "unallowable costs"). Kelly represents and agrees that these unallowable costs have been and will be separately estimated and accounted for by Kelly, and that Kelly has not and will not charge these unallowable costs directly or indirectly to any contracts with the State, the United States, or any state Medicaid Program, or seek payment for unallowable costs through any cost report, cost statement, information statement, or payment request submitted by Kelly to the Medicaid Program, Medicare Program or to any other State or Federal program.

13. This Agreement is intended to be for the benefit of the Parties only, and by this instrument the Parties do not release any claims against any other person or entity.

14. Kelly agrees that he will not seek payment for any of the health care claims covered by this Agreement from any health care recipients or their family members, sponsors, heirs, guardians, trustees, agents, attorneys-in-fact, or private insurance carriers. Kelly waives any causes of action against these recipients or their family members, sponsors, heirs, guardians, trustees, agents, attorneys-in-fact, or private insurance carriers based upon the claims for payment covered by this Agreement. However, this provision is not intended to extend to any Medicaid billing company which Kelly relied upon in its billing practices which are the subject of this Agreement.

15. Kelly expressly warrants that it has reviewed its financial condition and that it currently is solvent within the meaning of 11 U.S.C. § 547(b)(3), and will remain solvent for at

least 91 days following its payment to the State hereunder. Further, the Parties expressly warrant that, in evaluating whether to execute this Agreement, the Parties (1) have intended that the mutual promises, covenants and obligations set forth herein constitute a contemporaneous exchange for new value given to Kelly, within the meaning of 11 U.S.C. § 547(c)(1), and (2) have concluded that these mutual promises, covenants and obligations do, in fact, constitute such a contemporaneous exchange.

16. In the event that Kelly commences, or a third party commences, within 91 days of any payment under this Agreement, any case, proceeding, or other action (a) under any law relating to bankruptcy, insolvency, reorganization or relief of debtors, seeking to have any order for relief of Kelly's debts, or seeking to adjudicate Kelly as bankrupt or insolvent, or (b) seeking appointment of a receiver, trustee, custodian or other similar official for Kelly or for all or any substantial part of Kelly's assets, Kelly agrees as follows:

a. Kelly's obligations under this Agreement may not be avoided pursuant to 11 U.S.C. § 547, and Kelly will not argue or otherwise take the position in any such case, proceeding or action that (1) Kelly's obligations under this Agreement may be avoided under 11 U.S.C. § 547; (2) Kelly 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 (3) the mutual promises, covenants and obligations set forth in this Agreement do not constitute a contemporaneous exchange for new value given to Kelly.

b. In the event that Kelly's obligations hereunder are avoided pursuant to 11 U.S.C. § 547, the State, at its sole option, may rescind the releases in this Agreement, and bring

any civil claim, action or proceeding against Kelly for the claims that would otherwise be covered by the release provided herein. If the State chooses to do so under the provisions of this subparagraph, but in no other event, Kelly agrees that (1) any such claims, actions or proceedings brought by the State 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 Kelly will not argue or otherwise contend that the State's claims, actions or proceedings are subject to an automatic stay; (2) that the State has a valid claim against Kelly in the amount of at least \$189,584.04 under State statutes and/or common law doctrines, and the State may pursue its claim in any case, action, or proceeding. The statement contained herein regarding the State's "valid claim" is solely for the purposes of this subpart and, except in the event the State brings an action under the provisions of this subparagraph, in no way admits liability on the part of Kelly for the claims of the State, said liability being expressly denied.

c. Kelly acknowledges that its agreements in this paragraph are provided in exchange for valuable consideration provided in this Agreement.

17. The Parties will each bear their own respective legal and other costs incurred in connection with this matter, including the preparation and performance of this Agreement.

18. Dr. Kelly represents that this Agreement is freely and voluntarily entered into without any degree of duress or compulsion whatsoever and in consultation with legal counsel.

19. This Agreement shall be governed, construed, and enforced by and in accordance with the laws of the State of North Carolina, without regard to its conflict of laws rules, and the Parties agree that the sole and exclusive jurisdiction and sole and exclusive venue for any dispute

arising between the Parties under, regarding, or relating to this Agreement will be Superior Court for Wake County, North Carolina.

20. This Agreement constitutes the complete agreement between the Parties, and supersedes all prior negotiations, agreements and understandings with respect thereto. This Agreement may not be amended except by written consent of the Parties.

21. The undersigned individuals signing this Agreement represent and warrant that they are fully authorized to execute this Agreement on behalf of the Parties, and that any and all necessary actions (including but not limited to formal corporate Board of Directors' action, resolution, and/or other Board or shareholder authorization) have been taken to fully authorize the execution of this Agreement by the undersigned individuals on behalf of the respective Parties.

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

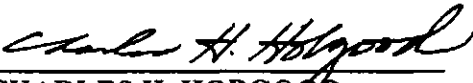
23. The invalidity, illegality, or unenforceability of any provisions of this Agreement shall not affect the validity, legality, or enforceability of any other provisions of this Agreement, which shall remain in full force and effect.

24. This Agreement is effective on the date of signature of the last signatory to the Agreement and shall become final and binding only upon signing by each of the Parties hereto.

This SETTLEMENT AGREEMENT agreed and executed by the Parties hereto:

THE STATE OF NORTH CAROLINA

DATED: 8/4/14

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

DR. CALVIN A. KELLY, LPC & ASSOCIATES

DATED: 7-23-14

BY: 
CALVIN A. KELLY, Ph. D.
(as Owner)

DATED: 7/23/2014

BY: 
JOSEPH E. ZESZOTARSKI, Jr., Esq.
Gammon, Howard & Zeszotarski, PLLC
115 1/2 West Morgan Street
Raleigh, NC 27601

CALVIN A. KELLY, Ph.D.

DATED: 7-23-14

BY: 
CALVIN A. KELLY, Ph. D.
(as an Individual)

DATED: 7/23/2014

BY:


JOSEPH E. ZESZOTARSKI, Jr., Esq.
Gammon, Howard & Zeszotarski, PLLC
115 ½ West Morgan Street
Raleigh, NC 27601

ATTEST:

Secretary
{CORPORATE SEAL}