



JOSH STEIN
ATTORNEY GENERAL

STATE OF NORTH CAROLINA
DEPARTMENT OF JUSTICE

SETH DEARMIN
CHIEF OF STAFF

April 30, 2018

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 Warren Daniel
Senator Shirley Randleman
Senator Norman W. Sanderson
Representative James Boles, Jr.
Representative Ted Davis, Jr.
Representative Allen McNeill
Representative Rena W. Turner
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 Kmart Corporation

Dear Members:

Section 114-2.5 of the North Carolina General Statutes requires the Attorney General to report to the Joint Committee 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 Kmart and the State of North Carolina.

The settlement resolves allegations that from September 1, 2004 through December 31, 2016, Kmart failed to include discounted generic drug prices when billing the Medicaid program.

Under the terms of North Carolina's settlement, the State of North Carolina will recover \$932,492.11. Of that amount the federal government will receive \$628,144.59 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 \$91,592.48 of North Carolina's recovery. The North Carolina Medicaid Program will receive \$99,750.20 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 \$105,090.35 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 \$7,914.49 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 blue ink, appearing to read 'Seth Dearmin', followed by a horizontal line.

Seth Dearmin
Chief of Staff

SD:ng

cc: John Poteat, NCGA Fiscal Research Division

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. Kmart Corporation, a Delaware corporation, operates approximately 250 in-store pharmacies throughout the United States, Puerto Rico and the Virgin Islands. Kmart Corporation is wholly owned and operated by Sears Holdings Corporation, a Delaware corporation which is headquartered in Hoffman Estates, Illinois.

B. On July 16, 2008, James Garbe ("Relator") filed a *qui tam* action in the United States District Court for the Central District of California captioned *United States of America, et al., ex rel. Garbe, v. Kmart Corporation*, Case No. CV08-04669 (C.D. Cal.)(hereinafter the "Civil Action"). The Civil Action was subsequently transferred to the Southern District of Illinois and assigned case number 3:12-cv-00881-MJR-PM (S.D. Ill.). On August 8, 2017, Carl Ireland, as guardian of both Mr. Garbe and Mr. Garbe's estate, was substituted as Relator in the Civil Action.

C. Kmart has entered into a separate civil settlement agreement (the "Federal Settlement Agreement") with Relator and the United States of America (as that term is defined in the Federal Settlement Agreement) hereinafter referred to as the "United States."

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

E. The State contends that it has certain civil and administrative causes of action against Kmart for engaging in the following conduct (the "Covered Conduct"):

The State contends that from the period September 1, 2004 through December 31, 2016, Kmart submitted false prescription reimbursement claims to the Medicaid Program in connection with discounted generic drug prices that were available to enrolled members of Kmart's Retail Maintenance Program and other discount generic drug programs. Specifically the State contends that to the extent the Medicaid Program defined "usual and customary price" to include discounted generic drug prices offered to enrolled members of Kmart's discount generic drug programs, Kmart failed to explicitly include those discounted generic drug prices when billing the Medicaid Program resulting in Kmart's submission of false or fraudulent claims to the Medicaid Program. The State contends that as a result of Kmart's actions, Kmart received reimbursement amounts that were higher than it was entitled to receive. Kmart's conduct is referred to below as the "Covered Conduct".

F. 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.

G. 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 sub-paragraph (c) below), collectively, the sum of \$39,056,891.41, (collectively, the "Settlement Amount"). Kmart agrees to pay the Medicaid Participating States' share of the Settlement Amount in three installments as follows: Kmart shall pay the first payment to the Medicaid Participating States [\$2,296,500.49] no later than fourteen (14) days after the Effective Date of the Federal Settlement Agreement; the second payment of [\$2,296,500.49] shall be due on the one year anniversary of the Effective Date of the Federal Settlement Agreement; and the third and final payment of [\$2,181,675.46] will be due on the two year anniversary of the Effective Date of the Federal Settlement Agreement.

(a) The first payment to the Medicaid Participating States of their share of the Settlement Amount shall be paid by electronic funds transfer to the New York State Attorney General's National Global Settlement Account ("NY Settlement Account") pursuant to written instructions from the State Negotiating Team ("State Team"), which written instructions shall be delivered to counsel for Kmart. The second and third

payments to the Medicaid Participating States will be apportioned between electronic funds transfers to the NY Settlement Account and to the Relator pursuant to written instructions from the State Team, which written instructions shall be delivered to Kmart.

(b) 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 provided such an Agreement is fully executed by the State and delivered to Kmart's attorneys within 45 days of receiving this Agreement. If such a State Settlement Agreement is not fully executed by the State and delivered to Kmart's attorneys within 45 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 45 day period.

(c) The total portion of the amount paid by Kmart in settlement for the Covered Conduct for the State is \$932,492.10, consisting of a portion paid to the Plaintiff State under this Agreement and another portion paid to the United States as part of the Federal Settlement Agreement. The amount allocated to the Plaintiff State under this Agreement is the sum of \$71,485.28 for the first payment, \$72,446.02 for the second payment, and \$68,823.74 for the final payment (the "State Amount"). If the State does not execute this Agreement within 45 days of receiving this Settlement Agreement, the State Amount 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. The State agrees to dismiss with prejudice any state law claims which the State has the authority to dismiss currently pending against Kmart in State or Federal Courts for the Covered Conduct.

3. Subject to the exceptions in Paragraph 4 below, in consideration of the obligations of Kmart set forth in this Agreement, and conditioned upon receipt by the State of its share of the Medicaid State Settlement Amount, the State agrees to release Kmart and its corporate parents, subsidiaries, affiliates, predecessors and successors and all current and former officers, directors, employees, and agents of Kmart, together with their parents, subsidiaries, affiliates, predecessors and successors, 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.

4. 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 3 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 liability for expressed or implied warranty claims or other claims 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 goods or services due.

5. 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 of the Constitution, that this Agreement bars a remedy sought in such criminal prosecution or administrative action.

6. In consideration of the obligations of the State set forth in this Agreement, Kmart waives and discharges the State, its agencies, employees, and agents from any causes of action (including attorneys' fees, costs, and expenses of every kind and however denominated) which Kmart has against the State, its agencies, employees, and agents arising from the State's investigation and prosecution of the Covered Conduct.

7. The amount that Kmart must pay to the State pursuant to Paragraph 3.1. 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 payor, for the Covered Conduct; and 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 to withdraw the appeal of or not to appeal or cause the appeal of any such denials of claims.

8. Kmart 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.

9. 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)(1)(B)(ii)(I).

10. The Federal Settlement Agreement contains various provisions for the benefit of the United States and Relator in the event of Kmart's default on any of the payments owed under that agreement, including but not limited to representations and waivers by Kmart in the event of a Kmart bankruptcy. In the event that such provisions are triggered, and monetary benefits result therefrom, the State shall be entitled to share in those monetary benefits, consistent with the monetary terms of this Agreement and the Federal Settlement Agreement.

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

12. Kmart agrees to cooperate fully and truthfully with any State investigation of individuals or entities not released in this Agreement. Upon reasonable notice, Kmart shall facilitate, and agrees not to impair, the cooperation of its 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 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.

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 by this instrument the Parties do not release any liability against 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. 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 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.

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 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. Hobergood

Dated: 11/14/2017

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

By: Dave Richard

Dated: 11/9/2017

DAVE RICHARD
Deputy Secretary for Medical Assistance
Division of Medical Assistance

KMART, CORP.

By:  Dated: 12/22/17

Andrew M. Johnstone
Deputy General Counsel - Litigation

By:  Dated: 12/15/17

William Johnson
Catherine M. O'Neill
Christopher Burris
Counsel to Kmart Corporation