



JOSH STEIN
ATTORNEY GENERAL

STATE OF NORTH CAROLINA
DEPARTMENT OF JUSTICE

SETH DEARMIN
CHIEF OF STAFF

March 19, 2019

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
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 Walgreens Co.

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 Walgreens and the State of North Carolina.

The settlement resolves allegations that from January 1, 2008 through December 31, 2017, Walgreens submitted claims in which the prices identified as the usual and customary prices for certain prescription drugs that it sold through the Prescription Savings Club ("PSC") program were substantially higher than the prices it charged for those drugs pursuant to the PSC program.

Under the terms of North Carolina's settlement, the State of North Carolina will recover \$3,382,859.11. Of that amount the federal government will receive \$1,964,370.08 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 \$296,660.93 of North Carolina's recovery. The North Carolina Medicaid Program will receive \$529,059.31 as restitution and interest. 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 \$498,298.53 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 \$94,470.26 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,



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 Walgreen Co. (“Walgreens”), collectively, “the Parties.”

II. PREAMBLE

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

A. Walgreens, a Delaware corporation with its principal place of business in Deerfield, Illinois owns a series of retail pharmacies throughout the United States.

B. On or about January 13, 2012 Marc Baker filed a qui tam complaint against Walgreens under seal in the United States District Court for the Southern District of New York, captioned United States of America et al, ex rel. Marc Baker v. Walgreen Co. 12 Civil 0300 (JPO). This action will be referred to as the “Civil Action.”

C. Walgreens has entered into a separate Stipulation and Order of Settlement and Dismissal (“the Federal Settlement Agreement”) with the United States of America (as that term is defined in the Stipulation and Order of Settlement and Dismissal) hereinafter referred to as the “United States.”

D. The State contends that Walgreens caused claims for payment to be submitted to the State’s Medicaid Program (42 U.S.C. Chapter 7 Subchapter XIX).

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

From January 2008 through December 2017 (“Covered Period”), Walgreens violated the

FCA by (1) submitting claims to the State’s Medicaid program in which the prices it

identified as the usual and customary ("U&C") prices for certain prescription drugs that it sold through the Prescription Savings Club ("PSC") program were higher than the prices it charged for those drugs pursuant to the PSC program, and thereby (2) obtaining more money in reimbursements from the State's Medicaid program for sales of such drugs than it was entitled to receive. The claims referenced in the prior sentence relate to Medicaid fee-for-service claims, and do not cover Medicaid managed care claims.

F. This Agreement is neither an admission of facts or liability by Walgreens nor a concession by the State that its allegations are not well founded.

G. 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. Walgreens 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 \$60,000,000.00 plus accrued interest (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) As provided in the Federal Settlement Agreement, Walgreens shall pay to the United States the sum of \$32,052,268.41 plus accrued interest pursuant to the terms of the Federal Settlement Agreement.

(b) The total portion of the amount paid by Walgreens for the Covered Conduct for the States (subject to the non-participating state deduction provision of sub-paragraph (d) below) and as provided in the Federal Settlement Agreement, is \$60,000,000.00 consisting of a portion paid to the States under this Agreement of \$27,947,731.59 and another portion paid to the United States as part of the Federal Settlement Agreement of \$32,052,268.41. Walgreens shall pay to the Medicaid Participating States the sum of \$27,947,731.59 plus accrued interest on that amount of 2.87% per annum commencing on October 15, 2018 and continuing to and including December 31, 2018 (the "Medicaid State Settlement Amount"), no later than seven (7) business days after the Federal Agreement is accepted by the Court. However, if payment is made more than three (3) business days after the date the Federal Agreement is accepted by the Court, additional interest will accrue for each day until paid. The Medicaid 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 Walgreens. The electronic funds transfer shall constitute tender and negotiation of the State Amount as defined in Paragraph III.1(d) below.

(c) Walgreens shall execute a State Settlement Agreement with any State that executes such an Agreement in the form to which Walgreens and the State Team have agreed, or in a form otherwise agreed to by Walgreens and an individual State. The State shall constitute a

Medicaid Participating State provided this Agreement is fully executed by the State and delivered to Walgreens's attorneys within 60 days of receiving this Agreement. Walgreens's offer to resolve this matter with the State shall become null and void absent written agreement between counsel for Walgreens and the State Team to extend the 60-day period.

(d) The total portion of the amount paid by Walgreens in settlement for the Covered Conduct for the State is \$3,377,041.15, 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 \$1,412,671.07 plus applicable interest (the "State Amount"), of which \$706,335.53, and interest thereon, 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 be returned to Walgreens absent written agreement between counsel for Walgreens 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 Walgreens 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 \$296,660.93. This amount is to be paid through the State Team and has been addressed via side letter with the Relator(s) in the Civil Action.

3. Subject to the exceptions in Paragraph 4 below, in consideration of the obligations of Walgreens set forth in this Agreement, and conditioned upon tender and negotiation of the State Amount, the State agrees to release Walgreens, its predecessors and current and former

parents, divisions, subsidiaries, affiliates, successors, transferees, heirs, and assigns (collectively, the "Defendant 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 Walgreens 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 to the State arising from the Covered Conduct for claims submitted or caused to be submitted to any "managed care entities" as defined by 42 U.S.C. § 1396u-2;
- (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, including quality of goods and services;

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

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

(k) any liability of individuals.

5. In consideration of the obligations of Walgreens set forth in this Agreement, and the Corporate Integrity Agreement (the "CIA") that Walgreens 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 the State of the State Amount, the State agrees to release and refrain from instituting, recommending, directing, or maintaining any administrative action seeking exclusion from the State's Medicaid Program against Walgreens for the Covered Conduct, except as reserved in Paragraph 4 above. Nothing in this Agreement precludes the State from taking action against Walgreens in the event that Walgreens is excluded by the federal government, or for conduct and practices other than the Covered Conduct.

6. Walgreens 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 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 Walgreens 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 Walgreens 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 and settlement of the Covered Conduct.

8. The amount that Walgreens must pay to the State pursuant to Paragraph III.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 program payor, for the Covered Conduct; and Walgreens 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. Walgreens 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. Walgreens 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. Walgreens agrees to cooperate fully and truthfully with any investigation by the State related to the Covered Conduct of individuals or entities not released in this Agreement. Upon reasonable notice of such an investigation, Walgreens 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 Walgreens. Upon request, Walgreens 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 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, as well as complete and unredacted copies of any other non-privileged documents in its possession, custody, or control relating to the Covered Conduct. Walgreens 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 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, Walgreens agrees to pay the State Team's reasonable expenses and fees, including travel costs, consultant expenses, and administrative fees. Walgreens 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 the 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 Walgreens 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: F. Edward Kirby, Jr. Dated: 1-24-19

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

By: DAVE RICHARD Dated: 1/15/2019

DAVE RICHARD
Deputy Secretary, NC Medicaid
Division of Health Benefits

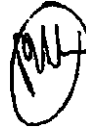
WALGREEN CO.

By: *Lee Robinson* Dated: 12/14/2018

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Counsel for Walgreen Co.

By: *Elena Kraus* Dated: 12-14-18 

Elena Kraus
Senior Vice President and General Counsel

Walgreen Co.