



**JOSH STEIN**  
**ATTORNEY GENERAL**

**STATE OF NORTH CAROLINA**  
**DEPARTMENT OF JUSTICE**

**SETH DEARMIN**  
**CHIEF OF STAFF**

May 21, 2021

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  
Representative James Boles, Jr.  
Representative Allen McNeill  
Representative Carson Smith  
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 Preferred Pain  
Management

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 Preferred Pain Management and the State of North Carolina.

The settlement resolves allegations that from June 1, 2014 through May 24, 2017, Preferred Pain Management billed for urine drug tests that were not medically necessary.

Under the terms of North Carolina's settlement, the State of North Carolina will recover \$789,292.95. Of that amount, the federal government will receive \$696,147.73 for North Carolina's federal portion of Medicaid and Medicare recoveries. Pursuant to G.S. § 1-610, the qui tam plaintiffs whose whistleblower actions brought this matter to the government's attention will receive \$24,217.76 of North Carolina's recovery. The North Carolina Medicaid Program will receive \$34,017.51 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 \$28,764.52 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 \$6,145.43 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 black ink, appearing to read 'Seth Dearmin', with a large, stylized flourish extending to the right.

Seth Dearmin  
Chief of Staff

SD:ng

cc: William Childs, NCGA Fiscal Research Division  
Mark White, NCGA Fiscal Research Division  
Morgan Weiss, 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 Defendants Preferred Pain Management & Spine Care, P.A. (“Preferred Pain”), and Dr. David Spivey (collectively “Defendants”). Collectively, all of the above will be referred to as “the Parties.”

### II. PREAMBLE

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

A. Preferred Pain is a pain management medical practice with its principal place of business in Winston-Salem, North Carolina. Preferred Pain participates in Federal health care programs, including but not limited to the Medicare and Medicaid programs. Dr. David Spivey is Preferred Pain’s owner, Chief Executive Officer, and President.

B. On January 22, 2018 Relator filed a qui tam action in the United States District Court for the Middle District of North Carolina captioned *United States ex rel. Rebecca Kovalich v. Preferred Pain Management & Spine Care, P.A. et al.* (No. 18-CV-44), pursuant to the qui tam provisions of the False Claims Act, 31 U.S.C. § 3730(b) (the “Civil Action”). Relator alleged that Defendants ordered and billed for medically unnecessary urine drug testing (UDT), including both presumptive and definitive UDT. The United States intervened in the Civil Action on April 30, 2019 and filed the United States’ Complaint on October 18, 2019. The State of North Carolina did not intervene in the Civil Action.

C. Preferred Pain Management & Spine Care, P.A., and Dr. David Spivey have entered into a separate civil settlement agreement (the “Federal Settlement

*Preferred Pain Management & Spine Care, P.A., et al*

Agreement”) with the “United States of America” (“United States”) as that term is defined in the Federal Settlement Agreement.

D. The State contends that the Defendants submitted or caused to be submitted claims for payment 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 Defendants arising from the conduct described in this paragraph, to wit: Defendants ordered and billed the North Carolina Medicaid program for UDT that was not medically reasonable and necessary (CPT codes G6031, 80346, 82055, G6040, 80320, G6041, 80323, G6042, 80324, G6043, 80345, 80348, 80349, G6044, 80353, 80354, 80356, G6053, 80358, 80359, G6056, 80361, 80362, 80365, 80369, 80372, 80373, G6045, G6046, G6052, 83992, G0431, 80301, G0479, G0480, G0481, G0482, G0483, and 80307), along with non-covered urine specimen validity testing (CPT codes 82570 and 83986), during the period from June 1, 2014 through May 24, 2017. This conduct is referred to herein as the “Covered Conduct”.

F. Defendants deny the allegations in Paragraphs B and E.

G. This Agreement is neither an admission of liability by Defendants, nor a concession by the State that its claims are not well founded.

H. Relator claims entitlement under 31 U.S.C. § 3730(d) and N.C.G.S. §1-610(e) to a share of the proceeds of this Settlement Agreement and to Relator’s reasonable expenses, attorneys’ fees and costs.

### 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. Defendants have agreed to pay to the United States (as defined in the Federal Settlement Agreement), collectively, the sum of \$789,292.95 (the "Settlement Amount"). The Settlement Amount constitutes a debt immediately due and owing on the "effective date" of the Federal Settlement Agreement.

(a) A portion of the Settlement Amount is paid by Defendants in satisfaction of the Defendants' obligations to the Medicaid program for the Covered Conduct, in the amount of \$212,660.31 ("Medicaid Settlement Amount"), which consists of \$93,145.22 owing and payable to the State pursuant to this Agreement (the "State Amount") and \$119,515.09 owing and payable to the United States pursuant to the Federal Settlement Agreement. Pursuant to the payment of the Settlement Amount under the Federal Settlement Agreement, to which the State is an intended third party beneficiary, the State shall be entitled to receive the State Amount, less any Relator Share agreed upon by way of a Relator Share Side Letter agreement entered into between the State and Relator. Of the State Amount, \$46,572.61 is restitution.

(b) Upon receipt of the Settlement Amount, the United States Attorney's Office for the Middle District of North Carolina will direct payment of the State Amount to the Medicaid Investigations Division of the North Carolina Attorney General's Office pursuant to this Agreement.

(c) Defendants shall execute this Agreement contemporaneously with the Federal Settlement Agreement.

2. Subject to the exceptions set forth below, and subject to Paragraph 11 (concerning default) and Paragraph 12 (concerning bankruptcy), and upon the State's receipt of the State Amount, the State releases Defendants from any civil or administrative monetary claim the State 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 False Claims Act, N.C.G.S. §1-605, et seq. or the common law theories of payment by mistake, unjust enrichment, and fraud.

3. Contingent upon the receipt of the Medicaid Settlement Amount, the State, if served with the Civil Action and otherwise liable to pay a Relator's share, agrees to pay the Relator the amount of \$55,291.68, as soon as feasible after receipt of said Settlement Payment. This amount and payment of same has been addressed via a Side Letter with the Relator in the Civil Action.

4. Subject to the exceptions in Paragraph 5 below, in consideration of the obligations of Defendants set forth in this Agreement, and conditioned upon tender and negotiation of the State Amount, the State agrees to release Defendants, together with its current and former parent corporations; direct and indirect subsidiaries; brother or sister corporations; divisions; current or former corporate owners; the corporate successors and assigns of any of them (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 States' Medicaid Program for the Covered Conduct.



5. Notwithstanding the releases given in Paragraph 2 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 Defendant 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 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 based on a failure to deliver goods or services due; or
- (k) any liability of individuals.

6. 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 Defendants for the Covered Conduct, except as reserved in Paragraph 5 above. Nothing in this Agreement precludes the State from taking action against Defendants in the event that Defendants are excluded by the federal government, or for conduct and practices other than the Covered Conduct.

7. Defendants waive and shall not assert any defenses they 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.

8. In consideration of the obligations of the State set forth in this Agreement, Defendant 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 Defendant 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 of the Covered Conduct.



9. The amount that Defendants 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 Defendants agree 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 agree to withdraw the appeal of, or not to appeal or cause the appeal of, any such denials of claims.

10. Defendants 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.

11. In exchange for valuable consideration provided in this Agreement, Defendants acknowledge the following:

a. In evaluating whether to execute this Agreement, the Parties intend that the mutual promises, covenants, and obligations set forth herein constitute a contemporaneous exchange for new value given to Defendants, within the meaning of 11 U.S.C. § 547(c)(1), and the Parties conclude that these mutual promises, covenants, and obligations do, in fact, constitute such a contemporaneous exchange.

b. The mutual promises, covenants, and obligations set forth herein are intended by the Parties to, and do in fact, constitute a reasonably equivalent exchange of value.

c. The Parties do not intend to hinder, delay, or defraud any entity to which Defendants were or became indebted to on or after the date of any transfer contemplated in this Agreement, within the meaning of 11 U.S.C. § 548(a)(1).

d. If Defendants' 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) or if, before the Settlement Amount is paid in full, Defendants or a third party commence a case, proceeding, or other action under any law relating to bankruptcy, insolvency, reorganization, or relief of debtors seeking any order for relief of Defendants' debts, or to adjudicate Defendants as bankrupt or insolvent; or seeking appointment of a receiver, trustee, custodian, or other similar official for Defendants or for all or any substantial part of Defendants' assets:

(i) the State may rescind the releases in this Agreement and bring any civil and/or administrative claim, action, or proceeding against Defendants for the claims that would otherwise be covered by the releases provided in Paragraph 2 above;

(ii) the State has an undisputed, noncontingent, and liquidated allowed claim against Defendants in the amount of \$445,040.67, less any payments received pursuant to this Agreement, provided, however, that such payments are not otherwise avoided and recovered from the State by Defendants, a receiver, trustee, custodian, or other similar official for Defendants; and

(iii) if any payments are avoided and recovered by Defendants, a receiver, trustee, custodian, or similar official for Defendants, Relator shall, within thirty days of written notice from the United States to the undersigned Relator's counsel, return any portions of such payments already paid by the State to Relator pursuant to Paragraph 3.

e. Defendants agree that any civil and/or administrative claim, action, or proceeding brought by the United States and/or the State under Paragraph 12.d is not subject to an "automatic stay" pursuant to 11 U.S.C. § 362(a) because it would be an

exercise of the United States' and/or the State's police and regulatory power. Defendants shall not argue or otherwise contend that the United States' and/or the State's claim, action, or proceeding is subject to an automatic stay and, to the extent necessary, consents to relief from the automatic stay for cause under 11 U.S.C. § 362(d)(1). Defendants waive and 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 claim, action, or proceeding brought by the United States and/or the State within 120 days of written notification to Defendants that the releases have been rescinded pursuant to this paragraph, except to the extent such defenses were available on October 18, 2019.

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

13. Defendants agree to cooperate fully and truthfully with any State investigation of individuals or entities not released in this Agreement. Upon reasonable notice of such an investigation, Defendants shall encourage, and agree not to impair, the cooperation of their directors, officers, and employees, and shall use their 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 the Defendants. Upon request, Defendants agree 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 that it has undertaken, or that has been performed by another on their 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.

Defendants shall be responsible for all costs they may incur in complying with this paragraph.

14. Upon receipt of the payment described in Paragraph 1, above, and subject to the terms of the Settlement Agreement and this Agreement, the Parties shall promptly sign and file in the Civil Action a Joint Stipulation of Dismissal of the Civil Action pursuant to Rule 41(a)(1).

15. 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.

16. 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.

17. 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, other than reflected in Paragraph 1(a) above.

18. 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.

19. The undersigned 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.

20. 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.

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

22. 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.

23. 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.

24. 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: \_\_\_\_\_ Dated: 3/26/2021


F. EDWARD KIRBY  
DIRECTOR MEDICAID INVESTIGATIONS DIVISION  
OFFICE OF THE ATTORNEY GENERAL



DAVID SPIVEY, M.D.

By:  Dated: 3-30-21  
DAVID SPIVEY, M.D.

By:  Dated: 3/29/2021  
ROBERT E. DESMOND, ESQ.  
SMITH ANDERSON  
Counsel to Dr. David Spivey

By:  Dated: 3-29-2021  
LAETITIA L. CHELTENHAM, ESQ.  
HALL, RENDER, KILLIAN, HEATH & LYMAN, LLP  
Counsel to Preferred Pain Management  
& Spine Care, P.A.

PREFERRED PAIN MANAGEMENT & SPINE CARE, P.A.

By: David L. Spivey MD Dated: 3-30-21

David L. Spivey, M.D.  
Name

President  
Title

Preferred Pain Management & Spine Care, PA  
Organization

By: Robert E. Desmond Dated: 3/29/2021

ROBERT E. DESMOND, ESQ.  
SMITH ANDERSON  
Counsel to Preferred Pain Management  
& Spine Care, P.A.

By: Laetitia L. Cheltenham Dated: 3-29-2021

LAETITIA L. CHELTENHAM, ESQ.  
HALL, RENDER, KILLIAN, HEATH & LYMAN, LLP  
Counsel to Preferred Pain Management  
& Spine Care, P.A.