



STATE OF KANSAS  
OFFICE OF THE ATTORNEY GENERAL

**DEREK SCHMIDT**  
ATTORNEY GENERAL

January 24, 2018

MEMORIAL HALL  
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TOPEKA, KS 66612-1597  
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Chris McDaniel  
Investigative Reporter, BuzzFeed News  
Newsroom  
111 E. 18<sup>th</sup> Street  
New York, NY 10003

**VIA [chris.mcdaniel@buzzfeed.com](mailto:chris.mcdaniel@buzzfeed.com)**  
**Hard Copy Will NOT Follow**

Re: Request for Records

Dear Mr. McDaniel:

On December 19, 2017, we received your email dated the same date requesting records in the possession of this office. In your email, you request the following:

This letter is a request for copies of public records under the Kansas Open Records Act. Pursuant to § 45-215 et seq., we request that you provide copies of any and all records in the possession of your office, regardless of who produced them, regarding medicaid fraud and Foundation Care, a pharmacy located in Earth City, Missouri.

1. Any records of correspondence with Foundation Care or its representatives;
2. Any records of an investigation into Foundation Care;
3. Any records of complaints about Foundation Care;
4. Any records indicating any settlement with Foundation Care;
5. Any records of correspondence between employees of the Kansas Attorney General's office in which Foundation Care was discussed;
6. Any records of correspondence between the Kansas Attorney General's office and other states in which Foundation Care was discussed.

On December 22, 2017, we emailed you a letter acknowledging receipt of your request pursuant to the provisions of K.S.A. 45-218(d), and advised you we would begin searching for records responsive to your request. Our letter also noted that your request for records did not include a mailing address where you may be contacted as required by the Attorney General Record Request Policy.<sup>1</sup> On December 22, 2017, we received your email providing your mailing address.

On January 5, 2018, we received your email dated the same date which stated the following: "Checking back on this. Any indication of when these records will be available?" On January 10, 2018, we received your email dated the same date which stated the following: "Checking back in on this. Any idea when the records will be ready?"

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<sup>1</sup> See Attorney General Record Request Policy at <http://ag.ks.gov/docs/default-source/publications/kansas-attorney-general's-record-request-policy.pdf?sfvrsn=10>

On January 16, 2018, we emailed you a letter notifying you that we completed our search for records that may be responsive to your request for records. Our letter advised you that we identified almost 300 pages of paper records and approximately 865 emails that may be responsive to your request for records.

Our January 16, 2018, letter stated that because of the broadness of your request for records, we were unable to determine which emails were responsive to your request for records without opening and reviewing each email. We noted that under the Kansas Open Records Act, (KORA), K.S.A. 45-215 *et seq.*, a requester is, of course, free to phrase a request broadly and to seek broad categories of records. We also noted that a broad request hampers our ability to search for specific records the requester may in fact be interested in and increases the associated costs of responding to such a broad request. And the request could be declined pursuant to K.S.A. 45-218(e) if the request places an unreasonable burden in producing the records.

Our January 16, 2018, letter then noted that based on a cursory review of the records we identified, we believed that many if not most of the records would be exempt in their entirety from disclosure pursuant to various KORA provisions. We also noted that the records that are not exempt from disclosure may nonetheless contain information that would not be subject to disclosure pursuant to the KORA. Because of this, our letter noted that many of the remaining records will need to be redacted under the provisions of K.S.A. 2017 Supp. 45-221(d) which requires the separation or deletion of material in public records that is not open to the public. If we were to redact and produce those records, it is likely that the redactions would cover most of the content.

Pursuant to K.S.A. 45-218(f), a public agency may charge and require advance payment of a fee for providing access to or furnishing copies of public records.<sup>2</sup> Our January 18, 2018, letter notified you, as you requested, that the fee would significantly exceed the \$100.00 maximum fee you were willing to pay. We noted that you may wish to consider whether it would be possible to revise your request for records to focus more directly on records that would be responsive to your area of interest. We asked that you contact us no later than January 30, 2018, with any revisions to your request for records.

On January 17, 2018, we received your email dated the same date which stated the following:

I would be willing to curtail the request. I think what would be helpful in determining *what* I would like to curtail in the request, is having the settlement agreement with Foundation Care. I am assuming that there's a relatively short agreement between the state and the pharmacy.

If that's the case, and I could receive that, that would be extremely helpful for determining what I'd like to ask for, and I'd be able to narrow down the request significantly.

We have completed our search for records that may be responsive to your January 17, 2018, revised request for records. Please be advised that we identified 10 pages of records responsive to your revised request for records. The 10 pages of records are enclosed.

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<sup>2</sup> *Id.*

Letter to Chris McDaniel  
January 24, 2018  
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If you would like to further clarify the request for records received in this office on December 19, 2017, you may send the clarification to me at [Cheryl.Whelan@ag.ks.gov](mailto:Cheryl.Whelan@ag.ks.gov) or at the address on this letter. If we do not hear from you by **Wednesday, February 14, 2018**, we will consider your remaining request for records withdrawn.

Sincerely,

OFFICE OF THE ATTORNEY GENERAL  
DEREK SCHMIDT

A handwritten signature in cursive script that reads "Cheryl L. Whelan".

Cheryl L. Whelan  
Assistant Attorney General

CLW:sb

Enclosure (10 pages)

## SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement (“Agreement”) is entered into by and between the State of Kansas and its related agencies, including, but not limited to, the Kansas Department of Health and Environment, Division of Health Care Finance, and the Kansas Medical Assistance Program, acting through the Attorney General of the State of Kansas, Derek Schmidt, and Foundation Care, LLC, the Defendant, and shall be effective upon the execution of this Agreement by all parties (“Effective Date”). The State and Defendant shall be collectively referred to as the “Parties.” The Parties, through their authorized representatives, **STIPULATE, COVENANT,** and **AGREE** as follows:

### Section I: Preamble

A. The State of Kansas and the duly elected, qualified, and acting Attorney General Derek Schmidt, duly responsible for the enforcement and administration of the State of Kansas law, shall be collectively referred to as the “State.”

B. All references to Defendant herein shall include acts individually, in concert, or by or through employees, agents, representatives, affiliates, assignees, and successors. The State and the Defendant, and the persons executing this Agreement on their behalf, hereby represent that the persons so executing this Agreement have full and binding authority to do so.

C. Defendant expressly denies any wrongdoing, and the State acknowledges that Defendant has denied any wrongdoing. This Agreement does not constitute an admission of fault or liability by the Defendant, nor does it constitute evidence of any liability or unlawful conduct on the part of the Defendant.



D. The Parties further acknowledge that this settlement is intended to resolve only the “Covered Conduct” (defined below) claims concerning only the State of Kansas and the Kansas Medical Assistance Program (“KMAP”).

E. This Agreement is the product of a compromise between the Defendant and the State, and the amount of the settlement is based on the Parties’ respective assessments of numerous factors and issues relating to potential litigation.

F. In order to avoid the delay, uncertainty, inconvenience, and expense of potential litigation of the State’s claims against the Defendant, and as a result of a mutual desire to settle their disputes, the Parties have reached a full and final settlement as set forth in this Agreement.

G. The State represents that no interest in its claims against the Defendant has been assigned by the State to any third party.

H. Having read and understood the terms and conditions of this Agreement, the Parties agree that this Agreement constitutes a compromised resolution of the Parties’ disputes. The Parties have had the opportunity to consult with legal counsel regarding this Agreement, and agree to be bound by all provisions contained herein, waiving any rights to trial or appeal that they may have.

## **Section II: Terms and Conditions**

NOW THEREFORE, for the mutual promises, covenants and obligations set forth below, and for the good and valuable consideration as stated herein, the receipt and sufficiency of which is hereby acknowledged, the State and the Defendant agree as follows:

1. The foregoing Preamble is incorporated herein.
2. The phrase “Covered Conduct” as used in this Agreement refers to the conduct investigated and communicated by the State of Kansas to Defendant, including, but not limited to

Defendant's entering into a contractual agreement with Medicine Shoppe International, Inc., ("MSI") granting direct access by Defendant, to the Medicine Shoppe #1336 ("MS #1336") computer system which permitted Defendant to file electronic claims directly to KMAP for Medicaid services reportedly provided by MS #1336. The State asserts that the claims misrepresented that MS #1336 had provided the goods and/or services when, in fact, the goods and/or services were actually billed and provided by Defendant, which company was at the time registered with the State as an out-of-state pharmacy, but was not an approved in-state KMAP provider. The State does not assert that the goods and/or services were not provided or that they were medically inappropriate or otherwise inconsistent with the standard of care. The Covered Conduct is expressly limited to conduct which has occurred prior to the Effective Date of this Agreement (other than as provided below).

3. The Defendant asserts that they believed MSI, a KMAP provider, properly supplied and billed KMAP for specialty pharmaceuticals properly filled by Defendant, who was a Kansas registered out-of-state provider, pursuant to a Shared Services Agreement between MSI and Defendant, which was approved by the Kansas Board of Pharmacy pursuant to Kan. Admin. Reg. 68-7-20.

#### **The Settlement Payment**

4. Defendant agrees to reimburse the State and KMAP the amount of three hundred thousand dollars (\$300,000.00) in full and final payment of the State's Release of the Defendant set forth below ("the Settlement Amount").

5. The amount set forth in paragraph 4 shall be paid to the State of Kansas as follows:

- a. Any portion, up to and including the full amount owed in paragraph 4, shall first be paid back to the Kansas Medicaid Program from any and all Medicaid reimbursements that may be due and owing to Defendant by United Healthcare of the Midwest Inc., Amerigroup Kansas Inc., or Sunflower State Health Plan Inc., (Managed Care Entities), but that are otherwise subject to a payment suspension that has been imposed on Defendant during the pendency of the State's investigation into the Covered Conduct; or
- b. Within thirty (30) days from the execution of this Agreement, any portion of the amount set forth in paragraph 4 that remains unpaid will be paid by Defendant to the State of Kansas pursuant to instructions provided separately from this Agreement.

6. It is understood and agreed that the Settlement Amount is compensatory only and that no portion of this payment shall be allocated or attributed to or characterized as the payment of fines, penalties, or other punitive damages or assessments.

**The State's Release of the Defendant**

7. Subject to the Defendant paying the Settlement Amount, the State does, as of the Effective Date, fully and finally release the Defendant, their present and former parent corporation(s), their present and former subsidiaries and affiliates known at the time of the signing of this Agreement, their predecessors, successors, and assigns, as well as their current and former owners, directors, officers, employees, sales representatives, attorneys, insurers, agents and shareholders (collectively, "Defendant Released Parties") from any claim under the Kansas False Claims Act, Kan. Stat. Ann. § 75-7501 *et seq*, and any other civil or administrative

claim, action, suit, overpayment demand, or proceeding the State has, may have or could have asserted in the future under any source of law arising from, or relating to, the Covered Conduct.

8. Subject to the provisions of this agreement, the State further releases the Defendant Released Parties from any action taken by the State pursuant to 42 C.F.R. §455.23 and KAR 30-5-61a and any related suspension of KMAP payments, to include the release of any funds currently held in escrow as part of that action. Upon execution of this Agreement, such payment suspension shall be lifted and all pending claims and suspended payments shall be processed by the Medicaid program and the Managed Care Entities and shall be paid accordingly.

9. This Release shall only release the Defendant with respect to the Covered Conduct and not with respect to any other conduct.

10. As of the Effective Date, the payment of all amounts required by paragraph four (4) of this Agreement shall fully discharge the Defendant Released Parties from any obligation to pay additional reimbursements, restitution, compensatory damages, civil penalties, or costs and expenses of litigation, including attorneys' fees, to the State for the Covered Conduct.

11. The State shall not initiate or prosecute civil litigation against the Defendant Released Parties based on the Covered Conduct. The Parties agree that this Agreement is not punitive in purpose or effect.

12. In consideration of the obligations of the Defendant set forth in this Agreement, and conditioned on the Defendant's payment in full of all amounts required by paragraph four (4) of this Agreement, the State agrees to release and refrain from instituting, continuing, directing, recommending, or maintaining any action seeking exclusion or suspension from KMAP and/or its state-sponsored health plans against the Defendant Released Parties for the



Covered Conduct. Nothing in this Agreement precludes the State from taking action against the Defendant for conduct and practices other than the Covered Conduct or for any civil or administrative liability under any statute, regulation, rule, policy, contract or of any other sort not expressly released by this Agreement.

13. Notwithstanding any other provisions of this Agreement, specifically reserved and excluded from the scope and terms of this Agreement, and from the scope and terms of any release, are any and all of the following:

- a. Any claims based upon such obligations as are created by this Agreement;
- b. Any liability of any sort under State revenue codes;
- c. Any express or implied warranty claims or other claims for defective or deficient products or services, including quality of goods and services, provided by the Defendant;
- d. Any claims based on a failure to deliver items or services due; and
- e. Claims of natural persons or consumers, or claims the State could assert on behalf of such natural persons or consumers, including for co-payments or co-insurance under Medicare Part B, occurring prior to the Effective Date of this Agreement.

Notwithstanding the foregoing, the State covenants not to sue the Defendant Released Parties based on the claims reserved from the scope of the State's release by this subparagraph if such claims are based upon the Covered Conduct.

**Defendants' Release of the State of Kansas**

14. The Defendant fully and finally releases the State, its agencies, employees, servants, attorneys and agents from any claims (including attorneys fees, costs, and expenses of every kind and however denominated) that the Defendant could have asserted against the State,

its agencies, employees, servants, attorneys and agents, related to the Covered Conduct and the State's investigation and prosecution thereof.

**Future Conduct**

15. If, after the Effective Date, a Kansas federal or state court determines that the Defendant has engaged in the Covered Conduct within the State of Kansas, this will be a material breach of this Agreement and shall revoke all releases of the Defendant granted hereby. In that event, the State may proceed with any and all claims against the Defendant which would otherwise have been released by this Agreement. In such event, the applicable statute of limitations will be six years prior to the Effective Date and the Defendant agree that the period of time between and including the Effective Date and the date such Covered Conduct becomes known to the State shall be excluded when determining whether any civil or administrative claims are time-barred by statute of limitations, laches, or any other time-related defenses. The Defendant further agrees that in such event it will not assert or argue in any judicial or administrative forum that the State of Kansas has failed to act in a timely fashion and will not plead statute of limitations, laches, or other similar defenses to any civil or administrative action against it based on the Covered Conduct.

**Miscellaneous Provisions**

16. This Agreement constitutes the complete agreement between the Parties with regard to the settlement of potential claims. The Parties represent and acknowledge that in entering into this Agreement they are not relying on any promises or representations other than those expressly set forth in this Agreement.

17. This Agreement, including any and all attachments or exhibits, constitutes the complete agreement between the State and the Defendant and may not be amended except by a writing signed by the State and the Defendant.

18. The obligations arising from this Agreement constitute a contemporaneous exchange for new value between the Parties and not on account of an antecedent debt.

19. The Defendant represents that they are solvent as of the signing of this Agreement and that they will be solvent both prior to and after the payment of the Settlement Amount.

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

21. Nothing in this Agreement shall relieve the Defendant of their other obligations under applicable federal, state and local law.

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

23. Nothing in this Agreement shall be construed to create a waiver of the State of Kansas' sovereign immunity.

24. Except as expressly set forth in this Agreement, this Agreement shall neither create, nor affect, any rights of persons, or private or governmental entities or litigants, who are not parties to this Agreement.

25. Except as otherwise provided herein, 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.

26. This Agreement shall be governed by the laws of the State of Kansas.

27. The exclusive forum for resolving any disputes under this Agreement shall be the District Court of Shawnee County, Kansas.

28. The bold-faced paragraph captions in this Agreement are for convenience only and do not add to, detract from or change the substantive language or terms of this Agreement.

29. The undersigned individual(s) signing this Agreement on behalf of the Defendant represents and warrants that they are duly authorized by the Defendant to execute this Agreement. No personal or individual liability shall be assigned, sought or applied to such individuals.

30. The undersigned individual(s) signing this Agreement on behalf of the State represent that they are signing this Agreement in their official capacities only and that they are duly authorized to execute this Agreement in such capacity. No personal or individual liability shall be assigned, sought or applied to such individuals.

31. The State and the Defendant agree that should any nonmaterial portion or portions of this Agreement be found to be void, unenforceable or otherwise invalid by any court of competent jurisdiction after the exhaustion of all rights to appeal, the entire Agreement shall not be nullified and such invalid portion or portions shall be severed from the remainder of the Agreement as if they had never been entered into and the remainder of the Agreement shall be enforced. The Parties agree that portions of this Agreement concerning the release of claims and/or the payment of the Settlement Amount are material.

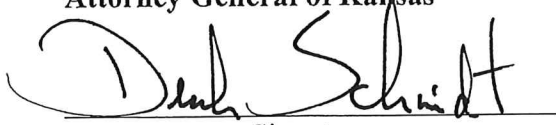
32. This Agreement may be executed in counterparts, each of which shall constitute an original and all of which shall be deemed to constitute one and the same Agreement.

**Acts Necessary to Effectuate Agreement**

33. Each Party agrees to perform such further acts and to execute and to deliver such further documents as may reasonably be necessary to carry out this Agreement.

IN WITNESS WHEREOF, the State and the Defendants set their hands and seals on the  
dates set forth below:

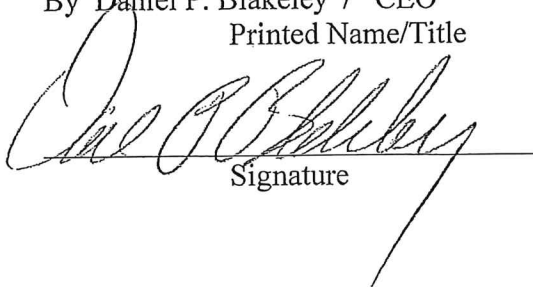
**Derek Schmidt**  
**Attorney General of Kansas**

  
Signature

Date: 11/18/2015

**Foundation Care, LLC.**

By Daniel P. Blakeley / CEO  
Printed Name/Title

  
Signature

Date: 03 November 2015