

IN THE MATTER OF EMPOWER HEALTHCARE SOLUTIONS, LLC
SETTLEMENT AGREEMENT

PARTIES

THIS SETTLEMENT AGREEMENT (“Settlement Agreement”) is made and entered into effective as of the date of its signing between the State of Arkansas (“State”) by and through its Attorney Lloyd Warford, Deputy Attorney General of the Medicaid Fraud Control Unit (“MFCU”), and on behalf of Arkansas Attorney General, Leslie Rutledge, and Empower Healthcare Solutions, LLC, including its affiliates, owners, subsidiaries, employees, members, directors, managers, attorneys, and agents (hereinafter collectively, “Empower”), by and through its CEO, Mitch Morris.

PREAMBLE

Pursuant to the MFCU’s authority under Ark. Code Ann. §§ 5-55-101, *et seq.*, Ark. Code Ann. § 5-37-217, and Ark. Code Ann. §§ 20-77-901, *et seq.*, the State has conducted an investigation of certain claims, as defined in Ark. Code Ann. §§ 5-55-102 and 20-77-901.

The MFCU seeks reimbursement, damages and costs related to Empower’s classifications of expenditures to be used in the calculation of the Medical Loss Ratio (“MLR”) and the State MLR and risk corridor reconciliation for CY 2020, in accordance with the terms set forth herein.

The State has also received allegations related to the operation of Empower’s Special Investigations Unit (“SIU”) and allegations related to providers of direct care and contractors providing services through the Community Investment program.

To date, the MFCU has not identified any overpayments, misclassifications or other violations of applicable laws that are sufficient to support credible evidence of fraud or false claims with regard to Empower.

The State acknowledges and agrees that Empower has fully cooperated with the MFCU to identify, analyze and produce requested documents to assist with the MFCU investigation of Empower described above.

It is the intent of the parties to settle all of the claims and allegations set forth herein including, without limitation, all known and alleged overpayments and classifications of Community Investment program funds with respect to Empower.

COVERED CONDUCT

The MFCU contends that it has civil claims against Empower relating to Empower’s classifications of expenditures to be used in the calculation of the Medical

Loss Ratio (“MLR”) and the State MLR and risk corridor reconciliation for CY 2020 for Empower’s Behavioral Health Stabilization Capitation Program and the Community Investment program and the operation of the SIU. That conduct is referred to below as the “Covered Conduct.”

The Covered Conduct includes \$3,681,911.00 in funds that were paid for Medicaid services in 2020 that were not expended for services under Empower’s Behavioral Health Incentive Plan, administrative costs or reported as profit in 2020, the approximate \$8.0 million in capitated payments under Empower’s Behavioral Health Stabilization Capitation program, \$6,681,600.00 in funds classified or held as approved Community Investment program funds for 2020, and the investigation and allegations regarding SIU.

For purposes of this Settlement Agreement, the term “Covered Conduct” means any and all alleged and actual civil or administrative claims, actions, penalties, or causes of action of any kind including without limitation those based on Ark. Code Ann. § 5-55-101, *et seq.* Ark. Code Ann. § 5-37-217, Ark. Code Ann. §§ 20-77-901 through 20-77-912, and Ark. Code Ann. § 20-77-2506, or common law theories of payment by mistake, unjust enrichment, breach of contract, or fraud.

EXCLUSIONS FROM COVERED CONDUCT

This Settlement Agreement does not include any overpayments or misclassifications not specifically identified and settled herein or any claim unknown to the Office of the Attorney General. Specifically, the MFCU has ongoing investigations that involve (1) individuals, providers and subcontractors who are part of the Empower network, but not directly against Empower, including matters referred for investigation to the State by Empower’s SIU, and (2) how Community Investment funds were spent by provider recipients. These investigations do not at this point directly implicate Empower and are not covered by this Settlement Agreement. The ongoing audits and investigations not specifically resolved by this agreement will continue.

This is a civil settlement of allegations of fraud and false claims as set forth herein and defined above as Covered Conduct, and does not absolve any individual of criminal liability in any prosecution by the State or federal government.

The investigations, audits and claims set forth in this Exclusions section are collectively referred to herein as the “Excluded Claims.”

THE MFCU POSITION

The MFCU alleges that Empower knowingly violated the Arkansas Medicaid Fraud False Claims Act, Ark. Code Ann. §§ 20-77-901, *et seq.* as follows:

- (i) Classification of Community Investment Expenditures in CY 2020

In 2020, the Arkansas Department of Human Services (“DHS”) approved Empower spending \$2,015,000 of Medicaid funds on community investments provided by Access Health Services (“Access”). Empower also submitted budgets from Access proposing Community Investment expenditures of \$1,690,000 in 2021; and \$1,690,000 in 2022. Empower contends that it “booked” this liability under an accrual methodology of accounting, but acknowledges that it did not expend these funds in 2020. Despite a September 22, 2020 approval letter and an October 7, 2020 approval letter from DHS, which does not specify or limit when such 2020 funds may be expended, there is a dispute as to whether these expenditures were approved using 2020 Medicaid funds, but whether approved or not the MFCU asserts that these 2021 and 2022 expenditures cannot be made with Medicaid funds from 2020. While Community Investment funds are authorized substitutes for 2020 direct care services, the MFCU asserts that 2020 Community Investment must be expended in the same 2020 contract year.

Empower retained \$3,380,000 of 2020 capitation payments/premium revenue in its bank account that was not paid out either as Community Investment (or other qualified benefit expenditures) or as administrative expenditures. The MFCU asserts Empower must classify unexpended funds as profits for purposes of its MLR and/or State MLR/risk corridor reconciliation calculation, even though Empower asserts that it “allocated” these 2020 funds as a liability for 2021 and 2022 based on an accrual methodology of accounting.

In 2020, DHS approved Empower’s Independent Case Management proposal as a Community Investment expenditure, with a three-year funding schedule totaling \$5,039,900, with \$1,738,300 for 2020. Despite an October 7, 2020 approval letter from DHS, which does not specify or limit when such 2020 funds may be expended, the MFCU asserts that DHS approved Community Investment expenditures of only \$1,738,300 for 2020 for this project, but that Empower classified expenditures of the entire \$5,039,900 that Empower paid out in 2020 as a Community Investment expenditure. The MFCU asserts that Empower misclassified \$3,301,600 as approved 2020 Community Investment expenditures in the numerator of the 2020 MLR and 2020 State MLR/risk corridor reconciliation calculation, and that the misclassification did not comply with the applicable federal regulations and the Empower-DHS PASSE contract.

(ii) Classification of Behavioral Health Stabilization Capitation Payments and Incentive Plan Expenditures in CY 2020

The MFCU asserts that, with encounters down and a precipitous drop in services provided in 2020 due to the COVID-19 pandemic, a significant amount of Medicaid dollars paid to Empower based on the capitation rate for CY 2020 was accumulating and eventually would have to be reconciled and repaid to the Arkansas Medicaid Program. Empower engaged an actuarial consulting firm to develop a Behavioral Healthcare Capitation Stabilization Program to provide capitated payments from April 2020 – August 2020 to 25 contracted Behavioral Health and IDD providers. Empower reported approximately \$11.7 million in “BH stabilization payments” on its financial template report submitted to DHS. While Empower could create a capitated rate, the

payments made pursuant to those rates had to be reconciled to encounter claims at the end of 2020, and any unearned income had to be repaid to DHS or classified as profit. Empower completed the reconciliation process and identified \$3,681,911 in capitation payments that were not directly attributable to specific patient claims data. Rather than require immediate repayment of this amount, Empower rolled the approximate \$3.7 million payment in 2020 over to 2021 as a performance incentive payment plan called the Behavioral Health Incentive Plan, which allowed each provider to “earn out” in 2021 their “carry-over balance” paid in 2020. The MFCU asserts that, while Empower could develop subcapitated rates, they lacked the authority to make behavioral healthcare stabilization payments to its subcontracted providers in 2021 out of 2020 Medicaid dollars without DHS approval and had no authority to “roll over” the unearned portion of these stabilization capitated rate payments it already paid in CY 2020 to be “earned” in CY 2021. The MFCU further asserts that Empower does not have encounter claims data that justifies and reconciles with the total amount of these stabilization capitated rate payments since such payments must be made for services provided.

As a result of these actions, the MFCU asserts that Empower (a) knowingly made or caused to be made false statements or representations of material facts in a claim for payment or application for benefits or payment under the Arkansas Medicaid Program and (b) knowingly made or caused to be made, omissions or false statements or representations of material facts for use in determining rights to a benefit or payment under the Arkansas Medicaid Program.

The MFCU is responsible for defending and enforcing the reconciliation process applicable to managed care in Arkansas. The MFCU asserts that all funds not properly expended or exceeding the authorized profit permitted by the contract period must be returned to the Medicaid program during the reconciliation process. The MFCU asserts that permitting the classification process to move funds from one contract period to the next in a way that avoids the reconciliation process is a violation of the contract and the law.

The MFCU acknowledges and agrees that this Settlement Agreement is not an admission of liability or wrongdoing on the part of Empower and Empower emphatically disagrees with and denies the assertions and allegations set forth herein, any wrongdoing and any violation of applicable law.

EMPOWER’S POSITION

Empower disagrees with the assertions set forth in the MFCU’s position above and does not admit, and specifically denies, that Empower knowingly or unknowingly, intentionally or unintentionally, violated the Arkansas Medicaid Fraud Act or the Arkansas Medicaid False Claims Act or failed to comply with any statute, regulation, contract, the Provider-Led Arkansas Shared Savings Entity Provider Agreement (“PASSE”) with DHS, Medicaid Program Manual rule or other guidance governing Empower’s expenditures, classification of expenditures, submission of claims and receipt of reimbursement from the Arkansas Medicaid Program, or any other violation

of any such contract, agreement, policy, rule, regulation or law. Empower hereby agrees to reclassify certain expenditures for purposes of this settlement and resolution of Claims set forth herein.

Empower contends that during the beginning of the COVID-19 pandemic, access to behavioral health (“BH”) services was in jeopardy due to the fragility and uncertainty of the BH provider community/network. In an effort to (i) stabilize and preserve the BH provider network and (ii) meet Empower’s contractual obligations with DHS (such as network adequacy, service availability, etc.), Empower sought the services of an independent third party financial consulting firm to explore alternative payment methods with Empower’s contracted providers, in accordance with Section 9.8.2.3 of the PASSE Agreement, to ensure network adequacy and the availability of BH services. Empower contends that it informed DHS regarding the proposal and structure of the BH Capitation Stabilization program and further asserts that DHS expressed support for the BH Capitation Stabilization program. Empower implemented the BH Capitation Stabilization program to stabilize the BH network during an uncertain period of the COVID-19 pandemic, and Empower, working with its independent consultants and financial advisors, continued to capture services, encounters, and claims information on a fee-for-service basis to reconcile and offset against the capitation payments on a monthly basis. Empower asserts there was a monthly offset during the BH Capitation Stabilization program from April 1, 2020 through August 31, 2020, followed by a three-month run out / reconciliation period through the end of November 2020. Empower and its consultants and financial advisors developed a value-based / performance payment plan (known as Behavioral Health Incentive Plan or “BHIP”) that included certain performance and shared savings metrics intended to improve quality of care. Each provider is required to “earn out” their carry-over balance based on the BHIP metrics before a provider receives any additional payment under BHIP. The BHIP amount is \$3,681,911.00, which is identified above and which is being settled and resolved through this Settlement Agreement, even though Empower asserts that its reporting and accounting principles were appropriate and accurate.

With respect to the Community Investment program, Empower coordinated with five providers to submit Community Investment applications to DHS on June 12, 2020, in compliance with the PASSE contract, 45 CFR § 158.150, and as directed by the process designed by DHS. The full proposals for all five Community Investment programs, including the three-year proposals and budgets for Independent Case Management and Access Health Services, were submitted to DHS in the late summer or early fall of 2020. The Community Investment proposal submitted by Independent Case Management included an aggregate amount of \$5,039,900 for a three-year program. The Community Investment proposal submitted by Access Health Services included an aggregate amount of \$5,395,000 for a three-year period. On September 22, 2020, Empower received its first approval letter from DHS, approving the Access Health Services Community Investment proposal. The September 22, 2020 approval letter from DHS states “DHS has reviewed Empowers Access Health Services proposal and determined this proposal is approved.” On October 7, 2020, Empower received another approval letter from DHS, which (i) confirmed DHS’s approval of the Access Health

Services Community Investment proposal for Crisis Services, (ii) confirmed DHS's prior verbal approval of the Independent Case Management Community Investment proposal, (iii) confirmed DHS's prior verbal approval of the Arkansas Healthcare Alliance Community Investment proposal, and (iv) also formally approved in writing all five of the Community Investment proposals submitted by (1) Access Health Services, (2) Independent Case Management (ICM), (3) Arkansas Healthcare Alliance, (4) Arkansas Community Health Network, and (5) ARcare. The October 7, 2020 approval letter from DHS states "we also verbally agreed we would approve the ICM proposal" and "we formally approved the Access Health Crisis Service proposal on September 22." Empower believes that DHS approved the Community Investment proposals as submitted with their full budgets, including both of the three-year projects. Empower asserts that, as a result, it was authorized to expend the entire amount to Independent Case Management using 2020 funds and to book the liability for Access Health Services using an accrual basis methodology of accounting and to retain such funds for 2021 and 2022 expenditures to satisfy its accrued liability. Empower entered into Community Investment – Grant Agreements with the Community Investment recipients out of an abundance of caution, even though it was not required by DHS. The purpose of these contracts is to contractually require each recipient to use the grant award / funds only for purposes of fulfilling their individual Community Investment purpose and to evidence each recipient's agreement to abide by applicable laws and to memorialize each recipient's commitment to comply with the representations, warranties and stated uses of the funds, as described in their DHS-approved applications.

Empower acknowledges and agrees that this Settlement Agreement is a compromised settlement of disputed claims to avoid the cost, burden, and uncertainty of litigation.

CONSIDERATION AND RELEASE

Empower agrees to reclassify \$5,039,900 of Community Investment expenditures on the Independent Case Management project in CY 2020 such that only the \$1,738,300 approved for CY 2020 is included as benefit expenditures and the remaining \$3,301,600.00 will be reclassified as administrative expenses or profit in Empower's calculation of the 2020 MLR and 2020 State MLR/risk corridor reconciliation.

Empower agrees to classify \$2,015,000 for the Access Health Services Community Investment project approved for CY 2020 as benefit expenditures in Empower's calculation of the 2020 MLR and 2020 State MLR/risk corridor reconciliation. The remaining \$3,380,000.00 will be classified as profit in Empower's calculation of the 2020 MLR and 2020 State MLR/risk corridor reconciliation and applied through the calculation of the CY 2020 risk corridor reconciliation.

This Agreement does not modify DHS's approval of the three year plans for the Independent Case Management project or the Access Health Services Community Investment project. The MFCU does not object to these programs reporting approved

benefit expenditures in 2021 and 2022 provided the expenditures are in fact made in accordance with approved budgets.

Empower agrees to reclassify the \$3,681,911 in Behavioral Health Stabilization payments made in CY 2020, which Empower rolled over as a “carry-over balance” to be “earned out” by providers in 2021 under Empower’s Behavioral Health Incentive Plan, as either administrative expenditures or profit in Empower’s calculation of the 2020 MLR and 2020 State MLR/risk corridor reconciliation.

Empower agrees to modify the classification of the total of \$10,363,511 for 2020 as set forth above. Empower further agrees that the initial CY 2020 risk corridor reconciliation, with the foregoing classification and reclassification required by this Settlement Agreement, will include all claims and revenue incurred between January 1, 2020 and December 31, 2020, with allowable claims runout for CY 2020 submitted to Empower through November 30, 2021, and to provide the initial CY 2020 risk corridor financial template settlement payment calculation with eleven months of runout information to DHS no later than January 7, 2022. Empower further agrees to make 75% of the initial CY 2020 risk corridor settlement payment calculated through the Milliman risk corridor financial template to DHS no later than January 7, 2022 by wire transfer as follows:

Bank Name: Bank of America
Payee Account Name: Treasurer State of Arkansas
Treasury Address: 1401 West Capitol, Suite 275, Little Rock, AR 72201
Account number: 000073828756
Wire routing number: 026009593

This Settlement Agreement is intended merely as a modification of the timing of the payment of a portion of the CY 2020 risk corridor settlement payment and in no way relieves Empower of its obligation to pay 100% of the remaining final CY 2020 risk corridor settlement payment. Empower agrees and affirms that the final CY 2020 risk corridor settlement payment calculation with fifteen months of claims runout information will be provided by Empower to DHS in accordance with the Empower-DHS PASSE Contract and that the final CY 2020 risk corridor settlement will be paid in accordance with the Empower-DHS PASSE Contract. Empower agrees to provide the MFCU, no later than January 7, 2022, with an itemized explanation of the calculation of the amounts entered in the numerator and denominator of the State MLR ratio before and after the foregoing classification and reclassification required by this Settlement Agreement so that the MFCU receives documentation supporting that Empower has performed its obligations under this Settlement Agreement.

Empower agrees that the calculation of the MLR for CY 2020 and the MLR report to be submitted to DHS by April 30, 2022, as required by the Empower-DHS PASSE Contract, will include the foregoing classification and reclassification required by this

Settlement Agreement, as will any and all monthly reports, quarterly reports/data requests and financial reports submitted to the State.

Empower agrees to pay the MFCU one million dollars and no cents (\$1,000,000.00), to be paid as a civil penalty of \$750,000.00 and investigative costs of \$250,000.00. This amount will be reconciled by the Arkansas State Medicaid Program and shall be a one-time cash payment by Empower due by January 7, 2022, or by the signing of this Settlement Agreement, whichever is later. Payment shall be made by two checks. The check for the civil penalty portion shall be made payable to the Arkansas Medicaid Program Trust Fund. The check for investigative costs shall be made payable to the Office of the Attorney General. Both checks shall be sent to the Office of the Arkansas Attorney General, c/o Chief Fiscal Officer, Debra Hope, 323 Center Street, Suite 200, Little Rock, Arkansas 72201 and referenced appropriately with either "Empower – civil penalty" or "Empower – investigative costs." Although retained by the Office of the Attorney General, the MFCU shall take the "investigative costs" check and apportion the same Federal Medicaid Assistance Percentage as is applied to the underlying "Empower – civil penalty" check prior to depositing the balance within the applicable Attorney General account. The investigative costs paid by Empower to the MFCU will be used to fund future investigations pursuant to Ark. Code Ann. § 20-77-903(c)(2).

The Settlement Agreement is to be executed and returned to the MFCU office, to the attention of Mr. Lloyd Warford, on or before December 31, 2021. Email copies of the executed Agreement may be provided by December 31, 2021, with originals to be delivered by January 7, 2022.

Collectively, the one-time cash payment of \$1,000,000.00 and the 75% initial CY 2020 risk corridor settlement payment constitute the "Settlement Amount." The foregoing consideration, including payment of the Settlement Amount, is given by Empower in full and final settlement of any and all Covered Conduct that could be brought by the State of Arkansas against Empower. Conditioned upon the full payment of the Settlement Amount, the MFCU otherwise unconditionally and irrevocably releases, waives and discharges Empower from any and all liability for the Covered Conduct, but not including the Excluded Claims.

Upon the full payment of the Settlement Amount, the MFCU shall terminate and conclude all current investigations of the Covered Conduct and further agrees to forbear from filing any civil action or lawsuit against Empower for any of the Covered Conduct, but not including the Excluded Claims.

Any release pursuant to this Settlement Agreement is only effective upon the full performance of the terms and conditions contained in this Settlement Agreement.

In the event Empower fails to tender full payment of the Settlement Amount, the MFCU retains the right to enforce the provisions of this Settlement Agreement, including the institution of suit on the Covered Conduct and seek any available redress.

Other than as specifically provided herein, each party to this Settlement Agreement shall bear all of its own attorney's fees and costs arising from the actions, investigations, and potential suits or claims associated with the Covered Conduct. Empower understands and agrees that all attorney's fees associated with defending the allegations of false claims resolved by this settlement must be paid from Empower profits or other funds and cannot be classified as administrative expenditures in Empower's calculation of the 2020 MLR and 2020 State MLR/risk corridor reconciliation or in Empower's calculation of the 2021 MLR and 2021 State MLR/risk corridor reconciliation.

This Settlement Agreement represents solely a compromise of disputed claims within the meaning of Rule 408 of the Federal and Arkansas Rules of Evidence.

The terms, conditions, and considerations expressed in this Settlement Agreement are contractual and not a mere recital. The terms and conditions of this Settlement Agreement shall be governed by the laws of the State of Arkansas.

The MFCU and Empower agree that this Settlement Agreement may not be modified, amended, or altered except by a written agreement that is executed by both parties.

SUSPENSION

Upon the execution of this Settlement Agreement and payment of the Settlement Amount, the December 1, 2021 partial payment suspension based on the MFCU investigation shall be lifted. The November 16, 2021 DHS Notice of Intermediate Sanction letter and other administrative actions are not part of this settlement. Nothing in this Agreement is intended to limit DHS's oversight of Empower or the PASSE system.

Empower agrees not to disburse additional Community Investment funds before April 1, 2022. This will give the MFCU time to complete its audit regarding how previous Community Investment funds were expended.

OTHER PROVISIONS

The parties agree that records will be kept in accordance with all applicable state and federal laws and regulations. Additionally, nothing in this Settlement Agreement is intended to alter or restrict the application of any state or federal law, any state public records, freedom of information, or open record statute, rule, regulation or law. Pursuant to Ark. Code Ann. § 25-18-401(1), no public official or employee acting on behalf of a governmental agency or another agency wholly or partially supported by or expending public funds shall agree or authorize another to agree that all or part of the Settlement Agreement be kept secret, sealed or otherwise withheld from public disclosure.

SIGNATURES

Each party has had an opportunity to read, review, and discuss with counsel this Settlement Agreement. Each undersigned is a duly authorized representative of the entity for which the undersigned party purports to represent.

EFFECTIVENESS

This Settlement Agreement shall become effective immediately upon the execution of the Settlement Agreement by all parties but the suspension will not be lifted until the Settlement Amount has been paid.

**LESLIE RUTLEDGE, ATTORNEY GENERAL
THE STATE OF ARKANSAS**


By: 
Lloyd Warford, Deputy Attorney General
Director, Medicaid Fraud Control Unit

Date: 12/30/2021


EMPOWER HEALTHCARE SOLUTIONS, LLC

By: 
Mitch Morris, CEO


Date: December 30, 2021

By: 
Bass, Berry & Sims, PLC
Brian Roark, Attorney for Empower

Date: December 30, 2021

By: 
Butler Snow LLP
Scott B. Shanker, Attorney for Empower

Date: December 30, 2021

By: 
Friday, Eldredge & Clark LLP
Tim Ezell, Attorney for Empower

Date: December 30, 2021

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