

SETTLEMENT AGREEMENT

This SETTLEMENT AGREEMENT ("Agreement") is entered into by and between the North Carolina Medical Board ("Medical Board") and the North Carolina State Board of Examiners in Optometry ("Optometry Board"), concerning the settlement of all pending litigation between the parties.

Whereas the Optometry Board is the plaintiff in a lawsuit entitled *The North Carolina State Board of Examiners in Optometry v. The North Carolina Medical Board*, Case No. 03 CV 015248. The Medical Board filed a Notice of Appeal with the North Carolina Court of Appeals with regard to the preliminary injunction entered by the Superior Court of Wake County on March 2, 2005. All matters referred to above are hereinafter referred to collectively as "the Litigation";

Whereas nothing contained in this Agreement shall be considered or interpreted to be an admission of liability or violation of any laws by either party, nor shall it be considered an admission by either party of an inability to prove the allegations, defenses, or assertions contained the Litigation. Rather, the parties are entering into this Agreement to resolve existing litigation in the most effective and efficient matter for all involved while ensuring the safe practice of medicine and optometry in this State and therefore believe that their actions in entering this Agreement are in the best interest of the public;

Whereas for reimbursement purposes, medical, surgical and optometric acts or procedures may be described by Current Procedural Terminology ("CPT") Codes. The purpose of this Agreement is not to determine the appropriate CPT Code for a specific act or procedure. Any references to CPT Codes are used only as a convenient means of describing certain acts or procedures;

Whereas the Parties to this Agreement desire to settle and finally resolve the Litigation, and wish to enter into a settlement agreement which provides for the dismissal of all of the Litigation;

NOW, THEREFORE, in consideration of the following covenants and agreements, the parties agree as follows:

1. CPT Codes 92230 and 92240

- a. Pursuant to the terms of a moratorium described in section 6 of this Agreement, the Optometry Board will not credential any North Carolina licensed optometrist to perform CPT Code procedures 92230 and 92240 during the moratorium period.
- b. Any North Carolina licensed optometrist who performs CPT Code procedures 92230 or 92240 will be practicing beyond the scope of his/her license.

2. CPT Codes 68200 and 67515

- a. Pursuant to the terms of a moratorium described in section 6 of this Agreement the Optometry Board will not credential any North Carolina licensed optometrist to perform CPT Code procedures 68200 and 67515 during the moratorium period.
- b. Any North Carolina licensed Optometrist who performs CPT Code procedures 68200 or 67515 will be practicing beyond the scope of his/her license.

3. CPT Code 92235

The Optometry Board will have the right to credential optometrists to perform CPT Code procedure 92235, subject only to the following terms and conditions:

- a. Prior to the credentialing of any Optometrist to perform this procedure, the Medical Board shall have the right to provide significant input through a designee agreeable to both parties. The designee will act in an advisory capacity to the Optometry Board with respect to minimum educational or other requirements for certification and the development of protocols for the performance of the procedure.
- b. No Optometrist will be credentialed to perform CPT Code procedure 92235 unless and until the Optometrist or a member of his staff is ACLS certified. If the Optometrist is not ACLS certified, the staff member who is ACLS certified shall be present during the performance of the procedure.
- c. A "crash cart" shall be present and available at the Optometrist's office or other location at which such procedure is being performed during the performance of the procedure. The parties agree that the term "crash cart" shall have the meaning commonly understood in the medical community.
- d. No Optometrist will be credentialed to perform CPT Code procedure 92235 unless and until the Optometrist has made best efforts to establish a relationship with a physician who will be reasonably available to provide medical assistance in the event of a medical complication during the performance of the procedure. If the Optometrist is unable to establish a relationship with a physician, the Optometry Board shall require the Optometrist to furnish information or evidence to establish that best efforts were made.
- e. If the Optometrist, after best efforts, is unable to establish a relationship with a physician, the Optometrist shall immediately request emergency

medical services in the event of a medical emergency or complication during the performance of the procedure. An Optometrist who has established such a relationship with a physician, in addition to notifying such physician of the emergency or complication, may also notify emergency medical services.

- f. Any North Carolina licensed Optometrist who performs CPT Code procedure 92235 in North Carolina without having been credentialed by the Optometry Board or without fulfilling the requirements set forth in subparagraphs “b” through “e,” above, will be performing procedures for which he/she has not been credentialed and would be subject to disciplinary action by the Optometry Board.

4. CPT Code 90782

The Optometry Board will have the right to credential Optometrists to perform CPT Code procedure 90782 subject only to the following limitations and conditions:

- a. The Optometry Board will have the right to credential Optometrists to perform injections into the periocular muscles except for the purpose of cosmesis. Any Optometrist who performs an injection into the periocular muscles without having been credentialed by the Optometry Board will be performing procedures for which he/she has not been credentialed and would be subject to disciplinary action by the Optometry Board.
- b. The Optometry Board will not credential Optometrists to inject into the extraocular muscles. Any Optometrist who performs an injection into the extraocular muscles will be practicing beyond the scope of his/her license.

5. CPT Code 11900

The Optometry Board will have the right to credential Optometrists to perform CPT Code procedure 11900 subject only to the following terms and conditions:

- a. Prior to the credentialing of any Optometrist to perform this procedure, the Medical Board shall have the right to provide significant input, through a designee agreeable to both parties. The designee will act in an advisory capacity to the Optometry Board with respect to minimum educational or other requirements for certification and the development of protocols for the performance of the procedure.
- b. Optometrists credentialed to perform this injection procedure shall be limited to injecting chalazia.

- c. An Optometrist credentialed to perform this procedure who injects lesions other than chalazia will be practicing beyond the scope of his/her license.
- d. Any North Carolina licensed Optometrist who injects a chalazia in North Carolina without having been credentialed by the Optometry Board will be performing procedures for which he/she has not been credentialed and would be subject to disciplinary action by the Optometry Board.

6. Moratorium

The Parties agree that a moratorium period of eighteen (18) months shall commence on the date of execution of this Agreement. During this moratorium period, the Optometry Board will not take any action intended to permit, authorize or result in the credentialing of optometrists to perform the CPT Codes described in paragraphs 1 and 2 of this Agreement including but not limited to initiating litigation, rule-making or declaratory ruling proceedings.

7. Termination of all prior Agreements

- a. The Parties agree to terminate the June 8, 1994 Agreement and all amendments with respect to any prospective duties or obligations which any party may have had pursuant to the Agreements.
- b. It is the parties' express intent to terminate prospectively, rather than rescind, the 1994 Agreement (as amended). Accordingly, and in furtherance of their agreements herein, the parties agree that after their execution of this Agreement and for the period of time set forth in paragraph 6 of this Agreement, neither of them will make any assertion or take any position at any time or in any forum or medium that conflicts with the terms of paragraphs 4.A, 4.B, 4.C, or 4.D of the 1994 Agreement, as amended, except to the extent provided in or permitted by this Agreement.

8. Dismissal of Litigation

Upon execution of this Agreement the parties shall immediately direct their respective counsel to dismiss the Litigation with prejudice and without costs to either party. The parties agree that in any litigation or administrative proceeding occurring after the period of moratorium discussed in paragraph 6 herein, the dismissal with prejudice of the Litigation by the Optometry Board shall not act to bar the Optometry Board from asserting or taking the position that all of the CPT Codes which were the subject matter of the Litigation fall within the scope of practice of optometry. The parties agree to cooperate fully to promptly complete all acts and to execute all documents necessary to dismiss the Litigation.

The parties therefore further agree that this Agreement shall act as a tolling agreement as to any statute of limitation, statute of repose, assertion of waiver or

estoppel, assertion of laches, assertion of *res judicata* or collateral estoppel, or other such defenses which otherwise might be raised by either party in such subsequent litigation or administrative proceeding. The Optometry Board likewise agrees that in any subsequent litigation or administrative proceeding it will not assert any claim for specific performance based on the document signed by the Medical Board President and by the attorney for the Optometry Board on or about June 28, 2000 (a copy of which is attached as Exhibit 6 to the Complaint in the Litigation).

Except as described herein, the Optometry Board releases, waives, and abandons all claims it has or may have in the future against the Medical Board, its directors, officers, attorneys, agents, employees, and successors, from all actions, causes of action, claims and liabilities including, without limitation, those arising out of the Litigation, whether known or unknown, including without limitation all claims for costs, expenses, attorney fees, compensatory damages, and interest. The Medical Board releases, waives, and abandons all claims it has or may have in the future against the Optometry Board, directors, officers, attorneys, agents, employees, and successors, from all actions, causes of action, claims and liabilities including, without limitation, those arising out of the Litigation, whether known or unknown, including without limitation all claims for costs, expenses, attorney fees, compensatory damages, and interest.

9. Authorization

Each individual signing this Agreement warrants and represents that he has the full authority and is duly authorized and empowered to execute this Agreement on behalf of the Party for which he signs.

10. Attorney's Fees

Each Party shall bear its own attorney's fees and costs arising from the actions of its own counsel in connection with this Agreement and incurred prior to the date of execution of the Agreement.

11. Severability

If any provision of this Agreement shall be held by a court of competent jurisdiction to be illegal, invalid or unenforceable, the remaining provisions shall remain in full force and effect.

12. Binding Effect

This Agreement shall be binding on the parties and their successors in interest to the extent permitted by law.

13. Entire Agreement and Modification

This Agreement contains the entire agreement of the parties with regard to the matters set forth herein. This Agreement supersedes any previous Agreements entered into by the parties. This Agreement cannot be modified, amended, altered, waived or superseded, in whole or part, except by a written agreement so stating which is signed by all parties to this Agreement. No delay or omission on the part of either party to this Agreement shall operate as a waiver of any such right or any other right. Waiver of any one breach of any provision shall not be deemed a waiver of any other breach of the same or any other provision.

14. Additional Documents


The Parties agree to perform in good faith, cooperate fully and execute any and all supplementary documents and to take all additional steps which may be necessary or appropriate to give full force and effect to the basic terms and intent of this Agreement.

15. This Agreement shall become effective on execution.

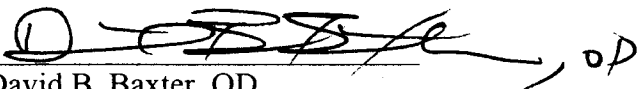
16. This Agreement may be signed in multiple counterparts, each of which shall be considered an original.

This the 13th day of August, 2005

The North Carolina Medical Board

By: 
Charles L. Garrett, MD
President

North Carolina State Board of Examiners in
Optometry

By: , OD
David B. Baxter, OD
President