

CAUSE NO. D-1-GV-14-00581

THE STATE OF TEXAS,	§	IN THE DISTRICT COURT
	§	
Plaintiff,	§	
	§	
v.	§	
	§	
	§	53rd JUDICIAL DISTRICT
XEROX CORPORATION; XEROX	§	
STATE HEALTHCARE, LLC; ACS	§	
HEALTHCARE LLC, A XEROX	§	
CORPORATION,	§	
	§	
Defendants.	§	TRAVIS COUNTY, TEXAS

LINDA REED’S REQUEST FOR DECLARATORY JUDGMENT AND FOR AWARD OF TRUE WHISTLEBLOWER’S SHARE OF XEROX SETTLEMENT

COMES NOW Linda Reed, pursuant to Texas Civil Practice and Remedies Code 37.004, and files this request for declaratory judgment, as the true and original whistleblower in the above entitled action, to determine her share of the Xerox settlement, and would respectfully show the Court as follows:

I. SUMMARY OF MOTION AND REQUESTED RELIEF

Over twelve years ago, and more than five years before anyone brought a lawsuit against Xerox State Healthcare, LLC (f/k/a ACS State Healthcare LLC and now known as Conduent State Healthcare, LLC, hereinafter “Xerox”), Linda Reed blew the whistle to the HHSC and to U.S. Senator John Cornyn about Xerox’s failure to assure the medical necessity of prior authorized services. Her January 2007 alarm spurred a State Inspector General investigation into Xerox’s dental prior authorization process that concluded Xerox was engaging in the acts that are the subject of this lawsuit—namely, that Xerox was approving the expenditure of Medicaid dollars without actually determining whether such services were medically necessary.

Ms. Reed, who worked in Xerox's dental prior authorization quality assurance division from 2005 to 2007, was the first person to reveal these facts to the State. Her actions in 2007 revealed the specific facts about Xerox's fraudulent process that form the foundation of this case. Her October 2017 deposition testimony in this lawsuit was pivotal in proving that Xerox's actions constituted fraud or abuse of funds in the Medicaid system.¹ She is the true and original whistleblower in this case, and she has been expressly acknowledged as such by HHSC staff. The State and Xerox have now reached a settlement (the "Xerox settlement"). See Settlement Agreement and Release attached as **Exhibit 1**. Because Ms. Reed provided crucial information both before this case was filed, and in this case through discovery, she is entitled to an award of up to five percent of the recovery in this case. See TEX. GOV'T CODE § 531.101. Ms. Reed seeks five percent of the settlement, as allowed by law.

II. PROCEDURAL & FACTUAL HISTORY

A. Linda Reed began working at Xerox as a true insider.

Linda Reed has spent the majority of her career working in quality assurance for Texas' Medicaid administrator. See **Exhibit 2**, affidavit of Linda Reed. She worked as a claims adjudicator and quality assurance analyst for National Heritage Insurance Company (NHIC) from 1994 to 2004. *Id.* NHIC was charged with prior authorization of Texas' Medicaid dental services prior to 2004. *Id.* At NHIC she began as a claims adjudicator, which required her to understand and follow State guidelines for determining whether to pay or deny a request to pay for dental claims. *Id.* Claims processing included reviewing and processing prior authorized dental services. *Id.* Later, she was

¹ None of the other parties that have applied for a share of the Xerox settlement provided any original testimony or original evidence that was used in this case. Upon information and belief, those other parties neither worked inside Xerox, nor were intimately familiar with the dental prior authorization process, unlike Ms. Reed. Tex. Hum. Res Code 36.113 bars free-riding latecomers who are not the original source of "the information on which allegations or transactions in a claim are based."

promoted to a position where she tested NHIC's claims adjudication system to ensure that the process performed as it should. *Id.* By the time she left NHIC in 2004, she was performing quality assurance for NHIC, which included dental claims. *Id.*

She began working for Xerox in March 2005 as a quality assurance analyst within the medical services group. *Id.* That position required her to review Xerox's orthodontic prior authorization process, assure that it operated correctly, and attempt to confirm that only medically necessary services were approved. *Id.* She was concerned that Xerox's prior authorization process and its quality assurance process provided for no review of diagnostic material. *Id.* She saw that prior authorization requests were not being reviewed by qualified staff, if at all. *Id.* Within six months of working at Xerox, she complained to her supervisor at Xerox that the orthodontic prior authorization process was broken. *Id.* She provided specific examples of how Xerox's prior authorization clerks were issuing prior authorization approvals for items that were not covered benefits, such as Sonic toothbrushes. *Id.* She complained that Xerox's dental director was not looking at orthodontic prior authorization requests, and she complained that those requests were not receiving a proper medical necessity review. *Id.* Xerox did nothing to address the problems.

B. Linda Reed blew the whistle on Xerox's prior authorization process, and the State's subsequent investigation revealed that her information was correct.

By 2007, Linda Reed had had enough of Xerox's broken prior authorization process. *Id.* She wrote two emails to Senator Cornyn expressing some of her concerns. *Id.* In her two emails to Senator Cornyn in January 2007, she expressly raised the following issues regarding Xerox's prior authorization process, which encompassed Dental/Orthodontia prior authorizations:

1. She was a Quality Analyst and reviewed prior authorizations including dental prior authorizations;
2. Prior authorizations required a determination of medical necessity;

3. The Xerox process provided little time to research and ensure eligibility, much less medical necessity;
4. Xerox did not have enough of the appropriate staff to ensure medical necessity;
5. Xerox was prior authorizing or approving services that in the past had been denied, such as sonic toothbrushes.

See *Id.*

On her behalf, Senator Cornyn's office sent a letter to the Texas Health and Human Services Commission on February 2, 2007 requesting a response to her concerns. *Id.* Between February 2, 2007 and February 14, 2007 HHSC acknowledged receiving the claims she made. HHSC opened an investigation. *Id.* Senator Cornyn's Office received a response dated February 15, 2007 from HHSC assuring they would "vigorously monitor ACS' [Xerox's] performance" and HHSC would "be investigating" the matter. *Id.* Linda Reed left Xerox in May 2007, and moved to work at the HHSC Office of Inspector General (OIG) in 2008. *Id.*

Rather than correct the problems that she identified, HHSC refused to act until the issue could not be ignored any longer. Following a series of high-profile news stories about Xerox's failure to properly vet orthodontic prior authorization requests and oversee the expenditure of Medicaid funds, HHSC came under intense public scrutiny.

HHSC contacted Linda Reed on May 28, 2013 at her place of employment (Office of Inspector General Office) and requested an interview, as they believed she had information that could help their investigation into the Xerox orthodontic matter. *Id.* HHSC employees Angela Branch and Beverly Luna interviewed Linda Reed, and both Ms. Branch and Ms. Luna referred to Ms. Reed as "the Whistleblower" and admitted that if "they" had listened to Ms. Reed back in 2007, it could have saved the State of Texas hundreds of millions of dollars. *Id.* Based on Ms. Reed's 2007 complaints,

she was asked to find and provide further documentation to Angela Branch and Beverly Luna. *Id.* After the interview, Beverly Luna asked Linda Reed to visit with Jennifer Stansbury, who was also working at the OIG. Beverly Luna again introduced Linda Reed to Jennifer Stansbury as “the Whistleblower.” *Id.* After the interview, Jennifer Stansbury sent Linda Reed an email on or about June 5, 2013 thanking her for meeting with HHSC’s Legal Division. *Id.*

C. The State sued Xerox, and used Linda Reed’s specific information to do so.

Due to intense public criticism surrounding how it handled Xerox’s prior authorization failures, the HHSC was forced to fire Xerox as its Medicaid contractor administrator in early 2014. The State, not HHSC, filed this lawsuit on May 9, 2014. The State’s allegations are lifted directly from Linda Reed’s whistleblowing complaint. The State’s allegations are set out in its discovery responses. See **Exhibit 3**, excerpt of State’s Eighth Amended Answers to Xerox’s Interrogatories. The first four unlawful acts cited by the State are:

1. From the outset, Xerox misrepresented to the State its Orthodontia Prior Authorization Process consisted of Xerox’s Dental Director reviewing each Prior Authorization request and the diagnostic materials to ensure the patient had a severe handicapping malocclusion.

2. Xerox misrepresented it was conducting Prior Authorization of Orthodontia PA Requests and reviewing for medical necessity when in actuality it merely performed a clerical approval of the requests regardless of Medicaid policy criteria.

3. Xerox misrepresented its Dental Clerks were PA “Specialists,” qualified and medically knowledgeable to verify medical necessity.

4. Xerox misrepresented that Quality Assurance was performed to verify that medical necessity determinations were correct.

Id. These four allegations are the core of what Ms. Reed disclosed in January 2007 and the subsequent investigations. Ms. Reed’s complaint to Senator Cornyn, which was forwarded to then-HHSC Commissioner Hawkins, prompted an investigation that outlived her tenure at the agency.

That HHSC investigation led to a formal published OIG audit, issued in August 2008. That audit found that “not all documentation that supports the Texas Medicaid Program benefits for orthodontic PA [prior authorization] requests, approved by the [Xerox] PA dental team, is reviewed.” **Exhibit 4**, 2008 OIG Audit Report. That is exactly what Linda Reed complained about in her email to Senator Cornyn. **Compare Exhibit 2**, Reed Affidavit (complaining that prior authorization “request[s] are being approved without documentation of medical necessity” because “there is very little time for research to ensure the provider or client is eligible for the services”) **to Exhibit 4**, 2008 Audit Report (concluding that “approximately 90% of the documentation for orthodontic PA requests is not being reviewed,” so “The PA dental team members could be approving a portion of orthodontic PA requests that are not for the treatment of severe handicapping malocclusion and other special medically necessary circumstances.”).

Conclusions from that 2008 investigation and report were highlighted in the HHSC OIG’s 2012 follow-up audit, the Executive Summary of which is excerpted below:

EXECUTIVE SUMMARY

Audit Results (Statement of Findings)

This audit is a follow-up to Finding 1 of the Prior Authorization (PA) Audit issued by OIG on August 12, 2008. That finding addressed the issue that not all the documentation that supports a Dental/Orthodontic PA request was reviewed. This issue has not been addressed as of the date of this audit. In the audit, we noted:

1. The Texas Medicaid & Healthcare Partnership (TMHP) is not hiring medically knowledgeable personnel.
2. The Dental Director is not approving all orthodontic PA requests.
3. The Quality Assurance Review tool does not address medical necessity.
4. Orthodontic PAs were authorized while on the open case list.
5. There are control weaknesses in the PA request approval process.

See **Exhibit 5**, *Performance Audit Report Texas Medicaid & Healthcare Partnership Prior Authorization Follow-up*, OIG Report No. 11-70-05290801-MA-03, published August 1, 2012.

These are the same allegations that are the basis for the State's claims in this lawsuit, and they all began with Ms. Reed's whistleblower complaint in January 2007.

If there is any doubt that the State relied on Ms. Reed's complaint as the basis for this lawsuit, it bears mentioning that the State's discovery responses even reference her specific example of Xerox approving the purchase of Sonic toothbrushes, which have never been a covered service in the Medicaid system:

11. Xerox approved PA Requests for sonic toothbrushes.

Sonic tooth brushes are not a covered benefit under Medicaid policy. *See* TMPPM (2005) 18-51 to 18-53; TMPPM (2006) 20-46 to 20-48; TMPPM (2007) 19-45 to 19-47; TMPPM (2008) 19-40 to 19-42; TMPPM (2009) 19-42 to 19-44; TMPPM (2010) CH-169 to 171; TMPPM (2011) CH-188 to 190; TMPPM (2012) CH-200 to 202; *see also* excerpt from December 3, 2015 Deposition of Amy Stabeno at 237:23-238:17.

See Supplemental Answer to Interrogatory No. 6 below and Exhibit N attached hereto identifying the Prior Authorization Requests identified to date where Xerox approved PA Requests for sonic toothbrushes.

See **Exhibit 3**, at page 40.

Ms. Reed's support of the State's lawsuit against Xerox did not end there. She was a pivotal witness in this case, and provided two days of hard-hitting deposition testimony regarding Xerox's fraudulent violations of Medicaid policy and process, and her part in reporting those violations to Xerox and the State. A condensed copy of the October 24-25, 2017 deposition is attached as **Exhibit 6**.

In sum, the State's claims in this case are based on both general and specific revelations in Ms. Reed's 2007 whistleblowing report of Xerox's improper activity, and she personally supported the State's allegations as the case proceeded. The significance of her information and the role she played in advancing the litigation of this case cannot be overstated.

III. LEGAL BASIS FOR AWARD/REQUEST FOR DECLARATORY JUDGMENT

A. Government Code 531.101 provides for an award to whistleblowers like Linda Reed.

Texas statutes provide for several way for people to benefit from reporting Medicaid fraud, waste and abuse. Certainly, the most commonly used mechanism is the Texas Medicaid Fraud Prevention Act, TEX. HUM. RES. CODE §36.101, et seq, which requires a person to file a civil lawsuit and fund the prosecution if the State declines to take over the action. But there are other ways to be a good steward of Medicaid funds without requiring such a large temporal and financial commitment. Texas Government Code section 531.101 permits an award to be granted to an individual who simply reports activity that constitutes fraud or abuse of funds in Medicaid if the disclosure results in the recovery of a penalty. The statute does not require that the whistleblower's report be made to a specific agency or person. The amount permitted to be awarded under section 531.101 is up to five percent of the recovery, which reflects the smaller legal, financial, and time commitment required of the individual, but still acknowledges that such whistleblowing is to be encouraged and rewarded.

Section 531.101 provides that any award should be based on the penalty recovered. It is undisputed that the State's allegations against Xerox in this case constitute an attempt to recover **only penalties**. Since the first time Xerox filed an answer attempting to shift responsibility to third-parties, the State has consistently and vociferously claimed that this was not a tort case or a breach of contract case—it was, the State claimed, a Medicaid fraud case seeking only penalties and it would only ever be that. When Xerox argued that the State's recovery would necessarily include damages, and challenged the State's position that this Medicaid fraud lawsuit was seeking to recover only penalties, the Texas Supreme Court deferred to the State's argument and concluded that the only remedies that the State could recover in this Medicaid fraud case were **penalties**. The Supreme Court opinion concludes:

Construing the statute as a whole, we conclude Section 36.052 of the TMFPA employs a penalty scheme and is not an “action for the recovery of damages” to which Chapter 33’s proportionate-responsibility mandate applies.

In re Xerox Corporation, 555 S.W.3d 518, 534 (Tex. 2018). Thus, the State used Ms. Reed’s report of Xerox’s fraud, waste and abuse to pursue this action for penalties and secure a settlement based on fraud allegations that could only result in penalties.

Finally, section 531.101 assumes that any such award would have to come from “an administrative penalty imposed under Section 32.039, Human Resources Code.” While the State could have pursued its claims against Xerox administratively, HHSC decided to bury the information Ms. Reed disclosed. In the face of two (2) State OIG audit reports indicating that Ms. Reed’s whistleblowing complaint was correct, the HHSC did nothing to correct Xerox’s failures. Instead, the Xerox problem continued to fester and grow until 2013. When public pressure and news stories became too much to bear, the State stepped in to fire Xerox and the Attorney General’s Office elected to use Ms. Reed’s whistleblowing report to file a civil Medicaid fraud lawsuit. The fact that Ms. Reed’s information was so significant that it deserved a formal civil venue does not reduce the value of her disclosure, it magnifies it. There can be no reasonable dispute but that Ms. Reed’s information was the genesis of the largest Medicaid fraud lawsuit in Texas history, and the largest single Medicaid fraud settlement in Texas history. But because the State rather than the HHSC is the named plaintiff, the Commission is not in a position to make an award to Ms. Reed. Indeed, it appears that when faced with Ms. Reed’s whistleblowing report of Xerox’s fraud and waste, HHSC decided to “grade its own papers” regarding its oversight of Xerox and the prior authorization process. HHSC has always been reluctant to acknowledge the Xerox problem, and may now be reluctant to accept that Ms. Reed told them about it in 2007.

Moreover, the decision to take Ms. Reed’s information and pursue it through a civil Medicaid

fraud claim, instead of seeking an administrative penalty hearing, was made by the Attorney General's Office, not the HHSC or HHSC-OIG. The State and HHSC have a memorandum of understanding that gives the Attorney General's Office the sole discretion to determine whether to pursue a claim administratively or civilly. See Nov. 12, 2012 MOU between Attorney General's Office and HHSC Office of Inspector General, attached as **Exhibit 7**. Thus, it appears that even if the HHSC had wanted to use Ms. Reed's information in an administrative penalty hearing, HHSC has relinquished its power to do so; the Attorney General's Office gets to elect the remedy. Because the Attorney General's Office decided to pursue an alternate remedy (a civil Medicaid fraud case, instead of an administrative hearing), the recovery occurred outside of the administrative venue where the HHSC Commissioner could easily award Ms. Reed her share of the settlement. For that reason, Ms. Reed has filed this motion to bring her full contribution to light, and to receive her just reward. This Court is the fact finder that sits in the same position that the Commission would be in, if the Commission would have taken administrative action in its own name against Xerox based on her complaint. In sum, there is a reasonable basis in law to extend section Texas Government Code section 531.101 to this case, and permit Ms. Reed to receive the award that she is entitled to receive had the case been pursued administratively. Ms. Reed requests that this Court enter a declaratory judgment reflecting that the Nov. 12, 2012 MOU cannot operate to deprive her of her statutory ability to seek a portion of the award in this case.

Ms. Reed does not expect the State will deny that her contribution to this case was both actual and significant; important to both pre-lawsuit and post-petition development; and both generally correct and specifically revealing. The fact that the State found her information to be so useful should not deprive her of the Legislature's intent to award her for her huge contribution to this case. Nor should the Commission be permitted to avoid the spirit of the law because the State, instead of the

specific HHSC agency, brought the case in civil court instead of an administrative hearing. Forum shopping for the purpose of avoiding payment of an award to a deserving whistleblower would undermine section 531.101. *See Reliant Energy, Inc. v. Gonzalez*, 102 S.W.3d 868, 875 (Tex.App.—Houston [1st Dist.] 2003), *aff'd*, 159 S.W.3d 615 (Tex.2005); *In re Houston Nw. Partners, Ltd.*, 98 S.W.3d 777, 780 (Tex.App.—Austin 2003, orig. proceeding [mand. disp'd]); *DB Entm't v. Windle*, 927 S.W.2d 283, 288 (Tex.App.—Fort Worth 1996, orig. proceeding [mand. disp'd])(Recognizing the strong and important public policy against forum shopping.). This court should not allow it to happen. Certainly this Court should not allow other whistleblowers, all of which were later in time and derivative of Ms. Reed's 2007 complaint, to profit handsomely due to HHSC's refusal to acknowledge and respond. Ms. Reed's early complaint may make HHSC look bad, but it looks bad only because HHSC did nothing with it. HHSC and the State cannot pretend that they knew nothing about the Xerox problem until five years later when other people began filing qui tam lawsuits in response to the OIG audits and news stories. Now that the State has taken Ms. Reed's complaint and pursued it in this civil venue, it is both legally and equitably appropriate that this Court decide Ms. Reed's standing and merit to receive what she deserves under section 531.101.

In fact, an award of only 5% of the settlement in this case will be exactly what the Legislature intended, considering that the State brought this case only in its own name, prosecuted the case entirely on its own for almost 5 years, including over 100 days of depositions all over the United States, and spent over \$20 million in time and expenses. Given the State's lone commitment to this lawsuit, anything more than a 5% award to the true, original, and only legitimate whistleblower could be unconscionable.

Therefore, Ms. Reed files this motion pursuant to the jurisdiction granted under Texas Civil Practice and Remedies Code section 37.004, seeking a declaration regarding her status and right to

receive five (5%) percent of the Xerox settlement and all necessary preliminary declaratory judgments related to that conclusion, including a declaratory judgment regarding her ability to receive an award under section 531.101 in light of the Nov. 12, 2012 Attorney General-HHSC MOU.

IV. PARALLEL FILINGS

Concurrent with this filing, Ms. Reed is filing a formal motion to lift abatement and plea in intervention. She is also re-urging her right to an award with the Commission, although the Commission may not have standing to actually award a portion of the Xerox settlement. In close proximity with this filing, Reed intends to file a motion to strike other relators' claims as untimely, unhelpful, and lacking with regard to any substantial contribution to the prosecution of this case, and otherwise barred by the TMFPA. Ms. Reed is not only the original whistleblower, she is the only person who provided the significant information upon which this case was based.

V. PRAYER

WHEREFORE, PREMISES CONSIDERED, Linda Reed prays this Court:

- 1) declare Linda Reed to be the original whistleblower,
- 2) award five percent of the Xerox settlement to her, and
- 3) award such other and further relief to which she may show herself justly entitled.

Respectfully submitted,



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CERTIFICATE OF SERVICE

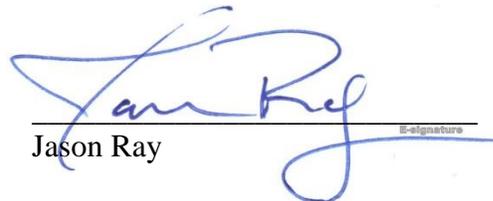
I hereby certify that a true and correct copy of the foregoing was served via email and/or fax, on this the day of 26st day of March 2019, on the following:

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