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 MOTION TO DISQUALIFY "JOINT RELATORS"

COMES NOW Linda Reed, as the true and original whistleblower in the above entitled action, and moves to disqualify the "joint relators" from receiving any portion of the Xerox settlement, and would respectfully show the Court as follows:

I. SUMMARY OF MOTION AND REQUESTED RELIEF

The qui tam mechanism has historically been susceptible to abuse by 'parasitic' relators who bring damages claims based on information within the public domain or that the relator did not otherwise uncover. *See Graham County Soil and Water Conservation Dist. v. U.S. ex rel. Wilson*, 559 U.S. 280, 294-295 (2010) (outlining the history of legislative action to curb "parasitic" qui tam lawsuits). That is exactly the case here. There are at least three reasons why the joint relators' claims must be dismissed. First, the settlement dollars are expressly for breach of contract and negligence damages, not TMFPA penalties, so the relators are entitled to nothing since their TMFPA claims accounted for 0% of the settlement.

Second, Texas Human Resources Code ("TMFPA") section 36.106 bars later-filed lawsuits

that are based on the same underlying facts as an earlier filed lawsuit. Thus, unless each of the eight *qui tam* lawsuits describe distinctly different claims against Xerox that had nothing to do with Xerox's orthodontic prior authorization, the subsequently filed seven lawsuits against Xerox must be dismissed.

TMFPA section 36.113(b) provides the third reason why the relators are disqualified from receiving any part of the Xerox settlement.[1] That subsection bars relators from the opportunistic behavior they have exhibited in this case. The "joint relators" are jurisdictionally barred from bringing any action against the Xerox defendants because their claims are derivative of publicly disclosed audits, investigations, and news stories that were disclosed years before the earliest *qui tam* allegations were made. Therefore, Ms. Reed moves to disqualify the "joint relators" from being awarded any portion of the Xerox settlement.

II. HISTORY

In March 2019, Ms. Reed filed a Motion to Lift Abatement, Motion to Intervene, and Motion for Award. Ms. Reed believes those are motions properly before this Court, and asks that those motions be considered pursuant to the due order of pleadings, so that Ms. Reed is granted standing to assert this motion. Just prior to filing the instant motion, Ms. Reed filed a Motion to Strike "Relators' Joint Motion for Determination of Relators' Share and for Expenses, Attorney Fees, and Costs Pursuant to TMFPA §36.110" on the grounds that this Court has no legal basis to consider the Motion (because the Relators are not a party to the case) and because the Court has no factual basis to consider the Motion (because there is no evidence that the Relators' claims overlap the State's

[1] The Defendant Xerox used various names at various times when it was the State's Medicaid administrator. "Affiliated Computer Services," "ACS," and "ACS State Healthcare" operated under the name "TMHP," and the "Texas Medicaid Healthcare Partnership" from 2004 through at least 2010, when "Xerox," and/or "Xerox State Healthcare" purchased the company, which later became "Conduent" and "Conduent State Healthcare." For simplicity, this Motion refers to the Defendants as simply "Xerox."

claim in this case). Should the Court deny Ms. Reed's Motion to Strike, Ms. Reed asks the Court to consider this Motion to Disqualify the Joint Relators from receiving any portion of the Xerox settlement.

III. EVIDENCE IN SUPPORT

Ms. Reed relies on the following evidence in support of this motion, which is attached to this motion and incorporated for all purposes:

Ex. 1- The Xerox Settlement in this case.

Ex. 2- Excerpts of Relators' Joint Motion for Determination of Relators' Share and for Expenses, Attorney Fees, and Costs Pursuant to TMFPA §36.110.

Ex. 3- Payment hold letter and excerpt of State audit results allegedly supporting administrative action against Harlingen Family Dentistry.

Ex. 4- Payment hold letter and excerpt of State audit results allegedly supporting administrative action against Antoine Dental Center and Dr. Nazari.

Ex. 5- Excerpt of deposition exhibit 259 from the deposition of Xerox dental director Dr. Jerry Felkner identifying two Antoine Dental Center patients.

Ex. 6- Excerpt of Antoine Dental Center administrative audit performed in support of the State's administrative payment hold action against Antoine Dental Center/Dr. Nazari, patients 96 and 217.

Ex. 7- Excerpt of deposition of Dr. Felkner concerning exhibit 259.

Ex. 8- Linda Reed's Request for Declaratory Judgment Award and for Award of True Whistleblower's Share of Xerox Settlement, filed March 26, 2019 in this case.

Ex. 9- Excerpt of State's 8th Amended Answers to Xerox's Interrogatories.

Ex. 10- Performance Audit Report, Texas Medicaid Healthcare Partnership, Prior Authorization Audit, issued August 29, 2008.

Ex. 11- Printout of *The Alfred I. DuPont-Columbia University Awards*, Columbia Journalism School, https://journalism.columbia.edu/dupont#duPont_Winners_Archive (from Apr. 5, 2019)

Ex. 12- "Texas Pays Big For Straight Teeth" *Texas Pays Big for Straight Teeth – WFAA Byron Harris*, YOUTUBE (May 24, 2011), https://www.youtube.com/watch?v=lykSySqzyPA.

Ex. 13- "WFAA-TV Feds to Investigate Texas Orthodontics Scam", YOUTUBE (Aug. 27, 2011), https://www.youtube.com/watch?v=BfBQyTYSVIs.

Ex. 14- "Feds audit Texas' Medicaid spending for braces" Longview News Journal; https://www.news-journal.com/news/local/feds-audit-texas-medicaid-spending-for-braces/article_133fccf5-c992-5306-855c-aa0534996238.html (Aug. 27, 2011).

Ex. 15- "Feds to investigate Medicaid orthodontics fraud in Texas" Dentist the Menace; http://blog.dentistthemenace.com/2011/08/feds-to-investigate-medicaid.html (Aug. 27, 2011).

Ex. 16- "Medicaid Fraud at ACS Processing Center" Nov. 11, 2011, YOUTUBE (Nov. 12, 2011), https://www.youtube.com/watch?v=6oKjeaFWoZQ.

Ex. 17- "Xerox owned company contributing to dental Medicaid fraud; Fraud from the dental office to the billing processor exposed" Dentist the Menace; http://blog.dentistthemenace.com/2011/11/xerox-owned-company-contributing-to.html (Nov. 11, 2011).

Ex. 18- "Byron Harris – State Senate Hearings December 16 2011", YOUTUBE (Dec. 17, 2011), https://www.youtube.com/watch?v=yT6QYy4hlSw&list=PL6B7BB6A7BF64572F&index=9.

Ex. 19- "All Smiles Dental – Dr. Malouf Fraud Settlement" March 21, 2012, YOUTUBE (Mar. 22, 2012), https://www.youtube.com/watch?v=6IIbMDwcrWs.

IV. THE PURPOSE OF *QUI TAM* LAWSUITS

The primary goals of the False Claims Act are "promoting private citizen involvement in exposing fraud against the government" and "preventing parasitic suits by opportunistic late-comers who add nothing to the exposure of fraud." *U.S. ex rel. Reagan v. East Texas Medical Center Regional Healthcare System*, 384 F.3d 168, 174 (5th Cir. 2004). "Parasitic" is not necessarily a pejorative term, but the term refers to "opportunistic plaintiffs…that merely feed off previous disclosures of fraud." *U.S. v. Planned Parenthood of Houston*, 570 Fed.Appx. 386, 389-90 (5th Cir. 2014) (noting at footnote 2 that a subsequent *qui tam* relator's lawsuit based on personal, independent, and more specific knowledge of false claims was not necessarily "parasitic" but was barred nevertheless because another, more general lawsuit had been filed first) *citing United States ex rel. Branch Consultants v. Allstate Ins. Co.*, 560 F.3d 371, 376 (5th Cir. 2009). Thus, the False Claims Act "encourage[s] suits from whistleblowers with 'genuinely valuable information' … by ensuring a 'race to the courthouse among eligible relators, which may spur the prompt reporting of fraud.' " *Id.*

This motion presents evidence that the joint relators' claims are barred because: 1) the settlement contains no funds that can be attributed to the TMFPA claims, 2) there can be only one "first" relator, 3) the State filed similar actions based on the same claims well before the first alleged "joint relator" filed their claim, and the facts regarding Xerox's prior authorization process were publicly disclosed years before the first "joint relator" filed their claim. **These are jurisdictional bars**, so the Court should consider whether it has jurisdiction to even entertain the joint relators' claims in their own separate lawsuits, much less maintain an action for a portion of the Xerox settlement in this case.

V. MOTION TO DISQUALIFY "JOINT RELATORS"

A. The Xerox settlement does not include any penalties, which is the only thing that is recoverable under the TMFPA, so there is no legal basis for the joint relators to share in the settlement.

From the date of filing on May 9, 2014 through February 14, 2019 the State pursued only TMFPA fraud claims against Xerox. For almost five years the State openly, repeatedly, relentlessly rejected any notion that its case involved breach of contract or tort claims against Xerox. The State relied on that fact exclusively when it argued to the Texas Supreme Court in *In re Xerox Corporation*, 555 S.W.3d 518 (Tex. 2018) and *Nazari v. State*, 561 S.W.3d 495 (Tex. 2018) that it was seeking only penalties, and not damages, in these cases. The State won both of those appeals because the Texas Supreme Court agreed that the only remedy available under the TMFPA is penalties:

> "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). The Supreme Court's decision was reiterated in the similarly aligned *Nazari* case issued the same day, in which the Supreme Court stated, "Our damages discussion in *Xerox* turns on the Act, not on chapter 33." *Nazari v. State*, 561 S.W.3d 495, 509 (Tex. 2018) (deciding that the State had not waived sovereign immunity to counterclaims in that case because the State had only brought TMFPA claims in that case, and the TMFPA does not allow for the recovery of damages that would abrogate immunity). Thus, the only available remedy under the TMFPA is penalties, not damages.

Two months after the *In re Xerox* decision became final, the State amended its petition to allege breach of contract and negligence against Xerox in this case. The same day, the State executed a settlement agreement in this case. Xerox Settlement, at **Appendix Ex. 1,** signature pages at page 22. That settlement agreement outlined **only** Xerox's contractual failures, stating:

B. The CONDUENT DEFENDANTS shall make payment to the STATE the total sum of $235,942,000.00 (the "Settlement Amount") in full settlement of the claims asserted in the Notice of Termination, the State Action, the Related Actions, the HHSC Action, and all claims that HHSC and/or the STATE had, has, or may have in the future arising from or related to the Covered Conduct.

1. $212,347,800.00 of the Settlement Amount is allocated to reimburse HHSC and/or the STATE for monetary losses claimed to have resulted from alleged failures to comply with obligations by Conduent Healthcare or TMHP under the 2003 Contract and 2010 Contract, as set out in the Audit Reports, Notice of Termination, the HHSC Action, and the State Action, including but not limited to the $133 million that the United States has determined the STATE must reimburse to the United States as a result of the allegedly improper prior authorization of claims for orthodontic treatment under the Texas Medicaid Program.

Exhibit 1, at page 9-10. In an effort to assure that its intentions were clear in light of the *In re Xerox* decision, the State expressly identified that the settlement dollars were **not penalties:**

3. No portion of the Settlement Amount shall be allocated or attributed to the payment of fines, penalties, or other punitive assessments, or to disgorgement of revenues. The STATE agrees that the allocation of the settlement proceeds in Sections III(B)(1), (2), and (3) is appropriate and not subject to reallocation for any purpose.

Exhibit 1, at page 10. Thus, the Xerox settlement does not provide any penalty dollars to the State.

The consequences of the State's late amendment for breach of contract and negligence, coupled with this settlement language, is obvious. The State wanted to seek a damages remedy, and then settle all of its claims only for those damages. The State clearly intended to settle its TMFPA claims, but it expressly recovered no money on those TMFPA claims. Because the State amended its claims to seek different remedies—that is, civil damages by way of breach of contract and negligence—the single satisfaction rule does not apply. Therefore the admission by the State that the settlement dollars are not penalties, but instead must be allocated as something else, is binding on the parties. Therefore, there is no legal basis for the joint relators to share in the Xerox settlement, because none of the settlement dollars can be attributed to the TMFPA claims that either the relators, or the State, brought in this case.

B. There can only be one "first to file."

Like the Federal False Claims Act, "the TMFPA has a similar first-to-file bar." *Planned Parenthood at* 389-90. This jurisdictional bar, found at Texas Human Resources Code section 36.106, is a broad jurisdictional bar to later-filed actions that are based on the same underlying facts as an earlier filed lawsuit. *See U.S. v. Planned Parenthood of Houston*, 570 Fed.Appx. 386, 389-90 and fn3 (5th Cir. 2014) (indicating that the first to file bar in both the federal and state laws is jurisdictional) and TEX. HUM. RES. CODE § 36.106 ("A person other than the state may not intervene or bring a related action based on the facts underlying a pending action brought under this subchapter.").

The joint relators admit that their first *qui tam* lawsuit against Xerox was filed February 28, 2012. Relators' Joint Motion, excerpted and highlighted at **Appendix Ex. 2**. Subsequent lawsuits were filed in April, May and July 2012. *Id.* If any case against Xerox is "based on the facts

underlying" an earlier filed *qui tam* lawsuit, then this court has no jurisdiction to award anything to the relator in the later case.

Federal False Claims Act analysis is instructive regarding how section 36.106 should be interpreted. In *U.S. ex rel. Branch Consultants v. Allstate Ins. Co.*, 560 F.3d 371, 378 (5th Cir. 2009), the Court held "as long as the later-filed complaint alleges the same material or essential elements of fraud described in a pending *qui tam* action," the first to file jurisdictional bar applies. "[A] relator who merely adds details to a previously exposed fraud does not help 'reduce fraud or return funds to the federal fisc,' because 'once the government knows the essential facts of a fraudulent scheme, it has enough information to discover related frauds.' " *Id.* citing *United States ex rel. LaCorte v. SmithKline Beecham Clinical Labs., Inc.*, 149 F.3d 227, 234 (3rd Cir. 1998). "The pendency of the initial *qui tam* action consequently blocks other private relators from filing copycat suits that do no more than assert the same material elements of fraud, regardless of whether those later complaints are able to marshal additional factual support for the claim." *Grynberg v. Koch Gateway Pipeline Co.*, 390 F.3d 1276, 1279 (10th Cir. 2004); *see Branch* at 378.

Obviously, all eight "joint relators" cannot be the first to file, because it is impossible for eight relators to all be first. To the extent the first relator referenced Xerox's fraudulent orthodontic prior authorization process, which was the basis for the State's claims in this lawsuit, all other relator claims are barred.

C. Every allegation against Xerox in this State lawsuit had been publicly disclosed, both to the State and by the State, well before February 2012.

Even if this Court assumes that this State lawsuit is completely derivative of the "joint relators'" earlier filed TMFPA lawsuits, the "Relators' Joint Motion" must be struck because they were not qualified relators on February 28, 2012. Their claims are barred as a matter of law under section 36.113(b), which states:

> Sec. 36.113. CERTAIN ACTIONS BARRED. (a) A person may not bring an action under this subchapter that is based on allegations or transactions that are the subject of a civil suit or an administrative penalty proceeding in which the state is already a party.
> (b) The court shall dismiss an action or claim under this subchapter, unless opposed by the attorney general, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed in a Texas or federal criminal or civil hearing in which the state or an agent of the state is a party, in a Texas legislative or administrative report, or other Texas hearing, audit, or investigation, or from the news media, unless the person bringing the action is an original source of the information. In this subsection, "original source" means an individual who:
> (1) prior to a public disclosure under this subsection, has voluntarily disclosed to the state the information on which allegations or transactions in a claim are based; or
> (2) has knowledge that is independent of and materially adds to the publicly disclosed allegation or transactions and who has voluntarily provided the information to the state before filing an action under this subchapter.

TEX. HUM. RES. CODE § 36.113.

This TMFPA public disclosure bar is "substantively identical to the FCA's [Federal False Claim Act's]." *U.S. ex rel. Colquitt v. Abbott Laboratories*, 864 F.Supp.2d 499, 537 (N.D.Tex. 2012); *see U.S. ex rel. King v. Solvay S.A., 2015 WL 925612*, at *5 (S.D.Tex. 2015) (finding that 36.113 "is substantially similar to the applicable version of the federal statute, with the exception of the information needing to be disclosed to the state rather than federal government" and applying it "in the same manner it applies the federal statute."). And like the FCA's public disclosure bar, the TMFPA's bar under section 36.113 is jurisdictional. TEX. HUM. RES. CODE § 36.113; s*ee U.S. ex rel. Fried v. West Independent School Dist.*, 527 F.3d 439, 441-42 (5th Cir. 2008) (whistleblower allegations based on previous state action or publicly disclosed information strip the court of subject matter jurisdiction over the claim) *citing Rockwell Int'l Corp. v. United States,* 127 S.Ct. 1397, 1405–07 (2007).

C1. By 2011, the State had already begun pursuing administrative penalty proceedings against dentists based on the exact same transactions that are the subject of this case.

By January 2012 (a month before the earliest alleged whistleblower filed their case), the State had wrongfully begun taking administrative action against many dental providers who had been paid for orthodontic services based on Xerox's prior authorizations. Prior authorization is a pre-delivery-of-service review of the patient's dental condition, which included Xerox's confirmation of medical necessity for orthodontic services and ratification that the services would be covered for payment.[2] The logical prerequisite to the State's administrative actions against the dentists was its complete renunciation of the orthodontic prior authorization approvals issued to those providers by Xerox. That rejection of Xerox's prior authorization approvals allowed the State to then allege that the dentists should never have been paid. The State's allegations in those administrative penalty cases involved the same patients, same orthodontic services, same dates of service, same Medicaid orthodontic policies and procedures, and same Xerox process for prior authorization that are at issue in this case.

Deposition evidence and exhibits from this case mirror the 2011 administrative claims that the State made against dentists in 2011. For example, the State placed Harlingen Family Dentistry on administrative payment hold[3] on September 30, 2011, alleging that 96% of its 85 audited orthodontic patients should not have been pre-approved by Xerox. See **Appendix Exhibit 3,** Payment hold letter and excerpt of Attachment A audit in support of administrative action against Harlingen Family Dentistry.[4]

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[2] Absent some subsequent or intervening disqualifying factor that would prevent payment.

[3] A "payment hold" is "An administrative sanction that withholds all or any portion of payments due a provider until the matter in dispute, including all investigation and legal proceedings, between the provider and HHSC or an operating agency are resolved. This is a temporary denial of reimbursement under Medicaid for items or services furnished by a specified provider." 1 TEX. ADMIN. CODE 371.1(57)

[4] Harlingen Family Dentistry later won that payment hold hearing because it proved that regardless of the State's assertion that essentially "Xerox's prior authorization approval of Harlingen's work was wrong," the State possessed

The same thing happened to Antoine Dental Center and Dr. Behzad Nazari, who were put on administrative payment hold on April 4, 2012 when the State alleged 98% of their 304 audited patients should not have been pre-approved by Xerox. See **Appendix Exhibit 4,** Payment hold letter and excerpt of Attachment A audit in support of administrative action against Antoine Dental Center. The State actually used Antoine Dental Center's and Dr. Nazari's patients from its administrative payment hold case[5] as evidence in this case against Xerox. Compare **Appendix Exhibit 5,** excerpt of deposition exhibit 259 from the deposition of Xerox dental director Dr. Jerry Felkner identifying two Antoine patients and **Appendix Exhibit 6,** excerpt of Antoine Dental Center administrative audit performed in support of the State's administrative payment hold action against Antoine Dental Center and Dr. Nazari, patients number 96 and 217. In the State's administrative case against Antoine Dental Center, patients number 96 and 217 were part of the State's audit; these same patients were used as part of the State's effort to prove that Xerox's dental director Dr. Felkner "could not possibly have adequately reviewed the clinical information supporting these requests." See **Appendix Exhibit 7,** excerpt of deposition of Dr. Felkner. Stated succinctly, the State used these patients in an attempt to prove their fraud case against Dr. Nazari, but lost that case and then used the exact same patients and facts that they lost on, in order to make the State's breach of contract case against Xerox.

The exact same patients and the exact same orthodontic services in those administrative payment hold cases are at issue in this case. Thus, it is undisputed that the relators brought their *qui tam* actions after the State had begun administrative penalty proceedings against dentists based on

no evidence that the orthodontic services Harlingen rendered were fraudulent.

[5] The State actually hired the relators' counsel (Dan Hargrove, Caitlyn Silhan, James R. Moriarty, and Ketan Kharod) to prosecute that administrative case. Antoine Dental Center and Dr. Nazari won that payment hold hearing. See SOAH Docket 529-13-0997; *Texas Health and Human Services Commission and Office of Inspector General v. Antoine Dental Center*, 487 S.W.3d 776, 777 (Tex.App.—Texarkana 2016, no pet.).

the same transactions.

In short, the relators simply filed their cases too late. TMFPA section 36.113(b) states that "the court shall dismiss an action or claim" if the "same allegations or transactions as alleged in the action or claim were publicly disclosed" before the relators' cases were filed. All of the allegations made and advanced in this case by the State against Xerox were publicly disclosed well before the earliest alleged relator filed their case. By February 2012, the State was already pursing action to recover Medicaid dollars from dentists based on Xerox's improper processes and procedures. Section 36.113(b) bars the relators' claims under these circumstances.

C2) In 2007, Linda Reed disclosed that Xerox's orthodontic prior authorization process was not actually determining medical necessity, and that Xerox could be approving services that were not covered by Medicaid.

The earliest public disclosure regarding the claims at issue in this lawsuit occurred in January 2007. See Linda Reed's Request for Declaratory Judgment Award and for Award of True Whistleblower's Share of Xerox Settlement, filed March 26, 2019 in this case, attached to and incorporated into this Motion for all purposes as **Appendix Exhibit 8**. For the sake of brevity, the facts and evidence in Ms. Reed's motion will not be rehashed in full here, but in sum, Ms. Reed disclosed that:

a) Xerox's processes did not permit its staff enough time "for research to ensure the provider or client is eligible for the services";

b) she had seen cases "where a procedure was approved and [but] the client was not eligible";

c) "request [sic] are being approved without documentation of medical necessity"; and

d) Xerox was prior authorizing or approving services that should not be approved, such as sonic toothbrushes.

These are the exact same claims that are at the heart of the State's case. The State's case mirrors

Linda Reed's statements to HHSC. Compare **Appendix Exhibit 8**, Linda Reed's Motion for Award, with **Appendix Exhibit 9,** excerpt of State's 8th Amended Answers to Xerox's Interrogatories.

C3) In 2008, the HHSC-OIG issued an audit report that formed the basis for the State's claims in this case.

Linda Reed's 2007 disclosure launched an investigation into Xerox's orthodontic prior authorization process. The result of that investigation was a 2008 audit report that forms the crux of this lawsuit. See Performance Audit Report, Texas Medicaid Healthcare Partnership, Prior Authorization Audit, issued August 29, 2008, attached as **Exhibit 10**. The most relevant excerpts are:

DETAILED FINDINGS AND RECOMMENDATIONS

Finding 1 – Opportunity for Improvement in the Orthodontic Prior Authorization Requests Process

An opportunity for improvement was noted in the documentation review process for orthodontic prior authorization (PA) requests. Currently, not all documentation that supports the Texas Medicaid Program benefits for orthodontic PA requests, approved by the PA dental team, is reviewed. Rules and

. . .

To approve an orthodontic PA request the PA dental team members verify the mathematical accuracy of, and ensure that, the Handicapping Labiolingual Deviation (HLD) index score is at least 26. The PA dental team members do not review the additional documentation required per the Texas Medicaid Providers Procedures Manual (TMPPM) and do not have the dental licenses necessary to determine if the additional documentation supports the HLD index score.

TMHP staff did state that under predefined circumstances, approximately 10%[2] of the orthodontic PA requests are referred to, and the documentation reviewed by, the Dental Director. This means approximately 90% of the documentation for orthodontic PA requests is not being reviewed. Zero of the 18 orthodontic sample items tested were referred to the Dental Director.

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. Dollars paid for orthodontic treatment, for the months of September 2007 through February 2008, were at least $52.6 million.

The importance of this 2008 audit report cannot be understated. This 2008 audit report was a pivotal

piece of evidence in this case. The State and Xerox referred to it hundreds of times in twenty depositions. When the State referenced the 2008 audit in those depositions, it did so to prove its contentions in this case, which are found in the State's 8th Amended Answers to Xerox's Interrogatories:

> **INTERROGATORY NO. 3:** Identify each and every "unlawful act" for which you seek civil penalties in ¶ 43 of the Petition, including the factual basis for each and the legal theories upon which you intend to rely for recovery of any civil penalty.

. . .

> **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.**

Appendix Exhibit 9, excerpt of State's 8th Amended Answers to Xerox's Interrogatories at pages 2, 18, and 37. Thus, the evidence supporting the State's specific claims in this lawsuit were publicly disclosed through this 2008 state audit. This audit report was publicly available years before any whistleblowers filed their claims alleging that Xerox was failing to properly analyze, examine or evaluate orthodontic prior authorization requests. Therefore, the joint relators are not proper whistleblowers, and all of their cases must be dismissed pursuant to section 36.113(b) based solely on the 2008 Audit Report.

C4) By early 2011, news organizations around the State were running award winning investigative stories that revealed the salacious details of Xerox's fraud.

The most undeniable public disclosures of the allegations in this case occurred in 2011, when

WFAA news in Dallas ran an investigative series that left nothing new to discover about Xerox's fraudulent Medicaid orthodontic prior authorization process. In 2014, Byron Harris received the broadcast equivalent of print journalism's Pulitzer Prize for his two-year long investigation into how Xerox's broken process exposed "hundreds of millions of dollars in questions spending on Medicaid dental care." *The Alfred I. DuPont-Columbia University Awards*, Columbia Journalism School, https://journalism.columbia.edu/dupont#duPont_Winners_Archive (last visited Apr. 5, 2019), page 6 of website printout attached as **Appendix Exhibit 11.** His first target was Medicaid orthodontics with a story titled "Texas Pays Big For Straight Teeth." *Texas Pays Big for Straight Teeth – WAFF Byron Harris*, YOUTUBE (May 24, 2011), https://www.youtube.com/watch?v=lykSySqzyPA, attached as **Appendix Exhibit 12.** It ran on May 13, 2011 and featured Dr. Larry Tadlock, a Texas dentist who would later go on to become one of the State's main dental experts when the State put Antoine Dental Center and Dr. Nazari on administrative payment hold in April 2012. While Mr. Harris' first story mainly concerned the amount of money being paid to Medicaid dentists, three minutes into the story Dr. Tadlock explains how Xerox's processes are to blame:

> Dr. Tadlock: "There is no accountability. There's no checks. There's no, so when a case is submitted, you would expect it to be reviewed and approved. It is for pre-approval. But there's no legitimate approval process."
> Reporter: "Medicaid orthodontic claims are processed by an outside contractor in Texas. According to the State, claims are rejected only when paperwork is incorrect. As unsightly as these teeth are, none qualify for Medicaid, says Dr. Larry Tadlock, an associate professor at Baylor Dental School. And this dentist says the scores can be adjusted to qualify for money."
> Dentist in shadow: "Any way you fill out that sheet will be approved. And providers use that as an excuse to lie on the sheet because they know there's no checks on that sheet."

"Texas Pays Big For Straight Teeth." May 13, 2011, attached as **Appendix Exhibit 12**.

By June 2011, WFAA had begun turning its attention to a troubling statistic that indicated Xerox's Dental Director was personally approving nearly 19,000 children for Medicaid braces in

2010. On August 27, 2011, WFAA turned its investigative guns on Xerox's dental director, Dr. Jerry Felkner, and reported facetiously that he could be "the busiest person in Austin" because he personally approved braces for 18,898 kids who were not supposed to get them.[6] *WFAA-TV Feds to Investigate Texas Orthodontics Scam*, YOUTUBE (Aug. 27, 2011), https://www.youtube.com/watch?v=BfBQyTYSVIs, attached as **Appendix Exhibit 13.** Outside of Byron Harris' dramatic attempt to catch Dr. Felkner as he drove away from Mr. Harris' embarrassing questions, that report pointed to Dr. Felkner's actions as the source of an improbably high number of orthodontic prior authorization approvals for children that Mr. Harris claimed should not have received braces. The same day the Longview New Journal reported:

> The Texas Health and Human Services Commission said it began investigating after WFAA started asking questions about Medicaid charges. The commission then received a letter last month from the U.S. Department of Health and Human Service's Office of Inspector General stating that it was conducting an audit of the state agency's pre-authorization process for orthodontic treatment.
>
> The purpose was to make sure "only medically necessary orthodontics cases are paid," according to a copy of the letter provided to The Associated Press on Friday.

See **Appendix Exhibit 14** "Feds audit Texas' Medicaid spending for braces" Longview News Journal; https://www.news-journal.com/news/local/feds-audit-texas-medicaid-spending-for-braces/article_133fccf5-c992-5306-855c-aa0534996238.html (Aug. 27, 2011). The same day, the blog "Dentist the Menace" also reprinted WFAA's written story on the State's audit of the "authorization process for orthodontic treatment." See **Appendix Exhibit 15,** "Feds to investigate Medicaid orthodontics fraud in Texas" Dentist the Menace; http://blog.dentistthemenace.com/2011/08/feds-to-investigate-medicaid.html (Aug. 27, 2011).

[6] The August 27, 2011 WFAA story "Feds to investigate Texas Orthodontics scam" can be found at https://www.youtube.com/watch?v=BfBQyTYSVIs ; a similar print story dated August 25, 2011 can be found at: https://www.wfaa.com/article/news/local/investigates/feds-investigate-texas-dental-medicaid-program/287-410554231

In November 2011, the WFAA story "Medicaid Fraud at ACS Processing Center" revealed that Xerox's orthodontic review and processing was the cause of high State spending on Medicaid braces:

> Reporter voice: "This is where they got approved—Affiliated Computer Systems, ACS, a $6 billion dollar company which does not reveal its methods and is protected by the State of Texas. ACS is a virtual assembly line of claims processing. That's partly how it made a billion dollars in profits last year. At its Austin facility, hundreds of its workers analyze claims and pass them on for payment by taxpayers. But the State won't let us talk to ACS."
> . . .
> Interview with Billy Millwee: "Ultimately, I'm accountable for whatever ACS does."
> . . .
> Whistleblower in shadow: "Your tax dollars aren't working. You're paying for services that shouldn't be paid for."
> Reporter: She's one of several former ACS employees who used to process dental claims. She describes a system where people are rewarded for ignoring problem claims, a system that doesn't look very hard to find overcharging, and does not act when it does. … The Dept of Health and Human Services became aware of millions of dollars of exceptional charges by dozens of Texas orthodontists nearly 2 years ago. . . . News 8 discovered the huge billings independent of the State, but nothing was done to investigate until we exposed the issue. What may be behind the problem goes beyond teeth, braces and dentists. It's the way ACS pays its workers—a policy called activity based compensation, or ABC. The concept of activity based compensation is quantity over quality. The more claims you process, the more money you make. . .
> Former ACS dental processor in shadow: "Your first thought is not what your quality is of getting the work out, but getting the work out to ensure that you're going to make the paycheck that you need to make. . . ."

Medicaid Fraud at ACS Processing Center Nov. 11, 2011, YOUTUBE (Nov. 12, 2011), https://www.youtube.com/watch?v=6oKjeaFWoZQ, attached as **Appendix Exhibit 16.** The "system" referred to in the story was Xerox's broken prior authorization system, which is the basis for the State's claims in this lawsuit. The story was reprinted on the "Dentist the Menace" website on the same day. See "Xerox owned company contributing to dental Medicaid fraud; Fraud from the dental office to the billing processor exposed" Dentist the Menace; http://blog.dentistthemenace.com/2011/11/xerox-owned-company-contributing-to.html (Nov. 11,

2011), attached as **Appendix Exhibit 17.**

On December 16, 2011, a WFAA evening news exposé began by claiming that in response to WFAA's reporting, the Texas Senate would "hold investigative hearings next year. It will examine how claims were approved, retrieve taxpayer money that may have been paid out incorrectly, and determine if it's a problem of the Medicaid system as a whole." Byron Harris – State Senate Hearings December 16 2011, YOUTUBE (Dec. 17, 2011), https://www.youtube.com/watch?v=yT6QYy4hlSw&list=PL6B7BB6A7BF64572F&index=9, attached as **Appendix Exhibit 18.** In that WFAA report, Xerox predecessor ACS's headquarters was shown while Byron Harris reported:

> Reporter voice: Part of a news 8 investigation that began with braces and ended up with Affiliated Computer Services, the company which processes Medicaid dental claims paying its workers on how many claims they process rather than how well they do the work.

Id.

On March 21, 2012, WFAA reported that "Some of the red flags should have come from here—TMHP, the agency that approves Medicaid dental billing. It did not have enough experts to review tens of thousands of dental records every year. . . the dentist who approved all this in this pickup truck [Dr. Felkner] has now been replaced—by five dentists." All Smiles Dental – Dr. Malouf Fraud Settlement March 21, 2012, YOUTUBE (Mar. 22, 2012), https://www.youtube.com/watch?v=6IIbMDwcrWs, attached as **Appendix Exhibit 19**.

These stories outlining Xerox's Medicaid fraud responsibility began running on news stations in the Dallas area at least a year before some of the so-called whistleblowers filed their cases. The news reports relentlessly set out Xerox's orthodontic prior authorization problems and even named the Xerox personnel who were at fault. Therefore, the joint relators are not proper whistleblowers, and their cases must be dismissed pursuant to section 36.113(b).

D. The State's intervention in the joint relators' other cases does not legitimize their claims

either in those cases or in this lawsuit, and cannot cure these jurisdictional defects.

Perhaps attempting to forestall any investigation into the legitimacy of their request for a portion of the Xerox settlement, the joint relators' motion leans heavily on the State's intervention into their other filed TMFPA cases. The joint relators' argument endeavors to spin the State's validation of their filing a *qui tam* lawsuit into an endorsement that they cannot be barred from a portion of the Xerox settlement. Unfortunately for the relators, U.S. Supreme Court case law indicates that if a False Claims Act lawsuit is jurisdictionally barred (*e.g.* by the public disclosure bar), even the government's intervention in the case cannot save the whistleblower's claims. In *Rockwell Intern. Corp. v. U.S.*, the Supreme Court wrestled with a postverdict motion to dismiss a relator's claims under the public disclosure bar. *Rockwell Intern. Corp. v. U.S.*, 549 U.S. 457 (2007). The lawsuit had been filed by the relator, and the government intervened and pursued the case to trial, winning a multimillion dollar verdict. *Id.* at 465-66. The Supreme Court found that the relator did not have "direct and independent knowledge" of the claims in the lawsuit, and held that the trial court lacked jurisdiction to enter judgment in favor of the relator. *Id.* at 476-77. But if the trial court lacked jurisdiction to hear the relator's claims, what should be done about the favorable verdict? The Court concluded "as common sense suggests… an action originally brought by a private person, which the Attorney General has joined, becomes an action brought by the Attorney General once the private person has been determined to lack the jurisdictional prerequisites for suit." *Id.* at 478. Likewise, in this case the Xerox settlement becomes the State's—and the State's alone—because the joint relators were barred by bringing such claims at the time they filed them.

VI. PRAYER

WHEREFORE, PREMISES CONSIDERED, Linda Reed prays this Court disqualify the named and anonymous parties associated with "Relators' Joint Motion for Determination of

Relators' Share and for Expenses, Attorney Fees, and Costs Pursuant to TMFPA §36.110" from any portion of the Xerox settlement.

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 eservice on this the day of 16th day of April 2019, on all counsel of record:

Jason Ray