



## **I. GENERAL DENIAL**

1. Defendants generally deny the allegations in plaintiff's original petition and request that the State be required to prove all charges and allegations by the applicable standard of proof required by the laws of the State of Texas.

## **II. COUNTERCLAIMS**

### **Waiver of Sovereign Immunity**

2. The State has waived sovereign immunity for claims by the Defendants, because the State brought claims against the defendants. When the government brings suit, it waives immunity from suit if "the claims are connected to, germane to, and defensive to the claims asserted by the entity." *Reata Const. Corp. v. City of Dallas*, 197 S.W.3d 371, 377 (Tex. 2006).

### **Conspiracy/Joint Enterprise**

3. The State conspired with the Texas Medicaid and Healthcare Partnership (a/k/a "Xerox") to induce the defendants into a reasonable belief that the statements, information and representations of material fact defendants made to Texas Medicaid to obtain prior authorizations and payment for orthodontic services and appliances were, in fact, true and correct. The specific promises, inducements, and representations made to defendants in the conspiracy between the State and Xerox are set out in more detail in the third party petition against Xerox, below. *Inter alia*, the State conspired with Xerox to convince defendants that the defendants' respective Medicaid patients should qualify for Medicaid orthodontic services. In addition, the State conspired with Xerox to review and approve Defendants' prior authorization forms and corresponding Handicapping Labio-lingual Deviation ("HLD") score sheets, which the State now claims should not have been approved. This led defendants to believe they were applying the correct standards. Defendants actually and justifiably relied on the State's prior authorization

approvals, and the record of approvals for similar orthodontic work to correct similar dental conditions year-after-year. In addition, the State conspired with Xerox to withhold information from defendants that would have clarified and demonstrated the conditions necessary to qualify for Medicaid orthodontic services. This conspiracy to induce the defendants to submit HLD score sheets reflecting certain conditions from 2004-2012, and the ensuing acts of the State to blame the defendants for the State's and Xerox's own improper acts and omissions, is a proximate cause of injury to defendants. Defendants re-allege and incorporate the third party petition facts, allegations, and requests for relief as if fully set out herein. Just as defendants seek recover against Xerox in the third party complaint set out below, defendants seek proportional recovery of actual and exemplary damages, interest, court costs, and attorney fees against the State for the same reasons.

4. The State conspired with Xerox to allow Xerox to violate its various contractual duties; those duties are set out below in the third party petition. The State permitted Xerox to process as many prior authorizations as possible without the required clinical dental review and without using medically knowledgeable personnel. The State conspired with Xerox to allow Xerox to violate the law. The State and Xerox created a scheme to rubber stamp and/or allow no legitimate review of prior authorizations submitted by the defendants. The conspiracy was committed with the intent to shift blame from the State and its agent, improperly blame the defendants, and enrich the State and Xerox. By recouping money from providers that were not actually to blame, the State and Xerox hoped to limit their own liability in the event of a Federal clawback action, and/or respond to unflattering news reports of Texas' payments for Medicaid braces. This agreement and ensuing acts of the State to blame the dentist providers for their own improper acts and omissions is a proximate cause of the injury to defendants. Defendants seek

recovery of actual and exemplary damages, interest, court costs, and attorney fees.

### **Breach of Contract**

5. Defendants are a direct or third party beneficiary of the contract with Xerox and the State. The State has breached terms of the contract by failing to supervise Xerox and/or reviewing the work product of Xerox. This breach by State, which allowed non-performance by Xerox, has created the pretext by which the State affirmatively sued defendants for repayment in this lawsuit and in past administrative actions brought by the State against the defendants. To the extent that the State has withheld money and/or made claims for damages against defendants based on the contracts in question, the State has waived immunity and is liable up to those amounts plead. Defendants re-alleges and incorporates the third party petition facts, allegations, and requests for relief as if fully set out herein. Just as defendants seek recover against Xerox in the third party complaint set out below, defendants seek proportional recovery of actual and exemplary damages, interest, court costs, and attorney fees against the State for the same reasons.

### **Conversion**

6. The law required defendants to request prior authorization for orthodontic services. Those prior authorization requests were approved by Xerox, which required defendants to provide the services. The State has unilaterally made a decision to that, based on the acts and omissions of Xerox, the defendants should not have been paid; the State then placed defendants on a payment hold. To the extent that defendants have provided services for which defendants should be paid, and money which has been earmarked by the State for that payment but withheld, the State has converted the funds. In addition, the States' acts/omissions are a violation of the Texas Constitution Section 9 in that the acts/omissions constitute a seizure of money held under the pretext of a payment hold. Defendants seek recovery of actual and exemplary damages, interest,

court costs, and attorney fees.

7. Collectively across all counterclaims, defendants seek monetary relief over \$1,000,000.

### **III. ORIGINAL THIRD PARTY PETITION AGAINST XEROX**

8. Defendants Dr. Behzad Nazari, D.D.S. d/b/a Antoine Dental Center, Dr. Behzad Nazari, Harlingen Family Dentistry, P.C. a/k/a Practical Business Solutions, Series LLC, Juan D. Villarreal D.D.S., Series PLLC d/b/a Harlingen Family Dentistry Group, Dr. Juan Villarreal, Richard F. Herrscher, D.D.S., M.S.D., P.C., Dr. Richard F. Herrscher, M & M Orthodontics, PA, Dr. Scott Malone, Dr. Diana Malone, Michelle Smith, National Orthodontix, Mgmt., PLLC, Dr. John Vondrak, RGV Smiles by Rocky Salinas, D.D.S. PA, and Dr. Rocky Salinas have appeared and answered herein.

9. Third party defendant Xerox Corporation is a corporation organized under the laws of New York and may be served with process upon its registered agent, Prentice Hall Corporation, 211 E. 7<sup>th</sup> Street, Suite 620, Austin, Texas 78701-3218. Third party defendant Xerox State Health Care, LLC, is a wholly-owned subsidiary of Xerox Corporation organized under the laws of the State of Delaware with Texas offices at 2828 N. Haskell Ave., Dallas, Texas 75204, and may be served with process upon its registered agent, CSC-Lawyers Incorporating Service Company, 211 E. 7<sup>th</sup> Street, Suite 620, Austin, Texas 78701-3218. Third party defendant ACS Healthcare, LLC, a Xerox Corporation, is a wholly-owned subsidiary of Xerox Corporation organized under the laws of the State of Delaware with its Texas offices at 2828 N. Haskell Ave., Dallas, Texas 75204, and may be served with process upon its registered agent, CSC-Lawyers Incorporating Service Company, 701 Brazos Street, Suite 1050, Austin, Texas 78701. Defendant Xerox Corporation acquired Defendant ACS in 2010. On information and belief, ACS State Healthcare, LLC, changed its name to Xerox State Healthcare, LLC, on April 1, 2012. Third

party defendants are referred to as “Xerox” in this pleading.

10. Defendants designate the third-party petition as a Level 3 case requiring a discovery control plan tailored to the circumstances of the specific suit.

11. All parties named as third-party defendants either reside and/or have done business in Texas within the meaning of Tex. Civ. Prac. & Rem. Code § 17.042, and this Court accordingly has jurisdiction over each of them. The amount in controversy exceeds the jurisdictional limits of this Court.

12. Venue is proper in Travis County, Texas pursuant to Tex. Civ. Prac. & Rem. Code §§ 15.002, 15.003, 15.005, and 15.062 and Tex. Hum. Res. Code § 36.052(d).

**Common Law Fraud (Fraudulent Misrepresentation and Fraudulent Inducement)**

13. Xerox’s prior authorization approvals were false representations made to defendants. It is believed Xerox and the State knowingly issued these prior authorizations to defendants because Xerox and the State knew that Xerox was approving requests without a proper medical review, and/or because Xerox approved the prior authorization requests without any knowledge of their truth. It is believed Xerox and the State intended for defendants to rely on the approvals as a prerequisite for providing the requested services. Approval was material because it was a mandatory prerequisite for payment. Defendants actually and justifiably relied on Xerox’s fraudulent approvals. As stated above in defendants’ counterclaims against the State, the State and Xerox acted in concert, conspiring to commit this fraud on the defendants.

14. Xerox’s approvals induced defendants to continue to grade subsequent HLD requests in the same or similar manner, and led defendants to believe that their requests were consistent with Medicaid standards and requirements. As stated above in defendants’ counterclaims against the State, the State conspired with Xerox to allow Xerox to issue approvals inducing defendants to

request prior authorizations and receive payment for orthodontic services from 2004 – 2012.

### **Breach of the Xerox-State of Texas Contract**

15. In the alternative, Xerox's actions constitute a breach of Xerox's contract with the State for the benefit of defendants. Xerox's contract with the State required that it conduct a proper, thorough and legal review of prior authorization requests for the purpose of determining medical necessity. To that end, Xerox should have employed a licensed dentist, and the State should have assured that occurred.

16. Xerox was an agent of the State of Texas engaged specifically for the purpose of determining medical necessity. The third party beneficiaries of that Xerox-State of Texas contract were Medicaid patients and defendants. The patients were entitled to receive orthodontic services that were medically necessary. Defendants were responsible for actually delivering the orthodontic services that Xerox had deemed medically necessary. Thus, defendants were the third party beneficiaries that relied on Xerox's approvals.

17. Xerox breached its contract by, *inter alia*, failing to provide qualified staff; possibly violating Texas law; permitting non-dentists to make determinations of medical necessity; and issuing medical opinions without conducting a reasonable and prudent examination of evidence. The breaches were material, and recurred across many different Medicaid patients and for many years. The State was aware of Xerox's contractual breaches as early as 2008, but permitted the breaches to continue.

18. Xerox's and the State's actions proximately caused defendants' injuries. Defendants' injuries were caused-in-fact by Xerox's and the State's actions, and they were foreseeable. Because Xerox's prior authorization was a necessary prerequisite to providing services, defendants relied entirely on Xerox's determinations regarding medical necessity; thus, Xerox's

actions were the direct factual cause of defendants' injuries. Xerox's actions were foreseeable in that a person of ordinary intelligence should have anticipated that issuing a decision without actually reviewing or considering the evidence (x-rays, photos, models, etc.) would eviscerate the credibility and reliability of the decision. Once the State had an excuse for claiming that Xerox's approvals were not trustworthy, it was foreseeable that the State would demand repayment, and/or would require defendants to independently do Xerox's job after the fact by proving that payment was proper because the services were medically necessary and reimbursable under Texas Medicaid law. In short, Xerox's failures created the pretext upon which the State has taken this civil fraud action, and similar administrative actions, against defendants.

#### **Breach of Contract (Promissory Estoppel)**

19. In the alternative, Xerox's and the State's actions constitute promissory estoppel. Prior authorizations constitute promises to defendants in numerous ways. Because prior authorization was a prerequisite to furnishing services, and because Xerox was the entity charged with discharging prior authorization duties, defendants reasonably, substantially, and foreseeably relied on Xerox's promises. As stated above in defendants' counterclaims against the State, the State conspired with Xerox to allow Xerox to issue these false promises from 2004-2012.

#### **Negligent Hiring/Negligent Supervision**

20. Xerox's and the State's actions constitute negligent hiring and/or negligent supervision. Xerox was required to render medical diagnoses. To that end, Xerox was required by law to employ a licensed dentist to render a diagnosis regarding medical necessity. Xerox was also required by law to properly supervise its employees to make sure diagnoses were made only by licensed dentists.

21. Xerox and the State knew or should have known that decisions regarding medical necessity can only be rendered by licensed personnel. Texas Occupations Code section 251.003 defines the practice of dentistry to include a diagnosis of the human mouth and/or teeth; section 256.001 states that a person may not practice dentistry without a license; section 264.151 makes it a third-degree felony to practice dentistry without a license.

22. Xerox's and the State's actions proximately caused defendants' injury. Defendants' injuries were caused-in-fact by Xerox's and the State's actions, and they were foreseeable. Because Xerox's prior authorization was a necessary prerequisite to providing services, defendants relied entirely on Xerox's determinations regarding medical necessity; thus, Xerox's actions were the direct factual cause of defendants' injuries. Xerox's actions were foreseeable in that any person of ordinary intelligence should have anticipated that paying defendants for services that have not properly been determined to be medically necessary would precipitate a demand for repayment from the State, and/or would require defendants to independently do Xerox's job after the fact by proving that payment was proper because those services were medically necessary and were reimbursable under Texas Medicaid law.

### **Negligence**

23. Xerox's and the State's actions constitute negligence and gross negligence. Xerox was required to render medical diagnoses. To that end, Xerox had a duty to employ a licensed dentist to render a diagnosis supporting or denying medical necessity. Xerox had a duty to assure that the personnel had appropriate education, training and experience to render such a finding. Xerox had a duty to review the supporting prior authorization documentation (such as x-rays and photos) to determine whether the requested services were medically necessary.

24. Xerox's actions breached the standard of care because Xerox: failed to provide prior

authorization staff that were properly licensed, qualified and experienced dental professionals; violated the law, specifically the Dental Practice Act, by permitting non-dentists to make determinations of medical necessity, and; issued medical opinions (prior authorizations) without conducting a reasonable and prudent examination of evidence.

25. Xerox's and the State's actions proximately caused defendants' injury. Defendants' injuries were caused-in-fact by Xerox's and the State's actions, and they were foreseeable. Because Xerox's prior authorization was a necessary prerequisite to providing services, defendants relied entirely on Xerox's determinations regarding medical necessity; thus, Xerox's actions were the direct factual cause of defendants' injuries. Xerox's actions were foreseeable in that any person of ordinary intelligence should have anticipated that paying defendants for services that have not properly been determined to be medically necessity would precipitate a demand for repayment, and/or would require defendants to independently do Xerox's job after the fact.

### **Negligent Misrepresentation**

26. Xerox's and the State's actions constitute negligent misrepresentation. Xerox's and the State's actions constitute misrepresentations to defendants in numerous ways. Because, *inter alia*, prior authorization approval was a prerequisite to furnishing services, these representations guided and controlled defendants' responses. Defendants justifiably relied on these representations. Further, Xerox and the State, each independently represented that Xerox's prior authorization approvals were dispositive of medical necessity; defendants expected that, once approved, no further inquiry into the medical necessity of the services would be required. Further, Xerox represented that its subsequent payments to defendants (after the services had actually been delivered) were made because services had been, in fact, properly approved as

medically necessary.

27. Xerox did not exercise reasonable care or competence in making its determinations and representations. Xerox knew or should have known that its representations were false.

28. Because prior authorization was a prerequisite to furnishing services, and because Xerox was the entity charged with discharging prior authorization duties, defendants reasonably, substantially, foreseeably, and justifiably relied on Xerox's representations.

### **Gross Negligence / Misapplication of Fiduciary Property**

29. Xerox and the State committed gross negligence and/or the misapplication of fiduciary property which would entitle defendants to unlimited punitive damages.

### **Damages**

30. Defendants suffered and continue to suffer significant damage. Xerox's and the State actions, independently and in collusion, caused injury to defendants. As a result of Xerox's and the State's actions, defendants submitted requests for payment and Xerox actually paid for those services, some defendants were placed on payment hold, defendants were forced to defend themselves in an administrative payment hold hearing, and defendants faced administrative claims by HHSC for repayment (including claims for treble damages and attorney fees). Defendants' reputations and businesses have suffered severe injury. Defendants seek recovery of actual and exemplary damages, interest, court costs, and attorney fees. Defendants also seek damages that would have given the defendants the benefit of the bargain by putting them in as good a position as they would have been in if the contract had been performed. Defendants also seek damages for its restitution interest to restore money sought by the Office of the Inspector General from defendants. In addition, defendants seek liquidated damages as set out in the Xerox-State of Texas contract.

**Claim for contribution from Xerox**

31. In the unlikely event that this Court were to award damages that represent any such recovery by the State against defendants, the third party defendants (*Xerox, et al*) are responsible to contribute any damages recoverable by the State against defendants that relate to Medicaid payments which resulted from the approval and/or payment of claims by the third party defendants for orthodontic services. The burden of paying any such damages, if any is to be assessed in this case, should be properly shifted under the facts and the law of contribution from defendants to Xerox.

**IV. Jury Demand**

32. Defendants respectfully request a trial by jury.

**V. Prayer**

33. Wherefore, premises considered, Defendants Dr. Behzad Nazari, D.D.S. d/b/a Antoine Dental Center, Dr. Behzad Nazari, Harlingen Family Dentistry, P.C. a/k/a Practical Business Solutions, Series LLC, Juan D. Villarreal D.D.S., Series PLLC d/b/a Harlingen Family Dentistry Group, Dr. Juan Villarreal, Richard F. Herrscher, D.D.S., M.S.D., P.C., Dr. Richard F. Herrscher, M & M Orthodontics, PA, Dr. Scott Malone, Dr. Diana Malone, Michelle Smith, National Orthodontix, Mgmt., PLLC, Dr. John Vondrak, RGV Smiles by Rocky Salinas, D.D.S. PA, and Dr. Rocky Salinas, pray that upon final hearing of the cause, judgment be entered jointly and severally against the State of Texas and third party defendants for damages, together with pre-judgment and post judgment interest at the legal rate, costs of court, and other such relief to which the defendants may be entitled.

Respectfully submitted,



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SALINAS.**

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Original Answer and third Party Petition was served via e-mail and certified mail, return receipt requested on the 12th day of January, 2015 on the following:

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