

CAUSE NO. D-1-GV-14-000581

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| RGV SMILES BY ROCKY L. SALINAS, | § | IN THE DISTRICT COURT |
| DDS, PA, AND DR. ROCKY SALINAS, | § | |
| INTERVENORS, | § | |
| | § | |
| VS. | § | |
| | § | |
| THE STATE OF TEXAS, | § | |
| PLAINTIFF, | § | |
| | § | 53rd JUDICIAL DISTRICT |
| VS. | § | |
| | § | |
| XEROX CORPORATION; XEROX | § | |
| STATE HEALTHCARE, LLC; ACS | § | |
| STATE HEALTHCARE, LLC, A XEROX | § | |
| CORPORATION | § | |
| DEFENDANTS. | § | TRAVIS COUNTY, TEXAS |

PLEA IN INTERVENTION

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES, RGV Smiles by Rocky L. Salinas, DDS, PA and Dr. Rocky Salinas, hereinafter Intervenors, and file this Plea in Intervention, and in support hereof, would respectfully show the Court the following:

I. Parties and Service

1. Plaintiff, State of Texas, has appeared in this action and may be served with a notice of this Plea by sending a copy to its attorney, the Attorney General of Texas, Greg Abbott, at P. O. Box 12548, Austin, Texas 78711-2548.

2. Defendant Xerox Corporation is a corporation organized under the laws of New York has agreed to accept service with process upon its Attorney in this suit. Defendant Xerox State Health Care, LLC, f/k/a ACS State Healthcare, LLC (misnamed by the State of Texas as ACS State Healthcare, LLC, a Xerox Corporation 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 has agreed to accept service with process upon its Attorney in this suit. 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. Defendants are referred to hereinafter as “Xerox Defendants.”

3. RGV Smiles by Rocky L. Salinas, DDS, PA, (hereinafter RGV) is a Texas professional association, and an approved Medicaid provider, with its principal place of business listed as 805 N. Cage, Pharr, Texas 78577. RGV can be served through the undersigned counsel.

4. Dr. Rocky Salinas¹ is a licensed Texas dentist, approved Medicaid provider, and the owner of RGV. Dr Salinas can be served through his undersigned counsel.

II. Jurisdiction and Venue

5. This Court has subject-matter jurisdiction in that the amounts sought by Intervenors from all parties (both Plaintiff and Defendants) are in excess of the minimal jurisdiction limits of this court. Intervenors affirmatively plead that this suit is not governed by the expedited-actions process in TEXAS RULE OF CIVIL PROCEDURE 169 because intervenors seek monetary relief over \$100,000.

6. This Court has jurisdiction over all parties in this petition because:

- a) The State has waived sovereign immunity and is subject to Intervenors’ claims;
- b) This Court has jurisdiction over Xerox Defendants because each Defendant does business in the State of Texas and committed the unlawful acts alleged in this petition in whole or part in Texas.

7. Venue is proper in Travis County under TRCP §15.020 because this suit involves a “major transaction”; Venue is permissive under TRCP §15.035(a) because Intervenor asserts claims for breach of contract. Venue is proper pursuant to TRCP §15.02 because all or a

¹ For the sake of simplicity, the Intervenors will be collectively referred to as “RGV” unless expressly noted.

substantial part of the events or omissions giving rise to the claim occurred in Travis County. Many of the unlawful acts committed by the State and Xerox Defendants were committed in Travis County, including the making of false statements and misrepresentations of material fact.

III. Intervenors' Interest in the Suit

8. Intervenors RGV Smiles and Dr. Rocky Salinas have a judicial interest in the matters and controversy in this litigation. The relationship between Intervenors, the State as the Plaintiff and the Xerox Defendants is a tripartite arrangement necessitating that, in the interest of judicial economy and justice, all claims be bound and subsumed into one cause of action. Upon information and belief, Intervenors were initially sued by the State in a *qui tam* action wherein the State alleged that Intervenors defrauded the State. The State has elected to pursue its remedies against the Intervenors in an administrative hearing. Now, the State has sued Xerox in State Court on the same facts, alleging that Xerox has committed fraud against the State. Intervenors have claims against both the State and Xerox. It is assumed that Xerox will have claims against the State, and perhaps allege claims against the Intervenors. All of the different parties' claims are inextricably intertwined, as they relate to Intervenors' submission of prior authorization requests to Xerox, the handling of those claims by the Xerox Defendants, the State's handling and oversight of its agent Xerox in Xerox's performance of its contractual and legal duties, and State's subsequent legal action against the Intervenors for services approved by Xerox.

IV. Facts

What is Prior Authorization?

9. Texas Medicaid requires that orthodontic services be independently and objectively scrutinized before the State consents to treatment and payment. Prior authorization is the

mechanism the State uses to determine the medical necessity of non-emergency orthodontic items/services prior to delivery of those items/services. Pursuant to Texas Health and Human Services Commission (hereinafter “HHSC”) rules, Texas Medicaid greatly restricts when it will pay for orthodontic services:

Orthodontic services for cosmetic reasons only are not a covered Medicaid service. **Orthodontic services must be prior authorized** and are limited to treatment of severe handicapping malocclusion and other related conditions as described and measured by the procedures and standards published in the [TMPPM²].

25 TEX. ADMIN. CODE §33.71 (emphasis added). Prior authorization is a statement of assurance to the orthodontic provider that, absent an intervening disqualifying factor, the delivery of the requested orthodontic service has been deemed by Xerox to be medically necessary, and therefore approved by the State.

10. The prior authorization process is straightforward. Texas Medicaid requires that a dental provider send documentation (x-rays, cephalographs, photos, etc.) regarding the patient’s orthodontic condition to Xerox for review. In addition, the orthodontic provider submits his professional opinion of the patient on a Handicapping Labio-lingual Deviation index (HLD) score sheet. Xerox knew providers relied entirely on the prior authorization process because approval was a mandatory prerequisite to providing orthodontic services and being paid. Once Xerox issued its prior authorization decision, the decision was not appealable by the provider.

11. The HLD scoring system combines a number of treatable orthodontic conditions into an index. HLD score sheets use a mix of objective and subjective conditions to determine whether a Medicaid patient qualifies for orthodontic services. The fact that the HLD score sheet requires both objective and subjective findings highlights the importance of Xerox performing a thorough

² “TMPPM” is the Texas Medicaid Provider Procedures Manual, which is issued yearly by the HHSC and provides valuable guidance to Medicaid providers.

prior authorization review.

The History of Orthodontic Prior Authorization.

12. The process for reviewing and approving orthodontic prior authorization requests pre-dates the defendant Xerox's handling of Medicaid claims processing. The National Heritage Insurance Corporation (NHIC) was responsible for reviewing prior authorization requests before Xerox assumed the contract in January 2004. Starting January 1, 2004, Xerox acted as an independent contractor, and was a contracted agent of the State, under the contract with HHSC. Xerox was responsible for reviewing each orthodontic service request, and Xerox was further charged with the responsibility to grant or deny each prior authorization request per the program requirements. The result was that Xerox had the final say in determining the medical necessity of each request for orthodontic services.

13. Prior to assuming the NHIC contract, and for a period of time after assuming the contract from NHIC, Xerox received training from NHIC personnel regarding the proper method for receiving and processing orthodontic prior authorization requests. NHIC personnel explained how and why the review of each prior authorization submission was important, and walked Xerox through the process. Despite its training from NHIC, Xerox had no intention of following the prior authorization system that had been in place for years, nor did Xerox intend to otherwise meet the prior authorization requirements set out in its contract, the TMPPM and required by state law.

Xerox rejects its contractual responsibilities.

14. When Xerox took over the contract in 2004, it immediately abandoned the prior authorization review process that had been setup by NHIC. Xerox never intended to fulfill its orthodontic prior authorization responsibilities to HHSC. From 2004 to 2011, Xerox continually

misrepresented that it was acting in compliance with its contractual duties.

15. It is now known that Xerox failed to adequately staff their prior authorization division with knowledgeable medical professionals. Xerox employed only one licensed dentist from 2004 through 2011, which was far short of the manpower necessary to handle the review of tens of thousands of orthodontic prior authorization requests every year. Xerox could not reasonably have expected to handle such a workload by employing only one dentist.

Xerox potentially commits thousands of violations.

16. It is believed Xerox allowed “dental specialists”—unlicensed, unqualified individuals—to render prior authorization opinions regarding the medical necessity of requested orthodontic services. The “dental specialist” approvals were not reviewed or ratified by Xerox’s licensed dental director or another qualified dental professional. These actions not only violated Xerox’s contractual obligations, they may have also violated other Texas law such as the Dental Practice Act.³ It is believed these unlicensed Xerox “specialists” rendered tens of thousands of prior authorization approvals/medical opinions in violation of Texas law.

17. Xerox was paid by the state for each prior authorization decision that was made. It is believed that Xerox employed unlicensed “specialists,” rather than licensed Texas dentists, as a profit generating measure.

18. From January 2005 through February 2012, Intervenor submitted prior authorization requests, as required, to Xerox for a determination of medical necessity. Unbeknownst to Intervenor, Xerox’s dental specialists—not the dental director—approved almost all of Intervenor’s requests. Xerox’s prior authorization approvals were promises that:

³ Texas Occupations Code §251.003 prevents unlicensed individuals from diagnosing conditions of the human teeth and mouth. Section 256.001 states that a person may not practice dentistry without a license. Thus, state law requires that opinions regarding medical necessity of orthodontic treatment must be made by licensed dentists. Section 264.151 prescribes penalties for certain violations of the Dental Practice Act.

- a) the requested orthodontic services were medically necessary, and/or
- b) the approval had been issued by a licensed dentist, and/or
- c) the approval was an actual and legitimate dental diagnosis, and/or
- d) the requested orthodontic services were allowable under Texas law and as permitted by Medicaid policy, the TMPPM, and HHSC rules, and/or
- e) a proper, thorough and legal review had been made, and/or
- f) future orthodontic services would be properly reimburseable to Intervenors, absent some intervening disqualification (such as the patient's ineligibility).

19. Because Xerox was charged with determining medical necessity, and because prior authorization approval was a mandatory prerequisite to furnishing services, the promises were material. Intervenors expected performance of these promises. Intervenors relied on Xerox. Further, Xerox promised that its subsequent payments to Intervenors (after the services had actually been delivered) were made because the services had been, in fact, properly approved as medically necessary. Each prior authorization approval represents a separate violation of the law if Xerox's approval was issued illegally and/or in violation of its contractual obligations.

Xerox actively concealed its potentially illegal activity.

20. Xerox withheld the truth regarding its prior authorization program. In an attempt to publicly appear consistent with NHIC's prior authorization process, Xerox continued to require that dental providers (such as Intervenor) submit all supporting documentation for each HLD score sheet. It is now believed that, incredibly, Xerox did nothing with that documentation, other than assure that it had been submitted by the provider. It is believed that Xerox's specialists were instructed to forward to its dental director only those requests that had scored below the threshold for orthodontic services (i.e. below 26 points on the HLD score sheet), or had some

provider justification attached. As a result, only 10% of the orthodontic prior authorization requests were actually forwarded to Xerox's one licensed dentist. Xerox's actions were calculated to make Xerox appear compliant with its contract and HHSC policies, while Xerox knew that its actions were entirely inconsistent with the letter and spirit of its obligations. Effectively, then, Xerox's actions not only damaged the Medicaid program directly by approving services without determining their medical necessity, but Xerox's deception also exacerbated the problem by failing to give providers guidance regarding the proper standard for medical necessity, thus causing these providers substantial damages.

21. For the past ten years, Xerox has continued to publicly represent to the world that it was fulfilling its contractual and legal responsibilities. Based on Xerox's representations that it was fulfilling its duties to the State, Xerox had its contract with HHSC repeatedly renewed from 2004 through the present. Each year that Xerox had its contract renewed, it represented that it would fulfill its contractual obligations and abide by Texas law requiring that decisions about medical necessity be rendered only by licensed dentists. Xerox made those representations knowing that it had not done so in the past, and had no intention of changing its procedures to do so in the future.

The *Frew* decision magnifies Xerox's acts.

22. In September 2007, after fifteen years of litigation on the subject, Texas was ordered to implement a corrective action plan that increased the Medicaid reimbursement rates to all dental providers. That plan was required pursuant to the *Frew* case⁴, which was a 1993 class-action

⁴ *Frew v. Gilbert*, 109 F. Supp. 2d 579 (E.D. Tex. 2000) *vacated sub nom. Frazar v. Gilbert*, 300 F.3d 530 (5th Cir. 2002) *rev'd sub nom. Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 124 S. Ct. 899, 157 L. Ed. 2d 855 (2004) and *aff'd in part, appeal dismissed in part sub nom. Frazar v. Hawkins*, 376 F.3d 444 (5th Cir. 2004); *Frew v. Hawkins*, 401 F. Supp. 2d 619 (E.D. Tex. 2005) *aff'd sub nom. Frazar v. Ladd*, 457 F.3d 432 (5th Cir. 2006); *Hawkins v. Frew*, 549 U.S. 1118, 127 S. Ct. 1039, 166 L. Ed. 2d 714 (2007).

lawsuit against the HHSC alleging that Texas' Medicaid reimbursement rates were so low that they prevented indigent children from receiving timely, comprehensive health care.

23. In response to *Frew's* corrective action plan, the 2007 Texas Legislature allocated \$707 million (\$1.8 billion in state and federal funds combined) to increase medical and dental reimbursement rates. The increase in dental reimbursement rates was intended to entice dentists to become Medicaid providers. It worked. The state raised payment rates for dental services, and, as a result, the number of dentists participating in Medicaid increased from 45.4% in 2007 to 63.4% in 2010. As expected indeed, as intended spending on Texas's dental services increased dramatically.

24. Although the number of prior approval requests increased by 240% between 2007 and 2010, Xerox continued to employ only one dentist. That dentist was neither tasked with nor responsible for supervising the clerical specialists that were issuing the approvals.

25. By 2010, orthodontic spending under Texas' Medicaid program had skyrocketed. Xerox was the sole entity responsible for overseeing this increase, because it was the sole gatekeeper for the approval and payment of orthodontic services. Although the Texas Legislature had increased funding to attract dentists into the Medicaid program, all of the budgeted funds were required to be spent only on medically necessary services.

The Office of Inspector General seeks recovery from Medicaid providers.

26. In early 2011, a series of news stories began highlighting the large amount of money being spent on orthodontics in Texas. In July 2011, the Federal government notified Texas of its intent to audit whether Texas' prior authorization process was ensuring that only medically necessary orthodontic cases were being approved and paid. With the prospect of a federal clawback action looming against Texas because of Xerox's prior authorization failures, the

Texas Office of Inspector General (hereinafter “State”) took a drastic step. Beginning in 2011, the State generated a list of the top Medicaid orthodontic billers and placed them on “payment hold.” Intervenor was one of those providers.

27. Given Intervenors’ proximity to some of the state’s poorest children, and the mandates of the *Frew* decision, Intervenor served a large Medicaid patient population. Because it served a large Medicaid population, it submitted a large number of prior authorization requests to Xerox from 2004 through 2011.

28. Intervenors did not know that Xerox was failing to perform a true and accurate review for medical necessity. Intervenors relied on Xerox’s prior authorization approvals to confirm that dentists’ analysis was proper and consistent with Medicaid standards and requirements.

29. Again unbeknownst to Intervenors, State audits in 2008 and 2012 concluded that most, if not almost all, of the prior authorization requests for patients with HLD scores of 26 or greater (indicating medical necessity) had not been actually “evaluated” at all by Xerox. These State audits made the Federal government’s pending audit especially dangerous to Texas, because the 2008 and 2012 audits were admissions that Xerox had been approving and paying claims that may not have met the federal standards for prior authorization. Thus the State, through the Attorney General, concluded that a true finding of medical necessity had in reality not occurred. The Attorney General claimed that billing for services that are not necessary is fraud, despite Xerox’s prior authorization approvals.

30. It is now believed that rather than prosecute Xerox for its failure to properly evaluate dentists’ prior authorization requests, the State and the Texas Attorney General protected Xerox. This protection included the State failing to allow TMHP to hire additional medically licensed staff, and in 2008-2009 telling TMHP to continue its prior authorization practices. Although the

Attorney General took immediate action against the providers, the Attorney General refused to hold Xerox accountable for its orthodontic “approvals,” its repeated contractual failures, or its violation of State law. Instead, the Attorney General made fraud allegations against each of the top 25 dental providers, including Intervenor, which has caused more injury and damages to Intervenors. Stated differently, Xerox issued its approvals through a process that gutted the State’s belief in the accuracy of Xerox’s decision, and the Texas Attorney General punished the providers instead of Xerox.

31. Because the acts/omissions of Xerox so undermined the process, the State eventually instituted a “payment hold” against Intervenor. A payment hold temporarily freezes future Medicaid payments to a provider, despite the provider’s ongoing participation in the Medicaid program. The payment hold against Intervenor was issued pursuant to what the State called a “credible allegation of fraud” regarding Intervenor’s orthodontic prior authorization requests. The State placed a 100% payment hold against Intervenor’s orthodontic billings.

32. At the time the Attorney General began prosecuting Intervenor and similarly situated Medicaid providers, it knew Xerox, not Intervenor, had the sole authority and responsibility to authorize orthodontic services and payments. The Attorney General knew that the State’s audits of Xerox in 2008 and 2012 had concluded that Xerox was violating its contract with the State, violating its own State-approved policies and procedures, and violating State law. Nevertheless, the Attorney General continued to only prosecute dental providers like the Intervenor; the Attorney General refused to hold Xerox responsible. In fact, in one shameless and brazen demonstration of State’s unwavering protection of Xerox, the Deputy Director of Texas’ Office of the Inspector General testified in a hearing that Xerox’s acts and omissions were so egregious

they were outside the course and scope of Xerox's agency with State.⁵ Upon information and belief, the State and the Attorney General protected Xerox for over 6 years fearing that revealing the State's culpability would subject the State to a federal clawback for hundreds of millions of dollars. Instead, the State and the Attorney General pointed at the dental providers.

33. Ultimately, the evidence of Xerox's failures, and the State's refusal to correct Xerox for over 6 years, became too much to hide. Three months after some providers filed suit against Xerox, and following a series of news stories questioning why Xerox had not suffered for its failures, the Attorney General reversed course. On May 9, 2014, the State, through the Texas Attorney General, filed this lawsuit against Xerox for fraud, basically mirroring the suit filed approximately 100 days earlier by similarly situated providers. The State's claims in this fraud lawsuit include admissions that the State knew as early as 2006 that Xerox's actions were improper.

34. As a result of the payment hold, Intervenor was required to make significant financial concessions and changes to its business. Intervenor also engaged legal counsel to defend itself from the State's claims, at a significant expense that continues today.

35. The State's allegations against Intervenor are rooted in two assumptions. First, the State assumes Intervenor's prior authorization requests were not properly vetted by Xerox; that is, Xerox approved Intervenor's requests without knowing whether approval was actually proper. Because Xerox is not a party to Intervenor's administrative case, Intervenor is prevented from determining whether Xerox did, in fact, perform a proper review of Intervenor's prior authorization requests. By intervening in this lawsuit, Intervenor seeks to address that question,

⁵ Incredibly, that testimony came in an administrative proceeding in which the State was seeking \$8 million from a dental provider for following Xerox's instructions to provide braces to the provider's patients. The idea that the State could not hold Xerox responsible for its contractual obligations because Xerox had done such a poor job that it was acting outside of its contract is a novel and imaginative reason not to prosecute Xerox.

and finally determine whether Xerox reviewed Intervenor's requests as required by its contract and the law.

36. Regarding the State's second assumption, the State alleges some of Intervenor's requests were approved when, in fact, they should have been denied. Intervenor denied that assertion in the administrative case, and Intervenor continues to deny that claim here. All services provided to Intervenor's patients were actually medically necessary, regardless of what Xerox decided and in any event under Medicaid guidelines once the authorization was approved, Intervenor was required to provide the services.

37. The State continues to aggressively fight any allegation or affirmative defense that could result in Xerox being held accountable for its part in these HLD scoring cases, despite the State's contentions in the District Court case to the contrary. Damages continue to accrue.

V. Causes of Action

A. Intervenor's Claims Against Xerox

Common Law Fraud (Fraudulent Misrepresentation and Fraudulent Inducement)

38. Intervenor re-alleges and incorporates the above facts and allegations as if fully set out herein. Xerox's prior authorization approvals were false representations made to Intervenor. It is believed Xerox knowingly issued these prior authorizations to Intervenor because Xerox knew that it was approving requests without a proper medical review, and/or because it approved the prior authorization requests without any knowledge of their truth. It is believed Xerox intended for Intervenor to rely on the approvals as a prerequisite for providing the requested services. Approval was material because it was a mandatory prerequisite for payment. Intervenor actually and justifiably relied on Xerox's fraudulent approvals.

39. Xerox's approvals induced Intervenor to continue to grade subsequent HLD requests in

the same or similar manner, and led Intervenor to believe that their requests were consistent with Medicaid standards and requirements.

40. Xerox's fraudulent approvals caused injury to Intervenor. As a result of Xerox's actions, Intervenor submitted requests for payment and Xerox actually paid for those services, Intervenor was placed on payment hold, Intervenor is forced to defend itself in an administrative payment hold hearing, and Intervenor is facing administrative claims by HHSC for repayment (including claims for treble damages and attorney fees). Intervenor's reputation and business have suffered severe injury. Intervenor seeks recovery of actual and exemplary damages, interest, court costs, and attorney fees.

Breach of the Xerox-State of Texas Contract

41. Intervenor re-alleges and incorporates the above facts and allegations as if fully set out herein. In the alternative, Xerox's actions constitute a breach of Xerox's contract with the State for the benefit of Intervenor. 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.

42. 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 Intervenor. The patients were entitled to receive orthodontic services that were medically necessary. Intervenor was responsible for actually delivering the orthodontic services that Xerox had deemed medically necessary. Thus, Intervenor was a third party beneficiary that relied on Xerox's approvals.

43. 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.

44. Xerox's actions proximately caused Intervenor's injury. Intervenor's injuries were caused-in-fact by Xerox's actions, and they were foreseeable. Because Xerox's prior authorization was a necessary prerequisite to providing services, Intervenor relied entirely on Xerox's determinations regarding medical necessity; thus, Xerox's actions were the direct factual cause of Intervenor's 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 assumed that Xerox's approvals were not trustworthy, it was foreseeable that the State would demand repayment, and/or would require Intervenor 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.

45. Intervenor suffered and continues to suffer significant damage. Intervenor seeks damages that would have given the Intervenor 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. Intervenor seeks reliance interest damages to restore the expenditures Intervenor made in reliance on Xerox's contract with the state and the approvals that Xerox made under that contract. Intervenor also seeks damages for its restitution interest to restore money sought by the Office of the Inspector General from Intervenor. Such damages would put the Intervenor in as good a position as it would have been in if the contract had been properly fulfilled. In addition, Intervenor seeks liquidated damages as set out in the Xerox-State of Texas contract. Intervenor has engaged legal

counsel to defend itself from the State's charges, and those legal expenses continue today. Intervenor has incurred benefit of the bargain damages, out-of-pocket damages, lost profits, lost future profits, loss of credit, and loss of goodwill. Intervenor seeks recovery of actual and exemplary damages, interest, court costs, and attorney fees.

Breach of Contract (Promissory Estoppel)

46. Intervenor re-alleges and incorporates the above facts and allegations as if fully set out herein. In the alternative, Xerox's actions constitute promissory estoppel.

47. Xerox's prior authorizations constitute promises to Intervenor in numerous ways. Because prior authorization was a prerequisite to furnishing services, and because Xerox was the entity charged with discharging prior authorization duties, Intervenor reasonably, substantially, and foreseeably relied on Xerox's promises.

48. Intervenor suffered and continues to suffer significant damage. Intervenor suffered reliance damages by investing time, labor, equipment, and orthodontic appliances in each Medicaid patient that Xerox approved. Intervenor has engaged legal counsel to defend itself from the State's charges, and those legal expenses continue today. Intervenor has been required to do Xerox's job after the fact—namely, demonstrate that the services were medically necessary and properly reimbursable under Texas Medicaid law. Intervenor has incurred benefit of the bargain damages, out-of-pocket damages, lost profits, lost future profits, loss of credit, and loss of goodwill. All of these damages were directly and/or proximately caused by Xerox's promises. Intervenor seeks recovery of actual and exemplary damages, interest, court costs, and attorney fees.

Negligent Hiring/Negligent Supervision

49. Intervenor re-alleges and incorporates the above facts and allegations as if fully set out

herein. Xerox'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.

50. Xerox 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.

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

52. Intervenor suffered and continues to suffer significant damage. Intervenor suffered reliance damages by investing the cost of services for each Medicaid patient that Xerox approved. Intervenor has engaged legal counsel to defend itself from the State's charges, and

those legal expenses continue today. Intervenor suffered and continues to suffer significant damage to its reputation, business, referral base, earnings and earning power. Intervenor has suffered inconvenience and loss of enjoyment of life in that he has had to dedicate significant mental and personal capital to doing Xerox's job. Intervenor has suffered exemplary damages because Xerox's conduct was grossly negligent, outrageous and malicious, and such conduct should be penalized so that it is deterred in the future. Intervenor seeks recovery of actual and exemplary damages, interest, court costs, and attorney fees.

Negligence

53. Intervenor re-alleges and incorporates the above facts and allegations as if fully set out herein. Xerox'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.

54. 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.

55. Xerox's actions proximately caused Intervenor's injury. Intervenor's injuries were caused-in-fact by Xerox's actions, and they were foreseeable. Because Xerox's prior authorization was a necessary prerequisite to providing services, Intervenor relied entirely on

Xerox's determinations regarding medical necessity; thus, Xerox's actions were the direct factual cause of Intervenor's injuries. Xerox's actions were foreseeable in that any person of ordinary intelligence should have anticipated that paying Intervenor for services that have not properly been determined to be medically necessity would precipitate a demand for repayment, and/or would require Intervenor to independently do Xerox's job after the fact.

56. Intervenor suffered and continues to suffer significant damage to its reputation, business, referral base, earnings and earning power. Intervenor has engaged legal counsel to defend itself from the State's charges, and those legal expenses continue today. Dr. Salinas has suffered inconvenience and loss of enjoyment of life in that he has had to dedicate significant mental and personal capital to doing Xerox's job. Intervenor has suffered exemplary damages because Xerox's conduct is grossly negligent, outrageous and malicious, and such conduct should be penalized so that it is deterred in the future. Intervenor seeks recovery of actual and exemplary damages, interest, court costs, and attorney fees.

Negligent Misrepresentation

57. Intervenor re-alleges and incorporates the above facts and allegations as if fully set out herein. Xerox's actions constitute negligent misrepresentation. Xerox's actions constitute misrepresentations to Intervenor in numerous ways. Because, *inter alia*, prior authorization approval was a prerequisite to furnishing services, these representations guided and controlled Intervenor's responses. Intervenor justifiably relied on these representations. Further, Xerox represented that its prior authorization approvals were dispositive of medical necessity; Intervenor 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 Intervenor (after the services had actually been delivered) were made because services had been,

in fact, properly approved as medically necessary.

58. 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.

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

60. Intervenor suffered and continues to suffer significant damage. Intervenor suffered reliance damages by investing time, labor, equipment, and orthodontic appliances in each Medicaid patient that Xerox approved. Intervenor has engaged legal counsel to defend itself from the State's charges, and those legal expenses continue today. Intervenor has been required to do Xerox's job after the fact. Intervenor has incurred benefit of the bargain damages, out-of-pocket damages, lost profits, loss of credit, and loss of goodwill. All of these damages were directly and/or proximately cause by Xerox's negligent misrepresentations. Intervenor seeks recovery of actual and exemplary damages, interest, court costs, and attorney fees.

Gross Negligence / Misapplication of Fiduciary Property

61. Intervenor re-alleges and incorporates the above facts and allegations as if fully set out herein. Plaintiffs plead Xerox committed gross negligence and/or the misapplication of fiduciary property which would entitle Intervenor to unlimited punitive damages.

B. Intervenor's Claims Against The State of Texas

Waiver of Sovereign Immunity

62. Intervenor re-alleges and incorporates the above facts and allegations as if fully set out herein. For a number of reasons, the State has waived sovereign immunity for claims by Intervenor, including the facts that the State brought, threatened and/or has taken civil and/or

administrative action against Intervenors, and because the State has filed suit against Xerox.

Conspiracy/Joint Enterprise

63. Intervenor re-alleges and incorporates the above facts and allegations as if fully set out herein. In the alternative, former Deputy Inspector General Jack Stick has stated publicly that acts and omissions of Xerox were so egregious as to be outside the course of scope of Xerox's agency relationship with the State. Assuming same to be true, then the State conspired with Xerox to breach the contract or allow the breach to continue, conspired to withhold funds from Intervenor but not Xerox, and conspired to falsely accuse Intervenor of fraud/crime.

64. The State conspired with Xerox to allow Xerox to violate its various contractual duties. 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 State and Federal law. The State and Xerox created a scheme to rubber stamp and/or allow no legitimate review of prior authorizations submitted by the dentists. The conspiracy was committed with the intent to shift blame from the State and its agent, improperly blame the Intervenors, 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 party to blame the dentist providers for their own improper acts and omissions is a proximate cause of the injury to Intervenors.

Not Liable for Illegal Acts of Third Party

65. Intervenor re-alleges and incorporates the above facts and allegations as if fully set out herein. As alleged by the State in Section VIII paragraph 46 of the State's petition, Xerox has

committed or is about to commit unlawful acts. The illegal acts of Xerox in failing to provide proper prior authorization review in rubber stamping the doctors prior authorization requests is not the fault of the doctors. The doctors are not responsible for or liable to the State for the illegal acts of a third party for which the doctors had no control; the State should not withhold money from the Intervenors because of the illegal acts of Xerox complained about by the State.

Breach of Contract

66. Intervenor re-alleges and incorporates the above facts and allegations as if fully set out herein. Intervenors are a direct or third party beneficiary of the contract with Xerox and the State of Texas. The State of Texas 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 Intervenors for repayment. To the extent that the State has withheld money and/or made claims for damages against Intervenors based on the contracts in question, the State has waived immunity and is liable up to those amounts plead.

Conversion

67. Intervenor re-alleges and incorporates the above facts and allegations as if fully set out herein. State and Federal law required Intervenor to request prior authorization for orthodontic services. Those prior authorization requests were approved by Xerox, which required Intervenors to provide the services. The State has unilaterally made a decision to that, based on the acts and omissions of Xerox, the Intervenor should not have been paid; the State then placed Intervenor on a payment hold. To the extent that Intervenor has provided services for which Intervenor 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.

VI. Damages

68. Intervenors have suffered and are entitled to recover damages including, but not limited to loss of use of funds sequestered by the State, actual damages, damage to reputation, damage to business, damage to earnings and earning power, inconvenience, loss of enjoyment of life, fees and expenses, interest, punitive/exemplary damages, and attorney fees.

VII. Conclusion

69. Xerox's actions have harmed Intervenor because Xerox committed fraud, negligent hiring, negligence, and gross negligence. Xerox's actions have subjected Intervenor to unnecessary civil and administrative legal action, and that, in turn has caused additional injury. Xerox's actions have required Intervenor to perform Xerox's job after-the-fact, by proving to the State that the orthodontic services rendered were medically necessary and appropriate for reimbursement. The State's actions have harmed Intervenor because the state's conspiracy to improperly blame the dentists has resulted in meritless legal claims against the Intervenors and conversion of the Intervenor's property.

VIII. Jury Demand

70. Intervenors respectfully requests a trial by jury.

IX. Request for Disclosure

71. Under Texas Rule of Civil Procedure 194, Intervenor requests that Plaintiff the State disclose, within 50 days of the service of this request, the information or material described in Rule 194.2.

X. Prayer

72. Wherefore, premises considered, Intervenor RGV Smiles by Rocky L. Salinas, DDS, PA and Dr. Rocky Salinas pray that upon final hearing of the cause, judgment be entered jointly and severally against the Plaintiff the State of Texas and Defendant Xerox State Healthcare, LLC for damages, together with pre-judgment and post judgment interest at the legal rate, costs of court, and other such relief to which the Intervenor may be entitled.

Respectfully submitted,



Jason Ray
Texas Bar No. 24000511
RIGGS, ALESHIRE & RAY, P.C.
700 Lavaca, Suite 920
Austin, Texas 78701
(512) 457-9806 (Telephone)
(512) 457-9866 (Fax)
jray@r-alaw.com

/s/ Hart Green w/ permission by J Ray

E. Hart Green
Texas Bar No. 08349290
Mitchell A. Toups
Texas Bar No. 20151600
WELLER, GREEN, TOUPS & TERRELL, L.L.P.
Post Office Box 350
Beaumont, Texas 77704-0350
(409) 838-0101 (Telephone)
(409) 832-8577 (Fax)
hartgr@wgttlaw.com
matoups@wgttlaw.com
**ATTORNEYS FOR INTERVENORS
RGV SMILES BY ROCKY L. SALINAS, DDS,
PA AND DR. ROCKY SALINAS**

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Plea in Intervention was served via e-mail and certified mail, return receipt requested on this 15th day of May, 2014 on the following:

Eric J.R. Nichols
Beck Redden
515 Congress Avenue, Suite 1750
Austin, Texas, 78701
ENICHOLS@beckredde.com
Attorney for Xerox Defendants

Raymond Winter
Chief, Civil Medicaid Fraud Division
Assistant Attorney General
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548
raymond.winter@texasattorneygeneral.gov
Attorney for the Plaintiff State of Texas



Jason Ray Signature