R. Jeffrey Layne (TX Bar No. 00791083)
jlayne@reedsmith.com
Benjamin Koplin (TX Bar No. 24055792)
bkoplin@reedsmith.com
Megan Alter Hudgeons (TX Bar No. 24001645)
mhudgeons@reedsmith.com
Reed Smith LLP
111 Congress Ave., Suite 400
Austin, TX 78701
T: 512.623.1821
F: 512.623.1802

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

UNITED STATES OF AMERICA, *ex rel.* INTEGRA MED ANALYTICS LLC, Plaintiff, v. 1. BAYLOR SCOTT & WHITE HEALTH, 2. BAYLOR UNIVERSITY MEDICAL CENTER – DALLAS, 3. HILLCREST BAPTIST MEDICAL CENTER, 4. SCOTT & WHITE HOSPITAL – ROUND ROCK, 5. SCOTT & WHITE MEMORIAL HOSPITAL – TEMPLE, Defendants.	Case No.: 17-CV-0886-DAE

DEFENDANTS BAYLOR SCOTT & WHITE HEALTH, BAYLOR UNIVERSITY MEDICAL CENTER—DALLAS, HILLCREST BAPTIST MEDICAL CENTER, SCOTT & WHITE HOSPITAL—ROUND ROCK, AND SCOTT & WHITE MEMORIAL HOSPITAL—TEMPLE'S JOINT REPLY BRIEF IN SUPPORT OF THEIR JOINT MOTION TO DISMISS RELATOR'S SECOND AMENDED COMPLAINT

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I. INTRODUCTION

Relator says Defendants' Motion to Dismiss (Dkt. 21, "MTD") is "a strawman attack on a counterfactual version of the Complaint." Dkt. 23 at 1 ("Opp'n"). They say their Second Amended Complaint (Dkt. 15, "SAC") is "extensive[ly] detail[ed]" and ought to survive Defendant's MTD. Opp'n at 1, 2. Defendants obviously disagree, and the law is squarely on our side.[1]

As demonstrated below and in the attached, Relator sourced ***every single pleaded fact*** from publicly-disclosed and publicly-available information – LinkedIn, CMS, the census bureau, and Defendants' own website. Relator recasts these benign facts as nefarious through unsupported assertions and bald conclusory statements. None of this comes close to meeting Federal Rule of Civil Procedure 9(b) 's requirement to plead the actual fraud of which Relator accuses Defendants (misdiagnosis by a physician, miscoding by a coder, provision of medically unnecessary treatment), nor a scheme to commit any such fraud.

A third amendment to the complaint could not possibly cure this deficiency. The ***second*** amendment reflects the sum-total of "information gleaned from Integra's comprehensive

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[1] Recently, the Department of Justice filed motions to dismiss eleven *qui tam* actions strikingly similar to this action. In those cases, a "big-data entrepreneur" formed a group of "shell company relators" and filed "essentially cloned complaints" to exploit CMS's vast amount of ***public*** data as a "massive business opportunity." Mot. to Dismiss Second Am. Compl., *Health Choice Grp., LLC v. Bayer Corp.*, No. 5:17-CV-126-RWS-CMC (E.D. Tex.), Dkt. 116 at 2-3, 5 (emphasis added) (internal citations omitted).

Relator is a member of an analogous group of "associated compan[ies]" established for the sole purpose of leveraging "statistic[s]" to file *qui tam* actions across various industry sectors. SAC ¶ 11. Relator specializes in bringing carbon-copy complaints against hospital systems and other healthcare providers about which they have no inside information, always relying on their "proprietary methodology" for analyzing publicly-disclosed data to "prove" fraud. *Compare* SAC *with* Second Am. Compl., *U.S. ex rel. Integra Med Analytics LLC v. Providence Health Services et al.*, No. 2:17-CV-01694-PSG-SS (C.D. Cal.); *compare* SAC with Orig. Comp., *U.S. ex rel. Integra Med Analytics, LLC v. Signature Healthcare, LLC,* No: 3:17-cv-01544 (M.D. Tenn.).

investigation [of 'non-public internal documents, [and] interviews with former employees']." Opp'n at 12. The facts, where they are specific and relate to Defendants' CDI, ***are all publicly disclosed***. Opp'n at 12. Elsewhere the "facts" are utterly vague, nonspecific, and innocuous (*e.g.*, conversations with an unnamed "former medical coder" regarding unspecified "directives to code a certain way" (SAC ¶ 22)). None of this is surprising. Apart from Relator's serial FCA litigation against healthcare providers (wherein they continually emphasize "proprietary analyses" of publicly-disclosed CMS data, *see, supra,* FN 1), Relator is an outsider that pleads no connection to any of the Defendants[2] or the healthcare industry. Relator thus resorts to sweeping allegations derived entirely from publicly-disclosed information and unmoored from the specific factual pleading Rule 9(b) requires.[3]

Opinions[4] of and quotations from publicly-disclosed data and documents, apart from being clearly barred for public disclosure, cannot be the sole grounds supporting a *qui tam* relator's FCA action. The Fifth Circuit's Rule 9(b) pleading standard requires specific factual pleading of ***at least*** the "who, what, when, where, how" of a scheme to commit fraud, and Relator has (essentially) pleaded only that Defendants have a CDI program, that they submit claims to Medicare, and that the claims are coded with CCs and MCCs. The Court should dismiss Relator's SAC with prejudice.

II. ARGUMENT

A. Every Specific Well-Pleaded Fact is Benign and Sourced from Publicly Disclosed Information

The FCA's public disclosure bar applies when there has been a public disclosure of

[2] In fact, they plead the opposite: "Relator uncovered Baylor's fraud by employing unique algorithms and statistical processes." SAC ¶ 40.
[3] For example, they say Defendants' CDI program differs from other hospitals' CDI programs, but fail to explain how Defendants' program departs in any way from long-established clinical documentation guidance published or endorsed by the federal Medicare agency.
[4] Even opinions described as "astounding," Opp'n at 8, or as "proprietary analysis," SAC ¶ 1, are still opinions.

substantially the same allegations or transactions alleged in an FCA complaint. 31 U.S.C. § 3730(e)(4)(A). The Supreme Court has consistently affirmed the wide reach of the bar: when an agency responds to a request for information, the response is a "report," the report is publicly disclosed. *Schindler Elevator Corp. v. U.S. ex rel. Kirk*, 563 U.S. 401, 411 (2011); *Graham County Soil and Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 290 (2010) (noting the "broad[] sweep" of the FCA's public disclosure bar).

When information is published on a website that is readily accessible, the information is likewise publicly disclosed under the bar. "Courts have unanimously interpreted the term 'public disclosure' to include websites and online articles." *Green v. Amerisourcebergen Corp., et al*., 2017 WL 1209909 (S.D. Tex. Mar. 31, 2017) (citing *Graham County*, 559 U.S. at 290; *Schindler*, 563 U.S. at 408). Even as Relator urges this court to give extra weight to "its 'independent investigation and analysis' of information pulled from numerous sources" (Opp'n at 12) in an attempt to avoid the bar, the "numerous sources" themselves each trigger the bar: CMS data; LinkedIn;[5] presentations[6] and other documents[7] published on readily accessible websites; and documents published on Defendants' own public-facing website.[8]

Regarding the publicly-disclosed CMS claims data, Relator asks this Court to create a new exception to the bar by finding that a public disclosure is not a public disclosure if the recipient

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[5] SAC ¶ 20; publicly available at https://www.linkedin.com/in/anthony-tony-matejicka-b9b3415a (Exh. A)
[6] SAC ¶¶ 24-26; Opp'n at 4-5; publicly available at http://g.tinyurl.com/y7p6sk38 (Exh. B)
[7] SAC ¶ 29; publicly available at https://acdis.org/system/files/resources/280688.pdf (Exh. C)
[8] SAC ¶¶ 26, 28, 30, 31, 32, publicly available at http://www.sw.org/misc/physicianresources/pdf/TealNotes/Tealquickies.pdf (Exh. D); http://www.sw.org/misc/physicianresources/pdf/TealNotes/03_AlteredMentalStatus.pdf (Exh. E); http://www.sw.org/misc/physicianresources/pdf/TealNotes/35_RespiratoryFailure.pdf (Exh. F); http://www.sw.org/misc/physicianresources/pdf/TealNotes/12_MedicalComorbidities.pdf (Exh. G); http://www.sw.org/misc/physicianresources/pdf/PlasticSurgery/PlasticSurg_ProgressNote.pdf (Exh. H)

member of the public promises to "***protect***" some aspect of the disclosure. Opp'n at 11 (emphasis in original). Such an exception would subvert binding Supreme Court precedent and is not supported by the statute. In *Schindler*, the Supreme Court clearly held that when the government prepares and produces a "report" in response to a request for information, the "report" and its attachments are publicly disclosed for purposes of the FCA. *Id*. at 416. The *Schindler* court found the information publicly disclosed not because ***FOIA*** required such an outcome, but because the responding agency gave the requestor "something that gives information," a "notification," and an "official or formal statement of facts." *Schindler*, 563 U.S. at 411. Relator responds by saying that CMS's "Instructions for Completing the Limited Data Set Data Use Agreement," which requires that disclosure recipients redact certain beneficiary health information prior to broader publication, frees the disclosure from the bar. Opp'n at 10. This is not so.

Relator urges this Court to find the instant CMS report ***not*** a publicly-disclosed report because CMS requires Relator to not further disclose information identifying Medicare beneficiaries.[9] Opp'n at 11. No cases support such an outcome. The CMS request-review-response process[10] is ***nearly identical*** to the process *Schindler* describes.[11] *Schindler* makes clear that the

[9] We would also mention that the CMS Instructions require Relator to certify itself as a researcher focused on benefitting Medicare beneficiaries in order to obtain the data at issue. Opp'n at 10. Relator is far from an altruistic researcher. *See, supra,* FN 1 and accompanying text.

[10] Requestor (in this case, Relator) requests a defined dataset and describes its intended use; CMS evaluates the purpose for the request and makes a determination; CMS notifies the requestor of the outcome and discloses (or does not disclose) the data. *See* Opp'n at 10, *citing to* CMS, "Instructions for Completing the Limited Data Set Data Use Agreement," Form No. CMS R-0235L, *available at* https://goo.gl/HJMiro)); *see Schindler* at 1893 (discussing various request-response processes that result in public disclosure); *see* Department of Health and Human Services, Centers for Medicare & Medicaid Services, "Limited Data Set (LDS) Files - Centers for Medicare & Medicaid Services," *available at* https://www.cms.gov/Research-Statistics-Data-and-Systems/Files-for-Order/Data-Disclosures-Data-Agreements/DUA_-_NewLDS.html.

[11] Requestor (in this case, Relator) requests a defined dataset and describes its intended use; CMS evaluates the purpose for the request and makes a determination; CMS notifies the requestor of the outcome and discloses (or does not disclose) the data. *See* Opp'n at 10, *citing to* Department of Health and Human Services, Centers for Medicare & Medicaid Services,

actions of the reporting agency (review, notify, disclose) and not the requestor trigger the bar. A request-response process produces a "report," and *Schindler* (considering the bar in the context of a FOIA request-and-response) says the "report" and "***any records*** the agency produces along with its written FOIA response are part of that response . . . and disclosed 'in' a report for the purposes of the public disclosure bar." *Schindler,* 563 U.S. at 411 (emphasis added). Relator says their promise to protect beneficiary-identifying information in the CMS-disclosed data excises the entire CMS report from the purview of the bar; no cases support that proposition, and nothing in the SAC relies on the protected information.[12]

Relator also says the type of data CMS disclosed cannot trigger the bar, because they cannot identify any cases holding that such data can be "publicly disclosed." That is not the standard. And to that point, several courts have held that "CMS data files" are qualifying public sources under the FCA's public disclosure bar. *U.S. ex rel. Ambrosecchia v. Paddock Labs., LLC*, 2015 WL 5605281, at *5 (E.D. Mo. Sept. 23, 2015), *aff'd*, *U.S. ex rel. Ambrosecchia v. Paddock Labs., LLC*, 855 F.3d 949 (8th Cir. 2017); *U.S. ex rel. Conrad v. Abbott Labs., Inc.,* 2013 WL 682740, at *5 (D. Mass. Feb. 25, 2013). Each of these cases focused on CMS's ***disclosure*** of the data, not on whether any of the data may have contained protected information. The "raw CMS data" disclosed to, and relied upon, by Relator in this *qui tam* falls squarely under the FCA's public disclosure bar. Opp'n at 2.

"Instructions for Completing the Limited Data Set Data Use Agreement," Form No. CMS R-0235L, *available at* https://goo.gl/HJMiro)); *see Schindler,* 563 U.S. at 411, 416 (discussing various request-response processes that result in public disclosure); *see* "Limited Data Set (LDS) Files - Centers for Medicare & Medicaid Services."

[12] *Spay* does not support Relator's argument that the data at issue was not publicly disclosed. *See* Opp'n at 10-11; *U.S. ex rel. Spay v. CVS Caremark Corp.*, 913 F. Supp. 2d 125, 182 (E.D. Pa. 2012). The *Spay* defendant argued that ***its own*** "***submissions***" ***to*** the government were public disclosures implicating the bar; the *Spay* court disagreed. *Id.* (emphasis added). The question of a defendant's own disclosure to the government, however, is inapposite to the instant matter. *Id*. at 184. We argue that ***CMS's*** report to Relator was a public disclosure. *Schindler* is clear: an agency "report" in response to a request triggers the bar.

Relator's "analysis" is simply opinions re the very transactions CMS disclosed in its report (in addition to publicly-available – and thus publicly-disclosed – census data), and nothing more, satisfying the requirement that the disclosure was a disclosure of substantially the same allegations or transactions alleged in an FCA complaint. 31 U.S.C. § 3730(e)(4)(A). That Relator formed and pleaded opinions regarding the data does not lessen the data's status as the very data that forms Relator's SAC. Relator claims their "exhaustive investigation" (SAC ¶ 4) clears the bar and uncovers "a system-wide scheme to code unwarranted MCCs."[13] Opp'n at 16. Yet their "investigation" sources only publicly-available information that is nonetheless innocuous. *See, supra,* FN. 5 through 8.

No part of Relator's "analysis" or "investigation" escapes the public disclosure bar. Regardless, their "investigation" results are also fatally vague and benign. The only "astounding" results are Relator's conclusions drawn from the benign publicly-available and disclosed information upon which they construct their case. *See* Opp'n at 8. Relator identifies not a single instance of coding or diagnosing – let alone ***false*** coding or ***false*** diagnosing, or a scheme to commit same. In this way, the Rule 9(b) pleading deficiency undermines Relator's claim to be an original source. This parasitic Relator is an outsider who cannot possibly "materially add[] to the publicly disclosed . . . transactions [with 'independent' facts]," because he has no independent

[13] The *Heath* case is unhelpful to Relator's argument. The *Heath* relator undertook an independent investigation that uncovered fraud while he was an insider hired by the defrauded parties to audit their telecom pricing structures; his investigation uncovered the fraud "*prior* to [his] discovery" of any publicly available information. *U.S. ex rel. Heath v. Wisconsin Bell*, 760 F.3d 688, 691 (7th Cir. 2014). *Springfield* and *Lam*, also brought by whistleblowing "insiders" with independent, non-public insider information to supplement the publicly disclosed sources, are similarly unhelpful. *Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 649 (D.C. Cir. 1994) (railroad company and its president were directly involved in arbitration proceedings that defendant presided over); *U.S. ex rel. Lam v. Tenet Healthcare Corp.*, 481 F. Supp. 2d 673, 688 (W.D. Tex. 2006) (physician relators maintained privileges and held directorships at defendant's hospitalsand aaa).

facts to add. 31 U.S.C. § 3730(e)(4)(B).

B. Relator Pleads No Instance of Fraud, No Scheme to Commit Fraud, and No Claim Affected by Fraudulent Acts per Rule 9(b)

Relator says that "most hospital groups . . . have a system-wide clinical documentation improvement ("CDI") program," and that "[t]hese programs are usually designed to promote accurate documentation and coding of a patient's diagnosis." Opp'n at 3 (citing SAC ¶ 20). Relator elsewhere cites to CMS and industry group guidelines for how CDI programs ought to be designed and operate.[14] When making similar allegations against a different hospital system, Relator criticized those defendants for downplaying the importance of one particular industry group, AHIMA. [15] Relator considers AHIMA a "preeminent" authority on CDI programs, writing "CMS cites AHIMA as authority for positions it takes on CDI." *Id.* Defendants do not argue that AHIMA is (or is not) such an authority;[16] instead, we note Relator's oft-stated position because Relator is

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[14] In ruling on a Rule 12(b)(6) motion to dismiss, this Court "must consider . . . documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) (citations omitted). A court may take judicial notice of a document that is a "matter of public record when deciding a Rule 12(b)(6) motion." *Prewitt v. Continental Automotive*, 927 F. Supp. 2d 435, 447 (W.D. Tex.) (Ezra, J.) (citing *Cinel v. Connick*, 15 F.3d 1338, 1343 n. 6 (5th Cir.1994)). "Publicly available court documents filed in a" federal court are matters of public record. *Rangel v. Case & Assocs. Properties, Inc.*, 2018 WL 3420825, at *2 (W.D. Tex. July 12, 2018); *see also Lam*, 481 F. Supp. 2d at 680. We ask this court to take judicial notice of Relator's Response in Opposition to Providence Health's Motion to Dismiss. *See, infra,* FN 15.

[15] Mem. in Opp'n to Mot. to Dismiss, *U.S. ex rel. Integra Med Analytics LLC v. Providence Health Services et al.*, No. 2:17-CV-01694-PSG-SS (C.D. Cal.), Dkt. 61 at n. 3, *citing* AHIMA, "Who We are," https://goo.gl/Ec593n; *see* FY 2008 IPPS Final Rule, 72 Fed Reg. at 47,182 (August 22, 2007).

[16] We do not, however, dispute that both CMS and other federal agencies consider AHIMA an authoritative voice on CDI programs. *See* FY 2008 IPPS Final Rule, 72 Fed Reg. at 47,182 (favorably discussing an AHIMA "article describe[ing] a program at a hospital utilizing clinical documentation specialists that work on the hospital treatment floors . . . that [after] one year . . . gained an additional $1.5 million in reimbursement"); *see also* Department of Health and Human Services, Agency for Healthcare Research and Quality ("AHRQ"), "AHRQ Quality Indicators Toolkit," *available at* https://www.ahrq.gov/sites/default/files/wysiwyg/professionals/systems/hospital/qitoolkit/b4-documentationcoding.pdf (citing to AHIMA's 2010 "Developing a coding compliance policy

curiously silent on what those "authoritative" CDI standards are, and how Defendant's CDI operations diverge from them in any way.

Indeed, if CMS "do[es] not believe there is anything inappropriate, unethical or otherwise wrong with hospitals taking full advantage of coding opportunities to maximize Medicare payment that is supported by documentation in the medical record,"[17] then surely Relator's factual pleading would provide far more specificity (or any specificity at all) to show how Defendants' CDI was uniquely unethical and fraudulent.

Relator does nothing of the sort. For example, Relator says CDI programs "promote the accurate documentation of a patient's diagnoses and treatments such that they can be properly coded for reimbursement." SAC ¶ 20. CMS and AHIMA, Relator's authoritative sources on CDI, anticipate the needs for physician and coder training on key words and phrases that trigger audits and payment, and repeated targeted queries to clarify ambiguities in the treatment record. *See, e.g.,* Sue Prophet, *Coding Compliance: Practical Strategies for Success*, Journal of AHIMA, vol. 69, no.1 (1998), 50-61. Relator never pleads specific facts showing that Defendants' training and queries are anything more than those necessary to address the practical realities of a CDI program contemplated by CMS and AHIMA. Instead they provide anonymous, vague quotes (Opp'n at 4), and paste misleading snippets of publicly-available CDI program documents that they describe as "aggressive[]" (Opp'n at 4) or constituting "pressure [to] diagnose something that did not call for a CC or MCC." (Opp'n at 5). The "'beta through psi' of Integra's case" is a meaningless jumble of naked conclusory statements. Opp'n at 12.

Even when Relator accuses Defendants of providing "medically unnecessary treatment" simply to support false MCC codes, they plead no specific facts. SAC ¶¶ 37-39; Opp'n at 6. Their

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document" publication as "a useful guide for developing hospital documentation and coding policy.")

[17] 72 Fed Reg. at 47,180.

sole support for the accusation is their observation that the incidence of certain MCCs exceeds a "national average" – an "excess" apparently attributable to fraud simply because it cannot be attributed to "chance." Opp'n at 6, 19. This is an incredible accusation – a systemic fraud that would require a vast and intentional conspiracy. Yet they plead no specific facts in support. They make an impermissible inference neither Rule 9(b) nor Rule 8(a) allows, and level exactly the sort of unsubstantiated smear that Rule 9(b) prohibits. *U.S. ex rel. Grubbs v. Kanneganti,* 565 F. 3d 180, 190-91 (5th Cir. 2009).[18]

C. Relator Are Not an "Original Source;" They Plead No Specific Facts and the Public Disclosure Bar Applies

The above-cited Rule 9(b) pleading deficiencies highlight the fact Relator is not an "original source" under the FCA. An "original source" has "knowledge that is independent of and materially adds to" public disclosures. 31 U.S.C. § 3730(e)(4)(B). But Relator is an outsider. They offer no inside information, no specific and independent knowledge that materially adds to what they scraped from the internet and/or received from CMS.

They object, pointing to the "astounding" results of their analysis. Opp'n at 8. If this Court were to hold that statistical analyses like theirs are well-pleaded ***facts***, it will be the first time in American jurisprudence that such statistical analyses are held to be anything other than ***opinion*** (opinions can be relevant, but they are not facts and they are subject to challenges). Relator has an opinion of how one ought to interpret the publicly-disclosed CMS data. Opp'n at 19. They need to bring ***independent*** information to overcome the public disclosure bar and they do not. *See Health Choice Grp., LLC v. Bayer Corp.*, 2018 WL 3637381, at *50 ("charts of publicly available

[18] Contrary to Relator's assertion (Opp'n at 17), Rule 9(b) applies to the FCA and is not a mere notice pleading standard. *U.S. ex rel. Grubbs v. Kanneganti,* 565 F. 3d at 185. Rule 9(b) ***requires*** that the fraud be pleaded with specific facts – whether the false claims themselves or a scheme to submit them.

information regarding Medicare and Medicaid reimbursements do not remedy the disconnect between the alleged underlying conduct and any actual false claims for reimbursement").[19]

"Independent" facts cannot "depend on the public disclosure or . . . merely constitute[] . . . an individual's unique expertise or training . . . ." *U.S. ex rel. Winkelman v. CVS Caremark Corporation*, 118 F. Supp. 3d 412, 423 (D. Mass. 2015), *aff'd*, *United States ex rel. Winkelman v. CVS Caremark Corp.*, 827 F.3d 201 (1st Cir. 2016) (internal citations omitted). Yet Relators ground the reliability of their entire SAC on their "extensive experience using statistical analysis to detect and prove fraud," SAC at ¶ 11, their "quantitative, statistical, and econometric analyses" executed with "mathematical precision." Opp'n at 14.

Relator's pleadings support the inference that Defendants' CDI program is similar in nature, purpose and function to every other CDI program in the country. They offer no specific, well-pleaded facts, and nothing Relator adds is independent of their supposed expertise. Everything that is non-public is so vague as to exist only as opinion in Relator's mind. This court may only consider well-pleaded facts on a motion to dismiss, making Relator's data analysis, ***its reliability notwithstanding***, insufficient to overcome the public disclosure bar or survive dismissal.

III. CONCLUSION AND REQUEST FOR ORAL HEARING

Defendants' motion to dismiss should be granted with prejudice. Pursuant to LR CV-7(h) Defendants respectfully ask the Court to grant an oral hearing on their Motion to Dismiss.

[19] *See, supra,* FN 1 and accompanying text.

Dated: December 21, 2018

Respectfully submitted,

/s/ R. Jeffrey Layne
R. Jeffrey Layne
Texas Bar No. 00791083
REED SMITH LLP
111 Congress Avenue, Suite 400
Austin, TX 78701
Tel: (512) 623-1821
Fax: (512) 623-1802
jlayne@reedsmith.com

Counsel for Defendants Baylor Scott & White Health, Baylor University Medical Center – Dallas, Hillcrest Baptist Medical Center, Scott & White Hospital – Round Rock, and Scott & White Memorial Hospital – Temple

CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that the following counsel of record were served via the CM/ECF system of the United States District Court for the Western District of Texas on December 21, 2018.

Jeremy H. Wells
Reid Collins and Tsai LLP
1301 S Capital of Texas Hwy
Suite C-300
Austin, TX 78746
512-647-6100
Fax: 512-647-6129
Email: jwells@rctlegal.com
Counsel for Relator

P. Jason Collins
Reid Collins & Tsai LLP
1301 S. Capital of Texas Hwy.
Building C, Suite 300
Austin, TX 78746
512-647-6100
Counsel for Relator

Scotty G. Arbuckle , III
Reid Collins & Tsai LLP
1301 S Capital of Texas Hwy Bldg., Ste 300
Austin, TX 78746
512-647-6100
Fax: 512-647-6129
Email: tarbuckle@rctlegal.com
Counsel for Relator

Erica Benites Giese
U.S. Attorney's Office
601 NW Loop 410
Suite 600
San Antonio, TX 78216
(210) 384-7150
Fax: (210) 384-7118
Email: erica.giese@usdoj.gov
Counsel for the United States

Susan Leslie Strawn
United States Attorney's Office
601 NW Loop 410 - Ste 600
San Antonio, TX 78216
(210) 384-7388
Fax: 210/384-7322
Email: susan.strawn@usdoj.gov
Counsel for the United States

/s/ R. Jeffrey Layne
R. Jeffrey Layne