

CAUSE NO. D-1-GV-10-000454

STATE OF TEXAS	§	IN THE DISTRICT COURT OF
<i>Plaintiff,</i>	§	
	§	
v.	§	
	§	
RETIREMENT VALUE, LLC,	§	
RICHARD H. "DICK" GRAY,	§	
HILL COUNTRY FUNDING, LLC,	§	
a Texas Limited Liability Company,	§	
HILL COUNTRY FUNDING, a	§	TRAVIS COUNTY, TEXAS
Nevada Limited Liability Company, and	§	
WENDY ROGERS,	§	
<i>Defendants,</i>	§	
	§	
AND	§	
	§	
JAMES SETTLEMENT SERVICES, LLC,	§	
ET AL.	§	
<i>Third-Party Defendants.</i>	§	126 <sup>th</sup> JUDICIAL DISTRICT

**THIRD-PARTY DEFENDANT, MICHAEL McDERMOTT'S REPLY TO THE TSSB'S PLEA TO THE JURISDICTION AND/OR MOTION FOR SUMMARY JUDGMENT**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Third-Party Defendant, **Michael McDermott** ("McDermott"), and files this Reply to the TSSB's Plea to the Jurisdiction and/or Motion for Summary Judgment (collectively, the "TSSB Response"), as follows:

**I. ARGUMENTS AND AUTHORITY**

**A. Summary judgment standard and procedure:**

1. Aside from its Plea to the Jurisdiction, which is opposed *infra*, the TSSB moves for summary judgment against McDermott—though the agency never states the ground(s) on which it is seeking summary judgment in its Response. McDermott presumes the TSSB sought to file a Traditional Motion for Summary Judgment ("MSJ") under Tex. R. Civ. P. 166a, in response to McDermott's Motion to Enforce the Settlement Agreement, *i.e.*, McDermott's claim that the

TSSB breached the Settlement Agreement. While the evidence attached to McDermott's Motion to Enforce Settlement Agreement, Seek Indemnification, and Enjoin (the "Motion"), and his Supplemental Brief in support of the Motion (the "Supplement") raises myriad genuine issues of material fact, McDermott has nevertheless filed a new and independent lawsuit in a Travis County District Court against the TSSB; John Morgan, in his official capacity as Commissioner of the TSSB; Retirement Value, LLC; and Eduardo S. Espinosa, Receiver for Retirement Value, LLC (the "Independent Lawsuit"). Accordingly, the TSSB's MSJ should be denied as moot.

2. To err on the side of caution and clarity, however, McDermott hereby replies to the TSSB's MSJ: To succeed on its MSJ, the TSSB "must establish that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *Cathey v. Booth*, 900 S.W.2d 339, 341 (Tex. 1995). "A defendant who conclusively negates at least one of the essential elements of each of the plaintiff's causes of action or who conclusively establishes all of the elements of an affirmative defense is entitled to summary judgment." *Id.* "In reviewing a summary judgment, [courts] must accept as true evidence in favor of the nonmovant, indulging every reasonable inference and resolving all doubts in the nonmovant's favor." *Id.*

3. Because the TSSB has not provided the ground(s) upon which it seeks summary judgment against McDermott, McDermott objects to the the TSSB's MSJ. McDermott also opposes the MSJ as shown *infra*, and in doing so, incorporates by reference his previously filed Motion and Supplement, as though each are fully set forth herein.

**B. The TSSB is not protected by immunity because it has violated Texas's Bill of Rights.**

4. In support of its Plea to the Jurisdiction, the TSSB cites a variety of case law to demonstrate that it is immune from suit unless certain narrow exceptions are in place as the result of either statutory waiver or the agency's consent to suit. TSSB Response at 4-8. While this is

correct to a degree, this case law does not cover the full scope of when governmental immunity is inapplicable. “The guarantees found in the Bill of Rights are excepted from the general powers of government; the State has no power to commit acts contrary to the guarantees found in the Bill of Rights.” *City of Beaumont v. Bouillion*, 896 S.W.2d 143, 148 (Tex. 1995). “Section 29 [of the Texas Bill of Rights] has been interpreted as follows: any provision of the Bill of Rights is self-executing to the extent that anything done in violation of it is void,” and “[w]hen a law conflicts with rights guaranteed by Article 1, the Constitution declares that such acts are void because the Bill of Rights is a limit on State power.” *Id.* at 148–49. “Thus, suits for equitable remedies for violation of constitutional rights are not prohibited.” *Id.* at 149.

5. Section 19 of the Texas Bill of Rights reads, “No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land.” TEX. CONST. art. 1, § 19. “The Texas due course clause is nearly identical to the federal due process clause,” and Texas courts “regard these terms as without meaningful distinction.” *Univ. of Tex. Med. Sch. at Houston v. Than*, 901 S.W.2d 926, 929 (Tex. 1995). McDermott has been deprived of his liberty and property without due process by the TSSB’s Collin County prosecution, as will be shown *infra* by the two-part analysis required of such deprivation claims.

6. This Court must determine (1) whether McDermott has a liberty or property interest that is entitled to procedural due process protection and, if so, (2) what process is due. *Id.* Liberty interests include “freedom from bodily restraint” and the ability “to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.” *Id.* at 929–30. The TSSB’s prosecution has resulted in a warrant for McDermott’s arrest, his payment of bond to avoid imprisonment, the surrender of his passport, and his being required to be under the

supervision of a Collin County district court. Further, “[ ] [W]here a person’s good name, reputation, honor, or integrity is at stake because of what the government is doing to him, the minimal requirements of due process must be satisfied.” *Id.* at 930. McDermott’s liberty and property rights, as well as his reputation, have been affected by state action, so “the due course guarantee applies,” and this Court must consider what process is due in the TSSB’s actions against McDermott. *See id.*

7. To answer this question, this court is to evaluate three factors: “(1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.” *Id.*

8. As already stated, the private interest affected is McDermott’s property, liberty, and reputation because McDermott’s freedom has already been curtailed, he has lost money to the bonding process, his indictment has been publicized by the TSSB and is now public record, and he faces imprisonment and fines. As to factors two and three, there is little to no need for this Court to determine what other kinds of procedural safeguards should be in place to protect McDermott’s rights, the TSSB’s interests in pursuing its current path, or the burdens the TSSB may face or adopting alternate procedures. The Texas Constitution and various statutes, all explained in McDermott’s Motion and Supplemental Brief, have already dictated what the TSSB, the Collin County District Attorney, and the Texas Attorney General are supposed to do in the case of securities investigations and prosecutions.

9. The TSSB cannot argue that it has any interest in its illegal behavior, as it is violating its own governing laws, and any argument that it has an interest in ignoring what is required by the Constitution and statutes is forbidden as being beyond its limited powers as a state agency. See *Morton v. Ruiz*, 415 U.S. 199, 235 (1974) (“Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures.”); see *Shields v. State*, 936 S.W.2d 711, 713–14 (holding that TSSB cannot exceed its statutory powers and thereby distort the very laws it’s required to uphold); see 7 TEX. ADMIN. CODE § 101.1(d) (prescribing that “[i]t is the duty of the Securities Commissioner to see that the provisions of the Texas Securities Act are at all times obeyed and to take such measures and to make such investigations as will prevent or detect the violation of any provision thereof”). Consequently, the TSSB has deprived McDermott of his rights under the due course clause of the Texas Constitution, and because this clause comes under the Texas Bill of Rights, which is self-executing, the TSSB has no immunity from suits opposing such violations. See *Bouillion*, 896 S.W.2d at 148–49 (explaining that “any provision of the Bill of Rights is self-executing to the extent that anything done in violation of it is void” and suits for equitable remedies challenging void state actions “are not prohibited”).

**C. This Court’s jurisdictional relationship to the Collin County proceedings:**

10. McDermott’s Motion and Supplement already address the relationship between this Court’s proceedings and the TSSB’s actions in Collin County. As further argument, McDermott directs the court’s attention to *Texas Alcoholic Beverage Commission v. Amusement and Music Operators of Texas, Inc.*, a case in which a trade association (“AMOT”) sued the TABC (the “Commission”) for directing law enforcement agents to find probable cause to cite “eight-liner” operators for gambling infractions, even though Texas statute had recently been amended to exclude eight-liners from the definition of “gambling devices.” 997 S.W.2d 651, 653 (Tex.

App.—Austin 1999, pet. dismissed w.o.j.). The Commission disregarded its revised governing statute because “the attorney general’s office [had] issued an opinion ruling that the amended definition of gambling devices violated the Texas Constitution because it purport[ed] to authorize the operation of certain lotteries not contemplated by the constitution.” *Id.* at 653. The Commission relied on the attorney general’s conclusion that the new statutory exemption was unconstitutional and could be ignored by the agency, and the agency sent out two memoranda to law enforcement agents explaining the elements that establish probable cause to find a gaming machine illegal and that the statutory exemption could be discarded from such evaluations. *Id.* at 654.

11. In response, AMOT sought “to enjoin the Commission and the Department of Public Safety from relying on the memoranda in enforcing the provisions of the Texas Penal Code governing the operation of gambling devices.” *Id.* at 654. AMOT argued that “the enforcement of the internal memoranda violated their rights to due process under the law, and challenged the authority of the two agencies to suspend section 47.01(4)(B) of the Texas Penal Code pursuant to an opinion of the attorney general.” *Id.* The Commission countered that the trial court had possessed no “subject matter jurisdiction to enjoin the enforcement of a criminal law matter” and that the two agency memos were not rules under the APA. *Id.* at 656–57.

12. The Austin Court of Appeals was unconvinced, and, as to the Commission’s first argument, replied, “[T]here was no criminal law before the trial court. The issue was whether the memoranda constituted an invalid rule of an administrative agency. The fact that the rule interpreted a provision of the Penal Code is ancillary to the administrative question before the trial court.” *Id.* at 656. The court explained that AMOT members were not restricted to challenging the Commission upon arrest and criminal trial because AMOT was challenging the

enforcement of an agency rule that was based only on an attorney general's opinion, "not on a decision by a court of law." *Id.* at 656. Such opinion is not law "and is not immune from [a] trial court's jurisdiction" or appellate review. *Id.*

13. Similarly, McDermott is arguing that the TSSB has no authority to ignore the Texas Constitution and the many statutes that govern the TSSB, district attorneys, and the attorney general. The TSSB has relied upon its own rule and the opinion of the Collin County District Attorney (who is not a legislator) that TSSB attorneys may serve as special prosecutors, despite all state law to the contrary, just as the Texas Alcoholic Beverage Commission flouted a new statute due to the opinion of the attorney general.

14. Even if it were to be found that the TSSB had not established a rule, as argued *supra*, it has deprived McDermott of his rights without the due course of law and can be challenged in this court for doing so because Texas's Bill of Rights is self-executing and requires no additional statute, such as the Declaratory Judgment Act, to invoke the jurisdiction of a Texas court so that his rights may be protected. *See Bouillion*, 896 S.W.2d at 148-49.

**D. Response to the TSSBs' argument regarding this Court's jurisdiction over the current dispute between McDermott, the TSSB, and the Receiver:**

15. McDermott has addressed the TSSB's jurisdictional argument by way of his Independent Lawsuit against John Morgan. Accordingly, the TSSB's Plea to the Jurisdiction should be denied as moot.

**E. The suitability of discovery production by the TSSB and an evidentiary hearing:**

16. McDermott will address the TSSB's argument as part and parcel of his Independent Lawsuit, in which he will move for the Court to order the TSSB to disclose "any intraagency or interagency notes, memoranda, reports, or other communications consisting of advice, analyses, opinions, or recommendations" under the good cause exception at TSA art. 581-28(B).

**F. The TSSB has established a rule under the Administrative Procedure Act.**

17. The TSSB asserts that its years of prosecutorial actions—and the legal interpretations it engages in to justify such—do not qualify as a “rule” under the Administrative Procedure Act because the TSSB’s prosecutions are “a statement regarding only the internal management or organization of a state agency and not affecting private rights or procedures.” TSSB Response at 20. The TSSB further argues that “[t]he agency practices here are, at most, intended to manage and direct the work of agency attorneys,” so the practices “do not constitute an ‘agency statement of general applicability.’” *Id.*

18. First, McDermott’s private rights and the legal protections to which he is entitled during the Collin County proceedings have indeed been affected by the TSSB’s interpretations of law, its statements, and its actions. As established *supra* and by his Motion and Supplement, McDermott has been denied the due course of law as contemplated by the Texas Constitution, and his liberty and reputation have suffered. Second, the TSSB’s arguments gloss over an underlying premise: when TSSB attorneys are directed by the agency to serve as special prosecutors (as they must be, since its attorneys could not act as such without agency permission), the TSSB is asserting that its directions are supported by law. In doing so, the TSSB is interpreting the scope of its legal authority without any statutory foundation for such practice. In this case, the TSSB is asserting its attorneys can affect the liberty and property rights of citizens—individuals external to the agency—through criminal prosecution.

19. Consequently, the TSSB’s reliance on *Slay v. Texas Commission on Environmental Quality* is misplaced. *See id.* In that case, the agency statements and guidelines at issue were recommendations communicated from one agency employee/representative to another. 351 S.W.3d 532, 546–47 (Tex. App.—Austin 2011, pet. denied). The agency had already been



granted authority by statute to impose the fines in question and to calculate fines with certain factors in mind, so the agency did not fabricate its own jurisdiction from inapplicable statutes to impose the fines. *Id.* at 537–38. The ultimate outcome of the recommendations was flexible and varied from case to case, depending on each individual’s facts. *Id.* at 537–41.

20. This is distinguishable from what the TSSB has done for years—declare that its employees have the legal authority to serve as special prosecutors in any criminal case in the state, since, given the TSSB’s logic (that district attorneys can appoint state agency attorneys to assist in any prosecution because district attorneys have such sweeping power, and state agencies are free to accept such appointments), there is nothing legally preventing its attorneys from acting as special prosecutors even in cases that do not involve securities, as long as a complicit district attorney (improperly) appoints them as such. This is a sweeping statement regarding the TSSB’s (and any investigatory state agency’s) jurisdiction over individual defendants, one without support in the state’s constitution or statutes. The effect of the statement is not confined to internal agency deliberations and operations as were the internal guidelines in *Slay*. *See id.* at 546–47 (concluding that “what ultimately matters is that the district court had evidence to the effect that the TCEQ commissioners were not bound to follow the Penalty Policy’s methodology when exercising their legislatively conferred discretion to impose penalties”). In *Slay*, the commissioners could adopt the recommendations or not. *Id.* In contrast, McDermott and other defendants prosecuted by the TSSB have no ability to choose their own impartial prosecutors who would satisfy the constitutional dictates requiring such impartiality. *See Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 810–11 (1987) (holding that appointment of an interested prosecutor is a fundamental error that “undermines the confidence in the integrity of the criminal proceeding”).

21. Similarly, the TSSB's interpretations of the law constitute "an agency statement of general applicability," because the agency is interpreting laws governing both the agency and district attorneys. As set forth in McDermott's Motion and Supplement, the TSSB has created expansive, illegal interpretations of TSA art. 581-3 and Texas Government Code § 41.102, which improperly grant district attorneys and state agency attorneys more power than is legally permitted. See attached Exhibit 7, pages 2-3 (State's Response to Rogers, arguing that Section 41.102(a) of the Texas Government Code allows a district attorney to "employ" TSSB attorneys as "assistant prosecuting attorneys"); see *Tex. Dep't of Pub. Safety v. Salazar*, 304 S.W.3d 896, 904-05 (Tex. App.—Austin 2009, no pct.) (stating that "[i]n order to be considered statements of 'general applicability' as described in section 2001.003(6), agency pronouncements must 'affect the interest of the public at large such that they cannot be given the effect of law without public input'" and that "[a]gency statements that 'have no legal effect on private persons' are not considered rules"). The expansive power implicated by these interpretations directly affects the prosecutions of numerous defendants across the state and will continue to do so if the TSSB is not directed to stop violating the law.

22. Alarming, these improper practices are relevant not only to the TSSB, but to every state agency with investigative authority. The legal rationale the TSSB uses to justify its illegal actions, that district attorneys have the power to appoint agency attorneys as prosecutors, could be used by any state agency in any prosecutorial district in the state, despite the fact that, as argued in McDermott's Supplement, the Texas Constitution and Texas's statutes do not permit such a separation-of-powers violation. By the TSSB's logic, district attorneys could also appoint attorneys who work for police departments or the Department of Public safety as "special prosecutors" of crimes investigated by those same law enforcement bodies.

23. Additionally, aside from incorrectly interpreting the law, the TSSB's arguments concerning the agency's prosecutorial authority directly contradict the facts surrounding its own actions and McDermott's indictments. The TSSB states, "[T]he duty of criminal prosecution in the trial courts resides in the county attorney and the district attorney (or criminal district attorney)" and "[i]t is undisputed that the Collin County DA did not refuse or neglect to prosecute the securities fraud but instead sought and obtained grand jury indictments." TSSB Response at 12.

24. In reality, TSSB attorneys are directing and controlling the Collin County prosecutions. As presented in McDermott's Motion and attached affidavits, TSSB attorneys are the only ones who appeared before the grand jury and at all subsequent hearings. The Collin County District Attorney did nothing with the cases until the TSSB arrived to direct the cases, as evidenced by the cases becoming live at approximately the same time TSSB attorneys were "deputized" by the Collin County District Attorney. See Exhibit 4. Further, as evidenced by Exhibit 5, TSSB attorneys have been serving as "special prosecutors" for years in several jurisdictions. It is disingenuous to say on one hand that TSSB employees have no authority in criminal cases while those same employees violate Texas law and adopt the very same prosecutorial authority that the TSSB is arguing it does not possess. A key question this Court should be asking is, "Would the Collin County District Attorney continue prosecuting McDermott if the TSSB attorneys removed themselves from the prosecution?" All the evidence before the Court indicates that the answer is "no."

25. Relatedly, the TSSB puts forth, "It is undisputed that the Collin County DA did not refuse or neglect to prosecute the securities fraud but instead sought and obtained grand jury indictments. Thus the conditions for the Attorney General's instituting criminal proceedings

under section 3 were not present.” TSSB Response at 12. But the TSSB waited several years before presenting its investigation to Collin County and could do so only because it relied on dubious theft and money laundering charges aside from criminal securities violations, as these charges added years to the prosecutorial window. Thus, the Attorney General’s jurisdiction was bypassed not because the TSSB followed the letter of the law or because Collin County was ready and willing to prosecute McDermott when a crime was detected (which would have been during the years from 2010 to 2012, as indicated by the RV proceedings). The Attorney General was bypassed because the TSSB intentionally structured McDermott’s prosecution so that it could control the criminal proceedings while excluding the Attorney General, the one state agency that actually has legal authority to represent the state during such criminal proceedings.

26. Given the TSSB’s failure to promptly submit its investigation to Collin County or the Attorney General and the fact that it barely beat the legal deadline in doing so, it is difficult to conceptualize how the TSSB regards the statute that commands it “shall at once lay before the District or County attorney of the proper county of any evidence which shall come to his knowledge of criminality under this Act” and that “neglect or refusal” of a local prosecutor to prosecute such criminality shall result in the TSSB’s investigation being submitted to the Attorney General. *See* TEX. REV. CIV. STAT. ANN. art. § 581-3. The TSSB neither “at once” provided its investigation to Collin County, nor did it contact the Attorney General after a marked delay in prosecution. It instead flouted both directives and waited years so that its own attorneys could generate and direct the Collin County prosecution, a course of action neither contemplated nor authorized in TSA art. 581-3.

**PRAYER**

WHEREFORE, PREMISES CONSIDERED, Third-Party Defendant, Michael McDermott, respectfully requests the following upon consideration of the applicable briefing:

1. The Court deny the TSSB's Plea to the Jurisdiction as moot;
2. The Court deny the TSSB's Motion for Summary Judgment as moot.
3. McDermott further prays for any other relief to which he is justly entitled at law or in equity, including the protection of his constitutional rights.

Respectfully submitted,

**DE LEON & WASHBURN, P.C.**

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ATTORNEYS FOR THIRD-PARTY DEFENDANT  
MICHAEL MCDERMOTT

**CERTIFICATE OF SERVICE**

I hereby certify that on the 22<sup>nd</sup> day of June, 2015, a true and correct copy of the above and foregoing document was served on the following via ProDoc e-service and/or email:

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/s/ Ben De Leon  
BENJAMIN S. DE LEON

CAUSE NOS. 380-80442-2015, 380-80443-2015, 380-80444-2015, and 380-80445-2015

STATE OF TEXAS

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V.

WENDY L. ROGERS

IN THE DISTRICT COURT OF  
380<sup>TH</sup> JUDICIAL DISTRICT  
COLLIN COUNTY, TEXAS

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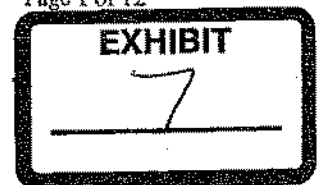
**STATE'S RESPONSE TO DEFENDANT'S MOTION TO DISQUALIFY**

**SPECIAL PROSECUTORS**

NOW COMES the State of Texas by and through Greta L. Cantwell, Special Assistant Criminal District Attorney for Collin County, Texas, and respectfully requests the Court to deny Defendant's Motion to Disqualify Special Prosecutors. In support of this response to the Defendant's Motion to Disqualify Special Prosecutors, the State offers the following:

The Defendant has asked this Court to disqualify Dale R. Barron, Matthew Leslie, Tina Lawrence, and Greta Cantwell, hereinafter referred to as "the Special Prosecutors," from acting as special prosecutors in the prosecution of Defendant on the following grounds:

- a. The Special Prosecutors have irreconcilable conflicts;
- b. The Special Prosecutors are prohibited by law from acting as prosecutors;
- c. The Special Prosecutors are not able to discharge their obligations under Article 2.01 of the Code of Criminal Procedure; and
- d. The Special Prosecutors have deprived the Defendant of her due process rights under both the Texas Constitution and the United States Constitution.





## ARGUMENT

The Defendant's Motion to Disqualify Special Prosecutors should be denied. The Collin County Criminal District Attorney has a clear legal right to appoint the Special Prosecutors to serve on his staff. No conflicts of interest exist, and the Defendant's due process rights have not been violated by the appointment of the Special Prosecutors. Further, the Special Prosecutors have been properly appointed as assistant prosecuting attorneys by the Collin County Criminal District Attorney, Greg Willis, and the Special Prosecutors are duly qualified, not barred by statute from acting as prosecutors, and have taken an oath, and are willing and able, to faithfully execute the duties required of assistant prosecuting attorneys.

### 1. SOLE DISCRETION LIES WITH THE DISTRICT ATTORNEY

Section 41.102(a) of the Texas Government Code provides that a district attorney "may employ the assistant prosecuting attorneys . . . that in his judgment are required for the proper and efficient operation and administration of [his] office." Section 41.103(a) of the Texas Government Code further requires that "[a]n assistant prosecuting attorney must be licensed to practice law in this state and shall take the constitutional oath of office."

Greg Willis, the Collin County Criminal District Attorney, employed the Special Prosecutors to act as assistant prosecuting attorneys in the prosecution of the criminal cases pending against Defendant in this Court. Further, each of the Special Prosecutors took the constitutional oath of office and are all licensed to practice law in Texas as required by Section 41.103(a) of the Texas Government Code. *See Defendant's Exhibit A to Defendant's Motion to Disqualify Special Prosecutors and State's Exhibit A attached hereto.* The Special Prosecutors' Deputations and Oaths of Office and their status as attorneys currently eligible to practice law in

Texas evidence that the Special Prosecutors have been properly appointed by the Collin County Criminal District Attorney, in his sole discretion, as assistant prosecuting attorneys as prescribed by Sections 41.102 and 41.103 of the Texas Government Code.

Pursuant to Section 41.105 of the Texas Government Code, the Special Prosecutors serve at the will of the Collin County Criminal District Attorney and as such are subject to removal by the Collin County Criminal District Attorney at any time. It would be improper for this Court to disqualify the Special Prosecutors absent a showing by the Defendant of a conflict of interest that rises to the level of a due process violation. *State ex rel. Hill v. Pirtle*, 887 S.W.2d 921, 927 (Tex. Crim. App. 1994) (En Banc.) (citing *State ex rel. Edison v. Edwards*, 793 S.W.2d 1, 6 (Tex. Crim. App. 1990) (En Banc.)).

## 2. DEFENDANT'S DUE PROCESS RIGHTS HAVE NOT BEEN VIOLATED

Defendant's Motion to Disqualify Special Prosecutors vaguely argues that the Defendant's due process rights under both the Texas and United States Constitutions have been violated and further fails to show, or even allege, that any specific, individual rights of the Defendant have been violated. Absent a showing that the Defendant has been denied due process, it is improper to disqualify the Special Prosecutors. *State ex rel. Hill v. Pirtle*, 887 S.W.2d 921, 927 (Tex. Crim. App. 1994) (En Banc.) (citing *State ex rel. Edison v. Edwards*, 793 S.W.2d 1, 6 (Tex. Crim. App. 1990) (En Banc.)). While the Defendant's Motion to Disqualify Special Prosecutors alleges several conflicts of interest on the part of the Special Prosecutors, none of these conflicts are alleged or shown by the Defendant as having violated any specific, individual rights of the Defendant. Further, these alleged conflicts of interest do not exist.

The first "irreconcilable conflict" mentioned in the Defendant's Motion to Disqualify Special Prosecutors is an alleged conflict arising because the Texas State Securities Board, hereinafter referred to as the "TSSB," acted as the referring agency, the employer of the complaining witness at the grand jury, and the employer of the Special Prosecutors prosecuting the Defendant. The Defendant has vaguely argued that the TSSB should not be allowed to act as the referring agency and the prosecutor because this somehow deprives the Defendant of her due process rights.

No conflict exists as a result of the fact that the referring agency employs both the complaining witness and the Special Prosecutors, nor has the Defendant shown how any alleged conflict violated her constitutional rights. The Special Prosecutors have each taken the constitutional oath of office to serve as assistant prosecutors, are bound by the statutory and ethical duties of any other prosecuting attorney, and serve at the will of the Collin County Criminal District Attorney. Furthermore, the Collin County Criminal District Attorney retained exclusive authority to oversee or direct the prosecution of Defendant. *See Defendant's Exhibit A to Defendant's Motion to Disqualify Special Prosecutors.*

Additionally, the Defendant imprecisely argued in her Motion to Disqualify Special Prosecutors that the Special Prosecutors' participation in the grand jury process somehow deprived Rogers of her due process rights. Article 20.03 of the Code of Criminal Procedure expressly entitles prosecutors to appear before grand juries and advise grand juries about indictable offenses. Accordingly, prosecutors routinely participate in grand jury proceedings. As previously shown in this Response, the Special Prosecutors have been properly appointed in the sole discretion of the Collin County Criminal District Attorney and were properly appointed at the time that the Special Prosecutors appeared before the Collin County Grand Jury at the

presentment of the indictments later filed against the Defendant. *See Defendant's Exhibit A to Defendant's Motion to Disqualify Special Prosecutors.*

The second "irreconcilable conflict" alleged by the Defendant in her Motion to Disqualify Special Prosecutors is an alleged conflict on the part of the Special Prosecutors because their actions in pursuing criminal charges against Defendant are alleged to be in violation of a Settlement Agreement entered into between the Defendant and the State, represented by the Texas Attorney General's Office, in an effort to resolve the previous civil action filed against the Defendant in the 126<sup>th</sup> District Court of Travis County, Texas. Yet no conflict exists here either because the TSSB has not violated this Settlement Agreement. First, the TSSB was not made a party to the Compromise and Settlement Agreement. *See Defendant's Exhibit C to Defendant's Motion to Disqualify Special Prosecutors at page 1 of 22.* Further, neither the State nor the TSSB ever promised Defendant that it would not pursue any further criminal enforcement action against the Defendant. In fact, section 17 of the Compromise and Settlement Agreement expressly states that the Defendant was released by the State "from any and all civil claims, demands, damages, actions, causes of action, and suits at law or in equity, of any kind or nature, whether arising under statute or common law, whether known or unknown, that have been brought, should have been brought, or could have been brought in the Pending Case." *See Defendant's Exhibit C to Defendant's Motion to Disqualify Special Prosecutors at paragraph 17, page 10 of 22 (emphasis added).* This Settlement Agreement defines the term "Pending Case" as Cause No. D-J-GV-10-000454, *State of Texas v. Retirement Value, LLC, Richard H. "Dick" Gray, Bruce Collins and Kiesling, Porter, Kiesling, & Free, P.C.*, in the 126<sup>th</sup> Judicial District Court of Travis County, Texas. *See Defendant's Exhibit C to Defendant's Motion to Disqualify Special Prosecutors at page 2 of 22 (emphasis in original).*

Indeed, this Settlement Agreement further expressly states that “[t]he State does not release or waive its right to demand additional enforcement of the laws and regulations of the State of Texas or the United States, except with regard to those claims and causes of action, . . . which were, or should have been, or could have been, asserted in the Pending Case, regarding Retirement Value or Hill Country Funding, and which occurred prior to this Settlement.” *See Defendant’s Exhibit C to Defendant’s Motion to Disqualify Special Prosecutors at paragraph 17, page 10 of 22 through 11 of 22* (emphasis added). The criminal charges pending against Defendant could not have been brought or asserted in this civil suit involving Defendant. In light of the express language of the Compromise and Settlement Agreement, the Defendant cannot in good faith argue that the TSSB agreed to forego any further criminal action against Defendant.

Further, at the time of the Defendant’s decision to agree to settle her civil suit in 2012, the Defendant, or at the very least Defendant’s legal counsel, should have known that the TSSB routinely investigates and prosecutes criminal actions at both the state and federal levels in carrying out its duties under Section 3 of The Securities Act. Tex. Rev. Civ. Stat. Ann. art. 581-3 (West 2010). Even a cursory review of the TSSB website shows that the overwhelming majority of enforcement actions taken by the Enforcement Division of the TSSB are criminal in nature, and have been for some time. *See generally Recent Enforcement Actions, State Securities Board, available at [http://www.ssb.state.tx.us/Enforcement/Recent\\_Enforcement\\_Actions.php](http://www.ssb.state.tx.us/Enforcement/Recent_Enforcement_Actions.php).* Additionally, this information published by the TSSB also shows that the TSSB routinely refers criminal cases to Criminal District Attorneys and United States Attorneys in Texas. Furthermore, the TSSB website provides details of all criminal enforcement actions taken by the TSSB by month and year. These descriptions of TSSB enforcement Actions show that in a number of actions, TSSB attorneys act as Special Assistant Criminal District Attorneys and

Special Assistant United States Attorneys. The Defendant, and at the very least Defendant's attorneys, in both the State's civil suit against Defendant and in this criminal matter, should have been aware of the history of TSSB's criminal enforcement actions and its authority to take such actions. At no time did the TSSB agree with Defendant to forego any criminal investigation or later prosecution of the Defendant.

The Defendant further claims in her Motion to Disqualify Special Prosecutors that she was tricked by the TSSB's alleged false promises to abandon her appeal of the Travis County Texas 126<sup>th</sup> District Court's ruling that the Retirement Value product at issue in the civil litigation was a security under Texas law, an issue the Defendant characterizes in her Motion as being "pivotal in these indictments." Additionally, the Defendant vaguely and by implication argues that this alleged trickery by the TSSB somehow violates her due process rights such that the only remedy is to disqualify the Special Prosecutors. First, the issue of whether or not the Retirement Value product is a security under Texas law is only related to the Defendants securities fraud charge (Cause No. 380-80448-2015) and not the other three criminal charges pending against the Defendant, which include theft (Cause No. 380-80443-2015), money laundering (Cause No. 380-80444-2015), and engaging in organized criminal activity (Cause No. 380-80445-2015). Second, the Defendant has failed to show how the abandonment of her appeal of the civil trial court's ruling that the Retirement Value product was a security bars her from making the same assertions as a defense to the criminal securities fraud charge currently pending against her in this Court. Further, as shown in the preceding paragraphs, the TSSB did not make any false promises to the Defendant to secure abandonment of her appeal. Finally, the Defendant has failed to show how her voluntary withdrawal of her appeal of the civil court's ruling has violated her due process rights. By her own assertion in the Defendant's Motion to

Disqualify Special Prosecutors, "Rogers did not admit to any wrongdoing, nor did the Settlement Agreement or the permanent injunction entered against her make any findings that she violated the securities laws or any other law." *See Defendant's Motion to Disqualify Special Prosecutors at paragraph 6.* Absent a valid claim that this alleged trickery by the TSSB violates the Defendant's Due Process rights, it is improper for this Court to disqualify the Special Prosecutors on this basis.

The third conflict alleged in Defendant's Motion to Disqualify Special Prosecutors involves Defendant's allegation that both the complaining witness, TSSB employee Letha Sparks, and the Special Prosecutors, TSSB attorneys Dale R. Barron, Matthew Leslie, Tina Lawrence, and Greta Cantwell, will be witnesses and thus cannot serve as prosecutors. The State agrees that TSSB employee Letha Sparks will be a witness in the criminal cases filed against Defendant in this Court. However, Letha Sparks, a TSSB financial examiner is not acting as a prosecutor in the cases filed against the Defendant and could not be appointed as a special prosecutor as she is not an attorney licensed to practice law in Texas. Thus there is no potential conflict of interest on the part of TSSB employee Letha Sparks. Further, the State does not intend or foresee the need to call any of the Special Prosecutors as witnesses in the cases filed against Defendant in this Court, nor has the Defendant made any showing as to how the Special Prosecutors have any personal knowledge that would require any of them to be witnesses for the Defendant. No conflict of interest exists here that would violate the Defendant's due process rights and the Defendant has not been able to allege any specific violations.

3. TSSB ATTORNEYS ARE NOT PROHIBITED BY LAW FROM ACTING AS PROSECUTORS

The Defendant erroneously reasons in her Motion to Disqualify Special Prosecutors that TSSB attorneys are prohibited by Section 3 of the The Securities Act from acting as prosecutors.

Section 3 of The Securities Act provides:

The administration of the provisions of this Act shall be vested in the Securities Commissioner. It shall be the duty of the Securities Commissioner and the Attorney General to see that its provisions are at all times obeyed and to take such measures and to make such investigations as will prevent or detect the violation of any provision thereof. The Commissioner shall at once lay before the District or County Attorney of the proper county any evidence which shall come to his knowledge of criminality under this Act. In the event of the neglect or refusal of such attorney to institute and prosecute such violation, the Commissioner shall submit such evidence to the Attorney General, who is hereby authorized to proceed therein with all the rights, privileges and powers conferred by law upon district or county attorneys, including the power to appear before grand juries and to interrogate witnesses before such grand juries.

Tex. Rev. Civ. Stat. Ann. art. 581-3 (West 2010). Section 3-1 of The Securities Act further provides that “[t]he Commissioner may utilize **any or all** penalties, sanctions, remedies, or relief as the Commissioner deems necessary.” Tex. Rev. Civ. Stat. Ann. art. 581-3-1 (West 2010) (emphasis added). The TSSB has complied with its obligations under Section 3 of The Securities Act by referring the criminal prosecution of the Defendant on charges of securities fraud, theft, money laundering, and engaging in organized criminal activity to the Collin County Criminal District Attorney. The Collin County Criminal District Attorney, using his sole discretion, subsequently decided to prosecute the Defendant and in doing so chose to appoint the Special Prosecutors to assist with his office’s prosecution of the Defendant. Nothing in The Securities Act expressly forbids TSSB attorneys from acting as special prosecutors, and any ruling doing so would infringe unnecessarily upon a prosecuting attorney’s “clear legal right,



under the constitutional and statutory mandate of his office, to make these appointments.” *State ex rel. Hill v. Pirtle*, 887 S.W.2d 921, 927 (Tex. Crim. App. 1994) (En Banc.).

4. THE SPECIAL PROSECUTORS ARE ABLE TO DISCHARGE THEIR OBLICATIONS  
UNDER ARTICLE 2.01 OF THE CODE OF CRIMINAL PROCEDURE

The Defendant asserts in her Motion to Disqualify Special Prosecutors that it is impossible for the Special Prosecutors to be objective in light of the fact that the Special Prosecutors and the complaining witness, Letha Sparks, are employed by the referring agency, the TSSB. First, the Defendant has failed to show how the Special Prosecutors’ duties as TSSB Enforcement Attorneys conflict or interfere with their duties as Special Assistant Criminal District Attorneys in Collin County, Texas. Second, the Defendant has failed to raise any arguments as to why the appointment of TSSB attorneys, who have expertise in matters involving securities and securities fraud, would be detrimental to the public interest or in any way violate the Defendant’s due process rights. As previously shown in this Response, the Special Prosecutors are attorneys licensed to practice law in Texas and are bound by the same ethical duties and professional responsibilities as all other attorneys in Texas. Further, the Special Prosecutors have taken the constitutional oath of office and in doing so have sworn to “faithfully execute the duties of the office of Assistant Criminal District Attorney, special prosecutor, for Collin County, Texas,” which includes a prosecutor’s duty under Article 2.01 of the Code of Criminal Procedure “to see that justice is done.” *See Defendant’s Exhibit A to Defendant’s Motion to Disqualify Special Prosecutors* (emphasis in original).

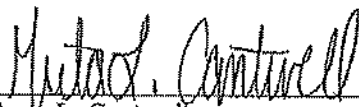
As previously shown in this Response, the Collin County Criminal District Attorney, Greg Willis, exercised sole discretion in appointing the Special Prosecutors to prosecute these

criminal cases and absent a showing that there exists a conflict of interest that would constitute a violation of the Defendant's due process rights, it would be improper to disqualify the Special Prosecutors. DA Willis has retained control and responsibility for the prosecution of the Defendant and can dismiss the Special Prosecutors at any time should he decide to do so.

**WHEREFORE, PREMISES CONSIDERED,** the State respectfully prays the Court deny the Defendant's Motion to Disqualify Special Prosecutors.

Respectfully submitted,

GREG WILLIS  
Criminal District Attorney  
Collin County, Texas

By:   
Greta L. Cantwell  
Special Assistant Criminal District Attorney  
Collin County District Attorney's Office  
2100 Bloomdale Road, Suite 100  
McKinney, Texas 75070  
gcantwell@ssb.state.tx.us  
(512) 992-3428 (Telephone)  
(512) 305-8398 (Facsimile)  
Texas Bar No. 24043593

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing *State's Response to Defendant's Motion to Disqualify Special Prosecutors* has been provided to the Defendant's attorney of record as listed below on this, the 22<sup>nd</sup> day of May, 2015, via hand delivery.

  
\_\_\_\_\_  
GRETA L. CANTWELL

Bogdan Rentea  
Attorney for Defendant Wendy Rogers  
505 W. 12<sup>th</sup> Street, Ste. 206  
Austin, Texas 78701  
(512) 472-6291 (Telephone)  
(512) 472-6278 (Facsimile)  
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STATE BAR of TEXAS

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OVERVIEW

CONTACT AND MAP



**Mr. Dale R. Barron**

Bar Card Number: 01817340

Work Address: 1210 River Bend Drive, Suite 208

Dallas, TX 75247

Work Phone Number: 214-630-8681

Primary Practice Location: Dallas, Texas

Current Member Status  
Eligible To Practice In Texas

In cooperation with

**License Information**

Bar Card Number: 01817340

Texas License Date: 09/11/1987

**Practice Information**

Firm: Texas State Securities Board

Firm Size: Solo

Occupation: Government Lawyer

Practice Areas: None Reported By Attorney

Services Provided: Hearing impaired translation: Not Specified

ADA-accessible client service: Not Specified

Language translation: Not Specified

**Foreign Language Assistance:**

None Reported By Attorney

**Law Schools**

Law School	Graduation Date	Degree Earned
University Of Arkansas: Little Rock	05/1983	Doctor of Jurisprudence/Juris Doctor (J.D.)

Exhibit A

**Public Disciplinary History  
State of Texas\***

Sanction	Date of Entry	Sanction Date Start - End	Probation Date Start - End
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No Public Disciplinary History - Texas

*\*NOTE: Only Texas disciplinary sanctions within the past 10 years are displayed. For sanction information beyond 10 years, information about a specific disciplinary sanction listed above or to request a copy of a disciplinary judgment, please contact the Office of the Chief Disciplinary Counsel at (877) 953-5535. There is a \$15.00 fee for each disciplinary judgment copied. Make checks payable to: State Bar of Texas; PO Box 12487; Austin TX 78711 or by Credit Card.*

**Other States**

Sanction	State	Sanction Date Start - End
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None Reported By Attorney

Statutory Profile Last Certified On: 09/12/2014

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**Courts of Admittance**

Federal  
Texas Northern District Court

**Other Courts**

None Reported By Attorney

**Other States Licensed**

Arkansas

Texas State Securities Board  
1210 River Bend Drive, Suite 208  
Dallas, TX 75247  
Phone: 214-630-8681

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OVERVIEW

CONTACT AND MAP



**Ms. Tina Leah Lawrence**

Bar Card Number: 24043774

Work Address: 208 E 10th St Fl 5

Austin, TX 78701-2407

Work Phone Number: 512-305-8392

Primary Practice Location: Austin, Texas

[{ CONTACT THIS LAWYER }](#)

[{ VISIT LAWYER WEBSITE }](#)

Current Member Status  
Eligible To Practice In Texas

In cooperation with

**License Information**

Bar Card Number: 24043774

Texas License Date: 05/04/2004

**Practice Information**

Firm: Texas State Securities Board

Firm Size: None Specified

Occupation: Government Lawyer

Practice Areas: None Reported By Attorney

Services Provided: Hearing impaired translation: Not Specified

ADA-accessible client service: Not Specified

Language translation: Not Specified

Foreign Language Assistance: None Reported By Attorney

**Law Schools**

Law School	Graduation Date	Degree Earned
University Of Texas	05/2003	Doctor of Jurisprudence/Juris Doctor (J.D.)

**Public Disciplinary History  
State of Texas\***

Sanction	Date of Entry	Sanction Date Start - End	Probation Date Start - End
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No Public Disciplinary History - Texas

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**Other States**

Sanction	State	Sanction Date Start - End
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None Reported By Attorney

Statutory Profile Last Certified On: 04/01/2014

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**Website**

[www.ssb.state.tx.us/](http://www.ssb.state.tx.us/)

**Courts of Admittance**
**Federal**

None Reported By Attorney

**Other Courts**

None Reported By Attorney

**Other States Licensed**

None Reported By Attorney



**Texas State Securities Board**  
208 E 10th St Fl 5  
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Phone: 512-305-8392

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STATE BAR of TEXAS

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OVERVIEW

CONTACT AND MAP



**Greta Lee Cantwell**

Bar Card Number: 24043593

Work Address: 115 E. Travis St., Ste. 1105  
Milam Building  
San Antonio, TX 78205

Work Phone Number: 210-886-0073

Primary Practice Location: San Antonio, Texas

[\( VISIT LAWYER WEBSITE \)](#)

Current Member Status  
Eligible To Practice In Texas

In cooperation with

**License Information**

Bar Card Number: 24043593

Texas License Date: 05/04/2004

**Practice Information**

Firm: Texas State Securities Board

Firm Size: 25 to 40

Occupation: Government Lawyer

Practice Areas: Criminal, Securities Law

Services Provided: Hearing impaired translation: Not Specified

ADA-accessible client service: Not Specified

Language translation: Not Specified

Foreign Language Assistance: Spanish

**Law Schools**

Law School	Graduation Date	Degree Earned
Texas Tech University	12/2003	Doctor of Jurisprudence/Juris Doctor (J.D.)

**Public Disciplinary History  
State of Texas\***

Sanction	Date of Entry	Sanction Date Start - End	Probation Date Start - End
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No Public Disciplinary History - Texas

*\*NOTE: Only Texas disciplinary sanctions within the past 10 years are displayed. For sanction information beyond 10 years, information about a specific disciplinary sanction listed above or to request a copy of a disciplinary judgment, please contact the Office of the Chief Disciplinary Counsel at (877) 953-5535. There is a \$15.00 fee for each disciplinary judgment copied. Make checks payable to: State Bar of Texas; PO Box 12487; Austin TX 78711 or by Credit Card.*

**Other States**

Sanction	State	Sanction Date Start - End
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None Reported By Attorney

Statutory Profile Last Certified On: 01/09/2015

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**Website**

[www.ssb.state.tx.us](http://www.ssb.state.tx.us)

**Courts of Admittance**

Federal

None Reported By Attorney

**Other Courts**

None Reported By Attorney

**Other States Licensed**

None Reported By Attorney

Texas State Securities Board  
115 E. Travis St., Ste. 1105  
San Antonio, TX 78205  
Phone: 210-886-0073

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OVERVIEW

CONTACT AND MAP



**Mr. Matthew Taylor Leslie**

Bar Card Number: 24061885

Work Address: PO Box 13167

Austin, TX 78711-3167

Work Phone Number: 512-305-8392

Primary Practice Location: Austin, Texas

Current Member Status  
Eligible To Practice In Texas

In cooperation with

**License Information**

Bar Card Number: 24061885

Texas License Date: 11/06/2009

**Practice Information**

Firm: State Securities Board

Firm Size: None Specified

Occupation: Government Lawyer

Practice Areas: Administrative and Public, Criminal,  
Government/Administrative, Securities Law

Services Provided: Hearing impaired translation: **Not Specified**

ADA-accessible client service: **Not Specified**

Language translation: **Not Specified**

Foreign Language Assistance:

None Reported By Attorney

**Law Schools**

Law School	Graduation Date	Degree Earned
University Of Texas	05/2009	Doctor of Jurisprudence/Juris Doctor (J.D.)

**Public Disciplinary History  
State of Texas\***

Sanction	Date of Entry	Sanction Date Start - End	Probation Date Start - End
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No Public Disciplinary History - Texas

*\*NOTE: Only Texas disciplinary sanctions within the past 10 years are displayed. For sanction information beyond 10 years, information about a specific disciplinary sanction listed above or to request a copy of a disciplinary judgment, please contact the Office of the Chief Disciplinary Counsel at (877) 953-5535. There is a \$15.00 fee for each disciplinary judgment copied. Make checks payable to: State Bar of Texas; PO Box 12487; Austin TX 78712 or by Credit Card.*

**Other States**

Sanction	State	Sanction Date Start - End
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None Reported By Attorney

Statutory Profile Last Certified On: 05/21/2014

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**Courts of Admittance**

**Federal**

None Reported By Attorney

**Other Courts**

None Reported By Attorney

**Other States Licensed**

None Reported By Attorney

State Securities Board  
PO Box 13167  
Austin, TX 78711-3167  
Phone: 512-305-8392

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