

In August 2012, the parties entered into a settlement agreement. Rogers agreed to pay the Receiver \$200,000¹ and to give up her interest in Retirement Value and in the estate. In exchange, the Receiver, on behalf of himself and Retirement Value, released Rogers from “all claims ... that are directly or indirectly related to Retirement Value, the sale of Interests or Wendy Rogers’ service as an officer of Retirement Value, and/or the Pending Case.”² Settlement Agreement (Exh. A-1) at §12. The Receiver also covenanted not to sue. *Id.* at §13.

The State also gave a release to Rogers. Its release, however, was considerably narrower. The State released Rogers from “any and all civil claims” that “could have been brought in the Pending Case.” *Id.* at §17. Far from covenanting not to sue, the State expressly reserved the right to “demand additional enforcement of the laws and regulations of the State of Texas.” *Id.*

Also as part of their settlement, the parties asked the Court to enter an agreed permanent injunction (the Agreed PI). The Agreed PI provided that the State “does not 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 the imposition of civil fines and civil penalties” related to Retirement Value. Agreed PI (Exh. A-2) at §1.11. The Agreed PI further recited that it was “meant to be a full, final and complete resolution of the civil obligations of Defendant Rogers to the State.” *Id.* at § V.

¹ Through an addendum to the Agreement, this amount was later reduced to about \$180,000.

² The “Pending Case” was defined as this case. Settlement Agreement at Recital A.

More than two years later, a grand jury in Collin County indicted Rogers on multiple felony counts related to her involvement in the Retirement Value scam. The criminal cases are currently pending before the 380th District Court in Collin County. Rogers has moved to dismiss at least a portion of the indictments against her arguing that the settlement agreement bars the criminal charges. See Motion to Quash, Dismiss or Set Aside Indictment (Exh. A-3).

Last month, Rogers moved to enforce the settlement agreement. Bluntly, it is not clear what relief she is seeking from this Court. On the one hand, she appears to be asking the Court to enforce the settlement agreement: she requests (i) a declaration that the State breached the settlement agreement by bringing the indictments; (ii) an order directing the State to “withdraw[] any and all complaints upon which the indictments were premised;” and (iii) a declaration that her due process rights were violated by the State “when she was asked to give up legal rights” without warning her that the State was contemplating criminal charges. Amd. Motion at 4. On the other hand, she appears to be seeking to set aside the agreement by requesting that her settlement consideration be returned.³ *Id.* Adding to the confusion, Rogers also assures that Court that she “is not asking the Court to take any action regarding the indictments.” Rogers Brief at 1.

³ This request is directed at the State. Yet, Rogers paid nothing to the State; she paid the Receiver.

ARGUMENT AND AUTHORITIES

Regardless of the relief she seeks, however, Rogers is entitled to nothing.⁴ To begin with, this Court lacks jurisdiction to consider her motion. Moreover, neither the State nor the Receiver has breached the settlement agreement. Nor has Rogers made any colorable allegation that she was fraudulently induced to enter into the settlement agreement. This Court should dismiss her motion.

I. This Court lacks subject-matter jurisdiction over Rogers' Motion

A settlement agreement is just an ordinary contract. State law does not provide for any special mechanism for its enforcement. *Gunter v. Empire Pipeline Corp.*, 310 S.W.3d 19, 22 (Tex. App. – Dallas 2009, pet. denied) (“The law does not recognize the existence of any special summary proceeding for the enforcement of a written settlement agreement”). Instead, parties must enforce settlement agreements using the usual means for enforcing agreements – a lawsuit which is resolved by either a summary judgment or trial. *Id.* This typically requires that the complaining party file an entirely new lawsuit.

Texas law provides only a limited exception to this requirement. If the Court retains plenary power over the underlying dispute, then the suit to enforce the settlement can be brought in the same proceeding as the original claim. *Mantas v. The Fifth Court of Appeals*, 925 S.W.2d 656, 658 (Tex. 1996). However, if the

⁴ To the extent that Rogers is attempting to raise Fourth and Fifth Amendment arguments based on the purported intersection between this case and whatever criminal investigation preceded the indictments similar to those raised by McDermott, these arguments are simply addressed to the wrong court. See Receiver's Response to McDermott's Motion to Enforce at 11-15.

dispute arises after the trial court's plenary jurisdiction has expired, then the party seeking to enforce the settlement must file a separate lawsuit. *Id.* at 658-59.

The disputes between Rogers and the State and Receiver in this case were fully resolved in 2012. That the receivership proceeding continues, as it must until the assets are finally disposed of, does not grant the Court continuing jurisdiction over this long-resolved dispute. Under the "discreet issue" doctrine, certain orders entered into during the court of a receivership are treated as final adjudications even though the receivership proceeding has not finally concluded. *Huston v. FDIC*, 800 S.W.2d 845, 847 (Tex. 1990) (opinion on reh'g) ("We hold that a trial court's order that resolves a discrete issue in connection with any receivership has the same force and effect as any other final adjudication of a court, and thus, is appealable."). The Supreme Court in *Huston* applied what had been a probate rule to receiverships. *Id.* at 848.

An order is final if it conclusively disposes of and is decisive of the issue or controverted question for which that part of the proceeding was brought. *Id.* Stated more simply, an order in a receivership proceeding is final if it resolves all issues of law and fact between the parties involved in the order. *Crowson v. Wakeham*, 897 S.W.2d 779, 782 (Tex. 1995). Here, all of the disputes between the Rogers and the State or the Receiver were resolved by settlement in 2012. The Receiver dismissed his claims and the parties agreed to the entry of an injunction, which the Court entered in November 2012. The Court's plenary power of the dispute between the

State and Rogers as well as the dispute between the Receiver and Rogers ended long ago.

A case cited by Rogers, *Kalyanaram v. University of Texas System*, 2009 WL 1423920 (Tex. App. – Austin 2009, no pet.) also demonstrates that this Court lacks jurisdiction over her motion. In *Kalyanaram*, the parties settled and the court entered an order dismissing Kalyanaram's claims. Several years later, he alleged that he was induced by fraud to release his claims. In order to make this claim, however, Kalyanaram had to satisfy the requirements of a bill of review. When he was unable to do so, the court dismissed his claims for fraud and breach of the agreement.

Accordingly, the Court lacks subject-matter jurisdiction to hear Roger's motion to enforce and it should be summarily dismissed.⁵ *B.Z.B., Inc. v. Clark*, 273 S.W.3d 899, 905 (Tex. App. – Houston [14th Dist.] 2008, no pet.)(holding that trial court lacked jurisdiction to consider dispute over settlement agreement that arose after plenary jurisdiction expired).

II. Neither the Receiver nor the State has breached Rogers' settlement agreement

Rogers' motion is entirely bereft of any allegations against the Receiver. It is far from clear whether Rogers even claims that the Receiver has breached her settlement agreement. This is hardly surprising as the Receiver has few, ongoing

⁵ As Rogers appears to have disavowed any attempt to have this Court interfere with the criminal proceedings against her, the Receiver will not brief arguments as to why the Court lacks jurisdiction to do that. To the extent, however, that Rogers seeks any such relief, the Receiver urges the Court to dismiss those claims for lack of subject-matter jurisdiction and incorporates by reference his arguments in response to McDermott's motion to enforce.

obligations to Rogers under the settlement agreement. Now that the settlement has been approved and the Receiver's claims dismissed, the only obligations the Receiver has to Rogers are to maintain the confidentiality of financial information that Rogers provided in connection with the settlement (Settlement Agreement at §8) and to seek to dismiss any suit against Rogers brought by Retirement Value (*id.* at §13). The Receiver has maintained the confidentiality of Rogers' financial information. And, Retirement Value has not sued Rogers. She has not alleged otherwise.

Presumably, Rogers is asserting that the State's alleged breach of contract somehow entitles her to money from the Receiver. She asserts no legal basis for such an argument and the Receiver is aware of none. Nevertheless, the Receiver will address her argument that the State has breached the settlement agreement.

Based on the facts alleged by Rogers, the State did not breach the settlement agreement. First, Rogers argues that the State agreed that it would "no longer pursue a finding that Rogers sold a security or committed securities fraud." Amd. Motion at 3. The State agreed to no such thing. That purported agreement is nowhere to be found in the settlement agreement. Rather, the State expressly reserved the right "to demand additional enforcement of the laws and regulations of the State of Texas or the United States." Settlement Agreement at §17.

Second, Rogers argues that the State breached the settlement agreement by indicting her for her conduct in connection with Retirement Value in violation of the release contained in the agreement. This argument is deeply flawed. To begin

with, the State did not release any sort of criminal claim. Its release is expressly limited to civil claims that could have been brought in this proceeding. The indictments against Rogers are decidedly criminal rather than civil in nature. Moreover, criminal charges could not have been brought in this civil case. "In a civil case, a court lacks jurisdiction to impose criminal liability on a defendant." *Anambra State Community in Houston, Inc. v. Ulasi*, 412 S.W.3d 786, 791 (Tex. App. – Houston [14th Dist.] 2013, no pet.)(dismissing claim seeking to impose criminal liability for violation of law for lack of subject-matter jurisdiction).

Moreover, a release cannot support a claim for breach of contract. At best, it would provide Rogers with an affirmative defense that she could assert in the criminal cases against her. A "release surrenders legal rights and obligations between the parties. It operates to extinguish the claim or cause of action as effectively as would a prior judgment between the parties and is an absolute bar to any right of action on the released matter." *Dresser Indus., Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 508 (Tex. 1993). Accordingly, a "release is expressly designated as an affirmative defense." *Id.* Simply put, suit on a released claim by a releasing party does not give rise to a claim by the released party for breach of the release portion of a settlement agreement. *Frontier Logistics, L.P. v. National Property Holdings, L.P.*, 417 S.W.3d 656, 663 (Tex. App. – Houston [14th Dist.] 2013, pet. denied).

Rogers has no claim for breach of contract. But, if she really wishes to assert such a claim against the Receiver, Rogers needs to file a separate suit so that her

allegations can be tested as required by the state law (including Chapter 27 of the Texas Civil Practice and Remedies Code) and the Texas Rules (including Rules 13 and 91a).

III. Neither the State nor the Receiver fraudulently induced Rogers to enter into the settlement agreement.

As with her breach of contract claim, Rogers makes no allegations of fraud against the Receiver. Without at least allegations of fraud, Rogers has not alleged any basis for the Court to order the Receiver to return Rogers' settlement payment. She must, therefore, be arguing that the Receiver is somehow responsible for the State's conduct in indicting her.

Rogers does not actually allege fraud on the part of the State. Instead, she argues that the State had an undisclosed intent to indict her when it settled with her.⁶ Amd. Motion at 2-3. What Rogers does not allege is that the State affirmatively lied to her about the possibility of an indictment or the existence of an ongoing criminal investigation. Nor does she point to any law or rule requiring that the State disclose the existence of a criminal investigation to her.

This failure is fatal to Rogers' fraud claim. Simply put, the State had no affirmative duty to inform Rogers of the possibility or existence of a criminal investigation. *United States v. Prudden*, 424 F.2d 1021, 1032 (5th Cir. 1970)(holding that IRS agent had no duty to inform taxpayer of an ongoing criminal investigation when conducting an audit); *also United States v. Blocker*, 104 F.3d 720, 729-30 (5th

⁶ Given that more than two years passed from the date the State executed the settlement agreement (August 2012) to the date of the indictments (February 2015), this allegation seems far-fetched.

Cir. 1997)(holding that state insurance examiner had no duty to disclose fact that he had secretly agreed to furnish information gleaned from his examination to the FBI). This rule has been uniformly adopted in the federal courts. *United States v. Stringer*, 535 F.3d 929, 940 (9th Cir. 2008)(collecting cases).⁷

There is no Texas law to the contrary. The one case on which Rogers bases her fraud claim, *Kalyanaram v. University of Texas System*, 2009 WL 1423920 (Tex. App. – Austin 2009, no pet.), also does not impose any such duty. Accordingly, Rogers has failed to allege a fraud claim against either the State or the Receiver.

Nor does *Kalyanaram* otherwise support a fraud claim against the State. Notably, the *Kalyanaram* court held that the defendant was entitled to summary judgment on Kalyanaram's claim that it fraudulently induced him to settle his claims. Moreover, the facts of *Kalyanaram* are simply inapposite. Kalyanaram alleged that the University committed fraud by misrepresenting that it would (i) abandon the criminal charges against him; (ii) cooperate with his criminal defense and (iii) adhere to the terms of the settlement. *Id.* at *4. The State in this case made no representations to Rogers about potential criminal charges. Moreover, as discussed above, the State has fully complied with the settlement agreement.

As part of this argument Rogers suggests that she has been damaged because she gave up her appeal of the Court's summary judgment ruling that Retirement Value's product was a security. Her argument makes no sense. The Receiver's

⁷ As may be obvious from the styles of these cases, the issues arise in the context of motions to dismiss indictments or to suppress evidence in criminal trials – a fact which demonstrates the impropriety of bringing this motion before this Court and the Court's lack of subject-matter jurisdiction.

claims were dismissed. Accordingly, the partial summary judgment never became final as to her. Similarly, the State's claims were reduced to the Agreed PI in which the Court did not find that Retirement Value's product was a security. Accordingly, the settlement imposes no limitation on her ability to argue that Retirement Value's product was not a security in her criminal case.

Accordingly, the Court should dismiss Roger's Motion to Enforce.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been forwarded to all counsel of record listed below, through the electronic filing manager if that counsel's e-mail address is on file or via e-mail, if not, on this 1st day of June 2015.

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By: /s/ Michael D. Napoli
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EXHIBIT "A"

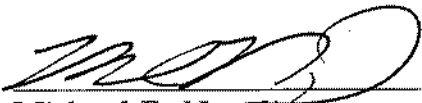
represented parties who have been placed in receivership by the TSSB. I have also represented both plaintiffs and defendants in lawsuits and arbitrations alleging securities fraud, including cases arising out of Ponzi schemes.

3. I am counsel for the Receiver, Eduardo S. Espinosa (the "Receiver"), in this matter. I have been counsel for the Receiver since this case began in May 2010.

4. Attached to my affidavit are true and correct copies of the following documents:

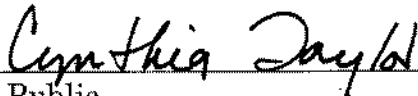
- a. The Settlement Agreement between Wendy Rogers and the Receiver, the State and others is attached as Exhibit A-1;
- b. The Agreed Permanent Injunction against Wendy Rogers, entered by the Court on November 21, 2012 is attached as Exhibit A-2; and
- c. Rogers' Motion to Quash and Set Aside Indictment filed in the 380th Judicial District Court is attached as Exhibit A-3.

FURTHER AFFIANT SAYETH NOT.



Michael D. Napoli

SUBSCRIBED AND SWORN TO BEFORE ME this 1st day of June 2015.



Notary Public

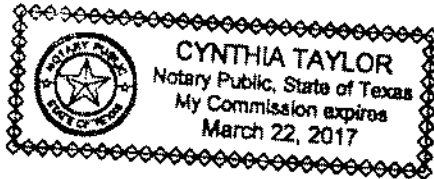


EXHIBIT "A-1"

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

STATE OF TEXAS,
Plaintiff,

IN THE DISTRICT COURT OF

v.

RETIREMENT VALUE, LLC,
RICHARD H. "DICK" GRAY,
HILL COUNTRY FUNDING, LLC,
a Texas Limited Liability Company,
HILL COUNTRY FUNDING, a Nevada
Limited Liability Company, and
WENDY ROGERS,
Defendants,

TRAVIS COUNTY, TEXAS

AND

JAMES SETTLEMENT SERVICES, LLC,
ET AL.
Third-Party Defendants

126th JUDICIAL DISTRICT

**MOTION FOR APPROVAL OF
SETTLEMENT WITH DEFENDANT WENDY ROGERS**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Eduardo S. Espinosa in his capacity as Receiver of Retirement Value, LLC, and files this Motion for Approval of Settlement with Defendant Wendy Rogers as follows:

Eduardo S. Espinosa, in his capacity as Receiver for Retirement Value, LLC ("RV Receiver"), the State of Texas (the "State"), Donald R. Taylor, in his capacity as Receiver for Hill Country Funding, LLC ("HCF Receiver"), and Gary Cain, Barry Edelstein and Qvest III Master Fund, LLC (the "Intervenors") have reached a compromise and settlement agreement of all claims and disputes they may have against Wendy Rogers ("Rogers") (collectively the Parties), and vice versa. The Parties have also agreed to full and complete releases of such

claims and disputes. A fully executed copy of the Compromise and Settlement Agreement between the Parties is attached and incorporated herein as Exhibit A.

In addition, upon the Court's approval of the Compromise and Settlement Agreement and in consideration of the promises and agreements contained therein, the Parties also request that the Court approve and enter the Agreed Permanent Injunction Order and Final Judgment As to Defendant Wendy Rogers attached to the Settlement Agreement as Exhibit 1.

This Court previously approved a contingency fee for the RV Receiver's counsel with respect to these claims. A settlement statement showing the gross recovery, the amount of attorneys' fees, and the net proceeds payable to the Receiver is attached and incorporated herein as Exhibit B.

The Parties agree that each party will bear their own attorneys' fees and costs.

PRAYER

The Receiver prays that the Court grant this motion to approve the attached Compromise and Settlement Agreement and the distribution of the proceeds and sign and enter the Agreed Permanent Injunction Order and Final Judgment As to Defendant Wendy Rogers.

The Receiver further prays for such further relief to which he may be justly entitled.

Respectfully submitted,



R. James George, Jr.
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State Bar No. 19856425
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ATTORNEYS FOR RECEIVER

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been forwarded to all counsel of record herein by:

- U.S. Mail, First Class (as to Ackels, Lanahan, Williams, and D'Agostino only)
- Certified Mail (return receipt requested)
- Facsimile
- Federal Express Delivery
- Hand Delivery
- Electronic Service

on this the 6th day of September, 2012, to wit:

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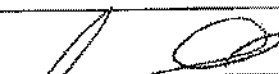
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