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

STATE OF TEXAS	§	**IN THE DISTRICT COURT OF**
Plaintiff,	§	
	§	
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,	§	
Defendants,	§	
	§	
AND	§	
	§	
JAMES SETTLEMENT SERVICES, LLC,	§	
ET AL.	§	
Third-Party Defendants	§	**126th JUDICIAL DISTRICT**

THIRD-PARTY DEFENDANT, MICHAEL McDERMOTT'S MOTION TO ENFORCE SETTLEMENT AGREEMENT, SEEK INDEMNIFICATION, AND ENJOIN, BRIEF IN SUPPORT THEREOF, AND REQUEST FOR EVIDENTIARY HEARING

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Third-Party Defendant, **Michael McDermott** ("McDermott") and files this Motion to Enforce Settlement Agreement, Seek Indemnification, and Enjoin, Brief in Support Thereof, and Request for Evidentiary Hearing, as follows:

I. BACKGROUND FACTS

A. The Retirement Value Lawsuit

1. On May 5, 2010, **the State of Texas,** at the request of then-Deputy Commissioner of the Texas State Securities Board ("TSSB"), **John Morgan** (who is now the Commissioner of the TSSB, hereinafter referred to as "Commissioner Morgan"), filed an Original Verified Petition

and Application for *Ex Parte* Temporary Restraining Order, Temporary and Permanent Injunction, Restitution, the Disgorgement of Economic Benefits, Receivership, and Other Equitable Relief, against Retirement Value, LLC and other parties, commencing the Receivership Lawsuit.

2. On May 5, 2010, the Court issued the First Amended Temporary Restraining Order and Order Appointing Receiver in the Lawsuit, providing certain injunctive relief and appointing the Receiver; and, on May 28, 2010, the Court issued the Agreed Temporary Injunction Order against Defendants Retirement Value, LLC ("RV"), Richard "Dick" Gray ("Gray") and the Relief Defendant, Kiesling, Porter, Kiesling & Free, P.C., and Order Appointing Receiver.

3. On August 12, 2011, Eduardo S. Espinosa, in his capacity as the Court-appointed Receiver for RV (the "RV Receiver" or the "Receiver") filed his Third Amended Cross-Claim and Third-Party Claim ("Third Amended Petition"), joining McDermott as an additional Third-Party Defendant in the Lawsuit. The RV Receiver asserted claims against McDermott in the Lawsuit for, among other things, indemnity, illegally selling unregistered securities, aiding and abetting the illegal sale of unregistered securities by others, and conspiring with and aiding and abetting the officers of RV in breaching their fiduciary duties to RV, arising out of and in connection with the RV Resale Life Insurance Policy Program ("RSLIP"). These are the very same allegations in the indictments against McDermott, which were filed on February 26, 2015, in the 417th Judicial District Court of Collin County, Texas (the "Criminal Action," Hon. Benjamin N. Smith, 380th Judicial District Court of Collin County, Texas, Judge Presiding).

4. On December 7, 2011, before McDermott had been served with the Receiver's Third Amended Petition, the Court signed an *Order Granting Motions for Partial Summary Judgment*

(the "Order"), and of which McDermott requests the Court take judicial notice. The verbiage of the Order states as follows:

> On this day came on to be heard two motions; the State's "Motion for Partial Summary Judgment: Retirement Value's Product was a Security" and the Receiver's "Motion for Partial Summary Judgment" on the security question. After considering the pleadings and arguments of counsel, *the Court finds that Retirement Value's product was a security* (emphasis added).
>
> It is hereby ORDERED that the Motions are [GRANTED].
>
> IT IS SO ORDERED.

5. On March 13, 2012, after being served with the Receiver's Third Amended Petition, McDermott timely filed his Special Appearance, Plea to the Jurisdiction, Plea in Abatement, Special Exceptions, and after and subject thereto, Original Answer. Out of the sake of judicial efficiency and to conserve judicial resources, McDermott thereafter waived his Special Appearance and entered a general appearance in this Lawsuit.

6. As set forth *supra*, McDermott was not a party to the Lawsuit on the date the Court signed the Order. Accordingly, on March 16, 2012, McDermott filed a Motion for Clarification of the Court's Order of December 7, 2011 ("Motion for Clarification"), seeking clarification on whether the Order was also binding on him.

7. On March 28, 2012, the Court entered an Order on the Motion for Clarification ("Clarification Order"), concluding the Order was also binding on McDermott.

8. On April 11, 2012, McDermott filed his Original Counterclaim against RV, and his Original Third-Party Petition against the TSSB and Commissioner Morgan in the Receivership Lawsuit, seeking a declaratory judgment (on the basis that the TSSB was engaging in ad-hoc rulemaking under TEX. GOV'T. CODE § 2001.038) and alternatively, a transfer of the Lawsuit to the Third Court of Appeals pursuant to TEX. GOV'T CODE § 2001.038(f) .

9. On April 17, 2012, McDermott filed his Notice of Appeal of the Court's Clarification Order, under Case No. 03-12-00240-CV; *Michael McDermott v. The State of Texas, Eduardo Espinosa, Temporary Receiver of Retirement Value, LLC, and Donald R. Taylor, Temporary Receiver of Hill Country Funding, LLC*; In the Third Court of Appeals for the State of Texas (the "McDermott Appeal"), on the basis that the life settlements sold in the RV RSLIP Program did not constitute a security under the Texas Securities Act ("TSA").

B. McDermott's Settlement with the State, Receiver, TSSB and Settlement Class

a. Relevant Terms of the Settlement

10. Effective May 6, 2012, after extensive negotiations by and among the Parties, McDermott entered into a Settlement Agreement with the State, RV and the RV Receiver, the TSSB and Commissioner Morgan, and the Cain and Edelstein Intervenors (hereinafter, the "Settlement Agreement").

11. Under Section I (8) of the Settlement Agreement, McDermott disputed the allegations made against him and admitted no wrongdoing in the Lawsuit, and he continues to do so.

12. Under Section I (9) of the Settlement Agreement, the Parties, including the TSSB and Commissioner Morgan, agreed that the purpose of the Settlement Agreement was to avoid further litigation, preparation and expense; to terminate all past, present and potential controversies between the Parties arising out of RV; and to compromise and settle all of the Parties' differences of any type arising out of RV that were or could have been asserted in the Receivership Lawsuit.

13. Under Section I (11) of the Settlement Agreement, the Releasing Parties, including but not limited to the State, the TSSB and Commissioner Morgan, agreed to resolve all claims that they had or may have had against McDermott arising out of RV, which were or could have been

asserted in the Lawsuit, without admission by any party of the merits of the claims, demands, charges, and/or contentions of the others. Likewise, McDermott agreed to resolve all claims that he had or may have had against the Releasing Parties arising out of RV, which were or could have been asserted in the Lawsuit, without admission by any party of the merits of the claims, demands, charges, and/or contentions of the others.

14. McDermott, without admitting any wrongdoing in the Lawsuit, agreed to pay the Receiver $750,000.00; the Settlement Agreement was approved by the Receivership Court on September 26, 2012, via its Order on Motion for Approval of Settlement with Michael McDermott.

15. Based upon McDermott's good-faith negotiations in the Lawsuit, which are specifically cited at Section II (2) of the Settlement Agreement, the Receiver agreed to give all other Third-Party Defendant Licensees, who had been sued in this Lawsuit and had not yet settled, an opportunity to pay 85% of their total commission amounts back to the Receiver in settlement of the Receiver's claims against them. The discounted offer remained open to the Third-Party Defendant Licensees for a period of two (2) weeks from and after such date the Settlement Agreement was fully executed by all Parties, including the TSSB, at which time it would be withdrawn and rendered of no further force and effect.

16. Pursuant to Section II (4) (A) of the Settlement Agreement, the Releasing Parties, including the State, the TSSB and Commissioner Morgan, did:

> . . . jointly for themselves and their respective heirs, executors, administrators, legal representatives, successors and assigns hereby *agree to mutually, irrevocably, unconditionally and completely, RELEASE, ACQUIT AND FOREVER DISCHARGE McDermott and his assigns, insurers, heirs, executors, legal representatives and legal counsel, of and from any and all claims, demands, actions, liabilities, damages, losses, costs, expenses, attorneys' fees and causes of action of any nature, both past and present, known and unknown, accrued and*

> *unaccrued, foreseen and unforeseen, asserted and not asserted, discovered or not discovered whether at law, in equity or otherwise, either direct or consequential, which they or any of them, have ever had or may now have against McDermott arising out of [RV], which were or could have been asserted by them in the Lawsuit*. The Releasing Parties further fully, completely, and unconditionally release and forever discharge McDermott from any claim that this Agreement was induced by any fraudulent or negligent act or omission, and/or result from any actual or constructive fraud, negligent misrepresentation, conspiracy, breach of fiduciary duty, breach of confidential relationship, or the breach of any other duty under law or in equity.

Settlement Agreement at Section II (4) (A) (emphasis added).

17. McDermott did the same for the Releasing Parties. *Id.* at Section II (4) (B).

18. The Receiver agreed to indemnify and hold harmless McDermott from any claims brought by, through, or under the Receiver; provided, however that the indemnity would be limited to the net money received by the receivership estate, after fees and expenses, from the $750,000.00 settlement amount. *Id.* at Section II (5).

19. As a part of the Settlement Agreement, McDermott non-suited his counterclaim against RV, his third-party petition against the TSSB and Commissioner Morgan, and the McDermott Appeal, all with prejudice. As part of the Settlement Agreement, The RV Receiver dismissed his claims in the Lawsuit against McDermott with prejudice, after McDermott paid the full settlement amount of $750,000.00 to the RV Receiver. *Id.* at Section II (20).

20. Under Section II (21) of Settlement Agreement, the Parties, including the State, the Receiver, the TSSB and Commissioner Morgan, agreed to "cooperate reasonably with each other and with their respective representatives in connection with any steps required to be taken as part of their respective obligations under the Agreement, and to (i) *furnish upon request to each other such further information*; (ii) execute and deliver or cause to be executed and delivered to each other such other documents; and (iii) do such other acts and things, all as the other party may

reasonably request for the purpose of carrying out the intent of this Agreement." (emphasis added). No one from the TSSB or the Receiver's offices contacted McDermott's attorneys in the Lawsuit to inform them of "such further information" the TSSB intended to use in the Criminal Action.

21. Similarly, and in the same spirit of good faith, McDermott agreed to the following:

> Cooperation with Investigation by Receiver and State. McDermott will cooperate with the RV Receiver and the State in connection with their investigation of the affairs of Retirement Value, including the prosecution of any claims the Receiver or the State may bring. With regard to all cooperation requests sought by the RV Receiver and the State from McDermott, such requests shall be directed through Ben De Leon, attorney of record for McDermott, via phone and/or email in connection with their investigation of the affairs of Retirement Value, including the prosecution of any claims the Receiver of [or] the State may bring.

Id. at Section II (3). As recounted *supra*, this provision resulted in McDermott and his attorneys meeting in person with representatives of the Receiver and TSSB while under the impression that, due to the mutual agreements made and releases given under the Settlement Agreement, the TSSB was no longer going to pursue McDermott in way regarding RV.

22. On June 4, 2012, after the Effective Date of the Settlement Agreement, pursuant to Section II (3) of the Settlement Agreement, Hector De Leon and Ben De Leon, attorneys for McDermott in the Lawsuit, met with Jack Hohengarten, attorney for the State, the TSSB and Commissioner Morgan in the Lawsuit, and Alexis Goldate (TSSB Enforcement Attorney) and Travis Iles (TSSB Assistant Director of Enforcement), at Mr. Hohengarten's office, to openly, honestly, and candidly discuss Conestoga Settlement Services, LLC, predecessor in interest to Conestoga International, LLC, which was then managed by McDermott, and the Conestoga Settlement Trust n/k/a Conestoga Trust (collectively, "Conestoga"). At the meeting, Hector De Leon and Ben De Leon offered to voluntarily provide the TSSB with various documents arising

out of and related to Conestoga's business operations, and they subsequently did so. Neither Hector De Leon, Ben De Leon, nor McDermott were ever advised that such documents (or any other information, for that matter) would be used as part of any ongoing or potential subsequent criminal investigation or proceeding against McDermott. Indeed, McDermott and his attorneys were never advised that the TSSB was continuing to conduct an investigation against McDermott, Gray, Wendy Rogers ("Rogers") and Ron and Don James (collectively, the "James Defendants"), arising out of and related to the RV RSLIP.

23. On September 6, 2012, the Receiver filed his Motion for Approval of Settlement with McDermott, which included the Settlement Agreement as Exhibit "A" thereto, and which was subsequently approved by the Court on September 26, 2012.

24. On February 21, 2013, the Court entered a Final Order and Judgment Approving Class Settlement and Class Counsel Fees and Expenses as to the Putative Settlement Class[1] ("Settlement Class Final Order").

25. On January 8, 2014, the Court entered the Agreed Order Granting Receiver's Motion to Dismiss with Prejudice as to McDermott. At that point, all civil and criminal proceedings arising out of or related to RV as to McDermott should have been fully and finally closed, but that has not been the case, as evidenced by the recent Criminal Action the TSSB initiated without any notice whatsoever to McDermott's counsel

C. The TSSB's Recent Criminal Case against McDermott and Breach of the Settlement Agreement

26. Around January 2015, a Grand Jury was convened in Collin County, Texas. During their course of deliberations, the Grand Jury returned four True Bills of Indictment against

[1] The Cain and Edelstein Intervenors are representatives of the Putative Settlement Class.

McDermott, filed on February 26, 2015, and charging: (1) Securities Fraud > $100K Article 581 Sec. 29C Texas Securities Act; (2) Theft Penal Code 31.03 F1; (3) Money Laundering > $200K Sec. 34.02 Texas Penal Code; (3) EOCA > $200K; 71.02(1) & (10) TPC. The Charging Agency was the TSSB, a party to McDermott's Settlement Agreement, *not* the Collin County District Attorney or the State of Texas, through the Attorney General's Office. The only named witness for each charge is Letha Sparks, a Financial Analyst and Investigator with the TSSB. The charges directly contravene the Settlement Agreement terms quoted in paragraph 16 *supra*, and the following terms specifically, found on page 7 of the Settlement Agreement:

> . . . RELEASE, ACQUIT AND FOREVER DISCHARGE McDermott . . . from any and all claims, demands, actions, liabilities, damages, losses, costs, expenses, attorneys' fees and causes of action of any nature, both past and present, known and unknown, accrued and unaccrued, foreseen and unforeseen, asserted and not asserted, discovered or not discovered whether at law, in equity or otherwise, either direct or consequential, which they or any of them, have ever had or may now have against McDermott arising out of [RV], which were or could have been asserted by them in the Lawsuit.

II. ARGUMENT AND AUTHORITY

A. Jurisdiction

27. In the Settlement Class Final Order, this Court "retain[ed] exclusive jurisdiction over the consummation, performance, administration, effectuation[,] and enforcement of the Settlement Agreement, and [the Settlement Class Final] Order." Therefore, McDermott brings his Motion before this Court.

B. Issues Presented by the Court:

1. What jurisdiction (and limits thereon)[2] does this Court have over such criminal proceedings that are occurring in Collin County, a separate jurisdiction, and its District Attorney ("DA") and any special prosecutors acting under the DA's mandate?

i. The TSSB cannot prosecute criminal violations.

28. In this case, the question of jurisdiction appears to be complicated, but it is not, and this Court's focus should not be on the authority of Collin County's district attorney. The question is whether or not the TSSB's attorneys can legally act as local prosecutors, and the answer is "no." The TSSB's authority is defined and limited by statute, and TSA article 581-3 (TEX. REV. CIV. STAT. art. 581-3, hereinafter referred to as "Art. 581-3") sets out that the TSSB is to investigate securities violations and then turn over its findings to local prosecutors or the Attorney General (when the local prosecutors decline to act).

> Art. 581-3. ADMINISTRATION AND ENFORCEMENT BY THE SECURITIES COMMISSIONER AND THE ATTORNEY GENERAL AND LOCAL LAW ENFORCEMENT OFFICIALS. 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.

[2] In this state's bifurcated system of civil and criminal jurisdiction, a civil court has jurisdiction to declare constitutionally invalid and enjoin the enforcement of a criminal statute only when (1) there is evidence that the statute at issue is unconstitutionally applied by a rule, policy, or other noncriminal means subject to a civil court's equity powers and irreparable injury to property or personal rights is threatened, or (2) the enforcement of an unconstitutional statute threatens irreparable injury to property rights. A naked declaration as to the constitutionality of a criminal statute alone, without a valid request for injunctive relief, is clearly not within the jurisdiction of a Texas court sitting in equity. *State v. Morales*, 869 S.W.2d 941, 942 (Tex. 1994). The relief requested herein by McDermott is clearly within the jurisdiction of this Court, and this Court alone.

29. As shown, only local prosecutors and the Attorney General, not the TSSB, may prosecute securities law violators. "Agencies may only exercise those specific powers that the law confers in clear and express language." *Buddy Gregg Motor Homes, Inc. v. Motor Vehicle Bd. Of the Tex. Dept. of Transp.*, 156 S.W.3d 91, 101 (Tex. App.—Austin 2004, pet. denied). Art. 581-3 clearly shows that only the Attorney General's office may adopt the role of local prosecutor. TEX. REV. CIV. STAT. art. 581-3. If the Texas Legislature wanted to grant the TSSB the authority to engage in the same role, it would have said as much in this very statute. "It is a rule of statutory construction that every word of a statute must be presumed to have been used for a purpose." *Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535, 540 (Tex. 1981). "[E]very word excluded from a statute must also be presumed to have been excluded for a purpose. Only when it is necessary to give effect to the clear legislative intent can we insert additional words or requirements into a statutory provision." *Id.* **The Texas Legislature chose to statutorily limit the TSSB to investigations and referrals to prosecutors, *not* to have prosecutorial authority itself**.

30. The TSSB may argue that their prosecutorial power does not need to be set out in statute because, "An agency may also exercise powers necessarily implied from the statutory authority granted or the duties expressly given or imposed." *See Buddy Gregg*, 156 S.W.3d at 101. But that would be incorrect. "[T]he agency may not, on a theory of necessary implication from a specific power, function, or duty expressly delegated, exercise a new or additional power or a power that contradicts the statute." *Id.* "Nor may the agency exercise a new power solely for administrative purposes of expediency." *Id.*

31. Thus, the TSSB may not exceed its defined powers, even if the agency or courts think it would be efficient to do so. *Pub. Util. Com'n of Tex. v. Cofer*, 754 S.W.2d 121, 124 (Tex. 1988).

In *Cofer*, the Attorney General was in a quandary because two state agencies were on opposing sides during litigation, and the statutes governing each agency directed that the Attorney General was to represent each of them in court. *Id.* at 122–23. The trial judge considered this to be a conflict of interest and a violation of the principle that parties in court are entitled to an adversarial system. *Id*. at 123. As a result, the judge used his inherent judicial powers to order the Attorney General to represent either one side only, or neither of the agencies. *Id*.

32. The Supreme Court recognized that courts "ha[ve] not only the power but the duty to insure that judicial proceedings remain truly adversary in nature." *Id.* at 124. Yet this power is tempered, because "when the Legislature has spoken on a subject, its determination is binding upon the courts unless the Legislature has exceeded its constitutional authority," and "[t]he courts are not free to thwart the plain intention of the Legislature expressed in a law that is constitutional." *Id*. The Court concluded that "[a] court may not write special exceptions into a statute as to make it inapplicable under certain circumstances not mentioned in the statute." *Id.*

33. Aside from case law, statutory comparisons clearly demonstrate the limits of the TSSB's enforcement powers. In contrast to the TSSB's statutes, the Attorney General's governing statutes and Texas Code of Criminal Procedure art. 2.07, both shown below, do permit that particular agency's attorneys to assist local prosecutors. *See* TEX. GOV'T CODE § 402.028; *see* TEX. CODE. CRIM. PROC. art. § 2.07.

> Attorney General may assist local prosecutors:
>
> Sec. 402.028. ASSISTANCE TO PROSECUTING ATTORNEYS. (a) At the request of a district attorney, criminal district attorney, or county attorney, the attorney general may provide assistance in the prosecution of all manner of criminal cases, including participation by an assistant attorney general as an assistant prosecutor when so appointed by the district attorney, criminal district attorney, or county attorney.

(b) A district attorney, criminal district attorney, or county attorney may appoint and deputize an assistant attorney general as assistant prosecutor to provide assistance in the prosecution of criminal cases, including the performance of any duty imposed by law on the district attorney, criminal district attorney, or county attorney.

(c) Nothing in this section shall prohibit an assistant attorney general from appointment as attorney pro tem under the provisions of Article 2.07, Code of Criminal Procedure.

Appointment of attorneys pro tem (applicable to attorneys general):

(a) Whenever an attorney for the state is disqualified to act in any case or proceeding, is absent from the county or district, or is otherwise unable to perform the duties of his office, or in any instance where there is no attorney for the state, the judge of the court in which he represents the state may appoint any competent attorney to perform the duties of the office during the absence or disqualification of the attorney for the state.
(b) Except as otherwise provided by this subsection, if the appointed attorney is also an attorney for the state, the duties of the appointed office are additional duties of his present office, and he is not entitled to additional compensation. Nothing herein shall prevent a commissioners court of a county from contracting with another commissioners court to pay expenses and reimburse compensation paid by a county to an attorney for the state who is appointed to perform additional duties.

(b-1) An attorney for the state who is not disqualified to act may request the court to permit him to recuse himself in a case for good cause and upon approval by the court is disqualified.

(c) If the appointed attorney is not an attorney for the state, he is qualified to perform the duties of the office for the period of absence or disqualification of the attorney for the state on filing an oath with the clerk of the court. He shall receive compensation in the same amount and manner as an attorney appointed to represent an indigent person.

(d) In this article, "attorney for the state" means a county attorney, a district attorney, or a criminal district attorney.

(e) In Subsections (b) and (c) of this article, "attorney for the state" includes an assistant attorney general.

(f) In Subsection (a) of this article, "competent attorney" includes an assistant attorney general.

> (g) An attorney appointed under Subsection (a) of this article to perform the duties of the office of an attorney for the state in a justice or municipal court may be paid a reasonable fee for performing those duties.

34. If the ability to be so appointed were necessarily implied, the Attorney General would need not need statutes such as Code of Criminal Procedure § 2.07 to define the agency's attorneys as "competent." By analogy, and the rules of statutory construction cited *supra*, the TSSB's attorneys cannot serve as local prosecutors unless a TSA statute, of which there are none, says they may do so.

35. As demonstrated, the TSSB has no authority, statutory or otherwise, to criminally prosecute those who violate securities laws; as a result, the TSSB's prosecutorial role in Collin County is null, and the TSSB should be ordered to refrain from acting as a local criminal prosecutor pursuing charges against McDermott in any county. This Court has no need to seek or assert jurisdiction over the Collin County District Attorney because it is sufficient for this Court to hold that the TSSB cannot prosecute McDermott for alleged securities violations in Collin County. The Collin County District Attorney cannot confer upon the TSSB any more power than the administrative agency has by statute, just as the trial judge in *Cofer* could not alter the Attorney General's statutorily defined role through his inherent powers of the court. Since the TSSB cannot consent to appointment, whatever appointment powers the district attorney does have are irrelevant because they cannot apply to the TSSB.

ii. <u>The TSSB has only investigatory powers and waived those in the Settlement Agreement.</u>

36. Though it does not have prosecutorial powers, the TSSB does have investigatory powers, and the TSSB agreed to waive its criminal investigation in the Settlement Agreement, which reads, "The parties desire to avoid further litigation, preparation and expense; to terminate all

past, present[,] and potential controversies between the parties related to RV; and to compromise and settle all the Parties' differences of any type related to RV, including but not limited to those asserted in the Pending Case." Settlement Agreement at I (9). The TSSB breached the Settlement Agreement by continuing with its criminal investigation and prosecuting McDermott (which it is not even legally authorized to do).

37. The TSSB may argue that it was required by law to turn over its criminal investigation to Collin County under Art. 581-3, but this is not so. It had the discretionary power to cease its own criminal investigation of McDermott, because Art. 581-3 reads that the TSSB is "to take such measures and to make such investigations as will prevent or detect the violation of any provisions thereof." The RV civil suit, injunction, and receivership put an end to RV's operations, and the suit allowed for full detection of any violations that may have occurred. A criminal investigation was not necessary to protect investors and retrieve their funds, and as explained *infra*, the criminal investigation and its findings were tainted because they were improperly and unconstitutionally hidden from McDermott. All of that aside, as has already been pointed out, the TSSB had agreed to end any conflict it may have had with McDermott, and continuing to pursue him for criminal allegations violates that agreement.

iii. <u>Even if TSSB attorneys can be appointed as special prosecutors under Art. 581-3, in this case, such appointment was improper because the TSSB attorneys are interested parties and cannot serve as impartial prosecutors.</u>

38. In *Young v. U.S. ex rel. Vuitton et Fils S.A.*, the United States Supreme Court establishe[d] a categorical rule against the appointment of an interested prosecutor, adherence to which requires no subtle calculations of judgment." 481 U.S. 787, 814 (1987). "Given the fundamental and pervasive effects of such an appointment, we therefore hold that harmless-error

analysis is inappropriate in reviewing the appointment of an interested prosecutor in a case such as this." *Id.*

> Between the private life of the citizen and the public glare of criminal accusation stands the prosecutor. That state official has the power to employ the full machinery of the state in scrutinizing any given individual. Even if a defendant is ultimately acquitted, forced immersion in criminal investigation and adjudication is a wrenching disruption of everyday life. For this reason, we must have assurance that those who would wield this power will be guided solely by their sense of public responsibility for the attainment of justice.

Id.

39. Since *Young*, this maxim has been applied to government agencies and their conduct. In *Carter*, the SEC had instituted a civil action and a request for injunctive relief against individual and corporate defendants. *U.S. ex rel. SEC v. Carter*, 907 F.2d 484, 485 (5th Cir. 1990). During the course of the civil suit, the SEC was appointed by the court "to serve as special prosecutor to investigate" possible violations of "the court's receivership injunctions" "and to recommend the institution of criminal contempt proceedings, if any such proceedings were appropriate." *Id.* at 485. The Fifth Circuit held that the SEC attorneys had been improperly appointed as special prosecutors because "courts should not appoint special prosecutors who have an extraneous interest in the case that may create 'the appearance of impropriety.'" *Id.* at 486 (quoting *Young v. U.S.*, 481 U.S. at 806). The court reasoned that "an attorney who represented a party's interest in an underlying civil matter might not be able impartially to discharge his or her duty as a special prosecutor, which is the 'dispassionate assessment of the propriety of criminal charges for affronts to the judiciary.'" *Id.* The Court also concluded that a special prosecutor's conduct can indicate that he is not acting in the legally required disinterested manner, such as when the special prosecutor engages in exaggerations and misrepresentations in its statements to the court. *Id.* at 487.

40. This Lawsuit is still live, and it will remain so until all of the life insurance policies held by the Receiver mature. During that time, McDermott is contractually required to cooperate with the State and the Receiver, even though he is now also being prosecuted by the TSSB. The State and the Receiver have already once attempted to argue to this Court that McDermott had breached the Settlement Agreement. *See* State and Receiver's Motion to Enforce Settlement with McDermott, of which McDermott requests the Court take judicial notice. The TSSB cannot be considered a disinterested prosecutor in the Criminal Action, as long as McDermott is subject to the Settlement Agreement with the State and the Receiver.

41. Further, as a special prosecutor, the TSSB has shown itself to be far from impartial; it requested that McDermott initially be held on a $1 million bond. **(**Despite the Receiver's statement on the front and center of his website page ("Indictments Handed Down," *available at* www.rvllcreceivership.com, last visited April 30, 2015), "the case will be prosecuted by the Collin County District Attorney's Office[,]" no one from the Collin County District Attorney's Office—the supposed lead prosecutor in the Criminal Action—was present at McDermott's bond reduction hearing on March 19, 2015. Hector De Leon's Affidavit at ¶ 10. The exaggerated and absurd nature of this request is confirmed by the fact that Judge Smith reduced the bond amount by eighty percent (80%), to a total of $200,000, at McDermott's bond reduction hearing. The TSSB's bias is also demonstrated by the fact that the indictments were not brought in Collin County until several years had passed after the effective date of McDermott's Settlement Agreement. The only logical explanation for the "Collin County District Attorney's Office" waiting years to prosecute McDermott, and the TSSB initially requesting a $1 million bond for McDermott, is that the TSSB is acting as both the lead prosecutor and the investigator in the Criminal Action in clear violation of the separation of powers doctrine. It would appear that

Collin County itself was not particularly interested in pursuing indictments, and the TSSB has been allowed to use the Collin County District Attorney's Office to continue pursuing those who should have been left in peace once they entered settlements with the State, the Receiver, and the TSSB itself.

42. Since the TSSB's attorneys cannot be appointed as special prosecutors under the TSA or case law prohibiting biased special prosecutors, the TSSB has no authority to be acting as such. As a result, this Court would not be overstepping its jurisdictional bounds in enjoining the TSSB from serving as a special prosecutor in prosecuting McDermott, because doing so is an express violation of the Settlement Agreement over which this Court holds jurisdiction.

2. Do the prior settlements in a civil matter provide any jurisdiction over subsequent criminal proceedings that involve the same issues before the court that approved the settlement and agreed order in the civil matter?

43. McDermott does not propose that this Court has jurisdiction over subsequent and legitimate criminal proceedings during which enforcement of a constitutionally sound law is being sought. *See State v. Morales*, 869 S.W.2d 941, 942 (Tex. 1994) (explaining that "a civil court has jurisdiction to declare constitutionally invalid and enjoin the enforcement of a criminal statute only when (1) there is evidence that the statute at issue is unconstitutionally applied by a rule, policy, or other noncriminal means subject to a civil court's equity powers and irreparable injury to property or personal rights is threatened, or (2) the enforcement of an unconstitutional statute threatens irreparable injury to property rights").

44. Rather, McDermott argues that (1) the TSSB's criminal prosecution is not legitimate, and (2) this Court has jurisdiction over the TSSB's compliance with the Settlement Agreement, and that such compliance, in addition to statutes and case law, requires that the TSSB abstain from prosecuting McDermott.

3. If waiver of criminal proceedings in a civil settlement is legally cognizable, what legal entity under Texas law would be required to approve such a waiver?

45. In addressing this issue, it is assumed the Court is hypothesizing that it is the TSSB who would be waiving criminal proceedings, as a person in McDermott's position cannot be understood as waiving the "right" or "ability" to engage in criminal proceedings. As presented *supra* in response to the Court's Issue 1, and as shown by analogous case law in Issue 5, *infra*, the TSSB had no authority to prosecute McDermott, so it could not waive such prosecution. The TSSB cannot "waive prosecution" because it cannot conduct prosecutions or be appointed as a local prosecutor. The TSSB cannot waive a power it does not have. But the TSSB can be enjoined from illegally using a power it does not have. By statute, the TSSB may only conduct investigations and agree to waive investigations.

4. If sufficient basis for jurisdiction is shown above, what express language in the settlement papers would show how that agreement discussed or otherwise addressed the potential for criminal proceedings?

46. The Settlement Agreement reads, "The parties desire to avoid further litigation, preparation and expense; to terminate all past, present[,] and potential controversies between the parties related to RV; and to compromise and settle all the Parties' differences of any type related to RV, including but not limited to those asserted in the Pending Case." Settlement at I (9). The Settlement Agreement also reads:

> Cooperation with Investigation by Receiver and State. McDermott will cooperate with the RV Receiver and the State in connection with their investigation of the affairs of Retirement Value, including the prosecution of any claims the Receiver or the State may bring. With regard to all cooperation requests sought by the RV Receiver and the State from McDermott, such requests shall be directed through Ben De Leon, attorney of record for McDermott, via phone and/or email in connection with their investigation of the affairs of Retirement Value, including the prosecution of any claims the Receiver of [or] the State may bring.

Id at Section II (3). This language misled McDermott into believing that no criminal investigation was pending because agreeing to this language was a waiver of his Fifth Amendment rights, and the TSSB (and the Receiver, a court-appointed individual who was complicit in the TSSB's conduct) was legally required to advise him of such waiver if a criminal case was being contemplated. Since neither the TSSB nor the Receiver warned him, their collective silence implied there was no criminal investigation. This issue and supporting case law is explored more fully *infra*.

5. To the extent not otherwise briefed, when discussing civil settlements waiving future criminal proceedings, what is the controlling case law in Texas, if any or out of state authority if there is no Texas authority on point?

47. Both cases summarized below demonstrate that when agencies do not have the statutory authority to prosecute crimes, they cannot engage in prosecutions or waive them, just as the TSSB can neither assume prosecutions nor waive such power.

a. <u>*Kalyanaram v. University of Texas System*</u>

48. In *Kalyanaram v. University of Texas System*, the petitioner attempted to have a final judgment approving a settlement agreement set aside because he claimed that the university had obtained the settlement "through fraud and duress," and because of such deception, the underlying lawsuit should be revived. No. 03-05-00642-CV 2009 WL 1423920 at *1 (Tex. App.—Austin 2009, no pet.) (mem. op.). The history of the case is slightly complicated because it involves several actions, both civil and criminal, and they resolved at different times.

> In 1998, UTD officers accused Kalyanaram of certain crimes and offered him the choice of either resigning or having the accusations referred to the Collin County District Attorney. Kalyanaram refused to resign, and UTD referred the accusations. Kalyanaram filed several civil suits against the University related to these events, including one in Travis County District Court. In 2000, Kalyanaram and the University resolved five of these suits, including the Travis County suit, in a Settlement Agreement and Mutual General Release. Accordingly, the District

> Court rendered a final judgment and order of dismissal with prejudice in the suit filed in Travis County.
>
> As Kalyanaram's civil suits continued, parallel criminal proceedings began. The Collin County District Attorney obtained an indictment of Kalyanaram in 2000 and another in 2002. Kalyanaram stood trial and was acquitted of all charges in 2002.

Id. After the acquittals, Kalyanaram sought the set-aside and to revive his civil suit because he believed the university had breached their settlement. *Id.*

49. But the court was not swayed by Kalyanaram's arguments that he was fraudulently induced into settling with the university through oral representations that the university "would 'abandon' its criminal charges if the parties settled." *Id.* at *4. The settlement had stated that it comprised the entire agreement and would not be affected by "oral representation," and Kalyanaram was given time to consult with counsel to consider the agreement. *Id.* Further, Kalyanaram had been aware two years before he entered the settlement that the university had forwarded its allegations to the district attorney. *Id.* The university could not abandon charges because they were "in the sole discretion of the District Attorney, not the University, and Kalyanaram cannot plausibly claim to have relied on any representation to the contrary." *Id.* Likewise, Kalyanaram could not rely on prior oral representations that the university "would 'cooperate' in his defense" because the university was legally required to comply with subpoenas and testify when asked to do so. *Id.* at *5. For these reasons, the court said he could not claim that he relied on oral, extrinsic representations made prior to the agreement. *Id.*

b. *State v. Peake*

50. In *State v. Peake*, a South Carolina Supreme Court case, the court concluded that the state's Department of Health and Environmental Control (DHEC) did not have the settlement authority to waive the criminal prosecution of Peake's violation of environmental laws because

only the Attorney General had the discretion to pursue or forgo criminal prosecution of such criminal violations. 579 S.E.2d 297 (S.C. 2002).

51. Peake owned a private water treatment plant and was approached by the DHEC about environmental infractions. *Id.* at 298. Peake and his attorney met with DHEC employees, and it was suggested by the DHEC that Peake pay a large penalty. *Id.* Around that same time, a DHEC employee who had spoken with Peake also "referred the case to a DHEC committee that reviews matters and determines whether to refer the violations to the Attorney General for possible criminal prosecution." *Id.* She did not mention the possibility of criminal charges to Peake. *Id.* Eventually, instead of paying a penalty, Peake entered a settlement with the DHEC wherein he deeded the treatment plant to a town. Soon afterwards, despite the settlement, he was indicted for environmental law violations. *Id.* at 299.

52. The court considered whether the DHEC can "settle criminal charges arising from alleged violations of the Act[.]" *Id.* The court recited that the Act allows for both civil penalties and criminal fines and/or imprisonment, and the court considered the following statute from the Act to be the most critical in deciding the issue:

> § 48-1-210. Duties of Attorney General and solicitors.
>
> The Attorney General shall be the legal advisor of the Department and shall upon request of the Department institute injunction proceedings or any other court action to accomplish the purpose of this chapter. In the prosecution of any criminal action by the Attorney General and in any proceeding before a grand jury in connection therewith the Attorney General may exercise all the powers and perform all the duties which the solicitor would otherwise be authorized or required to exercise or perform and in such a proceeding the solicitor shall exercise such powers and perform such duties as are requested of him by the Attorney General.

Id. at 503. The court concluded that this statute, through its first sentence, "envisions that DHEC will be responsible for the administration and prosecution of civil matters and penalties, unless it

requests the involvement of the Attorney General." *Id.* The second sentence, however, "provides unequivocally that the Attorney General, or the solicitor acting pursuant to the Attorney General's instructions, will bring any criminal charges." *Id.* To complete its analysis, the court read § 48-1-210 in combination with § 48-1-220, which states, "Prosecutions for the violation of a final determination or order shall be instituted only by the Department or as otherwise provided for in this chapter," and also looked to the state's constitution, which "vests sole discretion to prosecute criminal matters in the hands of the Attorney General." *Id.* at 300.

53. In taking these together, the court reasoned that the DHEC could not be allowed to be the "gatekeeper" of criminal prosecutions because this would violate the state's constitution. *Id.* As a result, this also meant that the DHEC did not have the authority to grant criminal immunity through settlements. *Id.*

C. Breach of Contract Issues

1. The TSSB has Breached its Contract with McDermott, and this Court Should Enforce the Contract Through Specific Performance.

54. McDermott's Settlement Agreement is "governed by contract law." *See City of Roanoke v. Town of Westlake*, 111 S.W.3d 617, 626 (2003). As consideration, McDermott paid $750,000 to the Receiver; dropped his counterclaim against RV, his third-party petition against the TSSB and Commissioner Morgan, and the McDermott Appeal; and released all signatory parties to the Settlement Agreement, including the State, the TSSB and the Receiver, from any further action. *See N. Nat. Gas Co. v. Conoco, Inc.*, 986 S.W.2d 603, 607 (Tex. 1998) (explaining that consideration is "either a benefit to the promisor or a loss or detriment to the promisee," and that "surrendering a legal right represents valid consideration"). If McDermott had not performed, as

specifically required by the Settlement Agreement, the TSSB would not have released him from all future claims and liabilities related to the RV Lawsuit.

55. Aside from the hefty payment and forbearance of his legal rights, McDermott and his attorneys cooperated with the State, the TSSB, and the Receiver in: (1) sharing over one hundred fifty pages of discovery documents with the Receiver, after the Settlement Agreement was approved by the Court; (2) meeting in person with the State and the TSSB on June 4, 2012, to candidly discuss the operations of Conestoga, the life settlement company then managed by McDermott, even though Conestoga had nothing to do with RV; (3) providing documents to the TSSB regarding Conestoga's business operations, after the June 4, 2012 meeting with the State and the TSSB; and (4) meeting with the Receiver's contingency fee counsel, John Thomas, on November 20, 2012 to discuss the affairs of RV.

56. McDermott has fully performed his contractual obligations under the Settlement Agreement, and has cooperated with the TSSB, the State, and the Receiver. Now, by seeking indictments against McDermott in a Collin County district court, the TSSB has breached its contract with McDermott, causing McDermott to suffer a variety of damages explained further *infra*. As described *supra*, and as required by the Settlement Agreement, McDermott negotiated and settled with the Receiver and the TSSB in good faith. Even though he never sold a single life settlement participation to an RV purchaser, and was not an RV officer, director, or employee, McDermott entered into the Settlement Agreement with the TSSB, Receiver, and the Settlement Class so he could move past the contentious litigation and no longer be pursued by the State for alleged wrongdoings.

57. McDermott was reasonable in believing that his $750,000 payment and further compliance with the Settlement Agreement should have satisfied the TSSB, in conformity with

the agreed-upon language. "While the word 'settle' can mean 'different things in different connections,' it has a distinct connotation in the context of a dispute. When parties agree to settle their differences, this is commonly understood as fully resolving those differences." *Gunn Infiniti, Inc. v. O'Byrne*, 996 S.W.2d 854, 860 (Tex. 1999). Indeed, the Settlement Agreement was fully executed in August 2012, more than two years ago, and the TSSB now seeks at this late date, in a rush to beat criminal statutes of limitation, to prosecute McDermott, after he was affirmatively led to believe the TSSB had fully and finally settled its grievances with him arising out of or related to RV. As a result, McDermott is pursuing the remedy of specific performance.

2. Specific Performance is the Appropriate Remedy to Address the TSSB's Breach.

58. As explained *infra*, the TSSB's criminal prosecution of McDermott has resulted in damages in the form of constitutional deprivations. Consequently, the circumstances justify the legal remedy of specific performance. McDermott is entitled to specific performance because there is no adequate remedy at law in terms of monetary compensation, as the only acceptable outcome is for the TSSB to cease harassing McDermott with legal actions. *See Sharyland Water Supply Corp. v. City of Alton*, 354 S.W.3d 407, 423 (Tex. 2011). McDermott's rightful expectation was that the TSSB would no longer pursue him in relation to RV's activities or the RV RSLIP suit, and as consideration, he paid $750,000.00 to the Receiver and gave up valuable legal rights. McDermott has performed his end of the bargain, and he has not breached the Settlement Agreement, since the Receiver still has the funds, and McDermott has not revived his suits. Nor has McDermott repudiated the Settlement Agreement. For these reasons, the equitable remedy of specific performance is appropriate. *See DiGiuseppe v. Lawler*, 269 S.W.3d 588, 593 (Tex. 2008) (reciting that "'to receive specific performance a person must show that it has substantially performed its part of the contract, and that it is able to continue performing its part

of the agreement" and that a "plaintiff's burden of proving readiness, willingness and ability is a continuing one that extends to all times relevant to the contract and thereafter'") .

59. The particular nature of McDermott's request for specific performance is presented in the alternative because it is unclear what, if any, legal relationship Dale Barron, an enforcement attorney in the TSSB's Dallas Office, has with the Collin County District Attorney. Depending on the nature of the relationship, McDermott requests that this Court either (1) enjoin the TSSB and its officers, agents, servants, employees and attorneys (including Dale Barron, Tina Lawrence, Matthew Leslie, and Greta Cantwell, the "special prosecutors" in the Criminal Action), and upon those persons in active concert or participation with them who receive actual notice of the injunction by personal service or otherwise, from criminally prosecuting McDermott in Collin County, or any other county, or (2) enjoin the TSSB, the Receiver, and the Settlement Class from sharing with any third party any evidence collected for the purpose of the RV civil litigation, before and after May 6, 2012, the effective date of the Settlement Agreement.

60. The reason that Barron's relationship with Collin County, and the legality of such, is unclear is that, as explained *supra*, the criminal prosecution at issue is governed by Art. 581-3 . The statute reads that the TSSB will "make such *investigations* as will prevent or detect the violation of any provision thereof." *Id.* (emphasis added). The statute specifically authorizes the TSSB to *investigate* violations of the TSA. *Id.* The statute *does not* authorize the TSSB to criminally prosecute violations of the TSA. *Id*. That role is to be filled by a local prosecutor or the Attorney General.

61. The TSSB is distinguished from prosecutorial authorities by being directed to turn over investigative findings to those with the legal authority to conduct prosecutions, much in the same manner as a police force would be. *See* TEX. CODE CRIM. PROC. art. 2.13 (directing that officers

have a duty to "preserve the peace," "interfere without warrant to prevent or suppress crime," notify a magistrate upon belief of a penal law violation, and to perform warrantless arrests in proper cases to take offenders before a court for trial).

62. Art. 581-3 concludes with, "In the event of the neglect or refusal of such [District or County] 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. art. § 581-3 (emphasis added). This final sentence reaffirms that the TSSB does not have the statutory authority to appear before grand juries or courts to prosecute criminal securities violations or other crimes; if a local prosecutor abstains from prosecution, the TSSB's sole recourse is to submit its evidence to the Attorney General for prosecution. *Id*. The statutes governing the Attorney General specifically state that assistant attorneys general can serve as attorneys pro tem for local prosecutors. TEX. GOV'T CODE § 402.028; TEX. CODE CRIM. PROC. art. § 2.07. The lack of any such authorization for TSSB attorneys, and the fact that the TSSB must turn over investigations to the Attorney General in certain instances, is a clear indicator that the Attorney General is the state agency that may locally prosecute securities violations, not the TSSB.

63. The TSSB may argue that they are acting as "special prosecutors" in Collin County. First, this is irrelevant, since they are not authorized by statute to operate as such. Further, the TSSB's attorneys are not even correctly fulfilling their dubious roles as special prosecutors. When a district attorney is not disqualified and requests a special prosecutor's appointment, the district attorney must retain management and control of the case. (*Davis v. State*, 840 S.W.2d 480, 487–

88 (Tex. App.—Tyler 1992, writ ref'd). Collin County has not done so, and McDermott's counsel has received no indication that anyone with the Collin County District Attorney's office has true supervisory authority over Dale Barron's conduct. Affidavit of Hector De Leon at ¶ 10. Despite Art. 581-3, and case law supporting a strict reading of that statute, TSSB attorney and employee Dale Barron presented the grand jury charges while utilizing TSSB employee Letha Sparks as the sole witness. Exhibit "3". In contravention of case law describing the proper roles of special prosecutors and their relationships with local prosecutors, no Collin County district attorneys were present during the grand jury proceedings. *See Davis*, 840 S.W.2d at 487–88. Likewise, in contravention of the statute granting the TSSB only investigatory authority, Dale Barron was the only prosecuting attorney present when McDermott's criminal defense counsel appeared before Judge Smith for a bond reduction hearing. Affidavit of Hector De Leon at ¶ 10.

64. Additionally, the original bond amount in itself indicates that the TSSB is completely directing the prosecution because that bond amount was $1 million. It is hardly plausible that the Collin County District Attorney's Office took *their* time and waited years to prosecute McDermott (and did so using the exact language and TSSB employees from the RV suit), yet then also felt McDermott was such a flight risk that he needed to be hit with a $1 million bond.

65. The TSSB cannot sincerely argue that it is authorized by law to serve as special prosecutors, and its behavior cannot be properly characterized as that of special prosecutors acting in accordance with the law. Barron and other TSSB attorneys are not Collin County District Attorneys, and they are not assistant attorneys general. They are prevented both by statute and case law from behaving as such, and this Court is within its legal rights to enjoin, as a means of upholding the Settlement Agreement through specific performance, the TSSB from continuing with McDermott's prosecution.

a. As Specific Performance, the State Should be Enjoined from Providing Evidence to the Collin County District Attorney or TSSB "Special Prosecutors" for McDermott's Prosecution, Because he was Deprived of his Constitutional Rights, and This Injury Cannot be Quantified.

66. In addition to the reasons given *supra* , this Court may enforce the Settlement Agreement through specific performance because the Settlement Agreement "contains the essential terms of a contract, expressed with such certainty and clarity that it may be understood without recourse to parol evidence," and specific performance is "used as a substitute for monetary damages when such damages would not be adequate. *See Paciwest, Inc. v. Warner Alan Prop., LLC*, 266 S.W.3d 559, 571 (Tex. App.—Fort Worth 2008, pet. denied). Since the State, through the TSSB, has sought to criminally prosecute McDermott, monetary damages could not possibly adequately compensate him because the State deprived him of his constitutional rights years ago and continues to do so.

67. In cases "involving claims of constitutional deprivation," the scope of the applicable remedy, "as in any equity case," depends on "the nature of the violation." *Cooper v. Nix*, 496 F.2d.1285, 1287 (5th Cir. 1974) (citing *Swann v. Charlotte-Mecklenburg Bd. Of Ed.*, 4012 U.S. 1, 16 (1971)); *see Radcliffe v. State*, 126 S.W.3d 534, 536 (Tex. App.—Houston 14th 2003, no pet.) (applying to a Sixth Amendment deprivation "the general rule that remedies should be tailored to the injury suffered from the constitutional violation" (citing *U.S. v. Morisson*, 449 U.S. 361, 364 (1981))).

68. As shown *infra* , Supreme Court and other case law considers the TSSB's and the Receiver's conduct improper, and the TSSB and its employees should not be allowed to pursue a tainted criminal prosecution against McDermott when the prosecution was made possible through unconstitutional and deceptive governmental conduct that deprived McDermott of his

constitutional rights. *See* TEX. CODE CRIM. PROC. art. 38.23(a) ("No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case."); *see U.S. v. Handley*, 763 F.2d 1401, 1405 (11th Cir. 1985) (reciting that courts are authorized to suppress discovery when improper conduct in the collection of such discovery can "be imputed to the government").

69. The TSSB's conduct was unconstitutional because the TSSB intentionally did not disclose to McDermott that he was the target of an ongoing criminal investigation and hid this information so that it could proceed with a criminal case utilizing a biased special prosecutor who exceeds statutory authority.[3] The Receiver was complicit in the TSSB's conduct, as he knew the TSSB was pursuing an ongoing criminal investigation against McDermott, and likewise did not disclose this fact to McDermott or his counsel. As explained *infra*, the TSSB and the Receiver's conduct was deceptive because they actively misled McDermott into believing that he was not considered as having engaged in intentionally wrongful conduct. Finally, the TSSB cannot defend its investigations as proper because it never maintained separate, parallel investigations into McDermott's alleged involvement with RV. The TSSB's breach of the Settlement Agreement should be corrected by the equitable remedy of specific performance because, "An analysis of the extent of a constitutional deprivation is not an exact science capable of quantification; rather, it is qualitative in nature." *Ryland v. Shapiro*, 708 F.2d 967, 974 (5th Cir. 1983); *see Swann*, 402 U.S. at 15 (explaining that when contemplating the appropriate

[3] Both civil and criminal investigations are all handled by the TSSB Enforcement Division. There is no delineation between divisions or personnel to alert targets when an investigation is civil or criminal. This is another factor that led McDermott and his attorneys to believe that the Settlement Agreement prevented the TSSB from later pursuing criminal charges against McDermott.

equitable remedy to correct a constitutional deprivation, "the task is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution").

i. The State's Hiding its Criminal Investigation from McDermott was Unconstitutional.

70. In *United States v. Kordel*, the officers of a company who had been subject to both civil and criminal actions brought by the United States Attorney appealed their convictions, arguing "that the use of civil discovery to obtain information useful to the government in [a] criminal case violated the fifth amendment." *Brock v. Tolkow*, 109 F.R.D. 116, 118 (E.D.N.Y. 1985) (citing *United States v. Kordel*, 397 U.S. 1, 8 (1985)). Significantly, "[b]efore the company had answered interrogatories in connection with that suit, *the FDA notified the company that it was contemplating a criminal proceeding against it for the same violations*." *Id.* (emphasis added). The Supreme Court found in favor of the government, and in negative response to the officers' arguments as to unfairness, the Court replied:

> We do not deal here with a case where the Government has brought a civil action solely to obtain evidence for its criminal prosecution *or has failed to advise the defendant in its civil proceeding that it contemplates his criminal prosecution*; nor with a case where the defendant is without counsel or reasonably fears prejudice from adverse pretrial publicity or other unfair injury; nor with any other special circumstances that might suggest the unconstitutionality or even the impropriety of this criminal prosecution.

Kordel, 397 U.S. at 11–12 (emphasis added). The RV litigation stretched on for years. Not once during that length of time did the TSSB or the Receiver ever inform McDermott or his counsel that the government "contempla[ted] his criminal prosecution." Affidavit of Hector De Leon at ¶¶ 4, 5, 7, 9; Affidavit of Ben De Leon at ¶¶ 13, 14, 23, 24, 29, 31. Courts characterize such government behavior as a display of "bad motives" that imply "unconstitutionality or even [] impropriety" on the part of government. *Brock*, 109 F.R.D. 116 at 118–19.

71. In *U.S. v. Scrushy*, 366 F.Supp.2d 1134 (N.D. Ala. 2005), the court determined that the Securities and Exchange Commission and the United States Attorney's Office had improperly conflated their civil and criminal investigations into Scrushy's financial activities, thus "depart[ing] from the proper administration of criminal justice." *Id.* at 1140. The impropriety materialized when the U.S. Attorney's Office began influencing the SEC's civil investigation by suggesting a deposition location with the intention of securing a favorable venue for perjury charges and influencing the kinds of questions the SEC asked of Scrushy during his deposition. *Id.* at 1139. The court excluded the deposition testimony as a result of the SEC's and USDOJ's impropriety. *Id.* at 1140.

72. Echoing the sensibilities of *Kordel*, the government's activities were found to be unacceptable because Scrushy was *never informed that he was the target of a criminal investigation*. *Id.* at 1139. The court cited *U.S. v Parrott*, 248 F.Supp. 196, 200 (D.D.C. 1965), in stating, "[T]he danger of prejudice flowing from testimony out of a defendant's mouth at a civil proceeding is even more acute when he is unaware of the pending criminal charge," which is the situation in which McDermott now finds himself. The court continued in saying:

> When a defendant knows that he has been charged with a crime, or that a criminal investigation has targeted him, he can take actions to prevent the providing of information in an administrative or civil proceeding that could later be used against him in the criminal case. *When a defendant does not know about the criminal investigation, the danger of prejudice increases*.

Scrushy, 366 F.Supp.2d at 1139 (paraphrasing *Parrott*, 128 F.Supp. at 200) (emphasis added).

73. As in the cited cases, neither McDermott nor his counsel were ever informed that the TSSB was pursuing criminal charges against McDermott. Affidavit of Hector De Leon at ¶¶ 4, 5, 7, 9; Affidavit of Ben De Leon at ¶¶ 13, 14, 23, 24, 29, 31. Because McDermott and his counsel were intentionally kept in the dark by the TSSB and the Receiver, they communicated with the

TSSB and the Receiver openly and in good faith before, during, and after the Settlement Agreement was entered. Affidavit of Hector De Leon at ¶¶ 4, 6; Affidavit of Ben De Leon at ¶¶ 13, 14, 23, 25, 26, 27. For example, McDermott and his attorneys provided the Receiver almost two thousand (2,000) pages of discovery on April 30, 2012, during the RV suit. Affidavit of Ben De Leon at ¶ 11. The Settlement Agreement confirms as much: "The evidence reflects that the parties shared substantial documents and data." Order at 6 (C).

74. Likewise, after the Settlement Agreement was entered, on November 20, 2012, McDermott, Ben De Leon, and Hector De Leon met in person with John Thomas of George, Brothers, Kincaid, & Horton, LLP, the attorney representing the Receiver in his contingency fee matters. During this meeting, McDermott spoke openly and honestly about the affairs of Conestoga Settlement Services, LLC, and did not decline to answer questions. Affidavit of Hector De Leon at ¶ 5; Affidavit of Ben De Leon at ¶ 14. In doing so, McDermott and his counsel were complying with the Settlement Agreement's requirement at Section II (3), that McDermott cooperate fully with the State and the Receiver. Once the Settlement Agreement was signed and approved by the Court, McDermott was obligated to answer questions and provide documents to the TSSB and the Receiver, *yet he signed the Settlement Agreement, waiving his Fifth Amendment rights, with no knowledge that he was being targeted for criminal prosecution*.

ii. The TSSB and the Receiver Intentionally Misled McDermott into Believing He was not Subject to Criminal Investigation.

75. The TSSB and the Receiver may argue that they were not required to disclose the TSSB's ongoing criminal investigation to McDermott and his counsel. But the TSSB and the Receiver not only hid the TSSB's criminal investigation of McDermott from him and his attorneys; they intentionally misled him into believing he would not be pursued for criminal wrongdoing. The

Settlement Agreement's language agreed to dispose of all controversies that could arise between the State, the Receiver, the TSSB, and McDermott. It also covertly required that McDermott cooperate fully with the State and the Receiver, in contravention of his constitutional rights.

76. Similarly, on page 6 of the Settlement Class Final Order, signed by this Court on February 21, 2013, the Order reads, "[I]t would ultimately be up to the fact-finder to determine whether Defendant acted *negligently*." (emphasis added). The TSSB and the Receiver agreed to and never disputed or corrected this language, thus making an affirmative declaration that it was agreeing that McDermott would be liable, at most, for negligent, rather than intentional conduct. Instead of correcting the language of the Order, the TSSB and Receiver remained mute and avoided alerting McDermott this language did not reflect their perception of the Settlement Agreement or McDermott's full liabilities. The TSSB now attempts to contradict the language in the Settlement Agreement and the Class Final Order by pursuing McDermott for intentional, criminal conduct—each indictment uses the language "knowingly and intentionally"—despite its being bound by the Settlement Agreement and this Court's Order.

77. As demonstrated by the affidavits of and Hector De Leon and Benjamin S. De Leon, attached hereto as Exhibits "1" and "2," respectively, the Receiver and his counsel, Mike Napoli, were complicit in the TSSB's ongoing investigation against McDermott, and failed to inform McDermott or his attorneys of such investigation until March 17, 2015, nearly three (3) years after the Effective Date of the Settlement Agreement.

78. In the Settlement Agreement, the Receiver agreed that part of McDermott's expectancy would be indemnity and McDermott's being held harmless from any claims brought by, through, or under the Receiver (bound by monetary limitations). *Id.* at II (5). The Criminal Action is a claim brought "by, through, or under the Receiver[.]" *Id*. at II (5). McDermott asks this Court to

enforce the Settlement Agreement and order the Receiver to pay, as indemnity, for the costs McDermott has incurred in enforcing this contract and defending against the Criminal Action, including McDermott's attorney's fees incurred since at least March 9, 2015, the date McDermott's attorneys were able to verify that he had indeed been indicted in Collin County, Texas. Affidavit of Ben De Leon at ¶¶ 29, 30. Alternatively, the Receiver has breached the Settlement Agreement, by affirmatively misleading McDermott about the TSSB's ongoing investigation and continuing to elicit information from him. *See id*. at Sections II (3) and (21). In such case, he should be ordered to pay expectancy damages. "Expectancy damages, similar to benefit-of-the-bargain recoveries, award damages for the reasonably expected value of the contract." *Sharifi v. Steen Automotive*, LLC, 370 S.W.3d 126, 148 (Tex. App.—Dallas 2012, no pet.). McDermott's expectation was that the TSSB, the State, and the Receiver would leave him in peace, that the RV matter was fully concluded, and that he would no longer have to expend money in defending against the TSSB's allegations.

iii. In Bad Faith and in Contravention of the Law, the TSSB Improperly Tricked McDermott into Waiving His Constitutional Rights Against Self-Incrimination and Should not Benefit from This Conduct.

79. As cited previously, Section II (3) of the Settlement Agreement requires that McDermott and his counsel cooperate with the investigation by the Receiver and the State, making McDermott vulnerable to the consequences of self-incriminating statements. This language was agreed upon after much discussion and mediation between the parties, yet the TSSB never informed McDermott that this requirement was a waiver of his substantial fifth amendment constitutional interests in protecting himself against self-incrimination, thus putting his criminal defense at risk. Given the case law and its strong similarities to McDermott's situation, the TSSB

cannot be heard to say that McDermott lacked such rights or that they were minimal, thus resulting in negligible harm.

80. In *S.E.C. v. Alexander*, a federal district court stayed the civil proceedings arising from a civil complaint filed by the SEC against parties who had already been indicted for multiple counts of conspiracy to commit mail and wire fraud. No. 10-CV-04535-LHK 2010 WL 5388000 at *1 (N.D. Ca. 2010). The court acknowledged that parallel civil and criminal proceedings are permissible if there is an "absence of substantial prejudice to the rights of the parties involved." Id. at *2 (citing *SEC v. Dresser Indus., Inc.*, 628 F.2d 1368, 1374 (D.C. Cir. 1980)). But courts can, within their discretion, stay civil proceedings in the interests of justice and are to evaluate the "particular circumstances and competing interests involved in the case; the first, significant factor to consider is "the extent to which the defendant's fifth amendment rights are implicated." *Id.*

81. The fifth amendment factor is the most significant because "other than cases involving bad faith or malice on the part of the government, 'the strongest case for deferring civil proceedings until after completion of criminal proceedings is where a party under indictment for a serious offense is required to defend a civil or administrative action involving the same matter." *Id.* at *3 (citing *Dresser*, 628 F.2d at 1375–76)).

> In such cases, allowing the civil action to proceed may undermine the defendant's Fifth Amendment privilege, expand criminal discovery beyond the limits of Federal Rule of Criminal Procedure 16(b), expose the defense strategy to the prosecution before the criminal trial, or cause other prejudice. Accordingly, where the civil proceeding wholly or substantially overlaps with the criminal proceeding, a court may be justified in staying the civil case, deferring civil discovery, or taking other protective measures.
>
> In this case, Swanson's Fifth Amendment concerns are substantial. The individual defendants in the civil proceeding have been indicted on serious criminal charges, and criminal proceedings have commenced in a related case, United States v.

> Alexander, et al., No. 10–cr–00730, in this District. Moreover, the SEC's allegations in its civil complaint overlap significantly, if not entirely, with the criminal charges. Both cases rest upon claims that Defendants, including Swanson, engaged in a scheme to defraud investors in APS Funding's GCF Investment and Greenlight Funds, made materially false representations, and misappropriated investor assets for personal benefit.
>
> . . .
>
> The factual allegations in the two cases are substantially the same, and the SEC concedes that it expects Swanson to assert his Fifth Amendment privilege in response to any discovery. Thus, Swanson's Fifth Amendment concerns are significant, and this factor of the analysis strongly supports a stay.
>
> . . .
>
> [Swanson's] Fifth Amendment rights appear to be implicated by nearly every aspect of the civil proceeding. If the civil case proceeds, he will be forced to choose between preserving his privilege against self-incrimination, thereby subjecting himself to a one-sided discovery process and adverse inferences drawn from his invocation of the Fifth Amendment, and waiving the privilege in order to mount a vigorous defense in the civil case. In addition, even if he invokes the privilege, the discovery he seeks from third-party witnesses may expose the basis of his criminal defense. Weighing these interests and burdens, the Court concludes that delaying the civil case will not seriously injure the public interest and would alleviate a severe burden on Swanson's rights and ability to defend himself in both proceedings. Accordingly, the Court finds that a stay is warranted.

Id. at *3, *7 (internal citation omitted).

82. McDermott unknowingly waived this right while the TSSB encouraged him to do so, knowing the waiver could only benefit their ongoing criminal investigation and knowing that McDermott was unaware that he was losing his rights against self-incrimination. Given the applicable legal standards justifying stays of civil proceedings, and Supreme Court precedent, the TSSB should have known better than to mislead McDermott into waiving his constitutional rights without informing him of their intentions, and the agency cannot now cynically claim that McDermott knew what was happening to him or that it resulted in no harm. "[C]ourts indulge every reasonable presumption against waiver of fundamental constitutional rights" and "do not

presume acquiescence in the loss of fundamental rights." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

> A waiver is ordinarily an intentional relinquishment of abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of right [] must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.

Id.

> [F]or a waiver to be effective it must be clearly established that there was an intentional relinquishment or abandonment of a known right or privilege. When determining whether there has been an intelligent waiver of the right to confront and cross-examine witnesses, we examine the specific facts and circumstances surrounding the waiver, including the background, experience, and conduct of the accused.

Stringer v. State, 241 S.W.3d 52, 56 (Tex. Crim. App. 2007) (internal quotations omitted).

83. The TSSB, through the guises of its civil investigation, causes of action brought by the State (at the insistence of the TSSB), and the Settlement Agreement, accomplished what it could not have accomplished had it told McDermott it was pursuing a criminal investigation—convincing McDermott to knowingly waive his constitutional rights against self-incrimination and to be fully compliant with the TSSB's investigation. Of course, McDermott's agreeing to such waiver would have been infinitely more unlikely if he had been told that he would be improperly prosecuted by a biased TSSB employee. This conduct not only ignored the standards of legal propriety set out in *Kordel*, but also flouted the TSSB's promise to negotiate with McDermott in good faith. *See Kordel*, 397 U.S. at 8 (providing examples of governmental impropriety, including failure to advise a civil defendant of contemplated criminal prosecution, creating "unfair injury," and "other special circumstances that might suggest the unconstitutionality or even the impropriety of the criminal prosecution").

84. Because McDermott was misled by the Memorandum of Understanding, entered May 6, 2012 by John Thomas and Ben De Leon, into believing the TSSB would behave openly, fairly, and honestly, he justifiably believed that the TSSB would follow the law while communicating with him. But it did not. Deceiving a person into waiving their fundamental constitutional rights while not even informing them that such rights are threatened by a criminal investigation, then prosecuting that person without authority while motivated by bias, blatantly contradicts statutory and case law. *See U.S. v. Kordel*, 397 U.S. 1, 11–12 (1970) (providing examples of governmental impropriety, including failure to advise a civil defendant of contemplated criminal prosecution, creating "unfair injury," and "other special circumstances that might suggest the unconstitutionality or even the impropriety of the criminal prosecution"). The TSSB affirmatively misled McDermott into believing he was not the target of a criminal investigation because legally, the TSSB was required to disclose that he was waiving his fifth amendment rights through the Settlement Agreement's contractual cooperation provision.

85. As explained *infra*, no matter what the TSSB may say about its ability to conduct parallel investigations, it must not affirmatively mislead its targets of investigation, *See U.S. v. Stringer*, 535 F.3d. 929, 940 (9th Cir. 2008), improperly commingle civil and criminal investigations, *see U.S. v. Scrushy*, 366 F.Supp.2d 1134, 1140 (N.D. Ala. 2005), or serve as a biased special prosecutor, see *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 814 (1987). Through its hiding the criminal investigation, tricking McDermott into waiving his fifth amendment rights, and then inappropriately adopting the role of interested special prosecutor, the TSSB has demonstrated the kind of impropriety and unfair injury the United States Supreme Court spoke against in *Kordel* and materially breached the Settlement Agreement in the process. *See Kordel*, 397 U.S. at 8 (providing examples of governmental impropriety, including failure to advise a

civil defendant of contemplated criminal prosecution, creating "unfair injury," and "other special circumstances that might suggest the unconstitutionality or even the impropriety of the criminal prosecution"). The *Kordel* court opined that such impropriety could justify the reversal of a conviction; in McDermott's case, he seeks an injunction against the TSSB's employees acting as special prosecutors and sharing evidence with prosecutors that had been gleaned from McDermott.

iv. The Civil and Criminal Investigations of McDermott Were not Handled in a Legally Acceptable Parallel Manner.

86. The TSSB will also likely argue that it is not improper for it to pursue both civil and criminal actions against the same person and will probably characterize its investigations as parallel and acceptable by law. For several reasons, such argument is an incomplete reflection of the law and the bounds within which agencies and collaborating prosecutors must act, to say nothing of the fact that even parallel investigations should not intentionally deprive a defendant of their rights. "[A] prosecut[or] may use evidence acquired in a civil action in a subsequent criminal proceeding unless the defendant demonstrates that such use would violate his constitutional rights or depart from the proper administration of criminal justice." *Scrushy*, 366 F.Supp.2d at 1138 (citing *U.S. v. Teyibo*, 877 F.Supp. 846 (S.D.N.Y. 1995) aff'd 101 F.3d 681, 1996 WL 167868 (2d Cir. 1996)) (emphasis in original). As demonstrated *supra*, the TSSB did indeed violate McDermott's constitutional rights and improperly administered justice.

87. "To be parallel, by definition, the separate investigations should be like the side-by-side train tracks that never intersect." *Id.* at 1139. Yet in McDermott's case, several TSSB officials and employees directed or took part in both the civil and criminal cases at issue. Letha Sparks, a TSSB financial analyst, worked on the RV case and served as the TSSB's sole witness before the

Collin County grand jury. Additionally, the language of the indictments is taken directly from the RV civil pleadings in which McDermott is mentioned; the evidence to supposedly support the RV civil pleading allegations (which McDermott denied and continues to deny) is presumably the same evidence the TSSB used to secure the indictments in the Criminal Action (which McDermott is vigorously fighting); Dale Barron is part of the TSSB staff which pursued the RV civil action; and Commissioner Morgan, the party who authorized the RV civil action, is now the TSSB Commissioner, when the indictments were brought in Collin County. Finally, the RV civil case and the criminal charges against McDermott "overlap completely" and share "identical issues.

88. Taken together, all these factors indicate that the TSSB commingled its civil and criminal investigations, and the TSSB should not be able to use evidence procured from McDermott in its criminal case. *Scrushy*, 366 F.Supp.2d at 1140 (finding that parallel civil and criminal securities investigations became "inescapably intertwined" and that testimony was improperly procured and should be excluded because the issues in the two cases were identical and completely overlapped, and Seiden, a Senior Accountant with the SEC Department of Enforcement, followed the instructions of the U.S. Attorney in taking depositions of defendants in the civil case).

89. To illustrate further, Texas criminal case law provides guidance as to the indicators of improper commingling between civil and criminal investigations and when parallel investigations are considered to have converged, thus possibly requiring the suppression of evidence. "When a state-agency employee is working on a path parallel to, yet separate from, the police, *Miranda* warnings are not required." *Wilkerson v. State*, 173 S.W.3d 521, 529 (Tex. Crim. 2005). But "if the once-parallel paths of [an agency] and the police converge, and police

and state agent are investigating a criminal offense in tandem, *Miranda* warnings and compliance with [Texas Code of Criminal Procedure] article 38.22 may be necessary." *Id*. "At this point, a[n] [agency] worker[4] may be viewed as an agent of the police." *Id*. Even a "CPS caseworker, teacher, preacher, probation officer, or mere family friend," if they are "working for or on behalf of the police by interrogating a person in custody, that agent is bound by all constitutional and statutory confession rules, including *Miranda* and Article 38.22." *Id*. at 529–30.

90. When determining whether a civil and criminal investigation have converged, "courts must examine the entire record" and closely evaluate "the actions and perceptions of the parties involved: the police, the [agency employee] (or other potential agent of the police), and the defendant himself." *Id*. at 530. As to these, the *Wilkerson* court provides several examples of relevant factors and concludes with a summary:

> At bottom, the inquiry is: Was this custodial interview conducted (explicitly or implicitly) on behalf of the police for the primary purpose of gathering evidence or statements to be used in a later criminal proceeding against the interviewee? Put another way, is the interviewer acting as an "instrumentality" or "conduit" for the police or prosecution? Most simply: is the interviewer "in cahoots" with the police?

Id.

91. The TSSB may argue this case law and its attendant standards are not relevant because this Lawsuit was not a criminal matter, the TSSB are not police, and McDermott was not questioned during physical custody. Such conclusions would be incorrect. First, the TSSB, according to Art. 581-3, is an executive agency with an investigative function; the agency can submit its investigations to district or county attorneys and the attorney general, the same as law enforcement agencies, and these referrals can lead to prosecutors bringing criminal charges.

[4] In *Wilkerson v. State*, the agency employee was a Child Protective Services case-worker.

92. Second, as shown by *Wilkerson*, a person does not have to be a police officer to present a threat to a person's constitutional rights. *Id*. What is required is that the person conducting the custodial interview is acting on behalf of law enforcement agencies to assist them in their investigation. *See id*. In this case, **this distinction is moot because the TSSB and its agents were the ones conducting both civil and criminal investigations at the same time**. There is not even a question of whether a non-employee can still be considered an investigative "agent" of the TSSB.

93. Third, while McDermott was never held in physical custody by the TSSB, he was contractually required to share information with the Receiver and the TSSB after the Settlement Agreement was reached and by the civil rules of discovery. He was also never informed that he was at risk of losing his constitutional liberties because of a criminal investigation. Because of the Receiver's and the TSSB's choosing to mislead McDermott, he was legally bound to cooperate with them, against his own self-interests and was not given the information he needed to invoke his constitutional rights to protect his interests. While he may not have been in physical custody, he was in constructive custody and not legally free to refuse the Receiver's or the TSSB's questions or requests for documentation.

> As used in our *Miranda* case law, "custody" is a term of art that specifies circumstances that are thought generally to present a serious danger of coercion. In determining whether a person is in custody in this sense, the initial step is to ascertain whether, in light of "the objective circumstances of the interrogation," Stansbury v. California, 511 U.S. 318, 322–323, 325, 114 S.Ct. 1526, 128 L.Ed.2d 293 (1994) (per curiam), a "reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave."

Howes v. Fields, 132 S.Ct. 1181, 1189 (2012).

94. Thus, not only did the Receiver and the TSSB knowingly hide from McDermott that he was the subject of criminal investigations and pending prosecutions, they also induced him into

agreeing to further endanger his constitutional rights against self-incrimination by contractually requiring that he and his attorneys continue assisting the TSSB and the Receiver if so asked. *See Scrushy*, 366 F.Supp.2d at1139 (explaining that a person is at risk of heightened prejudice during a civil investigation when they cooperate while lacking knowledge that a criminal investigation is proceeding); Settlement Agreement at Section II(3) and (21). **It was not until a phone conversation on March 17, 2015 with the Receiver and the Receiver's attorney of record, Mike Napoli, *after* the indictments were issued, that Hector De Leon and Ben De Leon learned for the first time that the TSSB was pursuing criminal charges against McDermott at least as early as the time the Settlement Agreement was being negotiated**. Affidavit of Hector De Leon at ¶¶ 7–9; Affidavit of Ben De Leon at ¶¶ 29–31.

III. CONCLUSION

95. For all the reasons shown, this Court should permanently enjoin the TSSB, its officers, agents, servants, employees, and attorneys (including Dale Barron, Tina Lawrence, Matthew Leslie and Greta Cantwell, the supposed "special prosectors" in the Criminal Action), and upon those persons in active concert or participation with them who receive actual notice of the injunction by personal service or otherwise, from continuing the criminal prosecution and investigation of McDermott. The Receiver and the TSSB affirmatively misled McDermott and his attorneys about the nature of the TSSB's investigation. Had McDermott known he was the target of an ongoing criminal investigation by the TSSB, he would have invoked his constitutional rights during the civil action. The TSSB was a party to the Settlement Agreement and deprived McDermott of his constitutional rights; the only adequate remedy is to prevent them from further prosecuting McDermott. In the alternative, should this court find that that the TSSB has the legal authority to prosecute McDermott in the Criminal Action (or any other

criminal proceedings), the TSSB, the Receiver, and the Settlement Class should be enjoined from sharing with the TSSB and the Collin County District Attorney any of the evidence the TSSB secured from McDermott prior to and after he signed the Settlement Agreement.

96. The Receiver hid the TSSB's investigation of McDermott from McDermott and his attorneys, even though he and his attorney knew about it while the Settlement Agreement was being negotiated. McDermott has produced over 2,000 pages of discovery in this Lawsuit, and has fully cooperated with the State and the Receiver under the Settlement Agreement. The Receiver's complicity in the TSSB's investigation should not be excused by this Court. The Receiver should indemnify McDermott for the costs he has incurred in enforcing this contract and defending against the Criminal Action in this Court and Collin County, including McDermott's attorney's fees. Alternatively, the Court should enforce the Settlement Agreement and order that the Receiver pay, as expectancy damages, McDermott's costs and attorney's fees incurred as of no earlier than March 9, 2015, the date McDermott's attorneys were able to verify he had indeed been indicted in the Criminal Action.

PRAYER

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

1. The Court hold an oral hearing on McDermott's Motion to Enforce Settlement Agreement, Seek Indemnification, and Enjoin ("the Motion"), and thereafter (i) summarily grant McDermott's Motion as to the Receiver, ordering the Receiver to indemnify McDermott under the Settlement Agreement, or, as expectancy damages, pay McDermott's court costs and attorney's fees incurred in this matter; and (ii) conduct an evidentiary hearing and subsequently enjoin the TSSB from further prosecuting McDermott.

2. In the alternative, should the Court summarily decide, without first even holding an oral hearing, that the TSSB may continue to prosecute McDermott in the Criminal Action, then the State, the TSSB , the Receiver and the Settlement Class should be enjoined from sharing with (i) "special prosecutors" Dale Barron, Tina Lawrence, Matthew Leslie, Greta Cantwell and (ii) the Collin County District Attorney's Office any of the evidence the Receiver and/or TSSB secured from McDermott prior to and after May 6, 2012, the effective date of the Settlement Agreement.

3. McDermott further prays for any other relief to which he's justly entitled at law or in equity, including the protection of his constitutional rights.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of May, 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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