



*Partners v. Arnold*, No. 14–0122, 14–0126, 2015 WL 2148767 (Tex. May 8, 2015), on McDermott’s arguments and authorities in his Motion and Brief in Support.

2. By way of preliminary statement, the *Life Partners* case addresses whether or not Life Partners’ product is a security. The Supreme Court held that Life Partners’ product is an “investment contract” and thus a “security” under the Texas Securities Act (“TSA”). *Life Partners*, 2015 WL 2148767 at \*1. Additionally, the Court declined to limit its holding to prospective application as to Life Partners. *Id.* at \*20. The holding only applied to Life Partners’ product. *See id.* at \*1 (“We hold that the agreements *at issue* are investment contracts . . .”) (emphasis added); \*17 (“Applying this definition *to Life Partners’ life settlement agreements*, we conclude . . . they are investment contracts, and thus securities, under the [TSA].”) (emphasis added); \*20 (noting that retroactive application of the Court’s holding “impose[s] no inequities *on Life Partners*”) (emphasis added).<sup>1</sup>

3. McDermott gave up the right to pursue his appeal (the “McDermott Appeal”) of the Court’s Order of December 7, 2011, concluding that the RV product was a security, based upon his execution of the Settlement Agreement, effective as of May 6, 2012. Had McDermott been advised by the TSSB and the Receiver, who was acting in complicity with the TSSB, that the TSSB was pursuing a criminal investigation against him, he would *not* have dismissed the McDermott Appeal with prejudice.

4. If anything, the underlying procedural history of the *Life Partners* decision supports McDermott’s arguments and authorities in his Motion and Brief in Support: On August 16, 2012, the State, at the request of TSSB Commissioner John Morgan, brought suit against Life Partners

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<sup>1</sup> McDermott is aware that the State and the Receiver will likely read the *Life Partners* decision differently, by claiming that the Texas Supreme Court’s holding applies to all life settlement agreements, both prospectively and retroactively. That being said, the *Life Partners* decision has no effect whatsoever on the arguments and authorities that McDermott raised in his Motion and Brief in Support, *i.e.*, it is a red herring that is not relevant to the issues before the Court.

in Cause No. D-1-GV-12-001128; Hon. Stephen Yelenosky, 345<sup>th</sup> Judicial District Court of Travis County, Texas, Judge Presiding. *See* Plaintiff’s Original Verified Petition and Application for Temporary Restraining Order, Temporary and Permanent Injunction, Appointment of Receiver, and Other Relief at 6–7 (citing TSA § 581-25-1(B) in support of Plaintiff’s jurisdictional argument). This lawsuit was also brought by the State, at the request of then-Deputy TSSB Commissioner John Morgan, under TSA § 581-1(B). *See* Plaintiff’s First Amended Verified Petition, on file with the Court. **The *Life Partners* decision and this lawsuit support McDermott’s argument that the TSSB only has civil investigatory authority, not criminal prosecutorial authority.**

5. The TSSB has contravened its own rules and regulations—and blatantly ignored the very Act under which it is governed—by bringing the Criminal Action against McDermott in Collin County. McDermott continues to assert that the TSSB and the Receiver (collectively, “Respondents”) acted wrongfully under the Settlement Agreement. Based upon the procedural history of the *Life Partners* decision and this very lawsuit, coupled with newly discovered evidence, McDermott urges the Court to focus on Respondents’ violation of constitutional law, as reiterated and expounded upon *infra*.

## II. BACKGROUND FACTS

6. McDermott hereby incorporates by reference the Background Facts set forth in his Motion and Brief in Support, ¶¶ 1–26, as if fully set forth herein.

7. To put McDermott’s supplemental argument in the proper context, McDermott would direct the Court to these additional background facts: TSSB enforcement attorney Dale R. Barron has a history of being deputized as a “special prosecutor” by elected criminal district attorneys in

Collin County, Texas. Exhibit 4.<sup>2</sup> Likewise, other TSSB employees, such as the current commissioner, John Morgan, have been appointed as “special prosecutors” for years. Exhibit 5.

8. In 1995, the Texas legislature passed Senate Bill 1379; this bill was signed into law, and it amended Article 2.07 of the Code of Criminal Procedure, Chapter 402 of the Government Code, Section 41.102 of the Government Code, and Chapter 574 of the Government Code. Tex. S.B. 1379, 74 R.S. (1995). These changes allow Texas attorneys general to assist locally elected prosecutors in prosecuting cases. *Id.* The changes “allow[] assistant attorneys general to serve as duly appointed and deputized assistant prosecutors” and clarify that an assistant attorney general may serve “as an attorney pro tem pursuant to Article 2.07, Code of Criminal Procedure.” *Id.*

9. The bill analysis for Senate Bill 1379 reads as follows:

The prosecutor assistance division of the Office of the Attorney General has provided technical and specialized assistance to local prosecutors across the state. Currently, although these actions are taking place, there is no statutory provision which allows the division to assist as a duly appointed assistant prosecutor, or as an attorney pro tem.

Senate Comm. on Criminal Justice, Bill Analysis, Tex. S.B. 1379, 74 R.S. (1995). The purpose of the bill is described as, “. . . authoriz[ing] the attorney general's office to provide technical and legal assistance as an appointed assistant prosecutor or as an attorney pro tem, upon the request of a local prosecuting attorney.” *Id.* Further, the bill analysis states, “It is the committee's opinion that this bill does not grant any additional rulemaking authority to a state officer, institution, department or agency.” *Id.* No law giving the TSSB the same authority as the attorney general’s has been passed, and as will be shown *infra*, this is because any such law would be unconstitutional, since among officers, only county attorneys, district attorneys, and the attorney general may represent the State in court.

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<sup>2</sup> The last exhibit to McDermott’s Motion and Brief in Support was Exhibit 3. Accordingly, McDermott attaches the first exhibit to his Supplemental Brief as Exhibit 4.

## II. ARGUMENTS AND AUTHORITY

10. The arguments and authority presented in McDermott’s Motion and Brief in Support, ¶¶ 27–96, are incorporated by reference as if fully set forth herein.

A. *This Court may enjoin the TSSB from prosecuting McDermott because it is attempting to enforce a criminal statute by applying an unconstitutional rule or policy that infringes on the exclusive powers of local prosecutors and the attorney general, and this rule/policy threatens McDermott’s property and personal rights.*

11. “[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. *State v. Morales*, 869 S.W.2d 941, 942 (Tex. 1994). Under *Morales*, this Court should enjoin the TSSB from prosecuting McDermott through the role of special prosecutor, attorney pro tem, or any form of deputized local prosecutor.

12. The TSSB, by acting as special prosecutor (or some other form of local prosecutor), is enforcing criminal laws: Article 581 Sec. 29(C) of the TSA, Texas Penal Code 31.03(F)(1), Texas Penal Code Section 34.02, and Texas Penal Code 71.02(1) and (10). Exhibit 3. The unconstitutional rule or policy being applied during these criminal enforcements—and threatening McDermott with the irreparable injuries of prison time and criminal fines—is the TSSB’s repeated practice of acting as a special prosecutor, attorney pro tem, or some other form of local criminal prosecutor, without any statutory or constitutional authority to do so.

**1. The TSSB has established an invalid *ad hoc* rule that its employees may act as local prosecutors:**

13. The Texas Government Code states that a “Rule”:

- (A) means a state agency statement of general applicability that:
  - i. implements, interprets, or prescribes law or policy; or
  - ii. describes the procedure or practice requirements of a state agency;
- (B) includes the amendment or repeal of a prior rule; and
- (C) does not include a statement regarding only the internal management or organization of a state agency and not affecting private rights or procedures.

TEX. GOV'T CODE § 2001.003(6). Likewise, TSA article 581-28-1, which governs the TSSB, defines “rule and regulation” in the same manner. “[T]o constitute a ‘rule’ under this definition, ‘an agency statement interpreting law must bind the agency or otherwise represent its authoritative position in matters that impact personal rights.’” *Tex. State Bd. of Pharmacy v. Witcher*, 447 S.W.3d 520, 528 (Tex. App.—Austin 2014, no pet.).

14. Examples of such statements by the TSSB include: (1) “Nancy Elmilady, an attorney in the Enforcement Division of the State Securities Board, will serve as a special prosecutor in the case [of theft and securities violations], working with the Hays County District Attorney’s Office.”; (2) “Angela Cole, an enforcement attorney in the Corpus Christi office of the State Securities Board, is serving as a Special Prosecutor in the case [dealing with sales of unregistered securities].”; (3) “Morgan’s 27 ½ years of experience at the Agency includes 13 years in the Enforcement Division, eight of them as Director of Enforcement. During that time he was a special prosecutor in securities fraud trials in several Central Texas counties.” Exhibit 5.

15. Through its public statements and actions, the TSSB has established a rule that its employees are legally authorized to act as special prosecutors in criminal cases, even though, as demonstrated *infra*, the Texas constitution expressly forbids this, and no statute permits the TSSB’s behavior (because any such statute would be unconstitutional). The TSSB has thus incorrectly interpreted and implemented the laws dealing with the power to represent the State in courts and the proper statutory procedures for appointing prosecutors in criminal cases.

16. The TSSB's behavior and statements are of general applicability because its employees have acted as special prosecutors for several years, during several different prosecutions, and in various parts of the state. The agency obviously feels free to prosecute any criminal case involving alleged securities violations and has shown it will do so at any time. The TSSB has engaged in this behavior in Collin County, Hays County, Nueces County, Hood County, and "several Central Texas counties" during the years of 2015, 2014, 2013, 2012, 2011, 2010, 2009, and, according to a TSSB press release, 1998 through at least 2011. Exhibits 4, 5, 6. Multiple TSSB employees such as Dale Barron, Nancy Elmilady, and Angela Cole have taken part in implementing this rule by serving as special prosecutors. *Id.* (Indeed, Mr. Barron, Greta Cantwell, Tina Lawrence, and Matthew Leslie, all TSSB enforcement attorneys employed and paid by the TSSB, are acting as the "special prosecutors" in the very Criminal Action against McDermott. Exhibit 6. The TSSB's statements and actions lead one to the conclusion that the agency's employees are legally authorized to serve as local prosecutors.

17. Finally, the TSSB's rule/policy does not come under an exception to rule creation because it results in the prosecution and criminal punishment of defendants like McDermott, and does not deal only with the internal management or organization of the agency. And the rule is *ad hoc* because it has not been established through the proper notice, hearing, and adoption procedures required by the TSA and the Administrative Procedures Act ("APA"). *See* TEX. CIV. STAT. art. § 581-28-1; *see* TEX. GOV'T CODE §§ 2001.023, 2001.029, 2001.033, 2001.035 (setting forth the notice, hearing, adoption, and substantial compliance requirements of the APA). For these reasons and others, as shown *infra*, the TSSB's rule/policy is invalid. TEX. GOV'T CODE § 20001.035 (prescribing that "[a] rule is voidable unless a state agency adopts it in substantial compliance with Sections 2001.0225 through 2001.034").

18. “An agency rule is invalid if (1) the agency had no statutory authority to promulgate it; (2) it was not promulgated pursuant to proper procedure; or (3) it is unconstitutional.” *Williams v. Tex. State Bd. of Orthotics & Prosthetics*, 150 S.W.3d 563, 568 (Tex. App.—Austin 2004, no pet.). The TSSB’s rule meets all three criteria establishing invalidity, and each will be addressed.

- i. The TSSB had no statutory authority to promulgate its *ad hoc* rule, and it was not promulgated pursuant to proper procedure.

19. “In deciding whether an administrative agency has exceeded its rulemaking powers, the determinative factor is whether the rule’s provisions are “in harmony” with the general objectives of the statute.” *Id.* “In determining whether a rule is in harmony with an act’s general objectives, courts look to all applicable provisions of that act, rather than only one particular section.” *Id.* “As in all questions of statutory interpretation, our goal is to determine and give effect to the legislature’s intent.” *Id.*

20. The TSSB’s behavior is clearly not in harmony with the TSA as shown by the Act itself and by statutes that allow other state agency employees to assist in local prosecutions. In this case, the statutes that should be considered by the Court are Texas Civil Statutes articles 581-28-1, 581-28, and 581-3, Texas Code of Criminal Procedure article 2.07, Texas Government Code §§ 41.102 and 574.004, and Texas Penal Code §§ 1.09 and 39.015.

- a. *Texas Civil Statutes articles 581-28-1, 581-28, and 581-3 analyzed:*

21. The TSSB’s establishing a rule that its employees may behave as local prosecutors violates TSA article 581-28-1, “Adoption of Rules and Regulations,” which reads

B. The board may, from time to time, in accordance with the provisions of this Section 28-1, make or adopt such rules and regulations as may be necessary to carry out and implement the provisions of this Act, *including rules and regulations governing registration statements, applications, notices, and reports, and defining any terms, whether or not used in this Act, insofar as the definitions are not inconsistent with the purposes fairly intended by the policy and provisions of this Act.* For the purpose of adoption of rules and regulations, the board may

*classify securities, persons, and matters within its jurisdiction, and prescribe different requirements for different classes.* The board may, in its discretion, waive any requirement of any rule or regulation in situations where, in its opinion, such requirement is not necessary in the public interest or for the protection of investors.

TEX. CIV. STAT. art. § 581-28-1 (emphasis added). Nowhere in this paragraph is the TSSB given authority to adopt rules allowing its employees to serve as criminal prosecutors.

22. Not only has the TSSB gone beyond the bounds of the subject matters for which it can establish rules, it has violated the statute dictating how TSSB rules are to be promulgated:

C. No rule or regulation may be made or adopted unless the board finds, after notice and opportunity for comment in accordance with the provisions of this Section 28-1, that the action is necessary or appropriate in the public interest or for the protection of investors and consistent with the purposes fairly intended by the policy and provisions of this Act.

*Id.* Despite these statutory requirements for notice, comment, and rule adoption procedures, the TSSB's rules show no provision by which its employees can act as local prosecutors. *See generally* 7 TEX. ADMIN. CODE. Again, the TSSB has violated its own governing statutes by establishing an *ad hoc* rule by which its employees act as criminal prosecutors.

23. Article 581-28 of the TSA is titled "Investigations, Investigatory Materials, and Registration Related Materials" and is introduced by the words "Investigations by Commissioner". Throughout the article, the word "investigation" is used multiple times, including in "C. Assistance to Securities Regulator of Another Jurisdiction." TEX. CIV. STAT. art § 581-28. Nowhere in this article is the TSSB Commissioner permitted to conduct or assist prosecutions in the role of prosecutor. *Id.* Likewise, TSA article 581-3 ("art. 581-3") directs the TSSB to *investigate* securities violations and then turn criminal findings over to a local prosecutor; if a local prosecutor fails to act on the findings, the TSSB is to present them to the

Attorney General, who is authorized by art. 581-3 to act as a stand-in district or county attorney. TEX. CIV. STAT. art. § 581-3 (emphasis added).

24. The TSSB's, local prosecutors', and the Attorney General's powers are designated by these articles (and the Texas constitution, as will be explained *infra*), and the TSSB's powers cannot be expanded according to the whims of the TSSB. The case law bears this out. *Shields v. State* makes clear that the TSSB cannot exceed the bounds of its governing statutes. *See Shields v. State*, 936 S.W.2d 711, 713 (Tex. App.—Austin 1996, no writ). In *Shields*, a civil cause of action, the State had alleged, and the trial court had found, that Shields had committed fraudulent acts while dealing in securities, thus committing several violations of the TSA. *Id.* The State sought an injunction against Shields under article 581-32(A), and the trial court granted an injunction “restrain[ing] Shields from future violations of that character” but went even further in “restrain[ing] his selling, brokering, or dealing in securities in any manner, without reference to fraud or the terms of the Act.” *Id.* On appeal, the Austin court found that because article 581-32(A) did “not authorize an injunction of that scope,” the trial court had abused its discretion in “restrain[ing Shields from] acts that are not fraudulent or a violation of the Act.” *Id.*

25. If the TSSB cannot seek injunctions that exceed its governing statutory language, it certainly cannot ignore the limitations placed on its role in criminal proceedings by art. 581-3 and the Texas Constitution; and, as shown in *Shields*, trial courts cannot be complicit and use their authority in allowing the TSSB to exceed its powers. As held in *Shields*, quoted directly *infra*, the TSSB cannot use whatever broad, self-appointed powers it pleases to enforce the TSA, because doing so is a violation of the TSA (and in McDermott's case, discussed *infra*, a violation of the Texas Constitution):

The State suggests the scope of the injunction is authorized by article 531-3 of the Act. That statute entrusts administration of the Act to the Securities

Commissioner and requires that officer 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. We hold the State's interpretation is not a reasonable construction of the statutory language. That interpretation turns the statute on its head because it would authorize the two public officers to misapply the terms of article 581-32—a statute that article 581-3 instructs them to enforce.

*Id.* at 713–14. (internal citations and quotation marks omitted). Just as in *Shields*, the TSSB would have us believe it can engage in whatever broad activity it wishes to enforce security laws; instead, it has “turn[ed] the statute on its head” because it has ignored and misapplied the very statutes it has been charged with enforcing. *See id.*

*b. Texas Code of Criminal Procedure article 2.07 analyzed:*

26. If it so attempts, the TSSB cannot cite Code of Criminal Procedure article 2.07, shown below, as giving it authority by rule to prosecute criminal cases.

(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.

27. The only attorneys discussed in article 2.07 above are “attorney[s] for the state,” which refers to county attorneys, district attorneys, and criminal district attorneys, and in (b) and (c), assistant attorneys general (all of which is consistent with the Texas Constitution, as explained *infra*). TEX. CODE CRIM. PROC. art. § 2.07. Subsection (c) cannot include TSSB attorneys because only attorneys general are specifically added for consideration (and adding other agencies’ attorneys would be unconstitutional), and the last sentence of (c) indicates that such attorney, if not an attorney for the state (such as an attorney general), “shall receive compensation in the same amount and manner as an attorney appointed to represent an indigent person.” *Id.*

28. A TSSB attorney therefore cannot be considered, as the statute clearly contemplates a person in this role, aside from an attorney general, as not already receiving compensation from the state as an employee or officer. *See* TEX. GOV’T CODE § 311.016(2) (prescribing that “[t]he following constructions apply unless the context in which the word or phrase necessarily requires a different construction or unless a different construction is expressly provided by statute” and that “(2) [s]hall imposes a duty”).

29. Further, “competent attorney” is clarified in (f) as including “an assistant attorney general.” TSSB attorneys were not included as “competent,” and the legislature’s so choosing must be respected by the TSSB. *See* TEX. CODE CRIM. PROC. art. § 2.07(f); *see Cameron v.*

*Terrell & Garrett, Inc.*, 618 S.W.2d 535, 540 (Tex. 1981) (reciting the rules that “every word of a statute must be presumed to have been used for a purpose,” “every word excluded from a statute must also be presumed to have been excluded for a purpose,” and “[o]nly when it is necessary to give effect to the clear legislative intent can we insert additional words or requirements into a statutory provision”). Accordingly, constitutional considerations aside, Code of Criminal Procedure article 2.07 does not vest the TSSB’s employees with any ability to serve as local prosecutors and does not support the TSSB’s *ad hoc* rule.

c. *Texas Government Code § 41.102 analyzed:*

30. Likewise, should it so attempt, the TSSB cannot cite TEX. GOV’T CODE § 41.102, shown below, as allowing its attorneys to serve as local prosecutors by rule:

(a) A prosecuting attorney may employ the assistant prosecuting attorneys, investigators, secretaries, and other office personnel that in his judgment are required for the proper and efficient operation and administration of the office.

(b) A prosecuting attorney may request the assistance of the attorney general, and the attorney general may offer to the prosecuting attorney the assistance of his office, in the prosecution of all manner of criminal cases or in performing any duty imposed by law on the prosecuting attorney. In requesting or accepting such assistance, a prosecuting attorney may appoint any assistant attorney general as an assistant prosecuting attorney.

(c) The attorney general may offer to assist a prosecuting attorney in the prosecution of criminal offenses concerning the Texas Youth Commission.

Subsection (a) above discusses a prosecuting attorney’s ability to employ personnel. Under TEX. LAB. CODE § 201.041,

“employment” means a service, including service in interstate commerce, performed by an individual for wages or under an express or implied contract of hire, unless it is shown to the satisfaction of the commission that the individual's performance of the service has been and will continue to be free from control or direction under the contract and in fact.

Similarly, the Merriam-Webster Dictionary defines “employ” as

- 1 a : to make use of (someone or something inactive) <employ a pen for sketching>  
b : to use (as time) advantageously <a job that employed her skills>  
c (1) : to use or engage the services of (2) : to provide with a job that pays wages or a salary
- 2 : to devote to or direct toward a particular activity or person <employed all her energies to help the poor>

Merriam-Webster, “employ”, <http://www.merriam-webster.com/dictionary/employ> (last visited May 22, 2015). Further, the definition of “personnel” is “a body of persons usually employed (as in a factory or organization)” and “a division of an organization concerned with personnel.” Merriam-Webster, “personnel”, <http://www.merriam-webster.com/dictionary/personnel> (last visited May 22, 2015).

31. Given these definitions and the context of Subsection (a), the conclusion to be drawn is that the subsection deals with hired employees and paid personnel. As salaried state employees, TSSB attorneys and assistant attorneys general cannot qualify as such. Therefore, Subsection (b) creates an exception and allows assistant attorneys general in particular to assist local prosecutors while retaining their status as state employees. TEX. GOV’T CODE § 41.102(b). The existence of Subsection (b) and the powers afforded the attorney general alone therein was a deliberate legislative choice. The legislative history of this statute shows that Subsection (b) was added in 1995 by Senate Bill 1379, after Subsection (a) had already been in existence. Tex. S.B. 1379, 74 R.S. (1995). If Subsection (a) already implied assistant attorneys general, or any state agency’s attorneys, could provide such assistance, Subsection (b) would not have been necessary. *Cameron.*, 618 S.W.2d at 540 (reciting the rule that “every word of a statute must be presumed to have been used for a purpose”).

*d. Texas Government Code § 574.004 analyzed:*

32. As shown in the language below, only assistant attorneys general, not TSSB attorneys, may be deputized as assistant prosecutors:

Nothing in this chapter shall prevent the attorney general from providing assistance to district attorneys, criminal district attorneys, and county attorneys on request by allowing assistant attorneys general to serve as duly appointed and deputized assistant prosecutors, nor shall this chapter prohibit the appointment of an assistant attorney general as an attorney pro tem pursuant to Article 2.07, Code of Criminal Procedure.

*e. Texas Penal Codes §§ 1.09 and 39.015 analyzed:*

§1.09. Concurrent Jurisdiction Under This Code to Prosecute Offenses That Involve State Property

With the consent of the appropriate local county or district attorney, the attorney general has concurrent jurisdiction with that consenting local prosecutor to prosecute under this code any offense an element of which occurs on state property or any offense that involves the use, unlawful appropriation, or misapplication of state property, including state funds.

§ 39.015. Concurrent Jurisdiction to Prosecute Offenses Under This Chapter

With the consent of the appropriate local county or district attorney, the attorney general has concurrent jurisdiction with that consenting local prosecutor to prosecute an offense under this chapter.

Once again, the statutes show that the agency of the Texas Attorney General is particularly designated to work with local prosecutors in pursuing criminal prosecutions, and the TSSB is given no analogous statutory consideration.

2. The Texas Constitution forbids TSSB attorneys from serving as local prosecutors.

33. The Office of the Attorney General's ("OAG") unique statutory position is not merely a matter of legislative whim; the OAG operates in this role because "[t]he courts have interpreted the constitution to confer upon the attorney general and the county or district attorney the

exclusive authority to represent the state.” Tex. Att’y Gen. Op. No. JM-791 (1987) (citing *Maud v. Terrell*, 200 S.W. 375 (Tex. 1918)).

That instrument [the Constitution], by Section 21 of Article 5, lodges with the county attorneys the duty of representing the State in all cases in the district and inferior courts, with the right in the Legislature to regulate by law the respective duties of district and county attorneys where a county is included in a district having a district attorney; and by Section 22 of Article 4 that duty as to suits and pleas in the Supreme Court is confided to the Attorney-General. With the limitation existing in the authority of the Legislature, under Section 22 of Article 4, to create additional causes of action in favor of the State and intrust their prosecution, whether in the trial or in the appellate courts, solely to the Attorney-General, *the powers thus conferred by the Constitution upon these officials are exclusive. The Legislature cannot devolve them upon others. Nor can it interfere with the right to exercise them.*

*State v. Walker-Texas Inv. Co.*, 325 S.W.2d 209, 212 (Tex. Civ. App.—San Antonio, writ ref’d n.r.e) (citing *Brady v. Brooks*, 89 S.W. 1052 (Tex. 1905); *Harris Cnty. v. Stewart*, 41 S.W. 650 (Tex. 1897); *State v. Int’l & G. N. R.R. Co.*, 35 S.W. 1067 (Tex. 1926)) (emphasis added).

34. The statutes cited *supra*—TSA articles 581-28-1, 581-28, and 581-3, Texas Code of Criminal Procedure article 2.07, Texas Government Code §§ 41.102 and 574.004, and Texas Penal Code §§ 1.09 and 39.015—all harmonize with each other and the Texas Constitution in the sense that county attorneys, district attorneys, and the attorney general are designated as having the power to prosecute criminal cases. The statutes also demonstrate that the attorney general is not treated as the *de facto* agency for prosecuting crimes; local prosecutors are shown deference in that they are given rights of first refusal in prosecuting cases before the attorney general may step in, and they can request and permit that the attorney general provide assistance. For example, the attorney general can serve as attorney pro tem only when a local prosecutor has recused herself, once again showing that local prosecutors are vested with the authority to prosecute criminal violations locally, and that power can be ceded *only to the attorney general*, the one state agency given constitutional authority to represent the State’s interests in court. *See*,

*e.g., Life Partners*, 2015 WL 2148767 (indicating the Texas Attorney General, *at the request of Commissioner Morgan*, brought suit against Life Partners).

35. Further, the attorney general can enjoy such power only when allowed by the Texas Constitution. The agency's powers cannot be expanded by statute beyond the office's constitutional boundaries.

This article [Article 4, § 22, Texas Constitution] is broad enough to confer all the power claimed; but it is not believed that it was the intention of the constitution to confer, by the general clause above referred to, power upon the legislature to give to the attorney general power to perform those acts which the constitution itself conferred upon county attorneys; but that it was intended thereby to give the legislature power *to confer upon the attorney general such powers as might be deemed necessary in regard to matters which had not been expressly conferred by the constitution upon some other officer. Any other construction would lead to the doctrine that the constitution had empowered the legislature to alter the constitution itself, without an express grant of such power.* Art. 2802a, R.S., grants some powers and imposes some duties upon the attorney general in regard to matters upon which the constitution is silent, and in so far as it does so, there can be no objection to their exercise. The legislature has imposed upon the attorney general many duties in regard to which the constitution says nothing, among which it is made his duty to examine the charters of contemplated railway corporations (Acts 1876, 141); he is made a member of the board to contract for public printing (Acts 1876, 31); he is member of the board to have land for new capital surveyed, sold and capital built (Acts 1879, 9, 111); and many other powers and duties are imposed upon that officer.

*Walker-Texas Inv. Co.*, 325 S.W.2d at 211 (emphasis added). As emphasized above, state officers are limited by the authority they are delegated by the state constitution, and these bounds cannot be expanded by the legislature, thus explaining why: (1) the TSSB has never been given statutory authority to directly prosecute criminal securities violations, and (2) why it is represented in civil suits by the attorney general.

36. If even the Texas Legislature cannot authorize the TSSB to prosecute criminal cases because it is prevented from doing so by the constitution, it defies reason that the TSSB attempts to construct legal workarounds that allow the office of the TSSB to encroach upon the

constitutional authority of local prosecutors and the attorney general and attempt to operate in two capacities. The TSSB has no constitutional capacity to accept the role of local prosecutor; the only state agency that can accept this role is the one so named by the Texas Constitution, the attorney general, because that is the only state agency with the power to represent the state. *E.g., Life Partners*, 2015 WL 2148767.

37. If an attorney of any other state agency wishes to represent the State in court, they must follow both the Texas Constitution and be permitted to do so by statute. These dynamics were spelled out in a Texas Attorney General Opinion, wherein the Texas Commission on Human Rights had inquired as to “the authority of the attorney general to represent the Texas Commission on Human Rights in litigation under article 5221K, V.T.C.S., the Commission on Human Rights Act.” Tex. Att’y Gen. Op. No. JM-791 at \*1 (1987). The Act had given the commission statutory “authority to bring civil suits to carry out the purposes of the article,” but the Act did not also expressly state that the attorney general shall represent the commission.” *Id.*

38. In reviewing precedent, the attorney general recited that “[p]rior opinions have determined that similar provisions do not limit the constitutional authority of the attorney general to represent the state in court, and that state attorneys of a state agency may appear in court for the agency only in subordination to the authority of the attorney general.” *Id.* This was so because, as stated previously, “Texas courts have held that the powers conferred by the[] constitutional provisions on the attorney general and the county or district attorneys are exclusive, and that the legislature may not confer them on others. . . .” *Id.* at \*2. Further, the constitution, in some exceptional instances, permits the legislature to designate the attorney general as the officer who will represent the state in lower courts during particular causes of action, even though such power is usually reserved to local prosecutors. *Id.*

39. The attorney general found that the legislature had done so in enacting Article 5221k, a statute of statewide concern, and that the Article “would be unconstitutional if it allowed any other attorney to represent the state, except in subordination to the attorney designated by the relevant constitutional provision.” *Id.* at \*3. The opinion closed in saying “[a]ny staff attorney or outside attorney employed by the commission may represent the commission in court only subject to the supervision and direction of the attorney general.” *Id.*

40. As concerns McDermott’s case, a few key, relevant points are raised in this opinion. First, state agencies cannot be presumed as being constitutionally fit to serve as local prosecutors. There is a presumption that county and district attorneys fulfill that role. Tex. Const. art. V, § 21 (amended Nov. 2, 1954). Second, the nature of a statutory infraction determines what kind of prosecutor is constitutionally permitted to proceed with a case. *See Walker-Tex. Inv. Co.*, 325 S.W.2d at 212 (reciting that “under Section 22 of Article 4,” the legislature may “create additional causes of action in favor of the State and intrust their prosecution, whether in the trial or the appellate courts, solely to the Attorney-General”). The Criminal Action, a criminal case based on alleged crimes and harms affecting residents of Collin County, would be presumed to come under the jurisdiction of local prosecutors. Third, **aside from the attorney general, a state agency does not have inherent, constitutional authority to pursue suits in court unless a statute that comports with the constitution says it may do so (with the understanding that they will be subordinate to a constitutionally designated prosecutor), and courts may not assist them in violating the laws.** *See id.* (opining that the powers of the local prosecutors and attorney general are “exclusive”); *see Lamar Cnty. Appraisal Dist. v. Campbell Soup Co.*, 93 S.W.3d 642, 646 (Tex. App.—Texarkana 2002, no pet.) (reciting that “[a]n agency may exercise only those specific powers that the Legislature confers on it in clear and express language.”);

*Pub. Util. Comm'n of Tex. v. Cofer*, 754 S.W.2d 121, 124 (Tex. 1988) (“The courts are not free to thwart the plain intention of the Legislature expressed in a law that is constitutional.”).

41. Indeed, even when the Texas Commission on Human Rights was allowed by statute to pursue civil causes of action, the Commission was constitutionally required to be subordinate to the attorney general during such actions, despite the attorney general’s absence from article 5221k. This is because Constitutional powers must be respected and are always underlying statutory directives. *See* TEX. GOV’T CODE § 311.021(1). Thus, the TSSB cannot be allowed to control and initiate actions that represent the state in court. The Texas Constitution and art. 581-3 forbids this. Moreover, even if the TSSB were found to be able to act in the assistantship capacity to a local prosecutor or the attorney general, it can do so *only if a constitutional statute permits it to do so*, and only in the kinds of actions so designated by statute. No statute permits the TSSB to represent the State in criminal prosecutions and exceed its constitutional authority, and the TSSB cannot argue it is acting under the power of local prosecutors because a local prosecutor cannot amend the constitution and designate powers to state agencies in addition to the attorney general; nor can prosecutors essentially rewrite the statutes and give state agencies more power than what the legislature has bestowed upon them. *See* Tex. Const. art. II, § 1 (establishing a division of powers with three separate departments and prescribing that “no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted”).

42. Since the TSSB, through an improperly *ad hoc*<sup>3</sup>, invalid rule, has violated the Texas Constitution and its own statutes and cannot act as local prosecutors, it should be enjoined from

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<sup>3</sup> The TSSB cannot argue that investigating criminal violations and turning over those investigations to statutorily authorized prosecutors is “novel to [the] agency or so specialized and varying as to be impossible of capture within any general rule.” *See Witcher*, 447 S.W.3d at 527–28. The TSSB has been conducting securities investigations for decades; the TSA – including art. 581-3, requiring the handing over of investigations to authorized prosecutors –

prosecuting McDermott. *See Morales*, 869 S.W.2d at 942; *see Witcher*, 447 S.W.3d at 527–28 (explaining that in some limited circumstances, agencies may promulgate rules in an *ad hoc* fashion without adhering to the APA, such as when an “issue is novel to [the] agency or so specialized and varying as to be impossible of capture within any general rule” or when doing so is “appropriate to flesh out [a] new statute or rule”) (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 201–03 (1947); *Sw. Bell Tel. Co. v. Pub. Util. Comm’n of Tex.*, 745 S.W.2d 918, 926 (Tex. App.—Austin 1988, writ denied)). “A rule that is not properly promulgated under mandatory APA procedures is invalid, and an agency decision based on an invalid rule must be reversed and remanded to the agency if substantial rights of the appellant have been prejudiced thereby.” *Id.* at 527.

43. Instead, the TSSB has avoided this statutorily mandated, transparent process by agreeing to take over, wholesale, unconstitutional criminal prosecutions throughout the state, even though the Texas Constitution grants prosecutorial authority only to county prosecutors, district prosecutors, and the Attorney General. *See Tex. Att’y Gen. Op. No. JM-791* (1987) (opining that “[t]he Texas Constitution places in the attorney general and the district or county attorney the exclusive power to represent the state,” and that a statute “would be unconstitutional if it allowed any other attorney to represent the state, except in subordination to the attorney designated by the relevant constitutional provision”).

44. Therefore, the TSSB’s prosecutorial behavior violates both Texas’s constitution and its statutes and, and since it has created an *ad hoc* rule in doing so, under *Morales*, this Court has the equitable authority to the TSSB from prosecuting McDermott.

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was passed in 1957. *Life Partners*, 2015 WL 2148767 at \*19. The TSSB has had every opportunity to strictly follow the statutes it is required to enforce by law, or to attempt a notice and hearing process by which the public and other government authorities could scrutinize any attempt by the TSSB to pass rules permitting its employees to serve as prosecutors.

### III. CONCLUSION

The *Life Partners* decision has no bearing on the arguments and authorities that McDermott raised in his Motion and Brief in Support. It actually supports McDermott's supplemental arguments and authorities herein, as the TSA only allows the TSSB to perform investigatory functions, not simultaneously act as a criminal prosecutor. The statutes and case law are clear on this issue; the TSSB has engaged in *ad hoc* rulemaking and has breached the Settlement Agreement by prosecuting McDermott in the Criminal Action in Collin County. Likewise, the TSSB breached the Settlement Agreement by failing to disclose to McDermott that he was subject of an ongoing criminal investigation by the TSSB. McDermott's constitutional rights have been violated in myriad ways due to Respondents' conduct, and should not go unchecked by the Court.

### 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,

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

901 S. MoPac Expressway  
Barton Oaks Plaza V, Suite 230  
Austin, Texas 78746  
Phone: (512) 478-5308  
Fax: (512) 482-8628

By: /s/ Hector De Leon

Hector De Leon (lead attorney)  
Texas Bar No. 05650800  
Email: hdeleon@dwlawtx.com  
Benjamin S. De Leon  
Texas Bar No. 24048426  
Email: bdeleon@dwlawtx.com  
Athena Ponce (filing attorney)  
Texas Bar No. 24083675  
Email: aponce@dwlawtx.com

ATTORNEYS FOR THIRD-PARTY DEFENDANT  
MICHAEL MCDERMOTT

**CERTIFICATE OF SERVICE**

I hereby certify that on the 22<sup>nd</sup> 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:

<p>Jack Hohengarten Texas Attorney General Financial and Tax Litigation Division 300 W. 15<sup>th</sup> Street, Sixth Floor Austin, Texas 78711-2548 (512) 475-3503 (512) 477-2348 fax jack.hohengarten@texasattorneygeneral.gov <i>Counsel for the State of Texas, the Texas State Securities Board, and John Morgan, In His Official Capacity as Commissioner of the Texas State Securities Board</i></p>	<p>Michael Napoli Cox Smith Matthews inc. 1201 Elm Street, Suite 3300 Dallas, Texas 75270 (214) 698-7800 (214) 698-7899 fax mnapoli@coxsmith.com</p> <p>Mary Schaerdel Dietz Cox Smith Matthews inc. 111 Congress Avenue, Suite 2800 Austin, Texas 78701 (512) 703-6300 (512) 703-6399 fax mdietz@coxsmith.com <i>Counsel for RV Receiver</i></p>
<p>Richard H. Gray 301 Main Plaza, #349 New Braunfels, Texas 78130 (210) 392-3550 texasgraze@gmail.com <i>Pro Se Defendant</i></p>	<p>Carl Galant Nicholas P. Laurent McGinnis Lochridge &amp; Kilgore, llp 600 Congress Avenue, Suite 2100 Austin, Texas 78701 (512) 495-6000 (512) 495-6093 fax cgalant@mcginnislaw.com nlaurent@mcginnislaw.com <i>Counsel for Third-Party Defendants, Ronald and Donald James</i></p>
<p>Bogdan Rentea Rentea &amp; Associates 505 W. 12<sup>th</sup> Street, Suite 206 Austin, Texas 78701 brentea@rentealaw.com <i>Counsel for Defendant Wendy Rogers</i></p>	<p>Geoffrey D. Weisbart Mia L. Storm Weisbart Springer Hayes, LLP 212 Lavaca Street, Suite 200 Austin, Texas 78701 gweisbart@hslawmail.com madams@hslawmail.com <i>Counsel for the Cain/Edelstein Intervenors</i></p>

Dale R. Barron Enforcement Attorney Texas State Securities Board 1210 River Bend Drive, Suite 208 Dallas, Texas 75247 dbarron@ssb.state.tx.us <i>Prosecuting Attorney in Collin County Criminal Action against Mr. McDermott</i>	
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/s/ Ben De Leon  
BENJAMIN S. DE LEON