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D-1-GV-10-000454

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, HILL COUNTRY FUNDING, , and WENDY ROGERS,	§ § § § §	**TRAVIS COUNTY, TEXAS**
	§	
Defendants,	§	
	§	
AND	§	
	§	
JAMES SETTLEMENT SERVICES, LLC et al.	§ §	
	§	
Third Party Defendants.	§	**126th JUDICIAL DISTRICT**

RECEIVER'S RESPONSE TO McDERMOTT'S MOTION TO ENFORCE

Michael D. Napoli
State Bar No. 14803400
DYKEMA COX SMITH
1201 Elm Street, Suite 3300
Dallas, Texas 75270
(214) 698-7837
(214) 698-7899 (Fax)
mnapoli@dykema.com

COUNSEL FOR THE RECEIVER OF
RETIREMENT VALUE, LLC

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Eduardo S. Espinosa, court-appointed receiver for Retirement Value, LLC responds in opposition to Michael McDermott's Motion to Enforce the Settlement Agreement between him and the Receiver.

SUMMARY

Rather than seek to enforce his Settlement Agreement, McDermott engages in a wholesale assault on the indictments pending against him in Collin County. Regardless of their merit, these arguments are addressed to the wrong court. He needs to bring them before the court in Collin County hearing his criminal case.

This Court lacks subject-matter jurisdiction over McDermott's motion. All disputes among the parties were resolved by settlement long ago. This Court has lost plenary power requiring McDermott to bring a new suit. Moreover, this Court lacks the jurisdiction to grant the relief that McDermott seeks – an end to or limitations on criminal case against him.

On a substantive level, McDermott's claims lack merit and should be dismissed.

- The Receiver is not a law enforcement official or even a governmental actor. He owes no constitutional duties to McDermott. Even if he did, the Receiver did not violate any of McDermott's constitutional rights.

- McDermott is not entitled to indemnity by the Receiver. The "by, through and under" indemnity contained in the Settlement Agreement does not apply to claims that are based on rights independent of his. As the State's right to bring criminal charges against McDermott is not dependent upon any rights held by the Receiver, the Receiver's contractual indemnity has not been triggered.

- The Receiver did not fraudulently induce McDermott to enter into the Settlement Agreement. McDermott waived the right to claim that the

Settlement Agreement was induced by fraud. Moreover, he cannot point to an affirmative misrepresentation by the Receiver and the Receiver had no duty to disclose any facts to McDermott. In any event, the Receiver was not aware of a criminal investigation of McDermott prior to the execution of the Settlement Agreement; assuming such an investigation actually occurred.

- The Receiver has not breached the Settlement Agreement.

Accordingly, the Court should dismiss McDermott's motion to enforce.

BACKGROUND

Michael McDermott was one of six Master Licensees for Retirement Value. His sales organization accounted for the overwhelming majority of sales, for which McDermott was paid approximately $1 million. Although he had direct contact with investors, McDermott's primary role was that of a recruiter and supporter of his downstream licensees. McDermott was also heavily involved in Retirement Value's marketing efforts.

The Receiver sued McDermott seeking to recover the money he was paid and damages resulting from his role in the Retirement Value scam. McDermott answered in March of 2012. A month later, McDermott asserted a third-party claim against the State Securities Board seeking a declaration that Retirement Value's product was not a security and that the TSSB had violated the Administrative Procedure Act by suing Retirement Value.[1] He also asserted a counterclaim against Retirement Value. The State asserted no claims against McDermott in this case.

In May 2012, the Receiver and McDermott mediated and reached a tentative agreement to settle. Napoli Affid. (Exh. A) at ¶4. Because McDermott wanted the

[1] An entity controlled by McDermott had previously filed a similar lawsuit which had been dismissed by the district court for lack of subject-matter jurisdiction.

complete elimination of civil liability, the Cain Intervenors agreed to pursue a class settlement on behalf of all Retirement Value investors and the State agreed to settle any potential civil claims against McDermott. The parties then began to negotiate a definitive Settlement Agreement. *Id.*

The definitive agreement proved difficult to negotiate. A significant portion of the difficulty related to the breadth of the release. McDermott wanted a very broad release; the State wanted a much narrower release. *Id.* at ¶5. In July 2012, the Receiver circulated what he believed was the final draft of the McDermott Settlement Agreement. *Id.* at ¶6; J. Thomas E-Mail of July 13, 2012 (Exhibit A-1). The July 2012 draft agreement recited that the Receiver and the State "have agreed to resolve all claims ... against McDermott related to RV, including but not limited to, the claims which were or could have been asserted in the Lawsuit." July 2012 Draft at Recital 11. The release language was similarly broad providing that the State and Receiver released McDermott from

> all claims ... past and present, known and unknown, asserted or not asserted ... whether at law, in equity or otherwise ... arising out of or related to Retirement Value, ***including all claims that were or could have been asserted by them in the Lawsuit.***

Id. at § 4.A (emphasis added). The State, however, objected to the breadth of the release.

After a month of further negotiation, the parties reached agreement on a new draft of the Settlement Agreement, which was executed in August 2012. Napoli Affid. at ¶7. The executed Settlement Agreement provided for a much narrower release. Instead of all claims relating to Retirement Value, Recital 11 was now

limited to "claims ... which were or could have been asserted in the Lawsuit." McDermott Settlement Agreement (Exh. A-2) at Recital 11. Similarly, the State and Receiver limited their release of McDermott to

> all claims ... past and present, known and unknown, ... whether at law, in equity or otherwise ... arising out of or related to Retirement Value, ***which were or could have been asserted by them in the Lawsuit.***

Id. at § 4.A (emphasis added).

The Court approved the class settlement, which was severed into another case. On February 21, 2013, the Court severed the Cain Intervenors claims against McDermott to Cause No. D-1-GV-13-000193; *Dr. Gary Cain and Barry Edelstein v. Michael McDermott* (the Class Action). Order of Severance (Exh. A-3). Several days later, the Court granted Final Judgment in the Class Action. Class Judgment (Exh. A-4). Approximately a year later – January 2014, the Cain Intervenors released the Class Judgment on behalf of the class. Release of Judgment (Exh. A-5)

McDermott non-suited his third party petition against the State and his counterclaim against Retirement Value in March 2013. After McDermott paid the agreed upon settlement amount to the Receiver, the Court granted the Receiver's motion to dismiss with prejudice in January 2014. Accordingly, all litigation among the parties in this Court ended over a year ago.

Nearly three years after the settlement, a grand jury in Collin County indicted McDermott on multiple felony counts related to his involvement in the Retirement Value scam. The criminal cases are currently pending before the 380th District Court in Collin County.

At no point prior to the execution of the Settlement Agreement in August 2012 was the Receiver or his counsel, including Michael Napoli, aware that the State or the TSSB had initiated a criminal investigation of McDermott or anyone else relating to Retirement Value. As of today's date, neither is aware of any evidence that a criminal investigation was in progress as early as August of 2012.[2] Napoli Affid. at ¶8; Espinosa Affid. at ¶6. Given that the indictments were not issued until more than two years later, it appears unlikely that a criminal investigation had begun that early.[3]

That the State would eventually undertake a criminal investigation into the principals of Retirement Value and those who worked with them should not have been a surprise to anyone involved in this case. Nor should anyone have been surprised that the TSSB would be involved in such an investigation. This case involved a scam that generated in excess of $77 million and victimized over 1,000 people – many of whom were elderly and most of whom resided in Texas. As the TSSB's website informs all who care to look, the TSSB often makes criminal referrals in its serious cases. TSSB Website (2012 Civil and Criminal Enforcement Actions)(Exh. A-6). Other life settlement scams of similar size had led to substantial prison sentences for the perpetrators. For example, the scam involving

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[2] McDermott's counsel have seriously misstated their conversation with the Receiver and his counsel. We did not tell them that we knew of a criminal investigation into McDermott (or anyone else) prior to the execution of the Settlement Agreement. Rather, we told him that no one had informed us of a criminal investigation but that, based on our experience and the size of the scam, we believed that an investigation and indictments were likely. Napoli Affid. at ¶10; Espinosa Affid. at ¶7.

[3] The State and TSSB were clearly continuing their civil investigation in 2012 and 2013 as the State twice amended its petition against the remaining defendants – Ron James, Don James and Mike Beste.

A&O Resource Management (based in Houston) led to decades in prison for its principals. DOJ Press Release (9/28/2011)(Exh. A-7).

ARGUMENT AND AUTHORITIES

Setting aside his outright misrepresentation of the conversation between the Receiver and his counsel, McDermott's arguments ultimately meet themselves coming and going. He argues that the State released criminal claims against him (it did not) but concedes that the agencies involved lacked authority to release those claims. He claims that the grand jury's indictment of him is somehow a suit by, through or under the Receiver entitling him to indemnity (it is not), but admits that it is the TSSB who appeared before the grand jury and is prosecuting the case.[4] He claims that the Settlement Agreement was induced by fraud (it was not), but seeks the benefits of the agreement.

The Court need not reach any of these issues. Stated simply, the Court lacks jurisdiction over the disputes between McDermott and the State or the Receiver because it long ago resolved all such disputes. This new dispute simply cannot be brought in this case. Moreover, the numerous issues that McDermott raises about the propriety of the criminal prosecution, whether his constitutional rights were somehow violated and whether certain evidence should he excluded are for the Collin County court to decide. This Court lacks the jurisdiction to interfere with the criminal court's jurisdiction.

[4] The TSSB is not actually prosecuting the case. The Collin County District Attorney has appointed employees of the TSSB as special prosecutors. Accordingly, those employees are acting as Collin County assistant district attorneys and not as TSSB employees.

Considered substantively, McDermott's arguments lack merit. At base, the Settlement Agreement settles three things: (1) a civil suit by the Receiver against McDermott; (2) a civil class action brought by investors against McDermott and (3) a civil suit brought by McDermott against the State and the TSSB. No party affirmatively or even impliedly agreed not to file a criminal complaint. Nowhere in the Settlement Agreement do the words "criminal" or "indictment" appear. McDermott even concedes that the TSSB and the Attorney General do not have the authority to waive a criminal prosecution on behalf of the State. Motion at 19. Thus, there is no basis to suggest that the Settlement Agreement precludes the criminal indictments.

I. This Court lacks the subject-matter jurisdiction necessary to consider McDermott's motion.

A. Having finally disposed of all claims between McDermott and the Receiver or the State more than a year ago, the Court lacks jurisdiction over the current dispute.

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

Texas law provides only a limited exception to this requirement. If the Court retains plenary power over the underlying dispute, then the suit to enforce the settlement can be brought in the same proceeding as the original claim. *Mantas v. Fifth Court of Appeals*, 925 S.W.2d 656, 658 (Tex. 1996). However, if the dispute arises after the trial court's plenary jurisdiction has expired, then the party seeking to enforce the settlement must file a separate lawsuit. *Id.* at 658-59.

As McDermott concedes, all litigation between him and the Receiver in this Court ended well over a year ago. The Court's plenary power, therefore, expired at the very latest on February 7, 2014 – 30 days after it dismissed the Receiver's claims against McDermott with prejudice.[5] TEX. R. CIV. P. 329b(d). It, therefore, lacks jurisdiction to hear this latest dispute between McDermott and the State and Receiver.

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

[5] McDermott's claims against the State were dismissed in March 2013 and the class claims were severed and dismissed in February 2013.

An order is final if it conclusively disposes of and is decisive of the issue or controverted question for which that part of the proceeding was brought. *Id.* Stated more simply, an order in a receivership proceeding is final if it resolves all issues of law and fact between the parties involved in the order. *Crowson v. Wakeham*, 897 S.W.2d 779, 782 (Tex. 1995). All such issues involving the parties to this motion were resolved by the Court's order in January 2014.

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

Moreover, because a judgment has been entered on tbe Settlement Agreement, McDermott would need to set aside this Court's judgment in order to have the Settlement Agreement set aside. To do so, he would need to file a bill of review. *Kalyanaram v. University of Texas System*, 2009 WL 1423920 (Tex. App. – Austin 2009, no pet.)

McDermott attempts to evade this law by arguing that the Court somehow reserved jurisdiction over his claims related to the Settlement Agreement by virtue of its order approving the class settlement. There are numerous problems with this argument. To begin with, the Court's order finally approving the class settlement, the Class Judgment, was not entered in this case. It was entered in the Class Action, which was Cause No. D-1-GV-13-000193. Thus, McDermott appears to have

filed his motion in the wrong case. But, as neither the State nor the Receiver has ever been a party to the Class Action, McDermott could not have sought relief against either party in that case. Moreover, the Court's reservation of jurisdiction over the Class Action related solely to that case and not to the separate disputes involving McDermott, the State and the Receiver. In any event, the Class Judgment was released in January 2014.

If McDermott wishes to assert claims against the Receiver based on the Settlement Agreement, McDermott needs to file a separate suit so that his allegations can be tested as required by the state law (including Chapter 27 of the Texas Civil Practice and Remedies Code) and the Texas Rules (including Rules 13 and 91a).

In the alternative, the Receiver objects to McDermott's attempt to obtain a summary determination of his claims related to the Settlement Agreement via his motion to enforce.

B. This Court lacks subject-matter jurisdiction to consider McDermott's complaints about the criminal case against him.

At base, McDermott asks the Court to interfere with the criminal case pending against him in Collin County. He argues that the State somehow waived the right to indict him and that he should have been *Mirandized* before participating in discovery.[6] Motion at 43. Among other things, he asks the Court to enjoin the TSSB from further prosecuting him and, in the alternative, to exclude

[6] As discussed below, these contentions are baseless.

certain evidence from the criminal case. Motion at 45-46. Quite simply, the Court lacks jurisdiction to take any action with respect to the criminal case.

It is a base principle of Texas law that a court exercising civil jurisdiction generally cannot interfere with an ongoing criminal prosecution. *Texas Liquor Control Bd. v. Canyon Creek Land Corp.*, 456 S.W.2d 891, 894 (Tex. 1970)(holding that court exercising civil jurisdiction lacked jurisdiction to interfere with state agencies attempt to enforce statute via a criminal case). Where a party is currently being prosecuted (as McDermott is):

> It is well settled that courts of equity will not interfere with the ordinary enforcement of a criminal statute unless the statute is unconstitutional and its enforcement will result in irreparable injury to vested property rights. The underlying reason for this rule is that the meaning and validity of a penal statute or ordinance should ordinarily be determined by courts exercising criminal jurisdiction. When these questions can be resolved in any criminal proceeding that may be instituted and vested property rights are not in jeopardy, there is no occasion for the intervention of equity.

State v. Morales, 869 S.W.2d 941, 945 (Tex. 1994) (quoting *Passel v. Fort Worth Indep. Sch. Dist.*, 440 S.W.2d 61, 63 (Tex. 1969)).

It is undisputed that the only rights at issue in McDermott's criminal case are his personal rights (i.e., his liberty right). Nor does McDermott allege that any of the statutes under which he has been charged are unconstitutional.[7] In the absence of a constitutional challenge involving vested property rights, this Court

[7] Even in his supplemental briefing, McDermott does not raise a constitutional issue. His argument is that the statutes that govern the TSSB and the appointment of special prosecutors by district attorneys do not allow employees of the TSSB to act as special prosecutors. At no point does he argue that any of the statutes that are applicable to the criminal charges against him are unconstitutional.

lacks jurisdiction over McDermott's claims. *Ryan v. Rosenthal,* 314 S.W.3d 136, 141 (Tex. App. – Houston [14th Dist.] 2010, pet. denied).

In his Supplemental Briefing (filed on May 22, 2015), McDermott misapplies *Morales* to the facts of this case. In *Morales*, the court distinguished between the enforcement of criminal statutes by non-criminal or civil processes (such as when a statute is incorporated into an agency rule that is enforced civilly) and the enforcement of criminal statutes by criminal processes. *Morales,* 869 S.W.2d at 945-46. Where a criminal statute is being enforced by a civil process, then civil courts have jurisdiction to construe them. But, where a criminal prosecution is involved, a civil court lacks jurisdiction "unless the criminal statute is unconstitutional and its enforcement will result in irreparable injury to vested property rights." *Morales*, 869 S.W.2d at 945.

This distinction was at issue in *Passel v. Fort Worth Independent School District,* 440 S.W.2d 61 (Tex. 1969), which was cited by the *Morales* court. In *Passel,* a school district policy required that parents sign a form averring that their children were not members of a fraternity or sorority. *Id.* at 62-63. A signed form was a requirement for registering for school. The policy was the school district's attempt to enforce a statute that made such societies illegal. Parents sued seeking an injunction against the school district's policy. Denying the school district's jurisdictional challenge, the *Passel* court held that civil courts had jurisdiction because the parents were not seeking to enjoin criminal enforcement of the statute but to prevent administrative enforcement of an administrative regulation of the

school district. *Id.* at 64. The *Passel* court distinguished the case before it from attempts to interfere with the enforcement of a criminal statute through criminal court prosecutions. *Id.* at 63 ("It is well settled that courts of equity will not interfere with the ordinary enforcement of a criminal statute unless the statute is unconstitutional and its enforcement will result in irreparable injury to vested property rights.")

Here, of course, we are dealing with a criminal case. McDermott has been indicted and a criminal case is currently pending against him. His fundamental complaint is that the specific individuals who are actively prosecuting the case are not authorized to do so. Complaints about the authority of special prosecutors can and must be made to the criminal court. *Stephens v. State*, 978 S.W.2d 728, 730-31 (Tex. App. – Austin 1998, pet. ref'd)(holding that the person who acted and was recognized by the court in prosecuting the case is presumed to be duly authorized and qualified).

As the *Morales* court noted, the limitations on the jurisdiction of civil courts to interfere with criminal proceedings are based on very pragmatic concerns. *Morales*, 869 S.W.2d at 947. As the court explained, Texas has "separate and distinct jurisdiction allocated by the Texas Constitution to our civil and criminal courts, including two courts of last resort: this court in civil cases and the court of criminal appeals in criminal cases." *Id.* The prospect of both civil and criminal courts involving themselves in criminal cases would "tend to 'hamstring' the efforts of law enforcement officers, create confusion and might result finally in precise

contradiction of opinions" between the Supreme Court and the Court of Criminal Appeals. *Id.* at 947-48 (quoting *Roberts v. Gossett,* 88 S.W.2d 507, 509 (Tex. Civ. App. – Amarillo 1935, no writ)). To the *Morales* court, the mere prospect that civil courts will "get into the business of construing criminal statutes" represented a significant danger. *Id.* at 948 n.16.

This danger is heightened here because the Court is being asked to interfere with an ongoing criminal case. *Ryan,* 314 S.W.3d at 146 (holding that the danger of confusion and conflict identified in *Morales* was far greater when a criminal case had already been filed). According to McDermott, criminal courts in Texas appear to have no issue with allowing employees of the TSSB to be appointed by local district attorneys as special prosecutors. The issue of who can and cannot act as a special prosecutor has been extensively litigated in the criminal courts. *E.g., State ex rel Hill v. Pirtle,* 887 S.W.2d 921 (Tex. Crim. App. 1994); *Medrano v. State,* 421 S.W.3d 869 (Tex. App. – Dallas 2014, pet. ref'd); *Stephens, supra.* For this Court to undertake to decide in a civil case whether certain TSSB employees were properly appointed as special prosecutors would create the very risk of variance between the civil and criminal courts about which *Morales* warned.

Finally, the person whose conduct is actually implicated by McDermott's complaints is Gregg Willis, the Collin County District Attorney. He is the one who appointed Dale Barron and the other TSSB employees to act as special prosecutors. If their appointment violates Texas law, then he is the person who violated the law. If, as McDermott alleges, the TSSB employees are acting without supervision, then

DA Willis failed to supervise them. Yet, be is not now and never has been a party to this case. His absence further demonstrates that the matters McDermott raises are outside this Court's jurisdiction and solely within the jurisdiction of the Collin County court.

This is not to say that McDermott is without a remedy for his alleged wrongs. The Collin County court has the jurisdiction to hear his complaints and, if they have merit (they do not), to take appropriate action to remedy any wrongs done to him.

- If the Collin County court thinks that employees of the TSSB are statutorily unqualified or not sufficiently disinterested to act as special prosecutors in the criminal case, then that court can disqualify them.
- If the Collin County court believes that the State somehow violated McDermott's right against self-incrimination or conducted an illegal search or seizure, then that court can either dismiss the indictments or exclude the improperly obtained evidence.
- If the Collin County court believes that the State somehow "waived" its right to punish McDermott criminally, then tbat court can dismiss the indictment.

It is to that court and not this Court to which McDermott must apply for relief. *Morales*, 869 S.W.2d at 942 (noting that jurisdiction does not flow "from a court's good intentions to do what seems 'just' or 'right;'" instead jurisdiction is conferred solely by the constitution and statutes of the state).[8]

The Court should dismiss McDermott's motion for lack of subject-matter jurisdiction.

[8] Notably, the authority on which McDermott relies to argue that the State or Receiver have acted improperly are uniformly opinions of courts hearing the criminal cases at issue.

II. To the extent that it has jurisdiction to consider it, the Court should deny McDermott's motion to enforce.

McDermott's substantive claims against the Receiver are wholly lacking in merit.[9] They are based on (i) a serious misconstruction of the Settlement Agreement; (ii) misapplication of the governing law; (iii) and an outright fabrication as to the Receiver's statements.

A. The Receiver has not violated McDermott's constitutional rights

In both his Motion and Supplemental Brief, McDermott asserts that the Receiver has somehow violated his constitutional rights. What he fails to specify, however, are exactly what rights he believes the Receiver violated. Equally importantly, he fails to explain how the Receiver, a non-governmental party, is legally capable of violating his constitutional rights.

1. A receiver appointed in a civil enforcement proceeding such as this is not an agent of the State and his actions are not those of the State.

The Receiver is an agent of this Court.[10] Although he may cooperate with government officials, he is not an agent of the government. *United States v. Koh*,

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[9] The Receiver does not mean to suggest that McDermott's claims against the State or the TSSB have merit. But, as they generally do not appear to concern him, the Receiver will not address them except as they relate to claims against him.

[10] Importantly, McDermott does not allege that the Receiver stepped outside of his role as a receiver to become a *de facto* law enforcement agent. Whether an otherwise independent third-party has done so is a complicated multi-factor inquiry, which McDermott wholly fails to raise or discuss. *See Wilkerson v. State*, 173 S.W.3d 521, 528-530 (Tex. Crim. App. 2005). The gist of the inquiry is whether the alleged agent was acting on his own behalf or on behalf of law enforcement. *Id.* As directed by this Court, the Receiver has investigated and prosecuted claims for the ultimate benefit of the investors. That the Receiver has recovered millions of dollars from various third parties demonstrates that he was pursuing his duties and not those of law enforcement. Accordingly, the Court should consider only whether the Receiver's duties as a receiver make him an agent of law enforcement.

199 F.3d 632, 640 (2nd Cir. 1999)(holding that receiver appointed by a state court in an enforcement proceeding was not an agent of the government). As an officer of the Court rather than the State, the Receiver's actions are not those of the State. *United States v. Farris*, 2008 WL 3833882, *8 (D. Nev. Aug. 15, 2008)("The Receiver's actions are not chargeable to the government because he is an officer of the court, not the prosecution.").

In *Farris*, the defendant argued that an indictment against her should be dismissed because the Receiver allegedly failed to preserve documents that would have been exculpatory. *Id.* at *7. In support of her argument, the defendant argued that the SEC requested the appointment of the receiver and that it had a "friendly" relationship with the receiver. The *Farris* court rejected these arguments finding that the receiver was not an agent of the government. *Id.* at *8; *also Koh*, 199 F.3d at 640 (holding that receiver's alleged vindictiveness against defendant could not be imputed to the government because the receiver was an agent of the court, not the government).[11]

As a non-governmental party, the Receiver does not owe the constitutional and statutory duties owed by the government to criminal suspects. *E.g.*, *United States v. Setser*, 568 F.3d 482, 487-88 (5th Cir. 2009)(holding that the Fourth Amendment does not apply to seizure of documents hy a receiver who later turned them over to law enforcement); *SEC v. W Financial Group LLC*, 2009 WL 6366540 (N.D. Tex. March 9, 2009)("Because the court-appointed receiver who subpoenaed

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[11] The Receiver notes that in both *Koh* and *Farris*, the courts determining these issues were the courts in which the criminal case was proceeding; not the receivership court.

Mackert's bank records is not an officer, employee, or agent of a government agency or department, the [Right to Financial Privacy Act] does not apply."). McDermott has failed to identify any Texas or federal case that suggests that court-appointed receivers act as government agents or owe duties to those who may be targets of a criminal investigation. Accordingly, the Receiver is legally incapable of violating McDermott's constitutional rights.

2. Even if he owed governmental duties to McDermott, the Receiver did not violate any such duties.

This case is a civil proceeding brought by the State against various parties involved in the Retirement Value scam. At some point, one or more law enforcement agencies began a criminal investigation that led to the indictments of several persons including McDermott. The Receiver does not know when the investigation began,[12] but it appears to have begun sometime after the State completed its civil litigation in this case. The State's active role in this case ended in the middle of 2013 with its settlement with the James Defendants and the grant of the State's summary judgment against HCF. Yet, the indictments were not filed until February 2015 – nearly two years later. This timing suggests that the State was not actively engaged in a criminal investigation in 2012.

Simultaneous criminal and civil investigations or proceedings are permissible and, to a large extent, encouraged. As federal courts have regularly noted when denying stays of civil proceedings, "[t]here is no general federal constitutional,

[12] Neither the Receiver nor his counsel was aware of a criminal investigation regarding Retirement Value in 2012 when the McDermott Settlement Agreement was negotiated and executed.

statutory, or common law rule barring the simultaneous prosecution of separate civil and criminal actions by different federal agencies against the same defendant involving the same transactions." *SEC v. First Financial Group*, 659 F.2d 660, 667 (5th Cir. 1981)(denying stay). Other courts have gone further, holding that "[e]ffective enforcement of the securities laws requires that the SEC and Justice be able to investigate possible violations simultaneously." *SEC v. Dresser Industries, Inc.*, 628 F.2d 1368, 1377 (D.C. Cir. 1980)(en banc)(holding that courts should refuse to "block parallel investigations by these agencies in the absence of 'special circumstances' in which the nature of the proceedings demonstrably prejudices substantial rights of the investigated party or of the government."). The same is true for state agencies.

While the government's ability to conduct parallel civil and criminal proceedings "is not wholly unrestrained," the government has a fairly free hand. *United States v. Posada Carriles*, 541 F.3d 344, 354 (5th Cir. 2008). Importantly to this case, the State has no duty to disclose the possibility or existence of a criminal investigation. *Id.* at 356-57 ("As [our cases] make clear, while the government may not make affirmative material misrepresentations about the nature of its inquiry, it is under no general obligation of disclosure."); *also United States v. Prudden*, 424 F.2d 1021, 1032 (5th Cir. 1970)(holding that IRS agent had no duty to inform taxpayer of an ongoing criminal investigation when conducting an audit); *United States v. Blocker*, 104 F.3d 720, 729-30 (5th Cir. 1997)(holding that state insurance examiner had no duty to disclose fact that he had secretly agreed to furnish

information gleaned from his examination to the FBI).[13] This rule is followed in all federal circuits.[14] *United States v. Stringer*, 535 F.3d 929, 940 (9th Cir. 2008)(collecting cases)("Almost every [] circuit has denied suppression, even when government agents did not disclose the possibility or existence of a criminal investigation, so long as they made no affirmative misrepresentations.").

The Receiver, as an agent of this Court and not of the government, is even further removed. The Receiver is allowed and expected to conduct his investigation and to pursue his claims without having to comply with the restrictions placed on law enforcement authorities. *Setser*, 568 F.3d at 487-90. A receiver may seize evidence without a warrant. *Id.* And, he may turn it over to law enforcement without a warrant. *Id.* There is no law that suggests that a Receiver's conduct has anything to do with the propriety of a criminal prosecution or investigation. Certainly, McDermott has cited none.

The Receiver did not affirmatively mislead McDermott about the existence or possibility of a criminal investigation. To begin with, the Receiver was not aware of the existence of a criminal investigation in 2012 when the Settlement Agreement was negotiated and signed.[15] Napoli Affid. at ¶8; Espinosa Affid. at ¶6. Moreover,

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

[14] Neither McDermott nor the Receiver has located a Texas case that specifically addresses parallel civil and criminal investigations on facts similar to this case.

[15] This assumes that there was a criminal investigation in 2012, which appears unlikely on the facts known to the Receiver.

McDermott does not identify any specific statement (or even a general one) by the Receiver or his counsel indicating that there was no criminal investigation. In fact, the Receiver never discussed the possibility of a criminal investigation with McDermott or his counsel. He certainly did not tell either that there was no criminal investigation. *Id.*

Instead, McDermott relies on the Receiver's failure to object to the Court's finding in the Class Judgment that the class would have to prove that McDermott was negligent in order to prevail. Motion at 34. He argues that this "failure" somehow misled him into believing that no one was considering a criminal charge against him. *Id.* This is nonsense. First, the Class Judgment relates solely to the civil claims brought by the class plaintiffs. The elements of the civil claim brought by the class (including the required *mens rea*) are, not surprisingly, different from the criminal offenses for which McDermott was indicted.[16] Notably, McDermott does not suggest that the Class Judgment misstated the intent required by the class claims.[17] *Id.* Second, neither the State nor the Receiver participated in the drafting of the Class Judgment, which was the work product of McDermott's counsel and Geoff Weisbart, counsel for the class. Napoli Affid. at ¶9. Third, neither the State nor the Receiver was a party to the Class Action and, thus, lacked standing to object to the Class Judgment.

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[16] The class alleged only a claim for rescission based on the failure of Retirement Value to register its offering of securities. As the registration issue is a strict liability cause of action, it is unlikely that the class would have to prove even negligence.

[17] He hardly could do so. His counsel approved the form of the Class Judgment.

McDermott also suggests that the Receiver somehow mislead him by not informing him that the State intended to breach the Settlement Agreement. This too is nonsense. Again, this presupposes that the State intended to pursue criminal charges against McDermott in 2012 and that the Receiver knew about it. In any event, the State has not breached the Settlement Agreement. The Settlement Agreement does not mention criminal charges or indictments. Certainly, the State did not enter into any sort of a covenant not to sue – either civilly or criminally.

All the State did was to release claims that could have been brought in this case. Settlement Agreement at § 4.A. This release is limited by its terms to civil claims as criminal claims could not have been brought in this case. Because this Court was exercising civil jurisdiction over this case, it lacked jurisdiction to consider criminal claims against any party. *Anambra State Community in Houston, Inc. v. Ulasi*, 412 S.W.3d 786, 791 (Tex. App. – Houston [14th Dist.] 2013, no pet.)("In a civil case, a court lacks jurisdiction to impose criminal liability on a defendant."). And, as McDermott concedes, neither the Attorney General nor the TSSB has the authority to enter into a non-prosecution agreement or to otherwise "waive" criminal charges. Motion at 19.

McDermott's argument that the Receiver should have *Mirandized* him before conducting discovery or meeting with him is perplexing to say the least. The right to receive the *Miranda*[18] warnings arises only in a custodial interrogation by law enforcement officials. *Herrera v. State*, 241 S.W.3d 520, 526 (Tex. Crim. App. 2007).

[18] *Miranda v. Arizona*, 384 U.S. 436 (1966).

Even if the State had actually undertaken a criminal investigation, McDermott would not have been entitled to *Miranda* warnings. Being the focus of a criminal investigation does not equate to being in custody. *White v. State*, 931 S.W.2d 736, 742 n.9 (Tex. App. – Corpus Christi 1996, pet. ref'd)(citing *Beckwith v. United States,* 425 U.S. 341, 345 (1976)). Further, the fact that an investigation has focused on a subject does not trigger the need for *Miranda* warnings in non-custodial settings. *Id.* (citing *Minnesota v. Murphy,* 465 U.S. 420, 431 (1984)).

Miranda is not applicable to this case. As discussed above, the Receiver is not a law enforcement official. Moreover, McDermott was never in custody. Under Texas law, "[a] person is in 'custody' only if, under the circumstances, a reasonable person would believe that his freedom of movement was restrained to the degree associated with a formal arrest." *Id.* at 525 (holding that an inmate questioned in jail was not entitled to *Miranda* warnings). That McDermott voluntarily met with the Receiver's counsel to discuss Retirement Value or with the TSSB to discuss Conestoga is hardly the same as the being hauled into an interrogation room by the police.

Not that a voluntary agreement to cooperate could ever rise to the level of a custodial interrogation, the Settlement Agreement did not require McDermott to meet with the Receiver or the TSSB. The Agreement provides that "McDermott will cooperate with the RV Receiver and the State in connection with their investigation of the affairs of Retirement Value." Settlement Agreement at § 3. It did not require

McDermott to meet with anyone.[19] Instead, it provided that all requests to McDermott be "directed through Ben De Leon, attorney of record for McDermott, via phone and/or email." *Id.* Thus, even under his strained interpretation of custody, McDermott was never in custody and his right to receive a *Miranda* warning never attached.

Accordingly, the Receiver did not violate McDermott's constitutional rights.

B. McDermott is not entitled to indemnity from the Receiver.

In the Settlement Agreement, the Receiver agreed to indemnify McDermott "from any claims brought by, through or under the Receiver." Settlement Agreement at § 5. McDermott argues, without citation to authority, that the criminal indictments against him are claims "by, through or under" the Receiver. He is flat wrong.

The indictments of McDermott for violations of the Texas Securities Act and the Penal Code are not claims that are brought by, through or under the Receiver. A "by, through or under" indemnity covers claims that were brought hy the indemnitor; brought by someone as a suhrogee or assignee of the indemnitor; or hrought hy someone claiming the right to bring the claim derivatively on behalf of the indemnitor. Where the party suing has a right to sue independent of the indemnitor's rights, a "by through and under" indemnity does not apply. *Manhattan Const. Co. v. Hood Lanco, Inc.*, 762 S.W.2d 617, 619 (Tex. App. –

[19] By his own admission, McDermott never met with the TSSB to discuss Retirement Value. His only meetings with the TSSB were to discuss his own business, Conestoga. Discussing McDermott's personal business was not compelled by the language of the Settlement Agreement.

Houston [14th Dist.] 1988, writ denied)(holding that a "by, through and under" indemnity agreement by plaintiff did not apply to a claim arising from a contract between co-defendants).

The State's criminal action against McDermott is based on the State's independent right to enforce its own laws. *Burks v.* State, 795 S.W.2d 913, 915 (Tex. App. – Amarillo 1990, pet. ref'd)(" A crime constitutes an offense against the sovereign. For that reason, a criminal action is pursued under the authority and in the name of the State."). It is not a claim that is derivative of any claim owned by the Receiver. In fact, the Receiver has no authority to bring a criminal action. *Id.* He did not even swear out a criminal complaint. As such, the criminal indictments against McDermott are not by, through or under the Receiver and McDermott is not entitled to indemnity.

The language of the Settlement Agreement is unambiguous. There is nothing in the indemnity language or elsewhere in the agreement that suggests that the Receiver would defend McDermott from criminal liability. The Court cannot rewrite the agreement to give McDermott something he did not bargain for.

Moreover, to require the Receiver to indemnify McDermott against a criminal charge would violate public policy. *Houston Ice & Brewing Co. v. Sneed,* 132 S.W. 386, 388 (Tex. Civ. App. 1910, writ dism'd).

> Punishment for crime is intended to be personal and absolute; and, to accomplish the prevention of crime which is the purpose of the punishment, it is quite necessary that the person should not "even entertain the hope of indemnity" for the offense committed.... To allow damages ... suffered in consequence of [a] conviction would in tendency

> make it profitable to violate the law, and oppose the principle of denying any redress for a violation of the law.

Id. at 388-89. Courts in Texas continue to follow this rule in various contexts. *E.g.*, *Peeler v. Hughes & Luce*, 868 S.W.2d 823, 831-33 (Tex. App. – Dallas 1993)(relying on the basic policy that individuals who have committed illegal acts shall not be permitted to profit financially or be otherwise indemnified from their crimes to preclude convicted criminals from suing their lawyers) *affirmed* 909 S.W.2d 494 (Tex. 1995). The Court should not interpret the Settlement Agreement so that it would violate long-standing public policy.

McDermott is not entitled to indemnity from the Receiver.

C. The Receiver did not fraudulently induce McDermott to execute the Settlement Agreement

McDermott has no valid claim against the Receiver for fraudulently inducing him into executing the Settlement Agreement. He bases his claim on his allegations that the State was conducting a criminal investigation of him and that the Receiver failed to notify him of it. There is utterly no basis for this claim.

1. The Settlement Agreement bars McDermott's claim for fraudulent inducement.

McDermott has waived his claim that he was fraudulently induced to enter into the Settlement Agreement. In the Settlement Agreement, the parties agreed that:

> In executing this Agreement, the Parties represent that neither they nor their attorneys have relied upon any statement or representation, other than those expressly contained in this Agreement, pertaining to this matter by those persons who are hereby released, or by any person or persons representing or acting on behalf of the Parties. The Parties acknowledge that they have separate counsel, that this Agreement has

> been explained to them by counsel, that they understand this Agreement and that they agree to the terms contained in this Agreement.

Settlement Agreement at § 22.D. (Nonreliance). McDermott further agreed that he "unconditionally releases and forever discharges the Releasing Parties [the Receiver, the State and the class] from any claim that this Agreement was induced by any fraudulent or negligent act or omission." *Id.* at § 4.B.

Having expressly disclaimed reliance on any representation of the Receiver and having expressly waived the right to claim that the agreement was induced by fraud, McDermott cannot now claim the Receiver fraudulently induced him into signing the agreement. *Schlumberger Technology Corp. v. Swanson,* 959 S.W.2d 171, 179 (Tex. 1997). In *Swanson,* the Supreme Court held that holding that a disclaimer of reliance on representations, "where the parties' intent is clear and specific, should be effective to negate a fraudulent inducement claim." *Id.* Disclaimers of the sort at issue here apply to both misrepresentations and omissions. *Id.* at 181. Like this case, the agreement in *Swanson* was a settlement agreement that resolved a complicated case. The disclaimer of reliance in *Swanson* was identical to that in the agreement here. *Id.* at 180.

In *Swanson,* two parties to a commercial dispute entered into a settlement. As part of the settlement, the plaintiff sold its interest in a project to the defendant for $800,000. *Id.* at 174. Shortly after the settlement, the defendant resold the project at a significantly higher value. *Id.* The plaintiff sued claiming that the defendant had lied about the value of the project and the potential sale. *Id.*

The *Swanson* court held that the settlement agreement barred any claim that the settlement was induced by fraud. In the settlement, as here, the parties agreed that neither was relying on any statements made by the other, that both sides were represented by counsel who had explained the agreement and its consequences to them. The court held that when parties are represented by counsel and deal at arm's length, disclaimers of reliance will be enforced against them. *Id.* at 181.

The Supreme Court has since clarified that disclaimers of reliance should be enforced where they contain a "clear and unequivocal expression of intent to disclaim reliance." *Forest Oil v. McAllen*, 268 S.W.3d 51, 60 (Tex. 2008). The Court also identified what it considered were the most relevant factors in determining the scope of a disclaimer.

> [W]e now clarify those that guided our reasoning: (1) the terms of the contract were negotiated, rather than boilerplate, and during negotiations the parties specifically discussed the issue which has become the topic of the subsequent dispute; (2) the complaining party was represented by counsel; (3) the parties dealt with each other in an arm's length transaction; (4) the parties were knowledgeable in business matters; and (5) the release language was clear.

Id. All of these factors are present here.

The Settlement Agreement was heavily negotiated. The parties reached an agreement in principal in May 2012 but did not agree to a form of agreement until August. One of the primary issues was the scope of the release. McDermott wanted a broad release that would have released all claims related to Retirement Value. The State wanted a narrower release. The parties agreed on a release that was limited to claims that could have been brought in this case.

The key dispute related to the Settlement Agreement is the scope of the release. McDermott argues that the State agreed to give up the right to bring criminal charges against him in connection with Retirement Value. The State obviously disagrees.

McDermott was represented in the negotiations by Ben and Hector De Leon who represent him today. He has always held himself out as a sophisticated and experienced business man. There is no reason to believe that he is not. Moreover, all of the parties dealt at arm's length.

The language of the settlement is very clear. In addition to the language disclaiming reliance that was identical to that found to be unequivocal in *Swanson*, McDermott agreed to unequivocally and unconditionally release the State and the Receiver from any claim that the release was procured hy fraud. Settlement Agreement at § 4.B. In exchange, McDermott received similar releases from the Receiver and the State. *Id.* at § 4.A.

The Court should enforce the Settlement Agreement as written and deny McDermott's motion.

2. Even if it were not foreclosed by the Settlement Agreement, McDermott's claim for fraudulent inducement is without merit.

At a very basic level, McDermott's claim is absurd. It is predicated on the notion that the Receiver "knew" that the State would indict McDermott nearly three years after the settlement. The mere passage of time suggests that the State had not formulated any intent as to indicting or even investigating McDermott in 2012.

To suggest tbat the Receiver had some duty (unknown to law) to warn him of events years in the future is simply folly.

As discussed above, McDermott merely assumes that the State was investigating him criminally in 2012. The Receiver is not currently aware of any evidence that suggests that an investigation was on going at that time. At the time, the Receiver was not aware of a criminal investigation. Napoli Affid. at ¶8; Espinosa Affid. at ¶6. Even if he had such knowledge, the Receiver had no duty to disclose the existence of a criminal investigation to McDermott. *See, supra,* 17-21.

Moreover, McDermott fails to identify a single statement by the Receiver that there was no criminal investigation. In fact, his argument is predicted on the claim that the Receiver said nothing one way or the other about the existence or possibility of a criminal investigation. He attempts to get around this by arguing that the Receiver's failure to object to a statement in the Class Judgment somehow misled him. In addition to being silly,[20] this too is nothing more than another omission, where the Receiver had no duty to speak. In any event, it was after McDermott executed the Settlement Agreement and could not have induced him to sign it. Nor has McDermott pointed to an allegedly false promise by the Receiver in the Settlement Agreement.

Accordingly, McDermott has no claim that the Receiver fraudulently induced him into executing the Settlement Agreement and the Court should deny his motion.

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[20] *See, supra,* at 21-22.

D. The Receiver has not breached the Settlement Agreement

McDermott generally argues that the Receiver breached the Settlement Agreement. Yet, his argument centers on the State's indictment of him. He makes no specific allegations of a breach by the Receiver and fails to identify any contractual duty owed by the Receiver that was breached.

The Receiver is not responsible for the indictments against McDermott. The Receiver is not a law enforcement officer or a prosecutor and lacks the capability to criminally charge anyone. The Receiver did not even swear out a criminal complaint against McDermott.[21]

Notably, McDermott has not pointed to a single affirmative obligation under the Settlement Agreement that the Receiver has allegedly breached. At best, he asserts that the State violated the release in the Settlement Agreement by indicting him. But, the Receiver is not responsible for the State's conduct.

In any event, a release does not support an action for breach of contract. At best, it would provide McDermott with an affirmative defense that he could assert in the criminal cases against him. A "release surrenders legal rights and obligations between the parties. It operates to extinguish the claim or cause of action as effectively as would a prior judgment between the parties and is an absolute bar to any right of action on the released matter." *Dresser Indus., Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 508 (Tex. 1993). Accordingly, a "release is expressly designated as an affirmative defense." *Id.* Simply put, suit on a released

[21] There is nothing in the Settlement Agreement that would preclude the Receiver from filing a criminal complaint against McDermott. He just did not do so.

claim by a releasing party does not give rise to a claim by the released party for breach of the release portion of a settlement agreement. *Frontier Logistics, L.P. v. National Property Holdings, L.P.*, 417 S.W.3d 656, 663 (Tex. App. – Houston [14th Dist.] 2013, pet. denied).

Accordingly, the Receiver did not breach the Settlement Agreement and the Court should dismiss McDermott's motion.

CONCLUSION

McDermott raises numerous challenges to the indictments pending against him in Collin County. Regardless of their merit, these challenges are not properly before this Court. They should and must be brought before the court in Collin County hearing his criminal case. This Court should dismiss McDermott's motion.

This Court also lacks jurisdiction to determine McDermott's claims that his Settlement Agreement was induced by fraud or to resolve his claims that it has been breached. In any event, McDermott's claims are without merit. For these reasons also, the Court should dismiss McDermott's motion.

Respectfully submitted,

By: /s/ Michael D. Napoli
Michael D. Napoli
State Bar No. 14803400

DYKEMA COX SMITH
1201 Elm Street, Suite 3300
Dallas, Texas 75270
(214) 698-7837
(214) 698-7899 (Fax)
mnapoli@dykema.com

COUNSEL FOR THE RECEIVER OF RETIREMENT VALUE, LLC

CERTIFICATE OF SERVICE

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

Jack Hohengarten Texas Attorney General Financial and Tax Litigation Division 300 W. 15th Street, Sixth Floor Austin, Texas 78711-2548 (512) 475-3503 (512) 477-2348 fax jack.hohengarten@texasattorneygeneral.gov **Counsel for the State of Texas**	Isabelle M. Antongiorgi Taylor Dunham, llp 301 Congress Avenue, Suite 1050 Austin, Texas 78701 (512) 473-2257 (512) 478-4409 fax iantongiorgi@taylordunham.com **Counsel for HCF Receiver**
Geoffrey D. Weisbart Mia A. Storm Weisbart Springer Hayes LLP 212 Lavaca Street, Suite 200 Austin, Texas 78701 (512) 652-5780 (512) 682-2074 fax gweisbart@wshllp.com mstorm@wshllp.com **Counsel for the Cain Intervenors**	Alberto T. Garcia III Garcia & Martinez, llp 5211 W. Mile 17 ½ Road Edinburg, Texas 78541 (956) 380-3700 (956) 380-3703 fax albert@garmtzlaw.com yoli@garmtzlaw.com **Counsel for the Harrison Intervenors**
Bogdan Rentea Rentea & Associates 1002 Rio Grande Street Austin, Texas 78701 (512) 472-6291 (512) 472-6278 brentea@rentealaw.com **Counsel for Wendy Rogers**	Meagan Martin Standly and Hamilton, LLP 325 N. St. Paul, Suite 3300 Dallas, Texas 75201 (214) 234-7900 (214) 234-7300 fax mmartin@standlyhamilton.com **Counsel for HCF Investor Intervenors**

Milton G. Hammond Law Office of Milton G. Hammond 6406 La Manga Drive Dallas, Texas 75248 (214) 642-0881 (972) 782-4540 fax mghammondlaw@gmail.com **Counsel for the Marlow Intervenors**	Carl Galant Nicholas P. Laurent McGinnis Lochridge & Kilgore, LLP 600 Congress Avenue, Suite 2100 Austin, Texas 78701 (512) 495-6000 (512) 495-6093 fax cgalant@mcginnislaw.com nlaurent@mcginnislaw.com **Counsel for Third Party Defendants Ron James, Don James, and James Settlement Services**

By: /s/ Michael D. Napoli
Michael D. Napoli