

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

STATE OF TEXAS,	§	IN THE DISTRICT COURT OF
	§	
Plaintiff,	§	
	§	
v.	§	TRAVIS COUNTY, TEXAS
	§	
RETIREMENT VALUE, LLC, <i>ET AL.</i>	§	
	§	
Defendants,	§	126 TH JUDICIAL DISTRICT

WENDY ROGERS' BRIEF IN SUPPORT OF HER FIRST AMENDED MOTION TO ENFORCE SETTLEMENT AGREEMENT, DISGORGEMENT OF SETTLEMENT FUNDS AND REQUEST FOR EVIDENTIARY HEARING (THE "MOTION")

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES WENDY ROGERS ("Rogers"), and as requested by the Court, files this, her brief in support of her Motion, and shows as follows:

1. Rogers incorporates herein her Motion and all exhibits thereto.
2. The Court has expressed some concern that it may not have jurisdiction over the Motion and the specific request for relief sought by Rogers.
3. Before addressing the Court's concerns, Rogers will point out the relief which she is NOT seeking. To wit: Rogers is not asking this Court to take any action, or make any ruling regarding the indictments themselves, as that action can only be taken by the Collin County District Court in which those indictments are pending.
4. By this Motion, Rogers is simply trying to address a settlement agreement entered into in this Court, approved by this Court, and over which this Court specifically retained jurisdiction.

(See **Exhibit A** to the Motion.)

5. Further, “*the Texas Supreme Court has specifically instructed that “[w]here [a] settlement dispute arises while the trial court has jurisdiction over the underlying action, a claim to enforce the settlement agreement should, if possible, be asserted in that court under the original cause number.*” *Mantas v. Fifth Court of Appeals*, 925 S.W.2d 656, 658 (Tex.1996); *see also Batjet, Inc. v. Jackson*, 161 S.W.3d 242, 245 (Tex.App.-Texarkana 2005, no pet.) (noting that the parties properly asserted their motion for summary judgment to enforce the settlement agreement in the trial court under the original cause number); *Citgo Ref. & Mktg. v. Garza*, 94 S.W.3d 322, 330 (Tex.App.-Corpus Christi 2002, no pet.) (noting that because settlement dispute arose while trial court still had jurisdiction, parties properly asserted claims to enforce settlement agreement under original cause number). Enforcement of a settlement agreement as a separate cause of action is only necessary where the trial court no longer has jurisdiction over the underlying action. *See Mantas*, 925 S.W.2d at 658–59.”
See Fleming v. Ahumada, 193 S.W.3d 704, 710 (Tex. App.—Corpus Christi 2006, no pet.)
6. Therefore, respectfully, this Court’s jurisdiction is clear and it should recognize and accept it and act on this Motion.
7. Although Rogers was denied the opportunity to conduct discovery prior to being ordered to file this brief, she has pieced together some disturbing, yet revealing facts. In short, those facts demonstrate or tend to support the proposition that the settlement agreement was obtained by fraud. (Rogers has scheduled depositions for May 11 and 12, 2015, and will supplement this brief with additional facts once the depositions are concluded and the

transcripts obtained.)

8. Specifically, it appears that the only complaining party that appeared in front of the grand jury that indicted Rogers, was an employee of the Texas State Securities Board (“TSSB”), and the only prosecutors presenting the case to that grand jury, were all staff attorneys from the TSSB. It further appears that not a single participant/investor in Retirement Value, LLC, filed a complaint with the Collin County District Attorney’s office.
9. It therefore appears that the same party that agreed, in writing, in the settlement agreement, not to pursue any further findings that Rogers committed securities fraud or sold a security, orchestrated indictments which by necessity require a determination inconsistent with that promise.
10. The case of *Kalyanaram v. Univ. of Texas Sys.*, 03-05-00642-CV, 2009 WL 1423920, (Tex. App.—Austin May 20, 2009, no pet.) is most instructive to an analysis of this situation. Although in that case the court of appeals upheld summary judgment in favor of the university and found against a claim that a settlement agreement was procured by fraud, its analysis is most useful here, because everything that was proven not to be true in that case, is in fact true here. (a copy of the opinion is attached hereto for the court’s convenience.) In that case, the Third Court upheld summary judgment dismissing the claim that the settlement agreement was procured by fraud, because it found that the claimant failed to produce even a scintilla of evidence that suggested that the university breached a promise not to refer the matter for prosecution to the Collin County District Attorney, nor that it had any influence or authority in bringing the charges. The criminal referral had been already made at the time the

settlement agreement was entered into and the university had in fact written a letter urging that no charges be brought and that no indictment be handed down. As will become evident below, the facts in this case are dramatically different.

11. In paragraph 17 of the settlement agreement, the Attorney General, on behalf of the TSSB, agreed as follows:

*“Release by the State. The State does hereby forever agree to **RELEASE, ACQUIT, FOREVER DISCHARGE AND HOLD HARMLESS** Wendy Rogers and her attorneys, insurers, representatives, successors and assigns, and all person or entities in privity therewith, from any and all civil claims, demands damages, actions, causes of action, and suits at law or in equity, of any kinds or nature, whether arising under statute or common law, whether known or unknown, that have been brought, should have been brought, or could have been brought in the Pending Case. The State does not release or waive its right to demand additional enforcement of the laws and regulations of the State of Texas or the United States, except with regard to those claims and causes of action, whether statutory, legal or equitable, which were, or should have been, or could have been, asserted in the Pending Case, regarding Retirement Value or Hill Country Funding, and which occurred prior to this Settlement. This release does not affect the claims of any other party. Nor does this release include the Emergency Cease and Desist Order entered by the Texas Securities Commissioner on March 29, 2010. By this release, the State does not intend to release any other person including without limitation Wells Fargo Bank, N.A., Wells Fargo Advisors, LLC, Wells Fargo Investments, LLC, Whitney Giles, Ronald James,*

Donald James, James Settlement Services, LLC, Mike Beste, or any licensee of Retirement Value.” (emphasis added) See **Exhibit A** to the Motion.

12. That promise was broken when a TSSB employee, as a complaining witness in front of the Collin County grand jury, at the urging of another TSSB employee, acting as a purported special prosecutor, convinced that grand jury that Rogers violated the securities laws of this state and committed securities fraud, contrary to the promise in the settlement agreement that they would never do so again.
13. Contrary to the situation in the *Kalyanaram* case, supra, where the court found that any promise by the university not to prosecute could not have been effective because the university did not have the authority to prosecute, and only the Collin County District Attorney had that authority, in this his case, the Attorney General, pursuant to the provisions of Article 581-3 of the Securities Act (the “Act”), does enjoy the rights, privileges and powers conferred by law upon district attorneys.
14. At no time during the proceedings in the receivership case, did the TSSB employees that were also acting as special prosecutors for Collin County, ever reveal to Rogers, her attorney, or the Court, that they were acting in dual roles. As a matter of fact, when introduced to the Court and the other parties in the case, they were always identified only as TSSB employees.
15. Further, although the TSSB Commissioner is obligated by the provisions of Article 581-3 of the Act to “*at once lay before the District or County Attorney of the proper county any evidence which shall come to his knowledge of criminality under the Act*”, he did not do so

until five years after he first requested the Attorney General to sue Rogers for violating the securities laws and committing securities fraud, and almost three years after he agreed to enter into the settlement agreement with Rogers.

16. The trickery, intentional failure to disclose, and intentional broken promises that did not exist in the *Kalyanaram* case, supra, exist here, and form the basis for Rogers' requests for relief.

17. The Court should, without delay, recognize its jurisdiction, order the offending parties to a hearing, and after affording them the due process which they did not care to afford to Rogers, find that the settlement agreement was induced by fraud, should be set aside, her settlement money returned to her, and for such other relief to which she may show herself justly entitled.

Respectfully submitted,

RENTEA & ASSOCIATES

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CERTIFICATE OF SERVICE

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

Electronic Service

on this the **30th day of April, 2015.**

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