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

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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 Aff. 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

[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 be excluded are for the Collin County court to decide. This Court lacks the jurisdiction to interfere with the criminal court's jurisdiction.

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[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 what 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 the 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, he 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 that 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 941 (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 by 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

[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.

[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 by the indemnitor; brought by someone as a subrogee or assignee of the indemnitor; or brought by 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 by 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 that 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.

[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
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State Bar No. 14803400

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CERTIFICATE OF SERVICE

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

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

EXHIBIT "A"

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

STATE OF TEXAS, Plaintiff, v. RETIREMENT VALUE, LLC, RICHARD H. "DICK" GRAY, HILL COUNTRY FUNDING, LLC, HILL COUNTRY FUNDING, , and WENDY ROGERS, Defendants, AND JAMES SETTLEMENT SERVICES, LLC et al. Third Party Defendants.	§	IN THE DISTRICT COURT OF TRAVIS COUNTY, TEXAS 126th JUDICIAL DISTRICT

AFFIDAVIT OF MICHAEL D. NAPOLI

BEFORE ME, the undersigned authority, on this day personally appeared Michael D. Napoli, who is personally known to me, and after being duly sworn according to law, upon his oath duly deposed and said:

1. My name is Michael D. Napoli. I am over 21 years of age and otherwise competent to testify. I have personal knowledge of the facts set forth herein, and they are true and correct.

2. I am a member of Dykema Cox Smith and have practiced law in Texas since 1991. During the course of my career, I have represented targets of investigations by the Securities and Exchange Commission ("SEC") and Texas State Securities Board ("TSSB"); defended claims brought by the SEC and TSSB; and

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

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

4. As counsel for the Receiver, I participated in the negotiations that lead to the settlement agreement between the State, the Receiver, the Cain Intervenors and Michael McDermott. In late April 2012, the parties attended a mediation to discuss the disputes between them. At or shortly after the mediation, the parties entered into an agreement in principal to settle.

5. The negotiations toward the final settlement agreement were lengthy and complicated. It was not until August 24, 2012 that the settlement agreement was finally executed by the parties. One of the most difficult issues was the scope of the release. McDermott wanted a very broad release; the State wanted a much narrower release.

6. As of July 13, 2012, the settlement agreement provided that the Receiver, State and Cain Intervenors "agreed to resolve all claims that they have or may have 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 Agreement at Recital 11.[1] The release provided by the Receiver, State and Cain Intervenors was similarly broad. It released McDermott from

[1] The July 2012 Draft Agreement along with the covering e-mail from John Thomas is attached as Exhibit A-1.

> 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). "Lawsuit" was defined to be this case, Cause No. D-1-GV-10-000454.

7. The TSSB and the Attorney General objected that the release was too broad and sought to limit it. After negotiations directly between the State and McDermott ending in August 2012, the parties agreed to limit the release to claims that could have been asserted in this case. Recital 11 was amended to read that the TSSB, the Receiver and the other parties releasing McDermott agreed to "resolve all claims that they have or may have against McDermott arising out of RV, which could have been asserted in the Lawsuit." Settlement Agreement at Recital 11. The release was also limited to claims that could have been brought in this lawsuit. It provided that the TSSB, the Receiver and the other parties 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). "Lawsuit" was defined to be this case, Cause No. D-1-GV-10-000454. The parties executed this form of the agreement and submitted it to the Court for approval. A copy of the Receiver's Motion for Approval of the McDermott settlement is attached as Exhibit A-2.

8. I did not know that the State of Texas (through the TSSB, a local district attorney or any other agency) was pursuing a criminal investigation of

McDermott or anyone else regarding Retirement Value in 2012. To this day, I do not know when the State (through the TSSB or otherwise) began its criminal investigation of McDermott or others regarding Retirement Value. At no point during the course of this case through the date that the settlement agreement was signed did I make any comment, orally or in writing, to McDermott or his counsel about the existence of a criminal investigation or the possibility or likelihood of criminal charges against anyone involved in Retirement Value. I did not tell either that there was not a criminal investigation. Neither McDermott nor his counsel asked me about the existence of a criminal investigation or the possibility or likelihood of criminal charges against anyone involved in Retirement Value until after charges were filed in 2015. I heard no one speak to McDermott or his counsel about a criminal investigation and saw no correspondence to McDermott or his counsel that discussed a criminal investigation prior to 2015. I learned of the indictments from Bogdan Renzaa who had forwarded a copy of Roger's indictment to John Thomas, another of the Receiver's counsel.

9. Neither the Receiver nor his counsel participated in the drafting of the documents related to the Court's approval of the settlement between the class represented by the Cain Intervenors and McDermott. Those documents were drafted by Geoff Weisbart, counsel for the Cain Intervenors, and McDermott's counsel. To my knowledge the State had no role in the drafting of the documents related to the Court's approval of the class settlement.

10. Earlier this year, on or about March 17, 2015, the Receiver and I spoke with Ben and Hector DeLeon. The primary topic of conversation was McDermott's claim for indemnity under the settlement agreement, which we refused. However, both Ben and Hector DeLeon expressed their surprise at the possibility that criminal charges would arise from Retirement Value. I was shocked that they were surprised by the possibility of a criminal case and expressed that to them. I told them that there were in excess of 1,000 victims who were taken for nearly $80 million and that it appeared highly likely that charges would be filed against someone. Hector DeLeon asked if I knew that the State was investigating criminal charges against McDermott back in 2012. I told him that I did not, that no one had told me that there was a criminal investigation but that I had long believed, given the scope of the fraud, that an investigation would eventually occur. He asked if someone should have informed McDermott of that possibility. I told him that he should have done so. I explained that as counsel to someone sued for his participation in a fraud, his first thought should have been the potential for criminal charges. He needed to make an informed tactical decision whether to take the Fifth or to respond to the suit and to make sure that the client was advised of the costs, risks and benefits of the chosen strategy.

11. I was aware in 2012 that the United States had filed criminal charges and obtained multi-decade sentences against principals of A&O Resource Management, another life settlement scam of roughly the same size as Retirement Value, and that sales agents involved in A&O's scheme had received multi-year

sentences in federal criminal cases. I was also generally aware that criminal charges are often brought in connection with securities scams that resulted in receiverships at both the state and federal level. While I had no knowledge that a criminal investigation had occurred or was occurring in 2012, I believed that a criminal investigation would likely take place and that criminal charges would likely be filed against persons with significant involvement in Retirement Value.

12. True and correct copies of the following documents are attached to my affidavit:

a. This Court's order severing the class claims against McDermott is attached as Exhibit A-3;

b. This Court's final judgment approving the class settlement in Cause No. D-1-GV-13-000193 (the Class Action) is attached as Exhibit A-4;

c. The Release of the judgment in the Class Action executed by the Cain Intervenors is attached as Exhibit A-5;

d. A print out of the TSSB's 2012 Civil and Criminal Enforcement Actions from its website is attached as Exhibit A-6; and

e. A press release from the United States Department of Justice announcing sentencing in criminal cases relating to A&O Resource Management is attached as Exhibit A-7.

FURTHER AFFIANT SAYETH NOT.

Michael D. Napoli

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

CYNTHIA TAYLOR
Notary Public, State of Texas
My Commission expires
March 22, 2017

Notary Public

EXHIBIT "B"

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**

AFFIDAVIT OF EDUARDO S. ESPINOSA

BEFORE ME, the undersigned authority, on this day personally appeared Eduardo S. Espinosa, who is personally known to me, and after being duly sworn according to law, upon his oath duly deposed and said:

1. My name is Eduardo S. Espinosa. I am over 21 years of age and otherwise competent to testify. I have personal knowledge of the facts set forth herein, and they are true and correct.

2. I am a member in the law firm of Dykema Cox Smith. I was admitted to practice law in the State of Louisiana in 1996 and in the State of Texas in 1999. Prior to entering private practice, I was an Enforcement Attorney with the United States Securities and Exchange Commission, where I investigated violations of and

enforced the antifraud provisions of the federal securities laws. Prior to attending law school, I worked as an accountant.

3. In addition to acting as a receiver in securities enforcement matters, I have a transactional practice concentrating on mergers and acquisitions and compliance with state and federal securities laws. I have also served as general counsel to a food distributer and senior corporate counsel to a telecommunications company. With over 20 years of professional experience as an accountant, a securities regulator, in-house counsel and a transactional lawyer, I am familiar with the possibility of parallel civil and criminal proceedings in securities matters.

4. I have been the Receiver in this case since it began in May 2010. The Order Appointing Receiver directs me to, among other things: take control of Retirement Value's property, assets, books, records, and the physical premises; conduct and manage Retirement Value's business affairs; file suit to recover assets of the estate or to collect on claims held by the estate; and to investigate Retirement Value's business affairs.

5. As the Receiver, I participated in the negotiations that lead to the settlement agreement between the State, the Receiver, the Cain Intervenors and Michael McDermott. In late April 2012, the parties mediated their disputes. At or shortly thereafter, the parties entered into an agreement in principal to settle. Lengthy and complicated negotiations toward the final settlement agreement ensued and the settlement agreement was finally executed on August 24, 2012.

6. Contrary to Mr. De Leon's assertion, I did not know that the State of Texas (through the TSSB, a local district attorney or any other agency) was criminally investigating McDermott or anyone else regarding Retirement Value in 2012. To this day, I do not know when the State (through the TSSB or otherwise) began its criminal investigation of McDermott or others regarding Retirement Value. At no point prior to the settlement agreement being signed did I comment, orally or in writing, to McDermott or his counsel about the existence or absence of a criminal investigation, or the possibility or likelihood of criminal charges against anyone involved in Retirement Value. Neither McDermott nor his counsel asked me about the existence of a criminal investigation or the possibility or likelihood of criminal charges against anyone involved in Retirement Value until after charges were filed in 2015. Prior to 2015, I heard no one speak to or correspond with McDermott or his counsel about a criminal investigation. I learned of the 2015 indictments when Bogdan Rentea forwarded a copy of Ms. Roger's indictment to Receiver's counsel.

7. On or about March 17, 2015, Michael Napoli, Receiver's counsel, and I spoke with Ben and Hector DeLeon. The primary topic of conversation was McDermott's claim for indemnity under the settlement agreement, which we refused. However, both Ben and Hector DeLeon expressed their surprise at criminal charges having arisen from Retirement Value. We were taken aback by their surprise at the possibility that a criminal case would ensue and expressed that to them. Hector DeLeon asked if we knew, in 2012, that the State was investigating

criminal charges against McDermott. Mr. Napoli and I both paused because of Mr. DeLeon's use of a knowledge qualifier and Ben DeLeon stated the assumption that the pause was a "yes." We immediately corrected him and said, no that is not a "yes." We reminded the DeLeons that over 1,000 victims were defrauded out of approximately $80 million. We further reminded them of the contemporaneous criminal charges that had been brought against other participants in the life settlement industry. Given those facts, we reasonably expected that criminal charges against someone would follow. We reiterated that we did not know of such an investigation and that no one had told us that there was a criminal investigation. I stated that given the magnitude and scope of the fraud, I believed such an investigation would probably occur. He asked if someone should have informed McDermott of that possibility. Mr. Napoli and I both concurred that "someone" should have notified Mr. McDermott of the potential for criminal charges. Mr. Napoli then proceeded to tell Mr. Deleon that: (i) you [Mr. DeLeon] should have done so; and (ii) as counsel to someone sued for participating in a massive fraud, among counsel first thoughts should have been the potential for criminal charges and its impact on their litigation strategy.

FURTHER AFFIANT SAYETH NOT.

Eduardo S. Espinosa

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

Notary Public

Napoli, Michael

From: John Thomas <jthomas@georgeandbrothers.com>
Sent: Friday, July 13, 2012 1:23 PM
To: Benjamin DeLeon (bdeleon@dwlawtx.com); Hector De Leon (hdeleon@dwlawtx.com); Geoff Weisbart; 'Jack Hohengarten' (Jack.Hohengarten@texasattorneygeneral.gov)
Subject: Retirement Value
Attachments: mcdermott settlement - final.doc

Here is what I believe to be is the final draft of the McDermott Settlement Agreement. Please let me know if you agree, and I will circulate signature copies. I would like to sign this up next week.

John W. Thomas
George & Brothers, LLP
1100 Norwood Tower
114 West 7th Street
Austin, Texas 78701
Phone: 512.495.1400
Fax: 512.499.0094
jthomas@georgeandbrothers.com

COMPROMISE, SETTLEMENT AND RELEASE AGREEMENT

This Compromise, Settlement, and Release Agreement (the "Agreement" or the "Settlement Agreement") is entered into effective as of the 6th day of May 2012 (the "Settlement Date"), between and among the following:

1. Michael McDermott ("McDermott");
2. Eduardo S. Espinosa, in his capacity as Court-Appointed Receiver for Retirement Value, LLC (the "RV Receiver" or the "Receiver") and Retirement Value, LLC, a Texas limited liability company ("Retirement Value" or "RV");
3. The State of Texas (the "State");
4. The Texas State Securities Board ("TSSB") and John Morgan, in his official capacity as Commissioner of the TSSB ("Commissioner Morgan"); and
5. Gary Cain and Barry Edelstein (collectively, the "Intervenors"), who will seek a putative settlement class on behalf of all participants in the RV Re-Sale Life Insurance Policy Program ("RSLIPP") (hereinafter referred to as the "Putative Settlement Class").[1]

McDermott, the RV Receiver, Retirement Value, the State, the TSSB, Commissioner Morgan, and the Putative Settlement Class will be collectively referred to as the "Parties," and may be individually referred to as a "Party."

[1] The Putative Settlement Class certification hearing is currently set for August 13-14, 2012.

I.
RECITALS

1. On May 5, 2010, the State, at the request of then-Deputy Securities Commissioner of Texas, John Morgan, filed an Original Verified Petition and Application for *Ex Parte* Temporary Restraining Order, Temporary and Permanent Injunction, Restitution, the Disgorgement of Economic Benefits, Receivership, and Other Equitable Relief, commencing a lawsuit numbered and styled Cause No. D-1-GV-10-000454; *State of Texas v. Retirement Value, LLC, Richard H. "Dick" Gray, Bruce Collins and Kiesling, Porter, Kiesling, & Free, P.C.*; In the 126th Judicial District Court of Travis County, Texas (the "Pending Case" or the "Lawsuit").

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

3. On August 12, 2011, the RV Receiver filed his Third Amended Cross-Claim and Third-Party Claim, joining McDermott as an additional Third-Party Defendant in the Lawsuit. The RV Receiver has asserted claims against McDermott in the Pending Case for, among other things, indemnity, illegally selling unregistered securities, aiding and abetting the illegal sale of unregistered securities by others, and conspiring with and aiding and abetting the officers of Retirement Value in breaching their fiduciary duties to Retirement Value.

4. On February 14, 2012, the Court granted the Receiver's Third Motion for Substitute Service, authorizing service of process on McDermott through various means.

On March 12, 2011, McDermott filed his Special Appearance, Plea to the Jurisdiction, Plea in Abatement, Special Exceptions, and after and subject thereto, Original Answer. On March 16, 2012, McDermott formally waived his Special Appearance via his Motion for Clarification of the Court's Order of December 7, 2011 (the "Securities Order"), thereby making a general appearance in the Lawsuit.

5. On March 28, 2012 the trial court signed an *Order on McDermott's Motion for Clarification of the Court's Order of December 7, 2011*, finding that the Securities Order was binding on Mr. McDermott and any other parties who had not yet appeared at the time the Securities Order was signed.[2] On April 3, 2012, McDermott filed his Motion to Intervene in Case No. 03-11-00867-CV; *Wendy Rogers v. The State of Texas, Eduardo Espinosa, Receiver of Retirement Value, LLC, and Donald R. Taylor, Receiver of Hill Country Funding, LLC, a Texas Limited Liability Company, and Hill Country Funding, a Nevada Limited Liability Company*; In the Third Court of Appeals (the "Rogers Appeal"). The Third Court of Appeals has not yet ruled on McDermott's Motion to Intervene in the Rogers Appeal.

6. On April 11, 2012, McDermott filed his Original Counterclaim against Retirement Value, and his Original Third-Party Petition against the TSSB and Commissioner Morgan in the Lawsuit, seeking a declaratory judgment and transfer of the Pending Cases to the Third Court of Appeals in the alternative

7. On April 17, 2012, McDermott filed his Notice of Appeal in Case No. 03-12-00240-CV; *Michael McDermott v. The State of Texas, Eduardo Espinosa, Temporary*

[2] On April 25, 2012, the trial court signed an *Amended Order on McDermott's Motion for Clarification of the Court's Order of December 7, 2011*, finding that the Securities Order was only binding on McDermott.

Receiver of Retirement Value, LLC, and Donald R. Taylor, Temporary Receiver of Hill Country Funding, LLC; In the Third Court of Appeals (the "McDermott Appeal").

8. McDermott disputes the allegations made against him and admits no wrongdoing.

9. The Parties desire to avoid further litigation, preparation and expense; to terminate all past, present and potential controversies between the Parties related to RV; and to compromise and settle all the Parties' differences of any type related to RV, including but not limited to those asserted in the Pending Case.

10. On June __, 2012, claims were asserted by the ~~Internvors~~ Intervenors on behalf of the Putative Settlement Class, requesting Court approval for a settlement class to seek a class-wide settlement as set forth in this Agreement.

11. RV, the RV Receiver, the Intervenors, the Putative Settlement Class, the State, the TSSB, and Commissioner Morgan (the "Releasing Parties") have agreed to resolve all claims that they have or may have against McDermott related to RV, including, but not limited to, the claims which were or could have been asserted in the Lawsuit, without admission by any party of the merits of the claims, demands, charges, and/or contentions of the others. Likewise, McDermott has agreed to resolve all claims that he has or may have against the Releasing Parties related to RV, including, but not limited to, the claims which were or could have been asserted in the Lawsuit, without admission by any party of the merits of the claims, demands, charges, and/or contentions of the others.

II.
TERMS OF AGREEMENT

In consideration of the promises and agreements contained in this Agreement – including the recitals, acknowledgements, representations and warranties set forth herein – the Parties agree as follows:

1. Monetary Consideration. McDermott agrees to pay the Receiver $750,000.00 (seven hundred and fifty thousand dollars, hereinafter referred to as the "Settlement Amount") as follows: (i) an initial payment of $400,000.00 (four hundred thousand dollars) into escrow within 60 days from the date when this Agreement has been fully executed by all Parties, with the remainder paid at the rate of $50,000.00 (fifty thousand dollars) per month on or before the final day of each month thereafter, until the Settlement Amount is paid in full. The escrow agent shall be De Leon & Washburn, P.C. The Settlement Amount will leave escrow and transfer to the Receiver once the settlement is formally approved by the Court. This settlement is expressly conditioned on and subject to court approval, and the conditions set out in Sections 7 and 8 hereof. If the Court does not approve the settlement and the refusal cannot be cured and/or the conditions set out in Sections 7 and 8 hereof are not met, the Settlement Amount will revert back to McDermott and this Agreement will be void. Assuming the settlement is fully approved by the Court as called for in this Agreement, the Settlement Amount paid to the Receiver shall only be used to pay premiums of policies held in the Receivership and the attorney's fees of counsel who prosecuted the claims against McDermott and represented the Putative Settlement Class.

2. Discounted Opportunity to Settle for Other Third-Party Defendant Licensees. Based upon McDermott's good-faith negotiations to date, the Receiver agrees

to give all other Third-Party Defendant Licensees, who have been sued in this Lawsuit and have not yet settled, an opportunity to pay 85% of their total commission amounts back to the Receiver in settlement of the Receiver's claims against them. The discounted offer will remain open to the Third-Party Defendant Licensees for a period of two (2) weeks from and after such date when this Agreement has been fully executed by all Parties, at which time it shall be withdrawn and rendered of no further force and effect. Ben De Leon, attorney of record for McDermott, shall have the right to review any written notice the Receiver intends to send to all Third-Party Defendant Licensees in this regard.

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

4. Mutual Releases.

A. Release by the Releasing Parties. In return for the Monetary Consideration to be paid as stated herein, the agreement to cooperate, the mutual releases and other good and valuable consideration, Retirement Value, the RV Receiver, the Putative Settlement Class, the State, the TSSB, and Commissioner Morgan (the "Releasing Parties"), jointly for themselves and their respective

heirs, executors, administrators, legal representatives, successors and assigns hereby agree to mutually, irrevocably, unconditionally and completely RELEASE, ACQUIT AND FOREVER DISCHARGE McDermott and his assigns, insurers, heirs, executors, legal representatives and legal counsel, of and from any and all claims, demands, actions, liabilities, damages, losses, costs, expenses, attorneys' fees and causes of action of any nature, both past and present, known and unknown, accrued and unaccrued, foreseen and unforeseen, asserted and not asserted, discovered or not discovered whether at law, in equity or otherwise, either direct or consequential, which they or any of them, have ever had or may now have against McDermott arising out of or related to Retirement Value, including all claims that were or could have been asserted by them in the Lawsuit. The Releasing Parties further fully, completely, and unconditionally release and forever discharge McDermott from any claim that this Agreement was induced by any fraudulent or negligent act or omission, and/or result from any actual or constructive fraud, negligent misrepresentation, conspiracy, breach of fiduciary duty, breach of confidential relationship, or the breach of any other duty under law or in equity.

B. Release by McDermott. In return for the mutual releases and other good and valuable consideration, McDermott, jointly for himself and his respective heirs, executors, administrators, legal representatives, successors and assigns hereby agrees to mutually, irrevocably, unconditionally and completely, RELEASE, ACQUIT AND FOREVER DISCHARGE the Releasing Parties and their parents, subsidiaries, predecessors, successors, assigns, insurers, heirs,

executors, legal representatives and legal counsel, of and from any and all claims, demands, actions, liabilities, damages, losses, costs, expenses, attorneys' fees and causes of action of any nature, both past and present, known and unknown, accrued and unaccrued, foreseen and unforeseen, asserted and not asserted, discovered or not discovered whether at law, in equity or otherwise, either direct or consequential, which he has ever had or may now have against the Releasing Parties or any of them arising out of related to Retirement Value, including all claims that were or could have been asserted by him in the Lawsuit. McDermott further fully, completely, and unconditionally releases and forever discharges the Releasing Parties from any claim that this Agreement was induced by any fraudulent or negligent act or omission, and/or result from any actual or constructive fraud, negligent misrepresentation, conspiracy, breach of fiduciary duty, breach of confidential relationship, or the breach of any other duty under law or in equity.

C. The Parties expressly waive the provisions of any law that might otherwise render their releases contained herein unenforceable with respect to unknown claims, including § 1542 of the California Civil Code, which provides as follows: "A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor."

D. The Parties expressly understand and agree that the exchange of releases does not apply to actions brought by any of them to enforce the terms of

this Agreement, and the Parties shall reserve and each has reserved all of their rights against the other to enforce the terms of this Agreement.

5. Indemnity. The Receiver will indemnify and hold harmless McDermott from any claims brought by, through, or under the Receiver; provided, however that the indemnity will be limited to the net money received by the receivership estate, after fees and expenses, from this settlement pursuant to paragraph 1. The indemnity clause shall not be construed in any manner that would result in a net loss to the receivership estate.

6. Non-Disparagement. RV, the RV Receiver, the Intervenors, the Putative Settlement Class and McDermott agree that they will not, at any time, disparage one another to any third parties in violation of the common law or any other statute.

7. Requirement of Court Approval of this Agreement.

A. The Parties understand and agree that the terms of this Agreement are conditioned upon final approval by the Court. The RV Receiver, by entering into this Agreement, additionally agrees to take all steps reasonably necessary to obtain approval from the Court, including filing a motion for court approval and making any reasonably necessary assurances or recommendations to the Court or any other parties. Should any investor or other interested person object or otherwise seek to prevent Court approval of this Agreement, the Parties agree to take all reasonable steps necessary to respond to such objections and obtain approval from the Court.

B. Should the Court fail to approve this Agreement for any reason, this Agreement shall be null and void as if the Parties had never entered into the Agreement. Should the Court reject any specific agreement or provision herein,

each party shall have the option of ratifying the Agreement without that provision or rejecting the Agreement in its entirety.

8. Certification of the Settlement Class.

A. This Settlement is expressly conditioned upon: (i) the Court's certification of a Settlement Class as defined herein; (ii) there being no Class Members who, at the time of the Settlement Hearing, continue to seek to opt out of the Settlement, unless McDermott waives this provision; and (iii) the Court's Final Approval of the Settlement (collectively, the "Settlement Conditions"). To the extent the Settlement Conditions are not met, McDermott does not waive, but rather expressly reserves, all rights to challenge any and all claims and allegations asserted in the Lawsuit upon all procedural and substantive grounds, including, without limitation, the ability to challenge class action treatment on any grounds and to assert any and all other potential defenses or privileges. The Parties agree that McDermott retains and reserves these rights, and they agree not to take a position to the contrary. The Receiver agrees to pay attorney's fees and expenses associated with a Settlement Class, up to a maximum of $50,000.00 in fees and $10,000.00 in expenses, to Class Counsel. If certification of the Settlement Class is ultimately reversed on appeal, the Settlement Amount would revert to McDermott and this Agreement shall be null and void, and all claims brought in the Lawsuit may again be pursued notwithstanding any intervening running of limitations.

B. Definitions: In addition to terms identified previously, the terms below and used hereinafter shall have the following meanings:

(1) "Class Counsel" means the law firm of Weisbart, Springer, & Hayes, LLP, subject to approval as Putative Settlement Class Counsel by the Court.

(2) "Counsel for McDermott" means the law firm of De Leon & Washburn, P.C.

(3) The "Court" means the Civil District Court of Travis County, 200th Judicial District.

(4) "Effective Date" means the date upon which all of the following have occurred: (1) the Settlement Conditions have been met; (2) the Court has entered an order certifying the Settlement Class; (3) Final Approval has been issued; and (4) the appeal period (i.e., 30 days) has run without an appeal of any Court order associated with the Settlement or, in the event of an appeal, the Parties have received actual notice that the Settlement has received final approval after completion of the appellate process and the final resolution of any appeals.

(5) "Final Approval" means the order or orders entered by the Court granting approval of the Settlement Agreement, dismissing with prejudice the claims the Parties have against each other (with continuing jurisdiction limited to enforcing the Settlement Agreement), and barring and enjoining all Parties from asserting any of the released claims.

(6) "Notice" means the Notice of a Proposed Class Action Settlement, which is to be mailed directly to all participants in the RSLIPP following Preliminary Approval of this Agreement.

(7) "Preliminary Approval" means the order or orders entered by the Court preliminarily approving the terms of this Settlement Agreement, certifying the Settlement Class, and approving the form of Notice to be sent to Class Members.

(8) "Settlement Class," "Class," or "Class Members." Solely for purposes of settlement and judicial approval of this Settlement Agreement, the Parties stipulate to the certification of the following Settlement Class:

> Any and all Persons who, for purposes of participating in Retirement Value's Re-Sale Life Insurance Program or any similar program specifically marketed by Retirement Value, either (i) invested, lent money, or otherwise caused funds to be paid with regard to such program, or (ii) signed a Retirement Value Policy Participation Agreement. The Settlement Class includes the 1252 Persons listed on Exhibit A attached hereto, which are the names of the known investors in Retirement Value identified to date by the Receiver and the State.

The Settlement Class must be certified pursuant to Tex. R. Civ. P.42(b)(2).

(9) "Settlement Hearing" means the hearing at which the Court will consider final approval of this Settlement Agreement and related matters.

C. Administrative Expenses: All administrative expenses, up to a maximum of $50,000.00 in attorneys' fees and $10,000.00 in expenses, including the cost of Notice to the Settlement Class and Class Counsel's ~~attorneys' fees~~, are to be paid by Class Counsel and reimbursed to Class Counsel by Receiver out of the Settlement Amount; unless the Court and the Receiver approves Class Counsel's request to pay such costs out of other Receivership assets, so

the entirety of the Settlement Amount may be used to pay insurance premiums in the Retirement Value portfolio.

D. Preliminary Approval: Within twenty-one (21) days after the execution of this Settlement Agreement, the Parties shall submit the Agreement to the Court and apply for:

(1) Preliminary Approval; and

(2) an order that, pending Final Approval, preliminarily enjoins the Releasing Parties, including each member of the Settlement Class, from commencing, prosecuting or maintaining in any court other than this Court any claim, action or other proceeding that challenges or seeks review of or relief from any order, judgment, act, decision or ruling of this Court in connection with this Settlement Agreement.

(3) Notice, Objections, and Settlement Hearing.

9. Class Counsel will undertake the administrative responsibility of providing Notice to the Class Members in connection with this Settlement Agreement. Class Counsel shall bear all costs of sending the Notice.

10. If envelopes from the mailing of the Notice are returned with forwarding addresses, the Class Counsel will re-mail the Notice to the new address within three (3) business days.

11. Class Counsel shall provide the Court, at least five (5) calendar days prior to the Settlement Hearing, a declaration of due diligence and proof of mailing with regard to the mailing of the Notice to proposed Class Members.

12. In the event that a Notice is returned to Class Counsel by the United States Postal Service because the address of the recipient is no longer valid, i.e., the envelope is marked "Return to Sender," Class Counsel shall perform a standard skip trace in an effort to attempt to ascertain the current address of the particular proposed Class Member in question and, if such an address is ascertained, Class Counsel will re-send the Notice within three (3) business days of receiving the newly ascertained address; if no updated address is obtained for that proposed Class Member, the Notice shall be sent again to the proposed Class Member's last known address. In either event, the Notice shall be deemed received once it is mailed for the second time. With respect to envelopes marked "Return to Sender," Class Counsel shall also call any identified last known telephone numbers (and telephone numbers updated through public and proprietary databases) of proposed Class Members to obtain their current addresses.

13. The Class Counsel shall provide a list of those Class Members who have not been located and the Class Counsel may engage third-party vendors, who shall also keep Class Members' social security numbers confidential, to locate Class Members. Class Counsel will maintain a log of its and any third-party vendors' activities undertaken pursuant to this section. Class Counsel shall provide all new and corrected contact information regarding the Class Members to the Receiver.

14. Class Member objections to this Settlement Agreement must be submitted in writing, and must include a detailed description of the basis of each objection. Objections must be filed with the Court, with copies served on counsel for all Parties to this Settlement Agreement, within thirty-five (35) days after the Notice mailed to Class Members. No one may appear at the Settlement Hearing for the purpose of objecting to

this Settlement Agreement without first having filed and served his or her objection(s) in writing within thirty-five (35) days after the Notice was mailed to Class Members.

15. Upon Preliminary Approval, the Parties will ask the Court to set a briefing schedule and a Settlement Hearing. The Parties shall file all papers in support of Final Approval of the Settlement Agreement no later than twenty (21) days following the close of the objection period, and the Settlement Hearing will be held no earlier than thirty (30) days following the close of the objection period.

16. No Admission of Liability. Mr. McDermott's settlement payment is not an admission of liability in the Lawsuit, such liability being expressly denied.

17. Attorneys' Fees. The Parties will bear their own costs and attorneys' fees.

18. Dismissal of Pending Appeals. Upon fulfillment of all the terms and conditions in this Agreement, McDermott will dismiss the Rogers Appeal and the McDermott Appeal.

19. Pending Hearings. McDermott's counsel has withdrawn McDermott's Response to the Wells Fargo Defendants' Motion to Stay and Motion to Sever Claims. McDermott's counsel has also withdrawn and passed McDermott's Motion to Compel Arbitration and Special Exceptions, which was set for hearing May 29, 2012.

20. Non-Suit. Upon Court approval of this settlement, McDermott will non-suit his counterclaims against RV and his third-party petition against the TSSB and Commissioner Morgan with prejudice. The Receiver will dismiss his claims in the Lawsuit against McDermott with prejudice upon receipt of the final installment payment pursuant to paragraph 1, above.

21. Cooperation. The Parties to this Agreement will act in good faith in the performance of their obligations under this Agreement consistent with the purposes of this Agreement. No Party will unreasonably delay, withhold or condition any notice, approval or similar action required or permitted by this Agreement. The Parties shall cooperate reasonably with each other and with their respective representatives in connection with any steps required to be taken as part of their respective obligations under this Agreement, and shall (i) furnish upon request to each other such further information; (ii) execute and deliver or cause to be executed and delivered to each other such other documents; and (iii) do such other acts and things, all as the other party may reasonably request for the purpose of carrying out the intent of this Agreement. All Parties shall act in good faith and use best efforts to obtain Court approval of the Settlement and the Settlement Class, and to otherwise meet the Settlement Conditions.

22. Representations and Warranties.

A. The Parties expressly represent and warrant to each other that they are legally competent and authorized to execute this Agreement and that the State officials executing this Agreement have received all necessary approvals.

B. The Parties further represent and warrant to each other that they have not sold, assigned, granted, or transferred to any other person or entity any claim, counterclaim, demand, action, or cause of action encompassed by this Agreement and that they are the real party in interest.

23. General Provisions.

A. Entire Agreement. This Agreement contains the entire agreement between the Parties with respect to the subject matter hereof, and supersedes in its

entirety any prior or contemporaneous agreement or understanding, oral or written, among the parties hereto regarding the settlement of the Pending Case. The terms and conditions hereof may not be changed or modified except by written agreement signed by all parties.

B. Choice of Law. The rights and liabilities of the Parties under this Agreement shall be governed as to validity, interpretation, enforcement, effect and damages by the laws of the State of Texas, without regard to any rules, statutes, or case law regarding conflicts of law. Venue for any matters related hereto lies in the Courts of Travis County, Texas.

C. Headings. The headings used in this Agreement are inserted solely for convenience and shall not be used to interpret the meaning of this document.

D. Nonreliance. 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 made by those persons and entities 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 their counsel, that they understand this Agreement, and that they agree to the terms contained in this Agreement.

E. Authorship of Agreement. This Agreement was drafted jointly by the Parties and their respective legal advisors, and is not to be construed or interpreted against any of the Parties on the grounds of sole or primary authorship.

F. Amendment. It is expressly understood and agreed that this Agreement may not be altered, amended, modified or otherwise changed in any respect whatever except by a writing duly executed by the undersigned and/or their respective authorized representatives.

G. Contractual Terms. The Parties understand and agree that the terms of this Agreement are contractual in nature and not merely recitals, and that the agreements contained herein and the consideration transferred is to compromise doubtful and disputed claims, to avoid further litigation, and to buy peace. No payments made, property or assets transferred or conveyed, releases or other consideration given will be construed as an admission of liability by any party.

H. Severability; Invalid Provisions Omitted. After the Agreement is approved by the Court, in the event that any provision, clause or part of this Agreement is subsequently held to be invalid, void, voidable, illegal and/or unenforceable by a court of law, any such ruling shall not affect the validity, enforceability and binding effect of the other provisions, clauses and portions of this Agreement. Any provision declared invalid, void, voidable, illegal and/or unenforceable shall be severable from the remainder of this Agreement.

I. Counterparts. This instrument may be executed in multiple original counterparts, each of which shall be deemed an original for all purposes. No single counterpart of this Agreement need be executed by all of the Parties, so long as each of the Parties shall have executed at least one counterpart.

IN WITNESS HEREOF, the Parties have executed this Agreement through their duly authorized representatives effective as of the Settlement Date.

[SIGNATURE AND ACKNOWLEDGMENT PAGES FOLLOW]

_____ Date: _____

MICHAEL MCDERMOTT

RETIREMENT VALUE, LLC

_____ Date: _____

EDUARDO S. ESPINOSA, in his capacity as
The court-appointed Receiver for Retirement
Value, LLC

THE STATE OF TEXAS

_____ Date: _____

By:
Its:

THE TEXAS STATE SECURITIES BOARD

_____ Date: _____

By:
Its:

A CLASS CONSISTING OF ALL PARTICIPANTS IN THE RE-SALE LIFE INSURANCE POLICY PROGRAM CREATED BY RETIREMENT VALUE, LLC.

_____ Date: _____

DR. GARY CAIN, CLASS REPRESENTATIVE

_____ Date: _____

BARRY EDELSTEIN, CLASS REPRESENTATIVE

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

STATE OF TEXAS, *Plaintiff*,	§	**IN THE DISTRICT COURT OF**
v.	§	
RETIREMENT VALUE, LLC, RICHARD H. "DICK" GRAY, HILL COUNTRY FUNDING, LLC, a Texas Limited Liability Company, HILL COUNTRY FUNDING, a Nevada Limited Liability Company, and WENDY ROGERS, *Defendants*,	§	**TRAVIS COUNTY, TEXAS**
AND	§	
JAMES SETTLEMENT SERVICES, LLC, *ET AL.* *Third-Party Defendants*	§	**126th JUDICIAL DISTRICT**

RECEIVER'S MOTION FOR APPROVAL OF SETTLEMENT WITH THIRD-PARTY DEFENDANT MICHAEL MCDERMOTT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Eduardo S. Espinosa in his capacity as Temporary Receiver of Retirement Value, and files this Motion for Approval of Settlement with Third-Party Defendant Michael McDermott as follows:

Eduardo S. Espinosa, in his capacity as Receiver for Retirement Value, LLC ("RV Receiver"), the State of Texas (the "State"), The Texas State Securities Board ("TSSB"), and John Morgan, in his official capacity as Commissioner of the TSSB ("Commissioner Morgan"), and Gary Cain and Barry Edelstein (the "Intervenors") have reached a compromise and settlement agreement of all claims and disputes they may have against Michael McDermott ("McDermott") (collectively the Parties), and vice versa. The Parties have also agreed to full

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

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

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

PRAYER

The Receiver prays that the Court grant this motion to approve the attached Compromise and Settlement Agreement and the distribution of the proceeds.

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

Respectfully submitted,

R. James George, Jr.
State Bar No. 07810000
John W. Thomas
State Bar No. 19856425
John R. McConnell
State Bar No. 24053351
George & Brothers, L.L.P
114 W. 7th St., Suite 1100
Austin, TX 78701-3015
Telephone: (512) 495-1400
Facsimile: (512) 499-0094

ATTORNEYS FOR RECEIVER

CERTIFICATE OF SERVICE

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

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

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

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PRO SE

John R. McConnell

COMPROMISE, SETTLEMENT AND RELEASE AGREEMENT

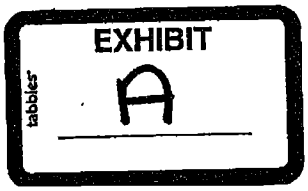
This Compromise, Settlement, and Release Agreement (the "Agreement" or the "Settlement Agreement") is entered into effective as of the 6th day of May 2012 (the "Settlement Date"), between and among the following:

1. Michael McDermott ("McDermott");
2. Eduardo S. Espinosa, in his capacity as Court-Appointed Receiver for Retirement Value, LLC (the "RV Receiver" or the "Receiver") and Retirement Value, LLC, a Texas limited liability company ("Retirement Value" or "RV");
3. The State of Texas (the "State");
4. The Texas State Securities Board ("TSSB") and John Morgan, in his official capacity as Commissioner of the TSSB ("Commissioner Morgan"); and
5. Gary Cain and Barry Edelstein (collectively, the "Intervenors"), who will seek a putative settlement class on behalf of all participants in the RV Re-Sale Life Insurance Policy Program ("RSLIPP") (hereinafter referred to as the "Putative Settlement Class").

McDermott, the RV Receiver, Retirement Value, the State, the TSSB, Commissioner Morgan, and the Putative Settlement Class will be collectively referred to as the "Parties," and may be individually referred to as a "Party."

I.
RECITALS

1. On May 5, 2010, the State, at the request of then-Deputy Securities Commissioner of Texas, John Morgan, filed an Original Verified Petition and



Application for *Ex Parte* Temporary Restraining Order, Temporary and Permanent Injunction, Restitution, the Disgorgement of Economic Benefits, Receivership, and Other Equitable Relief, commencing a lawsuit numbered and styled Cause No. D-1-GV-10-000454; *State of Texas v. Retirement Value, LLC, Richard H. "Dick" Gray, Bruce Collins and Kiesling, Porter, Kiesling, & Free, P.C.*; In the 126th Judicial District Court of Travis County, Texas (the "Pending Case" or the "Lawsuit").

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

3. On August 12, 2011, the RV Receiver filed his Third Amended Cross-Claim and Third-Party Claim, joining McDermott as an additional Third-Party Defendant in the Lawsuit. The RV Receiver has asserted claims against McDermott in the Pending Case for, among other things, indemnity, illegally selling unregistered securities, aiding and abetting the illegal sale of unregistered securities by others, and conspiring with and aiding and abetting the officers of Retirement Value in breaching their fiduciary duties to Retirement Value.

4. On February 14, 2012, the Court granted the Receiver's Third Motion for Substitute Service, authorizing service of process on McDermott through various means. On March 12, 2011, McDermott filed his Special Appearance, Plea to the Jurisdiction, Plea in Abatement, Special Exceptions, and after and subject thereto, Original Answer. On March 16, 2012, McDermott formally waived his Special Appearance via his Motion

for Clarification of the Court's Order of December 7, 2011 (the "Securities Order"), thereby making a general appearance in the Lawsuit.

5. On March 28, 2012 the trial court signed an *Order on McDermott's Motion for Clarification of the Court's Order of December 7, 2011*, finding that the Securities Order was binding on Mr. McDermott and any other parties who had not yet appeared at the time the Securities Order was signed.[1] On April 2, 2012, McDermott filed his Motion to Intervene in Case No. 03-11-00867-CV; *Wesley Rogers v. The State of Texas, Eduardo Espinosa, Receiver of Retirement Value, LLC, and Donald R. Taylor, Receiver of Hill Country Funding, LLC, a Texas Limited Liability Company, and Hill Country Funding, a Nevada Limited Liability Company*; In the Third Court of Appeals (the "Rogers Appeal"). The Third Court of Appeals has not yet ruled on McDermott's Motion to Intervene in the Rogers Appeal.

6. On April 11, 2012 McDermott filed his Original Counterclaim against Retirement Value, and his Original Third-Party Petition against the TSSB and Commissioner Morgan in the Lawsuit, seeking a declaratory judgment and transfer of the Pending Case to the Third Court of Appeals in the alternative

7. On April 17, 2012, McDermott filed his Notice of Appeal in Case No. 03-12-00240-CV; *Michael McDermott v. The State of Texas, Eduardo Espinosa, Temporary Receiver of Retirement Value, LLC, and Donald R. Taylor, Temporary Receiver of Hill Country Funding, LLC*; In the Third Court of Appeals (the "McDermott Appeal").

8. McDermott disputes the allegations made against him and admits no wrongdoing.

[1] On April 25, 2012, the trial court signed an *Amended Order on McDermott's Motion for Clarification of the Court's Order of December 7, 2011*, finding that the Securities Order was only binding on McDermott.

9. The Parties desire to avoid further litigation, preparation and expense; to terminate all past, present and potential controversies between the Parties related to RV and to compromise and settle all the Parties' differences of any type related to RV, including but not limited to those asserted in the Pending Case.

10. By September 10, 2012, Intervenors will assert claims on behalf of the Putative Settlement Class, requesting Court approval for a settlement class to seek a class-wide settlement as set forth in this Agreement.

11. RV, the RV Receiver, the Intervenors, the Putative Settlement Class, the State, the TSSB, and Commissioner Morgan (the "Releasing Parties") have agreed to resolve all claims that they have or may have against McDermott arising out of RV, which were or could have been asserted in the Lawsuit, without admission by any party of the merits of the claims, demands, charges, and/or contentions of the others. Likewise, McDermott has agreed to resolve all claims that he has or may have against the Releasing Parties related to RV, which were or could have been asserted in the Lawsuit, without admission by any party of the merits of the claims, demands, charges, and/or contentions of the others.

II.
TERMS OF AGREEMENT

In consideration of the promises and agreements contained in this Agreement – including the recitals, acknowledgements, representations and warranties set forth herein – the Parties agree as follows:

1. Monetary Consideration. McDermott agrees to pay the Receiver $750,000.00 (seven hundred and fifty thousand dollars, hereinafter referred to as the "Settlement Amount") as follows: (i) an initial payment of $400,000.00 (four hundred

thousand dollars) into escrow within 60 days from the date when this Agreement has been fully executed by all Parties, with the remainder paid at the rate of $50,000.00 (fifty thousand dollars) per month on or before the final day of each month thereafter, until the Settlement Amount is paid in full. The escrow agent shall be De Leon & Washburn, P.C. The Settlement Amount will leave escrow and transfer to the Receiver once the settlement is formally approved by the Court. This settlement is expressly conditioned on and subject to court approval, and the conditions set out in Sections 7 and 8 hereof. If the Court does not approve the settlement and the refusal cannot be cured and/or the conditions set out in Sections 7 and 8 hereof are not met, the Settlement Amount will revert back to McDermott and this Agreement will be void. Assuming the settlement is fully approved by the Court as called for in this Agreement, the Settlement Amount paid to the Receiver shall only be used to pay premiums of policies held in the Receivership and the attorney's fees of counsel who prosecuted the claims against McDermott and represented the Putative Settlement Class.

2. Discounted Opportunity to Settle for Other Third-Party Defendant Licensees. Based upon McDermott's good-faith negotiations to date, the Receiver agrees to give all other Third-Party Defendant Licensees, who have been sued in this Lawsuit and have not yet settled, an opportunity to pay 85% of their total commission amounts back to the Receiver in settlement of the Receiver's claims against them. The discounted offer will remain open to the Third-Party Defendant Licensees for a period of two (2) weeks from and after such date when this Agreement has been fully executed by all Parties, at which time it shall be withdrawn and rendered of no further force and effect. Ben De Leon, attorney of record for McDermott, shall have the right to review any

written notice the Receiver intends to send to all Third-Party Defendant Licensees in this regard.

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

4. Mutual Releases.

A. Release by the Releasing Parties. In return for the Monetary Consideration to be paid as stated herein, the agreement to cooperate, the mutual releases and other good and valuable consideration, Retirement Value, the RV Receiver, the Putative Settlement Class, the State, the TSSB, and Commissioner Morgan (the "Releasing Parties"), jointly for themselves and their respective heirs, executors, administrators, legal representatives, successors and assigns hereby agree to mutually, irrevocably, unconditionally and completely, RELEASE, ACQUIT AND FOREVER DISCHARGE McDermott and his assigns, insurers, heirs, executors, legal representatives and legal counsel, of and from any and all claims, demands, actions, liabilities, damages, losses, costs, expenses, attorneys' fees and causes of action of any nature, both past and present, known and unknown, accrued and unaccrued, foreseen and unforeseen,

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

B. Release by McDermott. In return for the mutual releases and other good and valuable consideration, McDermott, jointly for himself and his respective heirs, executors, administrators, legal representatives, successors and assigns hereby agrees to mutually, irrevocably, unconditionally and completely, RELEASE, ACQUIT AND FOREVER DISCHARGE the Releasing Parties and their parents, subsidiaries, predecessors, successors, assigns, insurers, heirs, executors, legal representatives and legal counsel, of and from any and all claims, demands, actions, liabilities, damages, losses, costs, expenses, attorneys' fees and causes of action of any nature, both past and present, known and unknown, accrued and unaccrued, foreseen and unforeseen, asserted and not asserted, discovered or not discovered whether at law, in equity or otherwise, either direct or consequential, which he has ever had or may now have against the Releasing Parties or any of them arising out Retirement Value, which were or could have been asserted by him in the Lawsuit. McDermott further fully, completely, and

unconditionally releases and forever discharges the Releasing Parties from any claim that this Agreement was induced by any fraudulent or negligent act or omission, and/or result from any actual or constructive fraud, negligent misrepresentation, conspiracy, breach of fiduciary duty, breach of confidential relationship, or the breach of any other duty under law or in equity.

C. The Parties expressly waive the provisions of any law that might otherwise render their releases contained herein unenforceable with respect to unknown claims, including § 1542 of the California Civil Code, which provides as follows: "A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor."

D. The Parties expressly understand and agree that the exchange of releases does not apply to actions brought by any of them to enforce the terms of this Agreement, and the Parties shall reserve and each has reserved all of their rights against the other to enforce the terms of this Agreement.

5. Indemnity. The Receiver will indemnify and hold harmless McDermott from any claims brought by, through, or under the Receiver; provided, however that the indemnity will be limited to the net money received by the receivership estate, after fees and expenses, from this settlement pursuant to paragraph 1. The indemnity clause shall not be construed in any manner that would result in a net loss to the receivership estate.

6. Non-Disparagement. RV, the RV Receiver, the Intervenors, the Putative Settlement Class and McDermott agree that they will not, at any time, disparage one another to any third parties in violation of the common law or any other statute.

7. Requirement of Court Approval of this Agreement.

A. The Parties understand and agree that the terms of this Agreement are conditioned upon final approval by the Court. The RV Receiver, by entering into this Agreement, additionally agrees to take all steps reasonably necessary to obtain approval from the Court, including filing a motion for court approval and making any reasonably necessary assurances or recommendations to the Court or any other parties. Should any investor or other interested person object or otherwise seek to prevent Court approval of this Agreement, the Parties agree to take all reasonable steps necessary to respond to such objections and obtain approval from the Court.

B. Should the Court fail to approve this Agreement for any reason, this Agreement shall be null and void as if the Parties had never entered into the Agreement. Should the Court reject any specific agreement or provision herein, each party shall have the option of ratifying the Agreement without that provision or rejecting the Agreement in its entirety.

8. Certification of the Settlement Class.

A. This Settlement is expressly conditioned upon: (i) the Court's certification of a Settlement Class as defined herein; (ii) there being no Class Members who, at the time of the Settlement Hearing, continue to seek to opt out of the Settlement, unless McDermott waives this provision; and (iii) the

Court's Final Approval of the Settlement (collectively, the "Settlement Conditions"). To the extent the Settlement Conditions are not met, McDermott does not waive, but rather expressly reserves, all rights to challenge any and all claims and allegations asserted in the Lawsuit upon all procedural and substantive grounds, including, without limitation, the ability to challenge class action treatment on any grounds and to assert any and all other potential defenses or privileges. The Parties agree that McDermott retains and reserves these rights, and they agree not to take a position to the contrary. The Receiver agrees to pay attorney's fees and expenses associated with a Settlement Class, up to a maximum of $50,000.00 in fees and $10,000.00 in expenses, to Class Counsel. If certification of the Settlement Class is ultimately reversed on appeal, the Settlement Amount would revert to McDermott and this Agreement shall be null and void, and all claims brought in the Lawsuit may again be pursued notwithstanding any intervening running of limitations.

B. Definitions: In addition to terms identified previously, the terms below and used hereinafter shall have the following meanings:

(1) "Class Counsel" means the law firm of Weisbart, Springer, & Hayes, LLP, subject to approval as Putative Settlement Class Counsel by the Court.

(2) "Counsel for McDermott" means the law firm of De Leon & Washburn, P.C.

(3) The "Court" means the Civil District Court of Travis County, 200th Judicial District.

(4) "Effective Date" means the date upon which all of the following have occurred: (1) the Settlement Conditions have been met; (2) the Court has entered an order certifying the Settlement Class; (3) Final Approval has been issued; and (4) the appeal period (i.e., 30 days) has run without an appeal of any Court order associated with the Settlement or, in the event of an appeal, the Parties have received actual notice that the Settlement has received final approval after completion of the appellate process and the final resolution of any appeals.

(5) "Final Approval" means the order or orders entered by the Court granting approval of the Settlement Agreement, dismissing with prejudice the claims the Parties have against each other (with continuing jurisdiction limited to enforcing the Settlement Agreement), and barring and enjoining all Parties from asserting any of the released claims.

(6) "Notice" means the Notice of a Proposed Class Action Settlement, which is to be mailed directly to all participants in the RSLIPP following Preliminary Approval of this Agreement. Ben De Leon, attorney of record for McDermott, shall have the right to review the Notice before it is mailed directly to all participants in the RSLIPP following Preliminary Approval of this Agreement.

(7) "Preliminary Approval" means the order or orders entered by the Court preliminarily approving the terms of this Settlement Agreement, certifying the Settlement Class, and approving the form of Notice to be sent to Class Members.

(8) "Settlement Class," "Class," or "Class Members." Solely for purposes of settlement and judicial approval of this Settlement Agreement, the Parties stipulate to the certification of the following Settlement Class:

> Any and all Persons who, for purposes of participating in Retirement Value's Re-Sale Life Insurance Program or any similar program specifically marketed by Retirement Value, either (i) invested, lent money, or otherwise caused funds to be paid with regard to such program, or (ii) signed a Retirement Value Policy Participation Agreement. The Settlement Class includes the 1252 Persons listed on Exhibit A attached hereto, which are the names of the known investors in Retirement Value identified to date by the Receiver and the State.

The Settlement Class must be certified pursuant to Tex. R. Civ. P.42(b)(2).

(9) "Settlement Hearing" means the hearing at which the Court will consider final approval of this Settlement Agreement and related matters.

C. Administrative Expenses: All administrative expenses, up to a maximum of $50,000.00 in attorneys' fees and $10,000.00 in expenses, including the cost of Notice to the Settlement Class, are to be paid by Class Counsel and reimbursed to Class Counsel by Receiver out of the Settlement Amount; unless the Court and the Receiver approves Class Counsel's request to pay such costs out of other Receivership assets, so the entirety of the Settlement Amount may be used to pay insurance premiums in the Retirement Value portfolio.

D. Preliminary Approval: Within twenty-one (21) days after the execution of this Settlement Agreement, the Parties shall submit the Agreement to the Court and apply for:

(1) Preliminary Approval; and

(2) an order that, pending Final Approval, preliminarily enjoins the Releasing Parties, including each member of the Settlement Class, from commencing, prosecuting or maintaining in any court other than this Court any claim, action or other proceeding that challenges or seeks review of or relief from any order, judgment, act, decision or ruling of this Court in connection with this Settlement Agreement.

(3) Notice, Objections, and Settlement Hearing.

9. Class Counsel will undertake the administrative responsibility of providing Notice to the Class Members in connection with this Settlement Agreement. Class Counsel shall bear all costs of sending the Notice.

10. If envelopes from the mailing of the Notice are returned with forwarding addresses, the Class Counsel will re-mail the Notice to the new address within three (3) business days.

11. Class Counsel shall provide the Court, at least five (5) calendar days prior to the Settlement Hearing, a declaration of due diligence and proof of mailing with regard to the mailing of the Notice to proposed Class Members.

12. In the event that a Notice is returned to Class Counsel by the United States Postal Service because the address of the recipient is no longer valid, i.e., the envelope is marked "Return to Sender," Class Counsel shall perform a standard skip trace in an effort to attempt to ascertain the current address of the particular proposed Class Member in question and, if such an address is ascertained, Class Counsel will re-send the

Notice within three (3) business days of receiving the newly ascertained address; if no updated address is obtained for that proposed Class Member, the Notice shall be sent again to the proposed Class Member's last known address. In either event, the Notice shall be deemed received once it is mailed for the second time. With respect to envelopes marked "Return to Sender," Class Counsel shall also call any identified last known telephone numbers (and telephone numbers updated through public and proprietary databases) of proposed Class Members to obtain their current addresses.

13. The Class Counsel shall provide a list of those Class Members who have not been located and the Class Counsel may engage third-party vendors, who shall also keep Class Members' social security numbers confidential, to locate Class Members. Class Counsel will maintain a log of its and any third-party vendors' activities undertaken pursuant to this section. Class Counsel shall provide all new and corrected contact information regarding the Class Members to the Receiver.

14. Class Members' objections to this Settlement Agreement must be submitted in writing, and must include a detailed description of the basis of each objection. Objections must be filed with the Court, with copies served on counsel for all Parties to this Settlement Agreement, within thirty-five (35) days after the Notice was mailed to Class Members. No one may appear at the Settlement Hearing for the purpose of objecting to this Settlement Agreement without first having filed and served his or her objection(s) in writing within thirty-five (35) days after the Notice was mailed to Class Members.

15. Upon Preliminary Approval, the Parties will ask the Court to set a briefing schedule and a Settlement Hearing. The Parties shall file all papers in support of

Final Approval of the Settlement Agreement no later than twenty (21) days following the close of the objection period, and the Settlement Hearing will be held no earlier than thirty (30) days following the close of the objection period.

16. No Admission of Liability. Mr. McDermott's settlement payment is not an admission of liability in the Lawsuit, such liability being expressly denied.

17. Attorneys' Fees. The Parties will bear their own costs and attorneys' fees.

18. Dismissal of Pending Appeals. Upon fulfillment of all the terms and conditions in this Agreement, McDermott will dismiss the Rogers Appeal and the McDermott Appeal. Pending fulfillment of all the terms and conditions in this Agreement, McDermott will move to abate the Rogers Appeal and the McDermott Appeal; representing that the parties have reached a settlement agreement and that, as soon as the Court formally approves the agreement, McDermott will file a motion to dismiss the Rogers Appeal and the McDermott Appeal.

19. Pending Hearings. McDermott's counsel has withdrawn McDermott's Response to the Wells Fargo Defendants' Motion to Stay and Motion to Sever Claims. McDermott's counsel has also withdrawn and passed McDermott's Motion to Compel Arbitration and Special Exceptions, which was set for hearing May 29, 2012.

20. Non-Suit. Upon Court approval of this settlement, McDermott will non-suit his counterclaims against RV and his third-party petition against the TSSB and Commissioner Morgan with prejudice. The Receiver will dismiss his claims in the Lawsuit against McDermott with prejudice upon receipt of the final installment payment pursuant to paragraph 1, above.

21. Cooperation. The Parties to this Agreement will act in good faith in the performance of their obligations under this Agreement consistent with the purposes of this Agreement. No Party will unreasonably delay, withhold or condition any notice, approval or similar action required or permitted by this Agreement. The Parties shall cooperate reasonably with each other and with their respective representatives in connection with any steps required to be taken as part of their respective obligations under this Agreement, and shall (i) furnish upon request to each other such further information; (ii) execute and deliver or cause to be executed and delivered to each other such other documents; and (iii) do such other acts and things, all as the other party may reasonably request for the purpose of carrying out the intent of this Agreement. All Parties shall act in good faith and use best efforts to obtain Court approval of the Settlement and the Settlement Class, and to otherwise meet the Settlement Conditions.

22. Representations and Warranties.

A. The Parties expressly represent and warrant to each other that they are legally competent and authorized to execute this Agreement and that the State officials executing this Agreement have received all necessary approvals.

B. The Parties further represent and warrant to each other that they have not sold, assigned, granted, or transferred to any other person or entity any claim, counterclaim, demand, action, or cause of action encompassed by this Agreement and that they are the real party in interest.

23. General Provisions.

A. Entire Agreement. This Agreement contains the entire agreement between the Parties with respect to the subject matter hereof, and supersedes in its

entirety any prior or contemporaneous agreement or understanding, oral or written, among the parties hereto regarding the settlement of the Pending Case. The terms and conditions hereof may not be changed or modified except by written agreement signed by all parties.

B. Choice of Law. The rights and liabilities of the Parties under this Agreement shall be governed as to validity, interpretation, enforcement, effect and damages by the laws of the State of Texas, without regard to any rules, statutes, or case law regarding conflicts of law. Venue for any matters related hereto lies in the Civil District Courts of Travis County, Texas.

C. Headings. The headings used in this Agreement are inserted solely for convenience and shall not be used to interpret the meaning of this document.

D. Nonreliance. 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 made by those persons and entities 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 their counsel, that they understand this Agreement, and that they agree to the terms contained in this Agreement.

E. Authorship of Agreement. This Agreement was drafted jointly by the Parties and their respective legal advisors, and is not to be construed or interpreted against any of the Parties on the grounds of sole or primary authorship.

F. Amendment. It is expressly understood and agreed that this Agreement may not be altered, amended, modified or otherwise changed in any respect whatever except by a writing duly executed by the undersigned and/or their respective authorized representatives.

G. Contractual Terms. The Parties understand and agree that the terms of this Agreement are contractual in nature and not merely recitals, and that the agreements contained herein and the consideration transferred is to compromise doubtful and disputed claims, to avoid further litigation, and to buy peace. No payments made, property or assets transferred or conveyed, releases or other consideration given will be construed as an admission of liability by any party.

H. Severability; Invalid Provisions Omitted. After the Agreement is approved by the Court, in the event that any provision, clause or part of this Agreement is subsequently held to be invalid, void, voidable, illegal and/or unenforceable by a court of law, any such ruling shall not affect the validity, enforceability and binding effect of the other provisions, clauses and portions of this Agreement. Any provision declared invalid, void, voidable, illegal and/or unenforceable shall be severable from the remainder of this Agreement.

I. Counterparts. This instrument may be executed in multiple original counterparts, each of which shall be deemed an original for all purposes. No single counterpart of this Agreement need be executed by all of the Parties, so long as each of the Parties shall have executed at least one counterpart.

IN WITNESS HEREOF, the Parties have executed this Agreement through their duly authorized representatives effective as of the Settlement Date.

[SIGNATURE AND ACKNOWLEDGMENT PAGES FOLLOW]

Date: _____

MICHAEL MCDERMOTT

RETIREMENT VALUE, LLC

Date: 6/22/12

EDUARDO S. ESPINOSA, in his capacity as
The court-appointed Receiver for Retirement
Value, LLC

THE STATE OF TEXAS

Date: 6-17-2012

By: John M. Hohengarten
Its: AAG

THE TEXAS STATE SECURITIES BOARD

Date: _____

By:
Its:

A CLASS CONSISTING OF ALL PARTICIPANTS IN THE RE-SALE LIFE INSURANCE POLICY PROGRAM CREATED BY RETIREMENT VALUE, LLC.

Date: _____

DR. GARY CAIN, CLASS REPRESENTATIVE

Date: _____

BARRY EDELSTEIN, CLASS REPRESENTATIVE

MICHAEL MCDERMOTT

Date: Aug 24 2012

RETIREMENT VALUE, LLC

Date: _____

EDUARDO S. ESPINOSA, in his capacity as The court-appointed Receiver for Retirement Value, LLC

THE STATE OF TEXAS

Date: _____

By:
Its:

THE TEXAS STATE SECURITIES BOARD

Date: 8-20-2012

By: JOHN MORGAN
Its: SECURITIES COMMISSIONER

A CLASS CONSISTING OF ALL PARTICIPANTS IN THE RE-SALE LIFE INSURANCE POLICY PROGRAM CREATED BY RETIREMENT VALUE, LLC.

Date: _____

DR. GARY CAIN, CLASS REPRESENTATIVE

Date: _____

BARRY EDELSTEIN, CLASS REPRESENTATIVE

Date: _____

MICHAEL MCDERMOTT

RETIREMENT VALUE, LLC

Date: 8/22/12

EDUARDO S. ESPINOSA, in his capacity as
The court-appointed Receiver for Retirement
Value, LLC

THE STATE OF TEXAS

Date: 8-17-2012

By: John M. Hohengarten
Its: AAG

THE TEXAS STATE SECURITIES BOARD

Date: _____

By:
Its:

A CLASS CONSISTING OF ALL PARTICIPANTS IN THE RE-SALE LIFE INSURANCE POLICY PROGRAM CREATED BY RETIREMENT VALUE, LLC.

Date: 8/23/2012

R. GARY CAIN, CLASS REPRESENTATIVE

Date: _____

BARRY EDELSTEIN, CLASS REPRESENTATIVE

Date: _____

MICHAEL MCDERMOTT

RETIREMENT VALUE, LLC

Date: 8/22/12

EDUARDO S. ESPINOSA, in his capacity as
The court-appointed Receiver for Retirement
Value, LLC

THE STATE OF TEXAS

Date: 8-17-2012

By: John M. Hohengarten
Its: AAG

THE TEXAS STATE SECURITIES BOARD

Date: _____

By:
Its:

A CLASS CONSISTING OF ALL PARTICIPANTS IN THE RE-SALE LIFE INSURANCE POLICY PROGRAM CREATED BY RETIREMENT VALUE, LLC.

Date: _____

J.P. GARY CAIN, CLASS REPRESENTATIVE

Date: 24 Aug 12

BARRY EDELSTEIN, CLASS REPRESENTATIVE

SETTLEMENT STATEMENT

Pursuant to the Fee Agreement between Eduardo S. Espinosa in his capacity as Receiver of Retirement Value, LLC and George & Brothers, LLP, the settlement proceeds received from Licensee **Michael McDermott** shall be disbursed as follows:

TOTAL SETTLEMENT:	**$750,000.00**
LESS:	
ATTORNEYS' FEES (37.5%)	**$281,250.00**
NET PROCEEDS TO CLIENTS:	**$468,750.00**

Our signatures below indicate that we have reviewed and understand the foregoing settlement statement and are in agreement with the division of the settlement proceeds as set out above.

Eduardo Espinosa — Date: 9/5/12

John W. Thomas — Date:

EXHIBIT B

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

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

ORDER ON MOTION FOR APPROVAL OF SETTLEMENT WITH MICHAEL MCDERMOTT

On this _____ day of _____ 2012, the Court considered the Motion for Approval of Settlement with Michael McDermott. Considering the settlement and noting the agreement of the parties to the settlement, the Court is of the opinion that the motion is well-taken and that it should be granted. It is therefore:

ORDERED that the settlement between Edwardo S. Espinosa, in his capacity as Receiver for Retirement Value, LLC ("RV Receiver"), the State of Texas (the "State"), the Texas State Securities Board ("TSSB"), and John Morgan, in his official capacity as Commissioner of the TSSB ("Commissioner Morgan"), and Gary Cain and Barry Edelstein (the "Intervenors") and Third-Party Defendant Michael McDermott ("McDermott"), collectively referred to as the "Parties," is approved, conditioned on fulfillment of the terms and payments called for in the agreement. The legal fees associated with the settlement are also approved. If the terms and payments are not made as called for in the settlement agreement, the agreement will be considered null and void.

Signed this ___ day of _____, 2012.

_____
THE HONORABLE GISELA D. TRIANA,
JUDGE PRESIDING

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.,	§	419th
	§	
Third Party Defendants.	§	**126TH JUDICIAL DISTRICT**

AGREED ORDER GRANTING SEVERANCE OF CLASS CLAIMS AGAINST THIRD-PARTY DEFENDANT MICHAEL MCDERMOTT

Before this Court is a Motion for Severance filed by Intervenor Class Representatives Dr. Gary Cain and Barry Edelstein ("Intervenor Class Representatives"). Intervenor Class Representatives filed class action claims against Third-Party Defendant Michael McDermott ("McDermott"). McDermott and Intervenor Class Representatives have reached an agreement regarding severance of said class claims against McDermott. The Court, having considered the Motion, the agreement of the parties, and the interest of justice finds that Intervenor Class Representatives' Motion to Sever their class claims against McDermott should be GRANTED.

IT IS, THEREFORE, ORDERED that Intervenors Dr. Gary Cain and Barry Edelstein's suit against McDermott as set forth in Intervenors' Class Claim against McDermott is hereby severed from this action and that the Clerk of the Court shall assign a new cause number to the

D-1-GV-13 000193 419th

case, styled *Dr. Gary Cain and Barry Edelstein, on behalf of themselves and those similarly situated, vs. Michael McDermott*, and assign the case to Judge Gisela Triana;

IT IS FURTHER ORDERED that the severed case shall be wholly separate from Cause No. D-1-GV-10-000454, *State of Texas v. Retirement Value, LLC, et al.*, for all purposes, including for hearings, motions, discovery, and trial and the trial date and other deadlines as set forth in the Court's Agreed Discovery Control Plan do not apply to the severed case and, if certification is unsuccessful, the parties shall attempt to agree upon applicable deadlines and submit the same to the Court as necessary;

IT IS FURTHER ORDERED that the severed case is subject to the June 23, 2010 Travis County Local Rule 2.6 assignment, and all pre-trial, trial, and post-judgment proceedings in the severed cause are assigned to Judge Gisela Triana.

Signed on this the 21 day of February, 2013

Gisela D Triana

THE HONORABLE GISELA D. TRIANA

AGREED AS TO FORM AND SUBSTANCE:

By: Ben De Leon

Benjamin S. De Leon
State Bar No. 24013426

COUNSEL FOR MICHAEL MCDERMOTT

By: for Geoff Weisbart

Geoffrey D. Weisbart
State Bar No. 21102645 Bar No. 2407812

COUNSEL FOR DR. GARY CAIN AND BARRY EDELSTEIN

I, AMALIA RODRIGUEZ-MENDOZA, District Clerk, Travis County, Texas, do hereby certify that this is a true and correct copy as same appears of record in my office. Witness my hand and seal of office on 02-21-13

AMALIA RODRIGUEZ-MENDOZA
DISTRICT CLERK
By Deputy:

CAUSE NO. D-1-GN-13-000193 GV

DR. GARY CAIN and BARRY EDELSTEIN,	§	**IN THE DISTRICT COURT OF**
Plaintiffs,	§	
v.	§	**TRAVIS COUNTY, TEXAS**
MICHAEL McDERMOTT,	§	
Defendant,	§	**126TH JUDICIAL DISTRICT**

FINAL ORDER AND JUDGMENT APPROVING CLASS SETTLEMENT AND CLASS COUNSEL FEES AND EXPENSES

A hearing was held on February 21, 2013 during which time the Court heard Plaintiffs/Class Representatives Dr. Gary Cain and Barry Edelstein (collectively, "Class Representatives") Motion for Final Approval of Class Action Settlement. Immediately prior to entry of this Order, on February 21, 2013 the Court signed an Agreed Order Severing Class Representatives' Claims against Defendant, Michael McDermott ("McDermott" or "Mr. McDermott") from Cause No. D-1-GV-10-000454; *The State of Texas v. Retirement Value, LLC, et al.*; In the 126th Judicial District of Travis County, Texas. The Court had previously entered an Order of Preliminary Approval appointing Class Counsel, approving notice to the Class, establishing deadlines for objections, setting a date for a final fairness hearing, certifying the Class and preliminarily approving the Settlement Agreement. Having considered the written submissions of the parties and the lack of objections submitted by any Class Member, and having held a final fairness hearing and having considered the evidence and argument offered at the final fairness hearing, it is hereby ORDERED that the class is finally certified and the settlement is finally approved as follows:

I. CLASS CERTIFICATION

A class may be certified if all four prerequisites of Rule 42(a) of the Texas Rules of Civil Procedure are met and one or more of the provisions of Rule 42(b) is satisfied. Tex. R. Civ. P. 42. Here, the proposed Class is defined as:

> Any and all Persons who, for purposes of participating in Retirement Value's Re-Sale Life Insurance Program or any similar program specifically marketed by Retirement Value, either (i) invested, lent money, or otherwise caused funds to be paid with regard to such program or (ii) signed a Retirement Value Policy Participation Agreement.

A. Rule 42(a) Criteria

Rule 42(a) provides:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

1. Numerosity - 42(a)(1)

This class encompasses 1,007 Class Members, too many for joinder of all to be practicable. *See Mullen v. Treasure Chest Casino LLC*, 186 F.3d 620, 624 (5th Cir. 1999) (finding that a class of 100 and 150 satisfies the numerosity requirement).[1] Numerosity is satisfied.

2. Commonality – 42(a)(2)

The commonality requirement of rule 42(a)(2) mandates there be at least one factual or legal issue which is common to all or substantially all of the class members. Tex. R. Civ. P.

[1] Because Texas Rule of Civil Procedure 42, governing class actions, was patterned after the federal equivalent, Federal Rule of Civil Procedure 23, Texas courts rely on both Texas precedent and persuasive federal decisions and authorities in interpreting class action requirements. *Citizens Ins. Co. of Am.v. Daccach*, 217 S.W.3d 430, 449 (Tex. 2007) (citing *Ford Motor Co. v. Sheldon*, 22 S.W.3d 444, 452 (Tex. 2000)); *Hall v. Pedernales Elec. Coop., Inc.*, 278 S.W.3d 536, 545 (Tex. App.—Austin 2009, no pet).

42(a)(2); *Citizens Ins. Co. of Am. v. Daccach*, 217 S.W.3d 430, 438 (Tex. 2007). Commonality is not a demanding test and is met when the resolution of at least one issue will affect all or substantially all of the putative class members. *Mullen*, 186 F.3d at 625. Class Members' claims are based on a general policy by Defendant and it is upon that policy that the litigation is focused. *San Antonio Hispanic Police Officers' Org., Inc. v. City of San Antonio*, 188 F.R.D. 433, 442 (W.D. Tex. 1999) (holding that "[a]s long as class members are allegedly affected by a defendant's general policy, and the general policy is the crux or focus of the litigation, the commonality prerequisite is satisfied"). Commonality is satisfied.

3. Typicality – 42(a)(3)

Rule 42(a)(3)'s typicality requirement is satisfied "if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory." *Southwestern Bell Tel. Co. v. Mktg. on Hold Inc.*, 308 S.W.3d 909, 920 (Tex. 2010). Class Representatives' claims arise from the same practice and course of conduct as do the claims of other members and their claims are based on the same legal theory. Typicality is satisfied.

4. Adequacy of Representation – 42(a)(4)

Rule 42(a)(4) requires the class representatives and their counsel to "fairly and adequately protect the interests of the class." Tex. R. Civ. P. 42(a)(4). To meet this requirement, plaintiffs must show "[1] the zeal and competence of the representative[s'] counsel and [2] the willingness and ability of the representative[s] to take an active role in and control the litigation and to protect the interests of absentees." *Stirman v. Exxon Corp.*, 280 F.3d 554, 563 (5th Cir. 2002). These requirements are met here. Class Counsel in this case is skilled, competent, and experienced and has significant experience in class actions in general. The evidence reflects that

Class Representatives have taken an active role in the litigation, consulted extensively with Class Counsel, personally participated in the settlement negotiations, and have reviewed and approved of all settlement documents. Class Counsel and Class Representatives are adequate.

B. Rule 42(b)(3).

In addition to complying with the prerequisites of Rule 42(a), a putative class action must also satisfy at least one subsection of Rule 42(b). Class Representatives here seek certification under rule 42(b)(3), which requires the Court to find that common questions of law and fact predominate over any questions affecting only individual members and a class action is superior to each individual class member bringing a separate claim.

Class Representatives allege in their Motion for Final Approval of Class Action Settlement that the substantive issues that control the outcome of litigation are (1) whether Retirement Value was registered to sell and did sell an unregistered security; and (2) whether McDermott was reckless with the law or not when he, directly or indirectly, materially aided an unregistered RV in the sale of an unregistered security. These issues will predominate in the trial on the merits of the case and the 42(b)(3) requirements are met here.

II. NOTICE WAS APPROPRIATE

In accordance with the procedures approved in the Preliminary Approval Order, the Class was provided with the Class Notice regarding the proposed Settlement Agreement and the deadlines and procedures for objecting. The Court finds that the Class Notice and measures taken by Class Counsel in mailing the Class Notices were adequate to inform Class Members of the proposed settlement and that such actions provided sufficient notice for Class Members' due process rights to be adequately protected.

III. SETTLEMENT APPROVAL

Having determined the class is properly certified and that notice was appropriate, the Court must next address the proposed Settlement Agreement. To approve the settlement, the Court must find the proposed settlement is "fair, reasonable and adequate." Tex. R. Civ. P. 42(e)(1)(C); *General Motors Corp. v. Bloyed*, 916 S.W.2d 949, 958 (Tex. 1996). The Texas Supreme Court has held that courts should apply the following six-factor test in determining the appropriateness of the proposed settlement: (1) evidence, if any, that the settlement was a product of fraud or collusion; (2) the complexity, expense, and likely duration of the litigation; (3) the stage of the litigation and available discovery; (4) the factual and legal obstacles to the plaintiffs' success on the merits; (5) the range of possible recovery and certainty of damages; and (6) the opinions of class counsel, class representatives, and absent class members. *Id.* at 955 (citing *Ball v. Farm & Home Sav. Ass'n*, 747 S.W.2d 420, 423-424 (Tex. App.—Fort Worth 1988, writ denied).

A. Factor 1 - There is no evidence of fraud or collusion behind the Settlement.

There is a presumption that no fraud or collusion occurred between counsel, in the absence of any evidence to the contrary. 4 Newberg on Class Actions § 11:51 (4th ed. 2002). Here, there are no allegations or indications of fraud or collusion. Indeed, the parties engaged in a lengthy, arms' length settlement process overseen by an experienced mediator. Based on the undisputed record, the Court determines the proposed settlement was the product of arms' length negotiations, free of fraud or collusion. This factor weighs in favor of approving the settlement.

B. Factor 2 - The complexity, expense and likely duration of the litigation.

This Court recognizes that it is important to be mindful of the vagaries of litigation and compare the significance of immediate recovery by way of the compromise to the mere

possibility of relief in the future, after protracted and expensive litigation. Specifically, as counsel for the parties have concluded, the probability of further protracted litigation, including appeals, would be a near certainty in the absence of a settlement. Additional litigation would likely include: (1) contested class certification proceedings; (2) an appeal under Texas Rule of Procedure 42(f); (3) dispositive motions; (4) extensive pretrial filings; (5) a lengthy trial; (6) post-trial proceedings in this Court; and (7) further appeals. Having considered the complexity, expense, and likely duration of the litigation, the Court concludes this factor weighs in favor of approving the proposed settlement.

C. Factor 3 – The stage of the proceedings and the amount of discovery repeated.

The evidence reflects that the parties shared substantial documents and data. In light of this discovery and statistical analysis, Class Counsel determined the proposed settlement is fair, adequate and reasonable. The Court determines the stage of the proceedings and the amount of discovery completed have provided the information necessary to permit the parties and the Court to make an informed judgment on the merits of the settlement. This factor therefore weighs in favor of accepting the proposed settlement.

D. Factors 4 and 5 – Factual and legal obstacles and the range of possible recovery and certainty of damages.

Litigating the case to trial also presents substantial risks to the Class Representatives and Class Members. Although Class Representatives and Class Counsel believe Class Members' claims are strong, it is clear that Defendant would put on a vigorous defense, and it would ultimately be up to the fact-finder to determine whether Defendant acted negligently. Class Representatives would have to obtain certification outside the settlement process. This would have been challenging.

In addition, the ability of the Class Members to obtain any recovery will be hotly contested and it is not certain that all class claims would prevail on the merits. This settlement also obtains monetary relief that is to be used to pay insurance premiums on policies that would otherwise lapse. In other words, this settlement accomplishes more and provides more funds to the RV Portfolio than could be provided after a successful trial. This factor therefore weighs in favor of accepting the proposed settlement.

The Court also acknowledges that Mr. McDermott has been making payments toward completion of this settlement, and will, following formal settlement approval, tender such payment to Eduardo S. Espinosa, in his capacity as court-appointed Receiver for Retirement Value, LLC, c/o Cox Smith Matthews, Inc. The Court acknowledges Mr. McDermott's initial payment, as is currently held by his counsel, will be in an amount not less than $258,319.17. The Court also acknowledges that the parties to the settlement have entered into a Modified Payment Plan, which only changes the payment terms of the settlement, not the amount and provides protections to the investors in the event complete payment does not occur. The Court finds that the Modified Payment Plan is necessary to effectuate the settlement, and necessary and in the best interests of the Receivership and Investors.

E. Factor 6 – Opinions of Class Counsel, Class Representatives and absent Class Members.

Class Counsel has engaged in numerous class action lawsuits and possesses a substantial amount of experience and expertise, and has concluded that the settlement is fair, reasonable, and adequate. The Class Representatives also strongly support the settlement. In addition to the opinions of Class Counsel and Class Representatives, the Court has considered the opinions of absent class members. In this case, *no* class members objected. The complete lack of opposition from absent class members weighs heavily in favor of approving the settlement.

The Court finds the opinions of Class Counsel, the Class Representatives, and the absent Class Members weigh in favor of approval. The Court finds the Settlement Agreement to be fair, reasonable and adequate.

IV. AWARD OF CLASS COUNSEL FEES AND EXPENSES

In a certified class action, the Court may award reasonable attorneys' fees and non-taxable costs that are authorized by law or the parties' agreement. Tex. R. Civ. P. 42(h). The Settlement Agreement provides that Class Counsel is to be paid $50,000.00 in attorneys' fees and expenses not to exceed $10,000.00. Class Counsel has paid all administrative expenses and its own fees to date. The request by Class Counsel for attorneys' fees and expenses was set forth in the notice and was met with no opposition from absent Class Members. Class Counsel, at this stage of the settlement only seek a proportionate amount of the fee and expenses, namely 34.44% ($258,319.17/$750,000.00) X $50,000.00 = $17,221.27).

A. Attorneys' Fees.

Rule 42(i) of the Texas Rules of Civil Procedures provides that "[i]n awarding attorney fees, the court must first determine a lodestar figure by multiplying the number of hours reasonably worked times a reasonable hourly rate. The attorney fees award must be in the range of 25% to 400% of the lodestar figure." The lodestar figure is to be adjusted up or down based on a variety of factors, such as the benefits obtained for the class, the complexity of the issues involved, the expertise of counsel, the preclusion of other legal work due to acceptance of the class action suit, and the hourly rate customarily charged in the region for similar legal work. *General Motors*, 916 S.W.2d at 960 (citing *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974). The Court's award is generally not to exceed 400% of the lodestar figure. *Id.*

1. Class Counsel's Hourly Rates

In determining the reasonableness of hourly rates, courts consider the experience, reputation and ability of the attorney, and the skill required by the case. *Shipes*, 987 F.2d at 320. Here, Class Counsel is an experienced and skilled practitioner in class actions. Considering the complex nature of this case and Class Counsel's experience, reputation and skill, the Court finds Class Counsel's rates are reasonable.

2. The Hours expended by Class Counsel.

The Court has also reviewed the evidence submitted concerning the number of hours expended. The Court is required to determine not only that the hours claimed by Class Counsel are reasonable, but also that the hours were reasonably expended. *Louisiana Power & Light Co. v. Kellstrom*, 50 F.3d 319, 325 (5th Cir. 1995). Having reviewed the evidence submitted, the Court concludes that the hours spent by Class Counsel were reasonably expended.

3. Adjustment of the lodestar using the *General Motors* factors.

The second step in establishing attorneys' fees is to consider whether the lodestar should be adjusted due to the circumstances of the case. *General Motors*, 916 S.W.2d at 960. The lodestar factors support adjusting the fees upward in this case.

Class Counsel incurred a substantial amount of time in investigating and prosecuting this case to resolution. Class Counsel's efforts were all reasonable and necessary, particularly that class actions are extremely complex and challenging. The time and labor factor weighs in favor of adjusting the lodestar.

Counsel has indicated that his involvement in this case has substantially diminished, and perhaps in some cases foreclosed, the acceptance of other employment or business opportunities. This preclusion of other employment weighs in favor of adjusting the lodestar.

Counsel has indicated that he handled this case on a contingency fee. Given the complex legal and factual issues confronting Class Counsel, Class Counsel undertook a considerable risk with no guarantee any fees or expenses would be recovered.

The results obtained by the Settlement were quite significant and greatly to the benefit of the Class Members. These results were largely due to Class Counsel's experience, reputation and ability.

In sum, having reviewed the request in light of all the *General Motors* factors, the Court finds that the factors are either neutral or support an upward adjustment of the multiplier. The fees sought are fair and reasonable and justified by the *General Motors* factors.

B. Expenses.

The appropriate analysis to apply in determining which expenses are compensable in a class action case is whether such costs are of the variety typically billed by attorneys to clients. *Abrams v. Lightolier*, 50 F.3d 1204, 1225 (3d Cir. 1995) (determining expenses are recoverable if it is customary to bill clients for these expenses). In this case, Class Counsel has incurred expenses through the date of filing the final approval motion and award of fees and expenses motion of slightly in excess of $3,288.00. These expenses include costs for filing and service fees, photocopies, mailing notices and travel. The expenses also include compensable costs for computerized factual and legal research (i.e., Pacer and Lexis). The Court finds the requested costs to be reasonable and, therefore, the Court finds Class Counsel should be reimbursed for these litigation related expenses.

Overall, the requested attorneys' fees and expenses are reasonable under the lodestar method of calculations. Accordingly, the Court awards $17,221.27 in attorneys' fees and $3,288.00 in expenses to Class Counsel to be paid by the Receiver pursuant to the Settlement Agreement.

V. CONCLUSION

Based on the foregoing analysis, the settlement, as evidenced by the parties' agreement, is hereby determined to be fair, reasonable and adequate. THE COURT FURTHER FINDS AND ORDERS AS FOLLOWS:

1. On December 12, 2012, the Court entered an Order Preliminarily Approving Settlement in this cause based upon a Settlement Agreement entered into by the Parties.

2. The Court hereby adopts all of the findings contained in its Order Preliminarily Approving Settlement. In addition, this Final Order and Judgment Approving Class Action Settlement incorporates by reference the definitions contained in the Settlement Agreement, and all capitalized terms used in this Final Order and Judgment Approving Class Action Settlement will have the same meanings as set forth in the Settlement Agreement, unless otherwise defined in this Final Order and Judgment Approving Class Action Settlement.

3. This matter satisfies the prerequisites for certification of a settlement class under Rule 42(a) and (b)(3) of the Texas Rules of Civil Procedure.

4. The Court finds that the Class satisfies Rule 42(b)(3) of the Texas Rules of Civil Procedure in that common questions of law and fact predominate over any questions affecting only individual members and a class action is superior to each individual class member bringing a separate claim, thereby making appropriate final relief with respect to the class as a whole.

5. The interests of the Class Members in this Settlement are cohesive and homogeneous, Class Representatives seek class-wide relief for common questions of law and fact. The relief offered in the Settlement is not dependent on adjudication of facts particular to any subset of the class nor does it require a remedy that differs materially among Class members.

As a result, all Class Members may properly be bound by the release and final judgment to be entered pursuant to the Settlement.

6. Notice to the Settlement Class has been provided in accordance and compliance with this Court's Order Preliminarily Approving Settlement, and notice has been given in an adequate and sufficient manner; constitutes the best notice practicable under the circumstances; and satisfies the requirements of due process. Full opportunity has been afforded to members of the Class to participate in this Fairness Hearing. Accordingly, the Court determines that all members of the Class are bound by this Order and Final Judgment Approving Class Action Settlement.

7. Plaintiffs' Motion for Final Approval of Class Action Settlement and Entry of Final Judgment is GRANTED.

8. Pursuant to Rules 42(a) and (b)(3) of the Texas Rules of Civil Procedure, the following Settlement Class is certified:

> "Any and all Persons who, for purposes of participating in Retirement Value's Re-Sale Life Insurance Program or any similar program specifically marketed by Retirement Value, either (i) invested, lent money, or otherwise caused funds to be paid with regard to such program or (ii) signed a Retirement Value Policy Participation Agreement."

9. The Settlement Agreement submitted by Class Representatives is finally approved as fair, reasonable and adequate and in the best interests of the Class, and the parties are directed to consummate and to implement the Settlement Agreement in accordance with its terms. The provision of equitable relief shall take place in accordance with the Settlement Agreement.

10. Dr. Gary Cain and Barry Edelstein are hereby certified as the Class Representatives of the Class defined above.

11. Geoffrey D. Weisbart, Esq. of WEISBART SPRINGER HAYES LLP, 212 Lavaca Street, Suite 200, Austin, Texas 78701 is appointed Class Counsel for the Settlement Class and shall act on behalf of the Class Representatives and all members of the Settlement Class.

12. Class Representatives' Motion for Award of Class Counsel Fees and Expenses is GRANTED.

13. Class Counsel has applied for an award of attorneys' fees and expenses to be paid pursuant to the terms of the Settlement Agreement. This Court awards Class Counsel attorneys' fees of $17,221.27 and expenses of $3,288.00 to be paid by the Receiver pursuant to the Settlement Agreement. Said fees and expenses are determined by the Court to be fair, reasonable and appropriate. Further, the Receiver is authorized to make such payment to Class Counsel, and further is authorized to pay Class Counsel a pro-rata portion of its fee upon receipt of any further settlement proceeds paid by McDermott.

14. Any person wishing to appeal this Final Order and Judgment Approving Class Action Settlement shall post a bond with this Court to cover the costs of appeal as a condition of prosecuting the appeal. The amount of the appeal bond will be set if, as, and when a notice of appeal is filed.

15. The Class Representatives, the Class Members, and Defendant having so agreed, good cause appearing, and there being no just reason for delay, it is ordered that this Final Order and Judgment Approving Class Action Settlement, is hereby entered as a final and appealable order.

16. This Action is dismissed with prejudice. Without affecting the finality of this Order, this Court retains exclusive jurisdiction over the consummation, performance, administration, effectuation and enforcement of the Settlement Agreement, and this Order.

SIGNED this 21 day of February, 2013.

HONORABLE GISELA D. TRIANA

CAUSE NO. D-1-GN-13-000193

DR. GARY CAIN AND BARRY EDELSTEIN, et al.	§	**IN THE DISTRICT COURT**
Plaintiffs/Class Representatives,	§	
	§	
v.	§	**419TH JUDICIAL DISTRICT**
	§	
MICHAEL McDERMOTT,	§	
Defendant.	§	**TRAVIS COUNTY, TEXAS**

NOTICE OF RELEASE OF JUDGMENT AND NONSUIT WITH PREJUDICE

TO THE HONORABLE JUDGE OF SAID COURT:

Plaintiffs/Class Representatives, **Dr. Gary Cain and Barry Edelstein** (collectively, "Class Representatives"), hereby provide notice to the Court that all matters in issue or controversy in the above action between Class Representatives and Defendant, Michael McDermott ("McDermott"), have been fully settled and compromised, that all of the terms of the settlement and compromise have been fully discharged between Class Representatives and McDermott, and that Class Representatives and McDermott have fully surrendered, released and discharged the other from any and all liability asserted or that could have been asserted in the above action.

Accordingly, Class Representatives hereby: (1) release the Judgment of this Court that was rendered against McDermott on February 21, 2013, as part of the *Final Order and Judgment Approving Class Settlement and Class Counsel Fees*; and (2) nonsuit any and all of their claims against Defendant with prejudice. All costs of court having been paid, no execution herein shall issue.

Respectfully Submitted,

WEISBART SPRINGER HAYES LLP
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Austin, Texas 78701
Phone: (512) 652-5780
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By: /s/ Geoffrey D. Weisbart
Geoffrey D. Weisbart
State Bar No. 21102645
Mia A. Storm
State Bar No. 24078121

ATTORNEYS FOR PLAINTIFFS/ CLASS REPRESENTATIVES DR. GARY COHN AND BARRY EDELSTEIN

CERTIFICATE OF SERVICE

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

- ☐ U.S. Mail, First Class or
- ☐ Certified Mail (return receipt requested)
- ☐ Facsimile
- ☐ Federal Express Delivery
- ☐ Hand Delivery
- ☒ Electronic Service

on this the 23rd day of January, 2014, to wit:

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Michael McDermott

/s/ Geoffrey D. Weisbart
Geoffrey D. Weisbart

2012 Civil and Criminal Actions

DECEMBER 2012

Arturo Gonzalez Salinas of McAllen was indicted Dec. 19 in Hidalgo County on charges of theft, securities fraud, and securing the execution of a document by deception. Salinas was indicted in connection with his sale of interests in a company that said it would build a hospital in Falfurrias. Salinas allegedly transferred some of an investor's money into his wife's bank account and spent the funds on personal expenses. He also failed to disclose his 2002 bankruptcy filing, federal tax liens, and a 2007 civil suit against him alleging fraud in another investment program.

Bruce Kyle Griffith's guilty plea to federal conspiracy and securities fraud charges was unsealed Dec. 5 by the U.S. District Court for the Northern District of Texas. Griffith served as president and CEO of Always Consulting Inc., a Richardson company that sold investments in oil and gas drilling projects. The company raised more than $2.2 million from investors for a drilling project in Oklahoma but failed to drill wells or return investors' money. The Texas Securities Commissioner in 2007 affirmed an Emergency Cease and Desist Order against Always Consulting, Griffith, and two other principals, finding that they engaged in fraud and sold securities without being registered to do so.

NOVEMBER 2012

Norma Eltringham, a bookkeeper and tax preparer in Abilene, pleaded no contest Nov.29 to a charge of aggregate theft and was ordered to pay $67,792 in restitution to investors in an oil-related startup. The sentence, issued in the 104th state District Court in Taylor County, includes seven years deferred adjudication. Eltringham controlled the finances of Research Production International, an Abilene company that was supposedly developing new technologies to extract oil. Eltringham took investors' money to pay for a pickup truck, to buy a rental property, and to make loans to friends. Eltringham funneled loan repayments into her bookkeeping and tax service business.

Sami A. London, a Euless resident, was arrested Nov. 17 in Tarrant County after being indicted in September on charges of securities fraud, theft, money laundering, and securing the execution of a document by deception. The indictments charge London with stealing money from investors in an oil drilling project in Falls County, near Temple. London allegedly misrepresented to investors that their funds would be deposited in a segregated account. He also paid for his personal expenses with investors' money.

Eddie Lacy Stivers III was arrested Nov. 9 in Hood County, five days after being indicted for allegedly selling fraudulent stock and promissory notes that promised ownership and a share of future profits in companies called Patriot Insurance Co., Patriot Holding Co., and Insurance Choice One LLC. A Hood County grand jury indicted Stivers on charges of securities fraud, theft, and money laundering. Stivers raised more than $550,000 and used some of investors' money to pay expenses incurred by him and wife, the indictment charges. The indictment also alleges that Stivers had perpetrated a similar fraud while doing business as Stivers & Associates.

OCTOBER 2012

Minor Vargas Calvo, a Costa Rican businessman with interests ranging from media to insurance to professional soccer, was sentenced to 60 years in federal

prison on Oct. 23 for perpetrating a $485 million bond fraud. Vargas was the president of Provident Capital Indemnity Ltd., which sold unregistered reinsurance bonds that were based on fraudulent financial statements and were not backed by reinsurance agreements with insurance companies, as Vargas had claimed. Provident Capital was the subject of a 2008 Emergency Cease and Desist Order entered by the Texas Securities Commissioner. Vargas was convicted in U.S. District Court in Richmond, Va., on charges of mail and wire fraud and money laundering.

SEPTEMBER 2012

Richard M. Plato, a disbarred lawyer with three prior criminal convictions, was convicted Sept. 24 in U.S. District Court in Houston on five counts of mail fraud and one count of conspiracy related to an oil and gas scam. Plato owned Momentum Production Corp. in Baytown, which sold approximately $6.2 million in promissory notes purportedly backed by Momentum's interests in South Texas oil and gas leases. Plato in fact ran a Ponzi scheme, paying some early investors with money from later investors, according to the superseding indictment of him.

AUGUST 2012

Michael D. Alexander was indicted Aug. 22 for securities fraud in Rockwall County for allegedly selling investors shares in timber harvesting operation in the Amazon. Alexander, a Rockwall resident, sold shares in Ecowood Recuperdore De Toras and Ecowood Resources International Inc. The indictment alleges that Alexander previously raised money by selling Ecowood stock, but then used the money to pay his personal expenses. Alexander also intentionally failed to disclose that the Ecowood companies did not own or control licenses to harvest timber from the Amazon, according to the indictment.

John Arthur Mertens of Austin, who allegedly defrauded investors in a trading scheme, was indicted Aug. 9 in Bexar County district court on one count of securities fraud and one count of fiduciary misapplication. According to the indictment, Mertens misrepresented to investors that he was a successful trader; said he was registered to sell securities when he was not; provided false account information; took unauthorized fees; and failed to tell investors he was operating a Ponzi scheme by paying investors with money from other investors.

JULY 2012

Three defendants in the wide-ranging AmeriFirst companies' fraud were sentenced to federal prison. In U.S. District Court in Dallas on July 20, **Dennis Woods Bowden** of Farmers Branch, the chief operations officer of AmeriFirst, was sentenced to 16 years in prison and ordered to pay $23 million in restitution. On July 2[illegible], **John Porter Priest** of Ocala, Fla., was sentenced to one year in prison and **Fred Howard**, of Tarpon Springs, Fla., was sentenced to five years. Each man was ordered to pay $4.7 million restitution. Dallas-based AmeriFirst sold $[illegible]0 million worth of fraudulent debt obligations to more than 500 investors in Texas and Florida.

Fred Howard was sentenced to five years in federal prison on July 18 after pleading guilty to one count of securities fraud in U.S. District Court in Dallas. Howard, a Florida resident at the time of his crime, was also ordered to serve three years of supervised release after prison and to pay restitution of $4.7 million. Howard sold partnership interests in Secured Capital Trust Ltd. (SCT) of Florida. He bought shares of the now-delisted Interfinancial Holdings Corp. on behalf of SCT, but failed to disclose he owned millions of shares in the company and thus had an incentive to boost the value of the stock. Howard also received

kickbacks in the form of rebates for buying Interfinancial shares, but he did not pass on the rebates to investors.

JUNE 2012

Robert Joseph Mangiafico Jr. of Dallas was indicted June 19 on a charge of tampering with a government record. The indictment is related to the March 2011 indictment of Mangiafico on charges of theft, money laundering, and engaging in organized criminal activity. Mangiafico and a business partner, Thomas Earl Grimshaw, did business as Security Financial Services LLC and allegedly sold annuities. Grimshaw's license to sell insurance was revoked in 2009 on the grounds he engaged in fraudulent or dishonest practices and misappropriated money belonging to an insured or insurer.

Kelly Gordon Rogers was indicted June 19 on a charge of money laundering related to bank loans he received. The indictment, issued by a Collin County grand jury, stemmed from the investigation into two other pending criminal cases against Rogers. Rogers was indicted May 1 on theft, money laundering, and securities fraud charges for stealing $2.8 million from investors in two separate oil and gas schemes. Rogers is an attorney in Frisco.

A federal grand jury in the District Court for the Northern District of Texas on June 5 indicted three North Texas men on securities fraud and other charges related to an oil and gas scheme. **Bruce Kyle Griffith** of Dallas, **David Kevin Lewis** (a/k/a David Shane Lewis) of Rockwall, and **Thomas A. Markham** of Plano allegedly sold units of interest in well drilling projects run by Always Consulting Inc. (ACI). The indictment charges the three men with defrauding investors in oil and gas projects, including a 20-well drilling project to be located in the Osage Nation Reservation in Oklahoma. ACI raised more than $2.2 million from investors for the Oklahoma project, but failed to drill wells or return investors' money. Griffith, Lewis, and Markham each have federal convictions for fraud-related offenses, none of which were disclosed to ACI investors.

MAY 2012

Kelly Gordon Rogers, an attorney in Frisco, was indicted May 1 in Collin County state District Court on two counts of aggregated theft, two counts of money laundering, and one count of securities fraud. The charges stem from Rogers' alleged theft of $2.8 million from investors in two separate oil and gas schemes. Rogers is also scheduled for trial in Collin County in June in a separate criminal case. In that case, Rogers is charged with misapplication of fiduciary property in another oil and gas venture.

APRIL 2012

Robbie Dale Walker of Dripping Springs was indicted on additional charges for an alleged oil and gas fraud targeting elderly investors. A Hays County grand jury on April 12 indicted Walker for securities fraud, money laundering, selling unregistered securities and acting as an unregistered securities dealer or agent. Walker was also indicted last year on a charge of theft related to the same alleged scheme. Walker allegedly defrauded three elderly women of more than $250,000 by convincing them to invest in oil and gas programs.

Terrence Riely, who pleaded no contest to misapplication of fiduciary property in Bexar County state District Court, on April 12 was ordered to pay restitution of $218,990, serve 10 years community supervision and perform 240 hours of community service. Riely was an officer of the Paramco Financial Group, which sold promissory notes through sales agents in and around San Antonio. Riely was indicted in 2010 for the fraudulent sale of securities and for failing to tell

investors about previous legal judgments against himself and Paramco. The indictment also alleged that Riely failed to tell investors that his late partner, Douglas Gregg, had been the subject of state regulatory sanctions in Texas and Utah.

Mary Alice Monteza and **Alan Keith Nelsen** of San Antonio were sentenced to state prison terms on April 24 and April 2, respectively, after being convicted on charges related to a fraudulent overseas trading investment. Monteza and Nelsen created a company called Castro International, which supposedly made money by investing in high-yielding foreign investments. The pair raised about $850,000 from investors, but Castro turned out to be a Ponzi scheme. A Bexar County state District Court judge sentenced Monteza to 10 years and Nelsen to seven years in prison. Monteza and Nelsen both pleaded no contest to a charge of aggravated theft.

MARCH 2012

Convicted of securities fraud, Corpus Christi adviser **William Erik Byrne** on March 21 was ordered to pay $719,000 in restitution and sentenced to 10 years community supervision and 30 days in jail. Byrne was sentenced in Nueces County state District Court. At the time of his sentencing, Byrne had already paid $100,000 in restitution. He sold nearly $1 million in fraudulent investment contracts and promissory notes. Byrne failed to disclose to investors his record of regulatory sanctions, including cease and desist orders from the State Securities board and Texas Department of Insurance.

FEBRUARY 2012

A Bexar County grand jury on Feb. 2 issued four indictments of **Michael Paul Harney** on theft charges stemming from the sale of allegedly fraudulent promissory notes to four investors, three of whom are elderly. Harney sold the securities through his company, Texas Senior Association of San Antonio, which he told investors was an estate and financial planning firm. According to the indictment, Harney falsely told investors he would use their money to invest in a business in Arizona. Harney also failed to disclose that he was been convicted of misdemeanor and felony fraud offenses in Michigan and served prison time in that state for four counts of embezzlement.

Tony Anthony Cruz Jr., the owner and operator of the Wealth Building Club Inc. (WBC) in San Antonio, was indicted Feb. 15 in U.S. District Court in San Antonio on eight counts of mail fraud. The indictment alleges Cruz sold fraudulent notes to investors in San Antonio, Eagle Pass, and Richmond. Cruz falsely told investors that he was a successful currency trader and that his investing acumen meant the WBC notes would pay returns of 2% to 6% a month, according to the indictment. The case was investigated by the State Securities Board and the FBI's San Antonio office.

Michael K. Wallens Sr. of Spring was sentenced to four years and five months in federal prison for his role in raising $17 million from investors who thought they were putting their money into safe and secure promissory notes. The sentence, issued Feb. 24 in U.S. District Court in Dallas, also requires Wallens to serve three years of supervised release after his prison term and pay $13 million in restitution to his victims. He had pleaded guilty to one count of securities fraud. Wallens and his son, Michael K. Wallens Jr., sold the fraudulent notes to approximately 180 investors through their company, W Financial Group (WFG) of Dallas. They falsely told investors their money would be held in cash and government and corporate bonds. The State Securities Board and federal authorities investigated the WFG case, which was prosecuted by the U.S. Attorney's Office in Dallas.

David Boyer Prince, a former California attorney who ran two fraudulent investment funds, on Feb. 8 was sentenced to seven years in federal prison. He had been convicted on five counts of wire fraud in U.S. District Court in San Francisco. The government's sentencing memorandum shows how Prince promised high "guaranteed" returns, but used investors' money for his personal expenses while running a Ponzi scheme that cost investors $1.1 million. In 2006 the Texas Securities Commissioner entered a Cease and Desist Order that barred Prince from selling unregistered securities and misleading investors. Prince's violation of that order was part of the federal case against him.

JANUARY 2012

Alan Nelson and **Mary Alice Monteza** of San Antonio on Jan. 9 pleaded no contest to first-degree aggravated theft in Bexar County state District Court. The pair raised about $850,000 from investors who thought their money was going into foreign high-yield investments. No investments were made. Bexar County prosecutors agreed to recommend that each defendant be sentenced to 18 years in prison – but that if Nelson and Monteza repaid $850,000 to investors before sentencing in April, community supervision would be recommended. The State Securities Board assisted in the investigation of Nelson and Monteza. In 2007, the Securities Commissioner entered a Cease and Desist Order against Nelson and Monteza for engaging in fraud and selling securities without being registered to do so.

JUSTICE NEWS

Department of Justice

Office of Public Affairs

FOR IMMEDIATE RELEASE

Wednesday, September 28, 2011

Houston-based Principals of A&O Entities Sentenced in Virginia for $100 Million Fraud Scheme

WASHINGTON – Two principals of A&O Resource Management Ltd. have been sentenced for their roles in a $100 million life settlement fraud scheme, which included more than 800 victims across the United States and Canada.

Today, Adley H. Abdulwahab, 36, of Houston, a hedge fund manager and part owner of A&O, was sentenced to 60 years in prison. Yesterday, the co-founder and vice president of A&O, Christian Allmendinger, 40, also of Houston, was sentenced to 45 years in prison.

U.S. Attorney for the Eastern District of Virginia Neil H. MacBride and Assistant Attorney General Lanny A. Breuer of the Criminal Division made the announcement today after the two A&O principals were sentenced by U.S. District Judge Robert E. Payne.

"The victims of A&O's scam were looking for a conservative investment, and they were manipulated into believing A&O was a safe, secure, no risk investment. It was all a big, fat lie; A&O was a sham, a financial house of cards waiting to collapse," said U.S. Attorney MacBride. "Hundreds of elderly retirees saw their life savings vanish, and their lives have been devastated by their loss. The Virginia Financial and Securities Fraud Task Force is dedicated to pursuing national impact frauds whose scams affect not only those on Wall Street, but folks on Main Street who work hard, play by the rules and try to provide for their families."

"These defendants used the savings of their unsuspecting, often elderly, investors to live the high life -- luxury houses, fancy cars, and even a 15-karat diamond ring," said Assistant Attorney General Breuer. "Having wiped out the life savings of many of their victims and stolen funds marked for retirement, Mr. Abdulwahab and Mr. Allmendinger appropriately now face significant prison terms. We will continue to aggressively pursue financial fraud throughout the country, and bring to justice those who illegally use the financial system for personal benefit."

On Sept. 7, 2010, a federal grand jury returned an 18-count indictment against Abdulwahab, Allmendinger and David White, 41, the former president of A&O. White and four others associated with the fraud scheme pleaded guilty in the fall of 2010. Allmendinger was convicted at trial on March 23, 2011, and Abdulwahab was convicted at trial on June 10, 2011.

According to court records and evidence at trial, the principals at A&O engaged in a scheme to defraud investors by making misrepresentations about such things as A&O's prior success, its size and office locations, its number of employees, the risks of its investment offerings, and its safekeeping and use of investor funds. Both Abdulwahab and Allmendinger were active in the day-to-day management of the companies, as well as in the marketing of A&O life settlement investment products to investors. Abdulwahab also lied to investors about having a college degree in economics, as well as failing to disclose to investors that he previously pleaded guilty to a felony charge of forgery of a commercial instrument in Texas state court.

When state regulators began to scrutinize A&O's investment products, Abdulwahab and others manufactured a sham sales transaction to "sell" A&O to a shell corporate entity named Blue Dymond and later to another shell corporate entity named Physician's Trust. This sale ended Allmendinger's association with the fraud scheme; however, A&O and Physician's Trust were still secretly controlled by Abdulwahab and his co-conspirators, who continued the fraud scheme through September 2009. The A&O fraud scheme caused more than 800 investors, many of whom were elderly, to lose more than $100 million. The vast majority lost all of their investment, which represented for many all of the money they had saved for their retirement.

Evidence at trial showed that A&O principals used the investors' money for personal enrichment, including purchasing multi-million dollar homes, luxury cars, a 15-carat diamond ring and other property.

"The A&O scheme wreaked havoc on the lives of hundreds of investors, and now those responsible will be held accountable as a result of the outstanding and collaborative work of task force members," said Lorin Reisner, Deputy Director of the U.S. Securities and Exchange Commission's (SEC) Division of Enforcement

"The U.S. Postal Inspection Service is committed to protecting consumers from falling victim to fraud scheme that facilitate the use of the U.S. Mail. We have dedicated resources, which focus on identifying and eliminating fraud schemes that target consumers and cost citizens and financial institutions billions each year." said Keith A. Fixel, Inspector in Charge of the U.S. Postal Inspection Service - Charlotte Division.

On June 22, 2011, five individuals connected with the A&O fraud scheme were sentenced: Russell E. Mackert, 52, general counsel for A&O, was sentenced to 188 months in prison; Brent Oncale, 36, former owner and founder of A&O, was sentenced to 120 months in prison; White, the former president of A&O, was sentenced to 60 months in prison; Eric M. Kurz, 47, a wholesaler of A&O investment products, was sentenced to 60 months in prison; and Tomme Bromseth, 69, an A&O sales agent in the Richmond area, was sentenced to 36 months in prison.

This investigation was conducted by the U.S. Postal Inspection Service, Internal Revenue Service and FBI, with significant assistance from the Texas State Securities Board, the Virginia Corporation Commission and the SEC. These cases are being prosecuted by Assistant U.S. Attorneys Michael S. Dry and Jessica Aber

Brumberg from the Eastern District of Virginia and Trial Attorney Albert B. Stieglitz Jr., of the Criminal Division's Fraud Section.

The investigation has been coordinated by the Virginia Financial and Securities Fraud Task Force, an unprecedented partnership between criminal investigators and civil regulators to investigate and prosecute complex financial fraud cases in the nation and in Virginia. The task force is an investigative arm of the President's Financial Fraud Enforcement Task Force, an interagency national task force.

President Obama established the Financial Fraud Enforcement Task Force to wage an aggressive, coordinated and proactive effort to investigate and prosecute financial crimes. The task force includes representatives from a broad range of federal agencies, regulatory authorities, inspectors general, and state and local law enforcement who, working together, bring to bear a powerful array of criminal and civil enforcement resources. The task force is working to improve efforts across the federal executive branch, and with state and local partners, to investigate and prosecute significant financial crimes, ensure just and effective punishment for those who perpetrate financial crimes, combat discrimination in the lending and financial markets, and recover proceeds for victims of financial crimes.

11-1277
StopFraud

Criminal Division

Updated September 15, 2014