

I. Summary of Response

M&M contends that Rick Gilpin (“ALJ Gilpin”) should be disqualified “in any and all administrative Health and Human Resource [sic] Commission Appeals division cases where Hearing Officer Gilpin was employed at the Texas Attorney General’s office on or before the Attorney General initiated or intervened in this proceeding.”¹ Amended Motion at 1. M&M cites to Article V, § 11, of the Texas Constitution and Rules 18a and 18b of the Texas Rules of Civil Procedure as legal grounds. None of the legal grounds cited by M&M applies to this administrative enforcement case. *See Pretzer v. Motor Vehicle Bd.*, 125 S.W.3d 23, 40 (Tex. App.—Austin 2003), *aff’d in part and rev’d in part on other grounds*, 138 S.W.3d 908 (Tex. 2004) (per curiam) (*citing Beyer v. Emps. Ret. Sys. of Tex.*, 808 S.W.2d 622, 627 (Tex. App.—Austin 1991, writ denied)). Moreover, M&M offers no authority for the sweeping proposition that the mere fact of prior employment at the same state agency, without more, should result in disqualification. In fact, as argued more fully below, Texas case law, applied to the facts here, supports denying M&M’s Motion. *See, e.g., Langdeau v. Dick*, 356 S.W.2d 945, 958 (Tex.Civ.App.—Austin 1962, writ ref’d n.r.e.); *Gamez v. State*, 737 S.W.2d 315, 319 (Tex.Crim.App. 1987).

II. Pertinent Facts

The Office of the Attorney General is a State law enforcement agency employing over 4000 people in locations across the state. Although Mr. Winter’s and ALJ Gilpin’s

¹ Counsel for M&M is also counsel for Harlingen Family Dentistry (“HFD”), the subject of another matter pending before ALJ Gilpin. HFD has filed similar motion to disqualify ALJ Gilpin.

employment at the Attorney General's office overlapped, Mr. Winter had never met ALJ Gilpin prior to Judge Gilpin's retirement. Exhibit 1, Winter affidavit, at ¶5. During the relatively brief period of time during which ALJ Gilpin's employment at the Attorney General's office and the *qui tam* action filed by Relator Ellis overlapped, the *qui tam* action was under seal; its existence was known only to the District Court, the Relator and her counsel, and selected attorneys wholly within the Civil Medicaid Fraud Division. *Id.* at ¶6.

In the summer of 2011, the Inspector General began an investigation of M&M. As a result, the Inspector General initiated an administrative enforcement proceeding. On January 23, 2012, the Inspector General issued to M&M a Notice of Intent to Assess Damages and Penalties. On February 1, 2012, M&M timely requested an administrative appeal of the notice of overpayment. Subsequently, HHSC set the appeal hearing in the HHSC Appeals Division. In March, 2013, the administrative enforcement case was assigned to, and is now pending before, HHSC-ALJ Gilpin.

Separately, on April 24, 2012, Dr. Ellis, (the *qui tam* relator) filed an action in Travis County District Court under the Texas Medicaid Prevention Act ("TMFPA") (the civil TMFPA, or *qui tam*, action). Dr. Ellis filed her suit under seal, as required by section 36.102 of the TMFPA. *See* Tex. Hum. Res. Code Ann. § 36.102 (West. 2013). The *qui tam* action named M&M as defendant.

On or about June 25, 2012, the State intervened in Dr. Ellis's TMFPA action but did not unseal the case. Ex. 2, Notice of Intervention. Neither M&M, nor any other

defendant, was served. *See* Tex. Hum. Res. Code § 36.102(b) (prohibiting service on a defendant until authorized by court order).

On June 6, 2013, the State filed in Travis County District Court a Notice of Election of Alternate Remedy under section 36.109 of the TMFPA as to M&M. Ex. 3, Notice of Election. Tex. Hum. Res. Code § 36.109 (West 2013). The State and Dr. Ellis also requested and received an order from the Court allowing the State and Dr. Ellis to: (1) inform M&M of the existence of the State's and Dr. Ellis's *qui tam* claims; (2) inform the ALJ of the existence of the *qui tam* claims against M&M; and (3) inform the ALJ that the State had elected to pursue the TMFPA claims against M&M in the administrative proceeding. Ex. 4, Order on Motion to Partially Unseal. On June 24, 2013, the State non-suited the under-seal TMFPA action pending in Travis County District Court against M&M. Ex. 5, Notice of Non-Suit.

This brief factual background is provided to clarify what appears to be an attempt by M&M to conflate the HHSC-OIG enforcement action, which was already pending in this administrative forum, with the *qui tam* action prior to its unsealing. It was not until after ALJ Gilpin had retired from the Office of Attorney General that the *qui tam* case was unsealed in district court and its existence was disclosed.

III. Argument & Authorities

- a. **Neither Article V of the Texas Constitution, nor TRCP 18a and 18b, applies, because an administrative agency is not a court vested with judicial power.**

M&M relies on Article V, § 11, of the Texas Constitution for the legal authority underpinning its motion to disqualify ALJ Gilpin. This reliance is misplaced. Article V does not apply to ALJs.

The Texas Constitution establishes three separate and distinct branches of government: the Legislative, Executive and Judicial departments.² Article V of the Texas Constitution establishes the Judicial Department. The courts in which judicial power is vested are set forth in Article V, Section 1:³

Sec. 1. JUDICIAL POWER; COURTS IN WHICH VESTED. The judicial power of this State shall be vested in one Supreme Court, in one Court of Criminal Appeals, in Courts of Appeals, in District Courts, in County Courts, in Commissioners Courts, in Courts of Justices of the Peace, and in such other courts as may be provided by law. The Legislature may establish such other courts as it may deem necessary and prescribe the jurisdiction and organization thereof, and may conform the jurisdiction of the district and other inferior courts thereto.

The HHSC Appeals Division is not one of the courts listed in Article V. Nor is it a court established by the legislature. It is therefore not a “court” vested with “judicial power”:

² Texas Constitution Article II, § 1: “DIVISION OF POWERS; THREE SEPARATE DEPARTMENTS; EXERCISE OF POWER PROPERLY ATTACHED TO OTHER DEPARTMENTS. The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another, and those which are Judicial to another; and *no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.*” (emphasis added)

³ Vernon’s Ann. Texas Const. Art. V, §1.

An administrative agency is not a “court” and its contested-case proceedings are not lawsuits, no matter that agency adjudications are sometimes referred to loosely as being “judicial” in nature. Agency adjudications do not reflect an exercise of the judicial power assigned to the “courts” of the State in Tex. Const. Ann. art. V, § 1; they are simply executive measures taken in the administration of statutory provisions.

Pretzer v. Motor Vehicle Bd., 125 S.W.3d at 40 (Tex. App.—Austin 2003), (citing *Beyer v. Emps. Ret. Sys. of Tex.*, 808 S.W.2d at 627).⁴

M&M also relies on Rules of Civil Procedure 18a and 18b in support of its Motion. These Rules are inapplicable for the same reasons that Article V is inapplicable.

Rule 18a(a) reads:

A party in a case *in any trial court* other than a statutory probate court or justice court may seek to recuse or disqualify a judge who is sitting in the case by filing a motion with the clerk of the court in which the case is pending....

Tex. Rule Civ. P. 18a(a) (emphasis added).⁵ Because an administrative agency is not a “trial court,” and ALJ Gilpin is not a “judge” within the meaning of TRCP 18a and 18b, these rules do not apply. Rules 18a and 18b, taken together, simply provide the procedural mechanism for the judicial resolution of a motion seeking disqualification on what are ultimately *constitutional* grounds. Further, Rule 18b, which merely provides the

⁴ Even a cursory review of Article V shows the distinction between Article V judges and administrative law hearings officers. For instance, Article V, § 1-a, provides for the retirement, removal and compensation of judges. None of these provisions pertain to ALJs. Moreover, Article V, § 12, states that, “All judges of courts of this State, by virtue of their office, are conservators of the peace throughout the State” such that they may be presented with an indictment which “invests the court with jurisdiction of the cause.” Article V, § 12(a)-(b). Clearly, ALJs may not be presented with criminal indictments. Even more fundamentally, to apply Article V, § 11, as M&M’s Motion urges, to ALJ Gilpin would contravene the separation of powers set forth in Article II, § 1: “[No] person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others.”

⁵ The previous version of Rule 18a was worded slightly differently. Compare Tex. R. Civ. P. 18a(a) (1990) with current Rule 18a(a) (amended 2011).

grounds for a motion under 18a, is limited to constitutional grounds provided by Article V, § 11. *Tesco Am., Inc. v. Strong Indus., Inc.*, 221 S.W.3d 550, 553 (Tex. 2006) (the grounds for disqualification cannot be expanded beyond those listed in the Texas Constitution). As the *Tesco* court explained:

... Rule 18b(1)(a) was not intended to expand disqualification further than constitutionally required...Both the rule and the Constitution specify the same three grounds for disqualification (interest, connection, and counsel), and no others.

Tesco, 221 S.W.3d at 553. Indeed, the grounds for disqualification listed in Rule 18b incorporate the provisions of Article V, §11, of the Texas Constitution and were “intended to *expound* rather than *expand* the Constitution.” *Tesco* at 553 (emphasis in original); *In re Wilhite*, 298 S.W.3d 754, 758 (Tex. App.—Houston [1st Dist.] 2009 orig. proceeding [mand. denied]). Since Rules 18a and 18b do not, and cannot, expand upon either the constitutional grounds for disqualification, or the constitutional grant of judicial power set out in Article V, §1, authority to file a motion to disqualify under Rules 18a and 18b simply does not exist in an administrative enforcement action. *Pretzer*, at 40. Consequently, these Rules do not apply to an administrative law judge and cannot be grounds for any disqualification of ALJ Gilpin.

Although M&M does not actually assert them, the only grounds upon which M&M could argue for the relief it seeks would be as a deprivation of due process. Although “an agency does not operate under the same rules as a court of law, nor is it subject to the same restrictions,” it nevertheless must “respect the due-process rights of

applicants who appear before it in contested cases.” *Flores v. Employees Retirement System of Texas*, 74 S.W.3d 539, 539 (Tex. App.—Austin 2002, pet. denied).

The inquiry, then, turns to whether M&M has due-process grounds for disqualification.

b. M&M cannot demonstrate grounds for disqualification.

Even if Article V, § 11, and TRCP 18a and 18b did apply, those provisions would not require the disqualification of ALJ Gilpin, because he did not work on this matter. Ex. 1 at ¶ 8. The constitutional provision reads:

No judge shall sit in any case wherein the judge may be interested, or where either of the parties may be connected with the judge, either by affinity or consanguinity, within such a degree as may be prescribed by law, or *when the judge shall have been counsel in the case.*

Tex. Const. art. V § 11 (emphasis added). TRCP 18b(a)(1) reads:

(a) Grounds for Disqualification. A judge must disqualify in an proceeding in which:

(1) the judge has served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter.

The cases interpreting these provisions upon which M&M relies do not apply here, because those cases do not apply to Assistant Attorneys General.

The Texas Office of Attorney General is a law enforcement agency and is part of the Executive branch of government. *See* Tex. Const. Art. IV, § 22. It is not a “law firm” to which traditional notions of “imputed knowledge” and “vicarious disqualification” are

appropriate.⁶ Indeed, the *Tesco* court, in an opinion relied upon heavily by M&M, recognized that government attorneys entering or leaving public service are often governed by different rules than those governing attorneys in private practice:

We express no opinion on cases involving attorneys entering or leaving government service, as those circumstances and the professional rules governing them are often different from those governing attorneys in private firms. *See, e.g.*, Tex. Disciplinary R. Prof'l Conduct 1.10, reprinted in Tex. Gov't. Code tit. 2, subtit. G, app. A, art. 10 § 9 (allowing attorneys who participate personally and substantially as public officers or employees in a matter to represent private clients in the same matter if the government agency consents); Tex. R. Civ. P. 18b(2)(d) (providing a discrete recusal rule for judges who previously served as government lawyers).

Tesco, 221 S.W3d at 554, fn. 14. *In re O'Connor*, also cited by M&M, likewise interpreted Article V, § 11, and TRCP 18b(1)(a) as they apply to private law partners. *In re O'Connor*, 92 S.W.3d 446, 448 (Tex. 2002) (per curiam).

Despite M&M's insistence that ALJ Gilpin's prior employment as an assistant attorney general makes him *de facto* counsel in any under-seal *qui tam* cases pending during his employment, the law is precisely the opposite. In *Langdeau v. Dick*, appellees moved to set aside the opinion and judgment of the appellate court asserting that the associate justice who wrote the opinion was disqualified because:

[T]he Attorney General during the time Justice Richards was one of his employees gave advise [sic] to the 'old Board of Insurance Commissioners' which resulted in deceitful and fraudulent practices by General American Casualty Company in which appellees became enmeshed. *Appellees do not state that Justice Richards gave any of this advice, only that he was an employee of the Attorney General when such advice was given.*

⁶ The Attorney General's office handles such diverse matters, in addition to Medicaid fraud, as cybercrime, money laundering, election fraud, child pornography, child support cases, consumer protection, and antitrust litigation.

Langdeau v. Dick, 356 S.W.2d 945, 958-959 (Tex. Civ. App.—Austin 1962, writ ref'd n.r.e.) (emphasis added). The Justice declined to step down, and the *Langdeau* court found no basis to disqualify him. *Id.* at 959. The Court held that, while the Attorney General is counsel in every case in which an Assistant Attorney General is counsel, the reverse is not so: “[A]n Assistant Attorney General is not of counsel in every case in which the Attorney General may be of counsel....” *Id.* Under this analysis, ALJ Gilpin represented no party in this case, and there are no grounds for his removal here.

Looking elsewhere for appropriate analogy, nowhere is the fundamental difference between government and private attorneys more apparent than in criminal cases, to which Rule 18a and 18b *do* apply. *Fuelberg v. State*, 410 S.W.3d 498, 502 (Tex. App.—Austin 2013, no pet.) (Appeal reinstated on other grounds, supplemental briefing requested at *Fuelberg v. State*, No. 03-11-00317-CR, 2014 WL 108321 (Tex. App. — Austin January 7, 2014) (per curiam)). M&M can find no authority in criminal cases, which, one could argue, would be subjected to more rigorous scrutiny than civil cases. “Without more, the mere fact that a judge served as a district attorney while an appellant’s case was pending does not disqualify the judge.” *Gamez v. State*, 737 S.W.2d 315, 318 (Tex. Crim. App. 1987) (judge not disqualified because there was no affirmative showing of judge’s actual participation as counsel in the case). “The prohibition found in Article 5, Section 11 of the Texas Constitution and Article 30.01 V.A.C.C.P., against a judge hearing a case in which he has acted as counsel requires that he *actually have participated in the very case*

which is before him....” Id., citing to Holifield v. Texas, 538 S.W.2d 123, 125 (Tex. Crim. App. 1976) (emphasis added).

Texas Code of Criminal Procedure, Art. 30.01 provides:

No Judge or justice of the peace shall sit in any case where he may be the party injured, or where he has been of counsel for the State or the accused, or where the accused or the party injured may be connected with him by consanguinity or affinity with the third degree....

Tex. Code Crim. Proc. Art. 30.01. Yet, in applying this language to former prosecutors — which is a much more apt comparison to former assistant attorneys general than attorneys practicing in a private law firm — courts have recognized that “for over a century the Court of Criminal Appeals has consistently held that, as applied to former prosecutors, a judge is disqualified *only if the record affirmatively demonstrates that he actively participated as a prosecutor in the very case he is presiding over as a judge.*” *Cruz v. State*, No. 07-09-0076-CR, 2010 WL 2326147, *4 (Tex. App.—Amarillo June 10, 2010, no pet) (mem. op.) (internal cites omitted) (emphasis added).

In keeping with the view that actual, active participation in the case is required for disqualification, Article 2.08 of the Texas Code of Criminal Procedure provides: “District and county attorneys shall not be of counsel adversely to the State in any case, in any court, nor shall they, after they cease to be such officers, be of counsel adversely to the State in any case in which they have been of counsel for the State.” Tex. Code Crim. Proc. Art. 2.08. Plainly, “of counsel” as used in Article 2.08 means of counsel *in the same case.* See *Utzman v. State*, 32 Tex. Cr. R. 426, 24 S.W. 412 (1893) (holding that Article 31 (now Article 2.08) of the Code of Criminal Procedure and its use of “of counsel in the

case” is the legislative construction of the constitutional clause in Article V, §11, disqualifying a judge “when he shall have been of counsel in the case.”) To construe it any other way would lead to the absurd result that once an attorney leaves the district attorney’s office, he or she may never represent a criminal defendant against the State.

In short, ALJ Gilpin did not serve as a lawyer in the matter in controversy. He was never of counsel, on any pleadings, or part of any discussion of this case. If he could not be disqualified on grounds applicable to trial judges, he should not be disqualified in this administrative action on due-process grounds.

IV. Conclusion and Request for Relief

M&M’s motion has no support in the law, and disqualification is not warranted by the facts. This Motion should be denied.

Respectfully submitted,

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JOHN B. SCOTT
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CHRISTINE ELLIS, D.D.S.

CERTIFICATE OF SERVICE

I certify that I have on this 24th day of March, 2014, served copies of this Response to M&M Orthodontics, PA's, Dr. Scott Malone's, and Dr. Diana Malone's Amended Verified Motion to Disqualify Administrative HHSC Appeals Hearing Officer Rick Gilpin, as follows:

<p><i>Via Facsimile 512-231-5779</i> HHSC Appeals Division 8407 Wall St., Room s-329 Austin, TX 78754</p>	<p><i>Via Facsimile 512-833-6484</i> <i>Steve.johnson@hsc.state.tx.us</i> Texas Health & Human Services Commission, OIG – Sanctions Division Steve Dallas Johnson 11101 Metric Blvd., Bldg. I Austin, TX 78754</p>
<p><i>Via Facsimile 361-884-7023</i> <i>tonycanales@canalessimonson.com</i> J.A. Canales, Esq. Canales & Simonson, P.C. 2601 Morgan Avenue P.O. Box 5624 Corpus Christi, TX 78465 COUNSEL FOR M & M ORTHODONTICS, PA, SCOTT MALONE and DIANA MALONE</p>	<p><i>Via Facsimile 512-457-9066</i> <i>jay@r-alaw.com</i> Jason D. Ray Riggs, Aleshire, Ray, P.C. 700 Lavaca, Suite 920 Austin, TX 78701 COUNSEL FOR M & M ORTHODONTICS, PA, SCOTT MALONE and DIANA MALONE</p>
<p><i>Via Facsimile 214-357-7252</i> <i>dhargrove@waterskraus.com</i> Dan Hargrove Waters & Kraus, LLP Dallas, Texas 75204 COUNSEL FOR RELATOR, CHRISTINE ELLIS, DDS</p>	<p><i>Via Email to jim@moriarty.com</i> James Moriarty Moriarty Leyendecker, PC 4203 Montrose Blvd, Suite 150 Houston, TX 77006 COUNSEL FOR RELATOR, CHRISTINE ELLIS, DDS</p>



Margaret Moore

Exhibit

1

**HHSC-APPEALS DOCKET NO. 12-0096-K
HHSC-OIG CASE NO. P200803163**

**M & M ORTHODONTICS, PA, DR.
SCOTT MALONE, and DR. DIANA
MALONE,**
Petitioners

v.

**TEXAS HEALTH & HUMAN
SERVICES COMMISSION, OFFICE
OF INSPECTOR GENERAL,**
Respondent

§ **BEFORE THE HEALTH AND**
§
§
§
§
§ **HUMAN SERVICES COMMISSION**
§
§
§
§
§ **APPEALS DIVISION**

AFFIDAVIT OF RAYMOND C. WINTER

§ STATE OF TEXAS
§
§ COUNTY OF TRAVIS

Before me, the undersigned authority, personally appeared Raymond C. Winter, who, being by me duly sworn, deposed as follows:

1. My name is Raymond C. Winter. I am over 18 years of age, of sound mind, capable of making this affidavit, and personally acquainted with the facts stated herein.
2. I am an attorney employed by the Texas Attorney General's Office ("OAG"). I am the Division Chief of the Civil Medicaid Fraud Division. I have been employed by the OAG since August 1998. Between August 1998 and March 2004, I was assigned full-time to the Administrative Law Division. Since 2004, I have been assigned full-time to the Civil Medicaid Fraud Division.
3. During my entire employment with the OAG, my office has been in the William P. Clements building, located at 300 W. 15th Street, Austin, Texas 78701.
4. ALJ Rick Gilpin was employed by the OAG, in the OAG's Opinions Committee Division from 1974 until his retirement from the OAG in December 2012.

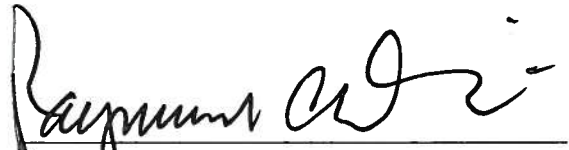
5. Prior to ALJ Rick Gilpin's retirement from the OAG, I never had the pleasure of meeting Mr. Gilpin. Prior to his retirement, I never spoke with or interacted with Mr. Gilpin. At no time when we were both employed by the OAG was Mr. Gilpin in my chain of command and at no time was I in his chain of command. Attached hereto as Exhibit "1" is a true and accurate copy of the OAG organizational work chart demonstrating the Administrative Law Division and the Civil Medicaid Fraud Division of the OAG are in separate and distinct reporting columns or "silos" from the Opinions Committee Division.

6. During the time that Mr. Gilpin's employment at the OAG and the *qui tam* matter filed by Relator Ellis overlapped, the *qui tam* action remained under seal. See Tex. Hum. Res. Code § 36.102. The existence of the *qui tam* matter was disclosed only to District Court personnel, the Relator and her counsel, and to selected attorneys wholly within the Civil Medicaid Fraud Division.

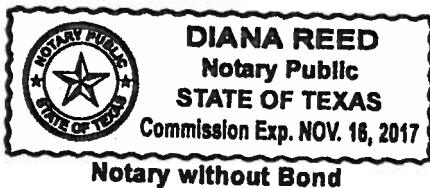
7. The *qui tam* matter was not unsealed until June 6, 2013.

8. Mr. Gilpin did not participate in any way in the *qui tam* matter.

Further affiant sayeth not.


 Raymond C. Winter

SWORN TO AND SUBSCRIBED before me on the 31st day of March, 2014.




 Notary Public in and for the State of Texas

Diana Reed
 Notary's Printed Name

My commission expires: 11-16-2017

Exhibit

2

CAUSE NO. D-1-GV-12-000435

STATE OF TEXAS,
ex rel.
(UNDER SEAL)
Plaintiffs,

§
§
§
§
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§
§
§
§

IN THE DISTRICT COURT

v.

TRAVIS COUNTY, TEXAS

(UNDER SEAL)
Defendants

98TH JUDICIAL DISTRICT

STATE OF TEXAS' NOTICE OF INTERVENTION

TO THE HONORABLE JUDGE OF SAID COURT:

This matter is governed by Tex. Hum. Res. Code Ann. § 36.001 *et seq.*, the Texas Medicaid Fraud Prevention Act ("the Act").

NOTICE OF INTERVENTION

Pursuant to § 36.102(c) of the Act, the State of Texas, acting by and through its Attorney General, Greg Abbott, hereby gives notice to the Court of its election to intervene and proceed with the pending *qui tam* action.

Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant Attorney General

JOHN SCOTT
Deputy Attorney General for Litigation

Margaret Moore

RAYMOND C. WINTER

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Attorneys for the State of Texas

ATTORNEYS FOR THE STATE OF TEXAS

CERTIFICATE OF SERVICE

I certify that the foregoing instrument has been sent via U.S. Certified Return Receipt Mail on this 25th day of June, 2012 to the Attorneys of Record for Plaintiff/Relator, Christine Ellis, as follows:

Dan Hargrove
Waters, Kraus & Paul, LLP
600 Navarro Street, # 500
San Antonio, Texas 78205

for Margaret Moore

RAYMOND C. WINTER

Exhibit

3

Dr. Diana T. Malone, DDS; Dr. Scott Malone, DDS; M & M Orthodontics, PA; M & M Orthodontics Clinic listed as 422 De Zavala Rd., San Antonio, Texas; M & M Orthodontics Clinic listed as 6735 FM 78 # 106, San Antonio, Texas; M & M Orthodontics Clinic listed as 3543 Roosevelt Ave., San Antonio, Texas; and M & M Orthodontics Clinic listed as 933 FM 3009, Schertz, Texas (collectively, the "Malone Defendants").

AGREED MOTION TO PARTIALLY UNSEAL

In order to pursue the alternate remedy in an administrative proceeding, the State requests that the Court enter an order partially unsealing the lawsuit against only the Malone Defendants for the following limited purposes:

1. Notifying the Malone Defendants of the existence of this lawsuit and the State's decision to pursue its claims by an alternate remedy in an administrative forum; and
2. Notifying the Texas State Office of Administrative Hearings and/or the Texas Health and Human Service Commission's Office of Administrative Hearings of the existence of the lawsuit and the State's decision to pursue its claims by an alternate remedy in that administrative forum.

The State further respectfully requests that the case remain under seal against the remaining defendants and for all other purposes pursuant to the Court's Order of October 16, 2012, a copy of which is attached as Exhibit A. The State has conferred with counsel for Relator and they agree to this motion.

Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant Attorney General

JOHN B. SCOTT
Deputy Attorney General for Civil Litigation

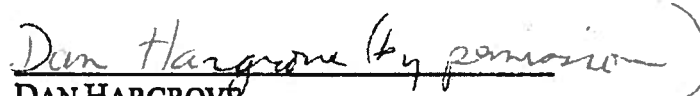
RAYMOND C. WINTER
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ATTORNEYS FOR THE STATE OF TEXAS

AGREED (as to Motion for Partial Unsealing):



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San Antonio, TX 78205
210-349-0515 (PHONE)
210-349-3666 (FACSIMILE)

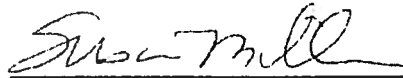
Attorneys for the Private Person Plaintiff,
Christine Ellis

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Notice of Election of Alternate Remedy and Agreed Motion for Partial Unsealing was sent via e-mail and first class mail on this 6th day of June, 2013, to the following attorneys for the Plaintiffs/Relators:

DAN HARGROVE
State Bar No. 00790822

HARGROVE LAW FIRM
600 Navarro Street, Suite 500
San Antonio, TX 78205
210-349-0515 (PHONE)
210-349-3666 (FACSIMILE)



Susan J. Miller

CAUSE NO. D-1-GV-12-000435

STATE OF TEXAS
ex rel. (UNDER SEAL)
Plaintiff,

v.

(UNDER SEAL)
Defendants,

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IN THE DISTRICT COURT

98th JUDICIAL DISTRICT

TRAVIS COUNTY, TEXAS

Filed in The District Court
of Travis County, Texas

OCT 16 2012 BP

At
Amalia Rodriguez-Mendoza, Clerk

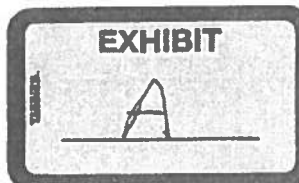
ORDER GRANTING EXTENSION OF TIME

CAME ON THIS DAY to be heard in the above-numbered and styled cause the unopposed Motion of the Movant, the State of Texas, for an extension of time for this case to remain under seal and for the State of Texas to consider its option to intervene in this case. The Court, having considered said Motion finds it to be well taken and rules that it should be GRANTED in all respects.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that this case and all pleadings and orders filed herein shall remain under seal until further order of this Court.

SIGNED this 16th day of October, 2012.

Muse D. Train
JUDGE PRESIDING



Exhibit

4

CAUSE NO. D-1-GV-12-000435

STATE OF TEXAS ex rel)
UNDER SEAL)
)
Plaintiffs,)
)
v.)
)
UNDER SEAL)
)
Defendants.)

IN THE DISTRICT COURT

OF TRAVIS COUNTY, TEXAS

98TH JUDICIAL DISTRICT

Filed in The District Court
of Travis County, Texas

JUN 06 2013

At
Amalia Rodriguez Mendoza, Clerk

ORDER ON MOTION TO PARTIALLY UNSEAL

CAME ON THIS DAY to be heard in the above-numbered and styled cause the Agreed Motion of the State of Texas for a partial unsealing as set forth in said Motion. The Court, having considered said Motion finds it to be well taken and rules that it should be GRANTED in all respects.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the Court ordered Seal existing in this case be and is hereby partially lifted only as to the following Defendants:

Dr. Diana T. Malone, DDS; Dr. Scott Malone, DDS; M & M Orthodontics, PA; M & M Orthodontics Clinic listed as 422 De Zavala Rd., San Antonio, Texas; M & M Orthodontics Clinic listed as 6735 FM 78 # 106, San Antonio, Texas; M & M Orthodontics Clinic listed as 3543 Roosevelt Ave., San Antonio, Texas; and M & M

Orthodontics Clinic listed as 933 FM 3009, Schertz, Texas (collectively, the "Malone Defendants").

Leave is granted to counsel for the State to disclose the existence of this suit to the Malone Defendants and to the Texas State Office of Administrative Hearings and/or the Texas Health and Human Service Commission's Office of Administrative Hearings of the existence of the lawsuit and of the State's decision to pursue its claims by an alternate remedy in that administrative forum. This partial unsealing takes effect upon the presentation for filing and entry of this Order and this Order shall remain under seal along with the remainder of the file which remains sealed.

IT IS FURTHER ORDERED that the Seal currently in place shall remain in full force and effect as to all remaining Defendants save and except only the Malone Defendants. This Order, the Motion relating to this Order and all prior pleadings shall also remain under seal until further order of the Court.

SIGNED this 6 th day of June, 2013.



JUDGE PRESIDING

Exhibit

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Orthodontics Clinic at 422 De Zavala Rd, San Antonio, Texas; M&M Orthodontics Clinic at 6735 FM 78 #106, San Antonio, Texas; M&M Orthodontics Clinic at 3543 Roosevelt Ave., San Antonio, Texas; and M&M Orthodontics Clinic at 933 FM 3009, Schertz, Texas (the "Malone Defendants") via an alternative administrative remedy, as authorized by Tex. Hum. Res. Code § 36.109.

4. On June 6, 2013, the Court granted leave to the State and Relator to partially unseal the TMFPA action to allow the State and Relator to advise the Malone Defendants that they had been named in the TMFPA action, to advise the presiding judge in the administrative proceeding that the Malone Defendants were named in the TMFPA action, and to advise the judge presiding in the administrative proceeding that the State and Relator would pursue the TMFPA claims against the Malone Defendants in the administrative proceeding. Exhibit 2.

5. On June 18, 2013, the State elected to pursue the TMFPA claims asserted by Relator against Dr. John G. Vondrak, DDS; Dr. John G. Vondrak, DDS, PA; National Orthodontix MGMT, PLLC; National Orthodontix MGMT, PLLC dba Sun Orthodontix; National Orthodontix MGMT; Orthodontix Ltd of Victoria, PLLC; Orthodontix Ltd of North East El Paso, PLLC; Orthodontix Ltd of Far East El Paso, PLLC, fka Sun Orthodontix; Sun Orthodontix of Far East El Paso, PLLC; Sun Orthodontix of East Corpus Christi, PLLC; Orthodontics Ltd of Victoria, PLLC fka Sun Orthodontix of Victoria, PLLC; Sun Orthodontix of Victoria, PLLC; Orthodontix

Ltd of North East El Paso, PLLC fka Sun Orthodontix of North East El Paso, PLLC; Sun Orthodontix of North East El Paso, PLLC; Orthodontix Ltd of West El Paso, PLLC; Sun Orthodontix of West El Paso, PLLC; Orthodontix Ltd of South East El Paso, PLLC; Sun Orthodontix South East El Paso, PLLC; Sun Orthodontix of Las Cruces, PLLC; and Orthodontix Ltd of Las Cruces, PLLC (collectively, the “National Orthodontix Defendants”); via an alternative administrative remedy, as authorized by Tex. Hum. Res. Code § 36.109.

6. On June 18, 2013, the Court granted leave to the State and Relator to partially unseal the TMFPA action to allow the State and Relator to advise the National Orthodontix Defendants that they had been named in the TMFPA action, to advise the presiding judge in the administrative proceeding that the National Orthodontix Defendants were named in the TMFPA action, and to advise the judge presiding in the administrative proceeding that the State and Relator would pursue the TMFPA claims against the National Orthodontix Defendants in the administrative proceeding. Exhibit 3.
7. Relator has the same rights in the alternate proceedings as she would have had if her claims against the Malone Defendants and the National Orthodontix Defendants were continued in this Court, including the right to participate as a party in the administrative action, and the right to a share of the proceeds of the action. Tex. Hum. Res. Code §§ 36.107(a), 36.109(a), and 36.110.

8. Accordingly, pursuant to TRCP 162, and without prejudice to: the State's rights to pursue its TMFPA claims against the Malone Defendants and the National Orthodontix Defendants in the administrative proceedings; the Relator's rights to participate in the administrative proceeding against the Malone Defendants and the National Orthodontix Defendants; and the Relator's rights to a share of the proceeds of the administrative proceeding against the Malone Defendants and the National Orthodontix Defendants, the State and Relator hereby give notice of Non-Suit of the State's and Relator's TMFPA claims against the Malone Defendants and the National Orthodontix Defendants (and only the Malone Defendants and the National Orthodontix Defendants) now pending in this Court.

Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant Attorney General

JOHN B. SCOTT
Deputy First Assistant Attorney General

A handwritten signature in black ink, appearing to read "RCW", is written over a horizontal line.

RAYMOND C. WINTER
State Bar No. 21791950
Chief, Civil Medicaid Fraud Division
(512) 936-1709
MARGARET MOORE
State Bar No. 14360050

**Deputy Chief, Civil Medicaid Fraud Division
(512) 936-1319 direct dial**

**Assistant Attorneys General
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**James Moriarty
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(713) 528-0700 Telephone**

Attorneys for Relator, Christine Ellis DDS

CERTIFICATE OF SERVICE

I certify that on the 24th day of June, 2013, the foregoing *State's and Relator's Notice of Non-suit of the Malone Defendants and the National Orthodontix Defendants* was served via Texas Rules of Civil Procedure on the following:

<p>Via Facsimile 361-884-7023 J.A. Canales, Esq. Canales & Simonson, P.C. 2601 Morgan Avenue P.O. Box 5624 Corpus Christi, TX 78465</p> <p>COUNSEL FOR M&M DEFENDANTS AND NATIONAL ORTHODONTIX DEFENDANTS</p>	<p>Via Facsimile 512-477-1188 Robert M. Anderton Law Offices of Hanna & Anderton 900 Congress Avenue, Suite 250 Austin, TX 78701</p> <p>COUNSEL FOR M&M DEFENDANTS AND NATIONAL ORTHODONTIX DEFENDANTS</p>
<p>Via Facsimile 214- 357-7252 Dan Hargrove Waters & Krauss, LLP Dallas, Texas 75204 COUNSEL FOR RELATOR, CHRISTINE ELLIS, DDS</p>	<p>Via Email to jim@moriarty.com James Moriarty Moriarty Leyendecker, PC 4203 Montrose Blvd, Suite 150 Houston, TX 77006 COUNSEL FOR RELATOR, CHRISTINE ELLIS, DDS</p>


Raymond C. Winter for RCW

CAUSE NO. D-1-GV-12-000435

STATE OF TEXAS,
ex rel.
(UNDER SEAL)
Plaintiffs,

v.
(UNDER SEAL)
Defendants

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IN THE DISTRICT COURT

TRAVIS COUNTY, TEXAS

98TH JUDICIAL DISTRICT

STATE OF TEXAS' NOTICE OF INTERVENTION

TO THE HONORABLE JUDGE OF SAID COURT:

This matter is governed by Tex. Hum. Res. Code Ann. § 36.001 *et seq.*, the Texas Medicaid Fraud Prevention Act ("the Act").

NOTICE OF INTERVENTION

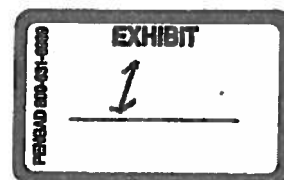
Pursuant to § 36.102(c) of the Act, the State of Texas, acting by and through its Attorney General, Greg Abbott, hereby gives notice to the Court of its election to intervene and proceed with the pending *qui tam* action.

Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant Attorney General

JOHN SCOTT
Deputy Attorney General for Litigation



Margaret Moore

RAYMOND C. WINTER
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MARGARET MOORE
State Bar No. 14360050
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State Bar No. 24051959
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DAMON T. ONG
State Bar No. 24065846
(512) 936-6615 direct dial

BRADEN E. CIVINS
24080836
(512) 463-7579 direct dial

Assistant Attorneys General
P.O. Box 12548
Austin, Texas 78711-2548
(512) 499-0712 fax
Attorneys for the State of Texas

ATTORNEYS FOR THE STATE OF TEXAS

CERTIFICATE OF SERVICE

I certify that the foregoing instrument has been sent via U.S. Certified Return Receipt Mail on this 25th day of June, 2012 to the Attorneys of Record for Plaintiff/Relator, Christine Ellis, as follows:

Dan Hargrove
Waters, Kraus & Paul, LLP
600 Navarro Street, # 500
San Antonio, Texas 78205

Margaret Moore
for _____
RAYMOND C. WINTER

Orthodontics Clinic listed as 933 FM 3009, Schertz, Texas (collectively, the "Malone Defendants").

Leave is granted to counsel for the State to disclose the existence of this suit to the Malone Defendants and to the Texas State Office of Administrative Hearings and/or the Texas Health and Human Service Commission's Office of Administrative Hearings of the existence of the lawsuit and of the State's decision to pursue its claims by an alternate remedy in that administrative forum. This partial unsealing takes effect upon the presentation for filing and entry of this Order and this Order shall remain under seal along with the remainder of the file which remains sealed.

IT IS FURTHER ORDERED that the Seal currently in place shall remain in full force and effect as to all remaining Defendants save and except only the Malone Defendants. This Order, the Motion relating to this Order and all prior pleadings shall also remain under seal until further order of the Court.

SIGNED this 6 th day of June, 2013.

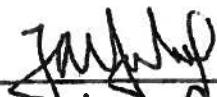

JUDGE PRESIDING

Corpus Christi, PLLC; Orthodontics Ltd of Victoria, PLLC fka Sun Orthodontix of Victoria, PLLC; Sun Orthodontix of Victoria, PLLC; Orthodontix Ltd of North East El Paso, PLLC fka Sun Orthodontix of North East El Paso, PLLC; Sun Orthodontix of North East El Paso, PLLC; Orthodontix Ltd of West El Paso, PLLC; Sun Orthodontix of West El Paso, PLLC; Orthodontix Ltd of South East El Paso, PLLC; Sun Orthodontix South East El Paso, PLLC; Sun Orthodontix of Las Cruces, PLLC; and Orthodontix Ltd of Las Cruces, PLLC (collectively, the "National Orthodontix Defendants").

Leave is granted to counsel for the State to disclose the existence of this suit to the National Orthodontix Defendants and to the Texas State Office of Administrative Hearings and/or the Texas Health and Human Service Commission's Office of Administrative Hearings of the existence of the lawsuit and of the State's decision to pursue its claims by an alternate remedy in that administrative forum. This partial unsealing takes effect upon the presentation for filing and entry of this Order.

~~IT IS FURTHER ORDERED that the Seal currently in place shall remain in full~~
force and effect as to all remaining Defendants save and except only the National Orthodontix Defendants. This Order, the Motion relating to this Order and all prior pleadings shall also remain under seal until further order of the Court. However, leave is granted to the State and Relator to disclose this Order to the administrative tribunal.

SIGNED this 18 th day of June, 2013.



Judge Presiding
Tim Sulgk

JUDGE PRESIDING