EXHIBIT
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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE:	§	**CHAPTER 11**
	§	
ABC DENTISTRY, P.A., *et al.*	§	**CASE NO. 16-34221**
	§	
DEBTORS	§	**Jointly Administered**

Dr. Saeed Rohi's Brief on Equitable Distribution of Settlement Proceeds

On October 5, 2017, the Court invited Dr. Rohi and counsel from the Office of the Attorney General of Texas (the "State") to posit the principles, formula and concept which should be applied under Federal Rule of Bankruptcy Procedure 9019 and other applicable law to resolve the State's claim to the settlement obtained by Dr. Rohi from the Debtors and the non-debtors. The parties stipulated at the September 7, 2017 hearing that the Court will make an oral, non-appealable determination of the amounts to be assigned to each class of controversies, i.e., Dr. Rohi's personal claims, attorney's fees, expenses and costs, and Medicaid fraud.

SUMMARY

1. Dr. Rohi put his career at risk when he brought claims in Harris County District Court for breach of contract, unlawful retaliation and "unlawful acts" under the Texas Medicaid Fraud Prevention Act[1] some three and a half years ago. Favorable rulings for Dr. Rohi in state court provided the impetus for the Debtors' bankruptcy cases. Then, this Court ordered mediation at which Dr. Rohi obtained a $3.5 million settlement. But the State stubbornly has refused for

[1] Under the Texas Medicaid Fraud Prevention statute, or "TMFPA", a private person may bring a civil action for a violation of Section 36.002 on behalf of the person and the state. TEX. HUM. RES. CODE §36.101. In the parlance of the case law under the somewhat analogous False Claims Act, 31 U.S.C. §3729 et. seq., the person who brings such a case is referred to as a "relator."

over eleven months to agree that a single dollar of that amount should be used to compensate Dr. Rohi for the damages to his life and career.[2]

2. Under the common fund doctrine, the formula for dividing the settlement proceeds could hardly be simpler: determine the amount of the proceeds which constitute the common fund and then fix the reasonable and necessary attorney fees attributable thereto. Thus, the first step is to determine the common fund and to do that, Dr. Rohi's personal claims must be fixed. For its part, the state already has taken the position that the common fund is a subset of the total settlement amount, because it insisted that 100% of its June 16, 2017 "notice of overpayment" of $312,962 should be taken off the top and removed from the calculus. To maintain logical consistency, a portion of the settlement proceeds to compensate Dr. Rohi for his personal claims should likewise be set aside with the balance representing the common fund.

3. In summary, the common fund results in the following formula: (a) from the gross settlement amount, deduct 100% of the state's and Dr. Rohi's individual claims (i.e., state's "notice of overpayment" and Dr. Rohi's breach of contract and retaliation claims) to determine the common fund; (b) from the common fund amount, deduct reasonable and necessary attorney fees and expenses; and (c) from the net, pay 70% to the state and 30% to Dr. Rohi as previously agreed.

BACKGROUND (CHRONOLOGY)

4. Dr. Rohi filed proofs of claim on November 2, 2016 (Claim Numbers 4-1, 5-1, and 6-1), amended October 26, 2017. The State filed a proof of claim on April 28, 2017 (Claim Number 6-1)[3], stating the amount of its claim was "unliquidated." It attached the state district court's

[2] The State has refused to acknowledge Dr. Rohi's right to receive any compensation whatsoever for his breach of contract claim or statutory retaliation claim under TMFPA §36.115.
[3] Amended on May 5, 2017 (Claim Number 6-2), but amount remained as "unliquidated."

order, "Relator's motion for partial summary judgment on the section 36.002(8) allegations against [Jabbary and ABC] is GRANTED on liability, but DENIED as to damages, penalties, attorneys' fees, and other relief requested."[4] This matters here because there has been no finding as to a specific number of "unlawful acts" by the Debtors and the non-debtors and there has been no assessment as to the damages for which they may be liable.

5. The State sent a "notice of overpayment" claim," based on statistical "sampling and extrapolation process" by letter dated June 16, 2017. It claimed $312,962. This notice was the culmination of the same "investigation" that derailed the $5 million settlement obtained by Dr. Rohi from the Debtors/non-debtors on September 28, 2015 (attached hereto as **Exhibit 2**). At a meeting of the parties at the Office of the Attorney General on June 20, 2017, the State presented its overpayment letter to Dr. Rohi's counsel.

6. The Debtors objected to the State's unliquidated proof of claim on June 26, 2017 (Dkt. Number 252) on the basis that it was duplicative of Dr. Rohi's proof of claim and that it violated the "one satisfaction" rule. Dr. Rohi subsequently joined this objection (Dkt. Number 290), asserting that the State had no standing to assert the Medicaid fraud claims prosecuted by Dr. Rohi.

7. On July 11, 2017, the State emailed counsel a request for Dr. Rohi's proposal for dividing the $3.5 million settlement. The following day, Dr. Rohi's counsel replied that after fees and breach of contract and retaliation damages, Dr. Rohi should receive 30% of the $969,000. (These two emails are attached hereto as **Exhibit 1**). No written response of any kind was made to this proposed division. Thereafter, the State has consistently failed to propose a division of the settlement proceeds.

[4] Claim Number 6-2.

8. Pursuant to the Court's order, the State, Debtors, and non-debtors and Dr. Rohi attended a second mediation on July 26, 2017, in Austin at a further cost to Dr. Rohi of nearly $10,000. The total settlement amount of $3.5 million payable over 6 years at 1.5% interest was orally amended to $4 million payable over 6 years at 0.5% interest. No agreement was reached as to the division of funds between the State and Dr. Rohi.

9. On August 30, 2017, the State responded to the Debtors' and Dr. Rohi's objections, again without stating the amount of its claim (Dkt. Number 299). Instead, it referred to the July 26, 2017 mediation and the belief that a "global resolution" was near. See ¶5 of Dkt. Number 299.

10. On September 7, 2017, the State advised the Court that there was a "global settlement amount that I believe both parties have agreed to" and specifically, "the number we're talking about is $4 million. . . " (9/7/17 transcript, p. 5, lines 4-7; p. 23, lines 6-9.) The State further advised the Court "that out of the four million, this $313,000 [June 16, 2017 notice of overpayment] claim was going to be paid." (*Id*. at p. 27, lines 5-6) At the same hearing, the State said it "is willing to also give a release which will benefit the Debtor entities as well as the non-Debtor entities if that claim is paid." (*Id*. at p. 26, line 25 to p. 28, line 3). The state insisted that 100% of $313,000 must be paid, that this sum was to be deducted from the $4 million settlement proceeds, and that "$313,000 is settlement of the OH [OIG] claim." (*Id*. at p. 27, lines 17-18). The Court then stated: "Mr. Long isn't saying that he gets a share of the 313. He's saying he wants a share of the full four million. And so, if I take the four million divvy it up, he isn't going to say that an amount that ought to get paid to the State under the 313, that the State would then pay something back to Dr. Rohi. All he's saying is he wants the full four million coming in to bear and then we would allocate out of that, 313 to the State, but that'll be taken into consideration of how much the State is entitled to overall. But not that he would get a qui tam reward for that." (*Id.* at

p. 30, lines 4-14]. "I think what we'll do, if you can get authority, is we will determine out of the four million, A, B, D will be already known, C you will get 30 percent of. And [the state is] locked into the 30 percent. We won't litigate whether 30 is fair, 25 is fair, 20 is fair. It'll be 30." (*Id.* at p. 32, lines 14-18).

ARGUMENT

A. Common Fund Doctrine and the Standard for Recovery of Attorney Fees

11. Common fund is unquestionably the applicable principle for the resolution of the State's claim to the settlement obtained by Dr. Rohi. Common fund prevents an opportunistic party from unjustly enriching itself.

> "[T]his Court has recognized consistently that a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole. The common-fund doctrine reflects the traditional practice in courts of equity, and it stands as a well-recognized exception to the general principle that requires every litigant to bear his own attorney's fees. The doctrine rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense. Jurisdiction over the fund involved in the litigation allows a court to prevent this inequity by assessing attorney's fees against the entire fund, thus spreading fees proportionately among those benefited by the suit." *Boeing Co. v. Van Gemert,* 100 S.Ct. 745, 749, 444 U.S. 472, 478 (1980), *citations omitted.*

12. In *Boeing,* the Supreme Court explained that "[j]urisdiction over the fund involved in the litigation allows a court to prevent ... inequity by assessing attorney's fees against the entire fund, thus spreading fees proportionately among those benefited by the suit." *Id.* Application of the common fund doctrine thus requires Court "control over a fund or jurisdiction over the parties...." *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 774 n. 15 (9th Cir.1977).

13. The determination of the reasonable and necessary fee to be awarded for generating the common fund is within the sound discretion of the Court. *Humphrey v. United Way of the Gulf Coast*, 802 F.Supp.2d 847, 858 (S.D. Tex. 2011). The common fund doctrine allows a Court to

distribute attorney's fees from the common fund that is created for the satisfaction of, for example, class members' claims when a class action reaches settlement or judgment. *Id.* (citing 4 William B. Rubenstein, Alba Conte, and Herbert B. Newberg, *Newberg on Class Actions* §14:6 (4th ed. Database updated June 2011). In the classic common fund case, like a class action, the litigation generates a pool of money, either through judgment or settlement, to which beneficiaries are entitled to claim a portion. *Id.* (following *United States ex rel. Bogart v. King Pharmaceuticals,* 493 F.3d 323, 329 (3d Cir.2007)).

14. A court of equity will allow reasonable attorney's fees to a complainant who, at his own expense, has maintained a successful suit or proceeding for the preservation, protection, or increase of a common fund. *Knebel v. Capital Nat. Bank in Austin*, 518 S.W.2d 795, 799 (Tex. 1975). In this instance, it is undisputed that the common fund was generated solely as a result of the litigation brought by Dr. Rohi through his counsel.

15. A contingent percentage fee is an appropriate basis for an award of attorneys' fees. *In re Lease Oil Antitrust Litigation* (No. II), 186 F.R.D. 403, 444 (S.D. Tex. – Corpus Christi, 1999) (citing *Longden v. Sunderman*, 979 F.2d 1095, 1101 (5th Cir. 1992)). While the "lodestar" and "blended" approaches may also be appropriate, *Id.*, Dr. Rohi's counsel in the state court litigation worked under a written, contingent fee agreement, thereby assuming the risk of payment and what turned out to be very lengthy litigation.[5] It is important to note, however, that attorney's fees provided for in a contingent fee agreement is not a ceiling upon the fees recoverable.

[5] A blended approach – figuring the appropriate percentage in light of accepted *Johnson* factors and then cross-checking that result with the lodestar method – has been adopted by the Fifth Circuit. *Id*. (citing *Johnson v. Georgia Highway Express*, 488 F.2d 714, 717-19 (5th Cir. 1974) (rev'd on other grounds).

Blanchard v. Bergeron, 489 U.S. 87, 96-97 (1989) (interpreting Section 1988 of the Civil Rights Act concerning fees).

16. Thus, the first step is to define the appropriate percentage rate of recovery. A survey conducted of the Fifth Circuit found one-third contingency fee awards appropriate where, unlike here, the fund is massive. *In re Lease Oil Antitrust Litigation* (No. II) at 444. Percentage fee awards necessarily increase as the amount of the recovery decreases. *Id.* (citing *In re Prudential Ins. Co. America Sales Litigation,* 148 F.3rd 283, 339 (3rd Cir. 1998).

17. Courts turn to the Johnson factors to determine whether counsel has earned a fee recovery above or below the norm, which include: (1) The time and labor required; (2) The novelty and difficulty of the questions; (3) The skills requisite to perform the legal service properly; (4) The preclusion of other employment due to acceptance of the case; (5) The customary fee for similar work in the community; (6) Whether the fee is fixed or contingent; (7) Time limitations imposed by the client or circumstances; and (8) The amount involved and results obtained. *Johnson*, 488 F.2d at 718.

18. In a common fund situation, *Johnson* has been followed in awarding both a contingent percentage fee and a lodestar fee award under a fee-shifting statute. *Brundle on behalf of Constellis Employee Stock Ownership*, (E.D. Va. 2017); 2017 WL 2727091, page 14:

> "Defendant's argument that a fee-shifting provision renders a common fund or contingent fee award redundant fails to recognize that the Fourth Circuit has held that contingent fees exist to compensate a prevailing plaintiff's counsel for more than the fee-shifting provision, and that a contingency arrangement must be given weight in a court's 'decisional calculus,' even when a lodestar calculation is also performed. [*In Re*] *Abrams*, 605 F.3d [238, 245 (4th Cir. 2010)]. Unlike a fee-shifting provision, which is focused more narrowly on compensating counsel for time spent working on services rendered, contingency fees are designed to 'transfer a significant portion of the risk of loss to attorneys taking a case.' *Id.* at 246. Without 'compensating attorneys for that risk,' '[a]ccess to courts would be difficult to achieve[.]' *Id.* This is because 'plaintiffs may find it difficult to obtain representation if attorneys know their reward for accepting a contingency case is

> merely payment at the same rate they could obtain risk-free for hourly work,' given that the 'downside is no payment whatsoever.' *Id.* If that is true in relatively straightforward cases, it is all the more true in complex civil actions such as this one, where the likelihood of success can be especially difficult to gauge at the outset of the litigation process. Accordingly, the Court agrees with plaintiffs that a contingent fee is appropriate in this civil action where the plaintiff and his counsel had a contract providing for such a fee. In granting both fee-shifting and contingent fee awards, courts have recognized, and this Court agrees, that the contingent fee award must be offset by the amount awarded under the fee-shifting provision."

B. Dr. Rohi's Breach of Contract Claim

19. As pled in paragraphs 16, 17 and 46 of the Second Amended Petition, Defendant Dr. Jabbary orally agreed to pay Dr. Rohi the greater of $1,000 a day or 30% of Dr. Rohi's gross production per day.[6] During his time working for Defendants, Dr. Rohi worked at three ABC Dental locations: ABC Dentistry West Orem, PLLC ("ABC WO"); ABC Dentistry Old Spanish Trail, PLLC ("ABC OST"); and ABC Dentistry Pasadena, PA ("ABC Pasadena"). Dr. Rohi received separate paychecks from each entity where he worked.

20. As shown in Dr. Rohi's October 26, 2017 amended proofs of claim and supporting evidence attached, Dr. Rohi's breach of contract damages against ABC WO are $2,436.99 and against ABC OST are $1,051.03.[7] Dr. Rohi's breach of contract damages against ABC Pasadena are $10,995.93 as Dr. Rohi was promised $38,000 for the 38 days he worked for ABC Pasadena (38 x $1,000/day = $38,000), but he was only paid $27,004.07.[8] Combining Dr. Rohi's breach of

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[6] *See* Second Amended Petition, attached to the state's May 5, 2017 amended proof of claim (Claim Number 6-2).

[7] Dr. Rohi seeks to recover his economic damages – damages that give him the benefit of his bargain by putting him in as good of a position as he would have been in if the contract had been performed. *Qaddura v. Indo-European Foods, Inc.*, 141 S.W.3d 882, 888-89 (Tex.App.—Dallas 2004, pet. denied); *see City of The Colony v. North Tex. Mun. Water Dist.*, 272 S.W.3d 699, 739 (Tex.App.—Fort Worth 2008, pet. dism'd); *Mays v. Pierce*, 203 S.W.3d 564, 577 (Tex.App.—Houston [14th Dist.] 2006, pet. denied). Dr. Rohi calculated his damages based on subtracting what he was paid from what was promised to him.

[8] The number of days Dr. Rohi worked at each location and the amount he was paid is shown on the evidence attached to Dr. Rohi's October 26, 2017 amended proofs of claim.

contract damages from the three ABC Dental locations where he worked, Dr. Rohi's total breach of contract damages are $14,483.95 ($2,436.99 + $1,051.03 + $10,995.93 = $14,483.95).

C. Dr. Rohi's Retaliation Claim

21. In violation of TMFPA §36.115, Defendants threatened, harassed, discriminated against and ultimately discharged Dr. Rohi because of his refusal to engage in Medicaid fraud, and hence, because of a lawful act taken by Dr. Rohi in furtherance of an action under the TMFPA. Therefore, per TMFPA §36.115(a)(2), Dr. Rohi is entitled to "not less than two times the amount of back pay, interest on the back pay and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorney's fees."[9]

22. Dr. Rohi was terminated by ABC on May 1, 2014. Therefore, his back pay is calculated from that date. As explained above, Dr. Rohi was to be paid $1,000 per day while working for ABC. Dr. Rohi worked for ABC five days a week, Monday through Friday.[10] From May 1, 2014 through December 31, 2014, there were 168 workdays. Thus, if Dr. Rohi was not fired from ABC, he would have made $168,000 from May 1, 2014 through December 31, 2014. For the full years of 2015 and 2016, there were 251 workdays each year, and thus Dr. Rohi's back pay for 2015 and 2016 is $251,000 each year. For purposes of the calculations described in this brief, Dr. Rohi's retaliation damages cease as of September 30, 2017. Therefore, from January 1, 2017 through September 30, 2017, there were 189 workdays, and thus Dr. Rohi's back pay for this time period in 2017 is $189,000. Adding together Dr. Rohi's back pay from May 1, 2014 through

[9] This section of the brief does not discuss litigation costs and reasonable attorney's fees as those are discussed in detail above.

[10] *See* Second Amended Petition, attached to the state's May 5, 2017 amended proof of claim (Claim Number 6-2), at ¶17.

September 30, 2017, his total back pay is $859,000.[11] This is the amount Dr. Rohi would have made as of September 30, 2017, had he not been wrongfully terminated from by the Defendants.

23. The amounts Dr. Rohi was actually paid from May 1, 2014 through September 30, 2017 are shown on his 2014 through 2016 1099s, his 1099 summaries kept by the Defendants, the ABC WO Vendor QuickReport and his 2017 paystubs that are all attached to his October 26, 2017 Amended Proofs of Claims as Rohi000237-000261. As shown on Rohi000238-239, Dr. Rohi made $15,281.95 in 2014 after his termination from ABC. As shown on Rohi000241-242, Dr. Rohi made $33,904.69 in 2015, and as shown on Rohi000243-244, Dr. Rohi made $57,802.37 in 2016. Dr. Rohi made $80,849.57 as of September 30, 2017, as shown on his paystubs, Rohi000249-261. Therefore, since Dr. Rohi's termination on May 1, 2014, Dr. Rohi has made a total of $187,838.58. Case law refers to this number as the relator's "compensatory payments", mitigating payments, or mitigation. See *U. S. v. Bornstein*, 423 U.S. 303, 314 (U.S. 1976); *United States ex rel. Mooney v. Americare, Inc*., 172 F.Supp.3d 644, 645 (E.D.N.Y. 2016).

24. *Bornstein* holds that back pay is to be doubled before any mitigating payments are deducted.[12] The United States Supreme Court held that this "method of computation most faithfully conforms to the language and purpose of the [False Claims] Act" by making the plaintiff whole and fixing "liability of the defrauder without reference to the adventitious actions of other persons."[13] By doubling damages prior to any deductions, the "deterrent impact" of the statute is maximized and the "relative rights and liability of the respective parties" are fixed "with maximum

[11] $168,000 + $251,000 + $251,000 + $189,000 = $859,000.
[12] *Bornstein*, 423 U.S. at 314.
[13] *Bornstein*, 423 U.S. at 314-315. Although the Federal False Claims Act is the qui tam statute at issue in *Bornstein*, and it is not a direct parallel to the Medicaid-specific TMFPA, the reasoning in *Bornstein* applies whether evaluating the False Claims Act or the TMFPA.

provision…best comport[ing]…with the language and purpose of the Act."[14] Similarly, the holding in *Mooney* was that the former employee's back pay damages were to be doubled before, rather than after, subtracting any mitigation arising from former employee's actual wages during relevant time period. *Mooney*, 172 F. Supp. At 646.

25. Therefore, Dr. Rohi's back pay plus two times the amount of Dr. Rohi's back pay is $2,577,000 ($859,000 x 3 = $2,577,000). Under TMFPA §36.115, Dr. Rohi is also entitled to interest on the back pay. As shown on the prejudgment interest calculation spreadsheet, attached to Dr. Rohi's October 26, 2017 Amended Proofs of Claim, the interest thus far, as of October 26, 2017, is $421,145.34.

26. Subtracting the mitigating payments from two times the back pay results in $2,389,161.42 ($2,577,000-$187,838.58 = $2,389,161.42), plus $421,145.34 in interest equals $2,810,306.76 ($2,389,161.42 + $421,145.34 = $2,810,306.76). Therefore, as of October 26, 2017, Dr. Rohi is entitled to $2,810,306.76 for the retaliation he endured in violation of TMFPA §36.115(a)(2).

27. Applying these concepts described above to the settlement fund obtained from the Debtors and the non-debtors instructs the following formula:

$4,000,000.00	Settlement Proceeds
($312,962.00)	(State's individual claim for overpayment)
$3,687,038.00	
($14,483.95)	(Dr. Rohi's individual claim for breach of contract)
($2,810,306.76)	(Dr. Rohi's individual claim for retaliation)
$862,247.29	

[14] *Id.* at 317.

($603,573.10)	(State's 70% qui tam claim)
($258,674.19)	(Dr. Rohi's 70% qui tam claim)
$0.00	

Distribution summary:

$916,535.10	State's individual claim for overpayment and 70% qui tam claim ($312,962.00 + $603,573.10)
($412,440.80)	(45% contingent attorney's fees; 45% of $916,535.10)
($201,637.72)	(State's share of litigation expenses, 22% of $916,535.10; 22% because $916,535.10 is 22% of $4 million
$302,456.58	State's share of the $4 million settlement

Date: October 26, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on October 26, 2017, a true and correct copy of the foregoing document was served via the Court's BK/ECF on all parties who receive electronic notice.

/s/ Charles E. Long
Charles E. Long