EXHIBIT
6

IN THE UNITED STATES BANKRUPTCY COURT
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 Reply Brief on Equitable Distribution of Settlement Proceeds

1. Dr. Rohi filed the lawsuit against ABC Dentistry, P.A.; ABC Dentistry West Orem, P.L.L.C.; ABC Dentistry Old Spanish Trail, P.L.L.C; Iraj S. Jabbary, DDS; ABC Dentistry Pasadena, PA and ABC Dentistry Hillcroft, PLLC (collectively, ABC) and prosecuted it without the State's participation. The State declined to intervene at the outset of the case, TMFPA § 36.104(a)(2), and rejected *ABC's* request that it intervene in July 2015. Shortly thereafter, Dr. Rohi's and his counsel's pursuit of claims against ABC without the State's involvement seemed to have paid off: he and his counsel obtained a $5 million settlement at mediation on September 28, 2015.[1]

2. However, just as the State has done for the past year in this case, the State impeded the September 2015 settlement for months[2] and ultimately blocked it by announcing that it would pursue an "investigation" and possible alternate administrative remedy under the auspices of the Texas Health and Human Services Office of Inspector General.[3] Thus, the State

[1] *See* September 28, 2015 settlement agreement attached hereto as **Exhibit A**.

[2] Emails between Dr. Rohi's counsel, Dr. Jabbary's counsel and State lawyers (December 21, 2015 to February 28, 2016), attached hereto as **Exhibit B**.

[3] Emails between Dr. Rohi's counsel and counsel for the State (March 31, 2016), attached hereto as **Exhibit C**. *See* TMFPA § 36.109(a) entitled "Pursuit of Alternate Remedy by State" discussed in paragraph 4, below.

scuttled the $5 million deal, forcing Dr. Rohi and his counsel back to litigation where they obtained a partial summary judgment as to liability.[4] That partial summary judgment led to ABC's bankruptcy filings in which the Court almost immediately ordered Dr. Rohi and ABC to return to mediation. They did so without any involvement of the State, agreeing to a settlement entitled, "Term Sheet."[5]

3. The State refused to take a position regarding the parties' November 2016 settlement. Instead, it continued the same investigation that it used to derail Dr. Rohi's September 2015 $5 million settlement. The result of the State's 18 month long investigation was a June 16, 2017 "notice of overpayment" to non-debtor ABC Pasadena.[6] Counsel for the State orally disclosed this to the Court on September 7, 2017, advising that ABC had agreed to pay the $312,962 overpayment as part of the amended Term Sheet proceeds.[7]

4. The very settlement in which the State played no role in obtaining and in which it refused to acquiesce is the settlement from which it now seeks to grab 93% – but only after first

[4] The Order of the 281st Judicial District Court is attached to the State's May 2, 2017 amended proof of claim, Claim Number 6-2.

[5] The Term Sheet is dated November 16, 2016. *See* Docket Number 235. An Amended Term Sheet was signed by Dr. Rohi and Jabbary on July 25 and 26, 2017 and is attached as **Exhibit G**. By exchange of emails during August 2017, the State and ABC agreed to $4 million at a lower interest rate than is payable under the Amended Term Sheet.

[6] Attached hereto as **Exhibit D**, without its exhibits as the exhibits have been withheld by the State. ABC did not appeal that determination pursuant to section III of the letter (page 4) and under the terms of section IV of the letter, the determination therefore became final on July 16, 2017.

[7] 9/7/17 hearing transcript, page 26 line 22 to page 27 line 6, excerpts of which are attached hereto as **Exhibit E**. At the September 7 hearing, the State advised that settlement amount was "four million" (page 23 line 14) although the State arrived at that number largely by swapping interest for principal. Four million then became the basis for discussion (see, page 25, line 3-5).

deducting its $312,962 "overpayment."[8] Such a deduction is in direct contravention of the TMFPA, which expressly provides that Dr. Rohi is entitled to a full relator's share to these proceeds:

> "Sec. 36.109. PURSUIT OF ALTERNATE REMEDY BY STATE. (a) Notwithstanding Section 36.101 [the section which allowed Dr. Rohi to sue ABC], the state may elect to pursue the state's claim through any alternate remedy available to the state, including any administrative proceeding to determine an administrative penalty. If an alternate remedy is pursued in another proceeding, the person bringing the action has the same rights in the other proceeding as the person would have had if the action had continued under this subchapter.
>
> (b) A finding of fact or conclusion of law made in the other proceeding that has become final is conclusive on all parties to an action under this subchapter. For purposes of this subsection, a finding or conclusion is final if:
>
> (1) the finding or conclusion has been finally determined on appeal to the appropriate court;
>
> (2) no appeal has been filed with respect to the finding or conclusion and all time for filing an appeal has expired; or
>
> (3) the finding or conclusion is not subject to judicial review." (emphasis added)

Thus, under the plain language of this provision, Dr. Rohi's right to a relator's share of the "overpayment claim" vested when he filed suit in 2014, and the State's attempt to deprive him of a relator's share is simply wrong.

5. The State's justification of this overreach – that the overpayment claim "doesn't arise under this case"[9] – is both inequitable and unconscionable. It is also contrary to the State's

[8] *See* State's brief at p. 1 and ¶7.

[9] *See* **Exhibit E**, 9/7/17 transcript excerpts, page 27, lines 9-10

position in other TMFPA cases.[10] The Office of the Texas Attorney General has unequivocally and emphatically posited that, "a relator's rights under chapter 36 **vest** at the time a relator files her under-seal petition. **Any subsequent resolution of these same claims in a later action brought by the State against these defendants would be considered an alternate remedy under section 36.109 of the TMFPA**"[11] (emphasis added). Thus, according to the State in other cases (but not this one), although an administrative claim invariably follows its own separate trajectory, this is of no consequence under the plain language of the statute.[12]

6. The inequitable result that follows from the State's contrary position in this case is plain. For example, if the State had determined that ABC received an overpayment in the amount of $3.7 million, its position would mean that the entire $3.7 million is off the table and it is not "what the fight is"[13] about. In that example, Dr. Rohi would be limited to a total of $90,000 out of the entire Term Sheet amount of $4 million (30% of $300,000). If the State unilaterally determined the overpayment was $4 million or more, Dr. Rohi would get zero dollars

[10] *See* third paragraph of State's letter brief (beginning with "Second") dated November 3, 2017, filed in Cause No. 2016-85086, *State v. Porter Medical Center, PLLC, et al.*, 61st Judicial District Court of Harris County, Texas, attached as **Exhibit F**.

[11] *Id.*

[12] The State's administrative claim was based on a statistical sample of "errors" occurring from August 30, 2011 through March 3, 2016. This includes the period of time covered by Dr. Rohi's claims but more importantly, TMFPA § 36.109 does not provide for an "exception" based on whether the alternative remedy overlaps or does not overlap with the relator's claims. Nor does it matter if the State's claim "did not arise under Dr. Rohi's case" and was completely unrelated to Dr. Rohi's claim. In any event, the State has offered no evidence whatsoever that its claim is "unrelated." The State would simply mislead the Court that because it allegedly "doesn't arise under Dr. Rohi's case," Dr. Rohi is entitled to nothing. This is an absurd result and the State itself tacitly admitted as much in **Exhibit F**.

[13] 9/7/17 transcript, page 27, lines 14-15, **Exhibit E**.

from the settlement that he obtained because according to the State, the overpayment claim "doesn't arise under this case."

7. Likewise, given the State's attempts to exaggerate its share of the proceeds, it maintains that Dr. Rohi's counsel is entitled to no attorney fees and expenses. This results from the logical inconsistency of the State's argument; i.e., that Dr. Rohi's personal claims may be paid pro rata, but there is no room for his attorney fees. Even if the Court accepts the State's proposed methodology, Dr. Rohi's counsel's attorneys' fees and expenses should be accounted for. As explained in Paragraphs 14 to 18 of Dr. Rohi's initial brief, Dr. Rohi's counsel's attorneys' fees should be paid as a contingent fee on the entire recovery because Dr. Rohi and his counsel prosecuted this lawsuit without the State's participation.[14]

8. The State argues that a relator's attorneys' fees and expenses are not payable unless there is a finding of liability, implying that no attorneys' fees or expenses can be paid from the settlement proceeds. *See* ¶18 of State's brief. This defies common sense and is another position that is in direct contradiction to the plain language of TMFPA § 36.110(c): "The court's determination of expenses, fees, and costs to be awarded under this subsection shall be made only after the defendant has been found liable in the action **or the claim is settled**." (emphasis added).

9. To be logically consistent, Dr. Rohi has suggested to the Court that the State's individual claim for overpayment and Dr. Rohi's individual claims for breach of contract and retaliation should be paid first. *See* ¶27 of Dr. Rohi's brief. The State does not address the fact that its $312,962 claim is an individual claim, or to use the State's language, a "personal" claim.

[14] In the alternative and at a minimum, Dr. Rohi's counsel's reasonable attorneys' fees and expenses, based on hourly rates, should be paid pro rata by Dr. Rohi and the State.

It is not logical or fair to treat the State's individual claim one way and Dr. Rohi's individual claims another.

10. The State asserts that its individual claim is "secured." *See* ¶1 of the State's brief. Regardless of the merit or lack of merit of that position, it matters not whether the State's claim is secured or unsecured because its lien status is irrelevant to the division of the settlement proceeds. The "common fund" doctrine means that both parties bear the fees and expenses of recovering the settlement funds, regardless whether the party has individual claims or TMFPA unlawful act claims. *See Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980).

11. In short, the State's position is both unfair and illogical. The State demands the entirety of its own, individual claim – the claim that "doesn't arise under" Dr. Rohi's case – as well as 100% of its ***unliquidated*** claim – a claim which is based solely on Dr. Rohi's state court petition.[15] Meanwhile, the State argues that Dr. Rohi and his counsel are entitled to nothing – despite literally having taken all the risks of litigation and having done all the work to produce the common fund.

12. There is no authority to support the State's position that it has the unilateral right to ignore TMFPA § 36.109 – contrary to the position it took on November 3, 2017 in another TMFPA case (**Exhibit F**). In the absence of any legal basis for its position, the State makes the bald assertion that "the parties" have agreed that the administrative claim is not included in the "total settlement amount." State's brief at page 2, paragraph 1. The implication is that "the

[15] Claim Numbers 6-1 and 6-2. Assuming for argument's sake that consideration of the size and legal effect of the TMFPA unlawful act claim (§ 36.002) played a considerable part in Defendants' willingness to settle, this is irrelevant to the methodology by which the settlement proceeds should be divided.

arties" refers to *all* the parties even though there is no such agreement between the State and Dr. Rohi.

13. The State also offers the Court no legal basis for its contention "that the lion's share of what is being settled would properly be classified as the TMFPA Claims." State's brief at page 3, paragraph 6. Moreover, the State simply lumps together the thousands of false claims alleged against ABC, ignoring that there are substantially different allegations as to each of the debtor and non-debtor defendants. Most importantly, the State glosses over the fact that its own proof of claim is expressly "unliquidated" because there has never been a determination by any court as to either a number of false claims violations ("unlawful acts") or monetary damages ("loss" to Texas Medicaid). Dr. Rohi's state court petition, alleging violations of TMFPA § 36.002(8), serves as the sole basis for the State's sworn proof of claim.[16] The State lauds the "value" of these same TMFPA claims as being the impetus to ABC's settlement. Yet again, in other currently pending TMFPA litigation, the State refers to identical allegations as "legal theories [which] are untested", lacking in "legal certainty" and a "novel nature."[17]

14. Regardless, the reasons and motivations of the defendants to settle are simply not relevant to any issue before this Court. The sole issue is the proper and equitable distribution of the money that was generated by Dr. Rohi and his counsel by way of settlement with those defendants. The methodology for dividing the funds should not be driven by speculating about what was important to the defendants; rather, it should be driven by what upholds and promotes

[16] Claim Number 6-1.

[17] State's November 3, 2017 letter brief, Page 2, **Exhibit F**.

the purpose of the law governing both the TMFPA and the law governing Dr. Rohi's individual claims and by what is fair and logical.

15. In its greed to exaggerate its share of proceeds to a staggering 93%, the State seeks to deprive Dr. Rohi's lawyers 100% of their fees. The State callously refers to one of the two attorney fee provisions of the TMFPA and then makes the leap that the statute "contemplates" no fee may be paid out of settlement proceeds. It then argues that Dr. Rohi is "estopped" from arguing otherwise. State's brief at pages 3-4, paragraph 7. The attorney fee provision in question relates to attorney fees payable as part of an "Award to Private Plaintiff" under TMFPA § 36.110(c).[18] What the section actually provides is simply that the court determines fees "only after . . . the claim is settled."[19] Without any basis, the State claims that Dr. Rohi is seeking a "double award" of fees – both statutory and under the common fund doctrine, and that the government cannot be liable for the relator's "expenses." Bizarrely, the sole case cited by the State for this proposition is harmful to its position. *U.S. v. Gilbert Realty Co.*, 34 F. Supp. 2d 527, 530 (E.D. Mich. 1998). In any event, Dr. Rohi does not seek fees *from the government*. To the contrary, he seeks fees from the defendants and the settlement fund his counsel alone generated from defendants.

16. *Gilbert* involved similar government overreach as the Court has witnessed in this case. In similar fashion to the State's unilateral settlement with ABC of the State's administrative "overpayment claim" – without court approval and without notice to or consent of Dr. Rohi – the government unilaterally settled a False Claims Act case in which it had not

[18] The State ignores entirely the second provision by which Dr. Rohi also is entitled to fees; TMFPA § 36.115(a)(2) entitled, "Retaliation Against Person Prohibited."

[19] TMFPA § 36.110(c).

intervened. Again, as here, the government did so without the permission of the court, and without consent or even prior notice to the relator. *Id.* at 529. After analyzing the statutory prohibition on government liability for a relator's expenses, the court punished the government for its unilateral settlement under Federal Rule of Civil Procedure 11, awarding the entirety of the compromise amount to the relator for her 30% share and attorney fees. The court expressly stated that consequently, "the government is left with no award." *Id.* at note 2.

17. Finally, the State refers to one of the attorney fee provisions of the TMFPA, § 36.110(c), for the proposition that "additive to the amount of civil remedies and penalties recovered from the Defendant in § 36.052." State's brief at page 8, paragraph 18. But this language is not to be found in the TMFPA and is simply incorrect. In fact, the first sentence of the TMFPA attorney fees provision cited by the State expressly provides in the same subsection that, "A payment to a person under this section shall be made from the proceeds of the action." TMFPA § 36.110(c).[20] Thus, Dr. Rohi is expressly entitled to recover his "reasonable expenses, reasonable attorney's fees, and costs that the court finds to have been necessarily incurred" and to receive them "from the defendant" i.e., "from the proceeds of the action." *Id.* If the State's position held sway, the only logical outcome is that the settlement amount agreed to by the debtors would not be the $4 million as was agreed.

18. The State offered the unhelpful conclusion that "this statutory reimbursement can be thought of as a separate claim to the benefit of relator's counsel." State's brief at page 8, paragraph 18. But this runs afoul of the settlement between Dr. Rohi and ABC as embodied in the Amended Term Sheet: the settlement is an "aggregate amount of $3.5 million." Amended

[20] "In this section, 'proceeds of the action' includes a settlement of the action." § 36.110(d).

Term Sheet, attached hereto as **Exhibit G**, at paragraph 1. Taken to its logical conclusion, the State's approach would require the debtors to pay attorney fees *in addition to* the "aggregate amount."

19. In conclusion, the only way of characterizing the settlement proceeds obtained by Dr. Rohi and his counsel is that it is a common fund. The only equitable and logical methodology for dividing the proceeds of the common fund is as stated in Dr. Rohi's initial brief: (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); (b) deduct reasonable and necessary attorney fees and expenses on a contingency fee basis (expressed as a percentage of the entire settlement amount); and (c) from the net, allocate 70% to the State and 30% to Dr. Rohi.

Respectfully submitted,

/s/ Charles E. Long
Charles E. Long
State Bar No. 12514700

CAGE, HILL & NIEHAUS, L.L.P.
5851 San Felipe, Suite 950
Houston, Texas 77057
Telephone: (713) 789-0500
Facsimile: (713) 974-0344
clong@cagehill.com

BREWER & PRITCHARD, P.C.
J. Mark Brewer, 02965010
A. Blaire Hickman, 24074407
800 Bering Drive, Suite 201
Houston, Texas 77057
(713) 209-2950
Brewer@bplaw.com
Hickman@bplaw.com
Counsel for Saeed Rohi, DDS

CERTIFICATE OF SERVICE

I certify that on November 6, 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