



parties, including the State and Interveners—of the process Judge John K. Dietz would use to draft his findings of fact and conclusions of law, a process that had not changed from that utilized by all parties during the First Phase of this trial, a process that heretofore had not drawn formal objection.<sup>2</sup>

## **II. The State and the Interveners Have Waived the Objection of Perceived Bias**

The State and the Interveners have moved to recuse Judge John K. Dietz on the ground that his having “ex parte” communications with the school district plaintiffs in the preparation of his findings of fact created the perception of bias.<sup>3</sup> However, due to their failure to timely make this motion, Movants have waived their objection.

Waiver is “[the] intentional relinquishment of a known right or intentional conduct inconsistent with claiming it.” *Kendall Builders, Inc. v. Chesson*, 149 S.W.3d 796, 804 (Tex. App.—Austin 2004, pet. denied), quoting *In re Media Arts Group, Inc.*, 116 S.W.3d 900, 909 (Tex. App.—Houston [14th Dist.] 2003, no pet.). The general concept applicable here, that one who sits on rights waives them, has been applied to attempted judicial disqualification attempts in our federal courts, in Texas, and in the courts of other states.

Rules of judicial disqualification are intended to preserve public confidence in the fairness of the bench and prevent the appearance of impropriety, not to deliver parties with a

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<sup>2</sup> The ISD Plaintiffs described facts surrounding these issues in their ISD Plaintiffs’ Response to the State of Texas’s Motion to Recuse [Sealed] at pp. 4–18. The Charter School Plaintiffs do not take issue with that fact statement, and, indeed, totally agree that it accurately states the relevant facts.

<sup>3</sup> We use the term “ex parte” cautiously; Judge Dietz stated to all parties his intent to make all communications available to all parties in order that they would have opportunity to object to his findings/conclusions and to submit others for his consideration. Hence, while some of the emails offered with the State’s exhibits were not disclosed to the Charter School Plaintiffs when originally sent, it was the understanding of the Charter School Plaintiffs that full disclosure was eminent, not only for the Charter School Plaintiffs to receive them, but, likewise to all other parties, the Interveners and state defendants alike.

tactical stratagem to be used only after a judge has ruled against them. *Kemp v. City of Grand Forks*, 523 N.W.2d 406, 408 (N.D. 1994).

In *E. & J. Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1295 (9th Cir. 1992), the Ninth Circuit upheld the refusal of a United States District Court Judge to recuse himself. The losing party had moved for a new trial on the ground that this judge, Coyle, should have disqualified himself under the federal rules. Judge Coyle refused the motion on the ground that the disqualification request was untimely. The appellate court agreed with him.

The *Gallo Winery* court wrote, apropos to the situation here, that a party that has information that raises a possible ground for disqualification cannot wait until after an unfavorable judgment before bringing the information to the court's attention. A recusal motion must be made in a timely fashion, says the court, citing to *Molina v. Rison*, 886 F.2d 1124, 1131 (9th Cir.1989), and *United States v. Conforte*, 624 F.2d 869, 880 (9th Cir. 1980). The court recognized, as should this Court, that "[t]he absence of such a requirement would result in ... a heightened risk that litigants would use recusal motions for strategic purposes." *Preston v. United States*, 923 F.2d 731, 733 (9th Cir. 1991)." "While there is no *per se* rule that recusal motions must be made at a fixed point in order to be timely," the court continued, paraphrasing and quoting "*Preston* (section 455 motion timely even though made 18 months after assignment to district court judge and shortly after an adverse discovery ruling), such motions 'should be filed with reasonable promptness after the ground for such a motion is ascertained.'" *Id.* at 733; 967 F.2d 1280 at 1295.

The Supreme Court of Vermont agrees with the premise that one cannot postpone their motion to recuse on the issue of perceived bias until such time as they foresee an adverse ruling. It held that a motion to disqualify a judge should not be entertained where the litigant knew of

the grounds for disqualification but waited until after receiving an adverse decision before filing the motion. *In re Miller*, 168 Vt. 585, 586, 718 A.2d 422, 423 (1998) (“The overwhelming weight of authority concludes that a motion to disqualify a judge should not be entertained where the litigant knew of the grounds for disqualification but waits until after receiving an adverse decision before filing the motion”).

Texas appellate courts have written abundantly on equivalent situations in the area of arbitration, where claims of perceived judicial bias are waived unless timely brought. For example, in *Kendall Builders, Inc.*, the court pointed out that a party may not use an alleged bias as a trial strategy so that one cannot sit on an objection in order to test the winds. As such, a party that proceeds to participate in an arbitration proceeding, while knowing of an objection to the arbitrator’s impartiality and failure to disclose information to one or more parties, waives that objection. *Mariner Fin. Group, Inc. v. H.G. Bossley*, 79 S.W.3d 30, 36 (Tex. 2002) (Owen, J., concurring). The court’s reliance on the following language best summarizes why this rule applying to a judge as an arbitrator, applies with equal force to this set of facts:

A party who does not object to the selection of the arbitrator or to any alleged bias on the part of the arbitrator at the time of the hearing waives the right to complain. A party may not sit idly by during an arbitration procedure and then collaterally attack that procedure on grounds not raised before the arbitrator when the result turns out to be adverse.

149 S.W.3d at 806, quoting *H.G. Bossley v. Mariner Fin. Group, Inc.*, 11 S.W.3d 349, 351–52 (Tex. App.–Houston [1st Dist.] 2000), *aff’d*, 79 S.W.3d 30, 32 (Tex. 2002) (internal citations omitted).

### **III. Conclusion and Prayer**

Attorneys for the Charter School Plaintiffs were not copied on the emails submitted by the state as exhibits 14-41 and while perhaps having preferred a different approach, did not file

formal objection. Neither did the State nor the Interveners. Thus, all parties, during the first phase of this trial and at the start of the second phase of this trial, were aware of the procedure Judge Dietz would be using to issue his findings of fact and conclusions of law, as described in the briefing of the ISD Plaintiffs. No party, including the Charter School Plaintiffs, filed formal objections, providing Judge Dietz with an opportunity of ameliorating any alleged fault in his methods. Moreover, in accordance with the dictates of the Rules of Procedure (Tex. R. Civ. P. 298, 299, 299a and 307), all parties will have equal opportunity to respond to the judge's findings and conclusions once issued and may at the time or prior, submit others for his consideration. As such, there is neither prejudice nor bias demonstrated by the State or the Interveners.

Further delay is untenable to the interests of all school children in this state, in general, and, in particular, to the students now enrolled in charter schools. This important case began in October of 2012 and has yet to be concluded. Time is of the essence. Thus, the Charter School Plaintiffs favor a resolution that would permit a final decision without the necessity to retry the evidence.

For the foregoing reasons, the Charter School Plaintiffs respectfully request that the Court deny the State of Texas' Motion to Recuse, and that it grant all further and other relief to which they are entitled.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

The undersigned certifies that on June 16, 2014, a true and correct copy of Charter School Plaintiffs' Response to the State of Texas' Motion to Recuse was served upon the following counsel of record *via* e-mail pursuant to the agreement of the parties and in compliance with the Texas Rules of Civil Procedure and the Texas Local Rules:

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