6/18/2014 6:35:20 PM
Amalia Rodriguez-Mendoza
District Clerk
Travis County
D-1-GN-11-003130

CAUSE NO. D-1-GN-11-003130

THE TEXAS TAXPAYER & STUDENT FAIRNESS COALITION, et al; CALHOUN COUNTY ISD, et al; EDGEWOOD ISD, et al; FORT BEND ISD, et al; TEXAS CHARTER SCHOOL ASSOCIATION, et al., Plaintiffs	§	IN THE DISTRICT COURT
JOYCE COLEMAN, et al., Intervenors	§	
vs.	§	200th JUDICIAL DISTRICT
MICHAEL WILLIAMS, COMMISSIONER OF EDUCATION, IN HIS OFFICIAL CAPACITY; SUSAN COMBS, TEXAS COMPTROLLER OF PUBLIC ACCOUNTS, IN HER OFFICIAL CAPACITY; TEXAS STATE BOARD OF EDUCATION, the TEXAS EDUCATION AGENCY, and the STATE OF TEXAS, Defendants.	§	TRAVIS COUNTY, TEXAS

Unofficial copy Travis Co. District Clerk Velva L. Price

STATE'S REPLY IN SUPPORT OF MOTION TO RECUSE

Because there can be no dispute that the Plaintiffs' extensive *ex parte* communications with Judge Dietz regarding the merits of this case require his recusal, Plaintiffs spend most of their Response invoking various alleged procedural defects in opposition to the Motion. For the reasons explained herein, none of the alleged defects is well founded. Rather, because the State's motion was filed as a soon as practicable after learning of the *ex parte* contacts that form the

basis for the recusal motion, and because the *ex parte* contacts at issue demonstrate an undeniable appearance of partiality, the State's Motion must be granted.

I. The State's Motion to Recuse is Timely Under Texas Rule of Civil Procedure 18a.

The Plaintiffs' assert the State's Motion is untimely under Rule 18a. Plfs' Response at 21-24. In so arguing, Plaintiffs attempt to couch the relevant triggering event for the State's Motion as the Judge's conduct at a proceeding held on August 13, 2013. *See* Response at 22. However, it is clear that the State's Motion was triggered by the May 15, 2014 disclosure of more than 30 *ex parte* email communications (and the content of those communications) and *ex parte* phone calls (the contents of which can never be known) between the Plaintiffs' counsel and the Judge, which were disclosed only *after* the State had undertaken repeated, ameliorative actions, beginning in August 2013, in an ultimately futile effort to ensure that such improper *ex parte* communications would not occur. *See* Ex. 42; State's Motion at 15-18.

A. Since August 2013, the trial court has assured the State that disputed matters in this case would be disclosed on the record; the State did not learn that this was incorrect until May 2014.

The record reflects the State's growing concern over the Judge's "off the record" discussions regarding the merits of the case. The State sought to balance this concern with its respect for Judge Dietz, the gravity of the matter before him, and the fact that any motion seeking to recuse Judge Dietz was required to be accompanied by specific evidence calling his impartiality into question—and not simply his flouting of judicial rules. Thus, rather than seeking to recuse Judge Dietz upon learning that the Judge wished to hold an off-the-record, closed-to-the-public "work session" in August 2013—as Plaintiffs now suggest the State should have done or risk waiver of their right to ever seek recusal—the State acted judiciously by filing a Request for Reporter. In so moving, the State requested that—in conformance with Texas

Unofficial copy Travis CO. District Clerk Velva L. Price

rules of court—all proceedings and communications "among the Court and the parties to this action be made on the record." *See* Ex. 42. Judge Dietz, acknowledging the State's concerns, responded to the request by assuring the State that *all* matters would be placed on the record but that certain proceedings, communications, and memoranda would be "sealed" and placed in a non-public, sealed file, that was not in the Official Court File Record but would be ultimately available for appellate review. *See* Ex. 4 at 5-6.

The Judge assured all parties during the August 2013 hearing that the Plaintiffs assert was the triggering event—that *ex parte* communications would not occur, stating [redacted] " and " [redacted] " (State Exhibit 3, 56-57) (emphasis added). While the State found the Judge's unilateral "sealing" of what should be publicly available records included in the Official Court File Record objectionable, in August 2013 (and up until the State learned of undisclosed *ex parte* communications in May 2014), the State did not believe it had legal grounds upon which to assert that this "sealing" process, in and of itself, provided sufficient, specific evidence of partiality upon which to base a recusal motion.

While the State did not believe that the questionable events that took place long before the May 2014 disclosure of the secret, *ex parte* communications were sufficient to demonstrate a lack of impartiality when they occurred, they do provide the necessary context for determining whether the March-May 2014 *ex parte* conversations demonstrate Judge Dietz's lack of impartiality in this case. Plaintiffs' attempts to characterize these earlier events as the relevant

Unofficial copy Travis Co. District Clerk Velva L. Price

triggering event for the State's recusal motion is nothing more than a transparent attempt to distract this Court from the irreparable appearance of partiality that was first made clear by the disclosure of the March–May 2014 emails. Impartiality is not always demonstrated by a singular action at a definitive moment in time. Rather, impartiality is more likely to be evident over a course of actions. Such is the case here.

B. The State's discovery of the nature, volume, and content of the ex parte communications in May 2014 was a proper trigger for its recusal motion.

There can be no dispute that the State first became aware of the merits-based nature of the *back-and-forth ex parte conversations* between the Plaintiffs' counsel and the Judge on May 15, 2014. Nevertheless, Plaintiffs argue that the State should have somehow known that *ex parte* conversations of the specific nature and extent now revealed were occurring between the Judge and Plaintiffs and, as a result, the State has now waived the right to ever complain of the communications. There is no legal basis to support such an assertion, and this Court's acceptance of Plaintiffs' waiver argument would have perverse consequences.

For example, Rule 18b makes clear that a party can waive a ground for recusal only *after* the specific facts supporting a basis for recusal are "fully disclosed" to it. TEX. R. CIV. P. 18b; *see also Ex parte Ellis*, 275 S.W.3d 109, 136 (Tex. App.—Austin 2008, no pet.) (finding that it is not the parties' burden to investigate possible grounds for recusal; rather, the court "should disclose on the record information…the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification"). Further, the recusal rule on its face authorizes a motion for recusal only when the moving party is fully aware of the specific facts that support recusal. Specifically, Rule 18a requires the motion to "state with detail and particularity facts that . . . if proven, would be sufficient to justify

Unofficial copy Travis Co. District Clerk Velva L. Price

recusal or disqualification." TEX. R. CIV. P. 18a(a)(4)(C). Furthermore, it provides that a motion must be filed only *after* the movant knows of the grounds for the motion. *Id.* 18a(b)(1)(A).

Plaintiffs' admission, *see* Response at 31, that they simply "were under the impression" Judge Dietz was sharing their *ex parte* communications with the State (when he was not) demonstrates that the salient facts that form the central basis for the State's recusal motion were never "fully disclosed" until May 2014.[1] As such, there is no basis upon which to find that the State waived its right to seek recusal on the grounds asserted in its motion. Indeed, Plaintiffs admit in their Response that there are *ex parte* communications that pre-date March 19, 2014, that *still* remain undisclosed to the State, and that some of those communications concern "substantive" matters. Response at 33; Plaintiffs June 17, 2014 Letter to the Court. Further, the emails that have been disclosed reveal that numerous *ex parte* phone conversations (the content of which can *never* be truly known) occurred between the court and Plaintiffs' counsel while this case was ongoing.[2] Thus, even now the full extent and nature of the *ex parte* communications that Plaintiffs claim the State has waived the right to challenge have yet to be "fully disclosed"

Unofficial copy Travis Co. District Clerk Velva L. Price

[1] Notably, Plaintiffs fail in their Response to squarely address their own ethical duty not to engage in these communications in the first instance. *See* Tex. Disciplinary Rules Prof'l Conduct R. 3.05, reprinted in Tex. Gov't Code, tit. 2, subtit. G, app. A. *See* Plfs' Response at 16. Apparently, after two months and 30 emails and numerous phone calls, neither the Plaintiffs' counsel nor the Judge thought to question whether counsel for the State (and all other parties to the suit) should be included in the flurry of emails between Ms. McIntosh and Judge Dietz.

[2] Plaintiffs blithely claim that the State "could have asked" them about what was said in these phone conversations instead of filing the recusal motion. Response at 33 n. 17 . But, regardless of whatever self-serving statements the Plaintiffs wish to make about the at-issue phone conversations, the relevant and undisputable fact is that, because those conversations were off the record and outside the presence of all of the parties, it can never be truly known what was said. This is the crux of why *ex parte* communications are to be avoided and are precluded by the rules. *See In re Wisconsin Steel Co.*, 48 B.R. 753, 760 (D.C. Ill. 1985) ("protestations of the participants that the communication was entirely innocent may be true, but they have no way of showing it except by their own self-serving declarations").

Accordingly, Plaintiffs cannot be heard to complain that the State somehow waived its right to complain about these communications.

Plaintiffs further urge that the State waived its right to seek recusal because it should have somehow divined that Plaintiffs were engaging in merits-based *ex parte* communications with the Judge despite the Judge's assertions to the contrary. Finding waiver on these facts would serve only to encourage obfuscation of the type engaged in by Plaintiffs in deliberately excluding the State (and other parties) from their substantive, merits-oriented conversations with the Judge. Indeed, statements made by Plaintiffs' counsel as recently as the May 2014 work session leave no doubt that the Court and Plaintiffs' counsel have been engaging in communications that, in the Judges' words, were deliberately "filter[ed]" from the other parties. For example, in discussing what Plaintiffs could do to prepare for the June 2, 2014, "visitation," this exchange occurred between the Judge and Plaintiffs' counsel:

State's Ex. 13 at 40 (emphasis added). This cryptic exchange suggests that as recently as May 2014 the Plaintiffs and the Judge were continuing to actively conceal from the State (and the other parties) exchanges that have occurred between them regarding the substance of this

Unofficial copy Travis Co. District Clerk Velva L. Price

lawsuit.[3] Given that ongoing effort, Plaintiffs cannot now assert "consent" and "waiver" in their Response.

Further, Plaintiffs cannot claim waiver on the basis that the State was generally made aware in March 2014 that some prior communications between the Plaintiffs and the Judge had occurred. *See* Response at 23-24. Absent evidence to the contrary, it was reasonable and proper for the State to assume out of deference to and respect for Judge Dietz that—consistent with the Rules of Disciplinary Procedure and Judicial Code of Conduct—any oblique references made during or before the March 2014 work session to prior communications between Plaintiffs and the Judge (which Plaintiffs claim are grounds for waiver) involved communications that did not discuss the merits of the case or simply related to the court's administrative functions.[4] Indeed, Plaintiffs' view that Defendants should have somehow assumed the Judge was communicating exclusively with Plaintiffs' counsel about the merits of this case is revealed through the tenor of their Response. For example, Plaintiffs argue that because the Judge "indicated his intention to confer with *the parties' counsel* regarding the findings of fact and conclusions of law," the State should have realized this meant Judge Dietz would be communicating exclusively with Plaintiffs' counsel and not all "parties" on the merits of the case. *See* Response at 24. A review of the actual transcript, however, shows that Judge Dietz actually told the parties that he

[3] It is unclear to what "memos" the Plaintiffs refer in this exchange. A review of State's Ex. 26, reveals comments between the Judge and Plaintiffs' counsel referring to "[redacted]" *See* Ex. 26 at 35 (margin note to FOF 26). Also, "Comment [HGM17]: JKD: See separate page "[redacted]." *See* Ex. 29 at 35 (margin note to FOF 10). These documents do not appear to be contained among the documents provided to the State.

[4] At the March 2014 hearing, the Judge referred to "three of four emails between me" and an attorney for one of the ISD Plaintiffs that predated the March 19, 2014 conference. *See* State's Ex. 9A at 27. But this statement does not indicate the substance of these emails; until these emails are disclosed to the other parties (and they have not been disclosed to date), there is no way to know whether they involve simple administrative matters or more substantive, merits-based discussions similar to the messages that have been disclosed to date.

Unofficial copy Travis Co. District Clerk Velva L. Price

"anticipate[d] talking with *the attorneys* sometime after March the 17th about findings of fact and conclusions of law and maybe the judgment." State's Ex. 7 at 129 (emphasis added). Judge Dietz did not inform the State (or any of the other parties present) that what he *really* meant by his reference to "talking with the attorneys" was "talking with the [Plaintiffs'] attorneys."

Indeed, Plaintiffs' representation to this Court that the foregoing statement should have conveyed to the State Judge Dietz's intention to engage in a secret discussion with only Plaintiffs' counsel, *see* Response at 24, can only be further evidence that the Judge and Plaintiffs have apparently developed some type of code that is known to them, but is indecipherable to the other parties to this suit (and the public) who have simply taken the Judge at his word that *ex parte* would violate the Judicial Cannons. *See* State Exhibit 3 at 56-57.

Moreover, any argument that the State should have somehow realized that the Judge intended to engage in ongoing, secret conversations with Plaintiffs is undermined by the fact the Judge unequivocally stated on the record on March 19, 2014, that "[redacted]" State's Ex. 9A at 27-28, *see also* State Exhibit 3 at 56-57. To penalize the State and the other parties to this suit for failing to "read between the lines" of the Judge's own on-the-record statements would serve only to undermine the very reasons the *ex parte* communication rules were created in the first place.

In sum, because Rule 18a requires a party to wait to file a motion to recuse until after the "movant knows of the ground stated in the motion," the State's motion, filed within days of first learning of the March-May 2014 *ex parte* emails and phone conversations, was timely.

Unofficial copy Travis Co. District Clerk Velva L. Price

C. Plaintiffs' other claims of procedural defects under Rule 18a are without merit.

In addition to claiming that the State's Motion is generally untimely, the Plaintiffs argue that the Motion should be denied because it lacks a proper verification and was filed in violation of Rule 18a's 10-day rule. Neither of these arguments compels denial of the State's motion.

1. Any defects related to the verification have been cured.

To the extent Plaintiffs complain that the Motion is defective because it was not verified when first filed, the State cured any defect by supplementing with a signed verification shortly after filing. *See, e.g., In re Laughlin*, 265 S.W.2d 805, 807 (Tex. 1954) ("In the absence of a showing of prejudice, our rules governing procedure in civil actions are extremely liberal in allowing amendment to cure defects, faults or omissions in a pleading, either of form or substance…amendment should be allowed to supply a necessary verification of a pleading); *cf. Dawson-Austin v. Austin*, 968 S.W.2d 319, 322 (Tex. 1998) (unverified special appearance could be cured by filing of a verification at any time before there is a general appearance). To resolve any doubt, the State is refiling its Motion to Recuse, with an amended verification attached; Rule 18a permits such amendments to cure. *See* TEX. R. CIV. P. 18a(g)(3)(A). Further, Rule 18a permits the verification to be made "on information and belief if the basis for that belief is specifically stated." *Id.* 18a(a)(4)(A). That is the nature of the verification submitted in support of the State's Motion. As such, any assertion made that the Motion fails to conform to Rule 18a is unfounded.

2. The June 2 "visitation" was not a "hearing" within the meaning of Rule 18a.

Plaintiffs also argue that the State's Motion is untimely under Rule 18a(b)(1)(B) because it was filed within ten days of a purported "hearing" scheduled on June 2, 2014. Response at 23. Tellingly, however, there is no docket entry or Notice of Hearing for any "hearing" set on June 2,

Unofficial copy Travis Co. District Clerk Velva L. Price

2014, and Plaintiffs cannot produce any evidence a "hearing" was set. This is because the matter scheduled for June 2 was a so-called "visitation"—a procedure unknown under court rules—that was requested by the Judge. *See* Ex. 13 at 39. In advance of this "visitation," the Judge requested that one attorney for each party attend and stated that he did not need all counsel present. *See* State's Ex. 13 at 39.

As explained herein, the State received the at-issue ex parte communications from Plaintiffs' counsel on May 15, 2014; it reviewed the ex parte communications and brought this Motion as soon as reasonably practicable thereafter. Plaintiffs can cite no authority that the informal "visitation" on June 2—which was at best an *ad hoc* proceeding not contemplated by the Rules of Civil Procedure—was a formal "hearing" that served to preclude the filing of the State's filing of the Motion under Rule 18a. Rather, the law makes clear that Rule 18a's 10-day rule is intended to "avoid the disruption caused by the filing of a recusal motion on the eve of trial," a circumstance not present here. *Martin v. State*, 876 S.W.2d 396, 397 (Tex. App.—Fort Worth 1994, no pet.). Further, "Rule 18a does not contemplate the situation"—such as the instant matter—"in which a party cannot know the basis of recusal until after a motion for recusal is no longer timely" under the Rule.

Given the foregoing, the 10-day rule does not serve as a procedural bar to the State's Motion.

II. The State's agreement to a confidential *submission* over two years ago did not constitute "consent" or "acquiescence" to the merits-based ex parte *conversations* between the Plaintiffs' counsel and the Judge.

As an alternative basis for arguing the State has waived its right to challenge the Plaintiffs' improper ex parte communications with the Judge, Plaintiffs argue that the State consented or acquiesced to the ex parte communications that are now at issue. Response at 25.

Unofficial copy Travis Co. District Clerk Velva L. Price

However, a review of the record demonstrates that the nature of the ex parte *conversations* that occurred between Plaintiffs and the Judge in March through May 2014 are of a fundamentally different nature—one that is critical to the recusal inquiry—from the few, discrete ex parte *submissions* to the Judge that the parties agreed to over two years ago.

For example, in support of their "consent" argument, Plaintiffs cite: (1) an out-of-date scheduling order; (2) statements in the recusal motion demonstrating the State's concerns over the closed procedure being applied to the judgment's negotiation (that ignore the State's Request for a Record requesting that "all communications and proceedings and communications among the Court and the parties to this action be made on the record"); and (3) emails between the State's counsel, some Plaintiffs' counsel, and the Judge to suggest the State waived its objection to the volume and content of ex parte communications of which it was unaware. *See* Ex. 42; Plaintiffs' Ex. 32 These arguments overlook Rule 18b(e)'s plain language and argue that the State acquiesced to the merits based ex parte communications, even though they had not been disclosed on the record, and thus waived any objection to them. TEX. R. CIV. P. 18b(e)("The parties to a proceeding may waive any ground for recusal after it is *fully* disclosed *on the record*")(emphasis added).

Plaintiffs rely on language in an out-of-date Scheduling Order which provides, "Each party *shall file with the Court*, without service on the other parties, draft findings of fact and conclusions of law." (Plaintiffs Exhibit 1, 2, 3, 5) (emphasis added). Not only does their argument ignore Rule 18, but it misconstrues the language in the Scheduling Order and requires this Court to assume facts that are unsupported by the record. The scheduling order allows the parties to file ex parte with the Judge by delivering findings of fact to t*he Court,* on a *particular day*, *before* trial without service to any other party. It does not, however, provide for or even

Unofficial copy Travis Co. District Clerk Velva L. Price

contemplate communications that flow the other direction—from the Judge to the Plaintiffs' attorneys. Nor does it provide that the Judge can comment on or edit the Plaintiffs' findings of fact and then return the edited version to only the Plaintiffs' counsel as feedback. And it certainly does not contemplate a collaborative drafting process between the Judge and the Plaintiffs. In short, the Scheduling Order mandates a single ex parte *submission* on a single date between the Judge and counsel for each party, and does not contemplate ongoing ex parte telephonic and email conversations about the judgment, merits of the case, witness credibility, findings and conclusions (or any other matter) between one party and the Judge at any time.[5] It is unreasonable for the Plaintiffs' attorneys to suggest otherwise.

At most, all that the foregoing shows is that the State participated in a procedure under which the parties would *submit* proposed findings of fact and conclusions of law prior to judgment on an *ex parte* basis so that each party's respective trial strategy was not disclosed prior to the 2013 trial. This limited agreement, however, is worlds apart from what the State first learned in May 2014 has actually occurred—that is, a collaborative back-and-forth *conversation* between Plaintiffs' counsel and the Judge regarding the merits of this litigation while the evidence is still open. These conversations far exceed the scope of any earlier order, as they appear to include discussions regarding Plaintiffs' advocacy strategies, discussion of evidence that could be adduced to support Plaintiffs' case, and discussion of witness credibility. These conversations are the communications that are the subject of the State's Motion. The State *never*

Unofficial copy Travis Co. District Clerk Velva L. Price

[5] The Code of Judicial Conduct creates no blanket exception from the general *ex parte* rule, although it allows for such communications in an effort to mediate or settle matters, but only after "notice to all parties." Importantly, after such communications related to settlement occur, the court is prohibited from hearing any contested matters between the parties without their consent. Canon 3(B)(8)(b). One would expect that if the State actually consented to ongoing ex parte telephone conversations and emails---likely against the State's own interest and possibly in violation of various Judicial Cannons—that consent would be clear in the record. No such consent is in the record, and the State's actions show it was never granted.

consented to such conversations. Nor does the Court's order contemplate such collaborative communication between the Judge and the plaintiffs. Therefore, the State's objection to them has never been waived.

The Plaintiffs argue that the State somehow consented to the *ex parte* conversations complained of in the Motion to Recuse because the State assisted in preparing certain findings of fact and conclusions of law after Judge Dietz requested that all parties work to coordinate them into a single *submission* after his February 4, 2013, ruling from the bench. Plfs Response at 24. Notably, the parties followed this procedure *before* the Judge re-opened the record. At that time, the parties were relying on the Judge's February 4, 2013, oral ruling and the evidentiary record was closed. The State *never* agreed that this procedure would or should apply once the judge re-opened the record, effectively withdrawing his prior ruling and allowing the parties to place new facts about changed circumstances before him.[6]

Further, to the extent the State agreed in the first phase of the trial in 2013 to limited ex parte *submissions* (filings without service) of proposed orders, these type of *ex parte* submissions have been found to be (while not optimal) a permitted procedure. *See infra* at Part III, B at 26-27. Here, the scheduling order governing the 2013 trial made clear that the *only* ex parte contact agreed to was limited to such one-way *submissions* (or filings without service) of proposed findings to the court. As explained below, however, the undeniable appearance of partiality is

[6] In a bench trial, the presiding judge exercises the functions of a jury and is charged with assessing the "credibility of the witnesses, logically evaluating the evidence, rationally resolving factual disputes on the basis of such evidence, and correctly applying the law to the facts." *Vickery v. Comm'n for Lawyer Discipline*, 5 S.W.3d 241, 251 (Tex. App.—Houston [14th Dist.] 1999 pet. denied) (citing *Mortensen v. Mortensen*, 186 S.W.2d 297, 299 (Tex. Civ. App.—San Antonio 1945, no writ); *Meyers v. Baylor University*, 6 S.W.2d 393, 395 (Tex. Civ. App.—Dallas 1928, writ ref'd)); *Torres v. State*, No. 01-94-01250-CR, 1996 WL 227513 (Tex. App.—Houston [1st Dist.] May 2, 1999, pet. ref'd) (in a bench trial the judge is the ultimate trier of fact). The judge, like a juror, must therefore be impartial and preserve his impartiality throughout a case.

Unofficial copy Travis Co. District Clerk Velva L. Price

raised once such submissions turn into a two-way collaborative conversation between the court and counsel for one party, as ultimately occurred here between Plaintiffs and the Judge. *See infra* at Part III, A at 19-23. Plaintiffs, therefore, cannot conflate the prior agreed order regarding filings to the court without service submissions of draft findings and conclusions during 2013 trial with a blanket "consent" permitting their extensive, collaborative *ex parte* conversations with the Judge regarding the merits of this case. *See id.*

Plaintiffs also assert that the "parties have long known that following the submission of proposed findings, Judge Dietz had reserved the right to communicate with the parties about the submissions sent to him." But the record does not support a finding that the State had any reason to believe that the Judge was engaging in *ex parte*, merits-based collaboration with the Plaintiffs. For example, while it is true that, at the March 2014 hearing, the Judge referred to "[redacted]" that predated the March 19, 2014 conference, *see* State's Ex. 9A at 27, the Judge did not indicate that the substance of these emails involved the merits of the litigation.[7] And, as noted above, there was no reason for the State to believe that these emails involved improper discussions because, consistent with the Rules of Disciplinary Procedure and Code of Judicial Conduct, it was presumed that they involved permissible administrative matters. Accordingly, until the true substance of the *ex parte* communications and the still undisclosed emails are disclosed to the State, the State cannot be

[7] Indeed, although it would have been proper for either the Court or the Plaintiffs to elaborate upon the substance of the emails exchanged between them so that all parties could be aware of the nature of the communications, it is significant that—even now—neither the Court or the Plaintiffs have attempted to describe with specificity the content of those exchanges. *See Ex parte Ellis*, 275 S.W.3d at 136 (it is court's burden to "disclose *on the record* information…the parties or their lawyers might consider relevant to the question of disqualification") (emphasis added). This leaves the State (and the other parties in this suit) in the position of "fighting blind" and, again, raises the specter of partiality because one is left to wonder why neither the Court nor the Plaintiffs have felt it necessary to disclose the specific nature of those communications.

Unofficial copy Travis Co. District Clerk Velva L. Price

said to have "consented" to those communications in any respect. *See* Plfs June 17 Letter to the Court.

In short, Plaintiffs' claim that the State (and other parties to this suit) somehow consented or acquiesced to communications that—even now—have not been fully described or disclosed to them is without merit.

III. The Nature, Volume, and Content of the Recently Disclosed *Ex Parte* Communications Between the Judge and Plaintiffs' Counsel Require Recusal Because They Call Into Question the Judge's Impartiality.

The ISD Plaintiffs do not dispute that the Judge and only certain Plaintiffs' counsel engaged in 30 or more *ex parte* emails between March 19, 2014, and May 14, 2014. Nor do they dispute that some (still undisclosed) *ex parte* conversations occurred before that time. These collaborative, *ex parte* communications compel recusal of Judge Dietz in the instant matter.

A. The communications demonstrate that collaboration between Plaintiffs and the Judge influenced the decision-making process.

Regardless of how Plaintiffs seek to retroactively characterize their *ex parte* discussions with the Judge in their Response, the best evidence of what occurred between Plaintiffs' counsel and the Judge are the communications themselves. These emails, to which are attached working drafts of findings of fact that include back-and-forth comments between the Judge and Plaintiffs regarding substantive edits and requests for additional evidentiary support, concern far more than a non-substantive request to draft findings to conform to an already-rendered decision. *See* State's Exs. 14-41. Rather, the emails show the Judge and Plaintiffs were engaging in extensive *ex parte* conversations about the very merits of the case, speculating about facts that were not in evidence (such as opinions including [redacted]), and discussing how the Plaintiffs' preferred the Judge to rule on certain matters. *See e.g.*, State's Ex. 26. Such discussions are particularly troubling given that the emails (and attachments thereto of draft

Unofficial copy Travis Co. District Clerk Velva L. Price

findings) demonstrate—contrary to the ISD Plaintiffs' assertions here—that Judge Dietz had yet to make firm, final decisions key issues in the case. *See* State's Exs. 13, 26.

For example, comments from Judge Dietz—indicated by "JD" and a number preceding the comment—to Plaintiffs' counsel (and their responses back) included statements such as:

Similarly, the same document contains the following statements:

Unofficial copy Travis Co. District Clerk Velva L. Price

At the May 14, 2014 hearing, the following dialogue took place between the Judge and Plaintiff's counsel:

. . .

. . .

. . .

Unofficial copy Travis Co. District Clerk Velva L. Price

State's Ex. 13 at 6-18.

Other comments from Judge Dietz to Plaintiffs demonstrate that—rather than working independently to render his decision in this matter—Judge Dietz was working collaboratively (and exclusively) with Plaintiffs to reach his decision. For example, at one point he comments to Plaintiffs on one proposed finding of fact: " " Plfs Response at Ex 29, attachment at 85 (emphasis added). These are the type of comments you might expect a judge to give to a law clerk assisting in drafting an opinion of the court, not to one of the parties in an active case in which the evidence has not closed.

Despite Plaintiffs' protests to the contrary, these emails cannot be deemed a mere discussion on non-substantive, administrative matters, particularly when the Judge's comments were made to only one set of counsel in an actively pending matter before the Judge. Not only do they involve the merits, but they included discussion of data that was not in the record. Indeed, the extensive, substantive ex parte collaboration that has occurred between the Judge and Plaintiffs in developing the Judge's findings and conclusions is precisely the type of *ex parte* communication that has been deemed to create an appearance of partiality, requiring recusal of the trial court judge.

B. The Judge's ex parte *conversations* with the Plaintiffs created an undeniable appearance of partiality.

In their Response, Plaintiffs seek to minimize their *ex parte* dialogue with the Judge by analogizing this matter to cases in which courts have not ordered recusal based on requests for *submission* of findings of fact. *See* Response at 29 (citing *In re Texas Extrusion Corp.*, 844 F.2d

Unofficial copy Travis Co. District Clerk Velva L. Price

1142, 1164 (5th Cir. 1988)). However, the cases relied upon by the Plaintiffs are distinguishable from the facts presented here.

In *Texas Extrusion*, for example, the court permitted the *ex parte* submission of findings to the court because, prior to the court requesting the submission, the court had made a *definitive* verbal ruling in the case such that the case was deemed to be "no longer pending for purposes of the[] provisions prohibiting *ex parte* contacts between counsel for a party and a judge in whose court that party's case is pending." 844 F.2d at 1164. In stark contrast, the instant matter remains actively "pending" because the Judge is *still* making rulings on evidence[8] and has yet to issue a definitive ruling in this matter following the reopening of evidence.

While Plaintiffs make much of the fact the Judge issued a verbal ruling in this matter following the initial 2013 bench trial, the fact that the Judge never issued a judgment but instead reopened the evidence shows that, until the Judge issues new (or renewed), definitive rulings based on the newly developed, full record, this matter remains actively "pending" before the Judge. *See, e.g, McCarthy v. George*, 623 S.W.2d 772 (Tex. App.—Fort Worth 1981, writ ref'd n.r.e.) (reopening of evidence under Rule 270 after verdict, but before entry of signed judgment, allowed for "full development" of case); *see also Eldred v. Eldred*, No. _____,1999 Tex. App. LEXIS 2570 (Tex. App.—Austin Apr. 8, 1999, no pet.) (likening court's decision to reopen evidence under Rule 270 following bench trial to a grant of a "new trial"). Unlike *Texas*

[8] Furthermore, there can be little doubt that the record is open given the Judge's *intent* to rule on and either admit or exclude the State's exhibits, which were originally offered in February:

[redacted].

[redacted]

Id. at 51.

Unofficial copy Travis Co. District Clerk Velva L. Price

Extrusion, then, the *ex parte* discussions between the Plaintiffs and the Judge at issue here involve pending matters in active dispute.

The still-pending nature of this matter also distinguishes this case from another opinion relied upon by Plaintiffs, *In re Colony Square*, *see* Response at 37, because the court in that matter found an *ex parte* request for submission of findings to be permissible because it was not made until it was clear on the record that the judge had reached a "firm decision" on all matters at issue in that case. 819 F.2d at 276-77. The same cannot be said here, because the *ex parte* conversations between the Judge and Plaintiffs show that Judge Dietz continues to actively struggle with his decisions in this matter and was in fact using his *ex parte* exchanges with the ISD Plaintiffs' for the purpose of solidifying his decisions in this case. *See, e.g.*, Response at Ex. 30 ([redacted]); *see also* State's Motion, Ex. 13 at 17 ([redacted]); Ex. 26 (comments to findings of fact and conclusions of law demonstrating fluid legal theories on which the judgment might rest). In short, Plaintiffs' attempt to characterize the Judge's March through May 2014 *ex parte* discussions with Plaintiffs as an effort to memorialize the decision the Judge rendered in early 2013 is contrary to the very content of the communications at issue.

Rather than the cases cited by Plaintiffs, this Court should look to those courts that have found situations similar to here, involving *ex parte* conversations about the substance of a court's order, to irreparably evidence a judge's lack of impartiality.[9] *See, e.g., In re Wisconsin Steel Co.*,

[9] The State has found no Texas case that has dealt with the specific questions raised here (i.e., the relationship between *ex parte* contacts regarding preparation of a court order and required recusal). But

Unofficial copy Travis Co. District Clerk Velva L. Price

48 B.R. 753 (N.D. Ill. 1985). In *Wisconsin Steel,* for example, the court held that the *ex parte* preparation of the court's memorandum opinion by the prevailing party created an appearance of impropriety that required reversal of the opinion and recusal of the judge. *Id.* In so holding, the court explained the insidious nature of such *ex parte* communications this way:

> Dealing first with the principal defense—that Judge McCormick had already made up his mind and Sweig served merely as scrivener— there is no way anyone other than Judge McCormick, not even Sweig, can know whether that is true. *Only Judge McCormick knows whether his mind was influenced in any degree by exposure to the Sweig opinion.* While his submission to this court would indicate that he had made up his mind before receiving the opinion, the comments he made in the hearing of January 22, 1985, indicate just the opposite. He stated at that time that he read and reread the Sweig opinion, discussed it with his law clerk, found the question very difficult and only after months of consideration decided to adopt the opinion as his own.
>
> It misses the point altogether to argue that the Sweig submission was merely a proposal. Of course it was a proposal. I would not expect Judge McCormick to commit himself in advance to sign and file the opinion exactly as submitted; it may have been unacceptable in whole or in part. *That Judge McCormick might have changed a word here and there, or deleted certain paragraphs, as the exhibit to his response indicates he considered doing, does not change the fact that Judge McCormick in requesting the opinion, and Sweig in submitting it, were engaging in an ex parte communication concerning the merits of the case. Indeed, it is difficult to imagine a communication that concerns the merits of the case in a way more plenary than the writing of a judge's opinion.* The lawyer has not merely suggested how the judge should rule but has prepared the ruling itself.
>
> The vice of ex parte communication is well illustrated by this case. It is rarely possible to prove to the satisfaction of the party excluded from the communication that nothing prejudicial occurred. *The protestations of the participants that the communication was entirely innocent may be true, but they have no way of showing it except by their own self-serving declarations.* This is why the prohibition is not against 'prejudicial' ex parte communications, but against ex parte communications.

Unofficial copy Travis Co. District Clerk Velva L. Price

---

because the rules regarding *ex parte* contacts between court and counsel are similar between jurisdictions, as they are all based on the model rules, the Court may look to cases outside of Texas for guidance.

Id. at 760 (emphasis added). The same concerns that lead to disqualification of the judge in *Wisconsin Steel* require recusal in this case.[10] That is, there is simply no way to ever know what degree of influence the *ex parte* communications at issue have had, and will have, on Judge Dietz's ultimate rulings in this matter. Indeed, the Judge himself admitted during the course of the *ex parte* conversations that he was "learning as [he was] going along"; this evidences that, at a minimum, the Plaintiffs were having a degree of influence on the Judge's ultimate decisions through their *ex parte* conversations. This, in and of itself, is sufficient to mandate recusal. *See id.*

Further, and contrary to Plaintiffs' assertions, the influence of their *ex parte* communications on the Judge (or, at a minimum, the appearance of such influence) cannot be "cured" by allowing the State and other parties excluded from the *ex parte* communications to file objections before the final findings of fact and conclusions of law are signed. For example, in *Smith v. State*, the Florida Supreme Court expressly rejected the argument that improper *ex parte* communications between the court and a prevailing party regarding preparation of a court order could be excused because the party excluded from that conversation "had ample opportunity to object to the substance of the proposed order." 708 So. 2d 253, 255 (Fla. 1998). The *Smith* court relied on an earlier decision in which it had held, "nothing is more…destructive of the impartiality of the judiciary than a one-sided communication between a judge and a single litigant. Even the most vigilant and conscientious of judges may be subtly influenced by such contacts." *Id.* (quoting *Rose v. State*, 601 So. 2d 1181 (Fla. 1992)); *see also In re S.A.G.*, 403 S.W.3d 907, 914 (Tex. App.—Texarkana 2013, pet. filed) ("Our adversarial system of justice,

[10] The relevant Illinois ethics and recusal rules at issue in Wisconsin Steel are essentially similar to the rules at issue in this matter. See, e.g., 48 B.R. at 760 (citing applicable rules).

Unofficial copy Travis Co. District Clerk Velva L. Price

grounded in the principle of an impartial judiciary, becomes compromised when one-sided…discussions with trial judges are encouraged."). Here, and regardless of the intentions of the Judge in engaging in the *ex parte* communications at issue, the communications irrevocably compromised the appearance of impartiality of the Judge. *See Smith*, 708 So. 2d at 255. As such, the only tenable outcome at this juncture is recusal of Judge Dietz. *See, e.g., Abdygapparova v. State*, 243 S.W.3d 191, 209 (Tex. App.—San Antonio 2007, pet. ref'd) (recusal required when *ex parte* communications revealed court was providing guidance to one side about their case and engaging in *ex parte* discussions about court rulings).[11]

The instant matter is also similar to *Williams v. Farmers Insurance Group, Inc.*, in which a Colorado court held that a trial court order granting a JNOV motion that "was the product of ex parte communications" had to be reversed and required the judge's recusal. 720 P.2d 598, 600 (Colo. Ct. App. 1985). Relevant here, the *Williams* court rejected an argument that, because the order at issue involved only questions at law, it could be adequately reviewed on appeal despite the contacts that led to its creation, as the court held that while an "unfavorable decision perceived to be the result of an impartial consideration may be bearable,…*an unfavorable*

Unofficial copy Travis Co. District Clerk Velva L. Price

[11] There can be no question that the emails (and attachments thereto) demonstrate the Court was providing inappropriate guidance to Plaintiffs (and vice versa)—while the matter was still pending before it and the judge was still developing his ruling—as to how to improve their case. For example, in comments provided from the Judge to Plaintiffs regarding proposed findings on adequacy, the Court comments on one proposed finding proffered by Plaintiffs: "[redacted]." Plaintiffs' Response at Ex 29, attachment at p. 85 (emphasis added). That sort of communication can only be characterized as an interactive discussion between the Judge and Plaintiffs as to how to develop the record to bolster Plaintiffs' case. Moreover, it bears noting that, because it appears ex parte communications between Plaintiffs and the Court may exist that predate March 19, 2014, there is no way to know if the Court provided similar guidance to the Plaintiffs before or during the second phase of this case such that the Court was providing guidance as to what type of evidence the Plaintiffs needed to introduce into the record to improve their case.

decision tainted by even the appearance of partiality cannot be condoned."[12] *Id.* (emphasis added). This is likewise true here. At this point, any decision ultimately rendered by Judge Dietz will be unbearably "tainted by…the appearance of partiality" because of the improper contacts that have already occurred. *See id.* As such, at this juncture there is no proper outcome except for recusal of Judge Dietz. *See id.*; *Abdygapparova*, 243 S.W.3d at 209; *see also Ahlers v. Ahlers*, A08-0901, 2009 WL 174288 at *5-*6 (Minn. Ct. App. Jan. 27, 2009) (unpublished) (holding that while *ex parte* communications between attorney and court regarding court's order "may have been unintentional and innocent, they raise the specter of partiality" because the communications dealt with "substantive, and not procedural matters" related to the order).

In sum, because the *ex parte* communications at issue here go far beyond a simple ex parte request to *submit* a proposed order, and instead evidence a pervasive and continuous

Unofficial copy Travis Co. District Clerk Velva L. Price

---

[12] Instructive here, the Colorado appeals court later contrasted its holding in *Williams* with a fact pattern presented in which it held that a court order that was the result of an *ex parte* request that the prevailing party *submit* an order did not present grounds for reversal or recusal. *See Aztec Minerals Corp. v. State*, 987 P.2d 895, 900 (Colo. Ct. App. 1999). The *Aztec* court distinguished *Williams* this way:

> [In *Williams*], a division of this court held that a trial court's order for judgment notwithstanding the verdict had to be stricken because it was the product of an ex parte communication that gave rise to an appearance of impropriety. In *Williams*, however, *communications between the court and counsel were not limited to a request to prepare the order, but also dealt with the form and content of the proposed order*. Further, the order embodied statements of fact which had not been offered at trial and were not contained in the record. The division concluded that *there was an appearance of partiality as a result of ex parte communications 'concerning the merits of the case.'*

Id. (quoting *Williams*, 720 P.2d at 600) (emphases added). So too here, the ex parte communications in this matter were not limited to a mere request that Plaintiffs submit proposed findings to the Court. Rather, like the improper contact in *Williams*, the emails submitted to the Judge show that the Plaintiffs and the Judge engaged in extensive *ex parte* discussions about the "form and *content*" of the order. That difference distinguishes this matter from those cases in which courts have found ex parte requests for submission of a proposed order to be permissible.

influence by Plaintiffs on Judge Dietz' *still-developing* findings and conclusions in this matter, any rulings now made by Judge Dietz will be so "tainted by…the appearance of partiality" that recusal is the only permissible outcome at this juncture.

C. The Judge's creation of a separate file of non-public court records demonstrates concern such that a lay person would reasonably question the Judge's impartiality in this case.

Finally, that the appearance of partiality looms over this case is also evidenced by the fact the Judge has created by fiat two files in this case: the publicly available court records and an entire separate file kept from public view and not entered into the Official Court Record. *See e.g.,* Ex. 3 at 55-56; Ex. 4 at 5-6; Ex. 13 at 53. The Judge has stated that his memoranda and Plaintiffs' drafts; transcripts of certain court sessions in the reporters record; certain emails from the Judge to the parties; and by inference the *ex parte* email communications at issue[13] in this recusal proceeding are maintained for the judiciary and, thus, are subject to Rule 12, excepted from the Public Information Act, and are not court records. The Judge based his *sua sponte* "sealing" of these court records on Rule 12.5 of the Rules of Judicial Administration. *See* Ex. 3 at 55-56; Ex. 4 at 5-6; Ex. 9A at 31-33; Ex. 13 at 53.

The Plaintiffs appear to concede that the judicial privilege invoked by the Judge can be "destroyed." Plfs' Response to Motion to Recuse at 12; Plfs' June 12, 2014 email. But the Plaintiffs fail to offer any argument or authority as to how the "judicial work product privilege" is destroyed by placing documents in the appellate record[14] or making them available to the

Unofficial copy Travis Co. District Clerk Velva L. Price

[13] There is no oral ruling stating that the March 19-May 14, 2014 *ex parte* emails are within the judicial privilege.

[14] The Plaintiffs argue that the judicial privilege could be destroyed by placing the documents in the appellate record; however the Judge, in fact, assented to the State's demand that they be available to the reviewing courts. These are undoubtedly court records that may only be sealed in strict compliance with TEX. R. CIV. P. 76a and not by judicial fiat.

public, but is not destroyed by providing the same documents to nearly 20 counsel representing adverse parties in litigation.[15] The Plaintiffs' and Judge's theory that statements of opposing counsel are part of the judicial work product is unfounded and not supported by any legal authority. Nevertheless, the existence of the non-public file in this case—coupled with the fact that the Judge has unilaterally added document after document to this file without entering them in the Official Court Record or complying with TEX. R. CIV. P. 76a—raises a serious question about whether that file exists solely because the Judge's impartiality might reasonably questioned by a lay person who reviewed those documents.

CONCLUSION

For the reasons stated herein and in the State's Motion to Recuse, the State respectfully requests that the Court GRANT the Motion to Recuse.

Unofficial copy Travis Co. District Clerk Velva L. Price

[15] By its plain terms, Rule 12 permits exemption from disclosure only items deemed "judicial records," and Rule 12.2(d) states that judicial records do *not* include a "record of any nature created, produced, or filed in connection with any matter that is or has been before a court." Despite this, the Judge has deemed records produced and filed in the instant matter to be protected judicial records. Further, pursuant to Rule 12.5(a), a document is not protected by judicial work product unless it is prepared by someone acting "on behalf of or at the direction" of the judge. By deeming documents edited by one set of parties (such as the at-issue drafts of findings exchanged between Plaintiffs and the Judge) "judicial work product," Judge Dietz has taken the position that Plaintiffs' counsel are acting as his agents (in the same way that a law clerk would act) in preparing the findings and conclusions. This alignment of the Judge with the Plaintiffs is, again, further evidence raising a specter of partiality in this case that simply cannot be cured.

Respectfully Submitted,

GREG ABBOTT
Attorney General of Texas

/s/ Daniel T. Hodge
DANIEL T. HODGE
Texas Bar No. 24048548
First Assistant Attorney General

DAVID C. MATTAX
Deputy Attorney General for Defense Litigation

JAMES "BEAU" ECCLES
Chief–General Litigation Division

SHELLEY N. DAHLBERG
Assistant Attorney General
Texas Bar No. 24012491
General Litigation Division
Texas Attorney General's Office
P. O. Box 12548, Capitol Station
Austin, Texas 78711
Phone: (512) 463-2121
Fax: (512) 320-0667

ATTORNEYS FOR DEFENDANTS

Unofficial copy Travis Co. District Clerk Velva L. Price

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of June, 2014, the foregoing document was served via electronic mail:

Richard E. Gray, III
Toni Hunter
GRAY & BECKER
900 West Ave.
Austin, Texas 78701

Randall B. Wood
Doug W. Ray
RAY & WOOD
2700 Bee Caves Rd., Suite 200
Austin, Texas 78746

Mark R. Trachtenberg
HAYNES AND BOONE, LLP
1 Houston Center
1221 McKinney Street, Suite 2100
Houston, Texas 77010

John W. Turner
HAYNES AND BOONE, LLP
2323 Victory Avenue, Suite 700
Dallas, Texas 75219

MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, INC.
David G. Hinojosa
Marisa Bono
110 Broadway, Ste. 300
San Antonio, Texas 78205

Multicultural, Education, Training And ADVOCACY, INC.
Roger L. Rice
240a Elm St., Ste. 22
Somerville, Ma 02144

J. David Thompson, III
Philip Fraissinet
THOMPSON & HORTON LLP
Phoenix Tower, Suite 2000
3200 Southwest Freeway
Houston, Texas 77027

Holly G. Mcintush
400 West 15th Street, Suite 1430
Austin, Texas 78701

J. Christopher Diamond
THE DIAMOND LAW FIRM, P.C.
17484 Northwest Freeway, Suite 150
Houston, Texas 77040

Craig T. Enoch
ENOCH KEVER PLLC
600 Congress, Suite 2800
Austin, Texas 78701

Robert A. Schulman
Joseph E. Hoffer
Leonard J. Schwartz
SCHULMAN, LOPEZ & HOFFER, L.L.P.
517 Soledad Street
San Antonio, Texas 78205-1508

/s/ Shelley N. Dahlberg
SHELLEY N. DAHLBERG
Assistant Attorney General

Unofficial copy Travis Co. District Clerk Velva L. Price