CAUSE NO. 14-06508-16

TEXAS ETHICS COMMISSION,	§	IN THE DISTRICT COURT
	§	
Plaintiff,	§	
	§	
v.	§	DENTON COUNTY, TEXAS
	§	
MICHAEL QUINN SULLIVAN,	§	
	§	
Defendant.	§	158th JUDICIAL DISTRICT

TEXAS ETHICS COMMISSION'S MOTION TO RECUSE

TO THE HONORABLE JUDGE OF THIS COURT:

The Texas Ethics Commission (the "TEC") files this motion to recuse pursuant to Rules 18a and 18b of the Texas Rules of Civil Procedure, and Canons 1, 2, 3, and 4 of the Code of Judicial Conduct. The TEC respectfully seeks the recusal of the Honorable Steve Burgess, 158th Judicial District Judge, from the above-styled action.

This motion is based on information made known to the TEC following a February 18, 2015 hearing conducted before Judge Burgess in the case. The information made known to the TEC following the February 18 hearing concerns Judge Burgess's status as a "follower" of Michael Quinn Sullivan on the social media platform Twitter; Judge Burgess's access to "tweets" from Sullivan and others on Sullivan's Twitter account concerning the case and the issues underlying the TEC's enforcement of lobby registration laws with respect to Sullivan; and efforts by Judge Burgess, or someone with administrative access to Judge Burgess's Twitter account, to delete his Twitter account immediately following the February 18 hearing; and public reaction to the information relating to these issues.

In light of this information made known to the TEC following the February 18 hearing, this motion is timely made as soon as practicable pursuant to TEX. R. CIV. P. 18(b)(1)(A).

I. PROCEEDINGS LEADING TO MOTION

As this Court is aware, this case represents a *de novo* appeal from a final decision issued by the TEC in July 2014. On June 25, 2014, the TEC held a formal hearing on two sworn complaints (SC-3120487 and SC-3120488), which contained allegations that Michael Quinn Sullivan had worked in 2010 and 2011 as a paid lobbyist without properly registering with the TEC as a paid lobbyist, in violation of section 305.003 of the Texas Government Code. On July 21, 2014, following the evidentiary hearing, the TEC issued a final decision on the sworn complaints. **Exhibit 1**. The final decision contains the TEC's factual findings about Sullivan's work in 2010 and 2011 as a paid lobbyist without properly registering as a paid lobbyist. It also contains the TEC's order that Sullivan pay a civil penalty of $10,000 ($5,000 for failure to register as a lobbyist in each of 2010 and 2011).

On August 1, 2014, Sullivan filed a petition in the 345th Judicial District Court of Travis County against the TEC and its commissioners, for declaratory and injunctive relief, and later amended that petition on August 18, 2014. **Exhibit 2** (first amended petition without attachments). Sullivan presented a request for temporary injunctive relief to the Travis County court, based on claims that the TEC had not properly issued the final decision. The Travis County court denied the request for temporary injunctive relief. **Exhibit 3**.

Sullivan then filed this lawsuit on August 22, 2014 in Denton County, appealing the TEC's July 21, 2014 final decision pursuant to Section 571.133 of the Texas Government Code. Thereafter, on October 13, 2014, the TEC timely filed a motion to transfer venue of the *de novo* appeal to Travis County, invoking both the mandatory venue provision of Section 571.133 of the Texas Government Code and the discretionary transfer provisions of TEX. CIV. PRAC. & REM. CODE § 15.002(b). On October 16, 2014, to provide the notice required for hearings on motions

to transfer venue under TEX. R. CIV. P. 86, the TEC noticed the motion to transfer for hearing on January 8, 2015. **Exhibit 4.**

On October 13, 2014, Sullivan filed a motion to realign the parties to reflect that the TEC was the party with the burden of proof in the *de novo* appeal, and set the motion for hearing on November 20, 2014.

Prior to the November 20 hearing, the 16th Judicial District Judge in Denton County recused herself from the case, thus resulting in the transfer of the case to this Court through order of the Honorable Bruce McFarling, 362nd Judicial District Judge and Local Administrative District Judge. **Exhibit 5.**

Once the case was reassigned to this Court, on December 5, 2014, Sullivan re-noticed his motion to realign parties for hearing on December 18, 2014, resulting in entry of an agreed order on that date. **Exhibit 6.** The TEC filed a First Amended Pleading as Realigned Plaintiff on December 23, 2014, subject to its pending motion to transfer venue.

On December 10, 2014, the TEC re-noticed the motion to transfer venue for January 26, 2015. **Exhibit 7.** On January 6, 2015, Sullivan filed a motion to dismiss the case pursuant to Chapter 27 of the Civil Practice and Remedies Code and noticed it, as well as a motion for TEC's counsel to show authority, for the January 26 hearing. The parties appeared for the January 26 hearing, but were not reached for the hearing due to the Court's being engaged in jury selection on that day in another case.

On February 18, 2015, the reset date, the Court conducted a hearing on the motion to show authority (which Sullivan ultimately withdrew at the hearing following discussion on the record), the TEC's October 2014 motion to transfer venue to Travis County, and Sullivan's motion to dismiss. The Court entered an order denying the motion to transfer venue. **Exhibit 8.**

Following the Court's entry of the order denying the transfer request, the Court conducted a hearing on the motion to dismiss, and indicated that it would dismiss the case under Chapter 27 of the Civil Practice and Remedies Code, for reasons stated on the record. Sullivan presented the Court with a proposed order granting Sullivan attorneys' fees and costs, along with a pre-prepared eight-page affidavit regarding the attorneys' fee and cost request that had been filed the morning of the hearing. The Court considered entering the order, but ultimately deferred entry of an order on the motion to dismiss so that the TEC could review the request for attorneys' fees and costs.

Following the February 18 hearing, at 5:37 p.m., a reporter with the Fort Worth Star Telegram, Bud Kennedy, published information on his Twitter account the following "tweet":

> Looks like the Denton judge who threw out @MQSullivan, ethics complaint, @Judge Burgess158, is an MQS Twitter follower

Exhibit 9. In response, counsel for Sullivan posted the following "tweet" at 5:48 p.m.:

> @BudKennedy I bet he also communicates, at least semi-annually, with the Texas Ethics Commission. #txspeechfight

Id. On February 19, at 5:57 a.m., Kennedy reported the following:

> 1 day after ruling in @MQSullivan's favor without disclosing he's a Twitter follower, judge deletes account #txlege

Exhibit 10. Thus, the information made known to the TEC is that at some point after Kennedy reported that Judge Burgess was a Sullivan "follower" on Twitter and Sullivan's counsel responded within 11 minutes, by 6:00 a.m. the following morning, Judge Burgess (or someone with administrative access to his Twitter account) had taken steps to delete Judge Burgess's Twitter account, and thus his status as Sullivan's follower on Twitter.

The TEC's motion is based on this evidence, discussed in greater detail below, that has caused and will cause Judge Burgess's impartiality in this case to be reasonably questioned.

II. DISPOSITION OF MOTIONS TO RECUSE

This motion is presented to this Court's consideration of two options that are prescribed by law – options that must be exercised prior to taking any further action in this case.

> [T]he respondent judge, within three business days after the motion is filed, must either:
>
> (A) sign and file with the clerk an order of recusal or disqualification; or
> (B) sign and file with the clerk an order referring the motion to the regional presiding judge.

TEX. R. CIV. P. 18a(f)(1); *see, e.g., In re Norman,* 191 S.W.3d 858, 860 (Tex. App.—Houston [14th Dist.] 2006, no pet.) (recognizing that probate judge presented with motion to recuse "had a mandatory duty either to recuse himself or to refer the recusal motion to the presiding judge" for determination). Additionally, "[i]f a motion is filed before evidence has been offered at trial, the respondent judge must take no further action in the case until the motion has been decided, except for good cause stated in writing or on the record." TEX. R. CIV. P. 18a(f)(2)(A).

Here, the TEC has filed its motion before evidence has been offered at trial, and accordingly, the Court should not take any further action until this motion is decided. *Id.* In this case, should this Court elect not to recuse itself, then the TEC respectfully requests that the Court refer the motion to the Honorable David L. Evans, Regional Presiding Judge for the Eighth Administrative Judicial Region, to rule on the referred motion or for assignment of a judge to rule. TEX. R. CIV. P. 18a(g)(1).

III. FACTUAL AND LEGAL BASIS FOR MOTION TO RECUSE

The legal standard for motions to recuse is set out in Rule 18b of the Texas Rules of Civil Procedure, and particularly rule 18b(1) & (2), which provide in part that "a judge must recuse himself in any proceeding in which: (1) the judge's impartiality might reasonably be questioned … [or] (2) the judge has a personal bias or prejudice concerning the subject matter or a party." TEX. R. CIV. P. 18b(1), (2). On the issue of whether a judge's "impartiality might reasonably be questioned," the issue is not whether the judge is actually biased. As the United States Supreme Court ruled in a recusal case on which the basis of recusal was campaign contributions:

> One must also take into account the judicial reforms the States have implemented to eliminate even the appearance of partiality. Almost every State – West Virginia included – has adopted the American Bar Association's objective standard: "A judge shall avoid impropriety and the appearance of impropriety." The ABA Model Code's test for appearance of impropriety is "whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired."

Caperton v. Massey Coal, 556 U.S. 868, 888 (2009) (citations omitted).

Texas has also adopted an objective test for impropriety. *See* TEX. CODE JUD. CONDUCT Canon 2 (entitled "Avoiding Impropriety and the Appearance of Impropriety in All of the Judge's Activities"); *see Rogers v. Bradley*, 909 S.W.2d 872, 874 (Tex. 1995) (stating the rule requiring appellate judges to recuse themselves in any proceeding in which Rule 18b of the Texas Rules of Civil Procedure requires recusal "in any proceeding in which . . . [the judge's] impartiality might reasonably be questioned"). Expanding on Texas' objective standard, Justice Gammage's declaration of recusal in *Rogers* stated:

> The rule does not require that the judge must have engaged in any biased or prejudicial conduct. It does require the judge to recuse if "his impartiality might reasonably be questioned," regardless of the source or circumstances giving rise

> to the question of impartiality and even though the source and circumstances may be beyond the judge's volition or control.

Rogers, 909 S.W.2d at 874.

The Texas intermediate courts of appeals have applied the same objective standard:

> The standard for recusal is clear. When the party moving for recusal relies on bias to claim the trial judge should be recused, the party filing the motion to recuse must show that a reasonable person, with knowledge of the circumstances, would harbor doubts as to the impartiality of the trial judge, and that the bias is of such a nature and extent that allowing the judge to serve would deny the movant's right to receive due process of law.

In re Commitment of Winkle, 434 S.W.3d 300, 311 (Tex. App.—Beaumont 2014, pet. filed Jul. 30, 2014); *see also Humitech Dev. Corp. v. Perlman*, 424 S.W.3d 782, 797 (Tex. App.—Dallas 2014, no pet.) ("The test for recusal under rule [18b(b)] is 'whether a reasonable member of the public at large, knowing all the facts in the public domain concerning the judge's conduct, would have a reasonable doubt that the judge is actually impartial.'" (quoting *Hansen v. JP Morgan Chase Bank, NA*, 346 S.W.3d 769, 776 (Tex. App.—Dallas 2011, no pet.))); *Duffey v. State*, 428 S.W.3d 319, 325 (Tex. App.—Texarkana 2014, no pet.) (same).

As the attached evidence shows, Judge Burgess has maintained an Internet presence. *See* **Exhibit 11** (screenshot of "Re-Elect Steve Burgess Judge" campaign page). Judge Burgess also maintained, until just a few days ago, a Twitter account under the username "@JudgeBurgess158." *See* **Exhibit 9** (screenshot of Bud Kennedy's ("@BudKennedy") Twitter posting of screenshot of Judge Burgess's ("@JudgeBurgess158") Twitter account profile page). Judge Burgess has thus been a Twitter "follower" of "@MQSullivan," which is Michael Quinn Sullivan's Twitter account name, for an undetermined period of time. *Id.* (posting: "Looks like the Denton judge who threw out @MQSullivan ethics complaint, @JudgeBurgess158, is an MQS Twitter follower."); **Exhibit 12** (screenshot of Michael Quinn Sullivan's

("@MQSullivan") Twitter account profile page). Kennedy later reported, and a screen shot of Judge Burgess's Twitter account indicated, that Judge Burgess "followed" only 33 Twitter accounts. **Exhibit 9**.

A Twitter "follower" relationship creates a situation in which the "follower" receives "tweets" generated on the account "followed" as updates to the Twitter account's home page, and provides the person "followed" with the ability to send the "follower" direct messages on Twitter. **Exhibit 13** (description of Twitter "follower" status posted by Twitter). Over time, Sullivan has himself "tweeted" multiple statements about the TEC and the hearing on the sworn complaints filed against him, including statements about the TEC administrative evidentiary hearing and the TEC's ruling. For example, on June 26, 2014, @MQSullivan posted: "Future of #txspeechfight? However TEC rules, we're focused on forcing TEC to defend speech-chilling actions in court." **Exhibit 14**. Many other postings followed, including:

- Would-be speech-regulators at TEC got dragged into the sunlight, & didn't like it. Get used to it… (June 26, 2014)

Exhibit 15

- Ethics? Tx Ethics Comm. admits to secret mtgs, claims Open Meetings Act only applies when they want… (Aug. 15, 2014)

Exhibit 16

- Lawyer for Tx Ethics Comm. tells judge his clients met in secret & not bound by state Open Mtgs law…. (Aug. 15, 2014)

Exhibit 17

- "When they came for me, there was no one left to speak out." #pulpitfreedom #pastors #1A #txspeechfight…" (Oct. 15, 2014)

Exhibit 18

- Who is praising TEC's unconstitutional speech-squelching rules? Leftists & establishment RINOS, of course. #TXSpeechFight (October 30, 2014)

Exhibit 19

- TEC anti-#1a attack on us so flimsy, Dir of Enforcement tells @txelectionlaw he's postponing 2/12 hearing. #winning #txspeechfight #txlege (February 5, 2015)

Exhibit 20

- Like Patton's 3rd Army, we won't let TEC retreat in #TxSpeechFight. We'll fight until they can't abridge #1a again. (February 5, 2015)

Exhibit 21

- My lawyers @txelectionlaw @JMNLawyer & I showed up at #txlege for #txspeechfight closed hearing; TEC cowards didn't. (February 12, 2015)

Exhibit 22

- Lawless DEM chairing TEC, appointed by @SpeakerStraus, says agency won't consider constitutional arguments OR COURT RULINGS. #txspeechfight (February 13, 2015)

Exhibit 23

Sullivan's lawyers argued at the February 18 hearing, and the Court articulated on the record,[1] a belief that the TEC's actions with respect to the sworn complaints concerned impermissible restrictions on constitutional protections, including those provided to freedom of speech.

Notably, sometime between 5:37 p.m. on February 18, 2015 (when Kennedy first posted his information about the Twitter relationship) and Sullivan's counsel responded to Kennedy's "tweet," and 5:57 a.m. on February 19, 2015, Judge Burgess's Twitter account was deleted.

[1]TEC's counsel has ordered a copy of the transcript of the February 18 hearing, which is currently being prepared by the court reporter.

Exhibit 10. As the attached screenshot reflects, "@JudgeBurgess158" was no longer searchable as of February 20, 2015. *See* **Exhibit 24** (screenshot of Twitter notification page indicating "Sorry, that page doesn't exist!" with "JudgeBurgess158" typed into the search box).

The events surrounding this case, from the TEC administrative proceeding involving Sullivan, to the TEC's final decision regarding Sullivan, to Sullivan's appeal of the TEC's final decision, have generated significant public interest within the State. Multiple Texas news distributors have published online articles regarding the TEC hearing and Sullivan's subsequent lawsuit, including, among others, the Fort Worth Star Telegram ("Ethics panel fines conservative activist $10,000," Jul. 22, 2014); the Texas Tribune ("Ethics Commission Slaps Conservative Activist With Fine," Jul. 21, 2014), the Austin-American Statesman ("Ethics agency imposes max fine on Michael Quinn Sullivan," Jul. 21, 2014), the Houston Chronicle ("Michael Quinn Sullivan promises 'fireworks' in ethics case (updated)," Aug. 12, 2013), and the San Antonio-Express News ("MQS and Ethics Commission set for final showdown on lobby case," May 29, 2014; "State regulators set for Sullivan lobbying trial," June 24, 2014; "Michael Quinn Sullivan ethics battle resurfaces," Aug. 8, 2013; "MQS refuses to testify at ethics showdown," June 25, 2014; "Conservative activist hit with ethics fine," Jul. 21, 2014; "Lobbying case headed back to court," Jan. 25, 2015; "Judge tosses ethics case involving high-profile conservative activist," Feb. 18, 2015; "Ethics Commission: No 'indication' MQS resides in Denton County," Jan. 22, 2015). **Exhibit 25**. In turn, these published articles have generated myriad public comments.

As with the *Massey* case, a case with this type of profile only amplifies the ever-present concern with maintaining the appearance of judicial impartiality. This concern stems from the recognized need for an unimpeachable judicial system in which the public has unwavering

confidence. *Richardson v. Quarterman*, 537 F.3d 466, 474 (5th Cir. 2008) (quoting *Potaashnick v. Port City Construction Co.*, 609 F.2d 1101, 1111 (5th Cir. 1980)).

Moreover, this matter does not only involve a situation in which Judge Burgess's impartiality could theoretically be questioned – although that would be enough under the law. There is evidence to indicate that citizens *have in fact* questioned Judge Burgess's impartiality and questioned the integrity of the judicial system:

- cue dramatic music (Feb. 19, 2015)
- /Wow (Feb. 19, 2015)
- Makes you wonder just how in bed that @MQSullivan and now-deleted @judgeburgess158 really are? (Feb. 19, 2015)

Exhibit 10. These questions about partiality and the integrity of the judicial system with respect to this case have been echoed elsewhere:

- Has the law been purchased?
- The courts are stacked with GOPers.
- More corrupt Repigblican judges!
- This is what happens when you have one party rule and elected judges.
- This man is the biggest fraud in Texas. Skated due to a partisan judicial system.

John Reynolds, *Judge Tosses Ethics Case Against Conservative Activist*, TEX. TRIBUNE, Feb. 18, 2015, *comments available at* http://www.texastribune.org/2015/02/18/ethics-case-against-mq-sullivan-tossed-denton-coun/comments/.

In *Bracy v. Schomig*, a federal appellate court noted that pertinent U.S. Supreme Court cases "tell us that ordinarily actual bias is not required, the appearance of bias is sufficient to disqualify a judge." *Richardson v. Quarterman*, 537 F.3d 466, 477 (5th Cir. 2008) (quoting

Bracy v. Schomig, 286 F.3d 406, 411 (7th Cir. 2002)). Likewise, whether the comments to those news stories are correct or not is not the test. The existence of the Twitter "follower" relationship between Sullivan and Judge Burgess, and the resulting *ex parte* access between Sullivan and the Court, has served to create an appearance that the Court is biased in favor of Sullivan, and what is perceived by some members of the public to be a political leaning in favor of Sullivan. For that reason alone, this Court should recuse itself from this case.

As stated above, Texas law requires that a "judge shall recuse himself in any proceeding in which . . . his impartiality might be reasonably questioned." *Kniatt v. State of Texas*, 239 S.W.3d 910, 915 (Tex. App.—Waco 2007, pet. ref'd). In determining whether a judge's impartiality might be reasonably questioned so as to require recusal, the proper inquiry is whether a reasonable member of the public at large, knowing all the facts in the public domain concerning the judge and the case, would have a reasonable doubt that the judge is actually impartial. *Burkett v. State*, 196 S.W.3d 892, 896 (Tex.App.—Texarkana 2006, no pet.). Moreover, the need for a recusal is triggered when a judge displays an "attitude or state of mind so resistant to fair and dispassionate inquiry" as to "cause a reasonable member of the public to question the objective nature of the judge's rulings." *Ex parte James W. Ellis*, 275 S.W.3d 109, 117 (Tex. App.—Austin 2008, no pet.) (quoting *Liteky v. United States*, 510 U.S. 540, 557-58 (1994)).

In furtherance of the goal of avoiding the appearance of impropriety, the Code of Judicial Conduct provides that judges "should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary" and "shall not allow any relationship to influence judicial conduct or judgment." TEX. CODE JUD. CONDUCT Canon 2(A). Nor should judges "lend the prestige of judicial office to advance the private interests of the judge or others;

. . . or permit others to convey the impression that they are in a special position to influence the judge." TEX. COD. JUD. CONDUCT Canon 2(B). Furthermore, the Code provides that judges must conduct their extra-judicial activities "so that they do not: (1) cast reasonable doubt on the judge's capacity to act impartially as a judge; or (2) interfere with the proper performance of judicial duties." TEX. CODE JUD. CONDUCT, Canon 4(A). Activity on social media websites implicates all of these constraints on judicial conduct.

Although the Texas Supreme Court's Judicial Ethics Advisory Committee has apparently not addressed the precise issues presented by judges having contact through social media with parties having contested matters before them, the judicial ethics committees of several other states have determined that Internet activity on social media websites implicates certain provisions of judicial codes of conduct.[2] Additionally, the Judicial Conference of the United States and the American Bar Association have issued advisory opinions acknowledging the ethical implications for judges of utilizing social media. *See* Jud. Conference of the U.S. Comm. on Codes of Conduct, *Advisory Op. No. 112*, GUIDE TO JUD. POL'Y, Vol. 2B, Ch. 2, p. 112-1 (recognizing that "although the format [of social media] may change, the considerations regarding impropriety, confidentiality, appearance of impropriety and security remain the

[2]*See, e.g.*, Ariz. Advisory Op. 2014-1 (May 5, 2014); Cal. Judges' Ass'n Adv. Op. 66 (2011); Conn. Informal Op. 2013-06 (Mar. 22, 2013); Fla. Advisory Ops. 2009-20, 2013-14, (Nov. 17, 2009, Jul. 30, 2013); Kent. Jud. Ethics Op. JE-119; Md. Advisory Op. Request 2012-07 (June 12, 2012); Mass. JEAC Op. 2011-6; N.Y. Advisory Op. 08-176 (Jan. 29, 2009); Ohio Jud. Ethics Advisory Op. 2010-7 (Dec. 3, 2010); Okla. Jud. Ethics Op. 2011-3 (Jul. 6, 2011); S.C. Op. No. 17-2009 (Oct. 2009); Tenn. Advisory Op. 2012-01 (Oct. 23, 2012); Utah Informal Advisory Op. 12-01 (Aug. 31, 2012); Wash. Ethics Advisory Comm. Op. 09-05 (Nov. 17, 2009).

same."); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 462 (Feb. 21, 2013) ("A judge who participates in ESM should be mindful of relevant provisions of the Model Code.").[3]

Florida's Judicial Ethics Advisory Committee has addressed this issue on more than one occasion. In the Florida JEAC's Advisory Opinion 2013-14, the Committee noted that Twitter users can create lists of "followers," and concluded that a judge's appearance on a Twitter user's list of "followers" could "create the impression of [the Twitter user] being in a special position to influence the judge," particularly in light of the fact that "Twitter has a 'direct message' feature that enables users to send messages directly to and receive messages directly from their 'followers.'" *Id.* at *2.

The Florida JEAC's conclusion in Opinions 2013-14 relied in part on its conclusion in Opinions 2009-20 "that the Florida Code of Judicial Conduct precludes a judge from both adding lawyers who appear before the judge as 'friends' on a social networking site and allowing such lawyers to add the judge as their 'friend.'" *Domville v. State*, 103 S.3d 184, 185 (Fla. App. 2012) (citing Fla. JEAC Op. 2009-20 (Nov. 17, 2009)). The JEAC had determined that the "listing of a lawyer as a 'friend' on the judge's social networking page—'[t]o the extent that such identification is available for any other person to view"—would violate Florida Code of Judicial Conduct Canon 2B [(addressing the problem of an impression of a special position of influence)]." *Id.* Elaborating on the JEAC's conclusion, the Florida court of appeals, in deciding to quash an order denying disqualification, stated, "Thus, as the Committee recognized, a judge's activity on a social networking site may undermine confidence in the judge's neutrality. Judges must be vigilant in monitoring their public conduct so as to avoid situations that will compromise the appearance of impartiality." *Id.* at 186.

[3]Copies of the various ethics and other opinions cited in the motion are attached as **Exhibit 27**.

On a related note, the Florida JEAC in Opinions 2013-14 noted that "[a] judge's Twitter account creates an avenue of opportunity for *ex parte* communication," given that a party could send a tweet about the case to the judge, the judge "could unwittingly receive the tweet," and the only way for the judge to avoid receiving the tweet "would be if the judge knew the party's Twitter account name, and exercised Twitter's blocking option when the judge set up the judge's Twitter account." *Id.* at *3. Canon 3, subsection (B)(8) of the Texas Code of Judicial Conduct prohibits *ex parte* communications between a judge and parties to proceedings before the judge:

> A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider *ex parte* communications or other communications made to the judge outside the presence of the parties between the judge and a party, an attorney, a guardian or attorney ad litem, an alternative dispute resolution neutral, or any other court appointee concerning the merits of a pending or impending judicial proceeding.

TEX. CODE JUD. CONDUCT, Canon 3(B)(8). As expressed in the Florida JEAC's Opinion 2013-14, a judge's interactions with persons who appear before them on Twitter can easily become *ex parte* communications, and can even more easily suggest a special position of influence or other impropriety.

Under the "reasonable person" standard, the integrity of the judicial process, which depends in large measure on maintaining the public's confidence in the impartiality of its judges, requires that the Court be recused from further involvement in this matter.

IV. CONCLUSION AND PRAYER

The TEC requests the following relief pursuant to this motion:

(1) That the Court voluntarily recuse itself from any further participation in this case;

(2) That in the alternative, should the Court not voluntarily recuse itself in response to the motion to recuse, that the motion to recuse be referred to the Honorable David L. Evans, Regional Presiding Judge for the Eighth Administrative Judicial Region, to rule on the referred motion or for assignment of a judge to consider this motion;

(3) That in the event a judge is assigned to consider this motion, that the assigned judge schedule and conduct a hearing on this motion;

(4) That in connection with any such hearing, the assigned judge permit the issuance of court process to allow the parties to fully discover the extent of contacts between Sullivan and Judge Burgess, including through the issuance of court process to obtain records from Twitter, such as records that are no longer accessible given the post-February 18 hearing deletion of Judge Burgess's Twitter account;

(5) That following any such hearing, this motion be granted and Judge Burgess be ordered recused from any further participation in this matter; and

(6) That following such a recusal, that this case should be referred to the Honorable David L. Evans, Regional Presiding Judge for the Eighth Administrative Judicial Region, for assignment of a judge to conduct further proceedings in this case.

The TEC also requests any other and further relief to which it may show itself to be entitled.

Respectfully submitted,

BECK | REDDEN LLP

By: */s/ Eric J.R. Nichols*

Eric J.R. Nichols
enichols@beckredden.com
State Bar No. 14994900
Gretchen S. Sween
gsween@beckredden.com
State Bar No. 24041996
515 Congress Avenue
Suite 1750
Austin, Texas 78701
Telephone: 512.708.1000
Fax: 512.708.1002

ATTORNEYS FOR TEXAS ETHICS COMMISSION

CERTIFICATE OF SERVICE

I hereby certify that, pursuant to Tex. R. Civ. P. 21a, a copy of the foregoing was delivered to counsel of record on February 23, 2015 through the Court's electronic filing system.

Via Email: jnixon@bmpllp.com
Joseph M. Nixon
BEIRNE, MAYNARD & PARSONS, L.L.P.
1300 Post Oak Blvd., Suite 2500
Houston, TX 77056

Via Email: ttrainor@bmpllp.com
James E. Trainor
401 W. 15th Street, Suite 845
Austin, TX 78701

Via Email: rhayes@hbwvlaw.com
Richard D. Hayes
512 W. Hickory, Suite 100
PO Box 50149
Denton, TX 76206

By: */s/ Eric J.R. Nichols*
Eric J.R. Nichols

VERIFICATION

STATE OF TEXAS §
§
COUNTY OF TRAVIS §

BEFORE ME, the undersigned authority, personally appeared Eric J.R. Nichols, a person known unto me, and who, upon his oath, did state the following:

"My name is Eric J.R. Nichols, and I am one of the attorneys for the Texas Ethics Commission in this proceeding. I am over 21 years of age and I am competent to make this verification. I hereby verify that the factual statements made in this motion to recuse are based, as applicable, on my personal knowledge of the proceedings; court records in reference to court proceedings; and the materials attached as exhibits to the motion, in reference to information made known to the Texas Ethics Commission and its counsel concerning material published on the Internet and on Twitter."

Eric J.R. Nichols

SWORN TO AND SUBSCRIBED before me on this the 23 day of February, 2015.

NOTARY PUBLIC STATE OF TEXAS
ELIZABETH O'CONNELL WALKER
My Commission Expires
June 12, 2016

Elizabeth O'Connell Walker
Notary Public, State of Texas

AFFIDAVIT

STATE OF TEXAS §
§
COUNTY OF TRAVIS §

BEFORE ME, the undersigned authority, personally appeared Denise Miller, a person known unto me, and who, upon his oath, did state and depose the following:

"My name is Denise Miller, and I am a legal assistant at Beck Redden LLP. I am over 21 years of age and I am competent to make this affidavit. I hereby verify that the following exhibits are true and correct copies of the following:

Exhibit 1: The Texas Ethics Commission's final order, dated July 21, 2014.

Exhibit 2: Plaintiff's First Amended Petition in Cause No. D-1-GN-14-002665 (without exhibits).

Exhibit 3: Order dated August 18, 2014.

Exhibit 4: Notice of hearing dated October 16, 2014.

Exhibit 5: Order transferring suit dated November 20, 2014.

Exhibit 6: Notice of hearing dated December 5, 2014.

Exhibit 7: First amended notice of hearing dated December 10, 2014.

Exhibit 8: Order denying motion to transfer dated February 18, 2015.

Exhibit 9: Printout of Twitter post dated February 18, 2015 with associated comments.

Exhibit 10: Printout of Twitter post dated February 19, 2015 with associated comments.

Exhibit 11: Printout of Re-Elect Steve Burgess Judge web page.

Exhibit 12: Printout of Michael Quinn Sullivan Twitter account first page.

Exhibit 13: Printout of FAQs published by Twitter.

Exhibit 14: Printout of Twitter posting dated June 26, 2014.

Exhibit 15: Printout of Twitter posting dated June 26, 2014.

Exhibit 17: Printout of Twitter posting dated August 15, 2014.

Exhibit 18: Printout of Twitter posting dated October 15, 2014.

Exhibit 19: Printout of Twitter posting dated October 30, 2014.

Exhibit 20: Printout of Twitter posting dated February 5, 2015.

Exhibit 21: Printout of Twitter posting dated February 5, 2015.

Exhibit 22: Printout of Twitter posting dated February 12, 2015.

Exhibit 23: Printout of Twitter posting dated February 13, 2015.

Exhibit 24: Printout of Twitter page on request for information relating to @JudgeBurgess158 dated February 20, 2015.

Exhibit 25: Newspaper articles printed from online platforms."

Denise Miller

SWORN TO AND SUBSCRIBED before me on this the 23rd day of February, 2015.

Elizabeth O'Connell Walker
Notary Public, State of Texas