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January 13, 2016

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VIA FEDERAL EXPRESS

Ronald F. Avery
1933 Montclair Drive
Seguin, Texas 78155

**Re: Avery v. Hearst Communications, Inc., 25th Judicial District Court of
Guadalupe County, Texas, Cause No. 15-2186-cv**

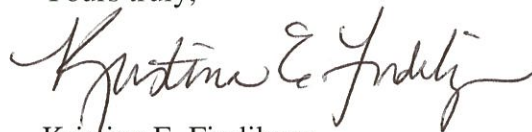
Dear Mr. Avery:

Enclosed for service under Texas Rule of Civil Procedure 21a(a) please find a copy of the following documents from Defendants Hearst Communications, Inc. and Dylan Baddour in the above-referenced matter, which were filed with the clerk today:

- Opposition to Motion for Recusal

Thank you for your attention to this matter. Please call me at (212) 649-2009, if you have any questions regarding the above.

Yours truly,


Kristina E. Findikyan

Enclosure

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CAUSE NO. 15-2186-CV

RONALD AVERY,

Plaintiff,

vs.

DYLAN BADDOUR, AND
HEARST COMMUNICATIONS, INC.,

Defendants.

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IN THE DISTRICT COURT OF

GUADALUPE COUNTY, TEXAS

25TH JUDICIAL DISTRICT

**DEFENDANTS HEARST COMMUNICATIONS, INC. AND DYLAN BADDOUR'S
OPPOSITION TO PLAINTIFF'S MOTION FOR RECUSAL**

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CAUSE NO. 15-2186-CV

RONALD AVERY,

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IN THE DISTRICT COURT OF

GUADALUPE COUNTY, TEXAS

25TH JUDICIAL DISTRICT

**DEFENDANTS HEARST COMMUNICATIONS, INC. AND DYLAN BADDOUR'S
OPPOSITION TO PLAINTIFF'S MOTION FOR RECUSAL**

TO THE HONORABLE COURT:

Defendants Hearst Communications, Inc., publisher of the Houston Chronicle, and Dylan Baddour, a reporter for the Chronicle (collectively “the Chronicle” or “Defendants”) hereby files this response opposing *pro se* plaintiff Ronald Avery’s motion to recuse The Honorable W.C. Kirkendall, District Judge, from presiding over this case. Plaintiff’s sole argument for recusal is that more than twenty-five years ago, Judge Kirkendall—who was then the District Attorney of the 25th Judicial District—handled an unrelated citizen complaint filed by Plaintiff. He submits no evidence of any personal bias or prejudice that Judge Kirkendall has towards him. Plaintiff’s motion is without any basis in fact or law and should be denied.

BACKGROUND

Pending before this Court is the Chronicle’s Motion to Dismiss pursuant to the Texas Citizens Participation Act, Tex. Civ. Prac. & Rem. Code § 27.001, *et seq.*, which is scheduled to be heard before Judge Kirkendall on February 4, 2016 at 9:00 a.m. Without notice to the

Chronicle,¹ on January 8, 2016 Plaintiff filed a Motion for Recusal of Judge Kirkendall on the grounds that in 1989 Plaintiff sent a complaint about the Seguin City Council, Seguin City Planner and Seguin Parks and Recreation Director to Judge Kirkendall in his then-capacity as District Attorney, who as part of his office's investigation forwarded it to the City of Seguin for comment. Mot. ¶¶ 4-5; Ex. A. Shortly thereafter, Judge Kirkendall responded to Plaintiff's letter, enclosing a copy of the City's response and alerting Plaintiff that there was no evidence of a statutory violation or other offense. *Id.* ¶ 5; Ex. B. The District Attorney's Office accordingly closed its file on the complaint and told Plaintiff there would be no further investigation of the matter. *Id.*

ARGUMENT

“[T]here is as much obligation for a judge not to recuse when there is no occasion for him to do so as there is for him to do so when there is.” *Rogers v. Bradley*, 909 S.W.2d 872, 879 (Tex. 1995) (Enoch, J., concurring) (quoting *United States v. Burger*, 964 F.2d 1065, 1070 (10th Cir. 1992)); *see also Kirby v. Chapman*, 917 S.W.2d 902, 908-09 (Tex. App.—Fort Worth 1996, no writ). Recusal on the grounds of alleged bias is only appropriate if “the movant provides sufficient evidence to establish that a reasonable person, knowing all the circumstances involved, would harbor doubts as to the impartiality of the judge” but “only when the bias attains a level denying the movant due process of law.” *Abdygapparova v. State*, 243 S.W.3d 191, 198 (Tex. App.—San Antonio 2007, pet. ref'd) (citing *Kemp v. State*, 846 S.W.2d 289, 305 (Tex. Crim. App. 1992) (en banc); Tex. R. Civ. P. 18b). Moreover, “the terms ‘bias’ and ‘prejudice’ do not encompass all unfavorable rulings towards an individual or her case, but instead must ‘connote a favorable or unfavorable disposition or opinion that is somehow *wrongful* or *inappropriate*,”

¹ The Chronicle only today learned of Plaintiff's Motion when it received a copy by certified mail.

either because it is undeserved, or because it rests upon knowledge that the subject ought not to possess . . . , or because it is excessive in degree.” *Id.* (quoting *Liteky v. United States*, 510 U.S. 540, 550 (1994)). Accordingly, “the proponent must show a ‘deep-seated favoritism or antagonism that would make fair judgment impossible.’” *Id.* (quoting *Liteky*, 510 U.S. at 555).

“The court enjoys a presumption of judicial impartiality which is not defeated by the mere assertion of bias based on a trial judge’s previous judicial relationship with a defendant.” *Abdygapparova*, 243 S.W.3d at 198-99 (citing *Durrough v. State*, 620 S.W.2d 134, 143 (Tex. Crim. App. 1981)); *cf. Clark v. City of Tyler*, No. 12-08-00459-CV, 2010 WL 3431163, at *3 (Tex. App.—Tyler Sept. 1, 2010, no pet.) (judge’s former position as district attorney of Smith County, and the alleged resulting close working relationship between the judge and the city and police defendants, was not grounds for recusal); *Scown v. City of Alpine*, 271 S.W.3d 380, 384 (Tex. App.—El Paso 2008, no pet.) (judge’s former position as City Attorney for defendant was not grounds for recusal where no evidence presented that such representation was related to the pending matter).

There is no basis for recusal in this case. Plaintiff’s motion appears to be a vehicle to reargue what he believed to be wrongful actions back in 1989 by City of Seguin representatives on an entirely unrelated matter. However, the “evidence” he submits in no way establishes either any underlying wrongful conduct by the City or any wrongful disposition by Judge Kirkendall. Plaintiff states that the motion is based on “personal bias or prejudice” (Motion ¶ 2) but the only “evidence” submitted is a more than twenty-five year old unrelated complaint that was handled appropriately by Judge Kirkendall as the then-District Attorney and thereafter closed for lack of merit. Accordingly, Plaintiff has not presented any evidence that would lead a reasonable person to harbor any doubts as to the impartiality of Judge Kirkendall to decide the present case, let

alone any evidence that would suggest that any alleged bias would rise to a level anywhere close to denying Plaintiff due process of law.

CONCLUSION

For the reasons set forth above, this Court should deny Plaintiff's Motion for Recusal.

Dated: January 13, 2016

Respectfully Submitted,

/s/ Jonathan R. Donnellan

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*Attorneys for Defendants Hearst Communications,
Inc. and Dylan Baddour*

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been delivered to the following pursuant to the Texas Rules of Civil Procedure on this 13th day of January, 2016:

Ronald F. Avery, *pro se* Plaintiff
1933 Montclair Drive
Seguin, Texas 78155
Phone: (830) 372-5534
Email: taphouse@sbcglobal.net

/s/ Jonathan R. Donnellan
Jonathan R. Donnellan

Attorney for Defendants