IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

AMERICAN OVERSIGHT and JOHN DOE Plaintiffs,	)	
v.	)	CIVIL ACTION FILE NO.
THE GEORGIA STATE ELECTION BOARD; JANICE JOHNSTON, in her Individual capacity and official capacity as a Member of the Georgia State Election Board; RICK JEFFARES, in his individual capacity and official capacity as a Member of the Georgia State Election Board; JANELLE KING, in her individual capacity and official capacity as a Member of the Georgia State Election Board; JOHN FERVIER, in his Official capacity as the Chairman of the Georgia State Election Board; SARA TINDALL GHAZAL, in her official capacity As a Member of the Georgia State Election Board Defendants.	)	24cv009124

DEFENDANTS' MOTION TO STRIKE CERTAIN ALLEGATIONS OF PLAINTIFFS' COMPLAINT

COMES NOW Defendant Georgia State Election Board, Janice Johnston, Rick Jeffares, Janelle King, John Fervier, and Sara Tindall Ghazal (collectively, "Defendants"), pursuant to O.C.G.A. § 9-11-12(f), and files its Motion to Strike Certain Allegations of Plaintiffs' Complaint as follows:

INTRODUCTION

Throughout Plaintiffs' complaint, Plaintiffs reference "guidance" that they "on information and belief," allege that the State Election Board received from the Office of the Attorney General. Defendants hereby file this motion seeking to strike these allegations as they refer to matters that would be inadmissible in evidence as they are protected by the attorney-client privilege.

SPECIFIC ALLEGATIONS THAT SHOULD BE STRICKEN FROM PLAINTIFFS' COMPLAINT

Because they reference legal advice allegedly provided by the Office of the Attorney General to the State Election Board, which would be subject to the attorney-client privilege and therefore inadmissible in evidence, Defendants move to strike the following paragraphs of Plaintiffs' complaint, either in part or in its entirety as noted by use of strikethrough text:

- ¶2 – (In part): To that end, the Individual Defendants scheduled a meeting for 4:00 pm on a Friday afternoon, knowing that Chair Fervier and Member Tindall Ghazal were unavailable (and indeed that Defendant Johnston could not attend in person), with virtually no notice to the public. After hearing not only that their colleagues were unavailable, ~~but also ***knowing*** that the Attorney General's office had instructed them that their plans were likely unlawful under the Open Meetings Act,~~ the Individual Defendants nonetheless charged forward. Disregarding established Board practice (the very practice that the Board had properly used to schedule validly convened meetings earlier that same week), they issued no email notice of the meeting, nor did they post a notice to the Board's website, nor did they provide the notice to Fulton County's legal organ or a newspaper of general circulation as the Act requires. Instead, they pulled together a hastily drawn up document purporting to be a notice, signed directly only by Defendant Jeffares, just a day before the supposed meeting. The notice was apparently posted in only one place: outside the room at the State Capitol Building where the meeting would take place, where only the few who happened to pass by late on a Thursday afternoon would come across it.

- ¶ 6 – (In its entirety): ~~Most alarmingly, the Individual Defendants had clear and explicit notice that their actions likely violated the Open Meetings Act. On information and belief, the Attorney General's office provided guidance to the Board on two separate occasions—on July 10 and July 11—saying just that. Nevertheless, the Individual Defendants proceeded with their unlawful plans anyway.~~

- ¶ 7 – (In part): ~~Subsequently, on information and belief, the Individual Defendants received additional notice from Chairman Fervier that officials in the Secretary of State's Office and Attorney General's Office had determined that their actions violated the Open Meetings Act~~. In addition, members of the public contacted the Board, further detailing their violations of Georgia Law. Nevertheless, the Individual Defendants took no steps to rectify their actions.

- ¶ 40 – (In its entirety): ~~On information and belief, Fervier subsequently sought and received oral guidance from the Attorney General's office about how to properly reschedule the meeting—and was told he would need to provide seven days' notice and that the meeting would need to be available to the public (i.e., via livestream).~~

- ¶ 42 – (In its entirety): ~~Regardless of any Members' availability for a meeting on July 12, convening a meeting that day would be inconsistent with the oral guidance Fervier received from the Attorney General's office.~~

- ¶ 43 – (In its entirety): ~~Moreover, on July 11, an attorney from the Attorney General's office sent an email to all five members of the Board warning that the proposed July 12~~

~~meeting could violate the state's Open Meetings Act.~~

- ¶ 44 – (In its entirety): ~~The Attorney General's office advised that the Act generally requires a minimum of one week's notice for non-emergency meetings or for meetings not arising under "special circumstances"; advised that even emergency/special circumstance meetings generally required 24 hours' notice, including an ad placed in the county legal organ; and further explained the procedural requirements for truly exceptional circumstances requiring a meeting on less than 24 hours' notice.~~

- ¶ 45 – (In its entirety): ~~Notably, the Attorney General's office expressed skepticism that emergency or exceptional circumstances existed in this case, and called upon the Board members to let the Attorney General's office know if there was in fact an emergency.~~

- ¶ 46 – (In its entirety): ~~The Attorney General's office also instructed that while the Open Meetings Act provides for members to attend a meeting by teleconference, such meeting must otherwise comply with various statutory requirements – including, for example, notice requirements and ensuring that members of the public can fully participate (including through appropriate technological accommodations secured by advance notice provided to those planning to participate by teleconference to ensure all participants can hear all meeting content).~~

- ¶ 47 – (In its entirety): ~~Moreover, the Attorney General's office advised that even assuming it is permissible for some members to participate by teleconference, a quorum must nevertheless be present in person in order to comply with the Act.~~

- ¶ 48 – (In its entirety): ~~On information and belief, none of the Individual Defendants responded to the July 11 email from the Attorney General's office.~~

- ¶ 81 – (In part): The Board, through the actions of the Individual Defendants, violated the Open Meetings Act by failing to comply with the statute's notice requirements under O.C.G.A. § 50-14-1(d)(1). As a continuation of the regularly scheduled July 9 meeting, the July 12 Unlawful Meeting required at least seven days' notice under the Act, O.C.G.A. § 50-14-1(d)(1)~~, as indicated by the Attorney General's Office in its July 10 email to the Board~~. Nonetheless, Defendant Jeffares' purported "notice" of the meeting was signed, at the earliest, barely 24 hours prior to the July 12 Unlawful Meeting.

- ¶ 91 – (In its entirety): ~~The Individual Defendants were on notice of these violations through oral guidance received by Chairman Fervier from the Attorney General's Office on July 10, 2024, as well as written guidance subsequently emailed by the Attorney General's Office to all Board members, including the Individual Defendants, on July 11, 2024.~~

ARGUMENT AND CITATION OF AUTHORITY

I. RULE 12(f) PERMITS STRIKING OF ANY ALLEGATIONS CONTAINING REFERENCES TO INADMISSIBLE EVIDENCE RELATED TO PRIVILEGED COMMUNICATIONS BETWEEN DEFENDANTS AND THEIR COUNSEL.

Under the Georgia Civil Practice Act, like the Federal Rules of Civil Procedure, it is proper to strike from a pleading any redundant, immaterial, impertinent, or scandalous matter. O.C.G.A. § 9-11-12(f). "One test as to whether matter in a pleading is irrelevant, immaterial or impertinent is whether evidence in support of it would be admissible." *Schaefer v. Mayor & Council of the City of Athens*, 120 Ga. App. 301, 304 (1969) (citing *Schenley Distillers Corp. v. Renken*, 34 F. Supp. 678). "Impertinence" for the purposes of a Rule 12(f) motion to strike has been said to consist of "any allegation not responsive nor relevant to the issues involved in the litigation." *Northwestern Mut. Life. Ins. Co. v. McGivern*, 132 Ga. App. 297 (1974). Though

motions to strike allegations in a complaint on the basis that the evidence will not be admissible at trial are generally disfavored due to the fact that the early nature of the proceeding can make it difficult for the trial court to determine what matters are truly relevant, granting a motion to strike is proper when it meets the "no possible bearing" test. *Chappuis v. Ortho Sport & Spine Physicians Savannah,* 305 Ga. 401, 407 (2019). Under this test, matters in pleadings may be stricken when it is "clear that it can have no possible bearing upon the subject matter of the litigation … ." *Id.* Because the inadmissibility of material protected by the attorney-client privilege is clear, even at this early stage of litigation, the allegations in question meet the "no possible bearing" test and must be stricken under Rule 12(f).

II. THE COMMUNICATIONS DESCRIBED IN PLAINTIFFS' COMPLAINT RELATE TO PRIVILEGED COMMUNICATIONS THAT WOULD BE INADMISSIBLE IN EVIDENCE UNDER O.C.G.A. § 24-5-501.

Georgia's evidence code excludes certain types of communications from evidence on the grounds of public policy, including communications between attorney and client. O.C.G.A. § 24-5-501(a)(2). "Once an attorney-client relationship has established between an attorney and [an organizational] client, the legal advice confidentially communicated to the authorized agents of the client is protected from discovery, and testimony concerning the content of such advice is inadmissible on grounds of public policy. *See S. Guar. Ins. Co. v. Ash*, 192 Ga.App. 24, 27 (1989)(finding that relationship between attorney and corporate client is protected from discovery and inadmissible in evidence). The statutes "make no distinction between *legal* advice given in regard to specific cases pending and *legal* advice concerning day-to-day business matters." *Id.* at 27-28 (emphasis supplied). Nor is there any distinction between confidential advice that is requested specifically by the client or "preventive legal advice that is confidentially provided sua sponte by the lawyer to the *authorized* agents with whom he regularly delas of his

established corporate client." *Id.* at 28 (emphasis supplied).

The attorney-client relationship between the Office of the Attorney General and the State Election Board is well established. The Georgia Attorney General is a constitutionally elected official who is required to "act as the legal advisor of the executive department, . . . and shall perform such other duties as shall be required by law." Ga. Const. 1983, Art. V, Sec. III, Para. IV. Consistent with this constitutional mandate, O.C.G.A. § 45-15-34 vests the Department of Law "with complete and exclusive authority and jurisdiction in all matters of law relating to the executive branch of the government." As the exclusive legal advisor to the Executive Branch of state government, the Attorney General has an attorney-client relationship with the State Election Board. *See* 2024 Op.Att'y Gen. No. 24-1. Therefore, the attorney-client relationship having been established between the Office of the Attorney General and the State Election Board, any testimony concerning the content of legal advice given by the Attorney General's Office to the State Election Board is inadmissible on grounds of public policy. *Ash*, supra, 192 Ga. App. at 27-28.

III. ANY REFERENCES TO ADVICE GIVEN BY THE ATTORNEY-GENERAL'S OFFICE TO THE STATE ELECTION BOARD SHOULD BE STRICKEN FROM PLAINTIFFS' COMPLAINT.

It appears that Plaintiffs do not have firsthand knowledge of any communications between the Office of the Attorney General and the State Election Board. Rather, each of their allegations are made "on information and belief." Presumably, their information is drawn from newspaper articles that have reported on the contents of communications allegedly provided to one or more media sources[1]. Plaintiffs have not explained how they intend to provide admissible

[1] Defendants do not admit that the allegations contained in Plaintiffs' complaint accurately describe any legal advice that their counsel provided. However, to contradict the allegations and correct any inaccuracies in the Plaintiffs'

evidence of these alleged communications at trial if their only source of this information stems from newspaper accounts that would be inadmissible hearsay.

However, to the extent that these allegations remain in the Complaint, they remain before this Court for the purposes of any further trial that may take place in this matter. As such, the presence of such information contained in the Plaintiffs' Complaint is prejudicial to the Defendants and should be stricken. The pleaded matters constitute communication between the Attorney General's Office and the Defendants, made in good faith in the performance of a legal duty, which is privileged pursuant to O.C.G.A. § 24-5-501(a)(2). The subject matter of the contentions asserted are matters that shall not be subject to discovery or admitted into evidence, or considered for other purposes in this action. They are therefore irrelevant, immaterial and impertinent and subject to being stricken under O.C.G.A. § 9-11-12(f).

IV. NO "WAIVER" OF THE ATTORNEY-CLIENT PRIVILEGE HAS BEEN MADE BY THE STATE ELECTION BOARD.

Though Plaintiffs do not specify the source of their "information and belief" as to the advice they claim that the Attorney General's Office gave to the State Election Board, to the extent any legal advice was disclosed to a third party, this disclosure is insufficient to amount to a waiver of privilege on behalf of the Board. Communications between an attorney and client are generally recognized as inadmissible even in cases in which the communications have been subject to some form of disclosure unless there is clear evidence of intentional waiver. *See Marriott Corp. v. American Academy of Psychotherapists, Inc*., 157 Ga. App. 497, 501-502 (1981). In *Marriott,* the Court stated:

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allegations, Defendants would then be forced to introduce evidence of the actual communications between Defendants and their counsel. The fact that the only way to rebut Plaintiffs' inaccurate descriptions of privileged communications is by waiving their privilege to disclose the actual communications further illustrates the absurdity that would result if these allegations are not stricken from Plaintiffs' complaint.

> Though the attorney/client privilege has rarely been discussed at length by our courts, it is generally accepted that "[t]he privilege in question is for the protection and benefit of the client, not of the attorney, so that **the client's disclosures may not be used against him** in controversies with third persons, and so it is designed to secure the client's confidence in the secrecy of his communication, and to promote greater freedom of consultation between clients and their legal advisers, its object being to secure freedom in communications between attorney and client in order that the former may act with full understanding of the matters in which he is employed."

Id. (emphasis added). The Court added that "the circumstances under which the defendant's counsel came into possession of the letter would not render it admissible. It was a confidential communication from client to attorney, and is protected . . ." *Id*

When a confidential communication is disclosed to a third party, the mere fact that a third party has come into possession of confidential communications is not evidence of waiver. *See* State v. Ledbetter, 318 Ga. 457, 463 (2024)("[I]n the absence of any evidence that the client knew about and approved of the disclosure, an attorney's disclosure alone, even if it was intended to benefit the client, does not establish that such disclosure was authorized."). See also *Rouse v. State*, 275 Ga. 605, 607 & n.12 (571 SE2d 353) (2002) (affirming the trial court's denial of admission into evidence a tape recording of a witness talking to his attorney, where the "record fail[ed] to establish conclusively" how the defendant obtained the recording but where the attorney "apparently … inadvertently disclosed" the recording and the record was "devoid of any evidence that shows that [the witness] authorized the release of this tape to anyone")

Though it is unclear how Plaintiffs purport to have information or belief about the alleged communications between Defendants and their counsel, it is clear that there is no evidence that there has been a clear and intentional waiver on the part of the Board. Even assuming for the purposes of argument that a board member or the executive director might have provided these

communications to a third party, this would not operate as a waiver of privilege on behalf of the Board. In *Sampson v. Sch. Dist.*, 262 F.R.D. 469, 479 (E.D. Pa. 2008), a federal district court considered similar circumstances and found that a school board president lacked the unilateral authority to waive the board's privilege when he disclosed privileged information to a third party. Noting that the president could only execute legal documents "when directed by the board," the court noted that "[i]f a board president cannot execute even minor contracts and 'other papers' without the board's approval, we conclude that the board president cannot waive the attorney-client privilege -- a much more significant decision -- on behalf of the school district without the board's approval." *Sampson,* 262 F.R.D. at 479.

Similarly, no single board member can waive privilege on behalf of the board, and neither can the executive director. Three voting members of the board are necessary to constitute a quorum, which is necessary to exercise the powers and perform the duties of the board. O.C.G.A. § 21-2-30(d). Further, O.C.G.A. § 21-2-30(k)(4), which governs the Georgia State Election Board, states that the executive director shall "**[w]ith the approval of the board**, enter into such contracts, leases, agreements, or other transactions with any person or agency as are deemed necessary to carry out the provisions of this chapter or to provide the services required by the board . . ." (emphasis added). Just as the board president in *Samson* could not waive privilege on behalf of the board because he could not execute simple contracts without board approval, the executive director of the State Election Board also cannot waive privilege on the board's behalf.

Because the references to advice or guidance given to Defendants by their counsel are prohibited from being the subject of discovery or admitted into evidence in this case, any allegation that contains such references should be stricken from the complaint.

CONCLUSION

For the forgoing reasons, Defendants respectfully request that this Court grant their motion to strike the above referenced allegations contained in Plaintiffs' complaint.

This 27th Day of September 2024.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day electronically filed the foregoing **MOTION TO DISMISS** with the Clerk of Court using the Odyssey e-filing system, which will send notification of such filing to the parties of record via electronic notification.

Dated: September 27, 2024.

/s/ Elizabeth Young
Elizabeth Young
Senior Assistant Attorney General