IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

STACEY KALBERMAN, Plaintiff, v. **GEORGIA GOVERNMENT TRANSPARENCY AND CAMPAIGN FINANCE COMMISSION, f/k/a GEORGIA STATE ETHICS COMMISSION**, et al., Defendants.	CIVIL ACTION FILE NO. 2012CV216247

PLAINTIFF STACEY KALBERMAN'S MOTION FOR SANCTIONS UNDER O.C.G.A. §§ 9-15-14(b), 9-11-37, & 15-1-3 AND BRIEF IN SUPPORT THEREOF

After two years of hard fought litigation and a week-long jury trial, Stacey Kalberman and her undersigned counsel again find themselves before this Court. The decision to return to Court was a hard one to make, but the grounds for the relief sought herein represent a total disregard for the judicial process that must be addressed by this Court. Thankfully, the type of conduct set forth in detail below rarely occurs during the course of legal proceedings. Accordingly, Kalberman believes that it is her obligation to bring this motion to correct this manifest injustice and fraud upon the Court.

While Kalberman does not yet know who is responsible for withholding critical evidence that was material to her claims in this case, neither side disputes that this evidence was, in fact, withheld from Kalberman and her attorney. It was not until Defendant Holly LaBerge made her primetime debut on television that Kalberman finally learned of this critical evidence that was intentionally concealed. The fact that Kalberman prevailed on her claims is of no consequence to the instant motion, because the statutes on which this motion relies do not justify abusive

litigation and bad faith discovery practices based on who wins the case. There still must be consequences for a party's misconduct, if and when it comes light. Otherwise, this case would become the guiding precedent for any litigant who wants to play hide-the-ball under the Georgia Civil Practice Act. Accordingly, Kalberman hereby moves the Court to impose sanctions under O.C.G.A. §§ 9-15-14, 9-11-37, and 15-1-3 against Defendants Georgia Government Transparency and Campaign Finance Commission, f/k/a Georgia State Ethics Commission (the "Commission") and Holly LaBerge, in her official capacity ("Laberge"), (collectively "Defendants"), and Defendants' counsel, the Office of the Attorney General of Georgia ("Defendants' Counsel"), showing the Court as follows: [1]

I. STATEMENT OF FACTS

On July 14, 2014, Kalberman learned of Defendants' and their Counsel's misconduct in withholding and alienating highly probative, relevant, and responsive documents from Kalberman's Counsel during the two-year pendency of this litigation. Specifically, through media reports and television interviews with LaBerge, it has now come to light that Chris Riley and Ryan Teague of the Governor's Office contacted LaBerge and allegedly "threatened" her in order to resolve the Commission's investigation into complaints against Governor Nathan Deal ("Deal Investigation"). LaBerge received these communications through phone conversations and text message correspondence, which she then emailed to her personal e-mail account to preserve the correspondence. LaBerge also memorialized the phone conversation and the text

[1] Out of an abundance of caution and to ensure compliance with the Court's Case Management Order, Kalberman's Counsel has contacted the Court's Chambers several times to determine if a discovery conference is required with respect to the instant Motion insofar as it raises discovery violations. (*See* Exh. M at 2). Based on the information provided by Chambers, it does not appear that the Court requires a settlement conference at this time, as Kalberman does not seek to compel discovery or obtain a protective order.

message correspondence in a memorandum ("Memorandum," attached at **"Exhibit A"**) that Commission Chairman Kevin Abernethy purportedly directed her to prepare.

Since LaBerge's revelation on prime time television of evidence not previously disclosed to Kalberman, several other key pieces of evidence also have come to light, all of which were subject to production to Kalberman.[2] This evidence includes, but is not limited to, text message correspondence between Riley and LaBerge (attached at **"Exhibit B"**) and a letter of recommendation from the Governor endorsing LaBerge to Leadership Georgia, an elite leadership organization (attached at **"Exhibit C"**). This evidence combined with the history of this case demonstrate that Defendants and/or their Counsel engaged in a concerted effort to conceal evidence and thwart Kalberman's ability to discover relevant material central to her claims.

The Discovery Requests and Responses – February 2013 through August 2013

On March 26, 2013, Kalberman propounded interrogatories and a request for production of documents to the Commission (attached at **"Exhibit D"**). In relevant part, in Request No. 2, Kalberman sought "the Commission's entire investigative file concerning Nathan Deal." Kalberman offered a privilege log and offered "that the documents will be viewed by counsel and Plaintiff only." The Commission responded, without objection or accepting Kalberman's offer of a privilege log, that it "will produce such documents to Plaintiff" (attached at **"Exhibit E"**). In June 2013, Defendants produced 13,198 pages of documents from the Deal Investigation file, which included correspondence, internal memoranda drafted by Commission staff, handwritten notes containing the Commission's work product, the revisions and drafts of

[2] Indeed, LaBerge's ongoing revelations continue without abatement. As recently as August 6, 2014, two days before the filing of this motion, LaBerge issued a press release including photographic copies of the original text message correspondence between herself and Riley and Teague. (attached at **"Exhibit Z"**). As discussed herein, such correspondence is undeniably responsive to Kalberman's discovery requests and was obviously in LaBerge's possession, but it was never produced.

consent orders resolving the complaints, and purportedly all of the correspondence reflecting negotiations between the Commission and Deal's representatives (attached at **"Exhibit F"**). However, the thousands of documents produced in response to this request did not include the Memorandum, text message correspondence between LaBerge and Riley and Teague, or e-mails created by LaBerge for the purpose of preserving that text message correspondence.

On April 17, 2013, Kalberman propounded interrogatories and requests for production of documents to LaBerge. Kalberman's Request No. 2 sought "any and all correspondence, including e-mails to and from your Personal E-mail Account(s) and/or your Commission E-mail Account(s) . . . concerning any issue relating to this lawsuit filed by Plaintiff, the Commission's investigation into alleged ethics violations by Nathan Deal (the "Deal Investigation"), [and] the State of Georgia Governor's Office" (attached at **"Exhibit G"**). Kalberman's Request No. 5 sought "any and all correspondence, including e-mails to and from your Personal E-mail Account(s) and/or your Commission E-mail Account(s), between yourself and any employee or representative of the State of Georgia Governor's Office, since July 1, 2011" (*see* Exh. G).

LaBerge, through her Counsel, responded to both requests, without objection, that she "will produce such documents to Plaintiff" (attached at **"Exhibit H"**). Contrary to her representations that the documents would be produced without objection, the documents produced by LaBerge in response to this request did not include the text message correspondence between LaBerge and Riley and LaBerge and Teague, e-mails created by LaBerge preserving that text message correspondence, or other correspondence between LaBerge and the Governor's Office, such as the Leadership Georgia recommendation.

In March of 2013, having received information that LaBerge was using her personal e-mail account to circumvent the Open Records Act, Kalberman also served a subpoena on

Google to obtain access to LaBerge's personal e-mail account (attached at "Exhibit I"). In response, LaBerge filed a motion to quash the subpoena, *inter alia*, because "the subpoena seeks information that is neither relevant or [sic] material to the Plaintiff's cause of action" (attached at "Exhibit J"). Defendants' Counsel argued to Kalberman's counsel that Kalberman should withdraw the subpoena because of the sensitive materials that were maintained in the subpoenaed personal e-mail accounts. (Worth Affidavit ¶ 34). The parties negotiated and resolved this discovery dispute in good faith through an agreement, under which Kalberman agreed to withdraw the subpoena in exchange for LaBerge's production of all work-related e-mails. The parties also recognized that LaBerge would produce any emails from her personal account that were also responsive to Kalberman's previous discovery requests propounded to LaBerge (*Id.* ¶ 35). Thereafter, LaBerge did produce some highly relevant and probative e-mail correspondence from her personal e-mail account. However, the e-mails produced by LaBerge did not include the e-mails created by LaBerge preserving the Riley and Teague text message correspondence, or other correspondence between LaBerge and the Governor's Office.

In addition to seeking relevant and responsive documents through the discovery process, on July 23, 2013, Kalberman sought documents under the Open Records Act, pursuant to O.C.G.A. § 50-18-70, *et seq*, which is even broader in scope than the Civil Practice Act and requires strict compliance by state agencies. In this Open Records Act request, Kalberman sought, *inter alia*, "[a]ny and all e-mails sent to or received by holly.laberge@gmail.com . . . containing communications, information, documents, discovery requests, files, or data related to Complaints filed with the Georgia State Ethics Commission and the Georgia Government Transparency and Campaign Finance Commission concerning Nathan Deal and the subsequent investigation/consent orders/fines" (attached at "Exhibit K"). In response, LaBerge informed

Kalberman that "Each of the items requested in the enclosed email dated July 23, 2013, has already been submitted to you in the context of the discovery of the cases. We have given you all the information that we are in possession of regarding the Stacey Kalberman, Sheri Streicker, and Nathan Deal cases" (attached at **"Exhibit L"**).

Finally, on July 31, 2013, Kalberman's Counsel deposed LaBerge. During this examination, LaBerge did not reveal the existence of this relevant documentation or the communications between herself and the Governor's Office. Instead, when questioned generally about the existence of correspondence with Riley, LaBerge testified that "Well, you've been given all of the documents in the Deal case so - -." (LaBerge Dep. at 160:11-12). Not until the following day, when Kalberman's Counsel deposed Ms. Elisabeth Murray-Obertein, was it revealed that LaBerge had received a call from the Governor's Office while she was on vacation at the beach, and that she had felt pressured to settle the Deal complaints. However, Kalberman was not in possession of any of this information when deposing LaBerge because she never received the responsive documents, including the Memorandum and related correspondence.

After this case was transferred from the Honorable Constance Russell to the Honorable Ural Glanville, the Court entered a Case Management Order stating that "the Court reminds the parties that, under the Civil Practice Act, they have a duty to fully cooperate in discovery and that the failure to fulfill this obligation may result in sanctions." (attached as **"Exhibit M"**). Per the Court's Order, the discovery period closed on August 30, 2013, at which point Defendants' and their Counsel had not produced numerous pieces of relevant and responsive evidence despite the various methods that Kalberman had used in an effort to obtain information during discovery.

Pre-Trial Matters, Trial, and Settlement– February 2014 to May 2014

On February 7, 2014, Defendants filed a Motion in Limine, seeking to exclude, *inter alia*,

"[a]ny and all testimony from any of the witnesses concerning the resolution of the complaints against the Nathan Deal campaign" (attached as **"Exhibit N"**). Specifically, Defendants stated that they anticipated Kalberman would seek to introduce evidence "[t]hat the Governor's office allegedly pressured LaBerge" and that "LaBerge frequently spoke privately about the investigation with individuals in the Governor's office." (Exh. N at 6-7). Defendants and their Counsel sought to exclude this evidence despite having exclusive knowledge of the Memorandum, the withheld correspondence, and LaBerge's own documented allegation that the Governor's Office threatened her to resolve the Deal Investigation. (*See id.* at 8). Defendants and their Counsel presented this disingenuous motion to the Court despite being fully aware that Kalberman alleged that she was constructively terminated for investigating the Deal complaints too closely, and then was replaced with someone who the Governor's Office believed it could influence to favorably resolve those complaints. Thus, the information contained in the withheld Memorandum and correspondence was highly probative in proving Kalberman's case, including her burden to show that Defendants' stated excuse for the adverse actions was pretextual.

However, in considering the Motion in Limine, the Court did not have this critical, probative evidence that would have aided the Court in rendering its decision. At the hearing, Defendants' Counsel argued that "[t]he only link . . . is going to be that Holly LaBerge was hired and Holly LaBerge was there," despite having exclusive possession of evidence showing a link between the Governor's Office "threatening" LaBerge to resolve the Deal complaints. Furthermore, Defendants had in their possession additional evidence of links to the Governor's office, including text messages from Riley stating that the Governor's office preferred LaBerge's "common sense" over Kalberman and the Governor's letter of recommendation for LaBerge. (*Compare* Hearing Transcript at 4:22-25, attached as **"Exhibit O"**, *with* Exhs. A-C). Because

Defendants and/or their Counsel concealed this relevant and probative evidence from Kalberman and the Court, the Court denied the Motion in Limine but qualified its ruling to see "how the evidence develops as to whether or not it's relevant." (Exh. O at 17:16-17). The Court further asked Kalberman's Counsel "to keep it related to those particular things and not just go far afield of what you think of where it may go" or the Court would "just exclude [LaBerge's] testimony." (*Id.* at 17:25-18:8).

Defendants and their Counsel filed another disingenuous pre-trial motion before the Court, seeking that the Court quash the subpoena requiring Governor Nathan Deal to appear at trial as a witness (attached as **"Exhibit P"**). Defendants claimed that "The Governor [] has no firsthand knowledge of the facts relevant to this action" and "[t]he Governor has no knowledge material enough to warrant his presence at this trial." (Exh. P at 2-3). Yet, Defendants and/or their Counsel were in exclusive possession of correspondence between LaBerge and members of the Governor's personal staff, a memorandum detailing a phone conversation between LaBerge and the Governor's Executive Counsel, and a recommendation from the Governor himself on behalf of LaBerge. (*See* Exhs. A-C). If the Court had been aware of this evidence, it would have been apparent that the Governor's testimony would have been highly probative and relevant to explain why his personal staff believed that they could pressure Kalberman's replacement into settling the complaints against him and whether the Governor had prepared a recommendation in exchange for LaBerge's favorable handling his case.

However, because Defendants and/or their Counsel had withheld certain evidence, the Court entered an Order holding that "[n]othing in the record, save Plaintiff's assertions, suggests that Governor Deal was involved in the decisions related to Plaintiff's testimony" (attached as **"Exhibit Q"**). The Court continued, "Simply put, the Court finds that Plaintiff has failed to

demonstrate that Governor Deal's testimony is relevant or that the sought-after information cannot be obtained from other, less burdensome sources." (*Id.* at 4). Notably, Kalberman had no evidence to directly link the Governor or his Office because Defendants and/or their Counsel concertedly concealed critical evidence, despite Kalberman's repeated and thorough attempts in the discovery process to obtain the requested information through a variety of "less burdensome sources."

The case proceeded to trial over the course of the first week of April 2014. Kalberman's Counsel, sensitive to the Court's cautionary instruction and the possibility of an appeal based on this evidentiary dispute, limited her questioning of the witnesses relating to the resolution of the Deal Investigation. (Worth Affidavit ¶ 46). Moreover, Ms. Murray-Obertein's testimony, which constituted the only evidence in Kalberman's possession and presented to the jury regarding the link between the Governor's Office and LaBerge's resolution of the Deal Investigation, was partially excluded as hearsay. Despite missing critical evidence that was highly probative of the case, the jury found sufficient evidence to enter a verdict in Kalberman's favor and awarded her $700,000 in compensatory damages. Following the jury verdict, the parties agreed to compromise Kalberman's amount of attorneys' fees, litigation expenses, and back pay, in exchange for foregoing an appeal (attached as **"Exhibit R"**).[4]

Revelations in the Press – July 2014

On July 14, 2014, LaBerge provided an exclusive "tell all" interview to Dale Russell, a local television journalist, wherein she detailed the Memorandum, and showed the e-mail and text message correspondence on camera (attached as **"Exhibit S"**). That same day, Defendants' Counsel released the Memorandum to the press. Thereafter, the Atlanta Journal-Constitution

[4] As the prevailing party, Kalberman was entitled to $627,759.25 in attorneys' fees and $9,478.39 in litigation expenses incurred during the course of litigation. She was also entitled to $65,000 as a back pay award. In exchange for the Defendants' agreement not to appeal the verdict, Kalberman settled this amount for $450,000. (Worth Affidavit ¶ 14).

filed a Complaint with the Attorney General's Office alleging that Defendants failed to provide the Memorandum in response to numerous Open Records Act Requests since July 2012 (attached as **"Exhibit U"**).

In the ensuing media frenzy, Defendants' Counsel issued a press release ("AG Press Release", attached as **"Exhibit V"**) stating that it had been in possession of the Memorandum since August 2013, but intentionally decided not to produce it in this case. In addition, Defendants' Counsel acknowledged that the e-mails maintained in LaBerge's e-mail account should have been produced pursuant to the agreement between Kalberman's Counsel and Defendants' Counsel, and that failure to produce those e-mails was a discovery violation. However, Defendants' Counsel specifically noted that they had never seen the responsive e-mails until LaBerge's televised interview. In turn, LaBerge's private civil attorney responded to the AG's Press Release with a letter, claiming that the Memorandum was "kept secret" by Defendants' Counsel (attached as **"Exhibit W"**). LaBerge was also "adamant" that she had told Defendants' Counsel about the correspondence between herself and the Governor's Office, and that Defendants' Counsel failed to produce the responsive documents.

While LaBerge and Defendants' Counsel have two entirely different recollections with respect to the concealed evidence in this case, all three sides now agree that the evidence was relevant and probative to Kalberman's claims and was not turned over to her counsel. Even more disturbing is that the Memorandum created by LaBerge documenting a purported threat by the Governor's Office days before the Governor's case went to hearing before the Commission was never placed in the Deal Investigation file. Instead, it appears that LaBerge hid the Memorandum away for safekeeping which, by extension, means that the document was alienated from the public and kept from Kalberman in the process. For these reasons, Kalberman now respectfully

requests that this Court impose sanctions against Defendants and/or Defendants' Counsel for their flagrant misconduct, bad faith litigation, and discovery abuses. Prior to bringing this motion, because this matter includes a discovery dispute, Kalberman's Counsel sought to confer with Defendants' Counsel in an effort to resolve this matter without further litigation. (*See* Worth Affidavit ¶ 49).

II. ARGUMENT AND CITATION TO AUTHORITY

A. This Court should impose sanctions under O.C.G.A. § 9-15-14(b) for Defendants' and their Counsel's bad faith, discovery abuses, and expansion of the proceedings

Under O.C.G.A. § 9-15-14(b), this Court may "assess reasonable and necessary attorney's fees and expenses of litigation . . . if it finds that an attorney or party unnecessarily expanded the proceeding by other improper conduct, including, but not limited to, *abuses of discovery procedures.*" (emphasis added); *see Santora v. Am. Combustion*, 225 Ga. App. 771, 774, 485 S.E.2d 34, 37 (1997) (awarding attorneys' fees under O.C.G.A. § 9-15-14(b) for a party's concealment of relevant evidence in discovery). "Improper conduct" includes breaching the duties of fairness to opposing counsel and candor to the Court, which duties prohibit "obstruct[ing] another party's access to evidence," "conceal[ing] a document or other material having potential evidentiary value," or "counsel[ing] another person to do any such act." G.R.P.C. Rules 3.3, 3.4. The duty of candor to the Court includes a duty to "preserve the integrity of the adjudicative process." *Id.* Rule 3.3 & cmt. 12.

The case of *Santora v. American Combustion* is particularly instructive in the unique factual scenario currently before the Court. In *Santora*, the appellate court upheld an award of sanctions imposed by the trial court, pursuant to O.C.G.A. § 9-15-14(b), because the plaintiff had "abused discovery by concealing from defendant [] a document important to the litigation." *Santora*, 225 Ga. App. at 771, 485 S.E.2d at 35. The concealment of this document was not

discovered until after the entry of the pretrial order, and the trial court responded to this concealment by dismissing the plaintiff's complaint in its entirety and entering an award of attorneys' fees to the opposing party. *Id.* at 772, 485 S.E.2d at 36.

In upholding the sanctions, the Georgia Court of Appeals noted the following facts of record: (1) instead of completing a privilege log, plaintiff's counsel sent a letter to opposing counsel stating that no documents had been withheld; (2) "[t]he plaintiff did not produce the document in discovery, nor did he testify about its existence when asked about conversations with [a relevant third party];" and (3) the evidence showed that the plaintiff's attorney was in possession of the document. *Id.* at 772-73. Accordingly, the appellate court held that the plaintiff had "wilfully attempted to conceal from his opponent a document that, at least facially, could have had a major impact on this litigation." *Id.* at 772, 485 S.E.2d at 36.

Likewise, the Georgia Supreme Court recently reiterated the importance of candor during the discovery process, in the unanimous, landmark opinion in *Ford Motor Co. v. Conley*, 294 Ga. 530, 757 S.E.2d 20 (2014). In *Ford Motor Co.*, the Georgia Supreme Court upheld the trial court's extraordinary grant of a new trial to the plaintiff, more than one year after a defense verdict at trial, due to the defendant's wilful concealment and misleading responses:

> If this case is to teach any lesson, it is that the civil discovery process is supposed to work to allow the parties to obtain the information they need to prove and defend their cases at trial before impartial juries. Discovery is not supposed to be a game in which the parties maneuver to hide the truth about relevant facts, and when a party does intentionally mislead its adversary, it bears the risk that the truth will later be revealed and that the judgment it obtained will be re-opened to allow a new trial based on the truth.

Id. at 559, 757 S.E.2d at 42. In the *Ford Motor Co.* case, the defendant provided a misleading interrogatory response indicating that it did not have insurance coverage, and failed to produce any of its insurance policies in response to the plaintiff's request for production of insurance

policy documents. *Id.* at 531-32, 757 S.E.2d at 25. One year later, it came to light that the defendant had a nationwide litigation practice of concealing insurance coverage during discovery in products liability litigation. *Id.* at 535-36, 757 S.E.2d at 26-27. The trial court found that the plaintiff "had no reason to know" of the withheld information and did not have the burden "to ferret out information that was clearly required to be produced under Georgia law." *Id.* at 536, 757 S.E.2d at 27. The Georgia Supreme Court held that the plaintiffs did not overlook the issue of the withheld information, and, instead, had propounded discovery requests that "were reasonably precise, straightforward, and unambiguous." *Id.* at 543, 757 S.E.2d at 30.

The Supreme Court further held that "[w]here a party simply answers a discovery request, the requesting party is entitled to believe the answer. Due diligence does not require the requesting party to disbelieve the substantive answers an opposing party has provided in discovery." *Id.* at 544, 757 S.E.2d at 32 (emphasis added). Here, as observed by the Supreme Court, Kalberman may never have learned of the existence of the withheld information and documents, had LaBerge not decided to give a "tell-all" interview where she described the Memorandum, text messages, and e-mails in question. (*See* Exh. S). Egregiously, LaBerge purposefully waited until after the trial to make this information public, showing that she possessed and wilfully concealed this information throughout the pendency of the litigation with Kalberman. This case involves more than one simple incident of discovery abuse. Instead, Kalberman was entitled to the concealed evidence through various methods that she employed in requesting documents during the discovery process, and the total failure of Defendants and/or their Counsel to produce these documents shows a wilful and concerted pattern of deception.

DEFENDANTS' AND/OR THEIR COUNSEL INTENTIONALLY WITHHELD THE E-MAIL CORRESPONDENCE

The parties do not dispute that LaBerge's e-mail correspondence was responsive to

Kalberman's discovery requests, and that the failure to produce it constitutes a discovery abuse. (*See* Exhs. V, W). Specifically, Kalberman sought any e-mails contained on LaBerge's personal e-mail account that were responsive to her discovery requests and/or related to Commission business in three ways: (1) by a request for production of documents under O.C.G.A. § 9-11-34; (2) by issuing a subpoena to Google; and (3) under the Open Records Act. (*See* Exhs. G, I, K). Notably, LaBerge's preservation and concealment of this correspondence on her personal e-mail account, rather than in the Commission's public file, demonstrates a purposeful and knowing violation of the Open Records Act and wilful intention to withhold information in Kalberman's case. (*See* Kalberman Affidavit ¶¶ 10-24). Defendants' Counsel has now admitted that the e-mail correspondence was responsive "and should have been produced," but lays the blame on LaBerge for failing to turn it over. (*See* Exh. V). Meanwhile, LaBerge claims that she informed her Counsel about the e-mails and was told that they were not responsive. (*See* Exh. W). The contradictory accounts between LaBerge and Defendants' Counsel demonstrate the culpability of one of these parties in the active concealment of these documents.

DEFENDANTS AND/OR THEIR COUNSEL INTENTIONALLY WITHHELD TEXT MESSAGE CORRESPONDENCE

Likewise, Defendants and/or their Counsel failed to produce text message correspondence between LaBerge and members of the Governor's Office, which was directly responsive to Kalberman's request and highly relevant to her theory of liability. (*See* Exh. B). Notably, Defendants responded to Kalberman's request for correspondence without objection and misleadingly asserted that they would produce the requested documents. (*See* Exh. H); *Santora*, 225 Ga. App. at 772, 485 S.E.2d at 36 (finding wilful concealment where the party asserted that it had not withheld any responsive documents). The Memorandum, which contained the full text message correspondence with Riley and Teague quoted therein, was explicit notice to

Defendants' Counsel that responsive correspondence existed and should be produced to Kalberman. (*See* Exh. A). Thus, at a minimum, Defendants' Counsel was obligated to confer with LaBerge and obtain that text message correspondence to produce it to Kalberman.[5]

According to LaBerge, Defendants' Counsel never asked her for copies of the text message correspondence, despite having knowledge of it since June 2013. (*See* Exh. W). Defendants' Counsel also failed to notify Kalberman that relevant, responsive documentation had been withheld under objection and failed to prepare a privilege log, so as to allow Kalberman to seek aid from the Court in obtaining the withheld documentation, pursuant to O.C.G.A. § 9-11-37. *See* U.S.C.R. 6.4; *Santora*, 225 Ga. App. at 772, 485 S.E.2d at 36 (finding wilful concealment where the party failed to enter a privilege log alerting opposing party that documents had been withheld).

DEFENDANTS' AND/OR THEIR COUNSEL INTENTIONALLY WITHHELD THE MEMORANDUM

The Memorandum was directly responsive to Kalberman's request for production of documents of "the entire Deal Investigation file." (*See* Ex. D). Defendants' response to this discovery request misleadingly stated that it was producing the requested documents, without objection, and without seeking the benefit of a privilege log, as was offered by Kalberman's Counsel. (*See* Exh. E). Yet, in producing the 13,198-page "entire Deal Investigation file," the Memorandum was withheld. (*See* Exh. F). The Deal Investigation file, as produced to Kalberman, includes numerous memorandum prepared by Commission staff for internal use and memorializations of phone conversations and correspondence between the Commission and Deal's representatives regarding resolution of the Investigation. Thus, there is no reasonable justification for failing to produce the Memorandum with the rest of the voluminous Deal

[5] Less than a month after the revelation of the Memorandum to the public, LaBerge has now come forward with the original text message correspondence. (*See* Exh. Z).

Investigation file. (*See* Kalberman Affidavit ¶¶ 17-24). Yet, when pressed, LaBerge testified under oath that "Well, you've been given all of the documents in the Deal case so - -" (LaBerge Dep. at 160:11-12); *see Santora*, 225 Ga. App. at 772 (finding wilful concealment where the party neither produced the document in discovery, "nor did [s]he testify about its existence").

Likewise, in response to an Open Records Act request, LaBerge represented to Kalberman that everything in the Deal case "has already been submitted to you in the context of the discovery of the cases." (*See* Exh. L); *Santora*, 225 Ga. App. at 772, 485 S.E.2d at 36 (finding wilful concealment where the party represented to opposing counsel that no responsive documents had been withheld). Kalberman, the former Executive Secretary of Commission, has attested that the Open Records Act prohibits: (1) hiding the Memorandum from public view; (2) maintaining a "personal file" that conceals sensitive documents; and (3) alienating the Memorandum from the Deal Investigation file so that it would not be subject to the Open Records Act. (*See* Kalberman Affidavit ¶¶ 10-24); O.C.G.A. § 50-18-70, *et seq.* Yet, Defendants failed to produce this document in response to Open Record Act requests, either to Kalberman or to representatives of the media. (*See* Exhs. K, L, U). Although the matter of violations of the Open Records Act is not before this Court, these violations show a concerted pattern of concealment of the Memorandum from Kalberman and the public, in blatant disregard of Defendants' duties under the Civil Practice Act and the Open Records Act.

Finally, LaBerge has represented to the media that Defendants' Counsel kept the Memorandum "secret" and "urged her not to mention the memo during her testimony in the Kalberman case." (*See* Exhs. T, W). If true, this egregious discovery abuse, unethical conduct, and fraud upon the Court warrants stiff sanctions. *See Santora*, 225 Ga. App. at 773, 485 S.E.2d

at 36 (finding wilful concealment where the evidence showed that the party's attorney was in possession of the disputed document and withheld it in discovery).

THESE EGREGIOUS DISCOVERY ABUSES HAVE UNNECESSARILY EXPANDED THE PROCEEDINGS

Additionally, Defendants and their Counsel unjustifiably expanded the proceedings by filing a motion in limine prior to trial, seeking exclusion of all evidence relating to the resolution of the Deal complaints, despite being in exclusive possession of the Memorandum and other probative correspondence. (*See* Exh. N). Thus, Kalberman was prejudiced in defending against this Motion, and the Court was crippled in making a fair determination in this highly factual evidentiary dispute. Indeed, the Court stated that it wanted to see "how the evidence develops as to whether or not it's relevant" because there was little direct evidence in the record to support Kalberman's position that the resolution of the Deal complaints was related to Kalberman's termination. (*See* Exh. O at 17:16-17).

However, had the Court been presented with the withheld evidence, the Court likely would have found it highly relevant that (1) the person from the Governor's Office that called LaBerge regarding the position of Executive Secretary—while Kalberman remained in that position—was the same person that called LaBerge one year later to "threaten" her to resolve the Deal Investigation; (2) Riley stated that the Governor's Office preferred LaBerge's "common sense" over Kalberman; and (3) the Governor himself wrote a letter of recommendation for LaBerge. (*See* Exhs. A-C). Yet, because Defendants and/or their Counsel wrongfully concealed this information from the Court, the Court was not able to weigh all of the evidence in resolving this evidentiary dispute and the jury was deprived of probative evidence.

Similarly, Defendants filed a motion to quash the subpoena to Governor Deal that misleadingly asserted that there was no evidence that he had relevant knowledge. (*See* Exh. P).

The Court granted the motion to quash because there was "[n]othing in the record, save Plaintiff's assertions" to support Kalberman's claim. (*See* Exh. Q) (emphasis added). Yet, had Kalberman been in possession of the withheld evidence, there would have been evidence before the Court that Governor Deal's Office contacted LaBerge to obtain the position of Executive Secretary while Kalberman remained in the position, thereafter, again contacted LaBerge to influence the resolution of the Deal Investigation, and repaid the favor in the form of an exclusive letter of recommendation from the Governor. Thus, these discovery abuses impeded not only Kalberman's trial of her case, but also the Court's ability to resolve disputes before it.

This misconduct has expanded these proceedings by calling into question the fairness of the trial, and Kalberman is now entitled to seek a new trial based on this newly discovered evidence, if she so desired. *See* OC.G.A. § 9-15-14(b); *Ford Motor Co.*, 294 Ga. at 544, 757 S.E.2d at 32. Indeed, Kalberman considered rescinding the settlement agreement with Defendants in its entirety because it was procured by the fraud of Defendants and/or their Counsel. However, the extreme remedy of rescission, which would obviate the verdict itself, would have caused an injustice to the jurors who spent long hours listening to the evidence and to the Court that expended its judicial resources in presiding over the trial. At the end of the trial, the jury rendered a fair and impartial verdict, and out of deference to the jurors and the judicial process, the verdict should stand. Further, to retry this case would demand even more expense to the taxpayers of this state who already have paid to try a case that should never have been tried. For these reasons, Kalberman does not seek a new trial.

Instead, as a sanction against Defendants and/or their Counsel for their misconduct in withholding this evidence throughout the pendency of Kalberman's suit, Kalberman seeks sanctions in amount that the Court determines is appropriate to punish and deter such conduct,

and to send a message to the legal community that fraud in the discovery process is not an acceptable litigation tactic.[6] *See Santora*, 225 Ga. App. at 772, 485 S.E.2d at 36. Additionally, Kalberman seeks the amount of attorneys' fees incurred in bringing this motion in the interests of justice. *See* O.C.G.A. §9-15-14(d). Kalberman agrees to donate any sanction amount awarded in excess of the expense incurred in bringing this motion to the State Bar of Georgia to fund ethics education. Thus, Kalberman respectfully requests the Court to impose $252,237.64 in sanctions against Defendants and/or their Counsel and award $47,524.18 in attorneys' fees and costs incurred from July 14, 2014 through the date of the filing of this pleading.[7]

B. <u>This Court should award attorneys' fees and sanctions under O.C.G.A. § 9-11-37(b) and (d), for egregious and admitted discovery abuses in this matter</u>

"Trial courts have a wide latitude in the management of discovery." *Gropper v. STO Corp.*, 276 Ga. App. 272, 276, 623 S.E. 2d 175, 179 (2005). "Trial judges have a broad discretion in controlling discovery, including imposition of sanctions." *Id.* (quoting *Butler v. Biven Software*, 238 Ga. App. 626, 522 S.E.2d 1 (1999)); *see also Daniel v. Corp. Prop. Inves.*, 234 Ga. App. 148, 505 S.E.2d 576 (1998). Generally, there are two sources of sanctions under O.C.G.A. § 9-11-37: (1) failure to comply with a court's order compelling discovery, following a party's filing of a motion to compel such discovery under subsection (b); and (2) a total failure to respond to a request for discovery under subsection (d).

Georgia Courts have recognized an exception to this statutory dichotomy to protect defrauded parties in extraordinary cases such as this one, where the opposing party responds to

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[6] Kalberman proposes that an appropriate amount would be the difference between the actual amount that she was entitled to as a prevailing party – including her back pay, attorneys' fees, and litigation expenses – and the amount she actually received in a compromised settlement of this matter. (*See* Worth Affidavit ¶ 14).

[7] If this Court awards sanctions, then Kalberman's Counsel will supplement this amount as necessary to include fees incurred after August 3, 2014 in further prosecuting this motion.

discovery with a false response that conceals the existence of responsive information and documentation and prevents the requesting party from filing a motion to compel and obtaining an order. *See Orkin Exterminating Co. v. McIntosh*, 215 Ga. App. 587, 591, 452 S.E.2d 159, 164 (1994); *Santora*, 225 Ga. App. at 773, 485 S.E.2d at 36 (upholding the trial court's imposition of the drastic, ultimate sanction of dismissing the plaintiff's complaint, despite the fact that the plaintiff had never violated a court's order); *see also Ford Motor Co.*, 294 Ga. at 544, 757 S.E.2d at 32 (noting the exception to the general prerequisite of obtaining an order to compel when a party provides a false response). Georgia Courts established this exception to the statute's requirements because "[a] litigant will not be heard to contend that its own conduct has removed it beyond the reach of sanctions, when it has frustrated the orderly process prescribed in O.C.G.A. § 9-11-37 by false or erroneous responses to interrogatories." *Orkin Exterminating Co.*, 215 Ga. App. at 591, 452 S.E.2d at 164; *see Santora*, 485 Ga. App. at 774, 485 S.E.2d at 37 (holding that the party's "false and misleading discovery responses prevented [the requesting party] from compelling production of this document.").

The Georgia Court of Appeals has held that, for purposes of O.C.G.A. § 9-11-37(d) sanctions, "a defendant's intentional false response to a discovery request equates to a total failure to respond." *MARTA*, 292 Ga. App. at 532, 664 S.E.2d at 895. In *MARTA*, during the trial, the court and the plaintiff learned that the defendant intentionally made false responses to discovery and destroyed documents. *Id.* at 535; 664 S.E.2d at 897. Accordingly, the trial court struck the defendant's answer, entered judgment in favor of the plaintiff, and continued the trial before the jury on the issue of damages only. *Id.* In affirming the trial court's imposition of this drastic sanction, the appellate court held that a false response is worse than no response because "[i]f the response is false, however, the party serving the interrogatory may never learn that it has

not really received the answer to the interrogatory. The obstruction to the discovery process is much graver when a party" provides a false response. *Id.* at 536, 664 S.E.2d at 897.

Thus, "when a defendant wilfully, knowingly, falsely, consistently and unequivocally denies the existence of requested discoverable documents, the plaintiff is not required to obtain an order compelling discovery before seeking sanctions under O.C.G.A. § 9-11-37(d)(1)." *Howard v. Alegria*, 321 Ga. App. 178, 189, 739 S.E.2d 95, 105 (2013). "Instead, prior to the imposition of such sanctions, all that is required is a request for sanctions, notice to all parties, and a motion hearing to determine if the offending party's failure to respond was wilful." *Id.*

In *Orkin Exterminating Co.*, the Georgia Court of Appeals held that an award of sanctions in the amount of fees necessitated by the defendant's false discovery response was proper to "recompense plaintiffs for the expenses they incurred as a result of the defendant's conduct" because the defendant's conduct not only necessitated substantial expense to plaintiffs, "it caused a mistrial and the waste of substantial time, money, and judicial resources." 215 Ga. App. at 590, 452 S.E.2d at 163. Moreover, the Court held that "[t]o condone such conduct would force parties to assume the falsity of every sworn interrogatory response and file endless motions preserving their right to relief." *Id.* at 591, 452 S.E.2d at 164; *see City of Griffin v. Jackson*, 239 Ga. App. 374, 377-78, 520 S.E.2d 510, 513 (1999) (upholding the striking of defendant's answer as sanctions for a "consistent pattern of conduct [] calculated to frustrate any attempt to locate the [concealed documents] and to mislead the court and the plaintiff as to the fate of the [documents]"); *Res. Life Ins. Co. v. Buckner*, 304 Ga. App. 719, 737, 698 S.E.2d 19, 34 (2010) (upholding sanction award in class-action lawsuit due to the party's "patently false discovery responses and its misrepresentations to the trial court" regarding the non-existence of

responsive documents). The court upheld the sanction award in the *Resource Life Insurance Company*, despite the defendant's claim that the sanction would total in excess of $400 million.

Here, as exhaustively set forth above, Kalberman propounded various discovery requests and a subpoena to the Commission and LaBerge, which would have required disclosure of the Memorandum, text message correspondence, and e-mails. (*See* Exhs. D, G, I, K). Defendants responded, without objection, that they would produce all documentation and testified under oath that all documents had been provided. (*See* Exhs. E, H, L; LaBerge Dep. at 160:11-12). These discovery responses were false when provided because the Memorandum, text message correspondence, and e-mails were in Defendants' possession at the time that Defendants answered discovery in 2013. Today, LaBerge claims that she did in fact produce all of the responsive documentation to Defendants' Counsel, who intentionally kept the Memorandum "secret" instead of producing it with the rest of the Deal Investigation file. (*See* Exh. W). Defendants' Counsel has admitted that the e-mail correspondence preserving the text messages was responsive to Kalberman's discovery requests and lays the blame on LaBerge for failing to turn the e-mails over to its office. (*Compare* Exh. V *with* Exh. W).

At this time it is not known which party is to blame for these flagrant discovery abuses. However, it is undisputed that there were serious discovery abuses and concealment of relevant documentation in this case. This misconduct has resulted in "the waste of substantial time, money, and judicial resources," such that this Court should impose sanctions against Defendants' and/or Defendants' Counsel for this serious discovery misconduct.

C. <u>This Court should sanction Defendants' and/or their Counsel under O.C.G.A. § 15-1-3</u>

Pursuant to O.C.G.A. § 15-1-3, this Court has the inherent power "[t]o control, in the furtherance of justice, the conduct of its officers and all other persons connected with a judicial

proceeding before it, in every matter appertaining thereto." The superior court "possesses inherent powers not specifically granted. Its judges are charged with the duty of administering justice and with maintaining the dignity and authority of the court." *Johnson v. State*, 177 Ga. 881, 882, 171 S.E. 699, 699-700 (1933) (emphasis added). "An attorney at law admitted to practice in the courts of this State is an officer of the courts, and as such, is as much subject to the power of the court to control the conduct of persons present in the courtroom as others are subject thereto." *Kellar v. State*, 226 Ga. 432, 433, 175 S.E.2d 654, 656 (1970). The Georgia Courts have recognized this inherent authority as a basis for awarding attorneys' fees as a sanction for a party's discovery abuses in withholding a document in the discovery process. *See Orkin Exterminating Co.*, 215 Ga.App. at 589, 452 S.E.2d at 162. ("[t]he powers of the trial court to control . . . discovery are to be construed broadly"); *Santora*, 225 Ga. App. at 772, 485 S.E.2d at 36 (noting that the trial court had exercised its inherent authority in imposing sanctions).

Here, Defendants and/or their Counsel have grossly impeded the administration of justice, and flagrantly disrespected the dignity and authority of the Court. They have ignored their discovery obligations under the Civil Practice Act, duty to the public under the Open Records Act, duty of fairness to opposing counsel, duty of candor to the Court, and concealed evidence from an impartial jury during the trial of this case. The cases cited above, including *Ford Motor Co.*, *Santora*, *MARTA*, *Orkin*, *Resource Life Insurance Company* and others demonstrate how severely Georgia Courts punish similar misconduct. In those cases, Georgia Courts have been willing to strike complaints or answers, enter a summary verdict on behalf of an aggrieved party, impose millions of dollars in sanctions, and interpret common law exceptions to the statutory discovery scheme to allow justice to prevail. The facts of this instant case are no less egregious than any of those cited above, and, in some ways, are worse because Defendants

and their Counsel are public employees that serve the State and taxpayers. Thus, if this Court determines that O.C.G.A. §§ 9-15-14(b) or 9-11-37 are inapplicable, Kalberman respectfully requests that this Court utilize its inherent authority to impose sanctions for this manifest injustice and breach of trust to the public caused by Defendants and/or their Counsel.

D. The Settlement Agreement is not relevant to this action for sanctions and fees arising out of Defendants' and Defendants' Counsel's misconduct

Defendants' and Defendants' Counsel's egregious misconduct in this case warrants imposition of sanctions to punish and deter further misconduct. Nevertheless, Defendants may attempt to argue that Kalberman has settled and released all claims for attorneys' fees and is barred from bringing this motion by the Consent Order Acknowledging Settlement. (*See* Exh. R). Because Kalberman never released any claims against Defendants' Counsel, at a minimum, this Court should impose sanctions against Defendants' Counsel for the extraordinary and egregious misconduct that has been detailed herein. (*See id*). Additionally, the Court should impose sanctions against LaBerge and the Commission, notwithstanding the settlement agreement, because this Court is not a party to the settlement agreement, and has the independent, inherent authority to impose sanctions against Defendants for their misconduct and harm caused to the dignity of the Court and the judicial process. *See* O.C.G.A. § 15-1-3(3); O.C.G.A. § 9-15-14(b) (stating that a court may assess sanctions *sua sponte*); *Johnson*, 177 Ga. at 882, 171 S.E. at 699. LaBerge strategically waited until the Court appeared to have relinquished its jurisdiction to air her "tell all interview," in which she boldly waved around the withheld documentation. If the Court determines that the settlement agreement bars sanctions, it would create unsettling precedent to litigants and their counsel demonstrating how to avoid liability for ethical misconduct and blatant fraud upon the Court.

Because this is an exceptionally unique case, there is no case law squarely on point. In response to this Motion, Defendants likely will cite to case law stating that a claim for attorneys' fees under O.C.G.A. § 9-15-14 generally is precluded by a settlement agreement. However, the Georgia cases applying this rule all involve a procedural history wherein the motion for fees under O.C.G.A. § 9-15-14 was filed **before** the entry of a settlement agreement by the parties. *See Hardwick v. Forston*, 296 Ga. App. 690, 675 S.E.2d 559 (2009); *Waters v. Waters*, 242 Ga. App. 588, 590, 530 S.E.2d 482, 484 (2000). Here, in this egregious and unique factual scenario, Kalberman was entirely unaware of Defendants' and/or their Counsel's grossly sanctionable conduct and did not have a pending motion under O.C.G.A. § 9-15-14 at the time of settling her statutory attorneys' fee award with Defendants as a prevailing party.

Accordingly, this Court should impose sanctions against Defendants and/or their Counsel for their egregious misconduct and to punish and deter such behavior. To find otherwise would allow an unscrupulous party or attorney to wilfully conceal evidence, procure a settlement based on the benefit of that discovery abuse, commit fraud upon the Court, and claim protection of a settlement agreement. The manner in which Georgia Courts have censured similar misconduct indicates that a result excusing and relieving Defendants and/or their Counsel from liability would be erroneous.

IV. CONCLUSION

For the foregoing reasons, Kalberman respectfully requests that this Court grant an evidentiary hearing to determine the scope and severity of this misconduct and the appropriate amount of sanctions against Defendants and/or their Counsel necessary to punish and deter any such future conduct and award attorneys' fees and costs incurred in bringing this motion.

[Signature on following page.]

Respectfully submitted this 8th day of August, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the within and foregoingth ***Plaintiff Stacey Kalberman's Motion for Attorneys' Fees and Sanctions under O.C.G.A. §§ 9-15-14, 9-11-37, and 15-1-3 and Brief in Support*** upon the opposing counsel of record by sending a copy via the United States Mail with adequate postage affixed to ensure delivery as follows:

Bryan K. Webb, Esq.
Senior Assistant Attorney General
Laura McDonald, Esq.
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This 8th day of August, 2014.

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