IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

STACEY KALBERMAN,	*	
	*	
Plaintiff,	*	
	*	
vs.	*	Civil Action No.:
	*	2012CV216247
GEORGIA GOVERNMENT	*	
TRANSPARENCY AND	*	
CAMPAIGN FINANCE	*	
COMMISSION, ET AL.,	*	
	*	
Defendants.	*	

BRIEF IN SUPPORT OF MOTION TO QUASH

I. INTRODUCTION

On or about March 5, 2014, the Office of the Governor received a subpoena directed toward Governor Nathan Deal.[1] The subpoena ostensibly calls for the Governor personally to attend the trial of this matter on March 31, 2014 and be sworn as a witness. (*See* Exhibit A hereto). Despite taking discovery from several public officials and deposing numerous former and current Georgia Government Transparency and Campaign Finance Commission (the "Commission") members, Plaintiff did not endeavor to pursue discovery from any member of the Governor's Office, and with good reason: the Governor has no direct factual knowledge relevant to the allegations in Plaintiff's Complaint or Amended Complaint. That Plaintiff is only seeking the Governor's testimony now, on the eve of a highly publicized and politically charged trial

[1] The Office of the Governor also received a subpoena directed at the Governor's Executive Counsel, Ryan Teague (the "Teague Subpoena"). Although the Office of the Governor is not formally moving to quash the Teague Subpoena, the Office, of course, adamantly objects Plaintiff soliciting any information from Mr. Teague that could encroach on the attorney-client privilege he shares with the Governor.

underscores the real motivation behind the subpoena: the desire to openly harass the Governor, unfairly dramatize the trial before the media, and leverage Plaintiff's claims with a jury.

This case involves allegations that, reducing the salary of Plaintiff's Executive Director Position in June 2011, the Commission retaliated against her in violation of Georgia's "Whistleblower" statute, O.C.G.A. § 45-1-4. Though the Governor was the subject of complaints made to the Commission in late 2010 and early 2011, the Governor has no direct factual knowledge of the day-to-day functions of the Commission or the information that eventually led the Commission to reduce the salary of Plaintiff's position. Only the Commission members and Commission staff can testify to that information. The Governor thus has no firsthand knowledge of the facts relevant to this action and seeks to quash this subpoena as improper, unreasonable, and patently oppressive. Even the "brief and succinct outline of the case and contentions" section of Plaintiff's Pretrial Order does not allege any direct knowledge on the part of the Governor, in particular.

Because the Governor is not alleged to have any direct factual knowledge relevant to the Complaint or Amended Complaint, and Plaintiff has not sought his testimony sooner, the subpoena is merely an attempt to harass the Governor and unfairly dramatize an already politically charged trial open to the public. Additionally, the subpoena is uniquely improper and burdensome given the Governor's weighty public responsibilities. The subpoena should be quashed.

II. ARGUMENT AND CITATION OF AUTHORITY

Code Section 9-11-45(a)(1) permits quashing a subpoena that is unreasonable and oppressive. *See also* O.C.G.A. § 24-10-22(b); *Washburn v. Sardi's Restaurants*, 191 Ga. App. 307, 310 (1989). The instant subpoena is clearly unreasonable and oppressive because the

Governor has no firsthand knowledge of the relevant facts of this case. Further, the subpoena presents an undue burden on the extremely hectic schedule of Georgia's chief executive officer.

1. The Governor Has No Personal Knowledge of the Relevant Facts, and Any Testimony Would be Immaterial.

The Governor is the head of the executive branch and oversees the day-to-day operation of the State. *See* Ga. Const. Art. V, Sec. I, Para. I; Art. V. Sec. II, Para. I; Art. V. Sec. III, Para. I. Nothing in the Amended Complaint requires or depends on the testimony of the Governor . The Governor is not alleged to have any personal knowledge of the Commission's personnel and budgetary decisions made on or about June 2011. The Governor is not alleged to have been involved in or consulted about the reduction in Plaintiff's salary, the creation of the staff attorney position, or generally how to allocate the Commission's budget during that time period. The allegations, true or false, regarding the conduct of the Commission members and staff depend on the *Commission members and staff* having personal knowledge of those actions, not the Governor. Thus what *de minimis* information the Governor may have on the background of the case, if any, can be supplied by other witnesses and is far outweighed by the burden of having the Governor testify. (*See* Section 2 below.)

If the Governor had information that is crucial enough to require the attendance of the Governor at trial (and he does *not*), there is no reason Plaintiff could not have obtained it earlier through deposition or written discovery. Plaintiff did not do so and only now seeks trial testimony from the Governor in an attempt to publically harass the Governor and unfairly prejudice the Governor as well as the Defendants before a jury. The Governor has no knowledge material enough to warrant his presence at this trial.

2. The Burden on Calling on the Governor to Testify Far Outweighs Any Possible Probative Value of that Testimony.

While any subpoena should be quashed if it is "unreasonable and oppressive," a subpoena on the Governor of the State of Georgia is exceptionally burdensome. Courts have routinely refused subpoenas on even lower-ranking state officials. For instance, in the case *Irene Stephens v. Georgia Dept. of Transportation*, 1:02-CV-1608-RWS in the United States District Court for the Northern District of Georgia, the Plaintiff tried to subpoena Chief Administrative Law Judge Lois Oakley. (*See* Exhibit B.) The court rejected the subpoena, quoting prior decisions:

> In general, high ranking government officials enjoy limited immunity from being deposed in matters about which they have no personal knowledge. The immunity is warranted because such officials must be allowed the freedom to perform their tasks without the constant interference of the discovery process. [Cits. omitted] Before the involuntary depositions of high ranking government officials will be permitted, the parties seeking the depositions must demonstrate that the particular official's testimony will likely lead to the discovery of admissible evidence and is *essential to that party's case*. [Cits. omitted] In addition, the evidence must not be *available through an alternative source or via less burdensome means*." *Warzon v. Drew*, 155 F.R.D. 183 (E.D. Wis. 1994). *See also In re: United States of America*, 985 F.2d 510 (11th Cir. 1993).

(emphasis added) (Order at p. 3 quoting *Smith v. State of Ga. Dept. of Children & Youth Srvcs*, 179 F.R.D. 644, 645-46 (N.D. Ga. 1998)).

The *Smith* decision, quoted by the court in the *Stephens* matter, involved a subpoena on the head of the Georgia Department of Juvenile Justice. 179 F.R.D. at 645. The *Warzon* case, which both *Smith* and *Stephens* cite, involved subpoenas on the Governor of Wisconsin and the Secretary of the Department of Administration of Wisconsin. 155 F.R.d. at 184. *In re: United States of America*, again relied upon by *Smith* and *Stephens*, 985 F.2d, involved a subpoena on Dr. David Kessler, Commissioner of the FDA. 985 F.2d at 511. In all of these cases the

subpoenas were quashed due to the immunity of high ranking governmental officials from such subpoenas.

The Governor is no less immune from such an improper subpoena. Nothing in the Complaint or Amended Complaint suggests that the Governor *must* be called to testify on these issues, or that he is the *only one* with relevant knowledge. Nothing suggests that the extraordinary step of calling a Chief Executive to testify must be exercised. Indeed, the burden imposed on the Governor here is greater than that imposed on the witnesses in the above cases. In short, the burden presented by the subpoena in the present case far outweighs any probative value.[2]

3. Respect for a Co-Equal Branch of Government Counsels in Favor of Quashing The Subpoena.

The Governor is head of the Executive Branch of state government, a branch of government co-equal with the Judicial Branch. The principles of separation of powers are at the foundation of our system of state government, just as they are in our federal system. *See, e.g.*, Ga. Const. Art. 1, Para. 2, Sec. 3. The federal courts have long recognized that subjecting the head of the Executive Branch to all but the most vital discovery – much less compulsory testimony during trial – raises separation of powers concerns. *See, e.g., United States v. Burr*, 25 F. Cas. 187, 192, F. Cas. No. 14694 (No. 14,694) (CC Va 1807) (Chief Justice Marshall sitting as trial judge). Plaintiff's failure to articulate any need at all for the Governor's testimony in this case does not remotely overcome such concerns here.

Because he subpoena should be quashed for the reasons articulated above, however, the Court need not address this thorny issue.

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[2] The burden is especially great given the imminent conclusion of the 2014 Session of the Georgia General Assembly and the magnitude of the Governor's duties immediately after that conclusion. Specifically, the March 31 through April 4, 2014 trial dates would fall directly in the middle of the 40-day window when the Governor must review all bills passed by the General Assembly and determine whether to sign or veto them.

III. CONCLUSION

For the foregoing reasons the subpoena against the Governor should be quashed. In the present case, the Governor is not alleged to have any personal knowledge to bring to bear, no relevant testimony to give, and the burden from testifying clearly outweighs any probative value of the subpoena. Plaintiff had full opportunity to seek discovery from the Governor through the ordinary discovery process, and elected not to do so. She seeks testimony now, presumably, in attempt to harass the governor, prejudice the jury, and create an unwarranted media spectacle of the trial. She should not be allowed to compel the Governor to testify.

This 17th day of March 2014.

Respectfully submitted,

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