IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

KAREN FINN, et al. Plaintiffs, vs. COBB COUNTY BOARD OF ELECTIONS AND REGISTRATION, et al. Defendants.	:	Civil Action File No.: 22-cv-2300-ELR

MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

Come now, Defendants Cobb County Board of Elections and Registration ("Elections Board") and Janine Eveler, in her official capacity as Cobb County Elections Director, (collectively "Election Defendants"), and move the Court to dismiss Plaintiffs' Amended Complaint [Doc. 37] pursuant to Fed. R. Civ. P. 12(b)(1) or, alternatively, to join all necessary parties pursuant to Fed. R. Civ. P. 19, showing the Court as follows:

1. Plaintiffs lack standing to bring their claims against Election Defendants, because the injuries they allege are not fairly traceable to the conduct of the Cobb County Board of Elections and Registration nor Janine Eveler. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409, 133 S. Ct. 1138 (2013).

2. Plaintiffs have failed to join indispensable parties pursuant to Fed. R. Civ. P. 19 such that those interested parties would be unable to defend their interests in the challenged school board districts, and such that the Election Defendants would be placed in the position of facing inconsistent obligations.

In support of the motion, Election Defendants rely on their Brief in Support of Motion to Dismiss Plaintiffs' Amended Complaint and the Declaration of Janine Eveler, filed on July 29, 2022.

Respectfully submitted this 9th day of September, 2022.

HAYNIE, LITCHFIELD & WHITE, PC

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CERTIFICATE OF SERVICE

I hereby certify that on September 9, 2022, I electronically filed the foregoing MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to all attorneys of record in this matter.

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BRIEF IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT

I. INTRODUCTION

Plaintiffs' Amended Complaint for Declaratory Judgement and Injunctive Relief [Doc. 37] ("Amended Complaint") contains the very same defects found in their original Complaint [Doc. 1]. Plaintiffs continue to challenge the constitutionality of Cobb County's newly drawn school board voting districts without joining the actual parties who created and enacted the contested district maps. Rather than amending their complaint to name the parties with a sufficient "personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." Baker v. Carr,

369 U.S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962), Plaintiffs double down on pursuing the "shoot the messenger" tactic in this litigation. While the Amended Complaint identifies numerous government officials and individual actors whose actions are responsible for the creation of the allegedly injurious election maps, Plaintiffs seem determined to avoid litigating directly with those parties. Instead, they ask the Court to grant injunctive relief and attorney's fees against election officials who had no control or input regarding the creation of the challenged districts, nor even a sufficient connection to the process to have knowledge of the facts alleged in the Amended Complaint.

Plaintiffs filed their original Complaint for Declaratory and Injunctive Relief on June 9, 2022, alleging that the Cobb County Board of Education ("School Board") and the State Legislature improperly used race to gerrymander the maps adopted during the Cobb County School District's recent redistricting process. [Doc. 1]. Election Defendants moved to dismiss that Complaint on July 29, 2022 [Doc. 30] noting that, aside from their identification as parties, the election officials named did not even appear in the Complaint until nearly the final page, where the Prayer for Relief contained one single mention: a request that the Court order them not to hold elections using the challenged district maps. [Doc. 1, ¶ 174].

The only significant difference in the original Complaint and the Amended Complaint is that Plaintiffs have inserted nine paragraphs expounding upon the general duties of the Board of Elections as election superintendent and alleging that their injuries will "flow directly" from the actions of the Election Defendants in holding the elections they are required by law to administer. [Doc. 37, ¶¶ 147-155]

However, Plaintiffs are not entitled to sue the Election Defendants simply because they need a party against whom the Court might issue an injunction. They also must plead and demonstrate the other elements of prudential standing, including some form of injurious conduct that is fairly traceable to the Election Defendants. Lewis v. Governor of Ala., 944 F.3d 1287, 1296 (11th Cir. 2019) ("To establish standing, in addition to demonstrating an injury-in-fact, Plaintiffs must also show a 'causal connection between [their] injury and the challenged action of the defendant—i.e., the injury must be fairly…trace[able] to the defendant's conduct'...")

Additionally, the failure of Plaintiffs to join the parties whose actions resulted in the ostensibly gerrymandered maps puts the Election Defendants in the unjust position of potentially being held liable under 42 U.S.C. §1983 for actions over which they have no discretion. Nowhere in the Amended Complaint do Plaintiffs identify any authority the Election Defendants would have to reject or even evaluate

district maps for claims of racial gerrymandering or other voting rights claims.[1] Yet here Plaintiffs ask the Court to hold the Election Defendants responsible in a civil rights enforcement action without even joining the parties whose actions allegedly deprived them of those rights.

Plaintiffs took the opportunity to amend their complaint and could have joined the interested parties who created and enacted the challenged district maps. Had Plaintiffs done so, Election Defendants would gladly have deferred to the interested parties, allowing them to litigate this matter and agreeing to abide by the ultimate decision of the Court regarding upcoming elections. However, Plaintiffs seem intent on trying to litigate this matter without an actual adverse party. This cannot be permitted, because allowing this action to proceed solely against the Election Defendants may subject to inconsistent obligations: a statutory duty to conduct

[1] In the Amended Complaint Plaintiffs make the general observation that county election superintendents are "charged with conducting elections" [Doc. 37, ¶ 148], and set forth three specific duties, none of which have anything to do with creating or evaluating school board election district maps. [Doc. 37, ¶¶ 149-150]. Neither the power granted in O.C.G.A. 21-2-70 (4) to issue "…rules and regulations…for the guidance of poll officers, custodians, and electors" nor the duty set forth in (7) to "select and equip polling places" permit the Elections Defendants to evaluate, ignore, redraw, or otherwise take any action regarding the maps at issue. Likewise, the duty described O.C.G.A. 21-2-70 (4) to "determine the sufficiency of nomination petitions" has nothing to do with determining the viability district maps, but instead relates to "nomination petitions signed by electors" as described in O.C.G.A. § 21-2-170 - petitions which are not at issue in this case at all.

elections using the school district maps adopted by the State Legislature in HB 1028, and - if those maps are determined to be racially gerrymandered - an obligation to pay damages and attorney's fees under 42 U.S.C. §1983 for actions over which they had no control.

Alternatively, Election Defendants request that the Court find that Plaintiffs' failure to include as parties the School Board, the State of Georgia or any of its election officials, nor the candidates who won their primary election deprives those parties of the ability to protect their interest in the challenged district maps. Accordingly, this Court should not allow this matter to proceed without either joining the indispensable parties or, if they cannot be joined, dismissing the action.

II. STATEMENT OF RELEVANT FACTS

Much like the original motion to dismiss, the facts relevant the requested dismissal of the Amended Complaint remain very limited. Plaintiffs spend most of the first 49 pages of their Amended Complaint detailing acrimony among the current School Board members, describing the actions of the School Board and the State Legislature in the redistricting process, and setting out the alleged problems with the new district maps. [Doc. 37, pp. 1-7, 12-49]. The Election Defendants are referenced in only three places in the entire Amended Complaint: in the list of identified parties [Doc. 37 ¶¶ 42-43], in the nine paragraphs describing Election Defendants' general

role in conducting elections [Doc. 37, ¶¶ 147-155], hastily inserted by Plaintiffs to try and salvage standing,[2] and in the Prayers for Relief, where Plaintiffs ask the Court enjoin the Election Defendants from holding elections using the challenged district maps [Doc. 37 ¶ 183(b)].

Plaintiffs' Amended Complaint also acknowledges for the first time that primary elections have already been held in the challenged districts [Doc. 37, ¶ 154]. This highly relevant fact is not mentioned in the original Complaint nor anywhere else in the Amended Complaint, but this admission should have also been accompanied by a recognition that the winning candidates should be joined as interested parties to this action.

Even after construing these facts from the Amended Complaint in the light most favorable to Plaintiffs, no amount of leeway can overcome the jurisdictional obstacle of Plaintiffs failure to demonstrate prudential standing. Accordingly, this Court does not have jurisdiction over the claims asserted against the Election

[2] Given the complete dearth of factual allegations involving the Election Defendants in the Plaintiffs' original Complaint, it seems evident that they were only included in this action for purposes of redressability, not because any of Plaintiffs' alleged injuries are fairly traceable to their actions. In an attempt to manufacture standing without adding the actual parties responsible for its alleged injuries, Plaintiffs added these few paragraphs to their Amended Complaint setting out the general duty of Election Defendants to administer elections, asserting that this administrative duty is the conduct from which their injuries flow. [Doc. 37, ¶ 155].

Defendants, and the Election Defendants therefore request that the Court dismiss all claims against them pursuant to Fed. R. Civ. P. 12(b)(1). If the Court declines to dismiss the Amended Complaint, at a minimum, it is obligated to join all indispensable parties under Fed. R. Civ. P. 19.

III. ARGUMENT AND CITATION TO AUTHORITY

A. Standard for Motion to Dismiss

"[A] motion to dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1) can be based upon either a facial or factual challenge to the complaint." McElmurray v. Consol. Gov't of Augusta-Richmond Cty., 501 F.3d 1244, 1251 (11th Cir. 2007). "A facial attack on the complaint requires the court merely to look and see if the plaintiff has sufficiently alleged a basis of subject matter jurisdiction, and the allegations in his complaint are taken as true for the purposes of the motion." *Id*. "

When evaluating a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), the court must take the facts alleged in the complaint as true and construe them in the light most favorable to the plaintiff. Resnick v. AvMed, Inc., 693 F.3d 1317, 1321—22 (11th Cir. 2012). To survive Rule 12(b)(6) scrutiny, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d

868 (2009) (*quoting* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)).

B. Plaintiffs lack standing to bring claims against the Election Defendants

"Article III of the Constitution limits federal courts to adjudicating actual 'cases' and 'controversies.'" A&M Gerber Chiropractic LLC v. GEICO Gen. Ins. Co., 925 F.3d 1205, 1210 (11th Cir. 2019); U.S. Const. art. III, § 2. "To have a case or controversy, a litigant must establish that he has standing," which requires proof of three elements. United States v. Amodeo, 916 F.3d 967, 971 (11th Cir. 2019). "[T]o satisfy Article III's standing requirements, a plaintiff must show (1) it has suffered an injury in fact that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180-81, 120 S. Ct. 693, (2000). "The plaintiff bears the burden of establishing each element." Cordoba v. DIRECTV, LLC, 942 F.3d 1259, 1268 (11th Cir. 2019).

"It is not enough that [plaintiff] sets forth facts from which [the court] could imagine an injury sufficient to satisfy Article III's standing requirements." Bochese v. Town of Ponce Inlet, 405 F.3d 964, 976 (11th Cir. 2005). Instead, "plaintiff has

the burden to clearly and specifically set forth facts sufficient to satisfy Art. III standing requirements." Id. "If the plaintiff fails to meet its burden, this court lacks the power to create jurisdiction by embellishing a deficient allegation of injury." *Id*.

Further, "when plaintiffs seek prospective relief to prevent future injuries, they must prove that their threatened injuries are "certainly impending." Clapper v. Amnesty Int'l USA, 568 U.S. 398, 401 (2013).

To establish standing Plaintiffs must show an injury-in-fact, and also a "causal connection between [their] injury and the challenged action of the defendant—i.e., the injury must be fairly…trace[able] to the defendant's conduct..." Lewis v. Governor of Ala., 944 F.3d 1287, 1296 (11th Cir. 2019) (internal quotes removed). The crux of Plaintiffs' lawsuit is that the "[School] Board and state legislators' use of race as the predominant factor in drawing the Challenged Districts, without narrowly tailoring that use to comply with a compelling governmental interest, violates the Equal Protection Clause..." [Doc. 37, ¶ 11]. Yet nowhere in the Amended Complaint do Plaintiffs bother to explain how their supposed injuries are fairly traceable to the Election Defendants. At best they accuse the Election Defendants of being the conduit through which the allegedly discriminatory maps will be implemented, but they do not explain how that ministerial obligation makes Election Defendants liable for the allegations of

improper racial gerrymandering as set forth in the other 95 percent of the Amended Complaint.

Plaintiffs likely felt compelled to include the Election Defendants, in part, due to the opinion of the 11th Circuit Court of Appeals in Jacobson v. Fla. Sec'y of State, 974 F.3d 1236, 1245-46 (11th Cir. 2020). In that case, several voters and organizations brought an action challenging the Florida statute which sets the order of candidates' names on the ballot. The Jacobson Court ruled that the plaintiffs failed to demonstrate standing to seek relief against the Florida Secretary of State because her office does not enforce the ballot order provision, noting that only the 67 county Election Supervisors are responsible for preparing the ballots. Id at 1253.

The result of that ruling has been that some subset of county election officials has been named in most election related federal lawsuits filed Georgia since then, including multiple suits currently pending before this Court. The New Georgia Project et al. v. Raffensperger et al., Case No. 1:21-cv-01229-JPB; Georgia State Conference of the NAACP et al. v. Raffensperger et al., Case No. 1:21-cv-01259-JPB; Asian Americans Advancing Justice-Atlanta, et al. v. Raffensperger et al., Case No. 1:21-cv-01333-JPB, etc. However, simply naming election boards and election directors as defendants because they run elections for their county does not meet the Plaintiffs' burden to demonstrate traceability and redressability. "It is the plaintiff's

burden to plead and prove…causation…" Hollywood Mobile Estates Ltd. v. Seminole Tribe of Fla., 641 F.3d 1259, 1266 (11th Cir. 2011). *See also*, Bischoff v. Osceola Cnty., Fla., 222 F.3d 874, 878 (11th Cir. 2000) ("The party invoking federal jurisdiction bears the burden of proving standing"). "Article III standing requires that the plaintiff's injury be 'fairly traceable' to the defendant's actions and redressable by relief against *that* defendant." Jacobson, 974 F.3d 1236, at 1256, *citing to* Lewis, 944 F.3d at 1298, 1301.

Indeed, the Election Defendants are in a similar position to the Florida Secretary of State in the Jacobson because in the plaintiffs in that case "…offered no…evidence that the Secretary plays any role in determining the order in which candidates appear on ballots." Id at 1253. Similarly, Plaintiffs in the present action have not plead any allegation that the Election Defendants played any role in creating, evaluating, accepting, rejecting, or otherwise exercising any control over the district maps or the redistricting process. Accordingly, as in the Jacobson case, "because the [Election Defendants] didn't do (or fail to do) anything that contributed to [their] harm," the voters and organizations "cannot meet Article III's traceability requirement." Id., citing to Lewis v. Governor of Ala., 944 F.3d 1287, 1301 (11th Cir. 2019) (en banc).

To be sure, Plaintiffs have attempted to remedy their complete failure to plead facts related to causation in their original Complaint by asserting in the Amended Complaint that their injuries directly flow from the Elections Defendants' duty to "interpret and enforce" the redistricting HB 1028. However, there is no authority cited by Plaintiffs showing that the Elections Defendants have any authority to "interpret" the Redistricting Plan, nor any discretion over whether enforce as currently adopted. In order to demonstrate causality Plaintiffs must show that Election Defendants have some type of control over the creation or use of the injurious maps. "The causation element of Article III standing requires 'a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court.' Hollywood Mobile supra, 641 F.3d at 1265, citing to Lujan, 504 U.S. at 560, 112 S. Ct. at 2136. Accordingly, because Plaintiffs have failed to articulate in their Amended Complaint how their claimed injuries are traceable to and redressable by the Election Defendants and not the independent actions of the parties who created the challenged maps, they have not carried their burden of demonstrating standing to sue the Election Defendants.

C. Plaintiffs have failed to join indispensable parties

Federal Rule of Civil Procedure 12(b)(7) provides for dismissal when a plaintiff fails "to join a party under Rule 19." Rule 19 provides a "two-part test for determining whether an action should proceed in a nonparty's absence." City of Marietta v. CSX Transportation, Inc., 196 F.3d 1300, 1305 (11th Cir. 1999). "The first question is whether complete relief can be afforded in the present procedural posture, or whether a nonparty's absence will impede either the nonparty's protection of an interest at stake or subject [existing] parties to a risk of inconsistent obligations." Id. (citing Fed. R. Civ. P. 19(a)(1)-(2)). If the Court determines that the non-party's absence will impede its rights, "and the nonparty cannot be joined," the court proceeds to the second step in the analysis and considers whether in "equity and good conscience the action should proceed among the parties before it, or should be dismissed." Id. (*citing* Fed. R. Civ. P. 19(b)). This analysis should not be formalistic, but rather based on "flexible practicality." Id. (citing Provident Trades men' s Bank & Trust Co. v. Patterson, 390 U.S. 102, 118-19, 88 S. Ct. 733, 19 L. Ed. 2d 936 (1968)).

The determination of whether a party is a "necessary party" comes down to whether "'(1) in that person's absence, the court cannot accord complete relief among existing parties,' or (2) where the absent party claims an interest relating to

the action, disposing of the action without the absent party may 'as a practical matter impair or impede the person's ability to protect the interest; or leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.'" Santiago v. Honeywell Int'l, Inc., 768 F. App'x 1000, 1004 (11th Cir. 2019), *citing* Fed. R. Civ. P. 19(a)(1)

The vast majority of the allegations in the Amended Complaint focus on the history surrounding the creation of the district maps created by the School Board and adopted by the State of Georgia, or upon the potential discriminatory impacts of the challenged maps. Neither the Elections Board nor Ms. Eveler have any authority regarding the drawing of district maps or the enactment of redistricting legislation in the State of Georgia, nor do they have any discretion over whether to follow the laws passed by the Legislature. The only interest the Election Defendants have in this matter is the legal obligation to conduct elections using the maps adopted by the State. They do not have any interest in either defending or challenging the constitutionality of the adopted maps. Accordingly, if this action moves forward without joining the School Board or the State actors involved in creating the maps,

Plaintiffs would be asserting claims about the contested maps without giving the parties who had an actual interest in the maps a chance to defend them.[3]

Additionally, without naming the parties that were directly involved in creating the allegedly injurious maps, Plaintiffs deprive the Court of the "concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." Baker v. Carr, 369 U.S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962). Here Plaintiffs make "no allegation…that the Board of Elections had anything to do with the passage of [HB

[3] Election Defendants are unaware of any reason that the School Board could not be named as defendants in this matter. To the extent that Plaintiffs may wish to argue that the State of Georgia cannot be joined because they are protected by sovereign immunity, it should be noted that this Court has recently held that: "The adoption of the Fourteenth and Fifteenth Amendments overrode any sovereign immunity to which states themselves might otherwise have been constitutionally entitled—and Section 2 [of the Voting Rights Act] is a valid expression of congressional enforcement power under those amendments." Rose v. Raffensperger, 511 F. Supp. 3d 1340, 1361 (N.D. Ga. 2021), citing to United States v. Marengo Cty. Com., 731 F.2d 1546, 1557 (11th Cir. 1984). At a minimum, the Plaintiffs could join the Secretary of State, as the State's "chief election official" O.C.G.A. § 21-2-50(b) (*see also*, Fair Fight Action, Inc. v. Raffensperger, 413 F. Supp. 3d 1251, 1284 (N.D. Ga. 2019) "it is clear that under both the Constitution and the laws of the State the Secretary is the state official with the power, duty, and authority to manage the state's electoral system" and also the members of the State Election Board who are authorized by O.C.G.A. § 21-2-31 (10) to "take such other action, consistent with law, as the board may determine to be conducive to the fair, legal, and orderly conduct of primaries and elections." § 1983 claims can "apply to the Secretary of State and the members of the State Election Board…the State Election Board may be sued for a Voting Rights Act claim." Fair Fight Action, 413 F. Supp. 3d at 1286 n.23.

1028]. There is no guarantee, therefore, of vigorous advocacy, which is one of the purposes of requiring Article III standing." Scott v. Dekalb Cty. Bd. of Elections, No. 1:02-CV-1851-ODE, 2005 U.S. Dist. LEXIS 47650, at *16 (N.D. Ga. Aug. 5, 2005).[4] The Election Defendants are not true adverse parties in the sense that they have an interest in defending the maps adopted under the Redistricting Plan, nor do they even have access to any facts that would shed any light on the allegations set forth in the Amended Complaint. Instead they are in the "unenviable position of defending actions of which [they have] absolutely no connection and only second hand knowledge." Id.

Further, as demonstrated by the Declaration of Janine Eveler, there are candidates who have already won primary elections in two of the challenged districts, Ward 2 and Ward 6: Stephen M. George was declared the winner of the Republican Primary for Board of Education District 2, Becky Sayler was declared the winner of the Democratic Primary for Board of Education District 2, and Nicole Davis was declared the winner of the Democratic Primary Board of Education

[4] In Scott, a case arising in this District, the Court mentioned that is possible to hold the Board of Election liable under § 1983 for ministerial duties in some instances, it held that the plaintiff in that case showed no causal nexus between Plaintiff's Article III injury and the actions of the Board of Elections. Scott v. Dekalb Cty. Bd. of Elections, No. 1:02-CV-1851-ODE. Similarly, Plaintiffs have failed to show a lack of causal nexus in this matter

District 6. See, Declaration of Janine Eveler [Doc. 30-2, ¶¶ 5-9]. These candidates, now running for election in the General Election in the new districts this November have a clear interest in whether those districts are to be upheld.

Finally, and most importantly for Election Defendants, allowing this action to proceed without the School Board or State of Georgia as defendants would result in inconsistent obligations. The Election Defendants have a duty to run elections using the maps adopted by the State Legislature and signed into law by the Governor. If the Court allows Plaintiffs to name the Election Defendants as the sole defenders of their §1983 claim, that puts them in the unjust position of subjecting them to liability for alleged civil rights violations over which they have absolutely no control.

III. CONCLUSION

Plaintiffs have the burden to clearly plead and prove the basic elements of standing in order to bring claims against the Election Defendants in this matter. Bochese, *supra* 405 F.3d at 976. Plaintiffs have not met that burden in their Amended Complaint, even construing the facts alleged by them in their favor. Plaintiffs have not alleged in their Amended Complaint that actions fairly traceable to the Election Defendants have or will imminently cause a concrete injury.

Alternatively, if the Court permits this matter to move forward it should join necessary parties to this action under Fed. R. Civ. P. 19. In particular, the School

Board, the State of Georgia (or its election officials) should be joined to defend their interests in the maps. Likewise, the candidates who have already been elected in the recent primary elections that used the new maps should be permitted to weigh-in on this challenge.

Accordingly, and for all the reasons set forth above, Election Defendants request that the Court enter an order dismissing all claims against them in Plaintiffs' Amended Complaint, or at a minimum, require the joinder of all necessary parties.

Respectfully submitted this 9th day of September, 2022.

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CERTIFICATE OF COMPLAINCE WITH LOCAL RULE 7.1

The undersigned hereby certifies that the foregoing document has been prepared in accordance with the font type and margin requirements of Local Rule 5.1 of the Northern District of Georgia, using a font type of Times New Roman and a point size of 14.

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