UNIVERSITY OF GEORGIA

School of Law
First Amendment Clinic
P.O. Box 388
Athens, Georgia 30603
TEL 706.542.1419
Fax: 706.227.5440

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VIA EMAIL - lguarnotta@burr.com
Leesa M. Guarnotta, Esq.
Burr & Forman LLP
171 Seventeenth Street, NW, Ste. 1100
Atlanta, GA 30363

Re: *South River Watershed Alliance v. Blackhall Real Estate Phase II, LLC*; Civil Action No. 21CV1931 (DeKalb County Superior Court, Georgia)

Dear Counsel:

We write on behalf of the Atlanta Community Press Collective ("ACPC"), a collective of writers and researchers engaged in the gathering and dissemination of news for the public through ACPC's online platform.[1] We write pursuant to O.C.G.A. § 9-11-34(b)(2) to object to Defendant Blackhall Real Estate Phase II, LLC's ("Blackhall's") Non-Party Requests for Production of Documents ("Requests") to ACPC dated October 21, 2022 in the above referenced matter. For the reasons set forth below, the Requests are procedurally and substantively improper. Accordingly, ACPC will not produce documents in response to Blackhall's Requests.

As an initial matter, the Requests are procedurally invalid for defective service because they were delivered to ACPC solely via e-mail. E-mail service is not generally authorized by O.C.G.A. § 9-11-34. ACPC is a non-party to this litigation and has not consented to electronic service under O.C.G.A. § 9-11-5(f). E-mail is also an improper means of serving non-parties with a subpoena under Georgia law. *See Smith v. State*, 308 Ga. 81, 90 (2020) ("[E]-mail is not a proper means of serving a subpoena under OCGA § 24-13-24.").

Notwithstanding defective service, the Requests are also substantively improper because they seek discovery of privileged information regarding journalistic sources and records that are protected from disclosure under Georgia's Shield Law. *See* O.C.G.A § 24-5-508. The Shield Law allows any non-party "person, company or other entity engaged in the gathering and dissemination of news for the public" to refuse to disclose *any* information, document, or item it obtains while gathering or disseminating the news. *Id.* (emphasis added).[2] This statutory

[1] *See* https://atlantapresscollective.com/.
[2] A parallel privilege, rooted in the First Amendment, also applies in federal court in the Eleventh Circuit. *See United States v. Capers*, 708 F.3d 1286, 1303 (11th Cir. 2013) ("Our Circuit recognizes a qualified privilege for journalists, allowing them to resist compelled disclosure of their professional news gathering efforts."); *see also Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 725-26 (5th Cir. 1980) (discussing First Amendment policies supporting recognizing privilege).

privilege applies to confidential and non-confidential information and to both testimony and documentary material. *See In re Paul*, 270 Ga. 680, 686 (1999) ("Unlike some states, the Georgia statute does not limit the privilege solely to confidential sources, but protects against the disclosure of any information obtained or prepared.").

ACPC is engaged in the gathering and dissemination of news for the public. Request Nos. 1-7 and 9-12 exclusively seek photographs, videos, internal communications, evaluations, and reports that would have been obtained or prepared by ACPC during the course of researching, gathering, and reporting news to the public. These items are not subject to discovery under the Georgia Shield Law.

The Georgia Shield Law may only be overcome if the party seeking discovery demonstrates waiver or "that what is sought: (1) is material and relevant; (2) cannot be reasonably obtained by alternative means; and (3) is necessary to the proper preparation or presentation of the case of a party seeking the information, document, or item." O.C.G.A § 24-5-508. Blackhall cannot make that showing here. First, ACPC has not waived the privilege. Second, Blackhall's Requests do not appear to have any significant materiality or relevance to the underlying litigation. Rather, they seek to capture an extremely broad range of documents and materials surrounding non-party ACPC's news gathering activities. For example, the Requests call for disclosure of ACPC's communications with a wide array of parties and third-parties to this action (Request Nos. 1 and 3-7) as well as ACPC's own *internal* communications (Request Nos. 2 and 7). Third, many of these documents could readily be obtained by alternative means, such as by serving discovery demands on the parties in *the underlying litigation* (e.g., Request Nos. 1, 5, and 10). Or by serving requests on third-parties who, unlike ACPC, do not receive the protection of a statutory privilege (e.g., Request Nos. 3-4, and 6-7). Moreover, Request Nos. 11-12 seek reports and appraisals about the properties, which Blackhall could perform at its own expense. Lastly, there is nothing to suggest that any of ACPC's communications, photographs, or other records would be "necessary" to the presentation of Blackhall's case. Given that Blackhall has not, and cannot, demonstrate waiver or any of the three elements necessary to overcome ACPC's privilege under the Georgia Shield Law, ACPC will not produce documents in response to Requests Nos. 1-7 and 9-12 and cannot be compelled to do so.

All of Blackhall's Requests are further improper because they impose an undue burden on ACPC. *See* O.C.G.A. § 9-11-26(c) (trial courts have discretion to "make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense[.]"). Where a party is seeking "sensitive materials, the trial court must balance the requesting party's specific need for the material against the harm that would result from the disclosure." *See Atlanta J.-Const. v. Jewell*, 251 Ga. App. 808, 812 (2001).

Here, the harm from disclosure would far outweigh Blackhall's need for the requested materials even if ACPC's newsgathering materials were not privileged under the Georgia Shield Law. ACPC has a strong interest in maintaining privacy over its work product, particularly its confidential sources and unpublished work. Requests Nos. 1-13 all seek communications, photographs, and other materials that are peripheral at best to the underlying litigation. *See S. Outdoor Promotions, Inc. v. Nat'l Banner Co.*, 215 Ga. App. 133, 135 (1994) (prohibiting a party's production request for documents that were only tangentially related to the matter at hand, finding that the "right to privacy substantially outweigh[ed] the de minimis relevancy of [the] particular discovery request"); *see also Walker v. Bruhn*, 281 Ga. App. 149, 151 (2006) ("Items that are neither pertinent nor relevant need not be produced."); *Horton v. Huiet*, 113 Ga. App. 166, 168 (1966) (court may refuse to order production where "the records and documents sought are not relevant to the issues").

Finally, Requests Nos. 8 and 13 are separately improper because they seek entirely irrelevant information. *See* O.C.G.A. § 9-11-26(b)(1) (authorizing discovery of only "relevant" information that "appears reasonably calculated to lead to the discovery of admissible evidence"). Specifically, Requests Nos. 8 and 13 seek information about payments or donations from ACPC to "the Plaintiffs" and information about individuals who may donate or provide gifts *to ACPC*. This kind of information about who a non-party has received or provided support to has no conceivable bearing on the underlying litigation and appears designed only to harass ACPC and infringe its privacy interests. *See NAACP v. Alabama*, 357 U.S. 449, 462 (1958) (recognizing that the "privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs"); *see also Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2389 (2021) (holding rule requiring charities to disclose the names and addresses of certain donors violated the First Amendment because it imposed an unjustified burden on associational rights).

ACPC rejects in the strongest terms Blackhall's attempt to use Georgia's non-party discovery mechanism to rake through a journalistic entity's files for materials that bear no significant relation to the underlying litigation and impose serious burden and harm on non-party ACPC. Please be advised that nothing in this letter is intended to waive, or should be construed as waiving, any of ACPC's rights, remedies, defenses, or privileges. Please direct any further correspondence in this matter to the First Amendment Clinic.

Sincerely,

Clare Norins

Clare R. Norins, Director
Allyson Veile, Legal Fellow
Lindsey Floyd, Legal Fellow
Aradhana Chandra, Law Student
FIRST AMENDMENT CLINIC
University of Georgia School of Law
cnorins@uga.edu
(706) 542-1419 (phone)

CC: John O'Shea Sullivan (ssullivan@burr.com)
Grace B. Callanan (gcallanan@burr.com)
Mark G. Trigg (mark.trigg@dentons.com)
Steven J. Labovitz (steve.labovitz@dentons.com)