

Georgia State University College of Law

## Reading Room

---

Georgia Business Court Opinions

---

2-22-2023

### **Galaxy Next Gen. v. Elhert, Order on Counterclaim Defendants' Motion to Dismiss**

Kelly Lee Ellerbe

Follow this and additional works at: <https://readingroom.law.gsu.edu/businesscourt>



Part of the [Business Law, Public Responsibility, and Ethics Commons](#), [Business Organizations Law Commons](#), and the [Contracts Commons](#)

---



December 12, 2022 (“Somerset’s Response”), Plaintiff Galaxy Next Generation, Inc.’s (“Galaxy’s”) Response Brief in Opposition to the Motion, filed December 12, 2022 (“Galaxy’s Response”), and Ehlert’s Reply Brief in Support of his Motion, filed January 6, 2023, the Court enters this order.

## **1. BACKGROUND**

This dispute concerns requests for the production of documents Ehlert lodged upon Somerset, an accounting firm. Primarily, Ehlert moves the Court to overrule certain privilege objections raised by Somerset on behalf of Somerset’s client Galaxy.

### **1.1 Underlying Facts**

#### *1.1.1 Somerset’s Audit of the Ehlert Companies*

Somerset had an ongoing relationship with Galaxy as its independent auditor. (McGahee Aff. ¶ 4.)<sup>2</sup> By virtue of this relationship, Somerset would, among other things, audit Galaxy’s quarterly reports and conduct a detailed annual audit each summer. (*Id.*)

According to Galaxy, on June 6, 2019, it entered into a letter of intent for Galaxy to purchase Ehlert Solutions Group, Inc. and Interlock Concepts, Inc. (the “Ehlert Companies”). (Compl. ¶ 12.) In June of 2019, in anticipation of the purchase, Galaxy retained Somerset “to conduct due diligence consisting of an

---

<sup>2</sup> The Affidavit of Magen McGahee is attached to Galaxy’s Response as Exhibit B.

independent audit” of the Ehlert Companies. (Id. ¶ 14; Ehlert Ans. ¶ 14.) As part of this audit, Somerset communicated with and obtained documents from Ehlert, various employees and other owners of the Ehlert Companies, the former accounting firm of the Ehlert Companies, the IRS, and others. (McGahee Aff. ¶ 17.)

Galaxy acquired the Ehlert Companies by way of a stock purchase agreement (“SPA”) that was executed on or about September 4, 2019. (Compl. ¶ 34; Mot. 1.) Consideration for the sale included three promissory notes. (Id. ¶ 36, Ex. A (Galaxy Closing Book) 25-31; Ehlert Ans. ¶ 36.) Somerset had not completed its due diligence when the SPA was executed. (Id. ¶ 45, McGahee Aff. ¶ 8.) Indeed, Galaxy’s obligation to pay Ehlert monies due under the first promissory note was tied to Galaxy’s completion of an analysis of certain withholding tax issues. (Id. ¶ 54, Ex. A ¶ 1.4, (Galaxy Closing Book) 25; Ehlert Ans. ¶ 54.) Galaxy contends “Somerset focused a great deal of its time investigating issues pertaining to [the Ehlert Companies’] accounts payable and the withholding tax liability” in the weeks following the SPA’s execution. (Id. ¶ 45.) Also, after the SPA was executed, Ehlert worked for Galaxy as its Chief Technology Officer. (McGahee Aff. ¶ 16.)

According to Galaxy, Somerset issued its audit letter outlining its findings about the Ehlert Companies on November 11, 2019, approximately five months after the audit began and more than two months after Galaxy claims the SPA was executed. (Compl. ¶¶ 34, 63.) As a result of Somerset’s findings, Galaxy alleges,



it renegotiated the “cash payment element of the acquisition deal . . . result[ing] in the execution of the Amended Promissory Note” on November 14, 2019. (Id. ¶¶ 64-66, 69.)

As expressly alleged in Galaxy’s Complaint, it repeatedly saw “red flags” about the accuracy of information Ehlert provided or the information he failed to provide about the Ehlert Companies on multiple occasions throughout this acquisition process. (Id. ¶¶ 19-20, 46, 54, 60.)

*1.1.2 HHM Assists Galaxy and Ehlert in Reviewing  
Tax Issues involving the Ehlert Companies*

Henderson Hutcherson & McCullough (“HHM”) serves as Galaxy’s “primary regular outside accountant.” (McGahee Aff. ¶ 12.) It assists Galaxy in the preparation of its tax forms, financial statements, quarterly and yearly SEC reports as well as providing Galaxy with general accounting advice. (Id.)

At or around the time the SPA was executed in September of 2019, Magen McGahee, Galaxy’s Chief Financial Officer, introduced Ehlert to HHM. (Ehlert Aff. ¶ 2.)<sup>3</sup> She explained that, in relation to Galaxy’s acquisition of the Ehlert Companies, HHM would review certain financial information involving the Ehlert Companies for tax purposes. (Id.)

---

<sup>3</sup> The Affidavit of Bradley Ehlert is attached to the Motion as Exhibit E.

Subsequently, during the course of its audit, Somerset determined certain entries in the Ehlert Companies' financial statements were misallocated in tax years 2017 and 2018 and might require an amendment in their corporate returns. (Id. ¶ 3.) If these corporate returns were amended, Ehlert's personal tax return would also require amendment. (Id.) Additionally, Ehlert's personal return for 2019 would also "interrelate" with the 2019 corporate returns. (Id. ¶ 4.) Because of all these interrelated tax issues, McGahee recommended Ehlert retain HHM as his personal accountant so that it could consider all of these returns in a unified fashion. (Id. ¶¶ 4-5.)

Ehlert has presented engagement letters, signed October 22, 2019, whereby he and his wife authorized HHM to prepare their 2019 personal tax returns, and he authorized HHM to prepare 2019 tax returns for each of the Ehlert Companies. (Ehlert Aff. ¶ 5, Ex. 1-2.) These engagement letters also contemplate work on "any requested prior amended returns." (Id.) On that same date, Ehlert signed power of attorney forms authorizing HHM to speak to the IRS on issues related to his personal tax returns and the Ehlert Companies' tax returns dating back to 2015.<sup>4</sup> (Id. ¶ 6, Ex. 3.)

---

<sup>4</sup> McGahee avers that Ehlert entered into the engagement letters and other HHM documents related to HHM's work on behalf of the Ehlert Companies in his capacity as Galaxy's Chief Technology Officer. (McGahee Aff. ¶ 16.)

A few months later, on January 15, 2020, HHM completed its review of the misallocated entries, determined their effects, and recommended that Ehlert file an amended return for 2018. (*Id.* ¶ 7, Ex. 4 (T. Farmer Jan. 15, 2020 email), Mot. 2.) Ehlert was soon thereafter terminated by Galaxy and ceased using HHM's accounting services. (Mot. 2-3.)

## 1.2 Procedural Posture

### 1.2.1 *Galaxy's Claims Against Ehlert*

Galaxy filed this action against Ehlert on August 2, 2021.<sup>5</sup> Among others, Galaxy asserted claims against Ehlert for breach of the SPA, common-law and securities fraud as well a breach of fiduciary duty. (Compl. Cts. I-II, IV, VI.) These claims are based, in whole or in part, on allegations that Ehlert (and others at his behest) misrepresented and/or failed to disclose information concerning Ehlert's personal tax liabilities, the Ehlert Companies' payroll-tax liabilities, accounts payable, contractual obligations, and the receipt and handling of a \$500,000 deposit made by a certain customer (Boxlight) on a purchase contract. (*Id.* ¶¶ 20-25, 27-29 41, 44, 47, 67.) In signing the SPA, the original promissory notes, and the amended promissory note, Galaxy contends it relied on these purported misrepresentations or acted without information that Ehlert should have rightfully disclosed. (*Id.* ¶ 81.)

---

<sup>5</sup> The early history of this action is addressed in the Court's Order on Motion for Abatement, Dismissal, Restructuring and Sanctions and Order on Motion to Realign Parties, entered March 2, 2022.



### *1.2.2 The Discovery Dispute*

This particular discovery dispute, which concerns the scope of the accountant-client privilege, has a long history. (See generally Reply, Ex. A.) Ehlert first lodged its requests for document production on Somerset in February of 2022. (Reply, Ex. A ¶ 1.) As described by Somerset, Ehlert “essentially [sought] the entire project file for any work performed by Somerset pertaining to Galaxy and its acquisition of ESG and Interlock.” (Somerset Resp. 2.) Said file consisted of over 8,500 documents, many with multiple pages. (Id.) Somerset served its written response to Ehlert in March of 2022; however, it was not accompanied by a privilege log. (Reply Ex. A ¶ 2.) Almost immediately, Ehlert began inquiring as to when it might receive a privilege log. (Id. ¶ 3) However, all, including Ehlert, recognized that the documents would have to be reviewed by Galaxy “for the purpose of assessing the applicability of the privilege.” (Id. ¶ 4, Ex. A A-2 (T. Andrews May 3, 2022 email).)

On July 22, 2022, after experiencing technical difficulties, Galaxy was given electronic access to review Somerset’s documents. (Id. ¶ 6, Ex. A A-2 (G. Lucas May 19, 2022 email), A-3 (M. Williams July 25, 2022 email).) Somerset had already determined some of its documents were non-responsive or protected by its own privileges, and these documents were not provided to Galaxy for review. (Lucas Aff. ¶ 6.)<sup>6</sup> Initially, Galaxy’s review of the Somerset production would only concern

---

<sup>6</sup> The Affidavit of J. Griff Lucas, III is attached to Galaxy’s Response as Exhibit C.



privilege issues. (Id. ¶ 7.) According to Galaxy, some of the documents Somerset gathered and produced to Galaxy’s counsel as being responsive to Ehlert’s request included items addressing Somerset’s general Galaxy auditing work that were unrelated to this dispute. (Lucas Aff. ¶¶ 8-9.) At some point, Somerset’s counsel requested that Galaxy’s counsel “conduct a detailed and thorough review of the documents for responsiveness/relevance” as well as privilege issues. (Id. ¶ 9.) Galaxy contends this expanded review came at the request of Somerset attorney’s because he lacked the background necessary to accurately discern what Galaxy-related information held by Somerset was responsive to Ehlert’s request. (Id.)<sup>7</sup>

The Galaxy attorney who assisted with Somerset’s review has offered a detailed explanation of the protocol he followed, including how he made suggestions regarding whether a document should be produced or withheld and why. (Id. ¶¶ 10-18.) He avers recommending Somerset designate a document non-responsive only where it was “abundantly clear” that the document was non-responsive. (Lucas Aff. ¶ 13.)

In August of 2022, the parties requested a six-month extension of all deadlines established in the Court’s initial Case Management Order. (1<sup>st</sup> Am. CMO 1-2.) Concerned that the Somerset document review process, which began in February of

---

<sup>7</sup> Somerset and Galaxy disagreed as to the propriety of Galaxy’s counsel reviewing Somerset’s production for responsiveness. (Reply Ex. A ¶ 7.)

2022, had become too prolonged, the Court established a September 30, 2022 deadline for Somerset to provide Ehlert with its privilege log. (Id. § 8.E.(1).)

On September 30, 2022, Somerset served its Amended Objections and Responses to Ehlert’s First Requests to Produce. (Mot. Ex. A-1.) Counsel for Galaxy who reviewed the Somerset documents avers that the final decision regarding the production belonged to Somerset. (Lucas Aff. ¶ 11.) In making its production, Somerset prepared what it generally referred to as a “privilege log” which also listed documents that were not produced as being unresponsive without clearly labeling them as such. (Id. ¶ 14.)

Ehlert objected that privileges were being too broadly asserted. After the good faith conferral efforts between Ehlert and Galaxy failed, Ehlert filed the instant Motion. (Mot. Ex. A; Galaxy Resp. Ex. A, Reply Ex. A.) While the Motion was pending, the parties pursued additional efforts to resolve the dispute which were also unsuccessful. (Galaxy Resp. Ex. A; Reply Ex. A ¶¶ 20-25.)<sup>8</sup>

## **2. STANDARD OF REVIEW**

“[A] trial court has broad discretion to control all discovery matters.” Smith v. Northside Hosp., Inc., 347 Ga. App. 700, 703 (2018). Georgia law allows for wide-ranging discovery such that “parties may obtain discovery regarding any

---

<sup>8</sup> The parties dispute whether and to what extent these additional efforts were pursued in good faith and whether the Court was misled into granting a briefing extension. (Galaxy Resp. Ex. A 3; Reply Ex. A ¶¶ 21-23.) The Court does not find it was intentionally misled into granting the briefing extension.

matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery.”

(Citation and punctuation omitted.) Id.; see also O.C.G.A. § 9-11-26(b).

### 3. ANALYSIS

#### 3.1 Georgia’s Accountant-Client Privilege

Georgia’s accountant-client privilege is outlined in O.C.G.A. § 43-3-29(b). In pertinent part, it provides:

**[a]ll communications** between a certified public accountant or employee of such certified public accountant acting in the scope of such employment and the person for whom such certified public accountant or employee shall have made any audit or other investigation in a professional capacity **and all information** obtained by a certified public accountant or such an employee in his or her professional capacity concerning the business and affairs of clients shall be deemed privileged communications in all courts or in any other proceedings whatsoever . . . (emphasis added).

As the Georgia Supreme Court recognized in Gearhart v. Etheridge, 232 Ga. 638, 639-640 (1974).

[t]he purpose of the accountant-client privilege is to insure an atmosphere wherein the client will transmit all relevant information to his accountant without fear of any future disclosure in subsequent litigation. Without an atmosphere of confidentiality the client might withhold facts he considers unfavorable to this situation thus rendering the accountant powerless to adequately perform the services he renders.

The attorney-client privilege has a similar objective. Hill, Kertscher & Wharton, LLP v. Moody, 308 Ga. 74, 78-79 (2020) (the attorney-client privilege “encourage[s] full and frank communication between attorneys and their clients and



thereby promote broader public interests in the observance of law and administration of justice.”) Accordingly, Georgia courts look to caselaw interpreting the attorney-client privilege for guidance in applying the accountant-client privilege. Gearhart at 640; see also Christenbury v. Locke Lord Bissell & Liddell, LLP, 285 F.R.D. 675, 680 (N.D. Ga. 2012)(finding accountant-client privilege “analogous to that of the attorney-client privilege.”)

Ehlert claims Somerset and Galaxy have too broadly applied the privilege. He raises three general arguments as to why Somerset should be compelled to produce certain documents it is withholding. First, Ehlert claims Galaxy impliedly waived the accountant-client privilege by placing the subject matter of the purportedly privileged information at issue in this litigation. (Mot. 6-7; Reply 10-14.) Second, Ehlert seeks to compel the production of four emails dated December 1, 2019 between his then accountant HHM and Somerset addressing the subject of “Brad Ehlert Taxes.” Ehlert claims these communications qualify for a joint-representation exception to the accountant-client privilege. (Mot. 5-6; Reply 14-15.) Third, Ehlert argues Somerset’s log includes communications with third parties or documents authored by or intended for third parties which are not confidential and thus are not shielded by privilege. (Mot. 4-5; Reply 15-17.)



### 3.2 Ehlert's Alleged Lack of Specificity

In support of each of his three arguments, Ehlert has attached an exhibit, excerpted from the privilege log, listing the documents at issue. (Mot. n. 1, Ex. B-D.) By Galaxy's calculation, the Motion seeks to compel the production of over 1,600 documents.<sup>9</sup> (Galaxy Resp. 2.) Before considering Ehlert's arguments, the Court will address Galaxy's contention that Ehlert's Motion lacks necessary specificity in that it fails to address withheld documents individually. (Galaxy Resp. 3.) By its very nature, a motion seeking to compel the production of privileged information will lack specificity. Speaking plainly, a party seeking to discover a purportedly privileged documents "does not know what it does not know."

The only information available to Ehlert about any of these documents is a short description apparently generated by Somerset, a creation date, and, in some cases, information about who authored the document and/or requested it. (See generally Mot. Ex. B-D.) In many respects, an analysis of each document would not add to the privilege analysis in a meaningful fashion. As a general matter, the Court does not find Ehlert's lack of specificity should bar all of the relief he seeks.

---

<sup>9</sup> Galaxy seems to suggest the large number of documents at issue in the Motion is reason for suspicion. (Galaxy Resp. 2-4.) Ehlert is seeking discovery from an accounting firm which, by its nature, has raised some thorny privilege questions. The production itself took months to engineer. Many documents were withheld. The Court does not find the number of documents at issue as indicative of anything other than the size and difficulties related to this particular production.

However, below, the Court will address the Motion's lack of specificity in relation to certain topics.

Moreover, the Court disagrees with the assertion that it is being asked to issue an advisory opinion about the application of the privilege to a category of documents as opposed to a specific document. To be justiciable, a controversy "must be definite and concrete, touching the legal relations of parties having adverse legal interests, rather than being hypothetical, abstract, academic or moot." In Interest of I.B., 219 Ga. App. 268, 269–270 (1995) (citation omitted). There is nothing hypothetical or abstract about the questions the Court is being asked to address, and it finds this privilege dispute presents justiciable questions.

### 3.3 Subject Matter Implied Waiver Exception

Ehlert contends privilege does not extend to certain documents found on the privilege log because Galaxy placed some of the communications with its accountant at issue by filing this lawsuit and accusing Ehlert of fraudulently misrepresenting and concealing information from Galaxy. (Mot. 6-7, Ex. D; Reply 10-14.)

#### *3.3.1 Applicability of the Subject Matter Implied Waiver Exception to the Accountant-Client Privilege*

The subject matter implied waiver asserted by Ehlert is recognized with regard to attorney-client privilege. Hill, Kertscher & Wharton, LLP at 79. Pursuant to this doctrine,

a litigant waives the privilege when he places information protected by the privilege in issue through some affirmative act for his own benefit since to allow the privilege to protect against disclosure of such information would be manifestly unfair to the opposing party. (citation and punctuation omitted).

Christenbury at 681-682.

This exception has not been addressed by a Georgia Court in the context of accountant-client privilege. As noted above, Georgia law finds the attorney- and accountant-client privileges to be generally analogous. See Gearhart at 640. Other exceptions to the attorney-client privilege have been applied to the accountant-client privilege, including the crime-fraud exception<sup>10</sup> and the joint-representation exception.<sup>11</sup> Additionally, the subject matter implied waiver exception has been applied in other privilege contexts, specifically involving medical records. See Moreland v. Austin, 284 Ga. 730, 732 (2008) (“Georgia law is clear that a plaintiff waives his right to privacy with regard to his medical records that are relevant to a medical condition the plaintiff placed in issue in a civil or criminal proceeding.”).

Based on the foregoing, particularly the concerns about “manifest[] unfairness” at the heart of subject-matter waiver exception, the Court finds it is properly applied to the accountant-client privilege. Christenbury at 681-682.

---

<sup>10</sup> In re Hall County Grand Jury Proceedings, 175 Ga. App. 349, 350 (1985).

<sup>11</sup> Gearhart v. Etheridge, 232 Ga. 638, 640 (1974).



### *3.3.2 Applicability of the Subject Matter Implied Waiver Exception to these Facts*

Christenbury sets forth a three-part test, initially established in Hearn v. Rhay, 68 F.R.D. 574, 581 (E.D. Wash. 1975), for determining when a subject matter implied waiver has occurred.

(1) the party asserting the privilege affirmatively acted in a manner which resulted in the assertion of the privilege; (2) through the affirmative act, that party placed the protected information at issue by making it relevant to the case; and (3) application of the privilege would deny the opposing party access to information vital to its defense.

Christenbury at 682.<sup>12</sup>

Here, as recognized in Hearn, when it filed this lawsuit, Galaxy met the first prong of affirmatively acting in a manner that asserts the privilege. Hearn at 581. As for the second prong, the Court finds Galaxy's affirmative act has made these accountant-client communications relevant to the present case. Galaxy tasked Somerset with conducting its "due diligence" in relation to its purchase of the Ehlert Companies, and what Somerset learned and shared with Galaxy informed Galaxy's decision to enter into the SPA in September of 2019 and also the amended promissory note on November 14, 2019. (McGahee Aff. ¶ 8.) Accordingly, communications and information shared between Somerset and Galaxy about Ehlert

---

<sup>12</sup> Christenbury further notes, "[t]he Hearn standard, widely seen as the majority view, is followed by the Eleventh and other Circuit Courts of Appeal." Id. at 682.



and the Ehlert Companies will be pivotal to Galaxy's fraud-based claims. Indeed, Galaxy has expressly alleged some of Ehlert's misrepresentations about which Galaxy complains were made directly to Somerset. (Compl. ¶ 81.) Finally, as to the third prong, application of the privilege would deny Ehlert access to information crucial to his defense. "In a claim for fraud and fraudulent concealment, the plaintiff must show all five elements of fraud, including justifiable reliance: proof that due care was exercised to discover the fraud." Infrasource, Inc. v. Hahn Yalena Corp., 272 Ga. App. 703, 707 (2005)(citation and punctuation omitted). Ehlert would be placed at a great disadvantage if he were forced to mount a defense on this key issue of Galaxy's reasonable reliance and its "due care" to discover any fraud without knowing what information Somerset -- the company Galaxy tasked with investigating the financial condition of the Ehlert companies -- learned and shared with Galaxy. The Court finds this discovery vital to Ehlert's preparation of an adequate defense.

For the above-stated reasons, the Court finds the requirements of the subject matter implied waiver exception of the accountant-client privilege have been met for some of the documents listed on Exhibit D to the Motion, and the Court directs review and production of those documents as specified below.

### 3.4 Joint-Representation Exception

#### 3.4.1 *Extent of Joint-Representation Exception to Account-Client Privileged Information and Communications*

Ehlert seeks to discover four emails exchanged between HHM and Somerset addressing the subject of “Brad Ehlert Taxes” identified on Exhibit C to the Motion. (Mot. 5-6, Ex. C; Reply 14-15.)

Ehlert claims he is entitled to review these documents under a joint-representation exception to the accountant-client privilege. (Mot. 5.) This “well-recognized” exception exists with regard to attorney-client privilege and applies “when an attorney jointly represents two or more clients whose interest subsequently become adverse.” Both v. Frantz, 278 Ga. App. 556, 563 (2006). As explained in Peterson v. Baumwell, 202 Ga. App. 283, 284-285 (1991),

[i]f two or more persons jointly consult or retain an attorney the communications which either makes to the attorney are not privileged in the event of any subsequent litigation between the parties. In such situations it is considered that the attorney does not have an attorney-client relationship with either of the joint parties. (citations omitted).

The Georgia Supreme Court has approved the joint-representation exception to the accountant-client privilege. Gearhart at 640 (“[a]ll communications between the joint clients and the accountant are privileged as to all outside parties, but the privilege does not exist between the principals involved.”)

### *3.4.2 Applicability of the Joint Representation Exception to these Facts*

It was Ehlert's understanding that his personal tax returns were "interrelated with the [Ehlert Companies'] corporate returns" which is what prompted Galaxy's request that Ehlert retain HHM to work on all of these tax returns in a unified fashion. (Ehlert Aff. ¶¶ 3-4.)<sup>13</sup> Communications Ehlert received from HHM reflect it was collectively considering tax issues for Ehlert and the Ehlert Companies which was consistent with Ehlert's understanding of HHM's mission. (*Id.* ¶ 7; Ex. 4 (T. Farmer Jan. 15, 2020 email).)

Galaxy disputes there was any joint representation between Ehlert and Galaxy concerning work HHM was performing for the Ehlert Companies. (Galaxy Resp. 26-27.) However, Galaxy acknowledges that should the four emails in question relate to work HHM was performing on Ehlert's 2019 personal tax returns, Ehlert should be permitted to discover the emails, "given HHM's joint representation of Galaxy." (*Id.* 26.) The Court rejects Galaxy's distinction that a joint representation existed as to the work HHM performed for Ehlert personally but not the work it performed for the Ehlert Companies.

Considering the circumstances and timing upon which these engagements occurred, the Court finds Ehlert and the Ehlert Companies together consulted HHM

---

<sup>13</sup> The Court notes that McGahee does not dispute Ehlert's explanation of how and why he came to retain HHM to work on his personal taxes. (*Compare* Ehlert Aff. ¶¶ 2-5; McGahee Aff. ¶¶ 15-16.)



to address common tax issues impacting each of them. This joint representation was in effect on December 1, 2019, when the four subject emails were transmitted. (Mot. Ex. C.)

Accordingly, the Court directs that these four email communications be produced to Ehlert.

### 3.5 Third-Party Communications Lacking Confidentiality

#### 3.5.1 *Applicability of Exception for Communications Shared with Third Parties as Lacking Confidentiality*

Georgia has long recognized that “[t]he attorney-client privilege protects communications between the client and the attorney that are intended to be confidential; the protection does not extend to communications which are not of a confidential nature.” Bryant v. State, 282 Ga. 631, 636 (2007) citing Taylor v. Taylor, 179 Ga. 691, 693 (1934). Based on this general premise, Georgia has found an attorney-client communication may not be privileged if shared with or made with the intent to be shared with a third party. See generally Parrish v. State, 362 Ga. App. 392, 401 (2022)(“client communications to an attorney for the purpose of being conveyed by the attorney to a third party” are not privileged); Rogers v. State, 290 Ga. 18, 20-21 (2011)(“The privilege does not extend to those situations in which third parties are present for attorney-client discussions.”)

Ehlert claims, “[s]everal of the documents and communications for which Galaxy has asserted the accountant-client privilege are emails that were sent to or



received from third parties; and documents authored by third parties or intended for conveyance to third parties . . .” (Mot. 4-5.) He identifies these documents in Exhibit B to his Motion, and relying on this authority concerning attorney-client privilege, seeks to compel their production as lacking the requisite confidentiality.<sup>14</sup> The Court finds this is one area where the law governing attorney-client privilege may not serve as a sound analogy for the accountant-client privilege.

The statutory basis for the attorney-client privilege is found in O.C.G.A. § 24-5-501(a)(2). It very simply states, “[t]here are certain admissions and communications excluded from evidence on grounds of public policy including . . . communications between attorney and client.” Caselaw developed the boundaries of this privilege, and any limit on the privilege restricting it to “confidential” communications was judicially created, not statutorily imposed.

By contrast, the statute outlining the accountant-client privilege has been very broadly drawn. It expressly applies to “all communications” between a certified public accountant and their client regarding an audit or investigation as well as “all information obtained by a certified public accountant . . . in his or her professional capacity concerning the business and affairs of clients . . . .” (Emphasis added).

---

<sup>14</sup> According to Galaxy, Ehlert’s Exhibit B contained 910 entries. (Galaxy Resp. 23.) As a result of the briefing process, some of these documents Ehlert listed on Exhibit B are no longer at issue. Based upon confusion regarding the documents that Galaxy deemed unresponsive and the manner in which they were reflected on the “privilege” log, Ehlert concluded these documents were being treated as privileged and sought to compel their production. (*Id.* 15-16; Reply 2-4.) However, as reflected in his Reply, Ehlert no longer contests the decision to withhold these 514 documents. (Reply 15.) Additionally, Ehlert is no longer contesting the decision to withhold the one document for which work-product protection was asserted. (*Id.*)

O.C.G.A. § 43-3-29(b). Notably, in his Motion, Ehlert does not even cite this statute outlining the accountant-client privilege or make any effort to analyze how its wide-ranging directives should be interpreted concerning communications shared or intended to be shared with third parties. (Mot. 4-5.) Accordingly, the Court finds, *as a general rule*, the third party exceptions to attorney-client privilege rooted in concerns about confidentiality do not apply to the accountant-client privilege.<sup>15</sup>

The Court recognizes that there could be exceptions to this general rule; however, based on the record before it, Ehlert has not attempted to substantively address one. As concerns this portion of Ehlert's Motion, the Court shares Galaxy's concerns about its lack of specificity. (Galaxy Resp. 2-4.) Ehlert seeks to compel the production of hundreds of documents that he describes as falling to various categories – sent to a third party, received by a third party, authored by a third party, or intended to be shared with a third party. (Mot. 4-5.) Yet, Ehlert's Motion devotes a mere two paragraphs of argument and almost no analysis as to why these hundreds of documents, which admittedly involve different postures, should all be produced. (*Id.*) In his Reply, Ehlert did make some more specific arguments, which the Court finds to be too little, offered too late.<sup>16</sup> The Court finds it would be unfair, if not

---

<sup>15</sup> Ehlert has cited one unpublished opinion from a federal court applying Georgia law that determined the accountant-client privilege did not apply to communications that were intended to be shared with a third party. Triad Constr. Co., Inc. v. Robert Half Int'l, Inc., 2015 WL 13358195 at \*6 (N.D. Ga. Feb. 23, 2015). As the opinion offers little analysis to support its conclusion, the Court does not find it very persuasive.

<sup>16</sup> With regard to six audit inquiry letters, Ehlert offered some authority supporting their discoverability in the form of a footnote citing the opinion of a Florida Bankruptcy Court. See In re Hillsborough Holdings Corp., 132 B.R. 478, 481 (1991). (Reply 15, n. 39.) By placing this authority in its Reply, Ehlert denied Galaxy the opportunity to respond.



impossible, for Galaxy to offer a consequential defense to Ehlert's numerous, passing arguments.

In essence, Ehlert posited a very generalized argument about these accountant-client communications involving third parties, and, in return, the Court is unable to craft anything more than a very generalized ruling.

### 3.6 Attorney's Fees and Requests for Sanctions

Neither Ehlert nor Somerset has made a specific request for attorney's fees. Galaxy has requested attorney's fees under O.C.G.A. § 9-11-37 and sanctions under O.C.G.A. § 9-15-14. (Galaxy Resp. 30.)

When a discovery motion is granted in part and denied in part, O.C.G.A. § 9-11-37(a)(4)(C) provides, "the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner." In light of the unique issues addressed by the Motion, the Court declines to award attorney's

---

However, a simple reading of this case reflects the Florida accountant-client privilege it addresses is far more limited than the one Georgia recognizes as the Florida privilege covers only "communication[s] made in confidence and not information furnished to accountants or by the accountants, intended to be disclosed to third parties." Id.; compare Fla.Stat. § 90.5055(1)(c) (with limited exception, "[a] communication between the accountant and the accountant's client is 'confidential' if it is not intended to be disclosed to third persons . . ."); O.C.G.A. § 43-3-29(b) (protects "all communications" between a certified public accountant and its clients as well as "all information" it may obtain concerning the business affairs of its clients.)

Also, for the first time in its Reply, Ehlert raises a policy argument regarding the special status of work performed by an independent auditor as supporting the disclosure of the documents found on Exhibit B of his Motion. See U.S. v. Arthur Young & Co., 465 U.S. 805, 817-818 (1984). (Reply 16-17.) Again, by placing this authority in his Reply, Ehlert has deprived Galaxy of the opportunity to respond. Further, a review of this authority demonstrates it is distinguished from the current situation. The opinion addresses a summons issued by the IRS under the Internal Revenue Code to further its criminal investigation of a corporate taxpayer's returns. Specifically, the IRS sought an independent auditor's tax accrual workpapers for the corporate client, and the U.S. Supreme Court's opinion cannot be divorced from its context – addressing the summons power congressionally afforded the IRS to pursue its enforcement responsibilities. Id. at 820-821.

fees or legal expenses to any party. Similarly, the Court finds Ehlert has engaged in no conduct that would merit sanction under O.C.G.A § 9-15-14.

#### 4. CONCLUSION

In light of the foregoing, the Court **ORDERS** Defendant/Counterclaim-Plaintiff Bradley Ehlert's Motion To Compel is **GRANTED IN PART** and **DENIED IN PART** as follows:

- (1) The Motion is **GRANTED** with regard to documents covered by the subject matter implied waiver, and, accordingly, Somerset shall review all documents listed in Exhibit D to the Motion and produce any documents that are related to (i) what Somerset knew, on or before November 14, 2019, about Ehlert's personal tax liabilities, the Ehlert Companies' payroll tax liabilities, accounts payable, contractual obligations, and the Boxlight deposit and (ii) what Somerset communicated to Galaxy regarding these same subjects.
- (2) The Motion is **GRANTED** with regard to documents covered by the joint representation exception, and, accordingly, Somerset shall produce the four documents listed in Exhibit C to the Motion.
- (3) The Motion is **DENIED** with regard to documents found on Ehlert's Exhibit B as the Court finds they are privileged.



(4) With regard to any documents that this Court has determined to be discoverable, they should be produced **no later than two weeks** after the entry of this order. Should Somerset have a question whether a particular document should be produced under the terms of this order, it should be brought to the immediate attention of the Court and, **in no event later than the aforementioned deadline for production**. Should Ehlert have a question regarding the discoverability of any document that Somerset continues to withhold, it too should be brought to the immediate attention of the Court, and **in no event later than two weeks** after receiving the documents Somerset produces pursuant to this order.

(5) No fees or sanctions are awarded.

SO ORDERED this 22<sup>nd</sup> day of February, 2023.

  
KELLY ELLERBE, JUDGE  
Superior Court of Fulton County  
Atlanta Judicial Circuit

*Filed and Served Upon Registered Contacts via Odyssey eFileGA*

Attorneys for Plaintiff and Counterclaim Defendants	Attorneys for Defendant / Counterclaim Plaintiff
Michael J. Ernst J. Griff Lucas, III STOKES CARMICHAEL & ERNST LLP	Jon David W. Huffman Scott B. McMahan Timothy Andrews

2018 Powers Ferry Rd., Suite 700  
Atlanta, GA 30339  
Tel: (404) 352-1465  
[mje@scelaw.com](mailto:mje@scelaw.com)  
[jgl@scelaw.com](mailto:jgl@scelaw.com)

*Attorneys for Galaxy Next Generation, Inc.,  
Gary LeCroy, Magen McGahee, Ehlert  
Solutions Group, Inc. and Interlock Concepts,  
Inc.*

**D. Michael Williams**  
HALL BOOTH SMITH, PC  
191 Peachtree Street, NE  
Suite 2900  
Atlanta, GA 30303-1775  
Tel: (404) 954-5000

*Attorneys for Somerset CPAs, P.C. and Becky  
Quintana*

**Catherine G. Lucas**  
DUANE MORRIS LLP  
1075 Peachtree Street NE, Suite 2000  
Atlanta, GA 30309-3929  
Tel: (404) 253-6912  
[klucas@duanemorris.com](mailto:klucas@duanemorris.com)

*Attorneys for Wade Walker and TPI Business  
Consultants, LLC*

POOLE HUFFMAN, LLC  
3562 Habersham at Northlake  
Building J, Suite 200  
Tucker, GA 30084  
Tel: (404) 373-4008  
[jondavid@poolehuffman.com](mailto:jondavid@poolehuffman.com)  
[scott@poolehuffman.com](mailto:scott@poolehuffman.com)  
[timandrews@poolehuffman.com](mailto:timandrews@poolehuffman.com)

*Attorneys for Bradley Ehlert*