No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

SOHAIL N. BUTT
Petitioner,

vs.

JOHN BRIGHAM ZIMMERMAN ET AL
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Eleventh Circuit

APPENDIX TO

PETITION FOR WRIT OF CERTIORARI

Sohail N. Butt
275 Whitney Way
Fayetteville, Georgia 30214
(404) 490-6451
sohailnbutt21@gmail.com

APPENDIX A

Decision of the United States Court of Appeals for the Eleventh Circuit

[DO NOT PUBLISH]

In the
United States Court of Appeals
For the Eleventh Circuit

No. 21-14187
Non-Argument Calendar

SOHAIL N. BUTT,

Plaintiff-Appellant,

Versus

EXECUTIVE DIRECTOR JOHN BRIGHAM ZIMMERMAN,
Georgia Composite Board of Professional Counselors, Social Workers and Marriage and Family Therapists,
in his official and individual capacities,
TOMMY BLACK,
in his individual and official capacity as a board member of Georgia Composite Board of Professional Counselors, Social Workers and Marriage & Family Counselors,
ARTHUR WILLIAMS,
in his individual and official capacity as a board member of Georgia Composite Board of Professional Counselors, Social Workers and Marriage & Family Counselors,
TONYA BARBEE,
in her individual and official capacity as a board member of Georgia Composite Board of Professional

Counselors, Social Workers and Marriage & Family Counselors,
RICHARD LONG,
in his individual and official capacity as a board member of Georgia Composite Board of Professional Counselors, Social Workers
and Marriage & Family Counselors, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Georgia
D.C. Docket No. 5:21-cv-00214-TES

Before WILSON, JORDAN, and BLACK, Circuit Judges.
PER CURIAM:

Sohail Butt, proceeding *pro se*, appeals the district court's dismissal of his complaint alleging civil rights violations under 42 U.S.C. §§ 1981, 1983, and 1985 on statute of limitations grounds. Butt also appeals the district court's dismissal of his petition for a writ of mandamus. After review,[1] we affirm.

---

[1] We review *de novo* the district court's dismissal under Federal Rule of Civil Procedure 12(b)(6). *Berman v. Blount Parrish & Co.*, 525 F.3d 1057, 1058 (11th Cir. 2008). We also review the district court's application of a statute of limitations *de novo*. *Id.* We review a district court's determination of whether it had

I. STATUTE OF LIMITATIONS

Butt contends the district court erred in dismissing his 42 U.S.C. §§ 1981, 1983, and 1985 claims as time-barred under the two-year Georgia statute of limitations for personal injury, O.C.G.A. § 9-3-33. He asserts a 20-year statute of limitations applies to his civil rights claims under O.C.G.A. § 9-3-22 because it applies to "actions for the enforcement of rights accruing to individuals under statutes or acts of incorporation or by operation of law." Butt also contends that even if the two-year statute of limitations applies, the statute of limitations has not yet commenced because Zimmerman and the Board never issued a final agency decision in Butt's appeal of the denial of his application for licensure as a marriage and family therapist.

"All constitutional claims brought under § 1983 are tort actions, subject to the statute of limitations governing personal injury actions in the state where the § 1983 action has been brought." *McNair v. Allen*, 515 F.3d 1168, 1173 (11th Cir. 2008). In Georgia, the applicable statute of limitations for personal injury actions is two years. O.C.G.A. § 9-3-33; see also *Lovett v. Ray*, 327 F.3d 1181, 1182 (11th Cir. 2003). Additionally, claims under §§ 1981 and 1985 are subject to the same statute of limitations period as § 1983 claims. See *Baker v. Birmingham Bd. of Educ.*, 531 F.3d 1336, 1337 (11th Cir. 2008); *Rozar v. Mullis*, 85 F.3d 556, 561 (11th Cir. 1996).

Pursuant to federal law, a cause of action accrues, and thereby sets the limitations clock running, when "the facts which would support a cause of action are apparent or should be apparent" to a

---

mandamus jurisdiction under 28 U.S.C. § 1361 *de novo*. *Cash v. Barnhart*, 327 F.3d 1252, 1255 n.4 (11th Cir. 2003).

reasonably prudent person. *Brown v. Ga. Bd. of Pardons & Paroles*, 335 F.3d 1259, 1261 (11th Cir. 2003) (quotation marks omitted). "This rule requires a court first to identify the alleged injuries, and then to determine when plaintiffs could have sued for them." *Rozar*, 85 F.3d at 562. Under the continuing violation doctrine, a plaintiff will not be time-barred if he complains of a violation that continues into the present but will be barred for complaining of a one-time violation with continuing consequences. *Lovett*, 327 F.3d at 1183.

Butt's federal civil rights claims were untimely because they were filed after the two-year limitations period for § 1983 claims in Georgia expired. The statute of limitations for Butt's § 1983 claims began running either on August 14, 2014, when Butt received a letter from the Board stating he was denied his licensure by endorsement, or at the very latest, on October 6, 2014, when Butt sat for the National Clinical Mental Health Counseling examination to obtain a license to practice. These events served as facts apparent to Butt that a cause of action against the Board for the failure to issue licensure was available. Butt did not file his claims arising from the Board's denial of his licensure until June 28, 2021—nearly seven years after Butt learned of the facts giving rise to his injuries. Furthermore, the continuing violation doctrine is inapplicable because his appeal points to a single violation—the Board's failure to issue a license—with ongoing consequences. As such, Butt's federal civil rights claims are time-barred.

II. WRIT OF MANDAMUS

Next, Butt asserts that regardless of the applicable statute of limitations, his claims are not barred because the interference with his property

rights in employment are ongoing. Butt contends a writ of mandamus is appropriate because the claim arises from the same transaction or occurrence as his federal civil rights claims.

"Mandamus relief is only appropriate when: (1) the plaintiff has a clear right to the relief requested; (2) the defendant has a clear duty to act; and (3) no other adequate remedy is available." *Cash v. Barnhart*, 327 F.3d 1252, 1258 (11th Cir. 2003) (quotation marks and alteration omitted). A district court has jurisdiction "to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. § 1361. However, federal courts lack jurisdiction to issue writs of mandamus to direct state officials in performing their state duties. See *Moye v. Clerk, DeKalb Cnty. Super. Ct.*, 474 F.2d 1275, 1276 (5th Cir. 1973).[2]

Butt failed to demonstrate a clear right to the mandamus relief requested. All defendants are members of the Board—a state entity; therefore, all defendants are state actors. As federal courts lack jurisdictional authority to issue writs of mandamus directing state officials in the performance of their duties, the district court did not err in dismissing Butt's motion for a writ of mandamus.

AFFIRMED.

---

[2] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this Court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to close of business on September 30, 1981.

APPENDIX B

Decision of the United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

SOHAIL N. BUTT,

Plaintiff,

v.

CIVIL ACTION NO.
5:21-cv-00214-TES

Executive Director JOHN BRIGHAM ZIMMERMAN, et al.,

Defendants.

ORDER

Plaintiff Sohail N. Butt brings this action against the Georgia Composite Board of Professional Counselors, Social Workers, and Marriage and Family Therapists (hereinafter, the "Board") and its members, in their official and individual capacities. His Complaint [Doc. 1] alleges that the Board and its members violated federal and state law by failing to grant him licensure by endorsement as an associate professional counselor in Georgia. All named Defendants in this action are members of the Board, and they *all* have moved for dismissal of the claims asserted against them on the same grounds. Upon consideration of such grounds, and for the reasons discussed in detail below, the Court **GRANTS** the following: Defendants Will Bacon, Tonya Barbee,

Tommy Black, Bob King, Ben Marion, and John Brigham Zimmerman's collective Motion to Dismiss [Doc. 17], Defendant Jack Perryman's Motion to Dismiss [Doc. 22], Defendant Arthur Williams' Motion to Dismiss [Doc. 23], Defendant Richard Long's Motion to Dismiss [Doc. 25], and Defendant Steve Livingston's Motion to Dismiss [Doc. 32].

BACKGROUND

The following recitation of facts is taken from Plaintiff's Complaint. Unless otherwise noted, the Court assumes these facts to be true for the purpose of ruling on the pending dismissal motions. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007). In March 2014, Plaintiff applied to the Board for licensure by endorsement to practice as a marriage and family therapist in the State of Georgia. [Doc. 1, ¶ 11]. Soon thereafter, the Board sent Plaintiff a letter denying his application for licensure by endorsement on the ground that he had "fail[ed] to document the required [marriage and family therapist] coursework and d[id] not document 100 hours of [associate marriage and family therapist] or [marriage and family therapist] supervision." [*Id.* at ¶ 12]. In this same letter, the Board informed Plaintiff of his right to appeal the denial of his application for licensure by endorsement. [*Id.* at ¶ 13]. Plaintiff timely submitted his request for an appeal, and thereafter, was scheduled to appear at the Board's monthly meeting on April 11, 2014, to discuss the merits of his application for licensure. [*Id.* at ¶ 14].

The following members of the Board were present at the meeting: Defendants Tommy Black, Steve Livingston, Arthur Williams, Richard Long, Will Bacon, Ben Marion, Robert King, and Jonathan

B. Zimmerman. [*Id.* at ¶ 16]. Senior Assistant Attorney General Patricia Downing was also present. [*Id.*].[1] During the meeting, the Board reviewed Plaintiff's educational background and concluded that he was not qualified for licensure by endorsement as a marriage and family therapist. [*Id.* at ¶ 17]. However, Defendant Black noted that Plaintiff's educational background was sufficient to qualify him for licensure by endorsement as a professional counselor. [*Id.*]. As a result, Defendant Zimmerman proposed that the Board consider Plaintiff's original application for licensure as *a family and marriage therapist* as an application for licensure as a *professional counselor*. [*Id.*]. The Board put the proposal to a vote and ultimately decided that Plaintiff would first practice as a licensed associate professional counselor for 12 months before then being granted licensure by endorsement as a professional counselor. [*Id.*].

Upon resolution of the matter, Defendant Zimmerman instructed Plaintiff to submit applications for licensure as an associate professional counselor and a professional counselor. [*Id.*]. Plaintiff was permitted to reuse certain forms from his original application when submitting these new applications. [*Id.*]. Before submitting the relevant forms, Plaintiff made sure to indicate that he was applying for "licens[sure] through endorsement as voted upon and approved by the Board [m]embers." [*Id.* at ¶ 18]. He mailed the documents on or about April 14, 2014. [*Id.*].

On August 14, 2014, Plaintiff received a letter from the Board regarding his application. [*Id.* at ¶ 23].

---

[1] Upon review of his Complaint, it appears that Plaintiff does not state a claim against Patricia Downing in either her official or individual capacity. See generally [Doc. 1].

In this letter, the Board did not grant Plaintiff licensure by endorsement (as he believed would be the case), but instead informed him that he still needed to register and pass the Professional Counselors Licensure examination or the National Clinical Mental Health Counseling examination to secure his licensure. [*Id.*].

Plaintiff alleges that the Board's failure to grant him licensure by endorsement contradicted its decision from the April 11, 2014 Board meeting, that would have allowed Plaintiff to practice as a licensed *associate* professional counselor for a 12-month period. [*Id.*]. He also alleges that the Board failed to memorialize its decision to grant Plaintiff licensure by endorsement in the meeting's minute sheet, as the Board was required to do pursuant to the Georgia Open Meetings Act. [*Id.* at ¶¶ 24–27, 44].

However, in the interest of securing his licensure, Plaintiff registered and sat for the National Clinical Mental Health Counseling examination on October 6, 2014. [*Id.* at ¶ 31]. He did not pass. [*Id.* at ¶ 32]. Plaintiff petitioned the Board to review his exam results because he believed the exam itself contained "inaccurate presentation of Georgia law and approved clinical evidence[-]based practice[.]" [*Id.* at ¶¶ 32, 35]. The Board took no action regarding this request. [*Id.*].

Plaintiff alleges that the Board, through its members, deprived him due process under the law, the right to pursue a profession of his choosing, and the right to earn a living wage. [*Id.* at ¶ 39]. He also alleges that he suffered "unequal treatment before the law." [*Id.*].

In response to Plaintiff's allegations, several Board members moved to dismiss those claims asserted against them. Specifically, Defendants Will

Bacon, Tonya Barbee, Tommy Black, Bob King, Ben Marion, and John B. Zimmerman filed the first Motion to Dismiss in this action, moving for dismissal based on lack of jurisdiction, insufficient process, insufficient service of process, and failure to state a claim upon which relief could be granted. [Doc. 17]. Soon thereafter, Board members and named Defendants Jack Perryman, Arthur Williams, Steve Livingston, and Richard Long each filed dismissal motions, wherein they adopted the brief contained in the first Motion to Dismiss. See [Doc. 22]; [Doc. 23]; [Doc. 25]; [Doc. 32].

There are six dismissal motions pending in this action, but only the first motion has a brief attached that contains substantive legal argument. See [Doc. 17-1]. The remaining five motions adopt the substantive legal arguments contained within that brief as their own. Therefore, the Court will consider the merits of that first motion and its brief as it applies to all named Defendants.

DISCUSSION

A. Legal Standard

When ruling on a 12(b)(6) motion, district courts must accept the facts set forth in the complaint as true. *Twombly*, 550 U.S. at 572. A complaint survives a motion to dismiss only if it alleges sufficient factual matter (accepted as true) that states a claim for relief that is plausible on its face. *McCullough v. Finley*, 907 F.3d 1324, 1333 (11th Cir. 2018) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009)). In fact, a well-pled complaint "may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and

unlikely." *Twombly*, 550 U.S. at 556 (citations omitted).

Although Federal Rule of Civil Procedure 8 does not require detailed factual allegations, it does require "more than [ ] unadorned, the-defendant-unlawfully-harmed-me accusation[s]." *McCullough*, 907 F.3d at 1333 (citation omitted). To decide whether a complaint survives a motion to dismiss, district courts are instructed to use a two-step framework. *Id.* The first step is to identify the allegations that are "no more than mere conclusions." *Id.* (quoting *Iqbal*, 556 U.S. at 679). "Conclusory allegations are not entitled to the assumption of truth." *Id.* (citation omitted). After disregarding the conclusory allegations, the second step is to "assume any remaining factual allegations are true and determine whether those factual allegations 'plausibly give rise to an entitlement to relief.'" *Id.* (quoting *Iqbal*, 556 U.S. at 679).

Furthermore, a complaint attacked by a 12(b)(6) motion is subject to dismissal when it fails to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Twombly*, 550 U.S. at 555. "A plaintiff must plead more than labels and conclusions or a formulaic recitation of the elements of a cause of action." *McCullough*, 907 F.3d at 1333 (internal quotations omitted); see also *Twombly*, 550 U.S. at 555. "To be sure, a plaintiff may use legal conclusions to structure his complaint, but legal conclusions 'must be supported by factual allegations.'" *McCullough*, 907 F.3d at 1333 (quoting *Iqbal*, 556 U.S. at 679).

The issue to be decided when considering a motion to dismiss is not whether the claimant will ultimately prevail, but "whether the claimant is entitled to offer evidence to support the claims."

Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), overruled on other grounds by *Davis v. Scheuer*, 468 U.S. 183 (1984). The factual allegations in a complaint "must be enough to raise a right to relief above the speculative level" and cannot "merely create[] a suspicion of a legally cognizable right of action." *Twombly*, 550 U.S. at 545, 555. Finally, complaints that tender "'naked assertion[s]' devoid of 'further factual enhancement'" will not survive against a motion to dismiss. *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557) (alteration in original). Stated differently, the complaint must allege enough facts "to raise a reasonable expectation that discovery will reveal evidence" supporting a claim. *Twombly*, 550 U.S. at 556. With the foregoing standard in mind, and taking the facts asserted in Plaintiff's Complaint as true, the Court rules on the pending dismissal motions.

B. Motions to Dismiss

1. Plaintiff's Federal Claims are Time-Barred

Plaintiff asserts claims under 42 U.S.C. § 1983 against all named Defendants, alleging that they violated his procedural and substantive due process rights when they failed to issue him licensure by endorsement as an associate professional counselor in the State of Georgia. *See* [Doc. 1, ¶¶ 70–88]. Plaintiff also asserts violations of his equal protection rights under 42 U.S.C. § 1981, alleging that the Board members failed to "accord [him] the same practices and procedures as applied to all other applicants for licensure[.]" [*Id.* at ¶ 66]. And, in his last federal claim, Plaintiff alleges that Defendants engaged in a

conspiracy to deprive him of his constitutional rights, in violation of 42 U.S.C. § 1985.[2] [*Id.* at ¶¶ 64–69]. Defendants argue that these claims are time-barred by the applicable statute of limitations.

As an initial matter, Plaintiff's § 1981 claims against Defendants must be brought under § 1983.[3] "Section 1981 does not provide a cause of action against state actors; instead, claims against state actors or allegations of § 1981 violations must be brought pursuant to § 1983." *Baker v. Birmingham Bd. of Educ.*, 531 F.3d 1336, 1337 (11th Cir. 2008) (citing *Butts v. Cnty. of Volusia*, 222 F.3d 891, 892–94 (11th Cir. 2000)). As a result, "[t]he Eleventh Circuit and various district courts have stated that because § 1983 is the sole remedy for a § 1981 claim against state actors, where a plaintiff asserts a § 1981 claim, it merges into the § 1983 claim that is asserted." *Siddiqui v. Wade*, No. 1:06-cv-1396-WSD, 2007 WL 1020802, at *3 (N.D. Ga. Apr. 2, 2007) (citing *Moore v. Ala. Dep't of Corr.*, 137 F. App'x 235, 237 (11th Cir. 2005)). This is relevant here because it means that

---

[2] In his Complaint, Plaintiff fails to specifically identify the basis for which he asserts his § 1985 conspiracy claims against Defendants. *See generally* [Doc. 1, ¶¶ 64–69]. However, in Plaintiff's Response [Doc. 27] to the various motions to dismiss, he finally provides some substance to his claim by alleging that Defendants "conspired to not record the vote proposed, seconded, and unanimously passed [at the April 11th Board meeting]." [Doc. 27, pp. 8, 26, 28].

[3] Plaintiff cannot bring independent § 1981 claims against Defendants but instead must assert the claims through § 1983. Regardless, the Court will continue to refer to Plaintiff's claims for equal rights violations as "§ 1981 claims" and his claims for Fourteenth Amendment violations as "§ 1983 claims" to acknowledge (somewhat formalistically) the difference in the claims.

Plaintiff's § 1981 claims are subject to the same statute of limitations period as his § 1983 claims.[4]

Since § 1983 does not have its own statute of limitations, claims brought under this statute are "subject to the statute of limitations governing personal injury actions in the state where the . . . action has been brought." *Crowe v. Donald*, 528 F.3d 1290, 1292 (11th Cir. 2008) (quoting *McNair v. Allen*, 515 F.3d 1168, 1173 (11th Cir. 2008)). In Georgia, there is a two-year statute of limitations for personal injury actions, as set forth in O.C.G.A. § 9-3-33. *Lovett v. Ray*, 327 F.3d 1181, 1182 (11th Cir. 2003); see also *Williams v. City of Atlanta*, 794 F.2d 624, 626 (11th Cir. 1986) (holding that "the proper limitations period for all section 1983 claims in Georgia is the two year period set forth in O.C.G.A. § 9-3-33 for personal injuries[]"). Similarly, the law is quite clear "that claims brought under § 1985 are "measured by the personal injury limitations period of the state." *Rozar v. Mullis*, 85 F.3d 556, 561 (11th Cir. 1996); *see also Palacious v. Lienhard*, No. 1:15- CV-01683-TCB-JFK, 2015 WL 11571038, at *13 (N.D. Ga. Dec. 30, 2015), adopted by 2016 WL 4502376 (N.D. Ga. Jan. 25, 2016) ("Section 1983 and 1985 claims are characterized as personal injury causes of action, and the state statute of limitations for personal injury actions applies to these federal claims.").

---

[4] The Court acknowledges that not all § 1981 claims are governed by the same statute of limitations period as all § 1983 claims. When a § 1981 claim relates to post-contract formation conduct and has been "made possible by the 1991 amendments to § 1981" such a claim is subject to a four-year statute of limitations period. *Baker v. Birmingham Bd. of Educ.*, 531 F.3d 1336, 1337–38 (11th Cir. 2008). However, the Court does not find that four-year limitations period applicable here, and even if it did, Plaintiff's claims would still be time-barred.

Plaintiff disputes the argument that his claims are governed by the two-year statute of limitations for personal injury actions. He argues that only "civil rights actions for personal injuries are limited in Georgia by a two-year statute of limitations[,]" and he "has not claimed personal injuries[]" in this action. [Doc. 27, p. 3]. Instead, he alleges that he has claimed violations for constitutional rights, which warrant the application of the 20-year statute of limitations found at O.C.G.A. § 9-3-22.

While "[m]ost civil rights actions are essentially claims to vindicate injuries to personal rights," that does not mean that "civil rights claims are a type of personal injury claim." *Seco v. NCL (Bahamas), Ltd.*, 588 F. App'x 863, 866 (11th Cir. 2014) (quoting *Everett v. Cobb Cnty. Sch. Dist.*, 138 F.3d 1407, 1409 (11th Cir. 1998)). The Court is well-aware that Plaintiff alleges claims for constitutional violations and not for personal injuries. However, the law is quite clear that "[a]ll constitutional claims brought under § 1983 are tort actions and, thus, are subject to the statute of limitations governing personal injury actions in the state where the § 1983 action has been brought." *Boyd v. Warden, Holman Corr. Facility*, 856 F.3d 853, 872 (11th Cir. 2017); *see also McNair*, 515 F.3d at 1173. Therefore, Plaintiff's assertion that the limitations period set forth in O.C.G.A. § 9-3-22 applies to his case is simply wrong.

Under O.C.G.A. § 9-3-22, the 20-year limitations period applies to "actions for the enforcement of rights accruing to individuals under statutes or acts of incorporation or by operation of law." O.C.G.A. § 9-3-22. Plaintiff cites to *Solomon v. Hardison*, 746 F.2d 699 (11th Cir. 1984), and *Cook v. Ashmore*, 579 F. Supp. 78 (N.D. Ga. 1984), in support of his argument that O.C.G.A. § 9-3-22 is the most

analogous Georgia statute (and not Georgia's personal injury statute) for statute of limitations purposes. However, these cases are no longer good law on this matter. In *Wilson v. Garcia*, the Supreme Court conclusively held that § 1983 actions are to be treated as personal injury actions for statute of limitations purposes. 471 U.S. 261 (1985). Circuit and district court cases decided before Wilson, such as Solomon and Cook, that adopt contrary holdings are simply no longer controlling law. Plaintiff's argument is unavailing, and the two-year statute of limitations period set forth in O.C.G.A. § 9-3-33 for personal injuries applies to his § 1981, § 1983, and § 1985 claims.

The two-year statute of limitations for Plaintiff's claims begins to run "when the facts that would support a cause of action are apparent or should be apparent to a person with a reasonably prudent regard for his rights." *Porter v. Ray*, 461 F.3d 1315, 1323 (11th Cir. 2006) (citing *Lovett*, 327 F.3d at 1182). "It is well established that a federal claim accrues when the prospective plaintiff knows or has reason to know of the injury which is the basis of the action." *McNair*, 515 F.3d at 1174 (quoting *Corn v. City of Lauderdale Lakes*, 904 F.2d 585, 588 (11th Cir. 1990)).

In this action, Plaintiff knew or had reason to know of his injuries in 2014—the year in which he was denied his licensure by endorsement. Plaintiff's § 1981 equal protection claims and § 1983 due process claims all center on the allegation that the Board denied his application for licensure by endorsement, in direct contradiction of its decision to grant his application during the April 11, 2014 Board meeting. And, his § 1985 conspiracy claims arise from the Board's alleged agreement to not record its decision to grant his application in the minute sheets for that meeting,

which would have also occurred on April 11, 2014. As a result of these actions, Plaintiff alleges that he was forced to take the October 2014 National Clinical Mental Health Counseling examination as the only means to secure his licensure—an examination that he failed because it allegedly contained questions with answers contrary to the laws of the State of Georgia. [Doc. 1, ¶ 87].

Plaintiff learned of his injury (i.e., the denial of his application for licensure by endorsement) on August 14, 2014—the date he received a letter from the Board detailing his need to register for and pass the National Clinical Mental Health Counseling examination to secure his licensure. Plaintiff, acknowledging the Board's refusal to grant him licensure by endorsement, took the National Clinical Mental Health Counseling examination on October 6, 2014 "in an effort to obtain [his] license to practice." [*Id.* at ¶ 31]. Therefore, at the very latest, Plaintiff knew of his injury on October 6, 2014. Pursuant to Georgia's two-year statute of limitations, his § 1981 equal rights claims, § 1983 due process claims, and § 1981 conspiracy claims should have been filed no later than October 6, 2016.[5] However, Plaintiff did not file any claims arising from the Board's denial of his application for licensure by endorsement until June 28, 2021—nearly seven years after Plaintiff learned of the facts giving rise to his injuries.

---

[5] To the extent that Plaintiff brings a claim against Defendants (assuming he could viably do so) for the allegedly inaccurate information contained in his National Clinical Mental Health Counseling examination, any such claim should have been filed no later than October 6, 2016—two years from the date he took the exam and learned of its contents.

Therefore, Plaintiff's § 1981 equal protection claims, § 1983 due process claims, and § 1985 conspiracy claims are time-barred.

2. Plaintiff's Claims for Equitable Relief (A Writ of Mandamus)

Plaintiff argues that he is "entitled to a Writ of Mandamus" compelling Defendants to (1) correct the minute sheet from the April 11th Board meeting to reflect the Board's vote to allow Plaintiff to practice as a licensed associate professional counselor for twelve months and then be granted licensure through endorsement as a licensed professional counselor thereafter; (2) issue a declaration that Plaintiff submitted his associate professional counselor application form to the Board on April 12, 2014; and (3) issue Plaintiff both an associate professional counselor license effective as of April 14, 2014 and a professional counselor license, effective as of April 14, 2015. [Doc. 1, ¶ 56]. In response, Defendants argue that Plaintiff's claims for equitable relief are barred by the affirmative defense of laches.

Although the issue of whether laches bars a claim generally should not be resolved on a motion to dismiss, there is at least one instance in which it is acceptable to resolve such a question. See, e.g., *Valencia v. Universal City Studio LLC*, No. 1:14-CV-00528-RWS, 2014 WL 7240526, at *3 (N.D. Ga. Dec. 18, 2014) (concluding that consideration of a defense of laches is "inappropriate at the motion to dismiss stage"). "[The defense of laches] may be asserted by motion to dismiss for failure to state a claim—provided that the complaint shows affirmatively that the claim is barred." *Motley v. Taylor*, 451 F. Supp. 3d 1251, 1276 (M.D. Ala. 2020) (quoting *Herron v.*

Herron, 255 F.2d 589, 593 (5th Cir. 1958)). And upon review, Plaintiff's claim for a writ of mandamus is barred, so the Court cannot provide the relief he seeks. "Mandamus relief is only appropriate when: (1) the plaintiff has a clear right to the relief requested; (2) the defendant has a clear duty to act; and (3) no other adequate remedy is available." *Cash v. Barnhart*, 327 F.3d 1252, 1258 (11th Cir. 2003) (citing *Jones v. Alexander*, 609 F.2d 778, 781 (5th Cir. 1980) (quotations omitted)). Plaintiff fails to show that he has a clear right to the relief requested.

All named Defendants are members of the Board—a State entity; therefore, all Defendants are state actors. It is clear from Plaintiff's pleading, that he takes issue with how these state actors carried out their official duties as members of the Board. "Federal courts do not have the jurisdiction to issue writs of mandamus directing state officials in the performance of their duties." *Jones v. Coleman*, No. 5:19-cv-93, 2020 WL 7409084, at *2 (S.D. Ga. Nov. 24, 2020) (quoting *Lawrence v. Miami-Dade Cnty. State Att'y Off.*, 272 F. App'x 781 (11th Cir. 2008)); *see also Church of Scientology of Ga., Inc. v. City of Sandy Springs*, 843 F. Supp. 2d 1328, 1380 (N.D. Ga. 2012). Therefore, Plaintiff seeks relief that is not available to him through a mandamus claim.

3. Plaintiff's Remaining State-Law Claims

In addition to his federal claims, Plaintiff also asserts state-law claims against all Defendants. Specifically, Plaintiff alleges that Defendants violated the Georgia Open Meetings Act, O.C.G.A. § 50-14-1, when they failed to record the vote at the April 11th Board meeting that allegedly granted him licensure by endorsement as an associate professional counselor

for a limited 12-month period. See [Doc. 1, ¶¶ 40–49]. Plaintiff also alleges that Defendants wrongfully interfered with his property rights to pursue a calling of his choosing and to earn a living from a calling of his choosing, in violation of O.C.G.A. § 51-9-1. [Doc. 1, ¶ 90].

Pursuant to 28 U.S.C. § 1367(a), a district court may exercise supplemental jurisdiction over state-law claims where it has original jurisdiction over other claims in the action. *See, e.g., Ameritox v. Millennium Lab'y*, 803 F.3d 518, 530 (11th Cir. 2015) (discussing how federal courts can "decide certain state-law claims involved in cases raising federal questions" under the doctrine of supplemental jurisdiction). However, a district court may decline to "exercise supplemental jurisdiction over non-diverse state-law claims, where the Court has dismissed all claims over which it had original jurisdiction." *Bagget v. First Nat'l Bank of Gainesville*, 117 F.3d 1342, 1352 (11th Cir. 1997); *see also Arnold v. Tuskegee Univ.*, 212 F. App'x 803, 811 (11th Cir. 2006) ("When the district court has dismissed all federal claims from a case there is a strong argument for declining to exercise supplemental jurisdiction over the remaining state law claims."). And, in instances where, as here, the federal claims are dismissed before trial, it is encouraged that the state-law claims should be dismissed as well. *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1996); *see also Mergen v. Dreyfoos*, 166 F.3d 1114, 1119 (11th Cir. 1999).

Since the Court has already dismissed Plaintiff's federal claims as time-barred, it now declines to exercise supplemental jurisdiction over the remaining state-law claims. Accordingly, Plaintiff's state-law claims are dismissed and may be filed in the appropriate state court.

CONCLUSION

For the reasons discussed in detail above, the Court **GRANTS** the following: Defendants Will Bacon, Tonya Barbee, Tommy Black, Bob King, Ben Marion, and John Brigham Zimmerman Motion to Dismiss [Doc. 17], Defendant Jack Perryman's Motion to Dismiss [Doc. 22], Defendant Arthur Williams' Motion to Dismiss [Doc. 23], Defendant Steve Livingston's Motion to Dismiss [Doc. 32][6], and Defendant Richard Long's Motion to Dismiss [Doc. 25]. Accordingly, as the Court has dismissed all claims against all Defendants, the Clerk of Court is **DIRECTED** to **CLOSE** this case.

SO ORDERED, this 25th day of October, 2021.

S/ Tilman E. Self, III
TILMAN E. SELF, III, JUDGE
UNITED STATES DISTRICT COURT

---

[6] Plaintiff initially served his summons and complaint on an incorrect individual, who shared the same name of the individual (Steve Livingston) that Plaintiff had intended to serve. See [Doc. 10]. The incorrect Livingston, having been served with a lawsuit, filed an Answer [Doc. 21] and Motion to Dismiss [Doc. 24] in response. Plaintiff, realizing the error, moved to dismiss the incorrectly served Livingston as a party to this action. [Doc. 29]. The Court granted that motion. [Doc. 29]. However, the incorrect Livingston's Motion to Dismiss remained pending. The Court resolves that matter now by **terminating** that Motion to Dismiss [Doc. 24] **as moot** in light of its Order [Doc. 29] dismissing him as a party.

APPENDIX C

Sohail N. Butt v. National Board of Certified Counselors, Inc.

In the Superior Court of DeKalb County,

State of Georgia

No. 2015CV1201

Appeal No. A16A0268

Cert. Denied on February 6, 2017, Case No. S16C1808

IN THE SUPERIOR COURT OF DEKALB COUNTY
STATE OF GEORGIA

SOHAIL N. BUTT,	)	
	)	
Plaintiff,	)	
	)	Civil Action File
v.	)	No. 15CV1201
	)	
NATIONAL BOARD OF CERTIFIED COUNSELORS INC.,	)	
	)	
	)	
Defendants.	)	

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

The above styled matter came before this Court for a hearing on July 20, 2015 on Defendant's Motion to Dismiss. The Plaintiff appeared *pro se* and counsel Joseph H. Wieseman, Esq. appeared for the Defendant. After full consideration of the pleadings, written submissions and having considered the arguments presented at oral hearing, the Court hereby GRANTS Defendant's Motion to Dismiss.

Factual and Procedural Background

Plaintiff filed his Complaint for Breach of Contract and Equitable Relief on or about January 5, 2015. On or about March 27, 2015, NBCC answered and filed a Motion to Dismiss Plaintiffs Complaint for failure to state a claim under O.C.G.A. § 9-11- 12(b)(6). Plaintiff responded to NBCC's Motion and filed *his* First Amended Complaint for Damages and Equitable

Relief. On or about May 15, 2015, NBCC filed a Motion to Dismiss Plaintiffs First Amended Complaint under O.C.G.A. § 9-11-12(b)(6). On or about July 1, 2015, Plaintiff filed a Motion for Leave of File an Out of Time Response to NBCC's Motion. On July 8, 2015, the Court denied Plaintiff's Motion for Leave to File an Out of Time Response. The Court held an oral hearing on July 20, 2015 on NBCC's Motion.

Plaintiff represents that he is a counselor and psychotherapist. [Amend. Compl. 9.] In August 2014, he applied to the Georgia Composite Board ("Board") to seek licensure as a professional counselor. [*Id.* at ¶ 20.) As part of the licensure process, the Board required Plaintiff to pass the National Clinical Mental Health Counselors Examination ("Exam"). [*Id.* at ¶ 1.] National Board for Certified Counselors, Inc. ("NBCC") administers the Exam. [*Id.* at ¶ 14.] Plaintiff contends he "promptly applied to the take the [Exam] and registered with NBCC by completing the required documentation, disclosing personal information and paying the fee of $195.00." [*Id.* at ¶21.] In September 2014, Plaintiff alleges NBCC confirmed his-registration in an email that included a Candidate Handbook for State Credentialing for NCMHCE (Handbook) and DSM-5 Update. [*Id.* at ¶ 22, Exhs. 1-3.]

In preparation of the Exam, Plaintiff contends he studied using unidentified sample tests and related materials provided on NBCC's website. [Amend. Compl. ¶ 24.) The Handbook states, "NBCC does not endorse any particular study materials for the [Exam]" and selected reference to various study guides are only "presented as possible helpful options in preparing for the [Exam]." [*Id.* at Ex. 2, 7.]

"[P]erformance enhancement is neither implied nor expressed." [*Id.*].

Plaintiff took the Exam on October 6, 2014. [*Id.* at ¶¶ 23, 25.] There, he "applied his knowledge, experience, ethical principles, evidence based practice and clinical knowledge to the scenarios presented [on the Exam] ...." [*Id.* at ¶ 35.] While he passed the information-gathering section, he failed the decision-making section. [*Id.* at ¶ 26.] As a result, he failed the Exam. [See *Id.* at ¶¶ 26, 35.]

Plaintiff contends the Exam was deficient. [*Id.* at ¶ 34.] "Plaintiff found it difficult if not impossible to make decisions due to lack of direct questions, medical, clinical, family histories or other indicators . . . which are all integral part of the practice of clinical mental health counseling ...." [*Id.*] Plaintiff contends this was the first time in his life he has failed an examination. [*Id.* at ¶36.] Still, he claims he passed the Exam. [*Id.*] Specifically, Plaintiff contends "at least three of his answers were correct and [he] felt the [Exam] answers were incorrect and contradictory to the training of clinical mental health counselors, their knowledge, expertise and evidence-based practice." [*Id.*]

Pursuant to the Handbook, a candidate may request a score verification by submitting a Score Verification Request Form along with payment of $20. [*Id.* at Ex. 3, 13.] Plaintiff does not contend that he either submitted the Form or paid the fee. [*See generally* Amend. Compl.] Instead, he alleges that he contacted NBCC "seeking clarification and validation of his answers ...." [*Id.* at ¶¶ 37-41, Exhs 4, 6.] NBCC responded in two separate letters and infonned Plaintiff, inter alia, that the Exam had a 71% pass rate, and NBCC had re-scored his Exam by hand, but his score did not change. [*Id.* at Exhs. 5, 7.]

Plaintiff contends the registration email, Handbook, and DSM-5 Update contain the terms of the alleged contract with NBCC. [*Id.* at ¶¶ 27, 28, 31.] The alleged terms and aforementioned sections provide a general overview and scheduling information for the Exam. [*Id.*] Plaintiffs Amended Complaint also contains four allegedly implied terms in the alleged contract between NBCC and Plaintiff. [*Id.* at ¶ 32.] As for the alleged breaches of the alleged terms, Plaintiff lists eleven different grounds. [*Id.* at ¶ 33, a-k.] All eleven grounds concern alleged problems with the content of the questions and scenarios in the Exam itself. [*Id.*]

In addition to a cause of action for breach of contract, Plaintiff alleges to two tort claims--misrepresentation and breach of duty of care. In terms of Plaintiff's misrepresentation claim, Plaintiff lists the same grounds that he supports his breach of contract claim to support his misrepresentation claim. [Compare *Id.* at ¶ 59, a-k, with ¶ 33, a-k.] With respect to his breach of duty of care claim, Plaintiff claims NBCC "warranted and represented it would present a clinical simulation examination to more realistically assess knowledge and expertise to make important clinical decisions ... [but] the [Exam] repeatedly failed to do so." [*Id.* at 62.] He further alleges NBCC "failed to apply due diligence and care knowing that NCMHCE candidates relied on the warranties and representations made in the NCMHCE content to prepare for same . . . ." [*Id.* at ¶ 64].

Motion to Dismiss Standard

A motion to dismiss for failure to state a claim upon which relief can be granted under O.C.G.A. § 9-11-12(b)(6) may only be granted if: "(1) the allegations

of the complaint disclose with certainty that the claimant would not be entitled to relief under any state of provable facts asserted in support thereof; and (2) the movant establishes that the claimant could not possibly introduce evidence within the framework of the complaint sufficient to warrant a grant of the relief sought. *Anderson v. Flake*, 267 Ga. 498, 501, 408 S.E.2d 10, 12-13 (1997). The pleadings must be construed "most favorably to the party who filed them, and all doubts regarding such pleadings must be resolved in the filing party's favor." *Id.* at 501,480 S.E.2d at 13.

Authority and Conclusions of Law

Breach of Contract Claims

Plaintiff carries the burden of proving the existence of a valid contract with NBCC. *Laverson v. Macon Bibb Cnty. Hosp. Auth.*, 226 Ga. App. 761, 762 (1997). There are four requirements to a valid contract: (1) there must be parties able to contract; (2) a consideration moving to the contract; (3) the assent of the parties to the terms of the contract; and (4) a subject matter upon which the contract can operate. O.C.G.A. § 13-3-1. Each of these four essential terms must be certain. *Laverson*, 226 Ga. App. at 762.

In order that it may allege an agreement, a complaint must set forth contract of such certainty and completeness that either party may have a right of action upon it for breach. *Id.*; *Jackson v. Williams*, 209 Ga. App. 640, 642 (1993). The requirement of certainty extends to the subject matter and purpose of the contract, the parties, the consideration, and even the time and place of performance. *Jackson*, 209 Ga. App. at 642. A party cannot enforce a contract in any

form of action if the terms are incomplete or incomprehensible. *Id.* at 643.

Every enforceable contract requires that parties must "mutually assent to the same thing in the same sense." *Gray v. Aiken*, 205 Ga. 649,653 (1949).

> The legal test for mutuality of assent to contract or meeting of the minds requires the application of an objective theory of intent whereby one party's intention is deemed to be that meaning a reasonable man in the position of the other contracting party would ascribe to the first party's manifestations of assent, or that meaning which the other contracting party knew the first party ascribed to his manifestations of assent.

Jackson Elec. Membership Corp. v. Ga. Pub. Serv. Comm'n, 294 Ga. App. 253, 259 (2008) (citing *N Ga. Elec. Membership Corp. v. Dalton*, 197 Ga. App. 386, 387 (1990)). It is well settled that contracts conditioned upon discretionary contingencies lack mutuality. *Stone Mountain Props., Ltd. v. Helmer*, 139 Ga. App. 865, 867 (1976).

This Court finds Plaintiff's allegations demonstrate that at the time he entered into the alleged contract with NBCC in September 2014, he reserved for himself the question of satisfaction of the content of the Exam. As a result, there was no mutuality to establish a contract between Plaintiff and NBCC. Without a valid contract, Plaintiffs breach of contract claim fails as a matter of law.

The Court also finds Plaintiff does not and cannot point to any provision of the alleged contract with NBCC entitling him to dispute the content of the Exam. Similarly, Plaintiff cannot demonstrate that NBCC assented to such additional right or intended

Plaintiff to have such right under an objective theory of mutuality. As a result, Plaintiffs breach of contract claim fails as a matter of law. The Court further finds there were no implied terms in the alleged contract between NBCC and Plaintiff to support Plaintiff's claims. *Myung Sung Presbyterian Church, Inc. v. N Am. Ass'n of Slavic Churches & Ministries, Inc.*, 291 Ga. App. 808, 811 (2008) (quoting *Fisher v. Toombs Cnty. Nursing Home*, 223 Ga. App. 842, 845 (1996)).

In addition to a lack of mutuality, Plaintiff cannot demonstrate NBCC made him an offer. Before a party can accept a contract, there must be a "definite offer." *Gray v. Aiken*, 205 Ga. 649, 653 (1949); *Citizens Trust Bank v. White*, 274 Ga. App. 508, 510 (2005). Per the Amended Complaint, the Board required Plaintiff to take the Exam since he sought licensing in Georgia. However, the Board's registration requirement on Plaintiff does not constitute an offer by NBCC. Because the terms of Plaintiff's alleged contract are both incomplete and incomprehensible, the Court finds Plaintiff cannot establish a binding contract with NBCC to sustain his breach of contract claim. *Jackson v. Williams*, 209 Ga. App. 640, 642 (1993).

Even if Plaintiff could establish a valid contract with NBCC, the Court finds Plaintiff has not alleged and can never establish a breach of any contractual term. The elements of a breach of contract claim are "(1) breach and the (2) resultant damages (3) to the party who has the right to complain about the contract being broken." *Norton v. Budget Rent a Car Sys., Inc.*, 307 Ga. App. 501, 502 (2010). Assuming arguendo there was a valid contract between NBCC and Plaintiff, NBCC was contractually obligated only to allow Plaintiff to sit for the Exam. As alleged, Plaintiff was permitted to and did in fact take the Exam. Thus, there was no breach of the alleged contract.

Plaintiffs only recourse in the event he did not pass the Exam was to have his score verified. To have a score verified, Plaintiff was required first to submit a Score Verification Request Form along with a payment of $20 to NBCC. Plaintiff does not allege he submitted the requisite form. He also does not allege he submitted the requisite payment. Thus, the Court finds Plaintiff was not entitled to a verification of his score.

Tort Claims

With respect to Plaintiffs tort claims, misrepresentation and breach of duty of care, the allegations all arise from the alleged contract with NBCC. "[A] defendant's mere negligent performance of a contractual duty does not create a tort cause of action; rather, a defendant's breach of a contract may give rise to a tort cause of action only if the defendant has also breached an independent duty created by statute or common law." *Fielbon Dev. Co. v. Colony Bank*, 290 Ga. App. 847, 855 (2008); *see also Servicemaster Co. v. Martin*, 252 Ga. App. 751, 757 (2001). Absent a legal duty beyond the contract, no action in tort may lie upon an alleged breach of a contractual duty. *Wallace v. State Farm Fire & Cas. Co.*, 247 Ga. App. 95, 98 (2000). Plaintiff does not allege and can never establish a test administrator owes a test taker an independent duty. Thus, Plaintiff's misrepresentation and breach of duty of care claims fail to state claims for relief.

In addition, Plaintiff's misrepresentation claim is not sustainable because a misrepresentation cannot be based on the occurrence of a future event. *Gibson Tech. Svcs. v. JPay, Inc.*, 327 Ga. App. 82, 84 (2014) (citing *BTL COM LTD v. Vachon*, 278 Ga. App. 256,

258 (2006)). The alleged misrepresentations in the September 2014 contract all concern how the Exam would be presented to Plaintiff in the future. Because the alleged misrepresentations are predicated on future events, the misrepresentation claim fails as a matter of law.

Conclusion

This Court finds the allegations of Plaintiffs First Amended Complaint disclose with certainty that Plaintiff would not be entitled to relief under any state of provable facts asserted in support thereof; and, NBCC has established Plaintiff could not introduce evidence within the framework of the First Amended Complaint sufficient to warrant a grant of the relief sought. Accordingly, it is **HEREBY ORDERED AND ADJUDGED** that Defendant National Board for Certified Counselors, Inc.'s Motion to Dismiss Plaintiffs First Amended Complaint under O.C.G.A. 9-11-12(b)(6) is GRANTED.

IT IS SO ORDERED this 4th day of August, 2015.

/s/ Asha F. Jackson
The Honorable Asha F. Jackson
Judge, Superior Court of DeKalb County

Prepared by:
Joseph H. Wieseman
Georgia Bar No. 558182
Hawkins Parnell Thackston & Young LLP
303 Peachtree Street, Suite 4000
Atlanta, Georgia 30308-3243
jwieseman@hptylaw.com
(404) 614-7400 (telephone)
(404) 614-7500 (facsimile)
Counsel for Defendant

FIFTH DIVISION
PHIPPS, P. J.,
DILLARD and PETERSON, JJ.

June 22, 2016

NOT TO BE OFFICIALLY REPORTED

In the Court of Appeals of Georgia

A16A0268. BUTT v. NATIONAL BOARD OF CERTIFIED COUNSELORS, INC.

PHIPPS, Presiding Judge.

In this case, the following circumstances exist and are dispositive of the appeal:

(1) The judgment of the court below adequately explains the decision; and

(2) The issues are controlled adversely to the appellant for the reasons and authority given in the appellee's brief.

The judgment of the court below therefore is affirmed in accordance with Court of Appeals Rule 36.

Judgment affirmed. Dillard and Peterson, JJ., concur.

REMITTITUR

SUPREME COURT OF GEORGIA

Case No. S16Cl808 Atlanta, February 06, 2017

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

SOHAIL N. BUTT v. NATIONAL BOARD OF CERTIFIED COUNSELORS, INC.

Upon consideration of the petition for certiorari filed to review the judgment of the Court of Appeals in this case, it is ordered that the petition be hereby denied.

All the Justices concur, except Peterson, J., disqualified.

Associated Cases: Al6A0268

Costs paid: Indigent

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta February 22, 2017

I hereby certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said Court hereto affixed the day and year last above written.

SEAL Chief Deputy Clerk Signature.

SUPREME COURT OF GEORGIA
Case No. S16C1808

Atlanta, February 06, 2017

The Honorable Supreme Court met pursuant to adjournment.
The following order was passed.

SOHAIL N. BUTT v. NATIONAL BOARD OF CERTIFIED COUNSELORS, INC.

The Supreme Court today denied the petition for certiorari in this case. All the Justices concur, except Peterson, J., disqualified.

Court of Appeals Case No. A I 6A0268

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Clerk's signature

APPENDIX D

Sohail N. Butt v. Brian P. Kemp in his official Capacity as Governor for the State of Georgia

In the Superior Court of Fulton County,

State of Georgia,

No. 2019CV328138

Appeal No. A22A1580

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

SOHAIL N. BUTT,
Plaintiff,

v.

Civil Action File No.
2019CV328138

BRIAN P. KEMP in his Official capacity as Governor of the State of Georgia,
Defendant.

Hon. Kimberly M. Esmond Adams

FINAL ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

The above-styled case came before the Court on Defendant Governor Kemp's Motion to Dismiss filed January 27, 2020. Following Plaintiff's Motion to Dismiss, the parties filed a number of other pleadings, responses and replies spanning nearly two years. Plaintiff timely filed a response in opposition to Defendant's Motion on February 20, 2020 and also amended his Complaint on the same day. Defendant filed its Reply to Plaintiff's Response to Defendant's Motion to Dismiss on November 22, 2021. Plaintiff then filed a Sur-Reply on November 29, 2021. Upon consideration of the pleadings and applicable authority, Defendant's Motion to Dismiss is hereby **GRANTED** for the reasons set forth below.

FACTUAL BACKGROUND

On or about July 23, 2016, Plaintiff Sohail N. Butt submitted a petition ("Petition") to then-

Governor Nathan Deal ("Governor Deal"), pursuant to O.C.G.A. § 43-1C-3, titled The Professional Licensing Regulation Reform Act, and O.C.G.A. § 50-13-9, authorizing private individuals the right to file petitions to the Governor regarding professional licensing board rules. Plaintiff's Petition involved the creation of documents originating from both Plaintiff and Governor Deal.

On or about April 10, 2019, Plaintiff's counsel at the time, Ms. Rachel O'Toole, sent an open records request, pursuant to the Georgia Open Records Act ("ORA"), to Defendant Governor Brian P. Kemp requesting all documents and communications related to the Petition or Plaintiff. Executive Counsel to the Defendant, Mr. David B. Dove, responded by letter on April 19, 2019, stating that no responsive documents existed.

In response by letter, on April 25, 2019, Plaintiff's counsel stated that documents and emails existed between the Office of the Governor and Plaintiff, including an email from the Deputy Executive Counsel at the time, Mr. Corey Miller, dated September 7, 2016, which states, inter alia, that the Office of the Governor is awaiting information from other entities pertinent to Plaintiff and the Petition.

Defendant's counsel responded by letter, on May 9, 2019, advising that all documents generated or received by previous administrations were archived prior to Defendant taking office. Plaintiff's counsel responded by letter, on May 24, 2019, demanding to know from whom to seek the documents. Defendant's counsel responded by letter, on May 30, 2019, directing Plaintiff's counsel to the Georgia Archives.

On May 31, 2019, Plaintiff's counsel submitted an open records request to the Georgia Archives that

appears identical to the initial open records request sent to Defendant. On June 4, 2019, a responsive letter from Georgia Archives advised that no records were found. On June 14, 2019, Plaintiff's counsel sent two individual open records requests to Defendant and the Georgia Archives. The letter to the Georgia Archives requested the following: retention periods for records received from Defendant upon change of administration; the Georgia Archives open records retention period policy and guidelines; and a response from the Georgia Archives on the "legal and factual basis for the retention periods" for communications and documents pertaining to petitions. The letter to the Defendant ("June 14, 2019 Request") requested the following: Office of the Governor's open records retention period policy and guidelines; a response from Defendant on the "legal and factual basis for the retention periods" for communications and documents pertaining to petitions; and a statement on whether the retention period policy was the same or different compared to the previous administration.

On June 22, 2019, a Georgia Archives representative responded to the Plaintiff's open records request. Neither Defendant nor Defendant's counsel responded to Plaintiff's June 14, 2019 Request.

Plaintiff filed an initial Complaint to enforce compliance with the Georgia Open Records Act on October 16, 2019. On December 18, 2019, Defendant was served with the Original Complaint and summons by sheriff's deputy. On January 27, 2020, Defendant filed an Answer and Defenses and a Motion to Dismiss, arguing that the response to the open records request letter was not necessary as the records do not exist and the request for a "legal and factual

basis" and statement is not a requirement under the ORA.

On February 20, 2020, Plaintiff filed an Amended Complaint with three (3) Counts. Count I alleges the Defendant violated the Georgia Open Records Act ("ORA") by not responding to the June 14, 2019 Request within three business days, pursuant to O.C.G.A. § 50-18-70(f). Count II alleges the Defendant violated the Georgia Records Act ("GRA") by not preserving documents in accordance with approved retention schedules, pursuant to O.C.G.A. § 50-18-92(a). Count III alleges that Defendant owes Plaintiff reasonable attorney's fees and litigation costs, pursuant to O.C.G.A. § 50-18-73(b).

LEGAL ANALYSIS

O.C.G.A. § 50-18-71(b)(1) requires that an agency produce responsive documents within three days. However, the statute goes on to state that "*nothing in this chapter shall require agencies to produce records in response to a request if such records did not exist at the time of the request.*" (Emphasis added.) Count I alleges that Defendant violated O.C.G.A. §50-18-70 et. seq., the Open Records Act ("ORA"), when it did not respond to the June 14, 2019 request within three business days. Plaintiff contends that Defendant's failure to provide records in response to its request for a retention policy violates the ORA.

In support of this contention, Plaintiff relies on *Wallace v. Greene County*, 274 Ga. App. 776, 783 (2005), which states, in reference to O.C.G.A. §§ 50-18-70(f) and 72(h), construed together, requires an "affirmative response" within three business days upon receiving an open records request in writing. Specifically, the Court in *Wallace* reasoned:

> If the custodian determines that the records exist but cannot be made available for inspection and copying within the three-day period, the requesting party must be provided a description of the records and an inspection timetable within the three- day period. OCGA § 50–18–70(f). In contrast, if the custodian has determined that access will be denied to all or part of the requested records, the requesting party must be provided the specific legal grounds for that determination within the three- day period. OCGA § 50–18–72(h). Finally, if the custodian has determined that access to the records will be permitted, the custodian must inform the requesting party within the three-day period of its determination so that arrangements for inspection and copying can then proceed.

Id. at 648-649.

Although *Wallace* suggests that an affirmative response is required, it is important to note the different facts giving rise to this determination. In *Wallace*, the Plaintiff requested his entire personnel file pursuant to the ORA. His personnel file undoubtedly existed and was, in fact, later produced after the lawsuit. The failure to provide an affirmative response regarding documents that exist and, in fact, are later proven to exist is a clear violation of the ORA. This is the sort of violation to which *Wallace* speaks. *Wallace* requires an affirmative response where the documents exist but have not been produced. Hence, Plaintiff's reliance on *Wallace* is misplaced.

Construing the evidence in the light most favorable to Plaintiff, there is no evidence that Defendant has documents responsive to Plaintiff's

request that he has failed to produce. The Court finds that the facts of this case do not amount to a violation of the Open Records Act. The Act clearly explains that "nothing in this chapter shall require agencies to produce records in response to a request if such records did not exist at the time of the request." O.C.G.A. § 50 18 71(b)(1)(A). The Complaint does not contain any factual allegations that could show Governor Kemp's office *does* have the requested records but refuses to produce them. Moreover because the Defendant did not have documents responsive to the Plaintiff's request, the three-day rule is not triggered. Accordingly, Plaintiff cannot prove a set of facts in support of his claim which would entitle him to relief.

Plaintiff also contends that Defendant failed to provide a factual and legal basis for its retention periods and a statement for whether the retention policy was different from the previous administration. This portion of Plaintiff's claim is without merit and Defendant correctly argues that the ORA does not require a response to either of these portions of the June 14, 2019 Request.

Turning next to Count II in which Plaintiff alleges a violation of the Georgia Records Act ("GRA"). An agency must preserve documents in accordance with approved retention schedules. O.C.G.A. § 50-18-92(a). Otherwise, the agency is in violation of the GRA. *Id.*

Although an approved retention schedule may be classified under the category of Defendant's open records retention period policy or guidelines, the Plaintiff argues in his Response in Opposition to Defendant's Motion to Dismiss, that this violation could only occur if Defendant had the requested

documents. Defendant asserts that the requested documents do not exist.

Accordingly, even construing the evidence in the light most favorable to the non-moving party as the Court is compelled to do, Plaintiff cannot present evidence sufficient to warrant a grant of the relief sought. Furthermore, even if Plaintiff could assert provable facts regarding non-compliance with the Georgia Records Act, there is no private cause of action for such non-compliance. *Griffin Indus. V. Ga. Dep't of Agric.*, 313 Ga. App. 69, 75, fn. 15 (2011). Therefore, Count II also fails.

As to Count III seeking Attorney's Fees, inasmuch as the claims that would form the basis of any award of fees have now been dismissed, Count III necessarily fails.

Accordingly, Defendant Governor Kemp's Motion to Dismiss is hereby GRANTED.

SO ORDERED this 23rd day of March, 2022.

/s/ Kimberly M. Esmond Adams
Honorable Kimberly M. Esmond Adams
Superior Court of Fulton County
Atlanta Judicial Circuit

Distribution List:

Jennifer Colangelo, Esq.
jcolangelo@law.ga.gov
Assistant attorney General and Counsel for Defendant.

Sohail N. Butt
Sambutt58@gmail.om
Pro Se Plaintiff

APPENDIX E

Sohail N. Butt v. Brad Raffensperger in his Official Capacity as Secretary of State for the State of Georgia,

In the Superior Court of Fulton County,

State of Georgia

No. 2019CV329033

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

SOHAIL BUTT,
Plaintiff

v.

Civil Action File No.
2019CV329033

BRAD RAFFENSPERGER,
in his capacity as Secretary of
State of the State of Georgia
Defendant

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

The above-styled matter is before the Court on Defendant Brad Raffensperger, in his capacity as Secretary of State of the State of Georgia's Motion for Summary Judgment, and Plaintiff Sohail Butt's opposition thereto; as well as Plaintiff's Motion for Summary Judgment and Defendant's opposition thereto. The parties having submitted briefs and not having requested oral argument, and the Court having reviewed the briefs as well as all matters of record, the Court hereby DENIES Plaintiff's Motion for Summary Judgment and GRANTS Defendant's Motion for Summary Judgment, for the reasons set forth in Defendant's brief in response to Plaintiff's Motion and in Defendant's Motion, which are incorporated by reference herein; and for the reasons set forth below.

Plaintiff filed this lawsuit *pro se*, bringing claims for violation of the Georgia Open Records Act

("ORA") as well as for attorney's fees and expenses of litigation. In brief, Plaintiff alleges that in early 2014, he applied to the Georgia Composite Board for Professional Counselors, Social Workers and Marriage and Family Therapists for a license to practice as a Marriage and Family Therapist, but was denied. After his unsuccessful appeal, on May 6, 2016 he submitted an Open Records Request ("Request") via email directed to the Professional Licensing Boards Division of the Office of the Secretary of State, seeking documents and correspondence pertaining to Plaintiff's application for licensure. In this lawsuit, Plaintiff alleges that Defendant's response to the Request was deficient, in that Defendant failed to produce certain identified email communications between Plaintiff and Brig Zimmerman, the Executive Director of the Composite Board, which were allegedly sent and received between April 11, 2014 and June 17, 2014. Defendant timely filed an answer to the lawsuit, and argues he did not have possession of any additional emails at the time of the Request, and that he searched for and provided all available, responsive emails as they related to Plaintiff's Request.

Regarding the establishment of the existence of the emails, which this Court does not doubt, Plaintiff cites to an email he sent to Zimmerman on June 17, 2014, in which he states, in relevant part: "Dear Mr. Zimmerman, My apologies for bothering you again. Just needed to know if any progress has been made with regards my application for licensure as an LPC." Plaintiff emphasizes the phrase "for bothering you again," implying he had sent previous emails, although no email between the two predating June 14, 2014 was produced. Plaintiff also cites to an email from Zimmerman to Tom Black, Chairperson and Board Member of the Composite Board, dated June

30, 2014, in which Zimmerman states that he had received on or around that time "about the 5th email" from Plaintiff "since April"; and deposition testimony from Zimmerman that he had received multiple emails from Plaintiff at the time he wrote that to Tom Black. Plaintiff also submitted an affidavit from his then-attorney, Rachel O'Toole, who states that she saw or otherwise semi-contemporaneously was aware of the emails Plaintiff alleges were not produced.

Plaintiff argues that "the evidence conclusively shows the existence of Missing Emails." But, that is not what Defendant is arguing (and that is not the issue before this Court). To the contrary, Defendant argues that irrespective of whether such emails were ever sent or received, any such emails were not in his possession at the time the Request was made. Defendant points to an email sent to Plaintiff by Zimmerman on June 30, 2014 - approximately two years prior to the Request at issue- stating that the Board had "experienced a severe corruption of [its] database that resulted in [its] system being completely down for approximately 2 weeks beginning June 10." This, Defendant argues, could explain why any emails between, circa, April and June 2014 were not in his possession at the time the Request was made.

O.C.G.A. § 50-18-71(b)(l)(A) provides that the ORA does not "require agencies to produce records in response to a request if such records did not exist at the time of the request." Plaintiff acknowledges this, and has no evidence that Defendant was in fact contemporaneously in possession of the emails such that it would constitute a violation of the ORA; but, he argues, that "do[es] not relieve an agency from failing to preserve documents in accordance with its approved retention schedules," citing to O.C.G.A. §§

50-18-92 and 50-18-94. But the ORA is codified at O.C.G.A. § 50-18-70 *et seq.*; O.C.G.A. § 50-18-90 *et seq.* constitute the Georgia Records Act, which requires state agencies to develop document retention schedules and which is distinct from the Open Records Act. *See, e.g., Georgia Ports Auth. v. Law.*, 304 Ga. 667, 679, 821 S.E.2d 22, 31 (2018) (referring to "the Open Records Act, see OCGA § 50-18-70(b)(1), and the Georgia Records Act, see OCGA § 50-18-91(1)" separately). In other words, Plaintiff asks this Court to find that Defendant violated the Open Records Act by (allegedly) violating the Georgia Records Act. This Court cannot do so. Under the Open Records Act, Defendant is only required to produce what is in its possession; and there is no evidence that the emails in question are in his possession - irrespective of their technical existence. To the contrary, there is evidence that they were lost in a database corruption event, and the Court has seen no evidence that contradicts this.

Accordingly, for the reasons set forth above and in Defendant's briefs, this Court does hereby DENY the Plaintiff's Motion for Summary Judgment and GRANT the Defendant's Motion for Summary Judgment.

As this concludes the matter in its entirety, the CLERK is directed to CLOSE this case.

This 2nd day of September, 2021.

Shukura Ingram Millender.
Superior Court of Fulton County
Atlanta Judicial Circuit

Filed and served electronically via e-File GA.

APPENDIX F

Sohail N. Butt v. Kimberly M. Esmond Adams in her Official Capacity as Judge of the Superior Court of Fulton County

In the Superior Court of Fulton County,

State of Georgia,

No. 2022CV36208

Appeal No. A23A0093 (Dec. 1, 2022)

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

SOHAIL BUTT,
Petitioner,

v.

KIMBERLY ADAMS,
Respondent.

Civil Action File No.
2022CV362087

Hon. Eric K.
Dunaway

ORDER DISMISSING PETITION FOR MANDAMUS AS MOOT

On March 15, 2022, Petitioner filed the above referenced mandamus action seeking an Order from the Court compelling Respondent, Judge Kimberly Esmond Adams of Fulton County Superior Court, to issue a ruling in Civil Action File No. 2019CV328138, *Sohail Butt v. Brian Kemp* ("the underlying case"). For the following reasons, the Petition is hereby DISMISSED.

"Mandamus is an extraordinary remedy to compel a public officer to perform his or her duty." *Baez v. Miller*, 266 Ga. 211 (1996). See O.C.G.A. § 9-6-20. "When the act that is the subject of a grant or denial of injunctive relief is completed, then the matter is moot and no longer subject to appeal." *City of Comer v. Seymour*, 283 Ga. 536, 538 (2008). Stated differently, "[w]hen the remedy sought in litigation no longer benefits the party seeking it, the case is moot and must be dismissed." *Jayko v. State*, 335 Ga. App. 684, 685 (2016) (citation omitted). See *Baca v. Baca*, 256 Ga. App. 514, 515-16 (2002) ("mootness is a mandatory ground for dismissal").

Here, Petitioner contends that Judge Adams' failure to rule on a Motion to Dismiss in the underlying case constitutes a violation of her statutory duty pursuant to O.C.G.A. § 15-6-21 (b). A review of the Court's database reveals that Judge Adams issued an Order granting the Motion to Dismiss on March 23, 2022.[1] Indeed, Petitioner filed a Notice of Appeal as to Judge Adams' Order on April 14, 2022. Based upon these facts, the Court finds that the remedy requested in this case has been provided, and the mandamus Petition is therefore moot and must be dismissed. *See Roberts v. Deal*, 290 Ga. 705, 706-707 (2012).

Accordingly, it is hereby ORDERED, that the Petition for Writ of Mandamus is DISMISSED.

SO ORDERED, this 12th day of May, 2022.

Eric K. Dunaway
Honorable Eric K. Dunaway
Judge, Fulton County Superior Court
Atlanta Judicial Circuit

Filed and served electronically via Odyssey eFileGA.

[1] A trial court may take judicial notice of the records of that court in other actions between the parties or their privies. *See Nationsbank, N.A. v. Tucker*, 231 Ga. App. 622, 623 (1998).

FIRST DIVISION
BARNES, P. J.,
REESE and LAND, JJ.

NOTICE: Motions for reconsideration must be physically received in our clerk's office within ten days of the date of decision to be deemed timely filed. https://www.gaappeals.us/rules

December 1, 2022

NOT TO BE OFFICIALLY REPORTED

In the Court of Appeals of Georgia

A23A0093. BUTT v. ADAMS.

BARNES, Presiding Judge.

Proceeding *pro se*, Sohail N. Butt appeals from the trial court's order dismissing his petition for a writ of mandamus as moot. Butt contends that the trial court erred in dismissing his petition in its entirety because, even if his substantive claim for mandamus was moot, he was entitled to proceed with his claim for attorney fees under OCGA § 13-6-11. We disagree and affirm.

The record reflects that in October 2019, Butt brought an action under the Georgia Open Records Act[1] against Brian P. Kemp in his official capacity as Governor of the State of Georgia in the Superior Court of Fulton County (the "underlying action"). The underlying action was assigned to the Honorable

[1] See OCGA § 50-18-70 *et seq.*

Kimberly M. Esmond Adams. Governor Kemp filed a motion to dismiss the underlying action in January 2020.

On March 15, 2022, Butt filed a petition for a writ of mandamus against Judge Adams in her official capacity in the Superior Court of Fulton County (the "mandamus action"). In the mandamus action, which was assigned to a different Fulton County judge, Butt sought to compel Judge Adams to rule on the motion to dismiss that remained pending in the underlying action and requested attorney fees under OCGA § 13-6-11.[2] In May 2022, the trial judge in the mandamus action entered an order dismissing Butt's mandamus petition as moot after taking judicial notice that Judge Adams had entered an order in the underlying action granting Governor Kemp's motion to dismiss on March 23, 2022.

On appeal from the dismissal of his mandamus petition, Butt acknowledges that his substantive claim for mandamus is moot, but he contends that he still may pursue his claim for attorney fees under OCGA § 13-6-11 against Judge Adams.[3] However,

---

[2] OCGA § 13-6-11 provides:

> The expenses of litigation generally shall not be allowed as a part of the damages; but where the plaintiff has specially pleaded and has made prayer therefor and where the defendant has acted in bad faith, has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense, the jury may allow them.

[3] Butt also contends that the trial court should have addressed his claim for costs as the prevailing party under OCGA § 9-11-54 (d). However, Butt never raised such a claim in the trial court, and we do not address issues of costs that were neither raised nor ruled upon in the court below. See *Zahabiuon v. Auto. Fin. Corp.*, 281 Ga. App. 55, 57 (2) (635 SE2d 342) (2006) (declining to address issue of costs that was neither raised nor ruled upon in the trial court); *Golden v. Newsome*, 174 Ga. App. 441, 441 (330

> [t]his Court has consistently found that attorney fees are not recoverable under OCGA § 13-6-11 where there is no award of damages or other relief on any underlying claim. The expenses of litigation recoverable pursuant to OCGA § 13-6-11 are ancillary and may only be recovered where other elements of damage are also recoverable.

(Citations and punctuation omitted.) *Security Real Estate Svcs. v. First Bank of Dalton*, 325 Ga. App. 13, 14 (752 SE2d 127) (2013). See *United Companies Lending Corp. v. Peacock*, 267 Ga. 145, 147 (2) (475 SE2d 601) (1996) ("A prerequisite to any award of attorney fees under OCGA § 13-6-11 is the award of damages or other relief on the underlying claim."). *See also Kammerer Real Estate Holdings v. Forsyth County Bd. of Commrs.*, 302 Ga. 284, 287 (4) (806 SE2d 561) (2017) ("[A] claim for attorney fees under OCGA § 13-6-11 is a derivative claim[.]"); *Ga. Dept. of Corrections v. Couch*, 295 Ga. 469, 474 (2) (a) (759 SE2d 804) (2014) ("OCGA § 13-6-11 does not create an independent cause of action. That statute merely establishes the circumstances in which a plaintiff may recover the expenses of litigation as an additional element of his damages.") (citations and punctuation

---

SE2d 178) (1985) (concluding that a challenge to the assessment of costs must first be raised in the trial court). Cf. *Copeland v. Home Grown Music*, 358 Ga. App. 743, 753-754 (4) (856 SE2d 325) (2021) (reviewing assessment of costs, where the prevailing party filed a motion for an award of costs after the entry of summary judgment in its favor, and the trial court thereafter entered an order awarding costs); *Bartelt v. Convergence.com Corp.*, 287 Ga. App. 871, 871-872 (652 SE2d 897) (2007) (reviewing assessment of costs, where the prevailing parties moved for costs pursuant to OCGA §§ 9-15-11 and 9-11-54 (d) after obtaining summary judgment, and the trial court issued a post-judgment order taxing certain costs).

omitted). Accordingly, given that Butt's substantive mandamus claim was moot and no relief was granted as to that claim, his derivative claim for OCGA § 13-6-11 attorney fees was subject to dismissal. *See Barnett v. Morrow*, 196 Ga. App. 201, 203 (396 SE2d 11) (1990) (concluding that OCGA § 13-6-11 attorney fees could not be awarded where substantive claim for specific performance had been rendered moot; noting that "[t]here is no authority for the proposition that merely seeking equitable relief, which for whatever reason is unobtainable, entitles one to recovery under OCGA § 13-6- 11"). *See also Golden Plaza LLC v. Augusta-Richmond County*, 228 Ga. App. 35, 35- 36 (491 SE2d 69) (1997) (concluding that plaintiff's request for attorney fees under OCGA § 13-6-11 was subject to dismissal, where substantive claims for injunctive and declaratory relief and damages were moot, given that the attorney fees "request was ancillary to the other claims") (physical precedent only). We therefore affirm the trial court's dismissal of Butt's mandamus petition in its entirety.

We do not authorize the reporting of this opinion because it does not announce a new rule or policy, or involve an interpretation of law that is not already precedent. See Court of Appeals Rules 33.2 (b), 34.

Judgment affirmed. Reese and Land, JJ., concur.

APPENDIX G

Sohail N. Butt v. Zimmerman et al.

In the Superior Court of Bibb County

State of Georgia

No. 2022-CV-076681

IN THE SUPERIOR COURT OF BIBB COUNTY
STATE OF GEORGIA

SOHAIL N. BUTT,	)	
	)	
Petitioner and Plaintiff,	)	
	)	
v.	)	Civil Action No.
	)	2022-CV-076681
JOHN BRIGHAM ZIMMERMAN, Executive Director of the Georgia Composite Board of Professional Counselors, Social Workers and Marriage & Family Therapists, in his official and Individual capacities; et al.,	)	
	)	
Defendants.	)	

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS[1]

Plaintiff, Sohail Butt, proceeding *pro se*, brought this action seeking damages, mandamus, and equitable relief against the Georgia Composite Board of Professional Counselors, Social Workers and Marriage and Family Therapists (hereinafter, the "Board"), its former members, and John Brigham Zimmerman, Executive Director, in their official and

[1] Counsel for Defendant, Arthur Williams, previously filed a Suggestion of Death with the Court on July 8, 2022, and a named party has not been substituted to date. Pursuant to O.C.G.A. § 9-11-25(a)(l), any claims against Mr. Williams are dismissed.

individual capacities. Plaintiffs Complaint alleges inter alia that the Board and its members violated state law, including the Georgia Open Meetings Act, by failing to grant him licensure by endorsement as an associate professional counselor and, thereafter, a licensed professional counselor. The matter is before the Court on Defendants' Motion to Dismiss. Upon consideration of the pleadings, applicable authority, and the oral argument held on October 3, 2022, Defendants' Motion to Dismiss is hereby GRANTED for the reasons set forth below.

FACTUAL BACKGROUND

In March 2014, the Board denied Plaintiffs endorsement application to practice as a marriage and family therapist in the State of Georgia because he did not meet minimum qualifications. [Complaint, ¶ 10]. The Board notified the Plaintiff of the denial via a letter dated March 17, 2014. [*Id.* at ¶¶ 10, 15]. Following the denial, Plaintiff was entitled to an appearance before the Board, which he requested. Plaintiff appeared before the Composite Board at its monthly meeting on April 11, 2014. O.C.G.A. § 43-1-19(a)(l); [*Id.* at ¶¶ 11-13]. During Plaintiffs appearance, the Board reaffirmed that he lacked the qualifications for licensure as a marriage and family therapist as it had previously communicated in the March 17, 2014, letter. [*Id.* at ¶ 15]. During the meeting, a Board member suggested that Plaintiff consider applying for licensure as a professional counselor based on his educational background. [*Id.*]. Plaintiff concurred with the suggested alternative. Plaintiff alleges that, during the course of the ensuing conversation, Board members told him that the Board would do three things: it would convert his denied

endorsement application to be a marriage and family therapist into an endorsement application for licensure as a licensed professional counselor; it would allow him to work as a "licensed associate professional counselor" for twelve months; and, at the end of the twelve-month period, it would automatically grant him licensure as a licensed professional counselor. [*Id.*]. The Board's minutes from the April 11, 2014, meeting state only: "Butt appeared before the full Board to discuss the application process and requirements for Marriage and Family Therapists and Professional Counselor in Georgia as an international applicant." [*Id.* ¶ 17].

Following the April 11, 2014 meeting, the Board sent Plaintiff a letter, dated August 14, 2014, regarding his application for licensure as a professional counselor. [*Id.* at ¶ 22]. In the letter, the Board informed the Plaintiff that he was approved to register for the Professional Counselors Licensure examination (NCMHCE) and would be issued a license upon the Board's receipt of a passing score; the Board did not grant Plaintiff licensure by endorsement (contrary to his belief). [*Id.* at ¶¶ 20, 22].

Plaintiff alleges that the Board's August communication contradicted its April 11, 2014 decision to grant him licensure by endorsement (i.e., without examination) as an associate professional counselor and, thereafter, a licensed professional counselor. [*Id.*]. Additionally, Plaintiff alleges that the Board failed to record its decision and/or vote to grant Plaintiff licensure by endorsement, in violation of the Georgia Open Meetings Act. [*Id.* at ¶¶ 17-19, 23-26, *passim*].

Significantly, in the interest of obtaining a license, Plaintiff applied for and took the National Clinical Mental Health Counseling Examination

(NCMHCE) on October 6, 2014. [*Id.* at ¶ 33]. Plaintiff failed the examination. [*Id.* at ¶ 34]. Plaintiff makes no allegation that he passed the licensing examination and admits that as a result of his failure, he filed suit against the independent testing agency (NBCC) in the Superior Court of DeKalb County. The DeKalb County action was ultimately dismissed by the Court. [*Id.* at ¶¶ 35-37].

Plaintiff alleges inter alia that Defendants acted in violation of the Georgia Open Meetings Act, thereby depriving him of due process under the law, the right to pursue a profession of his choosing, the right to his private property, and the right to earn a living. [*Id.* at ¶ 53, 60]. He also alleges he was deprived of "equal treatment before the law." [*Id.*].

Defendants moved to dismiss on June 23, 2022 based on the statute of limitations, res judicata, insufficient process, insufficient service of process, and failure to state a claim upon which relief can be granted. Plaintiff filed a Response in Opposition to Defendants' Motion to Dismiss on July 25, 2022. Defendants filed their Reply to Plaintiff's Response to Defendants' Motion to Dismiss on August 17, 2022. Oral Argument was held on October 3, 2022.

Legal Standard

A motion to dismiss is the appropriate relief when the averments in the pleading do not support an actionable claim. *Sumner v. Department of Human Resources*, 225 Ga. App. 91, 92 (1997) citing *Lau's Corp. v. Haskins*, 261 Ga. 491 (1991).

Legal Analysis

A. Plaintiff's Claims are Time-Barred

Plaintiff asserts claims under the Georgia Open Meetings Act, specifically O.C.G.A. § 50-14-1, as well the Georgia Constitution, alleging that Defendants violated his equal protection and due process rights when they failed to issue him licensure by endorsement as an associate professional counselor and, thereafter, a professional counselor in Georgia. [Complaint, ¶¶ 60-62, 85-102]. Plaintiff also alleges that Defendants, in doing so, unlawfully interfered with his property rights to pursue a calling of his choosing and to earn a living in violation of O.C.G.A. § 51-9-1. [*Id.* ¶¶ 107, 111-12]. Plaintiff's claims are time-barred.

Georgia's Open Meetings Act ("OMA") provides that actions contesting an agency's decision based on alleged violations of the Act must be filed "within 90 days from the date the party alleging the violation knew or should have known about the alleged violation so long as such date is not more than six months after the date the contested action was taken." O.C.G.A. § 50-14-l(b)(2); *See Tisdale v. City of Cumming*, 326 Ga. App. 19, 21-22 (2014) (the statute of limitations or repose is not tolled when the Plaintiff knew all of the facts necessary to show violation before the running of the statute of limitations or period of repose); *See also EarthResources, LLC v. Morgan County*, 281 Ga. 396 (2006).

The OMA 's time limit applies to civil actions that "contest" or "make the subject of a litigation" the "public agency decision." *Avery v. Paulding Co. Airport Auth.*, 343 Ga. App. 832, 840 (2017). In an attempt to evade the OMA's statute of limitations, Plaintiff denies that he is contesting a board decision and/or formal action of the Composite Board. Plaintiff's argument is not persuasive because his entire lawsuit "contests" the Board's actions (or non-

actions) stemming from the 2014 meeting. More specifically, his claims all center on the allegation that the Board failed to issue a license by endorsement. By seeking licensure as a remedy in this case, Plaintiff seeks to invalidate the Board's alleged non-action (of issuing a license) following the April 11, 2014 meeting. (Complaint, ¶¶ 62, 71, *passim*). As such, whether one applies the 90-day limitation or the six-month repose period, Plaintiff missed his Open Meetings deadline by many years, and any relief related to the Board's decision and/or inaction following the 2014 Board meeting is barred by the OMA's specific period of limitation.

Plaintiff's attempt to rely on O.C.G.A. § 9-3-22 to contend that he is entitled to a 20-year statute of limitations is misguided. The catchall 20-year period only "applies where there is no other applicable statute of limitations." *See McDaniel v. Kelly*, 61 Ga. App 105, 109 (1939) (evident purpose of OC.G.A. § 9-3-22 is to fix a period of limitations for special cases not provided for by the general statute of limitations). Here, O.C.G.A. § 50-14-l(b)(2) specifically governs Plaintiff's challenge to an alleged violation of the OMA and, therefore, O.C.G.A. § 9-3-22 does not apply.

Plaintiff is further time-barred from seeking civil penalties under the OMA as any penalties would necessarily be evaluated and/or assessed under a negligence standard. See O.C.G.A. § 50-14-6. Pursuant to O.C.G.A. § 9-3-33, the statute of limitations for an ordinary negligence claim in which one alleges personal injury is two years and, thus, has long since expired.

Additionally, Plaintiff's tort claims against the State, as well as his civil rights claims, are governed by the two-year limitations' periods set forth in the Georgia Tort Claims Act (O.C.G.A. § 50-21-27(a)(c))

and O.C.G.A. § 9-3-33, respectively. Here, the running of the statute of limitations is essentially the same: the statute began to run when Plaintiff discovered or should have discovered that he had been injured and the limitations period ran for two years.

In this action, Plaintiff knew or had reason to know of his injuries in 2014. Specifically, Plaintiff learned of his alleged injury (the Board's failure to issue him a license by endorsement) on August 14, 2014 - the date he received a letter from the Board detailing his need to register for and pass the National Clinical Mental Health Counseling examination in order to obtain a license. Plaintiff, in full acknowledgement of the Board's decision, more specifically, their refusal to grant him a license by endorsement, registered for and took the required examination on October 6, 2014 "in need to obtain [his] license to practice." [Complaint, ¶ 33]. Notably, Plaintiff did not file the instant claims arising from the Board's failure to issue a license by endorsement until May 11, 2022 - nearly eight years after he learned of the facts giving rise to his alleged injuries. As such, Plaintiffs tort and civil rights claims are time-barred.

Because all of the applicable statute of limitations periods have expired, Plaintiff's claims for equitable and mandamus relief are rejected on the basis of laches. *See Collier v. State*, 307 Ga. 363, 374 (2019) (while the doctrine of laches is based on more than the mere passage of time, laches is often applied in "obedience and in an analogy to the statutes of limitations, in cases where it would not be unjust and inequitable to do so."); *See also West v. Fulton County*, 267 Ga. 456, 458 n.3 (1997) (mandamus as a remedy may not lie where an applicant is guilty of gross laches or has permitted an unreasonable period of time to

elapse). Defendants, in attempting to defend themselves approximately eight years later, from mere recollections of Plaintiff - without any extrinsic evidence - are unduly prejudiced in their ability to adequately provide a legal defense. Plaintiff was not only aware of his alleged injury long ago but could have (and should have) acted much sooner. Plaintiff's unreasonable delay constitutes gross laches. Accordingly, Plaintiff's equitable claims for relief are also time-barred.

B. Open Meetings Act Claim

Even if not otherwise time-barred, Plaintiff's conflicting recollection of a conversation with the Board does not support a violation of the OMA or civil penalties. The OMA allows for civil penalties to be assessed "against any person who negligently violates" the OMA. O.C.G.A. § 50-14-6. When evaluating alleged violations, the Georgia Supreme Court has cautioned that the OMA should not be construed "so tightly" as to lead to a violation for a "technical violations." *EarthResources*, 281 Ga. 396 at 399. Instead, the focus should be on whether the alleged violation "deprived [the complainant] of a fair and open consideration of [his] request or in any way impede the remedial and protective purposes of the [Act]" and whether there was "sufficient compliance" with the OMA. *Id.* at 400.

Here, Plaintiff participated in the meeting at issue, and there is no credible argument that he did not receive "fair and open consideration" by the Board during his appearance following the Board's denial of his license. The meeting minutes accurately state not only that Plaintiff was given an appearance, but also give an accurate description that there was a

discussion about "the application and requirements for Marriage and Family Therapists and Professional Counselors in Georgia." [Complaint, ¶ 17]. Further, Plaintiff's attempt to conflate the Board's authority to license with the Board's compliance with the OMA requirements is misplaced. The OMA is not a licensing act, and the fact that Plaintiff did not receive a license is not the result of an OMA violation.[2] Thus, Plaintiff's failure to obtain licensure does not, as a matter of law, thwart the OMA's "remedial and protective purposes." Simply put, there is no evidence of an OMA violation and Plaintiff did not lose any rights as a result of an alleged OMA violation. Accordingly, Plaintiff's OMA claim is dismissed as a matter of law.

C. Writ of Mandamus

Plaintiff seeks a Writ of Mandamus compelling, among other things, Defendants to issue Plaintiff both a license as an associate professional counselor, effective April 14, 2014, and a license as a professional counselor, effective April 14, 2015. Plaintiff's mandamus action is barred by laches, and even if not time barred, Plaintiff is not entitled to mandamus relief as a matter of law.

Mandamus is an extraordinary remedy that it is only available to compel a public officer to perform a required duty when there is no other adequate legal remedy, and only if plaintiff has a clear legal right to the relief sought. *Brown v. Bowers*, 266 Ga. 136 (1996); *Bland Farms v. Ga. Dept. of Agriculture*, 281 Ga. 192,

---

[2] The proper vehicle to contest the denial of a license is a mandamus action in which the applicant must prove that he meets the minimum qualification for licensure pursuant to the Board's rules and laws. *Crawley v. Seignious*, 213 Ga. 810 (1958).

193 (2006). Here, Plaintiff's claim for mandamus relief stems from an alleged violation of the OMA. The OMA provides for equitable relief, including injunctions and "other equitable relief," and civil penalties for violations to ensure compliance with its provisions. O.C.G.A. §§ 50-14-5 and 50-14-6. However, the OMA is not a licensing statute and it does not create a clear legal right whereby mandamus would lie compelling the Board to issue a license to an applicant who does not meet the minimum requirement for licensure. Nor is this a situation where there is no other adequate legal remedy available to enforce violations of the OMA. *See Tobin v. Cobb County Bd. of Educ.*, 278 Ga. 663 (2004) (discussing similar provisions in the Open Records Act and holding that where the Open Records Act provided a remedy that was as complete and convenient as mandamus, the extraordinary remedy would not lie.)

In sum, Plaintiff has failed to show that he has a clear legal right to the relief requested (a license) in that he has not demonstrated that he meets the minimum qualifications for licensure. In fact, he has shown just the opposite by virtue of his having failed the required examination, which he readily admits. Accordingly, Plaintiff's petition for a writ of mandamus is without merit and is dismissed as a matter of law.

D. **Plaintiff's Constitutional Claims**

Plaintiff's constitutional claims are time-barred and Plaintiff's claims that Defendants in their official capacity and the Board violated the Georgia Constitution are further barred by sovereign immunity. The Georgia Constitution extends sovereign immunity to the state and all of its

departments, agencies, and officers and employees in their official capacity, except as specifically provided in Paragraph IX(e) of Article I, Section II. Defendants in their official capacities are immune from suit except as specifically waived in the Constitution or except as provided by an act of the General Assembly specifically providing that sovereign immunity has been waived and the extent thereof. *Woodard v. Laurens County*, 265 Ga. 404, 405 (1995). The burden of demonstrating a waiver of sovereign immunity rests with the person filing suit. *Bd. of Regents of the Univ. Sys. of Ga. v. Winters*, 331 Ga. App. 528, 534-35 (2015); *Dep't of Transp. v. Dupree*, 256 Ga. App. 668,671 (2002); *Bd. of Regents of the Univ. Sys. of Ga. v. Daniels*, 264 Ga. 328, 329 (1994). Plaintiff has not and cannot carry that burden. Accordingly, his constitutional claims also fail as a matter of law and are dismissed.[3] Similarly, the General Assembly has not authorized money damages against the Defendants in their individual capacities. Ga. Const. art I, sect. II, para. V(b)(4). As such, Plaintiff's state constitution-based claim for money damages also fails as a matter of law and is dismissed.

E. **Plaintiff's Tort Claim**

Plaintiff's tort claim is time-barred and is also barred by the Georgia Tort Claims Act ("GTCA") for a number of reasons. First, there is no express waiver in the GTCA for Mr. Butt's tort claim. In fact, the GTCA expressly bars Plaintiff's tort claim as it arises from the professional licensing process. *See* O.C.G.A.

---

[3] Because this action concerns matters which occurred before January 1, 2021, Plaintiff may not obtain equitable relief under state law. Ga. Const. art I, sect. II, para. V(b)(1).

§ 50-21-24(9). Second, the Defendants are entitled to official immunity pursuant to O.C.G.A. § 50-21-25(a). And, third, Plaintiff's filing of a purported ante litem notice in February 2022, based on an evident loss that occurred over 8 years ago in 2014, failed to comply with the 12-month ante litem notice requirement to the Risk Management Division of the Department of Administrative Services ("DOAS"). O.C.G.A. § 50-21-26(a)(l); See *Dep't of Pub. Safety v. Ragsdale*, 308 Ga. 210, 212 (2020) (under the GTCA, a person may not bring a tort claim against the state unless the person first gives the state written notice of the claim within the time, and in the manner, specified in O.C.G.A. § 50-21-26). Accordingly, Plaintiff has no valid tort claim under the law and this claim is dismissed.

CONCLUSION

For the foregoing reasons, the Court grants the Defendants' Motion to Dismiss.

SO ORDERED this 18th day of October 2022.

Jeffrey O. Monroe
Jeffrey O. Monroe
Judge, Superior Court of Bibb County
Macon Judicial Circuit.

APPENDIX H

Certificate of Active Supervision

STATE OF GEORGIA
OFFICE OF THE GOVERNOR
ATLANTA 30334-0900

Nathan Deal
Governor

Active Supervision Decision

To: Mr. Sohail Butt

Docket Number: Al6,08,002

Decision Date: December 19, 2016

Pursuant to the Georgia Professional Regulation Reform Act, O.C.G.A. § 43-lC-l, et seq., the Governor is vested with the duty to "actively supervise the professional licensing boards of this state." In accordance with the Georgia Professional Regulation Reform Act, Mr. Sohail Butt seeks review of the actions of the Georgia Composite Board of Professional Counselors, Social Workers, and Marriage and Family Therapists (hereinafter "Board"). Mr. Butt claims the Board is in violation of state policy and its rules and regulations with respect to his application for licensure by endorsement.

Georgia law grants the Board authority to determine the qualifications necessary to approve an application by endorsement. See O.C.G.A. §§ 43,lOA,5, 43-lOA-10. As such, the Board acted within its authority as granted by clearly articulated state policy. Therefore, I hereby approve of the Board's actions for the

purposes of active supervision review required by O.C.G.A. § 43-1C-3.

Nathan Deal
Governor

cc: Georgia Composite Board of Professional Counselors, Social Workers, and Marriage and Family Therapists