STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OTTAWA

ADELINE HAMBLEY,

Case No: 23-7180-CZ

Plaintiff,

Hon. Jenny McNeill
Sitting by SCAO Assignment

v.

OTTAWA COUNTY,
a Michigan County;
OTTAWA COUNTY BOARD OF COMMISSIONERS; and
JOE MOSS, **SYLVIA RHODEA**,
LUCY EBEL, **GRETCHEN COSBY**,
REBEKAH CURRAN, **ROGER BELKNAP**,
and **ALLISON MIEDEMA**,
Ottawa County Commissioners in their
individual and official capacities,

Defendants.

PLAINTIFF'S REPLY BRIEF IN SUPPORT OF MOTION TO ENFORCE SETTLEMENT AGREEMENT

Defendants' Answer contained various false, incomplete assertions about the course of the parties' negotiations leading up to, and on, November 6. This Reply does not join issue with every one, but points out major concerns with Defendants' Answer and attaches an additional exhibit that this Court should now have:

- Defendants requested confidentiality when their counsel approached Plaintiff's counsel on October 31 about potentially engaging in settlement negotiations. Plaintiff and counsel did their best to honor that while presenting this Motion. Now that Defendants have themselves attached some of the parties' written communications leading up to the November 6 Agreement, Plaintiff attaches the final communication left out of the defense's exhibits: Plaintiff's counsel's letter summarizing discussions up to that point that she asked defense counsel share with the entire Board of

Commissioners prior to the November 6 Board meeting. (See Ex. 4, 11/2/2023 Email, page 1 of Ex., Email with letter attachment; Ex. 5, 11/2/2023 Letter from S. Howard to D. Kallman and S. Kallman.)

- Defendants' suggestion that somehow the negotiations were only a series of offers from Plaintiff only is simply false, not to mention non-sensical. First, the emails which are now in the record belie that assertion. Defense counsel conveyed a counteroffer before November 6, reflected in email from Plaintiff's counsel to defense counsel, noting that she presented the defense counteroffer to Plaintiff, who rejected it. (Ex. 4, page 3.) Defendant counsel also delivered offers and counteroffers on November 6 throughout the day, with apparent authority from the Board in closed session. Defense counsel also represented that the Board had majority support to vote to accept the final accepted settlement terms when the Board would return to open session to vote – which it eventually did. The terms of the final deal upon which the Board voted 7-3 were memorialized between counsel in a writing compliant with MCR 2.507(G). Whether that writing was exchanged before, after or during the vote is of no consequence for the statute of frauds purpose inherent in MCR 2.507(G).

- During the closed session on November 6, attorneys for each side met with one another throughout the day to shuttle offers and counteroffers between their respective clients wherein Health Officer Hambley would resign, provide a release in this litigation, and accept a payment for her damages, along with multiple other terms:

    - After Defendants met in closed session on November 6, defense counsel initially reported to Plaintiff's counsel that Defendants would not accept a settlement offer where Plaintiff remained Health Officer. Defense counsel wanted an offer to settle from Plaintiff which included her resignation. Defense counsel suggested that the Board majority would agree to a payment of $1.8 million for Plaintiff's loss in pension value, and paying Plaintiff's attorney fees, in exchange for Plaintiff's resignation and release of the litigation, among other terms, like Ms. Mansaray's resignation.
    - Plaintiff's counsel countered with $8 million for Hambley to resign for compensation of her various damages, plus other terms.
    - Defense counsel countered with an offer to pay Hambley $3 million, plus $200,000 for attorney fees, and other terms.
    - Plaintiff's counsel countered with the County paying Hambley $4.455 million, plus a year of salary and benefits, and other terms.
    - Defense counsel countered with the County paying Hambley $4 million, and other terms.
    - Plaintiff's counsel countered with acceptance of the County paying

Hambley $4 million and all other terms that defense counsel proposed, and clarifying that the County indemnity policy would continue to cover Hambley and Mansaray as former employees. Defense counsel accepted this addition regarding indemnity.

- Defendants' and Plaintiff's counsel exchanged the emails in Exhibit 1 to Plaintiff's opening brief to memorialize the final essential terms before the Board took their vote in open session to approve this set of final essential terms. Whether the Board saw those emails before taking the vote is irrelevant to whether, as a matter of law, the Board voted to approve these terms of the deal memorialized by their authorized legal counsel, which became a final acceptance of essential terms upon the Board's vote. The emails are only a record of the deal's essential terms, sufficient to comply with MCR 2.507(G).

- This Court can, and now should, review the November 6 closed session meeting minutes, since Defendants have now directly invoked what happened in closed session with their arguments and with Defendant Moss' affidavit. They have waived attorney-client privilege as to what occurred in closed session to the extent necessary to ascertain what Commissioners intended to vote on 7-3 after attorneys for the parties exchanged confirmation of the terms of the settlement agreement.

Plaintiff respectfully requests that this Court enter an order of enforcement of the parties' November 6 Settlement Agreement.

BACKGROUND[1]

As the Court can see from the parties' exchange of written communications prior to November 6, Health Officer Hambley first tried multiple times to interest in Defendants in a settlement where she would stay the Health Officer with various other concessions and protections against illegal future attempts to oust her.

Prior to November 6, as the emails reflect, defense counsel first countered Plaintiff's offer to stay as Health Officer in a call to Plaintiff's counsel, whereby

[1] Hambley incorporates the statements of facts and background from her previous briefs.

defense counsel offered that Plaintiff resign as Health Officer and become Deputy Health Officer, with some financial guarantees regarding her pension and other terms. Plaintiff's counsel's email on November 1 references Plaintiff rejecting this counteroffer, and reiterated that her original settlement offer (where she stayed as Health Officer with various terms) was still open and asked that it be shared with the entire Board before rejection. (Ex. 4, 11/1/2023 Email from S. Howard, page 3; see also Ex. 5, Letter.)

Defense counsel signaled that the Board majority would reject Plaintiff remaining the Health Officer in settlement discussions prior to November 6 (as seen in the emails). Then, on November 6, defense counsel confirmed to Plaintiff's counsel – this time after meeting with the whole Board in closed session – that the Board majority would not entertain this possibility in a settlement.

Then – while Defendants remained in closed session on November 6 – Defendants' counsel and Plaintiff's counsel exchanged various offers wherein Health Officer Hambley would agree to resign, and accept a monetary payment for her damages and attorney fees. Both sides made offers and counteroffers which included multiple terms, as detailed above. Defendants, through their four attorneys David and Stephen Kallman, Lanae Monera and Jack Jordan, equally participated in making offers and counteroffers throughout the day, as is typical in mediations. There was no mediator to assist, so the lawyers met directly with each other to convey offers and counters. Although Plaintiff's counsel had suggested a mediator, Defendants' counsel rejected the idea: "…Before we go to the expense of a

mediator, let's see how far we can get with our discussions." (Ex. 4, page 3.) Even if everyone understood that the Board would need to vote as final confirmation of any deal in open session, defense counsel was still negotiating on behalf of Defendants, as occurs in any negotiation or mediation involving a public board.

The attorneys then exchanged the emails at Ex. 1 attached to Plaintiff's opening brief to memorialize the terms of the accepted Settlement that Defendants would vote to formally agree to in open session, as required under Open Meetings Act. The emails are necessary only for a writing memorializing the final essential terms, and exchanging them between counsel is adequate to satisfy MCR 2.507(G). The circumstances were sufficient as an objective indication of voting in open session to approve the terms of that deal as memorialized in the emails.

At around 5:30 p.m., when the Board returned to open session, Defendant Joe Moss' exact words in his motion were to "accept Counsel's recommendation regarding litigation and settlement activities in the case of Hambley v. Ottawa County as addressed during closed session." Defendant Moss asked that a roll call vote be taken, which was 7-3. The individual defendants all voted in favor of the motion. The motion passed. The next session of the continued termination special meeting was announced as November 14, 2023. The idea that the commissioners were voting on something other than accepting and affirming the settlement's terms, like the story that they were merely continuing negotiations or the like, and that they did that on a 7-3 vote, simply is not believable. Defendants and their

counsel gave an objective impression that they were voting to agree to the terms of the November 6 Agreement, with three Commissioners in dissent.

Defendants' Answer attached an affidavit from Defendant Joe Moss. That affidavit is more striking for what it carefully does not say than what it does: it alleges that corporate counsel did not recommend a $4 million settlement deal with Plaintiff. That, of course, leaves open several possible fact circumstances where there is still a binding settlement as a matter of law, like if the Board voted to accept the deal against counsel's advice or in the absence of any advice. Likewise, whether the Board members understood that they had received legal advice or "authorized Corporate Counsel to execute a final settlement" is not dispositive on whether Defendants objectively accepted all essential terms of a settlement which became binding as a matter of law upon their open session vote. However, it is simply difficult to believe, given all of the objective circumstances, that the Board did not understand that they were voting to accept a settlement deal where Plaintiff resigned for the $4 million payment. Defendants should not have any problem permitting the Court to review the closed session meeting minutes if the 7-3 vote was truly only reflecting an intent to continue negotiations.

REPLY ARGUMENT

Plaintiff relies on all prior arguments from her opening brief.

To determine whether there is a meeting of the minds on a settlement contract under MCR 2.507(G), courts use an objective standard, examining the

parties' words and actions rather than their subjective states of mind. *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 454 (2006).

Plaintiff's position is that there is enough evidence already in the record for the Court to determine there is a legally-enforceable settlement, given the objective words and actions of the parties and their lawyers. However, Defendants in their Response have chosen to attempt to rely on what allegedly occurred in closed session on November 6 to argue that the Board did not vote 7-3 to accept the settlement memorialized in email between their respective legal counsel. Since Defendants have opened that door, attorney-client privilege is waived to the extent necessary to the Court and Plaintiff to examine contrary evidence. This includes limited testimony of Commissioners, limited testimony of the County Clerk who kept the minutes, and examination of the closed session meeting minutes themselves. Plaintiff has served subpoenas on four Commissioners for Monday's hearing, as well as on Ottawa County Clerk and Register of Deeds Justin Roebuck, who took and keeps the official record of closed session minutes.

I. Defendants waived attorney-client privilege from events in the November 6 closed session, and Defendants can be compelled to testify about matters relevant to counter the claim that they did not vote in open session, 7-3, to approve the November 6 Agreement.

Michigan courts recognize the general proposition that a party waives the attorney-client privilege by testifying about privileged communication(s). *In re Vogel*, No. 288837, 2010 Mich App LEXIS 1004, at *7 (Ct App May 27, 2010); accord *McCarthy v Belcher*, 128 Mich App 344, 348 (1983).

The Michigan Court of Appeals noted that it will "look[] to federal precedent for guidance in determining the scope of the attorney-client privilege when a particular issue has been addressed by a federal court." *Nash v City of Grand Haven*, 321 Mich App 587, 594 (2017). Courts have noted that a party cannot use the attorney-client privilege as "both a sword and a shield." *In re Zetia Ezetimibe Antitrust Litig*, No. MDL No. 2:18-md-2836, 2022 U.S. Dist. LEXIS 171193, at *15 (ED Va Aug. 15, 2022). See also *In re United Shore Fin Servs, LLC*, No. 17-2290, 2018 U.S. App. LEXIS 138, at *3-4 (6th Cir Jan. 3, 2018) ("Litigants cannot hide behind the privilege if they are relying on privileged communications to make their case or, more simply, cannot use the privilege as a shield and a sword.") "Thus, the privilege may implicitly be waived when defendant asserts a claim that in fairness requires examination of protected communications." *United States v. Bilzerian*, 926 F2d 1285, 1292 (2d Cir 1991).

Federal courts thus recognize the doctrine of "at-issue waiver," which "occurs when the privilege holder asserts a defense, and attempts to prove that defense by disclosing or describing an attorney-client communication." *Abbott Labs v Andrx Pharm, Inc*, No 05 C 1490, 2006 U.S. Dist. LEXIS 55647, at *24 (ND Ill July 25, 2006) (internal quotation marks omitted). The Third Circuit noted:

> Courts have found that by placing the advice in issue, the client has opened to examination facts relating to that advice. Advice is not in issue merely because it is relevant, and does not necessarily become in issue merely because the attorney's advice might affect the client's state of mind in a relevant manner. The advice of counsel is placed in issue where the client asserts a claim or defense, and attempts to prove that claim or defense by disclosing or describing an attorney client communication.

Rhone-Poulenc Rorer v Home Indem Co, 32 F.3d 851, 863 (3d Cir. 1994).

By making claims about what they allegedly did not recommend or legal advice that they allegedly did not give (Defs' Answer at 5), defense counsel has still made an issue of what occurred in the closed session such that they have waived privilege precluding evidence on those matters. It seems difficult to believe that defense counsel did not give legal advice about offers received and conveyed over the course of November 6 while the Board was in closed session – which the Board voted to enter for the specific purpose of receiving legal advice about this litigation. But even if true, by alleging that Defendants' vote was not on whether to accept the terms of the negotiated settlement with Plaintiff, but allegedly for some other conjured reason, Defendants have waived any attorney-client privilege for matters discussed in the closed session minutes and/or for any testimony addressing what Defendants believed they were voting to approve in open session.

II. This Court can and should review the November 6 closed session meeting minutes *in camera* – at the very least.

Defendants' arguments and the sworn affidavit of Defendant Moss make the November 6 closed session meeting minutes directly relevant to refute those assertions. Conveniently, Defendants claim that a section of the Open Meetings Act preclude both this Court and Plaintiff from examining the November 6 closed session meeting minutes. This is not a correct conclusion under the law.

The OMA should be broadly construed to "promote openness in government." *Wexford County Prosecutor v Pranger*, 83 Mich App 197, 204 (1978). Defendants are relying on the following single sentence from OMA about the keeping of closed

session minutes: "… These [closed session] minutes shall be retained by the clerk of the public body, **are not available to the public**, and shall only be disclosed if required by a civil action filed under [OMA] section 10, 11 or 13. …" MCL 15.267(2) (emphasis added). This provision of OMA only refers to disclosure of closed session meeting minutes **to the public**, not disclosure to a court *in camera*. This provision also would not require keeping closed session meeting minutes from a party in litigation upon a valid discovery request, either, assuming no other valid objection to production existed (like inclusion of privileged material) – even if OMA prevents **public** disclosure of the minutes.

As another example, the Attorney General issued an Opinion that the clerk may release the closed session minutes to a member of the public body. Mich Op Atty Gen No 7061 (8/31/2000). The statement that the notes "shall only be disclosed" makes sense only as a modifier to the previous phrase of "the public," or else the clerk could not even release them to a member of the public body who wanted to refer to them. At the very least, this Court can review the minutes *in camera* and keep them under seal, which is the very epitome of not available to "the public." This is only fair since Defendants have made an issue of what they were allegedly voting upon when they returned in open session.

In *Berryman v. Madison Sch. Dist.*, No. 265996, 2007 Mich. App. LEXIS 464, at *7 (Ct. App. Feb. 22, 2007), the defendants submitted the minutes of the closed session to the court for *in camera* review, as well affidavits from all the board members stating that the discussion was limited to legal counsel's legal material.

Similarly, in *Emsley v. Charter Twp. of Lyon Bd. of Trs.*, Nos. 353097, 354162, 2021 Mich. App. LEXIS 6893, at *25 (Ct. App. Dec. 2, 2021), the court reviewed the closed session minutes *in camera*. Similarly here, viewing *in camera* or filing under seal for only the parties to view is not precluded "disclosure" under the statute. Moreover, if Defendants have nothing to hide, there should be no objection to the Court and counsel reviewing the minutes as to what the Board voted upon 7-3.

CONCLUSION

Accordingly, for the reasons stated in her opening brief and herein, Hambley respectfully requests that this Court enter an order to enforce the November 6 Settlement Agreement, pursuant to MCR 2.507(G).

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Dated: November 24, 2023 By: /s/ Sarah R. Howard

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