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FORSYTH COUNTY GEORGIA  
FILED IN THIS OFFICE

FEB 22 2008

*Douglas Bonelli*  
CLERK SUPERIOR COURT

In the Superior Court  
of Forsyth County  
State of Georgia

Michael D. Peck on Behalf of	)	
Himself and All Homeowners	)	Civil Action
Adjacent to Lanier Golf Club	)	File Number 07CV-2147
f/k/a Canongate on Lanier	)	
Golf Club,	)	
Plaintiff,	)	
v.	)	
Lanier Golf Club, Inc.,	)	
Defendant.	)	

Plaintiff's Response to  
Defendant's Motion for  
Contempt and Motion to Compel  
Discovery and for Sanctions

Comes now, Michael D. Peck, ("Plaintiff") and hereby responds to the Motion for Contempt and Motion to Compel Discovery and for Sanctions ("Motion") filed by Lanier Golf Club, Inc. ("Defendant") as follows:

Statement of Facts

On November 13, 2007, Defendant served Interrogatories, Notice to Produce and Request for Production of Documents and Things to

Plaintiff<sup>1</sup>. On December 10, 2007, Plaintiff responded<sup>2</sup>. On January 25, 2008, the court entered a Consent Scheduling Order Relative to the Proposed Class Certification ("Order")<sup>3</sup>. Paragraph Two of said order required as follows:

In accordance with O.C.G.A. § 9-11-23 (f)(2), all discovery directed solely to the merits of the claims or defenses is stayed until the court has issued its written decision regarding certification of the class. Prior to the hearing on class certification required above, discovery in this case will be limited to the issue of class certification. If evidence is presented to the court by affidavit, the parties shall have an opportunity to cross-examine said affiant as to such testimony offered by affidavit.

Discovery on class certification shall include whether the plaintiff(s) has met the requirements of O.C.G.A. § 9-11-23 (a), which are:

- (1) numerosity - that the class is so numerous as to make it impracticable to bring all members before the court;
- (2) commonality - that there are questions of law and fact common to the class members which predominate over any individual questions;
- (3) typicality - that the claim of the named plaintiff is typical of the claims of the class members;
- (4) adequacy of representation - that the named plaintiff will adequately represent the interest of the class; and
- (5) superiority - that a class action is superior to other methods of fairly and efficiently adjudicating the controversy.

Defendant claims that there is a discovery dispute at this point

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<sup>1</sup> Exhibit A of Motion.

<sup>2</sup> Exhibit B of Motion.

<sup>3</sup> Exhibit C of Motion.

in the litigation. There has been communication between counsel, research, and letters between counsel<sup>4</sup>. The gravamen of the Defendant's complaint is their assertion that they have not received the required discovery germane to the issue of whether the requested class should or should not be certified: "Defendant found [Plaintiff's discovery response] to be incomplete and unresponsive; specifically, Plaintiff provided little or no information as to identity of the individual class members, the basis for the claim evidence relating to the representations made to each class member, as well as the manner in which that evidence fits into the legal framework governing the claims pled in Plaintiff's complaint<sup>5</sup>."

### Argument and Citation of Authority

O.C.G.A. § 9-11-23 provides in part:

- (A) One or more members of a class may sue or be sued as representative parties on behalf of all only if:
- (1) The class is so numerous that joinder of all members is impracticable;
  - (2) There are questions of law or fact common to the class;
  - (3) The claims or defenses of the representative parties are typical of the claims or defenses of the class; and
  - (4) The representative parties will fairly and adequately protect the interests of the class.
- (B) An action may be maintained as a class action if the prerequisites of subsection (a) of this Code section are satisfied, and, in addition:
- (1) The prosecution of separate actions by or against

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<sup>4</sup> Exhibits D & E of Motion.

<sup>5</sup> Motion, ¶ 2.

individual members of the class would create a risk of:

- (a) Inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class; or
  - (b) Adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests;
- (2) The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
- (3) The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:
- (a) The interest of members of the class in individually controlling the prosecution or defense of separate actions;
  - (b) The extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
  - (c) The desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
  - (d) The difficulties likely to be encountered in the management of a class action.

The arguments of the Defendant are nonsensical and it appears that two major points from this code section have been overlooked or ignored. First, a plain reading of the code section indicates that all the prongs of subsection (a) are required to be satisfied. On the other hand, satisfaction of only one of the

prongs of subsection (b) is required. Second, both the cited code section and the Order require that "[A]ll discovery directed solely to the merits of the claims or defenses is stayed until the court has issued its written decision regarding certification of the class."

#### Injunctive and Declaratory Relief

The simple and sole prayer for relief by the Plaintiff is for final injunctive relief and/or corresponding declaratory relief with respect to the class as a whole. Paragraph (b) on page seven of the Complaint demands: "The Court declare and enforce against Defendant or any new owners an implied restriction limiting use of this property to golf course purposes only<sup>6</sup>."

The requirements of O.C.G.A. § 9-11-23 (b) are satisfied if the court determines that "[t]he party [Defendant] opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Therefore, if the Plaintiff can satisfy the requirements of subsection (a), all he needs to do to comply with subsection (b) is to satisfy one, not all three, of the listed requirements.

Defendant argues in paragraph five of the Motion that they can not determine if the requirements of O.C.G.A. § 9-11-23 (b)(3) are satisfied: "In essence, the court must make a finding that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." However, the court does not need to get to (b)(3) because (b)(2) injunctive relief is the only relief requested.

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<sup>6</sup> Complaint, ¶(b) on Page 7.

## Partial Stay of Discovery

Defendant is asking this court to hold the Plaintiff in contempt, to sanction him and then to compel discovery. Yet, the order of the court clearly requires otherwise: "[A]ll discovery directed solely to the merits of the claims or defenses is stayed until the court has issued its written decision regarding certification of the class." In paragraph 17 of the Motion, the Defendant asserts that "Without the information requested by the Discovery, Defendant is unable to complete discovery or prepare for the hearing on class certification in a timely fashion."

Plaintiff sent Defendant two letters on February 13, 2008, and both are listed as Exhibit E to the Motion. The second letter, included numerous affidavits from proposed class members. The Defendant has not provided any affidavits to the Plaintiff. Moreover, the first letter responded completely to each complaint that the Defendant had about the alleged lack of discovery.

Attached to Exhibit B to the Motion is Plaintiff's complete list of the names and addresses of each of the persons that own property next to the Golf Course. Also listed is the Forsyth County Tax Identification Number. Normally, complete names and addresses of class members are not required unless the court is required to comply with O.C.G.A. § 9-11-23 (c)(2) which is not required unless (b)(3) relief is requested by the Plaintiff.

Examples of the type of information that Defendant has demanded on all 122 members of the class at this point is shown on Paragraphs 3-5 & 15 of the letter (Exhibit E of the Motion). In addition to the complete list of property owners provided by the Plaintiff, the Defendant further demands additional information on each of these persons as follows:

- (1) Seller from whom they purchased their property

- (2) Date they closed on their property
- (3) Real estate agent or broker
- (4) Closing attorney
- (5) Any representations made by the seller or the seller's representative regarding the Golf Course, now known as Lanier Golf Club
- (6) Brochures or advertising materials
- (7) Appraisals or other estimates as to the value of the real property
- (8) Recorded plat

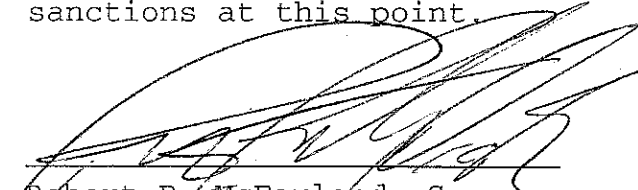
In essence, the Defendant is attempting to hold the Plaintiff to a (b)(3) standard when the Plaintiff is only seeking (b)(2) relief. While some of this type of information may be required in the future, there can be no doubt that the Defendant's purpose is to assist them with their argument for the final issue in this case. In addition to being a "merits based" discovery request, most of this type of information is available in the public records. Plaintiff has disclosed that the information supplied at this point mainly came from the tax records. In addition, Plaintiff disclosed the three persons that provided the information.

All the court is required to determine at the certification hearing is that the members of the class share a common right and common questions of law or fact predominate over individual questions of law or fact. *Hooters of Augusta, Inc. v. Nicholson*, 245 Ga. App. 363 (2000) and *Trend Star Continental, Ltd. v. Branham*, 220 Ga. App. 781 (1996). However, it appears that the Defendant is attempting to prove that there are facts that may be different as to each member of the alleged class. "The character of the right sought to be enforced in a class action may be common although the facts may be different as to each member of the alleged class." *Board of Regents, University System of Georgia v. Rux*, 2003, 260 Ga. App. 760 (2003).

Other than attorney fees, the Plaintiff is not seeking damages from the Defendant. However, even if they were seeking damages, some minor variations in amount of damages as to each member of the class would not prevent the court from certifying the class: "For purposes of class certification, minor variations in amount of damages do not destroy the class when legal issues are common. *Rux, Supra.*

### Conclusions of Fact and Law

The court should deny the Defendant's motion to compel discovery in view of the requirements of the Order that discovery is not allowed on the merits of the claims. Further, the court should determine that there has been no contempt and no need for sanctions at this point.



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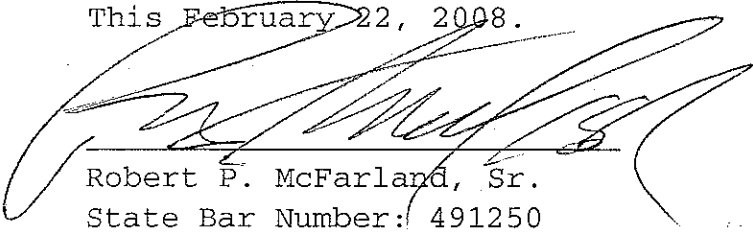
## Certificate of Service and Compliance

This is to certify that I have this day duly served opposing counsel with a copy of Plaintiff's Response to Defendant's Motion for Contempt and Motion to Compel Discovery and for Sanctions by fax transmission and by depositing same in the United States Mail, postage prepaid, addressed as follows:

G. Douglas Dillard  
Andrea Cantrell Jones  
Lauren M. Hansford  
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Atlanta, Georgia 30326  
(404) 965-3680 Fax: (404) 965-3670

This is to certify that I have complied with instructions from the court by transmitting via fax transmission to the Honorable Albert M. Pickett at (706) 955 8851 a copy of (1) Motion for Contempt and Motion to Compel Discovery and for Sanctions filed by Defendant and (2) Plaintiff's Response to Defendant's Motion for Contempt and Motion to Compel Discovery and for Sanctions.

This February 22, 2008.



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