

**IN THE SUPERIOR COURT OF TALBOT COUNTY  
STATE OF GEORGIA**

MARKER 21, LLC	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action File No. 2023-CV-038
	)	
STATE OF GEORGIA,	)	
	)	
Defendant,	)	
	)	
and	)	
	)	
GEORGIA WILDLIFE FEDERATION, INC., and FLINT RIVERKEEPER, INC.,	)	
	)	
Intervenors-Defendants	)	
_____	)	

**MOTION TO INTERVENE AND MEMORANDUM OF LAW IN SUPPORT BY  
GEORGIA WILDLIFE FEDERATION AND FLINT RIVERKEEPER**

Georgia Wildlife Federation, Inc. and Flint Riverkeeper, Inc., conservation organizations whose work includes ensuring public enjoyment and use of Georgia waterways for fishing, hereby move to intervene in this action as a matter of right under O.C.G.A. § 9-11-24(a), or alternatively by permission under O.C.G.A. § 9-11-24(b), based upon their compelling interests in the subject matter of this lawsuit and common questions of law and fact.

**BACKGROUND**

This case concerns an attempt by a riverfront property owner to exclude anglers from a portion of Yellow Jacket Shoals in the Flint River. Yellow Jacket Shoals is about a one-mile stretch of the Flint River that is famous among anglers for shoal bass fishing. Shoal bass are a relatively rare, native species of black bass that thrive in rocky shoals. Strong fighters, shoal bass

are difficult and fun to catch, and anglers from all over the world have visited the Flint River, including at Yellow Jacket Shoals, to catch this incredible sport fish.

Georgia Wildlife Federation and Flint Riverkeeper (collectively, Conservation Groups) are non-profit conservation organizations with strong histories of fighting for public access to waterways for fishing, including for shoal bass. Georgia Wildlife Federation (GWF) was established in 1936 by fishing and hunting clubs and has worked ever since to promote public access to and participation in fishing, hunting, and outdoor recreation. (Ex. A, Worley Decl. ¶ 5.) GWF hosts annual fundraising events such as Fisharama to support GWF's work, which includes advocating for public opportunities to fish, hunt, and enjoy the outdoors. (*Id.* ¶ 6.) Similarly, Flint Riverkeeper (FRK) works to restore and preserve the habitat, water quality, and flow of the Flint River and its tributaries for the use and enjoyment of all Georgians and visitors. (Ex. B, Rogers Decl. ¶¶ 5, 7.) FRK supports enjoyment and recreation on the Flint River. (*Id.* ¶ 10.) In May 2022, the respective heads of GWF and FRK co-authored a Letter to the Editor advocating for public access to the entire Flint River for fishing. (Compl. ¶ 79.)

Both organizations have worked to recognize and protect Georgia's shoal bass populations and habitats. For instance, they supported the Georgia Department of Natural Resources' identification of shoal bass as a high priority species in the State Wildlife Action Plan in September 2015. (Worley Decl. ¶ 23; Rogers Decl. ¶ 18.) And Conservation Groups both supported the Georgia legislature's designation of the shoal bass as the state's official riverine sport fish in 2020. (*Id.*)

GWF and FRK have members who fish in the Flint River at Yellow Jacket Shoals and who plan to fish there in the future. (Worley Decl. ¶¶ 18, 19, 20; Rogers Decl. ¶ 14.) These members pay fees for fishing licenses, and those fees are used in part to fund state activities like

managing fisheries and building boat ramps. (Worley Decl. ¶ 13; Rogers Decl. ¶ 20.)<sup>1</sup> Conservation Groups' members pay those licensing fees with the expectation that they may fish in navigable rivers without fear of being ticketed. (*Id.*) Conservation Groups' members also paddle, raft, and wade in the Flint River at Yellow Jacket Shoals. (Worley Decl. ¶¶ 18, 19, 20; Rogers Decl. ¶ 14.) Mike Worley, the President and CEO of GWF, has personally paddled through Yellow Jacket Shoals in an open canoe and has fished on the Flint River several times. (Worley Decl. ¶ 17.) Gordon Rogers, the Executive Director and Riverkeeper of FRK, has fished, rafted, and kayaked at Yellow Jacket Shoals dozens of times over the past 14 years in his capacity as Riverkeeper and on his own time. (Rogers Decl. ¶ 13.) Both men plan to fish and boat on Yellow Jacket Shoals in the future. (*Id.*; Worley Decl. ¶ 17.)

But now, the public's right to fish at Yellow Jacket Shoals is being challenged by Plaintiff Marker 21, LLC. Plaintiff seeks an order from this Court declaring that Plaintiff owns the bed of a portion of Yellow Jacket Shoals and has the exclusive right to control fishing in the shoals. In May 2023, Plaintiff sued the State of Georgia requesting the following relief: (I) a declaratory judgment that Plaintiff owns the bed of the shoals and has sole fishing rights; (II) a permanent injunction precluding the State from prosecuting Plaintiff under O.C.G.A. § 27-3-151(a)(1) for unlawfully preventing others from fishing; (III) in the alternative, damages resulting from the unconstitutional taking of private property without compensation; and (IV) litigation expenses. (Compl. at 18–19.)

The State of Georgia has moved to dismiss the complaint for lack of subject matter jurisdiction based on sovereign immunity, failure to state a claim, and improper venue. (Br. in

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<sup>1</sup> See also Wildlife Res. Div., Ga. Dep't of Nat. Res., Fact Sheet at 2 (2022), available at [https://georgiawildlife.com/sites/default/files/wrd/pdf/fact-sheets/WRDFactSheet\\_FY2022\\_110222\\_Final.pdf](https://georgiawildlife.com/sites/default/files/wrd/pdf/fact-sheets/WRDFactSheet_FY2022_110222_Final.pdf) (last visited Sept. 21, 2023).

Support of Mot. to Dismiss at 5.)<sup>2</sup> In its failure to state a claim argument, the State correctly asserts that Yellow Jacket Shoals is navigable, and that the riverbed is therefore owned by the State, precluding any claim that Plaintiff may control fishing in the shoals. (*Id.* at 14.) The State also argues that even if Plaintiff can demonstrate ownership of the navigable riverbed based on a pre-1863 grant, Plaintiff never had exclusive fishing rights. (*Id.* at 14–16.)

The State’s motion stayed discovery for 90 days or until the Court’s ruling, whichever occurred first. O.C.G.A. § 9-11-12(j)(1). The Court has not yet ruled on the motion, and the stay lifted on September 20, 2023. Upon information and belief, the parties have not yet engaged in discovery. Meanwhile, the Court set, continued, and then canceled a hearing on Plaintiff’s declaratory judgment claim. Most recently, the parties filed a joint motion for a scheduling conference to discuss the hearing on the declaratory judgment claim, oral argument on the motion to dismiss, the scope and length of discovery, and other deadlines. As of the date of the instant filing, the Court has not yet ruled on the motion or set a scheduling conference.

Conservation Groups now wish to intervene on behalf of the State of Georgia. The organizations believe that defending against Plaintiff’s claims and ensuring public access to the shoals for fishing is in furtherance of their missions. For the following reasons, GWF and FRK respectfully request the Court to grant this motion.

### **ARGUMENT**

#### **I. GWF and FRK have a right to intervene under O.C.G.A. § 9-11-24(a).**

An applicant shall be permitted to intervene in an action if the application is (a) timely, (b) the applicant can show an interest in the property or transaction relating to the subject matter

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<sup>2</sup> Conservation Groups support the State’s motion to dismiss for failure to state a claim. Conservation Groups defer to the State’s arguments on sovereign immunity and improper venue.

of the action, (c) the applicant is so situated that an unfavorable ruling may as a practical matter impair or impede the applicant's ability to protect that interest, and (c) the applicant's interest is not adequately represented by existing parties. O.C.G.A. § 9-11-24(a); *Ebon Found. v. Oatman*, 269 Ga. 340, 342 (1998) (finding right to intervene).

**A. The motion to intervene is timely.**

As an initial matter, Conservation Groups' motion to intervene is timely. Generally, a motion to intervene is timely if filed "before any substantial proceedings [have] been had in the case." *Moore v. Moore*, 247 Ga. 243, 244 (1981) (cleaned up). And "consideration of whether an application to intervene has been timely filed does not depend solely on the amount of time that may have elapsed since institution of the action." *Liberty Nat. Bank & Trust Co. v. Diamond*, 231 Ga. 321, 325–26 (1973); *see also Chiles v. Thornburgh*, 865 F.2d 1197, 1213 (11th Cir. 1989) (finding motion to intervene timely when filed "only seven months after" complaint, three months after government moved to dismiss, and before any discovery had begun).

Plaintiff Marker 21 filed its complaint on May 12, 2023. On June 22, 2023, Defendant State of Georgia filed a motion to dismiss, which is still pending. Upon information and belief, the parties have not yet engaged in or completed discovery. No substantial proceedings have been had in the case. *Moore*, 247 Ga. at 244. Simply stated, these proceedings are still in the very early stages. Accordingly, Conservation Groups' intervention motion is timely.

**B. Conservation Groups have a direct interest in the property relating to the subject matter of this case.**

Plaintiff Marker 21 has alleged that it owns the bed of a portion of Yellow Jacket Shoals in the Flint River where Conservation Groups' members currently fish and plan to fish.

Both GWF and FRK have a direct interest in the property at Yellow Jacket Shoals because both organizations advocate for public access to rivers for fishing and because their

members fish the property at issue. (Worley Decl. ¶¶ 18, 19, 20; Rogers Decl. ¶ 14.) In addition, both organizations have members who pay fishing licensing fees and taxes on recreational equipment that are intended to fund Georgia Wildlife Resources Division activities such as improving access to waterways and managing fisheries. (Worley Decl. ¶ 13; Rogers Decl. ¶ 20.) These members pay those taxes and fees with the expectation that they may lawfully fish in navigable rivers, including the Flint River at Yellow Jacket Shoals, without fear of being ticketed. Conservation Groups also have an interest in promoting the shoal bass fishery and in ensuring public access to state waters where shoal bass are found. (Worley Decl. ¶ 23; Rogers Decl. ¶¶ 18, 21.) Indeed, Plaintiff acknowledges Conservation Groups' interest in the property by alleging in its complaint that the leaders of both organizations submitted a "Letter to the Editor" in May 2022, advocating for full public access and use of the Flint River. (Compl. ¶ 79.)

**C. An unfavorable ruling would impair or impede Conservation Groups' ability to protect their interests.**

Should the Court issue an unfavorable ruling, Plaintiff Marker 21 would be entitled to exclusively control fishing on the property at Yellow Jacket Shoals, and Conservation Groups' members would no longer have the right to fish at that location. Should Conservation Groups' members attempt to fish at Yellow Jacket Shoals, they would be subject to ticketing or trespassing claims. An unfavorable ruling also would impair their ability to fish in a truly special location where they have already fished for decades, and it would seriously limit where Conservation Groups' members may fish for shoal bass, which are found in only a few small drainages in Georgia, Alabama, and north Florida. (Rogers Decl. ¶¶ 14, 19.)

**D. Defendant State of Georgia does not adequately represent Conservation Groups' interests.**

A showing of inadequate representation may be based solely on “the status and the claims of the parties as revealed by the pleadings and representations of counsel.” *Sw. Georgia Prod. Credit Ass'n v. Wainwright*, 241 Ga. 355, 356 (1978). Courts may assume a governmental body adequately represents an intervenor's interests **only** when the intervenor's interests are **identical** to those of the government. *DeKalb Cnty. v. Post Properties, Inc.*, 245 Ga. 214, 219 (1980).

Here, Conservation Groups' interests are not identical to the State of Georgia's interests, and, thus, no assumption of adequate representation should be made. Conservation Groups are primarily concerned with ensuring that their members may continue fishing at Yellow Jacket Shoals; they have an interest in the public's right to fish navigable waters. In contrast, the State's interests are to ensure its sovereign immunity, to defend against an inverse condemnation claim, and to avoid injunctive relief that would prevent the State from charging Plaintiff with unlawful acts in the future. (Br. in Support of Mot. to Dismiss at 5–18.) Although the State agrees that Conservation Groups' members may fish at Yellow Jacket Shoals, the State—in defending against the specific claims brought in this case—does not share an identical interest of protecting the fishing rights of Conservation Groups' members.

In addition, based on the pleadings filed to date, it appears that Conservation Groups have different legal theories than the State of Georgia in opposing Plaintiff's allegations concerning exclusive fishing rights. For instance, the State has relied solely on state law relating to the navigability of the Flint River, but Conservation Groups intend to raise and discuss U.S. Supreme Court precedent holding that federal law governs whether a stream is navigable for determining state riverbed title. *PPL Montana, LLC v. Montana*, 565 U.S. 576, 591 (2012). Furthermore, the State previously settled a separate case concerning riverbed ownership and

fishing rights on another portion of Yellow Jacket Shoals, to Conservation Groups' detriment.<sup>3</sup>

While the State has not indicated any willingness to settle the instant case, Conservation Groups seek intervention to ensure the protection of their members' fishing rights.

In sum, the State of Georgia does not adequately represent Conservation Groups' interests, and Conservation Groups should be allowed to intervene as of right.

**II. Alternatively, Conservation Groups may intervene permissively under O.C.G.A. § 9-11-24(b).**

In the alternative, Conservation Groups move for permissive intervention. An applicant may intervene if the application is timely and when the "applicant's claim or defense and the main action have a question of law or fact in common." O.C.G.A. § 9-11-24(b). In ruling on a permissive intervention request, "the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." *Id.*

First, as noted previously, this motion is timely because the complaint was filed less than five months ago, discovery has not been completed, and the Court has not yet ruled on a pending motion to dismiss. Second, common questions of law and fact exist between Conservation Groups' defense and the main action because both directly concern whether the portion of Yellow Jacket Shoals at issue is navigable or non-navigable. Likewise, the main underlying question that must be answered in this case is whether Plaintiff has exclusive fishing rights, which is precisely the question that Conservation Groups seek to have answered "no."

Moreover, allowing intervention will promote the interests of judicial economy and fairness without causing prejudice to the parties or undue delay. At this early stage of the proceedings, any delay would be insignificant. And hearing Conservation Groups' arguments

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<sup>3</sup> (Compl., Ex. A., *Four Chimneys, LLLP v. State of Georgia*, Final Judgment and Order, Case No. 22-cv-0296 (Mar. 27, 2023).)

would promote fairness by allowing anglers who have fished this property and intend to continue fishing at Yellow Jacket Shoals to assert their rights.

**CONCLUSION**

In sum, Conservation Groups meet the criteria for intervention. Georgia Wildlife Federation and Flint Riverkeeper therefore request this Court to grant their Motion to Intervene as a matter of right pursuant to O.C.G.A. § 9-11-24(a) or, in the alternative, by permission pursuant to O.C.G.A. § 9-11-24(b). As required, Conservation Groups have attached a pleading, (Ex. C, Ans.), setting forth the defense for which intervention is sought. O.C.G.A. § 9-11-24(c).

Conservation Groups also request permission to participate in any future status conferences or hearings that may be scheduled before the Court rules on this motion.

Respectfully submitted this 2nd day of October, 2023.

/s/ April S. Lipscomb  
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*Counsel for Georgia Wildlife Federation  
and Flint Riverkeeper*

**CERTIFICATE OF SERVICE**

I hereby certify that I have served the foregoing **Motion to Intervene and Memorandum of Law in Support by Georgia Wildlife Federation and Flint Riverkeeper** via the PeachCourt online filing system, which will automatically send e-mail notification of such filing to the following attorneys of record:

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This 2nd day of October, 2023.

/s/ April S. Lipscomb  
April S. Lipscomb (884175)

# Exhibit A

**IN THE SUPERIOR COURT OF TALBOT COUNTY  
STATE OF GEORGIA**

MARKER 21, LLC, )  
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Plaintiff, )  
 )  
v. )  
 )  
STATE OF GEORGIA, )  
 )  
Defendant, )  
 )  
and )  
 )  
GEORGIA WILDLIFE FEDERATION, )  
INC., and FLINT RIVERKEEPER, INC., )  
 )  
Intervenors-Defendants. )  
\_\_\_\_\_ )

Civil Action File No. 2023-CV-038

**DECLARATION OF MICHAEL WORLEY**

I, Michael Worley, hereby declare and state as follows:

1. My name is Michael Worley. I am over the age of 18 and competent to give this declaration. This declaration is based on my belief and personal knowledge of the facts below.
2. I obtained a Bachelor of Science degree with a major in biology from the University of West Georgia. I also obtained an Executive Education Certificate from the Goizueta Business School at Emory University.
3. From 1981 to 2014, I was employed by Georgia Power Company in a variety of roles, including as a lab technician at a power plant, as an emergency response environmental auditor, as a legislative and government affairs analyst, and as manager of community and economic development for non-metropolitan Georgia.

4. I am currently the President and CEO of Georgia Wildlife Federation (“GWF”), a role I have served in since 2015. GWF is a nonprofit membership organization recognized by the Internal Revenue Service under Section 501(c)(3) of the Internal Revenue Code. GWF is a Georgia nonprofit corporation, and GWF is registered with the State of Georgia to accept charitable donations. GWF’s principal office is in Covington, Georgia. GWF is an independent affiliate of the National Wildlife Federation.
5. GWF’s mission is to encourage the intelligent management of the life sustaining resources of the earth, including its essential water resources, protective forests and plant life, and dependent wildlife. GWF’s mission is also to promote and encourage the knowledge and appreciation of these resources, their interrelationship and wise use, without which there can be little hope for a continuing abundant life. GWF was founded in 1936 by fishing and hunting clubs, making it the oldest and largest member-supported conservation group in the state. GWF works across Georgia to promote access to and participation in hunting, fishing, and outdoor recreation.
6. GWF hosts annual Buckarama, Fisharama, and Turkeyrama events to raise money for GWF’s conservation programs. Proceeds from these events support GWF’s work to donate venison to food banks, recruit and retain hunters, restore healthy habitats and clean water, provide public access to nature trails, and advocate for wildlife and the public’s opportunities to hunt, fish, and enjoy the outdoors.
7. GWF has more than 50,000 members, donors, and event participants, as reported to the National Wildlife Federation.

8. GWF's members join the organization and participate in its activities specifically to protect Georgia wildlife and ensure wise management and enjoyment of natural resources by its members and the public.
9. GWF and its members are involved in protection of Georgia wildlife in a variety of ways, including participation in administrative, legislative, and regulatory decision-making processes concerning the use, protection, and development of the natural resources of Georgia. GWF has and will pursue litigation when necessary to defend Georgia's wildlife, ensure responsible management of natural resources, and protect public access to outdoor recreation. GWF also seeks to educate the public and its members about the importance of Georgia wildlife and natural resources and the threats to the long-term health of these resources.
10. As President and CEO of GWF, I am responsible for the overall management and maintenance of the organization, including the budget and financial management. I work with staff in preparing finance reports of revenue and expenditures for presentation to the Board of Directors on a regular basis. I oversee preparation and submittal of grant applications and follow-up with granting agencies and foundations, as well as individual donors.
11. In my role as President and CEO, I study and discuss the state of Georgia wildlife from the land, water, and air, look for negative impacts on natural resources, respond to citizen complaints, research and analyze management practices and regulation of natural resources, educate the public about Georgia wildlife and threats to it, work to empower stakeholders throughout the state, advocate compliance with environmental laws, work

on finding solutions to pollution problems, and act as a spokesman for the those with an interest in Georgia wildlife.

12. GWF worked to support the passage of the Georgia Outdoor Stewardship Act in 2019 and the establishment of the Georgia Outdoor Stewardship Program, administered by the Department of Natural Resources, which provides tax revenues generated from outdoor recreation equipment to support efforts of state and local governments in the stewardship and protection of lands, waters, and wildlife in Georgia. Protecting and providing public access to Georgia's fisheries, as well as raising revenue from taxes on the sale of fishing equipment, are central features of this program, and are of critical importance to GWF and its membership.
13. GWF members purchase fishing licenses and pay appropriate taxes and fees in accordance with Georgia laws and regulations so that they may enjoy unencumbered access to fisheries in navigable streams, like the Flint River and Yellow Jacket Shoals.
14. GWF often engages with Georgia's legislature and Department of Natural Resources to support public access to and effective management of Georgia's fisheries.
15. GWF is a member and active participant in the Aquatic Connectivity Team. The Aquatic Connectivity Team is a collaboration between interested organizations and government agencies that works to enable and protect fish and wildlife passage through Georgia's rivers, streams, and waterways.
16. GWF and its members, myself included, have a direct and beneficial interest in the continued protection, preservation, and enhancement of the environment on which Georgia wildlife depend. Defending the State of Georgia's protection of the public right to fish in navigable streams, including the Flint River at Yellow Jacket Shoals, is in

furtherance of GWF's mission to protect Georgia wildlife and promote responsible use and enjoyment by GWF's membership and the public.

17. I have paddled and fished on the Flint River several times and intend to do so again in the future. For example, on June 22, 2008, I paddled down the Flint River, including through Yellow Jacket Shoals, as a participant in the 'Paddle Georgia' event put on by the Georgia River Network. I paddled the full extent of the event, without portage, in an Old Town brand Discovery model canoe with one other adult. Though I do not recall the exact specifications of the canoe, it was at least 14 feet long, approximately 3 feet wide, at least 1 foot deep, more than 80 pounds, and capable of holding 2 people along with assorted cargo. The event was attended by approximately 300 people in at least 100 boats, including rafts, kayaks, and canoes. The water level during that event was particularly low, but participants nevertheless paddled down a stretch of the upper Flint River including Yellow Jacket Shoals.
18. GWF has many individual members who have engaged in rafting, kayaking, paddling, wading, fishing, and other outdoor recreation on the Flint River and who plan to engage in those activities in the future.
19. GWF has many individual members who have engaged in rafting, kayaking, paddling, wading, fishing, and other outdoor recreation at Yellow Jacket Shoals on the Flint River and who plan to engage in those activities in the future.
20. GWF has many individual members who have engaged in in-stream fishing for shoal bass on Georgia's streams and rivers, including and especially on the Flint River and at Yellow Jacket Shoals, and who plan to fish for shoal bass at Yellow Jacket Shoals in the future.

21. Shoal bass are a fish species that evolved in western Georgia's riverine environments. Shoal bass are adapted to live and thrive in shoals, rapids, and whitewater along Georgia's rivers. Shoal bass prefer highly oxygenated water and rely on ambush hunting techniques specifically adapted to succeed in whitewater environments. Most shoal bass populations occur in Georgia and are centered in the Flint and Ocmulgee River systems.
22. GWF recognizes that shoal bass are an important sport fish species that attract anglers from across Georgia, the country, and the world to western Georgia, and specifically to the Flint River and its shoals and rapids, including Yellow Jacket Shoals. Shoal bass are becoming more popular and appreciated as a sport fish because of their aggressive behavior and because they can be found and pursued in beautiful and exciting environments like the Flint River and Yellow Jacket Shoals. Attracting anglers interested in fishing for shoal bass is important for tourism and economic development in rural Georgia.
23. GWF has and continues to support efforts to recognize and protect Georgia's shoal bass populations and habitats. GWF supported DNR's identification of shoal bass as a high priority species in Georgia's State Wildlife Action Plan issued in September 2015. GWF supported the Georgia legislature's designation of the shoal bass as the state's official riverine sport fish in 2020.
24. GWF recognizes and supports fishing as a central feature of Georgia's culture, history, and economy, particularly fishing in rivers and streams. GWF was an ardent supporter of the effort to protect public fishing access in the Georgia Constitution, a measure that received overwhelming support from Georgia voters. GWF affirms that the Georgia

Constitution preserves the tradition of hunting and fishing for the people and the regulation and management of hunting and fishing for the public good.

25. The conservation of Georgia rivers and wildlife is an example of the North American model of wildlife conservation, which has proven highly effective at protecting natural resources and ensuring public access and enjoyment. Effective management, protection, and access to Georgia's streams and rivers are crucial to ensuring that Georgians and the broader public can enjoy and benefit from fishing. GWF has a responsibility to advocate for protection and responsible management of Georgia's fisheries and to advocate for public access to the state's rivers and streams.

I hereby declare under penalty of perjury that the foregoing is true and correct.

Respectfully submitted this 2nd day of October, 2023.



s/ Mike Worley  
President and CEO  
Georgia Wildlife Federation  
11600 Hazelbrand Road NE  
Covington, GA 30014

# Exhibit B

**IN THE SUPERIOR COURT OF TALBOT COUNTY  
STATE OF GEORGIA**

MARKER 21, LLC, )

Plaintiff, )

v. )

STATE OF GEORGIA, )

Defendant, )

and )

GEORGIA WILDLIFE FEDERATION, )  
INC., and FLINT RIVERKEEPER, INC., )

Intervenors-Defendants. )

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Civil Action File No. 2023-CV-038

**DECLARATION OF S. GORDON ROGERS IV**

I, S. Gordon Rogers IV, hereby declare and state as follows:

1. My name is S. Gordon Rogers IV. I am over the age of 18 and competent to give this declaration. This declaration is based on my belief and personal knowledge of the facts below.
2. Most of my educational and professional background has focused on biology, ecology, and water quality. I have a B.S. in Biology from the University of Georgia (“UGA”) and completed graduate work in marine ecology from UGA and Skidaway Institute of Oceanography in 1984.
3. From 1985 through 1995, I worked at the Georgia Department of Natural Resources in the Coastal Resources Division, first as a fisheries statistician and later as a marine fisheries biologist and policy analyst. From 1995 through 2004, I worked as a biological

research and water quality consultant and contractor. From 2004 to 2009, I worked as the Satilla Riverkeeper in South Georgia, advocating for the protection of the Satilla River watershed. I have also worked as a professional fisherman and guide, as well as a waste, demolition, and recycling contractor.

4. I am currently the Executive Director and Riverkeeper of Flint Riverkeeper, Inc. ("FRK"), which I joined in 2009. FRK is a nonprofit membership organization recognized by the Internal Revenue Service under Section 501(c)(3) of the Internal Revenue Code. FRK is a Georgia nonprofit corporation, and FRK is registered with the State of Georgia to accept charitable donations. FRK's principal office is in Albany, Georgia.
5. FRK's mission is to restore and preserve the habitat, water quality, and flow of the Flint River and its tributaries for the benefit of current and future generations and dependent wildlife.
6. FRK has close to 1,600 active individual members and over 4,000 'followers' on social media networks.
7. FRK's members join the organization and participate in its activities specifically to protect the Flint River and its associated tributaries, wetlands, and aquifers from pollution and destruction, and to maintain and improve the quality of these waters for their own use and enjoyment as well as for the use and enjoyment of all Georgians and visitors.
8. FRK and its members are involved in protection of the Flint River system in a variety of ways, including participation in administrative, legislative, and regulatory decision-making processes concerning the use, protection, and development of the natural resources of the Flint River system. FRK also seeks to educate the public and its

members about the importance of the Flint River and its tributaries and the threats to the long-term health of these resources. FRK and its members also actively participate in a variety of activities and projects to promote and maintain access to the river system's resources.

9. As Executive Director of FRK, I am responsible for the overall management and maintenance of the organization, including the budget and financial management. I work with staff in preparing finance reports of revenue and expenditures for presentation to the Board of Directors eight times each year. I oversee preparation and submittal of grant applications and follow-up with granting agencies and foundations, as well as individual donors.
10. In my role as the Riverkeeper, I monitor and document the Flint River and its tributaries from the land, water, and air, support enjoyment and recreation on the Flint River, work to protect the wildlife and natural resources of the Flint River, look for pollution problems, respond to citizen complaints, research and analyze dischargers' permits and compliance, educate the public about the river system and threats to it, work to empower stakeholders throughout the watershed, advocate compliance with environmental laws, work on finding solutions to pollution problems, seek ways to promote and maintain access to the river system's resources, and act as a spokesman for the Flint River watershed.
11. FRK actively supports effective enforcement and implementation of environmental and outdoor recreation laws, including Georgia state laws that govern public access to and responsible management of natural resources, particularly as they relate to activities

within the Flint River watershed. As specified in FRK's bylaws, FRK may engage in litigation to enforce these and other laws in furtherance of its mission.

12. FRK and its members, myself included, have a direct and beneficial interest in protection, preservation, effective management, and recreational enjoyment of the environment and natural resources in the Flint River watershed. Defending the State of Georgia's protection of the public right to fish in navigable streams, including the Flint River and Yellow Jacket Shoals, is in furtherance of FRK's mission to protect the Flint River and promote responsible use and enjoyment by FRK's membership and the public.
13. I have fished, rafted, waded, and kayaked on the Flint River, including at Yellow Jacket Shoals, many times between 2009 and 2023 in my professional role at FRK and in my personal capacity. My professional (for fundraising and outreach purposes) and personal recreational use of the upper Flint, including Yellow Jacket Shoals, number in the dozens of days per annum, hundreds of times over the last fourteen years. I plan to engage in these activities at Yellow Jacket Shoals in the future both professionally and personally.
14. FRK has many individual members who have fished, paddled, waded, rafted, and engaged in other outdoor recreation on the Flint River, including specifically at Yellow Jacket Shoals. These members plan to fish, paddle, wade, and raft at Yellow Jacket Shoals in the future. Yellow Jacket Shoals is a special place to me and to individual members of FRK because of its natural beauty, relative solitude, and shoal bass population.
15. Yellow Jacket Shoals is challenging but navigable by canoe, kayak, and raft during periods of both high and low water. Even at low water levels, there are multiple routes through Yellow Jacket Shoals that are navigable by raft, kayak and canoe. At higher water

levels, the full width of the river is easily navigable by raft, kayak and canoe.

Commercially guided fishing trips in rafts are common. Commercially liveried canoe and kayak trips are also frequent. FRK guides one or more combination kayak and canoe trips through the stretch of upper Flint, including Yellow Jacket Shoals, at least once per year and has done so for almost a decade.

16. Every year in May, FRK puts on a group raft, canoe, and kayak trip known as the 'lily float.' The event is guided by FRK staff and volunteers and is typically attended by dozens of participants who swim, wade, float, paddle, fish, and admire the peak bloom of the shoals spider lily. The lily float puts in at GA Hwy 36, floats down the stretch of the upper Flint River that includes Yellow Jacket Shoals and takes out at Pobiddy Road.
17. There are numerous public access points along the upper Flint, including: Joe Kurz WMA (White Oak Creek near the river), Flat Shoals Road (right of way only), GA Hwy 18/74, Pigeon Creek, Sprewell Bluff Park, GA Hwy 36, Big Lazer WMA (Big Lazer Creek near the river and the river itself), Pobiddy Road, and US Hwy 19. There are also at least two private (pay-for) access points: Goat Mountain and GA Hwy 36, both owned by the Flint River Outdoor Center. And there are two outfitter/livery businesses that service the upper Flint. There are at least three professional fishing guides who regularly take their clients on the upper Flint, including Yellow Jacket Shoals. All three professional fishing guides are supporters of FRK. The public access points at GA Hwy 36 and downstream at both Big Lazer WMA and Pobiddy Road bracket Yellow Jacket Shoals and are robustly used by both the fishing public and the fishing guides.
18. FRK advocates for and supports the revisions to the regulation of shoal bass harvest that were considered by the GA DNR Board during 2013 and 2014. FRK supports and

advocated for the Georgia DNR's identification of shoal bass as a high priority species in Georgia's State Wildlife Action Plan issued in September 2015. FRK supports and advocated for the Georgia legislature's designation of the shoal bass as the state's official riverine sport fish in 2020.

19. Many of FRK's individual members, myself included, and many anglers from around the country and the world, have fished for shoal bass. Shoal bass are native to Georgia and the Flint River is a primary habitat and population center for the species. Shoal bass are a very attractive sport fish and are becoming more popular among anglers. However, shoal bass are relatively rare compared to other bass species. The Flint River, and especially Yellow Jacket Shoals, are important fisheries for anglers pursuing shoal bass. The condition (biological status) of the fishery is excellent in the upper Flint and is carefully monitored by GA DNR. Angling in the upper Flint, under the current management structure of GA DNR, presents no danger to the fishery, to the shoal bass population.
20. FRK members purchase fishing licenses and pay appropriate taxes and fees in accordance with Georgia laws and regulations so that they may enjoy unencumbered access to fisheries in navigable streams, like the Flint River and Yellow Jacket Shoals.
21. FRK has focused on protecting and promoting the shoal bass fishery on the Flint River since its founding in 2008. Shoal bass fishing has been and remains a key activity for FRK to engage its members and the public in education, recruitment, and fundraising.
22. Shoal bass fishing is historically and increasingly important for outdoor recreation, tourism, and economic development in western Georgia. Public, predictable, and continuous access to rivers and streams in western Georgia, including the Flint River and

Yellow Jacket Shoals, is critical to ensuring effective management and enjoyment of shoal bass fisheries.

I hereby declare under penalty of perjury that the foregoing is true and correct.

Respectfully submitted this 2nd day of October, 2023.

A handwritten signature in black ink, appearing to read 'S. Gordon Rogers IV', written over a horizontal line.

s/ S. Gordon Rogers IV  
Executive Director and Riverkeeper  
Flint Riverkeeper, Inc.  
102 Pine Avenue  
Albany, GA 31701

# Exhibit C

**IN THE SUPERIOR COURT OF TALBOT COUNTY  
STATE OF GEORGIA**

MARKER 21, LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
STATE OF GEORGIA,	)	
	)	
Defendant,	)	Civil Action File No. 2023-CV-038
	)	
and	)	
	)	
GEORGIA WILDLIFE FEDERATION, INC., and FLINT RIVERKEEPER, INC.,	)	
	)	
Intervenors-Defendants.	)	

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**ANSWER AND DEFENSES OF INTERVENORS TO PLAINTIFF’S COMPLAINT**

Intervenors Georgia Wildlife Federation, Inc. (GWF) and Flint Riverkeeper, Inc. (FRK) hereby respond to the allegations of the Verified Complaint filed by Plaintiff Marker 21, LLC in the above action as follows:

FIRST DEFENSE

The Complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

The Court lacks subject matter jurisdiction.

THIRD DEFENSE

Plaintiff’s claims against the State of Georgia are barred by the doctrine of sovereign immunity.

FOURTH DEFENSE

Venue is improper in Talbot County.

FIFTH DEFENSE

Plaintiff's claims are barred by the doctrine of laches.

SIXTH DEFENSE

The property at issue has been dedicated to public use and has been used by the public for such a length of time that accommodation of the public rights may be materially affected by interruption of the right to use such land, such that Plaintiff may not now appropriate the land to private purposes. O.C.G.A. § 44-5-230.<sup>1</sup>

SEVENTH DEFENSE

Intervenors reserve the right to raise any other defenses allowed by law at such time as the allegations are more specifically pled or developed. Having raised their defenses, and without waiving same, Intervenors respond to the allegations of Plaintiff's Verified Complaint as follows:

1. Intervenors admit the allegations of paragraph 1.
2. Intervenors admit the allegations of paragraph 2.
3. Intervenors deny the allegations of paragraph 3.
4. Intervenors deny the allegations of paragraph 4.
5. Intervenors deny the allegations of paragraph 5.
6. Intervenors admit that the Georgia Department of Natural Resources (DNR) is not

issuing citations for fishing without permission in the area known as Yellow Jacket Shoals but deny the implication that DNR is refusing to enforce the law.

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<sup>1</sup> Intervenors assert this defense without admitting that the property at issue is owned by Plaintiff or that Plaintiff may control fishing rights on the property.

7. Intervenors admit that DNR, through its officers, has made statements that it would not issue citations for fishing without permission at Yellow Jacket Shoals but deny that DNR stated it would no longer enforce the law.

8. Intervenors deny the allegations of paragraph 8.

9. Intervenors lack the information required to admit or deny the allegations of paragraph 9.

10. Intervenors deny the allegations of paragraph 10.

11. Intervenors lack the information required to admit or deny the allegations of paragraph 11.

12. Intervenors lack the information required to admit or deny the allegation that DNR agents informed Plaintiff's managing member that DNR had determined that Yellow Jacket Shoals is navigable. Intervenors admit that Yellow Jacket Shoals is navigable and that the State of Georgia owns the riverbed up to the low water mark of the river, and that riparian owners, including Plaintiff, do not hold exclusive fishing rights.

13. Intervenors lack the information required to admit or deny the allegations of paragraph 13.

14. Intervenors admit that the cited code is accurately quoted in paragraph 14.

15. Intervenors admit that the cited code is accurately quoted in paragraph 15.

16. Intervenors admit that the cited code is accurately quoted in paragraph 16.

17. Intervenors admit that the cited code is accurately quoted in paragraph 17.

18. Intervenors deny the allegations of paragraph 18 as a disputed and overbroad legal interpretation.

19. Intervenors deny the allegations of paragraph 19 as a disputed and overbroad legal interpretation.

20. Intervenors deny the allegations of paragraph 20 as a disputed and overbroad legal interpretation.

21. Intervenors deny the allegations of paragraph 21 as a disputed and overbroad legal interpretation.

22. Intervenors admit that the cited opinion holds that the federal navigational servitude pertains to navigational rights and commerce, although the opinion does not state that the federal navigational servitude “relates solely” to navigational rights and commerce. Intervenors further note that the cited opinion is not controlling law in Georgia.

23. Intervenors deny the allegations of paragraph 23 as a disputed and overbroad legal interpretation of an opinion which is not controlling law in Georgia.

24. Intervenors admit the allegations of paragraph 24.

25. Intervenors admit the allegations of paragraph 25 but deny that the Consent Order is binding or based on a correct interpretation of the law.

26. Intervenors lack the information necessary to admit or deny the allegations of paragraph 26. Specifically, Intervenors cannot determine whether code and case law cited in the preamble of the Order constitutes the “basis” for the Order.

27. Intervenors admit the allegations of paragraph 27.

28. Intervenors admit the allegations of paragraph 28.

29. Intervenors admit the allegations of paragraph 29.

30. Intervenors admit the allegations of paragraph 30.

31. Intervenors admit the allegations of paragraph 31.

32. Intervenor admits the allegations of paragraph 32.
33. Intervenor lacks the information required to admit or deny the allegations of paragraph 33.
34. Intervenor lacks the information required to admit or deny the allegations of paragraph 34.
35. Intervenor admits the allegations of paragraph 35.
36. Intervenor denies the allegations of paragraph 36.
37. Intervenor denies the allegations of paragraph 37 and further notes that the cited opinion was issued in 2016, prior to the passage of SB 115, and is inappropriately quoted as pertaining to SB 115.
38. Intervenor denies the allegations of paragraph 38 as a disputed and overbroad legal interpretation.
39. Intervenor denies the allegations in paragraph 39. Intervenor specifically denies that Plaintiff has vested fishing rights.
40. Intervenor lacks the information required to admit or deny the allegations in paragraph 40.
41. Intervenor lacks the information required to admit or deny the allegations in paragraph 41.
42. Intervenor lacks the information required to admit or deny the allegations in paragraph 42.
43. Intervenor lacks the information required to admit or deny the allegations in paragraph 43.

44. Intervenors accept the label and definition of “River Property” in this case as a term of convenience, however Intervenors deny that Plaintiff owns the “River Property” or has the exclusive right to control fishing on the “River Property.” Intervenors make no admission as to whether the “River Property” comprises the relevant or appropriate segment of the Flint River for a determination of navigability.

45. Intervenors lack the information required to admit or deny the allegations in paragraph 45.

46. Intervenors lack the information required to admit or deny the allegations in paragraph 46.

47. Intervenors lack the information required to admit or deny the allegations in paragraph 47.

48. Intervenors admit the allegations in paragraph 48.

49. Intervenors admit the allegations in paragraph 49.

50. Intervenors admit the allegations in paragraph 50.

51. Intervenors admit the allegations in paragraph 51.

52. Intervenors admit the allegations in paragraph 52.

53. Intervenors admit the allegations in paragraph 53.

54. Intervenors admit the allegations in paragraph 54.

55. Intervenors admit, in part, with regard to common methods for shoal bass fishing, and deny, in part, with regard to the range of depths of holes that are typically fished for shoal bass.

56. Intervenors admit, in part, the allegations in paragraph 56 regarding the presence of rapids, hidden rocks, rock ledges, and sand bars at Yellow Jacket Shoals. Intervenors deny the

allegation in paragraph 56 characterizing Yellow Jacket Shoals as “treacherous,” as such characterization is subjective and disputed. Intervenors specifically deny that the River Property portion of Yellow Jacket Shoals is treacherous.

57. Intervenors lack the information required to admit or deny the allegations in paragraph 57. Specifically, the link provided does not direct to an existing web page.

58. Intervenors deny the allegations in paragraph 58.

59. Intervenors lack the information required to admit or deny the allegations in paragraph 59. Specifically, although historical records show that steamboat traffic was common on the Flint River as far upstream as Montezuma, Intervenors do not have records indicating that steamboats *never* reached farther upstream than Montezuma.

60. Intervenors deny the allegations in paragraph 60.

61. Intervenors admit the allegations in paragraph 61 and further note that FRK’s website discusses navigability of the Flint River for steamboat traffic only, not all commercial watercraft.

62. Intervenors admit the allegations in paragraph 62 but deny that the resolution is controlling law over the determination of riverbed ownership and public fishing rights on the Flint River.

63. Intervenors admit that the cited source is quoted accurately, however, Intervenors deny that the determination of navigability in the cited source is controlling law over the determination of riverbed ownership and public fishing rights on the Flint River.

64. Intervenors admit that the cited source is referred to accurately, however, Intervenors deny that the determination of navigability in the cited source is controlling law over the determination of riverbed ownership and public fishing rights on the Flint River.

65. Intervenor deny the allegations in paragraph 65.
66. Intervenor deny the allegations in paragraph 66.
67. Intervenor deny the allegations in paragraph 67.
68. Intervenor lack the information required to admit or deny the allegations in paragraph 68.
69. Intervenor lack the information required to admit or deny the allegations in paragraph 69.
70. Intervenor lack the information required to admit or deny the allegations in paragraph 70.
71. Intervenor lack the information required to admit or deny the allegations in paragraph 71.
72. Intervenor deny, in part, and otherwise lack the information required to admit or deny the allegations in paragraph 72. Specifically, Intervenor deny that DNR officials advising members of the public about the navigability of the Flint River constitutes a legal determination about the fishing rights of property owners, including Plaintiff.
73. Intervenor lack the information required to admit or deny the allegations in paragraph 73.
74. Intervenor admit that anglers enter Yellow Jacket Shoals to take fish from it but lack the information required to admit or deny the remaining allegations in paragraph 74.
75. Intervenor lack the information required to admit or deny the allegations in paragraph 75.
76. Intervenor lack the information required to admit or deny the allegations in paragraph 76.

77. Intervenors lack the information required to admit or deny the allegations in paragraph 77.

78. Intervenors lack the information required to admit or deny the allegations in paragraph 78.

79. Intervenors admit, in part, and deny, in part, the allegations in paragraph 79. Intervenors admit that the published letter was advocating for public access to Georgia rivers. However, Intervenors deny that the published letter was “decrying the enforcement of private property rights.”

80. Intervenors lack the information required to admit or deny the allegations in paragraph 80.

81. Intervenors admit the allegations in paragraph 81.

82. Intervenors admit the allegations in paragraph 82.

83. Intervenors lack the information required to admit or deny the allegations in paragraph 83.

84. Intervenors admit the incorporation of paragraphs 1 through 83 of the Complaint as though fully stated in paragraph 84.

85. Intervenors deny the allegations in paragraph 85 as disputed and overbroad legal interpretations.

86. Intervenors deny the allegations in paragraph 86.

87. Intervenors deny the allegations in paragraph 87.

88. Intervenors deny the allegation in paragraph 88 that DNR is refusing to enforce private property rights but admit that the Flint River is navigable at Yellow Jacket Shoals and that the State owns the River Property.

89. Intervenor admits the allegations in paragraph 89; however, this admission does not constitute an admission that Plaintiff has stated a claim upon which relief may be granted.

90. Intervenor denies the allegations in paragraph 90.

91. Intervenor denies the allegations in paragraph 91.

92. Intervenor lacks the information required to admit or deny the allegations in paragraph 92.

93. Intervenor lacks the information required to admit or deny the allegations in paragraph 93.

94. Intervenor denies, in part, and otherwise lacks the information required to admit or deny the allegations in paragraph 94. Specifically, Intervenor denies that Plaintiff's ability to trace title back to a grant from the State prior to 1863 is dispositive with respect to fishing rights on the River Property.

95. Intervenor denies the allegations in paragraph 95.

96. Intervenor denies the allegations in paragraph 96.

97. Intervenor denies, in part, and otherwise lacks the information required to admit or deny the allegations in paragraph 97. Specifically, Intervenor denies the allegations that the Flint River is not navigable at the River Property and that Plaintiff has the right to exclusively control fishing on the River Property.

98. Intervenor lacks the information required to admit or deny the allegations in paragraph 98.

99. Intervenor denies the allegations in paragraph 99.

100. Intervenor lacks the information required to admit or deny the allegations in paragraph 100.

101. Intervenors lack the information required to admit or deny the allegations in paragraph 101. Intervenors do not admit that any of the Plaintiff's allegations constitute a claim upon which relief may be granted, nor a claim over which this court has subject matter jurisdiction.

102. Intervenors lack the information required to admit or deny the allegations in paragraph 102. Intervenors do not admit that any of the Plaintiff's allegations constitute a claim upon which relief may be granted, nor a claim over which this court has subject matter jurisdiction.

103. Intervenors admit that the cited source is accurately quoted. Intervenors do not admit that the cited source is relevant to Plaintiff's claims and allegations.

104. Intervenors deny the allegations in paragraph 104.

105. Intervenors deny the allegations in paragraph 105.

106. Intervenors deny the allegations in paragraph 106.

107. Intervenors admit that Plaintiff has made the request described in paragraph 107.

108. Intervenors admit the incorporation of paragraphs 1 through 83 as though fully stated in paragraph 108.

109. Intervenors admit the characterization of cited law in paragraph 109. Intervenors do not admit the relevance of the cited law to Plaintiff's claims.

110. Intervenors admit the cited code is accurately quoted.

111. Intervenors admit the allegations in paragraph 111.

112. Intervenors lack the information required to admit or deny the allegations in paragraph 112.

113. Intervenors deny the allegations in paragraph 113.

114. Intervenor deny the allegations in paragraph 114.

115. Intervenor deny, in part, and otherwise lack the information required to admit or deny the allegations in paragraph 115. Specifically, Intervenor deny that Plaintiff is entitled to any legal remedy in this case, and therefore cannot characterize the adequacy of money damages. Intervenor lack the information required to admit or deny the character of Plaintiff's interest in the River Property.

116. Intervenor admit that the Plaintiff has made the request described in paragraph 116. However, Intervenor deny the allegations and assumptions upon which Plaintiff's request is based.

117. Intervenor admit the incorporation of paragraphs 1 through 83 as though fully stated in paragraph 117.

118. Intervenor deny the allegations in paragraph 118 as a disputed and overbroad legal interpretation.

119. Intervenor deny the allegations in paragraph 119 as a disputed and overbroad legal interpretation.

120. Intervenor deny the allegations in paragraph 120.

121. Intervenor deny the allegations in paragraph 121.

122. Intervenor admit the allegations in paragraph 122.

123. Intervenor admit the incorporation of paragraphs 1 through 83 as though fully stated in paragraph 123.

124. Intervenor deny the allegations in paragraph 124.

125. Intervenor lack the information required to admit or deny the allegations in paragraph 125.

126. Intervenors deny the allegations in paragraph 126 as overbroad and subjective legal interpretations.

127. Intervenors deny the allegations in paragraph 127 as overbroad and subjective legal interpretations.

128. Intervenors deny the allegations in paragraph 128.

129. Intervenors deny the allegation in paragraph 129 as a disputed and overbroad legal interpretation.

130. Intervenors deny each and every allegation in Plaintiff's Verified Complaint not specifically admitted, denied, or otherwise responded to herein.

#### **ANSWER TO PRAYER FOR RELIEF**

Intervenors deny that Plaintiffs are entitled to the relief requested, or to any relief.

Respectfully submitted this 2nd day of October, 2023.

/s/ April S. Lipscomb

April S. Lipscomb

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*Counsel for Georgia Wildlife Federation  
and Flint Riverkeeper*

**CERTIFICATE OF SERVICE**

I hereby certify that I have served the foregoing **Answer and Defenses of Intervenors to Plaintiff's Complaint** via the PeachCourt online filing system, which will automatically send e-mail notification of such filing to the following attorneys of record:

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This 2nd day of October, 2023.

/s/ April S. Lipscomb  
April S. Lipscomb (884175)