**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF GEORGIA**
**ATLANTA DIVISION**

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| **GEORGIACARRY.ORG, INC, and REBECCA BREED,** | ) | |
| **Plaintiffs,** | ) | **CIVIL ACTION FILE NO. 1:07-CV-2128-WBH** |
| **v.** | ) | |
| **KIPLING L. MCVAY,** | ) | |
| **Defendant.** | ) | |

**PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE 12(b)(6)**

**Procedural Issue**

Plaintiffs note at the outset that Defendant's Motion is a bit of a procedural muddle. It was filed in the ECF system as a "Motion for Judgment on the Pleadings," which is a motion under Rule 12(c) of the Fed. R. Civ. Proc. The Motion itself is styled as a motion pursuant to Rule 12(b)(6) of the Fed. R. Civ. Proc. The body of the Motion is consistent with the style. The Memorandum of Law Defendant filed with her Motion is styled as supporting a motion under both Rule 12(b)(1) and 12(b)(6). The arguments contained in the Memorandum address both rules. Plaintiffs are left to respond to a single motion that may be made pursuant to any one or any combination of these rules.

The dilemma of not knowing under what rule the Motion is made is not a trivial, academic matter. The procedures and safeguards attached to the three different rule sections vary greatly, as do the treatment of the different motions by the court. Rule 12(b)(6) and Rule 12(c) motions cannot be based on matters outside the pleadings. If the court considers matters outside the pleadings, the "procedure will automatically be converted into a Rule 56 summary judgment procedure." *Chatham Condominium Associations v. Century Village, Inc.,* 597 F.2d 1002, 1011 (5th Cir. 1979); Rules 12(b)(6) and 12(c), Fed. R. Civ. Proc.

A Rule 12(b)(1) motion can be one of two types, either facial or factual. In a facial motion, the court must consider the facts alleged in the complaint as true. In a factual motion, where the court considers matters outside the pleadings, the court must assess the evidence presented by the parties to determine if it has jurisdiction. *Id.* Thus, of the three different motions Defendants may be making, only a factual 12(b)(1) motion permits the Court to consider matters outside the pleadings. Defendant's Affidavit only may be considered in a factual Rule 12(b)(1) motion. To the extent the Court considers the Affidavit in any other context, the Motion must be

treated as one for summary judgment, and Plaintiffs must be given notice of and an opportunity to respond to such treatment. In the remainder of this Response, Plaintiffs shall treat Defendant's Motion as 1) a Rule 12(b)(1) facial attack, without reference to matters outside the Complaint; 2) a Rule 12(b)(1) factual attack, with reference to matters outside the pleadings; 3) a Rule 12(b)(6) motion, without reference to matters outside the Complaint; and 4) a Rule 12(c) motion, without reference to matters outside the pleadings.

**Argument**

"{D]ismissal for lack of subject matter jurisdiction prior to trial, and certainly prior to giving the plaintiff ample opportunity for discovery, should be granted sparingly." *Hospital Building Co. v. Trustees of Rex Hospital,* 425 U.S. 738, 746, 96 S.Ct. 1848, 48 L.Ed. 338 (1976). It is against this cautionary backdrop that all aspects of Defendant's Motion should be considered.

**I. Rule 12(b)(1) Facial Attack -- Standing**

I.A. Privacy Act § 7(a)

Defendant claims that Plaintiffs do not have standing. As noted above, in a Rule 12(b)(1) facial motion, the allegations contained in the Complaint must be taken as true. *Chatham,* 597

F.2d at 1011. The Complaint alleges that Defendant's clerk refused to accept Plaintiff Breed's Georgia firearms license ("GFL") application without Breed's Social Security Number ("SSN"). Doc. 1, ¶ 14. It also alleges that Defendant had a policy or custom or made a decision to require SSNs of all GFL applicants. Doc. 1, ¶ 18. It alleges that Defendant violated § 7(a) of the Privacy Act by refusing to accept and process Breed's and other GeorgiaCarry.Org members' GFL applications without their SSNs. Doc. 1, ¶ 28.

Section 7(a) of the Privacy Act states, "It shall be unlawful for any federal, state, or local government agency to deny any individual any right, benefit or privilege provided by law because of such individual's refusal to disclose its Social Security Number." Pub. L. 93-579, 88 Stat. 1896, 194, 5 U.S.C. § 552a (note). The acceptance and processing of a GFL application and the issuance of the GFL clearly are rights, benefits and privileges provided by law, and Defendant does not claim otherwise. Plaintiffs have a private right of action, pursuant to 42 U.S.C. § 1983, to sue for violations of the Privacy Act. *Schwier v. Cox,* 340 F.3d 1284, 1292 (11th Cir. 2003).

In order to have standing, a plaintiff must show 1) injury in fact 2) caused by the defendant, and 3) redressability of the injury. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L.Ed. 351 (1992). In the case at bar, Breed has alleged that she was denied the right, privilege or benefit of being able to apply for a GFL on account of Defendant's violation of the Privacy Act. She seeks declaratory and injunctive relief. "Because GFLs are valid for only five years, see Ga. Code Ann. § 16-11-129, [plaintiff] will have to continually renew his license and fill out the GFL application form. Thus, there is sufficient imminence of future harm." *Camp v. Cason,* 220 Fed. Appx. 976, 981, Order dated March 23, 2007, p. 9, Case No. 06-15404 (11th Cir.). It is therefore clear that Plaintiff Breed has standing to assert her § 7(a) claim.

I.B. Privacy Act § 7(b)

Breed also asserts a claim for violation of § 7(b) of the Privacy Act, which states, "Any federal, state, or local government agency which requests and individual to disclose her Social Security Account Number shall inform that individual whether that disclosure is mandatory or voluntary, by which statutory or other authority such number is solicited, and which uses will be made of it." The Complaint alleges that Defendant

required Breed and other members of GeorgiaCarry.Org to disclose their SSNs, failed to tell them by which statutory or other authority their number was solicited, and failed to tell them which uses would be made of their SSN. Plaintiffs seek declaratory and injunctive relief. Again, because they must apply for GFLs every five years, "there is sufficient imminence of future harm." Breed has standing to pursue her § 7(b) claim.

I.C. State Law Claim

Breed also brings a state law claim, alleging that Defendant violated O.C.G.A. § 16-11-129(a) by asking for information on the GFL application that is non-pertinent, irrelevant, and not designed to elicit information from the applicant pertinent to his or her eligibility for a GFL. Specifically, Defendant required Breed to disclose certain information about her employment. Complaint, ¶¶ 32-34. Breed requests declaratory and injunctive relief for this claim as well. Once again, there is sufficient imminence of future harm. Thus, Breed has shown she has standing for all three counts of her Complaint.

I.D. Associational Standing of GeorgiaCarry.Org, Inc.

Defendant also claims that GeorgiaCarry.Org ("GCO") does not have standing. Defendant *fails to cite a single case*

dealing with the subject of associational standing, no doubt because there is none helpful to Defendant's argument. It is well settled that "an association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Ouachita Watch League v. Jacobs,* 463 F.3d 1163, 1170 (11th Cir. 2006), citing *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.,* 528 U.S. 167, 181, 120 S.Ct. 693, 145 L.Ed. 2d 610 (2000).

The Complaint alleges that Breed is a member of GCO [¶ 7] and that other members of GCO were harmed in the same way that Breed was harmed [¶¶ 27, 28, 30, 31, 34, and 38]. The Complaint also alleges that GCO's purpose is to "foster the rights of its members to keep and bear arms." Doc. 1, ¶ 8. Because there is one natural person acting as a plaintiff, along with GCO itself, and because no damages are sought by any plaintiffs, there should be no need for other individual members to participate in this case.

In a case relied upon by Defendant, the Supreme Court held that an association may sue on behalf of its members "so long as

the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the case….” *Warth v. Seldin,* 422 U.S. 490, 512, 95 S.Ct. 2197, 119 L.Ed. 343 (1975). Obviously, not every witness need be a plaintiff.

The *Warth* court elaborated with “whether an association has standing to invoke the court’s remedial powers on behalf of its members depends in substantial measure on the nature of the relief sought. If in a proper case the association seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured. Indeed, in all cases in which we have expressly recognized standing in associations to represent their members, the relief sought has been of this kind.” *Warth,* 422 U.S. at 515. In the present case, Plaintiffs are seeking declaratory and injunctive relief, which is precisely the type of case the Supreme Court was describing. With no individualized damages that must be proven, participation by every member of GCO is neither desirable nor required. Thus, GCO has the same standing that Breed and GCO’s other members have.

I.E. Immunity from Award of Attorney's Fees

Finally, Defendant asserts that Plaintiffs do not have standing to request attorney's fees because attorney's fees are not available under 42 U.S.C. § 1988(b) against a judicial officer for an act or omission taken in such officer's judicial capacity. Plaintiffs note that it is extremely premature to litigate whether attorneys fees are available to the prevailing party at this early stage of the litigation, but they also observe that a ruling on this issue now may assist the parties in their settlement discussions.

While Defendant correctly states language from the law, she misapplies it to herself. The application of 42 U.S.C. § 1988(b) to this case hinges on whether Defendant is acting in a "judicial capacity" when she receives and processes GFL applications and issues GFLs. She is not.

Whether a judge is acting in a judicial capacity is not dependent on the mere fact that the act was performed by a judge, as not every act performed by a judge is judicial. Rather, the question turns on the "nature of the act itself, *i.e.*, whether it is a function normally performed by a judge, and to the expectations of the parties, *i.e.*, whether they dealt with the judge in his judicial capacity." *Stump v. Sparkman*,

435 U.S. 349, 362, 98 S.Ct. 1099, 1107 (1978). This holding is determinative of the issue in this case, because Breed did ***not*** "deal with [Defendant] in [her] judicial capacity," nor is issuing a license "a function normally performed by a judge."

The United States District Court for the Northern District of Georgia recently had occasion to rule on this very subject, to wit: whether Georgia probate judges are acting in a judicial capacity when they process GFL applications. The court decided that they are not. *Puckett v. Powell,* Case No. 1:06-CV-02383-BBM, N.D.Ga, Order dated August 2, 2007, p. 12, note 9. A copy of the Order is attached for the Court's convenience as Exhibit A.

The facts of *Puckett* were startlingly similar to the facts of the instant case. Plaintiff Christopher Puckett sued the Henry County, Georgia probate judge (the Hon. Kelley Powell) for Judge Powell's violation of § 7(b) of the Privacy Act, because Judge Powell had requested his SSN when he applied for a GFL and failed to give the warning information required by § 7(b). In granting Puckett's motion for summary judgment, the court also awarded Puckett his attorney's fees, finding on the issue of judicial capacity that "it appears that the Defendant's actions

were taken in an administrative capacity, rather than in a 'judicial capacity.'" Exhibit A, p. 12, Note 9.

The fact that a judge was performing an act prescribed by law is not determinative. This Circuit has upheld as appropriate an award of attorney's fees against a judge performing an act prescribed to him. *Glassroth v. Moore,* 347 F.3d 916 (11th Cir. 2003). Rather, the Supreme Court's *Stump* test determines whether the act is taken in a judicial capacity. This test has been restated by the former Fifth Circuit and adopted by this Circuit as a four-part test of whether: 1) the precise act complained of is a normal judicial function; 2) the events involved occurred in the judge's chambers or in open court; 3) the controversy centered around a case then pending before the judge; and 4) the confrontation arose directly and immediately out of a visit to the judge in his judicial capacity. *See, e.g., Sibley v. Lando,* 437 F.3d 1067, 1070 (11th Cir. 2005); *Scott v. Hayes,* 719 F.2d 1562, 1565 (11th Cir. 1983); and *Harper v. Merckle,* 638 F.2d 848, 858 (5th Cir. 1981). Defendant fails on all four parts of this test.

I.E.1. Issuing Firearms Licenses Is Not A Normal Judicial Function

Issuing firearms licenses is not a function performed by a judge in any state in the nation except Georgia. Of the five states bordering Georgia, licenses to carry concealed weapons are issued by sheriffs (Alabama[1] and North Carolina[2]), the state Department of Safety (Tennessee[3]), the State Department of Agriculture (Florida[4]), and the State Law Enforcement Division (South Carolina[5]). In fact, of the 47 states that issue licenses to carry concealed firearms,[6] only Georgia, New York, and New Jersey have provisions for judges to be involved at all in the licensing process, but only Georgia requires that applicants apply for licenses from a judge. It is quite clear that the issuance of any kind of license, whether a plumber's license or a firearms license, is not normally performed by a judge.

None of the trappings of a judicial function are present in issuance of GFLs by probate judges in Georgia. GFL applications

[1] Alabama Code 13A-11-75
[2] North Carolina Statutes 14-415
[3] Tennessee Code 39-17-1351
[4] Florida Statutes 790.06
[5] South Carolina Code 23-31-215
[6] Vermont does not issue licenses but does not prohibit carrying a concealed firearm without a license. Wisconsin and Illinois are the only two states in the nation that prohibit carrying concealed firearms entirely, and, therefore, neither has a licensing system for the carrying of concealed firearms.

are not adversarial proceedings. The probate judge does not hold an adversarial hearing, open a docket, take evidence, or issue any opinions, findings of facts, conclusions of law, orders, or judgments. The GFL, when signed by a judge, does not have the effect of a court order and is not enforceable by the contempt powers of the court.

(i) The Events Involved Occurred Neither in the Judges Chambers Nor in Open Court

Applying the second prong of the four-part test, the events involved in the instant case did not take place in Defendant's chambers or in open court. Breed went to apply for her GFL at the clerk's counter. Doc. 1, ¶ 14.

(ii) There Was No "Case" Pending

The third prong, whether the controversy involved a case pending before the judge, also fails. There was no case pending before Defendant.

(iii) Breed Did Not Visit Defendant in Her Judicial Capacity

The final prong, whether the confrontation arose immediately out of a visit to the judge in her judicial capacity, is not met. There is no indication that Breed visited Defendant in any capacity.

Thus, Defendant can not pass any single part of the four part test used in this Circuit to determine whether a judge is acting in a judicial capacity.

It may also be instructive to examine Georgia law to determine if the act of processing GFL applications is a judicial or ministerial function. The GFL statute itself, O.C.G.A. § 16-11-129, does not confer any discretion upon probate judges.[7] This is one of the main distinctions between a "shall issue" state like Georgia and a "may issue" state like New Jersey. In Georgia, a probate judge is required to issue a license to all eligible applicants.

The powers and duties of probate judges are listed in O.C.G.A. § 15-9-30. In addition to issuing GFLs, probate judges also issue marriage licenses (for which certain eligibility requirements must be met, just as for GFLs). O.C.G.A. § 15-9-30(b)(7). Probate judges also are charged with "performing such

[7] It may be helpful to refer to Georgia Attorney General Opinion U89-21, in which the Attorney General responded to the Probate Judge of Liberty County's query, "What discretion does the probate judge have in issuing or denying a firearms permit?" with "Generally speaking, the current statutory provisions do not provide for the exercise of discretion by the probate judge in passing upon an application for a firearms permit." The Attorney General noted that the sole exception was that the probate judge had the discretion to issue a GFL to an applicant who had been hospitalized at a mental hospital or drug or alcohol treatment center.

other judicial ***and ministerial*** functions as may be provided by law." O.C.G.A. § 15-9-30(b)(11) (emphasis supplied).

By specifically stating that probate judges are to perform "judicial ***and*** ministerial functions," Georgia's General Assembly has declared that not every act performed by a probate judge is to be considered judicial. The Georgia statute is consistent with the Supreme Court's holding in *Stump* that the nature of the activity itself is what must be examined:

> The ordinary,[8] under our laws, is an official charged with the performance of duties judicial, ministerial, and clerical. Not by his title, but only by his acts, can the exact capacity in which he appears ever be known upon any special occasion. In admitting a will to probate, he acts as a judicial officer.... In issuing a marriage license, he for the moment becomes a ministerial officer.

*Comer v. Ross*, 100 Ga. 652, 28 S.E. 387 (1897). Accordingly, the Georgia Supreme Court and the statute declare, like the U.S. Supreme Court, that the nature of the act determines whether the act is judicial, and the Georgia Supreme Court has declared that the issuance of a license is a ministerial, and not a judicial, act. The similarities between issuing firearms and marriage licenses are obvious. They both involve processing applications from applicants, determining whether the applicants are legally

[8] Until fairly recently, probate judges in Georgia were called "county ordinaries."

qualified for the license, and issuing the license only to those who are qualified under the law to receive the license.

The task for the Court is to "draw the line between truly judicial acts, for which immunity is appropriate, and acts that simply happen to have been done by judges." *Forrester v. White,* 484 U.S. 219 227, 108 S.Ct. 538, 544 (1988). Judicial acts are those that are "part of [a court's] function of resolving disputes between parties." *Rodriguez v. Weprin,* 116 F.3d 62, 66 (2d Cir. 1997) (holding that control of a docket is a judicial act). Acts taken in a judicial capacity include "asking questions at oral arguments and issuing a decision in the form of a written opinion . . ." *Sibley v. Lando*, 437 F.3d 1067, 1071 (11th Cir. 2005).

> Clearly, the paradigmatic judicial act is the resolution of a dispute between parties who have invoked the jurisdiction of the court. ***We have indicated that any time an action taken by a judge is not an adjudication between parties, it is less likely that the act is a judicial one***. We have been reluctant to extend the doctrine of judicial immunity to contexts in which judicial decision making is not directly involved."

*Cameron v. Seitz,* 38 F.3d 264, 271 (6th Cir. 1994) (emphasis added).

Issuing licenses is not a judicial act, under either federal or state law. It is no more judicial than is the

issuance of a marriage license, which Georgia law expressly holds to be ministerial. Defendant was not acting in a judicial capacity, and, therefore, Plaintiffs are entitled to attorney's fees if they are prevailing parties in this case.

**II. Rule 12(b)(1) Factual Attack**

Defendant also claims that Plaintiffs do not have standing based on the facts in this case. The legal standard for a Rule 12(b)(1) factual attack are the same as for a Rule 12(b)(1) facial attack, so that analysis need not be repeated here. Instead, Plaintiff only need address the factual support for her claims.

The only factual issues raised by Defendant are in Defendant's Affidavit, which states that Defendant's records do not contain an application for a GFL from Breed and that her clerk did not refuse to accept a GFL application from anyone on August 31, 2007. Defendant's Affidavit is most interesting for what it does not contain. Defendant fails to claim that she does not and did not ask for or require SSNs of GFL applicants. Defendant fails to claim that she does not and did not ask for or require employment information of GFL applicants. Finally, Defendant does not claim that her clerk did not tell Breed that SSNs were required of GFL applicants.

Thus, it appears that Defendant is making no attempt to introduce facts bearing on Plaintiffs' § 7(b) and state law claims. Rather, Defendant only introduces facts relevant to Plaintiffs' claims under § 7(a) of the Privacy Act.

Defendant's clerk told Breed that she would not accept Breed's application without Breed's SSN and proof of her SSN. Decl. of Rebecca Breed, ¶¶ 4-9. Even on the day this action was commenced, Defendant's office still required SSNs and proof of SSNs for GFL applications. Declaration of Thomas Eidson, ¶¶ 2-6.

Apparently, Defendant is taking the frivolous position that, even though her staff told Breed and other GCO members their applications would not be accepted without SSNs and proof of SSNs, Breed was required to engage in the futile exercise of attempting forcibly to hand her completed application to the very person who moments earlier had told Breed the application would not be accepted under those circumstances.

The Privacy Act does not require such games. Breed was entitled to take Defendant's staff at its word, that it would refuse Breed's application without an SSN and proof of SSN.

**III. Rule 12(b)(6) Motion**

Defendant's Motion under Rule 12(b)(6) must be considered without reference to matters outside the Complaint. The Court must accept the allegations in the complaint as true, and construe them in the light most favorable to the plaintiff. *Behrens v. Regier,* 422 F.3d 1255, 1259 (11th Cir. 2005). Thus, Defendant's Affidavit must be disregarded for this analysis.

As already shown above in the discussion of a Rule 12(b)(1) facial motion, the Complaint adequately asserts standing, and therefore claims for which relief can be granted. The allegations and legal support for Plaintiffs' claims need not be reiterated here.

**IV. Rule 12(c) Motion**

Defendant styled her Motion in the ECF system as a Motion for Judgment on the Pleadings (presumably pursuant to Rule 12(c) of the Fed. R. Civ. Proc.). Because Defendant neither called her Motion as one for judgment on the pleadings in the Motion itself, and because Defendant did not argue under Rule 12(c) in her Memorandum of Law, Plaintiffs assume she has abandoned her attempt to obtain a judgment on the pleadings. In an abundance of caution, however, Plaintiffs shall discuss that topic briefly here.

Despite the implication in the name of the judgment (i.e., as one on the pleadings – in the plural), only the complaint is considered in a motion pursuant to Rule 12(c). "We take as true the facts alleged in the complaint and draw all reasonable inferences in the plaintiff's favor." *Hardy v. Regions Mortgage, Inc.,* 449 F.3d 1357, 1359 (11th Cir. 2006). The "scope of the court's review must be limited to the four corners of the complaint." *St. George v. Pinellas County,* 285 F.3d 1334, 1337 (11th Cir. 2002).

Thus, a motion under Rule 12(c) is not analyzed significantly differently from one under Rule 12(b)(6). Defendant's Affidavit must be disregarded, and the Motion considered solely by examining the Complaint. Once again, Plaintiffs have demonstrated that their Complaint adequately pleads sufficient facts and law for them to pursue their claims.

**Conclusion**

Plaintiffs have shown that they both have standing (both individually and associationally), that they have stated claims for which relief can be granted, and that Defendant was not acting within a judicial capacity and is not therefore immune from an award of attorney's fees.

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**Local Rule 7.1D Certification**

The undersigned counsel certifies that the foregoing Plaintiff's Response to Defendant's Motion Pursuant to Federal Rules of Civil Procedure Rule 12(b)(6) was prepared using Courier New 12 point, a font and point selection approved in LR 5.1B.

/s/ John R. Monroe
John R. Monroe

**CERTIFICATE OF SERVICE**

I hereby certify that on October 16, 2007, I electronically filed the foregoing Plaintiff's Response to Defendant's Motion Pursuant to Federal Rules of Civil Procedure Rule 12(b)(6) with the Clerk of Court using the CM/ECF system, which will automatically send email notification of such filing to the following attorneys of record:

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