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COBB COUNTY, GEORGIA
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C. LaTain Kell Sr. - 49
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Connie Taylor, Clerk of Superior Court
Cobb County, Georgia

IN THE SUPERIOR COURT OF COBB COUNTY
STATE OF GEORGIA

COBB COUNTY, GEORGIA, Plaintiff, v. MICHAEL SCOTT MORRISON; ALFRED JAY NAULT; CHRISTOPHER JON COLEMAN; and 1290 CLOTHING CO LLC, d/b/a Tokyo Valentino; Defendants.	)	**CIVIL ACTION FILE NO.** 20-1-07595-49

ORDER DENYING DEFENDANTS' MOTION TO STRIKE, DISMISS, OR STAY AND GRANTING COUNTY'S MOTION FOR INTERLOCUTORY INJUNCTION

This matter is before the Court on (a) Defendants' Motion to Strike Or, In the Alternative, Motion to Dismiss or Stay ("Motion to Strike, Dismiss, or Stay") and (b) Plaintiff Cobb County's Motion for Interlocutory Injunction under O.C.G.A. § 9-5-1 and § 9-11-65(a). The parties briefed both motions and the Court heard evidence and argument on July 13, 2021. For the following reasons, the Court denies the Defendants' Motion to Strike, Dismiss, or Stay and grants the County's Motion for Interlocutory Injunction.

BACKGROUND AND FACTS

Defendants Michael Scott Morrison, Alfred Jay Nault, Christopher Jon Coleman, and 1290 Clothing Co LLC (collectively, "Tokyo Valentino" or "Tokyo") operate a retail store called Tokyo Valentino at 1290 Johnson Ferry Road in unincorporated Cobb County. It is undisputed that Tokyo Valentino is a "sexually oriented business"—specifically a "sexual device shop"—as that term is defined in Cobb County Code § 78-321 because Tokyo regularly makes many thousands of sexual devices available for sale. (Answer ¶ 1 admitting Complaint ¶¶ 55, 56;

Testimony of J. Santana; County Exs. 9, 10, 11, photographs of items; County Ex. 8, Tokyo inventory information.)

It is also undisputed that Tokyo Valentino operates its sexual device shop after 12:00 midnight on Friday and Saturday nights. (County Ex. 7 at 5, Tokyo website; J. Santana Testimony.) Tokyo's store at 1290 Johnson Ferry Road is in a GC zoning district, within 750 feet of an R-15 residential district, and within 1,500 feet of a hospital[1] as defined in the County Code. (County Ex. 5, Map; County Ex. 6, ManorCare Rehab Center information.)

Tokyo does not, however, have a 2021 Cobb County occupation tax certificate ("OTC / Business License"), nor does it have a Cobb County sexually oriented business license. Tokyo has not filed an application for either license. (Testimony of J. Guinn; County Ex. 4.)

Tokyo's adult entertainment establishment would have required special adult business licensing under the County's codes in March 2020, and would not have been allowed at Tokyo's location. (J. Guinn Testimony.) Although Defendant 1290 Clothing Co LLC applied for and received a 2020 OTC / Business License, its application and business license did not mention any sexually oriented "adult" products. Tokyo opened in June 2020 and subsequently notified the County that it would sell sex toys. In August 2020, Tokyo provided the County with records showing that Tokyo had many thousands of sex toys at the store. In September 2020, the County suspended the store's OTC / Business License, and in October the Board of Commissioners revoked it.

In November 2020, Defendant 1290 Clothing Co LLC sued Cobb County in federal court, challenging the County's decision to revoke the store's 2020 OTC / Business License. (Tokyo Ex. 1, Federal Complaint.) The federal complaint included a petition for writ of certiorari, but no

[1] "*Hospital* means a building or portion thereof designed and used for therapeutic treatment of bed patients who are physically or mentally ill." (County Ex. 1 at 13, Code § 78-321.)

writ of certiorari was ever issued on the petition. If Tokyo's OTC / Business License for 2020 had not been revoked, it would have expired on December 31, 2020. In May 2021, the federal court dismissed Tokyo's case under the abstention doctrine set forth in *Younger v. Harris*, 401 U.S. 37 (1971), and its progeny. (County Ex. 12, Notice of Supplemental Authority.) Tokyo has appealed that dismissal. (Tokyo Ex. 2, Notice of Appeal.)

APPLICABLE COBB COUNTY CODE PROVISIONS

Chapter 78 of the Cobb County Code contains business regulations. Article II, § 78-33 requires each business to be classified according to its dominant line of business, that is, the series of goods which produces the largest proportion of the business's gross revenues. (County Ex. 1 at 6.) Section 78-46(a) makes it "unlawful for any person to engage in any business provided for in this chapter without first applying for and obtaining a business registration certificate as required by this chapter . . . ." (County Ex. 1 at 8.) Section 78-2 provides that "[a]ny person violating any of the provisions of this chapter shall be punished as provided in section 1-10." (County Ex. 1 at 4.) Section 1-10(e), in turn, specifies that "[v]iolations of this Code that are continuous with respect to time are a nuisance," that the nuisance "may be abated by injunctive or other equitable relief," and that a fine "does not prevent equitable relief." (County Ex. 1 at 2.)

Chapter 78 also contains additional licensing regulations for certain kinds of businesses. Article III, Division 8 requires licenses and imposes various time, place, and manner regulations governing sexually oriented businesses ("SOBs"[2]). (County Ex. 1 at 10-24.)

Section 78-321 sets forth definitions that are applicable here. A *sexual device shop* is a type of *sexually oriented business*. The SOB code defines *sexual device* and *sexual device shop*:

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[2] "SOB" is an accepted abbreviation for the term "sexually oriented business." *See, e.g., Oasis Goodtime Emporium I, Inc. v. City of Doraville*, 297 Ga. 513, 514 (2015).

Sexual device means any three dimensional object designed for stimulation of the male or female human genitals, anus, buttocks, nipple, or for sadomasochistic use or abuse of oneself or others and shall include devices commonly known as dildos, vibrators, penis pumps, cock rings, anal beads, butt plugs, nipple clamps, and physical representations of the human genital organs. Nothing in this definition shall be construed to include devices primarily intended for protection against sexually transmitted diseases or for preventing pregnancy.

Sexual device shop means a commercial establishment:
(a) where more than 100 sexual devices are regularly made available for sale or rental; or
(b) where sexual devices are regularly made available for sale or rental and the establishment regularly gives special prominence to sexual devices (e.g., by using lighted display cases for sexual devices, having a room or discrete area of the establishment significantly devoted to sexual devices, positioning sexual devices near cash registers or similar points of sale, hosting events focused on sexual devices, or holding itself out to the public as a place that focuses on sexual devices).

(County Ex. 1 at 14, § 78-321.)

Section 78-322(a) makes it unlawful for any person to operate a sexually oriented business in the County without a valid sexually oriented business license. (County Ex. 1 at 15.)

Section 78-331 governs hours of operation, prohibiting sexually oriented businesses from being open between 12:00 midnight and 6:00 a.m. (County Ex. 1 at 20.)

Section 78-338 governs the location of sexually oriented businesses:

(a) It shall be unlawful to establish, operate, or cause to be operated a sexually oriented business in unincorporated Cobb County that is:
(1) Within 750 feet of a residence or residential zoning district;
(2) Within 1,500 feet of a church, school, governmentally owned or operated building, library, civic center, public park, hospital, community club, or prison;
(3) Within 1,000 feet of another sexually oriented business; or
(4) Within 500 feet of an establishment licensed to sell alcoholic beverages for consumption on the premises or to sell alcoholic beverages as a package store.

(County Ex. 1 at 23.)

Chapter 134 of the County Code is the Zoning Ordinance. Section 134-192 contains the "Summary of uses chart," which specifies the districts where land uses are permitted. (County Ex. 1 at 26-39.) Per § 134-192, sexually oriented businesses are permitted only in the LI and HI districts. (*Id.* at 38.) Sexually oriented businesses are not permitted in the GC district. (*Id.*)

DISCUSSION

A. Defendants' Motion to Strike, Dismiss, or Stay is denied.

Defendants argue that the complaint should be stricken under Georgia's anti-SLAPP statute (O.C.G.A. § 9-11-11.1). They also contend that the complaint should be dismissed under O.C.G.A. § 9-11-12(b)(6) because it is "premature." Finally, they seek a stay of proceedings based on the pendency of 1290 Clothing Co LLC's federal case against Cobb County.

First, the Court denies Defendants' motion to strike because the anti-SLAPP statute does not apply here. A SLAPP (strategic lawsuit against public participation) is "a lawsuit intended to silence and intimidate critics or opponents by overwhelming them with the cost of a legal defense until they abandon that criticism or opposition." *Geer v. Phoebe Putney Health Sys. Inc.*, 310 Ga. 279, 282 (2020), *recons. denied* (Nov. 2020).

To resolve the motion, "the trial court must first determine whether the claim against which the motion is brought is subject to the anti-SLAPP statute. If it is not, the trial court's analysis ends." *Geer*, 310 Ga. at 284. The statute covers only a "claim for relief against a person or entity arising from" an act by the person or entity "in furtherance of the person's or entity's right of petition or free speech" that is "in connection with an issue of public interest or concern." O.C.G.A. § 9-11-11.1(b)(1). In deciding whether the statute applies, a court considers "the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based." O.C.G.A. § 9-11-11.1(b)(2). Claims that are not based on acts "of free speech

or petition do not fall under the statute," and "are not afforded the procedural protections" of the statute. *Denton v. Browns Mill Dev. Co., Inc.*, 275 Ga. 2, 6 (2002). *Id.* Thus,

> the court must [first] decide whether the party filing the anti-SLAPP motion ... has made a threshold showing that the challenged claim is one arising from protected activity. It is not enough to show that the claim was filed after protected activity took place or arguably may have been triggered by protected activity. The critical consideration is whether the cause of action is based on the defendant's protected free speech or petitioning activity.

Geer, 310 Ga. at 284 (quoting *Wilkes & McHugh, P.A. v. LTC Consulting, L.P.*, 306 Ga. 252, 261-62 (2019)).

Tokyo's motion fails because the County's claims do not target an act of free speech or petitioning of the government on a matter of public interest. Count 1 seeks to enjoin Tokyo from continuing acts that violate Code § 78-46(a), a generally-applicable provision that prohibits operating any business without a valid, current OTC / Business License. Count 2 seeks to enjoin Tokyo from illegally operating a sexual device shop in violation of specific licensing, hours of operation, and location regulations. But sexual devices "are not protected expressions under either the First Amendment of the Federal Constitution or the free speech clause of the Georgia Constitution." *Morrison v. State*, 272 Ga. 129, 129 (2000).

Neither count seeks relief "arising from any act" by Defendants that is "in furtherance of" their right to petition or free speech "in connection with an issue of public interest or concern." Rather, each count targets illegal conduct. Thus, the anti-SLAPP statute does not apply, so Tokyo's motion to strike is denied.[3]

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[3] The Court finds, under O.C.G.A. § 9-11-11.1(d), that good cause exists to hear the County's noticed motion for interlocutory injunction even while Tokyo's anti-SLAPP motion to strike has been pending. As discussed above, the County's claims do not implicate the anti-SLAPP statute, so the statute's procedural protections do not apply. *Denton v. Browns Mill Dev. Co., Inc.*, 275 Ga. 2, 6 (2002). In any event, because the facts about Tokyo's illegal activity are undisputed, Tokyo's invoking of the anti-SLAPP statute does not justify any delay in resolving the County's motion for interlocutory injunction.

Second, Tokyo seeks dismissal under O.C.G.A. § 9-11-12(b)(6) because "Tokyo is pursuing its state-law certiorari remedy in the Federal Action," and thus, this case "seeks a remedy that is unavailable as a matter of law." (Motion to Strike, Dismiss, or Stay at 9, 8.)

Tokyo is mistaken that a certiorari claim makes injunctive relief "unavailable as a matter of law." A writ of certiorari, acting as supersedeas, suspends only "further proceedings in the suit in which the judgment superseded is rendered . . . ." *Int'l Images, Inc. v. Smith*, 181 Ga. App. 543, 543 (1987). Supersedeas does not "operate retroactively so as to undo what has previously been done in execution of the judgment appealed." *Bank South, N.A. v. Roswell Jeep Eagle, Inc.*, 200 Ga. App. 489, 491 (1991). Tokyo's certiorari claim—if it was ever actually "pending" in federal court—concerned the revocation of Tokyo's 2020 OTC. But the County's action here concerns Tokyo's acts in 2021 that violate the County's laws. Thus, the County's suit for injunction is not a "further proceeding in the suit in which the judgment superseded is rendered." *Int'l Images, Inc.*, 181 Ga. App. at 543. (County Ex. 12, Notice of Supp. Authority, Federal Court Order at 15 ("Cobb County's action filed in the Superior Court of Cobb County is not a further proceeding of the October 2020 license revocation. It is a separate matter filed in a different forum.").)

Finally, Defendants ask this Court to stay the complaint until the federal court decides Tokyo's case. The Court denies this request as moot because the U.S. District Court for the Northern District of Georgia dismissed Tokyo's case on May 28, 2021. (County Ex. 12, Notice of Supplemental Authority, Federal Court Order at 1-16.) But in any event, this case warrants swift and certain action, not a stay that would inequitably allow illegal conduct to continue.

For all of these reasons, the Defendants' Motion to Strike, Dismiss, or Stay is DENIED.

B. The Court will enjoin Tokyo Valentino's illegal acts.

Georgia law specifically authorizes an injunction to restrain an "act of a private individual or corporation which is illegal." O.C.G.A. § 9-5-1. Courts may also enjoin acts that are "contrary to equity and good conscience and for which no adequate remedy is provided at law." *Id.*

"The granting and continuing of injunctions shall always rest in the sound discretion of the judge, according to the circumstances of each case." O.C.G.A. § 9-5-8. The decision on a request for interlocutory injunction is in "the discretion of the trial court according to the circumstances of each case, and [the appellate court] will not disturb the injunction a trial court has fashioned unless there was a manifest abuse of discretion." *Grossi Consulting, LLC v. Sterling Currency Group, LLC*, 290 Ga. 386, 388 (2012).

Under Georgia law, an injunction may be issued to restrain an illegal act. O.C.G.A. § 9-5-1. *10950 Retail, LLC v. City of Johns Creek*, 299 Ga. App. 458 (2009) (affirming injunction prohibiting adult store from operating without an OTC, and from operating a sexually oriented business at its current location and without a license). Requiring compliance with local ordinances and prohibiting future violations is a proper subject of an interlocutory injunction. *Jacobs v. Chatham County*, 295 Ga. App. 74, 75-77 (2008) (affirming interlocutory and permanent injunctions requiring compliance with ordinances and prohibiting future violations; injunction was "an additional avenue to enforce [county's] ordinances"); *Regency Club v. Stuckey*, 253 Ga. 583, 586 (1984) (holding trial court erred in not enjoining illegal acts and that availability of criminal sanctions is insufficient to deny injunctive relief against those acts).

Because Defendants' operation of Tokyo Valentino violates the County's laws, the County is entitled to an interlocutory injunction to prevent Defendants' ongoing illegal acts. Their illegal flouting of the County's code is apparent from the Defendants' admissions as well as undisputed

facts adduced at the hearing. In such instances, the party seeking the injunction need not "show[] special damage" to prevail. *Graham v. Phinizy*, 204 Ga. 638, 645 (1949); *Jacobs*, 295 Ga. App. at 75-77; *Matthews v. Fayette Cty.*, 233 Ga. 220 (1974) (affirming interlocutory injunction to enjoin zoning violation).

As discussed previously, Defendants violate Code § 78-46(a) because they are engaging in business in unincorporated Cobb County without a current OTC / Business License. Defendants violate Code § 78-322(a) because they operate a sexually oriented business without a valid sexually oriented business license. Defendants violate Code § 78-331 because they operate their sexually oriented business during prohibited hours, between 12:00 midnight and 6:00 a.m. Defendants violate Code § 78-338(a)(1), (2) because they operate their sexually oriented business within 750 feet of a residential zoning district and within 1,500 feet of a hospital. And Defendants violate Code § 134-192 because they operate their sexually oriented business in the GC zoning district, a district in which sexually oriented businesses are not permitted.

The Court will enter an interlocutory injunction under O.C.G.A. § 9-5-1 and § 9-11-65(a) to restrain these illegal acts. *See 10950 Retail, LLC*, 299 Ga. App. at 459-60 (affirming injunction against adult store operating without license); *Stardust, 3007, LLC v. City of Brookhaven*, 348 Ga. App. 711, 717 (2019) (affirming separate contempt citations based on multiple location restrictions in injunction); *Sneakers of Cobb County v. Cobb County*, 265 Ga. 410 (1995) (affirming interlocutory injunction against adult club's ongoing ordinance violations).

A second, and alternative, basis for entering an interlocutory injunction is also straightforward. Besides enjoining illegal acts, a court may also enter an injunction to restrain acts that are "contrary to equity and good conscience and for which no adequate remedy is provided at law." O.C.G.A. § 9-5-1. Under this clause, a trial court weighs four factors:

> (1) there is a substantial threat that the moving party will suffer irreparable injury if the injunction is not granted; (2) the threatened injury to the moving party outweighs the threatened harm that the injunction may do to the party being enjoined; (3) there is a substantial likelihood that the moving party will prevail on the merits of [the] claims at trial; and (4) granting the interlocutory injunction will not disserve the public interest.

SRB Inv. Servs., LLLP v. Branch Banking and Trust Co., 289 Ga. 1, 5 (2011).

The moving party need not prove all four factors to obtain the interlocutory injunction. *City of Waycross v. Pierce Cty.*, 300 Ga. 109, 111 (2016). The trial court's decision on a motion for interlocutory relief will not be disturbed "unless there was a manifest abuse of discretion." *Grossi Consulting, LLC v. Sterling Currency Grp., LLC*, 290 Ga. 386, 388 (2012).

Under the first factor, denying the County's injunction would cause the County to suffer the irreparable harm of not enforcing ordinances—including zoning, licensing, and hours of operation regulations—designed to protect the health, safety, and welfare of its citizens. *SRB Inv. Servs., LLLP*, 289 Ga. at 5; *accord Manatee County v. 1187 Upper James of Fla., LLC*, 104 So. 3d 1118, 1121 (Fla. 2d Dist. Ct. App. 2012) ("[T]he 'irreparable harm' is the government's inability to enforce a duly enacted ordinance."); *see also Sneakers of Cobb County*, 265 Ga. at 411 (affirming interlocutory injunction for county against ongoing violations of ordinance, without any discussion of separate irreparable harm to county); *Cawthon v. Douglas County*, 248 Ga. 760 (1982) (same); *Matthews v. Fayette County*, 233 Ga. 220 (1974) (same); *Blackmon v. Richmond County*, 224 Ga. 387 (1968) (same). An interlocutory injunction is appropriate to prohibit Defendants' systemic, continual violations because their illegal activity would persist if the injunction were not granted.

As to the second factor, greater harm will come from denying injunctive relief than granting it. Denying injunctive relief would appear to ratify Tokyo's unlawful business practices and embolden them to operate in violation of law. *See Regency Club*, 253 Ga. at 586 (holding trial

court erred in refusing to issue injunction). Granting the injunction does not impose harm, as there is no legally cognizable harm in requiring Defendants to operate within the law.

Third, the undisputed evidence of Tokyo's unlawful acts shows that the County is likely to prevail on the merits of its claims at trial. Georgia appellate courts have often affirmed injunctions against sexually oriented businesses operating in violation of local ordinances. *See, e.g.*, *Stardust, 3007, LLC*, 348 Ga. App. at 717; *10950 Retail, LLC*, 299 Ga. App. at 461.

Finally, enjoining unlawful acts serves the public interest by requiring compliance with duly-enacted ordinances. *Id.* at 461 ("Should we adopt Love Shack's reasoning and bar the City from obtaining injunctive relief, the City would be perpetually unable to enforce its ordinances because Love Shack could continue to operate without ever obtaining a business license, which would be an absurd result.").

FINDINGS

For these reasons, the Court makes the following findings and enters an interlocutory injunction. The Court finds as follows:

1. Cobb County Code § 78-46(a) makes it "unlawful for any person to engage in any business provided for in this chapter without first applying for and obtaining a business registration certificate as required by this chapter . . . ." But Defendants operate a business in the County without having obtained a 2021 business registration certificate.

2. Cobb County Code § 78-322(a) makes it unlawful for any person to operate a sexually oriented business without a valid sexually oriented business license. But Defendants operate Tokyo Valentino, which they admit is a sexually oriented business as defined in Cobb County Code § 78-321, without a Cobb County sexually oriented business license.

3. Cobb County Code § 78-331 makes it unlawful to have a sexually oriented business open for business between 12:00 midnight and 6:00 a.m. But Defendants routinely keep Tokyo Valentino open for business after 12:00 midnight.

4. Cobb County Code § 78-338(a)(1) makes it unlawful to establish, operate, or cause to be operated a sexually oriented business in unincorporated Cobb County that is within 750 feet of a residence or residential zoning district. But Defendants operate Tokyo Valentino within 750 feet of an R-15 residential zoning district.

5. Cobb County Code § 78-338(a)(2) makes it unlawful to establish, operate, or cause to be operated a sexually oriented business in unincorporated Cobb County that is within 1,500 feet of a hospital. But Defendants operate Tokyo Valentino within 1,500 feet of a hospital, namely ManorCare Rehab Center at 4360 Johnson Ferry Place.

6. Cobb County Code § 134-192 provides that sexually oriented businesses are permitted only in the LI and HI zoning districts in Cobb County, and not in the GC zoning district. But Defendants operate Tokyo Valentino in a GC zoning district.

INJUNCTION

The Court hereby enters an interlocutory injunction, enjoining and restraining Defendants Michael Scott Morrison, Alfred Jay Nault, Christopher Jon Coleman, 1290 Clothing Co LLC d/b/a Tokyo Valentino, and their officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them who receive actual notice of this order, from engaging in or committing any of the following acts at 1290 Johnson Ferry Road:

a. Engaging in business until they make application for, and obtain, a Cobb County OTC / Business License for the business they would actually operate at 1290 Johnson Ferry Road.

b. Operating a sexually oriented business without applying for and obtaining a Cobb County sexually oriented business license.

c. Operating a sexually oriented business between 12:00 midnight and 6:00 a.m.

d. Operating a sexually oriented business within 750 feet of an R-15 residential zoning district.

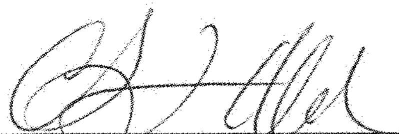
e. Operating a sexually oriented business within 1,500 feet of a hospital.

f. Operating a sexually oriented business in a GC zoning district.

This order granting injunction binds not only Michael Scott Morrison, Alfred Jay Nault, Christopher Jon Coleman, and 1290 Clothing Co LLC d/b/a Tokyo Valentino, but also those "in active concert or participation with [them]." *Wright v. Piedmont Property Owners Ass'n, Inc.*, 288 Ga. App. 261, 263 (2007) (citing O.C.G.A § 9-11-65(d) (injunction is binding "upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive notice of the order...")).

This order shall take effect at 11:59 p.m. on the date of its issuance.

SO ORDERED this 16th day of July, 2021.



C. LaTain Kell, Sr., Judge
Superior Court of Cobb County
Cobb Judicial Circuit

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served a copy of the within and foregoing order (Civil Action File No. 20-1-07595-49) upon all parties electronically, via Peach Court, or through the Cobb County Mail System, addressed to the following:

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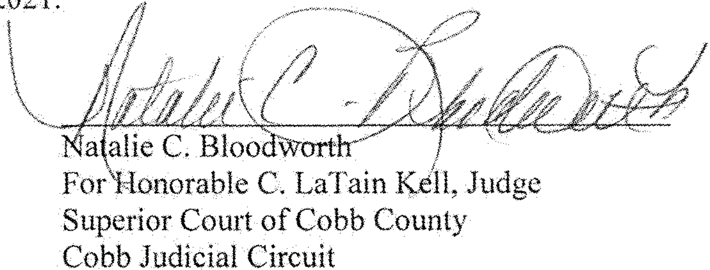
This 16th day of July, 2021.



Natalie C. Bloodworth
For Honorable C. LaTain Kell, Judge
Superior Court of Cobb County
Cobb Judicial Circuit