

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

DAVID SIMISTER, on behalf of)
himself and others similarly situated,)
)
Plaintiffs,)
)
v.)
)
COBB COUNTY, GA,)
)
Defendant.)
_____)

CIVIL ACTION FILE NO.
1:20-cv-03350-LMM

JOINT MOTION FOR APPROVAL OF SETTLEMENT AGREEMENT

Plaintiff David Simister (“Plaintiff”) and Defendant Cobb County, Georgia (“Cobb County” or “Defendant”) (collectively, “Parties”) jointly file this motion requesting the Court approve their settlement agreement. In support of their motion, the Parties rely upon the attached Brief in Support of Joint Motion for Approval of Settlement Agreement, Settlement Agreement and Release, Declaration of Lance J. LoRusso, and all files, records, and proceedings to date in this action. The Parties agree that the settlement set forth in the Settlement Agreement and Release is a fair and reasonable resolution of Plaintiff’s wage claims against Cobb County for alleged violations of the Fair Labor Standards Act (“FLSA”), 29 U.S.C. § 201, *et seq.* The Parties do not believe it necessary to hold,

and, thus, do not request, a hearing on this motion.

Respectfully submitted this 8th day of January, 2021.

LORUSSO LAW FIRM, P.C.

/s/ Lance J. LoRusso

Lance J. LoRusso
Georgia Bar No. 458023
Joseph Hayden Hillyer, Jr.
Georgia Bar No. 320038
1827 Powers Ferry Road, SE
Building 8, Suite 200
Atlanta, GA 30339
lance@lorussolawfirm.com
hayden@lorussolawfirm.com
Fax: (770) 644-2379
Phone: (770) 644-2378

Counsel for Plaintiff David Simister

HAWKINS PARNELL & YOUNG, LLP

/s/ Matthew A. Boyd

Ronald G. Polly, Jr.
Georgia Bar No. 583264
rpolly@hpylaw.com
Matthew A. Boyd
Georgia Bar No. 027645
mboyd@hpylaw.com
Parsa Fattahi
Georgia Bar No. 154232
pfattahi@hpylaw.com
303 Peachtree Street, NE
Suite 4000
Atlanta, Georgia 30308
Telephone: (404) 614-7400
Facsimile: (404) 614-7500

*Counsel for Defendant
Cobb County, GA*

**IN THE UNITED STATES DISTRICT COURT
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CERTIFICATE OF COMPLIANCE AND SERVICE

The undersigned counsel certifies that the foregoing **JOINT MOTION FOR APPROVAL OF SETTLEMENT AGREEMENT** has been prepared with one of the font and point selections approved by the Court in Local Rule 5.1B. The undersigned counsel further certifies that a copy of this pleading has been filed with the Clerk of Court using the CM/ECF system, which will automatically send email notification of the filing to the attorneys of record in this action.

This 8th day of January, 2021.

/s/ Lance J. LoRusso
Lance J. LoRusso
Georgia Bar No. 458023

**IN THE UNITED STATES DISTRICT COURT
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**BRIEF IN SUPPORT OF JOINT MOTION FOR
APPROVAL OF SETTLEMENT AGREEMENT**

Plaintiff David Simister (“Plaintiff”) and Defendant Cobb County, Georgia (“Cobb County” or “Defendant”) (collectively, “Parties”) reached a settlement in this action they believe, as explained below, is fair and reasonable. Accordingly, the Parties respectfully request the Court approve their settlement agreement.

I. BACKGROUND

Cobb County employs Plaintiff as a Captain in its Fire Department. On August 13, 2020, Plaintiff initiated this action against Cobb County seeking damages for alleged violations of the Fair Labor Standards Act (“FLSA”), 29 U.S.C. § 201, *et seq.* Specifically, Plaintiff contends Cobb County misclassified

him as an exempt employee until August 23, 2018¹ because, according to Plaintiff, his primary job duty was performing work as a non-exempt first responder preventing, controlling, and/or extinguishing fires. *See* 29 C.F.R. § 541.3(b); *Morrison v. Cty. of Fairfax, VA*, 826 F.3d 758, 767 (4th Cir. 2016); *Mullins v. City of New York*, 653 F.3d 104, 120 (2d Cir. 2011); *Barrows v. City of Chattanooga*, 944 F. Supp. 2d 596 (E.D. Tenn. 2013). Plaintiff also worked additional hours at times providing driving services for separate departments within Cobb County, specifically Senior Services and Elections, which he claims should have been factored into overtime pay calculations. Plaintiff further alleges that Cobb County retaliated by “terminating” him from his driving position with Senior Services and Elections.

Cobb County, on the other hand, contends Plaintiff’s primary duty as a Fire Captain was management (in terms of both percentage of work time and importance) and, thus, disputes it misclassified Plaintiff (or any other Fire Captain) as exempt. *See, e.g.* 29 C.F.R. § 541.102; *Maestas v. Day & Zimmerman, LLC*, 2013 WL 4767351 (D.N.M. Mar. 25, 2013). Cobb County further contends the hours Plaintiff spent performing additional work for Senior Services and Elections

¹ On that date, Cobb County converted its Fire Captains, including Plaintiff, to non-exempt employees.

fell under the FLSA’s “occasional or sporadic” exemption and was not subject to inclusion in any potential overtime calculations. *See* 29 C.F.R. § 553.30. Finally, Cobb County contends it eliminated Plaintiff’s and all other employees’ additional driving opportunities for legitimate and lawful reasons, namely to save costs associated with excessive overtime payments once Plaintiff had been reclassified as a non-exempt employee in 2018.

The Parties are familiar with the facts of the case and the legal issues raised by the pleadings and, through their respective counsel, have engaged in arms-length settlement negotiations to resolve their dispute. The terms and conditions of settlement reflected in the Parties’ proposed Settlement Agreement (attached to the Declaration of Lance J. LoRusso (“LoRusso Decl.”) as **Exhibit A**) are a product of those arms-length negotiations and represent a reasonable compromise of a bona fide dispute over Plaintiff’s exempt status under the FLSA.

The Parties have reached a settlement to resolve Plaintiff’s claims for unpaid overtime wages, liquidated damages, and reasonable attorneys’ fees and expenses, as outlined in more detail in the proposed Settlement Agreement. The Parties agree that the terms and conditions of settlement set forth therein are fair, reasonable, and in the best interests of the Parties. The Parties have entered into the Settlement Agreement because the Settlement Agreement reflects a reasonable

compromise of the Parties' disputed issues and claims. In addition, the Parties believe the certainty of settlement is preferable to the uncertain and costly outcome of protracted litigation.

II. LEGAL ANALYSIS

Claims for unpaid overtime under the FLSA can be settled or compromised in two ways: (1) when the Secretary of Labor supervises the settlement pursuant to 29 U.S.C. § 216(c); or (2) when a court reviews and approves settlement in a private action for unpaid overtime, such as the instant case. *Lynn's Food Stores, Inc. v. United States*, 679 F. 2d 1350, 1352-1353 (11th Cir. 1982). When an employee brings a private action for violation of the FLSA and presents a proposed settlement to the court, the court may approve that agreement if it is a fair and reasonable settlement of a bona fide dispute. *Id.* at 1353. That is, if a settlement reflects "a reasonable compromise over the issues" that are in dispute, the court may approve the settlement "in order to promote the policy of encouraging settlement of litigation." *Id.* at 1354.

The decision to approve an FLSA settlement as fair and reasonable lies within the trial court's discretion. *Lynn's*, 679 F. 2d at 1350. In exercising that discretion, courts consider the following factors: (1) the existence of fraud or collusion behind the settlement; (2) the complexity, risk, expense, and likely

duration of the litigation; (3) the stage of the proceedings and the amount of discovery completed; (4) the strength of the plaintiff's case and the probability of plaintiff's success on the merits; (5) the range of possible recovery; and (6) the opinions of the counsel. *Kirchner v. Lavalle*, No. 2:17-cv-159-FtM-99CM, 2017 U.S. Dist. LEXIS 171585, at *3 (M.D. Fla. 2017) (citing *Leverso v. South Trust Bank of Ala., Nat. Assoc.*, 18 F.3d 1527, 1531 n.6 (11th Cir. 1994)). Having satisfied these factors, as discussed in more detail below, the Parties show that the Settlement Agreement represents a fair and reasonable compromise of a bona fide dispute and request the Court's approval.²

² The Parties do not include analysis of Plaintiff's FLSA retaliation claim because, as Eleventh Circuit courts have concluded, "a court is not required to review the parties' settlement of a plaintiff's FLSA retaliation claim, provided its terms do not serve to contaminate the agreement as to the FLSA wage claim." *Goodwin v. Floco Foods, Inc.*, Civil Action No. 1:18-CV-00175, 2019 U.S. Dist. LEXIS 67216, at *2 (S.D. Ga. Apr. 19, 2019); *see also Kelly v. Aspire Physical Recovery at Hoover, LLC*, No. 2:17-cv-00961-JHE, 2018 U.S. Dist. LEXIS 108121, at *4 (N.D. Ala. June 28, 2018) (concluding that the court need not review the FLSA retaliation claim and finding that "courts in this Circuit have generally concluded that an FLSA [sic] retaliatory discharge claim is not subject to the same review unless its terms contaminate any associated wage claim"); *Jemley v. UMBWA, Inc.*, No. 6:15-cv-801-Orl-41TBS, 2017 U.S. Dist. LEXIS 140888, at *5 (M.D. Fla. Aug. 2, 2017) ("Settlement of FLSA retaliation claims (or of non-FLSA claims, for that matter) need not be approved by the district court, 'provided its terms do not serve to contaminate the Agreement as to the FLSA claim'"), *report and recommendation adopted*, 2017 U.S. Dist. LEXIS 139655 (M.D. Fla. Aug. 30, 2017); *Yost v. Wyndham Vacation Resorts, Inc.*, No. 6:10-cv-1583-Orl-36GJK, 2012 U.S. Dist. LEXIS 49277, at *10 (M.D. Fla. Mar. 26, 2012) (parties

A. The Parties Have a Bona Fide Dispute Over the Existence and Extent of Defendant's FLSA Liability.

The Parties have a bona fide dispute as to the existence and extent of Cobb County's liability to Plaintiff under the FLSA. As noted above, Plaintiff contends his primary duty as a Cobb County Fire Captain was preventing, controlling, and/or extinguishing fires and was, thus, a non-exempt first responder entitled to overtime under the FLSA. Plaintiff further contends he was entitled to overtime pay at a blended rate factoring in additional work he performed providing driving services for Cobb County Senior Services and Elections. As a result, Plaintiff contends Cobb County violated the FLSA when it failed to pay him at the relevant overtime premium rate for all hours it suffered or permitted him to work.

Cobb County, on the other hand, contends Plaintiff's primary duty was acting as an exempt manager supervising and managing other employees and was, thus, properly considered exempt from the FLSA's overtime requirements. Cobb County further contends Plaintiff freely and solely at his own option performed

represented to court that they settled plaintiff's state claim and FLSA retaliation claim in a separate settlement agreement), *report and recommendation adopted*, 2012 U.S. Dist. LEXIS 49275 (M.D. Fla. Apr. 9, 2012). Here, the Parties negotiated and resolved Plaintiff's FLSA retaliation claim separately from his FLSA wage claim. LoRusso Decl., ¶ 7. The resolution of Plaintiff's FLSA retaliation claim did not contaminate the FLSA Settlement Agreement in any way. LoRusso Decl., ¶ 7. Accordingly, the Parties' resolution of Plaintiff's FLSA retaliation claim does not require this Court's review or approval.

only occasional and sporadic work outside of his general occupational category when he provided driving services for Senior Services and Elections. As a result, Cobb County contends Plaintiff was never entitled to overtime pay at any rate. Cobb County also denies Plaintiff's allegation that it willfully violated the FLSA and did not act in good faith with respect to classification of Fire Captains as exempt from the FLSA.

B. The Parties' Settlement Agreement is Fair and Reasonable.

The Court should find the Settlement Agreement is fair and reasonable. There has been no fraud or collusion between the Parties in reaching settlement, which was reached through transparent, arms-length negotiations. Pursuing this litigation to its conclusion presents substantial risk and cost to both Parties, both in the uncertainty of judgment and in incurring the rapidly-increasing expense of attorneys' fees. Likewise, the expense of written discovery and depositions will be substantial.

Despite Plaintiff's confidence in his position, his probability of success is uncertain. Even if liability is established, the extent of provable damages would remain in dispute, as well as the applicability of liquidated damages, blended-rate overtime calculations, and the extended statute of limitations. This settlement, compared with the range of potential recovery, represents the Parties' recognition

of these uncertainties, as well as the substantial cost of pursuing this case to final judgment.

The amount included in the Settlement Agreement as backpay is based on Plaintiff's salary and the unpaid, scheduled work recorded in the payroll data provided by Cobb County between August 13, 2017 (*i.e.* three years prior to the filing of this lawsuit on August 13, 2020) and August 23, 2018, the date on which Cobb County converted its Fire Captains, including Plaintiff, to non-exempt, hourly employees. In total, Plaintiff could have recovered between \$859.98 and \$9,905.56 in backpay for recorded, scheduled work during that time period, depending on whether the computation only includes hours Plaintiff worked for the Fire Department (low end) or also includes hours Plaintiff worked for Social Services and Elections and calculated at a blended rate (high end). The Settlement Agreement provides for a fair amount of \$10,000.00 in backpay—which exceeds Plaintiff's potential high-end recovery amount—and an equal amount, \$10,000.00, in liquidated damages pursuant to 29 U.S.C. § 216(b). *See* LoRusso Decl. at Exhibit A.

The settlement amount also includes \$10,000.00 in attorneys' fees and expenses, which is below the reasonable fee rate in the Northern District of Georgia. *See* LoRusso Decl. at ¶ 13; *Eason v. Bridgewater & Assocs.*, 108 F. Supp.

3d 1358, 1364 (N.D. Ga. 2015) (finding fee rates of \$400/hour for partner's work and \$250/hour and \$325/hour for associates' work to be reasonable for FLSA litigation in the Atlanta area). As of December 17, 2020, Plaintiff's counsel has accrued \$18,990.00 in attorneys' fees and \$541.69 in expenses for 101.10 hours of work based on reasonable billing rates within the Northern District of Georgia. LoRusso Decl. at ¶ 13. Thus, this settlement represents a fair compromise, given that the Parties will avoid further litigation and Plaintiff is recouping more than what he could expect to recover if the case were litigated to judgment. *Id.* at ¶ 11-12.

Therefore, as the Parties agree, the Settlement Agreement is a fair, reasonable, and adequate settlement of a bona fide dispute. Accordingly, the Court should approve the Settlement Agreement.

III. CONCLUSION

For the foregoing reasons, the Parties request the Court approve the Parties' Settlement Agreement.

Respectfully submitted this 8th day of January, 2021.

LORUSSO LAW FIRM, P.C.

/s/ Lance J. LoRusso

Lance J. LoRusso
Georgia Bar No. 458023
Joseph Hayden Hillyer, Jr.

HAWKINS PARNELL & YOUNG, LLP

/s/ Matthew A. Boyd

Ronald G. Polly, Jr.
Georgia Bar No. 583264
rpolly@hpylaw.com

Georgia Bar No. 320038
1827 Powers Ferry Road, SE
Building 8, Suite 200
Atlanta, GA 30339
lance@lorussolawfirm.com
hayden@lorussolawfirm.com
Fax: (770) 644-2379
Phone: (770) 644-2378

Counsel for Plaintiff David Simister

Matthew A. Boyd
Georgia Bar No. 027645
mboyd@hpylaw.com
Parsa Fattahi
Georgia Bar No. 154232
pfattahi@hpylaw.com
303 Peachtree Street, NE
Suite 4000
Atlanta, Georgia 30308
Telephone: (404) 614-7400
Facsimile: (404) 614-7500

*Counsel for Defendant
Cobb County, GA*

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CERTIFICATE OF COMPLIANCE AND SERVICE

The undersigned counsel certifies that the foregoing **BRIEF IN SUPPORT OF JOINT MOTION FOR APPROVAL OF SETTLEMENT AGREEMENT** has been prepared with one of the font and point selections approved by the Court in Local Rule 5.1B. The undersigned counsel further certifies that a copy of this pleading has been filed with the Clerk of Court using the CM/ECF system, which will automatically send email notification of the filing to the attorneys of record in this action.

This 8th day of January, 2021.

/s/ Lance J. LoRusso

Lance J. LoRusso

Georgia Bar No. 458023

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[PROPOSED] ORDER

Upon consideration of Plaintiff David Simister’s and Defendant Cobb County, GA’s (collectively “Parties”) Joint Motion for Approval of Settlement Agreement (“Joint Motion”) and having reviewed the Parties’ proposed Settlement Agreement and Release (“Settlement Agreement” or “Agreement”) as well as the record herein, this Court finds the Agreement to be a fair and reasonable settlement that is consistent with requirements under the Fair Labor Standards Act (“FLSA”), 29 U.S.C. § 201, *et seq.* Accordingly, for the reasons set forth in the Joint Motion,

IT IS HEREBY ORDERED that the Joint Motion is **GRANTED**; and

IT IS FURTHER ORDERED that the Settlement Agreement is approved.

The Parties are directed to file a Joint Stipulation of Dismissal of this action with

prejudice within three (3) business days of receipt by Plaintiff of the settlement payments. The Parties shall bear their own costs.

It is so **ORDERED** this ____ day of _____, 2021.

LEIGH MARTIN MAY
UNITED STATES DISTRICT JUDGE

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DECLARATION OF LANCE J. LORUSSO

I, LANCE J. LORUSSO, pursuant to 28 U.S.C. § 1746, swear and affirm under penalty of perjury as follows:

1.

I am a partner at the LoRusso Law Firm, P.C.

2.

I have been licensed to practice law in the State of Georgia since October 1999 and have over 20 years of experience practicing in the area of wage and hour law.

3.

I am attorney of record for Plaintiff David Simister in this matter.

4.

I make this declaration in support of the parties' Joint Motion for Approval of Settlement Agreement in the case before this Court entitled *David Simister, on behalf of himself and others similarly situated v. Cobb County, GA*; Civil Action File No. 1:20-cv-03350-LMM.

5.

I state the following facts from my personal knowledge, and if called as a witness, I could and would so competently testify thereto under oath.

6.

Attached as **Exhibit A** to this declaration is a true and accurate copy of the Settlement Agreement and Release ("Settlement Agreement" or "Agreement") in this case agreed to by and between Plaintiff David Simister ("Plaintiff") and Defendant Cobb County, GA ("Cobb County" or "Defendant") (collectively, the "Parties").

7.

The Parties separately negotiated and resolved Plaintiff's FLSA retaliation claim in this action and resolution of that claim did not contaminate the Settlement Agreement in any way.

8.

Plaintiff was given the opportunity to review the Settlement Agreement and discuss the Settlement Agreement with counsel. Prior to the parties reaching an agreement, Plaintiff was given the opportunity to review the methodology used to calculate his backpay and liquidated damages amounts and discuss any questions with counsel.

9.

Prior to the parties reaching an agreement, Plaintiff was also provided the amounts of attorneys' fees and costs incurred to date and given the opportunity to contact counsel with any questions about those amounts.

10.

The settlement amount set forth in the Settlement Agreement includes an amount of \$10,000.00 allocated as backpay to Plaintiff and an equal amount of \$10,000.00 allocated as liquidated damages to Plaintiff.

11.

Based on analysis of the salary and payroll data provided by Cobb County, Plaintiff believes he is entitled to between \$859.98 and \$9,905.56 in backpay for work he performed during the time period relevant to this action, depending on whether additional hours he spent performing work outside of his regular job as a

Cobb County Fire Captain (*i.e.* additional hours driving for Cobb County Senior Services and Cobb County Elections) are factored into any overtime calculations.

12.

The settlement amount set forth in the Settlement Agreement includes \$10,000.00 in attorneys' fees and expenses, which I have accepted despite it being below the reasonable fee rate for comparable work in the Northern District of Georgia.

13.

As of December 17, 2020, Plaintiff's counsel has accrued \$18,990.00 in attorneys' fees and \$541.69 in expenses for a total of 101.10 hours of work (including 7 hours worked by me at \$500.00/hour; 46.70 hours worked by my second-year associate Joseph Hayden Hillyer, Jr. at \$200.00/hour; .60 hours worked by my senior associate Justin Meeks at \$275.00/hour; 1.80 hours worked by my junior associate Tiffany McKenzie at \$200.00/hour; and 45.00 hours worked by my paralegals at \$125.00/hour). These fees are based on reasonable billing rates for attorneys and paralegals of comparable skill and experience within the Northern District of Georgia. *See Eason v. Bridgewater & Assocs.*, 108 F. Supp. 3d 1358, 1364 (N.D. Ga. 2015) (finding fee rates of \$400/hour for partner's work, \$250/hour and \$325/hour for associates' work, and \$150/hour for paralegal's

work to be reasonable for FLSA litigation in the Atlanta area). All of the time and expenses incurred by Plaintiff's counsel have been necessarily and reasonably expended on behalf of Plaintiff.

I declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct.

This 8th day of January, 2021.

/s/ Lance J. LoRusso
Lance J. LoRusso

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SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release (“Settlement Agreement” or “Agreement”) is made and entered into by and between the Cobb County, Georgia (“Cobb County” or the “County”) and Plaintiff David Simister (“Plaintiff”). The County and Plaintiff are collectively referred to in this Agreement as the “Parties.”

RECITALS

- A. Whereas, Plaintiff is a current employee of the County; and
- B. Whereas, on August 13, 2020, Plaintiff filed the action captioned “*David Simister, on behalf of himself and others similarly situated v. Cobb County, GA,*” Civil Action File No. 1:20-cv-03350-LMM, in the United States District

Court for the Northern District of Georgia (“the Action”), arising out of his employment with the County; and

C. Whereas, Plaintiff’s Complaint alleges violations of the Fair Labor Standards Act (29 U.S.C. § 201, *et seq.*) (“FLSA”) and seeks recovery of overtime wages due to his alleged incorrect classification as “exempt” from the overtime requirements of the FLSA, and further seeks an equal amount of liquidated damages and reasonable attorneys’ fees and costs under the FLSA (“FLSA Wage Claims”); and

D. Whereas, Plaintiff’s Complaint alleges further violations of the FLSA and seeks recovery of lost wages due to the County’s alleged retaliatory termination of Plaintiff’s driving positions with Cobb County Senior Services and Cobb County Elections (“FLSA Retaliation Claim”); and

E. Whereas, the County filed an Answer to the Complaint denying the material allegations and asserting affirmative defense thereto; and

F. Whereas, the Parties have engaged in negotiations (including separate negotiations regarding the FLSA Retaliation Claim, which the Parties have determined through negotiation has little-to-no value in light of Cobb County’s stated reason for eliminating driving positions for Plaintiff and other County employees) in an attempt to resolve their differences and evaluate the data relevant

to a settlement calculation, and throughout these negotiations all Parties were, and continue to be, represented by counsel experienced in wage and employment matters; and

G. Whereas, the Parties wish to avoid the potential uncertainty, expense, and delay of litigation and have therefore, based upon their negotiations, agreed to a settlement of the Parties' dispute; and

H. Whereas, the Parties agree that the separate negotiations and resolution reached regarding Plaintiff's FLSA Retaliation Claim in no way contaminated this Settlement Agreement; and

I. Whereas, the potential recovery at trial, if any, remains unknown, but the Parties believe that the terms of this Agreement are consistent with and within the range of a reasonable result that Plaintiff might expect to obtain if he prevailed after a trial; and

J. Whereas, as a result of their negotiations, the Parties wish to settle the Action and resolve and release all disputes and claims arising out of the Action against the County.

NOW THEREFORE, in consideration for the mutual promises and undertakings of the Parties as set forth below, Plaintiff and the County hereby enter into this Agreement and agree as follows:

1. No Admission; Recitals: This Agreement does not constitute an admission by Cobb County of any wrongdoing with regard to Plaintiff's applications for employment, Plaintiff's employment with (including Plaintiff's compensation) Cobb County or of any violation by Cobb County of any federal, state or local law, ordinance or regulation or of any violation of Cobb County's policies or procedures or of any liability or wrongdoing whatsoever. Cobb County denies all such liability. Neither this Agreement nor anything in this Agreement shall be construed to be or shall be admissible in any proceeding as evidence of liability or wrongdoing. The recitals set forth in this Agreement are true and correct and are hereby fully incorporated by reference into this Agreement. By executing this Agreement, no Party admits or concedes any of the claims, defenses, or allegations that were raised or could be raised by any other party or any third party.

2. Settlement Terms:

- (a) Contingent upon Approval: Notwithstanding anything else contained herein to the contrary, this Agreement, and the Parties' obligations thereunder, shall not become effective unless and until the Court in the Action approves the Parties' settlement pursuant to this Agreement, and the Action is

completely and fully dismissed, with prejudice, with no other person seeking to join the Action.

- (b) Settlement Sum: The County shall pay a total of Thirty Thousand Dollars (\$30,000.00) in settlement of all of Plaintiff's claims in the Action, which includes attorneys' fees and costs ("Settlement Sum"). Although the Parties do not agree that there is liability regarding Plaintiff's claims, for purposes of this Agreement, the Settlement Sum represents the agreed upon amount for all overtime compensation allegedly owed to Plaintiff and the equal amount allegedly owed for liquidated damages, arising from an alleged three-year statute of limitations for recovery relief, and any and all other damages and/or relief recoverable in the Action, for the full liability period alleged in the Action, including attorneys' fees and costs.
- (c) Allocation of Settlement Sum: Subject to Court approval, the Settlement Sum will be allocated as follows:
- i. Overtime Compensation: The County will pay Plaintiff the total sum of \$10,000.00 in settlement for Plaintiff's claim for overtime compensation. This payment will be

made by payroll checks to Plaintiff and will be subject to the normal wage withholdings. The County will provide Plaintiff with a W-2 form regarding the payment for unpaid overtime compensation as required by law.

- ii. Liquidated Damages: The County will issue a check to Plaintiff in the sum of \$10,000.00 in settlement of Plaintiff's claim for liquidated damages.
- iii. Attorneys' Fees: The LoRusso Law Firm, P.C. shall receive a separate check payable to the law firm in the amount of \$10,000.00 for attorneys' fees and costs. Except as provided here, each party will bear its own attorneys' fees and costs.

- (d) Taxation: The Parties agree that the payment of liquidated damages to Plaintiff's counsel for distribution to Plaintiff is not wages, and therefore the Parties believe that such amounts are not subject to federal and state tax withholding requirements, although they are taxable as gross income. Plaintiff is encouraged to consult with a tax advisor or attorney to independently determine any federal, state, or local tax

consequences of the liquidated damages portion of the settlement amounts as no opinion on any tax matter is expressed herein. Plaintiff is solely responsible for reporting amounts received as liquidated damages pursuant to this Agreement to any applicable federal, state or local agency as required by law. Plaintiff agrees that the County is not responsible for any tax liability he may suffer as a result of the liquidated damages being subject to taxation. The LoRusso Law Firm, P.C. will provide Plaintiff with an IRS 1099 form regarding liquidated damages as required by law. Plaintiff's counsel shall provide the County with an executed IRS W9 form. The County will provide Plaintiff's counsel with an IRS 1099 form regarding attorneys' fees and costs. Except as provided herein, the Parties agree to be responsible for their own costs and expenses including attorneys' fees. To the extent any taxes are owed, Plaintiff hereby acknowledges that he will be individually responsible for the payment of those taxes (except any payroll taxes that are Cobb County's lawful obligation to pay).

(e) Approval: The Parties will present this Settlement Agreement to the Court along with a joint motion requesting the Court's approval of the settlement as fair, reasonable, and adequate and consistent with the FLSA. The Parties agree to take all reasonable actions consistent with this Agreement, the Court's rules, and applicable ethical rules to obtain approval. Within three (3) days of Plaintiff's receipt of all payments due pursuant to this Settlement Agreement, Plaintiff shall file a Stipulation of Dismissal pursuant to Fed. R. Civ. P. 41(a)(1)(ii) dismissing the Action with prejudice, and with the Parties bearing their own costs. Counsel for Plaintiff shall hold all amounts paid in trust, and shall not disburse the same, until the Action is fully and finally dismissed.

i. The County shall provide payment to Plaintiff and his counsel within 30 days after the Court approves the Settlement Agreement. The Parties agree and stipulate to the Court's continued jurisdiction over matters relating to the enforcement of the Settlement Agreement.

ii. The payments specified in paragraphs 2(c)(ii) and (iii)

shall be delivered to Plaintiff's attorney, Lance J. LoRusso, of the LoRusso Law Firm, P.C., at 1827 Powers Ferry Road, SE, Building 8, Suite 200, Atlanta, GA 30339.

3. Resolution of all Pending Matters; Representations and Warranties.

Upon receipt of the payments specified in paragraphs 2(c)(i), (ii), and (iii) of this Settlement Agreement, Plaintiff agrees to dismiss with prejudice his claims in the Action. Plaintiff represents and warrants that there are no additional administrative charges, lawsuits, civil actions or claims of any kind pending (or to his knowledge, threatened) on his behalf against Cobb County or its elected officials, officers, agents, attorneys, insurers, or employees. Plaintiff expressly acknowledges that upon his actual receipt of all amounts set forth in Paragraph 2 hereof, he has been fully compensated for his claims and that, to the extent any administrative agency seeks further recovery for these claims, that he would not be entitled to any further compensation. Notwithstanding, upon the Court's approval of the Parties' settlement pursuant to this Agreement, and the receipt of the payments due under this Agreement, Plaintiff agrees to dismiss with prejudice his claims in the Action (as set forth above), and to withdraw or dismiss any other complaint, claim, grievance, or charge that he has filed against the County similar to, relating to or

arising from the claims or factual contentions raised in this Action and occurring up to the Effective Date of this Agreement, regardless of the law, rule or regulation under which such claims are asserted. This Agreement extends to any such complaint, claim, grievance, or charge relating to or arising from the claims similar to, related to, or raised in the Action filed in any state court or federal court, or with any administrative body, agency, board, commission, or other entity whatsoever.

4. Release of Claims by Plaintiff: Plaintiff accepts this settlement, and understands that Plaintiff's acceptance of this settlement constitutes a full and complete settlement of all claims against the defendant Cobb County, Georgia set forth in the Action, or which involve the payment of wages, overtime compensation, or minimum wages under local, state, or federal law. Plaintiff hereby irrevocably and unconditionally releases and discharges forever Cobb County, and its employees, appointed or elected officials, officers, agents, attorneys and/or insurers (collectively, the "Releasees") from all manner of actions or causes of actions, suits, proceedings (whether civil, administrative or otherwise), debts, sums of money, accounts, contracts, controversies, promises, damages, judgments, executions, liabilities, claims, demands, costs or expenses of any kind or nature whatsoever, whether at law or in equity, or both, whether known or

unknown, fixed, liquidated or contingent, direct or derivative, which he had, now has, or may in the future claim to have, by reason of any act, matter, thing or cause whatsoever that occurs or has occurred on or prior to the date of this Agreement, related to Plaintiff's claims or factual contentions in the Action, or which involve the payment of wages, overtime compensation, or minimum wages under local, state, or federal law.

The Parties understand that this release extends to all grievances, disputes or claims of every nature and kind, known or unknown, suspected or unsuspected, arising from, or attributable to Plaintiff's claims that Cobb County, Georgia, violated the FLSA or any local, state or federal law rule or regulation involving the payment of compensation of any type, salary, raises, bonuses, wages, overtime compensation, or minimum wages, up to and including the effective date of this Agreement, including by allegedly failing to compensate Plaintiff for all hours worked, including any and all hours worked or allegedly worked for the Cobb County Fire Department and any other department of Cobb County (including, but not limited to Cobb County Senior Services and Cobb County Elections), due to misclassification as exempt from the FLSA. The Parties understand that this release does not include claims relating to conduct or activity that occurs after the

effective date of this Agreement or which involve matters outside the scope of this release, as stated herein.

5. Public Comments. The terms of this Settlement Agreement are not confidential; however, all Parties and their respective counsel agree that they will not publicize the settlement. In response to any inquiry by third parties (with the exception of the Parties' immediate families, financial advisors, elected or appointed officials, attorneys, or employees) that any of the Parties may receive into the settlement, the Parties agree that the only information any of them will provide is to state that the matter has been resolved to the satisfaction of everyone involved. Nothing contained herein, however, shall be construed to prevent Cobb County from communicating with its current or former employees regarding any aspect of their employment. The agreement as to publicity set forth in this paragraph shall apply except as prohibited by any federal, state or local law, ordinance or regulation, or public policies pertaining thereto. The Parties agree, however, that if the terms of the Settlement Agreement are disclosed in an official external statement by the County Manager or senior management personnel within the Cobb County Fire Department, this provision regarding public comments shall be moot, and the Parties will no longer be bound by it.

6. Knowledge of Parties: The Parties understand and agree to the settlement, this Agreement, and the terms and conditions contained herein, and enter into this Agreement knowingly and voluntarily. The Parties have investigated the facts pertaining to the settlement and the Agreement and all matters pertaining thereto as deemed necessary. The Parties have relied upon their judgment, belief, knowledge, understanding, and expertise after consultation with their counsel concerning the legal effect of the settlement, and this Agreement and its terms. By signing this document, the Parties signify their full understanding, agreement, and acceptance of the Agreement.

7. Entire Agreement: Plaintiff has been advised by counsel and has carefully read and fully understands all of the provisions of this Agreement. This Agreement may not be changed orally but only by an agreement in writing signed by the party against whom enforcement of any waiver, change, modification, extension or discharge is sought. Plaintiff acknowledges that he has not relied upon any representation or statement, written or oral, not set forth in this document. This Agreement contains the entire agreement of the Parties regarding the subject matter of this Agreement and shall constitute the final understanding between the Parties hereto. All prior negotiations made, or which have occurred prior to the date of this Agreement are merged into this Agreement.

8. No Additional Representations: Except for the terms of this Agreement, Plaintiff and the County, respectively, have not relied upon any statement or representation, written or oral, made by any Party, or any of their respective agents, attorneys or any other person, regarding any matter including, but not limited to, the federal or state income tax consequences of the Agreement to any Party. The Parties expressly acknowledge and agree that they have relied solely upon the advice of their own attorneys and/or accountants as to the tax and benefit consequences of the Agreement.

9. Warranty of Non-Assignment: Plaintiff represents and warrants that he has not assigned, transferred, or hypothecated any of the claims or portions of the claims that are the subject of this Agreement, and further agrees to indemnify and hold Cobb County harmless for any breach of this representation and warranty.

10. Binding Agreement: The Agreement shall bind and inure to the benefit of each of the Parties hereto and their spouses, domestic partners, children, heirs, estates, administrators, representatives, executors, attorneys, successors, and assigns. Except as expressly provided herein, this Agreement is not for the benefit of any person not a Party hereto or any person or entity not specifically identified as a beneficiary herein or specifically identified herein as a person or entity released hereby. The Agreement is not intended to constitute a third-party

beneficiary contract.

11. Interpretation and Construction: Any ambiguities or uncertainties herein shall be equally and fairly interpreted and construed without reference to the identity of the Party or Parties preparing this document or the documents referred to herein, on the understanding that the Parties participated equally in the negotiation and preparation of the Agreement and the documents referred to herein, or have had equal opportunity to do so. The headings used herein are for reference only and shall not affect the construction of this Agreement.

12. Governing Law and Venue: The settlement, this Agreement, and the documents referred to herein, shall be interpreted in accordance with the laws of the State of Georgia, and if necessary federal law. To the extent that any Party brings an action to enforce the terms of this Agreement, such action shall be filed and prosecuted in the Cobb County Superior Court and/or the United States District Court for the Northern District of Georgia, to the extent of that Court's jurisdiction.

13. Breach, Waiver and Amendment: No breach of this Agreement or of any provision herein can be waived except by an express written waiver executed by the Party waiving such breach. Waiver of any one breach shall not be deemed a waiver of any other breach of the same or other provisions of this Agreement. The

Agreement may be amended, altered, modified, or otherwise changed in any respect or particular only by a writing duly executed by the Parties hereto or their authorized representatives.

14. Execution: This Agreement, and any document referred to herein, may be executed in any number of counterparts, each of which may be deemed an original and all of which together shall constitute a single instrument. Photographic copies of such signed counterparts may be used in lieu of the originals for any purpose.

15. Effective Date: This Agreement shall become effective following execution by the Parties and their counsel, the approval of the Court, and the full and complete dismissal of the Action with prejudice.

IN WITNESS WHEREOF, the Parties hereto have executed this Settlement Agreement and Release on the date(s) set forth below.

Dated: January __, 2021

COBB COUNTY, GEORGIA

By: _____
Matthew A. Boyd
Attorney for Defendant
signing on behalf of Defendant

Dated: January ___, 2021

DAVID SIMISTER

By: _____
David Simister
Plaintiff

Dated: January ___, 2021

By: _____
Lance J. LoRusso
Attorney for Plaintiff