IN THE COURT OF APPEALS FOR THE STATE OF GEORGIA

MARINER HEALTH CARE, INC., Appellant,	)	
	)	Case No. A06A1372
v.	)	
	)	
PRICEWATERHOUSE–COOPERS LLP ET AL., Appellees.	)	
	)	

BRIEF OF APPELLANT

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PART ONE: PROCEDURAL HISTORY AND STATEMENT OF FACTS

Mariner Health Care, Inc. ("Mariner") appeals from the trial court's decision to strike Mariner's notice of voluntary dismissal under O.C.G.A. § 9-11-41. Neither the statutory language nor the cases interpreting it permits such a holding. Mariner also appeals from the trial court's dismissal of its complaint with prejudice, based on purported discovery abuses. Mariner did not violate any of the court's orders, and any conceivable imperfections in Mariner's discovery conduct fall far short of justifying dismissal with prejudice of its substantial fraud suit.

Mariner filed its complaint on August 29, 2002 (R-38) and an amended complaint on March 12, 2004 (R-6050), alleging fraud in connection with the 1998 merger and sale of Mariner Health Group, Inc. ("MHG") to Paragon Health Network, Inc. ("Paragon") (R-6104-10). Because of the fraud, Paragon purchased MHG at an artificially inflated value; after the merger, both companies ended up in bankruptcy, resulting in the post-bankruptcy creation of Mariner. R-6053-55. The complaint seeks damages arising out of the merger and sale, alleging that several of MHG's officers (collectively the "Individual Defendants") orchestrated a scheme leading to the fraudulent sale of MHG to Paragon. R-6058-88, 6097-105. It further alleges that PricewaterhouseCoopers LLP ("PwC") had rendered false

and misleading audit reports on MHG's financial statements. R-6088-97, 6106-10.

PwC responded by filing a third-party complaint against two former MHG directors (the Kelletts), alleging that if PwC were liable to Mariner for negligent misrepresentation, the Kellets were liable to PwC for indemnification. R-792, 794-96. The Kelletts, in turn, filed a third-party complaint against the Individual Defendants and PwC's audit engagement partner Williams for indemnification. R-1303, 1306-10. The Individual Defendants then filed counterclaims for indemnification against the Kelletts, should the Individual Defendants be found liable to Mariner. R-2335, 2343-45, 2347, 2354-57. In March 2004 (R-6034, 6114), the Individual Defendants dismissed all counterclaims they had originally filed against Mariner (R-2082-92, 2249-66).

Discovery opened in October 2002 (R-8805) and focused on approximately 45,000 "off-site" boxes of Mariner's documents located in warehouses (R-8863-64), and a smaller quantity of "on-site" documents (R-8897-901, 9033). For off-site documents, Mariner provided PwC with a general description of box contents (R-8868, 8930), and from these descriptions PwC identified 7,809 boxes that it wished to review. R-8864; 9072, 9082, 9097, 9123, 9142, 9160, 9163, 9165, 9330, 9375, 9427, 9434, 9454, 2d SR-2-9. A third-party vendor then electronically

imaged the particular documents selected by PwC. R-8897, 8944, 8981, 9000.

Despite voluminous discovery requests PwC made during the last few months before the January 15, 2004 document-production deadline set forth in the Scheduling Order (*e.g.*, PwC's request for 5,300 off-site boxes between October and November 2003 (R-9168-317, 9330, 9375, 9427, 9434, 2d SR-2-9)), Mariner substantially completed production by the evening of the deadline, when 711,000 images (roughly 300 boxes) were produced. R-12308, 11597, 9500-03, 9568. Only the production of 200 boxes remained in dispute, for which Mariner requested and was granted an extension until February 6, 2004 (R-8897, 8900), and the issue was resolved in such a way that it played no role in the trial court's sanctions ruling. Thus, by the end of document discovery, Mariner had given PwC images from more than 8,000 boxes, or 20 million pages. Mariner later discovered three isolated sets of materials that it promptly produced (*see infra* Part II.A.2).

During document production, Mariner prepared various privilege logs. In connection with documents of Mariner's law firm, Powell Goldstein Frazer & Murphy ("PGFM"), the trial court, on August 6, 2003, directed Mariner to create a log "identifying the document[s]," though not their contents, with "particularity." R-2971, 2976. Upon receiving the log, PwC complained generally that it was not

specific enough, "clump[ed]" documents together, and used "vague" descriptions. R-9067. Mariner addressed those concerns in a response. R-10334. PwC then filed motions to compel, in which it, for the first time, identified complaints about specific entries in the logs. *See, e.g.*, R-3185, 3199-213. PwC's motions also argued that Mariner had waived all privileges by bringing the lawsuit. R-3213-33. Based on PwC's concerns about specific entries, Mariner revised each log and attached them to its opposition briefs. *See, e.g.*, R-3466, 3493-94, 3613-99.

On February 16, 2004, the court held a hearing on PwC's motions, but did not resolve the motions or state "which documents have to be produced and which ones don't." R-12383, 12509. (Transcripts have "R" cites because the clerk included them in record.) Rather, the court stated that review of documents for privilege waiver was a "most arduous task" that it could not undertake unless it "shut down my court." R-12511. The court then described general categories of documents likely to be found non-privileged, but made clear that identification of documents required to be produced would occur later. R-12619. Both parties understood that the court would issue an order articulating the precise standards for determining the privilege issues. R-9627. That order was not issued until June 10, 2004 (R-11371), only after PwC asked the court for the order (R-6924-25).

As document discovery proceeded, the parties also arranged a deposition schedule. The Scheduling Order required the parties to exchange a list of first-round depositions by March 15, 2004, and by March 31 to "meet . . . to schedule the taking of depositions of the persons" thus listed. R-1803-04. On March 15, the parties exchanged first-round fact witness lists; Mariner listed 28 witnesses, and PwC listed 168. R-11303-06, 11308-42. On March 31, the parties met to schedule depositions. R-11185-88. Because PwC was scheduled to begin depositions three weeks before Mariner, and the parties had already agreed to schedule the weeks of depositions on a rolling basis, Mariner advised PwC that it had not yet decided which witnesses it would depose first; PwC responded by refusing to identify the persons it wished to depose. *Id.*; R-9614. Ultimately, the parties each suspended their merits-based deposition scheduling. R-9718.

On May 21, 2004, PwC filed a motion for sanctions for alleged discovery abuses, seeking dismissal of Mariner's complaint with prejudice. R-7660. The trial court scheduled oral argument for July 23, 2004, and on July 22, Mariner filed a voluntary dismissal of its complaint without prejudice pursuant to § 9-11-41(a) (R-10728), and a renewal action in the Superior Court of Fulton County pursuant to § 9-2-61. In response, PwC and the Individual Defendants (collectively the

"Defendants") moved to strike Mariner's voluntary dismissal. R-10760, 10769.

On September 30, 2004, the court heard argument on the motions to strike and for sanctions, and granted both. Responding to the court's request for draft orders that are "very long because you know what the appellate court's going to be looking for," (R-12779, 13030), PwC provided proposed orders of 26 pages (1st SR-33-58) and 68 pages (R-12212-80), which the court adopted virtually verbatim.

The November 4, 2004 Order held that § 9-11-41 prevented Mariner's voluntary dismissal because the Defendants had contribution and indemnification claims pending against the Kelletts as third parties. R-12281. The November 9, 2004 Order dismissed Mariner's complaint with prejudice, on the ground that Mariner had acted in conscious indifference to various discovery orders. R-12315.

Mariner timely appealed. R-1-4. Mariner preserved its enumerated errors regarding the trial court's (1) striking Mariner's notice of voluntary dismissal by memorandum in opposition (R-10802, 11840) and by argument (R-12824-67), and (2) granting PwC's motion for dismissal with prejudice by memorandum in opposition (R-11272, 10701) and by argument (R-12948-015).

PART TWO: ENUMERATION OF ERRORS

1. The trial court erred in striking Mariner's notice of voluntary dismissal,

because the Defendants had no right under § 9-11-41 to bar the dismissal.

2. The trial court abused its discretion in granting the sanction of dismissal with prejudice, because Mariner pursued the massive discovery in this case with diligence and in good faith, and the court's resort to dismissal with prejudice as the first and only sanction considered in the case is unprecedented in Georgia law.

Pursuant to § 5-6-34, jurisdiction is vested in this Court because final judgment has been entered, and this case does not fall within any of the classes of cases reserved to the Supreme Court under Art. VI, § 5, ¶ III; *id.* § 6, ¶¶ II-III.

PART THREE: ARGUMENT

The trial court's construction of § 9-11-41 is an issue of law that is reviewed *de novo*. *See Suarez v. Halbert*, 246 Ga. App. 822, 824 (2000). Its imposition of the sanction of dismissal with prejudice is reviewed for an abuse of discretion. *See Harwood v. Great Am. Mgmt. & Inv., Inc.*, 171 Ga. App. 488, 490-91 (1984).

I. Mariner Was Entitled To Dismiss Its Complaint Under § 9-11-41

Under § 9-11-41, Mariner had an absolute right to dismiss voluntarily its complaint without prejudice because the Defendants had no counterclaim against Mariner. Indeed, because the Defendants had claims only against third parties that were wholly derivative of Mariner's action, there is no basis whatsoever on which

the Defendants can prevent the dismissal.

A. Only Counterclaiming Defendants May Bar Plaintiff's Dismissal

Section 9-11-41(a) (1986) allows the plaintiff, as a matter of right, to dismiss the action "at any time before the plaintiff rests his case." The section includes a limited exception where "a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss," the defendant "object[s]" to the dismissal, and the counterclaim is not capable of "independent adjudication by the court" (the "counterclaim exception"). Here, Mariner had a clear right to dismiss unilaterally, since no defendant had a counterclaim against it. (And PwC's pending § 9-11-37 motion seeking the sanction of dismissal provided no basis to block Mariner's voluntary dismissal. *See, e.g., C & S Indus. Supply Co., Inc. v. Proctor & Gamble Paper Prods. Co.*, 199 Ga. App. 197, 198 (1991).)

The trial court ruled, however, that the right to bar dismissal extends to parties who have no counterclaims against the plaintiff, as long as they have claims against third parties—even where such claims seek only indemnification for any primary liability the defendant may have to the plaintiff. The court based this conclusion on § 9-11-41(c)—which states that the "Code section also applies to the dismissal of any counterclaim, cross-claim, or third-party claim"—finding that a

pending cross-claim or third-party claim, like a counterclaim, could provide a basis for barring a voluntary dismissal. But subsection (c) by its express language simply extends the right of voluntary dismissal to parties who have filed counter-, cross-, or third-party claims. It does not provide that cross- and third-party claims can bar a plaintiff's dismissal.

This is clear from the context of the statute. Section 9-11-41 is entitled "Dismissal of actions" and authorizes, in subsections (a) and (b) respectively, voluntary and involuntary dismissal of an "action" brought by a "plaintiff." Subsection (c) speaks of "*dismissal* of any counterclaim, cross-claim, or third-party claim" (emphasis added), and extends to such claimants the dismissal provisions of subsections (a) and (b) (as well as the statute's other subsections). As a result, reading subsection (c) together with subsection (a) leads plainly to the conclusion that a plaintiff or other party with an affirmative claim is precluded from exercising its statutory right of voluntary dismissal *only* where a defendant to that claim has itself counterclaimed and objects to the dismissal.

B. Georgia Decisions Support This Reading

Decisions of the Supreme Court of Georgia and of this Court confirm the plain meaning of § 9-11-41(a), by allowing defendants with counterclaims against

the plaintiff to bar the plaintiff's voluntary dismissal, and preventing parties without such claims from doing so. In *Sandifer v. Lynch*, 244 Ga. 369, 372 (1979), for example, a mother sought to dismiss her custody petition pursuant to the predecessor statute of § 9-11-41(a). The Supreme Court affirmed the denial of this motion, where the defendants objected and had counterclaimed for their own affirmative relief (*i.e.*, they sought an order awarding them custody). *See also Avnet, Inc. v. Wyle Labs., Inc.*, 265 Ga. 716, 717-18 (1995); *Worthen v. Jones*, 240 Ga. 388, 389 (1977); *Brown v. Liberty County*, 247 Ga. App. 562, 563 (2001); *Mote v. Helmly*, 169 Ga. App. 475, 476 (1984).

By contrast, where the objecting party "had not filed an affirmative claim for relief against [the plaintiff]," that party has no standing to bar the plaintiff's voluntary dismissal. *Smith v. Mem'l Med. Ctr., Inc.*, 208 Ga. App. 26, 28 (1993); *Mote*, 169 Ga. App. at 476 ("plaintiff who does not have a counterclaim against him can dismiss his action" in accordance with § 9-11-41-(a)); *Hosp. Auth. v. Gray*, 123 Ga. App. 415, 419 (1971) (Pannell, J., concurring specially) (counterclaim provision permits defendant to object and bar plaintiff's voluntary dismissal if defendant "has filed a counterclaim, and *in that instance only*" (emphasis added)). Georgia decisions also make clear that the only effect of

subsection (c) on subsections (a) and (b) is to put counter-, cross-, and third-party claimants in the same position as *plaintiffs*, with regard to the voluntary and involuntary dismissal of their claims. *See Maupin v. Vincent*, 245 Ga. App. 635, 635-36 (2000); *Robinson v. Stokes*, 229 Ga. App. 25, 25-26 (1997); *Zohoury v. Zohouri*, 218 Ga. App. 748, 749 (1995); *Bertone v. Wilkinson*, 213 Ga. App. 255, 256 (1994); *Pettus v. Drs. Paylay, Frank & Brown, P.C.*, 193 Ga. App. 335, 336 (1989); *T.V. Tempo, Inc. v. T.V. Venture, Inc.*, 182 Ga. App. 198, 200 (1987); *Spivey v. Rogers*, 173 Ga. App. 233, 238 (1984). And the federal model for § 9-11-41 (*Comments on the Georgia Civil Practice Act*, 3 GA. STATE B.J. 295, 295, 305-06 (1967)) does not permit parties to use cross- or third-party claims to bar a plaintiff's voluntary dismissal. *See, e.g., Country-Wide Produce, Inc. v. H. Sacks & Sons, Inc.*, 1992 WL 369928, at *1 (S.D.N.Y. Nov. 25, 1992).

The Supreme Court of Georgia has also stated that the purpose of subsection (a)'s counterclaim provision is to "prevent a plaintiff from invoking the jurisdiction of the court and then withdrawing when the defendant seeks affirmative relief from the plaintiff." *Worthen*, 240 Ga. at 389. Of course, this rationale has no application where the plaintiff, as in *Smith*, 208 Ga. App. at 28, faces no counterclaims and the defendant only has claims against other parties. Even more

obvious, it is not implicated where the defendant's claims against other parties depend entirely on the plaintiff prevailing on its claims, and seek solely to pass on any liability of the defendant. By their nature, such claims cease to exist when the plaintiff dismisses its case. This Court has noted that fact while rejecting application of the predecessor to § 9-11-41 to situations involving derivative cross- and third-party claims. *Hosp. Auth.*, 123 Ga. App. at 417 ("[A]t the time of the [plaintiff's] dismissal, the cross claim was for contribution only and the dismissal of the whole case eliminated this issue."); *Norman v. Walker*, 123 Ga. App. 413, 414 (1971) (Plaintiff's voluntary dismissal left "no case pending in the court below" on which to premise defendant's wholly derivative third-party claim.).

Thus, the trial court's construction of § 9-11-41 is contrary to the statute's plain language and decisions interpreting it. Moreover, under the trial court's erroneous construction, a defendant will now have control over a plaintiff's case so long as the defendant can devise a claim of secondary liability to assert against a non-party or co-defendant. Such an outcome was hardly contemplated by the drafters of § 9-11-41, who enacted the statute to give "a plaintiff an opportunity to escape from an 'untenable position' and relitigate the case." *Lakes v. Marriott Corp.*, 264 Ga. 475, 476 (1994); *accord, e.g.*, *Cotton v. Surrency*, No. A05A1679,

2006 WL 39263, at *1 (Jan. 9, 2006).

C. *Thomas v. Auto Owners* Does Not Hold Otherwise

Contrary to the trial court's ruling, *Thomas v. Auto Owners Insurance Co.*, 221 Ga. App. 815 (1996), does not support the Defendants' effort to bar Mariner's voluntary dismissal. *Thomas* simply confirms that, where a plaintiff voluntarily dismisses its suit, a defendant may continue its own *independent* claims in the case, if it preserves the right to do so by objecting to the dismissal of its claims at the time the plaintiff dismisses its case.

Thomas involved an injured insured who filed suit against her own uninsured motorist carrier, Auto Owners, and against the driver involved in the accident. *Id.* at 815-16. Auto Owners filed a cross-claim against the driver, based on subrogation for payments made to the plaintiff. *See id.*; § 33-7-11(d), (f). Thereafter, the plaintiff and the driver settled, and the plaintiff dismissed the complaint with prejudice. *Thomas*, 221 Ga. App. at 816. Although Auto Owners had pending its claim for subrogation against the driver, it did not respond in any way when the plaintiff filed her voluntary dismissal. *See id.* Instead, more than a year later (as Appellant Thomas's brief reveals), Auto Owners sought to pursue its cross-claim, as though the action remained pending in court. *See id.*

On appeal, the issue was whether such a party with a separate claim, capable of independent adjudication even if the plaintiff's claim were dismissed, was required to speak up at the time of the plaintiff's dismissal in order to prevent its pending claim from being dismissed along with the rest of the action. *See id.* at 815. This Court found that the trial court should have dismissed Auto Owners' cross-claim, because "Auto Owners' failure to object [meant that the plaintiff's] dismissal terminated the entire action including the cross-claim." *Id.* at 816.

The *Thomas* Court's conclusion—that Auto Owners' complete silence at the time of dismissal, and for more than a year thereafter, meant that its cross-claim was dismissed along with the rest of the case—is a straightforward application of Georgia precedents. Those precedents establish a presumptive rule that a party with an independently adjudicable claim (such as Auto Owners) may pursue its claim after the plaintiff dismisses its claims, but only if it objects at the time of dismissal to preserve its claim. *See, e.g., D.P.S. Indus., Inc. v. Safeco Ins. Co. of Am.*, 210 Ga. App. 289, 290 (1993); *Hardwick-Morrison Co. v. Maryland*, 206 Ga. App. 426, 426-27 (1992); *Moore v. McNair*, 145 Ga. App. 888 (1978). Based on these authorities, the *Thomas* Court concluded that the insurer had both the right and the duty to object at the time of dismissal in order to preserve its cross-claim,

and that the consequence of failing to object was dismissal of the cross-claim along with the entire action. *See Thomas*, 221 Ga. App. at 816. *Thomas* never held, much less suggested, that an objection by Auto Owners could have prevented the plaintiff from dismissing her own distinct claims that faced no counterclaims; that issue simply was not before the Court. In fact, the only decision citing *Thomas* describes it as holding merely that failure to object to voluntary dismissal terminates the entire action. *See Robinson*, 229 Ga. App. at 27.

II. In Any Event, It Was Error To Sanction Mariner By Dismissing Its Complaint With Prejudice

Even if the trial court properly struck Mariner's voluntary dismissal, the court abused its discretion when it dismissed Mariner's complaint. There is no basis for concluding that Mariner engaged in discovery abuses, much less any "flagrant" abuses to justify the extraordinary remedy of dismissal with prejudice.

A. Mariner's Conduct Does Not Support Dismissal With Prejudice

None of the five grounds addressed in the trial court's November 9, 2004 sanctions order supported dismissal of Mariner's suit.

1. The trial court incorrectly concluded (R-12335) that Mariner violated its August 6, 2003 Order, which required that the PGFM privilege log

describe documents, "but not [their] contents," with "particularity." R-2971, 2976. *First*, even assuming that the court's requirement of "particularity" applied to logs other than the PGFM log to which it was directed, each of the disputed logs reasonably complied with the court's order. Because the court did not define what it meant by "particularity," Mariner used a categorical format specifically recommended by the Advisory Committee of the Federal Rules of Civil Procedure for cases involving large numbers of privileged documents. R-10334; Fed. R. Civ. P. 26(b)(5) Advisory Committee Notes (1993 Amendments) (making clear that "[d]etails concerning time, persons, general subject matter, etc., may be appropriate if only a few items are withheld but may be unduly burdensome when voluminous documents are claimed to be privileged or protected, especially if the items can be described by categories"). To prepare the logs at issue here, Mariner reviewed millions of pages of documents for privilege—precisely the sort of voluminous production for which the Advisory Committee endorses the categorical approach that Mariner used. R-8897-01. Each log (a) referenced every document withheld for privilege or work-product reasons; (b) identified by Bates number every page of claimed privileged material; (c) organized related documents into specific categories; (d) noted the nature of the documents in each category;

(e) identified the nature of the privilege asserted; (f) provided the time period referred to or otherwise addressed by the withheld material; (g) provided the author and recipients of documents included in each category; and (h) stated the entity for whom the privilege was claimed. R-3524-612.

Second, Mariner acted promptly to address PwC's concern about the form of the logs. When PwC first complained about the logs by letter, it did so in general terms, and Mariner made a response intended to address those concerns. R-9067, 10334. As soon as PwC identified specific issues related to specific entries—which it did not do until its briefs supporting its motions to compel—Mariner revised the logs accordingly. *See, e.g.*, R-3466, 3613. In fact, PwC has conceded that the revised logs resolve or moot its complaints. R-4119, 4123, 4465, 4470; 1st SR-1-32.

2. The trial court incorrectly concluded (R-12341-52) that, with respect to two categories of production, Mariner violated the January 15 and February 6, 2004 document-production deadlines. The first category involved Mariner's delivery on January 15, 2004, of 711,000 images (roughly 300 boxes). Despite actual compliance with the deadline, the trial court described the delivery as an abuse because, "once Mariner knew that it . . . was going to have to produce

a very large number of documents at the last possible minute, Mariner failed to inform the Court and failed to ask the Court to extend the time period." R-12344. The court also faulted Mariner for stating, at a hearing on October 22, 2003, that it would be able to meet the January 15, 2004 deadline. *See id.* Actually, under the circumstances, Mariner more than adequately fulfilled its discovery obligations. As of the October 22 hearing, Mariner had no reason to believe that, given the year-long pace of discovery thus far, PwC would suddenly and substantially increase the number of documents it requested. It was only afterwards, during the three-week period from October to November 2003, that PwC demanded the production of more than 5,300 boxes of documents—*i.e.*, more than two-thirds of all the documents PwC ultimately requested to be produced. *Supra* at 3. Faced with this onslaught of requests so close to the January 15, 1004 deadline, Mariner struggled successfully to meet PwC's increased demands. R-8897. As a result, by the deadline, Mariner had produced virtually all of the documents PwC requested during written discovery, amounting to over 20 million pages.

The second category for which the trial court faulted Mariner (R-12345-50) involved three sets of materials that were not produced for review by either the January 15 or February 6, 2004 deadlines. In all three instances, the oversights

were innocent, and Mariner conducted itself reasonably. Further, the volume of these materials, which the court grossly mischaracterized as constituting 25% of Mariner's total production of documents (R-12351), actually accounted for less than 4% of Mariner's total production.

With respect to the first set, the vendor handling duplication mistakenly failed to copy images stored on seven CD-ROMs. As soon as Mariner discovered, in March 2004, that the parties did not have images from those CD-ROMs (R-9575), Mariner promptly arranged for PwC to receive them, as contemplated by § 9-11-26(e)(2), which requires a party, after learning of an incomplete discovery response, "seasonably to amend" it.

With respect to the second set, Mariner's initial search for documents failed to disclose 45 boxes of documents that had been placed in an unused room. These 45 boxes had been stored in a building adjacent to Mariner's offices in space used for the MHG/MPAN bankruptcy, and afterwards forgotten. When discovered by Mariner while it was preparing to vacate the space during March 2004, Mariner promptly produced the boxes to PwC. R-9573. Again, this later production, while regrettable, is within the contemplation of § 9-11-26(e).

Finally, with respect to potentially relevant documents stored on disaster

recovery tapes, as soon as Mariner discovered in May 2004 that the materials had been overlooked, it notified PwC. R-9623-25. Moreover, Mariner asked the trial court to suspend the current discovery schedule, including depositions, to allow the Defendants ample time to review any responsive material on the tapes. *Id.*

3. The court also wrongly concluded (R-12352-54) that Mariner violated its Scheduling Order. In particular, the Court concluded that Mariner failed to follow the direction that the parties exchange lists of first-round fact witness depositions by March 15, 2004, and that, by March 31, "the parties shall meet . . . to schedule the taking of depositions of the persons" identified on the lists. R-1804. In fact, Mariner's actions were entirely consistent with the Scheduling Order and the parties' agreement, based on guidance in the Order, that PwC would begin taking depositions during the week of May 17, 2004, while Mariner would not begin until three weeks after that, and would continue thereafter in the same rolling manner. R-11185-88. To that end, and in compliance with the Scheduling Order, the parties, on March 15, 2004, exchanged lists of first-round fact witnesses they wished to depose, with Mariner listing 28 witnesses and PwC listing 168. R-11303-06, 11308-42.

In light of this understanding, during a March 31 conference held pursuant to

the Scheduling Order, Mariner advised PwC that it had not yet decided which witnesses it would first depose. R-11185-88. Despite the parties' earlier agreement on scheduling on a rolling basis, and despite the fact that PwC's first deposition week was to begin three weeks before Mariner's, PwC refused to provide its list of witnesses for its first week of depositions simply because Mariner was not ready to identify its witnesses for its first week of depositions. R-9614, 11185-88. As a result, *neither* party scheduled any depositions on March 31, 2004; indeed, no merits-based depositions had been taken when Mariner filed its voluntary dismissal. Mariner cannot be faulted for conduct consistent with the Scheduling Order and the parties' agreement about scheduling depositions.

4. The trial court erred in holding (R-12354-60) that Mariner violated requirements set forth at the February 16, 2004 hearing on PwC's motions to compel. Mariner allegedly failed to produce certain documents challenged by PwC's motions before either of two deadlines established in the Scheduling Order, which stated that "[c]opies of any documents ordered to be produced shall be delivered to [PwC] by the sooner of: (a) fourteen (14) days of the order requiring their production; or (b) March 15, 2004." R-1802. The court concluded that any confusion was Mariner's responsibility, because Mariner did

not seek clarification from the court concerning the February 16 requirements. R-12357-58. The trial court's conclusions are wrong.

First, the Scheduling Order's two deadlines applied only to "documents *ordered to be produced*" (R-1802 (emphasis added)), and at the February 16 hearing, no documents were "ordered to be produced." Instead, on February 16, the court outlined certain broad principles for determining whether, as PwC argued, Mariner had waived its privileges on the documents challenged in PwC's motions to compel by injecting certain issues into the lawsuit as to a few categories of documents. R-12506-09. As the court itself recognized, those principles did not determine which documents should be produced: "Now having [described the categories of waiver], I'm not sure it's going to help you to the extent that I can sit here now and tell you which documents have to be produced and which ones don't. That's going to be a very difficult task." R-12508-09 (noting the "gap" between the ruling and identification of documents). Indeed, the task was so difficult that the court appointed a Special Master to assist. R-12511-12. Even with such help, the court acknowledged that the process might not be completed *before May 2004*—and even that date might be "aggressive." R-12621-22. In short, because the court, at the February 16 hearing, did not order the production of particular

documents, Mariner did not violate the Scheduling Order.

Second, the trial court established, at the February 16 hearing, a four-step process for determining which documents should be ordered to be produced, and that process effectively superseded the Scheduling Order's deadlines. The process included, in the following sequence: (1) a written order from the court detailing precise standards governing the privilege-waiver issues (R-12619); (2) a meet-and-confer between the parties to address privilege claims (*id.*); (3) the selection and appointment of a Special Master to resolve disputes the parties could not (R-12511-12); and (4) a report from the Special Master "based on whatever limited disputes are left . . . and making specific recommendations," with the result that the trial court would hold "a streamlined hearing" to rule on which documents should be produced (*id.*). Because the Special Master (the fourth step in the process) was not even appointed *until March 16* (R-6115)—one day after the March 15 deadline had passed—this new process was fundamentally incompatible with the deadlines in the Scheduling Order.

Third, despite the trial court's contrary assertion in its sanctions ruling, *both Mariner and PwC* reasonably believed that production of any documents depended on a written order from the court clarifying the categories and standards for

determining privilege waiver. R-12619; 9627. Indeed, as PwC's counsel later wrote in a letter to the court: "Until we received the Court's April 23, 2004 Order directing the parties to submit proposed orders, it had been our understanding from the February 16, 2004 hearing that the Court intended to write its own order on the substantive aspects of its rulings on the motions to compel, whereas the parties were only to submit an order on the special master." R-9627. Mariner cannot be faulted for having proceeded on an understanding of the trial court's intentions that even its adversary shared.

Fourth, even if the parties had somehow discerned the trial court's intentions and themselves prepared a written order immediately after the February 16 hearing, that order—the first of four steps—would not itself have enabled Mariner to begin producing documents at all, and certainly not by either deadline established in the Scheduling Order. At most, an order would have articulated standards to guide the parties, the Special Master, and the court in addressing the privilege-waiver issues; the order would not have set forth the actual documents to be produced. Indeed, the order that eventually was issued on June 10, 2004, did not identify specific documents to be produced. R-11371.

5. The trial court also improperly faulted Mariner (R-12360) for

failing to produce to the Special Master 18 boxes of documents over which Mariner asserted privilege. *First*, as discussed above, Mariner (like PwC) reasonably believed that the trial court intended to issue a written order to guide the Special Master in his review. So long as that order was outstanding, no purpose would have been served by producing documents to the Special Master. R-9732-33 (stating that, in late May 2004, the Special Master was waiting for the parties to jointly direct him how to proceed, and that he did not expect any party to simply send him documents for review). *Second*, Mariner understood that PwC was planning to narrow its challenges to the disputed privilege logs in a way that might have taken some of the documents in the 18 boxes out of contention. R-9582-83, 9657-59. Although, as it turned out, PwC never provided its revised challenges (*id.*), it made sense at the time for Mariner to wait for the promised revisions before providing documents to the Special Master, because the revisions might have reduced the number of documents he needed to review.

B. Even If Technical Non-Compliance Could Somehow Be Found, Dismissal With Prejudice Was Far Outside The Bounds Of Any Permissible Sanction Under Georgia Law

Dismissal with prejudice is a remedy reserved for "the most flagrant cases,"

Yarbrough v. Kirkland, 249 Ga. App. 523, 524 (2001)—*i.e.*, cases where willfulness, the need for the ultimate sanction of dismissal, and prejudice exist. None of these three factors remotely supports dismissal with prejudice here.

First, Mariner's conduct does not amount to "willful failure in bad faith or in total disregard of the court's order." *Harwood v. Great Am. Mgmt. & Inv., Inc.*, 171 Ga. App. 488, 490 (1984). In assessing willfulness, a court should consider, among other things, the size, volume, and amount of discovery requested, as well as the reasonableness of the justifications offered for noncompliance. *See Gen. Motors Corp. v. Conkle*, 226 Ga. App. 34, 42 (1997) (physical precedent); *see also Motani v. Wallace Enters., Inc.*, 251 Ga. App. 384, 386 & n.7 (2001) (citing *Conkle*); *Yarbrough*, 249 Ga. App. at 524 (same). For example, in *Conkle*, the trial court entered a default judgment after defendant General Motors withheld certain documents that the court had ordered it to produce. *See* 226 Ga. App. at 35-38. In reversing, this Court emphasized that, by the time the default judgment was entered, General Motors had produced over 500,000 pages of documents—"a breadth and volume" atypical of willful noncompliance and instead providing a "reasonable" excuse for late production of documents. *Id.* at 44-45.

Here, the magnitude of Mariner's discovery obligations—involving

production of approximately 20 *million* pages—dwarfs what was at issue in *Conkle*. Accordingly, Mariner's extensive and successful efforts in timely producing all but a tiny fraction of the boxes requested is at least as "reasonable" as General Motors' efforts in *Conkle*. And, as demonstrated above in Part II.A, in each of the five alleged instances of discovery abuse, Mariner either fully complied with the discovery process, or provided a justifiable explanation for any technical non-compliance, but in all events did not seek to intentionally thwart discovery.

Second, before imposing the "'drastic sanction[] of dismissal,'" the trial court did not adequately "'attempt to compel compliance . . . through the imposition of lesser sanctions.'" *Yarbrough*, 249 Ga. App. at 524; *see also Conkle*, 226 Ga. App. at 42-46 (error to not consider appropriateness of lesser sanctions). The trial court noted that it was forced to drastic ends—*i.e.*, the ultimate sanction of forever barring Mariner's lawsuit—because an earlier "threat of attorneys fees" had "caused no change in Mariner's behavior" (R-12377), but the court's characterization of events is contrary to the facts. The possibility of attorneys' fees rested on a motion that PwC had filed pursuant to § 9-11-37(a)(4) for fees incurred in preparing its various motions to compel. Although the trial court had that motion before it during the February 16 hearing, the court declined to consider the

fee request at that time, and the court never did hear PwC's request for attorneys' fees. Thus, the appropriateness of that request, which was not even a claim of disobedience of a court order, was never directly considered by the court, and certainly provided no basis for imposing the ultimate sanction of dismissal.

Third, the trial court did not make a determination whether Mariner's alleged discovery violations prejudiced PwC by "in fact imped[ing PwC's] ability to prepare a defense." *Harwood*, 171 Ga. App. at 491; *see also Conkle*, 226 Ga. App. at 42 (directing courts to consider "prejudice to movant's case"). Indeed, contrary to *Harwood* and *Conkle*, the trial court denied that prejudice is even relevant, relying on *State Farm Mutual Automobile Insurance Co. v. Health Horizons, Inc.*, 264 Ga. App. 443, 445 (2003). R-12379. But *Health Horizons* never suggested that it was overruling *Harwood* in requiring prejudice. While the trial court here did conclude, in the alternative, that PwC had been prejudiced "by being faced with impending depositions and extraordinary delays" (R-12381), that conclusion is unsupportable. No merits-related depositions had been taken or scheduled when Mariner filed its dismissal and PwC sought sanctions.

Thus, even if some form of misconduct were found, the prerequisites for the ultimate sanction of dismissal with prejudice are clearly lacking.

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CERTIFICATE OF SERVICE

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