

No. A09-2201

State of Minnesota
In Court of Appeals

FRONTIER INSURANCE COMPANY,
a foreign corporation in Rehabilitation,

Appellant,

vs.

FRONTLINE PROCESSING CORPORATION, a Nevada
Corporation; **LMA UNDERWRITING AGENCY, INC.,** a
Minnesota corporation; and **CHRISTOPHER LEON KITTLER,**

Respondents.

RESPONDENTS' BRIEF AND ADDENDUM

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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I. STATEMENT OF THE ISSUES

A. DID THE TRIAL COURT ABUSE ITS DISCRETION BY DISMISSING FRONTIER'S CLAIMS AS A DISCOVERY SANCTION?

On February 4, 2008, Frontline filed a motion for sanctions seeking the dismissal of Frontier's Complaint. This motion was based on Frontier's failure to adequately respond to discovery, its numerous discovery violations, and its intentional failure to comply with Court ordered discovery deadlines of February 5, 2006, October 26, 2007, December 10, 2007 and December 20, 2007. Frontier filed a brief in opposition to this motion on March 3, 2008. By Order dated April 29, 2008, the Special Master granted Frontline's motion and dismissed Frontier's case. (Appellant's Addendum at 8-16). The Special Master clarified the Order and denied reconsideration on August 4, 2008. (*Id.* at 17-23). The Trial Court adopted this Order of Dismissal "in its entirety" on October 7, 2008 (*Id.* at 24-33).

Apposite Cases and Authority.

Firoved v. General Motors Corp., 277 Minn. 278, 283, 152 N.W.2d 364, 368 (1967);

Breza v. Schmitz, 311 Minn. 236, 248 N.W.2d 921 (1976) Minn. R. Civ. P. 37.2(b);

Chicago Greatwestern Office Condo. Assn. v. Brooks, 427 N.W.2d 728, 730 (Minn. App.1988).

B. DID THE TRIAL COURT ABUSE ITS DISCRETION IN AWARDING FRONTLINE \$177,419.14 IN FEES AND COSTS?

On February 4, 2008, Frontline filed a motion for attorney's fees and costs. Frontier responded to that motion on March 23, 2009. On September 15, 2009, Special Master Lange awarded Frontline \$177,419.14 in attorney's fees and costs. (Appellant's

Addendum at 51). The Trial Court adopted this Order on October 26, 2009. (Id. at 53).

Apposite Cases and Authority.

Minn. R. Civ. P. 37.02.

C. DID THE TRIAL COURT COMMIT ERROR IN REFUSING TO STAY SANCTION PROCEEDINGS AGAINST FRONTIER – A FOREIGN INSURANCE COMPANY IN REHABILITATION?

On November 12, 2008, Frontier filed a motion to stay Frontline’s claim for attorney fees on the grounds that the Trial Court had no authority to sanction Frontier. Frontline filed its response on November 19, 2008. The Special Master denied Frontier’s motion on January 30, 2009. (Appellant’s Addendum at 34). The Trial Court adopted the Special Master’s Order denying the stay on March 2, 2009. (Id. at 38).

Apposite Cases and Authority.

Minn. R. Civ. P. 37.02.; Minn. Stat. Ann. § 60B.58; Schultz v. Interstate Contracting Co. 265 N.W. 296 (Minn. 1936).

II. STATEMENT OF THE CASE

Frontier filed its Complaint, over five years ago, in July of 2004. The case was filed in the Fourth Judicial District and was assigned to the Honorable John L. Holahan.

Frontier alleged that Frontline Processing, LMA Underwriting and Christopher Kittler (herein referred to as Respondents or Frontline) failed to pay premiums on numerous merchant bankcard bonds and failed to properly underwrite many individual bankcard bonds. Amended Complaint. Frontier sued Frontline for, among other things, breach of contract and fraud. Id.

Despite the seriousness of these allegations, over the next several years of

litigation, Frontier produced no real evidence in support of its claims. Instead, Frontier attempted to gain advantage over Frontline through an unprecedented pattern of delay, obstruction and obfuscation. As part of Frontier's litigation strategy, it failed to answer over 28 discovery requests. (Appendix 1 at 174-187). All 28 of these discovery requests had been ordered produced on numerous occasions, including orders issued on November 15, 2006, October 3, 2007, November 2, 2007, and December 26, 2007. Furthermore, the limited discovery responses Frontier did finally provide, on December 20, 2007, have been characterized by Judge Lange and Judge Holahan in part as "seriously deficient . . . woefully inadequate" and "failed to provide any relevant information whatsoever!" (Appellant's Addendum at 10-16). Judge Lange, who had been appointed special master in this case in September of 2009, has stated bluntly!

"I have been litigating cases as a lawyer and a judge for over 40 years and I have never seen such obfuscation"

Transcript of Hearing, 3/11/08 (Appendix 1 at 8-10).

As a result of this long pattern of delay and obfuscation, on April 29, 2008, Judge Lange finally put a stop to Frontier's misconduct. Frontier's case was dismissed in its entirety. (Id. at 8-16). Judge Lange renewed and clarified his recommendation by Order dated August 4, 2008. (Id. at 17-23). On October 7, 2008, Judge Holahan adopted this order in its entirety. (Id. at 24). Subsequently, after denying Frontier's multiple motions to stay and for reconsideration, Judge Lange entered an Order dated September 15, 2009 granting Frontline a portion of its attorney fees. (Id. at 51). This Order was ultimately adopted by Judge Holahan in its entirety on October 26, 2009. (Id. at 53).

III. STATEMENT OF THE FACTS

In 1999, Frontline was a start-up Independent Sales Organization (“ISO”). ISO’s acquire merchants who want to be able to accept credit cards for payment of their offered goods and services. It was Frontline’s responsibility to put these acquired merchants into relationships with an acquiring bank (in this case First State Bank of Eldorado) and with a credit card processing company (in this case Global Payments).

It is undisputed that acting as an ISO and as an acquiring bank carries with it financial risks for both the ISO and the bank. For example, the ultimate responsibility for the funding of product returns lies with the ISO and the acquiring bank. In this regard, some merchants (internet merchants, travel agencies, etc.) carry a higher-risk of loss than other merchants. To protect against this type of loss, Frontline and First State Bank of Eldorado entered into a relationship with Frontier Insurance Company. Frontier would issue a type of insurance bond for the highest risk merchants and, in exchange, were paid a premium for each merchant that processed under the bond.

The Program began in 1999. It is undisputed that Frontline paid Frontier over \$500,000 in premiums. (Appellant’s Appendix at 123). Due to Frontier’s poor business practices, Frontline ended the ongoing relationship on April 1, 2000. (Respondant’s Appendix at 202-204).

Over five years ago, on July 14, 2004, Frontier filed a Complaint against Frontline, LMA and Chris Kittler (the owner of Frontline and LMA). This Complaint accused Frontline and LMA of intentionally defrauding Frontier through improper underwriting and by failing to pay premiums on bonds issued by Frontier. See Amended Complaint.

Frontier also accused Chris Kittler (individually) of intentionally defrauding Frontier. These claims have been held over Frontline and Chris Kittler's head for over five years.

As found by Judge Holahan, despite the seriousness of these allegations, despite the passage of several years of litigation, despite numerous discovery requests, and despite multiple court orders and discovery deadlines, Frontier failed to disclose in any detail what was wrong with the underwriting on any particular merchant, how much premium it believes was owed, how premium was calculated on any individual bond, or even how much was owed on any particular bond. (Appellant's Addendum at 24-33). Frontier did nothing but repeatedly restate the unsupported allegations in its Complaint with no real evidentiary support whatsoever.

Rather than produce evidence and allow Frontline to prepare its defense, Frontier instead chose the tactic of willful delay and obfuscation. This intentional tactic of misconduct came in three parts.

First, as found by Judge Lange and Judge Holahan, Frontier engaged in a lengthy "pattern of delay and inattention." (Appellant's Addendum at 5). Over several years of litigation, Frontier did almost nothing to advance its case. It failed to properly answer discovery, it failed to diligently review documents, it failed to subpoena third-party records, it did nothing but offer excuses and file last minute requests for extension of time.

Second, and most importantly, in attempting to hide its evidence from scrutiny by Frontline, Frontier willfully and intentionally ignored multiple court orders including, most recently, Judge Lange's Orders dated November 15, 2006, October 3, 2007,

November 2, 2007 and December 26, 2007.¹ (Appellant's Appendix at 27) (Addendum at 7) (Appendix 1 at 42-44) (Appellant's Addendum at 1-7). All of these Orders specifically required Frontier to take action, to supplement its discovery, and to disclose its evidence to Frontline. As found by Judge Lange and Judge Holahan, Frontier ignored these orders without excuse or justification.

Finally, Frontier failed to honestly answer over 28 of Frontline's straightforward discovery requests. Special Master Lange ordered Frontier to answer all of these discovery responses on November 15, 2006. (Appendix 1 at 65-132) (A lengthy hearing where Special Master Lange discussed and ruled on each discovery request). Just a sample of some of the requests Frontier failed to answer in any meaningful way are as follows:

REQUEST FOR PRODUCTION NO. 3: Please produce all travel and expense records, files and reports for the individuals listed in your responses to LMA's Interrogatory No. 28 [Frontier agents with knowledge of case] for the years 1999 through 2001.

REQUEST FOR PRODUCTION NO. 4: Please produce all financial information including bills, receipts, invoices, payments, reimbursements, expenses, travel expenses, etc. relating to any and all business Frontier Insurance Company conducted at any time with any defendant.

INTERROGATORY NO. 9-14: Please state, with a reasonable amount of detail, what was wrong or improper with the underwriting on the MasterCard surety bond Benchmark Custom Golf [and 5 other merchants]

¹ It should be noted that while Mr. Olson, Frontier's local counsel, signs many of the pleadings in the Addendum and Appendix attached to Frontier's Brief, Frontier's Atlanta counsel, John Menechino and his firm Smith, Currie and Hancock, handled (with the exception of one hearing) all discovery matters in this case. It is obvious that all discovery decisions came from Frontier and its Atlanta counsel, and not from Mr. Olson's office.

with a bond number of 122738. Please include a description of any information you believe was incomplete, inaccurate or missing.

INTERROGATORY NO. 15: You have claimed that “\$314,094.46” of premium was “not reported” (see your response to LMA’s Interrogatory No. 34). Please state, by merchant name, on what particular bond or bonds that premium was owed and when the premium was owed.

REQUEST FOR PRODUCTION NO. 12: Please produce the personnel file for Chris McEvoy [Frontier’s main contact] (redacting, if necessary, by redaction and accompanying privilege log, any private medical information).

REQUEST FOR PRODUCTION NO. 13: Please produce any documents that in any way discuss or relate to any disciplinary actions, or work performance issues, related to Chris McEvoy.

REQUEST FOR PRODUCTION NO. 16: Please produce any and all documents or worksheets that show how any of the premiums at issue in this lawsuit were calculated by Frontier.

REQUEST FOR PRODUCTION NO. 18: Please produce any and all documents that show or demonstrate that premiums were underpaid or unreported.

REQUEST FOR PRODUCTION NO. 23: Please produce any and all documents you received from, or sent to, Ron Reavis.

(Appendix 1 at 177-185). All of these requests go to the heart of Frontier’s claims and seek information that should have been available at the time the Complaint was filed.

The first deadline to produce this information was February 5, 2006. (Appellant’s Addendum at 10, 27). Frontier ignored this deadline and subsequent final deadlines were set for October 26, 2007 and December 10, 2007. (Addendum at 7-8) (Appendix 1 at 42-44). Frontier missed each of these deadlines, finally producing some limited supplementation – nearly two years later – on December 20, 2007. (Appellant’s Appendix at 115-125). This supplementation was so woefully inadequate and incomplete that it can be characterized as nothing more than yet another intentional failure to

respond. As a result of these incomplete discovery responses, and combined with Frontier's long history of discovery abuse, Frontier's case was dismissed. (Appellant's Addendum at 8-16, 24-33). Subsequently, Frontline received an award of its fees and costs. (Id. at 44-49, 51-54).

IV. STANDARD OF REVIEW

At issue here is whether District Judge Holahan abused his discretion in entering a discovery sanction of dismissal of Frontier's case and in awarding Frontline a portion of its attorney fees and costs. The determination as to whether to issue a discovery sanction, including dismissal, is within the discretion of the trial court. Reichert v. Union Fidelity Life Ins. Co., 360 N.W.2d 664, 667 (Minn. App. 1985); (citing Scherer v. Hanson, 270 N.W.2d 23 (Minn. 1978)). The standard of review of a dismissal order requires this court to view the record in the light most favorable to the trial court's orders. Id., (citing Zuleski v. Pipella, 309 Minn. 585, 245 N.W.2d 586 (1976)). In Zuleski, the Court held "The decision to dismiss necessarily depends upon the circumstances peculiar to each case, justice and equity to each party, and considered with reference to just, speedy, and inexpensive disposition of the case and the policy underlying the dismissal rules of preventing harassment and unreasonable delays in litigation."

Frontier also contends that Judge Holahan's committed error in his refusal to stay the sanction proceedings against Frontier. To the extent this decision was based on his interpretation of Minnesota Statute Annotated § 60B.58, the standard of review is de novo. Great W. Cas. Co. v. Barnick, 542 N.W.2d 400, 401 (Minn. App. 1996).

V. ARGUMENT

A. DUE TO FRONTIER'S INTENTIONAL DELAY, OBFUSCATION AND ITS REFUSAL TO ABIDE BY SEVERAL DISCOVERY ORDERS, THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DISMISSING FRONTIER'S CLAIMS.

1. Judge Lange diligently presided over discovery in this case and was particularly well suited to render his decision.

The Honorable Judge Steven Lange was appointed Special Master over this case on September 20, 2006. Of course, due to Judge Lange's 40 plus year career as a lawyer, trial lawyer, judge and special master, he was particularly well-suited to analyze and rule on the conduct of Frontier. Without question, Judge Lange intimately and diligently presided over this case. He was involved in dozens of calls and emails, he participated in at least two lengthy telephone hearings, he reviewed thousands of documents, he read hundreds of pages of briefs, he participated in three, multi-hour and in person hearings, and he drafted and issued several lengthy, well reasoned orders. Judge Lange has spent well over 100 hours on the file. (Appendix 1 at 1-7). He was intimately familiar with this case, the parties, and the tactics of Frontier.

As part of his intimate handling of the case, and based on his first hand review of Frontier's misconduct, Judge Lange made the following findings:

Plaintiff's failure to conduct discovery was, in the Special Master's opinion, part of a pattern of delay and inattention.

Order and Memorandum, 12/26/07 (Appellant's Addendum at 5).

"I have been litigating cases as a lawyer and a judge for over 40 years and I have never seen such obfuscation"

Transcript of Hearing, 3/11/08 (Appendix 1 at 8-10) (commenting on Frontier's

misconduct).

Defendants have barely more information today, than they had prior to Frontier's purported supplementation of discovery on December 26, 2007. Moreover, the nature of Frontier's discovery violations is particularly egregious, since the Special Master has repeatedly ordered that the discovery be provided.

....

The failure to provide adequate discovery after the numerous orders extending deadlines, compelling discovery and admonishing the parties as to the possibility of sanctions here, is not part of an isolated event, but part of a lengthy pattern of non-compliance by Frontier. Finally, the failure to respond appropriately to discovery, was without justification.

Order and Memorandum, 4/29/08 (emphasis added) (Appellant's Addendum at 15).

Moreover, the Special Master's decision was not based on this single interrogatory, but on the entirety of defendants' efforts to obtain discovery from plaintiff. The Special Master's Order and Memorandum cites numerous other discovery violations, all of which are serious, and all of which prevented the defendants from formulating a defense to plaintiff's complaint.

Order and Memorandum, 8/04/08 (Appellant's Addendum at 23). As a result, Special Master Lange, after several warnings went unheeded, and after several final discovery deadlines were ignored, dismissed Frontier's case.

Judge Holahan then performed a de novo review of the lengthy discovery record and adopted Judge Lange's dismissal order "in its entirety" finding the following:

Frontier's claims have been pending against Frontline and Chris Kittler's for four years. Despite the seriousness of these allegations, despite numerous discovery requests, and despite multiple court orders and discovery deadlines, Frontier has not, to this day, disclosed in any detail what is wrong with the underwriting, how much premium it believes was owed, or how much is owed on any particular bond. Frontier has done nothing but repeatedly restate the unsupported allegations in its Complaint

and provided no evidence to support its claims.

....

Plaintiff's failure to comply with discovery and Court orders in this case is egregious.

....

The failure to provide adequate discovery after numerous orders extending deadlines, and the Special Master compelling discovery and admonishing the parties as to the possibility of sanctions, is not part of an isolated event, but part of a lengthy pattern of non-compliance by Frontier. Examples of Plaintiff failing to respond appropriately to discovery are numerous.

....

Plaintiff's failure to respond appropriately to discovery was without justification.

Order and Memorandum, 10/07/08 (Appellant's Addendum at 25, 27, 31-33).

As found by Judge Lange and Judge Holahan, Frontier's misconduct was particularly unique, unjustified, and egregious. This was no ordinary discovery dispute. There is nothing in the record suggesting that these judges abused their discretion in this regard.

2. Frontier intentionally delayed this case and has repeatedly and intentionally ignored the orders of the Special Master and the District Court.

Frontier's misconduct in this case has been truly egregious. The Special Master dismissed Frontier's case because, for years, Frontier attempted to gain advantage over Frontline by refusing to produce any evidence in support of its claims. In doing so, Frontier has refused to answer discovery and it has intentionally ignored several orders issued by the Special Master.

Prompted by the first two years of Frontier's evasiveness and delay, Frontline filed

its first motion seeking to compel full discovery responses. (Appendix 2 at 291-327). By that time, of course, Frontier had already had two years to gather its evidence. In a hearing held on November 15, 2006, the Special Master went through each request and granted Frontline's motion to compel nearly in its entirety. Specifically, the Special Master ordered Frontier to respond to over 28 discovery requests that were not appropriately answered by Frontier. See generally, Transcript of Hearing and Order, where Judge Lange went through each individual request (Appendix 1 at 65-133). A summary of these 28 unanswered discovery requests that Judge Lange ordered answered is included. (Appendix 1 at 138-141). During the hearing, the Special Master made very clear that it expected Frontier to respond to the discovery requests forthwith.

[I]t's Frontier who started this lawsuit, and if it's seeking hundreds of thousands or seven figures or more of damages, it needs to come forth with appropriate discovery [responses] and soon.

(Appendix 1 at 110).

Again I want to reiterate the fact that Frontier is the Plaintiff, and if it's going to pursue massive litigation like this and put the Defendants to massive expense, it has an obligation to come forward and do its due diligence to provide these numbers [requested in discovery].

(Appendix 1 at 119-120).

In its Brief, Frontier admits that Judge Lange ordered the discovery answered, but argues repeatedly that no deadline for complying with the Special Master's order was ever set, and therefore, it argues that it had an unlimited time in producing the information. Frontier's Brief at 39 ("At the November 15, 2006 hearing, the Special Master asked the parties to agree to a February 2007 discovery cutoff – but no such date

was ever set or ordered”). This argument smacks of bad faith. Both Judge Holahan and Judge Lange were at the meeting when the deadline was set and both have already ruled that Frontier agreed to the February 5, 2007 deadline.

Judge Holahan has specifically ruled: “Following that [Nov 15, 2006] hearing, counsel met in chambers with both Judge Holahan and the Special Master. At that time, Frontier agreed to provide the required discovery responses, as ordered by the Special Master, on February 5, 2007.” (Appellant’s Addendum at 24-33 (emphasis added)). Despite this specific finding, Frontier persists in arguing that the February deadline never occurred and that Frontier had no deadline – whatsoever – to comply with the Special Master’s discovery order. Frontier has no credibility on these discovery issues.

Despite the Special Master’s direct Order to produce the discovery responses, for nearly six months, Frontier took no action to adequately answer the outstanding discovery. In other words, it flat ignored a duly appointed Special Master’s Order to supplement its discovery responses. Counsel for Frontline, therefore, requested Frontier to comply with the Court’s order and respond to discovery. (Appendix 1 at 134-135). Frontier, however, continued to ignore both Frontline’s request and the Special Master’s Order, and refused to supplement its inadequate discovery responses. It did absolutely nothing for nearly one year.

Frontier’s complete inaction culminated in a September 24, 2007 telephonic hearing for the purpose of monitoring the discovery process. During the hearing, the Special Master specifically sought input from counsel on an appropriate date for completion of discovery. Mr. Menechino, counsel for Frontier, agreed without caveat or

qualification that Frontier would be able to fully respond to all outstanding discovery requests by October 26, 2007. In fact, the October 26, 2007 date was the date suggested by Frontier. On October 3, 2007, as a result of that hearing, the Special Master issued an order stating:

All written discovery shall be completed and all written discovery answers fully supplemented by Friday, October 26, 2007, at 4:30 p.m.

(Addendum at 7-8 (emphasis added)).

Despite the Special Master's clear and unequivocal Order, and with no Order granting an extension in place, Frontier did not provide any discovery on October 26, 2007. Instead, just two days before the deadline, Frontier requested yet another extension of the deadline. (Appendix 1 at 136-137).

On November 2, 2007, the Court held a hearing on Frontier's request for an extension. During that hearing, counsel for Frontline identified the discovery requests to which Frontier had not yet responded. Significantly, these discovery requests were the same 28 requests the Special Master had reviewed on November 15, 2006, found relevant, and specifically ordered Frontier to answer. (Summary at Appendix 1 at 138-141). During the hearing, the Special Master voiced his acute displeasure at Frontier's continued delay and inattentiveness.

The reason I was called into the case by Judge Holahan in September of 2006 is because he could see that for the year or two preceding his appointing me Special Discovery Master is because it [discovery progress] wasn't happening in 2005 and it wasn't happening in 2006 and so he appoints me in September of 2006 and now another year has gone by and it seems to me you are just making excuses in all due respect.

(Appendix 1 at 41). The Special Master also stated: "...I don't know how much more

slack I can cut you after three and-a-half years.” Id. The Special Master then set December 10, 2007 as the absolute complete and final written discovery deadline:

So if you finish it [the document review] on November 30th then I expect the supplementation to be done by Monday, December 10th.

....

So we now have, we are going to complete all of the written discovery, supplementation, as indicated here and the last possible date that that can be done is December 10th.

(Appendix 1 at 42-44).² Following the hearing, Counsel for Frontier circulated a memorandum of understanding and provided it to the Special Master. The memorandum stated:

All parties shall fully supplement their responses to Interrogatories and Requests to Produce by December 10, 2007, which is 10 days after Plaintiff’s counsel’s[?]contemplated view of Defendant’s documents in Billings, MT on or about November 27 – 30.³

(Appendix 1 at 142 (emphasis added)).

Incredibly, despite the Special Master’s order, and its own agreement to abide by the December 10 deadline, Frontier produced no documents or discovery responses on December 10. Instead, Frontier waited until that very day, at 4:56 p.m., to request a ten-day extension. (Appendix 1 at 144-146).

² Frontier casually characterizes this Order as “granting an extension of time.” This is absurd. The Court was simply, patiently, giving Frontier yet another deadline to be obeyed. Of course, Frontier ignored this second deadline.

³ In its Brief, Frontier mischaracterizes this Order as Judge Lange requiring them to inspect all of the documents “from November 27, through November 29, 2007.” Brief at 29. Frontier had years to review the documents and could have done so at any time prior to the December 10 deadline. The November 27 through November 29 contemplated period was suggested and agreed to by counsel for Frontier. [cite]

As a result, Frontline filed a motion seeking dismissal of Frontier's claims. In an order of December 26, 2007, the Special Master, showing great restraint, again voiced its acute displeasure with Frontier's delay and inattention, but denied Frontline's motions for sanctions. (Appellant's Addendum at 1). The Special Master did, however, specifically warn Frontier that continued refusal to comply with a discovery order could result in a sanction of dismissal. Judge Lange warned Frontier as follows:

Without a doubt, plaintiff [Frontier] failed to meet the discovery deadlines set forth in the scheduling order and those granted by the Special Master following the November 2nd hearing. As the Special Master explained at that hearing, there is little excuse for plaintiff's failure to conduct discovery in the year following the release of the document index. Certainly, under Minn. R. Civ. P. 37.2(b), sanctions are available against parties who, like plaintiff, fail to provide timely discovery. In Breza v. Schmitz, 311 Minn. 236, 236-37, 248 N.W.2d 921, 922 (1976), the Minnesota Supreme Court affirmed dismissal of plaintiff's complaint where the record supported the trial court's findings that:

'plaintiff... willfully and without justification or excuse' refused to comply with discovery orders and 'deliberately and in bad faith, with the intent to delay the trial' continued to refuse to cooperate with the court and defendants' counsel to bring the case to a prompt and expeditious conclusion as directed by this court and thereby 'forfeited her right to trial of her case on the merits.'

(Appellant's Addendum at 4).

3. **A look at Frontier's final supplementation of discovery reveals that Frontier completely refused to abide by the orders of the Special Master and that dismissal of the case was proper.**

As indicated above, Frontier flat refused to provide any discovery responses by the absolute final discovery deadline of December 10, 2007. Instead, without Court permission, Frontier provided incomplete and inadequate responses on December 20,

2007. (Appellant's Appendix at 115-125). The Judge allowed that self-granted extension of time, after the fact, on December 27, 2007 (Id. at 1-7). In any event, Judge Lange, four months later, in an Order dated April 29, 2008, described these limited responses in part as "seriously deficient ... disingenuous ... fails to provide any relevant information whatsoever ... particularly egregious ... [and] without justification." (Appellant's Addendum at 11-12, 14-15).

For purposes of brevity, Frontline will not go through all 28 discovery requests Frontier failed to answer, but rather, will highlight a few responses. For example, Frontline's Request for Production No. 3 sought travel and expense reports for the Frontier agent and employees that worked on this Program, including: Scott Azzollini, Maureen Hardy, John Hillman, David Campbell, Chris McEvoy, Peter Foley, and Nancy Pierro. (Appendix 1 at 177). This information is relevant to prove that Frontier's own agents traveled and underwrote many of Frontline's merchants.

Despite the fact that Special Master Lange ordered the information produced, Frontier's supplemental response stated that it could not release any records. (Appellant's Appendix 1 at 116). In justification, it offered evidence that Chris McEvoy – only one of the several agents and employees at issue in the discovery request – was not a Frontier Insurance Company employee, but rather, was an employee of Frontier Insurance Group. (Id. at 127). Frontier's obligations, however, under Request for Production No. 3, had already been ruled on nearly one year previously on November 15, 2006, by the Special Master.

Mr. Olsen [counsel for Frontier]: We objected to [Request for Production No. 3] on the grounds that it's overly broad and seeks irrelevant evidence, but what we would agree to is to produce travel and expense records sufficient for the defendants to determine when our employees or agents visited the defendant's office or visited customers related to the bonds that were at issue in this litigation.

They want to know when our agents visited them and their customers, and that information we can provide.

The Court: The production should encompass appropriate answers, identification of individuals, and documentation with respect to travel to visit any of defendants', plural, facilities or merchants' offices, and I understand that's what the Plaintiffs are willing to produce

(Appendix 1 at 96). Clearly, the Special Master ruled, and Frontier's own counsel agreed, that Frontier was obligated to respond to Request for Production No. 3 by producing "travel and expense records sufficient for the defendants to determine when our employees or agents visited the defendant's office or visited customers related to the bonds that were at issue in this litigation." Thus, Frontier's December 20 supplemental response to Request for Production No. 3, which refused to produce any travel or expense records concerning Chris McEvoy – or anyone else – is clearly not in compliance with the Special Master's orders. Frontier flat ignored the Court's Order.

Frontline's Request for Production No. 4 requested "all financial information including bills, receipts, invoices, payments, reimbursements, expenses, travel expenses, etc. relating to any and all business Frontier...conducted at any time with defendant."

(Appendix 1 at 148-149). Frontier's December 20, 2007 supplemental response was that it would "make available its financial information for the years 1999, 2000, and 2001."

(Id. at 149). Outrageously, the "financial information" Frontier actually "made available"

was its generic asset and liability statements for the years 1999 through 2001. (Id. at 190-199). Frontier completely ignored the discovery request and Judge Lange's Order.

In its Brief, Frontier argues that this response was adequate. Again, Frontier's own defense simply highlights its evasive tactics. The asset and liability statements do not, in any respect, include "bills, receipts, invoices, payments, reimbursements, expenses or travel expenses" as requested by the discovery. (Id. at 190-199).

Moreover, the asset and liability statements do not identify which assets and liabilities (or most importantly expenses) relate to Frontier's business dealings with Frontline – the category of documents expressly requested – and the category of documents that would prove Frontier visited and underwrote many of Frontline's merchants. Frontier has flat refused to produce relevant information that it represented it had, was asked for, and was ordered produced.

Furthermore, Frontier's failure to answer Interrogatory 15 is perhaps its most egregious violation of the Special Master's Orders. (Id. at 149-150, 153). It is important to remember that in this case, Frontier is claiming (without any real support) that Frontline (and Chris Kittler individually) committed fraud by intentionally failing to pay premiums on merchant bankcard bonds.

Premiums, however, were calculated on a merchant bond by merchant bond basis, using as a baseline – with many variables – the amount each merchant processed. If a merchant never processed, no bond premium was owed. As a result, in discovery, Frontline asked Frontier how much in premiums "were owed to Frontier Insurance Company" and in Interrogatory No. 15 "by merchant name, on what particular bond or

bonds that premium was owed and when the premium was owed.” (Id. at 152-154). This was a simple, straightforward request, that clearly asks for a breakdown, by merchant, of how much and when the premium was owed.

Instead of answering this discovery, three years after the case was filed, Frontier produced nothing more than a list of merchants (some with bond numbers and some without), no dates, and the following vague response:

Supplemental Answer to Interrogatory No. 15: With regard to merchants and bonds where premium was owed, please see the attached Exhibit B spreadsheet. With regard to when the premium was owed, Defendants were to calculate premium payments due Frontier on a monthly basis, based on each merchants’ prior monthly volume. Thus, for example, after all bonded merchants total volume for say, August 2000 was closed, Defendants were to assess the premium percentage for August 2000 and then in September 2000, retain 40% and send Frontier the remaining 60% of the premium charged.

(Appellant’s Appendix at 121 and Exhibit B at 129-132).⁴

This lawyer created response, made after years of litigation, tells Frontline absolutely nothing. As found by Judge Lange and Judge Holahan, this response tells Frontline nothing about Frontier’s case or how this “failure to pay premium” allegation was calculated. (Appellant’s Addendum at 13, 25, 28-29). The simple fact is, Frontier refused to disclose, by merchant, when the premium was owed, how the premium owed was calculated, or even how much was owed.

Of course, one of the purposes of interrogatories is to prevent unjust surprise and prejudice, at trial. This fact was clearly recognized by Judge Lange. (Id. at 13) (Judge

⁴ To demonstrate the evasiveness of the response, this answer generally references dates of August and September, 2000. The program ended on April 1, 2000. (Appendix 1 at 202). This intentional obfuscation should not be tolerated.

Lange holding: “Clearly, by this time in the case, defendants have every right to know the exact extent of the claims against them, so they can prepare to test those claims through trial.”). The proper relief for abusing this clear rule of civil procedure, of course, lies within the discretion of the [district] court. Thorson v. Zollinger Dental, PA, 728 N.W.2d 261, 266 (Minn. App. 2007).

In its Brief, Frontier claims this request “asks only for merchants – not for premium amount due on each bond.” Frontier’s Brief at 18. First, as found by Judge Lange, Frontier’s interpretation was “tortured” and that any reasonable interpretation of this request would dictate a breakdown of premium owed by merchant and by bond. (Appellant’s Addendum at 13; Appendix 1 at 9-10). And, in fact, the interrogatory clearly asks for “by merchant name, on what particular bond or bonds that premium was owed and when the premium was owed.”

Second, Frontier argues deceptively that: “The Special Master did not direct Frontier, either at or after the March 11, 2008 hearing, to provide specific premium calculations. Nor did the Special Master give any prior warning that failure to do so would result in dismissal.” Frontier’s Brief at 19 (emphasis added). Frontier chooses its words wisely. Missing from Frontier’s Brief, however, is the fact that 17 months earlier, Judge Lange had specifically ordered Frontier to provide the merchant by merchant, bond by bond premium data. On November 15, 2006, Judge Lange specifically examined Frontline’s discovery request and specifically ordered Frontier to produce the “work product” calculations behind its unpaid premium claim. Judge Lange found that Frontline “is entitled to know how you came to that [unpaid premium] calculation” and “just to give

them [Frontline] a number is sort of meaningless. That's like shooting darts." (Appendix 1 at 107-108).

Therefore, 17 months before the dismissal hearing, Frontier was specifically told that an unsupported unpaid premium number was not sufficient and that Frontier was required to show the "work product" and calculations behind that number. In fact, Frontier continued to ignore this Court Order even after December 26, 2007, where Judge Lange, in a lengthy written Order, specifically warned Frontier that failure to comply with his orders would result in dismissal. Despite this warning, Frontier did not supplement its inadequate discovery and Special Master Lange dismissed its case (after a hearing held on March 11, 2008), four months later, on April 24, 2008. (Appellant's Addendum at 8-16) (Appendix 2 at 381-460).

Interrogatories 9 through 14 seek the details of what Frontier alleged to be wrong or improper with Frontline's underwriting of certain numbered bonds. Frontier had alleged, with no specifics whatsoever, that the underwriting was improper for the following merchants: Benchmark Custom Golf, Jewelry Auctions, National Fair Credit, High End Replicas, Bert Consulting Group, and Mastercard Bond number 150830. This list, however, is nothing more than a list of merchants that had generated claims.

Frontline in discovery, therefore, specific to each merchant, asked: "With a reasonable degree of detail, what was wrong or improper with the underwriting on the Mastercard Surety bond, Bench Mark Custom Golf with a bond number of 122738. Please include a description of any information you believe was incomplete, inaccurate or missing." (Appendix 1 at 179-180).

Frontier's response to each and every one of these merchant specific interrogatories was virtually identical and simply regurgitated various allegations made in its complaint without identifying the details of Frontline's alleged improper underwriting of the specified bonds. (Id. at 150-153). The responses did not set forth any detail, as requested, regarding what was wrong with underwriting. Instead, Frontier responded in the broadest of unhelpful generalities. For example:

Defendants failed to observe the appropriate standard of care in underwriting [Frontier inserted the various businesses names] including the failure to observe the maxim to never issue a bond unless there is no identified risk of nonperformance.

Id. In other words, Frontier's response to the interrogatories was that Frontline erroneously issued bonds, without specifics whatsoever, because they were too risky. However, this response is meaningless because Frontier is in business precisely to provide bonds to "risky" businesses. As Frontier stated in one of its own briefs:

The Bank would require a bond be posted for the more "risky" type merchants and LMA/Frontline asked Frontier to act as surety in this regard, which it did.

Frontier's Brief in Response, 03/03/08 (Appendix 1 at 201). Thus, Frontier's response, to the effect that Frontline bonded "risky" businesses, does not explain what was particularly wrong or improper about the specific merchant that caused the loss or the underwriting procedures employed by Frontline. The whole point of the program was to bond "risky" businesses. As found by Judge Lange, these discovery responses were inappropriate because "At the very least, Frontline was entitled to know the reason the merchants were considered to be at high risk." (Appellant's Addendum at 13). This was the very purpose

of these specifically tailored interrogatories and Frontier was obligated to answer.

Evanson v. Union Oil, 85 F.R.D. 274, 272 (D.C. Minn. 1979) (holding that an implicit condition in any order to answer an interrogatory is that the answer be true, responsive and complete).

Likewise, Frontier's supplemental responses to Interrogatories 16 through 18 are intentionally nonresponsive. (Appendix 1 at 153-154). Interrogatories 16 through 18 requested a breakdown of bond claims that were denied by Frontier and an explanation as to why those claims were denied. Rather than answer the interrogatories, Frontier simply stated in its discovery responses that it will "make its documents available in a manner and/or time and place mutually agreeable to both parties." Id. Of course, this response ignored not only the fact that the Special Master ordered the interrogatories fully answered, and fully supplemented, no later than December 10, 2007, but also, that Interrogatories 16-18 were interrogatories, and, as drafted, required written responses, not the future production of documents – at an unspecified time or place, well after the final close of written discovery. Frontier's defiance of Judge Lange was willful and without excuse.

Frontier's response to Frontline's Request for Production No. 23 also demonstrates well Frontier's complete refusal to accept the authority of the Special Master. This request sought "any and all documents you [Frontier and its counsel] have received from or sent to Ron Reavis [Frontline's ex-employee and a defendant in the case.]" (Appendix 1 at 186). On November 15, 2006, Judge Lange ordered that all documents sent to or received from Ron Reavis be produced.

MR. OLSON: [Frontier's counsel] We have produced the majority of those documents, and we agree that it's discoverable.

THE COURT: All Right. Well, let's make sure we eliminate the word "majority" and encompass all correspondence back and forth between Frontier and Mr. Reavis.

(Appendix 1 at 128 (emphasis added)). Clearly Judge Lange ordered all documents produced. Rather than produce the documents, and in direct contradiction to Judge Lange's Order, in December of 2007, one year later, Frontier refused to provide any documents, and instead, objected to the request saying "Frontier objects to responding to this request on the grounds that the information sought is protected by the work product and/or joint defense doctrine" (Appendix 1 at 156). Despite Judge Lange's Order overruling all objections, and despite his clear Order to produce all the documents, Frontier ignored Judge Lange and instead filed a baseless joint defense objection. Frontier is the Plaintiff in the suit. It has no defense, and certainly it has no defense doctrine with Ron Reavis – an individual defendant, that had been sued by Frontier.

As recognized by Judge Holahan, if a party refuses to comply with discovery orders without justification or excuse and continues to refuse to cooperate with the court, the party forfeits its right to a trial on the merits. State v. Ri-Mel, Inc., 417 N.W. 2d 102, 110 (Minn. App. 1987) (upholding a \$581,000 default judgment when party refused to produce documents despite district courts discovery orders). In this case, Frontier repeatedly refused to obey Court orders in an attempt to gain advantage. Clearly dismissal is warranted in this case.

4. **Frontline followed all discovery orders, completely abided by the rules of discovery and cannot be blamed for Frontier's repeated and egregious discovery violations.**

a. **Frontline has fully complied with the discovery process.**

For some reason, Frontier spends a good chunk of its 55 page appeal brief discussing Frontline. Frontier's Brief at 24-33. Of course, dismissal was entered against Frontier, not Frontline. Frontier goes so far as to make the outrageous suggestion that Frontline somehow forced Frontier to violate Judge Lange's numerous discovery orders. Id. This argument is absurd. Tellingly, Frontier fails to point to a single instance where Frontline was sanctioned by Judge Lange or Judge Holahan for any discovery misconduct.

The fact is, over the past five years, Frontier filed one motion to compel against Frontline. This motion resulted in an Order on November 8, 2006 requiring Frontline to do five things. (Addendum at 1-6). This order and Frontline's prompt compliance with this Order are documented as follows:

November 8, 2006 Order

Frontline's Compliance

1. "...Defendants shall provide to plaintiff the index of documents contained in the document repository located in Billings, Montana on or before November 10, 2006."	Frontline provided the index to Judge Lange on November 8, 2006. Judge Lange provided the index to Frontier on November 17, 2006.
2. "Defendants shall authorize non-party First State Bank of Eldorado to produce all documents in its possession which are responsive to the subpoena issued by Frontier."	Frontline immediately complied.

3. "Defendants shall authorize non-party Global Payments, Inc. to produce all documents in its possession dated between April 1, 1999 and February 1, 2001, which are responsive to the subpoena issued by Frontier."	Frontline complied in writing on November 29, 2006.
4. "Defendants Kittler and Frontline shall amend their responses to plaintiff's Interrogatories and Requests for Admission to reflect their first person knowledge by November 10, 2006."	Frontline and Kittler complied on November 3, 2006, and, although unnecessary, has supplemented its responses twice since that time.
5. "Defendants shall produce to the special master the documents listed in its privilege log by November 7, 2006, for in camera review."	Frontline produced the documents on November 8, 2006 (the date the Order was actually issued). Frontline provided a second production on January 3, 2007, and a third production on February 26, 2007.

(Id.); (Appendix 1 at 11-12); (Appendix 1 at 13-16); (Appendix 1 at 17-18); (Appendix 1 at 19); (Appendix 1 at 20-21); (Appendix 1 at 22-31); (Appendix 1 at 32-34). Frontier's suggestion that Frontline has made discovery difficult is just plain wrong. Frontline appropriately answered every discovery request and complied with every order of Judge Lange. (Appellant's Addendum at 48) (Judge Lange finding that by November 2, 2007, "Frontline's discovery deficiencies been largely corrected, and Plaintiff was able to conduct the discovery it needed to conduct, in order to proceed."). Frontier's excuse on appeal that it was all "Frontline's fault" is without merit.

b. Frontier's claim that Frontline produced too many documents is absurd.

As an example of the absurdity of Frontier's "Frontline's fault" excuse is a look at Frontier's claim that Frontline produced too many documents. See e.g. Frontier's Brief at

25. (Frontier arguing “to locate that evidence, Frontier was forced to manually search through some 250,000 pages of stored records that respondents had placed in a storage facility in Montana⁵. . .”). This, of course, was meant to suggest that Frontline improperly dumped raw data on Frontier. This is false. In fact, nowhere in its 55 page appeal brief does Frontier identify to the Count what it actually asked for in discovery. What Frontier actually asked for in discovery was every single document in Frontline’s possession concerning the entire credit card program. Frontier’s discovery requested:

Any and all correspondence or other documents from or to any parties or any third party regarding the contracts or transactions at issue in *Frontier Insurance Company v. LMA Underwriting Agency, Inc , Frontline Processing Corporation, Christopher Leon Kittler and Ronald Reavis*, Case File No. 041193 in the District Court for the Fourth Judicial District, Hennepin County, Minnesota . . . including but not limited to:

. . . .

f. Any and all documents relating in any way to Frontier bonds issued to, by or on behalf of the Bank and/or any Defendants at any time from January 1, 1998 to the present.

(Appendix 1 at 46-47 (emphasis added)). In response, Frontline produced approximately 250,000 documents – or every single document that Frontier requested. For Frontier to complain that it had to look through the exact documents it asked for is unconvincing to say the least.

It is also of extreme importance to note that all of the documents in Frontline’s possession were made available for inspection and copying since the very first weeks of

⁵ The “storage facility” or “warehouse” referenced repeatedly in Frontier’s Brief was, in actuality, a conference room in undersigned’s law offices in Montana. The documents were there because Frontline is a Bozeman, Montana Company.

this case – a case that was filed over five years ago. (Appendix 1 at 48-49, ¶ 3-4; 52, ¶ 11).

In fact, attached hereto are several letters from the record that confirm not only an open invitation to review the documents, but also, confirm that Frontline had hundreds of thousands of relevant, responsive documents in its possession. (Id. at 53-59). All Frontier needed to do – at any time over the past five years – was to come look at the documents and utilize them (if it needed to) to build its case – Frontier flat refused to do so. Instead Frontier chose a path of obfuscation and delay.

c. Frontier’s claim that Frontline’s index was a “problem” is without merit.

On a related issue, Frontier attempts to excuse its misconduct by arguing that its utilization of an index of documents created by Frontline’s attorneys was “deeply problematic.” Frontier’s Brief at 26-27. The Index Frontier is referring to is a 700 page index of the approximately 250,000 Frontline documents located in Billings, Montana. This index was created by Frontline’s attorneys and paralegals for purposes of litigation and was not intended to be produced to Frontier. Judge Lange found the index to be work product, however, in order to facilitate discovery, he ordered it produced. (Addendum at 1). In other words, Judge Lange gave Frontier, without charge, Frontline’s own work product index.⁶ Therefore, from early in this case, Frontier had not only complete access to all of Frontline’s documents, but also an index of those documents. On this issue,

⁶ The index included numerous headings and topics including five pages of headings entitled “Frontier bond paperwork.” (Appendix 1 at 60-64). Frontier never utilized the index to look at Frontline’s documents.

Judge Lange found:

[THE COURT] What else do you [Frontier] expect from the Defendants, you have 250,000 pages of documents, you have their index that I gave you free at no cost to you that they spent 40,000 dollars doing. At that point you have got to do your due diligence, don't you?

MR. MENECHINO: Absolutely. We did.

THE COURT: And you are claiming you have.

MR. MENECHINO: Absolutely Judge.

THE COURT: Did anybody, after you had the index, go back to Billings and go through those files one at a time?

MR. MENECHINO: We did not, your Honor.

....

THE COURT: You keep slipping and sliding, Mr. Menechino. If I wanted to find out what was in those two rooms of documents and I have the index, I go back to Billings and I look at what is in the Frontier bond paperwork in the file bates stamped and dated March 6, 2000. I don't rely on them to provide me redactions or anything. I go back to that room. Now I have the index really [you] never took advantage of using it after I gave you 40,000 dollars worth of free labor. I mean, that's my impression. Convince me I'm wrong.

(Appendix 1 at 36-38 (emphasis added)). For Frontier to argue that Frontline stood in the way of discovery is absurd. The fact that the index did not give Frontier exactly what it wanted is beside the point. As recognized by Judge Lange, and admitted by Frontier, Frontier never used the index at all, and more importantly, failed for years to timely inspect the very documents it requested in discovery. Id.

5. **Frontier's claim that its discovery abuses should be excused because – according to its lawyers – it has a good case, should be rejected.**

Frontier argues that this Court should excuse its intentional discovery misconduct because they have proven Frontline failed to pay premium. Frontier goes so far as to say: “Respondents, however, clearly paid no premiums on their unreported bonds” and that

“Respondents’ discovery responses were patently false.” Brief at 28-29. Frontier’s bold, unsupported statements are outrageous, unproven, and have no basis in fact or the record.

As found both by Special Master Lange and Judge Holahan, there is no real evidence that Frontline – or anyone else – owes money on any particular bond or bonds. To this day, there is no evidence that Frontier is owed premium on any of the bonds in its “Working Copy” bond list – which was produced four years after litigation began, but yet, is nothing more than a list of merchant names. (Appellant’s Appendix at 129-133). Of course, it is axiomatic that, at some point in a case, a plaintiff must allege specific, affirmative evidence and may not rely on unsupported allegations of fact. Musicland Group, Inc. v. Ceridian Corp., 508 N.W. 2d 524, 531 (Minn. App. 1993).

In this case, after several years of open discovery, all Frontier has submitted is its unsupported word that Frontline failed to report and pay premium on a number of bonds. And, while Frontier speaks in terms of its “Working Copy” bond list evidence as “matter of fact,” the allegations in its Complaint, and the “Working Copy” bond list itself, are not supported by any real evidence.

For example, Frontier has sworn under oath – repeated in argument here – that the bonds listed on the “Working Copy” are Frontier bonds, and that Frontline owes premium on these bonds. Frontier’s Brief at 29-30. However, Frontier’s “Working Copy” list of “unreported Frontier bonds” makes no sense whatsoever and is, in fact – in some instances – completely false. The fact is, Frontier’s “Working Copy” attachment includes alleged “Frontier bonds” on numerous merchants (well over 150) that did not even submit

applications to Frontline until months after the Frontier/Frontline relationship was terminated.

For instance, by example only, in the alphabetical “D” section of the so-called “Working Copy,” Frontline pulled from the merchant files – the same merchant files that have been available to Frontier for years – the applications of four merchants on Frontier’s list.⁷ (Appellant’s Appendix at 272). The names and corresponding application dates of these merchants are as follows:

Danny Graber	8/09/00
Down to the Wire Sports	8/24/00
Dowdy Entertainment	8/29/00
Dawkins Entertainment	8/21/00

Copies of the original merchant applications for these merchants (personal information redacted) are part of the record. (Appendix 1 at 205-208). These merchants have application dates of August 2000. The Frontier program at issue here, however, ended when a Columbia Casualty Company Indemnity Policy was issued. (Id. at 202). A copy of that policy was also part of the record. (Appendix 1 at 204). This umbrella, indemnity policy has an effective date of April 1, 2000, with a retroactive date of April 1, 1999. Id.

Frontier’s case, therefore, was apparently based on an attempt to collect premiums on merchants that did not even make contact with Frontline until over three months after the program was terminated. It is obvious now, that from the beginning, Frontier has

⁷ The box containing “D” merchants was the top box. All of the documents relevant to this case have been made available to Frontier since shortly after the Complaint was served.

believed it could win its case through misinformation and discovery tricks. For Frontier to now argue that the dismissal should be overturned due to the “evidence” supporting its claims is ironic at best.

The fact is, a close look at Frontier’s case, and its appeal here, reveals that Frontier’s entire lawsuit and appeal is based on the unproven and unverified word of a single, ex-employee of Frontline, Ron Reavis. See Frontier’s Brief at 14, 31-33, 35. Quite simply, however, Mr. Reavis cannot be trusted.

Ronald Reavis left Frontline in 2002 after Frontier’s owner, Chris Kittler, learned that Reavis had been embezzling from Frontline and lying to Kittler for many years. (Appendix 1 at 210 ¶ 4). At that time, Reavis signed a statement setting forth some of the dishonest behavior he had engaged in with regard to Frontline’s business. (Id. at 211-212). After Reavis’ departure, Frontline learned of many more instances of Reavis’ wrongdoing, including forged checks and use of the company credit card for personal purchases. (Id. at 210 ¶ 5).

Because of Reavis’s multiple acts of dishonesty, Frontline sued Reavis and obtained a judgment against him in the United States Bankruptcy Court for the District of Minnesota on December 13, 2004. (Id. at 213). The findings of fact associated with that judgment provide a detailed record of Reavis’ malfeasance and evidence of his character. (Id. at 214-222). United States Bankruptcy Judge Nancy C. Dreher found:

Whether Defendant [Reavis] committed larceny or embezzlement is of little difference. Defendant appropriated for his benefit with fraudulent intent \$30,927.38 when he forged checks and used for his benefit and without Frontline’s authority Frontline’s credit card accounts. Defendant also committed embezzlement or larceny when he forged a

check for \$1,996.00 to pay himself on a promissory note not authorized by Frontline. Those amounts shall be excepted from discharge. To discover Defendant's embezzlement Frontline also expended \$2,812.50 for a forensic document examiner to discover the forgeries and \$25,733.71 to recover information concerning the unauthorized use of company funds from Defendant's damaged hard drive. These expenses were the direct result of Defendant's [Reavis's] wrongful taking from Frontline and shall also be excepted from discharge.

Id. at 8. Reavis is, of course, Frontier's star – and only – witness.

On appeal, Frontier relies upon its star witness as the singular proof that Frontline failed to pay premium and hid documents in discovery. Frontier Brief at 14, 31-33, 35. Of relevance here, however, is the fact that – despite five years of litigation, and despite unfiltered access to every single document generated by the Program – Frontier could not substantiate any amount owing on any particular bond.

Furthermore, Reavis was terminated from Frontline in the year 2002, two years before this case was even filed. In other words, Reavis had absolutely nothing to do with discovery, or the gathering of documents for discovery, in this case. Reavis has no idea what documents were produced or how they were produced. He has no idea as to what documents Frontier even examined. Yet, Frontier relies on Reavis to inform this Court as to what was produced and how it was produced. This is absurd. Reavis' unverified word should not be used to excuse Frontier's pattern of misconduct.

6. Frontier's pattern of intentional delay and obfuscation caused Frontline severe prejudice.

Frontier argues in its Brief that dismissal is not appropriate because the Special Master and the Trial Court “did not specifically identify any prejudice” and that the only prejudice claimed by Frontline was that the “discovery period was longer than

anticipated” and that Frontier’s discovery answers were “incomplete.” Frontier’s Brief at 37-38. Frontier’s arguments are without merit.

First, under no stretch of imagination can five years be characterized merely as a “discovery period that was longer than expected.” For five years, Frontier has willfully refused to provide any real evidence in support of its case. It has only made allegations; allegations that have been substantiated by nothing more than the lies of a terminated ex-employee and the baseless accusations of a near-bankrupt insurance company. For five years, Frontline, LMA and Chris Kittler have had these allegations of intentional wrongdoing hanging over their heads. Frontier has failed to produce any evidence despite numerous discovery requests and despite several Special Master Orders requiring them to do so. Instead, Frontier has decided to hide its purported evidence from Frontline, waiting until deposition or trial to act from ambush. This conduct clearly has caused Frontline prejudice and should not be tolerated.

Of course, as this Court had recognized on numerous occasions, the imposition of sanctions for violations of discovery rules and orders is a matter particularly suited to judgment and discretion of the trial court. In a case such as this, where Frontier’s misconduct has dragged out over years, the Special Master and the Trial Court are in the best position to determine whether any harm has resulted from the violation and the extent to which this harm can be eliminated or alleviated. State v. Lindsay, 284 N.W.2d 368, 373 (Minn. 1979). In this case, both Judge Lange and Judge Holahan found that the only way to stop Frontier’s misconduct was through dismissal.

Both Judge Lange and Judge Holahan recognized that Frontline had the burden of showing some prejudice of a substantial right or advantage if Frontier were allowed to reinstate the action. Id., citing Firoved v. General Motors Corp., 277 Minn. 278, 283-284, 152 N.W.2d 364, 368 (1967). Both Judge Lange and Judge Holahan found that clearly that burden had been met. The court in Firoved, however, also recognized that in some cases defendants are also entitled to the weight of the policy allowing sever sanctions which seek to prevent unreasonable delays even in the absence of a showing of particular prejudice. Id. at 284, 152 N.W. at 369. Of some note, the delay in Firoved was 15 months, versus the five year delay Frontier has caused.

For instance, the allegations in Frontier's Complaint concern a program that was terminated eight years ago in 2000. Despite this fact, Frontier wants yet more time to comply with Court orders and to answer Frontline's discovery. This is not incremental delay, this is delay that has undeniably lead to lost witnesses and faded memories. Frontier itself has indicated that it can no longer produce six of its eight witnesses "with knowledge" because they no longer work for Frontier. (Appendix 1 at 223-225). Only one of Frontline's witnesses still work for Frontline. For Frontier to suggest that the five years that has passed since the filing of the Complaint has not caused prejudice is absurd. Witnesses have moved, memories have failed, and Frontline has been prevented from preparing a defense to the case.

Second, Frontier's suggestion that the Special Master did not make a finding of prejudice is just plain wrong. Judge Lange and Judge Holahan both specifically found that Frontier's misconduct has prejudiced the Defendants to such a great extent that it has

prevented them from even preparing a defense to this case. This, of course, is the greatest prejudice. Judge Lange found:

In imposing its sanctions here, the Special Master considered the impact of plaintiff's failure to respond as to each defendant and came to the conclusion that plaintiff's discovery violations prevented each of the defendants from obtaining information necessary to formulate a defense.

....

Frontier's discovery violates as to Frontline's discovery also precluded LMA and Kittler from forming an adequate defense to the complaint against them. Unless Frontier was able to establish that it provided the information requested by Frontline to LMA and Kittler, it cannot mitigate the prejudice of its discovery violations upon LMA and Kittler, because they are still left without the information [Frontier] was charged with providing.

....

Moreover, the Special Master's decision was not based on this single interrogatory, but on the entirety of defendants' efforts to obtain discovery from plaintiff. The Special Master's Order and Memorandum cites numerous other discovery violations, all of which are serious, and all of which prevented the defendants from formulating a defense to plaintiff's complaint.

(Appellant's Addendum at 21-23). Frontier has intentionally decided not to disclose evidence in support of its case. This, of course, has prevented Frontline from learning what evidence Frontier has, or from impeaching that evidence. It also sets up Frontline witnesses to be unfairly ambushed by unproven evidence at deposition or trial. Frontier has chosen to gain advantage through obfuscation and delay. As found by Judge Lange and Judge Holahan, this has been prejudicial to the defendants. This finding was entirely appropriate.

B. FRONTIER'S ARGUMENT THAT ITS CLAIMS WERE DISMISSED WITHOUT PRIOR WARNING HAS NO BASIS IN FACT.

Frontier's argument that its claims were dismissed without prior warning is incorrect. Frontier repeatedly ignored several specific written discovery closure dates set by the Special Master. As to each deadline, lengthy hearings were had in which Frontier was admonished and ordered to comply with the discovery orders. The discovery at issue here was first specifically ordered produced by Judge Lange on November 15, 2006. (Appendix 1 at 65-133). Frontier failed to produce the requested information despite the passing of Court ordered deadlines to do so on February 5, 2007 (Appellant's Appendix at 27), October 26, 2007 (Addendum at 7), December 10, 2007 (Appendix 1 at 42-44), and December 20, 2007 (Appellant's Addendum at 1-7).

In response to Frontier's missing the final deadline of December 10, 2007, Frontline requested the sanction of dismissal. In denying that request, the Special Master made a point of clearly and specifically warning Frontier of the possibility of dismissal as a sanction. The Special Master stated:

As the Special Master explained at that hearing [of November 2, 2007], there is little excuse for plaintiff's failure to conduct discovery in the year following the release of the document index. Certainly, under Minn. R. Civ. P. 37.2(b), sanctions are available against parties who, like plaintiff, fail to provide timely discovery. In Breza v. Schmitz, 311 Minn. 236, 236-37, 248 N.W.2d 921, 922 (1976), the Minnesota Supreme Court affirmed dismissal of plaintiff's complaint where the record supported the trial court's findings that [dismissal was appropriate based upon plaintiff's failure to comply with discovery].

(Appellant's Addendum at 1-7). Clearly, Frontier was warned, not only that sanctions were available for its failure to comply with discovery orders, but that those sanctions

specifically include dismissal.

Despite this warning, Frontier continued, for months after the warning was issued, to ignore the Court's discovery orders. As just one example, as discussed above, nearly two years prior to the dismissal of Frontier's case, Frontier was specifically ordered to produce the "work product calculations" behind its unpaid premium claim. Judge Lange specifically found that Frontier was "entitled to know how [Frontier] came to the [unpaid premium] calculation." (Appendix 1 at 107-108). Frontier refused to provide these calculations despite Court ordered deadlines to do so, on February 5, 2006, October 26, 2007, December 10, 2007 and December 20, 2007. This failure to respond continued despite the clear warning of dismissal issued on December 26, 2007. As of March 11, 2008 (when the hearing on dismissal was held) Frontier had still not provided the calculations that had been ordered produced well over a year earlier. As a result, dismissal was entered. Clearly Frontier had clear warning. In this regard, Judge Lange found:

The Special Master could not have been any more clear as to the discovery deadlines in this case. In its Order and Memorandum of December 26, 2007, the Special Master made a point of analyzing the issue of sanctions and warned plaintiff that its failure to appropriately respond to discovery in a timely fashion, would be sanctioned, up to and including the possibility of dismissal. The failure to provide adequate discovery after the numerous orders extending deadlines, compelling discovery and admonishing the parties as to the possibility of sanctions here, is not part of an isolated event, but part of a lengthy pattern of non-compliance by Frontier. Finally, the failure to respond appropriately to discovery, was without justification.

(Appellant's Addendum at 8-16 (footnote omitted)).

C. FRONTIER'S ARGUMENT THAT ONLY ITS CASE AGAINST FRONTLINE SHOULD BE DISMISSED IS WITHOUT MERIT AND IS NOT SUPPORTED BY THE LAW.

- 1. The sanctions in the case were personal to the misconduct of Frontier and were appropriate.**

In its Brief, Frontier attempts to avoid the consequences of its misconduct by arguing that only Frontline filed the final dismissal motion and, therefore, only Frontline should “benefit” from the dismissal. Frontier’s Brief at 43-46. Frontier then suggests that discovery should be started over and that it should be allowed to proceed with its case unabated and undeterred against the remaining Defendants – including against Chris Kittler individually. This argument misses the point entirely. This court reviews a district court’s discovery sanction for an abuse of discretion. Chicago Greatwestern Office Condo Ass’n v. Brooks, 427 N.W.2d 728, 730 (Minn. App. 1988). On review of a dismissal order, this court reviews the record in a light most favorable to the district court’s order. Reichert v. Union Fidelity Life Ins. Co., 360 N.W.2d 664, 667 (Minn. App. 1985).

The purpose of sanctions (including dismissal) is to punish the offending party and to prevent like conduct in the future. Dismissal may be an appropriate sanction against a party who willfully, without justification or excuse, and with intent to delay trial fails to comply with discovery orders or refuses to cooperate with the court and counsel to resolve the case promptly and expeditiously. Breza v. Schmitz, 311 Minn. 236, 237, 248 N.W. 2d 921, 922 (1976). Sanctions, therefore, are personal to the offending party – in this case, Frontier. Of course, the prejudice this misconduct causes (inability to prepare,

expense, delay, obfuscation, lost data and witnesses) results in irreparable injury to all defendants that share an interest in understanding the allegations made against them.

In fact, Minnesota Rule 37.02(b) does not require a motion seeking dismissal from any party, let alone, all parties. The Rule only requires a failure to obey an order. The Rule reads as follows:

(b) Sanctions by Court in Which Action Is Pending. If a party . . . fails to obey an order to provide or permit discovery, including an order made pursuant to Rules 35 or 37.01, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

....

(3) An order striking pleadings or parts thereof, staying further proceedings until the order is obeyed, dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

Rule 37.02(b) (emphasis added).

The Rule, therefore, does not require a motion from any party. Of course, it is axiomatic that if no party need file a motion, then certainly, all parties need not file. Put simply, nothing in the law requires duplicate motions to dismiss from Kittler or LMA. Of course, this is consistent with the fact that a trial court has discretion to choose a just sanction for failure to obey discovery rules. See Norwest Bank Midland v. Shinnick, 402 N.W.2d 818, 823 (Minn. App. 1987); Chicago Greatwestern Office Condo. Assn. v. Brooks, 427 N.W.2d 728, 730 (Minn. App.1988). In this case, the sanction was specifically tailored to address Frontier's repeated, intentional misconduct:

In fact, Rule 37(b)(2) of the Federal Rules of Civil Procedure is substantially the same as the Minnesota sanctions rule, therefore Minnesota courts may look to judicial

interpretation of that rule to assist in an analysis of the appropriateness of the sanction imposed in this case. Chicago Greatwestern Office Condominium Ass'n v. Brooks, 427 N.W.2d 728, 731 (Minn. App. 1988). Federal courts have noted that a motion for dismissal is not a prerequisite to the imposition of sanctions under Rule 37. Properties Intern. Ltd. v. Turner, 706 F.2d 308, 310 (11th Cir. 1983) ("Rule 37(b) provides that sanctions may be imposed where a party 'fails to obey an order to provide or permit discovery.' There is no requirement that the opposing party move for this order [of dismissal] -only that it be issued and disobeyed."); Tamari v. Bache & Co., 729 F.2d 469, 472 (7th Cir. 1984). The fact is, Minnesota Rule 37.02 does not require that any party move for sanctions before they are imposed, it only requires a violation of a Court order. As a result, contrary to Frontier's Brief, there simply is no requirement that all parties move for dismissal.

2. Frontier has repeatedly argued in this case that, for purposes of discovery, Frontline, Kittler and LMA share an identity of interest.

Frontier argues in its Brief that Frontline, LMA and Kittler are separate, legal entities, and therefore, only the case against Frontline should be dismissed. Frontier's Brief at 28-30. In fact, Frontier in its Brief goes so far as to blame Judge Lange for leaping to conclusions on this issue and states:

It is, and remains undisputed that no Respondent other than Frontline ever complained of or sought sanctions based on the discovery posed solely by Frontline. Nor does the Special Master explain when or how he became aware that Respondents were operating "jointly" for discovery purposes -- when they earlier had argued they were not.

Frontier's Brief at 45-46. This argument by Frontier is a complete and total reversal from the position Frontier has taken throughout this entire case. Indeed, the above argument filed by Frontier with this Court should be compared with a brief Frontier filed with the Special Master several months ago:

An analysis of the facts in this case clearly illustrates that, for purposes of Minnesota Rules of Civil Procedure 33.01(a), defendants Kittler, Frontline and LMA Underwriting Agency, Inc. ("LMA") should be deemed to be a single party, because they are all represented by the same counsel and share identical interest in this litigation. . . . Based on these, and other facts, the Amended Complaint alleges there is such unity of interest and ownership between Frontline, LMA and Kittler that the separate personalities of Frontline, LMA and Kittler do not exist. . . . [A]ll three are represented by the same counsel, and because their interests are identical none have made any cross-claims against the other.

Accordingly, because LMA, Frontline and Kittler are, in fact, one party,

(Appendix 1 at 226-237). The simple fact is, as recognized by Judge Lange and Judge Holahan, all Respondents had a unified interest in Frontier answering its discovery. All Respondent's needed the discovery information to formulate its separate defense to this case. This unified interest, however, is in no way is inconsistent with the fact that each Respondent would have different defenses to this same information – for example, Chris Kittler as an individual would have an additional defense that he always acted in his corporate capacity. Unlike Frontier, Frontline has been entirely consistent on this point. Frontier's arguments here are without merit.

D. JUDGE LANGE AND JUDGE HOLAHAN FOUND ENTRY BY ENTRY THAT FRONTLINE'S FEES WERE REASONABLE AND WERE DIRECTLY RELATED TO PLAINTIFF'S DISCOVERY MISCONDUCT.

As part of Frontline's motion for fees, Judge Lange and Judge Holahan had before

them the unredacted, detailed time entries of Frontline's counsel. (Appendix 2 at 328-380) (demonstrating the portion of fees and costs that were awarded). Judge Lange, an attorney and Judge for over 40 years, found that the fees he awarded – entry, by entry – were reasonable, and were directly related to Frontier's discovery misconduct. (Appellant's Addendum at 44-50). According to his Order and Memorandum, Judge Lange specifically looked at the time entries and found:

However, plaintiff's argument that defendants incurred only nominal costs as a result of its failure to comply with discovery orders is specious. The entire subject matter of this lawsuit after November 2, 2007, was focused on Plaintiff's failure to obey discovery orders. . . . Finally, plaintiff contends that some of defendants' time entries are unrelated to the failure to comply with the discovery orders. However, the vast majority of defendants' time entries after November 2, 2007 are clearly related to the matter of sanctions for failure to conduct discovery. To the extent that some additional work may have been conducted, it was because of plaintiff's persistence in pursuing extensions, appeals, stays and other relief, associated with its failure to conduct adequate discovery. The Special Master hereby specifically finds, that the entirety of defendants' fees incurred after November 2, 2007, were reasonable and necessary, in light of the unique circumstances of this case, and that the claim for said fees is adequately supported by appropriate and detailed time records.

(Appellant's Addendum at 44-48). Frontier provides no evidence or coherent argument that Judge Lange was wrong in his specific finding.

In fact, the reasonableness of Frontline's fees have been well scrutinized. The affidavit in support of the attorney fees stated that the fees were "necessary for the proper representation of the client and that charges for any unnecessary or duplicative work has been eliminated. . ." (Appendix 2 at 328-380). Judge Lange looked at the detailed fee statement, entry by entry, and made a specific finding that the fees were "reasonable and necessary, in light of the unique circumstances of the case." (Appellant's Addendum at

48). As evidence of his diligence, Judge Lange's detailed review also rejected \$117,750 in Frontline's requested fees. (Id. at 44-50). Clearly he considered both sides of the issue. Of course, Judge Lange's approach is well recognized in Minnesota law.

Minnesota Rule 37.02 provides "the court in which the action is pending may make such orders in regard to the failure [to obey a discovery order] as are just. . . ."

Furthermore, Minnesota Rule 37.04 provides:

The court in which the action is pending on motion may make such orders in regard to the failure as are just, including any action authorized in Rule 37.02(b)(1), (2), and (3). In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(emphasis added).

The advisory committee notes confirm this discretion granted to the Court and specifically remark that: "The court is specifically given authority to make such orders as may be just in addition to the specified sanctions." The Special Master, therefore, clearly has considerable latitude in rectifying the wrongs caused by Frontier. This entire case has been unjust and the damage caused by this injustice should be rectified.

The Special Master and Judge Holahan have already found that Frontiers' continued pattern of delay has been so egregious that it has prevented Frontline from even preparing a defense. Obfuscation has been Frontier's chosen litigation tactic from the very beginning. All of Frontline's time, therefore, has been wasted. Of course, this was exactly what occurred in the St. John's Episcopal Church v. Brewmatic (Minn. App. August 29, 2000), 2000 WL 1220726, *9. In that case, the Court found:

St. John's incurred costs of \$23,076.13 claimed attorney fees of \$343,300.50, \$90,143.50 of which was attributable solely to discovery motions. Regarding the remaining attorney fees, the district court's findings indicate that Brewmatic's misconduct hindered St. John's preparation of its case throughout the course of litigation. The evidence supports the district court's findings that the attorney fees and costs incurred by St. John's were reasonable.

Id. This, of course, is exactly what occurred here.

Considering the fact that Frontier has intentionally ignored discovery orders, has refused to present any real evidence in support of its case, and has forced Frontline to endure five years of wasted and unnecessary litigation, certainly Judge Holahan's Order (that gave Frontline only a portion of its fees) was just. Nothing in Frontier's Brief supports the rejection of Judge Lange's and Judge Holohan's reasoned finding on that issue.

E. THE COURT DID NOT ERR IN FAILING TO STAY FRONTLINE'S MOTION FOR SANCTIONS AND REQUEST FOR FEES AND COSTS.

1. An attorney fee sanction is not an independent claim addressed by the Order of Rehabilitation or the MIRLA.

Frontier's Brief misses the point entirely. An attorney fee sanction under Minn. R. Civ. P. 37.02(b) is not an affirmative claim barred by the New York Order of Rehabilitation or Minnesota's Insurer's Rehabilitation and Liquidation Act ("MIRLA").

Tellingly, nowhere in Frontier's 55 page brief does it point to a case or statute that says that an attorney fee sanction is a claim barred by an Order of Rehabilitation. In fact, Frontier does not even examine the actual language of the statute it relies upon.

Minnesota Statute Annotated § 60B.58 actually reads:

Subdivision 1. Filing claims. In a liquidation proceeding in a reciprocal state against an insurer domiciled in that state, claimants against the insurer who reside within this state may file claims either with the ancillary receiver, if any, in this state, or with the domiciliary liquidator. Claims must be filed on or before the last dates fixed for the filing of claims in the domiciliary liquidation proceeding.

(emphasis added). This statute does not help Frontier. The statute does not, in express language or in policy, address a sanction of attorney fees against an insurer – like Frontier – that itself has filed and prosecuted a lawsuit in Minnesota. The statute never mentions the Minnesota Rules of Civil Procedure that expressly allow for an attorney fee award against a litigant – like Frontier – that avails itself of a Minnesota Court. The MIRLA, on its face, applies to affirmative claims against an insurer, not an attorney fee sanction for litigation misconduct.

Likewise, the actual Order of Rehabilitation never mentions an attorney fee sanction. The Order of Rehabilitation merely states the following: “[a]ll persons are enjoined and restrained from commencing or prosecuting any actions, lawsuits or proceedings against Frontier or the insurance superintendent as Rehabilitator.” (Order of Rehabilitation, a copy of which is attached as Exhibit A to Frontier’s Motion for Stay filed November 12, 2008.) Frontline, of course, never commenced or prosecuted any “action, lawsuit, or proceeding” against Frontier. Frontline has always been a defendant in a case commenced by Frontier.

Put simply, an award of attorney fees is not a claim covered by the MIRLA or the Order of Rehabilitation, but rather, a sanction for Frontier’s own misconduct that is specifically allowed by the Minnesota Rules of Civil Procedure. See, eg. Schultz v.

Interstate Contracting Co., 265 N.W. 296 (Minn. 1936) (costs and attorney fees are not independent, affirmative claims, but are ancillary claims that are available only after a party avails itself of the jurisdiction of the Court). In this respect, Judge Lange and Judge Holahan were absolutely correct. An award of attorney fees based on the misconduct of Frontier is not a separate, independent claim addressed by either the Order of Rehabilitation or the MIRLA.

2. **Frontier should not be allowed to pick and choose what Rules of Civil Procedure and Orders of this Court it is required to obey.**

Frontier should not be allowed to pick and choose what Rules of Civil Procedure it is required to follow and what Court Orders it is required to obey. It seems axiomatic that a party that files a civil suit in a Minnesota District Court is subject to the Minnesota Rules of Civil Procedure. Frontier, with the apparent blessing of the Rehabilitator, filed suit in Minnesota. It, like Frontline, should then be subject to all of the Rules of Civil Procedure, including Minnesota Rule 37.02(b) that allows for an award of attorney fees as a discovery sanction.

In fact, as this Court is aware, on numerous occasions throughout the litigation, Frontier has invoked the rules of civil procedure whenever and wherever beneficial to Frontier. Frontier even sought discovery sanctions against Frontline based on the very rules of civil procedure that it now seeks to avoid. Its hypocrisy apparently knows no limits. As found by Judge Holahan:

4. Plaintiff's reliance on MSA § 60B.001 is misguided. While the statute does provide for cooperation between states when an insolvent insurer is in a receivership proceeding, this has nothing to do with an insurer that files an action outside of the original domiciliary receivership proceeding, fails

to comply with discovery and is facing possible sanctions of reasonable attorneys fees and costs for forcing opposing counsel to incur these fees and costs for four years. The statute was intended to keep insurers from facing counter-claims against them when they needed to file in outside jurisdictions to collect debts. The claim against Frontier is not a counter-claim, but an ancillary claim of sanctions because of debts Frontier has forced Frontline to incur because of their non compliance with basic procedural rules.

....

6. Plaintiff argues again against complying with the Minnesota Rules of Civil Procedure only when they are of no benefit to him.

(Appellant's Addendum at 40-41) (footnote omitted).

From a practical standpoint, Frontier's arguments make no sense whatsoever. What Frontier is arguing here is that, although it was proper for Frontier to sue Frontline in a Minnesota Court, that same Minnesota Court has no jurisdiction over sanctioning Frontier's misconduct in that very same case. This is absurd. Frontier is not above Minnesota law. Frontier purposely chose a Minnesota court to file its case and it should not be allowed to flee Minnesota in the face of sanctions against it.

Of course, the reason Frontier wants to go to New York is that a New York Rehabilitation Court knows nothing about Frontier's repeated pattern of misconduct in Minnesota. Judge Lange and Judge Holahan, on the other hand, have lived with this case for years and are intimately familiar with the facts. Minnesota Courts must be allowed to control the conduct of the litigants that come before them. As a result, this Court should find that Judge Holahan acted properly in denying Frontier's ill-conceived motion to stay.

This, of course, was a case Frontier filed, pursuing money damages, in a Minnesota Court. For Frontier to suggest that it can litigate -- for its own benefit -- in

Minnesota, but that Minnesota Courts cannot affirmatively sanction Frontier and control its conduct is absurd. No wonder Frontier believed it could act with impunity – it feels that it is “above the law.” Frontier obviously ignored Judge Lange’s orders because it actually believes this Court has no authority to sanction its misconduct. No law, from any jurisdiction, supports Frontier’s position.

V. CONCLUSION

For the reasons stated above, Respondents’ respectfully request that the rulings, orders and judgment of the Trial Court be affirmed in all respects.

Dated this 13th day of April, 2010.

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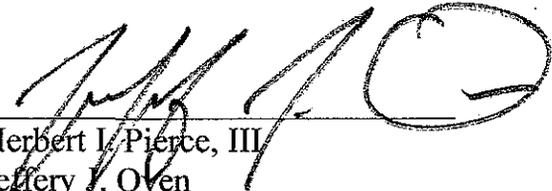
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CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds.1 and 3, for a brief produced with a type-size limitation of LR 7.1(e). The length of this brief is 13,978 words. This brief was prepared using Microsoft Word 2007.

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