

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.

APPELLANT'S 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 APPELLANT'S CLAIMS AS A DISCOVERY SANCTION?

In Response to Respondent Frontline's Motion for Sanctions, Appellant explained at pages 3-5, 11-14, and 23-25 of its opposition memorandum, that it would be error to invoke the extreme remedy of dismissal of Appellant's claims as a discovery sanction because: there was no violation of a discovery order; Respondents showed no prejudice or extraordinary circumstances, as required to support a dismissal of claims on procedural grounds under Minnesota law; and, lesser sanctions would have resolved any discovery issues. Appellant also made those arguments at Appx. 71 and 73-75. The Special Master nevertheless granted Respondents' motion, ordered Appellants' claims dismissed, and denied reconsideration. See, Addendum at 8 and 17. The Trial Court affirmed the Special Master's Order of Dismissal "as adopted in its entirety." See Addendum at 24. Appellant's Objections to the Special Master's Order of Dismissal, at pages 2-3 and 31-32, preserved the issues for appeal. Those issues were also preserved at Appx. 96-103.

Apposite Authority.

Beal v. Reinertson, 298 Minn. 542, 543-44, 215 N.W.2d 57, 58-59 (Minn. App. 1974). *Dennie v. Metropolitan Medical Center*, 387 N.W.2d 401, 406 (Minn. App. 1986). *Sudheimer v. Sudheimer*, 372 N.W.2d 792, 794-95, Minn. App. 1985).
Minn. R. Civ. P. Rule 37.02.

B. DID THE TRIAL COURT ABUSE ITS DISCRETION BY DISMISSING APPELLANT'S CLAIMS AS A DISCOVERY SANCTION WITHOUT PRIOR WARNING OR OPPORTUNITY TO CURE THE ALLEGED DISCOVERY VIOLATION?

Appellant pointed out below that its claims should not have been dismissed as a discovery sanction, because no prior warning was given before dismissal.

See, e.g. Appx. at 70, at paragraph 10, and at the last paragraph, at 71. The Special Master disregarded that point, and , ordered Appellants' claims dismissed.

See, Addendum at 15. The Trial Court affirmed the Special Master's Order of Dismissal. See Appx. at 31. Appellant's Reply to Respondent Frontline's Response Brief in Opposition to Frontier's Objections to the Special Master's Order of Dismissal preserved the issue for appeal. See Appx. at 94-95.

Apposite Authority.

Jadwin v. City of Daytonn, 379 N.W.2d 194, at 196 (Minn. App. 1985).

Sudheimer v. Sudheimer, 372 N.W.2d 792, at 795, (Minn. App. 1985).

Chicago Greatwestern Office Condo. Assc. v. Brooks, 427 N.W.2d at 732 (Minn. App. 1988).

C. DID THE TRIAL COURT ABUSE ITS DISCRETION BY DISMISSING APPELLANT'S CLAIMS AGAINST ALL RESPONDENTS AS A DISCOVERY SANCTION, WHEN ONLY RESPONDENT FRONTLINE CONTENDED THAT IT WAS DUE DISCOVERY FROM APPELLANT, AND ONLY FRONTLINE SOUGHT SANCTIONS IN THIS CASE?

On June 17, 2008, Appellant filed its Reply Brief in Support of Motion for Clarification and Reconsideration, see, e.g. pages 2-3 and 5-7, which explained

why Appellant's claims should not be dismissed against the Respondents who did not serve the discovery requests at issue, or move to enforce them. The Special Master nevertheless held that Respondent Frontline was acting for other Respondents, and dismissed all claims against all Respondents. See, Addendum at 21-22. The Trial Court affirmed the Special Master's Order of Dismissal, without specifically addressing the issue of claims against other Respondents. See Addendum at 24. On August 25, 2008, Appellant filed its Objections and Memorandum of Law in Response to the Special Master's Orders Dismissing Frontier's Claims, preserving the issue for appeal at pages 28-31.

Apposite Authority.

Firoved v. General Motors Corporation, 277 Minn. 278 at 284, 152 N.W.2d 364 at 369 (sanction of dismissal should be imposed only for extraordinary circumstances or prejudice that can be remedied only by dismissal).

Jadwin v. City of Daytonn, 379 N.W.2d 194, at 197 (Minn. App. 1985) (rejecting imposition of a sanction of dismissal on agency principles).

D. DID THE TRIAL COURT ERR BY AWARDING FEES AND COSTS UNDER MINN. R. CIV. P. 37.02?

Appellant opposed Respondents' request for an award of fees and costs under Minn. R. Civ. P. Rule 37.02 for routine litigation expenses unrelated to a motion to compel. See Appx. at 152 - 155. The Special Master, however, awarded all of Respondents' fees incurred after November 2, 2007. See, Addendum at 44.

The Trial Court affirmed. See Addendum at 53 - 54. Appellant preserved the issue for appeal at Appx. 169 *et seq.*

Apposite Authority.

Minn. R. Civ. P. R. 37.02.

General Environmental Science Corp. v. Horsfall, 25 F.2d 1048, 1994 WL 228256 at *12 (6th Cir. 1994).

Toth v. Trans World Airlines, Inc., 862 F.2d 1381, 1386 (C.A.9 1988).

Stillman v. Edmund Scientific Co., 522 F.2d 798 at 802 (C.A.Md. 1975).

E. DID THE TRIAL COURT ERR BY FAILING TO STAY CLAIMS AGAINST APPELLANT UNDER MINNESOTA AND NEW YORK LAW GOVERNING INSURANCE COMPANIES IN REHABILITATION?

In response to Respondent Frontlines' Motion for Fees and Costs, Appellant moved for a stay based upon Minnesota and New York law governing insurance companies in rehabilitation that require any claims against Appellant to be brought in the New York Rehabilitation Court overseeing Appellant's rehabilitation. The Special Master's Order of January 30, 2009 ruled that the Trial Court's Order had decided the issue of Respondents' claims for fees and costs, and that Appellant had acquiesced to the Court's determination of the fees issue. See Addendum at 34 *et seq.* The Trial Court affirmed that Order. See Addendum at 38 *et seq.* Appellant's Objections to the Special Master's Order of January 30, 2009, filed on February 19, 2009, preserved the issue for appeal, as did

Appellant's March 23, 2009 letter to Judge Holahan, requesting reconsideration of the ruling on the issue.

Apposite Authority.

Minn. Stat. §60B.01 et seq.

New York Insurance Law §7408 (6).

II. STATEMENT OF THE CASE

Frontier filed its Complaint in this case in July, 2004, in the Fourth Judicial District, County of Hennepin. The Honorable John L. Holahan, was assigned as the presiding Judge.

Plaintiff/Appellant Frontier Insurance Company is an insurer in rehabilitation in the State of New York. Defendants/Respondents were all in the business of processing credit card transactions for merchants, in exchange for a fee based on each merchant's credit card volume. The bank that financed the credit card transactions required Respondents to post surety bonds to indemnify the bank for potential losses from the credit card charges facilitated by Respondents' business.

Frontier's Amended Complaint alleged that the Respondents failed to report surety bonds they wrote in Frontier's name, failed to pay premiums due on the bonds they wrote, and failed to follow proper underwriting standards. On October 11, 2006, Respondent Frontline filed a motion to compel Frontier to fully and completely respond to certain discovery requests, and on February 4, 2008, filed a motion for sanctions, alleging that Frontier's supplemental discovery

responses were not adequate. Respondent Frontline's February 2008 Motion to Compel and Respondents' November 2008 Motion for Fees and Costs led to a series of orders issued between April 29, 2008 and October 26, 2009, by the Special Discovery Master, and affirmed by the District Court (see Appx. at 8, 17, 24, 34, 42, 44, 51 and 53). Among other things: (a) all of Frontier's claims against all of the Respondents were dismissed as a discovery sanction, without prior warning or an opportunity to cure; and (b) the Respondents were awarded all of their attorneys' fees and costs incurred after November 2007, in the amount of \$177,419.14, even though a large percentage of those fees were unrelated to a discovery dispute.

STATEMENT OF THE FACTS

Discovery requests were served by the parties in mid-2006. On August 21, 2006, Frontier filed a Motion to Compel Respondents to more fully respond to its discovery requests. On September 20, 2006, Judge Holahan appointed retired Judge Steven Lange as Special Master to preside over Frontier's motion to compel, and any other discovery matters that might arise. On October 11, 2006, Respondent Frontline filed its motion to compel further discovery responses from Frontier. No other Respondent joined in that motion.

On November 2, 2006, the Special Master held a hearing on Frontier's Motion to Compel. By several orders issued on and after November 8, 2006, the Special Master agreed that Frontier was entitled to additional documents and other

information from the Respondents, and granted much of the relief that Frontier was seeking.

On November 15, 2006, the Special Master held a hearing on Respondent Frontline's motion to compel discovery, at which he ruled, from the bench, that many of Appellant's discovery responses required supplementation; but the Special Master also noted that several discovery responses would have to be supplemented in the future, based on information that was due Appellant Frontier from the Respondents. The Special Master accordingly granted some of Respondent Frontline's specific requests to compel further discovery responses, and overruled others. There is a dispute whether February 5, 2007 was set as a deadline for Frontier and Respondent Frontline to supplement their discovery responses.

Discovery proceeded in 2007, but no discovery responses were served by either party in February, 2007, or for many months thereafter. As a result, by Order of October 3, 2007, the Special Master set October 26, 2007 as the date for completion of written discovery. The Special Master subsequently extended that date twice, to December 10, 2007, and then to December 20, 2007, at Frontier's request. See Addendum at 3. Frontier filed its supplemental responses to Frontline's discovery on December 20, 2007. See, Appx. at 1.

Respondent Frontline filed a motion on December 11, 2007, which requested discovery sanctions against Frontier, and argued that Frontier's supplemental discovery responses were not timely. That motion was denied by

the Special Master on December 26, 2007. See, Addendum at 1. But, in that same Order, filed six days after Frontier had served its Supplemental Discovery Responses as ordered, the Special Master for the first time warned that Frontier's claims might be dismissed, if it did not fully supplement its discovery responses prior to the deadline that had already expired. See, *Id.*, at 5. Other than the "warning" made only after Frontier had already served its supplemental discovery responses, and after expiration of the discovery cutoff, Frontier was not put on notice that its claims may be dismissed as a sanction for allegedly inadequate discovery responses.

On February 4, 2008, Respondent Frontline (but no other Respondents) filed a second motion for discovery sanctions, arguing this time that Frontier's December 20, 2007, supplemental discovery responses were inadequate and did not comply with the prior order to fully supplement. Frontier responded to that motion on March 3, 2008, and Respondent Frontline Replied on March 7, 2008. The Special Master held a hearing on March 11, 2008, and, on April 29, 2008, without any further order or warning that Frontier needed to supplement in any way its December 20, 2007, discovery responses the Special Master summarily dismissed all of Frontier's claims as a discovery sanction, including those against the Respondents who had never complained about any of Frontier's discovery responses or joined in any discovery motion. See Addendum at 8 et seq. The Special Master's Order reserved the issue of fees. *Id.*

On June 3, 2008, Frontier filed a Motion for Clarification and Reconsideration, which was essentially denied by the Special Master on August 8, 2008. See Addendum at 17. On August 25, 2008, Frontier filed its Objections to the Special Master's Orders of Dismissal with the Trial Court. Respondent Frontline responded to Frontier's Objections on September 11, 2008, and Frontier replied on September 29, 2008. On October 7, 2008, the Trial Court filed its Order and Memorandum affirming and adopting the Special Master's Orders of Dismissal in all respects. See Addendum at 24.

On November 10, 2008, Respondent Frontline was for the first and only time joined by its co-Defendants/Respondents in filing a Motion for Fees and Costs against Frontier. In response to the fee request, on November 12, 2008, Frontier filed a Motion for Stay, arguing that if Respondents were seeking to prosecute a claim for attorneys' fees and costs, while Frontier was in a receivership proceeding in New York, they must do so pursuant to the claims procedure established by the New York Rehabilitation Court. Respondents filed their Response to Frontier's Motion to Stay on November 19, 2008, and Frontier replied on December 5, 2008. The Special Master's Order and Memorandum of January 30, 2009 denied Frontier's Motion for Stay. See Addendum at 34. On February 19, 2009, and pursuant to Minn. R. Civ. P. 53.07 (b), Frontier filed with the Trial Court Objections to the Special Master's Order of January 30, 2009. On March 2, 2009, the Trial Court affirmed the Special Master's Order of January 30, 2009. See Addendum at 38.

On March 23, 2009, Frontier filed its Response to Respondents' Motion for Fees and Costs, which the Special Master had held in abeyance. Respondents replied on April 9, 2009. On July 23, 2009, the Special Master entered an Order that Respondents were entitled to an award of all of the fees and costs they incurred after November 2, 2007, and directed Respondents to file affidavits itemizing their fees and expenses. See Addendum at 44. Respondents' counsel filed their Affidavits on August 4, 2007, and Frontier responded with its August 28, 2009 Letter Brief. On September 15, 2009, the Special Master awarded \$177,419.14 in Rule 37.02(b) fees and costs to Respondents. On October 2, 2009, Frontier filed its Motion to Modify the Special Master's September 15, 2009 Order with the Trial Court. The Trial Court denied Frontier's Motion to Modify on October 26, 2009. See Addendum at 53. On October 27, 2009, the Trial Court entered its Order of October 26, 2009 as a Judgment. Frontier filed its Notice of Appeal on December 8, 2009.

This Court's assessment of the dismissal of Frontier's claims will necessarily involve a review of the two Requests for Production and 11 Interrogatories that the Special Master and the Trial Court found to have been less than fully answered. Each of those responses is set forth below, along with the facts relevant to each instance.

Frontline's Request for Production of Documents 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 for the years 1999 through 2001."

Frontier initially told the Special Master that it could produce the requested records. However, Frontier later learned that the individuals in question worked for its former parent company, Frontier Insurance Group Inc. ("FIGI"), and not for Frontier.

On May 14, 2007, Frontier filed its Supplemental Response to Request for Production No. 3 explaining that Frontier could produce only its own employees' records. That same Supplemental Response referred to and attached, in response to Requests for Production 12 and 13, an affidavit of Frontier's Corporate Counsel, stating under oath that the individuals in question were not Frontier's employees, and that Frontier could not produce personnel records of FIGI employees. Frontier's Supplemental Responses filed December 20, 2007 referred to and extended the responses Frontier had previously made on May 17, 2007. See Appx. at 116.

Frontier's counsel explained to the Special Master, at the March 11, 2008 hearing on Respondent Frontline's Motion for Sanctions, that FIGI and Frontier were no longer related entities. See, March 11, 2008 hearing Transcript at p. 59. FIGI had filed for bankruptcy. *Id.* Frontier went into rehabilitation under the control of The New York Commission of Insurance, and "sued the former officers of Frontier Insurance Group". *Id.* As a result, counsel said it was almost certain

that FIGI would sue Frontier, if the latter produced personnel records of FIGI employees. *Id.*

The Special Master's Memorandum of April 29, 2008 (see Addendum at p. 11) notes that Respondent Frontline could have subpoenaed the FIGI employee records, if Frontier has raised the issue before December 20, 2007. The criticism was misplaced, however, because Frontier did raise the issue in May, 2007, as Frontier's December 20 Supplemental Discovery Responses state. See, Appx. 116.

In sum, Frontier timely disclosed its inability to obtain the requested records, and Respondent Frontline did nothing to obtain the records for itself. Moreover, the Special Master's reasoning suggests that Respondent Frontline was derelict for failing to subpoena records that it knew, for over half a year, Frontier could not obtain. Yet, Frontline continued to insist that Frontier produce those records, and the Special Master agreed.

Frontline's Request for Production of Documents 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."*

Frontier responded: *"Pursuant to Defendants' specific request as it relates to this Request for Production, Frontier will make available its financial information for the years 1999, 2000 and 2001"*.

The Special Master criticized Frontier for producing general financial statements, when the Request asked for “information relating to its business with Frontline.” See, Addendum at 12. Yet, Frontier’s counsel advised at the March 11, 2008 hearing that he had discussed with Respondents’ counsel the fact that general financial statements were “the only thing I have got that is even close to responding to that request,” and that opposing counsel then replied that Frontier should produce those statements. See, March 11, 2008 hearing Transcript at p. 67. The Trial Court and Special Master nevertheless rebuked Frontier for producing the only responsive documents it had in response to Request for Production No. 4. See Addendum at 32 and 12, respectively.

Frontline’s Interrogatory No. 8: This Interrogatory asked: “... *please describe the total amount of premiums you believe were owed to Frontier Insurance Company.*” See Appx. at 116- 117.

Frontier’s supplemental response answered the Interrogatory, stating that “at least an additional \$598,012.21 in unpaid premiums” was due. Frontier also listed 25 bonds on which it believed additional premium was due, stating: “*As discovery in this case is still open and ongoing, Frontier reserves the right to supplement this information as necessary and/or appropriate*”. *Id.*

The Special Master’s Order of Dismissal, though conceding that discovery depositions did remain open, faulted Frontier for saying that it might supplement based on depositions to be taken, reasoning that Respondents had a “right to know

the exact amount of the claims against them”, notwithstanding what future deposition might show. See, Addendum at 13.

Frontier had hoped at the time to obtain additional bond and premium information by examining Respondents’ officers in depositions then scheduled in the case. See, e.g. Transcript of March 11, 2008 hearing at p. 56-57. Frontier knew that Respondents had access to the premium bond information they were asking for in Interrogatories 8 and 15, according to Paragraphs 4 & 5 of Mr. Reavis’ May 22, 2009 Supplemental Affidavit. See, Appx. at 286. Frontier accordingly asked Respondents in Frontier’s Interrogatories Nos. 26 and 27 for those premium and bond details. See, e.g. Appx. at 16-17. Again, however, the Special Master faulted Frontier for stating that it would depose Respondents about information they should have produced in the first place. That demonstrates how severely the burden of identifying Respondents’ bonds and premiums was shifted onto Frontier. Given Respondents’ failure to report the bonds they wrote, Frontier’s reserving the distinct possibility that additional bonds would be identified was appropriate and careful.

Frontline Interrogatories 9 - 14: Frontline’s Interrogatories 9 -14 asked for the basis of Frontier’s claim that Respondents improperly underwrote specific bonds. For example, Interrogatory No. 9 asked: *“Please state, with a reasonable amount of detail, what was wrong or improper with the underwriting on the MasterCard surety bond Benchmark Custom Golf [sic] with a bond number of*

122738. Please include a description of any information you believe was incomplete, inaccurate or missing". See Appx. at 118.

Frontier answered each interrogatory as to each bond by stating, among other things, that: *"Defendants' failure to properly underwrite was broad and systemic. Defendants represented that they were highly qualified in the merchant bankcard industry and Frontier's reliance on Defendants' representation of underwriting expertise in this business was an integral part of the underwriting relationship . . . Defendants either failed to properly investigate potential merchants and screen out unqualified high risk merchants from participation in the program or issued bonds ignoring the high risk characteristics of these unqualified merchants resulting in exposure of Frontier to claims and losses. Many times Defendants would issue bonds without even telling Frontier, obviously indicating a complete lack of underwriting communication whatsoever. In further response, Frontier refers to its Expert Report."* See Appx. at 118-119.

Frontier's answers to these six interrogatories noted Respondents' "broad and systemic" underwriting failures, and referred to Frontier's Expert Report. That report stated, under the headings "Under This Scheme an Agency Cannot Issue Bonds" and "Defendants' Negligence and Breach of Duty In Issuing Bonds" (see, Appx. at 111-112), four specific underwriting standards Respondents violated, i.e.: 1) Respondents were "paid by the banks (obligees) to bring Merchants (principals) to the Banks," contrary to a surety rule barring payments to producing agents; 2) Respondents "were the producing agent and agency and, at

the same time, controlled the processing of the work,” contrary to the surety rule that producing agents should “never directly control” the risk for which they proposed bonding; and, 3) that Respondents breached their agreement and insurance custom and practice, and 4) acted negligently, by failing to report bonds they wrote and to pay premiums as they agreed – which are the basic wrongs underlying Frontier’s claims in this case.

The Trial Court and the Special Master entirely ignored Frontier’s references to the expert report in answer to Interrogatories 9-14, despite the Special Master acknowledging that the standards identified by the expert were relevant to Frontier’s underwriting claims. See March hearing Transcript at p. 63-64).

The Special Master instead stated that Frontier had an obligation to state, in its answers Interrogatories 9 -14, why the merchants on those bonds “were considered to be at high risk.” See, Addendum at 13. But those interrogatories do not ask about high risk merchants.

Accordingly, Frontier’s counsel told the Special Master at the March 11, 2008 hearing that Frontier “indicated everything we know right now” on the underwriting question, but noted that Frontier intended to depose Respondents about those merchants in the pending depositions. See March 11, 2008 hearing Transcript at p. 62-63). This response posed no prejudice to Respondents, because only they knew if they could provide more information on high-risk merchants at their depositions; and if Respondents provided no more information at their

depositions, Frontier had already stated all that it knew. By dismissing Frontier's claims, the Trial Court and Special Master merely allowed Respondents to evade having to testify at the previously-scheduled depositions.

Frontline's Interrogatory No. 15: Interrogatory No. 15 asked: "*You have claimed that \$314,094.46¹ 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.*"

Frontier responded: "*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, retain 40% and send Frontier the remaining 60% of the premium charged.*" See Appx. at 121.

Contrary to the language of the Interrogatory, the Special Master stated: "Clearly, the interrogatory requests that plaintiff actually perform the premium calculation as to each merchant and list the dates on which the premiums were

¹ Frontier initially claimed that a cumulative premium amount of \$314,094.46 was due it. Frontier increased that amount to \$598,012.21, based largely on additional premium that was due on unreported bonds found in Respondents' records during discovery.

owed.” See Addendum at 13. But Interrogatory 15 requested only the “merchant name” on each bond. Frontier’s response names those merchants.² The Special Master, however, chose to read into Interrogatory 15 a request for the specific amount of premium under each bond, apparently reasoning (as suggested by the foregoing quotation) that Frontier had to “actually perform the premium calculations as to each merchant” in order to determine which merchant bonds had premium owing.

While Frontier did make premium calculations on each bond, and disclosed that fact to the Special Master, Interrogatory 15 does not ask Frontier to identify those calculations. This is readily seen by comparing Interrogatory 15’s wording to Frontline’s Interrogatory No. 17, which specifically asked (on a different subject) that Frontier identify “each merchant *and the amount attributable to each*”. See Appx. At 122. With deference to the Special Master, Interrogatory 15 asks only for merchants -- not for the premium amount due on each bond. The Trial Court repeated the Special Master’s reasoning. See Addendum at 28.

At the March 11, 2008 hearing, Frontier’s counsel advised the Special Master that Frontier had made premium calculations, bond by bond, that it would have provided, had Frontier understood Interrogatory 15 to request bond-by-bond

² The Special Master (see Addendum at 23) and Trial Court (see Addendum at 28) erred in stating that Appellant gave “no information which would allow Defendants to identify a particular bond for which a premium was owed” for a particular merchant. Appellant named merchants’ on whose bonds premiums were owed.

calculations and not an aggregate total. See, March 11, 2008 hearing Transcript at pp. 54-56. Frontier's counsel also noted that Respondents could ask for those calculations in the pending depositions. *Id.* Moreover, Frontier later produced the specific calculations, which were performed in December, 2007. See Supplemental Affidavit of Ron Reavis, at Paragraph 7, Appx. at 286 and at 294-302. Those disclosures show that Frontier was not hiding premium calculations, but was answering the interrogatory as Frontier reasonably understood it.

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.

Frontline Interrogatory Nos. 16 -18: Frontline posed three interrogatories concerning claims made on bonds written by Respondents, as follows:

Interrogatory No. 16: *Please identify all bond payment claims submitted by First State Bank, LMA and/or Frontline that were not paid, for whatever reason, by Frontier.*

Interrogatory No. 17: *Please state which merchant claims make up the amount stated in your response to Interrogatory No. 16, above, and identify each merchant and the amount attributable to each.*

Interrogatory No. 18: *Please state each and every reason payment on the claims, identified in Interrogatories 16 and 17 above, was denied. See Appx. at 121-122.*

Frontier answered each of these interrogatories by stating: *Pursuant to Rule 33.03 of the Minnesota Rules of Civil Procedure Frontier will make its documents available in a manner and/or at a time and place mutually agreeable to the parties.*³ *Id.*

Minn. R. Civ. P. Rule 33.03 permits Frontier to answer Interrogatory Nos. 16 -18 in precisely the manner it did. The Special Master never suggested or directed in advance that Rule 33.03 should not be used to answer Interrogatories 16 – 18. Yet, in his April 29, 2008 Order of Dismissal, Special Master blamed Frontier for answering them under Rule 33.03. See Addendum at 13-14. Equally important is that Frontline had never requested copies of the documents Frontier had offered to produce. See, March 11, 2008 hearing Transcript at p. 65. The undisputed facts, therefore, are that: there was no motion or order for Frontier to supplement its responses to Interrogatories Nos. 16 – 18 in the first place; Respondent Frontline failed to request or to make arrangements to inspect the documents Frontier agreed to produce; and, there was no prior warning that Rule 33.03 could or should not be used to answer those interrogatories.

STANDARD OF REVIEW

A trial court's discovery orders are reviewed for an abuse of discretion, see *Charges of Unprofessional Conduct*, 720 N.W.2d 807, 811 (Minn. 2006). But when a trial court's decision to dismiss involves the interpretation of a procedural

³ Frontier added the following sentence to its answer in Interrogatory No. 16: "Please also see Frontier's previous Supplemental Answer to Interrogatory No. 25.

rule, the appropriate standard of review is *de novo*. See, *Modrow v. JP Foodservice, Inc.*, 656 N.W.2d 389, 393 (Minn. 2003).

III. ARGUMENT

A. **DISMISSAL OF APPELLANT’S CLAIMS AS A DISCOVERY SANCTION WAS AN ABUSE OF DISCRETION, BECAUSE DISCOVERY DELAYS AND DISRUPTIONS IN THIS CASE DID NOT ARISE FROM APPELLANT’S DISOBEDIENCE TO A DISCOVERY ORDER OR FROM EXCEPTIONAL CIRCUMSTANCES JUSTIFYING A DISMISSAL.**

1. **Controlling Law.**

Minnesota law expresses a clear preference that cases be decided on their merits, and not on procedural grounds. See, e.g., *Dennie v. Metropolitan Medical Center*, 387 N.W.2d 401, 404 (Minn. 1986) (reversing trial court after reviewing the “facts and circumstances of this case,” because trial court’s order was tantamount to dismissal of the plaintiff’s case, and trial court would have better served the interest of the parties by ruling on the disputed discovery issues, and granting a brief continuance if necessary to accommodate the rulings and proceed with a trial on the merits); *Petrich v. Dyke*, 419 N.W.2d 833, 834 (Minn. App. 1988) (vacating default judgment entered for failure to attend depositions, where the party showed a valid case on the merits and acted with diligence once the default was entered).

Peters v. Waters Instruments, Inc., 312 Minn. 152, 251 N.W.2d 114 (1977) (citations omitted), for example, teaches that: “an order of dismissal with prejudice must be justified by the fact and circumstances peculiar to each case. . . . Since a

dismissal with prejudice is a drastic form of relief, it should be granted only in exceptional circumstances where there are “ ‘considerations of willfulness and contempt for authority of the court, or the litigation process.’ ” Indeed, “the court should not ignore what role, if any, the Defendant played in the delay” of the prosecution of the case. See, *Modrow v. J.P. Food Service, Inc.*, 656 N.W.2d at 396 (Minn. App. 2003).

Accordingly, claims may be dismissed on procedural grounds under Minnesota law only if the party moving for dismissal has suffered prejudice that can be remedied only by dismissal. In *Firoved v. General Motors Corp.*, 277 Minn. 278, 152 N.W.2d 364 (1967), the Supreme Court of Minnesota specifically stated that, although a trial court has discretion to dismiss claims as a sanction, it may do so only if the party who has moved for dismissal shows that it will suffer a “particular prejudice of such a character that some substantial right or advantage will be lost or endangered” in the absence of a dismissal. *Id.*, 277 Minn. at 283-84, 152 N.W.2d at 368. The *Firoved* opinion also specifically noted “such prejudice should not be presumed, nor inferred from the mere fact of delay,” see, *Id.*, 277 Minn. at 283-84, 152 N.W.2d at 369, and that “the ordinary expense and inconvenience of preparation and readiness for trial, which can be adequately compensated by the allowance of costs, attorneys’ fees, or the imposition of other reasonable conditions are not prejudice of the character which would justify . . . a dismissal with prejudice.” *Id.*, 277 Minn. at 283, 152 N.W.2d at 368. See, also, *Beal v. Reinertson*, 298 Minn. 542 at 544, 215 N.W.2d 57 at 58-59 (1974)

(dismissal was in error where no particular showing of prejudice was made, and the trial court could have ordered plaintiff to produce records by date certain, or his action would be dismissed); *Dennie v. Metropolitan Medical Center*, *supra* at 387 N.W.2d 404 (citing *Firoved* as the best expression of the Supreme Court's position on the issue of dismissal as a procedural sanction); *K-MART Corp. v. County of Becker*, 639 N.W.2d 856, at 860 (Minn. 2002), (“the rules of civil procedure allow a court to dismiss an action for failure to comply with discovery obligations only under exceptional circumstances”).

This Court, too, in *Chicago Greatwestern Office Condominium Assoc. v. Brooks*, 427 N.W.2d 728 at 731 (Minn. App. 1988), has held that a trial court's discretion narrows as it imposes increasingly severe sanctions, because severe sanctions infringe “upon a party's right to a trial by jury . . . and runs counter to the sound policy of deciding cases on the merits, and against depriving a party of his fair day in court.” Moreover, even when a discovery failure does result in prejudice, “it is the normal rule that the proper sanction must be no more severe than is necessary to prevent prejudice to the movant”. *Id.* As a result, Minnesota appellate cases have repeatedly required trial courts to address discovery violations by means less severe than dismissal. *See, e.g., Beal, supra*, 298 Minn. at 544, 215 N.W.2d at 58-59; *Sudheimer v. Sudheimer, supra*, 372 N.W.2d 792 at 795 (Minn. App. 1985); *Hoyland v. Kelly, supra*, 379 N.W.2d 150 at 153 (Minn. App. 1985); *Petrich v. Dyke*, 419 N.W.2d 833 (Minn. 1988).

2. It was an Abuse of Discretion to Dismiss Appellant's Claims, Given the Problematic Discovery Process in This Case.

The trial court abused its discretion by dismissing Frontier's claims as a discovery sanction, because most of the discovery disputes in this case were directly caused by Respondents' spurious claims that they themselves could not find the bonds they wrote in Frontier's name, and which were central to Frontier's claims. Because it was the Respondents who were playing "hide the ball," it made Frontier's job of identifying all of the non-reported bonds and calculating its damages extremely difficult. The Special Master was clear in this regard -- specifically finding that Respondents' discovery conduct was "problematic". See Appx. at 15, at ft. nt. 1.

The inherent difficulties for Frontier to respond to discovery requests asking for specific identification of bonds in Respondents' exclusive possession and control, and a calculation of damages based on premiums due for those unreported bonds, made the imposition of the severe sanction of dismissal improper. As explained below, Frontier timely produced all of the evidence in its control that was responsive to the discovery posed by Respondent Frontline. In doing so, Frontier fully complied with the discovery rules and orders, and the Trial Court clearly abused its discretion by dismissing Frontier's claims as a discovery sanction.

Had Respondents identified the bonds they wrote, in response to Interrogatories asking them about those bonds, Frontier could have quickly

calculated the premiums Respondents owed on the bonds in question, and discovery could have been completed without delay. In fact, Frontier did calculate the premiums due on Respondents' bonds, within three weeks of finally locating them. Discovery was delayed only because Frontier was forced to search for Respondents' own bonds -- a search that resulted from Respondents' suspect denial that they did not know where the bonds were.

Not only did Respondents claim that they couldn't find the unreported bonds; they denied that they even wrote them or that they existed. The evidence of record discovered by Frontier, however, shows that Respondents in fact wrote 80 bonds in Frontier's name, all of which were unreported to Frontier. 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 Montana -- which documents the Special Master found were not made available to Frontier as they were kept in the normal course of the Respondents' businesses. But, even after finding that Respondents had required Frontier to search for needles in haystacks, when the information sought should have been readily available, the Special Master nevertheless relieved Respondents of their duty to produce their own bonds, and placed all the burden of finding them on Frontier.

As noted above, Minnesota cases make clear that a trial court should consider the amount of and reasons for any delays when imposing discovery sanctions, particularly when severe sanctions are being considered. *Firoved v. General Motors Corp.*, *supra* at 152 N.W.2d 369. But discovery in this case was

made inherently more difficult for Frontier when Respondents denied that they could find, or even that they wrote, most of the key bonds at issue. In fact, the problems went deeper than the Trial Court or Special Master ever acknowledged.

a. Respondents' Discovery Conduct was Deeply Problematic.

The Special Master ultimately required Frontier to bear the burden of finding Respondents' bonds, but that decision did not proceed smoothly. Frontier initially found that Respondents' stored documents could not be searched systematically. The Special Master, therefore, ordered Respondents to produce an index they had prepared for the 250,000 pages of documents in their records warehouse. Respondents assured the Special Master that their index would provide ready identification of any Frontier bonds in their records. See, Addendum at 5. But when Frontier received in response to requests for documents identified by the index documents that did not correspond to the descriptions provided, the Special Master was "extremely concerned" that the index served only to hide Respondents' bonds. *Id.*

The Special Master appropriately, and repeatedly, noted his concerns about the "problematical aspects to Frontline's discovery". See, Appx. 15, A at 1. As one example, in his Memorandum issued with the December 26, 2007, Order (see Appx. at 15), the Special Master said that:

"In fact, the Special Master is extremely concerned that the existence of bonds may have been hidden by the index's description. It was the Special Master's conclusion that the Billings repository did not

contain documents kept in the ordinary course of business, but instead, contained documents that were collected, organized and indexed for the purposes of litigation. The primary reason that defendants were permitted to provide discovery by examination in situs was the existence of the document index, which defendants assured would be helpful in assisting plaintiff in obtaining discovery. ‘The Special Master is cognizant that had plaintiff examined the documents earlier, the flaws of the index would have been brought to its attention prior to the close of discovery. In fact, plaintiff did advise the Special Master that it believed the document index did not list all the bonds at the November 2nd [2007] hearing. However, at that hearing, defendants still represented that the index would be helpful to plaintiff in obtaining the discovery that was needed.’

See Appx. at 5 - 6.

The Special Master acknowledges in the quoted passage that the “primary reason” he directed Frontier to search for Respondents’ bonds, in Respondents’ warehouse, was Respondents’ representation that their index would allow one to find those bonds readily. The Special Master acknowledged, however, that Frontier’s attempt to use the index “proved to be problematic.” See Appx. at 12. Thus, the entire premise for making Frontier search for Respondents’ bonds was mistaken. Nonetheless, the Special Master still continued to require Appellant to find Respondents’ bonds among the latter’s stored records, despite Frontier’s

consistently-stated position that the simple remedy would be to “order that they [Respondents] produce all the bonds they wrote”. See, November 2, 2007 Hearing Transcript at p. 10).

The difficulties described above might be expected in a case involving 250,000 pages of documents, but the problems with finding specific documents in the Respondents’ exclusive custody and control were made even more difficult by the Respondents’ misconduct. From the beginning of discovery, Respondents’ swore under oath that they did not fail to report any bonds they wrote, or fail to pay the premiums that were due on those bonds. Frontier later proved that was not true.

Frontier’s Interrogatory No. 26, for example, asked Respondents to identify unreported merchant bonds, to which Respondent LMA swore there were no unreported bonds. See, e.g., Appx. at 52. Respondent Kittler answered that same Interrogatory by saying that he dealt with Frontier only in his corporate capacity and had no personal knowledge of Frontier bonds. See, Appx. 16 - 17. Yet, Frontier found in Respondents’ records warehouse 82 unreported bonds that Respondents wrote, and Mr. Kittler’s personal (not corporate) signature appears on 67 of those 82 unreported bonds. See, Appx. at 187 – 268. Similarly, Respondent LMA swore in response to Frontier Interrogatories 22, 23, and 27 (see Appx. 51 - 57) that it reported and paid all premiums due on the bonds it wrote for Frontier. Respondents, however, clearly paid no premiums on their unreported bonds.

Respondent Kittler stated in response to the same Interrogatories that he knew of no unpaid premiums.⁴

Respondents' discovery responses, therefore, were patently false. Frontier was able to prove the falsity, however, only ultimately by manually searching through Respondents' 250,000 pages of records - a task which the Special Master ordered Appellant to undertake from November 27 through November 29, 2007 -- to locate 82 unreported bonds that had been randomly placed among the mountains of paper. Within two weeks of that search, Frontier compiled a preliminary list of the unreported bonds it had found, identified in a document entitled "Working Copy", see Appx. at 269, which Frontier then provided to Respondents in the form of a supplemental discovery response on December 13, 2007, long before its claims were dismissed.

The Working Copy lists every merchant on the 82 unreported bonds written by Respondents, and identifies 77 of those 82 unreported bonds by specific Frontier bond number. The document was called a "Working Copy" because Frontier found among Respondents' records references to many other "umbrella bonds" that were apparently replaced by Frontier bonds that had yet to be found.⁵

⁴ Respondents repeated the same denials, under oath, in responding to Frontier's First Set of Requests for Admissions Nos. 22, 25 and 26.

⁵ Respondents got "umbrella bonds" from sureties other than Frontier. Respondents often replaced those umbrella bonds with Frontier bonds. Frontier found five unreported Frontier bonds from references showing Respondents replaced umbrella bonds with those five Frontier bonds. Frontier found many

Footnote continued on next page.

The 82 unreported bonds that were found comprise 60% of the 140 Frontier bonds Respondents are now known to have written. After Frontier found those bonds, it repeatedly emphasized to the court the fact that Respondents had those bonds in their stored records all along, which was contrary to their sworn discovery responses. See, Appx. at 142 and 170. Respondents never denied that fact.

Respondents' unreported bonds, the vast majority of them bearing Respondent Kittler's signature, are evidence that neither the Trial Court, the Special Master, nor Respondents should have ignored. The Special Master, belatedly recognized the significance of this evidence in his Order of July 23, 2009, where he said that, "It is possible that had the case not been dismissed, plaintiff could have established that defendants had violated discovery orders such that it would have been entitled to an award of costs and attorneys fees." See Appx. at 48. Despite his belated recognition of Respondents' conduct, however, the Special Master and the Trial Court did not reconsider the dismissal of Frontier's claims. The Trial Court, in fact, flat out contradicted the Special Master's conclusion and the evidence of record, when it ruled that Frontier's

other umbrella bonds references suggesting more unreported bonds, and Frontier intended to follow up on them in depositions that were scheduled when its claims were dismissed. As a result, the Working Copy listed both umbrella bonds and Frontier bonds.

“claims about bonds Defendants issued but never reported is [sic] entirely unsubstantiated”.⁶

Frontier’s Working Copy provided clear corroboration of prior evidence submitted in support of its position that Respondents should have been required to produce their own bonds. The Working Copy also corroborated by two affidavits of Mr. Ron Reavis, a former employee and CFO of Defendants. Mr. Reavis’ June 11, 2006 affidavit states, at Paragraphs 36-37, and 39 (see, Appx. 85 - 86), that Respondents failed to report over \$280,000 in premiums due to Frontier. Mr. Reavis’ September 1, 2006 affidavit states at Paragraph 8 (see Appx. 91) that Respondent Kittler directed Mr. Reavis to alter data to reduce the premiums reported as owed to Frontier. Mr. Reavis’ Affidavit also states that Respondents had kept all of their Frontier records in a single file drawer when Mr. Reavis worked with Respondent. *See, Id.* at ¶¶ 4 & 6, Appx. at 90. The fact that Respondents later claimed that those records were dispersed among 250,000 pages of records was significant, and worthy of inquiry, given Mr. Reavis’ prior statement that Respondents had used their vast store of records to thwart discovery of relevant documents in the past. *See, Id.* at ¶ 7, Appx. at 90. In short, it should

⁶ Frontier later noted that this evidence of Respondents’ unreported bonds and false discovery responses made an award of fees to Respondents unjust under Minn. R. Civ. P. Rule 37.02. See Appx. at 167, et. seq., see e.g. 170-173. The Trial Court noted that this evidence went to the “merits of Frontier’s case”, but declined to “waste time and resources” considering those merits again. See Trial Court’s Order of October 26, 2009, at ¶¶ 1 & 2. Addendum at 53 – 54. In fact, the Trial Court never considered that evidence.

have been clear that the discovery process adopted by the Special Master in this case was problematic due to the Respondents' misconduct.

In dismissing Frontier's claims, therefore, the Trial Court and the Special Master clearly abused their discretion by failing to assess the impact of the Respondents' discovery misconduct, and all of the facts and circumstances. Before any sanctions were even considered against Frontier, Respondents should have been required to explain their sworn denials that they wrote any unreported bonds, which denials were proved to be false by the evidence Frontier discovered that was hidden in Respondents' own records. Respondents should also have been held to account for the fact that documents kept in a single file drawer when Mr. Reavis worked with Respondents were later hidden and dispersed throughout 250,000 litigation documents.

The *Firoved*, *Dennie*, *Peters* and *Petrich* cases, cited above, all require a careful assessment of circumstances such as these when a trial court considers imposing a sanction of dismissal. And all of these cases recognized that a dismissal of claims was not an appropriate sanction given circumstances less compelling than those here. The Trial Court should therefore have inquired into the problematic facts of this case before imposing sanctions, because a party's "conduct in deceitfully complying with discovery is as willful as a failure to comply with a court order and should be treated in as serious a manner." *See, Deutz & Crow Co. v. Anderson*, 354 N.W.2d 482, at 491 (Minn. App. 1984). *Modrow v. JP Foodservice, Inc.*, 656 N.W.2d 389 at 396 (Minn. App. 2003) (a

trial court should not ignore “what role, if any, the Defendant played in the delay” of a case). Under these precedents, it was a clear abuse of discretion to impose the severest of sanctions without inquiry into the accumulated evidence of Respondents’ misconduct during discovery.

In sum, and as explained in greater detail below, despite all of the evidence of Respondents’ discovery misconduct, the Special Master required Frontier to search for unreported bonds at Respondents’ records warehouse, beginning on November 27, 2007. Within three weeks of that search, Frontier reviewed 12,000 pages of documents, corrected labeling problems, identified over 80 unreported bonds in Respondents’ records, and on December 10, 2007, due to the death of an immediate family member of Mr. Reavis (who had helped Respondent calculate premiums owed on Respondents’ bonds) requested and received an extension of ten days to supplement its discovery responses based on the newly discovered evidence. All of that work, which would not have been necessary had Respondents not abused the discovery process, resulted in the “Working Copy” that was provided on December 13, 2007, and which allowed Frontier to complete its non-paid premium damage calculations by December 20, 2007 (see Appx. at 286, ¶7, and 294. Frontier’s supplemental discovery responses, based on all of the foregoing, were served by December 20, 2007 -- just as the Special Master ordered. It was therefore a clear abuse of discretion to dismiss Frontier’s claims in this case for allegedly failing to obey an order to supplement.

b. The Trial Court and Special Master Erred in Assessing Appellant's Discovery Responses.

The actual search of Respondents records that led to discovery of the 82 unreported bonds began on November 27, 2007, as the Special Master specifically ordered; and within three weeks all of the evidence discovered in that search was compiled and submitted of record, in order to comply with the December 20, 2007 date for the end of written discovery, as the Special Master also ordered.

Unfortunately, this compressed time frame led to repeated errors in the Orders of the Trial Court and Special Master concerning Frontier's discovery responses.

One such error is described in more detail below: i.e., the recollection that Frontier missed a February 5, 2007 discovery date. Similarly erroneous statements are found in the Trial Court's Order of October 7, 2008, which states: "Plaintiff's claim about bonds that defendants issued but never reported is entirely unsubstantiated," see Appx. at 29; that "Frontier has not to this day disclosed in any detail . . . how much premium it believes was owed," see Appx. at 25; and, that Frontier failed to disclose "what was wrong with the underwriting" done by Respondents. *Id.* These charges go to the very basis for Frontier's major claims in this case, i.e. that Respondents wrote unreported bonds, and failed to pay bond premiums; improperly issued bonds (i.e., underwrote bonds that should never have been issued), but they are erroneous charges.

Frontier substantiated its "claims about bonds that defendants issued but never reported" in several ways. First, Frontier produced the "Working Copy",

see Appx. at 269, which listed every merchant on the 82 unreported bonds found in Respondents' records warehouse. Second, Frontier made copies of those 82 unreported bonds and submitted them to the Court. See Appx. at 184 and at 187 *et seq.* And, third, Mr. Reavis' June 19, 2006 Affidavit states that Respondents failed to report bonds. See, Appx. at 85 – 86, ¶¶ 35 – 39. The evidence, therefore, amply substantiated Frontier's "claims about bonds that defendants issued but never reported." Frontier repeatedly claimed in papers filed with both the Trial Court and Special Master, that Respondents issued these unreported bonds -- which it ultimately provided. See Appx at 142, 170.

The Trial Court also erred in finding that Frontier never disclosed "how much premium it believes was owed". See Addendum at 25. As Frontier stated in answer to Respondent Frontline's Interrogatory number 15: "Frontier believes that Defendant owes Frontier at least an additional \$598,012.21 in unpaid premiums." See Appx at 117. Further, Frontier's counsel told the Special Master at the March 11, 2008 hearing on Respondent Frontline's Motion for Sanctions, that if Frontline had asked for them, Frontier would have broken down its calculation of the amounts of premium due on each merchant bond. See March 11, 2008 hearing Transcript at p.55. In fact, when the Special Master asked, "Do you have those calculations?" Frontier's counsel answered, "Yes". *Id.* Frontier's counsel also explained that he did not produce the calculations only because he did not understand Interrogatory 15 to ask for them, but "I will give it to them, they can ask for that during the depositions [then pending]. I have nothing to hide in

that regard, . . .” *Id.* March 11, 2008 hearing Transcript at pgs. 55-56.

Respondents, however, never asked Frontier for those bond-by-bond premium calculations. Nor did the Special Master ever order Frontier to produce those calculations (although Appellant did produce them to show that they existed all along). See Appx. At 294-302.

The Trial Court additionally erred in finding that Frontier failed to disclose what was wrong with Respondent’s underwriting of bonds. Frontier plainly stated, in answer to each of the six interrogatories (numbers 9 – 14 inclusive) posed about Respondent Frontline on the underwriting issue, that it relied on Respondents’ self-proclaimed underwriting expertise, but that Respondents violated basic surety underwriting standards in issuing bonds Frontier entrusted to them. Frontier also answered those interrogatories by citing its expert report in this case, which sets out four specific underwriting standards that Respondents had violated in writing bonds for Frontier, as described in detail above.

In short, the Trial Court and the Special Master erred in assessing every major area of discovery for which fault was attributed to Frontier. Based solely on those errors, all of Frontier’s claims were dismissed. This case would have been entirely different had there been – as the Trial Court and Special Master asserted – no evidence that Respondents wrote unreported bonds, no statement of the premiums Respondent owed, and no statement of the underwriting standards Respondent violated. But those are not the facts because Frontier did produce evidence to support its claims, and to show that Respondents had engaged in

discovery misconduct in an effort to conceal relevant evidence. It was therefore an abuse of discretion to dismiss Frontier's claims when there was, in fact, substantial evidence which shows they have merit.

3. No Prejudice or Exceptional Circumstances Support Dismissal of Appellant's Claims Under Minnesota Law.

Respondents' problematic discovery conduct is by no means the only basis for finding that the dismissal of Frontier's claims was an abuse of discretion -- because the prejudice and exceptional circumstances required by Minnesota law to justify the severe sanction of dismissal do not exist. The only claimed prejudice is that Respondent was required to provide an index of its records to Frontier, that the discovery period was longer than anticipated, and that Frontier's discovery answers were incomplete. As shown below, none of these matters justified dismissal, because a lesser sanctions would have remedied any discovery violations attributed to Frontier's December 20, 2007 Supplemental Discovery Responses; but those lesser remedies were never employed. The summary imposition of a dismissal was therefore an abuse of discretion.

Both the Trial Court and the Special Master found that Frontier's alleged failure to provide adequate discovery responses prejudiced Respondents' preparation of their defenses. *See*, Appx. 16 and 29. But the Special Master did not specifically identify any prejudice, and the Trial Court, likewise, was able to say only that that Respondents suffered prejudice because they "incurred expenses of \$40,000 to index the 250,000 documents in Montana," and because "[h]aving

this lawsuit drag on was an embarrassment and damages from a reputation standpoint was of a lot of money.” See, Appx. at 29-30. As explained above, however, the “index” was used by Respondents to hide documents -- not to make their identification easier -- and there was no evidence the index was prepared for Frontier.

Moreover, any costs associated with indexing documents, and any inconvenience or damages to reputation, could have been remedied by an award of damages if Respondents were to prevail at trial. Normal costs and consequences of litigation, however, are not the type of prejudice “such as would justify visiting the extreme consequences of dismissal”. See, *Firoved, supra*, 277 Minn. at 284, 152 N.W.2d at 369. This is all the more true where the delay and discovery disputes were caused by the Respondents themselves.

a. The Trial Court and Special Master Incorrectly Attributed a Pattern of Noncooperation in Discovery to Appellant.

The Trial Court and Special Master both concluded that the dismissal of Frontier’s claims was justified by a lengthy pattern of Frontier’s noncooperation in discovery. The Trial Court, in fact, labeled the conduct as “egregious”. See Appx. at 15 and Appx. at 31 - 32. What the Trial Court termed egregious delay, however, was in fact two brief discovery extensions that were timely requested by Frontier and approved; while on the other hand approximately 85% of the one year discovery extension in this case should actually have been attributed to Respondents.

The Special Master and the Trial Court found that Frontier had agreed to “provide the required discovery responses, as ordered by the Special Master” by February 5, 2007. *See* Appx. at 10 and at 27. But the referenced February 5, 2007 deadline, on which both the Trial Court and Special Master relied as justification for their orders of dismissal, was never formally ordered, and it was in any event extended with court approval several times. Furthermore, Respondents themselves missed the same deadline, if it existed.

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 set or ordered. An email sent by Frontier’s counsel on the date of the November 15 hearing states that: “The court will set a deadline for supplementation of all discovery responses, **and is considering** February 15, 2007.” *See* Appx. at 165. That date apparently was not agreeable, however, because Respondents’ counsel wrote to Frontier’s counsel on November 20, 2006, stating that Respondents “are agreeable to the February 1, 2007 cut-off date for the exchange of all discovery documents and Interrogatory Responses,” i.e., they were looking for an earlier date than that being considered by the Special Master. *See* Appx. at 166.

On January 31, 2007, Frontier’s counsel followed up with a letter to Respondents' counsel, *see* Appx. at 162, which explains that Respondents’ counsel cancelled a December 4, 2006 telephone conference call, in which counsel were to confer and agree on the February discovery date. *Id.* Respondents’ counsel did not respond to that January 31, 2007 letter, even though it was sent in time for an

agreement to be reached, and for discovery to be exchanged, in February 2007. In fact, Respondents' counsel did not address discovery dates again until April 6, 2007.⁷ See Appx. at 163.

Thus, the record clearly documents that Respondents failed to agree on a February discovery date, and that the Court did not order one. Moreover, because another discovery date was not set until October 26, 2007, Respondents themselves were responsible for 85% of the "lengthy pattern of non-compliance" wrongly attributed to Appellant as a basis for dismissing its claims because Respondents never agreed to a discovery cutoff date in February, never asked that one be formalized in a court order, and remained silent for months afterwards.

b. The Faults Found in Appellant's Discovery Responses Were Minor, Technical, Easily Remedied and Do Not Justify a Dismissal.

The Trial Court and Special Master rebuked Frontier most frequently for failing to provide information it did not have, and which was being hidden by Respondents or was in the possession and control of third parties. That 'fault' was noted with respect to Frontier's responses to: **Request for Production No. 3**, (seeking FIGI's employee records Frontier twice stated they could not produce); **Request for Production No. 4**, (Frontier could produce only the general financial records it had); and, **Interrogatories 9-14**: (the Special Master required answers

⁷ The facts noted in this paragraph were set out at pages 9 and 10 of Respondents' Objections filed with the Court on August 25, 2008. Respondents had a full opportunity to contest those facts, but did not do so.

stating which merchants were high risk, although Frontier stated that it had provided everything it knew prior to pending depositions of Respondents). In each instance, Frontier answered the discovery, and explained any limits on its response or the information that was within its control. In each instance Frontier also tendered the information or documents it did have, except for Request for Production No. 3, in which Frontier advised that it could not produce FIGI personnel records. The discovery rules required nothing more.

The Special Master also chided Frontier for stating, in answer to Interrogatory No. 8, that Frontier would supplement the unpaid premium owed on Respondent's bonds after deposing Respondents, and offering to produce the responsive documents in answer to Interrogatories 16-18. Even if those responses were in any way deficient, any such minor, technical violations most certainly do not support a dismissal of claims as a sanction. *See, Chicago Greatwestern, supra*, 427 N.W.2d at 732.

B. IT WAS AN ABUSE OF DISCRETION TO DISMISS APPELLANT'S CLAIMS WITHOUT PRIOR WARNING TO APPELLANT OF A POSSIBLE SANCTION OF DISMISSAL

A dismissal on procedural grounds should be imposed only in cases where a party "violated the discovery rules in a manner which defeats their purpose by conduct which can only indicate an unmistakable challenge to the authority of the rules". *See, Garrity, supra*, 280 Minn. 202, 207, 159 N.W.2d 103, 107 (1968). A clear warning that a party must comply with an order to produce specific

information, or suffer dismissal, serves as a test whether the party is challenging the discovery rules.

Minnesota courts have repeatedly emphasized the importance of a clear warning before a sanction of dismissal is imposed. See, e.g., *O'Neil v. Corrick*, 307 Minn. 497, 239 N.W.2d 230 (1976) (dismissal proper where plaintiff was ordered to answer interrogatories fully, or have its case dismissed); *Jadwin v. City of Dayton*, 379 N.W.2d 194, 196-197 (Minn. App. 1985) (Minnesota law emphasizes that an order compelling discovery should contain: (1) a date certain by which compliance is required, and (2) a warning of the sanctions for non-compliance.); *Sudheimer, supra*, 372 N.W.2d 792, 795 (Minn. App. 1985) (a clear warning of an automatic dismissal is a significant factor in determining whether such a sanction was appropriate); see also, *Chicago Greatwestern, supra*, 427 N.W.2d 728 (Minn. App. 1988); *Petrich, supra*, 419 N.W.2d 833 (Minn. App. 1988); *Hoyland, supra*, 379 N.W.2d 150 (Minn. App. 1985); *Bio-Line, Inc. v. Wilfley*, 365 N.W.2d 338 (Minn. App. 1985).

The Trial Court and the Special Master both made a basic factual error in asserting that the Special Master's "Order and Memorandum of December 26, 2007" gave a proper, prior warning of dismissal to Frontier. See Appx. 15 and 31. It plainly did not, because both the Special Master and the Trial Court thought, erroneously, that "Plaintiff provided the requested discovery on December 26, 2007," see, Appx. at 11 and 28, respectively, when in fact Frontier had actually served the discovery at issue on December 20, 2007 -- a week before the purported

warning. In subsequent argument, Frontier advised both the Trial Court and the Special Master that the purported warning was given after the subject discovery was filed, but they refused to change their ruling. See Appx. at 71-72 and 94-94. It was, on these undisputed facts, an abuse of discretion to dismiss Frontier's claims without a prior warning or opportunity to cure.

Moreover, Frontier's diligent conduct in the weeks prior to the discovery deadline of December 20, 2007, which included searching for, reviewing, processing and supplementing discovery based on the search of Respondents' voluminous records, clearly demonstrates that Frontier was not attempting or intending to obstruct discovery; but instead to complete it under circumstances made difficult by Respondents themselves. Without a prior warning, a sanction of dismissal operates as a summary death sentence for claims, rather than an adjudication of them. This Court should reverse, correct the injustice and permit Frontier's claims to be heard on their merits.

C. IT WAS AN ABUSE OF DISCRETION TO DISMISS CLAIMS AGAINST ALL RESPONDENTS, WHEN ONLY RESPONDENT FRONTLINE CONTENDED THAT IT WAS DUE DISCOVERY OF ANY KIND FROM APPELLANT, AND ONLY FRONTLINE SOUGHT SANCTIONS IN THIS CASE.

The Special Master, in his Order of October 4, 2008 Addendum At 21-22, held that Respondents had a "joint defense strategy" for purposes of discovery in this case. Based on that holding, the Special Master dismissed Frontier's claims against all three Respondents. See Addendum at pp. 17-18. The Trial Court's Order of October 7, 2008, does not address the issue of the dismissal of claims

against all Respondents, although the issue was extensively briefed. See e.g., Addendum at 103-105. As explained below, the Special Master's rulings are internally inconsistent, and inconsistent with Minnesota law.

Frontier's Motion for Reconsideration pointed out that Respondents had specifically argued on other issues that they had no identity of interest in this case, and took the position that they could not be considered a single entity for discovery purposes. See Appx. at 69-70. At the hearing on November 15, 2006, the Special Master agreed, and ruled that each Respondent should be treated separately for discovery purposes. (See November 15, 2006 hearing Transcript at p. 12 (as paginated at the bottom of the page).

More specifically, Respondent Frontline had moved to strike Frontier's objection that, because Respondents had the same interests, it should not be required to answer more than a cumulative total of fifty interrogatories from all three Respondents together. To counter Frontier's objection, Respondent Frontline vigorously argued that Defendants had no unity of interest:

"In this case, that's not even remotely true. We've got an individual Defendant here, Chris Kittler, who is being attacked for personal liability. We've got a company, Frontline Processing, that is a credit card processing company. It doesn't do underwriting. It's a company that's so distinct from LMA, which is the insurance -- insurance/charge back insurance company, that the defenses of each of these are going to be very different."

See, November 15, 2006 hearing Transcript at p. 13 (as paginated at the bottom of the page). Based on that argument, the Special Master held that Respondents were different parties, and would be treated separately for discovery purposes.

In his Order of August 4, 2008, however, the Special Master reversed course, holding that Respondents did not have separate interests, and saying that the Special Master became aware before the November 15, 2006 hearing that Respondents had a joint defense strategy. See Addendum at p. 21-22. Thus, the Special Master ruled that Respondents should have the benefits of operating separately for discovery purposes, when it was in their favor to take that position; yet ruled subsequently that Respondents were operating jointly and had an identify of interests when only one of them had moved for discovery sanctions. In effect, the Special Master ruled in favor of Respondents on opposite sides of the same issue at different times. The Special Master suggested it was ironic that Frontier initially argued that Respondents had the same interests, but changed its position for the purpose of sanctions. See, Addendum at 21. The true irony is that the Special Master ignored the fact that his dismissal of Frontier's claims on the grounds that Respondents had a joint interest in discovery, contradicted his earlier ruling that they did not.

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.

Finally, a sanction of dismissal should be imposed only for extraordinary circumstances or prejudice that can be remedied only by a dismissal. See, *Firoved, supra*, 277 Minn. at 284, 152 N.W.2d at 369. Again, no Respondent, except Frontline, moved for or argued that it was entitled to such a sanction. Further, even Respondent Frontline failed to carry the burden of establishing prejudice as to itself, citing only the “inconvenience and added expense occasioned by delay” -- which are patently insufficient grounds to support a dismissal with prejudice. See, *Id.*. It was an abuse of discretion, therefore, for the Special Master to impose the most extreme sanction in favor of Respondents who had requested no sanction at all, and the Trial Court abused its discretion in adopting the Special Master’s ruling on this point.

D. THE AWARD OF FEES AND COSTS UNDER RULE 37.02 WAS IMPROPER.

1. Respondents Were Awarded Over Sixty Thousand Dollars in Routine Litigation Fees and Costs that are Improper under Rule 37.02(b).

Minn. R. Civ. P. 37.02(b) does not contemplate an award of routine litigation fees unrelated to a specific discovery request. F.R.C.P. 37(b)(2), which is worded almost identically to Minn. R. Civ. P. Rule 37.02, limits awards to fees and costs to those “caused by the failure” to obey a discovery order. See, *General Environmental Science Corp. v. Horsfall*, 25 F.2d 1048, 1994 WL 228256 at *12

(6th Cir. 1994) (reversing award when trial court did not try to discern fees and expenses caused as a result of discovery violations); *Toth v. Trans World Airlines, Inc.*, 862 F.2d 1381, 1386 (C.A.9 1988) (awarding Rule 37(b)(2) expenses not incurred as a result of disobedience to court order was abuse of trial court's discretion); *Stillman v. Edmund Scientific Co.*, 522 F.2d 798 at 802 (C.A.Md. 1975) (Rule 37 sanctions pertain to discovery, and assessment may not be made for expenses incurred outside that process).

The last paragraph of Minn. R. Civ. P. 37.02(b) also plainly limits an award to “the reasonable expenses . . . caused by” a failure to obey an order to provide or permit discovery. The Special Master correctly incorporated that principle in his order, stating that under Rule 37.02: “Clearly, an award of attorneys’ fees must be fashioned by the actual costs associated with the failure to produce discovery. . . [.]” See Addendum at p.47. However, that Special Master then went on to erroneously conclude that the: “entire subject matter of this lawsuit after November 2, 2007 was focused on Plaintiff’s failure to obey discovery orders.” *Id.* As a result, Respondents were awarded tens of thousands of dollars in fees and costs that their affidavits expressly identify as routine litigation expenses, and which were entirely unrelated to the discovery motions.

a. Defendants’ Attorneys’ Fees in 2007 Were Mostly Litigation Fees.

From November 2 through the end of 2007, Respondents regularly paid three types of routine litigation fees, for tasks unrelated to any discovery failure:

1) fees associated with producing their own documents, 2) expenses of preparing for depositions, and 3) costs preparing their expert report. Frontier identified fees totaling \$10,793.00 for those tasks. See, Appx. at 303.

Respondents' fee affidavits also identified other, normal litigation fees, unrelated to any failure to obey a discovery order, albeit not of the three routine types of litigation tasks referred to in the preceding section. See, *Id.* Thus, Respondents' fee requests itemized \$12,680.50 in fees from November 3, 2007 through December 31, 2007, that were unrelated to any failure to obey a discovery order. This is 55% of all fees (\$22,958.50) Respondents claimed they expended in that period. Clearly, Respondents were not primarily focused on discovery after November 2, 2007, and it was in error to award them all fees incurred in that period under Rule 37.02(b).

b. Over \$55,000 in Routine Litigation Fees Were Awarded in 2008 and 2009.

Respondent continued to incur routine litigation fees and costs after 2007. Frontier identified \$19,088.00⁸ in such fees from January 1, 2008 through March 11, 2008, based on Respondents' fees affidavits which expressly describe those fees as incurred on routine litigation tasks and not because of a failure to obey a discovery order. See Appx. at 305-307. The Special Master also awarded

⁸ The fees listed at Appx. 303 include the period from December 21 to 31, 2007. To adjust for the fees incurred in 2007, which have already been calculated in the preceding period, \$747.50 in fees are deducted from the total fees listed at Appx. 304 et seq. This leaves a net fee amount of \$19,088.00 in routine litigation fees was expended from January 1, 2008 through March 11, 2008.

\$27,901.00 in fees Respondents incurred from March 12, 2008 to June 1, 2009, that their affidavits identify as routine litigation fees. *Id.*, at 308-312. Finally, Respondents incurred \$7,699.03 in expenses, rather than fees, prior to November 3, 2007, which are outside the period covered by the Special Master's Order. See Appx. at 313. In summary, Respondents spent a total of at most \$100,580.03 in fees that could possibly have been caused by the failure to obey a discovery order after November 2, 2007. See *Id.*, at 304. The Special Master, therefore, erred in awarding \$177,419.14 in fees under Rule 37.02, because he allowed fees and expenses that were not "caused by the failure" to obey a discovery order.

E. THE TRIAL COURT ERRED IN FAILING TO STAY CLAIMS AGAINST APPELLANT FOR FEES AND COSTS.

1. Minnesota Law Directs its Courts to Defer to the New York Rehabilitation Court in Determining Claims Against Appellant.

In order to manage inter-state insurer insolvencies, most states have enacted some form of the two principle model insurance insolvency acts: the Insurer's Rehabilitation and Liquidation Act (IRLA) and the Uniform Insurance Rehabilitation and Liquidation Act (UILA). See, e.g., *Isermann v. MBL Life Assur. Corp.*, 231 Wis. 2d 136, at 149-150, 605 N.W.2d 210 at 215-16 (Wis. App. 1999). Minnesota Insurer's Rehabilitation and Litigation Act ("MIRLA") seeks to resolve potential conflicts among insurance claims filed in different jurisdictions, expressly stating as one purpose the "lessening the problems of interstate rehabilitation and liquidation by facilitating cooperation between states in the

liquidation process ...". *See, e.g.*, Minn. Stat. §60B.01 Subd.4(e).

More specifically, MIRLA provides for the uniform treatment of claims against insolvent insurers domiciled in states other than Minnesota that have adopted the "reciprocal" provision of the IRLA or UILA model acts, by directing Minnesota claimants to: 1) file claims in Minnesota, if an ancillary receiver for the insurer is appointed in Minnesota; or 2) file their claim with the receiver in the insurer's domiciliary state, in the absence of such an ancillary receivership in Minnesota. *See*, Minn. Stat. §60B.58. Because New York is a reciprocal state with Minnesota, under UILA, and as no ancillary receiver for Frontier exists in Minnesota, MIRLA directs that claims against Frontier are to be brought not in Minnesota's courts, but in the Rehabilitation Court of Appellant's home (domiciliary) state.

MIRLA defines a reciprocal state as "any other state than this state in which in substance and effect" specified provisions of MIRLA are in force. *See*, Minn. Stat. §60B.03 Subd. 10. New York, having in effect the specified MIRLA provisions, is a reciprocal state with Minnesota.⁹ New York recognizes Minnesota as a reciprocal state on the same basis. *See*, New York Insurance Law §7408 (6).

⁹ Specifically, the operative MIRLA sections and their New York corollaries are: 1) Minn. Stat. §60B.21, concerning the appointment of the Insurance Commissioner to liquidate a domestic insurer, and New York Insurance Law § 7405; 2) Minn. Stat. § 60B.54, concerning a non-domiciliary, reciprocal insurer's title to property, and New York Insurance Law § 7410 (b); 3) Minn. Stat. § 60B.55, concerning the Insurance Commissioner's appointment as ancillary receiver for a non-domiciliary receiver, and New York Insurance Law § 74014(a); 4) Minn. Stat. §60B.57,

Footnote continued on next page.

2. The Trial Court Erred in Refusing to Stay Respondents Fees Claim.

On October 15, 2001, a New York Rehabilitation Court entered an Order of Rehabilitation for Frontier. That Order, among other measures pertinent to Frontier's rehabilitation, enjoined all persons from commencing or prosecuting any actions, lawsuits, or proceedings against Frontier, or the Superintendent of Insurance of the State of New York, as Rehabilitator for Frontier, stating:

7. All persons are enjoined and restrained from commencing or prosecuting any actions, lawsuits, or proceedings against Frontier or the Superintendent as Rehabilitator; [and]
8. All persons are enjoined and restrained from obtaining preferences, judgments, attachments, or other liens or making any levy against Frontier's assets or any part thereof.

See, Order of Rehabilitation, a copy of which is attached as Exhibit A to Frontier's Motion for Stay filed November 12, 2008.

Given Frontier's on-going receivership proceedings in New York, the prosecution of a claim against Frontier in the Trial Court would violate the New

concerning a non-resident's claims against a Minnesota insurer, and New York Insurance Law § 7411; 5) Minn. Stat. §60B.58, concerning the claims of resident claimants against non-domiciliary insurers in receivership in reciprocal states, and New York Insurance Law § 7412; 6) Minn. Stat. §60B.59, staying actions against an insurer in receivership in reciprocal state proceedings, and, 7) Minn. Stat. §60B.60, concerning priority of claims, and New York Insurance Law § 7413. Further, New York Insurance Law §7425 provides for voiding of fraudulent and preferential transfers, as specified in Minn. Stat. §60B.03 Subd. 10.

York Court's Order of Rehabilitation, as well as applicable MIRLA statutes (such as Minn. Stat. § 60B.58, requiring the claims to be brought in Frontier's domiciliary state, as no ancillary proceeding has been filed in Minnesota). A mechanism is in place for Respondent Frontline to pursue its claim in New York, and New York is the proper forum for claims against Frontier, under both Minnesota and New York insurance law.

3. The Trial Court and Special Master Erred in Holding They Had Decided, or Must Decide, Respondents' Fees Claim.

The Special Master's January 30, 2009 Order and Memorandum erred in ruling that the issue of a stay's effect on Respondent Frontline's claims for attorneys' fees had been litigated and was therefore foreclosed under *Reinhardt v. Milwaukee Mut. Ins. Co.*, 524 N.W.2d 531,535 (Minn. App. 1994 [sic]), and the doctrine of stare decisis. *Reinhardt* is inapplicable. The syllabus by the Court in *Reinhardt* clearly states that the matter at issue in that case had already been decided in an earlier litigation, of which the party attempting to re-litigate the matter had "notice and an opportunity to intervene," and was therefore bound by the determination of damages and final judgment entered in that earlier action. *Id.*, 524 N.W.2d at 532.

Here, in contrast, the Trial Court, in its January 29, 2009 letter, stated clearly that it "will not be entering judgment on any claim in the matter until all claims are resolved." See, Appx. at 136. Further, even if the Trial Court had intended its October 7 Order to decide the stay issue, which is not plausible given

that the Order did not mention that issue, see Addendum at 24 *et seq.*, that Court could have revised that Order at any time before the entry of a final judgment in the case. See, Minn. R. Civ. P. Rule 54.02; see, also, *Zentz v. ITT Blackburn Corp.*, 298 Minn. 219, 214 N.W.2d 466, at 468 (Minn. 1974). Consequently, it was clear error to deny Frontier's Motion to Stay on the grounds that a final judgment on the stay issue had been entered in this case. There was no final judgment.

a. Respondent's Claim for Attorneys' Fees should be Deferred by this Court, for Determination by Frontier's New York Rehabilitation Court.

The Trial Court and the Special Master suggested that Frontier, having availed itself of the jurisdiction of the Court, cannot pick and choose which Rules of Civil Procedure should be applied. See Addendum at 37 and at 40-41. Frontier's Motion to Stay does not address an award of Respondent's fees claim under Minn. R. Civ. P. 37.02(b). Rather, the question posed is where that claim must be made. MIRLA directs the Trial Court to defer the determination of that claim to the Rehabilitation Court in New York that is charged with Frontier's delinquency proceedings.

An insolvent insurer's filing of a claim in the court of a reciprocal state does not open the insurer to affirmative claims in that court. In *Isermann, supra*, which involved substantially the same IRLA and ULA provisions at issue in this case, the Court stated that the policies enacted in those provisions "are best supported in this case by yielding to the expertise and uniform procedures of the

rehabilitation court.” *See, Isermann, supra*, 231 Wis. 2nd at 152, 605 N.W.2d at 217.

In *Bard v. Charles R. Myers Ins. Agency, Inc.*, 839 S.W.2d 791 (Tex. 1992), likewise, the issue was whether a Vermont insurance commissioner, as receiver for an insolvent insurance company, exposed the insurer to counterclaims in Texas by filing suit to recover premiums in a Texas court. *Id.* at 839 S.W.2d at 795-96. The court in *Bard*, in holding that the fact “that the Commissioner initiated suit against Myer in Texas does not affect the enforcement of the Vermont receivership court’s injunction in Texas,” stated: “To hold that a receiver, by going into a foreign court to collect sums alleged to be due the estate, thereby opens the estate to suits in those foreign jurisdictions would defeat the goal of state insurance insolvency statutes and would greatly increase the expense and complexity of insurance insolvency proceedings.” *Id.* 839 S.W.2d at 796.

Here, Frontier did not expose itself to Respondent’s claim by coming into a Minnesota Court. This Court, accordingly, should defer to the New York Rehabilitation Court.

IV. CONCLUSION

Because the Trial Court abused its discretion in dismissing Frontier’s claims without properly considering Respondents’ discovery misconduct, or the fact that Frontier timely produced evidence to support its claims, and without finding any prejudice or extreme circumstances that would support such a severe

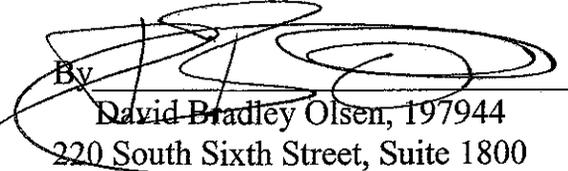
sanction, or giving any prior warning or opportunity to cure as required by Minnesota law; and because the trial court abused its discretion by dismissing claims against Respondents who were not parties to any discovery motion, this Court should reverse, correct the injustice and permit Frontier's claims to be heard on their merits. If this Court does not reverse the dismissal of Frontier's claims, it should also reverse the award of fees and claims awarded by the Trial Court to Respondent, as such an award is unjust under the facts and circumstances of this case or should, at a minimum drastically reduce the award. Alternatively, this Court should direct that the Trial Court refer all claims as to any fees or costs claimed by Respondent to the New York Rehabilitation Court supervising the rehabilitation of Frontier.

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