IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

STACEY KALBERMAN, Plaintiff, v. GEORGIA GOVERNMENT TRANSPARENCY AND CAMPAIGN FINANCE COMMISSION, f/k/a GEORGIA STATE ETHICS COMMISSION, et al., Defendants.	CIVIL ACTION FILE NO. 2012CV216247

DEFENDANT GEORGIA GOVERNMENT TRANSPARENCY AND CAMPAIGN FINANCE COMMISSION'S RESPONSE TO PLAINTIFF'S MOTION FOR SANCTIONS

COMES NOW, Defendant Georgia Government Transparency and Campaign Finance Commission (hereinafter, the "Ethics Commission") and through its counsel of record, files this brief in opposition to Plaintiff's Motion for Sanctions.

I. RELEVANT FACTS

On June 8, 2012, Plaintiff filed a lawsuit against the Ethics Commission and Holly LaBerge, in her official capacity. Shortly after this case was transferred to the Honorable Ural Glanville, this Court entered a Case Management Order. [Pl. Mtn, Ex. M.] The Order provided that all discovery be completed by August 30 and that all discovery motions be filed by no later than the close of discovery. [Pl. Mtn., Ex. M, p. 1.] The parties actively participated in discovery and thousands of pages of documents were produced by Defendants. [Pl. Mtn, p. 15]

Thereafter, this action proceeded to trial on April 4, 2014, and a jury rendered a verdict on April 8, 2014, awarding $700,000.00 in non-wage compensatory damages to Plaintiff. No judgment was thereafter entered. Instead, on May 12, the parties executed a Settlement Agreement and Full

and Final Release of Claims, pursuant to which Defendants agreed to pay Plaintiff $1,150,000.00: (i) $725,111.79 to Plaintiff, and (ii) $424,888.21 to her counsel. [Pl. Mtn, Ex. R.]

On May 19, 2014, after reviewing the Settlement Agreement and Full and Final Release of Claims, the Court entered a Consent Order Acknowledging Settlement. [Pl. Mtn. Ex. R.] In its Order, the Court directed Defendants to deliver two settlement checks constituting the full settlement amount to Plaintiff's counsel by July 1. [Pl. Mtn, Ex. R, ¶ 2.] In that same Order, the Court directed that, upon receipt of payment in full of the settlement amount, "Plaintiff shall *promptly* file with the Clerk of the Court of the Fulton County Superior Court, an appropriate and proper Dismissal with Prejudice of this action." [Pl. Mtn, Ex. R, ¶ 6 (emphasis supplied).]

As directed by the Court, Defendants delivered the two settlement checks to Plaintiff by July 1. [*See* Affidavit of Bryan Webb, hereinafter "Webb Aff.," attached hereto as Attachment "A," ¶ 7 & Exhibit "1."] Plaintiff and her counsel cashed the checks on July 3 and July 2, respectively. [*See* Affidavit of Lisa Pratt, hereinafter "Pratt Aff.," attached hereto as Attachment "B," ¶ 2 & Exhibit "1."] Plaintiff, however, has never complied with the Court's Order directing her to file a Stipulation of Dismissal promptly or otherwise. [*See generally*, Dkt.]

Having secured the settlement funds while avoiding compliance with the Court's directive regarding dismissal of the case, Plaintiff now moves the Court to impose monetary sanctions against the Ethics Commission and LaBerge, in her official capacity, and their counsel, the Office of the Attorney General of Georgia. In ostensible support of this post-settlement Motion, Plaintiff alleges that certain documents responsive to her discovery requests were not produced during the discovery period in this case. Plaintiff seeks sanctions pursuant to O.C.G.A. § 9-15-14(b) and § 9-11-37, as well as pursuant to O.C.G.A. § 15-1-3 in the event the Court holds those other statutes to be inapplicable. [*See* Pl. Mtn., p. 24; *see also id.* at pp. 22-24.]

For the reasons set forth below, Plaintiff is unable to show that the Ethics Commission (or for that matter, Defendant LaBerge, in her official capacity) should be held responsible for alleged conduct that if committed, did not occur within the scope of Defendant LaBerge's job duties with the Ethics Commission or in furtherance of the Ethics Commission's business. Moreover, this Court lacks jurisdiction regarding Plaintiff's Motion as it relates to the Ethics Commission (and LaBerge in her official capacity) because this action should be deemed to have been dismissed prior to August 8, and said Motion is barred by the Settlement Agreement entered into by the parties. Finally, even if the Court considers the specific statutes under which Plaintiff is bringing her Motion, the Motion is nevertheless untimely and fails to satisfy applicable standards for the imposition of sanctions.

II. ARGUMENT AND CITATION OF AUTHORITY

A. Plaintiff Has Failed To Show that the Ethics Commission Committed Any Discovery Abuses or May be Held Responsible for Any Alleged Discovery Abuses Under the Law.

While Plaintiff seeks sanctions against the Ethics Commission, her Motion is completely devoid of any facts that the Commission itself was involved in the purported discovery abuses on which her Motion is based. [*See* Pl. Mtn.] Moreover, while Plaintiff has not made the argument, it is worth noting that the Commission cannot be held responsible for any discovery abuse or fraud allegedly committed by Defendant Holly LaBerge.[1/] "The common law principle of respondeat superior is codified in Georgia under O.C.G.A. § 51-2-2, which provides that '[e]very person shall be liable for torts committed by his . . . servant by his command or in the prosecution and within the scope of his business . . . .'" *Graham v. City of Duluth*, ___ Ga. App. ___, 759 S.E.2d 645, 650 (2014). "As our Supreme Court has explained, 'the test to determine if the employer is liable is whether the employee was acting within the scope of the employee's employment and on the

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1/ The Ethics Commission expresses no opinion as to whether LaBerge in fact engaged in such conduct as alleged by Plaintiff, but simply notes that if she did, she was not acting within the scope of her authority as Executive Secretary or otherwise on behalf of the Commission.

business of the employer at the time of the injury.'" *Id.* (quoting *Chorey, Taylor & Feil, P.C. v. Clark*, 273 Ga. 143, 144, 539 S.E.2d 139 (2000)). "Thus, '[t]wo elements must be present to render a master liable under respondeat superior: first, the servant must be in furtherance of his master's business; and second, he must be acting within the scope of the master's business.'" *Id.* (quoting *Piedmont Hosp. v. Palladino*, 276 Ga. 612, 613, 580 S.E.2d 215 (2003). "Under Georgia law, 'if a servant steps aside from his master's business to do an act entirely disconnected from it, and injury to another results from the act, the servant may be liable, but the master is not liable.'" *Id.* (quoting *Piedmont Hosp.*, 276 Ga. at 614, 580 S.E.2d at 217).

It is undisputed that the Commission's business in no way involves discovery abuse or fraud. Indeed, the Commission exists to enforce and ensure compliance with the law, not undermine it. [*See* Affidavit of Hillary Stringfellow, hereinafter "Stringfellow Aff.," attached hereto as Attachment "C," ¶ 3 & Exhibit "1."] Similarly, Defendant LaBerge's job as Executive Secretary in no way contemplated such misconduct. Instead, it was her job to, among other things, manage the day-to-day operations and staff of the Commission, which included ensuring that the Commission fulfilled its duties under the Campaign Finance Act. [Stringfellow Aff., ¶ 4 & Exhibit "2."] To the extent Plaintiff is able to establish that Defendant LaBerge stepped aside from the Commission's business and her job responsibilities to engage in discovery abuse and fraud (which she denies), the Commission cannot be held responsible for her actions as a matter of law. *See Graham*, ___ Ga. App. at ___, 759 S.E.2d at 650. Accordingly, Plaintiff's Motion, insofar as it is directed to the Ethics Commission, must be denied for this reason alone.[2/]

[2/] In addition, because "[s]uits against public employees in their official capacities are in reality suits against the state," it follows that Defendant LaBerge cannot be sanctioned in her official capacity for any misconduct that she allegedly committed outside the scope of her employment. *Liberty County Sch. Dist. v. Halliburton*, No. A14A0333, 2014 WL 3557433, at *4 (Ga. App. July 16, 2014). Just as the Commission cannot be held vicariously liable for these alleged acts, nor can the state. *See Graham*, ___ Ga. App. at ___, 759 S.E.2d at 650.

B. This Court Lacks Jurisdiction.

This Court lacks jurisdiction to hear this Motion, because this case should be treated as having been dismissed with prejudice. As directed by the Court, Defendants delivered the two settlement checks to Plaintiff by July 1, but Plaintiff has never complied with the Court's Order directing her to file a Stipulation of Dismissal promptly thereafter. [*See* Webb Aff. ¶ 7, Ex. "1"; *see generally* Dkt.] Plaintiff and her counsel cashed the checks on July 3 and July 2, respectively. [*See* Pratt Aff. ¶ 7, Ex "1."] Therefore, because the prompt filing of the Stipulation of Dismissal was the specific duty of Plaintiff and within her exclusive ability and control, the Court should treat this action as having been dismissed on July 1, 2014, or, at the very least, at some time prior to the filing of the instant Motion more than a month later on August 8. *Cf. Dillard Land Investments, LLC. v. Fulton County*, ___ Ga. ___, No. S13G1582, 2014 WL3396511, at *3 (July 11, 2014) (holding that "it is the plaintiff's knowledge of the 'actual, as opposed to possible, conclusion of the litigation [that] precludes filing a [unilateral] voluntary dismissal" under O.C.G.A. § 9-11-41(a), and that "the oral announcement of a dispositive ruling in open court, for example, ends the time for filing a unilateral voluntary dismissal").[3/]

"The dismissal of a lawsuit generally deprives the trial court of jurisdiction to take further action in a case." *Montgomery v. Morris*, 322 Ga. App. 558, 560 & n.2, 745 S.E.2d 778, 780 & n.2 (2013) (noting the exception for attorneys' fees motions pursuant to O.C.G.A. § 9-15-14). In *Montgomery*, the trial court granted a motion for contempt under the same case number as an action

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[3/] Under Paragraph 4 of the Consent Order Acknowledging Settlement, the Court expressly "retain[ed] jurisdiction of this matter through and until either (1) Plaintiff receive[d] the Settlement Checks from Defendants and entere[ed] a Dismissal with Prejudice as set forth [] in Paragraph 6 [of the Consent Order] or (2) Plaintiff enter[ed] and enforce[d] upon an ex parte Judgment that Plaintiff obtain[ed] based on Defendants' default as detailed in Paragraph 3 [of the Consent Order]." (Emphasis in original.) Plaintiff's Motion is not founded upon any alleged violation of Paragraph 4, any alleged default under Paragraph 3, or any failure to comply with the Consent Order otherwise.

that had been dismissed, without prejudice, nearly a year earlier. *Id.* at 558-59, 745 S.E.2d at 779. At that time, the court had granted the parties' respective motions, each in part, to enforce a settlement agreement and ordered that the case be closed, but stated that the court would "'retain[] complete jurisdiction to vacate this Order and to re-open the action if necessary." *Id.* at 559, 745 S.E.2d at 779.

Nearly a year later, Morris renewed a previous motion for contempt alleging that Montgomery had willfully failed to comply with the terms of the trial court's previous orders. *Id.*, 745 S.E.2d at 779. The trial court granted the motion, but the court of appeals held that the trial court had lost jurisdiction over the case when it dismissed the case without prejudice. *Id.*, 745 S.E.2d at 779-80. In so holding, the court of appeals observed that it had previously "found that a consent order was a final judgment, and that the trial court was correct in finding that it had no jurisdiction to entertain further motions." *Id.* at 561, 745 S.E.2d at 781 (*citing Levingston v. Crable*, 203 Ga. App. 16, 416 S.E.2d 131 (1992)). Therefore, the court held that despite the trial court's order "purporting to retain jurisdiction, 'because the Civil Practice Act makes no provision for the reinstatement of an action after dismissal as distinguished from a recommencement, a trial court has no power to order reinstatement of the action after it has been . . . dismissed.'" *Montgomery*, 322 Ga. App. at 561, 745 S.E.2d at 780 (*quoting Gallagher v. The Fiderion Group, LLC*, 300 Ga. App. 434, 436, 685 S.E.2d 387, 388 (2009)).

As the court in *Montgomery* explained, pursuant to the dismissal of an action, "[a]ll prior orders in the case are superseded, and because the dismissal divests the trial court of jurisdiction, orders entered after the dismissal are null." 322 Ga. App. at 562, 745 S.E.2d at 781 (*citing Gallagher*, 300 Ga. App. at 436, 685 S.E.2d at 388). Therefore, because this action should be deemed to have been dismissed on or about July 1, 2014, and certainly before Plaintiff filed the instant Motion more than a month later on August 8, 2014, this Court lacks jurisdiction over this

action to award sanctions under either O.C.G.A. § 15-1-3 or 9-11-37.[4/] Plaintiff's Motion should be denied for this reason as well.

C. Plaintiff's Request for Relief Pursuant to O.C.G.A. § 9-15-14(b) is Barred by the Parties' Settlement Agreement.

As set forth above, the only exception regarding the Court's lack of jurisdiction after a case is dismissed is with regard to an attorneys' fee motion pursuant to O.C.G.A. § 9-15-14. "O.C.G.A. § 9-15-14 authorizes a trial court to award 'reasonable and necessary' attorney fees and litigation costs in civil cases against a party that has engaged in abusive litigation." *Williams v. Becker*, 294 Ga. 411, 413, 754 S.E.2d 11, 13 (2014). Under subsection (b) of the statute, the court may award fees and expenses against an attorney or party that "brought or defended an action, or any part thereof, that lacked substantial justification or that the action, or any part thereof, was interposed for delay or harassment, or if it finds that an attorney or party unnecessarily expanded the proceeding by other improper conduct, including, but not limited to, abuses of discovery procedures available under . . . the 'Georgia Civil Practice Act.'" O.C.G.A. § 9-15-14(b); *see also Williams*, 294 Ga. at 413, 754 S.E.2d at 13. As used in subsection (b), "'lacked substantial justification' means substantially frivolous, substantially groundless, or substantially vexatious." O.C.G.A. § 9-15-14(b).[5/]

Plaintiff's request for attorneys' fees under § 9-15-14(b) is barred by the parties' Settlement Agreement with respect to the Ethics Commission and LaBerge, in her official capacity. Plaintiff's Motion states that "Defendants likely will cite to case law stating that a claim for attorney's fees

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[4/] As addressed in detail in Section C below, the limited statutory exception to post-judgment jurisdiction provided under O.C.G.A. § 9-15-14(e) does not apply in this action.

[5/] Inasmuch as Plaintiff has requested an award of fees and expenses under O.C.G.A. § 9-15-14, the Court is required to conduct an evidentiary hearing on both "the need for," as well as the "value of," such an award, unless Defendants waive the right to such a hearing. *See Williams*, 294 Ga. at 413, 754 S.E.2d at 13. Defendants do *not* waive their right to such a hearing and, per the suggestion of the Supreme Court, has this day filed a separate request for a hearing in response to Plaintiff's Motion. *See id.* at 413 & n.2, 754 S.E.2d at 13-14 & n.2.

under O.C.G.A. § 9-15-14 generally is precluded by a settlement agreement." [Pl. Mtn., p. 25 (*citing Hardwick v. Fortson*, 296 Ga. App. 690, 675 S.E.2d 559 (2009); *Waters v. Waters*, 242 Ga. App. 588, 530 S.E.2d 482, 484 (2000); *see also generally* Pl. Mtn., pp. 24-25.] Plaintiff, however, asserts that "the Georgia cases applying this rule all involve a procedural history wherein the motion for fees under O.C.G.A. § 9-15-14 was filed before the entry of a settlement agreement by the parties." [Pl. Mtn., p. 25 (emphasis in original).] Plaintiff asserts that "this is an exceptionally unique case" in which she was "entirely unaware" of the alleged conduct by Defendants at the time of the settlement. [Pl. Mtn., p. 25.]

As Plaintiff obliquely concedes in her Motion, the Georgia courts have long held that when a party settles all claims in a case, she may not thereafter seek additional relief from the Court, including any relief pursuant to O.C.G.A. § 9-15-14, unless she reserved her right to do so. *See Hunter v. Shroeder*, 186 Ga. App. 799, 800, 368 S.E.2d 561, 562 (1988); *Ingram v. Star Touch Communications, Inc.*, 215 Ga. App. 329, 331, 450 S.E.2d 334, 336 (1994); *Waters*, 242 Ga. App. at 590, 530 S.E.2d at 484; *Hardwick*, 296 Ga. App. at 691, 675 S.E.2d at 560; *see also Kluge v. Renn*, 226 Ga. App. 898, 899-900, 487 S.E.2d 391, 394 (1997) (applying holdings in *Hunter* and *Ingram* to abusive litigation action pursuant to O.C.G.A. § 51-7-80). As Plaintiff concedes, there exists no case authority recognizing the availability of relief pursuant to § 9-15-14 based on the post-settlement discovery of additional facts.[6/] Indeed, the Ethics Commission certainly would not have supported any settlement of this action which left open the possibility of further court proceedings (and the additional expenditure of public funds for attorneys' fees), as "buying peace" was a material consideration and inducement for it.

[6/] Notably, Plaintiff does not seek a new trial under O.C.G.A. § 5-5-41(a), which, of course, would require her and her attorneys to, *inter alia*, return the substantial sums paid to them in settlement of this action. [*See* Pl. Mtn., p. 18.] The Commission, however, submits that the sole relief, if any, available to her is under that statute, and not under O.C.G.A. § 9-15-14(b).

Recognizing the availability of post-settlement relief pursuant to § 9-15-14 – in situations other than where a party has reserved her right to seek such relief – runs counter to the considerations underlying the holding in *Hunter* and the cases following it, not to mention the strong public policy favoring settlement and finality. *See e.g. Kothari v. Tessfave*, 318 Ga. App. 289, 298, 733 S.E.2d 815 (2012) (noting that "settlement agreements are highly favored under the law and will be upheld whenever possible as a means of resolving uncertainties and . . . settling lawsuits.")

In *Hunter*, the parties entered a consent order dismissing all claims. In the order of dismissals with prejudice, the court stated "that the mutual dismissals contained herein are a fair and reasonable settlement of all claims in this action under all the facts and circumstances of this case . . . ." Nevertheless, the defendants thereafter sought an award of their attorneys' fees under O.C.G.A. § 9-15-14. The court in *Hunter* reasoned that:

> [i]t appears to us so plain, fair and reasonable as to admit no dispute, that in providing in OCGA § 9-15-14(e) that a party could move for attorney fees and expenses within 45 days of "final disposition" of a case, the legislature certainly did not intend to include per se a case where the claiming party has induced or achieved, by mutual dismissal of all then-pending claims or counterclaims, a dismissal with prejudice of the other's claims, actions or defenses.

186 Ga. App. at 800, 368 S.E.2d at 562; *see also Kluge*, 226 Ga. App. at 899-900, 487 S.E.2d at 394 (1997) (applying *Hunter* to abusive litigation action pursuant to O.C.G.A. § 51-7-80).

Similarly, the parties here entered into a settlement of "all claims, demands, actions, causes of action, suits, damages, losses and expenses of any and every nature and description whatsoever, including but not limited to, those claims . . . asserted or which might have been asserted by or on behalf of Plaintiff against the Defendants . . . ." In agreeing to this broad release, Plaintiff did not reserve the right to seek relief under O.C.G.A. § 9-15-14. [Pl. Mtn., Ex. R.] A consent order was then entered by this Court, in which the Court stated that it "[had] found [the Settlement Agreement's] terms to be acceptable in all respects." Thus, upon Defendants' payment of the

agreed-upon settlement amount, Plaintiff was required by Order of the Court to promptly file a Dismissal with Prejudice.

Plaintiff does not dispute that the Settlement Agreement was fair and reasonable. In return for releasing all claims and dismissing the case with prejudice, Plaintiff received at least two significant pieces of consideration. First, she avoided a challenge to her attorneys' fee claim before the Superior Court. Plaintiff claims that, "[a]s the prevailing party, [she] was *entitled* to $627,759.25 in attorneys' fees and $9,478.39 in litigation expenses incurred during the course of litigation." [Pl. Mtn., p. 9 n.4 (emphasis supplied); *see also id.* at p. 19, n.6.] The Georgia Whistleblower Act, however, provides only that "[a] court *may* award *reasonable* attorney's fees, court costs, and expenses to a prevailing public employee." O.C.G.A. § 45-1-4(f) (emphasis supplied). Therefore, even as a prevailing party, Plaintiff would not have been *entitled* to an award of attorneys' fees and expenses – or the full amount claimed.

As the statute itself makes clear, even a prevailing party is not entitled to recover *all* of her attorney fees, but only her reasonable attorney's fees and expenses of litigation. Although there are no published decisions interpreting O.C.G.A. § 45-1-4(f), "'[i]t is well-settled that an award of attorney fees is to be determined upon evidence of the reasonable value of the professional services which underlie the claim for attorney fees.'" *Southern Cellular Telecom v. Banks*, 209 Ga. App. 401, 403, 433 S.E.2d 606, 608 (1993)). "A naked assertion that the fees are 'reasonable,' without any evidence of hours, rates, or other indication of the value of the professional services actually rendered is inadequate." *In re Estate of Boss*, 293 Ga. App. 769, 771-72, 668 S.E.2d 283, 285 (2008).

Plaintiff also claims that she was "*entitled* to $65,000 as a back pay award." [Pl. Mtn., p. 9 n.4 (emphasis supplied); *see also id.* at p. 19, n.6.] O.C.G.A. § 45-1-4(e)(2)(D) provides that a court "may" order "[c]ompensation for lost wages," but the statute does not create an entitlement to such

an award in the full amount claimed. Once again, although there are no published decisions interpreting O.C.G.A. § 45-1-4(e)(2)(D), it is also well-established that an employee who seeks damages pursuant to a loss of employment has a duty to mitigate any damages and the amount of recovery may be reduced by her failure to do so. *See e.g. Boone v. Atlanta Independent Sch. Sys.*, 275 Ga. App. 131, 135, 619 S.E.2d 708, 712 (2006). The issue of any award of back pay here was not submitted to the jury, but instead, was to be decided by the Court.

As a result of the settlement, Plaintiff was not required to demonstrate her right to either back pay or the full amount of her claimed attorneys' fees. Instead, through her counsel, she settled the above amounts for the not insubstantial sum of $450,000.00 – $424,888.21 of which was paid to her attorneys – as well as an *additional* $700,000.00 reflecting the damages awarded as non-wage compensation by the jury. In exchange for her agreement to accept these amounts, she secured a second significant piece of consideration: Defendants' agreement not to appeal the verdict. [Pl. Mtn., p. 9 n.4.].

As the court found in *Hunter*, this Court too should find that it was not the intent of the legislature to include a case under O.C.G.A. § 9-15-14 where Plaintiff here "has induced or achieved, by mutual dismissal of all then-pending claims or counterclaims," which but for Plaintiff's failure to comply with the Consent Order would have been filed on or about July 1, 2014. The foregoing establishes yet another reason why Plaintiff's Motion for Sanctions must be denied.

D. Plaintiff Is Not Entitled to Relief Pursuant to O.C.G.A. § 9-11-37.

Plaintiff also seeks an imposition of sanctions pursuant to, *inter alia*, O.C.G.A. § 9-11-37. [Pl. Mtn., pp. 19-22.] "O.C.G.A. § 9-11-37 authorizes a trial court to award 'reasonable and necessary' attorney fees and litigation costs in civil cases against a party that has engaged in abusive litigation." *Williams v. Becker*, 294 Ga. 411, 413, 754 S.E.2d 11, 13 (2014).

1. Plaintiff's Motion Pursuant to § 9-11-37 Is Untimely.

The Case Management Order made clear that "[d]iscovery shall close on August 30, 2013" and "[a]ll discovery motions must be filed prior to the expiration of the discovery period . . . ." [*See* Pl. Mtn., Ex. M, pp. 1 (Case Management Order).] The Court did not extend the time for Plaintiff to file this motion seeking discovery sanctions, nor does any portion of the Civil Practice Act appear to authorize the filing of a Rule 37 motion after the case was required to be dismissed with prejudice by Plaintiff. As such, Plaintiff's Motion, insofar as it has been brought pursuant to § 9-11-37, should be denied as untimely.

2. Plaintiff Has Not Made the Required Showing for Sanctions Under O.C.G.A. § 9-11-37(b) or (d).

Plaintiff seeks discovery sanctions under O.C.G.A. §§ 9-11-37(b) and (d). Even if the Court were authorized to consider a motion seeking discovery sanctions after Plaintiff was required to file a dismissal with prejudice, Plaintiff has not made the required showing under either section of this statute.

a. Sanctions are not authorized under O.C.G.A. § 9-11-37(b) because the Ethics Commission did not violate an Order granting a motion to compel discovery under O.C.G.A. § 9-11-37(a).

"Before sanctions may be imposed under [O.C.G.A. § 9-11-37(b)], the party seeking discovery must first obtain an order under [O.C.G.A. § 9-11-37(a)] requiring the recalcitrant party to make discovery." *Wills v. McAuley*, 166 Ga. App. 4, 303 S.E.2d 26 (1983). "It is only the violation of an order under [O.C.G.A. § 9-11-37(a)] which is punishable by the imposition of sanctions under [O.C.G.A. § 9-11-37(b)]." *Id.* (gathering cases). Because Plaintiff never filed a motion to compel under O.C.G.A. § 9-11-37(a) and the Defendants never violated an Order issued thereunder, the imposition of sanctions under O.C.G.A. § 9-11-37(b) is not authorized. *See id.* (denying motion for sanctions under O.C.G.A. § 9-11-37(b) on this ground).

b. Sanctions are not authorized under O.C.G.A. § 9-11-37(d) because the Ethics Commission did not "seriously" or "totally" fail to respond to Plaintiff's document requests.

Next, "[t]he authorization of immediate sanctions under Rule 37(d) has been construed to apply to nothing 'less than a serious or total failure to respond . . . ." *Wills*, 166 Ga. App. at 4, 303 S.E.2d at 28. "Thus, a *total* failure to serve answers or objections would constitute a failure to respond under [§ 9-11-]37(d) and would subject a party to immediate sanctions. On the other hand, answering partially or giving evasive answers evidences a dispute between the parties which is brought before the trial court by a [§ 9-11-]37(a) motion to compel discovery and is resolved through an order to compel answers or a protective order." *Id.* (reversing trial court's order of sanctions under § 9-11-37(d) when defendant "answered hundreds of questions during the course of discovery and . . . the veracity of most of these answers is unquestioned."). *See also Mayer v. Interstate Fire Ins. Co.*, 243 Ga. 436, 254 S.E.2d 825 (1979) ("Since Rule 37 is intended to enforce the duty to respond to [discovery requests] and since a response was made here, the imposition of sanctions under Rule 37(d) was error.").

In two cases cited by Plaintiff, the Court of Appeals has made a very limited exception to the "total failure to respond" requirement under § 9-11-37(d), which does not apply here. In *MARTA v. Doe*, 292 Ga. App. 532, 537, 664 S.E.2d 893, 898 (2008), the court held that "an intentionally false response to a document production request (particularly concerning a pivotal issue in the litigation) authorizes a trial court to impose the sanctions permitted by OCGA § 9-11-37(d) for a total failure to respond." (Emphasis added) (finding that "MARTA had flagrantly abused the discovery process" by "unmistakably and intentionally misrepresent[ing] to [plaintiff] that [specifically requested] documents had never been created nor maintained" when defendant "had consciously destroyed the documents . . . .") Similarly, in *Howard v. Alegria*, 321 Ga. App. 178, 739 S.E.2d 95 (2013), the Court of Appeals found that the defendants totally failed to respond to plaintiff's document request,

and that sanctions were appropriate under § 9-11- 37(d), when they "willfully, knowingly, falsely, consistently and unequivocally denie[d] the existence of requested discoverable documents . . . ." In that case, the defendants "intentionally lied in *numerous* responses to interrogatories and document requests, abused its subpoena power, and intentionally destroyed crucial and probably damaging evidence . . . ." *Id.*, 321 Ga. App. at 190, 739 S.E.2d at 104 (emphasis in original). Thus, in the most egregious of cases, in which a party intentionally destroys key, damaging evidence related to a pivotal issue in the case, and intentionally and willfully lies in its discovery responses to cover it up, the Georgia courts may consider the party as having totally failed to respond, thereby justifying discovery sanctions under §9-11-37(d). None of that is alleged to have happened here.

In this case, the Ethics Commission provided detailed responses to Plaintiff's written discovery requests and produced thousands of pages of documents. [Pl. Mtn, p. 15, Exs. D-F.] Plaintiff does not allege that the Ethics Commission ever destroyed any documents or tried to cover them up. The Attorney General's Office and LaBerge similarly do not point the finger at the Ethics Commission for the alleged failure to produce responsive documents. Indeed, during depositions, the central issue reflected in the Memorandum of Record and the majority of the text messages – that Ms. LaBerge purportedly felt threatened by the Governor's Office - was openly discussed and even became the subject of a motion in limine. [See Murray-Obertein Dep., pp. 55-56; Pl. Mtn, Exs. A, pp. 1-9 and N.] As such, Plaintiff can hardly allege any Defendant – least of all the Ethics Commission - was hiding the ball as these documents were cumulative of testimony that had already been given in the case. *Gill v. Spivey*, 264 Ga. App. 723, 723, 592 S.E.2d 132, 133 (2003) (holding that to obtain a new trial based on newly-discovered evidence, the moving party must show that the evidence "is not cumulative only . . . .") Notably, while Plaintiff had already taken Ms. LaBerge's deposition at the time she learned of these alleged threats, she never sought to elicit testimony on this subject matter from the other individuals who are alleged to have threatened Ms. LaBerge – Chris

Riley and Ryan Teague. She also never sought to introduce this testimony at trial. The Court agreed, at Plaintiff's request, that Plaintiff could proffer testimony outside of the presence of the jury regarding this exact subject matter and that if determined to be relevant, the Court would then allow her to present it to the jury. The Attorney General's Office did not oppose Plaintiff's request. Clearly, Plaintiff ultimately determined that this issue was not pivotal to her case, because she ultimately chose to not even proffer testimony on it outside the presence of the jury – despite knowing LaBerge claimed she was threatened during the conversations she had with Mr. Riley and Mr. Teague in July 2012 which are the subject of the Memorandum of Record and the text messages.

The other text messages, emails and the letter nominating Ms. LaBerge for Leadership Georgia are unrelated to her official duties with the Ethics Commission and not in furtherance of the Ethics Commission's business. While Plaintiff does not identify the request to which she contends these documents were responsive, it must be assumed that it is Request No. 5 to LaBerge, in her official capacity, and not a request that was sent to the Ethics Commission. In the request to LaBerge, Plaintiff sought any correspondence, including emails in LaBerge's email accounts, between "yourself and any employee or representative of the State of Georgia Governor's Office since July 1, 2011." [Pl. Mtn, Ex. G.] Definition C further provided that "you" and "your" as used in the request means "Defendant Holly LaBerge, in her Official capacity as Executive Secretary of the . . . Commission, her attorneys and agents; and all persons acting on her behalf." These documents can hardly be considered correspondence between LaBerge and the Governor's Office in her official capacity. Moreover, the fact that the Governor's Office issued a letter of recommendation for her to Leadership Georgia, with marginal comments about LaBerge, can hardly be relevant to the Plaintiff's claims stemming from alleged conduct more than a year prior.

As such, Plaintiff cannot show that the Ethics Commission (or, for that matter, LaBerge in her Official Capacity) engaged in such egregious conduct that their discovery responses could

reasonably be construed as a complete failure to respond subjecting either of them to sanctions under O.C.G.A § 9-11-37(d). Accordingly, Plaintiff's Motion should be denied for these reasons as well.

3. An Award of Sanctions Under O.C.G.A. § 9-11-37 Would Be Unjust.

Even if the Court were authorized to award sanctions under § 9-11-37, such an award against the Defendants and their counsel would be unjust. It is well-settled that the discretion of the trial court to manage its affairs is governed by the Due Process Clause of the Fifth Amendment. *See Resource Ins. Co. v. Buckner*, 304 Ga. App. 719, 738, 698 S.E.2d 19, 35 (2010). "To comply with the Due Process Clause," any sanctions imposed by the court must be "both 'just' and 'specifically related to the particular "claim" which was at issue . . . .'" *Id.*, 304 Ga. App. at 738, 698 S.E.2d at 35 (quoting *Serra Chevrolet, Inc. v. Gen. Motors Corp.*, 446 F.3d 1137, 1151 (11th Cir. 2006), which reversed a discovery sanctions award because it was "unjust and out of proportion with the harm caused to [plaintiff] by the production delay" and because it "had no apparent relationship with the discovery abuse."). *See also, Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 707 (1982) (explaining that under the "general due process restrictions on the court's discretion," "any sanction must be 'just' . . . ."). *cf.* O.C.G.A. § 9-11-37(d) ("In lieu of any order, or in addition thereto, the court shall require the party failing to act or the attorney advising him, or both, to pay the reasonable expenses, including attorney's 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).

Under the circumstances of this case, to impose a fine on Defendants as Plaintiff requests and to require that they and their counsel pay Plaintiff's fees for filing the instant Motion would be unjust for several reasons.[7/] The most important of these reasons is that Plaintiff does not allege that the

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[7/] Should it be necessary for an evidentiary hearing to be conducted on Plaintiff's Motion, it is apparent that it will need to cover a great deal more than just the issues specifically identified by Plaintiff in her Motion. For example, the Commission respectfully submits that the

Ethics Commission engaged in any improper conduct, and neither the Attorney General's Office nor LaBerge point their finger at the Ethics Commission regarding the alleged failure to produce documents in this case. Additionally, the documents in question were either (1) cumulative of evidence already in the record [Compare Pl. Mtn., Exs. A and B, pp. 1-9 with Murray-Obertein Dep., pp. 55-56], *cf. Armstrong v. Gynecology & Obstetrics of DeKalb, P.C.*, No. A140648, 2014 WL 2853831, at *4 (Ga. App. June 24, 2014) (affirming trial court's exclusion of cumulative evidence); *Gill v. Spivey*, 264 Ga. App. 723, 723, 592 S.E.2d 132, 133 (2003) (holding that to obtain a new trial based on newly-discovered evidence, the moving party must show that the evidence "is not cumulative only . . . ."); (2) were not relevant to the case for the same reasons the testimony on this

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documentation offered in support of Plaintiff's Motion raises questions regarding the fees being sought. Plaintiff states in her sworn affidavit that she "*first learned* of the existence of" the alleged withheld evidence and claimed discovery abuses "during the week of July 14, 2014, following an interview that day between Defendant LaBerge and television reporter Dale Russell." [*See* Pl. Aff., ¶ 25 (emphasis supplied); *see also* Pl. Aff., ¶ 26; Pl. Mtn. p. 2 ("On July 14, 2014, Kalberman learned"); p. 9 ("On July 14, 2014, LaBerge provided an exclusive 'tell-all' interview").] Plaintiff's counsel states in her sworn affidavit that her client then "instructed" her to file a motion seeking sanctions against Defendants and/or their Counsel." [*See* Worth Aff., ¶ 16.]

Yet, the time records submitted in support of Plaintiff's Motion show that four of her attorneys already had billed 16.2 hours – more than $3,700.00 (minus a courtesy discount of $540.00) – collectively to this matter on July 10, 11 and 13, 2014. [*See* Worth Aff., Ex. KW-1.] Indeed, the time records for Plaintiff's counsel reflect that one of the firm's associates spent 5.2 hours "review[ing] documents/discs produced in case" on July 10, four days before the broadcast of the interview with Defendant LaBerge. [*See id.*]

Moreover, Plaintiff's Motion makes reference to Defendant LaBerge's interview as having occurred during "prime time," suggesting – correctly so, the Commission understands – that the interview was broadcast during the July 14 evening news. [*See* Pl. Mtn., p. 1 ("her primetime debut"); p. 3 ("LaBerge's revelation on prime time television").] Yet, the time records of Plaintiff's counsel for July 14 show five attorneys collectively billing 15.1 hours – more than $3,600.00 (minus a courtesy discount of $150.00) – to this matter on that day. [*See id.*] Indeed, one associate billed 6.2 hours of time to the matter on July 14 without any reference to the interview in either his or the other attorneys' time entries. [*See id.*] The first mention of the "LeBarge interview" in the time records of Plaintiff's attorneys does not appear until the following day, July 15. [Worth Aff., Ex. KW-1.]

The Ethics Commission is not imputing any improper conduct to Plaintiff or her counsel, but will want an opportunity to explore issues such as the timing of these fees at any hearing on this matter.

issue was sought to be excluded in the Motion in Limine incorporated herein by reference [*See* Pl. Mtn., Ex. N-O (citing cases to supporting that this evidence was not relevant to the case)]; and/or (3) were not responsive to a discovery request to either Defendant. *Cf. Lovell v. Ga. Trust Bank*, 318 Ga. App. 860, 862, 734 S.E.2d 847, 849 (2012) (affirming denial of motion to compel irrelevant documents, as "the documents would add nothing of substance to [plaintiff's] claim.").[8/] Additionally, Plaintiff has not shown that the production of the documents in question would have changed the outcome of this case in any way, much less resulted in a settlement hundreds of thousands of dollars richer than the agreement the parties reached. *Cf. Gill*, 264 Ga. App. at 723, 592 S.E.2d at 133 (holding that to obtain a new trial based on newly-discovered evidence, the moving party must show that the evidence "is so material that it would probably produce a different verdict . . . .").

4. Plaintiff has not demonstrated the existence of the type of willful, bad faith misconduct that is required to justify the drastic sanction she has requested.

Finally, even if the Court were authorized to award sanctions under § 9-11-37, it would not be authorized to award the drastic sanction Plaintiff has requested. Plaintiff argues that "[t]rial judges have a broad discretion in controlling discovery, including imposition of sanctions." [Pl. Mtn., p. 19. (quoting *Gropper v. STO Corp.*, 276 Ga. App. 272, 276, 623 S.E.2d 175, 179 (2005).] While this is true, the Georgia courts have made clear that "[t]he court's discretion . . . is not unlimited . . . ." *Gen. Motors Corp. v. Conkle*, 226 Ga. App. 34, 39, 486 S.E.2d 180, 186 (1997). The court can only impose "drastic sanctions" when "the failure is willful, in bad faith or in conscious disregard of an order." *Id.*, 226 Ga. App. at 38, 486 S.E.2d at 185 (quoting *Joel v. Duet Holdings*, 181 Ga. App. 705, 707, 353 S.E.2d 548 (1987)). "This is 'distinguished from an accidental or involuntary non-compliance.'" *Id.* (quoting *Bells Ferry Landing, Ltd. v. Wirtz*, 188 Ga.

[8/] Upon information and belief, the Attorney General's Office will set forth in its brief how the Memorandum of Record was not responsive to any discovery requests to the Ethics Commission or LaBerge.

App. 344, 345, 373 S.E.2d 50 (1988)). "[I]t is clear that the ultimate sanction requires more than merely willful, as opposed to negligent, behavior." *Gen. Motors*, 226 Ga. App. at 39, 486 S.E.2d at 186. *Cf. Harwood v. Great American Mgmt. &, etc.*, 171 Ga. App. 488, 491, 320 S.E.2d 269 (1984) (reversing dismissal of lawsuit as a discovery sanction because "it [could not] reasonably be said that the appellants were guilty of such a wilful or flagrant disregard either of the court or of the discovery process as would justify the extreme sanction of dismissal."). *See also Mayer v. Interstate Fire Ins. Co.*, 243 Ga. 436, 437, 254 S.E.2d 825, 827 (1979) ("The presence or absence of willfulness remains relevant in the choice of sanction."). As previously noted, Plaintiff's Motion is not predicated on any action allegedly taken, directed, or authorized by the Ethics Commission itself, let alone any action done willfully, in bad faith or in conscious disregard of the discovery process.

Furthermore, when the Georgia courts refer to "drastic" discovery sanctions or the "ultimate" sanction, they normally mean dismissal (for plaintiff) or default judgment (for defendant). Plaintiff cannot seek a default judgment here because the parties have resolved their claims through settlement. Nevertheless, Plaintiff seeks the "ultimate" sanction for a case in the current procedural posture, i.e., to upset the parties' settlement agreement and require Defendants to pay her an additional $252,237.64, plus $47,524.18 in newly-incurred attorney's fees and costs. Under well-established Georgia law, the Court cannot award such a drastic sanction against the Commission unless Plaintiff shows that it acted willfully and in bad faith. For the same reasons set forth above in Sections D.2 and D.3, Plaintiff cannot make such a showing here and therefore, her Motion for Sanctions must be denied for this additional reason as well.

E. Plaintiff Has Not Shown that Discovery Sanctions are Authorized or Appropriate Under O.C.G.A. § 15-1-3.

Apparently recognizing that she cannot satisfy the standards of either of the two statutes that specifically authorize sanctions for discovery abuses, O.C.G.A. §§ 9-15-14 and 9-11-37, Plaintiff asks the Court to sanction Defendants and their counsel based solely upon its inherent authority, as

set forth in O.C.G.A. § 15-1-3. [Pl. Mtn, pp. 22-24.] The Georgia courts have exercised their inherent authority to sanction parties or counsel who, for example, intentionally fail to appear, intentionally disregard their orders, or interfere with the court's ability to administer justice. *See, e.g., Bayless v. Bayless*, 280 Ga. 153, 154, 625 S.E.2d 741, 742 (2006) (affirming sanctions against party for failing to attend court proceedings and a "pattern of ignoring the trial court's directives ...."); *In re Schoolcraft*, 274 Ga. App. 271, 275, 617 S.E.2d 241, 245 (2005) (upholding trial court's citation of criminal attempt against an attorney who provided false information to the court in a criminal bond hearing). Such sanctions are inappropriate here for a number of reasons.

First, Plaintiff has not cited a single case in which a Georgia court has sanctioned a party or an attorney for allegedly withholding discovery materials, based upon its inherent authority alone, when the requirements of one of these other two statutes (which are more specifically designed to address such matters) were not met. Plaintiff cites two cases for the proposition that "[t]he Georgia Courts have recognized this inherent authority as a basis for awarding attorneys' fees as a sanction for a party's discovery abuses": *Santora v. American Combustion, Inc.*, 225 Ga. App. 771, 485 S.E.2d 34 (1997) and *Orkin Exterminating Co, Inc. v. McIntosh.*, 215 Ga. App. 587, 452 S.E.2d 159 (1995). (Pla. Brief, p. 23.) Contrary to Plaintiff's suggestion, however, the Court of Appeals did not uphold discovery sanctions in either case based upon the court's inherent authority. In *Santora*, the court held that discovery sanctions were appropriate under O.C.G.A. § 9-11-37, and specifically declined to address whether sanctions might have been appropriate based upon "the trial court's exercise of its inherent authority under O.C.G.A. § 15-1-3." *Santora*, 225 Gap. App. at 772, 485 S.E.2d at 36. Similarly, while the court in *Orkin Exterminating Co.* noted that the trial court has certain inherent authority under O.C.G.A. § 15-1-3, it did not hold that sanctions were appropriate under that authority, upholding an award of attorney's fees based solely on O.C.G.A. § 9-11-37. *Orkin Exterminating Co.*, 215 Ga. App. at 589-91, 452 S.E.2d at 162-63. The Ethics Commission is

aware of no Georgia case in which discovery sanctions have been upheld based upon the Court's inherent authority, when the requirements of O.C.G.A. §§ 9-15-14 and 9-11-37 were not met.

Moreover, for the reasons discussed in more detail above, the Ethics Commission did not, in any way, intentionally disregard the Court's Orders or interfere with the administration of justice. Accordingly, even if the Court were authorized to issue discovery sanctions based upon its inherent authority when the requirements of these two other statutes have not been met, such sanctions would be inappropriate here.

F. <u>The Ethics Commission Expressly Requests A Hearing under O.C.G.A. § 9-15-14(b).</u>

As discussed above, Plaintiff seeks, as sanctions, an award of attorney's fees and expenses pursuant to, *inter alia*, O.C.G.A. §§ 9-15-14(b). After due notice of the fees issue, the statute requires, unless waived, that the Court conduct an evidentiary hearing "to provide the [opposing] party the opportunity to confront and challenge the evidence regarding the *need for* and value of the legal services at issue." *Williams v. Becker*, 294 Ga. 411, 413, 754 S.E.2d 11, 13 (2014) (*citing Ellis v. Caldwell*, 290 Ga. 336, 340, 720 S.E.2d 628 (2012)) *Id.*, 754 S.E.2d at 13 (*citing Ellis*, 290 Ga. at 340, 720 S.E.2d 628) (emphasis supplied). The Georgia Supreme Court has suggested that "it is a good practice to make a specific request for a hearing in response to a motion for attorney fees." *Williams*, 294 Ga. at 413 & n.2, 754 S.E.2d at 13-14 & n.2.[9/]

As set forth above and for such additional reasons and argument as the Ethics Commission may present at the evidentiary hearing, the Ethics Commission submits that Plaintiff is not entitled to the specific relief requested or to any relief whatsoever and that Plaintiff's Motion should be dismissed in its entirety. Nevertheless, pursuant to O.C.G.A. § 9-15-14(b), and as strongly suggested

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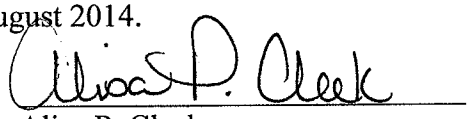
[9/] If the court determines that an award of attorney fees is appropriate under § 9-15-14(b), the court "must make express findings specifying the abusive conduct for which the award is made." *See Williams*, 294 Ga. at 413-14, 754 S.E.2d at 14 (vacating award for failing to make express findings specifying abusive conduct); *see also Reynolds*, 322 Ga. App. at 790, 746 S.E.2d at 269 (same).

by relevant Supreme Court authority, Defendant hereby expressly requests – and does *not* waive – the evidentiary hearing that Plaintiff's Motion has necessitated. *See Williams*, 294 Ga. at 413 & n.2, 754 S.E.2d at 13-14 & n.2.[10/]

III. CONCLUSION

For each of the foregoing reasons, the Court should deny Plaintiff's Motion for Sanctions.

Respectfully submitted, this 22nd day of August 2014.



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[10/] The Ethics Commission submits that Plaintiff is not entitled to an award of fees or expenses in any amount. Nevertheless, Plaintiff's claim of $47,175.50 in legal fees incurred as a result of 204.8 hours billed by 5 different attorneys over 23 days between July 10 and August 4 is wholly unreasonable. Many entries are simply for in-firm conferences or "in office meetings" between Plaintiff's own counsel with no other work indicated: July 11 (2.8 hours by DBB, and 2.2 hours by EVE); July 14 (.8 hour by KEA); July 15 (2.5 hours by KEA); July 17 (3.0 hours by KEA); July 21 (2.5 hours by KEA and 2.9 hours by KAW); July 22 (1.0 hour by HGT, 3.7 hours by DBB, and 3.0 hours by KAW); July 24 (3.2 hours by DBB); July 28 (2.4 hours by DBB); July 29 (1.0 hour by HGT, 1.8 hours by DBB, and 1.0 hour by KEA); July 30 (.4 hour by EVE); and July 31 (1.6 hours by HGT). Several significant time entries also include such office conferences while referring to other possible legal work, but the entries fail to distinguish between the two and sometimes fail to identify the legal worked performed. For example, on July 15, DBB billed 9.3 hours to "[c]onfer numerous times" with 4 other attorneys in the firm and prepare "[REDACTED] with" 3 of those others attorneys. Indeed, there are numerous redactions related to the subject of the work for which fees are sought. The Ethics Commission reserves its right to make further inquiries of Plaintiff and her counsel regarding such entries, and to present additional argument with regard to the same, at the hearing on this matter.