APPENDIX A

IN THE SUPERIOR COURT OF FULTON COUNTY
BUSINESS CASE DIVISION
STATE OF GEORGIA

SAMACA, LLC, Plaintiff, v. CELLAIRIS FRANCHISE, INC., GLOBAL CELLULAR, INC., and CELL PHONE MANIA, LLC, Defendants

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Civil Action File No. 2016CV276036
Date: February 7, 2017

ORDER ON DEFENDANTS' MOTION TO DISMISS COMPLAINT AND COMPEL ARBITRATION

This matter is before the Court on the Motion to Dismiss Complaint and to Compel Arbitration by Defendants Cellairis Franchise, Inc. ("Cellairis") and Global Cellular, Inc. ("Global") (collectively as "Movants"). After consideration of the motions and briefs submitted the Court finds as fol1ows:

I. FACTUAL BACKGROUND

Defendant Cell Phone Mania, LLC ("CPM") operated four franchise units under franchise agreements with Cellairis. CPM operated the franchise units under Cellairis' trademark at the Dolphin Mall in Miami, Florida. Global, an affiliate of Cellairis, licensed the spaces where the franchise

units were located from Dolphin Mall. Cell Phone Mania then sublicensed the spaces from Global.

Around June 2014, CPM, Movants and Plaintiff Samaca, LLC ("Samaca") began negotiations regarding Samaca's potential acquisition of the franchise units that CPM operated. On June 30, 2014, the parties reached an agreement whereby Samaca could purchase Cell Phone Mania's interest in the franchise units. By the terms of their agreement, Cellairis required Samaca to execute four franchise agreements ("Franchise Agreements") which vested ownership interest in the franchise units to Samaca. Each of the Franchise Agreements contained a comprehensive agreement to arbitrate by which the parties agreed to arbitrate:

> All controversies, claims, or disputes between Company and FRANCHISEE arising out of or relating to: a. This agreement or any other agreement between Company and FRANCHISEE; b. the relationship between FRANCHISEE and the Company; c. The scope and validity of this Agreement or any other agreement between Company and FRANCHISEE, specifically including whether any specific claim is subject to arbitration at all (arbitrability questions); and/or d. The offer or sale of the franchise opportunity .. . Any claims by or against any affiliate of the Company may be joined, in the Company's sole discretion, in the arbitration.

In order to acquire the sub-licenses for the spaces at Dolphin Mall where the franchise units were located, Global required Samaca to execute four sub-license agreements (the "Sub-License Agreements") on June 30, 2014. The Sub-License Agreements contained a similar arbitration agreement whereby Samaca and Global agreed to arbitrate:

> All controversies, claims, or disputes between Company and Sub-licensee arising out of or relating to: a. This agreement or any other agreement between Company and Sub-licensee; b. the relationship between Sub-licensee and Company; c. The scope and validity of this Agreement or any other agreement between Company and Sub-licensee, specifically including whether any specific claim is subject to arbitration at all (arbitrability questions); and/or d. The offer or sale of the franchise opportunity …. Any claims by or against any affiliate of the Company may be joined, in the Company's sole discretion, in the arbitration.

Notably, each arbitration agreement contained a Delegation Provision by which the parties agreed to arbitrate "whether any specific claim is subject to arbitration at all (arbitrability questions)." Plaintiff contends that, on the same day, Cellairis presented an Assignment and Assumption Agreement ("AA Agreement") which assigned CPM's interest in the franchise units to Samaca. Plaintiff claims the AA

Agreement was predated to have an effective date of September 1 , 2014; the AA Agreement was signed by Cellairis, CPM and Samaca. The AA Agreement contained a general venue selection provision where the parties agreed that:

> ... the Georgia State Courts for Fulton County, Georgia ... shall be the sole and exclusive venue and sole and exclusive proper forum in which to adjudicate any case or controversy arising either, directly or indirectly, under or in connection with this Agreement and the parties further agree that, in the event of litigation arising out of or in connection with this Agreement in these courts, they will not contest or challenge the jurisdiction or venue of these courts.

By the terms of the AA Agreement, Samaca was also required to sign new franchise and sublicense agreements that were to be "substantially the same form" as the prior Franchise and Sub-License Agreements. While the parties never executed new franchise or sub-license agreements, the new agreements were attached to the AA Agreement and contained the same mandatory arbitration agreement as the original Franchise and Sub-License Agreements.

Samaca began to operate the franchise units on October 1, 2014. Samaca claims that during this time Movants were in negotiations to extend the lease on the franchise units, but told the landlord at Dolphin Mall they would no longer be able to afford rent.

Around December 2014 Samaca learned that Dolphin Mall had refused to renew the leases for the franchise locations and, as a result, Samaca brought suit seeking to rescind the agreements, among other claims. Defendants have now filed a motion to dismiss and compel arbitration based on the arbitration agreements contained in the original Franchise and Sub-License Agreements. Samaca claims the arbitration agreements are invalid and superseded by the subsequent AA Agreement which names this Court as the "sole and exclusive venue and sole and exclusive proper forum to adjudicate any case or controversy."

II. ANALYSIS

The issue is whether the arbitration agreements contained in the Franchise and Sub-License Agreements were superseded by the AA Agreement. Under the terms of the arbitration agreements, "all matters relating to arbitration will be governed by the Federal Arbitration Act" ("FAA"). The FAA creates a presumption in favor of arbitrability that courts are to apply "only where a validly formed and enforceable arbitration agreement is ambiguous about whether it covers the dispute at hand." *Dasher v. RBC Bank,* 745 F.3d 1111, 1122-23 (11th Cir. 2014) (quoting *Granite Rock Co. v. Int'l Bhd. of Teamsters,* 561 U.S. 287, 30 I (2010). While doubts concerning the scope of an arbitration clause should be resolved in favor of arbitration, the presumption does not apply to disputes concerning whether an agreement containing an arbitration clause has been superseded. *See Applied Energetics, Inc. v. NewOak Capital Mkts., LLC,* 645 F.3d 522, 526 (2nd Cir. 2011

). The Eleventh Circuit recently reasoned that the threshold determination of whether a subsequent agreement entirely superseded a prior agreement is made under state law without applying the FAA's presumption in favor of arbitrability. *Dasher,* 745 F.3d at 1122-23.

Here, Plaintiff has challenged the validity of the arbitration agreements by arguing that the arbitration agreements are invalid and were superseded by the AA Agreement. Therefore, the Court applies Georgia contract law to look for objective evidence that the parties intended for the AA Agreement to supersede the Franchise and Sub-License Agreements.

Under Georgia's merger rule, "[a]n existing contract is superseded and discharged whenever the parties subsequently enter upon a valid and inconsistent agreement completely covering the subject-matter embraced by the original contract." *Atlanta Integrity Mortgage, Inc. v. Ben Hill United Methodist Church, Inc.,* 286 Ga. App. 795, 797 (2007). In order for the merger rule to apply, however, the terms of the contracts must completely cover the same subject matter and be inconsistent. *Id.* In the cases where Georgia courts found that the terms of a subsequent agreement to be inconsistent with a previous agreement, the courts have looked to the express intent of the parties and whether both agreements could be performed. *See Triple Net Properties, LLC, v. Burruss Development & Construction, Inc.,* 293 Ga. App. 323 (2008) (holding that a subsequent agreement superseded a previous agreement because the terms were inconsistent and

both contracts could not possibly be performed); *Mapei Corp. v. Prosser,* 328 Ga. App. 81 (2014) (holding that the clear language of the superseding-agreement made clear that it replaced the earlier-entered agreements entirely).

Here, the AA Agreement explicitly incorporates by reference the Franchise and Sub-License Agreements which include the arbitration agreements. The AA Agreement also required that the parties execute subsequent Franchise and Sub-License Agreements in "substantially the same form" as the prior Franchise and Sub-License Agreements. Even though the parties never signed the subsequent Franchise and Sub-License Agreements, the new agreements were attached to the AA Agreement and contained the same mandatory arbitration agreement as the original Franchise and Sub-License Agreements. Absent a clear expression that the parties intended the AA Agreement to supersede the previous agreements, it cannot be said that the AA Agreement is inconsistent with the previous agreements as it required the execution of new arbitration agreements and incorporated the previous agreements by reference. Thus, the Court finds the merger rule does not apply and the arbitration agreements were not superseded. The question of arbitrability of the claims raised against Movants should be submitted to an arbitrator.

The Court hereby GRANTS Defendants' Motion to Dismiss Complaint and to Compel Arbitration.[1]

SO ORDERED this 7th day of February, 2017.

Stamped signature
ALICE D. BONNER, SENIOR JUDGE
Superior Court of Fulton County
Business Case Division
Atlanta Judicial Circuit

[1] In addressing the Motion to Dismiss the Court has not considered the two affidavits submitted with Movants' Reply Brief, which would convert the Motion to Dismiss to a motion for summary judgment

APPENDIX B

345 Ga.App. 368
813 S.E.2d 416

SAMACA, LLC.
v.
CELLAIRIS FRANCHISE, INC. et al.
A17A1715

Court of Appeals of Georgia.

February 28, 2018
Reconsideration Denied March 20, 2018

[813 S.E.2d 417]

David R Martin, Atlanta, for Appellant.

Jared Cassity Miller, Ronald Thomas Coleman Jr., Justin Philip Gunter, Atlanta, for Appellee.

Barnes, Presiding Judge.

The appellant is Samaca, LLC ("Samaca"), a Florida limited liability company. The appellees are Cellairis Franchise, Inc. ("Cellairis") and Global Cellular, Inc. ("Global"), Georgia corporations, and Cell Phone Mania, LLC ("CPM"), a Florida limited liability company (collectively "appellees"). Samaca appeals from the trial court's order granting the appellees, [sic] motion to dismiss the complaint and to compel arbitration. Samaca contends that the trial court erred in denying its motion to strike, making certain

factual findings as to the purchase and renewal of the franchise leases, and in finding that the arbitration agreements were not superceded [sic] and inconsistent with a forum selection clause. Following our review, we affirm.

"The standard of review from the [grant] of a motion to compel arbitration is whether the trial court was correct as a matter of law. Further, the construction of a contract is a question of law for the court that is subject to de novo review." (Footnotes omitted.) *D. S. Ameri Constr. Corp. v. Simpson*, 271 Ga. App. 825, 826, 611 S.E.2d 103 (2005). "The [appellees], as the parties seeking arbitration, bear the burden of proving the existence of a valid and enforceable agreement to arbitrate. And the validity of an arbitration agreement is generally governed by state law principles of contract formation." (Citations and punctuation omitted.) *McKean v. GGNSC Atlanta*, 329 Ga. App. 507, 509 (1), 765 S.E.2d 681 (2014).

The facts pertinent to this appeal demonstrate that Cell Phone Mania operated four franchises located at the Dolphin Mall in Miami, Florida, under franchise agreements with Cellairis. Global, an affiliate of Cellairis, licensed the spaces from the operator of the Dolphin Mall, and Cell Phone Mania sub-licensed the spaces to operate the franchises in Dolphin Mall from Global. On June 30, 2014, Cell Phone Mania and Samaca reached an agreement for Samaca to purchase Cell Phone Mania's four franchises, and in conjunction with the sale, Samaca entered into four new franchise agreements (the "Franchise

Agreement") with Cellairis. The Franchise Agreements contained an arbitration clause, whereby Samaca and Cellairis agreed to arbitrate:

> all controversies, claims, or disputes between Company and FRANCHISEE arising out of or relating to: a. This agreement or any other agreement between Company [813 S.E.2d 418] and FRANCHISEE; b. The relationship between FRANCHISEE and Company; c. The scope and validity of this Agreement or any other agreement between Company and FRANCHISEE, specifically including whether any specific claim is subject to arbitration at all (arbitrability questions) and/or d. The offer or sale of the franchise opportunity .... Any claims by or against any affiliate of the Company may be joined, in the Company's sole discretion, in the arbitration.

Sanaca [sic] also entered into four new sub-license agreements (the "Sub–License Agreements") with Global to acquire Cell Phone Mania's sub-licenses to operate the franchises in the mall. The Sub–License Agreements, also effective June 30, 2014, contained a similar agreement, whereby Samaca and Global agreed to arbitrate:

> all controversies, claims, or disputes between Company and Sub-licensee arising out of or relating to: a. This

> Agreement or any other agreement between Company and Sub-licensee; b. The relationship between Sub-licensee and Company; c. The scope and validity of this Agreement or any other agreement between Company and Sub-licensee, specifically including whether any specific claim is subject to arbitration at all (arbitrability questions); and/or d. Any agreement relating to the purchase of products or services by Sub-licensee from Company .... Any claims by or against any affiliate of the Company may be joined, in the Company's sole discretion in the arbitration.

Either on the same day or within the same time period, Cell Phone Mania, Samaca, and Cellairis executed an Assignment and Assumption Agreement (the "AA Agreement"), effective September 1, 2014, reflecting the parties' various assignments and assumptions related to the purchase of the franchises and sub-licensing of the mall spaces. The AA Agreement also stated that Samaca was required to sign new franchise and sub-license agreements which were "attached to this Agreement" and "incorporated herein by this reference," and that it would abide by all of the "terms, conditions, and requirements" of the Franchise and Sub–License Agreements. However, those new agreements within the AA Agreement were not signed. The AA Agreement contained a choice of law provision stating, in pertinent part, that:

> This Agreement shall be governed by and construed under the laws of the State of Georgia, without regard to its conflicts of laws provisions. The parties acknowledge and agree that the Georgia State Courts for Fulton County, Georgia, or if such court lacks jurisdiction, the U.S. District for the Northern District of Georgia, shall be the sole and exclusive venue and sole and exclusive proper forum in which to adjudicate any case or controversy arising either, directly or indirectly, under or in connection with this Agreement and the parties further agree that, in the event of litigation arising out of or in connection with this Agreement in these courts, they will not contest or challenge the jurisdiction or venue of these courts. The parties expressly consent and submit to the jurisdiction and venue of these courts, and the parties waive any defenses of lack of personal jurisdiction, improper venue and *forum non conveniens* .

It further provided that, the "Agreement may be executed in several counterparts, each of which shall be deemed as an original, but all of which together shall constitute one and the same instrument."

Samaca took possession of the four franchise units on October 1, 2014 and began operating the franchise units. However, later in 2014, Cellairis, Global, and

Samaca learned that Dolphin Mall would not renew the licenses for the franchise locations at Dolphin Mall. In March 2015, Samaca sued Cellairis and Global in state court in Florida seeking to rescind the Franchise Agreement and Sub–License Agreements. Cellairis and Global moved to dismiss that action based on the arbitration clauses and because the complaint failed to state a claim. Before the Court ruled on that motion, Samaca voluntarily dismissed its suit, and subsequently initiated the underlying complaint in Georgia state court.

The appellees filed a motion to dismiss and compel arbitration based on the arbitration agreements in the Franchise Agreements and the Sub–License Agreements. In response, [813 S.E.2d 419] Samaca amended its complaint to allege that the AA Agreement and attendant choice of law provision superseded the Franchise Agreements and Sub–License Agreements and their attendant arbitration clauses. The trial court granted the appellees motion to dismiss and to compel arbitration, finding that, contrary to Samaca's contention, the arbitration agreements contained in the Franchise and Sub-licensing Agreements were not superceded [sic] by the AA Agreement.

1. Initially we note that, as is the case here, "the [Federal Arbitration Act] FAA applies in state and federal courts to all contracts containing an arbitration clause that involves or affects interstate commerce." (Citation omitted.) *American Gen. Financial Svcs. v. Jape*, 291 Ga. 637, 638 (1), 732

S.E.2d 746 (2012).1 "[T]he first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute."(Citation, punctuation, and emphasis omitted.) *Primerica Financial Svcs. v. Wise*, 217 Ga. App. 36, 40 (5), 456 S.E.2d 631 (1995). And as a matter of contract, "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." (Citation and punctuation omitted.) *AT& T Technologies v. Communications Workers of America* , 475 U.S. 643, 648, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986).

[T]he federal policy favoring arbitration is taken into consideration even in applying ordinary [s]tate law. The federal policy favoring arbitration is not, however, the same as applying a presumption of arbitrability. We only apply the presumption of arbitrability to the interpretation of contracts if we have already determined that, under [s]tate law, the parties formed a valid agreement to arbitrate. (Punctuation omitted.) *Bickerstaff v. SunTrust Bank*, 332 Ga. App. 121, 128–129 (2) (a), 770 S.E.2d 903 (2015), *reversed on other grounds*, 299 Ga. 459, 788 S.E.2d 787 (2016). Thus, "[t]he threshold determination of whether a subsequent agreement entirely superseded a prior agreement is made under state law, without applying the FAA's presumption." *Dasher v. RBC Bank (USA*), 745 F.3d 1111, 1122 (II) (B) (11th Cir. 2014). See *Stewart v. Favors* , 264 Ga. App. 156, 159 (1), 590 S.E.2d 186 (2003) ("[W]hen deciding whether the parties agreed to arbitrate a certain matter including arbitrability, courts

generally should apply ordinary state-law principles governing the formation of contracts.") (citation and punctuation omitted.). Further, in considering arbitrability a court "is not to rule on the potential merits of the underlying claims. Even if it appears to the reviewing court that the claims asserted are meritless or even frivolous, it must not allow those considerations to interfere with its determination of arbitrability." (Footnotes and punctuation omitted.) *BellSouth Corp. v. Forsee* , 265 Ga. App. 589, 595 S.E.2d 99 (2004).

With these principles in mind, to determine if an existing contract has been superseded and discharged, the parties must "subsequently enter upon a valid and inconsistent agreement completely covering the subject-matter embraced by the original contract." (Citation and punctuation omitted.) *Hennessy v. Woodruff* , 210 Ga. 742, 744 (1), 82 S.E.2d 859 (1954). Thus, "the terms of those contracts must completely cover the same subject matter and be inconsistent." *Wallace v. Bock*, 279 Ga. 744, 745–746 (1), 620 S.E.2d 820 (2005) ("where the parties execute two successive agreements embodying completed negotiations 'on the same subject,' the doctrine of merger applies, and the second agreement supersedes the first."). See *Atlanta Integrity Mtg. v. Ben Hill United Methodist Church* , 286 Ga. App. 795, 797, 650 S.E.2d 359 (2007) ("Under the merger rule, an existing contract is superseded and discharged whenever the parties subsequently enter upon a valid and inconsistent agreement completely covering the

subject-matter embraced by the original contract.") (citation and punctuation omitted.)

Here, the AA Agreement is not a successive or inconsistent agreement, but rather part of a series of documents to effect [813 S.E.2d 420] the purchase and transfer of the Cell Phone Maniea [sic] franchises. It does not completely subsume the subject matter embodied in the Franchise and Sub-license Agreements, and in fact, instead specifically incorporated those documents by reference. According to the terms of the AA Agreement, its separate parts "together shall constitute one and the same instrument." Moreover, the terms of the AA Agreement are not inconsistent with the Franchise and Sub-license Agreements and thus it does not reflect that the parties intended that the choice of law provision in AA Agreement would supersede arbitration clauses. See *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 59, 115 S.Ct. 1212, 131 L.Ed.2d 76 (1995) ("The choice-of-law provision, when viewed in isolation, may reasonably be read as merely a substitute for the conflict-of-laws analysis that otherwise would determine what law to apply to disputes arising out of the contractual relationship.") Moreover, "when a court interprets such provisions in an agreement covered by the FAA, [as are the agreements in this case] due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration." *Id.* at 62, 115 S.Ct. 1212.

With that being so, the arbitration agreements at issue in this case include a "delegation provision" e.g., an agreement to arbitrate threshold issues concerning the arbitration agreement. The delegation provision clearly assigns responsibility for resolving "whether any specific claim is subject to arbitration at all (arbitrability questions)" to the arbitrator. "[J]ust as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, so the question who has the primary power to decide arbitrability turns upon what the parties agreed about that matter." (Emphasis omitted.) *Losey v. Prieto* , 320 Ga. App. 390, 393, 739 S.E.2d 834 (2013). Here, the arbitration agreements clearly delegated that responsibility to the arbitrator.

Accordingly, [t]he trial court did not err by compelling arbitration according to the terms of the agreement. Moreover, since all of the issues in the underlying suit were compelled to arbitration, there was nothing left for the trial court to resolve, and it was not error to dismiss the suit with prejudice[.] The dismissal with prejudice has no effect on a subsequent challenge to the arbitration ruling, which would be a separate action. (Citations omitted.) *Simmons Co. v. Deutsche Fin. Svcs. Corp.* , 243 Ga. App. 85, 90 (2), 532 S.E.2d 436 (2000).

2. Having so held in Division 1, we need not consider Samaca's remaining enumerations concerning what it contends were erroneous factual findings by the trial court and its failure to strike a reply brief.

Judgment affirmed.

* THIS OPINION IS PHYSICAL PRECEDENT ONLY. COURT OF APPEALS RULE 33.2(a).

Mercier, J. concurs. McMillian, J., concurs in judgment only.*

Notes:

[1] 9 USC § 2 of the FAA provides that:

A written provision in any ... contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

APPENDIX C

(SEAL) SUPREME COURT OF GEORGIA
Case No. S18C1072

Atlanta, October 22, 2018

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed.

SAMACA, LLC v. CELLAIRIS FRANCHISE, INC. et al.

The Supreme Court today denied the petition for certiorari in this case. All the Justices concur, except Peterson, J., not participating.

Court of Appeals Case No. A17A1715

SUPREME COURT OF THE STATE OF GEORGIA
Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.
/s/ Thérèse S. Barnes, Clerk

APPENDIX D

(SEAL) SUPREME COURT OF GEORGIA
Case No. S18C1072

Atlanta, November 15, 2018

The Honorable Supreme Court met pursuant to adjournment. The following order was passed.

SAMACA, LLC v. CELLAIRIS FRANCHISE, INC. et al.

Upon consideration of the Motion for reconsideration filed in this case, it is ordered that it be hereby denied.

All the Justices concur, except Peterson, J., not participating.

SUPREME COURT OF THE STATE OF GEORGIA
Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.
/s/ Thérèse S. Barnes, Clerk

APPENDIX E

IN THE SUPERIOR COURT OF FULTON COUNTY
BUSINESS CASE DIVISION
STATE OF GEORGIA

SAMACA, LLC, Plaintiff, v. CELLAIRIS FRANCHISE, INC., GLOBAL CELLULAR, INC., and CELL PHONE MANIA, LLC, Defendants

Civil Action File No. 2016CV276036

Filed: February 27, 2019

ORDER ON DEFENDANTS' MOTION FOR ATTORNEYS' FEES AND EXPENSES AND PLAINTIFF SAMACA, LLC'S CROSS MOTION TO COMPEL ARBITRATION OF DEFENDANT'S [SIC] MOTION FOR LEGAL EXPENSES

The above styled action is before this Court on the Motion of Defendants Cellairis Franchise, Inc. ("Cellairis") and Global Cellular, Inc. ("Global") (collectively, "Defendants") for an award of Attorneys' Fees and Expenses (hereinafter "Motion for Fees") filed on March 24, 2017 and Plaintiff Sama ca LLC' s Cross Motion to Compel Arbitration of Defendants Motion for Legal Expenses (hereinafter "Motion to Compel") filed on November 26, 2018. Having considered the record, the Court finds the following:

I. BACKGROUND

Plaintiff Samaca, LLC is a Florida limited liability company that had reached an agreement with Cell Phone Mania ("CPM") to purchase CPM' s four franchises. CPM operated the four franchises at the Dolphin Mall in Miami, Florida under franchise agreements with Cellairis. Global, an affiliate of Cellairis, licensed the spaces from the operator of the Dolphin Mall and CPM sub-licensed the spaces to operate the franchises in Dolphin Mall from Global. On June 30, 2014, when Plaintiff and CPM had reached an agreement for Plaintiff to purchase CPM's four franchises. Plaintiff entered into four new franchise agreements (the "Franchise Agreements") with Cellairis. Plaintiff also entered into four new sub-license agreements (the "Sub-License Agreements") with Global to acquire CPM's sub-licenses to operate the franchises in the mall. Both the Franchise Agreements and the Sub-License Agreements contained an agreement to arbitrate.

Within the same time period, Plaintiff, Cellairis and CPM executed an Assignment and Assumption Agreement (the "AA Agreement") effective September 1, 2014 which stated that Plaintiff was required to sign new franchise and sub-license agreements which were "attached to this Agreement" and "incorporated herein by this reference." The AA Agreement contained a choice of law provision where the parties agreed the sole and exclusive venue to adjudicate any controversy would be in this Court, Plaintiff took possession of the four franchise units on October 1, 2014 and later in 2014 learned that Dolphin Mall would not renew the licenses for the franchise locations at Dolphin Mall. Plaintiff sued Cellairis in March 2015 in state court in Florida, asking to rescind the Franchise Agreements and Sub-License Agreements. Cellairis and Global moved to dismiss

the action based on the arbitration clauses and because the complaint failed to state a claim. Before the Court ruled on that motion, Plaintiff voluntarily dismissed its suit.

When Plaintiff initiated the underlying complaint in the Superior Court of Fulton County, Defendants filed a Motion to Dismiss and Compel Arbitration based on the arbitration agreements in the Franchise Agreements and the Sub-License Agreements. Plaintiff then amended its complaint to allege that the AA Agreement and attendant choice of law provision superseded the Franchise Agreements and Sub-License Agreements and their attendant arbitration clauses.

II. PROCEDURAL HISTORY

On February 7, 2017, this Court issued an Order on Defendants' Motion to Dismiss Complaint and Compel Arbitration (hereinafter "Order") granting Defendants' Motion to Dismiss and to Compel Arbitration, holding that the "[t]he question of arbitrability of the claims raised against [Defendants] should be submitted to an arbitrator." Following the Order, Plaintiff filed an appeal. Prior to the case appearing before the Georgia Court of Appeals, Defendants filed their Motion for Fees on March 24, 2017.

On February 28, 2018 the Court of Appeals unanimously affirmed the trial court holding that "the arbitration agreements at issue in this case include a 'delegation provision' e.g., an agreement to arbitrate threshold issues concerning the arbitration agreement." Plaintiffs Motion for Reconsideration with the Court of Appeals was denied on March 20, 2018. Plaintiffs Petition for Certiorari with the

Supreme Court of Georgia was denied on October 22, 2018 and it Petition for Reconsideration of the Denial of its Petition for Certiorari was denied on November 15, 2018.

III. ANALYSIS AND FINDINGS OF LAW

A. Defendants' Motion for Attorneys' Fees

In their Motion for Fees, Defendants assert that, as the "prevailing party" in the action, they are entitled to an award of attorneys' fees and expenses under Section 13(K) of the Franchise Agreements.[1] Defendants explain that because they indisputably sought to enforce their contractual right to arbitrate, they "unquestionably" prevailed in this action in enforcing that contractual right and are therefore entitled to recover their attorneys' fees and litigation expenses. The Defendants assert that, alternatively, they are also entitled to attorneys' fees and expenses under O.C.G.A. § 9-15-14 (a) and O.C.G.A. § 9-15-14 (b), claiming that Plaintiff could not have reasonably believed its claims would have succeeded in this forum and that Plaintiff's conduct in this proceeding "unnecessarily expanded the proceeding."

1. Prevailing party

[1] Section 13(K) of the Franchise Agreements provides that "[i]n any arbitration or litigation to enforce the terms of this Agreement, all costs and all attorneys' fees (including those incurred on appeal) incurred as a result of the legal action shall be paid to the prevailing party by the other party." See Franchise Agreements (Exhibits 18 - 21 of Complaint) § 13(K).

Defendants argue that because they indisputably sought to enforce a contractual right in this action - their contractual right to arbitrate - and because they unquestionably prevailed in this action of enforcing their contractual right, they have prevailed in litigation to enforce a contractual right, thus enabling them to recover their attorneys' fees and expenses under Section 13(K) of the Franchise Agreements at issue in this case. Defendants concede that a party ordinarily is not the prevailing party until the merits of a case have been decided, but argue that they moved for attorneys' fees once Defendants "became the prevailing parties by dismissal of Samaca's complaint." Finally, Defendants contend the fact that this Court did not adjudicate the ultimate merits of Plaintiff's claims is not material to Defendants' fee claim.

Insofar as the parties' agreements expressly state that "[a]II controversies, claims, or disputes ... arising out of or relating to ... [the] agreement ... (and/or] "[t]he scope and validity of th[e] Agreement" and "specifically including whether any specific claim is subject to arbitration at all (arbitrability questions)" must be decided by an arbitrator. The Court therefore finds that Defendants' request for fees under the "prevailing party" provision arises out of or is related to the agreement and thus must be decided by an arbitrator.

For the forgoing reasons, Defendants' motion for attorneys' fees pursuant to § 13(K) of the parties' contract is DENIED.

2. O.C.G.A. § 9-15-14

Defendants contend that pursuant to O.C.G.A. § 9-15-14(a) and (b) this Court has jurisdiction to

award attorneys' fees. Under O.C.G.A. § 9-15-14(a), a court is required to award reasonable and necessary attorneys' fees and expenses of litigation if it finds that a party "has asserted a claim, defense, or other position with respect to which there existed such complete absence of any justiciable issue of law or fact that it could not be reasonably believed that a court would accept the asserted claim." O.C.G.A. § 9-1-14(a) [sic]. A court may also award attorneys' fees and expenses if an attorney or party "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." O.C.G.A. § 9-15-14(b). The decision to grant an award of attorneys' fees and litigation expenses, and the amount of any such award, rests solely with the court without input from a jury. O.C.G.A § 9-15-14(f).

The Georgia Court of Appeals has held that fees under O.C.G.A. § 9-15-14(b) are warranted where a party's tactics delay the disposition of the case and expand the proceedings. Harkleroad & Hermance, P.C. v. Stringer, 220 Ga. App. 906,909,472 S.E.2d 308, 312 (1996) (finding that defendants' tactics in the trial court were meant to delay the disposition of the case, to harass and to expand the proceedings, reasoning that defendants avoided a decision for almost three years on a routine action, where defendants presented no evidence to support a number of his counterclaims; filed a direct appeal without following the interlocutory appeals procedures; requested binding arbitration on the eve of trial, made no effort to prove his counterclaims in arbitration, and then disputed the award in trial court.).

Insofar as the present Motion asks this Court to award fees based on litigating Defendants' Motion to Compel Arbitration and Dismiss, the Court

considers whether Plaintiffs claims "lacked substantial justification" or "were interposed for delay or harassment." In considering Defendants' Motion to Compel Arbitration and Dismiss, the narrow issue before this Court was whether the parties' claims should have been submitted to arbitration, and whether the arbitrability of certain claims should also be submitted to arbitration. Based on the clear and unambiguous language of the parties' agreements, specifically the delegation clause which noted that whether any specific claim is subject to arbitration is itself a subject to arbitration, and the express incorporation of the arbitration clauses into the Assignment & Assumption Agreement, the Court finds that Plaintiffs arguments to the contrary lack substantial justification, and that Plaintiffs conduct in the litigation of the claims before this Court was interposed for delay or harassment.

B. Plaintiff' s Motion to Compel Arbitration

Plaintiff asserts that because Defendants' Motion for Fees involves a question of arbitrability arising out of the parties' agreements, it should be decided by an arbitrator. In response, Defendants assert that no arbitrability dispute exists and raise the arguments put forth in their Motion for Fees. The Court has addressed this question in section A of this Order, and has found that the question of arbitrability under the parties' contract is for an arbitrator. However, the Court has also found that Plaintiff's tactics during the pendency of this case were meant to delay the disposition of the case and to harass and expand these proceedings for almost three years, thus

justifying an award of attorneys' fees under O.C.G.A. § 9-15-14.

For the foregoing reasons, Defendants' motion for attorneys' fees under O.C.G.A. § 9-15-14(b) is hereby GRANTED. The Court will defer a ruling as to the amount of fees until after the merits of the case have been decided in arbitration. After such a ruling by an arbitrator, Defendants are invited to renew their motion before this Court.

SO ORDERED, this 27th day of February 2019.

(signature)
ALICE D. BONNER, SENIOR JUDGE
Superior Court of Fulton County
Business Case Division
Atlanta Judicial Circuit

*****

APPENDIX F

IN THE SUPERIOR COURT OF FULTON COUNTY
BUSINESS CASE DIVISION
STATE OF GEORGIA

SAMACA, LLC, Plaintiff, v. CELLAIRIS FRANCHISE, INC., GLOBAL CELLULAR, INC., and CELL PHONE MANIA, LLC, Defendants

Civil Action File No. 2016CV276036
Business Case Div. 1

Filed: March 6, 2019

AMENDED ORDER ON DEFENDANTS' MOTION FOR ATTORNEYS' FEES AND EXPENSES AND PLAINTIFF SAMACA, LLC'S CROSS MOTION TO COMPEL ARBITRATION OF DEFENDANTS' MOTION FOR LEGAL EXPENSES

The above styled action is before this Court on the Motion of Defendants Cellairis Franchise, Inc. ("Cellairis") and Global Cellular, Inc. ("Global") (collectively, "Defendants") for an award of Attorneys' Fees and Expenses (hereinafter "Motion for Fees") filed on March 24, 2017 and Plaintiff Samaca LLC's Cross Motion to Compel Arbitration of Defendants Motion for Legal Expenses (hereinafter "Motion to Compel") filed on November 26, 2018. Having considered the record and argument of counsel at a

hearing held on February 12, 2019, the Court finds the following:

I. BACKGROUND

Plaintiff Samaca, LLC is a Florida limited liability company that had reached an agreement with Cell Phone Mania ("CPM") to purchase CPM's four franchises. CPM operated the four franchises at the Dolphin Mall in Miami, Florida under franchise agreements with Cellairis. Global, an affiliate of Cellairis, licensed the spaces from the operator of the Dolphin Mall and CPM sub-licensed the spaces to operate the franchises in Dolphin Mall from Global. On June 30, 2014, when Plaintiff and CPM had reached an agreement for Plaintiff to purchase CPM's four franchises, Plaintiff entered into four new franchise agreements (the "Franchise Agreements") with Cellairis. Plaintiff also entered into four new sub-license agreements (the "Sub-License Agreements") with Global to acquire CPM's sub-licenses to operate the franchises in the mall. Both the Franchise Agreements and the Sub-License Agreements contained an agreement to arbitrate.

Within the same time period, Plaintiff, Cellairis and CPM executed an Assignment and Assumption Agreement (the "AA Agreement") effective September 1, 2014 which stated that Plaintiff was required to sign new franchise and sub-license agreements which were "attached to this Agreement" and "incorporated herein by this reference." The AA Agreement contained a choice of law provision where the parties agreed the sole and exclusive venue to adjudicate any

controversy would be in this Court. Plaintiff took possession of the four franchise units on October I, 2014 and later in 2014 learned that Dolphin Mall would not renew the licenses for the franchise locations at Dolphin Mall. Plaintiff sued Cellairis in March 2015 in state court in Florida, asking to rescind the Franchise Agreements and Sub-License Agreements. Cellairis and Global moved to dismiss the action based on the arbitration clauses and because the complaint failed to state a claim. Before the Court ruled on that motion, Plaintiff voluntarily dismissed its suit.

When Plaintiff initiated the underlying complaint in the Superior Court of Fulton County, Defendants filed a Motion to Dismiss and Compel Arbitration based on the arbitration agreements in the Franchise Agreements and the Sub-License Agreements. Plaintiff then amended its complaint to allege that the AA Agreement and attendant choice of law provision superseded the Franchise Agreements and Sub-License Agreements and their attendant arbitration clauses.

II. PROCEDURAL HISTORY

On February 7, 2017, this Court issued an Order on Defendants' Motion to Dismiss Complaint and Compel Arbitration (hereinafter "Order") granting Defendants' Motion to Dismiss and to Compel Arbitration, holding that the " [t]he question of arbitrability of the claims raised against [Defendants] should be submitted to an arbitrator." Following the Order, Plaintiff filed an appeal. Prior to

the case appearing before the Georgia Court of Appeals, Defendants filed their Motion for Fees on March 24, 2017.

On February 28, 2018 the Court of Appeals unanimously affirmed the trial court holding that "the arbitration agreements at issue in this case include a 'delegation provision' e.g., an agreement to arbitrate threshold issues concerning the arbitration agreement." Plaintiff's Motion for Reconsideration with the Court of Appeals was denied on March 20, 2018. Plaintiff's Petition for Certiorari with the Supreme Court of Georgia was denied on October 22, 2018 and it Petition for Reconsideration of the Denial of its Petition for Certiorari was denied on November 15, 2018.

III. ANALYSIS AND FINDINGS OF LAW

A. Defendants' Motion for Attorneys' Fees

In their Motion for Fees, Defendants assert that, as the "prevailing party" in the action, they are entitled to an award of attorneys' fees and expenses under Section 13(K) of the Franchise Agreements.[1] Defendants explain that because they indisputably sought to enforce their contractual right to arbitrate, they "unquestionably" prevailed in this action in

[1] Section 13(K) of the Franchise Agreements provides that " [i]n any arbitration or litigation to enforce the terms of this Agreement, all costs and all attorneys' fees (including those incurred on appeal) incurred *as* a result of the legal action shall be paid to the prevailing party by the other party." *See* Franchise Agreements (Exhibits 18 - 21 of Complaint) § 13(K).

enforcing that contractual right and are therefore entitled to recover their attorneys' fees and litigation expenses.

The Defendants assert that, alternatively, they are also entitled to attorneys' fees and expenses under O.C.G.A. § 9-15-14(a) and O.C.G.A. § 9-15-14(b), claiming that Plaintiff could not have reasonably believed its claims would have succeeded in this forum and that Plaintiffs conduct in this proceeding "unnecessarily expanded the proceeding."

I. Prevailing party

Defendants argue that because they indisputably sought to enforce a contractual right in this action - their contractual right to arbitrate - and because they unquestionably prevailed in this action of enforcing their contractual right, they have prevailed in litigation to enforce a contractual right, thus enabling them to recover their attorneys' fees and expenses under Section 13(K) of the Franchise Agreements at issue in this case. Defendants concede that a party ordinarily is not the prevailing party until the merits of a case have been decided, but argue that they moved for attorneys' fees once Defendants "became the prevailing parties by dismissal of Samaca's complaint." Finally, Defendants contend the fact that this Court did not adjudicate the ultimate merits of Plaintiff's claims is not material to Defendants' fee claim.

Insofar as the parties' agreements expressly state that "[a]ll controversies, claims, or disputes ... arising out of or relating to… [the] agreement ... [and/or] "[t]he scope and validity of th[e] Agreement" and

"specifically including whether any specific claim is subject to arbitration at all (arbitrability questions)" must be decided by an arbitrator. The Court therefore finds that Defendants' request for fees under the "prevailing party" provision arises out of or is related to the agreement and thus must be decided by an arbitrator. For the forgoing reasons, Defendants' motion for attorneys' fees pursuant to § l 3(K) of the parties' contract is **DENIED**.

2. O.C.G.A. § 9-15-14

Defendants contend that pursuant to O.C.G.A. § 9-15-14(a) and (b) this Court has jurisdiction to award attorneys' fees. Under O.C.G.A. § 9-15-14(a), a court is required to award reasonable and necessary attorneys' fees and expenses of litigation if it finds that a party "has asserted a claim, defense, or other position with respect to which there existed such complete absence of any justiciable issue of law or fact that it could not be reasonably believed that a court would accept the asserted claim." O.C.G.A. § 9-l-14(a) [sic].

A court may also award attorneys' fees and expenses if an attorney or party "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." O.C.G.A. § 9-l5-14(b). The decision to grant an award of attorneys' fees and litigation expenses, and the amount of any such award, rests solely with the court without input from a jury. O.C.G.A § 9-15-14(f).

The Georgia Court of Appeals has held that fees under O.C.G.A. § 9-15-14(b) are warranted where a party's tactics delay the disposition of the case and

expand the proceedings. Harkleroad & Hermance, P.C. v. Stringer, 220 Ga. App. 906, 909, 472 S.E.2d 308, 312 (1996) (finding that defendants' tactics in the trial court were meant to delay the disposition of the case, to harass and to expand the proceedings, reasoning that defendants avoided a decision for almost three years on a routine action, where defendants presented no evidence to support a number of his counterclaims; filed a direct appeal without following the interlocutory appeals procedures; requested binding arbitration on the eve of trial, made no effort to prove his counterclaims in arbitration, and then disputed the award in trial court.).

Insofar as the present Motion asks this Court to award fees based on litigating Defendants' Motion to Compel Arbitration and Dismiss, the Court considers whether Plaintiffs claims "lacked substantial justification" or "were interposed for delay or harassment." In considering Defendants' Motion to Compel Arbitration and Dismiss, the narrow issue before this Court was whether the parties' claims should have been submitted to arbitration, and whether the arbitrability of certain claims should also be submitted to arbitration. Based on the clear and unambiguous language of the parties' agreements, specifically the delegation clause which noted that whether any specific claim is subject to arbitration is itself a subject to arbitration, and the express incorporation of the arbitration clauses into the Assignment & Assumption Agreement, the Court finds that Plaintiff's arguments to the contrary lack substantial justification, and that Plaintiffs conduct in the litigation of the claims before this Court was interposed for delay or harassment.

Accordingly, Defendants' motion for attorneys' fees under O.C.G.A. §9-15-14(b) is **GRANTED**. Having considered the record, including the parties' briefs and Defense counsel's fee invoices,[2] the Court finds Defendants are entitled to $59,983.78 in reasonable and necessary fees and costs incurred by them as a result of Plaintiff's sanctionable conduct. This amount represents the total fees requested by Defendants incurred in defending this action from the commencement of the case through March 22, 2017 (shortly before Plaintiff filed its Notice of Appeal) minus invoice entries that include billing items regarding Defendants Cellairis' and Global's Motion to Stay Discovery and for Protective Order (filed on October 20, 2016), motion which was denied by this Court.

B. Plaintiff's Motion to Compel Arbitration

Plaintiff asserts that because Defendants' Motion for Fees involves a question of arbitrability arising out of the parties' agreements, it should be decided by an arbitrator. In response, Defendants assert that no arbitrability dispute exists and raise the arguments put forth in their Motion for Fees. The Court has addressed this question in section A of this Order, and has found that the question of arbitrability under the parties' contract is for an arbitrator.

[2] Although a hearing was held on February 12, 2019 on the parties' motions, Plaintiff did not cross examine Defense counsel or otherwise object at the hearing to the reasonableness or necessity of any portion of the requested fees and costs.

However, the Court has also found that Plaintiff's tactics during the pendency of this case were meant to delay the disposition of the case and to harass and expand these proceedings for almost three years, thus justifying an award of attorneys' fees under O.C.G.A. § 9-15-l4(b). Importantly, awards under 9-15-14 are not "claims" subject to arbitration but rather constitute sanctions of the Court intended to recompense litigants and to punish and deter litigation abuses. *See* Long v. City of Helen, 301 Ga. 120, 121, 799 S.E.2d 741, 742 (2017); Riddell v. Riddell, 293 Ga. 249, 250, 744 S.E.2d 793, 794 (2013).

Given all of the above, Plaintiffs Motion to Compel Arbitration is **GRANTED IN PART** with respect only to Defendants' motion for attorneys' fees pursuant to §13(K) of the parties' contract and is otherwise **DENIED** with respect to Defendants' motion for attorneys' fees under O.C.G.A. §9-15-14(b)

SO ORDERED this 6th day of March, 2019.

signed
ALICE D. BONNER, SENIOR JUDGE
Superior Court of Fulton County
Business Case Division
Atlanta Judicial Circuit

APPENDIX G

Court of Appeals
of the State of Georgia

ATLANTA, April 02, 2019

The Court of Appeals hereby passes the following order

A19D0372. SAMACA, LLC v. CELLAIRIS FRANCHISE, INC. et al.

Upon consideration of the Application for Discretionary Appeal, it is ordered that it be hereby DENIED.

LC NUMBERS:

2016CV276036

Court of Appeals of the State of Georgia
Clerk's Office, Atlanta, April 02, 2019.

(SEAL)

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ Stephen Castlen, Clerk.

APPENDIX H

(SEAL) SUPREME COURT OF GEORGIA
Case No. S19C1106

December 23, 2019

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed.

SAMACA, LLC v. CELLAIRIS FRANCHISE, INC. et al.

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur, except Peterson, J., not participating.

Court of Appeals Case No. A19D0372

SUPREME COURT OF THE STATE OF GEORGIA
Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.
/s/ Thérèse S. Barnes, Clerk

APPENDIX I

(SEAL) SUPREME COURT OF GEORGIA
Case No. S19C1106

January 27, 2020

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed.

SAMACA, LLC v. CELLAIRIS FRANCHISE, INC. et al.

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

All the Justices concur, except Peterson, J., not participating.

SUPREME COURT OF THE STATE OF GEORGIA
Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.
/s/ Thérèse S. Barnes, Clerk

APPENDIX J
IN THE SUPERIOR COURT OF FULTON COUNTY
BUSINESS CASE DIVISION
STATE OF GEORGIA

SAMACA, LLC, Plaintiff, v. CELLAIRIS FRANCHISE, INC., GLOBAL CELLULAR, INC., and CELL PHONE MANIA, LLC, Defendants

CIVIL ACTION NO.: 2016CV276036
Business Case Div. 1
[Filed June 4, 2019]

ORDER ON PLAINTIFF'S MOTION FOR ATTORNEYS' FEES AND EXPENSES UNDER O.C.G.A. § 9-15-14

The above styled action is before the Court on Plaintiff Samaca, LLC' s Motion for Attorneys' Fees and Expenses Under O.C.G.A. § 9-15-14 ("Motion"). Therein Samaca seeks all of its fees and expenses incurred in addressing Defendants' request for attorney's fees under Section 13(K) (prevailing party provision) of the parties' Franchise Agreements. Having considered the entire record,[1] the Court finds

[1] Plaintiff's Motion for Leave to File a Reply is hereby GRANTED and the Reply, which was attached to the motion, is considered to have been filed on the record on April 25, 2019. In addition to the foregoing Reply, the Court has considered all of the parties' briefs and submissions with respect to Plaintiff's Motion, including: Defendants' Opposition to Samaca's Motion for Attorney's Fees and Expenses Under O.C.G.A. §9-15-14, filed on April 23, 2019; Defendants' Response to Plaintiff's Motion for Leave to File a Reply, filed on May 21, 2019; Plaintiff's Objection to Defendants' Response to Plaintiff's Motion for Leave to File a

Plaintiffs Motion is untimely under O. C. G .A. § 9-15-14(e) insofar as it was submitted more than 45 days after the final disposition of this action. See O.C.G.A. § 9-15-14(e) ("Attorney's fees and expenses under this Code section may be requested by motion at any time during the course of the action but not later than 45 days after the final disposition of the action."); see e.g. Kim v. Han, 339 Ga. App. 886, 795 S.E.2d 191 (2016) ("the phrase 'final disposition' should be considered to be synonymous with the phrase "final judgment" as it is used in the statute enumerating when an appeal may be taken"); Fairburn Banking Co. v. Gafford, 263 Ga. 792, 439 S.E.2d 482 (1994) ("'Final disposition of the action,' as used in statute providing that motion for attorney fees may be made within 45 days of final disposition of action, means final judgment of trial court"); Trammel v. Clayton Cty. Bd. Of El-10 Comm'rs, 250 Ga. App. 310,310, 551 S.E.2d 412,413 (2001) ("[t]inal disposition of this action within the meaning of OCGA § 9-15-14(e) was the entry of final judgment by filing the order granting summary judgment . . . in the trial court [which] constituted a final appealable order from which the 45 days began to run within which to seek sanctions.").[2]

Reply, filed on May 24, 2019; Defendants' Notice of Filing of Samaca's Supreme Court Certiorari Petition and Supplemental Brief, filed on May 21, 2019; and Plaintiff's Objection to Notice of Filing Samaca's Supreme Court Certiorari Petition, filed on May 24, 2019.

[2] Plaintiff cites to Workman v. RL BB ACQ I-GA CVL, LLC, 303 Ga. 693,814 S.E.2d 696 (2018) in support of its assertion that the Motion was timely. Insofar as Workman does not discuss the statute at issue here, O.C.G.A. § 9-15-14(e), the Court finds the holding and analysis of Workman to be inapposite.

Moreover, even assuming that the Motion is timely, the Court finds that Defendants' request for an award of fees under Section 13(K) for having "prevailed" in having the underlying complaint dismissed and arbitration compelled presented justiciable issues such that an award of fees to Plaintiff under O.C.G.A. §9-15-14(a) or (b) is not warranted. Accordingly, Plaintiffs Motion is hereby **DENIED**.

SO ORDERED this 4th day of June, 2019.

/s/ Alice D. Bonner
ALICE D. BONNER, SENIOR JUDGE
Superior Court of Fulton County
Business Case Division
Atlanta Judicial Circuit

*****

APPENDIX K

Court of Appeals
of the State of Georgia

ATLANTA, July 23, 2019

The Court of Appeals hereby passes the following order

A19D0539. SAMACA, LLC v. CELLAIRIS FRANCHISE, INC. et al. .

Upon consideration of the Application for discretionary Appeal, it is ordered that it be hereby DENIED.

LC NUMBERS:

2016CV276036

(SEAL) *Court of Appeals of the State of Georgia*
Clerk's Office, Atlanta, July 23, 2019.

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.
Witness my signature and the seal of said court hereto affixed the day and year last above written.
/s/ Stephen Castlen, Clerk.

APPENDIX L

Court of Appeals
of the State of Georgia

ATLANTA, August 7, 2019

The Court of Appeals hereby passes the following order

A19D0539. SAMACA, LLC v. CELLAIRIS FRANCHISE, INC. et al.

Samaca, LLC filed an application for discretionary appeal seeking review of the trial court's order denying a claim for OCGA § 9-15-14 attorney fees. In connection with the application, Samaca filed a motion to recuse staff attorney Charles Bonner. The application for discretionary appeal was denied on July 23, 2019, and the motion to recuse was deemed moot. On July 24, 2019, Samaca filed a motion for reconsideration. Samaca also filed an emergency motion demanding that Bonner be recused from any decision relating to the motion for reconsideration.

Under the Georgia Rules of Judicial Conduct, judges ensure that staff members "observe the standards of fidelity and diligence that apply to the judges[.]" See Code of Judicial Conduct Rule 2.12 (A). Pursuant to Rule 2.11 (A), there are instances in which disqualification may be required. There is, however, no requirement that any such disqualification be disclosed on the record. See Code of Judicial Conduct Rule 2.11 (C) ("[j]udges disqualified by the terms of rule 2.11 *may* disclose on

the record . . . the basis of their disqualification") (emphasis supplied).

We have reviewed the motion for reconsideration, which is hereby DENIED. The emergency motion is thus DISMISSED as MOOT.

LC NUMBERS:
2016CV276036

(SEAL) *Court of Appeals of the State of Georgia*
Clerk's Office, Atlanta, 08/07/2019.

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.
Witness my signature and the seal of said court hereto affixed the day and year last above written.
/s/ Stephen Castlen, Clerk.

APPENDIX M

Court of Appeals
of the State of Georgia

ATLANTA, August 29, 2019

The Court of Appeals hereby passes the following order

A19D0539. SAMACA, LLC v. CELLAIRIS FRANCHISE, INC. et al.

Upon consideration of the APPELLANT'S Amended Motion for Reconsideration in the above styled case, it is ordered that the motion is hereby DENIED. For the reasons set forth in our order dated August 07, 2019, denying Appellant's Motion for Reconsideration and dismissing Appellant's Emergency Motion as moot, we hereby deny the Amended Motion for Reconsideration.

LC NUMBERS:
2016CV276036

(SEAL) *Court of Appeals of the State of Georgia*
Clerk's Office, Atlanta, August 29, 2019.

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.
Witness my signature and the seal of said court hereto affixed the day and year last above written.
/s/ Stephen Castlen, Clerk.

APPENDIX N

(SEAL) SUPREME COURT OF GEORGIA
Case No. S20C0114

December 23, 2019

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed.

SAMACA, LLC v. CELLAIRIS FRANCHISE, INC. et al.

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur, except Peterson, J., not participating.

Court of Appeals Case No. A19D0539

SUPREME COURT OF THE STATE OF GEORGIA
Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written**.**
/s/ Thérèse S. Barnes, Clerk

APPENDIX O

(SEAL) SUPREME COURT OF GEORGIA
Case No. S20C0114

January 27, 2020

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed.

SAMACA, LLC v. CELLAIRIS FRANCHISE, INC. et al.

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

All the Justices concur, except Peterson, J., not participating.

SUPREME COURT OF THE STATE OF GEORGIA
Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written**.**
/s/ Thérèse S. Barnes, Clerk

APPENDIX P
(Excerpt of complaint)

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

SAMACA, LLC, Plaintiff, vs. CELLAIRIS FRANCHISE, INC., GLOBAL CELLULAR, INC., and CELL PHONE MANIA, LLC, Defendants.

CIVIL ACTION NO. 2016 CV 276036
JURY TRIAL DEMANDED

[Filed June 3, 2016]

COMPLAINT

Plaintiff Samaca, LLC presents its complaint against Cellairis Franchise, Inc., Global Cellular, Inc., and Cell Phone Mania, LLC, alleging and praying for relief as follows:

Contents *****

Rescission for Fraudulent Inducement *****

COUNT VII (As to Cellairis and Global)*****
Rescission for Negligent Misrepresentation*****

JURY DEMAND AND PRAYER FOR RELIEF *****

*****

JURISDICTION AND VENUE

5. This Court has jurisdiction and venue is proper as to Defendants Cellairis and Global because these defendants have their registered office and agent in Fulton County, Georgia. O.C.G.A. § 14-2-510.

6. The Court also has jurisdiction and venue is proper as to Defendants Cellairis and CPM by virtue of the forum selection provision contained in Section 11 of the Assignment and Assumption Agreement ("Assignment & Assumption Agreement") signed by them effective September 1, 2014. A true and correct copy of the Assignment & Assumption Agreement is attached as **EXHIBIT 1 HERETO**.

7. Plaintiff invokes the referenced forum selection provision as a separate and severable provision without admitting to or ratifying the enforceability of the remaining substantive portions of the Assignment & Assumption Agreement.[1]

[1] Indeed, as explained below, Plaintiff seeks to rescind as void and unenforceable the **Assignment & Assumption Agreement** as well as the related June 30 Agreements (defined paragraph 64 below).

*****

COMPLAINT EXH 1 ***

ASSIGNMENT AND ASSUMPTION AGREEMENT DOLPHIN MALL (#K114) & DOLPHIN MALL (#21P) AND DOLPHIN MALL (#06A) & DOLPHIN MALL (#17)

This ASSIGNMENT AND ASSUMPTION AGREEMENT ("**Agreement**") is made effective as of September 1, 2014 by and between CELLAIRIS FRANCHISE, INC., ("**Cellairis**"), Cell Phone Mania, LLC ("**Assignor**"), and SAMACA, LLC ("**Assignee**").

*****

NOW THEREFORE, for and in consideration of $10.00 and other good and valuable consideration, together with the mutual promises and covenants contained herein, the receipt, sufficiency, delivery, and adequacy of which is hereby acknowledged by the parties, Assignor, Assignee, and Cellairis intending to be legally bound agree as follows:

*****

3. Assignor agrees and represents, as an inducement to Cellairis to enter into this Agreement, that at the time of the execution of this Agreement, Assignor will have fully satisfied all outstanding financial obligations to Cellairis and any affiliate of Cellairis, including but not limited to, Global Cellular, Inc.

a. Specifically, Assignor owes the following amounts that must be paid; however, Assignor is being paid the sum of $350,000.00 from Assignee as the sales price for the units being transferred pursuant to this Agreement ("Sales Price"), and Assignee shall pay Global Cellular, Inc. the Sales Price on behalf of Assignor, which shall be paid as follows:

*****

8. This Agreement constitutes the complete understanding between the parties. This Agreement cannot be amended, altered, modified, or superseded, in whole or in part, except by a written agreement so stating which is signed by all parties to this Agreement. No other promises or agreements shall be binding unless in writing and signed by the parties.

9. This Agreement may be executed in several counterparts, each of which shall be deemed as an original, but all of which together shall constitute one and the same instrument.

10. This Agreement is binding upon, and shall inure to the benefit of, the parties and their respective heirs, executors, administrators, successors and assigns.

11. This Agreement shall be governed by and construed under the laws of the State of Georgia, without regard to its conflicts of law provisions. The parties acknowledge

and agree that the Georgia State Courts for Fulton County, Georgia, or if such court lacks jurisdiction, the U.S. District for the Northern District of Georgia, shall be the sole and exclusive venue and sole and exclusive proper forum in which to adjudicate any case or controversy arising either, directly or indirectly, under or in connection with this Agreement and the parties further agree that, in the event of litigation arising out of or in connection with this Agreement in these courts, they will not contest or challenge the jurisdiction or venue of these courts. The parties expressly consent and submit to the jurisdiction and venue of these courts, and the parties waive any defenses of lack of personal jurisdiction, improper venue and forum *non conveniens*. Should any provision of this Agreement require interpretation or construction, it is agreed by the parties that the entity interpreting or construing this Agreement shall not apply a presumption that the provisions hereof shall be more strictly construed against one party by reason of the rule of construction that a document is to be construed more strictly against the party who prepared this Agreement, it being agreed that all parties have participated in the preparation of all provisions of this Agreement.

12. Each person who executes this Agreement on behalf of any party to the Agreement represents and warrants that he or she has

been duly authorized by such party to execute the Agreement.

13. Each party shall bear its own costs and expenses, including attorneys' fees and expenses of litigation, in connection with this Agreement.

14. The parties agree to execute any additional documents reasonably requested by another party so as to effectuate the purposes and effects of this Agreement.

15. Assignee acknowledges that the General Counsel for Cellairis Franchise, Inc. and Global Cellular, Inc. represents those entities only in this transaction and in the preparation of this Agreement. Assignee acknowledges and agrees that it has been advised to consult with independent legal counsel with respect to this Agreement and has been provided a full and fair opportunity to do so.

CELLAIRIS FRANCHISE, INC.
/s/ Jeff Nestinger
Its: VP of Franchising

ASSIGNOR: Cell Phone Mania, LLC
/s/ Oz Aharon
Its: Managing Member

ASSIGNEE: SAMACA, LLC
By: /s/ Arnaldo Gonzalez Rodriguez
Its: Managing Member

*****

APPENDIX Q

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

SAMACA, LLC, Plaintiff, vs. CELLAIRIS FRANCHISE, INC., GLOBAL CELLULAR, INC., and CELL PHONE MANIA, LLC, Defendants.

CIVIL ACTION NO. 2016 CV 276036

[Filed: September 2, 2016]

FIRST AMENDMENT TO COMPLAINT AND VERIFICATION

Plaintiff Samaca, LLC files its first amendment and verification of the original Complaint, stating under oath as follows:

Plaintiff revises and restates Paragraph 6 of the Complaint as follows:

The Court also has jurisdiction and venue is proper as to Defendants Cellairis, Global and CPM by virtue of the forum selection clause contained in Section 11 of the Assignment and Assumption Agreement ("Assignment & Assumption Agreement") effective September 1, 2014. A true and correct copy of the Assignment & Assumption Agreement was attached to the original Complaint as **EXHIBIT 1 THERETO**. At all relevant times to this action, Defendants Cellairis and Global acted in concert, were alter egos, were under common control,

and the facts and claims alleged herein against these Defendants are inherently inseparable and interdependent. Moreover, the claims against Global arise from and are so related to the Assignment & Assumption Agreement that Global must be equitably bound by its forum selection clause.

Except as amended herein, all other portions of the original Complaint remain unchanged.

D. R. MARTIN, LLC

By: /s/ David R. Martin
David R. Martin
*****
COUNSEL FOR PLAINTIFF SAMACA

*****

APPENDIX R

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

SAMACA, LLC, Plaintiff, vs. CELLAIRIS FRANCHISE, INC., GLOBAL CELLULAR, INC., and CELL PHONE MANIA, LLC, Defendants.

CIVIL ACTION NO. 2016 CV 276036
[Filed: November 3, 2016]

ORDER OF RECUSAL

On November 2, 2016, the above-captioned matter came before the Honorable Shawn Ellen LaGrua for a Scheduling Conference. The limited purpose of the Scheduling Conference was for the Court to advise the parties that Jason Samuel Adler, Esq. ("Mr. Adler"), Corporate Counsel for Defendant Cellairis Franchise, Inc., serves/served as the Treasurer of Judge LaGrua's Campaign Committee. While the Court does not believe Mr. Adler's service in this capacity is any impediment to this Court's ability to fairly preside over this matter nor does the Court harbor any bias or prejudice in favor of or against the parties as a result thereof, the Court wanted to give the parties an opportunity to consider this potential issue prior to the motions hearing scheduled before the Court on November 30, 2016.

On November 3, 2016, David Martin, Esq., counsel for Plaintiff Samaca, LLC ("Plaintiff'), advised the Court that Plaintiff believes Mr. Adler's service as Treasurer creates a conflict and warrants Judge LaGrua's recusal in this case. Plaintiff further

requested that this Court voluntarily recuse to prevent any discomfort or awkwardness for the parties involved and to eliminate the necessity of having to promptly file a Motion to Recuse.

Now, as a courtesy to the parties and in furtherance of Plaintiffs request, this Court, on its own motion, hereby recuses itself from the above matter pursuant to Uniform Superior Court Rule 25.7. This matter shall be removed from the docket of Judge Shawn Ellen LaGrua. The Clerk of Superior Court and/or the Office of Superior Court administration shall take whatever administrative action is necessary to accomplish said reassignment.

In furtherance thereof, the motions hearing scheduled before this Court on November 30, 2016 at 3:15 p.m. has been removed from the Court's Calendar. Additionally, as ordered by this Court during the Scheduling Conference on November 2, 2016, all discovery depositions and related merits discovery are temporarily stayed, apart from discovery requests relating to venue, until such time as the pending motions can be heard by the newly assigned Judge.

SO ORDERED, this 3rd day of November, 2016.

(signed)
SHAWN ELLEN LAGRUA, JUDGE
Fulton County Superior Court
Atlanta Judicial Circuit

*****

APPENDIX S

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

SAMACA, LLC, Plaintiff, vs. CELLAIRIS FRANCHISE, INC., GLOBAL CELLULAR, INC., and CELL PHONE MANIA, LLC, Defendants.

CIVIL ACTION NO. 2016 CV 276036
[Filed: December 20, 2016]

ORDER TRANSFERRING CASE TO BUSINESS CASE DIVISION

Pursuant to Atlanta Judicial Circuit Rule 1004, as set forth by the Supreme Court of Georgia establishing the Metro Atlanta Business Case Division in the Fulton County Superior Court, the above-styled cases are hereby TRANSFERRED TO THE BUSINESS CASE DIVISION and assigned to the Honorable Alice D. Bonner.

The Clerk of Court is direct to transfer the cases to the Court Unit "Business Court 1" as "Judge, Business Court."

SO ORDERED, 19th day of December, 2016.

/s/ Gail S. Tusan
GAIL S TUSAN, CHIEF JUDGE
for Judge Kelly Lee Ellerbee
Superior Court of Fulton County
Atlanta Judicial Circuit

APPENDIX T

IN THE SUPERIOR COURT OF FULTON COUNTY, STATE OF GEORGIA

SAMACA, LLC, Plaintiff, vs. CELLAIRIS FRANCHISE, INC., GLOBAL CELLULAR, INC., and CELL PHONE MANIA, LLC, Defendants.

CIVIL ACTION
FILE NO. 2016CV276036
[Filed: March 24, 2017] [EXCERPT]

DEFENDANTS CELLAIRIS' AND GLOBAL'S MOTION FOR ATTORNEYS' FEES AND EXPENSES AND BRIEF IN SUPPORT

Defendants Cellairis Franchise, Inc. ("Cellairis") and Global Cellular, Inc. ("Global") (collectively, "Defendants") move the Court for an Order awarding Defendants their attorneys' fees and expenses incurred in connection with this action.[1]

Pursuant to the parties' written agreements, Defendants are entitled to recover their attorneys' fees because they prevailed in this action. Section 13(K) of the Franchise Agreements that were at issue in this case provides that "[i]n any arbitration or litigation to enforce the terms of this Agreement, all costs and all attorneys' fees (including those incurred on appeal) incurred as a result of the legal action shall

[1] Defendants do not, and in no way intend to, waive the arbitration clauses contained in the contracts at issue. This request set forth in this Motion is limited to enforcement of Defendants' right to recover attorneys' fees.

be paid to the prevailing party by the other party." *See* Franchise Agreements (Exhibits 18-21 of Complaint) § 13(K). Defendants are entitled to recover their attorneys' fees and costs because they prevailed in this proceeding in enforcing their contractual right to arbitration. As discussed below, this Court has on multiple occasions in other matters enforced this same contractual attorneys' fees provision in the same form Franchise Agreement.

Plaintiff Samaca, LLC ("Plaintiff") filed its claims in this Court despite having previously agreed to arbitration clauses that clearly and unequivocally requires arbitration of these claims. Accordingly, Defendants requested that Plaintiff dismiss its claims and re-file them in an arbitration proceeding. When Plaintiff refused, Defendants were forced to take formal steps to enforce their contractual arbitration rights by moving to dismiss and to compel arbitration. On February 7, 2017, this Court granted Defendants' motion to dismiss and to compel arbitration and dismissed this lawsuit. Defendants now seek to recover their attorneys' fees and expenses of litigation pursuant to their express contractual right to do so. These fees and expenses would have been unnecessary but for Plaintiff's disregard of the arbitration clauses to which it agreed and Plaintiff's failure to file these claims in the proper forum. Alternatively, as discussed below, the Court should award Defendants their attorneys' fees and expenses pursuant to O.C.G.A. § 9-15-14.

PROCEDURAL BACKGROUND

A. Plaintiff Improperly Files Its Claims in Florida.

This action is not the first time Plaintiff has filed these claims in an incorrect forum. On March 13, 2015, Plaintiff filed a Complaint in the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County, Florida, seeking to rescind the same agreements that were the subject of Plaintiff's claims in this action. See Plaintiff's Florida Complaint in Case No. 15-006018 CA 01 ("Florida Action") (attached as Exhibit A). On May 21, 2015, Defendants filed a motion to dismiss for improper venue and failure to state a claim in the Florida Action, arguing primarily that the parties' contractual arbitration and forum selection clauses precluded Plaintiff's pursuit of the Florida Action. See Plaintiff's Motion to Dismiss in Florida Action (attached as Exhibit B). Instead of dismissing its claims, Plaintiff pursued its claims in this improper forum, noticed and took an out-of-state deposition, and noticed a hearing on Defendants' motion to dismiss, which was set for February 25, 2016. After Defendants' Georgia counsel, admitted pro hac vice in the Florida Action, traveled to Florida to attend the hearing, Plaintiff's then-counsel[2] advised Defendants on the morning of the hearing that "irreconcilable differences" had arisen between Plaintiff and its counsel and that Plaintiff's counsel would be seeking to withdraw from the Florida Action. See February 25, 2016 E-Mail from Plaintiff's Counsel in Florida Action (attached as Exhibit C). As a result, the hearing on Defendants' motion to dismiss was cancelled. Subsequently, nearly a year after filing its Complaint, on April 28, 2016, Plaintiff voluntarily dismissed the Florida Action. See Plaintiff's Notice of

[2] Plaintiff was represented by different counsel in connection with the Florida Action.

Voluntary Dismissal Without Prejudice in Florida Action (attached as Exhibit D).

B. Plaintiff Re-Files Its Claims in This Court, in Disregard of the Mandatory Arbitration Provisions in the Parties' Contracts.

After forcing Defendants needlessly to incur attorneys' fees and expenses in defending the improperly-filed Florida Action, Plaintiff then, instead of filing its claims in the correct forum (an arbitration proceeding), re-filed its claims in this Court on June 3, 2016. See Complaint. Before filing any substantive pleadings, counsel for Defendants contacted counsel for Plaintiff, again informed Plaintiff that its claims are subject to mandatory arbitration, and asked whether Plaintiff would consent to having its claims heard in arbitration. Plaintiff refused, however, forcing Defendants to incur further unnecessary costs in litigating over the proper forum for these claims. See July 23, 2016 E-Mail from Defendants' Counsel to Plaintiff's Counsel (attached as Exhibit E). Instead of agreeing to arbitration, Samaca aggressively pursued discovery and served multiple sets of discovery requests on Defendants. On August 5, 2016, Defendants filed their Motion to Dismiss Complaint and to Compel Arbitration and Memorandum of Law in Support, as well as an Answer and Affirmative Defenses. After full briefing, the Court granted Defendants' Motion to Dismiss and to Compel Arbitration on February 7, 2017 and dismissed this action in favor of arbitration. Plaintiff filed a Notice of Appeal of the Court's February 7, 2017 Order on February 27, 2017.

ARGUMENT AND CITATION OF AUTHORITY

Based on the plain language of the parties' contracts, Defendants request that the Court award them their attorneys' fees and costs in the amount of $67,000.78. With this Motion, Defendants submit detailed evidence establishing that this is the amount of attorneys' fees and costs Defendants have incurred in connection with this action. Defendants have also submitted evidence establishing the reasonableness of those fees and costs.

A. <u>Defendants are Entitled to Recover Their Reasonable Attorneys' Fees</u>.

1. The Parties' Contracts Entitle Defendants, as the Prevailing Party, to Recover their Fees and Costs.

Defendants request that, pursuant to the parties' contracts, the Court award them the attorneys' fees they have been forced to incur in this action. The parties' contracts allow Defendants to recover their attorneys' fees in precisely this circumstance, where Defendants have prevailed in litigation and enforced a contractual right. Defendants indisputably sought to enforce a contractual right in this action — their contractual right to arbitrate — and Defendants unquestionably prevailed in this action in enforcing that contractual right. Therefore, Defendants are entitled to recover their attorneys' fees and litigation expenses. Samaca improperly brought claims in this Court against Defendants — including claims relating to the four Franchise Agreements at issue — that were subject to mandatory arbitration under the Franchise Agreements. See Franchise Agreements (Exhibits 18-21 of Complaint) (the "Franchise Agreements").

Samaca executed the Franchise Agreements on July 1, 2014. See Complaint ¶¶ 60 n.32, 64, 78, Exs. 18–21; Affidavit of Jeff Nestinger (filed Oct. 6, 2016; Ex. 1 to Reply) ¶ 4. As set forth in prior briefing, the Franchise Agreements contained a comprehensive agreement to arbitrate, whereby Samaca agreed to arbitrate:

> **all controversies, claims, or disputes** between Company and FRANCHISEE **arising out of or relating to**: a. **This agreement or any other agreement** between company and FRANCHISEE; b. **The relationship** between FRANCHISEE and Company; **The scope and validity of this Agreement or any other agreement** between Company and FRANCHISEE, **specifically including whether any specific claim is subject to arbitration at all (arbitrability questions)**; and/or d. **The offer or sale of the franchise opportunity** . . . . Any claims by or against any affiliate of the Company may be joined, in the Company's sole discretion, in the arbitration.

Franchise Agreements § 13(D)(1) (pp. D-64 – D-65) (emphasis added). Because Plaintiff failed to adhere to its contractual obligation to arbitrate the claims in this case, despite being fully aware of these broad arbitration clauses,[3] Defendants were forced to seek to enforce in this action their contractual right to arbitrate these claims. On August 5, 2016, Defendants moved to dismiss Plaintiff's Complaint in its entirety

[3] *See* July 23, 2016 E-Mail from Defendants' Counsel to Plaintiff's Counsel (attached as Exhibit E).

and for an Order compelling arbitration. See Motion to Dismiss and to Compel Arbitration; see also Defendants' Answer and Affirmative Defenses at 3 (¶¶ 5-7), 28 (First Defense). On February 7, 2017, this Court granted Defendants' Motion, dismissed Plaintiff's claims, and compelled arbitration.

Section 13(K) of each of the Franchise Agreements provides:

> In any arbitration or litigation to enforce the terms of this Agreement, all costs and all attorneys' fees (including those incurred on appeal) incurred as a result of the legal action shall be paid to the prevailing party by the other party. Attorneys' fees include a charge for the service of in-house counsel at the market rate for independent counsel of similar experience.

Franchise Agreements § 13(K) (p. D-70).[4] Defendants put Plaintiff on notice of their right and intent to recover fees for forcing Defendants to enforce their contractual arbitration right. *See* Defendants' Motion to Dismiss Complaint and to Compel Arbitration at 10 n.6; Defendants' Answer at 33. Yet, Plaintiff persisted in pursuing its claims in this improper forum.

In this action, Defendants clearly sought to enforce their contractual right of arbitration under the Franchise Agreements. As the Court is aware,

[4] Although this provision allows Defendants to seek recovery of the value of their in-house's counsel's time in assisting on this matter, Defendants do not seek to recover that amount in order to streamline this request and in order further to demonstrate the reasonableness of Defendants' request in this Motion.

Defendants' primary defense in this action was to assert their contractual arbitration rights.[5] In dismissing Plaintiff's claims, the Court, in fact, enforced Defendants' contractual right to arbitration. Defendants' enforcement of their contractual right under the Franchise Agreement was the primary issue litigated in this action and was the basis on which this action was resolved. Accordingly, Defendants sought "to enforce the terms of th[e Franchise] Agreement[s]" in this litigation, and the contractual fee provision applies.

Defendants were also clearly the prevailing party in this action. Defendants prevailed in enforcing their contractual arbitration rights, and the Court granted Defendants' Motion to Dismiss and to Compel Arbitration in its entirety and dismissed Plaintiff's claims. Thus, Defendants prevailed entirely in this action. That this Court did not adjudicate the ultimate merits of Plaintiff's claims is not material to Defendants' fee claim. By this Motion, Defendants seek to recover only the fees incurred in this action, not fees for litigating the ultimate merits, which Defendants will seek to recover in the arbitration where those issues are litigated. The primary issue in this action was arbitration, and Defendants clearly prevailed on that issue. Plaintiff received none of the relief it sought in this action. Instead, Defendants prevailed on the entirety of their request for relief in this action and received the precise substantive relief they sought

[5] Defendants have several other substantive defenses to Plaintiff's claims, but asserted them in the alternative in the event the Court did not grant Defendants' arbitration motion.

in this action, an Order compelling arbitration and the dismissal of Plaintiff's claims. Therefore, even though Plaintiff can re-file its claims in arbitration, Defendants prevailed in this action.

Defendants have recently enforced the same attorneys' fees provision set forth in Section 13(K) of the Franchise Agreement under analogous circumstances in another matter. On January 26, 2016, an American Arbitration Association arbitrator ruled that Cellairis and Global were entitled to recover their attorneys' fees and expenses under the same contractual fee provision in a Franchise Agreement with a different franchisee, in connection with an arbitration that dealt **solely with the issue of arbitrability and did not address the ultimate merits of any claims**. *See* January 26, 2016 AAA Order (attached as Exhibit F) (holding that because Cellairis and Global prevailed on the question of arbitrability,[6] they were "entitled to the associated costs and attorneys' fees. An award of attorneys' fees and costs in this arbitration does not depend on whether the Claimants ultimately prevail in the federal action. It is enough, under the clear terms of the Franchise Agreement, that the Claimants prevailed in this arbitration action."). On December 6, 2016, this Court confirmed the arbitration Order and the attorneys' fees award. *See* December 6, 2016 Order in *Cellairis Franchise, Inc., et al. v. Michael Duarte*, Civil Action File No. 2016CV276078 (Fulton Superior Ct.) (Campbell, J.) (attached as Exhibit G) (holding that the arbitrator had "correctly awarded [Cellairis and Global] their attorneys' fees").

[6] In that case, unlike here, the claims at issue were not subject to arbitration.

Under Georgia law, contracts allowing for an award of attorneys' fees and costs to the prevailing party are enforceable. See *Cheeley Invs., L.P. v. Zambetti*, 332 Ga. App. 115, 117, 770 S.E.2d 350, 353 (2015); *Discovery Point Franchising, Inc. v. Miller*, 234 Ga. App. 68, 73, 505 S.E.2d 822, 826 (1998) (A franchise agreement that provided that, in the event of a dispute, the prevailing party would be entitled to recover reasonable attorney fees and court costs from the other party was enforceable according to its terms.). This Court has on multiple occasions enforced Defendants' right to recover their attorneys' fees and litigation expenses under Section 13(K) of this same form of Franchise Agreement. *See* Exhibit G (December 6, 2016 Order in Civil Action File No. 2016CV276078); August 24, 2015 Order in *Cellairis Franchise, Inc., et al. v. Mobile Mania LLC, et al.*, Civil Action No. 2015CV61627 (Fulton Superior Ct.) (Glanville, J.) (attached as Exhibit H); March 7, 2016 Order in Civil Action No. 2015CV61627 (Fulton Superior Ct.) (Glanville, J.) (attached as Exhibit I).

For these reasons, the Court should award Defendants their attorneys' fees and litigation expenses pursuant to Section 13(K) of the Franchise Agreements that Plaintiff executed and that were at issue in this action.

2. Alternatively, the Court Should Award Defendants their Fees and Expenses Pursuant to O.C.G.A. § 9-15-14.

In addition, and alternatively, Defendants are entitled to recover their fees and expenses pursuant to O.C.G.A. § 9-15-14. That statute provides, in pertinent part:

(a) In any civil action in any court of record of this state, reasonable and necessary attorney's fees and expenses of litigation shall be awarded to any party against whom another party has asserted a claim, defense, or other position with respect to which there existed such a complete absence of any justiciable issue of law or fact that it could not be reasonably believed that a court would accept the asserted claim, defense, or other position. Attorney's fees and expenses so awarded shall be assessed against the party asserting such claim, defense, or other position, or against that party's attorney, or against both in such manner as is just.

(b) The court may assess reasonable and necessary attorney's fees and expenses of litigation in any civil action in any court of record if, upon the motion of any party or the court itself, it finds that an attorney or party 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 Chapter 11 of this title, the 'Georgia Civil Practice Act.' As used in this Code section, 'lacked substantial justification' means substantially frivolous, substantially groundless, or substantially vexatious.

O.C.G.A. § 9-15-14(a), (b). Plaintiff's conduct in this action justifies an award of fees in favor of Defendants under both O.C.G.A. § 9-15-14(a) and O.C.G.A. § 9-15-14(b).

Despite having already once before filed its claims in an improper forum (Florida state court), and having been put on notice of Defendants' arbitration rights at that time, Plaintiff in this action again filed its claims in the wrong forum in complete disregard of the mandatory arbitration clauses (in fact, between the Franchise Agreements and Sub-License Agreements eight separate arbitration clauses) that clearly covered these claims. Because Defendants have already explained at length in their prior briefing why the parties' contracts clearly require arbitration of these claims, Defendants, for efficiency's sake, do not repeat all of those arguments again here. In brief, Plaintiff could not have reasonably believed its claims were properly brought in Court given that the arbitration clauses covered not only all claims, controversies, and disputes arising under any contracts between Plaintiff and Defendants, but also all claims, controversies, and disputes arising out of the relationship between the parties. See Franchise Agreements § 13(D)(1) (pp. D-64 – D-65); Sub-License Agreements (Compl., Exs. 22–25) at § 13 (p. E-9). In addition, the parties' agreements specifically required arbitration of the issue of "whether any specific claim is subject to arbitration at all (arbitrability questions)." Id. Given this clear and unequivocal language, Plaintiff could not have reasonably believed its claims would have succeeded in this forum. Yet, Plaintiff stubbornly persisted, even after Defendants asked Plaintiff to consent to arbitration after Plaintiff filed its Complaint (see Exhibit E),

forcing Defendants to incur additional unnecessary legal expenses litigating about the proper forum for these claims, even though the parties' contracts are unequivocal on that issue. Plaintiff's refusal to recognize Defendants' clear arbitration rights justifies an award of fees under both O.C.G.A. § 9-15-14(a) and O.C.G.A. § 9-15-14(b).

In addition, as the record makes clear, Plaintiff's conduct in this proceeding repeatedly "unnecessarily expanded the proceeding." O.C.G.A. § 9-15-14(b). In this action, Plaintiff, among other things: (i) filed a 168-paragraph Complaint, which, including exhibits, totaled 1,118 pages, forcing Defendants to incur additional expense in answering Plaintiff's unnecessarily long pleading; (ii) refused to consent to arbitration and then aggressively opposed Defendants' motion to compel arbitration, without any legitimate basis; (iii) aggressively sought to pursue discovery, including on merits issues, notwithstanding Defendants' threshold arbitration defense; (iv) took the unusual and unsupported step of moving to strike Defendants' reply brief, even though reply briefs are routinely filed in this Court and are not prohibited by any rule; (v) requested the recusal of the initially-assigned judge; (vi) amended its Complaint twice; and (vii) filed a meritless motion to strike portions of Defendants' opposition to Plaintiff's motion to transfer.

Georgia law allows the Court to award a party its attorneys' fees and costs when a party takes clearly meritless positions in litigation or when "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[.]" O.C.G.A. § 9-15-14(a); O.C.G.A.

§ 9-15-14(b). Plaintiff's overly aggressive litigation tactics throughout this action and its repeated filing of meritless motions and assertion of meritless legal positions resulted in the significant expansion of this proceeding, required Defendants to incur substantial fees to enforce their straightforward arbitration rights in an action that never should have been brought in the first place, and warrant an award of fees under O.C.G.A. § 9-15-14(a) and O.C.G.A. § 9-15-14(b).

B. Evidence of Defendants' Attorneys' Fees and Expenses.

Evidence supporting the amount of the attorneys' fees and litigation expenses that Defendants have incurred in connection with this action and evidence of the reasonableness of those amounts is being filed with this Motion. *See* Affidavit of Ronald T. Coleman, Jr. (attached as Exhibit J) ("Coleman Affidavit"); Redacted Copies of Defendants' Attorneys' Fees Invoices (attached to Coleman Affidavit as Exhibit 1).

In total, Defendants have incurred amounts exceeding $74,000 in connection with their defense of this action, but seek only $67,000.78 in fees and expenses in this Motion. *See* Coleman Affidavit ¶¶ 18-20. These fees were incurred, among other things, in preparing Defendants' Motion to Dismiss and to Compel Arbitration and related briefs, preparing an Answer and Affirmative Defenses to Plaintiff's voluminous Complaint, responding to Plaintiff's discovery requests and producing documents (including regarding the arbitration issues), attending the hearing held in this action, litigating Plaintiff's ancillary procedural motions, and preparing this

Motion, which likewise seeks to enforce a contractual right. *Id.* ¶ 13. The details and basis for these amounts are set forth in detail in the attached affidavit and the fee invoices attached to the affidavit. Those amounts are reasonable for the work completed. *Id.* ¶¶ 11, 13, 18.

These fees and expenses would have been avoidable if not for Plaintiff's stubborn refusal to recognize the impact of the binding arbitration clauses to which it agreed. Moreover, the amount of attorneys' fees Defendants have been forced to incur in this action has been increased because of Plaintiff's overly aggressive litigation tactics throughout this action, which are explained at length in the preceding section. Plaintiff's aggressive litigation tactics and repeated assertion of meritless positions in this action is further justification for the reasonableness of the fees and expenses Defendants incurred in defending this action.

In addition to the overall amount, the hourly rates charged to Defendants by undersigned counsel, which are discounted from Defendants' counsel's standard hourly rates, are reasonable. *See* Coleman Affidavit ¶¶ 11, 18. In the prior litigation cited above, both this Court and the AAA arbitrator have previously granted Defendants' requests for attorneys' fees, thus necessarily finding the rates charged by undersigned counsel (the same hourly rates sought here) to be reasonable in other franchise litigation matters undersigned counsel has handled for Defendants. *See* January 26, 2016 AAA Order (attached as Exhibit F); August 24, 2015 Order in Civil Action No. 2015CV61627 (Fulton Superior Ct.) (Glanville, J.) (attached as Exhibit H); March 7, 2016

Order in Civil Action No. 2015CV61627 (Fulton Superior Ct.) (Glanville, J.) (attached as Exhibit I).

CONCLUSION

For the foregoing reasons, Defendants request that the Court enter an Order, pursuant to Section 13(K) of the Franchise Agreements, awarding Defendants their attorneys' fees and legal expenses in the amount of $67,000.78, as specified above. Alternatively, the Court should award Defendants their attorneys' fees and expenses pursuant to O.C.G.A. § 9-15-14. A proposed Order is attached as Exhibit K for the Court's consideration.

Respectfully submitted this 24th day of March, 2017.

PARKER, HUDSON, RAINER & DOBBS LLP

/s/ Jared C. Miller
Ronald T. Coleman, Jr.
Georgia Bar No. 177655
Jared C. Miller
Georgia Bar No. 142219
Justin P. Gunter
Georgia Bar No. 969468

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APPENDIX U

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

SAMACA, LLC, Plaintiff, vs. CELLAIRIS FRANCHISE, INC., GLOBAL CELLULAR, INC., and CELL PHONE MANIA, LLC, Defendants.

CIVIL ACTION NO. 2016 CV 276036

[Filed April 4, 2017] [EXCERPT]

PLAINTIFF'S VERIFIED RESPONSE AND REPLY BRIEF TO DEFENDANTS CELLAIRIS' AND GLOBAL'S MOTION FOR ATTORNEY'S FEES AND EXPENSES

Plaintiff Samaca, LLC ("Plaintiff") opposes **Defendants Cellairis' and Global's Motion for Attorney's Fees and Expenses** filed on March 24, 2017**.** ("**Defendants' Motion**").[1]

Contents

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[1] Plaintiff objects to any additional briefing or submission of written evidence by Defendants without leave of court or outside of a hearing on their motion. *See* Uniform Superior Court Rules 1.5, 6.1 and 6.2. Throughout this litigation, Defendants have taken the position that they have unlimited follow-up briefing rights. Plaintiff requests Court notice of any deviation from procedure per USCR 1.5.

INTRODUCTION

Defendants' Motion comes after this Court's **Order on Defendants' Motion to Dismiss and Compel Arbitration** (the "**Order**") entered February 7, 2016 and Plaintiff's appeal of the **Order** on February 27, 2017. (*See* Plaintiff's **Notice of Appeal**). The **Order** dismissed Plaintiff's action and held that an arbitrator must decide the "arbitrability" of Plaintiff's claims. No merits were decided.

With remarkable irony,[2] **Defendants' Motion** asserts not one, but two, claims related to the same dispute. Defendants seek litigation expenses under the disputed Franchise Agreements[3] effective June 30, 2014 ("**June 30 Franchise Agreements**") attached to the **Verified Complaint** (Exh. 18-21).[4]

[2] Betraying their own concern, Defendants declare that by filing the motion they "do not…waive the arbitration clauses contained in the contracts at issue." **Defendants Motion** (p. 1 n. 1). Yet, Defendants' filing in this Court – showing no exception to arbitrability – is glaringly contradictory and financially prejudicial to Plaintiff. Defendants essentially say "Even if the main issue is the same (i.e. the existence of enforceable agreements), you have to arbitrate, but I don't."

[3] Once the supersedeas of Plaintiff's appeal goes into effect under O.C.G.A. 5-6-46(a), it seems doubtful that the Court could exercise jurisdiction over this portion of the **Defendants' Motion**.

[4] The **Verified Complaint** includes the original **Complaint** filed June 3, 2016, **First Amendment to Complaint and Verification** filed September 2, 2016, and **Second Amendment to Complaint and Verification** field November 8, 2016.

Alternatively, they ask for these expenses under O.C.G.A. § 9-15-14.[5]

Judicial estoppel bars the Court from hearing these claims because they also raise questions of arbitrability. But even on the merits, these claims must be denied.

Defendants' novel "request" for disputed contract damages

On March 27, 2017, Plaintiff filed **Plaintiff's Verified Emergency Motion to Treat "Request" as Counterclaim and to Dismiss the Same.** ("**Emergency Motion**"). Plaintiff contended that **Defendants' Motion** citing the "request" for litigation expenses in their original Answer (p. 33) amounted to a counterclaim. This counterclaim had matured, if at all, when the **Order** was entered and could not be presented without leave of court. Under 9-11-8(c) & (f), Plaintiff asked the Court to treat the request as a counterclaim and dismiss it. The Court in its March 29, 2017 order ("**March 29 Order**") denied the **Emergency Motion.**

However, the Court seemed to recognize that Defendants' "request" would involve a claim that had

[5] The Supreme Court of Georgia recognizes that a motion for attorney's fees under O.C.G.A. § 9-15-14 may be made during the pendency of appeal. However, the trial court is "subject to the peril that a decision which conflicts with that of the appellate court will be made nugatory." Fairburn Banking Co. v. Gafford, 263 Ga. 792, 794 (1994).

not matured and that Defendants had not raised a counterclaim:[6]

> Plaintiff asks the Court to convert Defendants' request for fees under the Franchise Agreements into a counterclaim. "A claim which either matured or was acquired by the pleader after serving his pleading may, with the permission of the court, be presented as a counterclaim by supplemental pleading." O. C. G.A. § 9-11-13 (e). Here, the pleader is Defendants and ***they have not requested this request be converted to a counterclaim***.

March 29 Order (p. 2) (Emphasis added).

Thus, with no counterclaim pending against Plaintiff, Defendants have no means to recover litigation expenses on this contractual theory in this Court. The **March 29 Order** (p. 2) also stated in relevant part:

> Assertion of a counterclaim arising under the Franchise Agreements would have been at odds with their argument that ***all claims*** arising from the Franchise Agreements, including the arbitrability of the claims, are subject to arbitration.

(Emphasis added).

Defendants point to no authority to recover on their "request." Theirs cannot be a motion for

[6] If Plaintiff's understanding is right, the **March 29 Order** solved the "final disposition" problem more efficiently than the **Emergency Motion** had proposed.

summary judgment on the "request" where no counterclaim has been presented, nor merits discovery allowed.[7] "Cases heard on contract where an issuable defense is filed require trial by jury unless waived." Redding v. Commonwealth of America, Inc., 143 Ga. App. 215 (1977) (reversing the trial court for holding bench trial on disputed contract claim). The **Verified Complaint** (Count I) ¶¶ 1-116 chronicles in detail why the parties entered into no enforceable contracts at all. [8] And, critically, Plaintiff demanded a trial by jury.

I. PROCEDURAL BACKGROUND

A. Plaintiff's initial Florida case is only relevant to show that Defendants believed litigation in Georgia was appropriate.

Ignoring the big picture, the Defendants fault Plaintiff for the initial Florida case where it had different counsel. But Defendants leave out how they

[7] Under O.C.G.A. 9-11-12(j), merits discovery was automatically stayed for 90 days upon Defendants' motion to compel arbitration on August 5, 2016. The stay was set to expired on November 3, 2016. After defendant moved to continue the stay, the first trial judge, Hon. Shawn Ellen LaGrua, initially denied Defendants' motion to stay in an Order dated October 27, 2016. (See **EXHIBIT 1 HERETO**). However, one week later, in an Order dated November 3, 2016, said trail judge recused herself due to Defendants' general counsel being her campaign treasurer. In the same order, without explanation, the trial judge reinstated the stay as to merits discovery, but allowed venue discovery. (See **EXHIBIT 2 HERETO**).

[8] Any theoretical counterclaim by Defendants stood automatically denied under O.C.G.A. § 9-11-12(a).

deceived Plaintiff concerning a franchise investment in that state. Defendants took $350,000 of Plaintiff's money, and then wrecked its investment by failing and refusing to transfer any enforceable franchise rights.[9] Defendants' bad faith and misconduct were the exclusive cause that compelled Plaintiff's legal action. Defendants should have compensated Plaintiff long ago without a fight either in Florida or here.

Plaintiff is a "mom & pop" Florida company.[10] The franchise investment and key witnesses were in Florida.[11] The loss happened in that state. Moreover, as alleged in the present case,[12] Florida has remedial investor and consumer protection laws that are not subject to waiver.[13] Hence, barring special circumstances, Defendants had reason to expect that they would be called into a Florida court. In any event, Defendants cannot seek fees and expenses in this

[9] **Verified Complaint** (Count I) ¶ 1-116.

[10] The owners are Arnaldo Gonzalez and his wife, Carolina Troccola Ballester. **Verified Complaint** ¶ 1.

[11] **Verified Complaint** (Count I) ¶ 1-116.

[12] **Verified Complaint** (Counts III-V).

[13] Florida has its own Deceptive and Unfair Trade Practices Act, Fla. Stat. §§ 501.201 – 501.213 and franchise act, Flat. Stat. § 817.416. Choice of venue and law provisions could not waive these remedial rights. Management Computer v. Perry Construction, 743 So. 2d 627 (Fla. 1st DCA 1999); Voicestream Wireless v. U.S. Communications, 912 So.2d 34 (4th DCA 2005) (waiver of protections of remedial statute of Florida Franchise Act, Fla. Stat. § 817.416, was void); *accord*, Moon v. CSA-Credit Solutions of America, 304 Ga. App. 555, 696 S.E.2d 486, 488 (2010) (Texas choice of law and venue invalid in so far as they deprived Georgia residents of statutory protections of O.C.G.A. §§ 18-5-1 et seq. relating debt adjustment agreements).

case[14] for what happened in Florida, even if venue in that state was challenged.[15]

Yet if the Florida case is relevant, it is to show ***Defendants' own belief*** that the forum selection clause ("Forum Selection Clause") of the **Assignment & Assumption Agreement**[16] required litigation in Georgia. Defendants' motion to dismiss the Florida case even quotes the Forum Selection Clause and states:

> ***Plaintiff's claims*** in this case against the Cellairis Defendants ***are unquestionably covered by the above forum selection*** and arbitration clauses. These clauses, to which Plaintiff agreed, broadly require the adjudication of all claims under the Agreements or arising out of either the contracts or the relationship between the parties to be pursued only in Georgia, ***either in arbitration or litigation in a Georgia court (depending on the agreement and the type of claim)***.

Defendants' Motion (Exh. B, ¶ 20) (Emphasis added).

If arbitration, and not litigation, was the only means for deciding this case, Defendants would have taken a categorical position that arbitration was inescapable. But they did not.

[14] O.C.G.A. § 9-15-14(a) applies only to "civil actions to any court of record of this state."

[15] Defendants shows no attempt whatsoever to seek attorney's fees in Florida. Plus, the Florida court never ruled on the issue of venue.

[16] **Verified Complaint**, Exh. 1 (p. 5) (Sec. 11)

The arbitration provisions in this case were anything but "straightforward"[17] At a hearing on February 25, 2016 in Florida, Defendants' lead counsel, Ron T. Coleman, Jr., reiterated Defendants' candid equivocation:

> MR . COLEMAN : Your Honor, may it please the Court, I'm Ron Coleman. First, let me thank the Court for me having the opportunity to appear pro hac vice in this case. I represent Cellairis and Global. The case involves one franchisee of my client selling to another franchisee and a dispute arising out of that transaction. Our motion originally was to dismiss because of their ***forum selection clauses*** and arbitration agreements and all of the relevant agreements that my client has signed. And although February is a wonderful time to be here in Miami, **we think the case *clearly needs to be litigated*** *or arbitrated,* as the case may be, ***in Georgia***.

(Transcript of Hearing on February 25, 2016, a copy of which is attached as **EXHIBIT "3" HERETO**) (Emphasis added).

Therefore, even in the mind of Defendants' lead counsel, there was the distinct prospect that the ***"case clearly needs to be litigated"*** in Georgia. Thus, the Court should reject Defendants' contrived indignation that arbitration was uncontestable.[18]

[17] See **Defendants' Motion** (p. 10): stating that Defendants were required "to incur substantial fees to enforce their straightforward arbitration rights in an action that never should have been brought in the first place." (Emphasis added).

[18] If Defendants' had been so certain this case was subject to arbitration, they could have omitted their Answer (or obtained

B. Plaintiff's lawsuit was objectively reasonable and compelled exclusively by Defendants' bad faith.

In filing this action in Georgia, Plaintiff took a reasonable and well-founded position. Both Defendants are Georgia corporations with registered offices in Fulton County. The Forum Selection Clause making this Court the "exclusive"[19] forum and venue, was drafted by Defendants.[20] And Defendants even agreed[21] not to challenge it.[22] (But they did so

another extension) and only moved to dismiss for lack of jurisdiction and venue under O.C.G.A. § 9-11-12(b)(1) and (3). Majeed v. Randall, 279 Ga. App. 679, 681 (2006) (grant of motion to dismiss obviates need for timely filed answer). That they did not do so, speaks volumes.

[19] The **Assignment & Assumption Agreement** which contains the Forum Selection clause was the document with the latest effective date (September 1, 2014) of all the documents signed by the parties. The supposedly incorporated arbitration provisions had effective dates in blank for future negotiation and conclusion, events that never happened.

[20] See **Affidavit of Arnaldo Gonzalez**, **First Amendment to Complaint and Verification** filed September 2, 2016.

[21] After filing this action on June 5, 2016, undersigned counsel had a telephone conversation with Defendants' counsel, Jared Miller. In that conversation, on July 14, 2016, Mr. Miller asked the undersigned counsel what his position was on arbitration. Undersigned counsel stated the Forum Selection Clause superseded the arbitration provisions and that the arbitration provisions were not enforceable. Mr. Miller reacted by saying "OK, that's a reasonable argument" or words to that effect.

[22] The Forum Selection Clause states in pertinent part: "…the parties further agree that, in the event of litigation arising out of

anyway). As confirmed by Mr. Coleman's statements in open court, this case was not obviously and perforce required to go to arbitration. Thus, Plaintiff had no obligation to blithely waive its rights to sue in this Court.

II. ARGUMENT AND CITATION OF AUTHORITIES

A. Defendants claim for litigation expenses must be denied.

1. Defendants are judicially estopped from seeking disputed attorney's and expenses fees in this Court.

Defendants' self-contradiction is extraordinary. Defendants are judicially estopped from seeking fees or expenses anywhere other than in arbitration. This applies to both claims under the disputed **June 30 Franchise Agreements** and O.C.G.A. § 9-15-14.

> [T]he essential function and justification of judicial estoppel is to prevent the use of intentional self-contradiction as a means of obtaining unfair advantage in a forum provided for suitors seeking justice. The primary purpose of the doctrine is not to

or in connection with this Agreement, in these courts, they will not contest or challenge the jurisdiction or venue of these courts. The parties expressly consent and submit to the jurisdiction and venue of these courts, and the parties waive any defenses of lack of personal jurisdiction, improper venue and forum *non conveniens*." **Assignment & Assumption Agreement** (Sec. 11) (emphasis added) (italics in original).

> protect the litigants, but to protect the integrity of the judiciary. The doctrine is directed against those who would attempt to manipulate the court system through the calculated assertion of divergent sworn positions in judicial proceedings and is designed to prevent parties from making a mockery of justice through inconsistent pleadings.

(Footnote omitted.) Nat. Bldg. Maintenance Specialists v. Hayes, 288 Ga. App. 25, 26-27 (2007).

Defendants secured the Court's ruling that questions of arbitrability are for an arbitrator to decide. (**Order** p. 5). Defendants cannot now have it both ways. Under the doctrine of judicial estoppel, the Court must deny **Defendants' Motion** in its entirety. *See* Yates Paving & Grading Co. v. Bryan County, 265 Ga. App. 578, 584 (2004) *cert. denied* 6/7/2004 (attorney fee counterclaim arising from contract with arbitration provision was also subject to arbitration). Defendants' alternative claim under § 9-15-14 for fees and expenses would also raise an issue of arbitrability.[23]

[23] Relied on by Defendants, the arbitration provision of Section 13D(1) of the disputed **June 30 Franchise Agreements** covers:

> "all controversies, claims or disputes between [Cellairis/Global] and FRANCHISEE arising out of or relating to …[t]his agreement." …[or] the relationship between FRANCHISEE and the [Cellairis/Global];

The asserted O.C.G.A. § 9-15-14 attorney's fees incurred "relat[e]"to the **June 30 Franchise Agreements.** Thus, by judicial estoppel, their arbitrability must be decided by an arbitrator, not this Court.

a) Defendants are not the "prevailing party" under the June 30 Franchise Agreements.

But even if Court had decided the **June 30 Franchise Agreements** were valid, Defendants cannot recover under Section 13(K), which states:

> In any arbitration or litigation to enforce the terms of this Agreement, all costs and all attorney's fees (including those incurred on appeal) shall be paid to the ***prevailing party*** by the other party. Attorney's fees include a charge for the service of in-house counsel at the market rate for independent counsel of similar experience.

(**Defendants' Motion** p. 5.) (Emphasis added).

The **Order** did not make Defendants the "prevailing party." Rather, it held that "[t]he question of arbitrability of claims should be submitted to an arbitrator." (**Order** p. 5). In other words, the Court did not hold the case was actually subject to arbitration, or that Defendants prevailed on any substantive claim.

In Foot Solutions, Inc. v. Washio, No. 1:09-cv-01207-JOF, 2009 WL 4261213, at *2 (N.D. Ga. Nov. 24, 2009), franchisees invoked the following contractual provision in seeking attorney's fees from

franchisor whose declaratory judgment action was dismissed in favor of arbitration:[24]

> In the event of any legal or administrative proceeding between the Franchisor and Franchisee arising under this Agreement, the prevailing party shall be entitled to recover reasonable attorney [sic] fees and court costs from the other.

Referring to the concept of "prevailing party" in Sole v. Wyner, 551 U.S. 74 (2007), the court held there was no "prevailing party" on an order compelling arbitration. Thus, no attorney's fees were warranted because, "[w]hile Defendants here have succeeded in having Plaintiff's claims turned to arbitration, there is no information yet on whether Defendants have achieved more than this procedural victory." *See also*, Frazier v. Johnson, 2009 WL 331372 (M.D. Fla. 10, 2009) (Order granting motion to compel on arbitrability denied attorney's fees to defendants because they were not prevailing parties as term normally used because arbitrator had still not decided merits of the case).

Defendants' Motion studiously omitted any reported cases. Instead, they point to a private arbitrator award and court orders in a confirmation or default setting.[25] Defendants do not even bother to show or discuss the underlying facts of these cases.

[24] As distinguished from our case, Foot Solutions did not indicate a challenge to the validity of the agreement containing the arbitration clause.

[25] **Defendants' Motion** p. 7, Exhibits E, F, G. H, and I. None of these documents are authenticated. Nor do they show the specific text of the fee shifting agreements.

b) The June 30 Franchise Agreements are unenforceable agreements to agree, lacking essential material terms.

Plaintiff incorporates by reference the **Verified Complaint** (Count I) showing the **June 30 Franchise Agreements** are unenforceable agreements-to-agree. Unless and until there is mutual assent to all essential terms, there is no complete and enforceable contract. TransSouth Financial Corp. v. Rooks, 269 Ga. App. 321, 324 (2004). Moreover, "[i]f the contract is unenforceable for lack of mutual assent, an arbitration clause contained within the contract is likewise unenforceable." Extremity Healthcare, Inc. v. Access to Care Am, LLC, (A16A1990, Ga. App. Oct. 28, 2016) *citing* TransSouth 269 Ga. App. at 324. Thus, any purported attorney fee provision in the **June 30 Franchise Agreement** is also unenforceable.

c) Even assuming the June 30 Franchise Agreements are enforceable, the subsequently effective Assignment & Assumption Agreement controls and requires that each party bear its own litigation expenses.

The **Assignment & Assumption Agreement,** was made effective September 1, 2014, that is, subsequent to the **June 30 Franchise Agreements**. Under the **Assignment & Assumption**

Agreement,[26] each party[27] agreed to pay its own respective litigation expenses. Section 13 states:

> Each party shall bear its own costs and expenses, including attorney's fees and expenses of litigation, in connection with this [Assignment & Assumption] Agreement.

When the intention of the parties is clear, it shall be enforced. O.C.G.A. § 13-2-3. There can be no doubt this phase of the litigation concerned the **Assignment & Assumption Agreement**. Further, any ambiguity in an agreement, must be construed against the drafter. O.C.G.A. § 13-2-2(5).[28] Defendants were the exclusive drafters of the **Assignment & Assumption Agreement**. They are bound by its terms. They cannot now seek fees and expenses for the parties' litigation in connection with said agreement.

[26] **Verified Complaint**, Exh. 1 (p. 5) Of course, Plaintiff contends that no enforceable agreements were reached at all in this case. And it invoked the Forum Selection Clause as an independent provision. **Verified Complaint** § 7 n. 1. Equity Trust Co. v. Jones (A161A0813 (Oct. 19, 2016 Ga. App.).

[27] Since Global is also relying on the **June 30 Franchise Agreements** for an award of attorney's fees, it must also bear the benefits and burdens of the **Assumption & Assignment Agreement.** Global is expressly a third-party beneficiary of the latter. O.C.G.A. § 9-2-20(b), and is an alter ego of Cellairis. (**Verified Complaint** ¶§ 6, 13, 14).

[28] **Affidavit of Arnaldo Gonzalez**, attached to **First Amendment to Complaint and Verification** filed September 2, 2016. Defendants drafted the **Assignment & Assumption Agreement**, the **June 30 Franchise Agreements** and the **June 30 Sub-License Agreements**.

2. **Defendants motion under O.C.G.A. § 9-15-14 is patently meritless.**

a) Plaintiff's assertion of jurisdiction and venue in this Court was firmly grounded in law and fact.

Apart from being judicially estopped (Part III, A. 1, *supra*) (pp. 10-11), **Defendants' Motion** under O.C.G.A. § 9-15-14 has no basis whatsoever. Plaintiff's claims asserting jurisdiction and venue in this Court are objectively reasonable. As shown above, until recently, even Defendants' counsel could only equivocate on whether the Forum Selection Clause or the arbitration provision would apply. Arbitration was by no means the only and incontestable forum for deciding this case. And any confusion on the proper forum was created exclusively by Defendants who drafted the conflicting documents.

Separately, Defendants, not Plaintiff, had the burden of showing that jurisdiction and venue lay elsewhere. "In Georgia, a defendant who files a motion to dismiss for lack of personal jurisdiction has the burden of proving lack of jurisdiction." Home Depot Supply v. Hunter Management, LLC, 289 Ga. App. 286 (2008). Also, any disputed facts are resolved in favor of the party asserting the existence of personal jurisdiction. Alcatraz Media, LLC, v. Yahoo! Inc., 290 Ga.App. 882, 883-4 (2008). Further, jurisdiction, venue and arbitration are waivable. O.C.G.A. §§ 9-11-8(c) and 12(b); SunTrust Bank v. Lilliston, 338 Ga. App. 738, 791 S.E.2d 614 (2016) (arbitration waivable)

Moreover, having agreed to the Forum Selection Clause, Defendants were required to show that "enforcement would be unreasonable under the

circumstances." Laibe Corp. v. Gen. Pump & Well, Inc., 317 Ga. App. 827, 832 (2013). To boot, the Forum Selection Clause "should be upheld ***absent a compelling reason*** such a fraud, undue influence, or overweening bargaining power." Constructores Asociados de Vivienda y Urbanización S.A. de C.V. v. Bennet Motor Express, 308 Ga. App. 67, 69 (2011) (emphasis added).

If that were not enough, the question of arbitrability required that Defendants show by "***clear and unmistakable evidence*** that the parties agreed to arbitrate the issue of arbitrability." Extremity Healthcare, Inc. v. Access to Care Am., LLC, (A16A1900) (Oct. 28, 2016) n. 1 *citing* Panhandle Fire Protection v. Batson Cook Co., 288 Ga. App. 194, 197(1)(b). (2007) (emphasis added).[29]

With these exacting requirements for objections to venue -- not to mention the contradictory transaction documents *that Defendants themselves drafted* -- the motion for litigation expenses under O.C.G.A. § 9-15-14 is no less than startling.

b) Plaintiff did nothing to expand this proceeding or take any other unreasonable position.

Lacking affidavits about the specific conduct at issue, **Defendants' Motion** (p. 10) recites seven examples, labeled "(i) – (vii)," of supposedly frivolous litigation. Because Defendants do not support these

[29] Respectfully, this is one important part of the Order with error that shall be addressed in Plaintiff's appeal. The Order (p. 5) erroneously placed the burden on Plaintiff to show "a clear expression of the parties" that the Forum Selection Clause "supersede[d]" the arbitration provisions.

disputed assertions with any factual detail, the Court should disregard them entirely.[30]

Yet, taking the first five in order, Plaintiff responds to each one:

(i) Defendants' protests about the length of the complaint are contrived.[31] The **Verified Complaint** involves complex and fatally defective transaction documents consisting of approximately 1,000 pages drafted by Defendants. Because these concern a franchise investment, the transaction is intricately regulated by federal law.[32] Georgia courts have only recently started to develop experience with the tort aspects of federal franchise regulation. *See* Legacy Academy v. Mamilove, LLC, 761 S.E.2d 880, 892 (Ga. App. 2014) *rev'd on other grounds*, 297 Ga. 15 (2015). This Court recognized the complexity when it granted Plaintiff's motion to transfer the action to the Business Case Division. (See **Order Transferring Case to Business Case Division** entered December 20, 2016).[33]

[30] Defendants make their § 9-15-14 motion solely against Plaintiff and not its counsel. This is scant consolation. Professional reputations are fragile and can be easily tarnished even by scurrilous associated claims.

[31] Given Defendants professed certainty on the arbitration provisions, they should have forgone the answer and only moved to dismiss for lack of jurisdiction and venue under O.C.G.A. § 9-11-12(b)(1) & (3).

[32] 16 Code of Federal Regulations Part 436, provides a basis for tort claims under O.C.G.A. § 51-1-6. Legacy, supra.

[33] **Defendants' Motion** essentially asks this Court to sanction Plaintiff for reasonably opposing a transfer of this case to arbitration. If this is sufficient reason for sanctions, then Defendants must be sanctioned as well for their failed opposition

(ii) Plaintiff's refusal to consent to arbitration was reasonable. Plaintiff incorporates by reference its argument from Part III, A, 2 a) (pp. 15-17).

(iii) Plaintiff pursued discovery appropriately, and Defendants' vague suggestion to the contrary is simply unsubstantiated and false. Any merits discovery was served on July 23, 2016[34] *before* Defendants moved to compel arbitration on August 5, 2016. And Plaintiff did not pursue merits discovery during the stay.

(iv) **Plaintiff's Motion & Brief to Strike** filed October 7, 2016 was granted in part, although on different grounds. The **Order** (p. 6 n. 1) disregarded the two affidavits submitted with the Defendants' late-filed reply brief[35] on their motion to compel arbitration. Importantly, Defendants' objectionable 21-page reply brief came 62 days after their opening brief. They did not seek leave of court to exceed the briefing provided in Uniform Superior Court Rules (USCR) 1.5, 6.1 and 6.2. Interpreting USCR 25.1, the Supreme Court of Georgia teaches that the USCR must be read restrictively. *See* Post v. Fripp 298 Ga. 241, 252 n. 2 (2015) (Because USCR 25.1 does not provide for amending an affidavit to recuse, no such amendment is permitted). Briefs beyond what is

to Plaintiff's motion to transfer this case to the Business Case Division. See **Defendants' and Global's Opposition to Motion to Transfer Case to the Business Case Division** filed November 28, 2016.

[34] See Plaintiff's **Certificates of Service of** Discovery filed on said date.

[35] *See* **Defendants Cellairis' and Global's** Reply **in Support of Motion to Dismiss Complaint and to Compel Arbitration** filed October 6, 2016.

permitted in USCR 6.1 & 6.2 require leave of court. It is that simple, and it makes sense.[36]

(v) However, Defendants' most disturbing accusation is that Plaintiff somehow acted improperly when on November 2, 2016 the initial trial judge disclosed without advance notice to Plaintiff a potential conflict. (*See* **Hearing Transcript** dated November 2, 2016 filed on February 21, 2017).[37] This conflict was that Defendants' general counsel, Jason Adler[38] was, and had been for several years, the

[36] If any party unnecessarily expanded these proceedings, it was Defendants who believed they were entitled to endless and redundant briefing on every issue. See Defendants filed multiple briefs regarding **Defendants' Motion to Stay Discovery** filed October 20, 2016, before the order on October 27, 2016 denying their effort to extend the automatic stay of discovery. *See* **Reply in Support of Defendants' Cellairis' and Global's Motion to Stay Discovery and for Protective Order** filed Oct. 25, 2016 and **Defendants Cellairis' and Global's Response to Plaintiff's Objection to Reply Brief** filed Oct. 26, 2016.

[37] The disclosure occurred 147 days after Defendants accepted service of the complaint on June 6, 2016; *see* **Stipulation Regarding Acceptance of Service** filed June 8, 2016; and 89 days after Defendants moved to compel arbitration on August 5, 2016.

[38] Shown in Defendants' billing records starting June 6, 2016 (Exhibit 1 to Mr. Coleman's affidavit, **Defendants Motion**, Exh. J), Defendants' counsel was in regular communication with Mr. Adler about this case. Thus, Defendants should have known of the trial judge's potential conflict *before* the judge first disclosed it to Plaintiff on November 2, 2016. See electronic mail by Jared Miller dated October 25, 2016 attached as **EXHIBIT 5 HERETO** advising the judge's staff attorney, Elizabeth Baum: "***Mr. Adler would also like to attend the hearing [on November 2, 2016].***" Thus, at least by October 25, Mr. Adler knew of the potential conflict, and

judge's re-election campaign treasurer. The next day, without moving to recuse, Plaintiff informed the judge and all parties by electronic mail of the Supreme Court of Georgia's decision in Post v. (State) Fripp 298 Ga. 241 (2015) (judge was required to recuse from case involving his re-election campaign treasurer). A true and correct copy of Plaintiff's counsel's email is attached as **EXHIBIT 4 HERETO**. After receiving this information, the initial judge voluntarily recused. *See* **Order of Recusal** entered November 3, 2016. (**EXHIBIT 2 HERETO**)

And Defendants want this Court to impose attorney's fees and expenses on Plaintiff even when its position is supported by the judge and the Georgia Supreme Court.[39]

neither he nor Defendants disclosed it to Plaintiff before the November 2, 2016 hearing. Had Plaintiff learned of this conflict at the start of the case, Plaintiff would have asked for the initial trial judge's recusal, which was entirely justified under Post v. Fripp 298 Ga. 241 (2015). Then, Plaintiff would have immediately sought transfer to the Business Case Division to expedite this case. Any delay in this case was Defendants' fault.

[39] The last two are hardly worth mentioning: (vi) Involves Plaintiff having twice amended its complaint, as was its right under O.C.G.A. Sec. 9-11-15(a). Defendants offer no explanation about why this was improper. (vii) Refers to **Plaintiff's Motion & Brief to Strike Portions of Defendants Cellairis' and Global' Opposition to Motion to Transfer Case to Business Case Division** filed December 21, 2016. Plaintiff rightfully objected to Defendants' redundant argument about arbitration included in opposition to **Plaintiff's Motion to Transfer Case to Business Case Division** filed November 7, 2016, a motion that was granted. See **Order Transferring Case to Business Division** entered December 20, 2016.

Respectfully, Defendants' O.C.G.A. § 9-15-14 motion is disappointing and unworthy of the talent and experience of Defendants' counsel.

B. Defendants claimed fees and expenses are excessive and not allocated to the time spent on the arbitration provision or the supposedly offending conduct under O.C.G.A. § 9-15-14.

Defendants' claimed litigation expenses of $67,000.78 are clearly excessive and mostly unpaid.[40] Defendants overstaffed this case with three attorneys when it supposedly involved a "straightforward" arbitration provision.[41] Also, Defendants make no showing whatsoever of the attorney's fees and expenses attributable to enforcing arbitration provisions.[42] And they do not allocate expenses to the specific conduct that supposedly justifies any award under O.C.G.A. § 9-15-14. Duncan v. Cropsey, 210 Ga. App. 814, 815-816, 437 S.E.2d 787 (1993).

[40] Notably, Defendants have apparently paid only $25,352.99 and balked in paying the rest of their attorneys' invoices. See p. 3 of invoice dated December 31, 2016 (showing payments of $25,352.99) and p. 2 of invoice dated February 28, 2017 (showing $48,984.50 due) attached as Exhibit 1 to Mr. Coleman's affidavit (**Defendants' Motion**, Exh. J).

[41] Plaintiff is represented by one attorney in this action.

[42] Defendants do not distinguish between Cellairis and Global regarding the latter's participation in the disputed **June 30 Franchise Agreements** provisions. Since Defendants maintain that Global and Cellairis are legally separate, no contractual basis is shown for Global's recovering any fees. Thus, at least half the claimed fees have no basis.

A cursory review of Mr. Coleman affidavit (**Defendants' Motion**, Exh. J p. 5) shows that Defendants even seek to recover fees and expenses for "(xix) attending an in-person settlement meeting with counsel for [Plaintiff]"[43] as well as on matters in which Plaintiff "prevailed."[44]

If Cellairis is entitled to any litigation expenses as a putative "prevailing party" (a status Plaintiff denies), these are limited to the time spent only on its opening motion and brief to dismiss field on August 5, 2016.[45] Time spent on the Answer, excessive follow-up briefing, and any other collateral matters not concerning the enforcement of the arbitration provision must be denied.[46]

[43] Defendants' counsel even seek more than $2,000 in fees for time on November 2, 2016 (See Exhibit 1 to Coleman affidavit) for discussions with Jason Adler concerning the initial judge's recusal, a matter that they could have avoided by Defendants' making an early disclosure in the case. Given the conflict that Defendants knew existed with the initial trial judge (which they should have immediately disclosed), the delay and extra proceedings are attributable to Defendants.

[44] See Order entered October 27, 2016 denying Defendants' motion to extend stay of discovery, and Order entered December 20, 2016 granting Plaintiff's motion to transfer this case to Business Case Division.

[45] This amount would be something less than $5,320 (1/2 of $10,640), the total amount allegedly incurred through August 5, 2016 by Cellairis that may relate to the motion to compel arbitration. Global's portion is unrecoverable since Defendants cite no contract document and maintain that Global is a separate entity.

[46] The time entries attached to Mr. Coleman's affidavit are hopelessly redacted. A table showing the entries with identifiable

Lastly, Plaintiff requests the right to cross-examine Mr. Coleman and any other relevant witness on **Defendants' Motion**.

III. CONCLUSION

The Court should deny **Defendants' Motion**.

This 3d day of April, 2016.

D. R. MARTIN, LLC
By: /s/ David R. Martin
David R. Martin
Georgia Bar # 474761
5200 Peachtree Road, Suite 3116
Atlanta, Georgia 30341 Tel. (770) 454-1999
***** COUNSEL FOR PLAINTIFF SAMACA, LLC**

litigation expenses that may concern Defendants' opening motion to compel arbitration and the remaining unidentifiable and/or unrelated fees is attached as **EXHIBIT 6 HERETO.**

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

SAMACA, LLC, Plaintiff, vs. CELLAIRIS FRANCHISE, INC., GLOBAL CELLULAR, INC., and CELL PHONE MANIA, LLC, Defendants.

CIVIL ACTION NO. 2016 CV 276036

VERIFICATION

I, David R. Martin, counsel to Plaintiff in the above action, make these statements based on personal knowledge and under oath. The facts alleged in **PLAINTIFF'S VERIFIED RESPONSE AND REPLY BRIEF TO DEFENDANTS CELLAIRIS' AND GLOBAL'S MOTION FOR ATTORNEY'S FEES AND EXPENSES** are true and correct.

/s/ David R. Martin
David R. Martin

Sworn and subscribed before me
This 3d day of April 2017
/s/ Martha Rodriguez
_____ (SEAL)
NOTARY PUBLIC

APPENDIX V

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

SAMACA, LLC, Plaintiff, vs. CELLAIRIS FRANCHISE, INC., GLOBAL CELLULAR, INC., and CELL PHONE MANIA, LLC, Defendants.

CIVIL ACTION NO. 2016 CV 276036

[Filed: November 6, 2017]

PLAINTIFF'S REQUEST FOR HEARING ON DEFENDANTS MOTION FOR ATTORNEY' S FEES & EXPENSES

Plaintiff Samaca, LLC requests a hearing on **Defendants Cellairis' and Global's Motion for Attorney's Fees and Expenses** filed on March 24, 2017 ("Defendants' Motion"). The last written submission on this motion was filed on April 19, 2017.[1] Hence, the matter has been pending without decision or hearing for 201 days.[2]

[1] See **Plaintiff's Conditional Sur-Reply to Defendants' Reply in Support of Motion for Attorney's Fees & Expenses**.

[2] By letter to the Court dated June 1, 2017, Plaintiff's counsel requested a hearing on the motion at the "earliest opportunity." (A copy of said letter without enclosures is attached as EXHIBIT

While Plaintiff Samaca appealed the order dismissing the action on February 7, 2017[3] the Court continues to have jurisdiction to decide Defendants' Motion under O.C.G.A. § 9-15-14. Fairburn Banking Co. v. Gafford, 263 Ga. 792, 794 (1994). Deciding this matter without further delay comports with the Georgia Supreme Court's stated preference for deciding motions under O.C.G.A. § 9-15-14 "while the trial court's memory of events is still fresh." Fairburn Banking Co., 263 Ga. at 794. Further, Defendants' Motion casts a pall on Plaintiff and its counsel, who will prove that Defendants' Motion itself frivolous, vexatious, and presented for an improper purpose.[4]

Regarding the part of the **Defendants' Motion** that seeks attorney's fees under the disputed June 30 Franchise Agreements,[5] the Court lacks jurisdiction

"A" HERETO). Generally, motions should be decided within 90 days "after the same have been argued…or submitted...without argument." O.C.G.A. § 15-6-21(b).

[3] See **Notice of Appeal** filed February 27, 2017. The appeal was docketed to the August 2017 term with a decision expected on March 16, 2018. Georgia Court of Appeals Docket # A17A1715. http://www.gaappeals.us/docket

[4] A notice of abusive litigation served on Defendants' counsel is attached as EXHIBIT "B" HERETO.

[5] Defendants' Motion pp. 1-8. To be sure, Defendants admitted, and the Court affirmatively decided that this portion of Defendants' Motion did not constitute a counterclaim in this action. See **Order Denying Plaintiff's Verified Emergency Motion and Brief for Court to Treat "Request" for**

and authority on the same because it dismissed this action[6] See Montgomery v. Morris, 322 Ga.App. 558, 560 & n. 2 (2013) ("The dismissal of a lawsuit generally deprives the trial court of jurisdiction to take further action in a case. An exception…exists for attorney fee motions pursuant to OCGA § 9-15-14." [footnote partially subsumed in quote]. On the merits, **Defendants' Motion** is frivolous as well.

WHEREFORE, Plaintiff Samaca respectfully requests that **Defendants' Motion** under O.C.G.A. § 9-15-14 be set for a hearing at the next available hearing date.

Respectfully submitted, this 6th day of November 2017.

D. R. MARTIN, LLC
By: /s/ David R. Martin
David R. Martin
*****
COUNSEL FOR PLAINTIFF SAMACA, LLC

****

Attorney's Fees and Expenses as Counterclaim and Dismiss the Same (p. 2) dated March 29, 2017 and **Defendants Cellairis' And Global's Reply in Support of Motion for Attorneys' Fees and Expenses** (pp. 3-4) filed April 12, 2017.

[6] This is independent from any lack of jurisdiction because of the supersedeas effect of Plaintiff's appeal of the February 7 Order. O.C.G.A. § 5-6-46(a).

APPENDIX X

IN THE SUPERIOR COURT OF FULTON COUNTY
BUSINESS CASE DIVISION
STATE OF GEORGIA

SAMACA, LLC, Plaintiff, v. CELLAIRIS FRANCHISE, INC., GLOBAL CELLULAR, INC., and CELL PHONE MANIA, LLC, Defendants

---

Civil Action File No. 2016CV276036
Bus. Ct. Div. 1
[Date: December 5, 2017]

ORDER ON PLAINTIFF'S REQUEST FOR HEARING

The above styled matter is before the Court on Plaintiffs Request for Hearing on Defendants [sic] Motion for Attorney's Fees and Expenses ("Plaintiffs Request for Hearing"). Therein Plaintiff asks the Court to schedule a hearing at the next available hearing date on Defendants Cellairis' and Global's Motion for Attorneys' Fees and Expenses (Defendants' "Motion for Fees").

On Feb. 7, 2017, the Court entered an order granting Defendants' Motion to Dismiss Complaint and to Compel Arbitration. Thereafter, on Feb. 27, 2017, Plaintiff filed a Notice of Appeal of that order. On Mar. 24, 2017, Defendants filed their Motion for Fees, seeking an award of their attorneys' fees and expenses incurred in connection with this action pursuant to: (1) a “prevailing patty" provision of the

Franchise Agreements at issue in this action[1]; or (2) alternatively, pursuant to O.C.G.A. §9-15-14. On Apr. 28, 2017, the record was transmitted to the Court of Appeals of Georgia and the appeal was docketed on May 18, 2017.

Given the current procedural posture of this case as under appellate review and the grounds upon which Defendants contend they are entitled to their fees and expenses as stated in their Motion for Fees, including the "prevailing party" provision in the subject Franchise Agreements, the Court hereby RESERVES RULING on Defendants' Motion for Fees and, at this time, DENIES Plaintiff's Request for Hearing until the conclusion of the appeal.

SO ORDERED this 5th day of December, 2017.

Signature
JOHN J. GOGER, JUDGE ON BEHALF OF ALICE D. BONNER, SENIOR JUDGE
Superior Court of Fulton County
Business Case Division
Atlanta Judicial Circuit

[1] See Franchise Agreements, § 13(K).

APPENDIX Y

**IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA**

SAMACA, LLC, Plaintiff, vs. CELLAIRIS FRANCHISE, INC., GLOBAL CELLULAR, INC., and CELL PHONE MANIA, LLC, Defendants.

CIVIL ACTION NO. 2016 CV 276036

[Filed: November 26, 2018].

PLAINTIFF'S MOTION TO COMPEL ARBITRATION OF DEFENDANTS CELLAIRIS' AND GLOBAL'S MOTION FOR ATTORNEYS' FEES AND EXPENSES

Plaintiff Samaca, LLC ("Plaintiff" or "Samaca") moves to compel arbitration of **Defendants Cellairis' and Global's Motion for Attorney's Fees and Expenses** filed on March 24, 2017**.** ("**Defendants' Motion**").

In addition to the arguments made herein, Plaintiff incorporates by reference the arguments and authorities raised in **Defendants' Motion to Dismiss Complaint and to Compel Arbitration And Memorandum of Law in Support** filed August 5, 2016 and **Defendants Cellairis' and Global's Reply in Support of Motion to Dismiss Complaint and to Compel Arbitration** filed October 6, 2016**.**

SUMMARY

Now that the Georgia Court of Appeals has ruled that an arbitrator must decide questions of arbitrability in this case, this court is bound by this ruling under O.C.G.A. 9-11-60(h). Thus, an arbitrator, not the Court, must decide whether "all controversies, claims or disputes" raised by **Defendants' Motion** are arbitrable. Defendants are otherwise judicially estopped from having this Court and not an arbitrator decide the arbitrability of **Defendants' Motion**.

I. BACKGROUND AND DISCUSSION

A. Samaca's lawsuit filed in this Court.

On June 3, 2016, Plaintiff filed a complaint against Defendants concerning a botched franchise transaction. Asserting eight counts and the right to trial by jury,[1] Samaca contends that no valid agreement at all exists between the parties.

In its original complaint, Plaintiff expressly invoked the forum selection clause ("**Forum Selection Clause**") in the **Assignment & Assumption Agreement**[2] "as a separate and severable provision" without ratifying the validity of any agreement between the parties. **Complaint** ¶ 7 & fn 1. The **Forum Selection Clause** stated in pertinent part as follows:

> The parties acknowledge and agree that the Georgia State Courts for Fulton County, Georgia, or if such court lacks

[1] Plaintiff amended the complaint on November 8, 2016 to add the eight count for equitable rescission based on non-performance.

[2] Unless otherwise specified, capitalized bold terms have the same meaning used in Plaintiff's **Complaint** filed June 5, 2016.

> jurisdiction, the U.S. District for the Northern District of Georgia, shall be the sole and exclusive venue and sole and exclusive proper forum in which to adjudicate any case or controversy arising either, directly or indirectly, under or in connection with this Agreement and the parties further agree that, in the event of litigation arising out of or in connection with this Agreement in these courts, they will not contest or challenge the jurisdiction or venue of these courts. The parties expressly consent and submit to the jurisdiction and venue of these courts, and the parties waive any defenses of lack of personal jurisdiction, improper venue and *forum non conveniens.*[3]

B. <u>Defendants original motion to compel arbitration</u>.

On August 5, 2016, Defendants moved to compel arbitration by citing arbitration provisions in the **June 30 Franchise Agreements** and **June 30 Sub-License Agreements**. These arbitration provisions respectively read in relevant part:

> (1) <u>Claims subject to arbitration</u>. Subject to Paragraph 13.D.2**,** the parties agree that all controversies, claims, or disputes between [Cellairis] and [Samaca] arising out of or relating to:

[3] **Assignment & Assumption Agreement**, Sec. 11, **Complaint, Exhibit** 1. Samaca's limited invocation of the **Forum Selection Clause** preserved its claims for rescission and its contention that no valid agreement exists at all.

> a. This Agreement or any other agreement between [Cellairis] and [Samaca];
> b. The relationship between [Cellairis] and [Samaca];
> c. The scope and validity of this Agreement or any other agreement between [Cellairis] and [Samaca], ***specifically including whether any specific claim is subject to arbitration at all (arbitrability questions)***; and/or
> d. The offer or sale of the franchise opportunity
>
> will be subject to arbitration to be administered by the American Arbitration Association ("AAA").…

June 30 Franchise Agreements, Sec. 13 D. Complaint, Exhibits 18, 19, 20, 21 (pp. 65-66) (Emphasis added).

> Claims Subject to Arbitration. Except as otherwise provided herein, the parties agree that all controversies, claims, or disputes between [Global] and [Samaca] arising out of or relating to:
>
> a. This Agreement or any other agreement between [Global] and [Samaca];
> b. The relationship between [Samaca] and [Global];
> c. The scope and validity of this Agreement or any other agreement between [Global] and [Samaca], ***specifically including whether any specific claim is subject to***

> ***arbitration at all (arbitrability questions)***; and/or
>
> d. Any agreement relating to the purchase of products or services by [Samaca] from [Global]
>
> will be subject to arbitration to be administered by the American Arbitration Association ("AAA").…

June 30 Sub-License Agreements, Complaint Exhibits 22, 23, 24, 25 (pp. 9-10) (Emphasis added).

After noting that each arbitration provision contained a "Delegation Provision," the court held: "[t]he question of arbitrability of the claims raised against [Defendants] should be submitted to an arbitrator."[4] Thus, without deciding the merits, trial court granted Defendants' motion to compel arbitration and dismissed the complaint. The trial court subsequently ruled that no counterclaim by Defendants is pending in this case.[5]

On February 28, 2018, the Court of Appeals affirmed the trial court. Samaca, LLC v. Cellairis Franchise, Inc., 813 S.E.2d 416, 345 Ga. App. 368

[4] Order dated February 7, 2017 pp. 2, 5.

[5] Order dated March 29, 2017 pp. 2-3. This is an important ruling. Otherwise the Court of Appeals would not have had jurisdiction in Samaca's direct appeal. O.C.G.A. § 5-6-34(a). In addition, a pending counterclaim would have given Samaca rights to discovery under O.C.G.A. § 9-11-26 and a trial by jury under O.C.G.A. § 9-11-38 in this fact-intensive case. As noted below, the portion of **Defendants' Motion** founded on Section 13(K) of the disputed **June 30 Franchise Agreements** is procedurally and jurisdictionally flawed.

(2018) (physical precedent only). The Court of Appeals held in pertinent part:

> [T]he arbitration agreements at issue in this case include a "delegation provision" e.g., an agreement to arbitrate threshold issues concerning the arbitration agreement. The delegation provision clearly assigns responsibility for resolving "whether any specific claim is subject to arbitration at all (arbitrability questions)" to the arbitrator. "[J]ust as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, so the question who has the primary power to decide arbitrability turns upon what the parties agreed about that matter."

Id. 420. (Citations omitted)

On October 22, 2018, the Supreme Court of Georgia denied Samaca's petition for certiorari. Hence, under O.C.G.A. 9-11-60(h),[6] the Court of Appeals' ruling concerning the arbitrability "delegation provision" binds this Court. Moreover, Defendants are judicially estopped from submitting questions of arbitrability to this Court. *See* Nat. Blg. Maintenance Specialists v. Hayes, 288 Ga. App. 25, 26-27 (2007) ("[T]he essential function and justification of judicial estoppel is to prevent the use

[6] Stating in pertinent part: "any ruling by the Supreme Court or the Court of Appeals in a case shall be binding in all subsequent proceedings in that case in the lower court…."

of intentional self-contradiction as a means of obtaining an unfair advantage….")

C. Defendants' Motion for attorneys' fees.

Defendants' Motion was filed after Samaca's notice of appeal on February 27, 2017. It seeks legal expenses under Section 13(K) of the disputed **June 30 Franchise Agreements (**the **"Section 13(K) Request")**[7] and, alternatively, under O.C.G.A. § 9-15-14.

Both grounds for **Defendants' Motion** raise arbitrability questions that only an arbitrator, not a court, must decide.

1. The Section 13(K) Request.

Regarding the Section 13(K) Request,[8] Defendants' right to recover depends on the validity of the **June 30 Franchise Agreements**. If these agreements are invalid, then Defendants cannot

[7] Citing Montgomery v. Morris, 322 Ga. App. 558, 560 (2013). Samaca has already noted that the Court lacks jurisdiction over the Section 13(K) Request since the trial court dismissed the case on February 7, 2017. *See* **Supplement To Plaintiff's Verified Motion [sic] And Reply To Defendants Cellairis' And Global's Motion For Attorney's Fees And Expenses** (p. 2) filed October 24, 2018. Not knowing how this Court will rule on jurisdiction, Samaca moves to compel arbitration regarding this portion of **Defendants' Motion** as well.

[8] Section 13(K) of the **June 30 Franchise Agreements** states: "In any arbitration or litigation to enforce the terms of this Agreement, all costs and all attorney's fees (including those incurred on appeal) incurred as a result of the legal action shall be paid to the prevailing party by the other party. Attorneys' fees include the charge of in-house counsel at the market rate for independent counsel of similar experience."

recover anything under their terms.[9] Hence, this concerns a dispute "arising out of or relating to…The scope and validity of this Agreement or any other agreement [between the parties], specifically including whether any specific claim is subject to arbitration at all (arbitrability questions)" At Defendants' behest, the trial court and now the Court of Appeals have compelled arbitrability questions to an arbitrator. Since the Section 13(K) Request also raises arbitrability questions, it, too, must be compelled to arbitration.[10]

2. The O.C.G.A. § 9-15-14 request.

Similarly, Defendants' statutory request under O.C.G.A. § 9-15-14 for abusive litigation against Samaca also raises arbitrability questions. It, too, concerns a dispute "arising out of or relating to…The scope and validity of this Agreement or any other agreement [between the parties], specifically including whether any specific claim is subject to arbitration at all. (arbitrability questions)."

[9] The procedural absurdity of Defendants' Section 13(K) Request should be evident. How can Defendants with no counterclaim pending recover by "motion" under a disputed contract when its validity has not been adjudicated? And how can Defendants do so while ignoring the opposing party's right to discovery and a jury trial in this fact-intensive case?

[10] Defendants may argue that their Section 13(K) Request falls under an exception for claims "based on FRANCHISEE's failure to pay any money due under this Agreement, any agreement with Global Cellular, or any unpaid invoices owed to Global Cellular when due." **June 30 Franchise Agreements**, Section 13(D)(2)(v). See similar provision in **June 30 Sub-License Agreement**, Sec. 13 p. E-10. Of course, this argument must also be remitted to an arbitrator since Samaca challenged the validity all agreements with Defendants. **Complaint** (Counts I – VIII).

A court's duty to "rigorously enforce" arbitration provisions extends to claims based on statutory rights. Shearson/Am. Express Inc. v. McMahon, 482 U.S. 220, 226 (1987); Mitsubishi Motors Corporation v. Soler Chrysler, 473 U.S. 614 (1985) (compelling arbitration of statutory antitrust claims even though these were not mentioned in arbitration provision).

Hence, this Court may not decide whether Defendants' abusive litigation motion under O.C.G.A. § 9-15-14 is arbitrable. Under the arbitrability "delegation provision," only an arbitrator may decide this question.

II. CONCLUSION

The Court must compel arbitration of **Defendants' Motion** to decide whether "all controversies, claims or disputes" raised therein are arbitrable.

This 26th day of November 2018.

D. R. MARTIN, LLC

By: /s/ David R. Martin
David R. Martin
***** **FOR PLAINTIFF SAMACA, LLC**

APPENDIX Z

**IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA**

SAMACA, LLC, Plaintiff, vs. CELLAIRIS FRANCHISE, INC., GLOBAL CELLULAR, INC., and CELL PHONE MANIA, LLC, Defendants.

CIVIL ACTION NO. 2016 CV 276036

[Filed: January 11, 2019]. [EXCERPT]

PLAINTIFF'S REPLY TO DEFENDANTS' OPPOSITION TO SAMACA'S MOTION TO COMPEL ARBITRATION

As permitted by the **Court's Amended Scheduling Order Setting Post-Appeal Briefing and Hearing Schedule** dated December 7, 2018, plaintiff Samaca, LLC ("Plaintiff" or "Samaca") replies to Defendants' Opposition to Samaca's Motion to Compel Arbitration filed January 3, 2019 ("**Defendants' Opposition**").

*****

Moreover, prior to filing its motion to compel arbitration, Samaca inquired by email to the Court and Defendants whether Samaca's motion to compel was even necessary:

*****

David Martin dmartin@abogar.com Fri, Nov 16, 2018 at 11:21 AM
To: "Jimenez, Lynette" <lynette.jimenez@fultoncountyga.gov>
Cc: "Ronald T. Coleman, Jr." <RTC@phrd.com>, "Jared C. Miller" <jcm@phrd.com>, "Justin P. Gunter" <jgun@phrd.com>
Bcc: SAMACA LLC <samacallc@gmail.com>, Arnaldo Gonzalez <arnagon11@gmail.com>

Ms. Jimenez,

Good morning and hopes that you are well. To update you, the Supreme Court of Georgia denied Samaca, LLC's motion for reconsideration of its petition for certiorari. A copy is of yesterday's order attached.

The remittitur should follow in the near term. As you know, still pending is Cellairis Franchise, Inc. and Global Cellular, Inc.'s motion for attorneys' fees under the disputed franchise documents and O.C.G.A. Sec. 9-15-14.

Given the affirmance of the trial court's order compelling issues of arbitrability to the American Arbitration Association, there is no question now that defendants' claim for attorneys' raises an issue of arbitrability that can only be decided by an arbitrator. This is apart from the Court's lack of jurisdiction regarding defendants' effort to seek attorneys' fees under Section 13(K) of the disputed franchise documents.

> I would like to avoid taking up the Court's time with a motion to compel arbitration, if one is necessary. As you know, Samaca has already raised this arbitrability issue.
>
> After the remittitur is received, a brief conference call with the Court may be useful to save everyone's time and resources from being consumed with further litigation.
>
> Thank you for your attention to this matter.
>
> Best regards,
>
> David Martin
> for Samaca, LLC

See **EXHIBIT "A" HERETO**. Only after not receiving a response did Samaca file its motion.

*****

Separately, Defendants' concern with practicality and efficiency seems to matter only when it suits them. If they truly had this concern, they should have never filed their own motion to compel arbitration. At any rate, the U.S. Supreme Court in Henry Schein, Inc., et al. v. Archer & White Sales, Inc., 586 U.S. ___ (Jan. 8, 2019) expressly rejected this as a basis for not enforcing an arbitrability delegation provision. In Schein, the party resisting arbitration argued that "as a practical and policy matter, it would be a waste of the parties' time and money to send the arbitrability question to an arbitrator if the argument for arbitration is wholly groundless." Slip. Op. p. 7. The Court disagreed: "The short answer is that the [Federal Arbitration] Act contains no 'wholly

groundless' exception, and we may not engraft our own exceptions onto the statutory text." Id.

This 11th day of January 2019.

D. R. MARTIN, LLC

By: /s/ David R. Martin
*****
COUNSEL FOR PLAINTIFF SAMACA, LLC

*****

APPENDIX AA

[p. 1]

IN THE SUPERIOR COURT OF FULTON COUNTY
BUSINESS CASE DIVISION
STATE OF GEORGIA

Fulton County Superior Court
EFILEDTAW
Date: 3/1/2019 6:05 AM
Cathelene Robinson, Clerk

SAMACA, LLC, Plaintiff, v.	CIVIL ACTION FILE NO. 2016CV276036
CELLAIRIS FRANCHISE, INC., GLOBAL CELLULAR, INC., and CELL PHONE MANIA, LLC, Defendants.	Bus. Ct, Div. 1

HEARING BEFORE
THE HONORABLE ALICE BONNER
February 12, 2019
10:15 a.m.
136 Pryor Street, SW
Atlanta, Georgia

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Heather Brown, CCR
CCR-4759-4284-5258-1376

APPEARANCES OF COUNSEL

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On behalf of the Defendants:

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Also Present for the Defendants:

Justin Gunter, Esquire
Jason Adler, Esquire

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Exhibit Description Page

(No exhibits were marked during this hearing.)

INDEX

INDEX OF DOCUMENTS READ INTO THE RECORD

(Attached for reference purposes only.)

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P-R-O-C-E-E-D-I-N-G-S

·February 12, 2019

THE COURT: · We're here for the argument in the case of Samaca, LLC. · versus Cellairis Franchise, Inc, et al. · And I'm ready to hear the argument on the motion for an award of attorney's fees. · Yes, sir.

MR. MARTIN: · Your Honor, may it – my name is David Martin and I represent Samaca, LLC. I'd like to preserve my --

THE COURT: · I'm sorry. · I can't hear you.

MR. MARTIN: · May I approach the podium?

THE COURT: · Yes.

MR. MARTIN: · Yes. · Thank you. · My name is David Martin for Samaca, LLC. · I'd like to preserve my objection to the consideration and ruling on the motion for attorney's fees, based on our pending motion to compel arbitration. · And I have a specific order that I'd like to propose to the Court, and --

THE COURT: · Well, you can talk about that when it's your turn to respond to the argument.

MR. MARTIN: · Just want to make sure I'm not waiving it.

THE COURT: · All right.

MR. MARTIN: · Thank you, Your Honor.

THE COURT: · If you will make sure that the microphones are working, I need to hear you.

MR. MILLER: · Okay. · It sounds like it's on, Your Honor. · I'll speak loudly.

THE COURT: · Please do.

MR. MILLER: · Okay.

THE COURT: · Important.

MR. MILLER: · Good morning, Your Honor. My name is Jared Miller. · I'm here on behalf of the defendants, Cellairis Franchise, Inc. and Global Cellular, Inc., and allow me to introduce you to who's with me here today. · Justin Gunter is my colleague, and has helped out on briefs in this case; Jason Adler is the general counsel for my clients, Cellairis and Global; and also in the courtroom is Erik Badia, he's not participating on the case, but he's a first-year associate and just here to observe.

THE COURT: · Okay.

MR. MILLER: · We're here today, as Your Honor's aware, on an important motion, which is my clients' motion to recover attorney's fees and expenses incurred in this case.

We move for attorney's fees in this case

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on two grounds. One is the contract between the parties. · There's actually multiple different contracts, all with attorney's fees provisions. · They provide that, in any action to enforce a term of the contract, that the prevailing party recovers all of its fees, including on appeal. · And I'll get into that a little more. The second and separate independent basis is under O.C.G.A. 9-15-14, for the litigation conduct of the defendant, Samaca, in this case. We think this is the quintessential case where attorney's fees should be awarded. · Samaca has forced us to litigate now for nearly four years, and we've not even really started to litigate the merits of this case even after four years. · This entire action, meaning in this court, has been unnecessary. · And all of this has been solely because Samaca has refused to honor the binding arbitration clauses in the eight different contracts it's signed with my client requiring arbitration of any disputes arising from the relationship between the parties.

None of the fees incurred by my side in this action in this court would have been necessary, had Samaca adhered to that contract and filed its claims in the proper form. · And for that reason, we

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think attorney's fees are appropriate in this case. These fees have been a major expense to my client and

the inability to litigate this case in the proper form in arbitration has been a serious issue.

I'm sure the Court is aware of some of the history of the litigation in this case, but since it's been a fairly long process to get here, I'd like to present a handout to sort of remind the Court of the history.

THE COURT: · That's fine.

MR. MILLER: · May I approach, Your Honor?

THE COURT: · Yes.

MR. MILLER: · I'd like to direct the Court, in particular, to the first timeline handout, which is entitled, Samaca's Expansive Litigation Conduct. · This timeline here shows -- lists only Samaca's filings in this case, and it's nearly three pages long, before we even get to litigating the merits of this case. Initially, Samaca filed this action in state court in Florida before we even got there -- got here back in 2015. · We filed a motion to dismiss that action, asserting that it needed to be in arbitration. · We also noted that there was a Georgia forum-selection clause making the action in Florida

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wholly inappropriate. · Samaca forced us to litigate in Florida for more than a year before voluntarily dismissing that action. · We even had to go down to Florida for a hearing on that motion, which Samaca canceled at the last minute before they voluntarily dismissed that action. · We are not seeking fees on this motion for the Florida action because it's not part of this action, but that's important context for the Court to be aware. · That was a full year before we even got here.

Then, in June 2016, Samaca filed this action in this court with a lengthy complaint of 42 pages, 104 footnotes, over 1,000 pages considering exhibits. · We advised Samaca immediately, as they were already aware, all of the claims in the complaint were subject to binding arbitration. · We asked them to dismiss the complaint and submit it to arbitration. · They refused to do so and elected to proceed in this action. · We informed them at that time there was an attorney's fees provision and we were going to seek fees. · And here we are, nearly three years later, and we've just gotten to the point of finally getting final confirmation. · We do, in fact, need to go to arbitration. · We prevailed on that issue, and we have a lot of fees incurred

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because of Samaca's refusal on that issue.

Even in addition to our motion to compel arbitration, Samaca filed a litany of pleadings in this court. · The second page of this motion, of this handout, is all of Samaca's filings. They filed motions to strike, reply briefs, objections that they contested. · Every little thing. As a result, the fees were -- were much higher.

Then, once we finally got the order from this Court confirming the arbitration clause, they appealed the case to the Court of Appeals, as it was their right to do, but that resulted in more fees. · When they lost in the Court of Appeals, they filed a motion to reconsider in the Court of Appeals. They lost on that. · Then they filed a petition for certiorari at the Georgia Supreme Court. · They lost on that. · Then they filed a motion to reconsider the Supreme Court's denial of cert, which I think is a rare thing to do, and

they lost on that. · And so, the fees in this action are a result of Samaca filing it here, and then aggress ively [sic] pursuing litigation at every possible step, when we should have been in arbitration from the beginning.

The arbitration clause in this contract could not be more clear. · And that's on one of the

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handouts I've given up to the Court. · Samaca signed eight separate contracts requiring the arbitration of all claims. · That's the handout entitled, Mandatory Arbitration Clauses. · Four copies of the franchise agreement relating to four locations, four sublicense agreements. · Those provisions required the arbitration of all claims, controversies, or disputes relating to the agreement, relating to the relationship between the parties, including – and this is important -- including any dispute as to arbitration. · Meaning, all of the arguments Samaca raised as to whether arbitration could be – whether the arbitration clauses were enforceable and whether they applied, those were not even issues this Court could consider, and the law on that is crystal clear. These arbitration provisions could not be clearer. This Court found that. · The Court of Appeals found that as well.

The prevailing party fee provision in this case is equally crystal clear. · That's the other handout I've given Your Honor. · It's section 13(k) of the franchise agreement that provides: · In any arbitration or litigation to enforce the terms of this agreement, all costs and attorney's fees, including those incurred on appeal, incurred as a

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result of the legal action shall be prevaid – shall be paid to the prevailing party by the other party.

It unquestionably applies here. · We were enforcing the terms of the contract in this case. Samaca filed claims, we enforced the terms of the contract, meaning the arbitration requirement. That's what this Court found. · We are the prevailing party in this action. · The only relief that we sought in this action, enforced in the arbitration clause, we recovered. · The Court dismissed Samaca's claims in its entirety.

You'll hear Samaca argue that there is no adjudication on the underlying merits of Samaca's claims. · That's not relevant because we're not seeking fees for adjudicating the merits of the claims. · We're seeking fees in this action in which we've prevailed on every issue asserted in this action.

So we think the contractual attorney's fees provision requires the Court to award all the fees that we've incurred in this action. · It's a simple matter of contractual interpretation and application.

The other basis, as I mentioned, is 9-15-14, for which we've sought our fees. · We timely

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brought that motion. · The statute allows us to bring that motion within 45 days of the dismissal, the final adjudication, and we did that. · The statute allows any party to recover fees with respect to which any issue was asserted where there lacked any reasonable basis for the side to believe that they could prevail on their issue.

As I mentioned, the delegation clause here is crystal clear. · The case law on this is very strong, both from the U.S. Supreme Court and the Georgia Supreme Court. · The arbitration clauses, delegation clauses, must be enforced. · Samaca presented no reasonable argument, at any time in this proceeding, why the arbitration clause should not be enforced. · And, in fact, it was. · So we think this is the quintessential case for fees under 9-15-14.

We also think there's a basis to recover fees under Section B of 9-15-14, which allows the recovery of fees for expansive litigation conduct and for any litigation conduct resulted in delay and unnecessary expense. · And here, the handout I presented up to Your Honor shows just that.

Even if Samaca elected to try to bring these claims in this court, it was not necessary for nearly three, four years of filings, moving to strike

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every brief. · This whole action has been just an attempt to delay adjudication of the merits. · Just as one example, we filed a reply brief on our motion to compel arbitration. · Samaca moved to strike that reply brief claiming, without a basis, that you can't file a reply brief in the Superior Court when there is no rule saying that, and when it's commonly done.

And then, throughout this action and on appeal, Samaca continued to file its own reply briefs and supplemental briefs. · Just another indication of Samaca saying one thing, and then when that argument didn't work, trying something else.

Samaca persisted in pursuing discovery on merits issues in this court before waiting for a ruling

on the arbitration issue. · Samaca has flip-flopped on its arguments. · Samaca resisted us trying to take this case to arbitration for years. And then, when it was crystal clear from all three levels of courts in this state, claims had to be arbitrated, Samaca reversed its arg ument, [sic] and now is trying to, itself, file its own motion to compel arbitration, the attorney's fees issues, when it took the opposite position for years and when there's no legal support for that argument.

Samaca filed a request for a hearing

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upon our motion back in 2017 for attorney's fees, and then recently tried to have that hearing canceled, and argued, actually the Court should not hear any of these issues. · Samaca file -- conceded to filing this Court has jurisdiction over our 9-15-14 claim, as it clearly does, but now has filed papers saying, well, actually the Court should not hear the 9-15-14 claim. So Samaca has continued to switch its position as it's been convenient for it and over litigate every single issue, to the point where the fees for this type of case are higher than they should have been with a reasonable opposition. · And, for that reason, we think 9-15-14 fees should be awarded.

Samaca tries to raise a number of procedural arguments for why the Court should not hear our motions today. · But those are outlined in our briefs in detail. · I'm happy to answer any questions the Court has and I will, of course, request the opportunity to rebut any argument Mr. Martin makes.

But, in short, Samaca has raised no valid reason why this Court does not have authority. Motions for attorney's fees are commonly filed.

There's clearly jurisdiction in this case. · We presented case law supporting the Court's ability to

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award fees here today. · We don't believe Samaca's presented any case law showing any otherwise -- otherwise. And just from a common sense and policy standpoint, where Samaca has spent three years in this court trying to avoid arbitration, the issue could not have been clearer. · There needs to be some sanction for that type of conduct to discourage that type of litigation conduct. · Otherwise, we don't think there would be any effective penalty for doing that. · The procedure that Samaca is going to argue here for today to decide things in a very piecemeal fashion will be highly inefficient, just add to more fees, and it's not required by the law.

So, unless the Court has any further questions about our position, I will stand on our briefs, and I request the opportunity to rebut any argument made by Samaca.

THE COURT: · You'll have that opportunity. · Thank you.

MR. MILLER: · Thank you, Your Honor.

THE COURT: · Mr. Martin?

MR. MARTIN: · Thank you, Your Honor.

I'm David Martin. · I represent Samaca, LLC, in this case. · Can you hear me well?

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THE COURT: · Barely.

THE COURT: · I don't know what's wrong with the microphones.

MR. MARTIN: · I don't what's going – is this one better? · Or is this one --

THE COURT: · That's better.

MR. MARTIN: · This is better. · I'm going to stand real close.

THE COURT: · Thank you.

MR. MARTIN: Yes. · Again, I'm here to represent Samaca, LLC. Today in the courtroom, I have Samaca's co-owner, Mr. Arnaldo Gonzalez, here to my right, and he was elegantly attired to request permission to sit next to me in counsel's table, but he had a snafu with the bottom part of his wardrobe while getting into an Uber car on his way to my office this morning. · So I think he feels more comfortable there, so I won't request permission for him to sit with me on this.

I also have my legal assistant, Martha Rodriguez, in the courtroom. · She may have to leave in a few minutes to run an errand. · I just don't want that to constitute a disruption in the court. · I just wanted to give you some -- some notice about that. And, of course, we have the court reporter, Heather

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Brown, who I've engaged. · I saw that my friend, Mr. Miller, handed her his card. · I don't think we have an agreement about who's going to share the cost for

the -- for the takedown, but maybe we can cover that later.

I'd like to present a -- and as I stood up -- and I'm sorry for the -- for the preemptory objection, but I think that, procedurally, I need to protect the record on two points. · And I'd like to read this order, which I've specifically drafted for this hearing, and that I ask to be made part of the record, so that the wording is clear.

Under judicial estoppel, the law of the case in Samaca, LLC v. Cellairis Franchise, 345 Ga. App. 368(2018), and American General Financial Services v. Jape, 291 Ga. 637(2012), Plaintiff Samaca makes a continuing objection to any consideration and ruling by the Court on the arbitrability or the merits of Defendants Cellairis' and Global's Motion for Attorney's Fees and Expenses filed March 24th,2017 as supplemented.

I'll refer to that motion as the motion for attorney's fees. · In the line of this proposed order -- in another line of this proposed order, I say that, If denied, Plaintiff shall have no duty to

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renew its objection to preserve error. I have a copy of the proposed order for Mr. Miller, and I would ask for permission to either approach the bench or hand this to the Court's deputy.

THE COURT: · You may approach.

MR. MARTIN: · Thank you, Your Honor. And I would ask that the Court, after reviewing the objection, rule on the -- on the objection.

THE COURT: · I'm not going to rule at the moment.

MR. MARTIN: · Okay. · And -- and – Your Honor --

THE COURT: · You may argue, and you don't waive whatever objection, or you may not argue. · It's up to you.

MR. MARTIN: · Yes, ma'am.

THE COURT: · I'm not going to --

MR. MARTIN: · Thank you.

THE COURT: · -- follow your orders.

MR. MARTIN: · Thank you, Your Honor.

The second objection, and, again, it's worded for today in a proposed order, is that under section -- O.C.G.A. Section 9-11-6(d), O.C.G.A. 24-603(a) [sic], and Rule 6.1 of the Uniform Superior

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Court Rules, Samaca makes a continuing objection to any unsworn allegations of unstipulated fact by defendants' counsel in this hearing or as presented in the Motion for Attorney's fees. So we'd include a motion to strike all the factual assertions made by counsel that weren't -- that weren't supported by affidavit in the record or by sworn testimony.

· And if I may, again, approach the bench --

THE COURT: · You may.

MR. MARTIN: · -- with a proposed order. Thank you.

And, I'm sorry, Your Honor, I just need to request that the Court rule on the objection. I understand the Court's position.

THE COURT: · I'll decline to do that.

MR. MARTIN: · Thank you, Your Honor.

THE COURT: · Defer a ruling.

MR. MARTIN: · I would also like to make that apply to -- on the paper that Cellairis' counsel tendered to the Court called, Samaca's Expansive Litigation Conduct. · It's neither sworn, nor authenticated, nor key to any court filing in the record. · And I would request The Court's ruling on

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the motion to exclude this --

THE COURT: · I'll defer a ruling.

MR. MARTIN: · Thank you, Your Honor.

MR. MILLER: · And on that note, Your Honor, that's merely a demonstrative exhibit.

THE COURT: · Why don't you wait for rebuttal.

MR. MILLER: · Thank you, Your Honor

MR. MARTIN: · My client, Samaca, LLC, pursued an investment opportunity in 2014, the first half of 2014, with the purpose of qualifying the owners, Mr. Gonzalez who's here today, and his wife, to immigrate to this country. · That investment opportunity had to have a minimum of five years of lifespan. · They learned about a franchise opportunity from Cellairis Franchise and Global Cellular, and

they reached a point where my client, in exchange for $350,000, was to acquire franchise rights to operate a cellphone repair business in Dolphin Mall in Miami, Florida.

To summarize what happened in this case is that no rights, no enforceable, valid rights, were ever conveyed to Samaca. · Indeed, as we allege in our complaint, and was alleged in the original complaint, no agreement was ever concluded. · The material terms

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of an agreement were never concluded. · That was something that I think was -- was missed here. · But I will get to that later. After giving this money to Cellairis and Global, my client occupied these certain spaces in this mall for just a matter of a few weeks, and was kicked out by the owner of the mall, saying that Cellairis never acquired these rights. · And he didn't learn about this from Cellairis. · He learned about it from the mall. · When I say, he, I'm referring to Mr. Gonzalez, who was operating the business. · And my client went to Cellairis to look for relief, and Cellairis made promises that they would fix the situation. · And time began to run and then months began to run.

My client engaged counsel. · It wasn't me, it was Florida counsel, who then proceeded to file suit in Miami Circuit Court in March of 2015. Further negotiations continued, but immediately were -- a couple of months after my client filed suit in Miami, Cellairis filed a motion to dismiss the complaint in Miami. · Not a motion to compel arbitration, but a motion to dismiss. · This motion to dismiss is found in

Cellairis's motion for attorney's fees dated March 24th, 2017, as Exhibit B. · I have

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copies of the motion to show the Court that may help, in my presentation, for you to understand the point I'm making. · If you'd like to see them, I can give you this.

THE COURT: · I'll -- I'll take it, but I would hope that you would focus on the point of this argument.

MR. MARTIN: · Yes.

THE COURT: · I'm very aware of the history of the case.

MR. MARTIN: · Okay.

THE COURT: · I've been handling it for a good while.

MR. MARTIN: · Okay.

THE COURT: · So I know the background. And this is not about the merits of your claim, this hearing. · It's about the arbitrability of the question of attorney's fees.

MR. MARTIN: · Oh, I am so encouraged by that, Your Honor, because that's what I wanted to get to.

THE COURT: · Well, I wish you would. Thank you.

MR. MARTIN: · Okay. · The only person that can determine whether the attorney's fees motion is

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arbitrable is an arbitrator. · That's what this Court held in its February 7th, 2017 order. · That is what the Court of Appeals held in its February 28th, 2008 order. · The remittitur filed November 26th, 2018, establishes the law of the case. · The parties and the Court are now bound to follow that order, and the only thing that the Court can do, with regard to this motion for attorney's fees, is refer it to an arbitrator to determine whether it's arbitrable. There is more.

On June 6th, 2019 [sic], the United States Supreme Court said that what they -- that, when there is an enforceable arbitrability delegation provision, even if the Court thinks that the question of arbitrability is, quote, wholly groundless, it must still refer the matter to an arbitrator to determine arbitrability. · In that case, Your Honor – pardon me -- it's Henry Schein, Inc. vs. Archer and White. There is no U.S. report or page number yet, but that's found at 586 U.S., and the date of the opinion, which is cited in my -- in my motion to compel, is January 6th, 2019 [sic].

So the way I see it here, Your Honor, is there's nothing else to do in this case other than refer Cellairis and Global's motion to an arbitrator

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to determine whether it is arbitrable. That's the entire motion. · Unless the Court wants me to address, point-by-point, the factual assertions that we've objected to and that we believe need to be stricken, I don't have anything else to say.

THE COURT: · Let me hear whatever rebuttal Mr. Miller has, and then I will decide whether you need to have surrebuttal. · How is that?

MR. MARTIN: · That's fine, Your Honor.

THE COURT: · All right. · Now, I wish you would address the issue of arbitrability of attorney's fees. · I did not mean to imply that that was decided, but I do think that's the key to the argument today.

MR. MILLER: · Sure. · Certainly, Your Honor.

THE COURT: · Not the behavior of the plaintiff so much, but the -- even though it may be reprehensible, but the question of who decides.

MR. MILLER: · Your Honor, we don't think there is any inconsistency in our position at all. The arbitration clause in this case requires arbitration of any claims or disputes between the parties, if a party seeks to enforce that clause.

Here, Samaca is relying on the

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delegation clause, arguing that because there is a question of arbitrability, the arbitrator needs to decide that. But there is no dispute as to arbitrability of the attorney's fees claims. · What I mean by that is, we believe the attorney's fees claims should be heard in this court, of course, because we filed the motion here. · We believe the case law supports that, and it just makes practical sense for the judge who presided over the case to adjudicate the conduct, as opposed to an arbitrator on a cold record.

Samaca, we believe, likewise, has no intent of arbitrating the attorney's fees issue. Samaca has never said, in any filing in this case or in an e-mail, that they believe the substance of the attorney's fees claims should be heard in arbitration. · Instead, it's our belief that what Samaca wants to do, is Samaca

wants this Court to refer the fee issue to arbitration so Samaca can go to the arbitrator and argue the fee issue, along with everything else, should be heard back in this court.

There's no law, and the contract does not require the Court to refer this matter to arbitration, where neither party wants to arbitrate. We sent Mr. Martin an e-mail, after he filed his

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motion to compel arbitration, asking that question. You say there's a question as to arbitrability. · Do you -- is it your position the fee claim should be arbitrated? · He refused to respond to that question. His answer was, that's immaterial. · And I have a copy of that e-mail here, if Your Honor would like to see it. · It's also attached to one of our filings.

THE COURT: · I don't need to see it.

MR. MILLER: · We believe that is not immaterial and irrelevant; that's the key question here. · If Samaca was saying the attorney's fees issue needs to be adjudicated by an arbitrator, the merits of that, the attorney's fees claim, that might be a different matter. · Samaca's not taking that position.

We said to Samaca, we think what you're trying to do here is to go to an arbitrator to just argue that issue should come back to court. · That's not supported by the law, and that makes no sense.

Samaca did not deny that. · Their response was, even if it's inefficient, that's irrelevant.

Our argument is completely supported by, both the text of the contract, and by the law. · The parties' arbitration agreement, on the handout I presented to

the Court, requires the arbitration of all controversies, claims, or disputes, including

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disputes as to whether any specific claim is subject to arbitration. · There's no dispute about the attorney's fees claim being subject to arbitration because we want it in court, and we believe Samaca wants it heard in court. · If Your Honor were to ask Samaca on the record today where it ultimately wants the merits of the fee claim determined, I'd be interested to hear the answer on that.

Similarly, the governing law here does not require the Court to refer this matter to arbitration for an arbitrability decision, whether their dispute is to arbitrability. · I would refer to Court to the text of the Federal Arbitration Act itself. · The FAA, specifically 9 U.S.C., Section 4, which is recited in the briefs, that's the provision -- the governing provision that governs the issue here today before the Court. · The contract and the parties have all agreed that the FAA applies.

That provision allows a party to file a motion to compel arbitration only where a party is aggrieved by the alleged failure, neglect, or refusal of another to arbitrate. · But nobody wants to arbitrate the substance of the attorney's fees claims. · And, if that were the case, Samaca can seek an order directing that the arbitration proceed on

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the merits of the attorney's fees claims. · They've not done that. · They're merely asking for an arbitrator to decide -- there's no dispute on this issue because everyone wants to come back to court. Undoubtedly, if

we waited to bring our fee claim in arbitration, you would've -- we would have heard Samaca say in arbitration, well, you should have brought the attorney's fee issue in court because that's what the governing law provides, and because the judge is more familiar with the conduct.

The other issue I would point out is that Samaca, itself, clearly did not believe that the attorney's fees claim should be arbitrated. · We filed our motion for attorney's fees back in March of 2017. Samaca filed multiple response briefs to our motion, none of which requested arbitration, and even requested a hearing in this court, and did not request arbitration until after more than a year. Went up on appeal, came back down, now Samaca says, oh, it needs to be arbitrated.

To the contrary, Samaca filed an emergency motion to treat our attorney's fees claim as a counterclaim, and said Samaca -- this is a quote from Samaca's motion filed on March 27, 2017: Plaintiff shall have the right to raise defenses,

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conduct discovery, and have a trial before a jury.

We don't believe the law supports that on a motion for attorney's fees, that's a separate issue. · But the point is, Samaca made filings to this Court asking for the attorney's fees actions to be heard in -- the attorney's fees motion to be heard in this court.

THE COURT: · Mr. Miller, I am not so interested in the parties' positions as I am in the Court of Appeals' positions and the Supreme Court's position. · I want to do what the law requires. · And I don't think it's a persuasive argument that a party did

or did not ask for something. · You might say more that would persuade me, but you understand, I'm not taking sides. · I'm trying to do the legally correct thing.

MR. MILLER: · Well, I understand that, Your Honor. · And so I would then just refer the Court then to the governing contract and law. The arbitration agreement itself only requires disputes as to whether something is arbitrated to go to court. And the governing law says that the Court should enforce arbitration clauses, like any other contract, as they are written. · And so, where there is no dispute as to arbitration, we think the law does not

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require referral to the arbitration -- to an arbitrator, merely to decide that everyone agrees to come back to court.

And then, I would rely on the text of the Federal Arbitration Act itself, which applies. That's the governing authority for the issue before the Court. · It's really as simple as those two authorities.

The only other point I would make before I sit down, Your Honor, is we do not believe, regardless of what the Court finds on that issue, that the 9-15-14 claim needs to go to the arbitrator. We cited case law in our brief that 9-15-14, which is, of course, a statutory claim, can be decided by this Court, even if the substantive claims must be arbitrated. There's two claims in our brief on that. That's a Georgia statute designed to give the courts of this state authority to protect the parties against unsupported positions, like Samaca's here, and expansive litigation. · The statute talks about courts deciding. · We don't know where else that motion would be

heard. · That motion provides the courts to make that decision, and not arbitrators. And Samaca itself, as I mentioned, has admitted in a brief that the Court has jurisdiction to decide that

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motion.

So regardless of what the Court decides on the contract claim, we think the 9-15-14 claim should be heard in this court separately.

THE COURT: · Thank you.

MR. MILLER: · Thank you, Your Honor.

THE COURT: · One more thing: · Be careful what you ask for. · Because, you know, if I decide in your favor, there is sure to be appeals and motions for reconsiderations, and I'm just wanting to make sure what your client wants.

MR. MILLER: · We understand. · And I appreciate that, Your Honor.

THE COURT: · All right.

MR. MILLER: · Thank you.

THE COURT: · Mr. Martin, do you wish to have the final word?

MR. MARTIN: · I do, Your Honor. I'm sorry if I am disturbed by Mr. Miller's factual assertions to this Court. · We reiterate the sworn and verified facts in our – in our reply papers to the motion for attorney's fees. I just want to focus on one.

Mr. Miller stated that there's no dispute from Samaca that this must go to an

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arbitrator on the question of arbitrability. · In the first response to the motion for attorney's fees that Samaca filed on March 3rd, 2017, second page, judicial estoppel bars the Court from hearing these claims because they also raise questions of arbitrability. · And we have paragraph, after paragraph, after paragraph expanding on that statement. · What Mr. Miller came up here and told the Court is simply false, and I'm disturbed --

THE COURT: · Where do you believe the correct forum is to decide on the question of attorney's fees?

MR. MARTIN: · Take this -- this matter needs to be combined with their claims for attorney's fees and decided in tandem. They say there's no dispute about arbitrability. · Well, they – of attorney's fees on the motion. They spent two years contradicting themselves saying that their motion is not subject to arbitrability. · When, on the other hand, they said --

THE COURT: · I don't really understand what you're saying. · My question was: · What is the forum for the decision on the question of attorney's fees?

MR. MARTIN: · It should all be in the

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same forum, whether it's arbitration or litigation, but only an arbitrator can decide that. So that, if we all go to the arbitrator, even on this motion, we're going to argue in front of the arbitrator, whether the Cellairis' motion for attorney's fees is subject to arbitration and whether our motion for attorney's fees is subject to arbitration, because we'll have one. They also frivolously expanded this case by contradicting

themselves for the last two years and bringing this motion for attorney's fees, which we could also assert on the same grounds that they bring here today. An arbitrator has to decide that as well.

But I want to say this, and I don't -- it should not sound evasive:· My mental impressions and litigation strategy are not subject to disclosure.· I have a plan for this, but it's irrelevant.· The only relevant question here is who decides whether this motion for attorney's fees by Cellairis is arbitrable.· And the Court of Appeals has spoken and the United States Supreme Court has spoken as well.· I don't see any way around it.· And if there is a way around it, then I'd like to learn it.· But I haven't heard anything here that would create an exception.· His only statement is, there's

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no dispute about the attorney's fees being arbitrable?· What are we doing here today?· Why are we in this courtroom?· We're disputing the specific question and issue of whether there is an arbitrability question that needs to go to an arbitrator.· And the Court of Appeals says it does.

THE COURT:· Thank you.

MR. MARTIN:· Thank you.

THE COURT:· All right.· I'll take the matter under advisement.· I hope to render a decision shortly.

MR. MARTIN:· Thank you, Your Honor.

THE COURT:· Thank you for your argument.

MR. MILLER:· Thank you, Your Honor.

(Proceedings concluded at 10:56 a.m.)

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CERTIFICATE

*****

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DISCLOSURE OF NO CONTRACT

*****

[p. - unnumbered]

WORD INDEX

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[p. – unnumbered; proposed orders on objections]

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IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

SAMACA, LLC, Plaintiff, vs. CELLAIRIS FRANCHISE, INC., GLOBAL CELLULAR, INC., and CELL PHONE MANIA, LLC, Defendants.	CIVIL ACTION NO. 2016 CV 276036

ORDER ON PLAINTIFF'S OBJECTION # 1.

Under judicial estoppel, the law of the case in Samaca, LLC v. Cellaris Franchise, Inc., 345 Ga. App. 368 (2018), and Am. Gen. Fin. Servs. v. Jape, 291 Ga. 637, 644 n. 3 (2012), Plaintiff Samaca, LLC makes a continuing objection to any consideration and ruling by the Court on the ***arbitrability*** or the ***merits*** of **Defendants Cellairis' and Global's Motion for Attorney's Fees and Expenses** filed on March 24, 2017 as supplemented. (Hereinafter the "Motion for Attorney's for Attorney's Fees and Expenses filed on March 24, 2017 as supplemented. (Hereinafter the "**Motion for Attorney's Fees**").

THE OBJECTION IS HEREBY ___
GRANTED ___ DENIED.
[IF DENIED,] Plaintiff shall have no duty to renew its objection to preserve error.

IT IS SO ORDERED and filed, in open court on February 12, 2019.

_____

ALICE D. BONNER, SENIOR JUDGE
Superior Court of Fulton County
Business Case Division
Atlanta Judicial Circuit

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

SAMACA, LLC, Plaintiff, vs. CELLAIRIS FRANCHISE, INC., GLOBAL CELLULAR, INC., and CELL PHONE MANIA, LLC, Defendants.	CIVIL ACTION NO. 2016 CV 276036

ORDER ON PLAINTIFF'S OBJECTION# 2.

Under O.C.G.A. § 9-11-6(d), O.C.G.A. § 24-6-603(a), and Rule 6.1 of the Uniform Superior Court Rules, Plaintiff Samaca, LLC makes a continuing objection to any unsworn allegations of unstipulated fact by defendants' counsel in this hearing or as presented in the **Motion for Attorney's Fees**.

THE OBJECTION IS HEREBY
____GRANTED ____ DENIED.
[IF DENIED,] Plaintiff shall have no duty to renew its objection to preserve error.

IT IS SO ORDERED and filed, in open court on February 12, 2019.

_____

ALICE D. BONNER, SENIOR JUDGE
Superior Court of Fulton County
Business Case Division
Atlanta Judicial Circuit

APPENDIX BB

IN THE COURT OF APPEALS
STATE OF GEORGIA

SAMACA, LLC,
Petitioner-Appellant,
vs.
CELLAIRIS FRANCHISE, INC., GLOBAL CELLULAR, INC., and CELL PHONE MANIA, LLC,
Respondents-Appellees.

Application No. A19D0372

*****

APPLICATION FOR DISCRETIONARY REVIEW WITH O.C.G.A. § 5-6-35(j) REQUEST
[Filed March 11, 2019] [EXCERPT]

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*****

I. INTRODUCTION.

(1) The main question in this appeal is whether a party's motion for sanctions under O.C.G.A. § 9-15-14 is exempt from arbitration under the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq*. This case would establish precedent.

(2) Petitioner Samaca, LLC ("Samaca" or "Petitioner") submits that the trial court erred in ruling that the matter is not arbitrable. Further, the trial court possessed no power to even rule on the arbitrability of any part of a motion for attorneys' fees by respondents Cellairis Franchise, Inc. and Global Cellular, Inc. (collectively "Cellairis" or "Respondents").[1]

(3) This result follows from judicial estoppel, the law of the case in Samaca, LLC v. Cellairis Franchise, Inc., 345 Ga. App. 368, 813 S.E.2d 416 (2018) (Case No. A17A1715), and Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S.Ct. 524; 586 U.S. ___ (2019).

(4) If needed, Petitioner also shows reversible error on the merits of the trial court's 9-15-14(b) award.

A. Procedural Background

(5) As noted, the parties have already been to this Court on direct appeal in Samaca, LLC v. Cellairis Franchise, Inc., 345 Ga. App. 368, 813 S.E.2d 416 (2018) (Case No. A17A1715) (physical precedent only) ("Samaca I").

(6) In that case, this Court affirmed the trial court's order of February 7, 2017 (the "**Final Order**") that granted Respondents' ***own motion*** to compel arbitration of Samaca's complaint on the issue of

[1] Cell Phone Mania, LLC never appeared in the action and suffered default judgment.

arbitrability and dismissed the case. Because certain relevant documents to this petition are already in the record of Case No. A17A1715, Samaca also cites to this record when needed.[2]

(7) The central ruling secured by Cellairis in Samaca I is that the parties are bound by a so-called arbitrability "delegation provision." This provision grants an arbitrator the power to decide arbitrability questions regarding "threshold issues" such as "whether any specific claim is subject to arbitration at all." Samaca, 813 S.E.2d at 420.

(8) In other words, in this case, an arbitrator, not the trial court, must determine in the first instance whether any claim must be decided by arbitration or by a court. Hence, until an arbitrator decides arbitrability, no one can determine the merits of any claim.

(9) Nonetheless, despite having successfully advocated for the enforcement of the arbitrability "delegation provision," Cellairis filed a motion for attorneys' fees against Samaca. Samaca's first argued judicial estopped because Cellairis' motion also raised arbitrability questions. After the remittitur, Samaca asserted the law of the case and moved to compel arbitration on the question of arbitrability. Cellairis turned around and fought Samaca every step of the way. Despite Cellairis' self-contradiction, the trial court decided arbitrability as well as merits questions. It then sanctioned Samaca under 9-15-14(b) for

[2] References to the volume and record page from Case No. A17A1715 are denoted as [V-_ ; R-___]. The Final Order, the abbreviation for Order on Defendants' Motion to Dismiss Complaint and Compel Arbitration filed February 7, 2017, attached as **EXHIBIT 5 HERETO** also appears at [V-4; R-1389].

having opposed Cellairis' *own motion* to compel arbitration on arbitrability questions.

B. The Order for Which Appeal is Sought

(10) Samaca seeks permission to appeal from the **Amended Order on Defendants' Motion for Attorneys' Fees and Expenses and Plaintiff Samaca, LLC's Cross Motion to Compel Arbitration of Defendants' Motion for Legal Expenses** dated March 6, 2019 (the "**Amended Order**")[3] of the Superior Court of Fulton County, Georgia, Honorable Alice D. Bonner, presiding, in the case styled Samaca, LLC v. Cellairis Franchise, Inc.

[3] Before the Amended Order, the Order on Defendants' Motion for Attorneys' Fees and Expenses and Plaintiff Samaca, LLC's Motion to Compel Arbitration of Defendant's [sic] Motion for Legal Expenses entered February 27, 2019 ("Initial Order") deferred awarding the amount of fees and expenses until the "merits of the case" were arbitrated, which has not occurred. A copy of the Initial Order is attached as **EXHIBIT 10 HERETO**. To the extent the Initial Order has legally effect, this petition applies to the Initial Order as well. In response, Samaca presented Plaintiff's Urgent Request for Certificate of Immediate Review Under O.C.G.A. § 5-6-34(b) and Alternative Motion to Set Aside filed February 28, 2019 ("Request for Certificate"), a copy attached as **EXHIBIT 11 HERETO**. Then, Cellairis filed Defendants' Opposition to Samaca's Request for Certificate of Immediate Review and Alternative Motion to Set Aside filed March 4, 2019, a copy attached as **EXHIBIT 12 HERETO**. On p. 3, Cellairis "suggest[ed]" that the trial court proceed to award fees, which the trial court did in the Amended Order on March 6. On the same day, the trial court entered Order Denying Request for Certificate of Immediate Review and Alternative Motion to Set Aside and Plaintiffs' Motion for Leave to File Reply Brief filed March 6, 2019, a copy attached as **EXHIBIT 14 HERETO**.

Global Cellular, Inc. and Cell Phone Mania, LLC, Case No. 2016CV276036.

(11) A copy of the Amended Order is attached as **EXHIBIT 1 HERETO**.

(12) The Amended Order granted $59,983.78 in legal expenses under 9-15-14(b) pursuant to Defendants Cellairis' and Global's Motion for Attorneys' Fees and Expenses and Brief in Support filed March 24, 2017 ("Motion for Attorneys' Fees") attached as **EXHIBIT 2 HERETO**.

(13) The **Motion for Attorneys' Fees** was based on a "prevailing party" provision in the disputed franchise documents. "Alternatively," Cellairis sought legal expenses under 9-15-14.

(14) The **Amended Order** granted and denied in part **Plaintiff Samaca, LLC's Motion to Compel Arbitration** ("**Motion to Compel Arbitration**") filed November 26, 2018, a copy of which is attached as **EXHIBIT 3 HERETO**.

(15) The trial court correctly compelled arbitration of the "prevailing party" provision claim but should not have decided that the claim was in fact arbitrable. Regarding 9-15-14, the trial court was wrong on three counts: It should not have decided arbitrability. It should not have decided the merits. And it should not have awarded fees.

II. JURISDICTIONAL STATEMENT WITH 5-6-35(j) REQUEST

(1) As it pertains to the **Motion to Compel Arbitration**, Samaca submits that the **Amended Order** is a final order for purposes of a direct appeal under O.C.G.A. § 5-6-34(a)(1). This is so because "the case is no longer pending in the court below, except as provided in Code Section 5-6-35(b)."

(2) Although O.C.G.A. § 5-6-35(b)(10) identifies "awards of attorneys' fees or expenses of

litigation under Code Section 9-15-14" as among the "cases" subject to discretionary review, 5-6-35 does not identify orders denying a motion to compel arbitration after a final disposition.[4]

(3) As Justice Nahmias said in a special concurrence in American General Financial Services v. Jape, 291 Ga. 367, 645 (2012):

> [P]arties who cannot obtain an immediate appeal of the denial of a non-frivolous motion to compel arbitration will remain entitled to a direct appeal of the issue when their case is final, see OCGA § 5–6–34(a)(1)[.]

This is such a case. The entire action has finally terminated, and nothing remains pending. *See* Georgia Arbitration Code, O.C.G.A. § 9-9-16 ("Any judgment or any order considered a final judgment under this part may be appealed pursuant to Chapter 6 of Title 5."); *Cf.* Torres v. Piedmont Builders, Inc., 300 Ga. App. 872, 873 (2009) (direct appeal allowed from motion compelling arbitration where trial court dismissed the case).

(4) Since the **Amended Order** is a final order in this regard, Samaca requests that this Court grant this application under O.C.GA. § 5-6-35(j).[5]

[4] Under the "firm direction" of American General Financial Services v. Jape, 291 Ga. 637, 644 n. 3 (2012), the trial court was "urge[d]" to defer ruling on Cellairis' motion for attorneys' fees until an interlocutory appeal was attempted. (J. Nahmias, specially concurring). The Amended Order did not follow the direction and decided the entire Motion for Attorneys' Fees before ruling on Samaca's Motion to Compel Arbitration.

[5] O.C.G.A. 5-6-36(j) states:

> When an appeal in a case enumerated in subsection (a) of Code Section 5-6-34, but not in subsection (a) of this Code

(5) Alternatively, because the **Amended Order** also made an award of attorneys' fees and expenses under 9-15-14, this discretionary application lies under O.C.G.A. § 5-6-35(a)(10).

III. THE ERRORS: WHY THIS APPEAL SHOULD BE GRANTED.

(1) This appeal should be granted because the trial court should have granted Samaca's entire **Motion to Compel Arbitration.** The standard of review is *de novo*. Cash In Advance of Florida v. Jolley, 272 Ga. App. 282 (2005). After the remittitur in Samaca I, the enforceability of the arbitrability "delegation provision" became the law of the case.[6] A copy of the remittitur is attached as **EXHIBIT 4 HERETO**. There is no conceptual difference between Cellairis' motion to compel arbitration in Samaca I, and Samaca's own motion. Both concern disputed

> section, is initiated by filing an otherwise timely application for permission to appeal pursuant to subsection (b) of this Code section without also filing a timely notice of appeal, the appellate court shall have jurisdiction to decide the case and shall grant the application. Thereafter the appeal shall proceed as provided in subsection (g) of this Code section.

The Amended Order, as it pertains to 9-15-14 award for attorneys' fees, would also become directly appealable. Haggard v. Board of Regents, 257 Ga. 524 (1987).

[6] O.C.G.A. § 9-11-60(h) states: "[A]ny ruling by the Supreme Court or the Court of Appeals in a case shall be binding in all subsequent proceedings in that case in the lower court and in the Supreme Court or the Court of Appeals as the case may be."

claims between the parties. Both raise questions of arbitrability that only an arbitrator may decide.

(2) This appeal should be granted because judicial estoppel barred the trial court from deciding the arbitrability of any part of the **Motion for Attorneys' Fees**. The standard of review is *de novo.* Jolley, *supra.* The doctrine of judicial estoppel states:

> [T]he essential function and justification of judicial estoppel is to prevent the use of intentional self-contradiction as a means of obtaining unfair advantage in a forum provided for suitors seeking justice. The primary purpose of the doctrine is not to protect the litigants, but to protect the integrity of the judiciary. The doctrine is directed against those who would attempt to manipulate the court system through the calculated assertion of divergent sworn positions in judicial proceedings and is designed to prevent parties from making a mockery of justice through inconsistent pleadings.

(Footnote omitted.) Nat. Bldg. Maintenance Specialists v. Hayes, 288 Ga. App. 25, 26-27 (2007). For more than two years, Cellairis litigated to cement a ruling that the arbitrability "delegation provision" was enforceable. The trial court could not decide arbitrability at all in this case.

(3) This appeal should be granted because the trial court disregarded binding precedent of the United States Supreme Court brought to its attention before issuing the **Amended Order**. Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S.Ct. 524, 529; 586 U.S. ____ (January 8, 2019) held:

> We must interpret the [Federal Arbitration] Act as written, and the Act in turn requires that we interpret the contract as written. When the parties' contract delegates the arbitrability

> question to an arbitrator, a court may not override the contract. ***In those circumstances, a court possesses no power to decide the arbitrability issue. That is true even if the court thinks that the argument that the arbitration agreement applies to a particular dispute is wholly groundless***.

139 S. Ct. at 529 (2019) (emphasis added). Notably, the Amended Order did not cite Henry Schein, Inc. or discuss any Federal Arbitration Act authority to justify not following this precedent. The trial court should have granted Samaca's entire Motion to Compel Arbitration.

(4) This appeal should be granted because, even if the trial court had the power to adjudicate the 9-15-14(b) claim, the existence of a legitimate dispute removed its authority to award fees. Plus, no evidence supports the award. The standard of review is abuse of discretion. Lee v. Park, 341 Ga. App. 350 (1) (2017).

IV. BACKGROUND AND ARGUMENT.

(1) Although a background summary appears in this Court's published opinion in Samaca I, Samaca provides certain clarifications.

(2) Samaca sought to acquire franchise rights to operate a cell phone repair business in Dolphin Mall in Miami, Florida for a minimum period of five years.

(3) In June 2014, Samaca signed papers drafted exclusively by Cellairis. Although Samaca paid Cellairis $350,000 for the franchise rights, Samaca's complaint shows it acquired no valid and enforceable rights at all and that the parties never *concluded* an agreement with all the essential terms. *Cf.* Samaca I, 813 S.E.2d at 817. After briefly occupying the franchise spaces at Dolphin Mall, Samaca was forced to leave because *Cellairis* never

acquired the necessary rights. To be sure, it was Cellairis, *not* Dolphin Mall, who refused to acquire/renew the license rights to operate in the mall.[7] *Cf.* Samaca I, 813 S.E.2d at 418.

(4) In March 2015, represented by other counsel, Samaca filed suit in Florida. Cellairis disputed venue and filed a motion to dismiss, not a motion to compel arbitration. Cellairis did not seek to compel arbitration because the transaction documents contained both forum selection and arbitration clauses that required the case to be heard in Georgia.

(5) The forum selection clause (the "Forum Selection Clause") was contained within the Assignment & Assumption Agreement ("**AA Agreement**"). The **AA Agreement** had an effective date of September 1, 2014. It was pursuant to the **AA Agreement** that Samaca paid Cellairis the $350,000 for the franchise rights. The Forum Selection Clause states as follows:

> The parties acknowledge and agree that ***the Georgia State Courts for Fulton County, Georgia***, or if such court lacks jurisdiction, the U.S. District for the Northern District of Georgia, ***shall be the sole and exclusive venue and sole and exclusive proper forum in which to adjudicate any case or controversy arising either, directly or indirectly, under or in connection with this Agreement*** and the parties further agree that, in the event of litigation arising out of or in connection with this Agreement in these courts, they will not contest or challenge the jurisdiction

[7] **Complaint** ¶¶1-116 [V-3; R-7-35].

> or venue of these courts. The parties expressly consent and submit to the jurisdiction and venue of these courts, and the parties waive any defenses of lack of personal jurisdiction, improper venue and *forum non conveniens.*[8]

(6) Meanwhile, certain franchise and sub-license documents (the "**June 30 Franchise Agreements**" and "**June 30 Sub-License Agreements**"), each with an effective date June 30, 2014, contained arbitration clauses.

(7) The **June 30 Franchise Agreements** arbitration clause read as follows:

> (1) Claims subject to arbitration. Subject to Paragraph 13.D.2, the parties agree that all controversies, claims, or disputes between [Cellairis] and [Samaca] arising out of or relating to:a. This Agreement or any other agreement between [Cellairis] and [Samaca]; b. The relationship between [Cellairis] and [Samaca]; c. The scope and validity of this Agreement or any other agreement between [Cellairis] and [Samaca], *specifically* ***including whether any specific claim is subject to arbitration at all (arbitrability questions)***; and/or d. The offer or sale of the franchise opportunity

[8] Quoted at 813 S.E.2d at 418; also found at [V-3; R-9, R-53] Assignment & Assumption Agreement, Sec. 11, Complaint, Exhibit 1. (Emphasis added). This document was between Samaca, Cellairis, and Cell Phone Mania, LLC with Global Cellular, Inc. named expressly as the party receiving the $350,000 payment.

> will be subject to arbitration to be administered by the American Arbitration Association ("AAA")….

June 30 Franchise Agreements, Sec. 13 D. **Complaint**, Exhibits 18, 19, 20, 21 (pp. 65-66) (Emphasis added).[9]

(8) The **June 30 Sub-License Agreements** said as follows:

> Claims Subject to Arbitration. Except as otherwise provided herein, the parties agree that all controversies, claims, or disputes between [Global] and [Samaca] arising out of or relating to: a. This Agreement or any other agreement between [Global] and [Samaca];
> b. The relationship between [Samaca] and [Global]; c. The scope and validity of this Agreement or any other agreement between [Global] and [Samaca], *specifically including whether any specific claim is subject to arbitration at all (arbitrability questions)*; and/or d. Any agreement relating to the purchase of products or services by [Samaca] from [Global]
> will be subject to arbitration to be administered by the American Arbitration Association ("AAA")….

June 30 Sub-License Agreements, Complaint, Exhibits 22, 23, 24, 25 (pp. 9-10) (Emphasis added).[10]

(9) In the Florida motion to dismiss, Cellairis argued by brief as follows:

> *Plaintiff's claims* in this case against the Cellairis Defendants *are unquestionably covered*

[9] Quoted at Samaca I, 813 S.E.2d at 418.

[10] Quoted at Samaca I, 813 S.E.2d at 418.

> *by the above forum selection and arbitration clauses.* These clauses, to which Plaintiff agreed, broadly require the adjudication of all claims under the Agreements or arising out of either the contracts or the relationship between the parties to be pursued only in **Georgia, *either in arbitration or litigation in a Georgia court (depending on the agreement and the type of claim).***

See Exhibit B ¶ 20 to **Motion for Attorneys' Fees** (Exh. 2) (Emphasis added).

(10) If arbitration, not litigation, was the only means for deciding this case, Cellairis would have taken this categorical position in the Florida case. But it did not. Then, at a hearing in Florida on February 25, 2016, Cellairis' lead counsel Ron T. Coleman Jr. reiterated Cellairis' candid equivocation:

> MR . COLEMAN : Your Honor, may it please the Court, I'm Ron Coleman. First, let me thank the Court for me having the opportunity to appear pro hac vice in this case. I represent Cellairis and Global.
>
> …..
>
> Our motion originally was to dismiss because of their *forum selection clauses* and arbitration agreements and all of the relevant agreements that my client has signed. And although February is a wonderful time to be here in Miami, we think the case *clearly needs to be litigated* or arbitrated, as the case may be, *in Georgia*. [Emphasis added].

(*See* Hearing Transcript of February 25, 2016 in Florida case, a copy of which is attached as Exhibit 3 (p. 5:2-17) to Plaintiff's Verified Response and Reply Brief to Defendants Cellairis and Global's Motion for Attorneys' Fees and Expenses ("Plaintiff's Verified

Response") filed April 3, 2017, a copy of which is attached as **EXHIBIT 6 HERETO**.

(11) Therefore, even in the mind of Cellairis' lead counsel, because of the Forum Selection Clause, there was a distinct prospect that the ***"case clearly needs to be litigated"*** in Georgia.

(12) Samaca voluntarily dismissed the Florida suit in March 2016 and filed this action in Georgia in June. In its *original* complaint,[11] Samaca invoked the Forum Selection Clause as a ***separate and severable agreement*** contained within the **AA Agreement** while challenging the validity of the transaction documents as a whole.[12]

(13) Cellairis answered the complaint and moved to compel arbitration based on the arbitration clauses in the **June 30 Franchise Agreements** and the **June 30 Sub-License Agreements**.

(14) Samaca argued that no arbitration agreement existed because the Forum Selection Clause superseded and was inconsistent with the arbitration provisions.[13] Cellairis argued that the arbitration provisions controlled. Cellairis later

[11] The Amended Order (p. 2) and Samaca I, 813 S.E.2d at 819, state that Samaca amended its complaint to assert the "choice of law" (sic) provision to argue that this had superseded the arbitration clauses. Instead, Samaca's original complaint on June 3, 2016 asserted the Forum Selection Clause as the basis for venue. Complaint ¶¶ 6-7 [V-3; R-9]. The only relevant amendment on September 2, 2016 was to state that Global was also bound by the Forum Selection Clause. [V-4; R-1184].

[12] [V-3; R-9] Complaint ¶¶ 6-7 fn. 1.

[13] [V-4: R-1191-1199].

argued that the provision remitting "arbitrability questions" to the arbitrator required that an arbitrator decide questions of arbitrability and that the arbitration agreements were "incorporated" into the **AA Agreement**.[14]

(15) On February 7, 2017, relying on case law that none of the parties cited or briefed, the trial court ruled in favor of Cellairis, stating in relevant part:

> ***Absent a clear expression that the parties intended the AA Agreement to supersede the previous agreements, it cannot be said that the AA Agreement is inconsistent with the previous agreements*** as it required the execution of new arbitration agreements and incorporated the previous agreements by reference. Thus, the Court finds the merger rule does not apply and the arbitration agreements were not superseded. ***The question of arbitrability of the claims raised against [Defendants] should be submitted to an arbitrator.***

See **Final Order** (Exh. 5) (p. 5) (emphasis added).[15]

[14] The later arguments by Cellairis arrived in a 21-page reply brief [V-4-1221] 62 days after their opening motion. In this Court and any other court that allows reply briefs, these arguments would have been waved. Samaca unsuccessfully moved to strike Cellairis' reply brief. [V- 4; R-1240-1245]. While Samaca appealed the denial of the motion to strike as an error, this Court in Samaca I did not decide the issue. Still, Samaca refuted Cellairis' additional arguments in this first appeal, but these arguments were also not addressed in Case No. A17A1715.

[15] [V-4; R-1393].

(16) The trial court then dismissed the case.[16]

(17) Notably, the trial court misunderstood Samaca's arguments. Samaca argued that the *Forum Selection Clause* (***not*** the **AA Agreement**) superseded and was inconsistent with the arbitration clauses.[17] Like an arbitration clause, the Forum Selection Clause is treated as a distinct contract severable from the agreement in which it is contained. Equity Trust Co. v. Jones, 339 Ga. App. 11, 12 (2016). Respectfully, this oversight was repeated when Samaca I, 813 S.E.2d at 419-420, viewed the transaction documents *as a whole,* instead of examining the Forum Selection Clause and arbitration provisions as distinct contracts.

(18) The Forum Selection clause had an effective date of September 1, 2014, involved *all* four parties, and was supported by the $350,000 payment by Samaca. In contrast, the arbitration clauses were effective June 1, 2014 and did not apply to all of the parties in the transaction and were not expressly supported by Samaca's payment. Meanwhile the alleged "incorporated" arbitration clauses involved franchise documents that were never signed. Samaca I, 813 S.E.2d at 418. ("However, those new

[16] On December 30, 2016, prior to this dismissal, the trial court entered a default judgment in favor of Samaca against defendant Cell Phone Mania, LLC, which judgment was certified as final under O.C.G.A. § 9-11-54(b). [V-4; R-1386-7].

[17] [V-4; R- 1194-1199] Plaintiff's Response and Reply Memorandum to Motion to Dismiss Complaint and to Compel Arbitration (pp. 8-12 fn 20) ("Plaintiff's Response"). [V-3; R-9 fn. 1].

agreements within the AA Agreement were not signed."). (*See also* **Final Order** (Exh. 5 p. 5).[18]

(19) Nevertheless, in affirming the trial court, this Court ruled in relevant part:

> [T]he arbitration agreements at issue in this case include a "delegation provision" e.g., an agreement to arbitrate threshold issues concerning the arbitration agreement. The delegation provision clearly assigns responsibility for resolving "whether any specific claim is subject to arbitration at all (arbitrability questions)" to the arbitrator. "[J]ust as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, so the question *who* has the primary power to decide arbitrability turns upon what the parties agreed about *that* matter."

Samaca I, 813 S.E.2d at 420. **(**italics added; citations omitted).

(20) While the appeal was pending, on March 24, 2017, Cellairis filed the **Motion for Attorneys' Fees**. For its main argument, Cellairis asserted a "prevailing party" provision in the disputed **June 30 Franchise Agreements**. In the "alternative," Cellairis sought attorneys' fees under 9-15-14, claiming that Samaca's opposition to the motion to compel arbitration was frivolous. (pp. 8-10). Cellairis did not submit affidavits regarding the allegedly frivolous conduct by Samaca.[19]

[18] [V-4; R-1391]. "[T]he parties never executed new franchise or sub-license agreements…"

[19] Cellairis included an unsworn list of seven "(i) – (vii") supposedly improper acts in the case. Motion for Attorneys' Fees (Exh. 2 p. 10). Samaca refuted each with sworn statements in

(21) On April 3, 2017, Samaca filed **Plaintiff's Verified Response** (Exh. 6). Samaca's lead argument was: "Judicial estoppel bars the Court from hearing these claims because they also raise questions of arbitrability." (p. 3). Regarding the 9-15-14 claim, Samaca objected to the lack of affidavits concerning the allegedly abusive conduct. (p. 17).

(22) After the remittitur on November 26, 2018, Samaca asserted the law of the case in its **Motion to Compel Arbitration** (Exh. 3 p. 5 fn. 6), filed the same day.

(23) Samaca showed that both the "prevailing party" attorney fee claim[20] and the 9-15-14 claim also raised questions of arbitrability. Regarding the latter, Samaca showed that statutory rights, such as 9-15-14, also raise an issue of arbitrability. **Motion to Compel Arbitration** (Exh. 3) (pp. 6-8).

(24) On January 3, 2019, Cellairis filed **Defendants' Opposition to Samaca's Motion to Compel Arbitration**, a copy of which is attached as **EXHIBIT 7 HERETO**. In relevant part, Cellairis

Plaintiff's Verified Response (Exh. 6 p. 21-23). As shown at the end of this brief, Cellairis' putative affidavit by Ronald T. Coleman Jr. was not sworn and was limited to trying to authenticate and lay a business records foundation for invoices without allocating expenses as required for 9-15-14 claims.

[20] Samaca also showed that the trial court lacked jurisdiction over the "prevailing party" claim because the case had been dismissed. Montgomery v. Morris, 322 Ga. App. 558, 560 (2013). Motion to Compel Arbitration (Exh. 3 p. 6 fn. 7). In addition, Samaca showed that without having asserted a counterclaim, Cellairis' motion on this disputed provision had no legal basis. Plaintiff's Verified Response (Exh. 6 pp. 4-6).

argued: "Here, no controversy over arbitrability exists to be decided." (p. 5).

(25) On January 11, 2019, Samaca filed **Plaintiff's Reply to Defendants' Opposition to Samaca's Motion to Compel Arbitration**, a copy of which is attached as **EXHIBIT 8 HERETO.** In this reply, Samaca disputed Cellairis' assertion that there was no controversy about arbitrability. It then cited the U.S. Supreme Court's decision on January 8, 2019 in Henry Schein, Inc. 139 S.Ct. 524, which mandates that an arbitrator decide arbitrability issues, even if the trial believes these issues are "wholly groundless." (pp. 2, 5).

A. The trial court should have granted the entire Motion to Compel Arbitration.

(26) On February 12, 2019, the trial court jointly heard the **Motion for Attorneys' Fees** and the **Motion to Compel Arbitration**. Again citing judicial estoppel and the law of the case, Samaca made a continuing objection to the trial court's considering and ruling upon the arbitrability or the merits of the **Motion for Attorneys' Fees**. Samaca also made a continuing objection to any unsworn allegations by Cellairis' counsel or as presented in the **Motion for Attorneys' Fees.** *See* **Hearing Transcript** (pp. 4:15-21, 17:6-19:19), attached as **EXHIBIT 9 HERETO**.

(27) Samaca again cited the U.S. Supreme Court's decision in Henry Schein, Inc., informing the trial court that only an arbitrator may decide questions of arbitrability "even if the Court thinks that the question of arbitrability is, quote, wholly groundless." *See* **Hearing Tr.** (Exh. 11) (pp. 23:10-22).

(28) Nevertheless, on February 27, 2019, the trial court issued the **Initial Order** (Exh. 10), saying

that Samaca was liable under 9-15-14 but deferred the award. Then, on March 6, 2019, it issued the **Amended Order** that awarded money damages of $59,983.78. It did not explain the calculation, the allocation, or the proof on which the award is based. The trial court had no authority to decide the arbitrability, much less the merits, of the 9-15-14 claim. Henry Schein, Inc., 139 S. Ct. at 529

(29) The trial court also ruled that the "prevailing party" provision in the disputed **June 30 Franchise Agreement** is arbitrable:

> Insofar as the parties' agreements expressly state that "[a]II controversies, claims, or disputes ... arising out of or relating to ... [the] agreement ... (and/or] "[t]he scope and validity of th[e] Agreement" and "specifically including whether any specific claim is subject to arbitration at all (arbitrability questions)" must be decided by an arbitrator. [sic]. *The Court therefore finds that Defendants' request for fees under the "prevailing party" provision arises out of or is related to the agreement and thus must be decided by an arbitrator.*

Amended Order (p. 4). (Emphasis added). The trial court had no authority to rule on its arbitrability. Only an arbitrator did. Henry Schein, Inc., 139 S. Ct. at 529.

(30) These arbitrability rulings create other problems. The **Amended Order** arguably altered the **Final Order** (Exh. 5)[21] that dismissed the case and compelled arbitration on arbitrability. It usurped and revoked the arbitrator's exclusive power to decide

[21] [V-4; R-1389-1395]

arbitrability as to the above described matters. This has implications for other transaction provisions in future arbitration. For instance, Section 13 of the **AA Agreement** states: "Each party shall bear its own costs and expenses, including attorneys' fees and expenses of litigation, in connection with this Agreement."[22] In turn, as we know, the Forum Selection Clause in Section 11 of the **AA Agreement** says the trial court is the "sole and exclusive" forum for "any case or controversy". Therefore, until the **Amended Order** is reversed, the parties cannot proceed to arbitration on a proper basis.

(31) The **Amended Order** did not mention judicial estoppel, the law of the case from Samaca I or, even, Henry Schein, Inc. Samaca cited each of these before the trial court's rulings. As held in Henry Schein, Inc., when the parties have delegated arbitrability questions to an arbitrator, "***a court possesses no power to decide the arbitrability issue***. This is true even if the court thinks that the argument that the arbitration agreement applies to a particular dispute is wholly groundless." 139 S.Ct. at 529. (Emphasis added).

(32) This Court of Appeals has expressed a similar view. When a matter is referable to arbitration, it "***deprive[s] the court of the authority to conduct***" further proceedings on the matter. GF/Legacy Dallas, Inc. v. Juneau Construction Co., LLC, 282 Ga. App. 14, 17 (2006).

(33) In our case, the trial court could do nothing except refer the entire **Motion for**

[22] [V-3; R-53] Section 13 of AA Agreement attached as Exh. 1 to Complaint.

Attorneys' Fees to an arbitrator. **Hearing Tr**. (Exh. 9 p. 23:23-24:2).

B. <u>The trial court abused its discretion in awarding fees under 9-15-14(b).</u>

(34) If the above does not warrant reversal, the trial court abused its discretion and was not authorized to make an award under 9-15-14(b). The Forum Selection Clause provided firm grounds for Samaca to file suit in the trial court.

> No [one] is bound to forego litigation at the expense of yielding rights apparently well founded.... Where there is a bona fide controversy for the tribunals to settle, and the parties cannot adjust it amicably, there should be no burdening of one with the counsel fees of the other, unless there has been wanton or excessive indulgence in litigation**.**

<u>Estate of McNair v. McNair,</u> 343 Ga. App. 41 805 S.E.2d 655, 659 (2017) (citations and punctuation omitted).

(30) Moreover, a court is barred from awarding fees under 9-15-14(b) when there is a factual or legal dispute.

> **[A] court is <u>not</u> authorized to award attorney fees under OCGA § 9-15-14(b) where a ruling on the claim at issue is dependent upon the resolution of a factual or legal dispute.**

<u>Lee v. Park,</u> 341 Ga. App. 350 (1), 800 S.E.2d. 29, 33 (2017) (emphasis added) (citations omitted).

(31) The **Amended Order** (p. 6) made the following findings regarding the Section 9-15-14 motion:

> *Based on the clear and unambiguous language of the parties' agreements*, specifically the delegation clause which noted that whether any specific claim is subject to arbitration is itself a [sic] subject to arbitration, and the express incorporation of the arbitration clauses into the Assignment & Assumption Agreement, the Court finds that Plaintiff's arguments to the contrary lack substantial justification, *and that Plaintiff's conduct in the litigation of the claims before this Court was interposed for delay or harassment*. [Emphasis added].

(32) "[I]t is incumbent upon the court to specify the conduct upon which the award is made." Hall v. Monroe County, 271 Ga. App. 895, 897 (2005).[23] Without any textual analysis of the Forum Selection Clause, the trial court's findings are untenable. Neither Cellairis nor even the trial court initially saw "clear and unambiguous language [in]

[23] The **Amended Order** (p. 7) also says: "[T]he Court has also found that Plaintiff's tactics during the pendency of this case were meant to delay the disposition of the case and to harass and expand these proceedings for almost three years, thus justifying an award of attorneys' fees under O.C.G.A. § 9-15-14(b)." The reference to "tactics" is not explained. This appears to refer solely to Samaca's reliance on the Forum Selection Clause because no other "tactics" are described.

the parties' agreements". In moving to dismiss the case in Florida, Cellairis did not seek to compel arbitration. Instead, due to the Forum Selection Clause, Cellairis admitted the prospect that "***the case clearly needs to be litigated"*** in Georgia.

(33) Regarding the arbitrability "delegation provision," this was not a matter of Samaca having to show a "clear expression" that the **AA Agreement** superseded the arbitration clauses. **Final Order** (Exh. 5 p. 5). Rather, Cellairis (*not* Samaca) had the inescapable burden to prove the existence of an agreement to arbitrate arbitrability by "clear and unmistakable evidence." First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995). Given the Forum Selection Clause, this was a tall order. In this regard, the Forum Selection Clause had a "delegation provision"[24] of its own:

> [The trial court] ***shall be the sole and exclusive venue and sole and exclusive proper forum in which to adjudicate any case or controversy arising either, directly or indirectly, under or in connection with this Agreement.*** [Emphasis added].

(34) The term "controversy" includes arbitrability. Rent-A-Center W., Inc. v. Jackson, 561 U.S. 63, 68 (2010). In contrast to arbitrators, courts are presumed to have authority to decide arbitrability. First Options, 514 U.S. at 939. At a minimum, there is an ambiguity in this case. But "clear and unmistakable evidence" tolerates no

[24] The term "delegation provision" has no universal meaning. It was a term adopted by the parties in the U.S. Supreme Court case addressing an agreement to arbitrate arbitrability. Rent-A-Center W., Inc. v. Jackson, 561 U.S. 63, 68 (2010).

ambiguity. Even if both the Forum Selection and arbitration clauses stood together, courts are not allowed to prefer arbitration over litigation. "[F]ederal law places arbitration clauses on equal footing with other contracts, not above them." Janiga v. Questar Capital Corp., 615 F.3d 735, 740 (7th Cir. 2010). In sum, there was no "clear and unambiguous language" about *who* would decide arbitrability.

(35) Even after the law of the case, the trial court was unclear about *who* decides arbitrability. In the **Amended Order**, the trial court decided the arbitrability of the 9-15-14 motion saying it was not arbitrable. It reasoned as follows:

> Importantly, awards under 9-15-14 are not 'claims' subject to arbitration but rather constitute sanctions of the Court intended to recompense litigants and to punish and deter litigation abuses. *See* Long v. City of Helen, 301 Ga. 120, 121, 799 S.E.2d 741, 742 (2017); Riddell v. Riddell, 293 Ga. 249, 250, 744 S.E.2d 793, 794 (2013).

Amended Order (p. 7).

(36) But Long and Riddell do not support this. To the contrary, Long shows that "the origins of OCGA § 9-15-14…arose out of torts of malicious use and malicious abuse of the judicial process." Id. at 120 n. 2. In other words, 9-15-14 is a codification of a state law tort ***claim***. To be sure, Georgia's other abusive litigation statute, O.C.G.A. § 51-7-85, shows this as well:

> On and after April 3, 1989, ***no claim other than as provided*** in this article or ***in Code Section 9-15-14 shall be allowed***, whether statutory or common law, ***for the torts of malicious use of civil proceedings***, ***malicious abuse of civil process, nor abusive litigation***, provided that

> claims filed prior to such date shall not be affected. This article is the exclusive remedy for abusive litigation. [Emphasis added].

(37) The trial court cited no authority under the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.,* that would exempt "sanctions of the Court" under 9-15-14 from arbitration. Samaca finds none. Indeed, "[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the [Federal Arbitration Act]." AT&T Mobility, LLC v. Concepcion, 563 U.S. 333, 341 (2011).

(38) Respectfully, the trial court's misapprehension of Samaca's arguments carried over to Samaca I, 813 S.E.2d at 420. The Forum Selection Clause should have been treated as a distinct contract, separate from the **AA Agreement**.[25] The Forum Selection Clause "clearly dealt comprehensively with the same subject matter [of the arbitration clauses] – the circumstances and conditions under which claims between [all the parties] would be subject to [dispute resolution]. Waffle House, Inc. v. Pavesi, 343 Ga. App. 102, 105 (2017) (applying the contract merger doctrine).

(39) Also, let us not forget that Cellairis was the exclusive drafter of the documents in this case.[26] The Forum Selection Clause appeared in the specially-typed **AA Agreement**. This contrasts with the pre-printed forms of the **June 30 Franchise Agreements** and the **June 30 Sub-License Agreements**. Even if doubts are not construed

[25] [V-3; R-1194-96] **Plaintiff's Response** pp. 8-10 fn. 20. [V-3: R-9] Complaint ¶¶ 6-7 fn 1.

[26] **[V-4; R-1186] Affidavit of Arnaldo Gonzalez.**

against Cellairis under O.C.G.A. § 13-2-2(5) (as they should be), the Forum Selection Clause in the specially-typed **AA Agreemen**t is "entitled to most consideration" over the pre-printed arbitration clauses. O.C.G.A. § 13-2-2(7); Authentic Arch. Millworks v. SCM Group, 262 Ga. App. 826, 831 (2003) (contradictory typed provision overrides pre-printed language). And let us not forget that when Cellairis moved to dismiss Samaca's first suit in Florida, it did not even seek to compel arbitration because, under the Forum Selection Clause, it acknowledged the distinct prospect that the "***case clearly needs to be litigated.***" [27]

(40) Notably, this Court's decision in Samaca I, was a nonbinding physical precedent. Rule 33.2(a)(1). Therefore, one of the panel judges of this Court had reservations. Moreover, "[a] prevailing party is not perforce entitled to an award of attorney fees [under 9-15-14(b)]." Campbell v. The Landings Assn., 311 Ga. App. 476, 483 (2011). Cellairis should have been satisfied with its qualified victory. But the 9-15-14 motion was overreach.[28]

(41) After Samaca canvassed the nation for other cases in which the parties' transaction

[27] As a matter of contract, the AA Agreement (Section 11) states: "Each party shall bear its own costs and expenses, including attorneys' fees and expenses of litigation, in connection with this Agreement." This would bar the 9-15-14 motion. Plaintiff's Response to Defendants' Supplemental Brief in Support Of Motion for Attorneys' Fees and Expenses filed Jan. 11, 2019, EXH. 13 HERETO. (p. 13).

[28] Reputations are fragile. Motions for sanctions should not be brought except in the clearest cases based on evidence.

documents contained both a mandatory forum selection and an arbitration provision, Samaca I appears to stand alone in having ordered arbitration. *See* Arizon Structures Worldwide, LLC v. Global Blue Techs. -Cameron, LLC, 481 S.W.3d 542, 548 (Mo. App., 2015): ("A court cannot simultaneously give effect to an arbitration agreement stating that 'any dispute ... shall be ... resolved by binding Arbitration' …. and a contractual provision requiring '[a]ny controversy or claim ... be settled exclusively in …Court....'"); Goldman, Sachs & Co. v. Golden Empire Sch. Fin. Auth., 764 F.3d 210, 214 (2d Cir. 2014) ("[A]n agreement to arbitrate is superseded by a later-executed agreement containing a forum selection clause if the clause 'specifically precludes' arbitration, but there is no requirement that the forum selection clause mention arbitration"); Applied Energetics, Inc. v. NewOak Capital Markets, LLC, 645 F.3d 522, 525 (2d Cir. 2011) (Prior arbitration clause "stands in direct conflict" with subsequent forum selection clause stating "[a]ny dispute arising out of this Agreement shall be adjudicated in the Supreme Court, New York County or in the federal district court for the Southern District of New York."); Hyundai Merch. Marine Co. v. ConGlobal Indus., LLC, 2016 WL 695649, at *1 (N.D. Tex. Feb. 22, 2016) (Where arbitration clause read "[a]ny dispute between the parties hereto shall be resolved by arbitration and litigation in Dallas County, Texas," the court denied a motion to compel arbitration and held: "[T]he provision cannot reasonably be interpreted as expressing a clear and unambiguous intent of the parties to submit to binding arbitration"); PDX Pro Co., Inc. v. Dish Network, LLC, 2013 WL 3296539, at *3, *4 (D. Colo. July 1, 2013) ("The forum selection clause states that the state and federal courts of Colorado 'shall have

exclusive jurisdiction to hear and determine any claims, disputes, actions, or suits.' …. Similarly, the arbitration clause states that 'any and all disputes, controversies or claims…shall be resolved solely and exclusively by binding arbitration.'… "These provisions are all-inclusive, mandatory, and neither admits the possibility of the other."); Beumer Corp. v. Bloom Lake Iron Ore Mine Ltd., 2014 WL 2619676 (N.D. Ohio, June 12, 2014) ("[T]he Court Provision plainly states that '[a]ny disputes arising out of or in conjunction with this Agreement shall be adjudicated in the local, state or federal courts of Cleveland, Ohio. . . .' This language is broad and mandatory, and [movant] offers no meaningful argument as to why the phrase 'any dispute' does not include the 'substantive merits of their dispute,' nor does it explain how the phrase 'shall be adjudicated' leaves any room for arbitration"); GKD-USA, Inc. v. Coast Machinery Movers, 126 F.Supp.3d 553, 556-7 (D. Md., 2015) (Forum selection clause with subsequent "effective" date supersedes prior "effective" date arbitration clause.); Sharpe v. Ameriplan Corp.,769 F.3d 909, 918 (5th Cir., 2014) (Because forum selection clause allowed litigation, it could not be harmonized with arbitration clause; thus, plaintiffs could not be compelled to arbitrate their claims); Union Elec. Co. v. Aegis Energy Syndicate 1225, 713 F.3d 366, 368 (8th Cir., 2013) (forum selection clause "supplants" arbitration clause where parties agreed to "submit to the jurisdiction of the Courts…."; even if contract construed as a whole, ambiguity is construed against drafter).

C. The 9-15-14(b) award is excessive, unallocated and unsupported by evidence.

(42) Even if this Court disagrees with Samaca on the existence of a bona fide dispute, the award constitutes an excessive lump sum award that is unsupported by evidence. The **Amended Order** "fails to show the complex decision making process necessarily involved in reaching a particular dollar figure and fails to articulate why the amount awarded was [$59,983.79] as opposed to another amount." Fedina v. Larichev, 322 Ga. App. 76, 81 (2013).

(43) **Plaintiff's Verified Response** (Exh. 6 pp. 17, 21-23) specifically objected to the absence of affidavits needed to prove the allegedly abusive conduct and to allocate fees as required by Duncan v. Cropsey, 210 Ga. App. 814, 8-15-16 (1993). Further, at the February 12, 2019 hearing, Samaca made a continuing objection under O.C.G.A. § 24-6-603(a)[29] to unsworn allegations by Cellairis' counsel or as presented in the **Motion for Attorneys' Fees**. **Hearing Tr.** (Exh. 9 pp. 18:21-20:3) The Court did not direct oral testimony under O.C.G.A. § 9-11-43(b), and no one testified under oath at the hearing. *See* all 45 pages of **Hearing Tr.** (Exh. 9).

(44) Ronald T. Coleman Jr.'s purported affidavit for Cellairis attempted to authenticate and lay a business records foundation for legal invoices but did not allocate fees. However, the affidavit was not sworn before a notary, but only attested: "Signed,

[29] O.C.G.A. § 24-6-603(a) states:

> Before testifying, every witness shall be required to declare that he or she will testify truthfully by oath or affirmation administered in a form calculated to awaken the witness's conscience and impress the witness's mind with the duty to do so."

sealed, and delivered." O.C.G.A. § 45-17-1(1).[30] Despite page 1 of Exhibit J stating that Mr. Coleman had taken an oath, the notarial signature on the 9th unnumbered page does not state that the illegible notary actually administered an oath to Mr. Coleman. *See* Exhibit J (unnumbered 9th page) to **Motion for Attorneys' Fees** (Exh. 2). A notary's signature is not evidence of a document's other contents. O.C.G.A. § 45-17-8(f).[31] Cellairis had long notice of the failure to present sworn statements in support of their motion.[32] The record is closed and no second chance should be afforded to Cellairis.

V. CONCLUSION.

The trial court lacked power to decide the arbitrability of the entire **Motion for Attorneys' Fees**. Under judicial estoppel, the law of the case, and

[30] O.C.G.A. § 45-17-1(1) states:

> "Attesting" and "attestation" are synonymous and mean the notarial act of witnessing or attesting a signature or execution of a deed or other written instrument, *where such notarial act does not involve the taking of an acknowledgment, the administering of an oath or affirmation*, the taking of a verification, or the certification of a copy. [Emphasis added].

[31] O.C.G.A. 45-17-8(f) states:

> *The signature of a notary public documenting a notarial act shall not be evidence to show that such notary public had knowledge of the contents of the document so signed*, other than those specific contents which constitute the signature, execution, acknowledgment, oath, affirmation, affidavit, verification, or other act which the signature of that notary public documents…. [Emphasis added].

[32] Given the damage that 9-15-14 sanctions motions threaten to an attorney's professional reputation, even when the motion is only against his client, the importance of sworn evidence is especially critical.

Henry Schein, Inc., only an arbitrator may decide issues of arbitrability, including whether the 9-15-14 claim is arbitrable in this case. Until the **Amended Order** is reversed and Samaca's **Motion to Compel Arbitration** is granted in its entirety, the parties cannot proceed to arbitration on a proper basis.

Separately, if this issue must be reached, the trial court was not authorized to sanction Samaca under 9-15-14 for resisting Cellairis' motion to compel arbitration. The Forum Selection Clause provided Samaca with solid grounds for suing in the trial court. Even *Cellairis* believed this when Samaca first filed suit in Florida. Finally, the excessive lump sum award of $59,983.78 was neither properly allocated nor supported by admissible evidence.

WHEREFORE, Samaca respectfully requests that this appeal be allowed.

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Respectfully submitted this 11th day of March 2019.

D. R. MARTIN, LLC
/s/David Martin
David Martin
*****
ATTORNEY FOR PETITIONER-APPELLANT SAMACA, LLC.

APPENDIX CC
IN THE COURT OF APPEALS
STATE OF GEORGIA

SAMACA, LLC,
Petitioner-Appellant,
vs.
CELLAIRIS FRANCHISE, INC., GLOBAL CELLULAR, INC., and CELL PHONE MANIA, LLC,
Respondents-Appellees.

Case No. A19D0372
*****

RESPONSE IN OPPOSITION TO APPLICATION FOR DISCRETIONARY REVIEW

[Filed: March 21, 2019] [EXCEPT]

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*****
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INTRODUCTION

This Court should deny Samaca's Application for Discretionary Review because Samaca fails to meet its burden of showing any of the four justifications for a discretionary review under Georgia Court of Appeals Rule 31.[1]

In its application for appeal, Samaca claims the trial court erred by awarding sanctions against Samaca pursuant to O.C.G.A. § 9-15-14. As outlined below, Samaca's conduct in this case made this the quintessential case for an award of sanctions under O.C.G.A. § 9-15-14. Samaca challenges the sanctions award against it by making a technical argument that, where there is an arbitration clause requiring the arbitration of substantive claims, the trial court lacks authority to sanction litigants under O.C.G.A. § 9-15-14. Not surprisingly, Samaca's novel argument is unsupported by the applicable case law.

This case comes back to this Court after an almost three-year long history of litigation during which Samaca unjustifiably opposed its clear and unambiguous agreement to arbitrate. Moreover, during this lengthy litigation (which included a prior appeal and motion for reconsideration to this Court

[1] The day before Defendants' response was due, Samaca filed an Amended Application for Discretionary Review. For an unknown reason, Samaca filed the amended application to explain that the trial court denied Samaca's request for a certificate of immediate review of the trial court's interim order almost immediately after the trial court issued its final order sanctioning Samaca. Defendants maintain that this addition in Samaca's amended application is of no consequence. Accordingly, this Response responds to both Samaca's initial Application for Discretionary Review and Samaca's Amended Application for Discretionary Review.

and a petition for certiorari and motion for reconsideration to the Supreme Court of Georgia), Samaca repeatedly engaged in overly-litigious conduct that delayed and unnecessarily expanded the litigation. As a result, the trial court correctly sanctioned Samaca, finding that Samaca's arguments in this case "lack substantial justification" and that Samaca's "tactics during the pendency of this case were meant to delay the disposition of the case and to harass and expand these proceedings for almost three years."

Despite its sanctionable conduct, Samaca contends that the trial court could not impose sanctions without first allowing an arbitrator to decide whether the trial court had authority to impose sanctions pursuant to Section 9-15-14 of the Georgia Code. But, as the trial court correctly found, it should hardly need stating that a court's own procedural rules are not legal claims subject to arbitration. Neither the parties nor an arbitrator can divest a Georgia court of its authority to regulate litigation and sanction litigants pursuant to Georgia statutes. Samaca can cite no precedent supporting its far-fetched argument, and Defendants likewise have located no such authority. To the contrary, the decisions of this Court and courts around the country directly contradict Samaca's argument by affirming sanctions on parties that unjustifiably oppose arbitration.

Even Samaca's own recent trial court filing directly contradicts Samaca's arguments in its Application. In this appeal Samaca claims that the trial court lacked authority to grant Defendants' Motion for Attorneys' Fees and impose sanctions under O.C.G.A. § 9-15-14 given an arbitration clause. Today, however, Samaca filed its own copycat "Motion

for Attorney's Fees & Expenses under O.C.G.A. § 9-15-14" in the trial court.[2] Samaca's own request that the trial court impose sanctions pursuant to O.C.G.A. § 9-15-14 entirely undermines its Application to this Court. Moreover, Samaca's inconsistent conduct demonstrates that the purpose of Samaca's Application is to delay Defendants' recovery of their attorneys' fees. Accordingly, because Samaca's own actions demonstrate that its Application is patently meritless, this Court should deny Samaca's Application and not provide Samaca a platform to perpetuate its campaign of delay and harassing litigation. Samaca's remaining arguments rehash issues already resolved in Samaca's prior appeal and quibble with certain aspects of the trial court's Order. Samaca contends this Court's prior opinion was incorrectly decided and, therefore, that Samaca's legal positions were actually justified. But, Samaca's arguments still fail to squarely address the controlling and severable "delegation provision" in which Samaca agreed to arbitrate the "scope and validity of this Agreement specifically including whether any specific claim is subject to arbitration at all (arbitrability questions)." Samaca also contends that Defendants did not submit any sworn affidavits supporting the trial court's sanction. That position is directly contradicted by the two affidavits submitted by

[2] Samaca's copycat motion seeks sanctions against Defendants related to a different portion of the same Motion for Attorneys' Fees by Defendants that is the subject of Samaca's Application. Samaca confusingly filed today its motion under O.C.G.A. § 9-15-14 in the trial court, but then in the same motion "object[ed] to the Court's considering and ruling upon th[e] motion until an arbitrator decides whether it is arbitrable."

Defendants in which the notaries specifically stated that the affiant had been "duly sworn."

Samaca's Application is just the latest volley in Samaca's now well established history of abusive litigation. As a result of Samaca's conduct, this case has already been pending for almost three years without the parties commencing litigation on the merits of Samaca's claims. Over this time, Defendants have been forced to expend over $120,000 in attorneys' fees with no end in sight. Just in regards to Defendants' request for sanctions, Samaca has multiplied Defendants' expenses by filing: (1) an emergency motion to dismiss; (2) an opposition; (3) a sur-reply; (4) a request for hearing; (5) a supplemental brief; (6) a motion to compel arbitration; (7) a response to Defendants' response to Plaintiff's supplemental brief; (8) a response to Defendants' evidence of attorneys' fees and expenses; (9) a reply brief; (10) a motion for reconsideration and request for a certificate of immediate review; (11) a motion to set aside the trial court's order; (12) an initial application for discretionary review; and (13) an amended application for discretionary review—not even counting the plethora of unnecessary email communications Samaca sent to the trial court. Accordingly, because Samaca shows no reversible error, this Court should deny Samaca's Application and not provide Samaca with an additional platform for continued delay and abusive litigation.

FACTUAL AND PROCEDURAL BACKGROUND

Instead of succinctly stating the material facts relevant to its Application, Samaca's background statement focuses on its alleged merits claims, which are not before this Court, and is filled with disputed facts entirely irrelevant to the limited issues in the

Application. Given the sheer number of irrelevant allegations, Defendants will not belabor the Court by rehashing every error in Samaca's background statement. Rather, Defendants will succinctly state the relevant facts. Despite Samaca's complicated description, the transaction underlying this case involves a straightforward assignment and sale of four franchise units from one franchisee to another. To complete this transaction, Samaca executed four new Franchise Agreements and four new Sub-License Agreements with Defendants. Compl. at ¶ 63 (Vol. 3, R-21); Compl. at Exs. 18–25 (Vol. 3, R-558–R-1107).[3] Samaca's claim that the parties never concluded an agreement is false and belied by the allegations and documents attached to Samaca's own Verified Complaint. *See id.* In these agreements, Samaca also agreed to a "delegation provision" to arbitrate "[t]he scope and validity of this Agreement … specifically including whether any specific claim is subject to arbitration at all (arbitrability questions)." Compl., Exs. 18–21 at § 13(D)(1) (Vol. 3, R-622–R-623, R-725–R-726, R-829–R-830, R-923–R-924); Compl., Exs. 22–25 at § 13 (Vol. 3, R-980, R-1017, R-1055, R-1091). In March 2015, Samaca sued Cellairis and Global in Florida state court seeking to rescind the Franchise Agreements and Sub-License Agreements. Compl. at ¶ 106 (Vol. 3, R-33). Cellairis and Global moved to dismiss that action based on the arbitration agreements and because Florida was an improper venue in any event. Answer at ¶ 107 (Vol. 4, R-1157). Samaca selectively quotes Defendants' motion to create the misleading impression that Defendants did

[3] In many instances, Samaca did not include supporting documents in the Application Index, but rather cites to the record of its previous appeal, docket number A17A1715.

not raise the existence of the arbitration clauses. That is false. Defendants identified the arbitration clauses in the second sentence of the motion and repeatedly referred to Samaca's agreements to arbitrate throughout the motion. Defs.' Mot. to Dismiss for Improper Venue and Failure to State a Claim at 1–12 (Appl., Ex. 2 at 30–42). Before the Florida court could rule on that motion, Samaca voluntarily dismissed its suit. Compl. at ¶ 108 (Vol. 3, R-33).

Instead of pursuing arbitration, Samaca then initiated this suit in Georgia state court. *Id.* Appellees once again moved to dismiss based on the arbitration clauses (the "Arbitration Motion"). *See generally* Arbitration Motion (Vol. 4, R- 1127–R-1136). The trial court granted Appellees' Arbitration Motion, and Samaca appealed to this Court. *See generally* Order (Vol. 4, R-1389–R-1395). This Court affirmed the trial court's order and denied Samaca's motion for reconsideration. *See Samaca, LLC v. Cellairis Franchise, Inc.*, 345 Ga. App. 368 (2018) (physical precedent), reconsideration denied (Mar. 20, 2018), cert. denied (Oct. 22, 2018). The Supreme Court of Georgia likewise denied Samaca's petition for certiorari and also denied Samaca's motion for reconsideration. *See id.* Shortly after the trial court's Order granting the Arbitration Motion, Defendants filed a Motion for Attorneys' Fees pursuant to the parties' contracts and O.C.G.A. § 9-15-14 (the "Sanctions Motion"). *See generally*, Sanctions Motion (Appl., Ex. 2). As Defendants explained in the Sanctions Motion, sanctions were appropriate under O.C.G.A. § 9-15-14 because Samaca lacked any substantial justification for opposing arbitration and because Samaca's overly litigious conduct was designed to harass Defendants and expand the

proceedings. Sanctions Motion at 8–10 (Appl., Ex. 2 at 8–10). Samaca opposed the Sanctions Motion on a variety of procedural grounds. Then, over a year-and-a-half later, Samaca filed a belated motion to compel arbitration of the Sanctions Motion. *See generally* Pl.'s Mot. to Compel Arbitration (Appl., Ex. 3). Samaca contended that an arbitrator must first decide whether the trial court could impose sanctions pursuant to O.C.G.A. § 9-15-14. *Id.* Following full briefing on the Sanctions Motion and Samaca's motion to compel arbitration, the trial court held a hearing on the motions. *See generally*, February 12, 2019 H'rg Tr. (Appl., Ex. 9). During that hearing, Samaca did not cross-examine Defendants' counsel or otherwise contest the reasonableness or necessity of the attorneys' fees incurred by Defendants. *Id.*; *see also* Order at 6 n.2. (Appl., Ex. 1 at 6 n.2). After the hearing, the trial court entered an initial Order: (i) holding that an arbitrator must determine the arbitrability of Defendants' request for attorneys' fees pursuant to the parties' contracts (an issue that is not before this Court), and (ii) sanctioning Samaca for presenting arguments that lacked substantial justification and for conduct that was interposed for delay and harassment. Order at 6–7 (Appl., Ex. 10 at 6–7). At that time, the trial court reserved ruling on the proper amount of sanctions. *Id.* The trial court held that its imposition of sanctions under O.C.G.A. § 9-15-14 involved no arbitrability issue. Order at 7 (Appl., Ex. 1 at 7). The trial court later entered an Amended Order imposing a sanction of $59,983.78 on Samaca under O.C.G.A. § 9-15-14(b). *Id.* at 6 (Appl., Ex. 1 at 6).

ARGUMENT AND CITATION OF AUTHORITIES

This Court should deny Samaca's Application because Samaca cannot meet its burden to establish the requirements for a discretionary appeal. Pursuant to Rule 31(b), applications "will be granted only when: (1) Reversible error appears to exist; (2) The establishment of a precedent is desirable; (3) Further development of the common law … is desirable; or (4) [appeals of a judgment and decree of divorce]." Ga. Ct. App. R. 31(b) (emphasis added). "The applicant bears the burden of persuading the Court that the application should be granted." Id. As explained below, the trial court correctly sanctioned Samaca for taking positions lacking substantial justification and for litigation interposed for delay and harassment. Likewise, Samaca does not show that the establishment of additional precedent on these issues is desirable. In fact, Samaca's Application largely rehashes the same arguments already resolved by this Court in Samaca's previous appeal. Additional precedent would be cumulative. Accordingly, this Court should deny the Application.

I. The Trial Court Correctly Held that Samaca Raised No Arbitrability Issue.

This Court should deny Samaca's request for discretionary review because the trial court correctly held that its imposition of sanctions pursuant to Georgia's civil practice statutes raised no issue of arbitrability that the parties could arbitrate. The propriety of that holding should be indisputable given that Samaca has also now filed its own "Motion for Attorney's Fees & Expenses under O.C.G.A. § 9-15-14" in the trial court. As the trial court explained, "awards under 9-15-14 are not 'claims' subject to

arbitration but rather constitute sanctions of the Court ….” Order at 7 (Appl., Ex. 1 at 7). Although Defendants agree with Samaca that any dispute as to which *claims* must be arbitrated must itself be arbitrated, Samaca’s argument assumes without any explanation or support that the trial court’s imposition of sanctions pursuant to Georgia’s civil practice statutes raises a question of arbitrability. Critically, Defendants’ request for sanctions raised no arbitrability issue that the parties could be compelled to arbitrate—that is no issue of whether a legal claim is covered by an agreement to arbitrate.

As Samaca acknowledges, an “arbitrability” issue is an issue of whether a legal claim is covered by an agreement to arbitrate. Appl. at 2. The trial court’s application of its own procedural rules to impose sanctions pursuant to a statute in the Civil Practice Title of Georgia’s Code raises no such issue. Samaca’s argument mistreats O.C.G.A. § 9-15-14 as a substantive legal claim, subject to an arbitrability determination. It is not. Rather, the statute sets forth the powers of a court to govern proceedings “in any civil action in any court of record.” O.C.G.A. § 9-15-14(b). The statute “does not create a tort claim” that the parties could agree to arbitrate or be compelled to arbitrate. *See Deavours v. Hog Mountain Creations, Inc.*, 207 Ga. App. 557, 558 (1993), disapproved on other grounds, 213 Ga. App. 337 (1994) (emphasis in original). Instead, O.C.G.A. § 9-15-14 merely makes “procedural provision” for a trial court to award “sanctions against certain enumerated abuses ….” *Id.*; *see also Century Ctr. at Braselton, LLC v. Town of Braselton*, 285 Ga. 380, 383 (2009) (describing O.C.G.A. § 9-15-14 as a sanction available to a trial court, not as a legal claim). Because O.C.G.A. § 9-15-14 is not a legal claim, there can be no arbitrability

determination. The trial court's own rules and powers cannot be compelled to arbitration. Georgia precedent makes clear that this procedural rule "was made applicable only to courts of record of this state." *Style Craft Homes v. Chapman*, 226 Ga. App. 634, 635 (1997) (quotation omitted). The statute precludes "any non-court of record," like an arbitration tribunal, from imposing costs of litigation under O.C.G.A. § 9-15-14. *Id.* Although Samaca now flip-flops on its position, Samaca previously acknowledged that "O.C.G.A. § 9-15-14(a) applies only to 'civil actions to [sic] any court of record of this state.'" Pl.'s Resp. to Mot. for Att'ys' Fees at 7 n.14 (Appl., Ex. 6 at 7 n.14). Moreover, even after the trial court's Order compelling arbitration, Samaca acknowledged that "the Court continues to have jurisdiction to decide Defendants' Motion under O.C.G.A. § 9-15-14." Pl.'s Req. for Hr'g on Defs. Mot. for Att'y's Fees and Expenses at 2 (attached as Exhibit 1).[4] Today, Samaca even filed its own "Motion for Attorney's Fees & Expenses under O.C.G.A. § 9-15-14" in the trial court further illustrating that the trial court's imposition of sanctions pursuant to O.C.G.A. § 9-15-14 raises no arbitrability issue.

For these reasons, Georgia courts routinely impose sanctions pursuant to O.C.G.A. § 9-15-14 even when the legal claims in a case must be arbitrated.

[4] Plaintiff's Application Index failed to attach the full briefing and materials related to its Application. For example, Samaca omitted Defendants' Supplemental Brief in Support of Motion for Attorneys' Fees and Expenses, even though Samaca included its own response to that brief. Given these omissions, Defendants have attached the omitted briefing and materials to this Response.

See, e.g., *Marchelletta v. Seay Const. Servs., Inc.*, 265 Ga. App. 23, 29 (2004) (affirming trial court's grant of O.C.G.A. § 9-15-14 motion despite substantive claims being arbitrated); *Harkleroad & Hermance, P.C. v. Stringer*, 220 Ga. App. 906, 906 (1996) (reversing trial court's denial of O.C.G.A. § 9-15-14 motion despite substantive claims being arbitrated). Likewise, courts outside of Georgia also hold that a court's imposition of sanctions is not a question of arbitrability. *See, e.g.*, *Cuna Mut. Ins. Soc. v. Office and Professional Employees Intern. Union*, 443 F.3d 556, 563 n.1 (7th Cir. 2006) (noting that "even if there was a question of arbitrability in this case, Rule 11 sanctions may still apply"); *Aveta Inc. v. Bengoa*, 986 A.2d 1166, 1183–84 (Del. Ch. 2009) (rejecting argument that arbitration agreement could strip the court of jurisdiction to hold parties in contempt).

On the other hand, Samaca can cite no authority supporting its incredible proposition that an arbitrator must decide whether a court can enforce its own rules. Plainly, parties cannot contract around a court's procedural rules. Likewise, an arbitrator cannot strip a court of authority to enforce its own procedural rules. Simply put, the trial court, not an arbitrator, is responsible for enforcing its own rules for proceedings before the trial court. Samaca's position seems to be that, if there is an arbitration clause, the trial court has no authority to regulate litigants and counsel before it during proceedings to compel arbitration. This is not the law, and Samaca has offered no legal authority to support that surprising position. Accordingly, the trial court correctly determined that Defendants' request for sanctions did not create any arbitrability issue.

II. The Trial Court Correctly Sanctioned Samaca Pursuant to O.C.G.A. § 9-15-14.

This Court should deny Samaca's request for discretionary review because the trial court correctly sanctioned Samaca pursuant to O.C.G.A. § 9-15-14(b). This Court reviews a trial court's sanctions pursuant to O.C.G.A. § 9-15-14(b) for an abuse of discretion. *Chadwick v. Brazell*, 331 Ga. App. 373, 380 (2015). Samaca cannot show that the trial court abused its discretion either in finding that Plaintiff's arguments "lack substantial justification" or in finding that Samaca's conduct "was interposed for delay or harassment." Order at 6 (Appl., Ex. 1 at 6).

A. Samaca's arguments lacked substantial justification and were interposed for delay and harassment.

Although Samaca quibbles with the trial court's Order and reargues the points raised in its prior appeal, Samaca cannot establish that the trial court abused its discretion in awarding sanctions based on Samaca's unjustified arguments and harassing litigation. At the outset, Samaca's brief ignores altogether the trial court's finding that sanctions were appropriate because Samaca's conduct was interposed for delay and harassment. Order at 6 (Appl., Ex. 1 at 6-7). At minimum, this undisputed finding of the trial court is not an abuse of discretion and warrants denying Samaca's Application. As the trial court explained, "Plaintiff's tactics during the pendency of this case were meant to delay the disposition of this case and to harass." *Id.* at 7 (Appl., Ex. 1 at 7). As a result of these harassing tactics, Plaintiff prevented the expedient resolution of a straightforward motion to compel arbitration and "expand[ed] these proceedings for almost three years." *Id.* (emphasis added) (Appl., Ex. 1 at 7).

Turning to the trial court's finding that Samaca's arguments "lacked substantial

justification," Samaca once again has failed to present any substantive response. In opposition to Defendants' request for sanctions, Samaca did not address the controlling "delegation provision," in which Samaca indisputably agreed to arbitrate questions of arbitrability. Instead, Samaca's opposition focused on a plethora of procedural objections, almost all of which it has long since abandoned. This Court should deny Samaca's Application, and not allow Samaca to make new arguments that it failed to make nearly two years ago.

In any event, Samaca's various arguments fail to show any abuse of discretion. First, Samaca quibbles that the trial court's Order did not provide "textual analysis" of its arguments. Appl. at 22. Georgia law, however, contains no requirement that a trial court provide detailed "textual analysis" of each of Samaca's arguments. And, Samaca cites no authority for such a requirement. To the contrary, Georgia law states that "the trial court need not cite specific testimony, argument of counsel, or any other specific factual reference in its order awarding fees under O.C.G.A. § 9-15-14." *Heiskell v. Roberts*, 342 Ga. App. 109, 117 (2017). Even the case Samaca cites explains that a trial court only needs to "specify the conduct upon which the award is made" when imposing sanctions. *See Hall v. Monroe Cty.*, 271 Ga. App. 895, 897 (2005). The point is to provide a clear order, not a law review article. The trial court met this standard by explaining how Samaca's arguments lacked substantial justification in light of the "clear and unambiguous" delegation provision and the delegation provision's express incorporation into other contractual documents.

Second, Samaca repeats its improper arbitrability arguments and contends that this Court

erred in resolving Samaca's previous appeal. Defendants will not respond to each of these irrelevant arguments in order to avoid relitigating the issues that this Court already decided in the previous appeal. The controlling point is that Samaca agreed in a delegation provision to arbitrate the "scope and validity of this Agreement … specifically including whether any specific claim is subject to arbitration at all (arbitrability questions)." Compl., Exs. 18–21 at § 13(D)(1) (Vol. 3, R-622–R-623, R-725–R-726, R-829–R-830, R-923–R-924); Compl., Exs. 22–25 at § 13 (Vol. 3, R-980, R-1017, R-1055, R-1091). This delegation provision is enforceable, severable, and not impacted by any challenges to the contract or arbitration clause. Arbitration Motion at 9 (citing *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 69-72 (2010)) (Vol. 4, R-1135). Plaintiff did not dispute that it agreed to the delegation provision, that the delegation provision was severable from the rest of the contract, and that the delegation provision required an arbitrator—not a court—to decide all questions of arbitrability. Accordingly, Samaca's remaining arguments necessarily "lacked substantial justification" because they had to be presented to an arbitrator, not to a court.

The only argument Samaca makes that could be properly decided by the Court is Samaca's frivolous argument that Defendants did not show the existence of an agreement to arbitrate arbitrability by "clear and unmistakable evidence." Appl. at 22–23. That argument is patently false because Samaca's own verified Complaint acknowledged that Samaca executed the agreements attached to

Samaca's Complaint containing Samaca's agreement to arbitrate "whether any specific claim is subject to arbitration at all (arbitrability questions)."

Compl. at ¶ 63 (Vol. 3, R-21); Compl., Exs. 18–21 at § 13(D)(1) (Vol. 3, R-622–R-623, R-725–R-726, R-829–R-830, R-923–R-924); Compl., Exs. 22–25 at § 13 (Vol. 3, R- 980, R-1017, R-1055, R-1091). Moreover, since that time, Plaintiff has alleged in its own misguided Motion to Compel Arbitration that "an arbitrator, not the Court, must decide whether 'all controversies, claims or disputes'… are arbitrable." Pl.'s Mot. to Compel Arbitration at 2 (Appl., Ex. 3 at 2). Accordingly, the trial court correctly determined that Samaca's arguments lacked substantial justification and were interposed for delay and harassment.

B. The trial court's sanction was supported by competent and uncontradicted evidence.

Samaca cannot establish that the trial court abused its discretion in setting an appropriate amount for a sanction. In its Application, Samaca contends that "no evidence supports the award" and objects to "the absence of affidavits." Appl. 9, 29. These statements are simply false. As Samaca later implicitly acknowledges, Defendants submitted two affidavits from Defendants' lead counsel Ronald T. Coleman, Jr. setting forth in detail the rates charged by Defendants' counsel, the reasonableness of those rates, and the work performed. *See generally* Aff. of Ronald T. Coleman, Jr. (Appl., Ex. 2 at 73–114); 2d. Aff. of Ronald T. Coleman, Jr. (attached as Exhibit 3-1). Each of these affidavits also attached billing invoices containing narrative descriptions of each time entry. Aff. of Ronald T. Coleman, Jr. at Ex. 1 (Appl., Ex. 2 at 83–114); 2d. Aff. of Ronald T. Coleman, Jr. at Ex. 1 (attached as Exhibit 3-1 at 8–38). Samaca contends that these affidavits were "not sworn by a notary," but that allegation is also demonstrably false. *See* Appl. at 30. At the beginning of each affidavit, the

notary specifically states that "[b]efore me, the undersigned authority, personally appeared Ronald T. Coleman, Jr., who after being duly sworn, states and deposes as follows…." Aff. of Ronald T. Coleman, Jr. at 1 (Appl., Ex. 2 at 73) (emphasis added); 2d. Aff. of Ronald T. Coleman, Jr. at 1 (attached as Exhibit 3-1 at 1) (emphasis added). Although its argument is not clear, Samaca seemingly contends that the notary's statement that Mr. Coleman was "duly sworn" is somehow invalid because it appears at the beginning of the affidavit and not at the end. That argument makes little sense because a witness is ordinarily sworn before testifying, not afterwards. Moreover, Samaca cites no authority for this argument.

Not only did Defendants submit sufficient evidence, but the trial court's Order also evidences that the trial court carefully evaluated the evidence to reach an appropriate sanction. Notably, Samaca did not "cross examine Defense counsel or otherwise object at the hearing to the reasonableness or necessity of any portion of the requested fees and costs." Order at 6 n.2 (Appl., Ex. 1 at 6 n.2); *see also* February 12, 2019 H'rg Tr. (Appl., Ex. 9). Nevertheless, despite Samaca waiving any objection to the reasonableness or necessity of the requested fees, the trial court did not "rubber stamp" Defendants' request for fees. Instead, the Court specifically analyzed what fees were "incurred … as a result of Plaintiff's sanctionable conduct." Order at 6 (Appl., Ex. 1 at 6). The trial court ultimately concluded that Defendants were only entitled to fees through March 22, 2017, even though Defendants requested fees from a larger time period. The trial court also determined that Defendants were not entitled to fees related to Defendants' Motion to Stay Discovery and for Protective Order. As a result, the

trial court sanctioned Samaca for only $59,983.78 of the $120,087.19 in fees and costs Defendants requested.

III. Samaca Cannot Evade the Discretionary Review Procedure.

Although Samaca filed an application for discretionary review, Samaca also argues that this Court has jurisdiction over this case as a direct appeal from an order denying a motion to compel arbitration. At the outset, the very fact that Samaca filed an application for discretionary review evidences that not even Samaca really believes that it is entitled to a direct appeal. Otherwise, Samaca would have filed a notice of direct appeal.

The critical problem with Samaca's argument is that the underlying subject matter of this appeal is an award of attorneys' fees under O.C.G.A. § 9-15-14. This underlying subject matter requires an application for a discretionary appeal. See O.C.G.A. § 5-6-35(a)(10). In cases procedurally covered by the direct appeal statute (e.g., the denial of a motion to compel arbitration), but where the underlying subject matter is covered by the discretionary appeal statute (e.g., an award of attorneys' fees under O.C.G.A. § 9-15-14), "it is always the underlying subject matter that will control." *Numanovic v. Jones*, 321 Ga. App. 763, 764 (2013). As this Court has previously explained:

> When an appealed judgment or order is of a type listed in OCGA § 5–6–34, but concerns subject matter listed in OCGA § 5–6–35, both the direct and discretionary appeal statutes are implicated. In such cases, the Supreme Court of Georgia has held that the underlying subject matter prevails over the procedural judgment and determines whether the appellant has a

> right to a direct appeal or whether the appellant must seek discretionary review. In other words, if the underlying subject matter of the relief sought in the trial court is listed in the discretionary appeal statute, the appellant must obtain permission to file an appeal, even though the judgment or order is listed in the direct appeal statute.

Best Tobacco, Inc. v. Dep't Of Revenue, 269 Ga. App. 484, 485 (2004) (internal citations omitted). Thus, because this case involves an underlying award of attorneys' fees pursuant to O.C.G.A. § 9-15-14, "the discretionary application procedure must be followed, even when the party is appealing a judgment or order that is procedurally subject to a direct appeal under O.C.G.A. § 5-6-34(a)." *Rebich v. Miles*, 264 Ga. 467, 468 (1994).

This approach comports with the plain text of the appellate jurisdiction statutes, because the direct appeal statute (O.C.G.A. § 5-6-34) specifically excepts cases provided for in the discretionary appeal statute (O.C.G.A. § 5-6-35). *See* O.C.G.A. § 5-6-34(a)(1). This approach also serves an important practical purpose: "Otherwise, any party could avoid the discretionary review procedure by seeking relief, however inappropriate, that would trigger the right to a direct appeal." *Rebich*, 264 Ga. at 468. That is exactly the issue in this case. Samaca cannot evade the discretionary appeal process by belatedly filing a motion to compel arbitration. Otherwise, any party could secure a direct appeal simply by filing a motion to compel arbitration.

CONCLUSION

In sum, Samaca has failed to meet its burden to show any reversible error or any need for additional precedent. The trial court correctly determined that

its own authority to sanction litigants raised no issue of arbitrability. And, Samaca has failed to demonstrate any way in which the trial court abused its discretion by sanctioning Samaca. For these reasons, this Court should reject Samaca's Application for Discretionary Review.

[Signature Block on Following Page]

I certify that this submission does not exceed the word count limit imposed by Rule 24.

Respectfully submitted this 21st day of March, 2019.

PARKER, HUDSON, RAINER & DOBBS LLP

/s/ Jared C. Miller
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*****

Counsel for Respondents Cellairis Franchise, Inc. and Global Cellular, Inc.

APPENDIX DD

**IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA**

SAMACA, LLC, Plaintiff, vs. CELLAIRIS FRANCHISE, INC., GLOBAL CELLULAR, INC., and CELL PHONE MANIA, LLC, Defendants.

CIVIL ACTION NO. 2016 CV 276036

[Filed: March 21, 2019]. [Excerpt]

PLAINTIFF'S VERIFIED MOTION AND BRIEF FOR ATTORNEY'S FEES & EXPENSES UNDER O.C.G.A. § 9-15-14

Subject to the objection below, Plaintiff Samaca, LLC ("Samaca") moves for attorney's fees and expenses under O.C.G.A. § 9-15-14(a) or (b) against Cellairis Franchise, Inc. ("Cellairis") and Global Cellular, Inc. ("Global") (collectively "Defendants").

*****

OBJECTION TO ARBITRABILITY DETERMINATION BY THE COURT

Pursuant to the law of the case in Samaca, LLC v. Cellairis Franchise, Inc., 345 Ga. App. 368, 813 S.E.2d 416 (2018) finding that the parties in this action are bound by a valid arbitrability "delegation

provision," Samaca respectfully objects to the Court's considering and ruling upon this motion until an arbitrator decides whether it is arbitrable. *See also* Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S.Ct. 524 (2019) (valid arbitrability "delegation provision" requires that arbitrator determine arbitrability issue even if trial court believes the issue is wholly groundless.) This Court's order[1] with a contrary finding is currently the subject of a petition for appellate review filed by Samaca on March 11, 2019 in the Georgia Court of Appeals, Case No. 19D0372.

*****

INTRODUCTION AND BACKGROUND.

Defendants should be held jointly and severally liable to Plaintiff under O.C.G.A. § 9-15-14(a) or (b) for attorney's fees and expenses for having to defend against their claim under Section 13(K) (the "Section 13(K) claim") of the disputed **June 30 Franchise Agreements**.[2] On February 27, 2019, the Court

[1] **Amended Order on Defendants' Motion for Attorneys' Fees and Plaintiff Samaca, LLC's Cross Motion to Compel Arbitration of Defendants' Motion for Legal Expenses** on March 6, 2019. (the "**Amended Order**")

[2] Unless otherwise shown herein, the bold, capitalized defined terms in this motion have the same meaning

compelled arbitration and denied the Section 13(K) claim.[3] Defendants should have never presented the Section 13(K) motion in this court proceeding.

*****

CONCLUSION.

In connection with any future hearing on this motion under 9-15-14, Samaca will incur additional fees and expenses. These fees and expenses will be added to the $61,065.00 sought in this motion. Subject to the proper authority deciding its arbitrability, Samaca respectfully requests that this motion be granted.

Respectfully submitted this 21st day of March 2019.

D. R. MARTIN, LLC

By: /s/ David R. Martin
*****
COUNSEL FOR PLAINTIFF SAMACA, LLC

*****

as those contained in the **Complaint**, (p. 2), Guide to Terms & Abbreviations, filed June 3, 2016.

[3] *See* **Order on Defendants' Motion for Attorneys' Fees and Plaintiff Samaca, LLC's Cross Motion to Compel Arbitration of Defendants' Motion for Legal Expenses** (pp. 4-5).

APPENDIX EE

Court of Appeals
of the State of Georgia

Application No. A19D0539
Samaca LLC v. Cellairis Franchise, Inc., Global Cellular, Inc., and Cell Phone Mania, LLC
[Filed July 1, 2019] [EXCERPT]

APPLICATION FOR DISCRETIONARY REVIEW AND REQUEST TO ACCEPT AS DIRECT APPEAL UNDER O.C.G.A. § 5-6-35(j)

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Petitioner-Appellant

*****

I. THE ORDER AND THE BRIEFING

On June 4, 2019, the Superior Court of Fulton County, Georgia, Hon. Alice D. Bonner presiding, denied a motion by appellant Samaca, LLC ("Samaca") for fees and expenses under O.C.G.A. § 9-15-14 against appellees Cellairis Franchise, Inc. and

Global Cellular Inc. (collectively "Cellairis").[1] A copy of the **Order** is attached as **EXHIBIT 1 HERETO**. The **Order** is a nullity because the trial court had no power to rule on Samaca's 9-15-14 motion. ***Only an arbitrator had this power***. Until this **Order** is vacated or reversed, Samaca cannot proceed to arbitration on the rest of its claims on a proper basis. All claims between the parties must be decided in the same forum, not by piecemeal adjudications yielding, as here, inconsistent results.[2] The **Order** is otherwise incorrect as Cellairis clearly filed a frivolous claim against Samaca that consumed almost two years of its time.

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II. JURISDICTION

The Court has jurisdiction because this case does not fall within the cases reserved to the Supreme Court of Georgia under the Georgia Constitution of 1983, Art. VI § 5, ¶ 3; Id. § 6, ¶¶ 2-3. The **Order** is a final judgment because "the case is no longer pending in the court below". O.C.G.A. § 5-6-34(a)(1).

Because Samaca seeks to enforce the law of the case in Samaca, LLC v. Cellairis Franchise, Inc., 345 Ga. App. 368, 813 S.E.2d 416 (2018) (Case No. A17A1715) (physical precedent) *cert. denied* (Case No. S18C1072) (Oct. 22, 2018) ("**Samaca I**")[3] and the

[1] Appellee Cell Phone Mania, LLC did not appear in the action and suffered default judgment.

[2] ***

[3] Record citations to Case No. A17A1715 in Samaca I are denoted herein as [V-_; R-].

Federal Arbitration Act (the "FAA"),[4] the Court should grant the application as a direct appeal under O.C.G.A. § 5-6-35(j).[5] Samaca I held that under the FAA an ***arbitrator***, ***not*** a court, must decide whether "any specific claim" by Samaca is arbitrable. Samaca I, 813 S.E.2d at 420. This is the "underlying subject matter" in the first instance for purposes of O.C.G.A. §§ 5-6-34(a) and 5-6-35(a). By filing an application and not a notice of appeal, Samaca is ***not*** conceding that a discretionary application is required. Rather, it is following the sensible recommendation of two justices of the Supreme Court of Georgia: "[T]he more efficient path would be to file only an application, because this Court has made clear that when an application is filed, but a direct appeal is permitted, we will grant the application under OCGA § 5-6-35 (j)." Schumacher v. City of Roswell, 301 Ga. 635, 803 S.E.2d 66, 73 (2017) (J. Grant and J. Nahmias concurring).

The first "underlying subject matter" that this appeal must consider is ***not*** the 9-15-14 claim, but rather the law of the case in Samaca I, enforcing the FAA. Under O.C.G.A. § 9-11-60(h), "any ruling by the

[4] 9 U.S.C. §§ 1 et seq.

[5] O.C.G.A. § 5-6-35(j) states:

> When an appeal in a case enumerated in subsection (a) of Code Section 5-6-34, but not in subsection (a) of this Code section, is initiated by filing an otherwise timely application for permission to appeal pursuant to subsection (b) of this Code section without also filing a timely notice of appeal, the appellate court shall have jurisdiction to decide the case and shall grant the application. Thereafter the appeal shall proceed as provided in subsection (g) of this Code section.

Supreme Court or the Court of Appeals in a case shall be binding in any subsequent proceedings in that case in the lower court and the Supreme Court or the Court of Appeals as the case may be. *See also* O.C.G.A. § 15-1-3(3) ("Every court has power …[t]o compel obedience to its judgments…."); *see also* Raybestos-Manhattan, Inc. v. Moran, 284 Ga. 461 (1981) (Court of Appeals has jurisdiction over writs of mandamus and prohibition to compel trial court to enforce its judgment).

Most importantly, this appeal must be granted to obey the Supremacy Clause of the United States Constitution that requires enforcement of the FAA. *See* DirecTV, Inc. v. Imburgia, 136 S. Ct. 463, 468 (2015) (State courts must enforce the FAA); s*ee also* American General Financial Services v. Jape, 291 Ga. 637, 644-45 n. 3 (2012) (J. Nahmias concurring specially) (The Georgia Supreme Court has given "firm direction" to trial courts to issue certificates of immediate review from denials to enforce the FAA). Samaca submits that no appellate state court has discretion on whether to enforce the FAA. *See* AT&T Mobility, LLC v. Concepcion, 563 U.S. 333, 341 (2011) (state law may not prohibit enforcement of FAA).

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III. BACKGROUND AND SUMMARY

The basic facts appear in Samaca I. In sum, Samaca's complaint shows that Cellairis duped Samaca into purchasing a worthless cell phone repair franchise in Florida. Samaca also shows that the parties concluded no valid and enforceable agreement at all. Nonetheless, the trial court dismissed Samaca's complaint and compelled its claims to arbitration under the FAA pursuant to an arbitrability "delegation provision" in the disputed franchise

documents.[6] The "delegation provision" requires that an ***arbitrator,*** **not** a court, decide whether "any specific claim" is ***arbitrable***, that is, whether "any specific claim" is subject to arbitration.[7]

Samaca appealed, and this Court affirmed the trial court's order in Samaca I. The case should have ended then and there, and the parties should have proceeded to arbitration. However, Cellairis filed two post-dismissal claims for attorney's fees in the trial court. The first concerns the claim here: a "prevailing party" contract claim made under the ***same franchise documents in dispute, the dispute that was ordered to arbitration in*** **Samaca I**. The second was an "alternative" claim under 9-15-14.[8]

[6] Order entered February 7, 2017. Samaca I [V-4; R-1389].

[7] The arbitration provision, shown in Samaca I, 813 S.E.2d 417-8, reads as follows:

> [The parties agree] all controversies, claims, or disputes between Company and FRANCHISEE arising out of or relating to: a. This agreement or any other agreement between Company and FRANCHISEE; b. The relationship between FRANCHISEE and Company; c. The scope and validity of this Agreement or any other agreement between Company and FRANCHISEE, ***specifically including whether any specific claim is subject to arbitration at all (arbitrability questions)*** and/or d. The offer or sale of the franchise opportunity .... Any claims by or against any affiliate of the Company may be joined, in the Company's sole discretion, in the arbitration. [Emphasis added].

A mirror image of this clause covered Samaca and Global Cellular, Inc. Id.

[8] ***

Samaca argued that ***both*** claims ***also raised arbitrability questions*** that only an arbitrator could decide and that these claims were inextricably involved with the rest of the case.[9]

On February 27, 2019, the trial court "DENIED" Cellairis' "prevailing party" claim and ordered arbitration of that claim on the merits.[10] Then, on March 6, 2019, it "GRANTED" Cellairis' 9-15-14 claim in the shocking amount of $59,983.78. The trial court ruled that Samaca's opposition to arbitration "lacked substantial justification" and that "awards under 9-15-14 are not 'claims' subject to arbitration."[11]

The key concept to grasp is that the trial court had no authority to make either ruling concerning 9-15-14.[12]

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12 On March 11, 2019, Samaca sought discretionary review of the March 6 order by this Court in Case No. A19D0372 ("**Samaca II**"). Without explanation, Samaca's application was denied on April 2, 2019. Samaca submits the denial of review in Samaca II violated the law of the case in Samaca I and is unconstitutional under the Supremacy Clause of the U.S. Constitution. In this case, no court has power to decide the arbitrability of 9-15-14. Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S.Ct. 524, 529 (2019). Nor may state law exempt 9-15-14 from arbitration under the FAA. AT&T Mobility, LLC v. Concepcion, 563 U.S. 333, 341 (2011). On April 18, 2019, Samaca petitioned for certiorari from this denial in Samaca II in Case No. A19D0372, which is still pending in Case No. S 9C1106. The issue is immensely important. Georgia courts must obey federal law.

On March 21, 2019, Samaca filed its own 9-15-14 motion against Cellairis for having ***also*** resisted arbitration by filing its "prevailing party" contract claim.[13] Given the conflict between Samaca I and the trial court's March 6, 2019 order,

Samaca had no choice but to file its 9-15-14 motion with the trial court. ***However, Samaca, expressly and repeatedly objected to the trial court's "considering and ruling upon" its own 9-15-14 motion until an arbitrator decided its arbitrability***.

On the face of its 9-15-14 motion,[14] Samaca made the following objection:

OBJECTION TO ARBITRABILITY DETERMINATION BY THE COURT

> Pursuant to the law of the case in Samaca, LLC v. Cellairis Franchise, Inc., 345 Ga. App. 368, 813 S.E.2d 416 (2018) finding that the parties in this action are bound by a valid arbitrability "delegation provision," Samaca respectfully objects to the Court's considering and ruling upon this motion until an arbitrator decides whether it is arbitrable. *See also* Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S.Ct. 524 (2019) (valid arbitrability "delegation provision" requires that arbitrator determine arbitrability issue even if trial court believes the issue is wholly groundless.) This Court's order [the March 6 order][15] with a contrary finding is currently the subject of a petition for appellate

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review filed by Samaca on March 11, 2019 in the Georgia Court of Appeals, Case No. 19D0372.

Each subsequent briefing paper by Samaca reiterated the objection with an update to show that Samaca had filed a petition for certiorari to review Samaca II on April 18, 2019 with the Supreme Court of Georgia, which remains pending in Case No. S19C1106.[16]

IV. ENUMERATION OF ERRORS

A. The trial court's order is a nullity because it had no power to rule on Samaca's 9-15-14 claim.

Disregarding Samaca's objections and without a hearing, the trial court ruled on and denied Samaca's 9-15-14 claim. It possessed no power to do so. This is the law of the case under Samaca I and O.C.G.A. § 9-11-60(h). It is also the law of the United States as interpreted by the U.S. Supreme Court in Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S.Ct. 524, 529 (2019). The standard of review for this question of law is de novo.[17]

In Samaca I, this Court held that the FAA applies to this case and that an ***arbitrator*** must decide the ***arbitrability*** of Samaca's claims against Cellairis. Specifically, Samaca I held in pertinent part:

> [T]he arbitration agreements at issue in this case include a "***delegation provision"*** e.g., an agreement to arbitrate threshold issues concerning the arbitration agreement. ***The delegation provision clearly assigns***

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> ***responsibility for resolving "whether any specific claim is subject to arbitration at all (arbitrability questions)" to the arbitrator***. "[J]ust as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, so the question who has the primary power to decide arbitrability turns upon what the parties agreed about that matter."

Id. 813 S.E.2d at 420 (citation omitted; emphasis added).

The consequences of the so-called ***arbitrability*** "delegation provision" are profound. When the parties have delegated an ***arbitrability*** question to an arbitrator, the arbitrator has ***exclusive power*** to decide the question. In this case, even if it thinks the question is "wholly groundless" or "frivolous," a court ***may not*** decide whether a particular claim is subject to arbitration. Only an arbitrator may do this. Put differently, until an ***arbitrator*** determines whether any claim, including a claim for fees and expenses under O.C.G.A. § 9-15-14, is subject to, or not subject to, arbitration, ***no forum at all may decide the merits of that claim***. Said another way, the trial court could not even consider the question of arbitrability. Only an arbitrator could address this question no matter how unfounded a court may think it is.

This year, the U.S. Supreme Court made this principle indisputably clear:

> We must interpret the [Federal Arbitration] Act as written, and the Act in turn requires that we interpret the contract as written. When the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract. ***In those circumstances,***

> ***a court possesses no power to decide the arbitrability issue. That is true even if the court thinks that the argument that the arbitration agreement applies to a particular dispute is wholly groundless.***

Henry Schein, 139 S.Ct. at 529 (emphasis added).

Hence, in this case, the trial court possessed ***no power*** to decide whether Samaca's 9-15-14 is arbitrable, much less decide the merits. "Just as a court may not decide a merits question that the parties have delegated to an arbitrator, a court may not decide an arbitrability question that the parties have delegated to an arbitrator." Henry Schein, 139 S.Ct. at 530. Explained yet another way: "When the parties' contract assigns a matter to arbitration, a court may not resolve the merits of the dispute even if the court thinks that a party's claim on the merits is frivolous. [Citation omitted]. ***So, too, with arbitrability***." Id. (Emphasis added).

Under the law of the case, the trial court was bound by its own order enforcing the arbitrability "delegation provision" as affirmed by this Court in Samaca I. It was also bound by the U.S. Supreme Court's ruling in Henry Schein decided under the FAA. The trial court disregarded both.

State courts cannot disregard federal law. The "Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source." Howlett v. Rose, 496 U.S. 356, 371 (1990). "The Federal Arbitration Act is a law of the United States…. Consequently, the judges of every State must follow it." DirecTV, Inc. v. Imburgia, 136 S. Ct. 463, 468 (2015). "When this Court has fulfilled its duty to interpret federal law, a state court may not contradict or fail to implement the rule so

established." Marmet Health Care Ctr., Inc. v. Brown, 565 U.S. 530, 531 (2012) (*per curiam*) (***summarily*** reversing state appellate court and enforcing arbitration clause under FAA). This is "an elementary point of law." DirecTV, 136 S.Ct. at 468.

In addition, state law may ***not*** exempt claims from arbitration under the FAA. "When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the [Federal Arbitration Act]." AT&T Mobility, LLC v. Concepcion, 563 U.S. 333, 341 (2011).

It is indisputable that "lower courts must follow this Court's holding in *Concepcion*." DirectTV, 136 S.Ct. at 468.

In deciding Samaca's 9-15-14 claim, the trial court acted without any power to do so. Therefore, its ruling is void.

O.C.G.A. § 9-12-16 states:

> ***The judgment of a court*** having no jurisdiction of the person or the subject matter or ***which is void for any other cause is a mere nullity*** and may be so held in any court when it becomes material to the interest of the parties to consider it.

[Emphasis added].

Hence, the Order is a nullity and must be vacated. *See* Henry Schein, 139 S.Ct. at 531 (vacating order in which lower court improperly decided arbitrability); s*ee also* De La Reza v. Osprey Capital, LLC, 287 Ga. App. 196, 197 (2007) (when court lacks power, its order is void).

Even if the trial court's disregard of Samaca's objection to the court's lack of power under Henry Schein is treated as a failure to rule, the **Order** must

still be vacated and the case "remand[ed] for the trial court to consider [the objection] in the first instance." Auto-Owners Ins. Co. v. Hale Haven Props., LLC, 346 Ga. App. 39,

*****

V. CONCLUSION

Samaca respectfully requests that this appeal be allowed.

Respectfully submitted, July 1, 2019.

D.R. Martin, LLC

/s/ David Martin

*****

ATTORNEY FOR PETITIONER-APPELLANT SAMACA, LLC

*****

APPENDIX FF

Court of Appeals
of the State of Georgia

Application No. A19D0539
Samaca LLC v. Cellairis Franchise, Inc., Global Cellular, Inc., and Cell Phone Mania, LLC
[Filed July 1, 2019] [EXCERPT]

CONDITIONAL MOTION TO RECUSE
STAFF ATTORNEY
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*****

On July 1, 2019, Petitioner-appellant Samaca, LLC ("Samaca") filed an application in Case No. A19D0539 for direct or discretionary review of an order entered June 4, 2019 by the Superior Court of Fulton County, Georgia, Hon. Alice Dorrier Bonner, presiding.

Samaca makes this motion conditioned upon the Court's confirming the facts set forth below.[1] If these facts are not true or if staff attorney recusal is done in every case based on the relevant facts presented here, Samaca and its counsel advance their apology to this Court and all others concerned. Nevertheless, when such recusal occurs, it may be helpful to the bar and the parties for the Court to so indicate in an order or other notice.

Upon information and belief, Judge Bonner's son, Mr. Charles Dorrier Bonner, may be a staff attorney of this Court of Appeals. Samaca's counsel discovered this information sometime ***after*** June 4, 2019 while conducting online research to locate Judge Bonner's prior decisions. The online State Bar of Georgia Member Directory shows that Judge Bonner and Mr. Bonner share the name "Dorrier." The Member Directory also shows that Mr. Bonner works for the Court.

On June 10, 2019, the Clerk's office of this Court informed Samaca's counsel that the Court may not reveal whether Mr. Bonner is a staff attorney or the identity of the judge for whom Mr. Bonner may work in this capacity. *See* Affidavit of David R. Martin ¶¶ 1-14 attached as **EXHIBIT 1 HERETO**.

According to an article authored by the former Chief Judge of the Court, staff attorneys are "intimately involved in the opinion writing process." Stephen Louis A. Dillard, "Open Chambers: Demystifying the Inner Workings and Culture of the

[1] This Court's rules contain no specific provision addressing these circumstances. Samaca follows Ga. Ct. of App. Rule 44 *in pari materia* concerning the recusal of judges.

Georgia Court of Appeals," 65 Mercer Law Review 831, 846 (2014).[2] "[I]n the majority of cases[], I direct the assigned staff attorney to prepare an initial draft of the proposed opinion". Id. at 847. Moreover, "our central-staff attorneys also assist the judges in reviewing the merits of discretionary and interlocutory applications".
Id. at 846 n. 57.

> As with direct appeals, an application for a discretionary or interlocutory appeal is randomly assigned to a judge by the court's computer-generated "wheel." ***The application is then immediately and randomly assigned to an attorney in central staff to carefully review the application and accompanying materials, conduct any additional and necessary research (time permitting), and draft a memorandum on behalf of the assigned judge recommending the grant or denial of the application***. All of this work must be done within a very condensed period of time…. Suffice it to say, this does not give the central-staff attorneys or judges a significant amount of time to consider the merits of these applications.

Id. 854-55 (emphasis added).

[2] A copy of the article may also be found at https://libraries.mercer.edu/ursa/handle/10898/9514 (last viewed July 1, 2019). Samaca requests that the Court take judicial notice of the article under O.C.G.A. § 24-2-201.

It appears that, at least in the former Chief Judge's case, a staff attorney is assigned to a case "[]after any necessary recusals are made[]." Id at 846. It is not clear, however, if the same recusal measures are applied in all cases of "random[]" assignments of a staff attorney to evaluate an application for discretionary review.

Given the "intimate[]" role that a staff attorney may play in evaluating the merits of an application to review a trial court order, Samaca submits that recusal of a judge's staff attorney, who is the trial court judge's son, is necessary.

The Committee on Codes of Conduct of the Judicial Conference of the United States expresses a similar view of law clerks'[3] relationships to the judges for whom they work:

> Among judicial employees, law clerks are in a unique position since their work may have direct input into a judicial decision. Even if this is not true in all judicial chambers, the legal community perceives that this is the case based upon the confidential and close nature of the relationship between clerk and judge.

U.S. Advisory Opinion No. 51 (2009) (Law Clerk Working on Case in Which a Party Is Represented by Spouse's Law Firm).[4]

[3] Based on the former Chief Judge's description, a staff attorney performs thesame functions of a law clerk, except that the former is understood to be always a licensed attorney.

[4] A copy of this advisory opinion may be found at www.uscourts.gov/sites/default/files/guide-vol02b-ch02-2019_final.pdf (Last viewed July 1, 2019).

This has led the Committee to conclude:

> As for the necessity of maintaining the fact and the appearance of impartiality, it is unacceptable for a reviewing judge to rely upon the assistance of a clerk who is the son or daughter of a judge who decided the case in the lower court.

U.S. Advisory Opinion No. 64 (Employing a Judge's Child as a Law Clerk).[5]

When recusal is appropriate, the Committee believes that "the recused clerk should avoid any discussion of the case with the judge, law clerks, or others." U.S. Advisory Opinion No. 51. S*ee also* O.C.G.A. § 15-1-8(a)(2);[6] Georgia Judicial Code of Conduct, Canon 2 ("Judges Shall Avoid Impropriety and the Appearance of Impropriety in All of Their Activities"); Rule 2.2 ("Judges shall not permit family, social, political, financial, or other interests or relationships to influence the judge's judicial conduct or judgment."); Georgia Judicial Code of Conduct, Canon 3 ("Judges Shall Perform the Duties of Judicial Office Impartially, Competently, and Diligently."); Rule 3.9 ("Judges shall disqualify themselves in any

[5] ***

[6] O.C.G.A. § 15-1-8(a)(2) states in pertinent part:

> (a) No judge or Justice of any court, magistrate, nor presiding officer of any inferior judicature or commission shall: …
> (2) Preside, act, or serve in any case or matter when such judge is related by consanguinity or affinity within the third degree as computed according to the civil law to any party interested in the result of the case or matter;

proceeding in which their impartiality might reasonably be questioned"), in particular Rule 3.9(3)(c) (third-degree relative known by judge to have more than *de minimis* interest); *see also*, Alabama Advisory Opinion 91-421 (A judge is disqualified from appeals of cases in which the judge's father, a municipal court judge, sat as trier of fact. "The municipal judge's judicial reputation is an interest which could be substantially affected by the decisions on appeal in matters which he heard."); Florida Code of Judicial Conduct, Canon 3E(1)(e) (judge disqualified where third degree relative "participated as a lower court judge in a decision to be reviewed by the judge."); Ohio Code of Judicial Conduct Canon 2.11(a)(6) (similar).

> …."[T]hat jurists should stand fair and impartial between the parties who appear before them," stretches back to ancient times. **[Richard E. Flamm, Judicial Disqualification: Recusal and Disqualification of Judges, at 3, 7 (3d ed. 2017)]** (describing edicts contained in the Babylonia Talmud and the Roman Code of Justinian).
>
> English common law, too, has historically focused on the appearance of justice in its standards for judicial disqualification. In R. v. Sussex Justices, Ex parte McCarthy, [1924] 1 K. B. 256 (1923), one of the leading English cases on the subject, the King's Bench emphasized "'a long line of cases show[ing] that it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.'" Id. at 259 (*quoted in* Liteky v.

> United States, 510 U.S. 540, 565 (1994) (Kennedy, J. concurring)). McCarthy concerned a criminal case in which a clerk to the trial justices was also a partner in a law firm that represented the **[plaintiff against the]** defendant in a related civil matter. The question was whether, in light of the clerk's relationship to the case, the clerk was "unfit" to have retired with the justices as they considered their decision (per usual practice "in case the justices should desire to be advised upon any point of law"). Id. at 257, 259. The justices convicted the defendant and reached their decision without consulting the clerk, "who scrupulously abstained from referring to the case." Id. at 257. Regardless, on appeal, the King's Bench concluded that it mattered not "what actually was done"; instead, its analysis depended on "what might appear to be done." Id. at 259. The appellate court quashed the defendant's conviction, holding that "[n]othing is to be done which creates even a suspicion that there has been an improper interference with the course of justice." Id.

"Brief of Amici Curiae Former State and Federal Trial Court Judges in Support of Petitioner" pp. 4-5 filed June 25, 2018 in Lacaze v. Louisiana, U.S. Supreme Court (Case No. 17-1566) *cert. denied* (Oct. 9, 2018).[7] Alterations in **[bold brackets]**.

Accordingly, if Mr. Bonner is in fact the trial court judge's son and a staff attorney of this Court, Samaca very respectfully requests that

[7] ***

1) Mr. Bonner be recused from evaluating Samaca's application and from otherwise participating in any appellate proceedings related thereto and

2) Mr. Bonner's participation, if any, in the two prior appeals referenced in the case caption be disclosed.

The Court's courtesy and attention are always appreciated.

This submission does not exceed the word count limit imposed by Rule 24.

Respectful y submitted, this 1st day of July 2019.

D. R. MARTIN, LLC
/s/ David Martin
David Martin
*****
ATTORNEY FOR PETITIONER-APPELLANT SAMACA, LLC.

*****

APPENDIX GG
IN THE SUPREME COURT OF GEORGIA

SAMACA, LLC,
Petitioner
vs.
CELLAIRIS FRANCHISE, INC., GLOBAL CELLULAR, INC., and CELL PHONE MANIA, LLC,
Respondents
Case No. S19C1106

Filed: April 18, 2019

[EXCERPT]
****

PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI

Petitioner Samaca, LLC ("Samaca" or "Petitioner") requests a writ of certiorari to review the Court of Appeals' denial on April 2, 2019 of an application for discretionary review and request for treatment as a direct appeal under O.C.G.A. § 5-6-35(j).

I. INTRODUCTION.

This case presents the following issue of great concern, gravity or importance to the public:

> **May courts of this state exempt from the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.*, a claim for attorney's fees and expenses under O.C.G.A. § 9-15-14?**

To Petitioner's knowledge, this is a case of first impression concerning whether 9-15-14 is subject to arbitration under the Federal Arbitration Act (the "FAA"). Crucially in this case, *only* ***an arbitrator, not*** a court, may decide this question. Moreover, ***no state law may exempt a claim under 9-15-14 from the FAA***.

When the question of ***arbitrability*** is delegated to an arbitrator, only an arbitrator, *not* a court, has power to decide it. "***That is true even if the court thinks that the argument that the arbitration agreement applies to a particular*** *dispute is wholly groundless.*" Henry Schein, Inc. v. Archer & White, Inc., 139 S.Ct. 524, 529, 586 U.S. (Jan. 8, 2019) (emphasis added). Further, "[w]hen state law

prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the [FAA]." AT&T Mobility, LLC v. Concepcion, 563 U.S. 333, 341 (2011).

The "Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source." Howlett v. Rose, 496 U.S. 356, 371 (1990). "The Federal Arbitration Act is a law of the United States…. Consequently, the judges of every State must follow it." DirecTV, Inc. v. Imburgia, 136 S. Ct. 463, 468 (2015). "[T]he Judges in every State shall be bound" by "the Laws of the United States." U.S. Const., Art. VI, cl. 2. State courts' refusal to obey federal law and the U.S. Supreme Court is a matter of gravity or great pubic importance.

In this case, due to an arbitrability "delegation provision," ***no court*** possessed power to decide the ***arbitrability*** of ***any*** claim, including a claim under 9-15-14. Henry Schein, 139 S.Ct. at 529. Moreover, no state law may exempt a 9-15-14 claim from the FAA. Concepcion, 563 U.S. at 341. ***Hence, the subject orders in this case are nullity***. O.C.G.A. § 9-12-16 (void judgment is a nullity).

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V. ARGUMENT AND CITATION OF AUTHORITIES.

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A. The Court of Appeals should have granted Samaca's application and a direct appeal under O.C.G.A. § 5-6-35(j).

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Regardless of the nature of the "underlying subject matter," a direct appeal of right should exist. The Georgia Arbitration Code in O.C.G.A. § 9-9-16 states: "Any judgment or any order considered a final

judgment under this part may be appealed pursuant to Chapter 6 of Title 5." This is consistent with ultimately granting appellate review ***as a matter of right*** to enforce an arbitration clause under the FAA. As Justice Nahmais said in Jape:

> [P]arties who cannot obtain an immediate appeal of the denial of a non- frivolous motion to compel arbitration will remain entitled to a direct appeal of the issue when their case is final, *see* OCGA § 5–6–34(a)(1), ***so that the fundamental Congressional objective may still be served***.

Id. 291 Ga. at 645 (special concurrence) (emphasis added).

If the appealability of a final order denying arbitration depends upon the ***type*** of claim for which arbitration is sought, then federal goals are thwarted. Samaca submits that a discretionary refusal of an appeal from a final order denying a motion to compel arbitration would be unconstitutional under the FAA. Such refusal could be "***tantamount to the failure to enforce a valid arbitration agreement[] contrary to congressional objectives***." Jape, 291 Ga. at 641 *quoting* American Gen. Fin. Svcs v. Vereen, 282 Ga. App. 663, 666 (2006) (citations omitted).

Without a direct appeal after final disposition, there may be no other realistic opportunity to enforce an arbitration provision under the FAA. A trial court's final decision denying arbitration could be essentially unreviewable. Only astronomically low odds would remain in the U.S. Supreme Court.

B. No court had power to decide questions or arbitrability in this case.

The lower courts impermissibly decided the ***arbitrability*** of both claims in this case. Although raised below,[***fn omitted] these courts failed to follow

the U.S. Supreme Court's 2019 decision in Henry Schein. In that case, the Court held that when a valid arbitrability "delegation provision" exists, only an arbitrator, not a court, may decide the question of arbitrability. This is true even if the court believes the question of arbitrability is "wholly groundless." The Court said in relevant part:

> We must interpret the [Federal Arbitration] Act as written, and the Act in turn requires that we interpret the contract as written. When the parties' contract delegates the arbitrability question to an arbitrator, a court may he contract. In those circumstances, a court possesses no power to decide the arbitrability issue. ***That is true even if the court thinks that the argument that the arbitration agreement applies to a particular dispute is wholly groundless***.

Henry Schein, 139 S. Ct. at 529 (emphasis added).

Under Henry Schein, there is no doubt that Cellairis' ***entire*** motion for attorneys' fees, ***including the 9-15-14 claim***, had to be submitted to an arbitrator on the question of ***arbitrability***. "When this Court has fulfilled its duty to interpret federal law, a state court may not contradict or fail to implement the rule so established." Marmet Health Care Ctr., Inc. v. Brown, 565 U.S. 530, 531 (2012) (*per curiam*) (summarily reversing state appellate court and enforcing arbitration clause under FAA). This is "***an elementary point of law***." DirecTV, 136 S.Ct. at 468.

Cellairis and the lower courts were also bound by judicial estoppel and the law of the case to submit ***both*** claims to an arbitrator to decide their ***arbitrability***. Williams, 277 Ga. App. at 842 (judicial estoppel); Samaca I, 813 S.E.2d at 420; O.C.G.A. § 9-11-60(h). The courts ***should not*** have decided any questions of ***arbitrability***, much less the merits, and should have granted Samaca's ***entire*** motion to compel arbitration on the question of ***arbitrability of both claims.***

C. No court may exempt a claim under O.C.G.A. § 9-15-14 from the Federal Arbitration Act.

Further, state courts have no authority to exempt a claim under 9-15-14 from arbitration under the FAA. Section 2 of the FAA, 9 U.S.C. § 2, states:

> A written provision in any maritime transaction or a ***contract*** evidencing a transaction involving commerce to settle by arbitration a ***controversy*** thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. [Emphasis added].

On its face, the FAA does not exclude the "***contract***" in this case[11] or the "***controversy***"

[11] The FAA excludes from its application "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. These exclusions are not relevant here. *Cf.* New Prime, Inc. v.

involving claims under state law. "When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the [Federal Arbitration Act]." AT&T Mobility, LLC v. Concepcion, 563 U.S. 333, 341 (2011). It is indisputable that "lower courts must follow this Court's holding in Concepcion." DirectTV, 136 S.Ct. at 468.

The trial court's attempt to exempt this controversy from arbitration by saying that sanctions under 9-15-14 are not "claims" is untenable. First, ***only an arbitrator has the power to decide the question of arbitrability of a particular dispute.*** Henry Schein, 139 S.Ct. at 529. Second, ***no state law can exempt claims under 9-15-14 from the FAA***. Concepcion, 135 S.Ct. at 341.

Even so, the trial court was wrong in its "non-claim" characterization of 9-15-14. To be sure, the Supreme Court of Georgia held that 9-15-14 "arose out of the torts of malicious use and malicious abuse of the judicial process." Long v. City of Helen, 301 Ga. at 121 n. 2. Indeed, 9-15-14 is an integral part of Georgia's tort regime for abusive litigation in O.C.G.A. §§ 51-7-80 to 51-7-85.

Section 51-7-83(b) states:

> If the abusive litigation is in a civil proceeding of a court of record and no damages other than costs and expenses of litigation and reasonable attorney's fees are ***claimed***, ***the procedures***

Oliveira, 139 S.Ct. 532 (2019) (FAA does not apply to contract of interstate transportation workers).

> ***provided in Code Section 9-15-14 shall be utilized instead***. [Emphasis added].

In turn, Section 51-7-85 states:

> On and after April 3, 1989, ***no claim other than as provided in this article or in Code Section 9-15-14 shall be allowed***, whether statutory or common law, for the torts of malicious use of civil proceedings, malicious abuse of civil process, nor abusive litigation, provided that claims filed prior to such date shall not be affected. ***This article is the exclusive remedy for abusive litigation.*** [Emphasis added].

Thus, 9-15-14 provides a substantive legal ***claim*** whereby the trial court sits as the trier of fact.[***fn omitted] As Samaca argued below,[***fn omitted] ***statutory claims that would otherwise be decided by a court may be subject to arbitration***. Shearson/Am. Express Inc. v. McMahon, 482 U.S. 220, 226 (1987); Mitsubishi Motors Corporation v. Soler Chrysler, 473 U.S. 614, 628 (1985).

Simply put, ***no*** court has the power to decide the ***arbitrability*** of Cellairis' claims for attorneys' fees and expenses. And ***no*** state law can ***exempt*** a claim under 9-15-14 from the FAA. The consequences are terminal.

O.C.G.A. § 9-12-16 states:

> ***The judgment of a court*** having no jurisdiction of the person or the subject matter or ***which is void for any other cause is a mere nullity*** and may be so held in any court when it becomes

material to the interest of the parties to consider it. [Emphasis added].

Therefore, the subject orders are a nullity and must be vacated. *See* Henry Schein, 139 S.Ct. at 531 (vacating order); s*ee also* De La Reza v. Osprey Capital, LLC, 287 Ga. App. 196, 197 (2007) (when court lacks power, its order is void). Further, Samaca's ***entire*** motion to compel arbitration as to the ***arbitrability*** of ***both*** claims by Cellairis must be granted.

*****

Respectfully submitted on April 18, 2019.

D.R. Martin, LLC
/s/ David R. Martin
*****
COUNSEL FOR PETITIONER SAMACA, LLC

APPENDIX HH
IN THE SUPREME COURT OF GEORGIA

SAMACA, LLC,
Petitioner
vs.
CELLAIRIS FRANCHISE, INC., GLOBAL CELLULAR, INC., and CELL PHONE MANIA, LLC,
Respondents
Case No. S20C0114

Filed: August 26, 2019

[EXCERPT]
****

PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI

Petitioner Samaca, LLC ("Samaca" or "Petitioner") requests a writ of certiorari to review the Court of Appeals' orders dated July 23, 2019[***fn omitted] and August 7, 2019[***fn omitted] denying Samaca's **Application for Discretionary Review and Request to Accept as Direct Appeal under O.C.G.A. § 5-6-35(j)** ("**Application**") [***fn omitted] and motion for reconsideration.

On June 4, 2019, the Superior Court of Fulton County, Georgia, Hon. Alice D. Bonner presiding, denied a motion by Samaca for fees and expenses under O.C.G.A. § 9-15-14 against appellees Cellairis Franchise, Inc. and Global Cellular Inc. (collectively "Cellairis").[***fn omitted] A copy of the June 4 order (the "**Order")** is attached as **EXHIBIT 1 HERETO**. The **Order** is a nullity because the trial court had no power to rule on Samaca's 9-15-14 motion. ***Only an arbitrator had this power***. Until this **Order** is vacated or reversed, Samaca cannot proceed to arbitration on the rest of its claims on a proper basis. The arbitrability of all claims between the parties must be decided only by an arbitrator, not a court. [***fn omitted] *****

*****

V. ENUMERATION OF ERRORS AND ARGUMENT

A. <u>The Court of Appeals should have allowed Samaca's Application as a direct appeal or otherwise granted it.</u>

1. The "underlying subject matter" for purposes of O.C.G.A. § 5-6-34(a) and § 5-6-35 is the enforcement of the FAA regarding a claim for attorney's fees under 9-15-14.

******

Here, the threshold demand for relief and the enumerations of error concern enforcement of the FAA under the law of the case in **<u>Samaca I</u>**. The law of the case requires than an arbitrator, not a court, decide whether Samaca's 9-15-14 claim is subject to arbitration. Samaca's 9-15-14 motion was expressly ***"[s]ubject to***" a "***continuing***" objection that an arbitrator decide its arbitrability. Because no court has power to decide the antecedent question of ***arbitrability*** of "any specific claim," the trial court's order must be vacated as void. <u>Henry Schein</u>, 139 S.Ct. at 529, 531 (vacating order deciding arbitrability); *see* O.C.G.A. § 9-12-16 (void order is nullity). Because orders denying arbitration are ***not*** listed under the discretionary appeal statute in 5-6-35(a), a direct appeal should have been allowed.

Cellairis may argue that Samaca did not file a formally designated motion to compel arbitration or stay, and "invited" error. This is wrong. First, the law of the case in **<u>Samaca I</u>** under 9-11-60(h) already established that an arbitrator must decide questions of arbitrability. Second, Samaca's 9-15-14 claim was made ***"[s]ubject to"*** its written "***continuing***" objection to enforce **<u>Samaca I</u>** and is the equivalent of a motion to compel or stay pending arbitration. "[S]ubstance prevails over nomenclature." <u>Post v.</u>

State, 298 Ga. 241, 247 (Ga., 2015). Third, parties may file claims to perfect rights while simultaneously asserting the need to arbitrate these claims. In Gf/Legacy Dallas, Inc. v. Juneau Const. Co., 282 Ga. App. 14 (2006) *cert. denied* S07C0344 (Feb. 5, 2007) and Web IV, LLC v. Samples Constr., LLC., 824 S.E.2d 107 (Ga. App. 2019), plaintiffs simultaneously filed complaints in the trial court while asserting that the claims needed to be arbitrated. Here, the trial court violated **Samaca I** with its contradictory order in **Samaca II**. This left Samaca with no option but to file its 9-15-14 claim, subject to its continuing arbitrability objection while pursuing the appeal of **Samaca II**. Further, Samaca could not proceed to arbitration on a proper basis until the appeal in **Samaca II** is resolved. Under **Samaca I**, an arbitrator must decide all arbitrability questions, not just the ones that Cellairis choses.

Separately, insofar as it pertains ***solely*** to the 9-15-14 motion itself, which is listed under 5-6-35(a)(10), Samaca's **Application** sought relief in the alternative. Still, the **Application** should have been granted to enforce the arbitration provision under the FAA. As Justices Nahmais and Blackwell said in Jape:

> [P]arties who cannot obtain an immediate appeal of the denial of a non- frivolous motion to compel arbitration will remain entitled to a direct appeal of the issue when their case is final, *see* OCGA § 5–6–34(a)(1), ***so that the fundamental Congressional objective may still be served***.

Id. 291 Ga. at 645 (special concurrence) (emphasis added).

2. To the extent the Court of Appeals has discretion under O.C.G.A. § 5-6-35(a) to refuse an appeal to enforce the FAA, it is unconstitutional.

If the Court of Appeals has ***discretion*** to deny an appeal to enforce the FAA, then federal goals are thwarted. Such refusal are "***tantamount to the failure to enforce a valid arbitration agreement[] contrary to congressional objectives***." Jape, 291 Ga. at 641 *quoting* American Gen. Fin. Svcs v. Vereen, 282 Ga. App. 663, 666 (2006) (citations omitted) (emphasis added). "[T]he [Federal Arbitration Act] leaves no place for the exercise of discretion." Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 218 (1985). Also, without a direct appeal after final disposition, there may be no other realistic opportunity to enforce the FAA. A trial court's final decision denying arbitration would be essentially unreviewable. Only astronomically low odds would remain in the U.S. Supreme Court.

B. The Order is a nullity because the trial court had no power to rule on Samaca's 9-15-14 claim.

Disregarding Samaca's continuing objection and without a hearing, the trial court ruled on and denied Samaca's 9-15-14 claim. It possessed no power to do so. This is the law of the case under **Samaca I** and 9-11-60(h). It is also the law of the United States as interpreted by the U.S. Supreme Court in Henry Schein, 139 S.Ct. at 529. The standard of review for this question of law is *de novo.* [***fn omitted].

The consequences of the so-called ***arbitrability*** "delegation provision" are profound. This year, the U.S. Supreme Court made this indisputably clear:

> We must interpret the [Federal Arbitration] Act as written, and the Act in turn requires that we interpret the contract as written. When the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract. ***In those circumstances, a court possesses no power to decide the arbitrability issue***. ***That is true even if the court thinks that the argument that the arbitration agreement applies to a particular dispute is wholly groundless***.

Henry Schein, 139 S.Ct. at 529 (emphasis added).

Hence, in this case, ***no court possesses power*** to decide whether Samaca's 9- 15-14 is arbitrable, much less decide the merits. "Just as a court may not decide a merits question that the parties have delegated to an arbitrator, a court may not decide an arbitrability question that the parties have delegated to an arbitrator." Henry Schein, at 530. Explained yet another way: "When the parties' contract assigns a matter to arbitration, a court may not resolve the merits of the dispute even if the court thinks that a party's claim on the merits is frivolous. [Citation omitted]. ***So, too, with arbitrability***." Id. (Emphasis added).

State courts cannot disregard federal law. The "Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source." Howlett v. Rose, 496 U.S. 356,

371 (1990); *see also* DirecTV, Inc. v. Imburgia, 136 S. Ct. 463, 468 (2015). "When this Court has fulfilled its duty to interpret federal law, a state court may not contradict or fail to implement the rule so established." Marmet Health Care Ctr., Inc. v. Brown, 565 U.S. 530, 531 (2012) (*per curiam*) (***summarily*** reversing state appellate court and enforcing arbitration clause under FAA). This is "an elementary point of law." DirecTV, 136 S.Ct. at 468.

In addition, state law may ***not*** exempt 9-15-14 from arbitration under the FAA. "When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the [Federal Arbitration Act]." AT&T Mobility, LLC v. Concepcion, 563 U.S. 333, 341 (2011). It is indisputable that "lower courts must follow this Court's holding in *Concepcion*." DirectTV, 136 S.Ct. at 468.

In deciding Samaca's 9-15-14 claim, the trial court ***and*** the Court of Appeals acted without any power to do so. Therefore, their orders are void. *See* O.C.G.A. § 9-12-16; Henry Schein, 139 S.Ct. at 531 (vacating order that improperly decided arbitrability); s*ee also* De La Reza v. Osprey Capital, LLC, 287 Ga. App. 196, 197 (2007) (when court lacks power, its order is void).

Even if the trial court's disregard of Samaca's objection to the court's lack of power under Henry Schein is treated as a failure to rule, the **Order** must still be vacated and the case "remand[ed] for the trial court to consider [the objection] in the first instance." Auto-Owners Ins. Co. v. Hale Haven Props., LLC, 346 Ga. App. 39, 54 (2018); Earls v. Aneke, Case No. A19A0329 (Ga. App. June 14, 2019) Slip. Op. 9 ("[B]ecause the trial court did not rule upon this question, we vacate and remand for the court's consideration of this argument in the first instance.")

Respectfully submitted
on April 18, 2019.

D.R. Martin, LLC
/s/ David R. Martin
*****
COUNSEL FOR
PETITIONER
SAMACA, LLC

APPENDIX I I

Constitutional provisions, Statutes & Rules

Supremacy Clause, U.S. Constitution, Article IV, cl. 2:

*****

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.
> *****

O.C.G.A. § 5-6-34 (effective 2016 to May 6, 2019)

(a) Appeals may be taken to the Supreme Court and the Court of Appeals from the following judgments and rulings of the superior courts, the constitutional city courts, and such other courts or tribunals from which appeals are authorized by the Constitution and laws of this state:

(1) All final judgments, that is to say, where the case is no longer pending in the court below, except as provided in Code Section 5-6-35;

(2) All judgments involving applications for discharge in bail trover and contempt cases;

(3) All judgments or orders directing that an accounting be had;

(4) All judgments or orders granting or refusing applications for receivers or for interlocutory or final injunctions;

(5) All judgments or orders granting or refusing applications for attachment against fraudulent debtors;

(6) Any ruling on a motion which would be dispositive if granted with respect to a defense that the action is barred by Code Section 16-11-173;

(7) All judgments or orders granting or refusing to grant mandamus or any other extraordinary remedy, except with respect to temporary restraining orders;

(8) All judgments or orders refusing applications for dissolution of corporations created by the superior courts;

(9) All judgments or orders sustaining motions to dismiss a caveat to the probate of a will;

(10) All judgments or orders entered pursuant to subsection (c) of Code Section 17-10-6.2;

(11) All judgments or orders in child custody cases awarding, refusing to change, or modifying child custody or holding or declining to hold persons in contempt of such child custody judgment or orders;

(12) All judgments or orders entered pursuant to Code Section 35-3-37; and

(13) All judgments or orders entered pursuant to Code Section 9-11-11.1.

(b) Where the trial judge in rendering an order, decision, or judgment, not otherwise subject to direct appeal, including but not limited to the denial of a defendant's motion to recuse in a criminal case, certifies within ten days of entry thereof that the order, decision, or judgment is of such importance to the case that immediate review should be had, the Supreme Court or the Court of Appeals may thereupon, in their respective discretions, permit an appeal to be taken from the order, decision, or judgment if application is made thereto within ten

days after such certificate is granted. The application shall be in the nature of a petition and shall set forth the need for such an appeal and the issue or issues involved therein. The applicant may, at his or her election, include copies of such parts of the record as he or she deems appropriate, but no certification of such copies by the clerk of the trial court shall be necessary. The application shall be filed with the clerk of the Supreme Court or the Court of Appeals and a copy of the application, together with a list of those parts of the record included with the application, shall be served upon the opposing party or parties in the case in the manner prescribed by Code Section 5-6-32, except that such service shall be perfected at or before the filing of the application. The opposing party or parties shall have ten days from the date on which the application is filed in which to file a response. The response may be accompanied by copies of the record in the same manner as is allowed with the application. The Supreme Court or the Court of Appeals shall issue an order granting or denying such an appeal within 45 days of the date on which the application was filed. Within ten days after an order is issued granting the appeal, the applicant, to secure a review of the issues, may file a notice of appeal as provided in Code Section 5-6-37. The notice of appeal shall act as a supersedeas as provided in Code Section 5-6-46 and the procedure thereafter shall be the same as in an appeal from a final judgment.

(c) *****

(d) Where an appeal is taken under any provision of subsection (a), (b), or (c) of this Code section, all judgments, rulings, or orders rendered in the case which are raised on appeal and which may affect the proceedings below shall be reviewed and determined by the appellate court, without regard to the

appealability of the judgment, ruling, or order standing alone and without regard to whether the judgment, ruling, or order appealed from was final or was appealable by some other express provision of law contained in this Code section, or elsewhere. For purposes of review by the appellate court, one or more judgments, rulings, or orders by the trial court held to be erroneous on appeal shall not be deemed to have rendered all subsequent proceedings nugatory; but the appellate court shall in all cases review all judgments, rulings, or orders raised on appeal which may affect the proceedings below and which were rendered subsequent to the first judgment, ruling, or order held erroneous. Nothing in this subsection shall require the appellate court to pass upon questions which are rendered moot.

(e) ****

O.C.G.A. § 5-6-34 (effective May 7, 2019 to present).[1]

(a) Appeals may be taken to the Supreme Court and the Court of Appeals from the following judgments and rulings of the superior courts, the Georgia State-wide Business Court, the constitutional city courts, and such other courts or tribunals from which appeals are authorized by the Constitution and laws of this state:

[1] Part VII, Section 7-1 of Georgia House Bill 239, which amended 5-6-34, was "effective upon approval of this Act by the Governor or upon its becoming law without such approval." 2019 GA Act HB 239 Georgia Business Court; establish. The governor signed the bill on May 7, 2019. http://www.legis.ga.gov/Legislation/en-US/SignedByGov.aspx (Last viewed Jan. 11, 2020).

(1) All final judgments, that is to say, where the case is no longer pending in the court below, except as provided in Code Section 5-6-35;

(2) All judgments involving applications for discharge in bail trover and contempt cases;

(3) All judgments or orders directing that an accounting be had;

(4) All judgments or orders granting or refusing applications for receivers or for interlocutory or final injunctions;

(5) All judgments or orders granting or refusing applications for attachment against fraudulent debtors;

(6) Any ruling on a motion which would be dispositive if granted with respect to a defense that the action is barred by Code Section 16-11-173;

(7) All judgments or orders granting or refusing to grant mandamus or any other extraordinary remedy, except with respect to temporary restraining orders;

(8) All judgments or orders refusing applications for dissolution of corporations created by the superior courts;

(9) All judgments or orders sustaining motions to dismiss a caveat to the probate of a will;

(10) All judgments or orders entered pursuant to subsection (c) of Code Section 17-10-6.2;

(11) All judgments or orders in child custody cases awarding, refusing to change, or modifying child custody or holding or declining to hold persons in contempt of such child custody judgment or orders;

(12) All judgments or orders entered pursuant to Code Section 35-3-37; and

(13) All judgments or orders entered pursuant to Code Section 9-11-11.1.

(b) Where the trial judge in rendering an order, decision, or judgment, not otherwise subject to direct appeal, including but not limited to the denial of a defendant's motion to recuse in a criminal case, certifies within ten days of entry thereof that the order, decision, or judgment is of such importance to the case that immediate review should be had, the Supreme Court or the Court of Appeals may thereupon, in their respective discretions, permit an appeal to be taken from the order, decision, or judgment if application is made thereto within ten days after such certificate is granted. The application shall be in the nature of a petition and shall set forth the need for such an appeal and the issue or issues involved therein. The applicant may, at his or her election, include copies of such parts of the record as he or she deems appropriate, but no certification of such copies by the clerk of the trial court shall be necessary. The application shall be filed with the clerk of the Supreme Court or the Court of Appeals and a copy of the application, together with a list of those parts of the record included with the application, shall be served upon the opposing party or parties in the case in the manner prescribed by Code Section 5-6-32, except that such service shall be perfected at or before the filing of the application. The opposing party or parties shall have ten days from the date on which the application is filed in which to file a response. The response may be accompanied by copies of the record in the same manner as is allowed with the application. The Supreme Court or the Court of Appeals shall issue an order granting or denying such an appeal within 45 days of the date on which the application was filed. Within ten days after an order is issued granting the appeal, the applicant, to secure a review of the issues, may file a notice of appeal as provided in

Code Section 5-6-37. The notice of appeal shall act as a supersedeas as provided in Code Section 5-6-46 and the procedure thereafter shall be the same as in an appeal from a final judgment.

(c) *****

(d) Where an appeal is taken under any provision of subsection (a), (b), or (c) of this Code section, all judgments, rulings, or orders rendered in the case which are raised on appeal and which may affect the proceedings below shall be reviewed and determined by the appellate court, without regard to the appealability of the judgment, ruling, or order standing alone and without regard to whether the judgment, ruling, or order appealed from was final or was appealable by some other express provision of law contained in this Code section, or elsewhere. For purposes of review by the appellate court, one or more judgments, rulings, or orders by the trial court held to be erroneous on appeal shall not be deemed to have rendered all subsequent proceedings nugatory; but the appellate court shall in all cases review all judgments, rulings, or orders raised on appeal which may affect the proceedings below and which were rendered subsequent to the first judgment, ruling, or order held erroneous. Nothing in this subsection shall require the appellate court to pass upon questions which are rendered moot.

(e) *****

O.C.G.A. 5-6-35 (effective 2011 to present)

(a) Appeals in the following cases shall be taken as provided in this Code section:

(1) Appeals from decisions of the superior courts reviewing decisions of the State Board of Workers' Compensation, the State Board of Education, auditors, state and local administrative

agencies, and lower courts by certiorari or de novo proceedings; provided, however, that this provision shall not apply to decisions of the Public Service Commission and probate courts and to cases involving ad valorem taxes and condemnations;

(2) Appeals from judgments or orders in divorce, alimony, and other domestic relations cases including, but not limited to, granting or refusing a divorce or temporary or permanent alimony or holding or declining to hold persons in contempt of such alimony judgment or orders;

(3) Appeals from cases involving distress or dispossessory warrants in which the only issue to be resolved is the amount of rent due and such amount is $2,500.00 or less;

(4) Appeals from cases involving garnishment or attachment, except as provided in paragraph (5) of subsection (a) of Code Section 5-6-34;

(5) Appeals from orders revoking probation;

(5.1) Appeals from decisions of superior courts reviewing decisions of the Sexual Offender Registration Review Board;

(5.2) Appeals from decisions of superior courts granting or denying petitions for release pursuant to Code Section 42-1-19;

(6) Appeals in all actions for damages in which the judgment is $10,000.00 or less;

(7) Appeals, when separate from an original appeal, from the denial of an extraordinary motion for new trial;

(8) Appeals from orders under subsection (d) of Code Section 9-11-60 denying a motion to set aside a judgment or under subsection (e) of Code Section 9-11-60 denying relief upon a complaint in equity to set aside a judgment;

(9) Appeals from orders granting or denying temporary restraining orders;

(10) Appeals from awards of attorney's fees or expenses of litigation under Code Section 9-15-14;

(11) Appeals from decisions of the state courts reviewing decisions of the magistrate courts by de novo proceedings so long as the subject matter is not otherwise subject to a right of direct appeal; and

(12) Appeals from orders terminating parental rights.

(b) All appeals taken in cases specified in subsection (a) of this Code section shall be by application in the nature of a petition enumerating the errors to be urged on appeal and stating why the appellate court has jurisdiction. The application shall specify the order or judgment being appealed and, if the order or judgment is interlocutory, the application shall set forth, in addition to the enumeration of errors to be urged, the need for interlocutory appellate review.

(c) The applicant shall include as exhibits to the petition a copy of the order or judgment being appealed and should include a copy of the petition or motion which led directly to the order or judgment being appealed and a copy of any responses to the petition or motion. An applicant may include copies of such other parts of the record or transcript as he deems appropriate. No certification of such copies by the clerk of the trial court shall be necessary in conjunction with the application.

(d) The application shall be filed with the clerk of the Supreme Court or the Court of Appeals within 30 days of the entry of the order, decision, or judgment complained of and a copy of the application, together with a list of those parts of the record included with the application, shall be served upon the opposing

party or parties as provided by law, except that the service shall be perfected at or before the filing of the application. When a motion for new trial, a motion in arrest of judgment, or a motion for judgment notwithstanding the verdict has been filed, the application shall be filed within 30 days after the entry of the order granting, overruling, or otherwise finally disposing of the motion.

(e) The opposing party or parties shall have ten days from the date on which the application is filed in which to file a response. The response may be accompanied by copies of the record in the same manner as is allowed with the application. The response may point out that the decision of the trial court was not error, or that the enumeration of error cannot be considered on appeal for lack of a transcript of evidence or for other reasons.

(f) The Supreme Court or the Court of Appeals shall issue an order granting or denying such an appeal within 30 days of the date on which the application was filed.

(g) Within ten days after an order is issued granting the appeal, the applicant, to secure a review of the issues, shall file a notice of appeal as provided by law. The procedure thereafter shall be the same as in other appeals.

(h) The filing of an application for appeal shall act as a supersedeas to the extent that a notice of appeal acts as supersedeas.

(i) This Code section shall not affect Code Section 9-14-52, relating to practice as to appeals in certain habeas corpus cases.

(j) When an appeal in a case enumerated in subsection (a) of Code Section 5-6-34, but not in subsection (a) of this Code section, is initiated by filing an otherwise timely application for permission to

appeal pursuant to subsection (b) of this Code section without also filing a timely notice of appeal, the appellate court shall have jurisdiction to decide the case and shall grant the application. Thereafter the appeal shall proceed as provided in subsection (g) of this Code section.

(k) *****

O.C.G.A. § 9-15-14

(a) In any civil action in any court of record of this state, reasonable and necessary attorney's fees and expenses of litigation shall be awarded to any party against whom another party has asserted a claim, defense, or other position with respect to which there existed such a complete absence of any justiciable issue of law or fact that it could not be reasonably believed that a court would accept the asserted claim, defense, or other position. Attorney's fees and expenses so awarded shall be assessed against the party asserting such claim, defense, or other position, or against that party's attorney, or against both in such manner as is just.

(b) The court may assess reasonable and necessary attorney's fees and expenses of litigation in any civil action in any court of record if, upon the motion of any party or the court itself, it finds that an attorney or party 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 Chapter 11 of this title, the "Georgia Civil Practice Act." As used in this Code section, "lacked substantial

justification" means substantially frivolous, substantially groundless, or substantially vexatious.

(c) No attorney or party shall be assessed attorney's fees as to any claim or defense which the court determines was asserted by said attorney or party in a good faith attempt to establish a new theory of law in Georgia if such new theory of law is based on some recognized precedential or persuasive authority.

(d) Attorney's fees and expenses of litigation awarded under this Code section shall not exceed amounts which are reasonable and necessary for defending or asserting the rights of a party. Attorney's fees and expenses of litigation incurred in obtaining an order of court pursuant to this Code section may also be assessed by the court and included in its order.

(e) Attorney's fees and expenses under this Code section may be requested by motion at any time during the course of the action but not later than 45 days after the final disposition of the action.

(f) An award of reasonable and necessary attorney's fees or expenses of litigation under this Code section shall be determined by the court without a jury and shall be made by an order of court which shall constitute and be enforceable as a money judgment.

(g) Attorney's fees and expenses of litigation awarded under this Code section in a prior action between the same parties shall be treated as court costs with regard to the filing of any subsequent action.

(h) This Code section shall not apply to proceedings in magistrate courts. However, when a case is appealed from the magistrate court, the appellee may seek litigation expenses incurred below if the appeal lacks substantial justification.

O.C.G.A. § 51-7-83

(a) A plaintiff who prevails in an action under this article shall be entitled to all damages allowed by law as proven by the evidence, including costs and expenses of litigation and reasonable attorney's fees.

(b) If the abusive litigation is in a civil proceeding of a court of record and no damages other than costs and expenses of litigation and reasonable attorney's fees are claimed, the procedures provided in Code Section 9-15-14 shall be utilized instead.

(c) No motion filed under Code Section 9-15-14 shall preclude the filing of an action under this article for damages other than costs and expenses of litigation and reasonable attorney's fees. Any ruling under Code Section 9-15-14 is conclusive as to the issues resolved therein.

O.C.G.A. § 51-7-85

On and after April 3, 1989, no claim other than as provided in this article or in Code Section 9-15-14 shall be allowed, whether statutory or common law, for the torts of malicious use of civil proceedings, malicious abuse of civil process, nor abusive litigation, provided that claims filed prior to such date shall not be affected. This article is the exclusive remedy for abusive litigation**.**

SUPREME COURT OF GEORGIA RULES (GA.)
Ga. Rule 6. FRIVOLOUS APPEAL.

The Court may, with or without a motion, impose a penalty not to exceed $2,500 against any party and/or party's counsel in any civil case in which there is a direct appeal, application for discretionary appeal, application for interlocutory appeal, petition for certiorari, or motion which the Court determines to be

frivolous. The party or party's counsel may respond to such a motion within 10 days or, if no motion was filed, file a motion for reconsideration within 10 days of receipt of the order. The imposition of such penalty shall constitute a money judgment in favor of appellee against appellant or appellants counsel or in favor of appellant against appellee or appellee's counsel, as the Court directs. Upon filing of the remittitur in the trial court, the penalty may be collected as are other money judgments.

GEORGIA SUPREME COURT RULES, IV. DISCRETIONARY APPEALS

Ga. Rule 33. REQUIREMENTS.

Applications for discretionary appeal shall contain a jurisdictional statement and have attached a stamped copy of the trial court's order to be appealed, showing the date of filing. A transcript is not necessary, but affidavits, exhibits and relevant portions of the transcript should be attached to the application to demonstrate to the Court what the record will show if the application is granted. See Rule 17.

Responses, due within 10 days of docketing, are encouraged and should be filed as briefs. See Rule 18.

Ga. Rule 34. STANDARD FOR GRANTING.

An application for leave to appeal a final judgment in cases subject to appeal under OCGA § 5-6-35 shall be granted when:

(1) Reversible error appears to exist;
(2) The establishment of a precedent is desirable; or
(3) Further development of the common law is desirable.

GEORGIA COURT OF APPEALS RULES ("Ga. App. Rule") (Effective 2019).

Ga. App. Rule 7.

****

(e) Contempt. No Prosecution, Frivolous Appeals, and Penalties.

****

(2) Penalty.

The panel of the Court ruling on a case, with or without motion, may by majority vote to impose a penalty not to exceed $2,500 against any party and/or a party's counsel in any civil case in which there is a direct appeal, application for discretionary appeal, application for interlocutory appeal, or motion which is determined to be frivolous.

****

Ga. App. Rule 31. Discretionary Applications.

(a) Filing Deadline.

An application for discretionary appeal must generally be filed in this Court within 30 days of the date of the entry of the trial court's order being appealed, although pursuant to O.C.G.A. § 44-7-56, a discretionary application involving a dispossessory action must be filed within seven days of the entry of the trial court's order. The trial court's order is entered on the date it is filed with the trial court clerk.

(b) Burden of Proof.

The applicant bears the burden of persuading the Court that the application should be granted. An application for leave to appeal a final judgment in

cases subject to discretionary appeal under O.C.G.A. § 5-6-35 will be granted only when:

(1) Reversible error appears to exist;

(2) The establishment of a precedent is desirable;

(3) Further development of the common law, particularly in divorce cases, is desirable; or

(4) The application is for leave to appeal a judgment and decree of divorce that is final under O.C.G.A. § 5-6-34 (a) (1), timely under O.C.G.A. § 5-6-35 (d), and is determined to have possible merit.

An application filed by an attorney seeking to rely on the standard set forth in Rule 31 (b) (3) or (b) (4) must be accompanied by a certificate of good faith stating as follows:

> "I, the undersigned attorney of record in this case, am a member of the State Bar of Georgia in good standing and make this certificate of good faith as required by Rule 31 of the Court of Appeals of Georgia. I hereby certify that I am familiar with the trial court record in this case and based on the record and my understanding of the applicable law, I have a good faith belief that this application has merit and that it is not filed for the purpose of delay, harassment, or embarrassment. I further certify that I have been authorized by my client, the applicant, to file this application. This the _____ day of _____, 20__."

If the application is nevertheless found to be frivolous, a sanction of up to $2,500 may be imposed

upon the attorney filing it. See Rule 7 (e) (2), Contempt Penalty.

(c) Required Items.

Discretionary applications must contain a stamped "filed" copy of the trial court's order or judgment from which the appeal is sought. The stamped "filed" copy of the trial court's order or judgment must contain the signature of the trial court judge. Neither conformed signatures nor stamped signatures are permitted except for those courts in which the official practice is for the judge to electronically sign or stamp his or her signature. The Court will return any application not containing a stamped "filed" copy of the trial court order or judgment on which the application is based.

(d) Filing Fee.

The Clerk shall not receive an application unless filing fees have been paid or an exception set out in Rule 5 has been met. See O.C.G.A. § 5-6-4. The filing fee shall be in the amount set out in Rule 5. The filing date is the date the application is received in conformity with all court rules and all applicable fees are paid.

(e) Required Attachments.

The applicant shall include with the application a copy of any petition or motion that led directly to the order or judgment being appealed and a copy of any responses to the petition or motion.

(f) Sufficient Material.

Applications for discretionary appeal pursuant to O.C.G.A. § 5-6-35 must include sufficient material to apprise the Court of the appellate issues, in context, and to support the arguments advanced. Failure to submit sufficient material to apprise the Court of the issues and support the argument shall result in denial of the application.

(g) Format.

(1) Efiled applications.

Applicants who are represented by counsel must efile applications pursuant to Court of Appeals Rule 46, Electronic Filing of Documents, and in compliance with this Court's efiling instructions.

(i) Application briefs shall follow the requirements of Rule 24, Preparation of Briefs, including the length limitations for computer-generated documents in Rule 24 (f), and shall also follow the general format of Rule 2 (c), Documents.

(ii) Only documents directly relevant to the arguments raised should be uploaded as application exhibits.

(iii) Documents and attachments or exhibits to documents filed below must be uploaded as separate, independent exhibits.

(iv) Each uploaded exhibit must be titled to inform the Court of the nature of the exhibit and to correspond with the application index and citations in the application brief.

(v) The application index, which must be uploaded immediately following – and separately from – the application brief, must identify the exhibits in the order they are uploaded.

(vi) Efiled exhibits may not exceed a total of 100 pages collectively, exclusive of the application brief, application index, trial court order, and motion, with supporting documents leading to the trial court order, and any responses and supporting documents, and any transcripts. If the page limit is exceeded, the attorney submitting the application shall include, as a separate document, a signed certificate of good faith stating:

> "I, the undersigned attorney of record in the above-styled case, certify that all of the documents that have been uploaded as exhibits are directly relevant to the arguments raised in the application, are necessary to apprise the Court of the appellate issues, and support the arguments advanced in the application."

If the application materials are nevertheless found to include unnecessary or duplicative exhibits, a sanction of up to $2,500 may be imposed on the attorney filing the application. See Rule 7 (e) (2), Contempt Penalty.

(vii) Failure to comply with this rule and with the Court's efiling instructions may subject the application to dismissal or return for preparation according to the Court's rules.

(2) Paper-filed applications.

(i) Applications and responses to applications are limited to 30 pages in civil cases and 50 pages in criminal cases, exclusive of attached exhibits and parts of the record, and shall follow the general format of Rule 2 (c), Documents, and Rule 24, Preparation of Briefs.

(ii) Paper-filed applications shall include copies of all supporting materials from the record, indexed and tabbed with a blank sheet between each indexed item.

(iii) Paper-filed applications shall be securely bound at the top with staples or fasteners (round head or ACCO). If not prepared properly, the application is subject to dismissal or return for preparation according to the Court's rules. Tables of content, tables of citations, cover sheets, and certificates of service are not counted toward the page limit.

(h) Filing Under Seal.

No application for discretionary appeal shall be filed under seal unless counsel has moved the Court for permission to file under seal and the Court has granted the motion.

(i) No Extension of Time.

No extensions of time will be granted to file a discretionary application unless a motion for extension is filed on or before the application due date. The motion for an extension of time shall be submitted pursuant to Rule 40(b), Emergency Motions. The filing fee for the Rule 40(b) motion is separate from the discretionary application fee. No extension of time will be granted to file a response to a discretionary application.

(j) Response Time.

Responses are due within 10 days of docketing. No response is required, unless ordered by the Court.

(k) Deadline to File Notice of Appeal.

If the discretionary application is granted, the appellant must file a notice of appeal in the trial court within 10 days of the date of the order granting the application.

(l) Late Filings.

No pleadings will be accepted on an application for discretionary appeal which are filed more than 30 days after the date of the order granting, denying, or dismissing the application or denying or dismissing the motion for reconsideration.

Ga. App. Rule 33.2. Judgment as Precedent.

(a) (1) If an appeal is decided by a division of this Court, a published opinion in which all three panel judges fully concur is binding precedent. An opinion is physical precedent only (citable as persuasive, but not binding, authority), however, with respect to any

portion of the published opinion in which any of the panel judges concur in the judgment only, concur specially without a statement of agreement with all that is said in the majority opinion, or dissent.

(2) ****

The opinion of a case that is physical precedent shall be marked as such when it is cited.

GEORGIA'S JUDICIAL CODE OF CONDUCT (effective Nov. 1, 2018)

CANON 2

Judges Shall Perform The Duties Of Judicial Office Impartially, Competently, And Diligently.

*****

Rule 2.11 Disqualification and Recusal

(A) Judges shall disqualify themselves in any proceeding in which their impartiality might reasonably be questioned, *****

*****

(C) Judges disqualified by the terms of Rule 2.11 may disclose on the record, or in open court, the basis of their disqualification and may ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification. If following disclosure of any basis for disqualification, other than personal bias or prejudice concerning a party, the parties and lawyers, without participation by the judge, all agree that the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceeding. The agreement shall be

incorporated in the record or the file of the proceeding.

Commentary:

[1] Under this Rule, judges are subject to disqualification whenever their impartiality might reasonably be questioned, regardless of whether any of the specific items in Rule 2.11 (A) apply. *****

[2] Judges should disclose on the record, or in open court, information that the court believes the parties or their lawyers might consider relevant to the question of disqualification, even if they believe there is no legal basis for disqualification.