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United States Court of Appeals
for the Eighth Circuit

No. 22-1638

James Edward Bachman; Adella A. Bachman;
Eric J. Bachman; Rachel A. Bachman;
Matthew R. Bachman; C. Andrew Bachman

Plaintiffs - Appellants

v.

John Q. Bachman; Leaf Supreme Products, LLC,
A Nebraska Limited Liability Co.

Defendants - Appellees

Appeal from United States District Court
for the District of Nebraska – Omaha

Submitted: May 9, 2023
Filed: June 30, 2023
[Unpublished]

Before SHEPHERD, STRAS, and KOBES, Circuit Judges.

PER CURIAM.

After a wage dispute, John Bachman was sued by several members of his brother's family (the Bachman family) who worked for him. The district court[1] dismissed the case as a sanction under Fed. R. Civ. P. 41(b) for misconduct, and we affirm.

After careful review, we conclude that the district court did not abuse its discretion. See Siems v. City of Minneapolis, 560 F.3d 824, 826 (8th Cir. 2009) (standard of review). The Bachman family repeatedly filed premature and meritless motions, misstated the record, placed ex parte phone calls to the court about discovery disputes, made improper and overbroad privilege objections during depositions, told a subpoenaed witness not to attend his deposition, and failed to timely reschedule a deposition. The Bachman family's misconduct continued despite frequent warnings and multiple sanctions. See Hairston v. Alert Safety Light Prods., Inc., 307 F.3d 717, 719 (8th Cir. 2002) (explaining that the sanction of dismissal is appropriate when the failure to comply was due to "willfulness, bad faith, or any fault of petitioner" (citation omitted)). The case was properly dismissed.

The Bachman family also asks us to review other district court rulings on appeal. Even if we accepted this invitation, there isn't any merit to the Bachman

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[1] The Honorable Brian C. Buescher, United States District Judge for the District of Nebraska, adopting the report and recommendation of the Honorable Cheryl R. Zwart, United States Magistrate Judge for the District of Nebraska.

family's claims. We deny the motions to supplement the record, to strike, and for sanctions. The judgment is affirmed.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JAMES E. BACHMAN, ADELLA A. BACHMAN, ERIC J. BACHMAN, RACHEL A. BACHMAN, MATTHEW R. BACHMAN, and C. ANDREW BACHMAN,

Plaintiffs,

vs.

JOHN Q. BACHMAN, and LEAF SUPREME PRODUCTS, LLC, A Nebraska Limited Liability Co.;

Defendants.

8:19CV276

ORDER

(Filed Sep. 19, 2019)

After conferring with counsel, and for the reasons stated on the record, (Filing No. 43, audio file),

IT IS ORDERED:

1) Plaintiffs' motion to strike Defendants' answer, (Filing No. 37), is denied.

2) Plaintiffs' objection to permitting the defendants to perform any discovery before responding to the pending motion for summary judgment, (Filing No. 41), is overruled.

3) Defendants' deadline for responding to the plaintiffs' motion for summary judgment, (Filing No. 27), is stayed pending further order of the court.

4) The parties shall review the Nebraska magistrate judges' practices posted at the court's Civil Case Management website page.[1]

5) Counsel for the parties shall confer and, on or before October 7, 2019, they shall either file or email to my chambers (zwart@ned.uscourts.gov) their joint or separate Rule 26(f) Reports, a copy of which can be found at http://www.ned.uscourts.gov/forms.[2]

6) A telephonic conference with the undersigned magistrate judge will be held on October 10, 2019 at 10:00 a.m. to discuss the case progression schedule. Counsel shall use the conferencing instructions assigned to this case to participate in the call.

September 19, 2019.

BY THE COURT:

s/ Cheryl R. Zwart
United States Magistrate Judge

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[1] (https://www.ned.uscourts.gov/attorney/judges-information/civil-case-management).

[2] See https://www.ned.uscourts.gov/forms. The parties are hereby notified or reminded that the Rule 26(f) Report for civil cases pending in the District of Nebraska has been substantially modified, with an effective date of January 1, 2019.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JAMES E. BACHMAN, ADELLA A. BACHMAN, ERIC J. BACHMAN, RACHEL A. BACHMAN, MATTHEW R. BACHMAN, and C. ANDREW BACHMAN,

Plaintiffs,

vs.

JOHN Q. BACHMAN, and LEAF SUPREME PRODUCTS, LLC, A Nebraska Limited Liability Co.;

Defendants.

8:19CV276

ORDER

(Filed Oct. 18, 2019)

In their Rule 26(f) Report, (Filing No. 26), and during a conference call on case progression held on October 10, 2019, the defendants questioned whether this court has federal jurisdiction over Plaintiffs' claims. This court has previously concluded it lacks diversity jurisdiction over Plaintiffs' claims. Plaintiffs allege their claims arise under the federal Fair Labor Standards Act, 29 U.S.C. § 201 et seq. (FLSA), and this court has federal question jurisdiction.

Plaintiffs' complaint alleges Defendants violated the FLSA by failing to pay wages earned. To assert an FLSA claim, Plaintiffs must prove they were 1) "engaged in commerce or in the production of goods for commerce," or 2) were "employed in an enterprise engaged

in commerce or in the production of goods for commerce." 29 U.S.C.A. § 206. Defendants request an opportunity to first perform discovery aimed at these threshold issues before embarking on full discovery for this case.

Under the FLSA, and as applied to the business performed by Leaf Supreme Products, LLC,

> "Enterprise engaged in commerce or in the production of goods for commerce" means an enterprise that—
>
> > (A)(i) has employees engaged in commerce or in the production of goods for commerce, or that has employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person; and
> >
> > (ii) is an enterprise whose annual gross volume of sales made or business done is not less than $500,000 (exclusive of excise taxes at the retail level that are separately stated). . . .

29 U.S.C.A. § 203(s)(1). Defendants question whether Leaf Supreme Products had at least $500,000 in gross sales for the time period in question and if so, for what portion of that time period.

Plaintiffs' counsel argues the defendants are "an enterprise engaged in interstate commerce." And even assuming they were not, Plaintiffs argue FLSA coverage exists because Plaintiffs "were involved in

numerous phases of interstate commerce from designing the products, producing the products through metal roll forming, shipping the products and designing marketing materials used to market Leaf Supreme Product's through interstate commerce." (Filing No. 57, at CM/ECF p. 4).

The FLSA does not afford a basis for recovery of unpaid wages merely because the employee's "activities affect or indirectly relate to interstate commerce." McLeod v. Threlkeld, 319 U.S. 491, 497 (1943). An employee is engaged in commerce when his or her work was "actually in or so closely related to the movement of the commerce as to be a part of it." Id. Employee activities beyond movement in commerce "are governed by the other phrase, production of goods for commerce." Id. "It is not important whether the employer . . . is engaged in interstate commerce. It is the work of the employee which is decisive." Id.

A fact-intensive inquiry is necessary when determining the threshold issue of whether the defendants, or either of them, are "an enterprise engaged in interstate commerce" and for what time frames, and/or whether plaintiffs, or any of them, were "engaged in commerce or in the production of goods for commerce." Defendants request an initial discovery period focused solely on these initial questions to determine whether as to each plaintiff, and for all or any portion of the time frame alleged, this court has or lacks federal question jurisdiction. Defense counsel believes these issues can be flushed out in less than four months.

The court finds Defendants' request is reasonable and may serve to streamline discovery thereafter by defining the proper scope of the parties' future discovery as to any claims or time frames for which this court has jurisdiction. Accordingly,

IT IS ORDERED:

1) Plaintiffs' motion for reconsideration, (Filing No. 56), is denied.

2) Until further order of the court, the parties' discovery is limited to the issues of whether either or both defendants are "an enterprise engaged in interstate commerce" and for what time frames, and/or whether the plaintiffs, or any of them, were "engaged in commerce or in the production of goods for commerce" and for what periods of time.

3) The discovery described in paragraph 2 of this order shall be completed by January 31, 2020.

4) Any dispositive motion on the threshold issues outlined in paragraph 2 of this order shall be filed on or before February 21, 2020.

5) The clerk shall set an internal case management deadline of February 28, 2020 to check on case progression.

October 18, 2019.

BY THE COURT:

s/ Cheryl R. Zwart
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JAMES E. BACHMAN, ADELLA A. BACHMAN, ERIC J. BACHMAN, RACHEL A. BACHMAN, MATTHEW R. BACHMAN, and C. ANDREW BACHMAN, **Plaintiffs,** **vs.** **JOHN Q. BACHMAN, and LEAF SUPREME PRODUCTS, LLC, A Nebraska Limited Liability Co.;** **Defendants.**	**8:19CV276** **MEMORANDUM AND ORDER** (Filed Dec. 9, 2019)

This matter is before the Court on the Objection, ECF No. 60, to the Magistrate Judge's Order that appears at ECF No. 59 (the "Order"). In the Order, the Magistrate Judge ordered that, until January 31, 2020, discovery in this case be limited to the jurisdictional issue of whether either defendant is an enterprise engaged in interstate commerce. ECF No. 59 at 3.

When a party objects to a magistrate judge's order on a nondispositive pretrial matter, a district court may set aside any part of the order shown to be clearly erroneous or contrary to law. Fed. R. Civ. P. 72(a); *see* 28 U.S.C. § 636(b)(1)(A). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the

definite and firm conviction that a mistake has been committed." *Chase v. Comm'r*, 926 F.2d 737, 740 (8th Cir. 1991) (citing *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)). "An order is contrary to law if it fails to apply or misapplies relevant statutes, case law, or rules of procedure." *Haviland v. Catholic Health Initiatives-Iowa, Corp.*, 692 F. Supp. 2d 1040 (S.D. Iowa 2010) (internal quotation marks omitted). The standard of review for an appeal of a Magistrate Judge's order on nondispositive matters is extremely deferential. *See* 28 U.S.C. § 636(b)(1)(A); Shukh v. Seagate Tech., LLC, 295 F.R.D. 228, 235 (D. Minn. 2013).

In the Order, the Magistrate Judge explained that to assert a claim under the Fair Labor Standards Act, 29 U.S.C. § 206, Plaintiffs must prove they were 1) "engaged in commerce or in the production of goods for commerce," or 2) were "employed in an enterprise engaged in commerce or in the production of goods for commerce." Defendants raised questions about whether either of these threshold questions had been satisfied. The Magistrate Judge ordered that discovery be limited to these threshold issues to properly define the scope of the parties' future discovery.

The Magistrate Judge's Order is not clearly erroneous or contrary to law. The Magistrate Judge reasonably limited discovery to resolve threshold issues that may define the Court's jurisdiction in this case. Further, the Magistrate Judge placed a reasonable deadline on the limited discovery. The Order is particularly reasonable given the jurisdictional issues already

raised and the relatively extensive motion practice in this case. Accordingly,

IT IS ORDERED: the Objection, ECF No. 60, to the Magistrate Judge's Order that appears at ECF No. 59, is overruled.

Dated this 9th day of December, 2019.

BY THE COURT:

s/Laurie Smith Camp
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JAMES E. BACHMAN, ADELLA A. BACHMAN, ERIC J. BACHMAN, RACHEL A. BACHMAN, MATTHEW R. BACHMAN, and C. ANDREW BACHMAN, **Plaintiffs,** **vs.** **JOHN Q. BACHMAN, and LEAF SUPREME PRODUCTS, LLC, A Nebraska Limited Liability Co.;** **Defendants.**	**8:19CV276** **MEMORANDUM AND ORDER** (Filed Aug. 7, 2020)

This matter is before the Court on the Motion for Summary Judgment, ECF No. 76, filed by Defendant Leaf Supreme Products, LLC (Leaf Supreme) and John Q. Bachman. Also before the Court are Plaintiffs' Objection, ECF No. 80; Motion for Partial Summary Judgment, ECF No. 82; and Motion to Dismiss, ECF No. 84. For the reasons stated, the motions will be denied without prejudice to reassertion.

BACKGROUND

I. Procedural Background

In their Rule 26(f) Report, ECF No. 26, and during a conference call on case progression held on October

10, 2019, the Defendants questioned whether this Court has federal jurisdiction over Plaintiffs' claims. *See* Mem. & Order, ECF No. 59. Plaintiffs' remaining federal claims arise under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq*. For the Court to have jurisdiction over Plaintiffs' FLSA claims, Plaintiffs must demonstrate they were 1) "engaged in commerce or in the production of goods for commerce," or 2) were "employed in an enterprise engaged in commerce or in the production of goods for commerce." 29 U.S.C.A. § 206(a). Defendants argue that Plaintiffs were not engaged in commerce or the production of goods for commerce and that Leaf Supreme is not an "enterprise engaged in commerce" under the FLSA. Defendants requested that initial discovery be focused solely on these threshold questions to determine whether the Court has federal question jurisdiction over the FLSA claims.

The Court granted Defendants' request and ordered that the parties' discovery be limited to the issues of whether either or both Defendants are "an enterprise engaged in interstate commerce" and for what time frames, and/or whether the Plaintiffs, or any of them, were "engaged in commerce or in the production of goods for commerce" and for what periods of time. Mem. & Order at 3, ECF No. 59, Page ID 510; *see also* ECF No. 75 (overruling Plaintiffs' objection to limited discovery). The Court also entered a deadline for dispositive motions on the issue of this Court's subject matter jurisdiction.

In their Motion for Summary Judgment, Defendants argue that Leaf Supreme is not an enterprise under the FLSA because it did not generate more than $500,000 in 2016 and 2017. Defendants also argue that because Leaf Supreme is a family-owned business, it is exempt from FLSA coverage under 29 U.S.C. § 203(s)(2). Finally, Defendants argue that Plaintiffs Rachel and Adella Bachman were not involved in interstate commerce.

Plaintiffs argue that the Court should grant summary judgment in their favor on Defendants' affirmative defenses because Defendants failed to keep a record of hours worked and failed to pay wages. Plaintiffs also move to dismiss Defendants' affirmative defenses for essentially the same reasons. *See* ECF Nos. 83 and 85. Defendants ask the Court to sanction Plaintiffs for bringing these Motions because Plaintiffs' earlier motions based on similar grounds were addressed and denied. *See* Order, ECF No. 59.

II. Failure to Comply with Local Rules

Plaintiffs did not properly respond to Leaf Supreme's numbered paragraphs in its Statement of Facts, ECF No. 77. Plaintiffs said they did not respond to the Statement of Facts because "Defendants utterly failed in the Statement of Facts and their Brief to allege any controlling facts and apply the law to the case at hand." Pl. Reply Br. at 1, ECF No. 99. This is not a valid reason for failing to respond to Defendants' Statement of Facts. "[T]he rules clearly require that

[the party opposing summary judgment] respond in kind, and in a specific fashion to the statement of undisputed facts asserted by [the moving party]." *Tramp v. Associated Underwriters, Inc.*, 768 F.3d 793, 799 (8th Cir. 2014) (discussing NECivR 56.1). Plaintiffs instead submitted their own separate "Statement," ECF No. 86, that purports to support their own motions and their opposition to Defendants' Motion for Summary Judgment. Because Plaintiffs failed to respond to Defendants' Statement of Facts, the Court accepts Defendants' factual assertions to the extent they are supported by the record. *See* NECivR 56.1(b)(1) ("Properly referenced material facts in the movant's statement are considered admitted unless controverted in the opposing party's response.").

Plaintiffs also submitted a statement of undisputed facts in support of their Motion for Partial Summary Judgment. Defendants responded to Plaintiffs' statement but objected to most of Plaintiffs' factual assertions because they fell outside the scope of the limited jurisdictional discovery. The Court has considered Plaintiffs' factual assertions and evidence to the extent they are relevant to whether the Court has jurisdiction over their FLSA claims.

III. Factual Background

Leaf Supreme is a Nebraska limited liability company. It manufactures guards that keep debris out of rain gutters. Defendant John Q. Bachman is a member and majority owner of Leaf Supreme. Plaintiffs have

been Leaf Supreme's only employees. Plaintiffs assert that from October 1, 2016, to the present, they have not been paid any wages.

Plaintiffs allege that James, Adella, Eric, Andrew, Rachel, and Matthew Bachman were all employees of Leaf Supreme from its inception until April 4, 2019. James, Adella, Eric, and Andrew each worked full-time for Leaf Supreme since its inception until April 4, 2019. Plaintiffs claim that, during the relevant period, each of them worked over 50 hours per week. Rachel worked full time from the inception until August of 2017. After August 2017, she moved from Nebraska to attend school. While at school, she worked remotely on marketing materials and she worked on weekends and breaks from school.

Neither Plaintiffs nor Leaf Supreme kept records of Plaintiffs' hours worked. Plaintiffs assert that each of them, at one point or another, worked directly to produce the gutter protection products that Leaf Supreme sold. This labor included metal roll forming and shipping. After leaving Nebraska to attend school, Rachel worked remotely doing website maintenance for Leaf Supreme. Adella directed accounting and helped with marketing materials.

STANDARD OF REVIEW

"Summary judgment is appropriate when the evidence, viewed in the light most favorable to the nonmoving party, presents no genuine issue of material fact and the moving party is entitled to judgment as a

matter of law." *Garrison v. ConAgra Foods Packaged Foods, LLC*, 833 F.3d 881, 884 (8th Cir. 2016) (citing Fed. R. Civ. P. 56(c)). "Summary judgment is not disfavored and is designed for every action." *Briscoe v. Cty. of St. Louis*, 690 F.3d 1004, 1011 n.2 (8th Cir. 2012) (quoting *Torgerson v. City of Rochester*, 643 F.3d 1031, 1043 (8th Cir. 2011) (en bans)). In reviewing a motion for summary judgment, the Court will view "the record in the light most favorable to the nonmoving party . . . drawing all reasonable inferences in that party's favor." *Whitney v. Guys, Inc.*, 826 F.3d 1074, 1076 (8th Cir. 2016) (citing *Hitt v. Harsco Corp*., 356 F.3d 920, 923-24 (8th Cir. 2004)). Where the nonmoving party will bear the burden of proof at trial on a dispositive issue, "Rule 56(e) permits a proper summary judgment motion to be opposed by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves." *Se. Mo. Hosp. v. C.R. Bard, Inc.*, 642 F.3d 608, 618 (8th Cir. 2011) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)). The moving party need not produce evidence showing "the absence of a genuine issue of material fact." *Johnson v. Wheeling Mach. Prods.*, 779 F.3d 514, 517 (8th Cir. 2015) (quoting *Celotex*, 477 U.S. at 325). Instead, "the burden on the moving party may be discharged by 'showing' . . . that there is an absence of evidence to support the nonmoving party's case." *St. Jude Med., Inc. v. Lifecare Intl, Inc.*, 250 F.3d 587, 596 (8th Cir. 2001) (quoting *Celotex*, 477 U.S. at 325).

In response to the moving party's showing, the nonmoving party's burden is to produce "specific facts

sufficient to raise a genuine issue for trial." *Haggenmiller v. ABM Parking Servs., Inc.*, 837 F.3d 879, 884 (8th Cir. 2016) (quoting *Gibson v. Am. Greetings Corp.*, 670 F.3d 844, 853 (8th Cir. 2012)). The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts, and must come forward with specific facts showing that there is a genuine issue for trial." *Wagner v. Gallup, Inc.*, 788 F.3d 877, 882 (8th Cir. 2015) (quoting *Torgerson*, 643 F.3d at 1042). "[T]here must be more than the mere existence of some alleged factual dispute" between the parties in order to overcome summary judgment. *Dick v. Dickinson State Univ.*, 826 F.3d 1054, 1061 (8th Cir. 2016) (quoting *Vacca v. Viacom Broad. of Mo., Inc.*, 875 F.2d 1337, 1339 (8th Cir. 1989)).

In other words, in deciding "a motion for summary judgment, facts must be viewed in the light most favorable to the nonmoving party only if there is a genuine dispute as to those facts." *Wagner*, 788 F.3d at 882 (quoting *Torgerson*, 643 F.3d at 1042). Otherwise, where the Court finds that "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party," there is no "genuine issue of material fact" for trial and summary judgment is appropriate. *Whitney*, 826 F.3d at 1076 (quoting *Grage v. N. States Power Co.-Minn.*, 813 F.3d 1051, 1052 (8th Cir. 2015)).

DISCUSSION

I. Defendants' Motion for Summary Judgment

The FLSA provides for two types of coverage: (1) enterprise coverage under 29 U.S.C. § 203(s)(1)(A), and (2) individual employee coverage under 29 U.S.C. § 206(a)(1). Defendants contend that Leaf Supreme does not meet the statutory thresholds for enterprise coverage. Defendants also contend that two of the Plaintiffs are not entitled to individual coverage under the FLSA.

A. Enterprise Coverage

To qualify for enterprise coverage, an employer must be an "enterprise engaged in commerce or in the production of goods for commerce." 29 U.S.C. § 203(s)(1). To qualify as an enterprise, an employer must have yearly sales in excess of $500,000.00. *See* 29 U.S.C. § 203(s)(1). In 2016, total sales income for Leaf Supreme was $54,749.00. Df. Ex. 1-D, ECF No. 78 at 50, PageID 682. For 2017, total sales income was $362.069. Df. Ex. 1-E, ECF No. 78 at 51, PageID 683. The parties do not dispute that for the years 2016 and 2017, Leaf Supreme did not meet the $500,000 threshold.

In 2018, Leaf Supreme's total sales income was $500,047.00. Df. Ex. 1-F, ECF No. 78, PageID 684. Leaf Supreme argues that for 2018, it is exempt from enterprise coverage under the "mom and pop" exception to enterprise coverage in 29 U.S.C. § 203(s)(2). Section 203(s)(2) states:

> Any establishment that has as its only regular employees the owner thereof or the parent, spouse, child, or *other members of the immediate family of such owner* shall not be considered to be an enterprise engaged in commerce or in the production of goods for commerce or a part of such an enterprise.

(emphasis added). Although Title 29 does not define "immediate family;" 29 C.F.R. § 779.234 states that "[t]he term 'other members of the immediate family of such owner' is considered to include relationships such as brother, sister, grandchildren, grandparents, and in-laws but not distant relatives from separate households."

The Court finds the "mom and pop" exception does not apply here because the parties are family members from separate households. Caselaw interpreting the "mom and pop" exception is sparse, and the question of whether the exception includes uncles, nieces, and nephews has never been directly addressed. However, the Supreme Court stated the FLSA should be construed "liberally to apply to the furthest reaches consistent with congressional direction." *Tony and Susan Alamo Foundation v. Secretary of Labor,* 471 U.S. 290, 296 (1985) (quoting *Mitchell v. Lublin, McGaughy & Associates*, 358 U.S. 207, 211 (1959)). Although all the Plaintiffs are related to Defendant John Q. Bachman—Leaf Supreme's majority owner—none is a member of the same household. James is John Q.'s brother; Adella is John Q.'s sister-in-law; Eric, Andrew, and Matthew are John Q.'s nephews; and Rachel is John Q.'s niece.

Because "broad coverage is essential" under the FLSA, *Alamo Foundation*, 471 U.S. at 296, Plaintiffs are not John Q.'s immediate family members and Leaf Supreme does not fall under the "mom and pop" exception of 29 U.S.C. § 203(s)(2).

B. Individual Coverage

The FLSA also provides "coverage for 'employees who [are] themselves engaged in commerce or in the production of goods for commerce.'" *Reich v. Stewart*, 121 F.3d 400, 405 (8th Cir. 1997) (quoting *Brennan v. Arnheim & Neely, Inc.*, 410 U.S. 512, 517 (1973)). "For individual coverage, '[t]he burden of proof lies on employees to establish that they were engaged in interstate commerce, or in the production of goods, and that such production was for interstate commerce.'" *Miller v. Centerfold Entm't Club, Inc.*, No. 6:14-CV-6074, 2017 WL 3425887, at *3 (W.D. Ark. Aug. 9, 2017) (quoting *Joseph v. Nichell's Caribbean Cuisine, Inc.*, 862 F. Supp. 2d 1309, 1312 (S.D. Fla. 2012)). To meet their burden, Plaintiffs must show they were "engaged in commerce or in the production of goods for commerce." 29 U.S.C. § 207(a)(2)(C). The test "is not whether the employee's activities affect or indirectly relate to interstate commerce but whether they are actually in or so closely related to the movement of the commerce as to be a part of it." *McLeod v. Threlkeld*, 319 U.S. 491, 497 (1943).

Defendants do not argue that Plaintiffs James, Eric, Matthew, and Andrew Bachman were not engaged in

interstate commerce. Plaintiffs submitted affidavits showing that each Plaintiff provided warehouse labor for metal roll forming and shipping. *See generally* ECF No. 86-1. Plaintiffs' evidence also shows that most of Leaf Supreme's customers were out of state. *See* James E. Bachman Aff. ¶ 3, ECF No. 86-1, PageID 776. Based on this evidence, a reasonable juror could conclude that Plaintiffs were engaged in the production of goods for commerce.[1] Because Defendants have not moved for summary judgment on individual coverage for Plaintiffs James, Eric, Matthew, and Andrew Bachman, the Court concludes it has jurisdiction over their FLSA claims.

Defendants do challenge individual FLSA coverage as to Adella and Rachel Bachman. Rachel performed graphic design and website maintenance for Leaf Supreme. Adella worked in accounting and marketing for Leaf Supreme. Defendants argue that these tasks did not involve interstate commerce, supporting individual FLSA coverage.

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[1] Defendants object to this evidence because Plaintiffs did not present it in compliance with the Court's local rules on summary judgment and it fell outside the limited scope of discovery. The Court acknowledges that Plaintiffs' compliance with discovery requests has been the subject of several motions. Nonetheless, Defendants were able to take depositions and the Plaintiffs' job duties and nature of work fell within the scope of discovery. Although only portions of depositions have been submitted, the evidence shows that counsel for Defendants asked some of the Plaintiffs about their job duties for purposes of determining whether they were engaged in commerce. Accordingly, the Court has considered this evidence to determine whether it has jurisdiction over Plaintiffs' FLSA claims.

For an employee to be "engaged in commerce" under the FLSA, the employee must directly participate "in the actual movement of persons or things in interstate commerce" by "(i) working for an instrumentality of interstate commerce, *e.g.*, transportation or communication industry employees, or (ii) by regularly using the instrumentalities of interstate commerce in his work, *e.g.*, regular and recurrent use of interstate telephone, telegraph, mails, or travel." *Thorne v. All Restoration Servs., Inc.*, 448 F.3d 1264, 1266 (11th Cir. 2006) (citing 29 C.F.R. § 776.23(d)(2); 29 C.F.R. § 776.24)).

Defendants argue that Rachel did not have regular or recurring contact with instruments of interstate commerce because her work was related to web design and occurred mostly in the privacy of her dorm room. However, "[i[t is well-settled that the internet is an instrumentality of interstate commerce." *Miller*, 2017 WL 3425887, at *3 (citations omitted); see also *United States v. Hornaday*, 392 F.3d 1306, 1311 (11th Cir. 2004) ("The internet is an instrumentality of interstate commerce."). At her deposition, Rachel described her regular job duties as "market design work." Rachel Bachman Dep. 7:21-8:4, ECF No. 78, PageID 701-02. She said that her market design work included creating and maintaining "multiple websites." Rachel Bachman Dep. 8:5-9, ECF No. 78, PageID 702. In performing these duties, she regularly communicated with John Q. Bachman via email. Her duties continued remotely after she began college at Augustana University in Sioux Falls, South Dakota. Because Rachel regularly used the internet to complete her work for Leaf Supreme,

she has satisfied the requirements for individual coverage under the FLSA.

Defendants argue that Adella does not qualify for individual FLSA coverage because she was responsible for administrative and bookkeeping activities. The Department of Labor's Field Operations Handbook states that clerical employees who send bills, letters, etc., using interstate communication are engaged in interstate commerce. Field Operations Handbook, Chapter 11, 11c00 at 12, (current as of July 27, 2020), *available at* https://www.dol.gov/agencies/whd/field-operations-handbook/Chapter-11#B11c00. Further, employees who perform record-keeping activities related to interstate commerce are "so closely related to the interstate movement that the recordkeeping employees too are regarded as engaged in interstate commerce." *Id.* Adella's deposition shows that, in 2016, she assisted in preparing websites and participated in actual production of the product. Adella Bachman Dep. 13:1-8; ECF No. 78, PageID 707. The evidence shows that her job duties qualify for individual FLSA coverage.

Because the Plaintiffs have demonstrated that they were engaged in commerce, the Court is satisfied that each of the Plaintiffs qualifies for individual FLSA coverage. Accordingly, Defendants' Motion for Summary Judgment will be denied.

II. Plaintiffs' Motions to Dismiss and for Partial Summary Judgment

For nearly identical reasons,[2] Plaintiffs move to dismiss several of Defendants' affirmative defenses and move for summary judgment as those defenses. Plaintiffs argue that (1) Plaintiffs' failure to keep time records is not a valid defense to their FLSA claim; (2) estoppel and !aches are not valid defenses to an FLSA claim; and (3) a set off by an employer cannot reduce an employee's recovery below minimum wage. Plaintiffs' motions will be denied for several reasons. First, Plaintiffs raised most of these arguments in their Motion to Strike, ECF No. 37. In a telephonic hearing, Plaintiffs argued that Defendants failed to produce any evidence to support these affirmative defenses. *See* Audio File, ECF No. 43 at 10:45-11:00. The Court denied the Motion to Strike because discovery had not taken place on these issues. *Id.* at 11:40, 13:00-13:20.

Despite the Court's previous ruling, Plaintiffs again moved to dismiss Defendants' defenses on essentially the same basis. As noted above, the Court limited discovery to resolve threshold issues that may define the Court's jurisdiction in this case. Since the Court's prior ruling, no further discovery has taken place on the issues supporting Plaintiffs' motion to dismiss or

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[2] Plaintiffs' briefs in support of both the Motions to Dismiss and Motions for Partial Summary Judgment appear to rely on the same facts and the same evidence. Further, the briefs in support of each of these motions are nearly identical in substance. *See* ECF Nos. 83 and 85. Accordingly, the Court addresses these motions together.

motion for partial summary judgment. Because the Court anticipates that Plaintiffs will raise these issues in future motions, the Court will address why further discovery is necessary before Plaintiffs' Motions can be addressed.

A. Records of Hours Worked

Plaintiffs argue that their failure to keep time records is not a defense to an FLSA claim. In an FLSA claim, the plaintiff bears the burden of demonstrating "(1) that the plaintiff has performed compensable work and (2) the number of hours for which the plaintiff has not been properly paid." *Hertz v. Woodbury Cnty., Iowa*, 566 F.3d 775, 783 (8th Cir. 2009). The FLSA requires employers to "make, keep and preserve such records of the persons employed by him and of wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator [of the Department of Labor's Wage and Hour Division] as he shall prescribe by regulation or order. . . ." 29 U.S.C. § 211(c). If an employer has not kept adequate records of hours and wages, employees generally are not denied recovery on the ground that the precise extent of their uncompensated work cannot be proved. *Dole v. Alamo Foundation*, 915 F.2d 349, 351 (8th Cir. 1990). Rather, employees "are to be awarded compensation on the most accurate basis possible." *Id.* (citing *Anderson v. Mt. Clemens Pottery* Co., 328 U.S. 680, 687-88 (1946)).

When "an employer fails to maintain accurate time records, *Anderson* relieves the employee of proving the precise extent of uncompensated work and creates a relaxed evidentiary standard." *Carmody v. Kansas City Bd. of Police Comm'rs*, 713 F.3d 401, 406 (8th Cir. 2013) (citing *Anderson*, 328 U.S. at 687). Under this relaxed standard, "once the employee has shown work performed for which the employee was not compensated, and 'sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference,' the burden then shifts to the employer to produce evidence to dispute the reasonableness of the inference." *Id.* (quoting *Anderson*, 328 U.S. at 68788). This relaxed standard only applies where the existence of damages is certain, and uncertainty remains as to the amount of damages. *Id.*

Although Plaintiffs produced some evidence of the minimum wage they would be owed under the FLSA, Defendants have not had an opportunity to conduct discovery on the amount and extent of work Plaintiffs performed. Despite the parties' extensive motion practice—and perhaps because of it—this case is at an early stage procedurally. Only limited jurisdictional discovery has taken place and the existence of damages is not certain. The Court cannot determine whether Plaintiffs' evidence of damages will be sufficient to meet the relaxed standard under *Anderson* or even whether *Anderson* applies to the Plaintiffs in this case. Accordingly, Plaintiffs' Motion to dismiss Defendants' affirmative defense on this issue will be denied.

B. Equitable Defenses

Plaintiffs argue that the FLSA prevents Defendants' equitable defenses of estoppel, laches, and unclean hands. It is true "that FLSA rights cannot be abridged by contract or otherwise waived because this would 'nullify the purposes' of the statute and thwart the legislative policies it was designed to *effectuate*." *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 740 (1981). Accordingly, if Defendants argue that Plaintiffs waived rights under the FLSA to which they were otherwise entitled, such a defense would be invalid. However, in certain circumstances, courts have allowed defendants to assert equitable defenses in FLSA actions. *See Bailey v. TitleMax of Georgia, Inc.*, 776 F.3d 797, 804 (11th Cir. 2015). Absent discovery on these issues, the Court cannot determine whether such defenses are applicable.

Plaintiffs specifically argue that Leaf Supreme cannot assert the doctrine of unclean hands as a bar to recovery under the FLSA. Defendants do not directly assert a defense of unclean hands, but Plaintiffs apparently raise this issue based on Defendants' state-court allegations that Plaintiffs made unauthorized withdrawals from Leaf Supreme. Defendants respond that once discovery is completed on the merits of this case, they believe the evidence will show that Plaintiffs directed Leaf Supreme to pay Plaintiffs' personal expenses rather than paying Plaintiffs' wages. For the reasons stated above, the Court cannot determine whether this defense is valid under the FLSA and will

not be able to do so until the parties have completed discovery.

CONCLUSION

Evidence before the Court demonstrates that the Court has jurisdiction over Plaintiffs' FLSA claims, and Defendants' Motion for Summary Judgment will be denied. Plaintiffs' Motions will also be denied because they are premature. The Court cannot determine whether Defendants' affirmative defenses apply until after discovery is completed.

Accordingly,

IT IS ORDERED:

1. The Motion for Summary Judgment, ECF No. 76, filed by Defendant Leaf Supreme Products, LLC, and John Q. Bachman is denied;

2. Plaintiffs' Motion for Partial Summary Judgment, ECF No. 82, and Motion to Dismiss, ECF No. 84, are denied without prejudice to reassertion after discovery is completed; and

3. The Clerk of Court is directed to terminate Plaintiffs' Objection, ECF No. 80.

Dated this 7th day of August, 2020.

BY THE COURT:

s/Laurie Smith Camp
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JAMES E. BACHMAN, ADELLA A. BACHMAN, ERIC J. BACHMAN, RACHEL A. BACHMAN, MATTHEW R. BACHMAN, and C. ANDREW BACHMAN,

Plaintiffs,

vs.

JOHN Q. BACHMAN, and LEAF SUPREME PRODUCTS, LLC, A Nebraska Limited Liability Co.;

Defendants.

8:19CV276

MEMORANDUM AND ORDER

(Filed Nov. 18, 2020)

This case is before the court of the parties' cross discovery motions (Filing Nos. 108 and 115). Defendants Leaf Supreme Products, LLC and John Q. Bachman (hereafter "Defendants") have moved for a protective order limiting the scope of the Requests for Admission ("RFAs") and Interrogatories previously served by the Plaintiffs. Plaintiffs James E. Bachman, Adella A. Bachman, Eric J. Bachman, Rachel A. Bachman, Matthew R. Bachman and C. Andrew Bachman (hereafter "Plaintiffs")then filed a competing motion to compel – asking the court to require Defendants to respond to the RFAs, Request for Production of Documents ("RFPs"), and Interrogatories as requested. Also before the court is Defendants' Motion to Amend (Filing No.

111), which requests leave of court to amend their answer to assert additional claims and defenses.

Being fully advised, the court will grant in part and deny in part the motions for protective order and to compel and will grant the motion for leave to amend.

BACKGROUND

Defendant Leaf Supreme is a Nebraska limited liability company. It manufactures a type of "guard" meant to alleviate clogging (from leaves and other debris) in rain gutters. Defendant John Q. Bachman is a member and majority owner of Leaf Supreme. Plaintiffs have been Leaf Supreme's only employees. They claim that, from October 1, 2016 to the present, they have not been paid any wages, in violation of federal law. Neither Plaintiffs nor Leaf Supreme kept records of Plaintiffs' hours worked. (See generally, Filing No. 101).

Plaintiffs' federal claims arise under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 et seq.[1] Plaintiffs originally moved for summary judgment on the FLSA claims on August 6, 2019. (Filing No. 27). The court denied that motion, without prejudice to reassert

[1] There are ancillary state law claims alleged. However, because the relief and factual basis is largely duplicative of the FLSA claims discussed here, the court need not substantively address the state law claims further in order to render an order on these discovery and pleading issues.

after sufficient discovery.[2] (Filing No. 55). Later, during the initial planning conference, Defendants asserted this court lacked federal question jurisdiction. Specifically, Defendants question whether there is evidence supporting the FLSA requirements set forth in 29 U.S.C.A. § 206. The court allowed limited discovery on the jurisdictional issue and set a deadline for dispositive motions addressing the issue of federal subject matter jurisdiction. (Filing Nos. 58 and 59).

The parties conducted their limited discovery, and Defendants moved for summary judgment on jurisdictional grounds. (Filing No. 76). The court found that federal jurisdiction was proper under the FLSA and denied the motion. (Filing No.). Concurrently, Plaintiffs filed motions to dismiss and for partial summary judgment, (Filing Nos. and), claiming that Defendants' affirmative defenses were improper. The court denied those motions as premature, pending discovery on the merits. (Filing No. 101).

After the court resolved the above dispositive motions, the undersigned conducted another discovery planning conference with the parties. Thereafter, the court set progression deadlines and the parties began full discovery. (Filing Nos. and 104). Defendants' have not responded to, or have lodged general objections to, certain of Plaintiffs' discovery requests. Defendants

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[2] In addition to the early summary judgment motion, the court has also previously denied seven motions for injunctive relief (requesting for both temporary restraining orders or preliminary injunctions) filed by the various Plaintiffs, (See Filing Nos. 2, 7, 8, 9, 14, 16, and 51).

move for a discovery protective order, (Filing No. 108), and Plaintiffs have filed a corresponding motion to compel, (Filing No. 115).

Defendants argue that Plaintiffs' First and Second Sets of Requests for Admission are overbroad and harassing. Defendants assert a blanket objection to these requests and ask the court for an order relieving them from the duty to provide specific admissions or denials to the 299 requests propounded. (Filing No. 108). Plaintiffs objected to Defendants' request for protective order and filed a motion to compel their response to the RFAs. (Filing Nos. 112 and 115). There is also a dispute regarding Defendants' responses to certain Interrogatories and Requests for Production. While not entirely clear, it appears that the Interrogatories currently in dispute are Nos. 4-8, and Plaintiffs demand a supplemental response to RFP Nos. 1, 4, and 5. (Filing No. 115).

In addition to the discovery motions, Defendants seek leave of court to amend their answer to the First Amended Complaint. (Filing No. 111). Plaintiffs oppose the request, arguing that the proposed additional counterclaims and defenses are legally impermissible in this FLSA action.

ANALYSIS

I. Cross Motions to Compel and for Protective Order[3]

Given the dual discovery motions, this case presents an unusual standard of review. On their motion for protective order, Defendants, as the moving parties, "bear[ ] the burden to 'show the necessity of [the protective order's] issuance, which contemplates a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements.'" Kozlov v. Associated Wholesale Grocers, Inc., 2014 WL 4534787, at *2 (D. Neb. Sept. 11, 2014) (quoting Gen. Dynamics Corp. v. Selb Mfg. Co., 481 F.2d 1204, 1212 (8th Cir.1973)). "Rule 26(c) confers broad discretion on the trial court to decide when a protective order is appropriate and what degree of protection is required." Seattle Times Co. v. Rhinehart, 467 U.S. 20, 36 (1984).

On the motion to compel, Plaintiffs are the moving parties and must make a threshold showing that

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[3] In opposition to Plaintiffs' motion to compel, Defendants argue that Plaintiffs' motion should be denied for failure to comply with this court's rules regarding discovery disputes. While Defendants are correct that Plaintiffs did not certify that they had attempted to resolve this issue and did not contact the court to confer on these issues prior to formal motion practice, Defendants also failed to seek a court conference prior to moving for a protective order. More importantly, based on past conferences in this case, the court is not convinced a discovery conference would have resolved all or even part of the issues raised. So, in the interest of judicial economy, the court will take up the substantive issues presented on these motions even though the parties failed to comply with the court's procedures.

requested information is relevant to the claims or defenses alleged. ACI Worldwide Corp. v. Mastercard Techs., LLC, 2015 WL 4249760, at *1 (D. Neb. July 13, 2015). If they do so, the burden shifts to Defendants, as the responding parties, to prove their "objections are valid by providing specific explanations or factual support as to how each discovery request is improper." Whittington v. Legent Clearing, LLC, 2011 WL 6122566, * 3 (D. Neb. Dec. 8, 2011).

The standards will be applied as appropriate to each set of discovery requests.

a. Requests for Admission

Fed. R. Civ. P.36 allows a party to serve a written request to admit "the truth of any matters within the scope of 26(b)(1) relating to facts, the application of law to fact, or opinions about either." Fed. R. Civ. P. 36(a)(1). "Requests for admissions are not principally discovery devices." Safeco of America v. Rawstron, 181 F.R.D. 441, 445 (C.D.Ca.1998) (citation omitted). In theory, Rule 36 "presupposes that the party proceeding under it knows the facts or has the document and merely wishes its opponent to concede their genuineness." The rule was "designed as a device by which at least some of the material facts of a case could be established without the necessity of formal proof at the trial." Brentwood Equities, Inc. v. Taco Maker, Inc., 2015 WL 5883325, at *1 (D. Utah Oct. 8, 2015) (internal citation omitted).

"[T]he Federal Ru les of Civil Procedure . . . [do not set] a presumptive limit on the number of requests for

admission that may be propounded by a party." Wilson v. Jackson Nat'l Life Ins. Co., 2017 WL 10402569, at *2 (M.D. Fla. Feb. 13, 2017) (quoting Layne Christensen Co. v. Purolite Co., 2011 WL 381611, at *4 (D. Kan. Jan. 25, 2011)). However, "admissions should not be of such great number and broad scope as to cover all the issues [even in] a complex case, and [o]bviously . . . should not be sought in an attempt to harass an opposing party." Wilson, 2017 WL 10402569, at *2 (quoting Wigler v. Elec. Data Sys. Corp., 108 F.R.D. 204, 206-07 (D. Md. 1985) (citations and quotations omitted). Requests are improper if they amount to "an attempt to pick every nit that a squad of lawyers could possibly see[.]" U.S. v. Medtronic, Inc., 2000 WL 1478476, at *4-5 (D. Kan. July 13, 2000) (quotations omitted).

Both parties agree that the RFAs at issue can be bifurcated into two categories: Request Nos. 1-55 and Request Nos. 56-299. In their brief in support of the motion to compel, Plaintiffs claim that Request Nos. 1-55 are "standard requests, relating directly to the facts of the case or defenses raised by the Defendants." (Filing No. 116 at CM/ECF p. 1). Request Nos. 56-299, Plaintiffs assert, "relate to funds the Plaintiffs contributed to Leaf Supreme Products, LLC." (Id.) (emphasis added).

Defendants make no argument, either in their brief in support of their request for protective order or in opposition to the motion to compel, that addresses

the substance of Request Nos. 1-55.[4] Defendants' blanket objection to those requests is that Defendants should not have to answer any RFAs because Plaintiffs abused Rule 36 by serving a harassing number of requests, in total. And other than making conclusory statements that their requests are substantively relevant and proper in scope/number, Plaintiffs also do not specifically address Request Nos. 1-55.

As to Request Nos. 56-299, Defendants posit the following specific grievances (in addition to their general numerosity objection):

> 1) Requests 5[6] through 299 read primarily like depositions questions as each request asks Defendants to refer to documents sent with the requests. Thereafter, there are follow-up requests once the document is identified. These begin at Request for Admission 66 and continue throughout until Request 298.
>
> 2) Several of the requests deal with documents and issues that are not relevant to the issues of this case. For example, Request no. 64, 297, 31, 32 reference an "MOU", its execution and its enforceability. There is no MOU attached to the Requests and there is no explanation of what Plaintiffs mean. Defendants are aware of an "MOU" (Memorandum of Understanding") that is the subject of

[4] There are two exceptions: Request Nos. 31 and 32, which Defendants lump into their relevancy argument related to Request Nos. 64 and 297.

litigation pending in the District Court of Nebraska, Leaf Supreme Products, LLC v. James and Adella Bachman, CI 19 - 4497. Such is not relevant to these proceedings.

3) A number of requests refer to documents that are heavily redacted. Requests following these heavily redacted records stem from those records. It is not possible to answer these requests without being able to read the unredacted documents. (See Ex. F, Aranza Declaration). The redacted documents are found at IOE 58, 61, 63, 126, and 127. Even with those records that are not redacted, it is impossible to answer Requests 55 through 299 without being able to read and understand the redacted documents. As long as portions of these records are redacted, these requests cannot be answered.

4) Almost all of the Requests from number 56 through 299 cannot be answered as Plaintiffs were in possession of the records of Defendant Leaf Supreme throughout the time that Leaf Supreme was conducting business. In fact, it was necessary for Defendant John Bachman and Leaf Supreme to obtain an injunction to take possession of the business and of the premises. (Aranza declaration, Ex. E). All of these checks were written by either James, Adella, or Eric Bachman. It will be necessary to conduct discovery with them before these requests can be answered.

(Filing No. 109 at CM/ECF pp. 2-3). Plaintiffs claim that Request Nos. 56-299 are proper because they seek admissions related to monetary amounts contributed by Plaintiffs to Leaf Supreme. Plaintiffs claim that the amount contributed is relevant because it undercuts Defendants' theory that Plaintiffs made unauthorized withdrawals from Leaf Supreme in an amount that exceeded Plaintiffs' monetary contributions. Plaintiffs do not address Defendants' contentions about the MOU, the redactions, or access to the documents.

Under some circumstances, 299 RFAs may be permissible. Courts in other districts have allowed parties to propound RFAs in similar numbers. See, e.g., Sommerfield v. City of Chicago, 251 F.R.D. 353, 354 (N.D. III. 2008). However, as other courts have uniformly made clear, the number of RFAs must be reasonably proportionate to the needs of the litigation. Stokes v. Interline Brands Inc., 2013 WL 6056886, at *2 (N.D. Cal. Nov. 14, 2013) (number of requests propounded was unreasonable); Murray v. U.S. Dep't of Treasury, 2010 WL 3464914, at *2 (E.D. Mich. Sept. 1, 2010) (same).

The court is unconvinced that 299 requests are necessary here, given the fairly limited issues remaining in this case. Although the extensive, previous motion practice might tell a different story, this case is a basic FLSA wage and hour dispute.

The court has reviewed all of Plaintiffs' RFAs, and they run the spectrum: some are reasonable, but many others ask for admission of insignificant, minor details

or call for pure conclusions of law. See Mitchell v. Yeutter, 1993 WL 139218, at *1 (D. Kan. Jan. 12, 1993) (disallowing RFAs that "focus on small details, and not on major factual issues" of the case); Vernet v. Serrano-Torres, 2013 WL 12350557, at *3 (D.P.R. Jan. 30, 2013) (collecting cases that hold that RFAs may not be used to establish conclusions of law).

Requests for admission cannot be a complete substitute for formal and informal discovery in a case. Yeutter, 1993 WL 139218, at *1. Many of Plaintiffs' requests appear to be just that. For example, "First Set of Admissions, Request 5)" asks Defendants to "[a]dmit that the Defendants knew that Plaintiffs were entitled by law to be paid pursuant to the FLSA or showed reckless disregard that the Plaintiffs were not eligible to be paid pursuant to the FLSA." (Filing No. 115-3 at CM/ECF p. 2). This type of request is fundamentally flawed. First, it does not seek an admission of fact or the application of a fact to the law – it improperly calls for a pure conclusion of law. Lakehead Pipe Line Co. v. American Home Assur. Co., 177 F.R.D. 454, 458 (D. Minn. 1997) ("a request for admission which involves a pure matter of law, that is, requests for admissions of law which are related to the facts of the case, are considered to be inappropriate."). Moreover, this request essentially asks Defendants to concede the core disputed point in this lawsuit. That too is an improper use of Rule 36. Asarco LLC v. Union Pac. R.R. Co., 2016 WL 1755241, at *12 (D. Idaho May 2, 2016) ("requests for admission should not be used to establish facts which are obviously in dispute").

Many of the requests in the first group – Request Nos. 1-55 – are similarly flawed. For example, Request Nos. 5, 9, 10, 13-14, 24-30, 40-42 call explicitly for legal conclusions. And that listing is demonstrative, not exhaustive. RFAs that simply parrot the complaint, or call for disputed conclusions of law, are improper under Rule 36. Asarco, 2016 WL 1755241, at *12.

In addition to requests for legal conclusions, some requests call for admissions related to information that this court has previously addressed and determined to be irrelevant. The parties have previously disputed the relevancy of information related to a certain "Memorandum of Understanding" or "MOU" that forms the basis of a separate, state court action between some of these parties. This court observed then that: "Plaintiffs insist, however, that the MOU is somehow determinative of Plaintiffs' FLSA claims. Plaintiffs have failed to provide any evidence or explanation as to how the MOU affected their employment status or their entitlement to wages previously earned." (Filing No. 23 at CM/ECF p. 5). The court is aware of no newly presented evidence that would alter that previous observation. Requests for Admission related to the MOU (see Request Nos. 31, 32, 64, 65, 66, 67, 73 and 297) would thus appear irrelevant to the claims currently pending in this forum.

Other documents attached to the RFAs are very heavily redacted. (See, e.g., Filing Nos. 115-4 at CM/ECF p. 1 and 115-5 at CM/ECF p. 40). Defendants argue that they cannot effectively admit or deny requests stemming from those documents if they cannot effectively

review them first. (Filing No. 109 at CM/ECF pp. 2-3). The court agrees.

Moreover, the majority of the second grouping of requests – Request Nos. 56-299 – appear to be requests for Defendants to admit actions taken by Plaintiffs. Nearly all these requests deal with purported deposits into Leaf Supreme's accounts made by various Plaintiffs. The court is not convinced that is a proper use of Rule 36.[5] And requests that Defendants characterize the payments as "loans" likewise seems improper. None of the records attached to the RFAs appear to reflect the purpose behind any deposit. The lion's share of the documents attached are standard deposit slips and/or copies of checks, which provide no context. (See generally, Filing No. 115-4).

For clarity, the court is not determining whether the records of financial transactions attached to the RFAs are irrelevant. The court finds that even assuming the documents are relevant, the RFAs are improper. The court further notes that given the volume of financial documents at issue, discussions aimed at stipulating to foundation and authenticity of the financial documents would be both the common practice in this forum, and the most expedient and inexpensive course of action. Unfortunately, the litigation history in this case has been blighted by what, at times, appears to be personal animus rather than sound

[5] Plaintiffs' briefing in support of this argument is predominantly a discussion of the FLSA and its application and history. It does not explain why Defendants should be compelled to respond to Plaintiffs' voluminous discovery.

strategy. Plaintiffs' copious requests appear to be a symptom of that ongoing malady. When faced with similar case history and voluminous requests for admission, one court recognized:

> [t]he synergy of this litigation, as indicated by these pleadings, borders more on brinksmanship and sharp practice than anything else. Surely, judicial and litigation economy and efficiency, the intended and vital purpose of Requests to Admit, were not promoted by these parties.

Henry v. Champlain Enterprises, Inc., 212 F.R.D. 73, 82 (N.D.N.Y. 2003). The same is true here. Given all the foregoing defects in the Requests as drafted, and the fact that the volume of Requests served is disproportionate to the needs of this case, the court will grant Defendants a protective order as it relates to the RFAs.

b. Interrogatories

Plaintiffs' motion to compel seeks an order compelling responses to Interrogatory Nos. 4-8. (Filing No. 115). Defendants argue that Plaintiffs exceeded the allowable number of interrogatories, and no additional response is therefore required. In essence, Defendants claim that when a party believes too many interrogatories were served, that responding party can raise a general objection, unilaterally pick and choose which interrogatories to answer, and refuse to answer the rest. The court is not persuaded. "When a party believes that another party has asked too many interrogatories,

the party to which the discovery has be[en] propounded should object to all interrogatories or file a motion for protective order. The responding party should not answer some interrogatories and object to the ones to which it does not want to respond. By answering some and not answering others, the [party] waived this objection." Allahverdi v. Regents of Univ. of New Mexico, 228 F.R.D. 696, 698 (D.N.M. 2005). Defendants answered and objected to the interrogatories prior to seeking a protective order. Defendants responded to Interrogatory Nos. 2-3 and objected to the balance (including Interrogatory No. 1). That tactic is impermissible.

The court has reviewed the remaining interrogatories, and except as to Interrogatory No. 1 (which the parties agree is overbroad and impermissible), Defendants must answer and/or object to each interrogatory individually. If a dispute arises related to those individual responses, the parties must attempt to resolve their dispute informally, and if they cannot resolve the dispute through good faith discussions, they must participate in a discovery dispute conference before undersigned magistrate judge before engaging in formal motion practice.

c. Requests for Production

Finally, Plaintiffs' motion to compel requests supplemental response to RFP Nos. 1, 4, and 5. Defendants do not address the RFPs either in their brief in support

of their request for protective order or in opposition to the motion to compel.

Plaintiffs filed a copy of their document production requests, (Filing No. 115-1). However, the copy provided to the court does not include Defendants' responses to those requests. Presumably, because Plaintiffs only request additional responses to Request Nos. 1, 4 and 5, Defendants previously provided sufficient responses or produced documents sufficient to satisfy the other requests. However, because the parties have not provided the court with Defendants' objections to the RFPs in question, and have not sufficiently briefed the issues, any issues with the RFPs are not properly before the court.

That said, if Defendants have not objected, but also have not produced the documents, they must do so immediately. If Defendants have failed to respond to those requests altogether, they must do so immediately. If Defendants have lodged objections to those requests, and the parties disagree as to the validity of those objections, the parties must contact the court for a discovery dispute conference to discuss those objections and attempt to resolve those issues.

II. Motion for Leave to Amend

Defendants seek leave to amend their answer to the First Amended Complaint to assert additional defenses and counterclaims. (Filing No. 111) Because the request is made prior to the pleading amendment deadline in the scheduling order (Filing No. 104), the

request is governed by the liberal standard in Fed. R. Civ. P. 15.

Under Rule 15(a), "absent a good reason for denial—such as undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the non-moving party, or futility of amendment—leave to amend should be granted." Kozohorsky v. Harmon, 332 F.3d 1141, 1144 (8th Cir. 2003). Plaintiffs claim that Defendants' proposed pleading amendment is futile– alleging that an FLSA case cannot be expanded to include ancillary employment related claims and must be confined to evaluation of the wage payments in dispute. (Filing No. 112 at CM/ECF p. 2) (citing Tennessee Coal Iron & R. Co. v Muscoda Local No. 123, 321 U.S. 590, 602 (1944)).

Futility is a valid basis for denying leave to amend. U.S. ex rel. Lee v. Fairview Health Sys., 413 F.3d 748, 749 (8th Cir. 2005) (citing Moses.com Securities, Inc. v. Comprehensive Software Sys., Inc., 406 F.3d 1052, 1065 (8th Cir.2005)). An amendment is futile if it is clearly insufficient or frivolous on its face. See, e.g., Perez v. World Fin. Grp., 2019 WL 6698178, at *1 (D. Ariz. Dec. 9, 2019) ("[L]eave to amend should be denied as futile only if no set of facts can be proved under the amendment to the pleadings that would constitute a valid and sufficient claim or defense."); In re Senior Cottages of Am., LLC, 482 F.3d 997, 1001 (8th Cir. 2007) ("when a court denies leave to amend on the ground of futility, it means that the court reached a legal conclusion that the amended complaint could not withstand a Rule 12 motion").

The court will not reach the merits of the futility arguments here and declines to make a legal determination as the sufficiency of the additional claims. Plaintiffs have previously moved to strike (and for summary judgment on) Defendants' affirmative defenses based on similar reasoning. This court, when denying that request in Plaintiffs' most recent motion for summary judgment, noted that there are fact questions that need to be resolved prior to a determination as to which defenses are proper in this case. The court determined that

> [i]t is true "that FLSA rights cannot be abridged by contract or otherwise waived because this would 'nullify the purposes' of the statute and thwart the legislative policies it was designed to effectuate." Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 740 (1981). Accordingly, if Defendants argue that Plaintiffs waived rights under the FLSA to which they were otherwise entitled, such a defense would be invalid. However, in certain circumstances, courts have allowed defendants to assert equitable defenses in FLSA actions. See Bailey v. TitleMax of Georgia, Inc., 776 F.3d 797, 804 (11th Cir. 2015). Absent discovery on these issues, the Court cannot determine whether such defenses are applicable.

(Filing No. 101 at CM/ECF pp. 13-14). Discovery might also clarify whether, on the specific facts presented here, Defendants can assert certain counterclaims. Other courts have noted instances where similar

counterclaims have been allowable in an FLSA action. Ahle v. Veracity Research Co., 641 F. Supp. 2d 857, 863 (D. Minn. 2009); Lombardi v. City of Connersville, 2007 WL 190324, at *1-2 (M.D.Tenn. Jan. 22, 2007).

Perhaps Plaintiffs will, after the close of discovery, have a valid basis for dismissal of Defendants' additional claims. But those questions are better suited for full briefing on a substantive motion. This is underscored by the court's previous admonishment to Plaintiffs to desist with the piecemeal litigation of Defendants' claims and defenses, to finish discovery, and to litigate those issues on a consolidated motion. (Filing No. 101 at CM/ECF p. 14).

Aside from the futility argument addressed above, none of the other Rule 15 bases for denying Defendants' motion for leave are present in this case. The Eighth Circuit has acknowledged that prejudice may be present "when late tendered amendments involve new theories of recovery and impose additional discovery requirements . . . [.]" Bell v. Allstate Life Ins. Co., 160 F.3d 452, 454 (8th Cir.1998). Even still, the court must determine whether allowing the amendment would require "significant additional resources [for] discovery and trial preparation" or would "significantly delay resolving the dispute." Jewish Fed'n of Lincoln, Inc. v. Rosenblatt, 2018 WL 6171816, at *1 (D. Neb. Nov. 26, 2018) (citing Long v. Wilson, 393 F.3d 390, 400 (3rd Cir. 2004)) (emphasis added). No such prejudice or delay exists here.

The court will allow Defendants to amend their answer as requested.

Accordingly, IT IS ORDERED:

1) Defendants' Motion for Protective Order (Filing No. 108) and Plaintiffs' Motion to Compel (Filing No. 115) are resolved as follows:

    a. Defendants' Motion for Protective Order is granted as to Plaintiffs' First or Second Set of Requests for Admission, and accordingly, Plaintiffs' Motion to Compel answers to those requests is denied.

    b. Defendants% Motion for Protective Order is denied as to Plaintiffs' Interrogatory Nos. 4-8, and accordingly, Plaintiffs' Motion to Compel answers to those interrogatories is granted. On or before December 17, 2020, Defendants shall provide supplemental responses to Plaintiffs' Interrogatory Nos. 4-8, as outlined herein.

    c. Plaintiffs' Motion to Compel responses to Plaintiffs' Requests for Production Nos. 1, 4 and 5 is granted. To the extent Defendants have failed to respond to Plaintiffs' Requests for Production of Documents Nos. 1, 4, or 5, Defendants shall answer or object to those requests by December 17, 2020. To the extent Defendants have answered those requests but not produced responsive documents, Defendants must make that production by December 17, 2020.

d. The parties are required to informally attempt resolution of any additional discovery dispute. If informal resolution cannot be achieved, the parties shall contact the chambers of the undersigned magistrate judge on or before January 19, 2021 to schedule a telephonic discovery conference. No additional discovery motion shall be filed absent consent of the court.

2) Plaintiffs' Motion to Strike their Motion to Compel (Filing No. 118) is denied as moot.

3) Defendants' Motion for Leave to Amend (Filing No. 111) is granted. Defendants shall file their amended answer, a copy of which is attached to their motion, on or before November 24, 2020.

Dated this 18th day of November, 2020.

BY THE COURT:

s/ Cheryl R. Zwart
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JAMES E. BACHMAN, ADELLA A. BACHMAN, ERIC J. BACHMAN, RACHEL A. BACHMAN, MATTHEW R. BACHMAN, and C. ANDREW BACHMAN,

Plaintiffs,

vs.

JOHN Q. BACHMAN, and LEAF SUPREME PRODUCTS, LLC, A Nebraska Limited Liability Co.;

Defendants.

8:19-CV-276

MEMORANDUM AND ORDER

(Filed Jan. 7, 2021)

I. INTRODUCTION

This matter is before the Court on the Plaintiffs' Objection to Magistrate Judge's Order, Filing 123. Specifically, Plaintiffs object to the Magistrate Judge's Order granting leave to Defendants to amend their pleadings and file counterclaims. For the reasons stated, the Objection will be overruled.

II. BACKGROUND

The Court incorporates is previous Orders, Filing 10, Filing 23, and Filing 101, which contain a more detailed recitation of the factual allegations and

procedural history of this case. The Court provides the following background relevant to Plaintiffs' Objection:

Defendant Leaf Supreme Products, LLC ("Leaf Supreme") is a Nebraska limited liability company. Filing 26 at 1. It manufactures guards that keep debris out of rain gutters. Filing 26 at 2. Defendant John Q. Bachman is a member and majority owner of Leaf Supreme. Filing 26 at 1. Plaintiffs have been Leaf Supreme's only employees. Filing 26 at 2-4. Plaintiffs assert that from October 1, 2016, to the present, they have not been paid any wages. Filing 26 at 8. Plaintiffs allege that James, Adella, Eric, Andrew, Rachel, and Matthew Bachman were all employees of Leaf Supreme from its inception until April 4, 2019. Filing 26 at 2-4.

Though this case is at a relatively early stage procedurally, it has been extensively litigated. Relevant to the matter before the Court, on October 1, 2020, Defendants moved to amend their answer to assert affirmative defenses and counterclaims. Filing 111. Defendants sought to assert counterclaims that Plaintiffs[1] made improper payments to themselves using Leaf Supreme funds without categorizing the payments as wages. *See* Filing 128 at 7-9. On November 18, 2020, addressing several motions, the Magistrate Judge granted Defendants' motion to amend. Filing

[1] Defendants' counterclaims are only against Plaintiffs James, Adella, Eric, and Andrew Bachman. Although not all Plaintiffs are counter-defendants, for sake of brevity and clarity in this Memorandum and Order, the Court will refer to counter-defendants as "Plaintiffs."

122 at 15. The Magistrate Judge noted that amendment would not be futile, and discovery is needed to clarify whether Defendants can validly assert their counterclaims. Filing 122 at 14. Plaintiffs object to the Magistrate Judge's conclusion that the proposed counterclaims were not futile. Filing 123.

III. ANALYSIS

A. Standard of Review

In an appeal from a magistrate judge's order on a pretrial matter contemplated by 28 U.S.C. § 636(b)(1)(A), a district court may set aside any part of the magistrate judge's order shown to be clearly erroneous or contrary to law. *Id.* "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Chase v. Comm'r*, 926 F.2d 737, 740 (8th Cir. 1991) (citing *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)). "An order is contrary to law if it fails to apply or misapplies relevant statutes, case law, or rules of procedure." *Haviland v. Catholic Health Initiatives-Iowa, Corp.*, 692 F. Supp. 2d 1040, 1043 (S.D. Iowa 2010) (internal quotation marks omitted). The standard of review for an appeal of a Magistrate Judge's order on nondispositive matters is extremely deferential. *See* 28 U.S.C. § 636(b)(1)(A).

B. Defendants' Motion to Amend

Plaintiffs argue that Defendants' counterclaims are futile because the Fair Labor Standards Act ("FLSA") does not permit setoffs against minimum wage claims. Thus, according to Plaintiffs, it was manifestly erroneous to grant Defendants leave to amend their answer to include counterclaims which, if successful, would act as a setoff against Plaintiffs' minimum wage claim. Plaintiffs rely heavily on the Fifth Circuit's statement that "set-offs against back pay awards deprive the employee of the 'cash in hand' contemplated by the [FLSA], and are therefore inappropriate in any proceeding brought to enforce the FLSA minimum wage and overtime provisions." *Brennan v. Heard*, 491 F.2d 1, 4 (5th Cir. 1974). However, as stated elsewhere in the same authority cited by Plaintiffs, "set-offs are not categorically inappropriate in FLSA actions." *Willins v. Credit Sols. of Am., Inc.*, No. CIV. A. 309-CV-1025, 2010 WL 624899, at *2 (N.D. Tex. Feb. 23, 2010).

When dismissing counterclaims for setoffs in FLSA cases, courts are primarily concerned with employers attempting to assert unrelated, state-law counterclaims against their employees. *See Pioch v. IBEX Eng'g Servs., Inc.*, 825 F.3d 1264, 1273 (11th Cir. 2016). For example, in *Brennan*, the Fifth Circuit explained that "[t]he only economic feud contemplated by the FLSA involves the employer's obedience to minimum wage and overtime standards. To clutter these proceedings with the minutiae of other employer-employee relationships would be antithetical to the purpose of the [FLSA]." *Brennan*,

491 F.2d at 4. In *Brennan*, the employer sought setoffs against the amount of back pay owed for FLSA violations based on the value of goods and supplies the employer provided to its employees through the employer's company store. *Id.* at 2. The Fifth Circuit refused to permit these setoffs because they were not related to the amount of wages owed to the employees. *Id.* at 4.

Similarly, in *Donovan v. Pointon*, 717 F.2d 1320, 1323 (10th Cir. 1983), the employer sought setoffs in an FLSA action based on counterclaims that two employees owed the employer money for sums advanced to them. *Id.* The Tenth Circuit held that such setoffs were impermissible because the sole purpose of the FLSA action was to bring the employer into compliance with the FLSA. The court reasoned that permitting unrelated, state-law counterclaims would subvert that process. Thus, the employer could not assert the counterclaims in the FLSA action but could sue his employees in state court to recover sums owed to the employer.(citing *Brennan*, 491 F.2d at 4).

Where an employer's counterclaim for setoffs is related to the amount of wages owed, the counterclaim may be permissible. In *Singer v. City of Waco, Tex.*, 324 F.3d 813, 828 (5th Cir. 2003), employee firefighters successfully sued the City of Waco under the FLSA for miscalculated overtime payments. However, evidence showed that the City of Waco's method of calculating overtime payments resulted in overpayments for some work periods in which firefighters were not eligible for overtime pay. *Id.* at 826. The court thus offset the

firefighters' recovery based on overpayments for those periods. *Id.* at 828. The court reasoned that the setoff was not contrary to its holding in *Brennan* because the firefighters did not receive less overtime wages than they were entitled to under the FLSA, they simply received some of their overtime pay in advance. *Id.* at 828 n.9. Thus, the setoff was appropriate because it directly impacted the amount of wages owed to the firefighters. *See id.* at 828; *see also Willins*, 2010 WL 624899, at *2.

In sum, while courts are hesitant to permit setoffs in FLSA cases, they will do so when the setoffs are directly related to payment of wages. Plaintiffs' own brief acknowledges that "any claim brought by an employer against an employee *that is not directly related to payments of wages* is prohibited by numerous Federal Circuit Courts of Appeals if the counterclaim will reduce the employee's wage claim below minimum wage." Filing 124 at 1 (citations omitted) (emphasis added). Defendants counterclaims are not futile if they are directly related to payments of wages.

Though couched in different theories, Defendants' counterclaims are directly related to the amount of wages owed to Plaintiffs. Defendants' first counterclaim is that Plaintiffs assumed control of Leaf Supreme and paid themselves in excess of $100,000 toward personal expenses without categorizing these payments as wages. Filing 128 at 7-8. Defendants' second counterclaim alleges that Plaintiffs fraudulently paid themselves money for personal expenses without characterizing these payments as wages. Filing 128 at 8. Defendants' third counterclaim alleges that Plaintiffs breached a

fiduciary duty to Leaf Supreme by failing to treat payments for Plaintiffs' personal expenses as wages for work performed. Filing 128 at 9. Without addressing the merits of each of these counterclaims, each alleges that Plaintiffs received payments from Leaf Supreme that should have been categorized as wages. If successful on these counterclaims, any setoff would not cause Plaintiffs to receive less payment than they were entitled to under the FLSA but would account for wages Plaintiffs had already been paid.

The Court does not conclude at this stage that Defendants' counterclaims have merit. Discovery is necessary to determine whether the evidence supports Defendants' position. Plaintiffs' brief states, "Defendants have alleged the Plaintiffs made unauthorized withdraws [sic]. The Plaintiffs state that these withdraws [sic] were repayment for funds they had loaned Leaf Supreme Products, LLC." Filing 124 at 2. The conflict between these positions highlights the need for discovery on these allegations to determine whether the withdrawals or payments to Plaintiffs should have been properly categorized as wages.

V. CONCLUSION

Plaintiffs have not demonstrated that the Magistrate Judge's order was clearly erroneous or contrary to law. Defendants' counterclaims seek setoffs that are directly related to payments to Plaintiffs that should have allegedly been categorized as wages. Such claims are not categorically forbidden by the FLSA and

discovery is needed to determine whether they have merit. Plaintiffs' objection will be overruled.

IT IS ORDERED that the Plaintiffs' Objection to Magistrate Judge's Order, Filing 123, is overruled.

Dated this 7th day of January, 2021.

BY THE COURT:

/s/ Brian C. Buescher
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JAMES E. BACHMAN, ADELLA A. BACHMAN, ERIC J. BACHMAN, RACHEL A. BACHMAN, MATTHEW R. BACHMAN, and C. ANDREW BACHMAN,

Plaintiffs,

vs.

JOHN Q. BACHMAN, and LEAF SUPREME PRODUCTS, LLC, A Nebraska Limited Liability Co.;

Defendants.

8:19CV276

ORDER

(Filed Oct. 12, 2021)

This case is before the court on Defendants' Amended Motion to Compel (Filing No. 207) and Plaintiffs' Objection to Defendants' Amended Motion to Compel (Filing No. 212).

In support of their motion, Defendants claim that Plaintiffs obstructed certain properly noticed depositions through use of inappropriate speaking objections, evasive tactics, witness coaching, and a general unwillingness to participate in the discovery process. See generally (Filing No. 206). Defendants further claim that Plaintiffs' counsel directed a third-party to ignore a federal subpoena. (Filing No. 206 at CM/ECF p. 7). Defendants assert that, in light of the foregoing misconduct, and in light of Plaintiffs' previous discovery

misconduct, Plaintiffs' claims should be dismissed. (Filing No. 206 at CM/ECF pp. 7-8). If not dismissed, Defendants request an order compelling proper response to their discovery requests and for their attorney fees related to this motion.

DISCUSSION

The court has reviewed Defendants' evidence, including the excerpts from the depositions of Plaintiffs James E. Bachman, Adella A. Bachman, C. Andrew Bachman and Eric J. Bachman offered by Defendants in support of their motion. (Filing Nos. 206-2, 206-3, 211-2, and 211-3).

The court is stunned by Plaintiffs' conduct – in particular the conduct of Plaintiff James E. Bachman who, as a licensed attorney, is required to both know and follow the procedural and ethical rules for litigation in this court. Plaintiff James E. Bachman attended each deposition as legal counsel for his co-plaintiffs. Throughout each, his behavior demonstrated a complete disregard for the federal discovery rules. Plaintiffs' counsel made numerous speaking objections, almost all of which were framed as relevancy objections. He then instructed his clients/co-plaintiffs not to answer the questions over his objections. He made "asked and answered" objections and likewise instructed his co-plaintiffs not to answer. He made overbroad and improper privilege objections. And, he was clearly attempting to coach his co-plaintiffs through his use of these improper objections.

In Plaintiffs' objection to Defendants' motion, Plaintiffs attempt to justify this conduct, arguing that the questions being asked by defense counsel were irrelevant, and that asking plaintiffs to answer irrelevant inquiries was abusive and harassing. (Filing No. 213 at CM/ECF p. 8). Essentially, Plaintiffs' argument is premised on their legal contention that Defendants' affirmative defenses and counterclaim are improperly asserted.[1] (Filing No. 213 at CM/ECF pp. 1-7). They have taken the position that because (in their view) Defendants' affirmative defenses and counterclaim will fail as a matter of law, they are excused from conducting discovery on those issues. (Filing No. 213 at CM/ECF pp. 8-9). That position is seriously flawed. The court has repeatedly told Plaintiffs that Defendants are entitled to conduct discovery on their asserted claims and defenses. Until such time that the court makes a binding determination on the merits of Defendants arguments, Plaintiffs are legally obligated to respond to discovery requests targeting information relevant to Defendants' allegations. Put differently, Plaintiffs cannot unilaterally limit the scope of

[1] Plaintiffs' brief is almost entirely occupied with an argument on the merits of Defendants' asserted claims and defenses. Plaintiffs make these merits arguments in response to virtually every pretrial motion. As the court has previously (repeatedly) told the plaintiffs, those arguments regarding the substantive merits do nothing to advance their position on the procedural issues of discovery and other pretrial matters. Plaintiffs, however, continue to ignore the relevant standards for the discrete motions actually being litigated. It has created an unending cycle of regurgitated, irrelevant briefing. And in turn, it has derailed the efficient administration of this case.

discovery based on their view of the relevant law. They have consistently attempted to do so in response to written discovery, and those improper discovery practices have now spilled over into their depositions.

And their tactics are even more egregious in response to deposition questioning. As Plaintiffs' counsel is clearly aware, counsel cannot instruct a witness not to answer a deposition question based on relevancy.

> If a relevance objection arises during a deposition, counsel shall make the objection and the deposition should continue. [The deponent] cannot refrain from answering a question because he or his counsel determine a matter is irrelevant. In re Stratosphere Corp. Sec. Litig., 182 F.R.D. 614, 618 (D.Nev.1998) ("If irrelevant questions are asked, the proper procedure is to answer the questions, noting them for resolution at pretrial or trial.").

Lund v. Matthews, No. 8:13CV144, 2014 WL 517569, at *4 (D. Neb. Feb. 7, 2014).

"A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation enforced by the court, or to present a motion under Rule 30(d)(3)." Fed. R. Civ. P. 30(c)(2) (emphasis added). Thus, unless a party intends to present a motion under Rule 30(d)(3), which precludes examination that is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, an instruction not to answer based on relevancy is improper. Fed. R. Civ. P. 30(d)(3).

Plaintiffs have asserted no such motion, only making claims of annoyance, harassment, and bad faith in response to Defendants' motion. (Filing No. 213 at CM/ECF p. 8). However, even if the court were to construe Plaintiffs' objection to Defendants' motion as a standalone Rule 30(d)(3) motion, it would be utterly meritless. The court has reviewed the transcripts. Plaintiffs' counsel cannot legitimately claim that the questions to which he made these objections meet the Rule 30 standard for terminating or limiting a deposition. After thorough review of each deposition in question, the court cannot identify any line of questioning that could even remotely constitute bad faith or harassment. In large part, Plaintiffs' counsel objected to basic background inquires related to the plaintiffs' education, previous work history, and the like. While Plaintiffs may be uncomfortable answering certain or all those questions, that does not vest them with the right to refuse to participate in the discovery process.

The court is likewise convinced that Plaintiffs' counsel was attempting to use speaking objections to improperly influence his co-plaintiff's testimony. Even meritorious objections are improper when used for that purpose. Lund, 2014 WL 517569, at *4. His privilege objections appear to the court to be overbroad in most instances, as well. And perhaps most egregiously, Defendants have represented to the court that Plaintiffs' counsel advised a third-party deponent to ignore

a federal subpoena for his testimony.[2] Such conduct by a licensed attorney is inexcusable and, without question, sanctionable.

The court must now determine what sanction is just in these circumstances. Given the complete disregard for the rules and coupling it with Plaintiffs' seeming inability to complete good faith discovery in this matter, dismissal of this case is warranted. Both the undersigned and United States District Judge Brian C. Buescher have warned Plaintiffs that continued disruption of the proper administration of this case would result in harsh sanctions. (Filing No. 2 CM/ECF pp. 8-9). Plaintiffs have, apparently, not sufficiently heeded those warnings.

That being said, the court will not dismiss the case – yet. Plaintiffs should, however, recognize that they have escaped that result by a hair's breadth. After thorough consideration, the court has determined that instead of dismissal, the court will allow for the redeposition of each of the deponents whose deposition transcripts the court has reviewed and found to include improper objections and obstruction tactics by Plaintiffs' counsel. Defense counsel may re-notice the depositions of those deponents, and their depositions will take place in the presence of the undersigned magistrate judge at the federal courthouse in Omaha, Nebraska. This is not to be construed as an extension

[2] It appears that deponent, Bradley Dollis, did eventually appear for his deposition. Plaintiffs' counsel did not attend. Mr. Dollis testified under oath that Plaintiff James E. Bachman had advised him not to attend his deposition.

of the deposition deadline in a general sense. The deadline for completing depositions was September 24, 2021. The only depositions that may now occur are the re-deposition of: James E. Bachman, C. Andrew Bachman, Adella A. Bachman, and Eric J. Bachman.[3] These additional depositions will occur solely at Plaintiffs' expense. They necessitated this additional discovery, and, in equity, they will assume the cost.

It appears that the only way to complete depositions of the plaintiffs is for the undersigned to personally referee it. I will attend the depositions and make immediate rulings on any asserted objection.[4] Plaintiffs' counsel is admonished to familiarize himself more adequately with the proper bases on which deposition objections may be maintained. The court will not tolerate the type of antics that occurred during the previous depositions. Stated differently, if Plaintiffs' counsel continues to maintain the same abusive tactics during the additional depositions in this case, the court will

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[3] This is, of course, at Defendants' election. If Defendants do not wish to re-depose all the listed deponents, they need not. They may elect which depositions they would like to re-notice. The court has not included Bradley Dollis in its listing of depositions to be re-noticed. Plaintiffs' counsel did not attend and interfere with Mr. Dollis deposition. While Plaintiffs' counsel appears to have attempted to obstruct Mr. Dollis from attending the deposition at all, Mr. Dollis did appear, and defense counsel was able to question him unimpeded by Plaintiffs' counsel's repeated improper objections.

[4] Because the court will allow for these additional depositions, the court will not make formal rulings on all the objections asserted by Plaintiffs' counsel in the transcripts provided.

utilize its sanction authority to recommend dismissal of Plaintiffs' claims.

The court will also award attorney fees and costs incurred in litigating this issue. Fed. R. Civ. P. 37(a)(5)(A) ("the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust"). Based on the record before me, there is no excuse for the obstreperous conduct of Plaintiffs' counsel and Plaintiffs during their depositions. The court will therefore award sanctions to the defendants for the time spent preparing the instant motion and briefing, and defense counsel's time conferring with the court and opposing counsel regarding the same.

As a final note, Plaintiffs move the court to compel the deposition of Defendant John Q. Bachman. (Filing No. 214). Based on a review of the record and Plaintiffs' submissions in support of that request, it does not appear that Plaintiffs ever formally noticed Defendant John. Q. Bachman's deposition. There is nothing to compel and the deadline to notice and take new depositions has elapsed. Plaintiffs' motion will be denied.

Accordingly, IT IS ORDERED:

1) Defendants' Amended Motion to Compel (Filing No. 207) is granted as outlined herein.

2) Plaintiffs' Objection (Filing No. 212) is overruled.

3) Defendants may re-notice and retake the depositions of the following deponents:

   a. James E. Bachman;
   b. Adella A. Bachman;
   c. C. Andrew Bachman; and
   d. Eric. J. Bachman.

   These depositions must be taken on or before December 17, 2021 and will be taken at Plaintiffs' expense, to include the cost of a court reporter, the deposition transcript, and defense counsel's attorney fees for retaking the depositions.

4) The court will provide, via separate email to the parties' counsel of record, a copy of the undersigned magistrate judge's calendar and availability though December 17, 2021. The parties shall confer and propose mutually available times and dates to the court for scheduling any additional depositions. After confirming the court's availability, defense counsel shall properly notice each deposition in accordance with the federal rules and the local rules of this district. For any noticed deposition, defense counsel shall obtain the services of a court reporter but shall submit that expense for reimbursement from Plaintiffs.

5) Failure to cooperate with timely re-scheduling a deposition, attending the deposition as scheduled, or fully answering deposition

questions for which an objection has not been sustained by the undersigned magistrate judge will result in dismissal of the noncooperative plaintiff's case.

6) Further obstructionist and improper conduct by Plaintiffs' counsel will result in dismissal of his case and an order precluding him from representing the co-plaintiffs in this litigation.

7) Defendants' request for attorneys' fees related to its motion at Filing No. 207 is granted, with the issue of fees awarded decided as follows:

   a. On or before October 26, 2021, Defendants shall submit an itemized billing statement of its fees and expenses to Plaintiffs.

   b. Plaintiffs' counsel shall respond to this itemization within ten days thereafter.

   c. If the parties agree as to the amount to be awarded, on or before November 12, 2021, they shall file a joint stipulation for entry of an order awarding costs and fees to Defendants.

   d. If the parties do not agree on the attorney fees and costs to be awarded, or if Plaintiffs do not timely respond to the Defendants' itemization and demand, Defendants shall file a motion for assessment of attorney fees and costs by no later than November 19, 2021. This motion shall be submitted in

accordance with the court's fee application guidelines outlined in Nebraska Civil Rules 54.3 and 54.4, but a supporting brief is not required.

e. If a motion for fees is required, the court may award Defendants up to an additional $1000.00 to recover the cost of preparing their motion for assessment of fees.

8) Plaintiffs' Motion to Compel (Filing No. 214) is denied.

9) The deadline for filing motions for summary judgment is extended to January 18, 2022.

Dated this 12th day of October, 2021.

BY THE COURT:

s/ Cheryl R. Zwart
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JAMES E. BACHMAN, ADELLA A. BACHMAN, ERIC J. BACHMAN, RACHEL A. BACHMAN, MATTHEW R. BACHMAN, and C. ANDREW BACHMAN,

Plaintiffs,

vs.

JOHN Q. BACHMAN, and LEAF SUPREME PRODUCTS, LLC, A Nebraska Limited Liability Co.;

Defendants.

8:19-CV-276

MEMORANDUM AND ORDER

(Filed Nov. 17, 2021)

I. INTRODUCTION

Before the Court is Plaintiffs' Objection to Magistrate Judge's Order, Filing 217, which allowed Defendants to re-notice the deposition of several deponents and stated that Defendants may conduct discovery related to their counterclaims and affirmative defenses. Filing 216. This is the fourth time that the Court has been required to rule on an objection to a decision by the Magistrate Judge resolving a discovery dispute in this case. *See* Filing 68; Filing 145; Filing 184. The Court will overrule Plaintiffs' objection. Furthermore, the Court orders Plaintiffs to file a notice with the Court stating that they will attend their depositions within five calendar days of the date of this order.

II. BACKGROUND

A recitation of the entire factual background of this case is not necessary to rule on the current motion. The Court incorporates its previous orders which contain a more detailed statement of the facts and procedural history of this case. *See* Filing 10; Filing 23; Filing 101; Filing 145; Filing 203.

The facts relevant to the current motion are as follows: Defendant Leaf Supreme Products, LLC, ("Leaf Supreme") is a Nebraska limited liability company. Filing 26 at 1. It manufactures guards that keep debris out of rain gutters. Filing 26 at 2. Defendant John Q. Bachman is a member and majority owner of Leaf Supreme. Filing 26 at 1. Plaintiffs have been Leaf Supreme's only employees. Filing 26 at 2-4. Plaintiffs assert that from October 1, 2016, to the present, they have not been paid any wages. Filing 26 at 8. Plaintiffs allege that James, Adella, Eric, Andrew, Rachel, and Matthew Bachman were all employees of Leaf Supreme from its inception until April 4, 2019. Filing 26 at 2-4.

On August 21, 2021, Defendants filed an Amended Motion to Compel. Filing 207. In their motion, Defendants requested that the Magistrate Judge issue an order dismissing this case as a sanction for Plaintiffs' conduct. Filing 207 at 2. Alternatively, Defendants requested an order compelling Plaintiffs to answer questions in discovery, including questions about Defendants' affirmative defenses and counterclaims, as

well as an extension of the discovery and dispositive motion deadline. Filing 207 at 2.

With their motion, Defendants filed excerpts of their depositions of James, Andrew, Adella, and Eric Bachman. During the deposition of plaintiff James Bachman, who also serves as counsel for Plaintiffs, James Bachman refused to answer several questions based on his belief that they were irrelevant. Filing 206-3 at 6–9, 12–14. In other depositions, James Bachman, acting as attorney, instructed the deponent not to answer questions based on relevancy objections. *See*, *e.g.*, Filing 206-3 at 38; Filing 211-2 at 1–2, 4–5. He also made numerous speaking objections that he framed as relevancy objections, *see*, *e.g.*, Filing 211-2 at 1, 14; Filing 211-3 at 17, as well as constant "asked and answered," "foundation," and overbroad and improper "privilege" objections. *See*, *e.g.*, Filing 206-3 at 39–40; Filing 211-3 at 7, 11–13.

This misbehavior extended beyond James Bachman, however. Several times the deponents refused to answer a question when James Bachman made an objection. *See*, *e.g.*, Filing 211-3 at, 9, 15. At two points in plaintiff Adella Bachman's deposition, the record appears to show that she looked at James Bachman before answering questions. Filing 206-3 at 40–41, 45. When Defendants' counsel stated that he would have to ask the Magistrate Judge for a ruling to compel the answers, plaintiff Andrew Bachman stated, "Is your mommy going to help you" in a reference this Court concludes to be a reference to Magistrate Judge Cheryl Zwart. Filing 211-2 at 11.

Also included with Defendants' motion was the deposition of nonparty Bradley Dollis. In his deposition, Dollis stated that James Bachman called him to tell him not to attend his deposition. Filing 206-2 at 67. According to Dollis, James Bachman told him not to attend because his testimony was irrelevant. Filing 206-2 at 68.

Despite Plaintiffs' conduct, the Magistrate Judge decided not to dismiss the case with prejudice. Rather, the Magistrate Judge directed that Defendants could re-notice the depositions of plaintiffs James Bachman, Andrew Bachman, Adella Bachman, and Eric Bachman at Plaintiffs' expense. Filing 216 at 5–6. The Magistrate Judge further ordered that the depositions would take place before her so that she could rule on objections during the depositions. Filing 216 at 6. Because the depositions were to take place again, the Magistrate Judge did not rule on all the objections asserted by Plaintiffs during their depositions. Filing 216 at 6. In the same order, the Magistrate Judge denied Plaintiffs' Motion to Compel the deposition of defendant John Bachman because Defendants never formally noticed John Bachman and the deadline to notice and take new depositions had elapsed. Filing 216 at 7.

On October 22, 2021, Plaintiffs filed an Objection to Magistrate Judge's Order in which they argue that Defendants are not entitled to equitable defenses, that Defendants waived their right to claim certain withdrawals by Plaintiffs were wages, and that the Magistrate Judge erred in denying their request to depose John Bachman. Filing 217; Filing 218 at 1–10.

III. ANALYSIS

A. Standard of Review

When a party objects to a magistrate judge's order on a nondispositive pretrial matter, a district court may set aside any part of the order shown to be clearly erroneous or contrary to law. Fed. R. Civ. P. 72(a); *see* 28 U.S.C. § 636(b)(1)(A). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Chase v. Comm 'r*, 926 F.2d 737, 740 (8th Cir. 1991) (citing *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)). "An order is contrary to law if it fails to apply or misapplies relevant statutes, case law, or rules of procedure." *Haviland v. Catholic Health Initiatives-Iowa, Corp.*, 692 F. Supp. 2d 1040 (S.D. Iowa 2010) (internal quotation marks omitted). The standard of review for an appeal of a Magistrate Judge's order on nondispositive matters is extremely deferential. *See* 28 U.S.C. § 636(b)(1)(A); *Shukh v. Seagate Tech., LLC*, 295 F.R.D. 228, 235 (D. Minn. 2013).

B. The Magistrate Judge's Order Was Not Clearly Erroneous or Contrary to Law

In much of their brief in support of their objection, Plaintiffs argue that Defendants cannot assert equitable defenses or claim that withdrawals made by Plaintiffs were wages. Filing 218 at 1–8. As the Magistrate Judge observed, Plaintiffs have made this same argument incessantly despite the Court consistently

rejecting their argument. *See*, *e.g.*, Filing 83; Filing 85; Filing 126. The Court has repeatedly explained to Plaintiffs that the Court will not make a final ruling on whether Defendants may assert equitable defenses and counterclaims until the parties have conducted sufficient discovery. *See*, *e.g.*, Filing 101 at 11–14; Filing 122 at 15; Filing 145 at 3–6. Moreover, the Magistrate Judge expressly stated in her order that she was not making a final determination of the validity of Plaintiffs' objections. Filing 216 at 6. Thus, not only are Plaintiffs' arguments in their brief improper for the reasons this Court has explained earlier in this litigation, they are also irrelevant.

Assuming that Plaintiffs are also objecting to the Magistrate Judge allowing Defendants to retake the depositions in her presence, the Court concludes that the Magistrate Judge's decision is warranted. Given the conduct of Plaintiffs during these depositions, allowing Defendants to retake the depositions in front of the Magistrate Judge is necessary to proceed with discovery in this case. The Court has reviewed the deposition transcripts filed by Defendants and is shocked by Plaintiffs' behavior, especially the conduct of James Bachman. Plaintiffs exhibited inexcusable hostility to Defendants' counsel and refused to answer countless questions in violation of law. Andrew Bachman's reference to the Magistrate Judge as defense counsel's "mommy" demonstrates clear disrespect to her and the Court.

All this pales in comparison, however, to James Bachman apparently calling a nonparty deponent and

imploring him not to attend his deposition. This action by James Bachman, a licensed attorney, is astonishing. And, as the Magistrate Judge correctly noted, such conduct is also sanctionable. *See* Fed. R. Civ. P. 37.

Finally, Plaintiffs object to the Magistrate Judge's denial of their motion to compel the deposition of defendant John Bachman. Filing 218 at 10. The Court has reviewed the record and agrees with the Magistrate Judge that Plaintiffs never formally noticed John Bachman's deposition. The deadline to notice and take new depositions has passed and Plaintiffs make no arguments that they have good cause to extend these deadlines. In summary, the Magistrate Judge's order was not clearly erroneous or contrary to law. Plaintiffs' objections are overruled.

C. Plaintiffs Must File a Notice That They Will Attend Their Depositions

In accordance with the Magistrate Judge's order, Defendants have filed notices to take the depositions of Adella Bachman, James Bachman, Eric Bachman, and Andrew Bachman. Filing 221; Filing 222; Filing 223; Filing 224. The depositions are to take place at Roman Hruska Courthouse on December 6, 2021, and December 10, 2021. Filing 221; Filing 222; Filing 223; Filing 224. Given Plaintiffs' obstructive conduct in this case, however, the Court needs to ensure that they will attend their depositions, especially because the Magistrate Judge is going to preside over them. Thus, Plaintiffs are ordered to file notice with the Court

within five calendar days from the date of this order stating that they will attend their depositions. Violating this directive will result in sanctions. *See Aziz v. Wright*, 34 F.3d 587, 589 (8th Cir. 1994) (upholding dismissal with prejudice as a sanction for violating a court order). Furthermore, failure to attend these depositions will also result in sanctions. *See Schubert v. Pfizer, Inc.*, 459 F. App'x 568, 572 (8th Cir. 2012) (upholding dismissal with prejudice as a sanction for willfully violating discovery orders). The Court hereby gives notice to Plaintiffs that failure to cooperate with the Court's orders and discovery in this case may lead to dismissal with prejudice of their case. *See Vallejo v. Amgen, Inc.*, 903 F.3d 733, 749-50 (8th Cir. 2018) (affirming district court's imposition of sanctions under 28 U.S.C. § 1927 and Federal Rule of Civil Procedure 11 for relitigating already-decided discovery issues).

IV. CONCLUSION

The Magistrate Judge's Order was not clearly erroneous or contrary to law. Accordingly,

IT IS ORDERED:

1. Plaintiffs' Objection to Magistrate Judge's Order, Filing 217, is denied; and

2. Plaintiffs must file notice with the Court within five calendar days of the date of this order stating that they will attend their depositions as scheduled and ordered.

Dated this 17th day of November, 2021.

BY THE COURT:

/s/ Brian C. Buescher
Brian C. Buescher
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JAMES E. BACHMAN, ADELLA A. BACHMAN, ERIC J. BACHMAN, RACHEL A. BACHMAN, MATTHEW R. BACHMAN, and C. ANDREW BACHMAN,

Plaintiffs,

vs.

JOHN Q. BACHMAN, and LEAF SUPREME PRODUCTS, LLC, A Nebraska Limited Liability Co.;

Defendants.

8:19CV276

FINDINGS AND RECOMMENDATION

(Filed Nov. 23, 2021)

Plaintiffs have failed to timely file their notice confirming they will attend their court-supervised depositions scheduled for December 6 and December 10, 2021. See Filing No. 228. For the reasons stated in that order, and consistent with its ruling,

IT IS RECOMMENDED to the Honorable Brian C. Buescher, United States District Judge, pursuant to 28 U.S.C. § 636(b), that Plaintiffs claims be dismissed with prejudice without further notice.

The parties are notified that failing to file an objection to this recommendation as provided in the local rules of this court may be held to be a waiver of any

right to appeal the court's adoption of the recommendation.

November 23, 2021.

BY THE COURT:

s/ Cheryl R. Zwart
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JAMES E. BACHMAN, ADELLA A. BACHMAN, ERIC J. BACHMAN, RACHEL A. BACHMAN, MATTHEW R. BACHMAN, and C. ANDREW BACHMAN,

Plaintiffs,

vs.

JOHN Q. BACHMAN, and LEAF SUPREME PRODUCTS, LLC, A Nebraska Limited Liability Co.;

Defendants.

8:19CV276

AMENDED FINDINGS AND RECOMMENDATION

(Filed Nov. 23, 2021)

Plaintiffs have failed to timely file their notice confirming they will attend their court-supervised depositions scheduled for December 6 and December 10, 2021. See Filing No. 228. For the reasons stated in that order, and consistent with its ruling,

IT IS RECOMMENDED to the Honorable Brian C. Buescher, United States District Judge, pursuant to 28 U.S.C. § 636(b), that Plaintiffs claims be dismissed with prejudice without further notice.

The parties are notified that failing to file an objection to this recommendation by no later than

November 29, 2021 will be held to be a waiver of any right to appeal the court's adoption of the recommendation.

November 23, 2021.

BY THE COURT:

s/ Cheryl R. Zwart
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JAMES E. BACHMAN, ADELLA A. BACHMAN, ERIC J. BACHMAN, RACHEL A. BACHMAN, MATTHEW R. BACHMAN, and C. ANDREW BACHMAN,

Plaintiffs,

vs.

JOHN Q. BACHMAN, and LEAF SUPREME PRODUCTS, LLC, A Nebraska Limited Liability Co.;

Defendants.

8:19CV276

MEMORANDUM AND ORDER

(Filed Dec. 1, 2021)

On October 12, 2021 the undersigned granted Defendants' request for attorneys' fees related to the motion at Filing No. 207 and ordered Defendants to submit an itemized billing statement to Plaintiffs on or before October 26, 2021. (Filing No. 216). Plaintiffs were to respond to the itemization within ten days, then: (a) the parties would file a joint stipulation on or before November 12, 2021; or (b) Defendants would file a motion for assessment of fees and costs no later than November 19, 2021. Plaintiffs objected to the undersigned's order, and the objection was denied. (See Filing No. 228).

On November 11, 2021, Defendants filed a Motion for Award of Attorney Fees. (Filing No. 227). An affidavit submitted in support of Defendants' motion states that Plaintiffs' counsel did not respond to the itemized billing statement emailed to Plaintiffs' counsel on October 21, 2021, and again on November 3, 2021. (Filing No. 227-1 at CM/ECF pp. 2, 6-7). Similarly, Plaintiffs did not respond to Defendants' pending motion for fees, and the deadline for doing so has passed. The motion is deemed unopposed and will be granted as set forth herein.

Defendants request an award of $13,928.50 for fees granted pursuant to Filing No. 216, "relating to the depositions taken and [Defendants'] pursuit of attorneys fees." (Filing No. 227). Defendants request an additional sum of $1,247.00 for the preparation of this motion. (Id.)

The undersigned authorized attorney fees and costs incurred in litigating Defendants' motion to compel and Plaintiffs' objection to the motion to compel, specifically stating that sanctions would be awarded for the time spent preparing the motion to compel and briefing, and defense counsel's time conferring with the court and opposing counsel. (Filing No. 216). However, the order did not authorize payment for the first round of Defendants' depositions, taken in September 2021, as the court ordered the compelled depositions of James E. Bachman, Adella A. Bachman, C. Andrew Bachman, and Eric J. Bachman to be taken on or before December 17, 2021 at Plaintiffs' expense. (Filing No. 216 at CM/ECF p. 7). Defendants' itemized billing

statement includes 14.3 hours for conducting the depositions of the four named individuals in September 2021. The fees awarded will be reduced by $4,147.00 (14.3 hours at a rate of $290 per hour) to remove that time from the award calculation. The remainder of Defendants' claimed fees related to the motion to compel are approved.

In Filing No. 216, the undersigned stated, "If a motion for fees is required, the court may award Defendants up to an additional $1,000.00 to recover the cost of preparing their motion for assessment of fees." The $1,247.00 Defendants requested for the preparation of the instant motion is reduced to $1,000.00.

Accordingly, IT IS ORDERED:

1) Defendants' motion for award of attorneys' fees, Filing No. 227, is granted as follows:

    a. Defendants are entitled to attorneys' fees of $9,781.50 associated with the filing and briefing of the Motion to Compel at Filing No. 207.

    b. Defendants are entitled to attorneys' fees of $1,000.00 associated with filing the instant motion.

2) Within thirty (30) calendar days of the date of this order, Plaintiffs shall remit $10,781.50 in satisfaction of the sanctions awarded herein. (See Filing Nos. 216 and 228).

Dated this 1st day of December, 2021.

BY THE COURT:

s/ Cheryl R. Zwart
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JAMES E. BACHMAN, ADELLA A. BACHMAN, ERIC J. BACHMAN, RACHEL A. BACHMAN, MATTHEW R. BACHMAN, and C. ANDREW BACHMAN,

Plaintiffs,

vs.

JOHN Q. BACHMAN, and LEAF SUPREME PRODUCTS, LLC, A Nebraska Limited Liability Co.;

Defendants.

8:19-CV-276

MEMORANDUM AND ORDER

(Filed Dec. 9, 2021)

I. INTRODUCTION

On June 25, 2019, Plaintiffs filed suit against John Q. Bachman and Leaf Supreme Products, LLC, alleging violations of the Fair Labor Standards Act ("FLSA"), retaliation, and unjust enrichment. Filing 1. Two and a half years later, after Plaintiffs have filed around thirty-seven motions and objections to the Magistrate Judge's orders, discovery in this case remains pending. At every turn, Plaintiffs have resisted discovery and the efficient resolution of this case, necessitating over sixteen orders from the Magistrate Judge—not including numerous text orders—and nine memorandum and orders from an Article Ill judge.

In a September 9, 2021 Order, the Court outlined Plaintiffs' prior misconduct in this case, warned that it would sanction further misconduct, and directed Plaintiffs' counsel to provide the order to all named Plaintiffs to ensure that they were aware of their counsel's misbehavior on their behalf in this case. Most recently, counsel for Plaintiffs committed numerous acts in violation of this Court's rules and applicable law, including directing witnesses not to answer questions at depositions, advising a witness not to attend a deposition, and filing meritless motions that this Court finds to be an effort to delay these proceedings. Despite Defendants' motion to dismiss this case as a sanction for Plaintiffs' conduct, which was without question justified, the Court in a November 17, 2021 Order generously rescheduled the previously taken depositions to take place before Magistrate Judge Zwart so that she could attend the depositions in person and thwart further improper conduct. Given the question of whether Plaintiffs would actually show up to the rescheduled depositions, which were to be taken at their expense, the Court required Plaintiffs to file a simple notice that they would attend the depositions scheduled by the Court. In that same Order, the Court warned Plaintiffs that their failure to cooperate would lead to dismissal of their case. Plaintiffs ignored the Court's Order and did not file the required notice. The Magistrate Judge then recommended to the undersigned judge that this case be dismissed with prejudice. Filing 230.

Plaintiffs have objected to the Magistrate Judge's recommendation. Filing 231. The Court has reviewed

the record and the extensive litigation in this case and concludes that Plaintiffs' misconduct warrants dismissal with prejudice.

II. BACKGROUND

The Court's decision to sanction Plaintiffs by dismissing their case with prejudice is the result of their extensive misconduct since this case's inception and, most recently, Plaintiffs' defiance of the Court's simple order that they file notice that they intend to show up at the depositions that had to be rescheduled by the Court due to their misconduct. Therefore, the Court provides a detailed recitation of the procedural history of this case to illustrate why the Court feels that it is necessary to resort to this harsh sanction.

A. Background Facts

Defendant Leaf Supreme Products, LLC ("Leaf Supreme") is a Nebraska limited liability company. Filing 26 at 1. It manufactures guards that keep debris out of rain gutters. Filing 26 at 2. Defendant John Q. Bachman is a member and majority owner of Leaf Supreme. Filing 26 at 1. Plaintiffs have been Leaf Supreme's only employees. Filing 26 at 2-4. Plaintiffs assert that from October 1, 2016, to the present, they have not been paid any wages. Filing 26 at 8. Plaintiffs James, Adella, Eric, Andrew, Rachel, and Matthew Bachman allege they were all employees of Leaf Supreme from its inception until April 4, 2019. Filing 26 at 2-4. From the beginning of this case, plaintiff

James Bachman, a licensed attorney, has represented Plaintiffs.

B. Procedural History

Before filing the current suit, Plaintiffs had unsuccessfully attempted to remove a Nebraska state-court proceeding involving Leaf Supreme to federal court. Filing 10 at 3. The Court remanded the state-court suit because it asserted no federal question and the parties lacked diversity of citizenship. Filing 10 at 3. Plaintiffs then filed this lawsuit on June 25, 2019, Filing 1, over which Senior Judge Laurie Smith Camp previously presided. Within about a month, Plaintiffs filed six motions requesting various forms of preliminary injunctive relief.[1] *See* Filing 2; Filing 7; Filing 8; Filing 9; Filing 14; Filing 16. These motions were entirely meritless as only one even attempted to address the well-settled *Dataphase* factors governing preliminary injunctions. Senior Judge Smith Camp observed that it appeared Plaintiffs were using their preliminary-injunction motions to improperly litigate issues in the previously remanded state-court case. Filing 23 at 5.

Once it became clear that the Court would not grant Plaintiffs a preliminary injunction, Plaintiffs filed an Amended Complaint along with a Joint Motion for

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[1] Plaintiffs filed four of these motions within nine days of initiating this lawsuit, *see* Filing 2; Filing 7; Filing 8; Filing 9, and after Judge Smith Camp denied their motions, they filed two more, Filing 14; Filing 16.

Summary Judgment on August 6, 2019.[2] Filing 26; Filing 27. In filing the early motion for summary judgment, Plaintiffs likewise disregarded local rules. In her denial of the Joint Motion for Summary Judgment, Judge Smith Camp admonished,

> Plaintiffs also failed to comply with this Court's local rules. Specifically, Plaintiffs failed to submit a statement of individually numbered facts which they contest are material and undisputed. *See* NECivR 56.1(b)(1). Further, Plaintiffs' Motion failed to include pinpoint citations to evidence that supported their factual assertions. These deficiencies alone could be grounds for denial of summary judgment. The Court encourages the parties to familiarize themselves with the Court's local rules and the Federal Rules of Civil Procedure before this case progresses through discovery and future motion practice.

Filing 55 at 4.

On September 3, 2019, Defendants filed their Answer to Plaintiffs' Amended Complaint, in which they asserted affirmative defenses such as a right to offset any money provided to Plaintiffs by Defendants. Filing 35 at 3–5. Plaintiffs have incessantly argued that Defendants cannot assert equitable defenses to an FLSA action despite Judge Smith Camp, Magistrate Judge

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[2] Plaintiffs filed their Joint Motion for Summary Judgment just six days after Judge Smith Camp issued a second order denying their request for a preliminary injunction. *See* Filing 23; Filing 27.

Zwart, and the undersigned judge consistently rejecting their argument. *See*, *e.g.*, Filing 83; Filing 85; Filing 101 at 11–14; Filing 122 at 15; Filing 126; Filing 145 at 3–6; Filing 216 at 3; Filing 218; Filing 228 at 4–5.

Since September 3, 2019, the Court has been forced to address an endless cycle of discovery disputes, nearly all of which Plaintiffs caused by deliberately violating court orders,[3] disregarding local rules,[4] and filing frivolous motions. *See*, *e.g.*, Filing 42; Filing 44; Filing 60; Filing 68; Filing 82; Filing 84; Filing 101. Plaintiffs have objected to virtually every adverse ruling; placed the blame on Judge Smith Camp and Magistrate Judge Zwart for causing this case to head "in an erroneous direction," Filing 124 at 2; and attempted to relitigate issues the Court had resolved months ago. *See*, *e.g.*, Filing 180 (explaining Plaintiffs' attempt to reargue issues decided a year and a half ago); Filing 210 at 1–2 (observing that Plaintiffs were challenging a sanctions award entered eighth months prior). Even after being subjected to sanctions, Filing 148 at 5; Filing 216 at 6, Plaintiffs have escalated their conduct by

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[3] For example, Magistrate Judge Zwart has repeatedly ordered the parties to provide evidence that they attempted to informally resolve discovery disputes before filing a motion to compel. *See*, *e.g.*, Filing 66; Filing 122 at 4; Filing 180 at 4. Plaintiffs have constantly defied this order. *See e.g.*, Filing 180 at 2–3; Filing 204 at 1.

[4] In one particularly egregious example, Plaintiffs failed to file a notice that they changed their address in violation of the Court's General Rule 1.3(e). *See* Filing 138 (audio file) at 6:13–7:51; Filing 148 at 1–4. Plaintiffs' violation delayed these proceedings by months. Filing 148 at 5.

refusing to answer relevant and routine deposition questions, imploring a nonparty deponent not to attend his deposition, and continuing to make frivolous motions. *See* Filing 203 at 2–71; Filing 228 at 1–6.

In a September 9,2021 Order, the Court outlined Plaintiffs' improper motion practice and litigation misconduct. Filing 203 at 2–3. The Court noted that it was "astonished as to the number of baseless motions filed by Plaintiffs, several of which violated this Court's rules or are unsupported by established law." Filing 203 at 8. To ensure that all Plaintiffs knew about their counsel's misconduct, the Court ordered plaintiff James Bachman, who also serves as Plaintiffs' counsel, "to give a copy of [the] order to each [Plaintiff] so that the named Plaintiffs understand the potential consequences to themselves if Plaintiffs' counsel continues this dilatory conduct on their behalf." Filing 203 at 9. The Court warned that a continuation of Plaintiffs' frivolous motion practice could lead to sanctions under 28 U.S.C. § 1927 and Federal Rule of Civil Procedure 11. Filing 203 at 8–9. Based on the record, at least some of the named plaintiffs reviewed the order with James Bachman. *See* Filing 211-2 at 1 (Andrew Bachman informed by Defendants' counsel about the order); Filing 211-3 at 4–5 (Plaintiff Eric Bachman acknowledging reviewing the order).

C. The Recommendation of Dismissal with Prejudice

The Court generously gave Plaintiffs an ultimatum: either cooperate with discovery in this case or the Court would dismiss their case with prejudice. Filing 228 at 6–7. In an unambiguous Order, the Court directed Plaintiffs to file notice with the Court that they would attend their rescheduled depositions in front of Magistrate Judge Zwart within five days of the date of that Order. Filing 228 at 6–7. Plaintiffs failed to file the notice by the Court's mandated deadline. On November 23, 2021, Magistrate Judge Zwart recommended that this case be dismissed with prejudice without further notice. Filing 230. Plaintiffs filed an objection to Magistrate Judge Zwart's recommendation. Filing 231. Plaintiff James Bachman, serving as counsel for Plaintiffs, claims that he "had a medical procedure" the day before the Court ordered Plaintiffs to file notice that they would attend their depositions and that he was "still on opioid pain medication" four days afterwards. Filing 232 at 3–4. According to James Bachman, he reviewed the Order while still on medication and thought that the Court's clear directive stated he had to file notice five days before the depositions were to take place, not five days from the date of the Court's Order. Filing 232 at 3–4. The Court does not find this excuse credible given counsel for Plaintiffs' prior conduct in this case.[5] Furthermore, James Bachman still

[5] James Bachman's prior conduct includes instances this Court found he purposefully misstated the record, Filing 203 at 6–7, and made similar spurious excuses for his misconduct. *See*

had time after he allegedly stopped taking his medication in which to re-review the Court's order to ensure he had read it correctly and file the notice in a timely fashion but failed to do so. The Court notes James Bachman never sought the Court's leave to file the notices out of time, and instead waited until the end of the last day to object to Magistrate Judge Zwart's order to inform the Court of his alleged mistake. Thus, the Court concludes that Plaintiffs have deliberately violated the Court's order, just as they have deliberately and repeatedly violated the Court's local rules and other prior orders.

III. ANALYSIS

A. Standard of Review

The Federal Rules of Civil Procedure permit a court to dismiss a case with prejudice "for failure of a plaintiff to prosecute or to comply with these rules or any order of court." Fed. R. Civ. P. 41(b).[6] "[D]ismissal with prejudice is an extreme sanction that should be

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Filing 138 (audio file) (James Bachman claiming he did not respond to discovery because he never received it, despite being mailed and emailed the discovery requests); Filing 244 (James Bachman claiming he told a nonparty deponent not to attend a deposition in this case because he had filed a protective order in a different case).

[6] The Court also notes that it may dismiss this case under the Court's inherent power to impose sanctions. *See Jaye v. Barr*, No. C19-0121-LTS, 2021 WL 1148953, at *9 (N.D. Iowa Mar. 25, 2021) (outlining caselaw in support of a district court's inherent power to dismiss a case with prejudice as a sanction for abusing the judicial process).

used only in cases of willful disobedience of a court order or where a litigant exhibits a pattern of intentional delay." *Hunt v. City of Minneapolis*, 203 F.3d 524, 527 (8th Cir. 2000). "This does not mean that the district court must find that the appellant acted in bad faith, but requires 'only that he acted intentionally as opposed to accidentally or involuntarily.'" *Id.* (quoting *Rodgers v. Curators of Univ. of Mo.*, 135 F.3d 1216, 1219 (8th Cir. 1998)). "The sanction imposed by the district court must be proportionate to the litigant's transgression . . . [and] should only be used when lesser sanctions prove futile." *Bergstrom v. Frascone*, 744 F.3d 571, 574–75 (8th Cir. 2014) (internal citations and quotation marks omitted).

B. Reasons Supporting Dismissal with Prejudice

The decision to dismiss this case with prejudice is not one the Court takes lightly. This Court agrees dismissal is only appropriate when lesser sanctions have proven ineffective. That situation is present in this case. The Court twice sanctioned Plaintiffs for failing to participate in discovery in good faith, yet Plaintiffs have only escalated their obstructive conduct. At this point, the Court has no confidence that Plaintiffs intend to abide by the Court's orders and prior rulings, the Court's local rules, or the Federal Rules of Civil Procedure. The Court highlights three reasons for this determination: (1) Plaintiffs' frivolous motion practice, (2) Plaintiffs' obstruction of the discovery process, and (3) Plaintiffs' numerous violations of court orders and

the Court's local rules. Considered as a whole, Plaintiffs' conduct more than justifies dismissing this case with prejudice. Upon careful consideration of the record in this case, as well as the ineffectiveness of lesser sanctions, the Court has decided that dismissal with prejudice is warranted.[7]

1. Plaintiffs' Frivolous Motion Practice

The Eighth Circuit has upheld dismissal with prejudice as a sanction for filing frivolous motions and other similar litigation misconduct. *See Am. Inmate Paralegal Assoc. v. Cline*, 859 F.2d 59, 62 (8th Cir. 1988) ("[T]he voluminous amount of frivolous documents submitted by appellants—all typed—in connection with this litigation supports the dismissal with prejudice. . . ."); *Carman v. Treat*, 7 F.3d 1379, 1382 (8th Cir. 1993) (upholding dismissal with prejudice as a sanction for filing a motion that was not well-grounded in fact); *Joiner v. Delo*, 905 F.2d 206, 208 (8th Cir. 1990) (affirming dismissal with prejudice for blatantly misrepresenting the record). Federal Rule of Civil Procedure 11 encompasses a litigant's duty to refrain from filing frivolous motions. *See* Fed. R. Civ. P. 11(b). Although the Court has not sua sponte imposed Rule 11 sanctions on

[7] The Eighth Circuit may view dismissing a case with prejudice as a sanction more skeptically when the plaintiff is pro se. *See Brown v. Frey*, 806 F.2d 801, 804 (8th Cir. 1986). Although James Bachman is pro se, the same concerns underlying giving latitude to pro se litigants are not present here because he is a licensed attorney representing the other Plaintiffs in the case as well.

Plaintiffs in this case, it could have required Plaintiffs to show cause as to why their conduct did not violate Rule 11 numerous times. *See* Fed. R. Civ. P. 11(b)–(c)(3).

Plaintiffs' improper motion practice began as soon as they filed this case. Their numerous motions for preliminary injunctive relief were clearly an attempt to litigate an issue in a state-court suit. The fact that they continued to file motions for preliminary injunctive relief after Judge Smith Camp rejected their initial barrage only highlights the motions' frivolity.[8]

Furthermore, Plaintiffs have repeatedly litigated the issue of whether Defendants may assert affirmative defenses. Magistrate Judge Zwart settled this issue on September 19, 2019, Filing 43 (audio file); Filing 44, yet over two years later Plaintiffs continued to contest this issue. *See* Filing 217 (filed October 22, 2021). Plaintiffs have behaved similarly with respect to Defendants' counterclaims. *See* Filing 145 (finding that Defendants could conduct discovery on their counterclaims); Filing 172 at 20, 26 (litigating the issue of whether Defendants can assert counterclaims). Plaintiffs have simply ignored the Court's rulings and used

[8] Plaintiffs' improper motion practice bled into the dispositive motions they have filed. Since August 6, 2019, Plaintiffs have filed four dispositive motions that are virtually the same substantively. *See* Filing 27; Filing 82; Filing 84; Filing 219. The Court has told Plaintiffs several times that these motions are premature. *See*, *e.g.*, Filing 55 at 4. Despite twice being sanctioned for misconduct, *see* Filing 148; Filing 216; Plaintiffs filed a premature Motion for Partial Summary Judgment on October 25, 2021. Filing 219. The Court finds that Plaintiffs are using their dispositive motion practice as a dilatory tactic.

their belief that affirmative defenses and counterclaims in this case are unwarranted as a basis to refuse to answer questions in depositions and to generally resist discovery. *See* Filing 142 at 7–8 (in opposition to motion to compel, arguing that equitable affirmative defenses are unavailable in FLSA actions); Filing 206-3 at 8–9 (Plaintiff James Bachman refusing to answer questions relevant to Defendants' affirmative defenses); Filing 211-2 at 1–2 (Plaintiff Andrew Bachman refusing to answer questions relevant to Defendants' affirmative defenses); Filing 239 (arguing that Plaintiffs do not have to answer questions related to Defendants' affirmative defenses and counterclaims); Filing 241 (same).

Finally, Plaintiffs have purposefully misstated the record several times. As a primary example,[9] Plaintiffs have continually litigated the issue of whether Magistrate Judge Zwart granted their motion to compel the production of certain financial documents from defendant John Bachman in a November 18, 2020 Order. Filing 122. Although Magistrate Judge Zwart clearly compelled Defendants to answer or object to Plaintiffs' requests for production,[10] Plaintiffs have claimed several times that Magistrate Judge Zwart in fact ordered the production of the financial documents. *See* Filing

[9] Plaintiffs have also misstated the record by claiming they never received discovery requests from Defendants, despite the requests being both mailed and emailed to them. *See* Filing 148 at 2–4; Filing 210 at 1–2.

[10] Judge Zwart later found that Defendants had, in fact, timely objected to the requests for production. Filing 167 at 12–13.

151 at 2–3; Filing 166 at 2–3. Plaintiffs have gone so far as to accuse Magistrate Judge Zwart of misstating the record. Filing 171 at 1; Filing 172 at 4, 20–21. Despite the Court explaining to Plaintiffs that they were incorrect, *see* Filing 184 at 6–7, Plaintiffs raised the issue again in a subsequent motion. Filing 188 at 1–2.

This case is not one where the plaintiffs are unaware of their attorney's misconduct. *See Bergstrom*, 744 F.3d at 575 n.1 ("[D]ilatory conduct may be considered less worthy of dismissal with prejudice when attributable solely to a litigant's attorney."). The other plaintiffs are aware that James Bachman is engaging in frivolous motion practice on their behalf. *See* Filing 203 at 2–9 (outlining James Bachman's motion practice and ordering that James Bachman provide a copy of the order to the other plaintiffs); Filing 211-3 at 4–5 (Plaintiff Eric Bachman acknowledging reviewing the order with his counsel, plaintiff James Bachman). In fact, Plaintiffs' conduct during their depositions shows that they have been coordinating with James Bachman to obstruct discovery in this case. Furthermore, monetary sanctions have been unsuccessful in limiting Plaintiffs' endless flow of motions.[11] *See Hunt*, 203 F.3d at 527 (stating that district courts may dismiss with

[11] Plaintiffs have also allegedly implied that they have no intention of paying the first monetary sanction the Court imposed on January 14, 2021. *See* Filing 148 (imposing sanctions); Filing 234 at 3 (stating Plaintiffs have not paid the attorney fee award and that they would not be paid "until he had the money"); *Duncan v. City of Brooklyn Park*, No. CIV 05-711 DSD/SRN, 2006 WL 3804332, at *4 (D. Minn. Dec. 26, 2006) (finding that monetary sanctions were futile due to litigant's failure to pay them).

prejudice "when lesser sanctions prove futile"). Indeed, after the most recent monetary sanction on October 12, 2021, *see* Filing 216, Plaintiffs filed an Objection to the Magistrate Judge's Order, Filing 217, a Motion for Partial Summary Judgment, Filing 219, a Motion for Reconsideration, Filing 240, and a Motion to Supplement the Record regarding the Motion for Reconsideration, Filing 243, and another Motion to Supplement the Record regarding the Motion for Reconsideration, Filing 246, all within a two-month span. The Court has conducted a brief review of these motions and concludes that they are as meritless as nearly all of Plaintiffs' previous motions in this case. The persistent failure to cooperate and respect the Court's prior rulings makes it clear that Plaintiffs' conduct is deliberate rather than accidental. The Court concludes that Plaintiffs are using their frivolous motion practice to obstruct discovery and delay these proceedings. This "pattern of intentional delay is the type of conduct for which the extreme sanction of dismissal with prejudice is appropriate." *Hutchins v. A.G. Edwards & Sons, Inc.*, 116 F.3d 1256, 1260 (8th Cir. 1997). Therefore, Plaintiffs' motion practice supports dismissal of this case with prejudice.

2. Obstruction of the Discovery Process

Obstructing the discovery process can also support dismissal with prejudice. *See Hunt*, 203 F.3d at 527–28 (affirming dismissal with prejudice for delaying the discovery process); *Duncan v. City of Brooklyn Park*, No. CIV 05-711 DSD/SRN, 2006 WL 3804332, at *4 (D.

Minn. Dec. 26, 2006) (dismissing a case with prejudice because "Plaintiff [had] failed to comply with any discovery"). Beyond the filing of frivolous motions, Plaintiffs have engaged in other conduct to obstruct the discovery process and prevent Defendants from obtaining evidence. The first instance occurred early in this case, when the Court was attempting to determine if it had subject-matter jurisdiction. During limited discovery on the jurisdictional issue, James Bachman refused to sign a waiver to allow Defendants to access Department of Labor Records, despite a court order requiring him to do so, Filing 62 at 1; Filing 63-1 at 1; rebuffed a request to provide an address of a business he owned, Filing 72 at 2–3; and threatened to file a Motion for a Protective Order to prevent plaintiff Eric Bachman from attending a deposition. Filing 72 at 2. After the Court determined it had jurisdiction, Plaintiffs sent 299 requests for admission to Defendants, Filing 1091 at 3–41, against which Defendants obtained a protective order. Filing 122 at 8–10.

Later, on December 21, 2020, Magistrate Judge Zwart held a telephonic conference to resolve another discovery dispute because Plaintiffs failed to respond to Defendants' discovery requests despite Defendants both mailing and emailing them to Plaintiffs. Filing 138. During the conference, James Bachman claimed Plaintiffs never received the mailed discovery requests because Plaintiffs had changed their address without informing the Court in violation of the Court's General

Rule 1.3(e).[12] Filing 138 (audio file) at 4:30–5:43. James Bachman also failed to explain how Plaintiffs remained ignorant of the discovery requests despite having received them via email. *See* Filing 148 at 2. After the conference, Plaintiffs still refused to respond to Defendants' discovery requests, Filing 140 at 1, which required Magistrate Judge Zwart to grant a motion to compel responses. Filing 148. Magistrate Judge Zwart sanctioned Plaintiffs for their conduct.[13] Filing 148 at 5.

Despite being sanctioned, Plaintiffs' obstructive conduct only escalated. On August 21, 2021, Defendants filed an Amended Motion to Compel due to Plaintiffs' behavior during their depositions. Filing 207 at 2. As more fully outlined in the Court's November 17, 2021 Order, Plaintiffs refused to answer questions in

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[12] For unclear reasons, James Bachman claimed that he did not think there was a need to inform the Court of a change of address. Filing 138 (audio file) at 6:58–7:22. However, James Bachman had no issue filing a change of address on August 7, 2019. *See* Filing 30.

[13] Nearly nine months later, Plaintiffs attempted to reopen this issue. On September 21, 2021, Plaintiffs filed a motion asking Magistrate Judge Zwart to reconsider her imposition of sanctions. Filing 208. Plaintiffs purported to offer "new evidence" that Defendants may not have properly mailed the discovery requests at issue. Again, Plaintiffs ignored the clear evidence that the disputed requests were provided to them by email (even after the court had repeatedly referred Plaintiffs to the copy of the relevant transmittal email filed of record by Defendants). In an order filed on the same date as Plaintiffs' motion, the court rejected Plaintiffs' argument as entirely meritless and again warned Plaintiffs to cease their attempts at serial litigation of the same, settled issues. Filing 210.

violation of law, James Bachman used numerous improper speaking objections to coach witnesses, and plaintiff Andrew Bachman insulted Magistrate Judge Zwart by referring to her as defense counsel's "mommy." Filing 228 at 2–3. James Bachman, however, saved the most egregious conduct for himself. During the deposition of nonparty Bradley Dollis, Dollis stated that James Bachman called him to tell him not to attend his deposition because his testimony was irrelevant. Filing 206-2 at 67–68. This action by James Bachman, a licensed attorney, is astonishing.[14] The Court finds that Plaintiffs' obstructive conduct supports dismissing the case with prejudice.

3. Violations of Court Orders and Local Rules

Lastly, the willful disregard of a court order is grounds for dismissal under Federal Rule of Civil Procedure 41(b). *See Aziz v. Wright*, 34 F.3d 587, 589 (8th Cir. 1994) (affirming dismissal with prejudice for violating a court order); *Siems v. City of Minneapolis*, 560 F.3d 824, 826 (8th Cir. 2009) (upholding dismissal for delaying proceedings and violating court orders). In

[14] James Bachman attempts to excuse this behavior in one of his more recent filings. *See* Filing 243; Filing 244. According to James Bachman, this attempt to thwart a deposition was a good-faith mistake because he had filed a protective order with a Nebraska state court. Based on James Bachman's behavior in this case and the spuriousness of the excuse, the Court finds that this statement is not credible. Even assuming its truthfulness, the Court is perplexed as to how merely filing a protective order in an entirely different court and case would permit James Bachman to call a deponent and implore him not to attend a deposition.

several rulings, the Court has admonished Plaintiffs to abide by the Court's local rules. Filing 55 at 4 (encouraging Plaintiffs to familiarize themselves with the Court's local rules); Filing 101 (explaining that Plaintiffs had failed to abide by the Court's local rules); Filing 180 (directing parties to review the Court's local rules). Yet Plaintiffs have continued to violate the Court's local rules in a pattern consistent with open defiance. *See* Filing 55 at 4 (noting Plaintiffs' violation of Nebraska Civil Rule 56.1(b)(1)); Filing 101 (same); Filing 138 (noting Plaintiffs' violation of Nebraska General Rule 1.3(e)); Filing 167 (noting Plaintiffs' violation of Nebraska Civil Rule 7.1(c)(3)); Filing 180 (noting violation of Nebraska Civil Rule 7.1); Filing 204 (same).

Plaintiffs have also ignored or violated Court orders several times. As mentioned above, Plaintiffs have continued to litigate issues that the Court has already resolved. Moreover, because Plaintiffs' behavior in discovery was burdening the Court's docket, Magistrate Judge Zwart mandated that the parties resolve discovery disputes in good faith before filing a motion to compel. Filing 122. Plaintiffs have violated this order several times through their motions, Filing 180 at 4 (noting that Plaintiffs provided no evidence that they tried to resolve discovery dispute informally with opposing counsel); Filing 204 at 1–2 (same), or by placing ex parte phone calls to the Court regarding discovery disputes. Filing 180 at 2; Filing 180-1 at 1–2.

In recognition that the Eighth Circuit encourages "a warning from the district court that a particular

litigant is skating on the thin ice of dismissal," *Rodgers*, 135 F.3d at 1221, the Court warned Plaintiffs that their obstreperous activity would result in sanctions. Filing 203 at 9; Filing 210 at 2. Plaintiffs misconduct regrettably continued after these warnings. Finally, in an October 12, 2021 Order, Magistrate Judge Zwart explained that Plaintiffs had "escaped [dismissal] by a hair's breadth" and stated that further noncompliance with Court orders would result in a recommendation that Plaintiffs' case be dismissed. Filing 216 at 5–6. On November 17, 2021, the Court ordered Plaintiffs to file notice within five days of its order and warned Plaintiffs that "failure to cooperate with the Court's orders and discovery in this case may lead to dismissal with prejudice of their case." Filing 228 at 6. Plaintiffs failed to file notice in direct violation of the Court's Order. The Court concludes that Plaintiffs have engaged in "willful violation[s] of court orders." *Siems*, 560 F.3d at 827. These violations, one of which occurred after Plaintiffs were warned of the possibility of dismissal, support dismissing Plaintiffs' case with prejudice.

C. Futility of Lesser Sanctions and Prejudice to Defendants

Having determined that the facts warrant dismissal with prejudice, the Court turns to whether lesser sanctions are a viable option and the prejudice to Defendants of not dismissing this case. The Court concludes that, based on Plaintiffs' behavior throughout this litigation, lesser sanctions would be futile. It

further concludes that forcing Defendants to continue accumulating expenses caused by Plaintiffs' torrent of motions and abuse of the discovery process would be unduly prejudicial.

Before dismissing a case as a sanction, "[a] district court should weigh its need to advance its burdened docket against the consequence of irrevocably extinguishing the litigant's claim and consider whether a less severe sanction could remedy the effect of the litigant's transgressions on the court and the resulting prejudice to the opposing party." *Arnold v. ADT Sec. Servs., Inc.*, 627 F.3d 716, 722 (8th Cir. 2010). The Eighth Circuit also requires that courts attempt to use lesser sanctions to control litigant misbehavior before reaching for the ultimate sanction of dismissal with prejudice. *Siems*, 560 F.3d at 826. The Court has done so twice to no avail. *See* Filing 148; Filing 216. At this point, the case is nearing the two-and-a-half-year mark and the parties have not concluded discovery. Given Plaintiffs' conduct, the Court sees no end in sight. If the Court imposed lesser sanctions, additional delay would ensue or the Court would have to proceed to trial without completing discovery, both of which would unfairly prejudice Defendants. *See First Gen. Res. Co. v. Elton Leather Corp.*, 958 F.2d 204, 206–07 (8th Cir. 1992) (holding lesser sanctions were futile when they would have caused additional delay or forced the defendants to proceed to trial with incomplete evidence). Even requiring Plaintiffs to pay attorney fees for each meritless motion and for improper behavior in discovery would have little effect, especially considering that

it appears Plaintiffs have not yet paid the Court's first award of attorney fees from about a year ago. *See* Filing 234 at 3; *Duncan*, 2006 WL 3804332, at *4 (finding that monetary sanctions were futile due to litigant's failure to pay them). Indeed, even though the Court has twice sanctioned Plaintiffs, Plaintiffs' misconduct has only escalated.

Moreover, allowing this case to inch along forces Defendants to undergo additional expenses conducting discovery. Plaintiffs' behavior seems directed at making the litigation process as painful as possible for Defendants, which in turn exacts costs on "the administration of justice in the district court." *Doe v. Cassel*, 403 F.3d 986, 990 (8th Cir. 2005) (quoting *Rodgers*, 135 F.3d at 1219).

The Court finds that lesser sanctions have been and will continue to be futile. It further finds that continuing this litigation would be unduly prejudicial to Defendants. Accordingly, based on the conduct outlined above, the futility of lesser sanctions, and the prejudice to Defendants of continuing this litigation, the Court dismisses Plaintiffs' case with prejudice. *See Brown v. Frey*, 806 F.2d 801, 803 (8th Cir. 1986) ("A district court has the power under Fed.R.Civ.P. 41(b) to dismiss an action for the plaintiffs failure to comply with any court order. . . ."); *Rodgers*, 135 F.3d at 1221–22 (upholding dismissal for violating a court order and engaging in several intentional acts of delay); *Rogers v. Kroger Co.*, 669 F.2d 317, 320 (5th Cir. 1982) ("A clear record of delay coupled with tried or futile lesser

sanctions will justify a Rule 41(b) dismissal with prejudice.").

IV. CONCLUSION

The Court adopts the Findings and Recommendations of the Magistrate Judge and, for the reasons outlined in this order, dismisses this case with prejudice. Accordingly,

IT IS ORDERED:

1. The Magistrate Judge's Amended Findings and Recommendation, Filing 230, is adopted in its entirety;

2. Plaintiffs' Objection to the Magistrate Judge's Amended Findings and Recommendation, Filing 231, is overruled;

3. Plaintiffs' Motion for Partial Summary Judgment, Filing 219, is denied as moot;

4. Defendants' Motion to Extend Deadline, Filing 225, is denied as moot;

5. Plaintiffs' Motion for Reconsideration, Filing 240, is denied as moot;

6. Plaintiffs' Motion to Supplement the Record, Filing 243, is denied as moot;

7. Plaintiffs' Motion to Supplement the Record regarding the Motion for Reconsideration, Filing 246, is denied as moot.

8. The Clerk of the Court is ordered to terminate the Findings and Recommendation at Filing 229 because the Magistrate Judge filed an

amended Findings and Recommendation at Filing 230;

9. The Clerk of the Court is ordered to terminate the Objection to Motion for Three Judge Panel, Filing 248, as it is not motion;

10. The Court will consider Defendants' Motion for Sanctions, Filing 233, in a post-judgment order;

11. The Court dismisses Plaintiffs' case with prejudice;

12. The depositions scheduled for December 10, 2021, are cancelled; and

13. The Court will enter a separate judgment.

Dated this 9th day of December, 2021.

BY THE COURT:

/s/ Brian C. Buescher
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JAMES E. BACHMAN, ADELLA A. BACHMAN, ERIC J. BACHMAN, RACHEL A. BACHMAN, MATTHEW R. BACHMAN, and C. ANDREW BACHMAN,

Plaintiffs,

vs.

JOHN Q. BACHMAN, and LEAF SUPREME PRODUCTS, LLC, A Nebraska Limited Liability Co.;

Defendants.

8:19CV276

MEMORANDUM AND ORDER

(Filed Mar. 24, 2022)

This case is before the court on the motion for sanctions filed by Defendants John Q. Bachman and Leaf Supreme Products, LLC. (Filing No. 233). Defendants seek sanctions against Plaintiffs under 28 U.S.C. § 1927, Fed. R. Civ. P. 11, and/or the court's inherent power to impose sanctions. Also before the court is Plaintiff's response to the undersigned's order to show cause[1], and Judge Buescher's instruction to determine

[1] Filing No. 260 was filed using the "Objection" event type in CM/ECF and the docket text indicates it is an objection to the undersigned's Order to Show Cause (Filing No. 259) and Judge Buescher's Memorandum and Order on Plaintiffs' Motion for New Trial (Filing No. 258). Plaintiffs' brief and index of evidence argue against the initiation of contempt proceedings. The filings offer no new arguments in response to Filing No. 258, nor offer any reason

whether contempt proceedings or further monetary or other sanctions are appropriate based on Plaintiffs' failure to remit the attorney fees previously ordered. (See Filing No. 258 and 260).

For the reasons stated in this order, as well as the reasons contained in the record, Defendants' motion will be granted, and sanctions will be imposed as outlined herein. (Filing No. 233). Contempt proceedings will not be initiated, but monetary sanctions will be awarded attributable to Plaintiffs' delay in payment of the previously ordered sanctions.

BACKGROUND

Judge Buescher has provided an exhaustive summary of the procedural history of this case in the Memorandum and Order which ultimately dismissed Plaintiffs' claims. (Filing No. 249 at CM/ECF pp. 3-7). Additional facts were set forth in the Memorandum and Order filed on December 16, 2021 (Filing No. 253), and the Memorandum and Order filed on January 20, 2021. (Filing No. 258). These orders are incorporated by reference.

Facts related to the pending motion for sanctions and the inquiry regarding potential contempt proceedings will be addressed in turn, below.

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to overturn it. Thus, Plaintiffs' filings will be treated as a response to the order to show cause, rather than as an objection to the court's prior orders.

I. Sanctions

On November 30, 2021, Defendants filed the instant motion for sanctions against Plaintiffs, seeking relief under 28 U.S.C. § 1927, Fed. R. Civ. P. 11, and/or the court's inherent power to impose sanctions. Defendants allege Plaintiffs and Plaintiffs' Counsel engaged in "dilatory and abusive actions in pursuing this action." (Filing No. 233). They further allege that "A large portion of the filings in this case are due to Plaintiffs' refusal to accept the rulings of the Court or insisting upon forcing the Court to rule on matters that were not ready for a decision as discovery was not completed." (Filing No. 234 at CM/ECF p. 2). Plaintiffs did not file a response to Defendants' motion for sanctions.

As previously stated, the motion for sanctions will be granted. The fees previously awarded and sanctions imposed in this case are relevant to the court's ability to fashion the appropriate sanctions under the circumstances.

A. First Award of Sanctions

In January 2021, the undersigned granted a motion to compel filed by Defendants regarding Plaintiffs' responses to interrogatories and requests for production of documents. In addition, attorney fees were awarded as a sanction for Plaintiffs' failure to respond to discovery and for the delay and expense created by the necessity for Defendants' motion. The parties stipulated to fees in the amount of $2,436.00, and the

stipulation was approved on March 19, 2021. (Filing No. 165, Filing No. 167).

B. Second Award of Sanctions

On October 12, 2021, the undersigned granted Defendants' motion to compel and determined that Defendants were entitled to attorney fees for conduct which had occurred during Plaintiffs' depositions. (Filing No. 216). Plaintiffs objected and the objection was overruled. (Filing No. 228). Plaintiffs were given notice that failure to cooperate with the court's orders and discovery "may lead to dismissal with prejudice of their case." (Filing No. 228 at CM/ECF p. 5).

On November 11, 2021, Defendants filed a motion for award of attorney fees with an affidavit stating that Plaintiffs' counsel did not respond to the itemized billing statement emailed to counsel as instructed in Filing No. 216. (Filing No. 227-1 at CM/ECF pp 2, 6-7). Similarly, Plaintiffs did not respond to Defendants' motion for attorney fees and the deadline for doing so had passed. On December 1, 2021, the undersigned awarded Defendants' attorney fees but reduced the amount requested, ordering Plaintiffs to pay $10,781.50 within 30 calendar days. (No. 235). The amount was reduced because Plaintiffs were not ordered to pay attorney fees for the first round of Defendants' noticed depositions in September 2021. Instead, a second round of depositions was to be taken in December 2021 at Plaintiffs' expense.

On December 1, 2021, Plaintiffs filed a motion for reconsideration of the undersigned's award of sanctions in Filing No. 235, and the motion was denied. (Filing No. 238, Filing No. 242). On the same date, Plaintiffs also filed a motion for reconsideration of Filing No. 228, Judge Buescher's order denying Plaintiffs' objection to the undersigned's award of attorney fees. (See Filing No. 217, Filing No. 240). This motion was also denied. (Filing No. 249).

On December 15, 2021, Plaintiffs filed an objection to Filing No. 235. (Filing No. 251) In his order, Judge Buescher found that Plaintiffs had not challenged the calculation of fees and had instead attempted to relitigate the propriety of the award in Filing No. 216, which had already been the subject of an objection (Filing No. 217), and motion for reconsideration (Filing No. 240). See Filing No. 253 at CM/ECF p. 3. Plaintiffs' objection to Filing No. 235 was overruled and Plaintiffs were ordered to remit the $10,781.50, as ordered, and to remit payment of the attorney's fees previously awarded (Filing No. 148) and stipulated to (Filing No. 165), to the extent that obligation had not been satisfied.

C. Dismissal as a Sanction

In ruling on Plaintiffs' Objection to Filing No. 216, Judge Buescher ordered Plaintiffs to file notice with the court within five calendar days of November 17, 2021, stating that they would attend the court-supervised depositions on December 6 and December 10,

2021. Plaintiffs failed to comply with this order and the undersigned recommended on November 23, 2021, that this case be dismissed with prejudice. Plaintiffs were notified that failing to file an objection by November 29, 2021, would be held as a waiver of the right to appeal the court's adoption of the recommendation. (Filing No. 230). The recommendation was adopted by Judge Buescher over Plaintiffs' objection and a judgment was entered on December 9, 2021, dismissing Plaintiffs' claims as a sanction. (Filing No. 231, Filing No. 249, Filing No. 250). On December 23, 2021, Plaintiff filed a motion for new trial, asking Judge Buescher to reconsider the dismissal of the case. (Filing No. 254)

II. Satisfaction of Previously-Ordered Sanctions, and Contempt

James Bachman sent two checks in the amounts of $5,390.75 and $2,436.00 to Defendants on December 30, 2021, which partially covered the sanctions awarded. (Filing No. 256 at CM/ECF p. 4).

On January 11, 2022, defense counsel notified the court that checks written and signed by Plaintiffs' counsel for payment of sanctions were not honored; the bank stated it was unable to locate the account from which the checks were to be drawn. (Filing No. 259 citing Filing No. 227). On January 20, 2022, Judge Buescher denied Plaintiffs' motion for new trial and referred to the undersigned "the question of whether contempt proceedings or further monetary or other sanctions were appropriate based on Plaintiffs' failure

to remit the attorney fees previously ordered." (Filing No. 258). The undersigned entered an order to show cause on January 24, 2022, noting that Plaintiffs' counsel had not provided an explanation for tendering bad checks and there was no notice that the checks were replaced by a valid form of payment. (Filing No. 259). Plaintiffs were given until February 7, 2022, to show cause why they should not be held in contempt.

On February 7, 2022, Plaintiffs submitted a brief and index in response to the order to show cause. (Filing No. 260, Filing No. 261). Plaintiff's evidence indicates the checks submitted in December have the correct account and routing numbers and there were sufficient funds in the corresponding bank account. James Bachman asserts that on January 11, he received two successive emails from Defendants' counsel, one related to the state court matter and the other, a copy of Raymond Aranza's declaration regarding the checks not honored.[2] Bachman asserts he was "extremely busy on other matters" and did not read or respond to the declaration assuming, incorrectly, that the declaration related to the state court matter. He asserts that he did not know the checks were returned until he read Judge Buescher's January 20, 2021 memorandum and order. James Bachman then delivered substitute payment to Defendants' counsel. (Filing No. 261).

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[2] James Bachman's screenshot purportedly shows the emails from Defendants' counsel received at 3:44 p.m. and 3:46 p.m. on January 11, 2022. However, date and time stamps of the emails are not visible in the provided screenshot. (Filing No. 260-6)

Defendants confirmed that a payment of $5,390.75 was made on January 18, 2022, and a replacement check in the amount of $7,826.75 (the combined value of the two checks not honored) was deposited in the Walentine O'Toole Trust Account on January 21, 2022, which satisfied the sums which had been awarded or approved by the court at that time. (See Filing No. 167 approving the parties' stipulation to $2,436.00; Filing No. 235 awarding $10,781.50).

On February 16, 2022, Plaintiffs appealed the Judgment (Filing No. 250), denial of Plaintiffs' Motion for New Trial (Filing No. 258), and "all pre-judgment and post judgment rulings to the Eighth Circuit Court of Appeals." (Filing No. 263).

ANALYSIS

1. MOTION FOR SANCTIONS

I. Jurisdiction

Although Plaintiffs have appealed every substantive order of this court for review by the Eighth Circuit, this court retains jurisdiction to address the pending motion for sanctions and Plaintiffs' response to the order to show cause. Federal district courts have inherent powers, even after a case is closed, to enforce their own orders and judgments. Estrada v. Cypress Semi-Conductor (Minnesota), Inc., No. CV 08-4779 (PAM/JJK), 2010 WL 11602752, at *1 (D. Minn. Oct. 5, 2010), citing Peacock v. Thomas, 516 U.S. 349, 356 (1996). Further, district courts retain jurisdiction to impose sanctions designed to enforce their own rules, even if they no

longer have jurisdiction over the substance of a case. Therefore, "[a]lthough a notice of appeal has been filed, this Court has jurisdiction to determine whether sanctions and attorney's fees are appropriate." Anderson v. Ind. Sch. Dist. No. 97, No. Civ. 98-2217, 2003 WL 328043, *1 (D. Minn. Feb. 10, 2003). And, where the sanctions issues are not before the Court of Appeals, the district court retains jurisdiction to consider those issues. See id. (citing Harmon v. United States, 101 F.3d 574, 587 (8th Cir.1996)); see also Gundacker v. Unisys Corp, 151 F.3d 842, 848 (8th Cir.1998) (holding that where the issue of sanctions was not before Court of Appeals when appeal was filed, the district court retained jurisdiction); Perkins v. General Motors Corp., 965 F.2d 597, 599 (8th Cir. 1992) (recognizing that sanctions are collateral to the merits of the case and may be considered even after the merits are no longer before the district court).

The sanctions previously ordered or approved by the undersigned in Filing Nos. 167 and 235 have been paid, and the undersigned will not address the propriety of those sanctions, as that issue is now before the Eighth Circuit. The sanctions issue currently before the undersigned is whether Defendants are entitled to recovery for Plaintiffs' actions which unreasonably and vexatiously multiplied the proceedings or were done in bad faith, abused court processes, and whether filings were made for improper purposes, causing unnecessary delay, or increasing the costs of litigation. The court retains jurisdiction to address this issue.

II. Authority to Sanction

Defendants seeks sanctions under three theories of recovery: Fed R. Civ. P. 11, 28 U.S.C. § 1927, and the court's inherent power to fashion sanctions. Sanctions are meant to deter future sanctionable conduct, to reimburse the moving party for its reasonable expenditures related to the sanctionable conduct, and to control litigation and preserve the integrity of the judicial process. Nick v. Morgan's Foods, Inc., 270 F.3d 590, 594 (8th Cir. 2001); see also Kirk Capital Corp. v. Bailey, 16 F.3d 1485, 1490 (8th Cir. 1994) (Rule 11 sanctions are primarily to deter litigant and attorney misconduct).

If sanctions are to be imposed, the court must identify the authority relied on in making this determination. Fuqua Homes, Inc. v. Beattie, 388 F.3d 618, 623 (8th Cir. 2004). Identifying the source of authority is critical, because while the statutes and rules may overlap to some extent when defining sanctionable conduct, they may also "sanction different kinds of actions, require the application of disparate standards of proof, permit the sanctioning of different persons, and differ in the procedures that the sanctioning court must follow." Fuqua Homes, 388 F.3d at 623. In addition, the reach and application of the court's inherent power to sanction differs from that afforded under federal statutes and court rules. Statutes and rules, "taken alone or together, are not substitutes for the inherent power, for that power is both broader and narrower than other means of imposing sanctions. . . . [W]hereas each of the other mechanisms reaches only

certain individuals or conduct, the inherent power extends to a full range of litigation abuses." Chambers v. NASCO, Inc., 501 U.S. 32, 46 (1991).

A. Rule 11 of the Federal Rules of Civil Procedure

Rule 11 of the Federal Rules of Civil Procedure requires all parties who file pleadings, motions and other papers in federal court to ensure "that to the best of the person's knowledge . . . formed after an inquiry reasonable under the circumstances," that the claims and arguments presented "are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law," that the "allegations and other factual contentions have evidentiary support," and that the filing was not made "for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation." Fed. R. Civ. Proc. 11(b). Rule 11 sanctions may be imposed against not only an attorney, but a litigant who has signed an abusive pleading or motion. The primary purpose of Rule 11 sanctions is to deter attorney and litigant misconduct. Kirk Capital Corp. v. Bailey, 16 F.3d 1485, 1490 (8th Cir. 1994).

B. 28 U.S.C. § 1927

Section 28 U.S.C. § 1927 provides: "Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably

and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." This statute warrants sanctions when an attorney's conduct, "viewed objectively, manifests either intentional or reckless disregard of the attorney's duties to the court." Lee v. L.B. Sales, Inc. 177 F.3d 714, 718 (8th Cir. 1999) (internal citations omitted). Section 1927 authorizes sanctions against the offending attorney, not the party. See Kansas Public Employees Retirement System v. Reimer & Koger Associates, 165 F. 3d 627 (8th Cir. 1999). Unlike Rule 11, sanctions may be imposed under § 1927 irrespective of the merits of the court filings at issue. Section 1927 "does not distinguish between winners and losers, or between plaintiff and defendants. The statute is indifferent to the equities of the dispute and to the values advanced by the substantive law. It is concerned only with limiting abuse of court processes." Roadway Exp., Inc. v. Piper, 447 U.S. 752, 762 (1980).

C. Court's Inherent Power

In addition to the sanctions authorized by 28 U.S.C. § 1927, a federal court has the inherent power to impose sanctions against both litigants and attorneys who have acted in bad faith, vexatiously, wantonly, or for oppressive reasons. United States v. Gonzalez-Lopez, 403 F.3d 558, 564 (8th Cir. 2005). This inherent power assists the court in regulating its docket, promoting judicial efficiency, and deterring frivolous filings, (Roadway, 447 U.S. at 764-67), and

authorizes it to supervise, monitor and, when appropriate, discipline the conduct of attorneys admitted to practice before the court. Chambers, 501 U.S. at 43-46; In Re Attorney Discipline Matter, 98 F.3d 1082, 1087-88 (8th Cir. 1996). The court's inherent power affords district courts the autonomous authority to adopt and enforce local rules for imposing disciplinary sanctions on members of its bar. In re Fletcher, 424 F.3d 783, 792 (8th Cir. 2005); In Re Attorney Discipline Matter, 98 F.3d at 108788. The court's inherent power to award attorney fees is not dependent on which party wins the lawsuit, or the underlying merits of the parties' respective claims and defenses, but rather on how the parties conduct themselves during the litigation. Lamb Engineering & Const. Co. v. Nebraska Public Power Dist., 103 F.3d 1422, 1435 (8th Cir. 1997).

III. Sanctionable Conduct

A. Rule 11

Despite the length of the docket, the court does not know and will not speculate as to whether Plaintiffs would have been successful on the merits of this case, so sanctions will not be ordered under Rule 11.

B. 28 U.S.C. § 1927

Section 28 U.S.C. § 1927 authorizes the imposition of sanctions against James Bachman as counsel of record for Plaintiffs. See Lee v. First Lender Ins. Services, Inc., 236 F.3d 443, 445 (8th Cir. 2001) (holding sanctions were warranted under 28 U.S.C. § 1927

where baseless claims were not abandoned by the plaintiff until after extensive discovery and motion practice had occurred).

From the outset, Plaintiffs have urged the court to rule as expeditiously as possible because they were seeking alleged unpaid wages dating back to 2016. (Filing No. 27). Nonetheless, by December 2020, the undersigned observed, on the record, that Plaintiffs' motion practice has "unreasonably and exponentially increased the expense of this litigation while simultaneously delaying its resolution."[3] (Filing No. 131 at CM/ECF p. 2). At that point, Plaintiff had filed several unsuccessful motions for relief, motions to reconsider prior rulings, and motions to consider rulings already reconsidered and affirmed. (Id.) The undersigned "notified and reminded" Plaintiffs' counsel of the potential for sanctions under 28 U.S.C. § 1927 in December 2020.[4] (Filing No. 131 at CM/ECF p. 3, n. 1). Nonetheless, the problems plaguing this case continued, unabated.

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[3] James Bachman as a plaintiff, and counsel for the other plaintiffs, filed six motions in the span of just over one month requesting various forms of preliminary injunctive relief and attempting to improperly litigate issues in the previously remanded case pending in state court. (Filing No. 10 at CM/ECF p. 5, See Filing Nos. 2, 7, 8, 9, 14, 16). Plaintiffs also filed two early motions for summary judgment, and a motion to dismiss which were all denied without prejudice to reassertion after discovery had occurred. (Filing Nos. 27, 82, 84).

[4] Judge Buescher also provided notice of potential sanctions under 28 U.S.C. § 1927 in two separate orders (Filing No. 203 at CM/ECF pp. 8-9; Filing No. 228 at CM/ECF pp. 6-7).

Plaintiffs continued to challenge each unfavorable ruling to the fullest extent, filing numerous motions for reconsideration, objections, and motions for reconsideration of the court's orders denying Plaintiffs' objections. This court supports zealous representation and acknowledges Plaintiffs have the right to object to the undersigned magistrate judge's rulings and to appeal those rulings and the rulings of the district judge. Notwithstanding those rights, the constant scrutiny and re-litigation of settled matters multiplied the pleadings, caused unnecessary delay, and certainly increased the cost of litigation.

What was said in December 2020 remains true: "Plaintiffs' federal motion practice has created a Gordian knot, necessitating a diagramed schematic of Plaintiffs' recurring and duplicative motion practice. . ." The undersigned observed that the problems and delays in this case could be solved if Plaintiffs answered discovery and complied with the court's orders. (Filing No. 131 at CM/ECF p. 3). Later in this case, the docket was described as a "clutter of redundancies." (Filing No. 167 at CM/ECF p. 10). The docket demonstrates that Plaintiffs continued to obstruct discovery processes, filed unnecessary or repetitive motions, and defied court orders. Counsel's actions went beyond advocating. This is the very type of conduct which justifies imposing sanctions under 28 U.S.C. § 1927 against James Bachman, Plaintiffs' counsel.

The undersigned recognizes that "the imposition of sanctions is a serious matter and should be approached with some circumspection." Lupo v. R.

Rowland & Co., 857 F.2d 482, 485 (8th Cir. 1988)(citations omitted). The court should restrict sanctions to those "related concretely to redressing the harm" of the attorney's misconduct, and to those "necessary to deter" the attorney in the future. Schwartz v. Kujawa, 270 F.3d 578, 584 (8th Cir. 2001); Willhite v. Collins, 459 F.3d 866, 869 (8th Cir. 2006). Any award should be "remedial" in nature; that is, it should compensate the opposing parties for the fees they incurred as a result of the attorney's misconduct. Lupo, 857 F.2d at 485–86.

Defendants' motion requested an award of sanctions and an order allowing them to submit documentation identifying entries that were necessary because of Plaintiffs' actions. Defendants will be allowed to submit attorney fee documentation for the filings discussed hereinbelow. In fairness, the court cannot and will not order sanctions for the first time an issue was litigated, but sanctions are appropriate for the successive attempts to litigate the same issue, or motions which were focused on criticizing the court's past rulings rather than progressing the case.[5]

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[5] The court notes there were multiple instances in which Plaintiffs raised or repeated an issue or objection, yet, because the court was monitoring this case closely, Defendants were not required to submit a response prior to the court's ruling, thus limiting Defendants' fees and costs. No sanctions will be awarded related to such filings. See, for example:

- Motion for Reconsideration Filing No. 56, denied at Filing No. 59.
- Motion for Reconsideration Filing No. 73, denied at Filing No. 75.

The court's goal in awarding sanctions to Defendants is to put them in the position they would have been in but-for Plaintiffs' conduct, i.e. to balance the costs incurred and to require Defendants to invest only those costs which they should have expected for defending this type of dispute. The undersigned has attempted to identify and isolate the additional costs and fees incurred by reason of conduct that violated § 1927. However, as the Eighth Circuit has noted, the task is inherently difficult, and precision is not required. See Lee v. First Lenders Ins. Services, Inc., 236 F.3d at 446, (8th Cir. 2001). Defendants' counsel will be asked to demonstrate and provide an accounting of the costs attributable to the following:

i. Filing No. 129

The court found that limited discovery was necessary before a determination could be made regarding this court's jurisdiction to decide the FLSA issues. After the parties conducted their limited discovery,

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- Motion for Reconsideration Filing No. 125, denied at Filing No. 127.
- Motion for Reconsideration Filing No. 130, denied at Filing No. 131.
- Motion to Compel Filing No. 201, denied at Filing No. 204.
- Motion for Reconsideration Filing No. 208, denied at Filing No. 210.
- Objection Filing No. 217, denied at Filing No. 228.
- Motion for Reconsideration Filing No. 238, denied at Filing No. 242.
- Objection Filing No. 251, denied at Filing No. 253.

Defendants moved for summary judgment on jurisdictional grounds and Plaintiffs filed motions to dismiss and for partial summary judgment claiming Defendants' affirmative defenses were improper.

In her Order on the parties' Motions for Summary Judgment and Plaintiffs' Motion to Dismiss, Judge Smith Camp found that the court had jurisdiction over the FLSA claims, denying Defendants' Motion for Summary Judgment. However, she noted that discovery was still necessary before Plaintiffs' Motion to Dismiss or Motion for Summary Judgment could be addressed, thus both motions were denied without prejudice to reassertion. Judge Smith Camp stated: "Because the Court anticipates that Plaintiffs will raise these issues in future motions, the Court will address why further discovery is necessary before Plaintiffs' Motions can be addressed." (Filing No. 101 at CM/ECF p. 12).

Despite the court's orders detailing why discovery was necessary (Filing Nos. 101 and 122), Plaintiffs argued that Defendants should be prevented from amending its pleadings to add additional affirmative defenses and/or counterclaims on the grounds that the proposed amendments would be futile. (See Filing No. 112). After the undersigned granted Defendants leave to amend, Plaintiff again objected (Filing No. 122, 123), and filed an additional motion for reconsideration of Filing Nos. 44 and 101 (Filing No. 125). When that motion for reconsideration was denied, Plaintiffs filed yet another motion for reconsideration (Filing No. 130). Plaintiffs' objection at Filing No. 123 was overruled by

Judge Buescher, who stated, again, that discovery was needed to determine whether Defendants' counterclaims have merit. (Filing No. 145 at CM/ECF p. 6).

Overall Plaintiffs filed numerous overlapping filings which boil down to the same core finding: more discovery was needed prior to any judge granting a dispositive motion or preventing additional affirmative defenses or counterclaims from being asserted in an amended pleading. This same conclusion was reached by the undersigned, as well as two separate district judges. Plaintiffs' refusal to accept these orders and begin discovery caused delay and additional expense. Defendants are entitled to compensation for the costs associated with preparation of Filing No. 129, Defendants' response to Filing No. 123.

ii. Filing Nos. 174 and 189:

After the undersigned denied several of Plaintiffs' motions in Filing No. 167, Plaintiffs filed an objection (Filing No. 1). And when the objection was overruled (Filing No. 184), Plaintiffs filed a motion for reconsideration and a request to certify an interlocutory appeal (Filing No. 187). Judge Buescher found the motion to reconsider was meritless and frivolous, stating "Relitigating the merits of a past objection that the Court already overruled, without any showing that there has

been a manifest error of law or fact, is a waste of judicial resources.[6] (Filing No. 203).

Defendants are not entitled to attorney's fees for the preparation of responses to Plaintiffs' motions addressed in Filing No. 167, but they are entitled to reimbursement for Filing Nos. 174 and 189, in which Defendants were forced to brief the same issues ad nauseam.

iii. Filing No. 179

Plaintiffs filed a motion to compel in April 2021. Plaintiffs' brief in support of the motion contained a numbered list of previous (unrelated) rulings, stating in light of these rulings "the Plaintiffs are skeptical that this Court will apply the law impartially." (Filing No. 176 at CM/ECF p. 2).

While Plaintiff's motion to compel sought responses to legitimate discovery, Plaintiffs' list of grievances appeared to be a vehicle with which to express their displeasure with the direction of the case and to cast doubt on the validity of the undersigned's prior orders, an improper method of seeking any valid relief and an abuse of court processes. Plaintiffs' motion

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[6] Judge Buescher wrote that he was "astonished" by the number of baseless motions filed by Plaintiffs, "several of which violated this Court's rules or are unsupported by established law' and that if the behavior persisted, the court would impose sanctions pursuant to 28 U.S.C. § 1927 and Fed. R. Civ. P. 11. (Filing No. 203). The undersigned had previously warned of the potential for such sanctions at Filing No. 131 at CM/ECF p. 3).

forced Defendants to again respond to settled issues, incurring expenses which would not have been necessary but for Plaintiff's formal motion practice.

In response to the motion, the undersigned advised that Plaintiffs are best served by looking forward and relitigation of settled issues does nothing to advance Plaintiffs' case. Additionally, as the court noted, the disputed motion to compel may have been avoided had the parties' attempted to meaningfully discuss the issues prior to Plaintiffs filing the motion.[7] (See Filing No. 180 at CM/ECF p. 12). Defendants are entitled to payment from James Bachman for the expenses associated with the preparation of Filing No. 179.

iv. Filing No. 233 and Filing No. 234

The court will allow Defendants to submit documentation as to the fees incurred in the preparation of the instant motion for sanctions: Filing Nos. 233 and 234.

v. Filing No. 256, Filing No. 257 and Filing No. 262

The court excludes from this analysis any filings associated with the sanctions previously awarded

[7] While there is some evidence that Plaintiffs' counsel emailed opposing counsel prior to contacting the court by email on March 29, 2021, there is nothing in the record that indicates Plaintiffs' counsel took seriously the court's directive to attempt to confer with opposing counsel regarding the disputed discovery prior to filing the motion to compel on April 19, 2021. (Filing No. 180 at CM/ECF p. 4).

under Fed. R. Civ. P. 37(a)(5)(A). While additional sanctions may be justified under 28 U.S.C. § 1927, Defendants have already been reimbursed for the expenses awarded in Filing No. 216 and Filing No. 235. However, as will be discussed in more detail below, the court will allow Defendants to submit documentation as to the fees incurred in attempt to collect the previously-awarded sanctions.

C. Inherent Authority

Even if sanctions were not awarded under 28 U.S.C. § 1927, sanctions would also be justified under the court's inherent power due to Plaintiffs' repeated and direct violations of court orders and the local rules.[8]

"[T]he district court possesses inherent power 'to manage [its] own affairs so as to achieve the orderly and expeditious disposition of cases.'" Vallejo v. Amgen, Inc., 903 F.3d 733, 749 (8th Cir. 2018) The court's powers include "the ability to supervise and 'discipline

[8] See Chambers v. NASCO, Inc., 501 U.S. 32, 50 (1991):

> There is, therefore, nothing in the other sanctioning mechanisms or prior cases interpreting them that warrants a conclusion that a federal court may not, as a matter of law, resort to its inherent power to impose attorney's fees as a sanction for bad-faith conduct. This is plainly the case where the conduct at issue is not covered by one of the other sanctioning provisions. But neither is a federal court forbidden to sanction bad-faith conduct by means of the inherent power simply because that conduct could also be sanctioned under the statute or the Rules.

attorneys who appear before it' and discretion 'to fashion an appropriate sanction for conduct which abuses the judicial process,' including assessing attorney fees or dismissing the case." Id. Courts assess whether and when an attorney's conduct became not just "merely the disruption of court proceedings . . . [but] disobedience to the orders of the Judiciary. . . ." Chambers v. NASCO, Inc., 501 U.S. 32, 44 (1991) Attorneys are entitled to advocate zealously for their clients, but they must do so in accordance with the law, the court rules, and the orders of the court. Vallejo, 903 F.3d 733, 750.

A review of the docket reveals several instances in which Plaintiffs failed to comply with court orders.[9] So as not to belabor the point, the court notes that in the final months of this case alone, Plaintiffs failed to adequately participate in depositions, necessitating court-supervision of the re-noticed depositions and sanctions of attorney's fees. Plaintiffs' counsel also advised a nonparty deponent not to attend a noticed deposition, allegedly confusing this case with the case pending in state court. (See Filing No. 249 at CM/ECF p. 6, n. 5). Plaintiffs failed to follow court orders requiring them to confirm their attendance at the December 2021 court-supervised depositions, which ultimately led to the recommendation that this case be dismissed. And after the case was dismissed, Plaintiffs failed to remit payment for the full amount of the ordered sanctions

[9] A more complete listing of Plaintiffs' failure to obey court orders can be found in Filing No. 249 at CM/ECF pp. 12-15.

as directed by the court. This issue will be discussed in the contempt analysis, below.

A review of the docket also reveals several instances in which Plaintiffs' counsel failed to comply with the local rules. See Filing No. 55 at CM/ECF p. 4, Filing No. 48 at CM/ECF p. 2, Filing No. 101, Filing No. 180 at CM/ECF p. 4, Filing No. 204. In September 2021, this court recognized that Plaintiffs' counsel had limited experience in this court, which may explain a party's failure to comply with the local rules. However, the undersigned observed "At some point, failure to review and comply with those rules is no longer due to inexperience, but rather defiance. Plaintiffs' counsel has reached that point." (Filing No. 204).

At each turn, James Bachman either argued with or ignored the court's orders and local rules. The court finds the actions and filings of James Bachman vexatiously multiplied and extended the proceedings beyond what is acceptable and his repetitive and defiant conduct was tantamount to bad faith. Roadway Exp., 447 U.S. at 767. Sanctions would be appropriate under the court's inherent power. See Chambers v. NASCO, Inc., 501 U.S. 32, 46 (1991) (holding that federal courts have inherent power to compel payment of an opposing party's attorney's fees as a sanction for misconduct).

2. CONTEMPT

The contempt authority of the federal magistrate judges is outlined in U.S.C. § 636(e). If a magistrate judge believes an instance of contempt has occurred in

a civil case referred to that magistrate judge for management of pretrial matters, the magistrate may

> forthwith certify the facts to a district judge and may serve or cause to be served, upon any person whose behavior is brought into question under this paragraph, an order requiring such person to appear before a district judge upon a day certain to show cause why that person should not be adjudged in contempt by reason of the facts so certified. The district judge shall thereupon hear the evidence as to the act or conduct complained of and, if it is such as to warrant punishment, punish such person in the same manner and to the same extent as for a contempt committed before a district judge.

28 U.S.C. § 636(e)(6)(B)(iii).

Judge Buescher's order on January 20, 2022, stated that James Bachman provided no explanation for why the bank would not honor his checks. The court had no information at the time regarding whether James Bachman wrote bad checks to Defendants to avoid paying a sanctions award, but it was certainly clear that Plaintiffs were in violation of a direct order of the court. (Filing No. 258). The undersigned was tasked with "the question of whether contempt proceedings or further monetary or other sanctions are appropriate pursuant to Federal Rules of Civil Procedure 11 and, as well as the Court's inherent authority." (Filing No. 258 at CM/ECF p. 7).

Plaintiffs' responses to the order to show cause indicate that James Bachman made some effort on December 30, 2021, to comply with Judge Buescher's order to remit payment for the previously ordered sanctions, at least in part. For some reason, which does not appear to be attributable to any action by Plaintiffs, the checks were not honored, despite the checks being printed with the correct account and routing numbers, and the account having sufficient funds for the checks written on December 30, 2021. No sanctions will be entered for the return of the checks written on December 30, 2021, and the court will not recommend or certify facts for the initiation of contempt proceedings regarding the reason for the returned checks.

However, even if the checks written on December 30, 2021, were honored, the amount tendered was equal to $7,826.75. Plaintiffs still owed $5,390.75, which was not paid until January 18, 2022, almost three weeks after the court's deadline. James Bachman claims that there is no willful violation justifying a contempt finding, conveniently glossing over the fact that while he made payments on December 30, 2021, the checks written did not cover the entire amount outstanding. See Filing No. 260.

James Bachman claims that he did not know the checks were not honored until Judge Buescher's order on January 20, 2022 (Filing No. 258), yet he made a payment for $5,390.75 on January 18, 2022. (Filing No. 260-4 at CM/ECF p. 2). This means that James Bachman was aware that $5,390.75 was still owed, after the December 30, 2021 check amounts were deducted from

the total award. Additionally, Defendants alerted the court and Plaintiff to the shortfall in the brief responding to Plaintiffs' Motion for New Trial, filed on January 4, 2022. (See No. 256 at CM/ECF p. 4). Although James Bachman is given some credit for attempting to pay a portion of the sanctions ordered, he was still in violation of this court's clear and specific order to remit full payment within 30 days of the undersigned's December 1, 2021 order (Filing No. 235), and within 15 calendar days of December 16, 2021. (Filing No. 253 overruling Plaintiffs' objection to the undersigned's order and ordering payment of the attorney fees awarded in Filing No. 148).

In response to the order to show cause why contempt proceedings should not be initiated, James Bachman states that prior to the January 11, 2022, supplement, he was not alerted by Defendants' counsel that there was an issue with the checks. (Filing No. 260-7).[10] James Bachman acknowledges that he could have discovered the problem on January 11, 2022 by reading the email sent to him by Defendants' counsel, but he mistakenly believed that Raymond Aranza's email related to the state court proceeding, which

[10] Under ordinary circumstances, the court would expect parties to meet and confer about issues such as these, but given the posture of this case and Plaintiffs' motion for new trial which was pending at that time, Defendants' counsel was justified in filing a statement to document the issue and supplement the record rather than making additional attempts to collect from James Bachman.

Aranza had also emailed about minutes before.[11] James Bachman also seems to fault Defendants' counsel for not making the subject line of the email clear enough to alert him to a potential problem with the checks.

The court admonishes James Bachman that as Plaintiffs' counsel, he has a legal and ethical duty to thoroughly review electronic filings and correspondence with opposing counsel. Had he done so, he would have known on January 11, 2022, that there was a problem with the checks, when Raymond Aranza filed the supplement on this court's docket and emailed James Bachman the same. (See Filing No. 257). Further, while James Bachman took immediate action on January 20, 2022, to reissue the checks to fulfill the sanctions awards, he took no such action to inform the court that the payment had been made and the judgment had been satisfied. Had he done so, there may have been no reason for the court to issue a show cause order, and the parties' resulting responses to the show cause order could have been avoided. This is yet another example of how the litigation has been prolonged and complicated by James Bachman's failure to effectively communicate with opposing counsel and the court.

No further action will be taken by this court to initiate contempt proceedings before the district judge

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[11] As noted above, this is not the first instance in this case in which James Bachman explained his behavior by stating that he had confused this action with the pending action in state court.

regarding the timely payment of the previously ordered sanctions.[12] However, the undersigned has inherent authority to award attorney fees for the time it took defense counsel to draft the response to Plaintiffs' motion for new trial, Filing No. 256, the supplement at Filing No. 257, and the response to Plaintiffs' objection to the order to show cause at Filing No. 262 because each filing was directly related to Plaintiffs' failure to adequately communicate with opposing counsel, and for Plaintiff's failure to pay the ordered fees in full.

IT IS ORDERED:

1. Upon the court's thorough review of the record, briefing, previous orders, and submitted evidence, the motion for sanctions (Filing No. 233) is granted and the court imposes additional sanctions as follows:

    a. Defendants are entitled to reimbursement by James Bachman of Defendants' attorney's fees and expenses related to Filing Nos. 129, 174, 179, 189, 233, 234, 256, 257 and 262.

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[12] The undersigned has elected not to initiate contempt proceedings, although Plaintiffs' counsel clearly violated this court's order related to the payment of previously-ordered sanctions. If Plaintiffs again fail to comply with this court's directives particularly with regard to the timely payment of sanctions resulting from this order, the undersigned magistrate judge will not hesitate to again enter an order requiring Plaintiffs to show cause why contempt proceedings should not be initiated.

b. On or before April 7, 2022, Defendants shall submit an itemized billing statement of its fees and expenses to Plaintiffs.

c. James Bachman shall respond to this itemization within ten days thereafter.

d. If the parties agree as to the amount to be awarded, on or before April 28, 2022, they shall file a joint stipulation for entry of an order awarding costs and fees to Defendants.

e. If the parties do not agree on the attorney fees and costs to be awarded, or if James Bachman does not timely respond to the Defendants' itemization and demand, Defendants shall file a motion for assessment of attorney fees and costs by no later than May 12, 2022. This motion shall be submitted in accordance with the court's fee application guidelines outlined in Nebraska Civil Rules 54.3 and 54.4, but a supporting brief is not required.

f. If a motion for fees is required, the court may award Defendants up to an additional $1,500.00 to recover the cost of preparing their motion for assessment of fees.

2. Upon review, the undersigned will not initiate contempt proceedings.

3. The Clerk shall terminate the show cause deadline.

Dated this 24th day of March, 2022.

BY THE COURT:

s/ Cheryl R. Zwart
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JAMES E. BACHMAN, ADELLA A. BACHMAN, ERIC J. BACHMAN, RACHEL A. BACHMAN, MATTHEW R. BACHMAN, and C. ANDREW BACHMAN,

Plaintiffs,

vs.

JOHN Q. BACHMAN, and LEAF SUPREME PRODUCTS, LLC, A Nebraska Limited Liability Co.;

Defendants.

8:19CV276

ORDER

(Filed Apr. 26, 2022)

The court previously determined that Defendants are entitled to reimbursement by James Bachman of Defendants' attorney's fees and expenses related to Filing Nos. 129, 174, 179, 189, 233, 234, 256, 257, and 262. (See Filing No. 264 at CM/ECF p. 23). The parties have filed a joint stipulation for entry of an order awarding costs and fees in the amount of $14,761.00. The stipulation is supported by an itemized statement of fees prepared by defense counsel. (Filing No. 268 at CM/ECF pp. 2-3).

IT IS ORDERED that the joint Stipulation on Fees is approved. (Filing No. 268). Within thirty (30) calendar days of the date of this order, James Bachman shall

remit $14,761.00 to defense counsel in satisfaction of the sanctions awarded.

Dated this 26th day of April, 2022.

BY THE COURT:

s/ Cheryl R. Zwart
United States Magistrate Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 22-1638

James Edward Bachman, et al.

Appellants

v.

John Q. Bachman and Leaf Supreme Products, LLC,
A Nebraska Limited Liability Co.

Appellees

Appeal from U.S. District Court for the
District of Nebraska - Omaha
(8:19-cv-00276-BCB)

ORDER

(Filed Aug. 4, 2023)

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Grasz did not participate in the consideration or decision of this matter.

August 04, 2023

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans