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FILED
United States Court of Appeals
Tenth Circuit

March 14, 2024

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

FRANCIS YOMI,

Plaintiff - Appellant,

v.

XAVIER BECERRA, in his capacity as Secretary of U.S. Department of Health and Human Services,

Defendant - Appellee.

No. 23-3003
(D.C. No. 2:21-CV-02224-DDC-ADM)
(D. Kan.)

ORDER AND JUDGMENT*

Before **EID**, **CARSON**, and **ROSSMAN**, Circuit Judges.

Francis Yomi appeals the district court's dismissal of his employment discrimination lawsuit as a sanction for discovery misconduct. He also appeals various other orders, but those issues are moot if we affirm the dismissal sanction. We have jurisdiction under 28 U.S.C. § 1291 and we hold that the district court's

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

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dismissal sanction was not an abuse of discretion. We therefore affirm the dismissal, and we do not reach the other orders Mr. Yomi challenges.

I. BACKGROUND & PROCEDURAL HISTORY

A. Beginning of the Lawsuit and Early Discovery Disputes

Mr. Yomi previously worked in a Kansas field office of the Food and Drug Administration (part of the Department of Health and Human Services). After that employment ended, he moved to Maryland. In May 2021, however, he filed a pro se employment discrimination lawsuit in the United States District Court for the District of Kansas, alleging his former employer discriminated against him on the basis of race (African American), national origin (Cameroon), and sex (male). He also filed a motion to proceed in forma pauperis (IFP), which a magistrate judge denied without prejudice because the relevant information about Mr. Yomi's financial status was illegible.

Instead of filing a new IFP motion, Mr. Yomi filed a Federal Rule of Civil Procedure 72(a) objection,[1] with legible financial information attached. The district court overruled the objection but directed the court clerk to re-docket the objection as a renewed IFP motion. Mr. Yomi then moved for reconsideration, arguing his Rule 72(a) objection had really been, from the start, a renewed IFP motion, and the district court should not have said anything about it before receiving the magistrate judge's

[1] Throughout the record, the parties and the district court usually refer to Rule 72(a) and 72(b) objections as "motions for review." In this order and judgment, we will use the more common terminology.

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ruling. The district court denied the motion as baseless and pointed out that the magistrate judge had, in the meantime, already granted the as-construed renewed motion.

Following motion practice over whether Mr. Yomi had named the proper party, and whether he could submit a "reply" to the government's answer to his complaint, discovery began in early December 2001. Soon after, the government moved for entry of the District of Kansas's standard protective order, because Mr. Yomi would not agree to any protective order. The magistrate judge granted that motion. Mr. Yomi filed a Rule 72(a) objection, which the district court overruled.

Also, despite Mr. Yomi's claims that the alleged employment discrimination led to numerous health problems, Mr. Yomi would not agree to a standard release giving the government permission to obtain his protected health information directly from his healthcare providers (as opposed to Mr. Yomi himself producing the health records he deemed relevant). The government therefore moved for an order to that effect, which the magistrate judge granted. Mr. Yomi filed a Rule 72(a) objection, which the district court overruled.

B. Scheduling Mr. Yomi's Deposition

On December 30, 2021, the government e-mailed Mr. Yomi to schedule his deposition. The government said it planned to depose Mr. Yomi in Kansas because: (1) it is a general rule that plaintiffs must make themselves available to be deposed in the state where they filed suit; and (2) about a week earlier, Mr. Yomi had informed the court he needed more time to answer certain discovery requests because he

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planned to travel to Kansas to retrieve relevant medical records.[2] The government therefore proposed coordinating Mr. Yomi's deposition with the trip he already intended to make.

Mr. Yomi replied, "[Y]ou wrote as if you know for sure that I haven't yet gone there to get my medical records, whereas in fact you do not know if I went there or not." R. vol. I at 162. Without revealing whether he had, in fact, already traveled to Kansas, he went on to say he did not have enough money or time to come. He also asserted his belief that the Federal Rules of Civil Procedure did not allow the government to depose him more than 100 miles from his residence. "So," he concluded, "I will not come [to] Kansas for helping you in your deposition . . . ." *Id.* But he said the deposition could happen on March 11, 2022, in Maryland.

The government soon noticed Mr. Yomi's deposition for March 11 in Kansas City, Kansas. Mr. Yomi responded with a motion that his deposition be located no more than fifty miles from his home in Maryland. He told the court he did not have enough money to come to Kansas, and, "even if I had enough money, I would not still have come [to] Kansas to be deposed, since I have my own depositions to take, in which Defendant's witnesses will be deposed, and I would have spent that money for those depositions instead." *Id.* at 106. He further asserted his belief that the Federal Rules of Civil Procedure at least protected him from having to travel more than 100 miles for his deposition.

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[2] Mr. Yomi could not remember the names or addresses of the relevant medical providers, but he was confident he could find their offices if he were there in person.

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While this motion was pending, Mr. Yomi separately moved to postpone his deposition by forty-five days because he wanted to see the government's responses to outstanding requests for production of documents before he sat for his deposition. He did not explain why he first needed to see the government's responses, other than saying it was his "own discovery strategy." *Id.* at 176.

The district court referred Mr. Yomi's motions to the magistrate judge, who construed them as motions for protective orders. As to the deposition location, the magistrate judge agreed with the government that Mr. Yomi was presumptively required to make himself available in Kansas for a deposition. The magistrate judge further found Mr. Yomi had not demonstrated good cause for an exception because: (1) he had made only general statements about lack of money, as opposed to submitting an affidavit or details about his finances; and (2) he intended to travel to Kansas anyway to obtain documents. The magistrate judge additionally discussed the significance of Mr. Yomi's IFP status: "[I]t's likely that, in many situations, an indigent plaintiff can make a particular and specific demonstration of fact that the burden of traveling for his or her deposition would be undue. Plaintiff here simply has not met that burden." *Id.* at 195 (footnote and internal quotation marks omitted).

As to the request for a 45-day extension, the magistrate judge found that Mr. Yomi's alleged discovery strategy was not good cause to postpone his deposition. The magistrate judge further opined that allowing the extension "would invite further delays and motion practice in this already slow-moving case." *Id.* at 200.

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Mr. Yomi informed the government he planned to file Rule 72(a) objections to both of the magistrate judge's rulings. To accommodate this, the government filed an amended deposition notice, pushing the deposition back to April 8, 2022, still in Kansas City. Mr. Yomi then filed his Rule 72(a) objections.

By order dated April 13, the district court refused to overturn the magistrate judge's rulings.[3] The district court also warned Mr. Yomi about his overuse of objections and motions for reconsideration. "Indeed," the district court said, "plaintiff has turned this case into . . . something of a hydra: every time the court rules [on] a motion, three more appear in its place." *Id.* at 236–37. The court cautioned Mr. Yomi that his "litigation strategy, if it continues, may warrant some kind of filing restrictions or perhaps sanctions." *Id.* at 237.

The next day, the government e-mailed Mr. Yomi to coordinate a new deposition date. Mr. Yomi replied that he would not discuss a new deposition date until the government produced documents he had requested. The government then noticed his deposition for May 13, 2022, in Kansas City. Mr. Yomi responded by filing an objection to the deposition notice. This document repeated at length his arguments that he should not be required to go to Kansas for his deposition, including continued argument that the magistrate judge's ruling was wrong. Mr. Yomi further

[3] Obviously, April 13 is after April 8. The government does not claim it showed up at the deposition location on April 8, expecting Mr. Yomi to be there. It appears the government considered the deposition stayed pending the objections.

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stated, "[T]he Court did not order me to go [to] Kansas, but it simply denied my motion, and that does not mean that it ordered me to go [to] Kansas." *Id.* at 397.

The magistrate judge held a status conference on May 12, one day before the scheduled deposition. Much of this status conference revolved around ongoing disputes over written discovery (discussed further below). However, the magistrate judge noted that objections Mr. Yomi had filed on the docket, including his objection to the most recent deposition notice, "[are] not motions. They don't require any action by the court. . . . They're just effectively nothing on the docket sheet." Supp. R. vol. III at 6.

Later that same morning, the government e-mailed Mr. Yomi, emphasizing the magistrate judge's statement that his objection to the deposition notice had no legal effect. Thus, the government could insist on going forward with Mr. Yomi's deposition scheduled for the next day. But, "[i]n fairness," it offered to push the deposition out to June, "to give [Mr. Yomi] an opportunity to make travel arrangements." R. vol. III at 156. Mr. Yomi responded that he would not come to Kansas. He instead told the government that it would need to file a motion to compel or serve a subpoena, at which point he would respond with an affidavit of financial hardship. "I will not file any motion about this," he added, "whether a protective order or not. This time, you [will] file one, if you want to." *Id.* The government filed a new deposition notice for June 10, 2022, in Kansas City.

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C. Written Discovery

As the deposition dispute was playing out, the parties were also litigating over the adequacy of their responses to written discovery, especially production of documents. Both sides filed motions to compel. Briefing closed on the government's motion in late April 2022. Briefing on Mr. Yomi's motion was scheduled to conclude (with Mr. Yomi's reply) in late May. On May 18, however, Mr. Yomi e-mailed the magistrate judge's chambers announcing he had been in a car accident the day before, and requesting an indefinite stay. The magistrate judge entered an order extending his motion-to-compel reply deadline by two weeks, but further stating that "the court will not consider an indefinite stay without a formal motion . . . accompanied by evidence that supports the specific relief he seeks." R. vol. III at 71. The magistrate judge also advised that any medical paperwork submitted in support of a motion "must include letter(s) by one or more of his treating physicians that provides sufficient detail to explain the specific limitations that prevent [him] from fully participating in this lawsuit and the anticipated duration (to the extent it can be estimated) of any such limitations." *Id.*

On May 27, the magistrate judge entered an order granting the government's motion to compel in part. The magistrate judge set a compliance deadline of June 10, and stated "this production date is firm," in part because "the court has already factored in Yomi's informal request to stay the activities in this case because he was recently injured in a car accident" and "Yomi's discovery responses have remained

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deficient for too long." *Id.* at 86 & n.7.[4] The magistrate judge warned that failure to comply could lead to involuntary dismissal. The magistrate judge also noted Mr. Yomi's "steadfast[] refus[al] to appear for a deposition" as an example of "intransigence" that the court would not allow to continue. *Id.* at 86–87.

D. June 9 & 10

On June 9, Mr. Yomi filed an objection to the government's notice setting the deposition for June 10. He noted the magistrate judge's order in response to his e-mail about the car accident, in which the magistrate judge granted an extension of Mr. Yomi's deadline to file a reply in support of his motion to compel. Mr. Yomi claimed the magistrate judge

> made a mistake, since [she] may have thought that [the motion to compel] was the only thing to which I had to file something on, whereas there are many other things, such as, but not limited to, this current Objection. It should be construed that the Court granted me a Stay on everything I was supposed to submit, since it would make no sense that, because of the car accident, it grants me the stay on some few things (future submissions), and denies me the stay on some other things (some future submissions).

R. vol. III at 91. Mr. Yomi then criticized the magistrate judge's order regarding the location of his deposition, quoting verbatim from his since-overruled Rule 72(a) objection to that order. He added that he was in pain from the car accident and he could not afford a $1,200 trip (his estimate of what it would cost to travel to Kansas

[4] The government had first served the relevant requests in December 2021.

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City and back) because he currently did not have a job and was more than $76,000 in debt.

On June 10, the government arrived for Mr. Yomi's deposition at the designated place in Kansas City. After waiting for a half-hour, counsel for the government went on record with the court reporter to note Mr. Yomi's nonappearance, and then ended the deposition.

June 10 was also the court-ordered deadline for producing discovery responses, but Mr. Yomi produce none. That night, however, he filed a motion seeking a 90-day stay of all proceedings. Mr. Yomi argued that the injuries he sustained in the car accident made it very difficult for him to continue. Four days later, the magistrate judge denied the motion without prejudice because Mr. Yomi had not submitted anything from a physician stating his limitations and their expected duration.

E. The Government's Motion for Sanctions and Related Proceedings

On July 7, 2022, the government moved for dismissal as a sanction against Mr. Yomi for failing to attend his deposition and produce discovery responses on June 10.

On July 11, Mr. Yomi submitted a motion to stay, retroactive to the day of his car accident (May 17). The magistrate judge denied the motion the next day because, although Mr. Yomi submitted a letter from a physician, the letter stated only that Mr. Yomi was restricted from pushing or pulling more than five pounds and standing

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or walking more than thirty minutes. The magistrate acknowledged Mr. Yomi's claim

> that typing causes him pain, that walking to the library or FedEx for activities related to this lawsuit makes the pain worse, and that physical therapy will consume a lot of his time. But Yomi's lengthy and voluminous filings since the accident belie that he is impaired from being able to participate in this lawsuit. To the contrary, Yomi filed 6 pages of single-spaced objections to Defendant's [notice setting the deposition for June 10]; a 3-page, single-spaced motion to stay with exhibits; and the current 6-page, single-spaced renewed motion to stay. And this does not even account for the lengthy emails that Yomi routinely sends to the undersigned magistrate judge's chambers and opposing counsel that are not currently in the public record.

R. vol. III at 177–78 (citations omitted).

In August 2022, the magistrate judge issued a recommendation to grant the government's motion to dismiss as a sanction. The magistrate judge invoked three bases:

- failure to comply with a court order, *see* Fed. R. Civ. P. 41(b), specifically, the May 27 order to provide written discovery by June 10;
- failure to comply with an order permitting discovery, *see* Fed. R. Civ. P. 37(b)(2)(A)(v), again referring to the May 27 order; and
- failure to appear at a deposition after proper notice, *see* Fed. R. Civ. P. 37(d)(1)(A)(i).

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Mr. Yomi filed a Rule 72(b) objection. In December 2022, the district court reviewed the issues de novo, overruled Mr. Yomi's objection, adopted the magistrate judge's recommendation in full, and dismissed the case.

II. MOTIONS TO RECUSE

Mr. Yomi has filed motions to recuse the magistrate judge and the district judge. He claims they are both discriminating against him (based on his race and national origin), conspiring with the government to end his lawsuit, and retaliating against him because he filed judicial misconduct claims against them while the sanctions motion was pending.

We liberally construe these motions as motions to reassign the district judge and magistrate judge on remand. *See Ute Indian Tribe of the Uintah & Ouray Reservation v. Lawrence*, 22 F.4th 892, 911 (10th Cir.) (evaluating a reassignment request brought by way of motion), *cert. denied sub nom. Becker v. Ute Indian Tribe of the Uintah & Ouray Reservation*, 143 S. Ct. 273 (2022); *see also James v. Wadas*, 724 F.3d 1312, 1315 (10th Cir. 2013) ("Because [the appellant] is pro se, we liberally construe his filings, but we will not act as his advocate."). Technically speaking, these motions are moot if we affirm the sanctions order (because there would be no remand). Nonetheless, we understand these motions as part of Mr. Yomi's larger argument that the sanctions order was improper. In that light, we will address them first.

Mr. Yomi's dispute with the district judge and magistrate judge arises from the rulings they made against him, but "adverse rulings cannot in themselves form the

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appropriate grounds for disqualification," *Green v. Branson*, 108 F.3d 1296, 1305 (10th Cir. 1997) (internal quotation marks omitted). Mr. Yomi believes he has overcome this barrier because the district court's rulings were, in his view, perpetually and egregiously wrong, especially when he did not receive a stay in light of his car accident. But Mr. Yomi's subjective views about the quality of the district court's decisions are not relevant. Moreover, our review of the record shows the district court seriously considered each of Mr. Yomi's motions and his responses to the government's motions, and the court always issued thoughtful explanatory orders. There is no hint of bias or retaliation.

For all these reasons, we deny Mr. Yomi's motions to recuse the district judge and magistrate judge.

III. ANALYSIS

A. The *Ehrenhaus* Standard

When deciding whether to dismiss Mr. Yomi's action as a discovery sanction, the district court considered the five factors it "should ordinarily consider." *Ehrenhaus v. Reynolds*, 965 F.2d 916, 922 (10th Cir. 1992). Those five factors are:

1. the degree of actual prejudice to the defendant;
2. the amount of interference with the judicial process;
3. the culpability of the litigant;
4. whether the court warned the parties in advance that dismissal would be a likely sanction for noncompliance; and
5. the efficacy of lesser sanctions.

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Id. at 921.

B. Mr. Yomi's Arguments

Mr. Yomi's appellate briefs do not discuss the *Ehrenhaus* factors or the district court's weighing of them. Rather, he claims his objection to the June 10 deposition (which he filed on June 9), and his motion to stay all proceedings (filed on the evening of June 10), "nullified any and all Federal and Local Rules that could have sanctioned me for what both Judges and [opposing counsel] called disobedience of the Court's Order." Aplt. Opening Br. at 3. In other words, Mr. Yomi attacks the premise underlying the sanctions order, *i.e.*, that he disobeyed a court order or failed to attend a duly noticed deposition. Mr. Yomi is incorrect.

As to his June 9 objection to the June 10 deposition, the magistrate judge had already warned Mr. Yomi that such objections have no legal effect. Indeed, there is no provision in the Federal Rules of Civil Procedure for an objection to a deposition notice, much less an objection that has self-executing effect to stay the deposition. As for Mr. Yomi's claim that the government would need to move to compel him to attend, the government had no such duty. *See Robison v. Transamerica Ins. Co.*, 368 F.2d 37, 39 (10th Cir. 1966) ("The sanctions under [Rule 37(d)] apply without regard to whether the court has ordered the delinquent party to appear for his deposition . . . ." (internal quotation marks omitted)).

Concerning Mr. Yomi's motion to stay filed on the evening of June 10, this could not have had any effect on his failure to attend his deposition at 9:00 that morning. Nor was the motion the equivalent of an extension of time to comply with

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his written discovery obligations because extensions of time are not "a matter of right." 4B Charles Alan Wright et al., *Federal Practice and Procedure* § 1165 text accompanying n.15 (4th ed., Westlaw Apr. 2023 update).

Mr. Yomi also invokes Rule 37(d)(2), which says, "A failure described in Rule 37(d)(1)(A) [such as failing to attend a duly noticed deposition] is not excused on the ground that the discovery sought was objectionable, unless the party failing to act has a pending motion for a protective order under Rule 26(c)." Mr. Yomi appears to believe his May 18 e-mail to the magistrate judge (announcing his car accident), his June 9 objection to the deposition, and his June 10 motion to stay triggered this rule. Again, he is incorrect.

The May 18 e-mail obviously was not a motion, much less a motion for a protective order. Further, the magistrate judge warned Mr. Yomi that the court would not take any action beyond extending a reply-brief deadline without a formal motion.

The June 9 objection was not presented as a motion for a protective order. To the extent it could have been construed as one, the court had already denied a protective order on the grounds asserted (which were the same grounds asserted in Mr. Yomi's motion to limit his deposition to within fifty miles of his residence).

Likewise, the June 10 motion to stay was not presented as a motion for a protective order. Rather, it was a request to pause proceedings in light of Mr. Yomi's injuries. Nothing in the motion implied that the written discovery at issue "was

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objectionable." Fed. R. Civ. P. 37(d)(2). Moreover, the court had already overruled his objections to the discovery in question.

Thus, as of June 11, Mr. Yomi was in violation of his obligation to attend his deposition and to respond to the government's discovery requests. His filings on June 9 and 10 did not prevent that.

Mr. Yomi also appears to reassert his claim that the Federal Rules of Civil Procedure protected him from attending a deposition more than 100 miles from his home, so he was justified in refusing to attend. But the district court had already rejected this argument, and "an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings," *United States v. United Mine Workers of Am.*, 330 U.S. 258, 293 (1947). Indeed, a party who "mak[es] their private determination of the law, act[s] at their peril." *Id.*[5]

Next, Mr. Yomi appears to assert that the injuries from his car accident justified a stay, so we should review his case as if a stay had been in place. Again, this is an attempt to reargue the merits of the issues underlying his disobedience. In

[5] To be clear, we see no error in the district court's rejection of Mr. Yomi's 100-miles argument. Rule 45(c)(1) says, among other things, that a *subpoena* may command attendance at a deposition within 100 miles of the subpoenaed person's residence, or, if they are a party, within the state where they reside. But "[d]epositions of parties . . . need not involve use of a subpoena," and a district court may impose Rule 37 sanctions if a party fails to appear for a properly noticed deposition "without regard to service of a subpoena and without regard to the geographical limitations on compliance with a subpoena." Fed. R. Civ. P. 45 advisory committee's note to 2013 amendment.

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any event, the district court was within its discretion to conclude that Mr. Yomi submitted no evidence of relevant limitations, and that his continued output of lengthy filings following his car accident showed he remained capable of participating in the lawsuit.

Finally, Mr. Yomi points to Rule 37(d)(1)(B), which says, "A motion for sanctions for failing to answer or respond [to a written discovery request] must include a certification that the movant has in good faith conferred or attempted to confer with the party failing to act in an effort to obtain the answer or response without court action." Mr. Yomi argues the government never conferred with him and never included such a certification when it moved for the dismissal sanction. As to the certification, the government indeed included one. *See* R. vol. III at 142. As to actual failure to confer, Mr. Yomi appears to be saying the government did not confer between June 10 and July 7 (when it filed the sanctions motion). We will assume this to be true. Even so, the rule does not specify a timeframe in which conferral efforts must take place, and the record amply demonstrates the government's attempt to resolve the written discovery dispute informally. We see no basis to overturn the dismissal sanction on this account.

C. Applying the *Ehrenhaus* Factors

We cannot discern any other arguments in Mr. Yomi's briefing that may be relevant to the sanctions order. In the interest of justice, we will nonetheless review the district court's sanctions order for abuse of discretion. *See Lee v. Max Int'l, LLC*, 638 F.3d 1318, 1323 (10th Cir. 2011) ("[W]e will uphold a district court's sanctions

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order of dismissal . . . so long as our independent review of the record confirms that the district court didn't abuse its discretion."). We structure our review around the district court's application of the five *Ehrenhaus* factors, quoted previously.

First, the district court permissibly found actual prejudice to the government because it could not prepare an adequate defense without a deposition and written discovery. In theory, Mr. Yomi might have eventually cooperated with the government's discovery efforts, thus eliminating this prejudice. But, as we will discuss more thoroughly in the context of possible lesser sanctions, the district court properly found there was no reasonable expectation Mr. Yomi would ever fully comply.

Second, the district court had an adequate basis to conclude that Mr. Yomi's conduct severely interfered with the judicial process. Mr. Yomi's evasion of deposition and discovery obligations severely hindered the progress of the case. He accomplished much of this delay through, in the district court's words, "persistent abuse of motion practice that far exceeds the norms of reasonable and diligent litigation." R. vol. III at 365–66. Indeed, Mr. Yomi's opening merits brief unintentionally highlights the problem: "I believe the District Court has made wrong decisions on any and all its rulings on the *about 43 motions filed in the District Court so far*, except on [certain] unopposed motion[s]." Aplt. Opening Br. at 2 (emphasis added). Mr. Yomi's case was only about nineteen months old when the district court dismissed it.

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Third, we see no basis to disturb the district court's finding that Mr. Yomi was personally culpable for his behavior. We understand he suffered some injuries in the car accident, but, as already discussed, he failed to submit evidence to the district court that he was suffering limitations that affected his ability to participate in the case. Moreover, Mr. Yomi was already demonstrating obstructive behavior before the accident. As the district court observed, "Plaintiff's intransigence predate[d] his injury by months." R. vol. III at 368.

Fourth, the magistrate judge warned Mr. Yomi that failure to comply with his written discovery obligations by June 10 could lead to dismissal. Neither the district judge nor the magistrate judge explicitly warned Mr. Yomi that failure to attend his June 10 deposition could lead to the same result. However, in the same order in which the magistrate judge warned Mr. Yomi of the potential consequences of failing to answer written discovery by June 10, the magistrate judge also said Mr. Yomi's opposition to attending his deposition in Kansas was an example of intransigence that the court would not allow to continue.

Finally, the district court was within its discretion to determine that lesser sanctions would have no effect. Mr. Yomi amply demonstrated his willingness to ignore court orders, and sometimes to justify himself by unilaterally reinterpreting those orders to suit his needs. Moreover, he demonstrated an attitude (also reflected in his appellate filings) that he cannot be wrong, and anyone who opposes or rules against him must be biased, racist, and part of a conspiracy to suppress what he views as irrefutably meritorious claims.

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In light of all this, the district court acted within its discretion to dismiss Mr. Yomi's case as a sanction for his refusal to comply with court orders and discovery obligations.[6]

IV. CONCLUSION

We affirm the district court's judgment. We deny Mr. Yomi's motions to recuse. We grant his motion to supplement the record on appeal and we direct the clerk to create an appellant's supplemental record containing the fourteen district court documents listed in Mr. Yomi's motion. This includes district court ECF No. 223, which already exists in volume IV of the current record, but is sealed because it contains information about Mr. Yomi's health following his car accident.

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[6] When the district court dismissed the case, it also denied two pending Rule 72(a) objections as moot. One was an objection to the magistrate judge's denial of Mr. Yomi's July 11 motion to stay (the motion that included the doctor's letter stating Mr. Yomi could not push or pull more than five pounds and could not stand or walk more than thirty minutes). The other was an objection to an order striking an unauthorized surreply. Mr. Yomi argues the district court should have ruled on these objections first, before ruling on the dismissal recommendation, because they were "part of [his] arguments responding [to] or addressing [the government's] motion to sanction." Aplt. Opening Br. at 14. But Mr. Yomi had a full opportunity to object directly to the magistrate judge's dismissal recommendation. Indeed, he filed a Rule 72(b) objection comprising twenty-eight pages of single-spaced small type. *See* R. vol. III at 306–33. He gives us no authority for the notion that the district court had a duty to look at all of his other outstanding filings to understand his Rule 72(b) objection. We therefore reject this argument.

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Mr. Yomi asks us to unseal ECF No. 223 and we see no reason to deny that request, given that it is his own health information.

Entered for the Court

Joel M. Carson III
Circuit Judge

Appendix A. Pet. App. 21

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

FRANCIS YOMI,

Plaintiff,

v.

XAVIER BECERRA, in his capacity as Secretary of Health and Human Services,

Defendant.

Case No. 21-2224-DDC-ADM

MEMORANDUM AND ORDER

In May of 2021, pro se plaintiff Francis Yomi sued Xavier Becerra in his capacity as Secretary of the United States Department of Health and Human Services. In his Complaint, plaintiff asserts claims for hostile work environment, discrimination based on race and national origin, and retaliation, all relying on Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17. Doc. 1. Now, a year-and-a-half later, the discovery process barely has begun. This case's extensive and convoluted docket explains why. It captures plaintiff's consistent and determined effort to forestall even the most basic discovery. As a consequence, it provides important context for the issue decided in this Memorandum and Order.

Four pertinent events bring the case to its current increment. *First*, defendant filed a Motion for Discovery Sanctions against plaintiff (Doc. 221) under Fed. R. Civ. P. 41(b), 37(b)(2)(A)(v), and 37(d)(1)(A)(i). This motion asserts that plaintiff has failed to provide responses to discovery requests and refuses to appear for his deposition. *Second*, United States Magistrate Judge Angel D. Mitchell issued a Report and Recommendation (Doc. 242), recommending that the court grant defendant's motion and dismiss this case with prejudice.

Appendix B

Third, plaintiff filed a separate Motion for Review (Doc. 229). It asks the court to review Judge Mitchell's Order (Doc. 225) denying plaintiff's Motion to Stay Deadlines (Doc. 223). And *fourth*, plaintiff filed another Motion for Review (Doc. 246) of a separate Order (Doc. 241) granting defendant's Motion to Strike (Doc. 239) plaintiff's Surreply (Doc. 238). For reasons explained below, the court adopts the reasoning of Judge Mitchell's Report and Recommendation. It thus grants defendant's Motion for Discovery Sanctions and dismisses plaintiff's case as a sanction for his repeated obstructionist conduct. This ruling nullifies the need to address the other motions, rendering them moot.

I. Background

On August 4, 2022, Judge Mitchell issued a Report and Recommendation recommending dismissal of plaintiff's Complaint under Fed. R. Civ. P. 41(b), 37(b)(2)(A)(v), and 37(d)(1)(A)(i). Doc. 242 at 18. Judge Mitchell explained to plaintiff that he could serve and file specific written objections to the Report and Recommendation under 28 U.S.C. § 636(b)(1), Fed. R. Civ. P. 72(b)(2), and D. Kan. Rule 72.1.4. *Id.* Plaintiff filed an Objection to Judge Mitchell's Report and Recommendation. Doc. 250. Defendant filed a Response, Doc. 252, and plaintiff then filed a Reply, Doc. 255.

II. Legal Standard

When a magistrate judge enters an Order recommending a disposition, Fed. R. Civ. P. 72(b)(2) provides that a party may serve and file specific, written objections to the magistrate judge's order "within 14 days after being served with a copy of the recommended disposition." Fed. R. Civ. P. 72(b)(3) mandates that the district court then "must determine de novo any part of the magistrate judge's disposition that has been properly objected to." Fed. R. Civ. P. 72(b)(3); *see also* 28 U.S.C. § 636(b)(1) ("A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which

objection is made."). When the district court makes this determination, it "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge . . . [or] may also receive further evidence or recommit the matter to the magistrate judge with instructions." 28 U.S.C. § 636(b)(1).

The Tenth Circuit requires that parties bring "both timely and specific" objections to a magistrate judge's recommended disposition "to preserve an issue for de novo review by the district court[.]" *United States v. One Parcel of Real Prop.*, 73 F.3d 1057, 1060 (10th Cir. 1996). Here, there's no dispute about timelines. Plaintiff filed his Objection within 14 days after service of the Order containing the recommended disposition. *See* Fed. R. Civ. P. 72(b)(2). An objection is sufficiently specific if it "focus[es] the district court's attention on the factual and legal issues that are truly in dispute[.]" *One Parcel*, 73 F.3d at 1060. If a party fails to make a proper objection, the court has considerable discretion to review the recommendation under any standard it finds appropriate. *Summers v. Utah*, 927 F.2d 1165, 1167 (10th Cir. 1991).

Because plaintiff brings this lawsuit pro se, the court construes his filings liberally and holds them to a less stringent standard than formal pleadings drafted by lawyers. *See Hall v. Bellmon*, 935 F.2d 1106, 1110 n.3 (10th Cir. 1991) (applying the standard of liberally construing pleadings "to all proceedings involving a pro se litigant"). Under this standard, if the court reasonably can read the arguments of a pro se party to present a valid legal argument on which he could prevail, "it should do so despite the [party's] failure to cite proper legal authority, his confusion of various legal theories, his poor syntax and sentence construction, or his unfamiliarity with" legal proceedings. *Id.* at 1110. But the court can't assume the role of advocate for the pro se party. *Id.* Also, a party's pro se status does not excuse him from "the burden of alleging sufficient facts on which" he may base a recognized legal claim. *Id.* Nor is

he relieved from complying with the court's rules or facing the consequences of noncompliance. *Ogden v. San Juan Cnty.*, 32 F.3d 452, 455 (10th Cir. 1994).

III. Analysis

Liberally construing plaintiff's Objection, the court agrees with Judge Mitchell's conclusion. Plaintiff's repeated refusal to participate in the discovery process merits a dispositive sanction under the Federal Rules of Civil Procedure. Judge Mitchell's well-reasoned analysis properly applies the factors outlined in *Ehrenhaus v. Reynolds*, 965 F.2d 916 (10th Cir. 1992), concluding that they heavily favor granting defendant's motion and dismissing this case with prejudice. After conducting a de novo review of Judge Mitchell's Report and Recommendation—*see* section A, below—the court, in sum, agrees with all of Judge Mitchell's Order. It thus accepts, adopts, and affirms her Report and Recommendation in its entirety.

While adopting Judge Mitchell's Report and Recommendation in its entirety could suffice, the court nonetheless addresses several of plaintiff's objections to her Order. The court has construed plaintiff's Objection liberally, trying to locate any sufficiently specific arguments that might "focus the district court's attention on the factual and legal issues that are truly in dispute[.]" *One Parcel*, 73 F.3d at 1060. Plaintiff's objections fall far short of that mark. Most of them just accuse defendant and Judge Mitchell of malicious conduct and bias. This is a frequent tactic for this plaintiff, but his accusations lack any basis in fact, law, or logic. Plaintiff cites no evidence supporting his bias arguments—other than Judge Mitchell's rulings against him. But our Circuit has emphasized that "adverse rulings 'cannot in themselves form the appropriate grounds for disqualification[.]'" *Green v. Branson*, 108 F.3d 1296, 1305 (10th Cir. 1997) (quoting *Green v. Dorrell*, 969 F.2d 915, 919 (10th Cir. 1992)).

Below, in section A, the court reviews Judge Mitchell's application of the factors specified by the controlling legal standard. Then, in sections B and C, the court evaluates

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plaintiff's arguments, dividing them into two categories: (1) plaintiff's injury and Motion to Stay proceedings, and (2) plaintiff's failure to attend his deposition.

A. The *Ehrenhaus* Factors

In her Report and Recommendation, Judge Mitchell thoroughly analyzed whether this case meets the Tenth Circuit's standard for dismissing a case as a sanction for failing to comply with discovery obligations and orders. *See* Doc. 242 at 10–17 (applying the governing factors specified in *Ehrenhaus*, 965 F.2d at 920). In his Objection (Doc. 250), plaintiff doesn't present any arguments about any of the *Ehrenhaus* factors. Even so, the court reviews, de novo, Judge Mitchell's application of those factors.

The factors specified in *Ehrenhaus* inquire about:

> (1) the degree of actual prejudice to the defendants; (2) the amount of interference with the judicial process; (3) the culpability of the litigant; (4) whether the court warned the party in advance that dismissal of the action would be a likely sanction for noncompliance; and (5) the efficacy of lesser sanctions.

Ehrenhaus, 965 F.2d at 920–21 (quotation cleaned up).

First, Judge Mitchell found that plaintiff's "failure to provide meaningful discovery responses throughout the duration of this case has prevented [defendant] from exploring basic facts" about plaintiff's claims and formulating appropriate defenses. Doc. 242 at 12. The court agrees with her. Plaintiff's efforts to delay and blockade defendant from acquiring necessary information has impeded defendant's ability to mount a defense. Thus, the first *Ehrenhaus* factor—degree of actual prejudice to defendant—favors dismissal.

Second, Judge Mitchell held that plaintiff's unnecessary motion practice has "unilaterally ground this case to a halt." *Id.* at 14. The court's independent review of the docket confirms as much. The scant progress made during discovery traces directly to plaintiff's consistent and persistent abuse of motion practice that far exceeds the norms of reasonable and diligent

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litigation. Thus, the second *Ehrenhaus* factor—interference with the judicial process—strongly favors dismissal as a sanction.

Third, Judge Mitchell held that plaintiff "is culpable for engaging in willful litigation misconduct that has impeded the 'just, speedy, and inexpensive' determination of this action." *Id.* at 16 (quoting Fed. R. Civ. P. 1). Here again, the court agrees. As noted, plaintiff repeatedly has chosen to ignore court orders and the Federal Rules of Civil Procedure. His disregard for orders and the Rules of Civil Procedure has delayed this case's progress. The third *Ehrenhaus* factor—plaintiff's culpability—strongly favors dismissing the case.

Fourth, both the magistrate judges and district judge assigned to this case repeatedly have warned plaintiff: sanctions could follow if plaintiff elects to continue abusing motion practice and delaying discovery. Plaintiff has received more than ample warning that his continued behavior could produce serious consequences. The fourth *Ehrenhaus* factor—advance warning to the plaintiff—thus favors dismissal.

Last, Judge Mitchell held that "imposing any lesser sanction" than dismissal would "only perpetuate [plaintiff's] intransigence towards complying with his most basic discovery obligations and this court's orders." *Id.* at 17. Given plaintiff's indisputable reluctance to comply with court orders at every turn, the court finds Judge Mitchell's reasoning valid. The fifth *Ehrenhaus* factor—efficacy of lesser sanctions—favors dismissing this case.

Our Circuit has recognized that "dismissal represents an extreme sanction appropriate only in cases of willful misconduct." *Ehrenhaus*, 965 F.2d at 920. Mindful of this principle, the court carefully has reviewed plaintiff's behavior during this case and doesn't dismiss plaintiff's case without closely evaluating the sanction's appropriateness. After conducting this review and evaluation, the court now concludes that each factor either favors or strongly favors dismissal.

The court agrees with Judge Mitchell—dismissal is an appropriate sanction for plaintiff's conduct. Thus, the court accepts and adopts Judge Mitchell's Report and Recommendation (Doc. 242). It thus grants defendant's Motion for Discovery Sanctions and dismisses this case with prejudice as a sanction for plaintiff's continuing and willful misconduct.

B. Plaintiff's Injury and Motion to Stay Proceedings

The *Ehrenhaus* analysis could end the discussion. But the court, applying all appropriate caution, has considered the two principal arguments plaintiff makes in his Objection to Judge Mitchell's Report and Recommendation, Doc. 250. Plaintiff initially contends that Judge Mitchell clearly erred by holding that plaintiff's injuries—apparently sustained in a May 2022 car accident—didn't prevent him from participating in the lawsuit. Doc. 250 at 24–25 (Pl. Obj. ¶ m). He argues that his doctor's post-accident restrictions precluded him from: (a) lifting boxes of documents he purportedly needs to lift to litigate this case; and (b) walking to places (such as the library and FedEx) to make copies. *Id.* Also, he argues, injuries to his thumb, shoulder, and chest—requiring six months of recuperation—prevented him from participating because of pain caused by the injuries and time devoted to physical therapy.

Perhaps the restrictions in his physician's letter kept plaintiff from lifting document boxes and walking long distances. But plaintiff's arguments fail to show that his medical restrictions prevented him from complying with a discovery order or appearing for his deposition. Two things produce this conclusion.

First, none of the restrictions in his doctor's letter confine plaintiff's ability to fulfill all his discovery obligations. The volume of plaintiff's post-accident motion practice demonstrates that he can respond to written discovery, as required by the court's Order. And the doctor's restrictions don't prevent plaintiff from appearing and sitting for his deposition. Thus, the

doctor's restrictions don't explain why he didn't comply with the discovery proceedings that led to the court's sanctions.

Second, plaintiff's intransigence predates his injury by months. Defendant has sought written discovery responses and plaintiff's deposition since January 2022—well before plaintiff's auto accident in mid-May of this year. Plaintiff's "pro se status does not relieve him from complying with the court's procedural requirements." *Barnes v. United States*, 173 F. App'x 695, 697 (10th Cir. 2006). Also, "while unfortunate, plaintiff's injury does not relieve him from his obligation to participate in [ ] litigation." *Calia v. Correct Care Sols.*, No. CIV A 05-3202-CM, 2006 WL 2574635, at *2 (D. Kan. July 26, 2006). Thus, Judge Mitchell didn't err by denying plaintiff's motion for a stay of all proceedings.

Plaintiff makes several other arguments. But all of them originate in his misunderstanding about how a motion to stay works. Plaintiff argues that he didn't miss the deadline to comply with the discovery order because Judge Mitchell's Order (Doc. 219) didn't establish a new deadline once she denied plaintiff's Motion to Stay (Doc. 215). Doc. 250 at 2 (Pl. Obj. ¶ 1). He also appears to argue that a pending motion to stay pauses all deadlines. *Id.* And relatedly, he argues that defendant improperly filed for sanctions under Fed. R. Civ. P. 37(d)(2).

Plaintiff's first two arguments—asserting that Judge Mitchell didn't establish a "new deadline" after denying his stay motion and that his pending stay motion paused all attendant deadlines—misapprehend the Federal Rules of Civil Procedure. Judge Mitchell didn't need to establish a new deadline for him to comply with because nothing ever disturbed plaintiff's original deadline. A party's motion to stay, by itself, doesn't stay the case. If it did, a motion would have the same effect as a court's Order. That's not how it works. Plaintiff's last

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argument—that defendant improperly sought sanctions under Rule 37(d)(2)—fares no better. Rule 37(d)(2) provides cover for sanctions from certain discovery failures, but only when "the party failing to act has a pending motion for a protective order under Rule 26(c)." Plaintiff never filed a motion for a protective order under Rule 26(c).

C. Plaintiff's Failure to Attend His Deposition

Plaintiff tries to defend his failure to appear for his deposition with three principal arguments: (1) he contends Fed. R. Civ. P. 45(c) limits the place of his deposition to within 100 miles of his residence; (2) defendant never served him with a subpoena and the court never issued an Order compelling him to attend his deposition; and (3) plaintiff's "objection" to defendant's deposition notice nullified any obligation to appear for the deposition. All of these arguments misapprehend relevant provisions in the Federal Rules of Civil Procedure.

First, Judge O'Hara (the magistrate judge assigned to the case before Judge Mitchell) already has explained why Rule 45 doesn't require plaintiff's deposition to take place within 50 miles of his residence.[1] *See* Doc. 128. Plaintiff wouldn't accept Judge O'Hara's careful analysis, appealing his decision to the district judge assigned to the case. Rejecting plaintiff's appeal, the district judge—the undersigned—again explained again why plaintiff's position was wrong. *See* Doc. 178 at 4. Now, in this appeal, plaintiff makes the same argument all over again. There's nothing more to say on this subject, and plaintiff can't offer a plausible argument to support his renewal of his discredited argument.

Second, plaintiff claims he didn't have to appear for his deposition because the court never ordered him to appear and defendant never served him with a deposition subpoena. These

[1] Judge O'Hara's Order, Doc. 128, ruled on plaintiff's motion titled "Plaintiff's Motion to have deposition of a party taken within 50 miles of deponent (person who is deposed)'s residence or workplace[,]" Doc. 100. This context explains the discrepancy between Judge O'Hara's analysis that focused on a 50-mile distance from plaintiff's residence and the 100-mile distance specified in Fed. R. Civ. P. 45(c).

arguments are just plain wrong. Plaintiff's argument misreads Fed. R. Civ. P. 30(a)(1), 37(a)(3), and 37(d). Under the Federal Rules, a plaintiff is subject to sanctions for failing to attend his own deposition after defendant has "served [plaintiff] with proper notice[.]" Fed. R. Civ. P. 37(d)(1)(A)(i). Defendant noticed plaintiff's deposition properly several times. *See* Docs. 79, 80, 92, 141, 182, 208. Plaintiff failed to appear each time, filing, instead, "objections" to the notices. Nothing in the Federal Rules of Civil Procedure or this court's local rules suggests that filing an "Objection" to a properly served deposition notice displaces the party's duty to appear as noticed. Under Rule 37(d)(1)(A)(i), neither a court order nor a subpoena was required before the court could impose sanctions on a party for missing his deposition.

While no court order is required to compel a party to attend his deposition, Judge Mitchell correctly rejected plaintiff's argument that the order denying plaintiff's request for a protective order requiring the deposition to take place in Maryland didn't "*explicitly* order him to appear in Kansas[.]" Doc. 242 at 14. As Judge Mitchell explained, it's "disingenuous to suggest that is not exactly what the order did." *Id. See also Cont'l Fed. Sav. & Loan Ass'n v. Delta Corp. of Am.*, 71 F.R.D. 697, 699 (W.D. Okla. 1976) (explaining that "'the examining party may set the place for the deposition of another party wherever he wishes subject to the power of the court to grant a protective order under [Rule 26(c)(1)(B)] designating a different place'" (quoting 8A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2112 (3d ed. 1998))). The Rules required merely that defendant serve proper notice on plaintiff to compel him to attend his own deposition. 8A Wright & Miller, *supra*, § 2112. Once the court declined to issue a protective order negating or confining the place of the deposition, defendant's notice sufficed to compel plaintiff to appear in Kansas, where he'd chose to file suit.

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Third, plaintiff contends that his "Objection" (Doc. 214) to defendant's Fifth Amended Notice to take his deposition (Doc. 208) pre-empted any requirement that he appear for the deposition on the noticed date. But here, as with his understanding about the effects of his Motion to Stay, plaintiff misreads the Federal Rules. An "objection" made in response to an opposing party's deposition notice, has no effect. The governing rule permits a party to make objections "*at the time of the examination*—whether to evidence, to a party's conduct . . . or to any other aspect of the deposition[.]" Fed. R. Civ. P. 30(c)(2) (emphasis added). And when a party properly makes such an objection, it gets "noted on the record, but the *examination still proceeds*; the testimony is taken subject to any objection." *Id.* (emphasis added).

Once defendant served a notice directing plaintiff to appear for his deposition, he had two choices: appear as noticed for the deposition or file a motion for a protective order under Rule 26(c). Plaintiff did neither. Instead, he manipulated the process to maximize the prejudice sustained by defendant. Specifically, defendant issued the deposition notice on May 16, 2022, setting the deposition for June 10. Doc. 208 (Def. Fifth Am. Notice for Pl. Dep.). Defendant did nothing for 24 days. Then, on the day before the scheduled deposition—June 9—plaintiff filed his improper Objection and then failed to appear. *See* Doc. 214.

This Objection devotes six single-spaced pages to plaintiff's argument that his car accident prevented him from appearing for the deposition. Remarkably, plaintiff argued that "Today"—June 9—"was the only day [he] was able to finish with the writing of this Objection." *Id.* at 1. More remarkably yet, plaintiff's Objection asserted that the court "made a mistake" because Judge Mitchell's May 27, 2022, Order (Doc. 209)—which extended his deadline for filing a Reply to support his Motion to Compel—"should be construed" to "grant[ ] [him] a stay on everything [he] was supposed to submit." Doc. 214 at 1. This isn't how it works. While the

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case is still pending before the district court, no party can nullify an adverse ruling simply by asserting the court's adverse ruling "made a mistake." Nor can a litigant recharacterize a ruling simply by asserting that the ruling "should be construed" to mean the opposite of what it says. Plaintiff's "Objection" didn't have any effect at all—much less the transformative effect he tries to attach to it.

IV. Conclusion

The court isn't persuaded by any aspect of plaintiff's Objection to Judge Mitchell's Report and Recommendation. Finding the Report and Recommendation legally sound and well-reasoned, the court adopts it and grants defendant's Motion for Discovery Sanctions. The court thus dismisses this case under Fed. R. Civ. P. 41(b), 37(b)(2)(A)(v), and 37(d)(1)(A)(i) as a sanction for plaintiff's persistent and continuing failure to fulfill his discovery obligations. Because it dismisses this case, the court also denies plaintiff's other Motions for Review as moot.

IT IS THEREFORE ORDERED BY THE COURT THAT, after reviewing the Order de novo, the Report and Recommendation issued by United States Magistrate Judge Angel D. Mitchell on August 4, 2022, (Doc. 242) is **ADOPTED and AFFIRMED.**

IT IS FURTHER ORDERED BY THE COURT THAT defendant's Motion for Discovery Sanctions (Doc. 221) is granted.

IT IS FURTHER ORDERED BY THE COURT THAT plaintiff's action against defendant is dismissed with prejudice[2] under Fed. R. Civ. P. 41(b), 37(b)(2)(A)(v), and

[2] The Federal Rules of Civil Procedure state that, when a plaintiff fails to "comply with these rules or a court order," a dismissal "under this [Rule 41(b)] and any dismissal not under this rule—except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19—operates as an adjudication on the merits." Fed. R. Civ. P. 41(b).

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37(d)(1)(A)(i). The court directs the Clerk to enter judgment against plaintiff on all claims and close the case.

IT IS FURTHER ORDERED BY THE COURT THAT plaintiff's pending Motions for Review (Docs. 229, 246) are denied as moot in light of the court's Order dismissing this case.

IT IS SO ORDERED.

Dated this 27th day of December, 2022, at Kansas City, Kansas.

s/ Daniel D. Crabtree
Daniel D. Crabtree
United States District Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

FRANCIS YOMI,

Plaintiff,

v.

XAVIER BECERRA, in his capacity as Secretary of Health and Human Services,

Defendant.

Case No. 21-2224-DDC-ADM

REPORT AND RECOMMENDATION

This is an employment-discrimination case brought by pro se plaintiff Francis Yomi ("Yomi") against Xavier Becerra ("Becerra") in his official capacity as Secretary of the U.S. Department of Health and Human Services ("HHS"). The case arises from Yomi's probationary employment with the U.S. Food and Drug Administration ("FDA"), an agency of HHS. This matter is now before the court on Becerra's Motion for Discovery Sanctions. (ECF 221.) By way of this motion, Becerra asks the court to dismiss this case with prejudice as a sanction for Yomi's failure to participate in discovery—namely, his continued refusal to sit for his deposition and his continued failure to comply with a court order compelling him to provide written discovery responses. For the reasons explained below, the court recommends that the district judge grant the motion and dismiss this case with prejudice. Yomi's failure to comply with his discovery obligations has significantly prejudiced Becerra and has interfered with the judicial process by unilaterally grinding this case to a halt despite the court's prior warnings that his noncompliance could result in dismissal. Moreover, his noncompliance has been willful. The court is not persuaded that any lesser sanctions would be effective to prod Yomi into compliance given his established track record of intransigence towards complying with his discovery obligations.

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I. BACKGROUND

On May 15, 2021, Yomi filed this action asserting claims for hostile work environment, discrimination based on race and national origin, and retaliation in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq*. (ECF 1.) From the start, the case proceeded at a snail's pace because Yomi (unsuccessfully) sought reconsideration and/or review of nearly every initial order. (ECF 10 (motion for review of order denying appointment of counsel and leave to proceed in forma pauperis), 15 (motion to reconsider order denying motion for review), and 36 (motion for reconsideration of order striking reply to answer).) Discovery finally began in December of 2021, and Yomi's pattern of impeding case progress continued.

To begin, Yomi opposed Becerra's proposed, blanket protective order to govern the exchange of discovery. On December 10, Becerra was compelled to file a motion for entry of the court's form protective order. (ECF 50.) The court granted the motion, noting that "a protective order is fairly standard practice in employment cases and useful to both parties." (ECF 74, at 3.) In a similar vein, Yomi opposed the release of his medical records to Becerra. Again, Becerra was forced to pursue this fairly standard discovery through a motion to compel, which the court granted. (ECF 75, 96.) Yomi delayed providing this discovery, however, by filing motions for the district judge's review, which the district judge denied. (ECF 87, 102, 131.) His serial delays in providing this most basic discovery forced Becerra to seek, and the court to grant, an order amending the scheduling order deadlines for the first time. (ECF 106, 111.)

Next, Yomi began his crusade to resist yet another form of basic discovery: his deposition. Becerra has spent more than seven months trying to depose Yomi. Although Yomi filed this suit in Kansas, he now lives in Maryland. On December 30, Becerra emailed Yomi to request dates on which Yomi was available to be deposed in Kansas. (ECF 113-1, at 8-9.) Yomi responded that

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he "will not come in Kansas" for the deposition. (*Id.* at 8.) Yomi asserted that he did not have the time or money to travel to Kansas and "even if I had money, I would not have spent it for you." (*Id.* at 7.) Becerra then offered to coordinate the deposition with the dates on which Yomi would be in Kansas to gather medical records, a trip that Yomi had planned and disclosed in a December 20 court filing. (*Id.* at 6 (citing ECF 62-1, at 1).) Yomi again informed Becerra, "I will not come in Kansas for helping you in your deposition." (*Id.* at 5.) On January 2, Yomi sent Becerra two additional emails reiterating that he "would not come to Kansas" to be deposed. (*Id.* at 1.)

So when Becerra filed a notice on January 7 to take Yomi's deposition in Kansas City, Kansas (ECF 79), it surprised no one that Yomi challenged the deposition notice. On January 31, Yomi filed a "Motion to have deposition of a party taken within 50 miles of deponent (person who is deposed)'s residence or workplace." (ECF 100.) The court construed the motion as a motion for a protective order setting the deposition within 50 miles of Yomi's residence in Maryland. (ECF 128.) The court denied Yomi's motion, ruling that Yomi had "failed to demonstrate good cause to deviate from the general rule that a plaintiff must make himself available for a deposition in the district where he brought suit." (*Id.* at 1.) Yomi did not "provide an affidavit or specific supporting information to substantiate his claim that traveling to Kansas City for the deposition would be unduly burdensome." (*Id.* at 4.) And although Yomi broadly asserted that he did not have money to travel to Kansas City for the deposition, the court noted that Yomi had recently "informed defendant and the court he planned 'to travel to Kansas, from Maryland . . . to try to get some medical documents.'" (*Id.* (quoting ECF 62-1, at 1).) Thus, the court concluded that Yomi "does have the funds to travel to Kansas, but he simply does not want to use those funds in furtherance of his deposition." (*Id.* (also noting Yomi's representations in his supporting brief that he informed Becerra, "even if I had enough money, I would not still have come in Kansas to be

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deposed, since I have my own depositions to take . . . and I would have spent that money for those depositions instead").)

Undeterred, Yomi next moved to postpone his deposition (which Becerra had at that time noticed for March 14) for 45 days. (ECF 118.) On February 28, the court denied the motion, finding Yomi had not demonstrated good cause to delay the deposition. (ECF 130.) Pointedly, the court noted that granting Yomi's request "to halt discovery . . . would invite further delays and motion practice in this already slow-moving case." (*Id.* at 4.) That should have been the end of the matter, leading Yomi to sit for his deposition in mid-March. But on March 11 and 14, respectively, Yomi filed motions seeking district judge review of the orders denying his motion for a protective order and motion to postpone his deposition for 45 days. (ECF 142, 143.) And on March 16, Yomi filed an "objection" to the then-applicable notice of his deposition—the third amended notice. (ECF 145.)

During the same time period, Becerra was pursuing written discovery, and Yomi was creating just as much of a stalemate on that front. Yomi's responses to Becerra's First Request for Production of Documents and First Set of Interrogatories asserted a number of improper, conditional, and boilerplate objections, although he did produce some documents and answered some interrogatories subject to those objections. On March 15, Becerra requested a discovery conference to discuss Yomi's incomplete written discovery responses. After postponing the conference once at Yomi's request (ECF 149), the court convened a discovery conference on March 30. (ECF 159.) Based in part on Yomi's tone during the conference, it quickly became apparent that the court would not be able to help the parties resolve their disputes informally. So the court granted Becerra leave to file a motion to compel, which he did on April 7. (ECF 171.)

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On April 13, the district judge entered a memorandum and order addressing three of Yomi's motions for reconsideration/review. (ECF 178.) The court (1) denied Yomi's motion for reconsideration of the district judge's memorandum and order denying his motions for review related to the form protective order and his medical records, (2) denied his motion for review of the order denying his motion for a protective order regarding his deposition, and (3) denied his motion for review of the order denying his request to postpone his deposition. The court then addressed a separate request by Becerra to restrict Yomi's use of motions for review and reconsideration. (*Id.* at 5.) The court recognized that Yomi "has filed eight motions for review and three motions for reconsideration in the short life of this case," and noted that "[i]mproper use of motions to reconsider can waste judicial resources and obstruct the efficient administration of justice." (*Id.* (internal quotations and citations omitted).) The court aptly describe Yomi's pattern of over-litigating and unnecessarily protracting this litigation:

> [Yomi] has turned this case into a something of a hydra: every time the court rules a motion, three more appear in its place. Plaintiff's motions make repetitive argument under the guise of "clear error" that, at best, border on frivolous.

(*Id.* at 5-6.) Although the court did not at that time impose filing restrictions on Yomi, the court warned him that sanctions might be warranted if he continued this litigation strategy. (*Id.* at 6.)

Rather than heeding the court's warning, Yomi responded by filing a motion for the district judge to recuse from the case, which the court denied. (ECF 199, 220.) Once again unrelenting, Yomi appealed that denial. (ECF 227, 232.) The Tenth Circuit dismissed the appeal for lack of jurisdiction. (ECF 233.)

Following the district judge's order upholding the orders refusing to relocate or postpone Yomi's deposition, Becerra again emailed Yomi to ask his deposition availability. (ECF 222-2, at 2.) On April 14, Yomi responded that he "would not be available for a deposition" until Becerra

produced certain documents, and Yomi declined to provide his availability. (*Id.*) On April 19, Becerra filed a fourth amended notice to take Yomi's deposition. (ECF 182.) On April 25, Yomi filed yet another "objection" to the deposition notice, which included four pages of arguments, rehashing those previously made in his motion for a protective order and motions for review (ECF 185)—all of which the court had already rejected in two court orders.

On May 12, the court convened a status conference to discuss the state of discovery. (ECF 203.) During the conference, the parties confirmed that Yomi still had not sat for his deposition or fully responded to written discovery. In short, Yomi had done very little to keep the discovery schedule set five months earlier. During the hearing, Becerra made an oral motion to extend remaining scheduling-order deadlines. (ECF 204.) The court had little choice but to grant the motion and set a new pretrial schedule. So the court's second amended scheduling order extended discovery deadlines, rescheduled the pretrial conference and the date for submission of the pretrial order, and vacated the trial setting. (ECF 206.) The court urged the parties to work efficiently to timely complete pretrial matters according to the new schedule.

Becerra emailed Yomi later that day and *again* asked Yomi to provide his availability to be deposed. (ECF 222-3, at 1-2.) Yomi *again* responded that he would not come to Kansas for a deposition because he did "not have the money to come." (*Id.* at 1.) Yomi provided no specific facts or evidence to support his claim about the lack of travel expenses. On May 16, Becerra filed a fifth amended notice of Yomi's deposition, setting the deposition for June 10 in Kansas City, Kansas. (ECF 208.)

On May 18, Yomi informally emailed the undersigned's chambers to say that he was injured in a car accident the day before and requested that the court stay his briefing deadlines for pending motions. In response, the court extended Yomi's most immediate deadline, which was

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for a reply in support of a motion to compel. (ECF 209, at 1.) But, given Yomi's established intransigence to resisting discovery, the court stated that it would "not consider an indefinite stay without a formal motion." (*Id.*) The court required any forthcoming motion to extend or stay deadlines based on Yomi's injuries to "be accompanied by evidence that supports the specific relief he seeks." (*Id.*) The court cautioned that "[w]hatever paperwork [Yomi] elects to provide must include letter(s) by one or more of his treating physicians that provides sufficient detail to explain the specific limitations that prevent Yomi from fully participating in this lawsuit and the anticipated duration (to the extent it can be estimated) of any such limitations." (*Id.*)

On May 27, the court granted Becerra's motion to compel answers to written discovery, with certain document requests narrowed, and ordered Yomi to provide full and complete responses by June 10. (ECF 211.) The court specifically "caution[ed] Yomi that *this production date is firm*." (*Id.* at 14 (emphasis added).) The court noted that, "[i]n setting this deadline, the court has already factored in Yomi's informal request to stay the activities in this case because he was recently injured in a car accident." (*Id.* at n.7.) The court ruled that because "Yomi's discovery responses have remained deficient for too long," any motion for extension of the production deadline would have to accord with the procedure set out in the court's earlier May 27 order. (*Id.*) The court then discussed Yomi's "pattern of ignoring the court's orders and failing to participate in discovery," and stated that the court "cannot allow Yomi's intransigence to continue." (*Id.* at 14-15.) Thus, the court warned Yomi that if he failed to timely produce the required discovery, the court might recommend that the district judge dismiss this case. (*Id.* at 15 (citing FED. R. CIV. P. 37(b)(2)(A)(v).) Yomi did not produce the written discovery by the "firm" June 10 deadline.

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On June 9, Yomi filed "objections" to the fifth amended deposition notice. (ECF 214.) Again, the objections repeated arguments that the court had already twice considered and rejected. Yomi did, however, state "under penalty of perjury" that he did not have a job, had debts of more than $76,000, and did not have enough money to travel to Kansas, which he broadly estimated to cost $1,200. (*Id.* at 2.) Yomi did *not* move to stay the case or his noticed deposition before it began. So, on June 10 at 9:30 a.m., Becerra's counsel convened Yomi's deposition as scheduled. (ECF 222-5.) Yomi did not appear. (*Id.*) After Becerra marked four exhibits for the record, the proceeding concluded at 9:35 a.m. (*Id.*)

Late in the day on June 10, Yomi filed a motion for a 90-day stay of "everything in this lawsuit." (ECF 215, at 1-2.) In support of Yomi's motion, he submitted papers substantiating that a car accident occurred and medical records that supported the court's previous order granting a two-week extension. But the court found that "the papers do not establish that Yomi sustained injuries of the type or severity that would prevent him from participating in discovery and necessitate extending deadlines—aside from the modest extension the court already granted—and certainly not for 90 days." (ECF 219, at 2.) Notably, Yomi did not submit the "letter(s) from one or more of his treating physicians explaining any physical limitations that prevent him from fully participating in this lawsuit and the anticipated duration of any such limitations." (*Id.* at 2-3 (citing ECF 209, at 1).) Accordingly, on June 14, the court denied Yomi's motion to stay the case and extend deadlines—specifically including his request for "an extension of Yomi's deadline to comply with the court's May 27, 2022 order (ECF 211) compelling Yomi to respond to discovery"—but the denial was without prejudice to being renewed with an accompanying physician letter adequately supporting his request. (ECF 219, at 3-4.) The court concluded its order by again observing Yomi's questionable litigation behavior:

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> [Car accidents] run the spectrum from minor fender benders in which the participants suffer no physical injuries to severe crashes that result in lengthy hospitalizations or, sometimes, even death. The court cannot tell where exactly Yomi's accident falls on this spectrum, but it appears it is closer to the less-serious end of the spectrum. Under these circumstances, this court is not inclined to grant a lengthy extension of case-management deadlines, particularly given Yomi's history of unnecessarily protracting and over-litigating this case with unmeritorious motions and serial objections to complying with the Federal Rules of Procedure and this court's orders.

(*Id.*)

After this order, Yomi still did not produce his written discovery responses. Instead, he waited nearly four weeks and, on July 11, he filed a renewed motion to stay the case. (ECF 223.) This time, his renewed motion included a letter from one of his treating physicians. On July 12, the court denied Yomi's renewed motion. (ECF 225.) The court explained that the letter from Yomi's treating physician did not impose any medical restrictions "that would prevent Yomi from participating in this lawsuit." (*Id.* at 2.) The court further found that Yomi's claims that pain and physical therapy impair his ability to participate in this lawsuit were belied by Yomi's lengthy and voluminous filings. (*Id.* at 2-3.) In summary, the court found that Yomi's continued insistence that he is not capable of participating in this case "is driven more by his intransigence toward complying with his discovery obligations" than any sustained injuries. (*Id.* at 3.)

Yomi seemingly confirmed the court's finding on July 18 when, rather than finally sitting for a deposition or complying with the court's order compelling him to produce written discovery, he filed a 6-page, single-spaced motion for district judge review of the order denying his motion to stay. (ECF 229.)

To date, although Yomi has filed 43 pages of written briefing since his car accident (*see* ECF 214, 215, 223, 226, 227, 229, 232, 234, 235, and 238), there is no indication on the record

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that Yomi has taken any steps to respond to Becerra's written discovery requests, as the court ordered him to do on May 27. Likewise, his steadfast refusal to appear in Kansas for a deposition, which was first noticed on January 7, continues. The discovery period ended on July 29, with Yomi having succeeded in his apparent strategy of preventing Becerra from obtaining even the most basic discovery necessary to have a fair opportunity to defend against Yomi's claims.

II. ANALYSIS

Federal Rule of Civil Procedure 41(b) authorizes the court to involuntarily dismiss a case if "the plaintiff fails to prosecute or to comply with these rules or a court order[.]" *See also Olsen v. Mapes*, 333 F.3d 1199, 1204 (10th Cir. 2003) ("[T]he Rule has long been interpreted to permit courts to dismiss actions sua sponte for a plaintiff's failure to prosecute or comply with the rules of civil procedure or court's orders."). Dismissal under this rule generally operates as an adjudication on the merits. *See* FED. R. CIV. P. 41(b). Likewise, other rules provide for dismissal as a sanction when a party refuses to participate in discovery, such as by failing to attend his own deposition or disobeying a court order to provide discovery. *See* FED. R. CIV. P. 37(d)(1)(A)(i) (providing for sanctions when a party fails to attend his own deposition); FED. R. CIV. P. 37(b)(2)(A)(v) (providing for dismissal as a sanction when a party fails to obey an order to provide or permit discovery, among other things); *see also* FED. R. CIV. P. 16(f)(1)(C) (providing for sanctions for failing to obey a scheduling order, including dismissal under Rule 37(b)(2)(A)(v)). "A district court undoubtedly has discretion to sanction a party for failing to prosecute or defend a case, or for failing to comply with local or federal procedural rules." *Reed v. Bennett,* 312 F.3d 1190, 1195 (10th Cir. 2002).

Dismissal is appropriate in cases of willful misconduct. *See Ehrenhaus v. Reynolds,* 965 F.2d 916, 920 (10th Cir. 1992). Before imposing dismissal as a sanction, the court considers the

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non-exhaustive *Ehrenhaus* factors. *Id.* They include: (1) the degree of actual prejudice to defendants; (2) the amount of interference with the judicial process; (3) the litigant's culpability; (4) whether the court warned the party in advance that dismissal of the action would be a likely sanction for noncompliance; and (5) the efficacy of lesser sanctions. *Id.* at 920-21. "These factors do not constitute a rigid test; rather, they represent criteria for the district court to consider prior to imposing dismissal as a sanction." *Id.* at 921. Dismissal with prejudice is warranted when "the aggravating factors outweigh the judicial system's strong predisposition to resolve cases on their merits." *Id.* In this case, all of the *Ehrenhaus* factors weigh in favor of dismissing Yomi's case with prejudice.

A. Degree of Actual Prejudice to Becerra

The court turns first to the degree of actual prejudice to Becerra. It is significant. Yomi's refusal to produce discovery has kept Becerra from obtaining "basic information to discern the basis for [Yomi]'s claims." *E. Colorado Seeds, LLC v. Agrigenetics, Inc.*, No. 21-1057, 2021 WL 6102097, at *2 (10th Cir. Dec. 23, 2021) (finding plaintiff's seven-month delay in producing written discovery significantly prejudiced defendant). It is clear from the record that Becerra has spent considerable time and resources trying to coax Yomi into participating in this case. This began with Becerra trying to obtain responses to its discovery requests. Becerra served his initial sets of written discovery in December and January. After Becerra agreed to one extension, Yomi responded to the requests but asserted several objections. Becerra was then forced to file a motion to compel, which the court granted. Yomi has since disobeyed the court order to provide that discovery. The result is that Becerra still has little of the information he sought in *initial* written discovery, including answers to contention interrogatories.

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In addition, Becerra has expended significant time and resources attempting to obtain Yomi's deposition. After exchanging multiple emails with Yomi in an attempt to accommodate Yomi's travel schedule to return to Kansas, Becerra had to respond to Yomi's motion asking the court to set the deposition in Maryland. Becerra also endured motion practice on Yomi's motion for a 45-day extension of his deposition date and, when the court denied both of those motions, on Yomi's two motions seeking review. Becerra has now noticed Yomi's deposition five times to account for Yomi's serial motion practice and "objections" to the notices. Based on the fifth notice, Becerra was put to the time and expense of preparing for and attending Yomi's deposition, at which Yomi failed to appear.

Yomi's conduct—namely, his frivolous attempts to challenge court orders and persistent refusal to meaningfully participate in discovery—has stalled this case for months and forced Becerra to expend an inordinate amount of time and resources in responding to non-meritorious motions. The fact that Yomi proceeds pro se and is not incurring the same expenses "only compounds prejudice to the defendant." *Jefferson v. Amsted Rail Co., Inc.*, No. CV 18-2620-KHV, 2020 WL 1672665, at *5 (D. Kan. Apr. 6, 2020).

Further, Yomi's failure to provide meaningful discovery responses throughout the duration of this case has prevented Becerra from exploring basic facts about Yomi's claims and fully developing defenses to those claims. Indeed, Yomi has steadfastly refused to provide even the most basic information, such as the facts that support each of his claims, as requested in Becerra's interrogatories. The extended discovery period has now ended. Yomi's refusal, in turn, has made it virtually impossible for Becerra to prepare his defenses, issue follow up discovery, and prepare a proper dispositive motion.

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In sum, Becerra has been significantly prejudiced by having to devote time and expense to responding to unnecessary motion practice and serial objections, as well as by the inability to have a full and fair opportunity to formulate its defenses to Yomi's claims. This factor weighs heavily in favor of sanctions.

B. Interference with the Judicial Process

Yomi's failure to produce discovery also has significantly interfered with the judicial process. The original scheduling order imposed a discovery deadline of May 31. But that deadline became unworkable when Yomi refused to provide written discovery or sit for his deposition, compounded by his serial motions for review and reconsideration of every discovery order. The court was compelled to convene a status conference on May 12 to discuss the state of discovery. Given Yomi's inaction as of that date (even before his car accident), the court was forced to reset not only the discovery deadline, but also subsequent settings triggered off that deadline, such as the deadline to submit the pretrial order, the date of the final pretrial conference, and the dispositive-motion deadline. (ECF 206.) The court also vacated the trial setting. In an amended scheduling order, the court ordered Yomi to provide full and complete responses to discovery by June 10 and set an overall discovery deadline of July 29. (*Id.*)

Unfortunately, Yomi's intransigence toward participating in discovery has not ended. Discovery has been at a standstill for months because of his failure to participate. Although Yomi has filed multiple motions to stay the case based on his involvement in a car accident on May 17, the court has found them to be largely without merit. The court specifically found that Yomi's medical records and physician letter offered in support of his motion did not identify restrictions "that would prevent Yomi from participating in this lawsuit." (ECF 225, at 2.) Yomi has filed 39 pages of briefing since the accident, but he has not complied with the court's discovery orders. At

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this point, Yomi has rendered the scheduling order meaningless and unilaterally ground this case to a halt. Meanwhile, the court has expended time and resources taking up Yomi's motions to address his nonparticipation in a case that he appears interested in pursuing only on his own terms, but not if it means also complying with his obligations under the Federal Rules of Civil Procedure and this court's orders. Yomi's actions have undermined the orderly and efficient resolution of this case.

C. Yomi's Culpability

Yomi is culpable for his conduct. Given his flagrant disregard for participating in this litigation as required, the court has no reason to believe that circumstances beyond his control have prevented him from appearing as required or complying with court orders and procedural rules. Yomi suggests three reasons why his actions are excusable, but none of them hold water.

First, Yomi states he was under no obligation to appear in Kansas for his deposition because the court, in denying his motion for a protective order, did not affirmatively compel him to appear in Kansas. Yomi therefore asserts that sanctions cannot be ordered under Federal Rule of Civil Procedure 37(b) (governing sanctions for failure to obey a discovery order) because he argues that he has not violated a court order. Yomi is correct that the court's order denying his motion for a protective order did not *explicitly* order him to appear in Kansas for his deposition. (ECF 128.) But it is disingenuous to suggest that is not exactly what the order did. The court found Yomi had not overcome the general rule that he must make himself available for examination in the district where he chose to bring suit—*i.e.*, Kansas. (*Id.* at 4.) But in any event, a different rule governs the imposition of sanctions here. Federal Rule of Civil Procedure 37(d) provides for sanctions

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when a party fails to attend his own deposition "after being served with proper notice."[1] There is no dispute that Becerra's fifth amended notice of Yomi's deposition was proper and that Yomi nonetheless failed to appear. Yomi is wrong to the extent he asserts Becerra was thereafter required to move to compel his attendance. *See Cont'l Fed. Sav. & Loan Ass'n v. Delta Corp. of Am.*, 71 F.R.D. 697, 699 (W.D. Okla. 1976) ("The notice issued by Plaintiff is all that is necessary to require attendance of parties or their officers or managing agents and a subpoena was not required."). Yomi made the decision not to comply with the proper notice, and he is culpable for that decision.

Yomi next asserts he does not have money to travel to Kansas to be deposed. He points to his sworn statement in his June 9 "objections" to the fifth amended deposition notice that he does not have a job and is in debt. (ECF 214.) He argues that going to Kansas "would be the very last option" and that there "are many easier options to go with." (ECF 234, at 6.) Specifically, Yomi suggests conducting the deposition remotely. But the court already addressed these arguments. In February, the court ruled that nothing in the *in forma pauperis* statute requires the court or the opposing party to fund Yomi's deposition expenses, and also found that Yomi had not made a particular and specific demonstration that the burden of traveling to Kansas would be undue. (ECF 128, at 5.) The court further ruled that "where the witness to be deposed is the plaintiff in a suit seeking substantial damages, it is reasonable to give defendant 'an opportunity to be "up close and personal" when they assess what kind of witness [plaintiff] might make if this case ever gets to a jury.'" (*Id.* (quoting *Dubuc v. Cox Commc'ns Kan., LLC*, No. 21-2041-EFM, 2021 WL 4050855, at *2 (D. Kan. Sept. 5, 2021)).) And the court upheld those holdings on Yomi's motion for review.

[1] Yomi's assertion that Becerra failed to include a Rule 37(d)(1)(B) certification of conferral is incorrect. (*See* ECF 222, at 7.)

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(ECF 178.) Yomi has presented no new evidence of either (1) his current financial situation, such as bank statements, or (2) the cost of travel to Kansas, such as a rental-car or bus-ticket estimate. Thus, the court's previous decisions stand.

Finally, Yomi argues he cannot be held responsible for his failure to comply with his discovery obligations because he was injured in a car accident. But the court already addressed this argument—and Yomi's lack of support for it—on multiple occasions. (ECF 209, 211, 219, and 225.) While the court will not repeat itself here, suffice it to say that no stay has been entered in this case. Yomi should be focusing his efforts on actually complying with his discovery obligations rather than devoting so much energy to briefing multiple motions seeking to delay doing so.

Under these circumstances, the court has little trouble concluding that Yomi is culpable for engaging in willful litigation misconduct that has impeded the "just, speedy, and inexpensive" determination of this action. *See* FED. R. CIV. P. 1.

D. Previous Warning

On April 13, the court warned Yomi that he might be sanctioned if he continued to make frivolous, repetitive arguments to try to resist discovery. (ECF 178, at 6.) Then on May 27, the court warned Yomi that he could face sanctions, including dismissal of his case, if he did not comply with the court's directive that he fully respond to Becerra's discovery requests (as amended in part by the court) by June 10. (ECF 211, at 14-15.) Discussing Yomi's written discovery responses and failure to appear for a deposition, the court recognized that "Yomi has developed a pattern of ignoring the court's orders and failing to participate in discovery," and concluded, "The court cannot allow Yomi's intransigence to continue. It is disruptive to the orderly and efficient administration of this case. The court therefore warns Yomi that if he fails to timely produce the

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above discovery, the undersigned judge may recommend that Judge Crabtree dismiss this case." (*Id.*) Despite the warning, Yomi did not comply with the court's order compelling discovery. And although Yomi did not file a motion for review or reconsideration between April 13 and July 7 when Becerra filed the current motion for sanctions, Yomi since has filed a motion for review (ECF 229) and a notice of appeal (ECF 232). Becerra's motion for sanctions also put Yomi on notice that he was facing dismissal of his case for his nonparticipation and discovery violations. Yet Yomi still has not budged on his position in which he repeatedly insists that this case must stand still at his say-so or proceed only on his terms.

E. Efficacy of Lesser Sanctions

Although the court has not previously sanctioned Yomi, the court does not believe that any sanction other than dismissal would be practical or effective. Yomi refuses to sit for a deposition to answer questions about his claims and further refuses to fully respond to written discovery, including answering contention interrogatories. The other Rule 37(b)(2)(A) sanctions available to the court, such as striking Yomi's claims or deeming Becerra's defenses established, would have the same practical effect as dismissal. Moreover, the Tenth Circuit has agreed that "[m]onetary sanctions are meaningless to a plaintiff who has been allowed to proceed *in forma pauperis* and the sanctions set out in Fed. R. Civ. P. 37 will not substitute for plaintiff's failure to appear . . . for his deposition." *Smith v. McKune*, 345 F. App'x 317, 320 (10th Cir. 2009). In sum, the court is unpersuaded that allowing additional time for discovery or imposing any lesser sanction would move this case forward. To the contrary, it would only perpetuate Yomi's intransigence towards complying with his most basic discovery obligations and this court's orders. Such tactics simply are not allowed under the Federal Rules.

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IV. CONCLUSION

In sum, the court finds that the *Ehrenhaus* factors all weigh in favor of dismissal and that Yomi's lack of participation in the discovery process is the result of his willful misconduct. The court therefore recommends that the district judge dismiss this case with prejudice for Yomi's failure to prosecute his case, failure to comply with Rule 30(a)(1) and Rule 37(d)(1)(A) by not appearing for a deposition, and failure to comply with the court's May 27 order to provide discovery. *See* FED. R. CIV. P. 41(b); FED. R. CIV. P. 37(b)(2)(A)(v).

* * * * *

Pursuant to 28 U.S.C. § 636(b)(1), Fed. R. Civ. P. 72(b)(2), and D. Kan. R. 72.1.4(b), Yomi may file specific written objections to this Report and Recommendation within fourteen days after being served with a copy of it. If objections are not filed within the fourteen-day time period, no appellate review of the factual and legal determinations herein will be allowed by any court. *See In re Key Energy Res. Inc.*, 230 F.3d 1197, 1199-1200 (10th Cir. 2000).

IT IS THEREFORE RECOMMENDED that the district judge grant Becerra's Motion for Discovery Sanctions (ECF 221) and dismiss this case with prejudice.

IT IS FURTHER ORDERED that the clerk's office shall send a copy of this Report and Recommendation to Yomi by certified mail, with return-receipt requested.

Dated August 4, 2022, at Kansas City, Kansas.

s/ Angel D. Mitchell
Angel D. Mitchell
U.S. Magistrate Judge

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Additional material from this filing is available in the Clerk's Office.