

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHIGAN DEPARTMENT OF ENVIRONMENT,)	
GREAT LAKES, AND ENERGY, and)	
THE MICHIGAN DEPARTMENT OF NATURAL)	
RESOURCES,)	
)	
Plaintiffs,)	No. 1:20-cv-528
)	
-v-)	
)	Honorable Paul L. Maloney
LEE MUELLER, et al.,)	
)	
Defendants.)	
)	

**OPINION AND ORDER GRANTING PLAINTIFFS’ MOTION TO ENFORCE
THIS COURT’S PRIOR ORDER AND FOR FURTHER SANCTIONS**

“To say that the discovery phase of this case has not gone smoothly would be an understatement” (ECF No. 156 at PageID.4737). On January 24, 2022, this Court held a Rule 16 scheduling conference and entered a Case Management Order the following day (ECF No. 73). Since then, almost nothing, in regard to discovery, has gone according to plan. After Defendant Edenville Hydro Property, LLC (“EHP”) and Defendant Lee Mueller’s *numerous* failures to meet their discovery obligations and follow this Court’s orders, the Court has reached the point of considering whether to enter default against these Defendants as a sanction. For the following reasons, the Court will grant Plaintiffs’ motion to enforce this Court’s May 17, 2022 order (“the May 17 Order”) and, as a sanction, it will strike Defendant Mueller’s answer and enter default against Defendants Mueller and EHP pursuant to Fed. R. Civ. P. 37(b)(2)(A)(iii), (vi). But first, let’s summarize how we got here.

The present motion to enforce the May 17 Order/motion for sanctions is not the first of its type that Plaintiffs have filed. In June 2022, Plaintiffs filed their first motion to enforce the May 17 Order and for sanctions based on Defendant Mueller's failure to obey this Court's discovery orders (ECF No. 107). In granting that motion in part, the Court summarized the relevant background information:

Initial Disclosures: Defendant Mueller's initial disclosures were originally due on March 15, 2022 (*see* ECF No. 73). Defendant Mueller filed a motion to stay discovery on April 6 (ECF No. 78), which the Court denied following a hearing in mid-May (*see* ECF No. 99). The Court then ordered Defendant Mueller to produce his initial disclosures within fourteen days, which would have been May 31 (*see id.*). When Plaintiffs filed their motion for sanctions on June 14, Defendant Mueller still had not provided his initial disclosures, but the record indicates that he did so the following day on June 15 (*see* ECF No. 112).

First Set of Interrogatories/RFPs¹: Plaintiffs served Defendant Mueller with their first set of interrogatories/RFPs on February 28, 2022 (*see* ECF No. 74), meaning that Defendant Mueller's responses were originally due on March 30. *See* Fed. R. Civ. P. 33(b)(2); 34(b)(2)(A). Defendant Mueller failed to meet this deadline, and Plaintiffs informed Defendant Mueller that he had therefore waived all objections to the discovery requests and that they intended on filing a motion to compel (*see* ECF No. 82-3 at PageID.2853). Subsequently, on April 6, Defendant Mueller produced untimely responses to the discovery requests, consisting almost entirely of "general" and "specific" objections (*see* ECF Nos. 82-5, 82-6). Plaintiffs then filed their motion to compel on April 11 (ECF No. 81), and the Court heard oral argument on that motion at the mid-May motion hearing. After the hearing, on May 17, the Court ordered Defendant Mueller to provide complete responses to these outstanding discovery requests, with the exception of RFP #1, by May 31 (*see* ECF No. 99). Presumably as a delay tactic, Defendant Mueller filed multiple motions for reconsideration regarding the May 17 order, which set the May 31 deadline to respond to Plaintiffs' first set of interrogatories/RFPs (*see* ECF Nos. 102, 118). [Shortly thereafter, on June 14, 2022, Plaintiffs filed their motion for sanctions and to enforce the May 17 discovery order]. The Court denied both motions for reconsideration—the first on June 15 and the second on June 24 (ECF Nos. 110, 121). On June 28, Defendant Mueller then moved to extend

¹ "RFP" means "requests for production of documents."

the May 31 response deadline to July 31 (*see* ECF No. 124). On July 11, the Court granted in part and denied in part the motion, and it ordered Defendant Mueller to provide his responses to Plaintiffs' still-outstanding discovery requests (again, with the exception of RFP #1) by July 13 at noon (*see* ECF No. 129). [Just minutes before] noon on July 13, Defendant Mueller filed another motion indicating that he was not able to comply with the July 13 deadline, and he requested another extension (*see* ECF No. 130). Having previously warned Defendant Mueller that "the Court's patience has its limits" (ECF No. 129 at PageID.4400), the Court subsequently denied Defendant Mueller's motion for an extension of time the same day he filed the motion and ordered him to respond to Plaintiffs' first set of interrogatories/RFPs "immediately" (ECF No. 132).

At this point in the saga, the Court held a motion hearing on August 18, 2022. Among other motions, the Court heard oral argument on Plaintiffs' motion for sanctions and to enforce the May 17 discovery order. At the hearing, Plaintiffs claimed that Defendant Mueller still was not in compliance with the Court's May 17 order, which required Defendant Mueller to "properly and completely answer Plaintiffs' first set of interrogatories and RFPs," except for RFP #1, absent objections (*see* ECF No. 99 at PageID.4008). Defendant Mueller's counsel, on the other hand, contended that "[t]o the best of [his] knowledge," he believed that Defendant Mueller had completely complied with the May 17 discovery order (*see* ECF No. 144 at PageID.4663).

(ECF No. 156 at PageID.4738-40) (footnotes omitted) [hereinafter "the September 30 Order"].² After considering this relevant history and the Court's authority to award sanctions under Rule 37, the Court declined to award sanctions for Defendant Mueller and Defendant EHP's failure to timely produce their initial disclosures (*see id.* at PageID.4745), but the Court, in its discretion, awarded sanctions for Defendants' numerous failures to timely produce proper responses to Plaintiffs' first set of interrogatories/requests for production of documents ("RFPs") (*see id.* at PageID.4740-45). Finding that monetary sanctions would be inappropriate due to Defendant Mueller's asserted "dire" financial status, the Court instead

² In that order, the Court noted that "Defendant Mueller" referred to both Defendants Lee Mueller and Edenville Hydro Property, LLC (ECF No. 156 at PageID.4737 n.1).

awarded the nonmonetary sanction of accepting many of Plaintiffs' proposed established facts as true, pursuant to Rule 37(b)(2)(A)(i) (*see id.* at PageID.4742-43).

In the same order, the Court informed Defendants Mueller and EHP that the order did not relieve them of their discovery obligations as to Plaintiffs' first set of RFPs:

To the extent that Defendant Mueller still owes Plaintiffs the documents that they sought in their first RFPs—including all the documents that Defendant Mueller identified on his attorney-client privilege log—the Court reminds Defendant Mueller that, on July 13, he was ordered to produce those documents “immediately.” If he has yet to provide Plaintiffs with all the documents they requested in their first RFPs, the Court trusts that Defendant Mueller will do so immediately.

(*Id.* at PageID.4744-45). The Court issued that order on September 30, 2022.

Following the issuance of the September 30 Order (apart from Defendant Mueller filing an improper notice of interlocutory appeal pursuant to 28 U.S.C. § 1292(b), as the Court had not certified the September 30 Order for interlocutory appeal), the discovery issues involving Defendants Mueller and EHP appeared to be resolved. That is, until January 10, 2023, when Plaintiffs filed their second motion to enforce the May 17 Order and for further sanctions (ECF No. 198). Plaintiffs' motion and brief assert that Defendant Mueller *still* has not complied with his obligation to properly respond to Plaintiffs' first set of RFPs (*see generally* ECF Nos. 198, 199). Specifically, although the Court expressly ordered Defendants Mueller and EHP to produce the documents they identified in their attorney-client privilege log (*see* ECF No. 156 at PageID.4744-45), they have yet to produce 268 out of the 330 documents identified on the attorney-client privilege log (ECF No. 199 at PageID.5593). The Court was astonished by this assertion. If true, how many times does this Court need to order Defendants Mueller and EHP to properly respond to Plaintiffs' first set

of RFPs—again, which were originally served on February 28, 2022—before they comply? The Court awaited Defendants’ response to see if they had indeed failed to produce the missing 268 documents.

Defendants EHP and Mueller’s response implicitly provided the Court with the information it required: Rather than asserting that they *had* produced the alleged missing 268 documents, Defendants continued to raise arguments as to why they never should have been ordered to produce those documents in the first place—arguments that this Court has already rejected multiple times (*see* ECF No. 217). They assert that on January 18, 2023—three and a half months after the most recent time they were “remind[ed]”³ to produce the documents listed on the attorney-client privilege log—they produced 418 “additional privilege log entry-related files” (*Id.* at PageID.5918). But what about the 268 documents to which Plaintiffs are entitled and they claim they have yet to receive? Prior to filing the present motion to enforce, on December 16, 2022, Plaintiffs’ counsel even contacted Defendants Mueller and EHP’s counsel to inquire about the status of those documents (*see* ECF No. 217-1 at PageID.5925). Defense counsel explained that Defendant Mueller was in the process of bates stamping the documents and that counsel “should be able to provide [Plaintiffs’ counsel] with a status update by Weds. [December 21, 2022] afternoon” (*Id.* at PageID.5924). After defense

³ Although the Court does not intend to sound like a broken record, the Court reiterates that, following Defendant Mueller and Defendant EHP’s failure to comply with the original March 30, 2022 response deadline to Plaintiffs’ first set of interrogatories/RFPs, the Court ordered Defendants to serve their responses by May 31 (ECF No. 99), then again by July 13 at noon (ECF No. 129). When Defendants again failed to meet the July 13 deadline, they were ordered to serve their responses “immediately” (ECF No. 132 at PageID.4415). In the September 30 Order the Court “remind[ed]” Defendants Mueller and EHP of their obligations to respond to Plaintiffs’ first set of RFPs, including all the documents identified in Defendant Mueller’s attorney-client privilege log (ECF No. 156 at PageID.4744-45).

counsel never provided such an update, Plaintiffs justifiably filed the instant motion on January 10, 2023.

With that background, the Court can now turn to the pending motion to enforce the May 17 Order and for sanctions. However, the Court must first address one assertion made in Defendant Mueller and Defendant EHP's motion for clarification (ECF No. 201). On January 12, 2023, Defendants Mueller and EHP filed a motion for clarification, seeking answers to at least seven questions regarding how they should proceed with litigating their case following this Court's September 30 Sanctions Order (*see* ECF No. 201 at PageID.5609-10). The Court will not entertain those questions, as it is Defendants Mueller and EHP's job to determine how they wish to litigate this case, not the Court's. If they would like answers to these questions, they are more than welcome to ask their attorney. A motion for clarification, which is warranted when the language of a court order is unclear, is not the avenue to determine how parties should litigate their case. *See Costigan v. John Hancock Life Ins. Co.*, No. 5:15CV1002, 2015 WL 3540175, at *1 (N.D. Ohio June 4, 2015) (considering a motion to clarify an order granting in part a motion to dismiss where it was unclear whether the dismissal was with or without prejudice); *Lyons v. Brandly*, No. 4:03CV1620, 2008 WL 1843997, at *1 (N.D. Ohio Apr. 22, 2018) (considering a motion to clarify a typographical error in the court's order with respect to which counts the defendants were granted summary judgment).

In any event, the Court acknowledges that the motion for clarification raises one point worth addressing. The motion seeks clarification as to why the September 30 Order applies only to Defendants Mueller and EHP, and not the remainder of the defendants, given that

“Defendant [Mueller] had previously served as the sole controlling principal co-member manager of operations for ALL Defendant LLC entities in this litigation, and as sole controlling principal co-trustee and beneficiary of ALL Defendant Trust entities in this litigation” (ECF No. 201 at PageID.5612). The motion further asserts that the Court had an “apparent change in reasoning” from the August 18, 2022 motion hearing, in which Defendants Mueller and EHP assert that “the Court” stated, “I just want to make clear that some of the facts seem to implicate some of the entity defendants represented by the liquidating trustee. And because this motion wasn’t brought against those entities, we just want it to be clear that while those facts may be deemed as true as it relates to Mr. Mueller, they shouldn’t necessarily be binding on the entities for that purpose.” (*Id.* at PageID.5613) (quoting *Transcript of Motion Hearing*, ECF No. 144 at PageID.4664).

At the outset, the above-quoted material from the transcript was not stated by the Court; it was stated by counsel for the liquidating trustee, who wanted to ensure that the entities represented by the liquidating trustee—Boyce Michigan, LLC; Boyce Hydro, LLC; WD Boyce Trust 2350; WD Boyce Trust 3649; and WD Boyce Trust 3650 (collectively, “the Boyce Entities”) (ECF No. 67 at PageID.2666-67)—were not implicated in any potential sanctions order, given that they were not the subject of the motion for sanctions (*see* ECF No. 144 at PageID.4664). Because the Boyce Entities, represented by the liquidating trustee, were not the subject of the motion for sanctions and there was no evidence that the Boyce Entities had failed to comply with their discovery obligations, the Court agreed with the liquidating trustee’s counsel, and expressly indicated in the September 30 Order that, “The Court will deem Facts #1 through #7 as true, as they relate to Defendants Lee W. Mueller

and Edenville Hydro Property, LLC . . . They are not deemed as true as to any of the other defendants in this matter” (ECF No. 156 at PageID.4743-44) (internal citation omitted). Given that only Defendants Mueller and EHP had disregarded the Court’s orders, it was appropriate to sanction only those defendants and not the Boyce Entities.

To the extent that the motion for clarification questions why Defendant EHP, an entity defendant, was included in the motion for sanctions, the Court will clarify. In answering the complaint, the liquidating trustee explicitly indicated that he did not represent Defendant EHP: “Defendant Edenville Hydro [Property], LLC is not a substantively consolidated debtor and the Liquidating Trustee is not answering on behalf of Edenville Hydro [Property], LLC” (ECF No. 67 at PageID.2667 n.1). Instead, Attorney Lawrence Kogan represents Defendant EHP and has filed several documents on behalf of Defendant EHP, including the responses to both of Plaintiffs’ motions for sanctions/to enforce the Court’s discovery orders (ECF Nos. 89, 217). This entire discovery debacle arises out of Defendant Mueller *and* Defendant EHP’s failures to properly respond to Plaintiffs’ first set of interrogatories/RFPs (*see* ECF Nos. 82-5, 82-6) (showing that, collectively, Defendants Mueller and EHP served (improper and untimely) responses to Plaintiffs first set of interrogatories/RFPs). Indeed, when issuing discovery orders, the Court has explicitly indicated that the orders apply to both Defendant Mueller and Defendant EHP (*see* ECF Nos. 99, 136, 156). Defendant Mueller has been involved in discovery in this matter in two capacities: in his individual capacity on behalf of himself, as well as in his capacity as the former “sole controlling principal co-member manager of operations” of EHP (*see* ECF No. 201 at PageID.5612). And because *both* Defendant Mueller and Defendant EHP have

utterly failed to comply with this Court's discovery orders, it was appropriate to sanction both defendants.

Therefore, while the Court will grant Defendant Mueller and Defendant EHP's motion for clarification with respect to the question regarding why only they, and not the Boyce Entities, were sanctioned, the Court will not entertain the remainder of the improper motion for clarification. At last, the Court can now turn to the merits of Plaintiffs' motion to enforce the May 17 Order and for sanctions.

Rule 37(b)(2)(A) provides for discretionary sanctions if a party fails to obey a discovery order. *See Franklin v. Shelby Cty. Bd. of Educ.*, No. 2:20-cv-02812-JPM-tmp, 2021 WL 5449005, at *7 (W.D. Tenn. Nov. 22, 21). "The purpose of imposing sanctions is to assure both future compliance with the discovery rules and to punish past discovery failures, as well as to compensate a party for expenses incurred due to another party's failure to properly allow discovery." *Jackson v. Nissan Motor Corp.*, 888 F.2d 1391, *3 (6th Cir. 1989) (table) (internal quotation marks omitted). Rule 37(b)(2)(A) specifically provides that the Court may order any of the following sanctions for failure to obey a discovery order:

- (i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;
- (ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;
- (iii) striking pleadings in whole or in part;
- (iv) staying further proceedings until the order is obeyed;
- (v) dismissing the action or proceeding in whole or in part;

(vi) rendering a default judgment against the disobedient party; or

(vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

Fed. R. Civ. P. 37(b)(2)(A)(i)-(vii).

With respect to dismissal or entry of default as a sanction pursuant to Rule 37, “dismissal is an appropriate sanction where the party’s failure to cooperate with the court’s discovery orders is due to willfulness. A willful violation occurs whenever there is a conscious and intentional failure to comply with the court order.” *Bass v. Jostens, Inc.*, 71 F.3d 237, 241 (6th Cir. 1995). Although dismissal or entry of default as a sanction for failing to comply with a discovery order should be a “last resort,” *Bank one of Cleveland, N.A. v. Abbe*, 916 F.2d 1067, 1073 (6th Cir. 1990), the Sixth Circuit has noted that “[t]he use of dismissal as a sanction for failing to comply with discovery has been upheld because it accomplishes the dual purpose of punishing the offending party and deterring similar litigants from such misconduct in the future.” *Bass*, 71 F.3d at 241 (citing *Nat’l Hockey League v. Metro. Hockey Club, Inc.*, 427 U.S. 639, 642-43 (1976)). In *Harmon v. CSX Transp., Inc.*, 110 F.3d 364, 366-67 (6th Cir. 1997), the Sixth Circuit established a four-factor analysis for determining whether dismissal or entry of default as a sanction under Rule 37 is appropriate:

(1) whether the party’s failure is due to willfulness, bad faith, or fault; (2) whether the adversary was prejudiced by the dismissed party’s conduct; (3) whether the dismissed or defaulted party was warned that failure to cooperate could lead to dismissal or entry of default judgment; and (4) whether less drastic sanctions were imposed or considered before dismissal or default judgment was ordered.

Catrinar v. Wynnestone Cmtys. Corp., No. 14-11872, 2017 W: 4349284, at *1 (E.D. Mich. Sept. 30, 2017) (citing *Abbe*, 916 F.2d at 1073). District courts are encouraged to weigh all

four factors, but notably, no one factor is dispositive. *United States v. Reyes*, 307 F.3d 451, 458 (6th Cir. 2002).

Given that Defendants Mueller and EHP have already been sanctioned—in the form of this Court accepting certain facts as true pursuant to Rule 37(b)(2)(A)(i)—for their “repeated” disregard of their discovery obligations and this Court’s orders (*see* ECF No. 156 at PageID.4742), Plaintiffs ask for additional sanctions: striking Defendant Mueller’s answer and entering default against Defendants Mueller and EHP. After considering the four factors outlined above, the Court agrees that Plaintiffs’ requested sanctions are appropriate.

First, Defendant Mueller and Defendant EHP’s conduct rises to the level of willfulness, bad faith, and/or fault. The responses to Plaintiffs’ first set of interrogatories/RFPs have been the subject of nine motions filed by Defendants Mueller and EHP (*see* ECF Nos. 78, 96, 102, 118, 124, 130, 168, 187, 201). At least six times, the Court ordered or reminded Defendants to produce appropriate responses to these discovery requests (*see* ECF Nos. 99, 110, 121, 129, 132, 156), noting once that “The Court’s patience has its limits” (ECF No. 129 at PageID.4400). Over ten months after the original deadline to respond to these discovery requests has passed, the Court is still adjudicating issues surrounding Defendants’ failures to properly respond to these discovery requests. Defendants blame their failure to produce on Defendant Mueller’s “inability” to engage in the discovery process, but this excuse is insufficient (*see* ECF No. 217 at PageID.5918). Defendant Mueller personally identified 330 documents in response to Plaintiffs’ first set of RFPs that he believed were protected by attorney-client privilege. After his numerous challenges to the protection of those documents have failed, Defendant Mueller should have been readily able to produce

these documents—again, that he has already located and identified. But he apparently is still holding hostage 268 of these documents. At this point, Defendant Mueller cannot blame his failures to follow this Court’s orders on “inability”; he simply refuses to obey. The first factor weighs in favor of entry of default.

Second, Plaintiffs have certainly been prejudiced by Defendant Mueller and Defendant EHP’s failures to timely respond to Plaintiffs’ discovery requests. To reiterate, Plaintiffs served Defendants Mueller and EHP with their first set of interrogatories/RFPs on February 28, 2022 (ECF No. 74), and Defendants’ responses were originally due March 30, 2022. *See* Fed. R. Civ. P. 33(b)(2); 34(b)(2)(A). It is now February 2023, and Plaintiffs are still trying to obtain complete responses to these discovery requests. The Court has extended Defendant Mueller and Defendant EHP’s deadlines to respond to these requests several times to no avail.

Further, Plaintiffs have already had to seek extensions of the dates set in the Case Management Order because of Defendants Mueller and EHP’s delays in timely responding to Plaintiffs’ discovery requests (*see* ECF Nos. 113, 152); (*see also* ECF No. 116 (granting Plaintiffs’ motion to extend the mediation deadline: “Due to numerous discovery disputes and Defendant Mueller’s failure to comply with multiple discovery deadlines, appropriate discovery has not yet been accomplished, which is necessary to make mediation successful.”)). Defendants Mueller and EHP argue that Plaintiffs have not been prejudiced by any delays because they have already taken the depositions of Defendant Mueller and other third parties (*see* ECF No. 217 at PageID.5920). But Defendants ignore the fact that Plaintiffs have had to conduct these depositions without the benefit of reviewing all the

documents Defendants Mueller and EHP have been ordered to produce in response to Plaintiffs' first set of RFPs. Because the Court finds that Plaintiffs have been prejudiced by Defendant Mueller and Defendant EHP's conduct, the second factor also weighs in favor of entering default against Defendants Mueller and EHP. *See, e.g., Harmon*, 110 F.3d at 368 (“We have no doubt that CSXT was prejudiced by Harmon’s failure to respond to its interrogatories. Not only had CSXT been unable to secure the information requested, but it was also required to waste time, money, and effort in pursuit of cooperation which Harmon was legally obligated to provide.”).

Third, Defendants Mueller and EHP were warned that if they continue to “disregard [their] discovery obligations in the future, the Court will not hesitate to consider additional appropriate sanctions” (ECF No. 156 at PageID.4745). In the September 30 Order, the Court already found that monetary sanctions would be “pointless” based on Defendant Mueller’s numerous assertions regarding his “dire” financial status (*Id.* at PageID.4742-43). Thus, the Court, in its discretion, found that a sanction pursuant to Rule 37(b)(2)(i)—directing that many of Plaintiffs’ proposed established facts would be accepted as true as to Defendants Mueller and EHP—was appropriate. Defendants knew that the Court’s patience was running thin (*see* ECF No. 129 at PageID.4400), and they were expressly warned that the Court would consider further sanctions beyond accepting Plaintiffs’ proposed facts as true if they failed to comply with their discovery obligations (ECF No. 156 at PageID.4745).

Defendants Mueller and EHP argue that the Court did not explicitly warn them that the Court would consider *entry of default* if they continued to disregard their discovery obligations. The Court is not persuaded by this argument. The Court warned Defendants

that it would not hesitate to consider “additional appropriate sanctions,” and by continuing to do exactly what the Court warned against, Defendants were willing to roll the dice to see what further sanctions the Court would consider. If accepting the proposed facts as true was not enough to deter Defendant Mueller and Defendant EHP’s contumacious conduct, then logically, an additional, appropriate sanction is to strike their pleadings and enter default against these non-compliant parties. *See* Fed. R. Civ. P. 37(b)(2)(A)(iii), (vi). In any event, even the cases that Defendants Mueller and EHP rely upon do not help their case. *See Harris v. Callwood*, 844 F.2d 1254, 1256 (6th Cir. 1988); *Harmon*, 110 F.3d at 366-67; *Catrinar*, 2017 WL 4349284, at *1. In *Callwood*, the Sixth Circuit held that “in the absence of notice that dismissal is contemplated[,] a district court should impose a penalty short of dismissal unless the derelict party has engaged in ‘bad faith or contumacious conduct.’” 844 F.2d at 1256. For the reasons articulated throughout this opinion, the Court has found that Defendants Mueller and EHP have engaged in bad faith and/or contumacious conduct. Therefore, even if the Court’s warning that it would consider additional, appropriate sanctions if Defendants Mueller and EHP continued to disregard their discovery obligations was insufficient to put Defendants on notice that entry of default against them could be a potential sanction, their bad faith/contumacious conduct rendered such a specific warning unnecessary. Thus, the third factor also weighs in favor of entering default against Defendants Mueller and EHP.

Fourth and finally, the Court has already awarded less drastic sanctions to no avail (*see* ECF No. 156). The Court previously accepted Plaintiffs’ proposed facts as a sanction for Defendant Mueller and EHP’s conduct during discovery, and it reminded them of their

obligation to properly respond to Plaintiffs' first set of RFPs (*see id.* at PageID.4744-45). Despite that reminder (over four months ago) and the Court's award of less drastic sanctions, Defendants still have not produced all the documents they identified on their attorney-client privilege log. The fourth factor weighs in favor of entry of default.

Because all four factors weigh in favor of entry of default, the Court will strike Defendant Mueller's answer⁴ and enter default against Defendants Mueller and EHP. *See* Fed. R. Civ. P. 37(b)(2)(A)(iii), (vi). In accordance with the principle established in *Frow v. DeLaVega*, 82 U.S. (15 Wall.) 552 (1873), the Court will enter default but will withhold entering default judgment. The Court will enter default judgment, if appropriate, upon the conclusion of this matter. *See Kimberly v. Coastline Coal Corp.*, 857 F.2d 1474 (6th Cir. 1988) (table) ("When a default is entered against one defendant in a multi-defendant case, the preferred practice is for the court to withhold granting a default judgment until the trial of the action on the merits against the remaining defendants. If plaintiff loses on the merits, the complaint should then be dismissed against both defaulting and non-defaulting defendants.").⁵

The Court understands that this type of sanction is harsh, but in the Court's judgment, it is deserved. We have not reached this point because Defendants Mueller and EHP failed

⁴ Curiously, only Defendant Mueller has filed an answer, not Defendant EHP (*see* ECF No. 141). Thus, default could have been entered against Defendant EHP several months ago for reasons totally unrelated to its failures to comply with its discovery obligations.

⁵ Plaintiffs also ask the Court to issue monetary sanctions upon Attorney Lawrence Kogan (*see* ECF No. 199 at PageID.5598-99). Rule 37(b)(2)(C) states, "Instead of or in addition to the orders above, the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust." Fed. R. Civ. P. 37(b)(2)(C). At this time, the Court declines to impose monetary sanctions upon Attorney Kogan, Defendant Mueller, or Defendant EHP. Given Defendants' dire financial status and Attorney Kogan's sole practitioner/pro bono status, the Court finds that monetary sanctions, in addition to the sanctions already imposed, would be unjust on this record to date.

to meet a couple deadlines and maybe even inadvertently failed to comply with a court order; rather, we have reached this point because Defendants Mueller and EHP have exhibited a pattern of failing to—and possibly even deliberately defying—their discovery deadlines and this Court’s orders. The Court warned Defendants Mueller and EHP that it would not hesitate to consider additional, appropriate sanctions if they continued to disregard their discovery obligations (*see* ECF No. 156 at PageID.4745). They have done just that, resulting in the striking of Defendant Mueller’s answer and the entry of default as to both Defendant Mueller and Defendant EHP.

ORDER

In accordance with the accompanying opinion issued on this date,

IT IS HEREBY ORDERED that Plaintiffs’ second motion to enforce the May 17 Order and for sanctions (ECF No. 198) is **GRANTED** in part with respect to Plaintiffs’ request for sanctions as to Defendants Mueller and EHP. The motion is **DENIED** without prejudice in all other respects. As such, Defendant Mueller’s answer (ECF No. 141) is **STRICKEN** from the record, and default is **HEREBY ENTERED** against Defendants Lee Mueller and Edenville Hydro Property, LLC. If appropriate, a default judgment will enter upon the termination of this case.

IT IS FURTHER ORDERED that Defendant Mueller and Defendant EHP’s motion for clarification (ECF No. 201) is **GRANTED** in part. The remainder of the motion is **DENIED**.

IT IS FURTHER ORDERED that Defendant Mueller and Defendant EHP's motion for certification of an interlocutory appeal (ECF No. 168) and motions for reconsideration (ECF No. 183, 220) are **DISMISSED** as moot.

IT IS SO ORDERED.

Date: February 8, 2023

/s/ Paul L. Maloney
Paul L. Maloney
United States District Judge