Honorable David G. Estudillo

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

NATHEN BARTON, Plaintiff v. JOE DELFGAUW, XANADU MARKETING INC., STARTER HOME INVESTING INC. Defendant(s).	CASE NO. **3:21-cv-05610-DGE** RESPONSE TO DKT 312 NOTE ON MOTION CALENDAR: January 19, 2024

The Defendants refused to answer RFA's because they don't understand FRCP 36. Contrary to their assertion "the Defendants / Counterclamants have responded to Plaintiff's / Counter defendant's discovery request. The discovery requests were not ignored or disregarded" (Dkt. 312, 5:16), as of today the Defendants have never responded to any RFA in Exhibits NB132, NB192, NB195, NB199, and NB209. Nor do they testify to having done so or provided any copies of emails showing service of the RFAs. They gave the Court this disingenuous claim and their motion goes downhill from there. Dkts. 299, 301, and 303 testified to the never-responded-to RFA's.

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The Court should deny the Defendants' request to "withdraw admissions based on late responses" for the same reasons the *Conlon*[1] court denied that motion. In *Conlon*, the discovery deadline was October 15th and November 15th the dispositive motion deadline. Trial was to commence on January 11th of the next year. On August 19th the Government served Conlon requests for admissions that if admitted, would have gutted his lawsuit:

> "No portion of your incarceration from February 20, 1998[sic] to December 15, 1999 was caused by any negligent or wrongful act or omission of any employee of the United States." *Id*.

Conlon did not respond in the 30 days. Rule 36 is self-executing,[2] and the Government informed him that the admissions were deemed admitted. Conlon finally submitted responses on November 12 and moved to withdraw the admissions on November 15. On January 3, the district court denied Conlon's motion, noting that he had been warned of the consequences and he only had acted in the face of a dispositive motion. The court further held that Conlon had:

> "failed to show that presentation of the merits of this action will be subserved by permitting withdrawal of `several' of the admissions," and because "the defendant will be severely prejudiced by allowing withdrawal of the admissions since a dispositive motion is in the midst of briefing and trial is set to commence in eight days," *Id*.

Every *Conlon* factor weighs in favor of denying the Defendants' instant motion.

A. Their actions were knowing and willful

The defendants did not mistakenly or inadvertently fail to respond, they chose not to. In the "Offers of Proof" sections of Dkts. 299, 301, and 303, Barton documents conversations about late RFA responses and non-responses. Here are just three examples of Barton sending Ms.

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[1] *Conlon v. U.S.*, 474 F.3d 616, 618 (9th Cir. 2007)

[2] *Doctors Med. Ctr. of Modesto, Inc. v. Principal Life Ins. Co.*, CASE NO. 1:10-cv-00452-LJO-SKO (E.D. Cal. Mar 03, 2011)

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Gibson notices about RFA's being deemed admitted and/or exceeding 30 days.

Nathen Barton <farmersbranch2014@gmail.com> Thu, Dec 9, 2021 at 6:08 PM
To: DONNA GIBSON <donna@donnagibsonlaw.com>

Hello,

I am assuming you are aware that two outstanding requests for admissions have exceeded 30 days and you did not answer them, thus they are deemed admitted.

I don't want you to come back later and say you were unaware of this.

Nathen

Nathen Barton <farmersbranch2014@gmail.com> Mon, Dec 13, 2021 at 10:32 PM
To: DONNA GIBSON <donna@donnagibsonlaw.com>

Hello,

Obviously I see that you are delivering some admissions. I believe the impetus is on your to move the court to set aside the deemed versions?

Nathen Barton <farmersbranch2014@gmail.com> Fri, Jan 14, 2022 at 2:45 PM
To: DONNA GIBSON <donna@donnagibsonlaw.com>

Hello,

Thank you for these. I do see a few missing responses:
12.13.2021 AMENDED CD Starter Home Interrogatories 3.pdf
11.9.2021 CD Starter Home Interrogatories 1.pdf

It is deemed admitted but you have returned other admissions late so just notifying you I do not see a response to this one:
11.19.2021 CD Starter Home Admissions 4.pdf
11.18.2021 CD Starter Home Admissions 3.pdf

Opposing Counsel's response on January 14, 2021 says it all: "See, they aren't automatically deemed admitted, and I think I can argue that to the court".

DONNA GIBSON <donna@donnagibsonlaw.com> Fri, Jan 14, 2022 at 5:09 PM
To: Nathen Barton <farmersbranch2014@gmail.com>

See, they aren't automatically deemed admitted, and I think that I can argue that to the court.
I want to get you all of the responses.

On Fri, Jan 14, 2022 at 2:45 PM Nathen Barton <farmersbranch2014@gmail.com> wrote:
> Hello,
>
> Thank you for these. I do see a few missing responses:
> 12.13.2021 AMENDED CD Starter Home Interrogatories 3.pdf
> 11.9.2021 CD Starter Home Interrogatories 1.pdf
>
> It is deemed admitted but you have returned other admissions late so just notifying you I do not see a response to this one:
> 11.19.2021 CD Starter Home Admissions 4.pdf
> 11.18.2021 CD Starter Home Admissions 3.pdf

Barton did not want Opposing Counsel to be mistaken. He politely replied to Ms. Gibson's above email with his understanding of FRCP 36:

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Nathen Barton <farmersbranch2014@gmail.com> Fri, Jan 14, 2022 at 6:53 PM
To: DONNA GIBSON <donna@donnagibsonlaw.com>

I'm not an attorney but I haven't seen anything contrary to my understanding of FRCP 36(a)(3).

> (3) *Time to Respond; Effect of Not Responding.* A matter is admitted unless, within 30 days after being served, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney. A shorter or longer time for responding may be stipulated to under Rule 29 or be ordered by the court.

I did look in the local rules and I do not see anything that supersedes this. I don't see it addressed at all in the local rules.

LCR 36

REQUESTS FOR ADMISSION

RESERVED

I get that it does not take much to get late admissions set aside, but the rules seem pretty clear the burden is on you to do so. There is no advantage to me to 'blizzard' you with separate admissions requests hoping you fail to answer a set, as that is exactly what the court does not want. You have seen me clearly pointing out to you late admissions to get you to act on the issue.

Unless there is something I am not understanding about admissions being deemed admitted, I actually want you to address the situation. If I am wrong, do as you will.

Nathen

Opposing Counsel did not reply to this email and never wavered in her position until after Dkts. 299-304 were published. Pro-se Conlon only received two warnings. These Defendants, represented by *two* attorneys, received many. See Exhibits NB077C "Obviously the admissions are deemed admitted", NB132B, NB158C, NB166D, NB192B, NB195B, NB199, NB209B, NB216B, and NB221B in addition to the phone discussion ordered in Dkt. 96.

Although in their motion they don't admit any of their RFAs were answered beyond the 30 days / not answered, in their motion they blame the physical distance between them (the significance of this is never explained), covid, the number of requests, and remote workers (the significance of this is never explained). They never asked Barton or the Court for an extension to answer RFAs. Privately, they dropped the pretenses:

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DELFGAUW:Your stipulated facts that you filed

DONNA GIBSON <donna@donnagibsonlaw.com> Wed, Dec 6, 2023 at 9:25 AM
To: Nathen Barton <farmersbranch2014@gmail.com>

You have not followed procedure and I swear we went through this previously You did not file a motion to deem these admitted and therefore they are nominated. I am preparing a motion to strike if you do not withdraw and follow proper procedure.

I am in trial in another matter and do not have time for a long phone conversation but we have been down this road before

Ms. Gibson is correct; she and Barton had discussed deemed admissions at length, multiple times. Even in their motion they still fail to understand that admissions are self-executing: "Plaintiff . . . wishes to have this Court declare certain individual requests for admissions to be deemed admitted due to Defendant's failure to timely serve such responses."

Barton repeatedly warned the Defendants that their admissions were deemed. He quoted the rules to them. They choose not to act for two years until Barton filed Dkts. 299-304 at which point they feel they can ask the Court to permit them to withdraw unspecified admissions because "the failure to grant such relief results in great harm to one side and the undoing of that side's case" for reasons not explained. None of their official excuses are good cause. "An attorney's mistake due to administrative difficulties does not constitute good cause for delay".[3]

B. They do not specify the admissions they want to withdraw

Their request should be denied because of the nebulous "withdraw all deemed admissions" request. They don't admit that any RFAs were answered late or not answered. Which responses are defendants moving to withdraw? Those listed in Dkts 299, 301, and 303? We would have to speculate. Can the Court give the Defendants the blank check they are asking for? Is it any admission they find inconvenient at the motion in limine and trial stages? And what happens to the withdrawn RFAs? Are the Defendants asking them to all be withdrawn,

[3] *Artemus v. Louie*, Case No.16-cv-00626-JSC, 5 (N.D. Cal. Dec. 21, 2016)

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never to be seen or heard from again? What about RFAs that were untimely answered, but eventually answered with admissions? Are those to be withdrawn as well? We don't know.

C. They fail the First Prong of *Conlon*

> "Two requirements, therefore, must be met before an admission may be withdrawn: (1) presentation of the merits of the action must be subserved, and (2) the party who obtained the admission *must not be prejudiced* by the withdrawal." *Hadley v. U.S.*[4]

"The first half of the test in Rule 36(b) is satisfied when upholding the admissions would *practically eliminate any presentation of the merits* of the case." *Conlon*. Emphasis added.

"Practically eliminate any presentation of the merits of the case" is a bar higher than "if the admissions are not allowed to be withdrawn, Defendant's case will suffer irretrievable harm".

"Thus, the question is not whether allowing the deemed admissions would have any effect on a trial on the merits of the case; it is whether it would eliminate the need to reach a trial on the merits at all."[5] The Court can see in Dkts. 299, 301, and 303 that those admissions are not dispositive. "Here, by contrast, *the matters deemed admitted by plaintiff's late responses would not completely eliminate a trial on the merits*. . . . Therefore, the first part of the Rule 36(b) test is not met here and plaintiff's motion should be denied." *Carden*. Emphasis added.

Contrast the Defendants' lack of specifics with Western District of Washington 2023 case *Wandke v. Nat'l R.R. Passenger Corp.*[6] Amtrak cited the specific admissions it wished to withdraw, and went admission by admission arguing why they should be permitted to withdraw them. The counter-party briefed it's response and the Court then applied the two prong test admission by admission, granting the withdrawal of some and denying the withdrawal of others.

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[4] *Hadley v. U.S.*, 45 F.3d 1345, 1348 (9th Cir. 1995)

[5] *Carden v. Chenega Security Protection Services*, No. CIV S-09-1799-WBS-CMK, (E.D. Cal. Apr. 8, 2011)

[6] *Wandke v. Nat'l R.R. Passenger Corp*., No. C22-396-MLP, 10 (W.D. Wash. Jan. 13, 2023)

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Likewise, these Defendants should have cited each admission they wish to withdraw and for each admission explain why trial will be eliminated if not withdrawn. Barton could then have briefed counter-points. Having not done so, this Court should not find they have met their burden under the first prong of *Conlon*. This failure fits their pattern. In Dkt. 153 they were warned "although the Court is liberally construing defendants' motion this time, going forward, defendants must cite proper authority for their motions. They did not do so here."

D. They fail the Second Prong of *Conlon*

The second prong is prejudice to the party relying on the admissions.

> "it relates to the difficulty a party may face in proving its case, e.g., caused by the unavailability of key witnesses, because of the sudden need to obtain evidence' with respect to the questions previously deemed admitted."

The Defendants did not identify which admissions they wish to withdraw so Barton can't counter with the specific prejudices he will face if they are withdrawn. But the Court has seen in Dkt. 305 and 318 Barton relies heavily on admissions. For example, he did not depose two non-parties to the lawsuit because of the admissions in Section H of Dkt. 305. Barton did not do a forensic examination on the Defendants' computer system in large part because of admissions on which at the eve of trial he now relies. The Court relied on admissions in Dkt. 276. Do the Defendants now wish to withdraw any admission now viewed inconvenient to their case? Inconvenience to their case is not the same as inability to present one.

The second prong is not just the sudden need to obtain evidence days before trial, but the ability to gather evidence two years later. For example, Barton discussed the Defendants' claims with LGNB LLC, who gave him the information that formed the basis of the Admissions in Section H of Dkt. 305. Is LGNB LLC still in business? Do the people with the information still work there? Have their memories faded? No one knows.

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Barton did not do a forensic examination on the computer server that allegedly received the "opt in" in majority part because of the admissions from the Defendants.

They bounce servers around so it is unlikely there is still evidence to obtain 2 years later.[7]

Q.	Well, I guess we'll get into that next. For Starter Home, where is the equipment that is dialing the phones located?
A.	I believe the servers are in Florida. We have a server cluster. I don't know where all the servers are. We use a server company that bounces servers around. I don't even know which one. I employ two server guys actually. I contract two server guys who would have to give you more accurate information on where that is at.

Continuing to page 74:

Q.	Is there any reason why dialer data from last November and December of 2021 would be deleted?
A.	I don't know, unless the server guys deleted it for a reason. I don't know. There should be no reason for it.
Q.	So it's your company policy to delete data when possible or to not delete data when possible?
A.	The company policy is to have our servers run at maximum efficiency and if the dialer -- if the server team needs to compress or move data, I expect them to do their job.

[7] See Exhibit NB045, page 14. This deposition was taken on May 18, 2022.

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The Defendants claimed to have no call records just weeks and months after calling Barton so Barton asked Delfgauw why the records were gone. Delfgauw cited the company policy of running at maximum efficiency. It seems unlikely that two years later there is any forensic evidence to obtain from their computer system.

This is the prejudice Barton now faces. Without admissions, Barton would need to examine the Defendants computer system to determine if there ever was an "opt in", what website it came from, and what IP address it came from. This evidence seems very unlikely to still exist, or the cost to examine the computers looking for evidence so old or bounced around is likely significantly more expensive now than two years ago.

Without admissions Barton would need to depose LGNB LLC and The Mountaintop Network but it is unknown if the people with the information can still be found and the quality of their recollections at this point. Courts have found sufficient prejudice on far kinder facts than this case:

> "However, withdrawal would prejudice Plaintiffs. While Defendant's response was only ten-days late, the impact of the delay was significant, as the discovery deadline passed the day before Defendant served its responses. (Dkt. No. 16). As a result, Plaintiffs could not seek additional discovery based on Defendant's denial. Further, even if Plaintiffs would not suffer prejudice, Defendant does not allege that its oversight was due to good cause. (See Dkt. No. 46 at 3) (noting that responsibility for the tardy response "rests entirely with the undersigned counsel")."[8]

The Ninth Circuit has affirmed denial of motions to withdraw on far kinder facts:

> "The SEC had the burden of proving that the withdrawal of Reese's admissions would prejudice it in maintaining the case on the merits. *Id*. Because Reese filed her motion for withdrawal almost two months after the SEC's motion for summary judgment, more than three months after written discovery had closed, and near the time that deposition discovery closed, the SEC may have succeeded in establishing that it would have been

[8] *Fish, LLC v. Harbor Marine Maint. & Supply, Inc.*, CASE NO. C17-0245-JCC, 8 (W.D. Wash. Apr. 16, 2018)

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> prejudiced by the withdrawal. Id. at 624. Even if Reese had satisfied both prongs of the 36(b) test, we would affirm the district court's denial of her motion to withdraw. . . . The district court did not abuse its discretion in denying Reese's motion to withdraw her admissions." *S.E.C. v. Global Express*[9]

Discovery in this case closed on September 23, 2022, and the dispositive motion deadline closed on October 21, 2022. Dkt. 194.

> "The district court did not abuse its discretion in denying Sheppard's belated motion to withdraw admissions under Federal Rule of Civil Procedure 36(b). The court reasonably found that Defendants relied on the admissions for nearly seven months, would have been prejudiced at trial by having forgone discovery on the admitted matters, and Sheppard failed to show good cause for his delay in seeking relief."[10]

Barton relied on the admissions in this case for about 24 months and now we are on the eve of trial. "Generally, the closer a date is to trial, the greater the prejudice."[11]

E. The Defendants fail the second prong due to the weakness of their case

In *Herb Reed Enters., Inc. v. Monroe Powell's Platters, LLC*[12] the Court denied the defendant's motion to withdraw admissions for reasons very applicable here.

> "the Defendants are seeking to make a pointless amendment from admitting that they have no case to admitting that they do not know whether they have a case . . . Here, allowing the Defendants to withdraw their admissions would prejudice the Plaintiffs because it would purposelessly delay the case. As discusses above, the proposed amendments are pointless. Allowing the amendments would prolong discovery causing undue expense and delay. Accordingly, the second prong of the Rule 36(b) analysis is not satisfied . . . Here, as mentioned above, the Defendants' proposed amendments are meaningless. Thus, the Plaintiffs have yet to receive reasonable amendments which they may rely upon. Further, the Defendants failed to respond to the

[9] *S.E.C. v. Global Express*, 289 F. App'x 183, 191 (9th Cir. 2008)

[10] *Sheppard v. Cnty. of L.A.*, No. 16-56622, 2 (9th Cir. Nov. 21, 2019)

[11] *Artemus v. Louie*, Case No.16-cv-00626-JSC, 4 (N.D. Cal. Dec. 21, 2016)

[12] *Herb Reed Enters., Inc. v. Monroe Powell's Platters, LLC*, 2:11-cv-02010-PMP-RJJ, (D. Nev. Oct. 24, 2012)

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> requests in a timely manner and failed to demonstrate good cause for their delay . . . Finally, the Defendants appear unlikely to prevail in this litigation."

Barton has shown in Dkt. 305 Section (G) that the Defendants' case is extremely weak. Allowing them to withdraw whatever other admissions is just prolonging a lawsuit they are extremely unlikely to win.

F. Good cause, duration, and quickness of action are factors

In case after case, courts look at the time period a party has relied on admissions, if the moving party had good cause, simple negligence, or acted willfully, and a party's diligence after learning admissions were deemed.

> "Plaintiff has also failed to show good cause for his delay in seeking relief from the deemed admissions . . . plaintiff finally served his responses on July 22, 2017, almost a month after they were due . . . Plaintiff was also notified that his responses were deemed admitted . . . and that he could not amend his admissions without leave of court . . . Despite receiving such notice in July, plaintiff did not file the instant motion until November 12, 2017 . . . Counsel should have known as of that date that leave of court was required once the responses were deemed admitted . . . At that time, plaintiff should have moved to be relieved from the deemed admissions, but failed to do so." *Mohsin v. Cal. Dep't of Water Res.*[13]

Although Mohsin satisfied the two prongs the motion to withdraw was denied. The Defendants fail them all. They do not have good cause. Barton has relied on these admissions for about 730 days. And they knew or had reason to know they should have acted two years ago. See also *Hawks v. Seery*[14] (the defendant was already responsible for considerable delay in the case, did not timely move the court to set the deemed admission aside, did not have good cause for the delay, and had a weak case.)

G. The eve of trial is a large factor

[13] *Mohsin v. Cal. Dep't of Water Res.*, No. 2:13-cv-1236-TLN-EFB, 7 (E.D. Cal. Jan. 8, 2018)

[14] *Hawks v. Seery*, No. CV-21-00092-PHX-DGC, 2 (D. Ariz. Jan. 17, 2023)

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The *Conlon* appeals court noted "when the district court issued its order [denying the motion to withdraw the deemed admissions] only eight days remained until trial". This very motion is noted for 10 days before trial is scheduled to commence.

H. They have already significantly delayed the case

In Dkt. 194, on July 22, 2022, the Court extended the discovery deadlines to September 23, 2022, because "The circumstances of this case also require an extension of certain pretrial deadlines. Specifically, the Court must extend the discovery and dispositive motion deadlines because the Court is ordering further responses [from the Defendants] and because of late disclosures made by defendants". They were also sanctioned $1,500.

In Dkt. 244 the Court commented again on the situation "the Court extended the initial discovery deadline from June 22, 2022, to September 23, 2022, due to defendants' failure to respond to discovery requests and their untimely disclosure of witnesses, which resulted in sanctions".

Had the Defendants not engaged in misconduct that delayed the case, this case would have gone to trial in the fall of 2022. Their conduct already delayed the case for a year.

I. Their conduct is sanctionable.

The Defendants are playing coy. On the one hand they don't admit that any of the RFAs were answered late, or not answered at all. On the other hand, they ask to withdraw deemed admissions. Perhaps one reason they are playing games is because many other courts have sanctioned parties for less egregious behavior. See *Duarte Nursery, Inc. v. U.S. Army Corps of Eng'rs*,[15] ("In considering a motion to withdraw deemed admissions, a court may impose sanctions, including the payment of a monetary fine or the opposing party's increased costs and

[15] *Duarte Nursery, Inc. v. U.S. Army Corps of Eng'rs*, No. 2:13-CV-02095-KJM-AC, 2 (E.D. Cal. Nov. 13, 2015)

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expenses, even when the court grants the motion to withdraw deemed admissions . . . Courts in this district have required a party withdrawing admissions to pay a sanction to the opposing party to compensate for the expense caused by its untimely response"), *Norcal Home Design Inc. v. Code Blue 360, LLC,*[16] ("Akin to an award of reasonable costs to a prevailing party on a discovery motion, courts may require a party withdrawing admissions to pay a sanction to the opposing party to compensate for the expense caused by its untimely response . . . Sanctions for violations of local rules and Federal Rules of Civil Procedure are appropriately directed at the lawyers responsible, rather than the litigants . . . the Court finds it appropriate to award reasonable fees and costs . . . Plaintiff's counsel to show cause why sanctions in the amount of $2,500.00 should not be ordered for the apparent gamesmanship and mishandling of this matter").

If their motion is denied, they should be sanctioned for the time they wasted. They have previously been sanctioned thousands of dollars and a greater amount should be considered here. If it is granted, only Barton should be permitted to conduct additional discovery and the Defendants should pay for all reasonable discovery efforts since conducting discovery at this late stage will be less fruitful and more expensive than if done years ago. The Defendants cited *Smith v. First Nat. Bank of Atlanta*[17] and although withdrawal was permitted, the moving party was ordered to pay $18,250 for partial compensation of expenses.

Conclusion

> "Trial courts are advised to be cautious in exercising their discretion to permit withdrawal or amendment of an admission" *999 v. C.I.T. Corp.*[18]

[16] *Norcal Home Design Inc. v. Code Blue 360, LLC*, 2:21-CV-00491-JAM-DMC, (E.D. Cal. Jan. 24, 2023)

[17] *Smith v. First Nat. Bank of Atlanta*, 837 F.2d 1575, 1577 (11th Cir. 1988)

[18] *999 v. C.I.T. Corp.*, 776 F.2d 866, 869 (9th Cir. 1985)

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The deemed admissions will have some effect on the trial on the merits but that is not sufficient to withdraw them.

> "the question is not whether allowing the deemed admissions would have any effect on a trial on the merits of the case; it is whether it would eliminate the need to reach a trial on the merits at all."[19]

The admissions at issue in this case, by themselves, do not eliminate the need for a trial. That should be the end of the analysis. Even if the Defendants could show both prongs of *Conlon* were met, the Court is not required to allow them to withdraw the admissions. *Conlon*.

This Court held a conference in which all parties were warned that deadlines were to be taken seriously and would only be extended for good cause. This situation arose because two licensed defense attorneys did not and do not understand that deemed admissions self-execute and the 30-day deadline has teeth. This is not good cause:

> "The Federal Rules of Civil Procedure are not suggestions; they are the rules of practice in federal court. Attorneys admitted to practice have a duty of competence to their clients to understand and appreciate the applicable rules, including those particular to federal court practice. The Court's concern is that exercising discretion to relieve DMC from these admissions undercuts the self-executing nature of Rule 36 and tacitly implies that a party's or its attorney's failure to abide by the rules of practice is of little or no consequence." *Doctors Med. Ctr. of Modesto*

Instead of admitting that the root of this motion was their ignorance of FRCP 36, the Defendants tried to mislead the Court. First by denying that they have failed to respond to five sets of RFAs (unanswered to this very day), and then by making nonsense excuses that wouldn't work even if true.

This situation would have been avoided if Opposing Counsel had read and understood FRCP 36 when Barton quoted it to her two years ago. This lawsuit would already have been

[19] *Carden v. Chenega Security Protection Services*, No. CIV S-09-1799-WBS-CMK, 4 (E.D. Cal. Apr. 8, 2011)

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resolved but for the three-month delay caused by their previous "failure to respond to discovery requests and their untimely disclosure of witnesses". Granting their motion is rewarding the ineptness this Court warned Opposing Counsel of in Dkt 153. By the time this motion is resolved by the Court, Barton will have fully briefed the motion in limine and trial brief, and will have submitted the pretrial order, jury instructions, proposed voir dire, attended the pre-trial conference, and will have prepared for the trial starting on January 29, 2024.

Further delay will waste much of these efforts and will cost time and money to go back into discovery, all because they would not listen to FRCP 36. At the same time, while it is the Court's time to spend how it wishes, the Court runs on the public's money and this isn't a good use of it. Other court cases will take longer to resolve. Future parties will point to the Court's ruling on this motion to argue that deadlines and rules aren't important if a party's incompetence is severe enough. It will encourage similar behavior by others.

It isn't worth it in a lawsuit where, as Barton's motion in limine Section G points out, the Defendants have admitted and testified their way into exonerating Barton for the alleged April 1, 2021 "opt in". The Defendants did not contest this in their Response.[20] With that out of the way a major element of Barton's claims – they called without consent – is established. This Court should save relief from the rules for parties who make inadvertent mistakes in otherwise strong cases. This isn't that.

The Ninth Circuit in *Lux EAP, LLC v. Bruner*[21] affirmed the trial court in a case where both *Conlon* prongs were met but Lux had not shown good cause for its delay in seeking relief from the deemed admissions "although Lux had been aware of its admissions for weeks, it failed to file a motion to withdraw them prior to the summary judgment hearing." These Defendants

[20] All they could do is try to claim that Delfgauw's sworn testimony should be only used for impeachment.

[21] *Lux EAP, LLC v. Bruner*, No. 19-55453, 2 (9th Cir. Apr. 24, 2020) (Unpublished).

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have known or should have known for years their admissions were deemed and did nothing until the eve of trial. Their motion should be denied.

_____s/ Nathen Barton _____ ____1/8/2024_____
(signed) (Dated)

Nathen Barton
(469) 347 2139
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DECLARATION OF NATHEN BARTON

My name is Nathen Barton and I live at 4618 NW 11th Cir, Camas WA 98607. I am over the age of eighteen, and otherwise competent to be a witness in this matter. Except as expressly set forth herein, I make this declaration in my personal capacity and based on my personal knowledge.

- The screenshots of admission requests and the responses thereto are true and correct.
- The screenshots of interrogatory requests and the responses thereto are true and correct.
- The screenshots of deposition testimony are true and correct.
- The screenshots of emails are true and correct and are not misleading.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing statements are true and correct.

_____/s/ Nathen Barton_____ ___1/8/2024___ Signed in Camas Washington
Signed by Nathen Barton Date Clark County

CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing document to be electronically filed with the Clerk of the Court using the Electronic Filing (CM/ECF) system, which will send notification of such filing to all counsel of record and all pro se parties registered to use the CM/ECF system.

s/ Nathen Barton — 1/8,/2024
Nathen Barton — (Dated)

LCR 7(e)(4) Certification

I hereby certify this motion contains 4,102 words.

s/ Nathen Barton — 1/8/2024
Nathen Barton — (Dated)

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