

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF NEVADA

3 * * *

4 HYBRID INTERNATIONAL, LLC, a
5 Texas limited liability company;
JOHNATHAN SCHULTZ, an individual,

6 Plaintiff,

7 v.

8 SCOTIA INTERNATIONAL OF NEVADA,
9 INC., a Utah corporation; WARREN
BARBER, an individual; MAX BARBER, an
10 individual; DOES I through X; and ROE
business entities I through X, inclusive,

11 Defendants.

12 SCOTIA INTERNATIONAL OF
13 NEVADA, INC., a Utah corporation,

14 Counterclaimant,

15 v.

16 HYBRID INTERNATIONAL, LLC, a
Texas limited liability company,17 Counterdefendant.
18

Case No. 2:19-cv-02077-JCM-EJY

ORDER

19 Before the Court is Scotia International, Max Barber, and Warren Barber's Motion to
20 Withdraw Admissions and Showing Cause. ECF No. 77. Plaintiffs Hybrid International and
21 Johnathan Schultz filed a Response (ECF No. 78), and Defendants filed a Reply (ECF No. 80). The
22 Court finds as follows.

I. BACKGROUND

24 Plaintiffs filed this breach of contract lawsuit against Defendants in state court. Defendants
25 removed the case to this Court on December 4, 2019. ECF No. 1. Plaintiffs filed a First Amended
26 Complaint on August 31, 2020. ECF No. 46. Defendants filed an Answer and Counterclaims on
27 October 8, 2020. ECF No. 61. The parties exchanged initial disclosures, and in October 2020,
28 Plaintiffs served Defendants with their First Request for Admissions ("RFAs"), First Set of

1 Interrogatories, and First Request for Production of Documents and Things. Plaintiffs also issued
2 subpoenas seeking relevant information from third parties. Defendants sought to quash those third-party
3 subpoenas. ECF Nos. 35, 45. Both motions were denied. ECF No. 50, 58. Aside from the effort to
4 quash subpoenas, no other discovery actions were taken by Defendants.

5 On November 9, 2020, counsel for Defendants moved the Court to withdraw from this case.
6 ECF No. 63. The Court granted counsel's withdrawal motion and ordered that "the due date for
7 Defendants' responses to Plaintiff's written discovery ... [be] stayed for thirty (30) days" from the then-
8 required due date. ECF No. 65. The Court further ordered that neither party was allowed to propound
9 written discovery or set depositions during the period measured from the date of the Order through
10 December 30, 2020. The approximate six-week period of stayed discovery was provided to allow
11 Defendants to locate and retain new counsel. *Id.*

12 On December 18, 2020, Plaintiffs filed a motion to "stay discovery and trial deadlines pending
13 a notice of appearance of new counsel for Scotia and the Barber Defendants." ECF No. 66 at 2. The
14 Court granted a discovery stay through January 29, 2021, and Defendants were ordered to respond to
15 outstanding discovery propounded by Plaintiffs on or before February 16, 2021. ECF No. 69 at 4. The
16 Court further ordered that "if Defendants fail to respond to pending discovery, irrespective of whether
17 they retain counsel on or before the due date stated above, Plaintiffs may move to compel and for
18 sanctions." *Id.* Defendants did not respond to discovery or retain new counsel by the due date.

19 On February 23, 2021, Plaintiffs filed a motion for an order to show cause, stating that
20 Defendants had, yet again, failed to obtain counsel or respond to their discovery requests by the Court's
21 deadline. ECF No. 70. Plaintiffs requested that Defendants' RFAs be deemed admitted, and that
22 Defendants be required to show cause why they should not be held in contempt for failing to obey the
23 Court's discovery orders. *Id.* The Court granted Plaintiffs' motion, deemed Defendants to have admitted
24 each of the RFAs propounded by Plaintiffs, and ordered Defendants to show cause by May 20, 2020 why
25 they should not be held in contempt of Court. ECF No. 71. Defendants were further warned that failure
26 to timely respond to the order to show cause "shall result in a finding of contempt of court and additional
27 sanctions up to and including the striking of their answer and counterclaims or a finding of default." *Id.*
28 at 3.

1 On May 11, 2021, new counsel for Defendants entered their appearance and filed the pending
2 Motion to Withdraw Admissions and Showing Cause. ECF No. 77. Through this motion, Defendants
3 contend that they were unable to find counsel, and that pleadings and orders in this case were not mailed
4 to the correct address for Scotia. Further, Defendants claim they believed Plaintiffs “intended to wait
5 until Scotia had retained counsel before moving forward with discovery” based on Plaintiffs’ “previous
6 willingness to extend the discovery response deadlines” and therefore “did not believe that [Plaintiffs]
7 would force its responses or seek sanctions prior to Scotia obtaining new counsel.” *Id.* at 5.

8 **II. DISCUSSION**

9 **A. Defendant’s Motion to Withdraw Admissions is denied.**

10 Rule 36(a) states that a matter is deemed admitted “unless, within 30 days after being served,
11 the party to whom the request is directed serves on the requesting party a written answer or objection
12 addressed to the matter and signed by the party or its attorney.” Fed. R. Civ. P. 36(a)(3). Once
13 admitted, the matter “is conclusively established unless the court, on motion, permits the admission
14 to be withdrawn or amended.” Fed. R. Civ. P. 36(b).

15 The Ninth Circuit emphasizes that a court’s decision to grant relief under Rule 36(b) is
16 permissive, not mandatory, and that “[u]nanswered requests for admissions may be relied on as the
17 basis for summary judgment.” *Conlon v. United States*, 474 F.3d 616, 621 (9th Cir. 2007). “Trial
18 courts [have been] advised to be cautious in exercising their discretion to permit withdrawal or
19 amendment of an admission.” *Id.* (quoting *999 v. C.I.T. Corp.*, 776 F.2d 866, 869 (9th Cir. 1985)).
20 The Court *may* permit withdrawal or amendment if doing so (1) would promote the presentation of
21 the merits of the action and (2) if the court is not persuaded that it would prejudice the requesting
22 party in maintaining or defending the action on the merits. Fed. R. Civ. P. 36(b). “The party relying
23 on the deemed admission has the burden of proving prejudice.” *Conlon*, 474 F.3d at 622.

24 While “a district court must specifically consider both factors under the rule before deciding
25 a motion to withdraw or amend admissions,” the court is not required to permit withdrawal even if
26 both factors are met. *Id.* at 622, 624–25. “[I]n deciding whether to exercise its discretion when the
27 moving party has met the two-prong test of Rule 36(b), the district court may consider other factors,
28 including whether the moving party can show good cause for the delay and whether the moving

1 party appears to have a strong case on the merits.” *Id.* at 625. Even so, “a court should not go
2 beyond the necessities of the situation to foreclose the merits of controversies as punishment.”
3 *Hadley v. United States*, 45 F.3d 1345, 1348 (9th Cir. 1995).

4 Here, Defendants arguably meet both prongs of the Rule 36(b) test. The deemed admissions
5 would, in effect, preclude any presentation of this case on the merits as they act to admit essentially
6 all facts alleged in Plaintiff’s First Amended Complaint and to disprove the allegations in
7 Defendants’ Counterclaims. *See* ECF No. 70 at 14-18 (Plaintiff’s RFA’s to Scotia); *see also Sonada*
8 *v. Cabrera*, 255 F.3d 1035, 1039 (9th Cir. 2001) (finding first prong met when admissions “would
9 effectively eliminate a merits determination”). Further, the Court is not persuaded that withdrawal
10 would prejudice the requesting party in maintaining or defending this action on the merits. The
11 Ninth Circuit is “reluctant to conclude that a lack of discovery, without more, constitutes prejudice.”
12 *Conlon*, 474 F.3d at 624. Rather, any such prejudice “must relate to the difficulty a party may face
13 in proving its case at trial.” *Id.* Plaintiffs claim that withdrawal will prejudice them because
14 discovery is closed, and because prolonging this case would potentially prejudice Hybrid’s ability
15 to collect any judgment against Defendants. Neither showing of prejudice relates to Plaintiffs’
16 ability to present their case at trial and therefore are not the types of prejudice the Ninth Circuit
17 considers when addressing withdrawal motions. *See, e.g., Id.* (rejecting prejudice argument related
18 to closed discovery, noting that “[t]he district court could have reopened the discovery period”).

19 However, Defendants have not shown good cause to allow withdrawal. Defendants’ motion
20 argues that there were three reasons for their failure to comply with discovery and the Court’s orders:
21 (1) Plaintiffs’ pleadings were not mailed to the right Scotia address; (2) Defendants were “unable
22 to obtain counsel”; and (3) Defendants did not believe Plaintiffs would pursue this case while Scotia
23 did not have counsel. All are unavailing reasons that do not demonstrate good cause why Defendants
24 failed to participate in this case.

25 First, Defendants’ contention that Scotia was not properly served appears disingenuous. As
26 Plaintiffs explain, they mailed their pleadings to three addresses, all provided by Defendants’ prior
27 counsel upon withdrawal, including: (1) a Scotia address listed by Defendants’ prior counsel as
28 “corporate headquarters,” (2) the listed address for Max Barber, and (3) the listed address for Warren

1 Barber.¹ See ECF No. 78-2 (Certificates of Mailing/Service for ECF Nos. 66, 68, 70, 72).
2 Defendants claim that the “corporate headquarters” address is not the address listed on the Nevada
3 and Utah Secretary of State websites, and therefore that the documents were not properly served on
4 Scotia. ECF No. 77 at 5. Defendants also contend that the pleadings were not “served upon Scotia’s
5 registered agent for service of process.” *Id.* However, Plaintiffs have demonstrated that the
6 corporate headquarters address they sent litigation materials to was, in fact, the primary address
7 listed on both state websites before Defendants changed those addresses on March 25, 2021 and
8 April 2, 2021, which is *after* Plaintiffs filed their motion for an order to show cause.² Further,
9 Scotia’s registered agent for service, Dorothy Barber, lives at the same address of Max Barber—an
10 address that Plaintiffs have mailed their pleadings to in this case.

11 Defendants carefully crafted their motion and supporting declaration to avoid discussing
12 whether Max, Dorothy or Warren received any the pleadings in this case—Max Barber merely states
13 that he and the other Scotia officers and directors were not *personally served* with the motion for an
14 order to show cause. ECF No. 77-1 (Declaration of Max Barber). But personal service of pleadings
15 is not required by the federal rules. See Fed. R. Civ. P. 5(b)(2)(c) (allowing service of pleadings and
16 other papers by “mailing it to the person’s last known address—in which event service is complete
17 upon mailing”). Defendants do not deny that Plaintiffs mailed all pleadings and papers to (1) the
18 address listed by prior counsel as “corporate headquarters” and listed as Scotia’s primary address in
19 Nevada and Utah until March and April 2021, (2) Max Barber’s listed address, which happens to be
20 Scotia’s registered agent’s address, and (3) Warren Barber’s listed address.

21 Further, Defendants confusingly contend that they did not believe they had to act quickly to
22 find counsel because Plaintiffs moved to stay discovery after counsel withdrew proving that at least
23 one of the Defendants must have received Plaintiffs’ mailings while they were without counsel.
24 Tellingly, Defendants seem to abandon the argument regarding proper service in their reply and drop

25 ¹ Prior counsel provided a second address for Scotia, listed as an “office building.” See ECF No. 63 at 2. This
26 secondary address is the one Defendants now claim should have been used.

27 ² Compare ECF No. 78-3 (Scotia’s information on Nevada Secretary of State website before March 25, 2021,
28 listing corporate headquarters as primary address for all officers) and ECF No. 78-6 (Scotia’s information, registered
with Utah Secretary of State, listing corporate headquarters as principal address before April 2, 2021) with ECF No. 78-
4 (Nevada Secretary of State website showing address change on March 25, 2021) and ECF No. 78-5 (Utah Secretary
of State form showing address change for Scotia and its registered agent on April 2, 2021).

1 all pretense of arguing that their delay is excusable because of improper service. This fact, together
2 with Defendants' misrepresentation weigh in support of a finding of bad-faith litigation tactics, not
3 proof of Defendants' renewed commitment to engaging in this litigation.

4 Second, Defendants' proffered inability to retain counsel fails to be persuasive. The Court
5 provided Defendants with multiple extensions of the deadline to find counsel. Defendants did not,
6 and they provide no intelligible reason why they were unable to comply with those orders. Indeed,
7 in a similar case brought against Defendants in the District of Utah, Defendants' counsel withdrew
8 on November 6, 2020.³ ECF No. 78-1 at 22 (Civil Docket for Utah District Court Case No. 2:20-
9 cv-00610-JNP-CMR, ECF No. 155) (the "Utah case"). On December 14, 2020, the Magistrate Judge
10 in that case ordered Defendants to show cause why default judgment should not be entered against
11 them for failure to file an appearance of new counsel. *Id.* at 23 (Order to Show Cause at Utah case
12 ECF No. 165). Then, by December 22, 2020, Defendants found new counsel. *Id.* (Notices of
13 Appearance at Utah case ECF Nos. 166 & 167). Upon reviewing Defendants' actions in this and
14 the Utah case, it appears to the Court that Defendants may ignore Court orders until they are faced
15 with an order to show cause.

16 Defendants have not explained why they were unable to find counsel before an order to show
17 cause was issued against them. And, Defendants' action in at least one other case demonstrates their
18 ability to find new counsel as early as December 2020. Any delay attributed to Defendants'
19 "inability" to retain counsel does not show good cause for Defendants' inactivity in this case.

20 Third, Defendants' representation that they did not believe Plaintiffs would continue seeking
21 discovery while Defendants were without counsel is specious. While Plaintiffs sought a stay of
22 discovery while Defendants were meant to be looking for counsel, it was not reasonable to conclude
23 that a motion to stay discovery absolved Defendants of their obligation to find counsel in a timely
24 manner. Further, the Court denied Plaintiff's motion in part and gave Defendants a firm deadline to
25 find counsel and respond to discovery. At that time, any inclination that Plaintiffs' leniency would

26 ³ Defendants contend, without supporting authority, that filings in the other cases against them are irrelevant and
27 should not be considered. The Court disagrees and properly takes judicial notice of the docket and pleadings in the Utah
28 case. *See* Fed. R. Evid. 201(b); *White v. Martel*, 601 F.3d 882, 885 (9th Cir. 2010); *Harris v. City of Orange*, 682 F.3d
1126, 1132 (9th Cir. 2012) ("We may take judicial notice of undisputed matters of public record ... including documents
on file in federal or state courts").

1 advantage Defendants certainly should have dissipated. Allowing Defendants to ignore scheduling
2 orders simply because Plaintiffs once sought to stay discovery would undermine the purpose and
3 effect of those orders. *See Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 610 (9th Cir. 1992)
4 (“Disregard of [scheduling orders] “would undermine the court’s ability to control its docket, disrupt
5 the agreed-upon course of the litigation, and reward the indolent and the cavalier.”) (internal citations
6 omitted). Moreover, Defendants’ excuse is surprising as it implicates an insidious motive behind
7 dragging their feet to find counsel—they thought Plaintiffs would not pursue this case until new
8 counsel was found giving Defendants an incentive to put off the search. Unfortunately for
9 Defendants, Plaintiffs have persevered, and Defendants can no longer ignore Court orders.

10 In short, Defendants ask the Court to find that the last six months of noncompliance should
11 be ignored because—after facing the possibility of sanctions—they are now “committed to
12 continuing this litigation in a timely, efficient, and professional manner.” ECF No. 77 at 8.
13 Defendants come to this position too late to avoid any consequences for their inaction. The reasons
14 Defendants proffer for their inaction are, at best, insufficient to show good cause or, at worst, rooted
15 in misrepresentations meant to mislead the Court. Defendants’ lack of participation in this case,
16 their repeated attempts to quash duly served subpoenas, and their failure to pursue their affirmative
17 counterclaims through discovery or otherwise, demonstrate a lack of good faith throughout this
18 litigation.

19 Defendants’ actions in this case do not amount to good cause to excuse their failures to defend
20 against Plaintiffs’ case or prosecute their own. They have not proffered any good reasons for why
21 they have allowed the discovery period in this case to lapse without responding to any of Plaintiffs’
22 discovery requests or requesting any discovery to support their own affirmative counterclaims.
23 Defendants have still not attempted to answer the outstanding discovery pending since October 2020,
24 and they have failed to show any good cause or excusable neglect that would warrant re-opening
25 discovery.⁴ Instead, Defendants have shown that they have not taken this litigation seriously and

26 ⁴ Defendants appear to seek an extension of the discovery deadline in their motion to withdraw admissions. ECF
27 No. 77 at 6 (“Scotia’s counsel requests a reasonable deadline to respond to the discovery so that Scotia’s responses are
28 complete and fully and adequately respond to all requests.”). Defendants did not file a separate motion requesting such
relief, as required by LR IC 2-2(b) (“For each type of relief requested or purpose of the document, a separate document
must be file and a separate event must be selected for that document”). Further, Defendants did not include the

1 provide no legitimate reasons to assure the Court that they will now. They may have attempted to
2 mislead the Court about service difficulties that appear manufactured to excuse their inactivity. No
3 lesser sanction than deemed admissions will suffice to respond to their conduct. The Court therefore
4 exercises its discretion to deny Scotia's request to withdraw its deemed admissions.

5 **B. The Court declines to hold Scotia in contempt.**

6 In their motion, Defendants offer the excuses discussed above to support their contention that
7 they should not be held in contempt. As discussed above, those excuses do not persuade the Court.
8 Plaintiffs, in their opposition, contend that civil contempt is still an appropriate remedy here, and ask
9 the Court to strike Defendants' answer and counterclaims and render default judgment against them.
10 Defendants, apparently realizing that their proffered excuses do little to help their argument, respond
11 in reply that they *cannot* be held in contempt because they did not violate a "clear and definite" court
12 order. ECF No. 80 at 3-5. According to Defendants, the multiple court orders related to Defendants'
13 obligations to find counsel or respond to discovery were merely orders extending deadlines, not ones
14 clearly requiring any affirmative action by Defendants. *Id.*

15 Even putting aside the questionable logic of Defendants' argument, and the fact that they
16 raised this argument only in reply,⁵ the Court declines to hold Defendants in civil contempt.
17 Deeming the RFAs admitted is a sufficiently severe sanction to address Defendants' conduct in this
18 case. Further, civil contempt is meant to be coercive or compensatory, not punitive. *Shell Offshore*
19 *Inc. v. Greenpeace, Inc.*, 815 F.3d 623, 629 (9th Cir. 2016) (noting that there are two types of
20 contempt—civil and criminal—and "[t]he purpose of civil contempt is coercive or compensatory,
21 whereas the purpose of criminal contempt is punitive") (internal quotations omitted). "The test [to
22 distinguish civil from criminal contempt] is 'what does the court primarily seek to accomplish by
23 imposing the sanction?'" *Falstaff Brewing Corp. v. Miller Brewing Co.*, 702 F.2d 770, 778 (9th Cir.
24 1983) (quoting *Shillitani v. United States*, 384 U.S. 364, 370 (1966)). Plaintiffs do not seek any
25 coercive contempt order compelling Defendants to respond to still-outstanding discovery. Nor do

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27 information required by LR 26-3 to allow an extension of the discovery deadlines. While the Court does not undertake
28 a separate analysis of any such extension request, the good cause discussion relevant to the deemed admissions is
nevertheless relevant to any extension discussion and indicates that any such request should also be denied.

⁵ The Court "need not consider arguments raised for the first time in a reply brief." *Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007) (citing *Koerner v. Grigas*, 328 F.3d 1039, 1048 (9th Cir. 2003)).

1 Plaintiffs explain how a civil contempt order rendering default judgment would “compensate the
2 complainant for losses sustained” that would not already be addressed by the deemed admissions.
3 *Shell Offshore*, 815 F.3d at 629 (quoting *United States v. UMWA*, 330 U.S. 258, 303–04 (1947)). By
4 ordering Plaintiffs’ preferred contempt sanctions, the Court would be punishing Defendants for their
5 actions, rather than attempting to induce compliance with a court order or to compensate Plaintiffs.
6 *See Falstaff Brewing*, 702 F.2d at 778 (“The primary purpose of criminal contempt is to punish past
7 defiance of a court’s judicial authority, thereby vindicating the court.”). The Court declines to issue
8 contempt sanctions that would be effectively criminal in nature.

9 **C. Monetary sanctions are warranted to compensate Plaintiffs for Defendants’**
10 **conduct.**

11 Courts have “the inherent power to impose sanctions for ... bad-faith conduct.” *Chambers*
12 *v. NASCO, Inc.*, 501 U.S. 32, 46 (1991); *see also Roadway Express, Inc. v. Piper*, 447 U.S. 752, 765
13 (year) (recognizing the “well-acknowledged inherent power of a court to levy sanctions in response
14 to abusive litigation practices”). One such “permissible sanction is an assessment of attorney’s
15 fees”—an order . . . instructing a party that has acted in bad faith to reimburse legal fees and costs
16 incurred by the other side.” *Goodyear Tire & Rubber Co. v. Haeger*, __ U.S. __, 137 S.Ct. 1178,
17 1186 (2017) (citing *Chambers*, 501 U.S. at 45).

18 The Court finds that Defendants’ bad faith conduct in avoiding this litigation and failing to
19 timely retain counsel or respond to discovery is sanctionable conduct allowing Plaintiffs
20 reimbursement of attorneys’ fees and costs expended in opposing Defendants’ Motion to Withdraw
21 Admissions and Showing Cause (ECF No. 78).

22 **III. Order**

23 Accordingly, IT IS HEREBY ORDERED that Defendants’ Motion to Withdraw Admissions
24 and Showing Cause (ECF No. 78) is DENIED. The Court affirms its determination that Defendants’
25 Admissions are deemed admitted. The Court further DENIES Defendants’ request to extend the
26 deadline to respond to discovery.

27 IT IS FURTHER ORDERED that dispositive motions shall be due on or before **September**
28 **23, 2021**. The joint pretrial order shall be due 30 days after the dispositive-motion deadline. If

1 dispositive motions are filed, the joint pretrial order shall be due 30 days after decision on those
2 motions.

3 IT IS FURTHER ORDERED that Defendants shall be required to pay reasonable fees and
4 costs incurred by Plaintiffs related to their response to Defendants' Motion to Withdraw Admissions
5 and Showing Cause.

6 IT IS FURTHER ORDERED that, within ten (10) days of the date of this Order Plaintiffs
7 shall submit a memorandum of fees and costs incurred in responding to Defendant's Motion,
8 detailing the activities, hours spent (in tenths of hours), and the rate charged by each attorney who
9 worked on the response. Appropriate redactions from billing records for attorney client privilege
10 and/or work product may be made for the public filing with non-redacted copies of such records
11 filed under seal. Plaintiffs shall also submit to the Court records evidencing the costs incurred
12 relating to their response. Defendants shall have 14 days to file a response, if any is desired. No
13 reply shall be permitted by Plaintiff.

14 Dated this 24th day of August, 2021.

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17 ELAYNA J. YOUCHAK
18 UNITED STATES MAGISTRATE JUDGE
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