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STATE OF MINNESOTA DISTRICT COURT

COUNTY OF OTTER TAIL SEVENTH JUDICIAL DISTRICT

Gregory P. Hammes and Stephanie C. Hammes,

Plaintiffs,

vs.

Terry Magnuson, Barb Magnuson, Steven Larson, and Lakes & Plains Realty, Inc. d/b/a Coldwell Banker at the Lakes,

Defendants.

Case Type: Other Civil
Court File No. 56-CV-20-794

DEFENDANT TERRY MAGNUSON'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL DISCOVERY

INTRODUCTION

314

That is the number of interrogatories Plaintiffs Gregory P. Hammes and Stephanie C. Hammes (collectively "Plaintiffs") have served on Defendant Terry Magnuson ("Terry Magnuson"). Plaintiffs' Interrogatories are replete with interrogatories that contain separate and distinct questions, including, but not limited to, seeking the factual basis for 67 Requests for Admissions, 11 affirmative defenses, 108 denials to the allegations in Plaintiffs' Complaint and 54 responses to the allegations in Plaintiffs' Complaint for which Terry Magnuson lacked sufficient information to admit or deny. This is not a case of Terry Magnuson nitpicking Plaintiffs' Interrogatories; this is a case of a blatant attempt to circumvent the Rules of Civil Procedure and to unduly burden Terry Magnuson with improper discovery. Because Plaintiffs' Interrogatories grossly exceed the 50 interrogatory limit pursuant to the Rules, Plaintiffs' Motion to Compel Discovery should be denied and Terry Magnuson should be awarded his attorney fees and costs in having to respond to Plaintiffs' Motion.

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STATEMENT OF THE ISSUES

1. Whether Plaintiffs' Motion to Compel Discovery should be denied because Plaintiffs have served more than the 50 interrogatories permitted pursuant to Minnesota Rules of Civil Procedure Rule 33.01(a).

2. Whether Terry Magnuson should be awarded his attorney fees and costs incurred in connection with having to respond to Plaintiffs' Motion to Compel Discovery because Plaintiffs' Motion was not substantially justified.

RECORD

1. Pleadings and all documents on file with the Court;

2. Declaration of Natalie R. Walz;

3. Defendant Terry Magnuson's Answers to Plaintiffs' Interrogatories and Requests for Production of Documents, a copy of which is attached as Exhibit A to the Declaration of Natalie R. Walz; and

4. Defendant Terry Magnuson's Responses to Plaintiffs' Requests for Admissions, a copy of which is attached as Exhibit B to the Declaration of Natalie R. Walz.

STATEMENT OF FACTS

Plaintiffs commenced the above-captioned matter on or about October 30, 2019 asserting claims against Terry Magnuson for alleged nondisclosure of material facts regarding the geothermal heating and cooling system and the well on the subject property in connection with Plaintiffs' purchase of the subject property. (Compl. (Oct. 30, 2019).) On March 23, 2020, Plaintiffs purported to serve a joint set of Interrogatories, Requests for Production of Documents and Requests for Admissions on Terry Magnuson by email. (Walz Decl. ¶ 2 (July 13, 2020).) The parties, however, had not yet held the discovery conference required pursuant to Minnesota Rules of Civil Procedure Rule 26.06 and the parties had not agreed to accept service via email. (*Id.* at ¶ 3); Minn. R. Civ. P. 26.04 (2020) (stating parties cannot serve discovery until the parties have

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held discovery conference and prepared discovery plan pursuant to Minn. R. Civ. P. 26.06). The parties held the discovery conference on March 27, 2020 and finalized the Discovery Plan on March 30, 2020. (Walz Decl. ¶ 4.)

Even though Plaintiffs' discovery requests were not properly served, Terry Magnuson informed Plaintiffs that he would not require Plaintiffs to serve their discovery requests and would deem the discovery requests served as of March 30, 2020, the day the Discovery Plan was completed. (*Id.* at ¶ 5.) On April 29, 2020, Terry Magnuson timely served objections to Plaintiffs' Interrogatories and fully responded to Plaintiffs' Requests for Production of Documents and Requests for Admissions. (*Id.* at ¶¶ 6-7. Ex. A-B.)

On May 13, 2020, Plaintiffs demanded that Terry Magnuson provide answers to all of their Interrogatories in their "as is" form. (*Id.* at ¶ 8, Ex. C.) Terry Magnuson explained to Plaintiffs that, by an extremely generous count, e.g., counting Plaintiffs' interrogatory requesting the factual basis for Terry Magnuson's denial of Plaintiffs' 68 Requests for Admissions as one interrogatory, not 68 interrogatories, Plaintiffs' combined set of Interrogatories contained at least 94 interrogatories. (*Id.*) Terry Magnuson informed Plaintiffs that if they wanted to revise their combined set of Interrogatories to comply with the Rules, Terry Magnuson would answer the same. (*Id.*) When Plaintiffs steadfastly refused, Terry Magnuson informed Plaintiffs that if they brought a motion to compel the same, Terry Magnuson would count their Interrogatories in accordance with applicable law which would result in an even higher interrogatory count. (*Id.*) Plaintiffs now bring a Motion to Compel Terry Magnuson's answers to their Interrogatories based on Terry Magnuson's objection that the Interrogatories exceed the number permitted pursuant to Minnesota Rules of Civil Procedure Rule 33.01(a).[1]

[1] Plaintiffs do not seek to compel Terry Magnuson's answers to their Interrogatories based on the other objections asserted by Terry Magnuson to Plaintiffs' Interrogatories. (*See* Pls.' Mem. Support Mot. Compel Disc. (July 2, 2020).)

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ARGUMENT

I. PLAINTIFFS' MOTION TO COMPEL DISCOVERY SHOULD BE DENIED BECAUSE PLAINTIFFS HAVE SERVED MORE INTERROGATORIES THAN PERMITTED PURSUANT TO MINNESOTA RULES OF CIVIL PROCEDURE RULE 33.01(a).

Parties to a lawsuit are permitted to "obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense . . . ." Minn. R. Civ. P. 26.02(b). Parties may obtain discovery through written interrogatories. *Id.* 26.02(a). However, "[n]o party may serve more than a total of 50 interrogatories upon any other party unless permitted to do so by the court upon motion, notice and a showing of good cause." *Id.* 33.01(a). In determining "the total number of interrogatories each subdivision of separate questions shall be counted as an interrogatory." *Id.*; *Id.* 33.01(d) (stating "party may serve upon any other party written interrogatories, not exceeding 50 in number including all discrete subparts . . ."). The party upon whom the interrogatories are served "must respond by either answering the question to the extent his knowledge permits or declaring his lack of knowledge, or by making objections." *Garrity v. Kemper Motor Sales*, 159 N.W.2d 103, 106 (Minn. 1968); Minn. R. Civ. P. 33.01(b).

Where a party believes that another party has served interrogatories in excess of the Rules of Civil Procedure, it is proper for the party to object to all of the interrogatories as the party otherwise waives his objection that the party has exceeded the number of interrogatories permitted pursuant to the Rules. *State by Mattson v. Boening*, 276 Minn. 151, 149 N.W.2d 87 (1967) (stating failure to object to interrogatories in manner provided by Rules is a waiver of all defects and objections except those relating to privilege, work product and expert's conclusions); *see Allahverdi v. Regents of Univ. of New Mexico*, No. COV 05-0277 (JB/DJS), 228 F.R.D. 696

Terry Magnuson, therefore, does not address those objections herein. However, nothing herein shall be construed as a waiver by Terry Magnuson to those other and additional objections to Plaintiffs' Interrogatories.

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(D.N.M. July 11, 2005); *Constr. Sys., Inc. v. Gen. Cas. Co. of Wisconsin*, No. CV 09-3697 (RHK/JJG), 2011 WL 13312221, at *3-4 (D. Minn. Apr. 22, 2011) (finding party waived objection to interrogatory by responding to interrogatory). Accordingly, contrary to Plaintiffs' contention, it would not be proper for the responding party to choose 50 interrogatories to answer and then object to the balance of the interrogatories. *Id.* Nor would the propounding party want the responding part to do so; the Rules count interrogatories not answers. Minn. R. Civ. P. 33.01(a) (stating "[n]o party may serve more than a total of 50 interrogatories . . ." (emphasis added).) Accordingly, the responding party could pick 50 interrogatories, object to all or any portion of them and have no further obligation to answer any of the remaining interrogatories.[2]

The terms "separate question" and "discrete subpart" do not have precise definitions, however, courts generally find that "interrogatory subparts are to be counted as one interrogatory . . . if they are logically or factually subsumed within and necessarily related to the primary question." *In re: Activated Carbon-Based Hunting Clothing Mktg. & Sales Practices Litig.*, No. 09-MD-2059 (RHK/JJK), 2009 WL 10659390, at *2 (D. Minn. Sept. 22, 2009) (internal quotations omitted); *T.A. Schifsky & Sons, Inc. v. Bahr Constr., LLC*, 773 N.W.2d 783, 787 n. 3 (Minn. 2009) (stating "[w]here the language of the Federal Rules of Civil Procedure is similar to language in the Minnesota civil procedure rules, federal cases on the issue are instructive"). Alternatively stated, "once a subpart of an interrogatory introduces a line of inquiry that is separate and distinct from the inquiry made by the portion of the interrogatory that precedes it, the subpart

[2] Plaintiffs chastise Terry Magnuson for not answering at least 50 interrogatories from their combined set of Interrogatories. (Pls.' Mem. Support Mot. Compel Disc. 3 at ¶ 4.) In addition to the fact that had Terry Magnuson done so Plaintiffs would have undoubtedly argued this constituted a waiver of Terry Magnuson's objection that Plaintiffs' Interrogatories exceed the number permitted by the Rules, it is unclear why Plaintiffs would want Terry Magnuson to select 50 of the Interrogatories to answer as opposed to Plaintiffs selecting the 50 Interrogatories they want Terry Magnuson to answer. Terry Magnuson gave Plaintiffs this opportunity during his conference with Plaintiffs pursuant to Minnesota Rules of Civil Procedure Rule 37, but Plaintiffs refused to choose 50 Interrogatories for Terry Magnuson to answer. (Walz Decl. ¶ 8, Ex. C.)

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must be considered a separate interrogatory no matter how it is designated." *Henschen & Assocs., LLC v. Am. Portfolios Fin. Servs., Inc.*, No. CV 10-3590 (SRN/JSM), 2012 WL 13027961, at *6 (D. Minn. Apr. 9, 2012) (internal quotations omitted).

The best test for determining whether multiple questions within a single interrogatory constitute one or multiple interrogatories "is to examine whether the first question is primary and subsequent questions are secondary to the primary question." *Id.* The court should ask "can the subsequent question stand alone? Is it independent of the first question?" *Id.* While genuine subparts should not be counted as separate interrogatories, discrete or separate question should even if they are joined by a conjunctive word and may be related. *Id.*; Fed. R. Civ. P. 33, advisory committee note (1968) (stating "each separate question shall be counted as a separate interrogatory even though it is related to a prior question or is a subdivision of a question"). A party cannot evade the limitation imposed by Minnesota Rules of Civil Procedure Rule 33.01(a) by joining as subparts questions that seek information about discrete or separate subjects. *Id.*

Here, Plaintiffs jointly served 31 numbered Interrogatories on Terry Magnuson. (Walz Decl. ¶ 6, Ex. A.) However, at least 21 of these numbered interrogatories contain discrete and separate questions. When the discrete and separate questions in Plaintiffs' Interrogatories are counted, Plaintiffs' joint Interrogatories grossly exceed the 50 interrogatories permitted pursuant to Minnesota Rules of Civil Procedure Rule 33.01(a).[3]

[3] Minnesota Rules of Civil Procedure Rule 33.01(a) provides that "[n]o party may serve more than a total of 50 interrogatories upon any other party. . . ." The Rule does not limit the number of interrogatories that may be served on a party where multiple parties may be represented by the same counsel. *Id.* Terry Magnuson does not dispute that each Plaintiff in this action initially was entitled to serve 50 interrogatories on each Defendant. Indeed, Defendants Terry Magnuson and Steven Larson each served interrogatories on Plaintiffs even though both Defendants and both Plaintiffs are represented by the same counsel. (Walz Decl. ¶¶ 9-10.) However, unlike Plaintiffs' Interrogatories that were combined in one set, Defendants Terry Magnuson and Steven Larson's Interrogatories were properly served as different sets. (*Id.*) By choosing to combine their Interrogatories into one set, Plaintiffs waived any right they had to each serve 50 interrogatories on a party, i.e., each Plaintiff asked the same interrogatories to the same Defendant. Having properly answered Plaintiffs' joint Interrogatories by asserting objections, Plaintiffs do not get to now "amend" those Interrogatories to try to claim that some were served by one Plaintiff and others were served by the other Plaintiff,

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Interrogatory No. 3

Interrogatory No. 3 asks Terry Magnuson to "[s]tate the names, addresses, and phone numbers of all persons from whom you have obtained statements or reports concerning the subject matter of this lawsuit and give the dates on which the respective statements and or [sic] reports were obtained." (Walz Decl. ¶ 6, Ex. A.)

A "statement" is a defined term pursuant to Minnesota Rules of Civil Procedure Rule 26.02(d) and constitutes "(1) a written statement signed or otherwise adopted or approved by the person making it, or (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, that is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded." A "report", on the other hand, can be, but does not need to be in writing nor does it need to be adopted or approved by the person making it. Merriam-Webster <https://www.merriam-webster.com/dictionary/report> (accessed July 10, 2020) (defining "report" as "to give an account of . . . to serve as carrier of (a message) . . . to make a written record or summary of . . . to announce or relate as the result of investigation"). Accordingly, Interrogatory No. 3 requests information regarding two separate and distinct items and, therefore, constitutes two interrogatories.

Interrogatory No. 5

Interrogatory No. 5 provides that "[i]f you [Terry Magnuson] claim that the party(ies) asking these interrogatories have made any admissions against interest concerning the claims in this action, identify what was stated, when the statement was made, the person who made the

all in an effort to try to make their Interrogatories comply with the Rules. *See* Minn. R. Civ. P. 15.01 (stating party cannot unilaterally amend pleading once response to pleading has been served). But even if Plaintiffs can unilaterally amend their Interrogatories after Terry Magnuson has properly responded to them, Plaintiffs' Interrogatories still exceed the 50 interrogatories each of the Plaintiffs were initially provided under the Rules.

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statement, all persons who heard or received the statement, and what was done if anything, in reliance on the statement." (Walz Decl. ¶ 6, Ex. A.)

Interrogatory No. 5 goes beyond just seeking the details of any claimed admission made by Plaintiffs. It also inquires into Terry Magnuson's conduct, including, what, if anything, Terry Magnuson did in regards to the admission. Since the details of any admission by Plaintiffs and Terry Magnuson's conduct in relation to any admission by Plaintiffs are two distinct matters, Interrogatory No. 5 constitutes two interrogatories.

Interrogatory No. 7

An interrogatory that seeks the factual basis for each defense and/or affirmative defense in the responding party's answer to the complaint constitutes a separate and discrete interrogatory for each defense and/or affirmative defense. *Alexander v. 1328 Uptown, Inc.*, No. 18-CV-1544 (ECT/ECW), 2019 WL 4929931, at *14 (D. Minn. Oct. 7, 2019) (finding interrogatory asking responding party to identify factual basis for each of its 12 affirmative defenses constituted 12 separate and distinct interrogatories); *Farmers Ins. Exch. v. West*, No. CV 11-2297 (PAM/JJK), 2012 WL 12894845, at *8 (D. Minn. Sept. 21, 2012) (finding interrogatory seeking factual basis for each affirmative defense to constitute 14 discrete subparts "because the factual basis for each affirmative defense is not logically or factually subsumed within or necessarily related to the factual basis for every other affirmative defense . . .").

Interrogatory No. 7 requests that Terry Magnuson: "Explain in detail any defense, affirmative or otherwise, that you will or may impose against the claims made by the requesting party." (Walz Decl. ¶ 6, Ex. A.)

Not even including Terry Magnuson's defenses that do not constitute affirmative defenses, Terry Magnuson's Answer to Plaintiffs' Complaint alone sets forth 11 affirmative defenses to

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Plaintiffs' claims. (Def. Terry Magnuson's Ans. (Nov. 1, 2019) (identifying affirmative defenses as failure to state a claim upon which relief may be granted, Plaintiffs' alleged damages were caused by the action of others, consent, estoppel, merger, release, waiver, failure to plead fraud with particularity, comparative fault/contributory negligence, Plaintiffs' failure to mitigate alleged damages and parol evidence rule). Terry Magnuson's affirmative defenses are not logically or factually subsumed within each other and the factual basis for each defense varies. As such, Interrogatory No. 7 constitutes 11 interrogatories.

Interrogatory No. 9

Interrogatory No. 9 seeks that Terry Magnuson:

> Identify all persons or companies, including You, whether with our [sic] without charge, that have installed, operated, observed, inspected, serviced, maintained, repaired, or replaced any System or Well at the Property and provide:
>
> a. the name of such person or company;
>
> b. the date any of the foregoing was done;
>
> c. the reason for the same;
>
> d. what specifically was done or was not done;
>
> e. what the reason for the foregoing was;
>
> f. any discussions that were had or recommendations that were made;
>
> g. any expenses incurred; and
>
> h. any other information relevant to foregoing [sic].

(Walz Decl. ¶ 6, Ex. A.)

This Interrogatory not only seeks information for five separate and distinct actions that may have occurred – "installed, operated, observed, inspected, serviced, maintained, repaired, or replaced" – but also for two separate and distinct items – the geothermal heating and cooling

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system and the well on the subject property. Merriam-Webster <https://www.merriam-webster.com/dictionary/install> (accessed July 10, 2020) (defining "install" as "to set up for use or service"); Merriam-Webster <https://www.merriam-webster.com/dictionary/operate> (accessed July 10, 2020) (defining "operate" as "to cause to function"); Merriam-Webster <https://www.merriam-webster.com/dictionary/inspect> (accessed July 10, 2020) (defining "inspect" as "to view closely in critical appraisal . . . to examine officially"); Merriam-Webster <https://www.merriam-webster.com/dictionary/service> (accessed July 10, 2020) (defining "service" as "to repair or provide maintenance for"); Merriam-Webster <https://www.merriam-webster.com/dictionary/maintain> (accessed July 10, 2020) (defining "maintain" as "to keep in an existing state (as of repair, efficiency, or validity)"); Merriam-Webster < https://www.merriam-webster.com/dictionary/repair> (accessed July 10, 2020) (defining "repair" as "to restore by replacing a part or putting together what is torn or broken"); Merriam-Webster <https://www.merriam-webster.com/dictionary/replace> (accessed July 10, 2020) (defining "replace" as "to restore to former place or position".[4])

The Interrogatory further contains eight subparts for each of the five requested actions for the two items. While Terry Magnuson submits that at least four of those subparts (subparts c, e, f and h) are separate and distinct questions, even if it is assumed that all eight subparts are subsumed in the five actions, Interrogatory No. 9 still contains 10 interrogatories.

Interrogatory No. 10

Interrogatory No. 10 asks Terry Magnuson to "[i]dentify any and all dates that the System and/or Well was not operating as designed, what was done to rectify the same, how long such lasted and any other information relevant to the foregoing." (Walz Decl. ¶ 6, Ex. A.)

[4] In counting five separate actions in Interrogatory No. 9, Terry Magnuson considers that the words serviced, maintained, repaired and replaced as synonyms.

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Like Plaintiffs previous Interrogatory, this Interrogatory also asks Terry Magnuson to produce information regarding two separate and distinct items – the geothermal heating and cooling system on the subject property and the well on the subject property. Accordingly, even if the additional subparts to the Interrogatory are considered subsumed within the Interrogatory, Interrogatory No. 10 still consists of two interrogatories.

Interrogatory No. 11

Interrogatory No. 11 requests that Terry Magnuson: "Identify all knowledge you had regarding the system prior to listing the Property for sale on Zillow or any other listing site, prior to the walk through with the Hammeses, prior to the Closing, and prior to the Complaint in this action being served upon you." (Walz Decl. ¶ 6, Ex. A.)

While Interrogatory No. 11 carries the overall theme of Terry Magnuson's knowledge regarding the geothermal heating and cooling system on the subject property, such theme interrogatories are inappropriate. *Gander Mountain Co. v. Cabela's, Inc.*, No. CV 04-3125 (PJS/RLE), 2007 WL 9735300, at *3 (D. Minn. Jan. 19, 2007) (rejecting "common theme" test which provides that interrogatories should be counted as a single interrogatory where it contains subparts directed at eliciting details concerning a common theme). Interrogatory No. 11 requests Terry Magnuson's knowledge regarding the geothermal heating and cooling system at four distinct and separate times: (1) prior to listing the subject property for sale, (2) prior to Plaintiffs' unidentified walkthrough of the subject property, (3) prior to Plaintiffs closing on their purchase of the subject property and (4) prior to Terry Magnuson being served with Plaintiffs' Complaint in the instant action. Each one of these distinct time periods is a question that can be asked separately and is not factually subsumed within the other questions. Interrogatory No. 11, therefore, contains four interrogatories.

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Interrogatory No. 12

Interrogatory No. 12 requires Terry Magnuson to "[i]dentify when you first learned that the System was contaminated with Iron bacteria, what you did in response, any products used to try and treat the same, any services [sic] providers that were involved with such treatment, how long such addressed the issue, each subsequent action you took as a result of Iron bacteria contamination and how long each such action lasted." (Walz Decl. ¶ 6, Ex. A.)

Interrogatory No. 12, at a minimum, contains as least three separate and distinct questions: (1) it seeks information regarding Terry Magnuson's knowledge of alleged iron bacteria in the geothermal heating and cooling system, (2) it seeks information regarding what, if anything, Terry Magnuson did to remedy the allege iron bacteria and (3) it seeks information regarding what, if anything, any service providers did to remedy the alleged iron bacteria including, apparently, "how long" it took the service providers to perform the work.[5] Indeed, even Plaintiffs admit that Interrogatory No. 12 contains more than one interrogatory. (Pls.' Mem. Support Mot. Compel Disc. 7 at ¶ 12.) Because the areas of inquiry in Interrogatory No. 12 are separate and distinct, Interrogatory No. 12 contains at least three interrogatories.

Interrogatory No. 15

Interrogatory No. 15 requests that Terry Magnuson: "[e]xplain in detail and not in summary fashion all steps you took as part of potentially replacing/converting the System, why you took such steps, whether you signed any purchase agreements or similar agreements relating to replacing or converting the System, if both Barb and Terry did not sign such documents, why; and, why you ultimately did not replace/convert the System." (Walz Decl. ¶ 6, Ex. A.)

[5] The request in Interrogatory No. 12 seeking information regarding "how long" something took is extremely vague. (Walz Decl. ¶ 6, Ex. A.) It is unknown whether Plaintiffs are requesting the actual man hours of the labor that was performed, how long the action took to remedy the issue or some other period of time. Interrogatory No. 13 suffers from the same vagueness with respect to "how long" certain actions took. (*Id.*)

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Like Plaintiffs' Interrogatories that have come before, Interrogatory No. 15 similarly contains at least two separate and distinct questions. Interrogatory No. 15 asks Terry Magnuson to (1) identify the steps he took to convert the open looped geothermal heating and cooling system on the subject property to a closed loop geothermal heating and cooling system and (2) why he did not proceed with converting the open loop geothermal heating and cooling system to a closed loop system.

Interrogatory No. 16

Interrogatory No. 16 provides that Terry Magnuson should "[e]xplain in detail and not in summary fashion all conversations you had with anyone, including, but not limited to Dennis Hass, representatives of Elsner Well Drilling, representatives of Lake Region Electric, attorneys, etc., regarding the System, including maintaining and/or repairing the same, replacing the same and/or converting to a closed loop system." (Walz Decl. ¶ 6, Ex. A.)

Even if the breadth of this Interrogatory is set aside, namely, that it seeks every communication Terry Magnuson has ever had with any individual regarding any aspect of the geothermal heating and cooling system on the subject property, and Terry Magnuson only considers those individuals identified in the Interrogatory, Interrogatory No. 16 contains at least four interrogatories. While it is wholly improper for Plaintiffs to seek communications from Terry Magnuson regarding at least one of those individuals – his attorneys – based on the attorney-client privilege, Plaintiffs nonetheless requested the same requiring Terry Magnuson to respond and thereby constituting a separate interrogatory. Any communications Terry Magnuson may have had with different individuals are not factually subsumed within each other and constitute distinct and separate questions. Interrogatory No. 16, therefore, counts as at least four interrogatories.

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Interrogatory No. 17

Interrogatory No. 17 asks Terry Magnuson to "[e]xplain in detail and not in summary fashion all training you received from anyone or any source, including date, source, and substance, in relating to maintaining or servicing the System, and when and what of this training you then provided to the Hammeses." (Walz Decl. ¶ 6, Ex. A.)

Interrogatory No. 17 contains at least two distinct subparts: (1) it seeks information regarding what training Terry Magnuson received to maintain the geothermal heating and cooling system on the subject property and (2) it seeks information regarding what training Terry Magnuson provided to Plaintiffs regarding maintaining the geothermal heating and cooling system on the subject property. Interrogatory No. 17, therefore, constitutes two interrogatories.

Interrogatory No. 18

Interrogatory No. 18 requests that Terry Magnuson "[e]xplain in detail and not in summary fashion the impact of iron bacteria contamination on systems and wells such as the System and Well at the Property." (Walz Decl. ¶ 6, Ex. A.)

Interrogatory No. 18 is asking Terry Magnuson to describe the impact of iron bacteria on two separate and distinct items, namely, the geothermal heating and cooling system and the well on the subject property. Interrogatory No. 18 is, therefore, two interrogatories.

Interrogatory No. 20

Interrogatory No. 20 provides that Terry Magnuson should "[i]dentify all documents in your possession, custody, or control, that substantiate or support any and all defenses, affirmative or otherwise, that you will or may impose against the claims made by the requesting party." (Walz Decl. ¶ 6, Ex. A.)

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As previously discussed, not even taking into consideration Terry Magnuson's defenses that do not constitute affirmative defenses, Terry Magnuson's Answer sets forth 11 separate affirmative defenses. (Def. Terry Magnuson's Ans.) Requesting that Terry Magnuson identify all documents that support each of his affirmative defenses constitutes 11 interrogatories because Terry Magnuson's affirmative defenses are not factually subsumed within each other. *Alexander*, 2019 WL 4929931, at *14; *Farmers Ins. Exch.*, 2012 WL 12894845, at *8. As such, at a minimum, Interrogatory No. 20 constitutes 11 interrogatories.

Interrogatory No. 22

Interrogatory No. 22 requests that Terry Magnuson "[e]xplain in detail, and not in summary fashion, why you did not disclose all facts relating to the issues with the System and Well." (Walz Decl. ¶ 6, Ex. A.)

Like many of Plaintiffs' other Interrogatories, Interrogatory No. 22 also requests that Terry Magnuson provide information regarding two separate and distinct items on the subject property: (1) the geothermal heating and cooling system and (2) the well. Interrogatory No. 22, therefore, constitutes two interrogatories.

Interrogatory No. 23

Interrogatory No. 23 provides that "[i]f you [Terry Magnuson] allege that the System can be operated as represented, describe in detail and not in summary fashion all facts supporting the same and all actions and costs needed to so operate the System." (Walz Decl. ¶ 6, Ex. A.)

The facts supporting that the geothermal heating and cooling system on the subject property is operational and the costs to operate the geothermal heating and cooling system on the subject property are two separate and distinct matters. Interrogatory No. 23, therefore, contains two interrogatories.

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Interrogatory No. 24

Interrogatory No. 24 requests Terry Magnuson "[i]dentify how many gallons of water per day the System uses when operating as intended and whether you have all necessary permits for such operation." (Walz Decl. ¶ 6, Ex. A.)

This Interrogatory seeks information regarding two discrete topics: (1) how much water the geothermal heating and cooling system uses and (2) whether the necessary permits, if any, were obtained for the geothermal heating and cooling system. Despite being numbered as one, Interrogatory No. 24 contains two interrogatories.

Interrogatory No. 26

Interrogatory No. 26 requests Terry Magnuson to "[d]escribe in detail and not in summary fashion all information relating to the System and Well that You communicated to Steven Larson or any other representative of Lakes & Plains Realty, Inc. d/b/a Coldwell Banker at the Lakes including, when, and the substance of the same, including subsequent to commencement of this Action." (Walz Decl. ¶ 6, Ex. A.)

Interrogatory No. 26 suffers the same fate as so many of Plaintiffs' other Interrogatories in that it seeks information regarding two separate items on the subject property – the geothermal heating and cooling system and the well. The Interrogatory, therefore, necessarily includes a minimum of two interrogatories. Like Plaintiffs' previous Interrogatory seeking communications that Terry Magnuson had with anyone regarding the geothermal heating and cooling system on the subject property, Interrogatory No. 26 similarly subjects itself to increasing for each individual identified by Terry Magnuson. Indeed, Terry Magnuson's communications with different individuals are not factually subsumed within each other. Terry Magnuson, nevertheless, only has considered Interrogatory No. 26 to constitute two interrogatories.

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Interrogatory No. 27

Interrogatory No. 27 asks Terry Magnuson to "[d]escribe any and all use of the backup furnace that you admit to in Paragraph 18 of the Answer of Steven Larson, Terry Magnuson and Lakes & Plains Realty, Inc. d/b/a Coldwell Banker, including, who, when, why, and the status of the Well and System at any such times." (Walz Decl. ¶ 6, Ex. A.)

Interrogatory No. 27 contains at least three interrogatories; it asks Terry Magnuson to (1) identify when the backup furnace was used on the subject property, (2) identify what the operation of the geothermal heating and cooling system was on a particular date and (3) identify what the operation of the well was on a particular date. These are questions that each stand alone as separate questions and, as such, constitute three separate interrogatories.

Interrogatory No. 28

An interrogatory that seeks the factual basis for each denial in the responding party's answer to the complaint constitutes a separate and discrete interrogatory for each denial. *Alexander*, 2019 WL 4929931, at *14 (finding interrogatory requesting responding party to state in detail the facts upon which each denial in its answer was based constituted over 50 interrogatories where responding party had made more than 50 denials in its answer).

Interrogatory No. 28 requires Terry Magnuson, "[f]or any allegation in the Complaint that you denied, please explain in detail and not in summary fashion the basis for your response." (Walz Decl. ¶ 6, Ex. A.)

Terry Magnuson's Answer denies, in part or in total, 108 paragraphs of Plaintiffs' Complaint. (Def. Terry Magnuson's Ans.) Accordingly, even assuming that each paragraph in Plaintiffs' Complaint contained only one allegation, which they do not, Interrogatory No. 28 contains a minimum of 108 interrogatories.

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Interrogatory No. 29

As previously set forth, requesting a party to provide the factual basis for anything but an unqualified admission to the allegations in a plaintiff's complaint constitutes a separate interrogatory for each allegation. *Alexander,* 2019 WL 4929931, at *14; *Farmers Ins. Exch.*, 2012 WL 12894845, at *8.

Interrogatory No. 29 requires Terry Magnuson, "[f]or any allegation in the Complaint that you allege you do not have sufficient information to admit or deny, please explain in detail and not in summary fashion the efforts you made to gather sufficient information to admit or deny the same." (Walz Decl. ¶ 6, Ex. A.)

Terry Magnuson's Answer states that he does not have sufficient information to admit or deny, in total or in part, 54 paragraphs of Plaintiffs' Complaint. (Def. Terry Magnuson's Ans.) Again, assuming that each paragraph in Plaintiffs' Complaint only contains one allegation, which they do not, Interrogatory No. 29 contains a minimum of 54 interrogatories.

Interrogatory No. 30

Interrogatory No. 30 asks Terry Magnuson to "[d]escribe in detail and not in summary fashion all facts supporting each of your affirmative defenses set forth in either of your Answers." (Walz Decl. ¶ 6, Ex. A.)

As discussed in connection with Interrogatory No. 7 where Plaintiffs ask Terry Magnuson to explain all of his defenses, "affirmative of otherwise", Terry Magnuson's Answer sets forth 11 affirmative defenses. (Def. Terry Magnuson's Ans.) Each one of these affirmative defenses constitutes a separate interrogatory as Terry Magnuson's affirmative defenses are factually distinct. Interrogatory No. 30, therefore, contains 11 interrogatories.

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Interrogatory No. 31

Interrogatories asking for a factual basis for a denial of a request for admission are improper. *Lakehead Pipe Line Co. v. Am. Home Assurance Co.*, Civ. No. 5-95-42 (MJD/RLE), 177 F.R.D. 454, 458 (D. Minn. Dec. 5, 1997) (stating "[r]equests for [a]dmission are not a discovery device" and permitting "a party to simply append an interrogatory to each request effectively converts that request into a discovery device"). But even assuming the propriety of such an interrogatory, requests for admissions deal with discrete and separate subjects and, therefore, an interrogatory that asks a responding party to explain the basis for his denial of a request for admission is construed as containing a subpart for each request for admission. *Id.* (stating even if interrogatory requesting factual basis of denial of request for admission is appropriate, it should be counted as separate interrogatory for each request and, therefore, requesting party served 373 interrogatories where party had served 373 requests for admissions); *Constr. Sys., Inc. v.*, 2011 WL 13312221, at *3-4 (finding interrogatory asking for factual basis for denial of each request for admission to constitute discrete subparts); *U.S. v. R.J. Zavoral & Sons, Inc.*, No. 12-CV-668 (MJD/LIB), 2014 WL 12756820, at *12 (D. Minn. Jan. 17, 2014) (finding requesting party served 67 interrogatories where requesting party served 67 requests for admissions and sought factual basis for denial of each request). Requests for admissions and interrogatories are not interchangeable procedures, and the utilization of interrogatories disguised as requests for admissions in an attempt to circumvent the rules limiting the number of interrogatories is an abuse of the discovery process. *Id.*

Interrogatory No. 31 asks: "For any Request for Admission you [Terry Magnuson] don't admit in whole, please explain in detail and not in summary fashion the basis for your response." (Walz Decl. ¶ 6, Ex. A.)

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Plaintiffs served 68 Requests for Admissions on Terry Magnuson. (Walz Decl. ¶ 7, Ex. B.) Terry Magnuson admitted one of Plaintiffs' Requests for Admissions. (*Id.*) Accordingly, Interrogatory No. 31, in and of itself, constitutes 67 interrogatories.

Interrogatories Nos. 1, 2, 4, 6, 8, 13, 14, 19, 21 and 25

Interrogatories Nos. 1, 2, 4, 6, 8, 13, 14, 19, 21 and 25 all consist of one interrogatory for a total of 10 interrogatories.[6] (Walz Decl. ¶ 6, Ex. A.)

When all of the separate and discrete subparts of Plaintiffs' Interrogatories to Terry Magnuson are counted, Plaintiffs have served a total of **314** Interrogatories on Terry Magnuson.[7] Despite Plaintiffs' attempts to characterize otherwise, Terry Magnuson's objection that the number of interrogatories served by Plaintiffs exceeds the 50 they are permitted pursuant to the Rules is not Terry Magnuson's attempt to be an obstructionist or to force Plaintiffs to engage in "linguistic acrobatics." (Pls.' Mem. Support Mot. Compel Disc. 10 at ¶ 16.) If Plaintiffs had been over the 50 interrogatory limit by a few interrogatories, Terry Magnuson would have answered the interrogatories without waiving his other objections. But being over the 50 interrogatory limit by 264 interrogatories is another story. The fact that another Defendant decided to answer Plaintiffs' excessive Interrogatories in no manner compels or requires Terry Magnuson to follow suit, as Plaintiffs seem to think it does. Because Terry Magnuson properly objected to Plaintiffs' Interrogatories, Plaintiffs' Motion to Compel Discovery should be denied.

[6] Terry Magnuson contends that Interrogatory No. 6 regarding Terry Magnuson's experts contains multiple subparts. (Walz Decl. ¶ 6, Ex. A.) However, since expert disclosure is governed by Minnesota Rules of Civil Procedure Rule 26.02(e), Terry Magnuson counts Interrogatory No. 6 as one interrogatory.

[7] Plaintiffs' Interrogatories also include a definition section which provides different definitions for the word "identify" depending on whether the word is used in connection with a person, a document or a communication. (Walz Decl. ¶ 6, Ex. A.) Terry Magnuson has not even taken into consideration Plaintiffs' definition section in determining that Plaintiffs' Interrogatories exceed the 50 interrogatory limit permitted by the Rules.

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II. TERRY MAGNUSON SHOULD BE AWARDED HIS ATTORNEY FEES AND COSTS INCURRED IN CONNECTION WITH RESPONDING TO PLAINTIFFS' MOTION TO COMPEL DISCOVERY BECAUSE PLAINTIFFS' MOTION TO COMPEL DISCOVERY WAS NOT SUBSTANTIALLY JUSTIFIED.

If a motion to compel discovery is denied, the court shall require the moving party to pay to the non-moving party's attorney fees and costs incurred in connection with bringing the motion, unless the court finds that the motion was substantially justified or that an award of expenses would be unjust. Minn. R. Civ. P. 37.01(d)(2). Whether a motion to compel is substantially justified generally means that it is justified to a degree that could satisfy a reasonable person and more than merely undeserving of sanctions for frivolousness. *See Dewitt v. London Rd. Rental Ctr., Inc.*, 899 N.W.2d 883, 888 (Minn. Ct. App. 2017), *rev'd on other grounds*, 910 N.W.2d 412 (Minn. 2018).

Here, Plaintiffs' Motion to Compel Discovery was not substantially justified. Plaintiffs were not even in the same ballpark as to the number of interrogatories that are permitted to be served pursuant to the Rules. (Walz Decl. ¶ 6, Ex. A.) Rather than simply remove some of the offending interrogatories to even get a ticket into the right ballpark, Plaintiffs refused. (*Id.* at ¶ 8, Ex. C.) The suggestion by Plaintiffs that Terry Magnuson should have answered at least 50 of their Interrogatories not only is contrary to the law, but completely ignores the fact that when they were asked to revise their Interrogatories to comply with the Rules, Plaintiffs would not budge. (*Id.*) Given the same, it is untenable for Plaintiffs to imply that they would have been fine with Terry Magnuson responding to some, but all of, their Interrogatories. Terry Magnuson properly objected to Plaintiffs' Interrogatories as exceeding the limit permitted pursuant to Minnesota Rules of Civil Procedure Rule 33.01(a) and, therefore, Terry Magnuson should be awarded his attorney fees and costs in having to respond to Plaintiffs' Motion to Compel Discovery based on the same.[8]

[8] Terry Magnuson's attorney fees and costs are ongoing. Terry Magnuson will submit a declaration itemizing his attorney fees and costs in accordance with Minnesota General Rules of Practice Rule 119 within 10 days of an order entitling Terry Magnuson to his attorney fees and costs.

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CONCLUSION

By serving 314 interrogatories, Plaintiffs have grossly exceeded the 50 interrogatory limit imposed by Minnesota Rules of Civil Procedure Rule 33.01(a). Plaintiffs have failed to show any basis, let alone good cause, as to why they should be permitted to serve five times the number of interrogatories permitted by the Rules. Given the enormity by which Plaintiffs exceeded the number of permissible interrogatories, Terry Magnuson properly objected to the interrogatories. Plaintiffs' Motion to Compel Discovery should be denied and Terry Magnuson should be awarded his attorney fees and costs in having to respond to Plaintiffs' Motion.

TOMSCHE, SONNESYN & TOMSCHE, P.A.

Dated: July 13, 2020

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ACKNOWLEDGMENT

Defendants Terry Magnuson, Steven Larson and Lakes and Plains Realty, Inc. d/b/a Coldwell Banker at the Lakes, through their undersigned attorney, hereby acknowledge that costs, disbursements, and reasonable attorney and witness fees may be awarded pursuant to Minnesota Statutes Section 549.211 to the party against whom the allegations in this pleading are asserted.

Dated: July 13, 2020

/s/ Natalie R. Walz
Natalie R. Walz