IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 24–cv–00003–CNS–MDB

TYRIQ MILLER, and
ISAAC SMITH,

Plaintiffs,

v.

JOHN MATHENY,

Defendant.

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Magistrate Judge Maritza Dominguez Braswell

This matter is before the Court on Plaintiffs' Renewed and Amended Motion for Default Judgment (as to Defendant John Matheny Only).[1] (["Motion"], Doc. No. 72.) Defendant John Matheny ("Defendant Matheny or "Defendant") has not appeared in this action nor responded to the Motion. After reviewing the Motion and relevant law, the Court respectfully **RECOMMENDS** the Motion be **GRANTED**.

BACKGROUND

I. Procedural History

On January 2, 2024, Plaintiffs initiated this wage theft case against their former employer Gilbert's Tree Service, Inc. (the "Company") and one of its owners, Gilbert Rodriguez. (Doc.

[1] Plaintiffs have also submitted a "supplement" to the Motion, which describes their damage calculations in greater detail. (Doc. No. 42.)

No. 1. Plaintiffs filed an Amended Complaint, adding John Matheny as a Defendant, on March 30, 2024. (Doc. No. 11.) Defendants initially failed to appear and the Clerk of Court entered default against them on August 28, 2024. (Doc. Nos. 27–29.) Plaintiffs then moved for default judgment against Defendants. (Doc. No. 33.) However, while that default judgment motion was pending, Mr. Rodriguez appeared on behalf of himself and the Company, and Plaintiffs withdrew the motion. (*See* Doc. Nos. 46; 53.) Plaintiffs eventually settled their claims with Mr. Rodriguez and the Company. (*See* Doc. Nos. 61; 69.) The settlement, "specifically excludes Defendant Matheny from any releases and contemplates filing the instant [M]otion. It also permits the other Defendants to seek indemnification against Defendant Matheny if they were to want to do so." (Doc. No. 72 at 3.) Plaintiffs now renew their request for default judgment against Defendant Matheny. (Doc. No. 72.)

II. Allegations[2]

Plaintiffs Miller and Smith worked as arborists for the Company from approximately June 1, 2020, to August 2, 2023, and August 1, 2020, to August 2, 2023, respectively. (Doc. No. 11 at ¶ 1 (pg. 1)[3].) Defendant Matheny had an ownership interest in the Company during Plaintiffs' employment. (*Id.* at ¶¶ 15, 18 (pg. 4), 2 (pg. 5).) Plaintiffs say Defendant Matheny

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[2] For the purpose of this Motion, the Court presumes that all well-pleaded factual allegations are true. *See United States v. Craighead*, 176 F. App'x 922, 924 (10th Cir. 2006) ("The defendant, by his default, admits the plaintiff's well-pleaded allegations of fact.").

[3] The Amended Complaint's paragraph numbering mistakenly restarts at 1 following paragraph 21. For the sake of clarity, the Court will use the number assigned to a given paragraph. However, because numbers 1 through 21 are assigned to two different paragraphs, when citing these paragraphs the Court will also note the page on which the paragraph in question can be found.

exercised substantial control over the functions of the Company's employees, including the ability and authority to hire and fire employees, set rates of pay, and set employee schedules. (Doc. No. 11 at ¶¶ 16 (pg. 4), 3 (pg. 5); *see also* Doc. No. 72 at 8 (describing Defendant Matheny as a "manager of the company" and saying Mr. Rodriguez "functionally delegated all of the day-to-day decision-making and management authority to Defendant Matheny[ ] for the duration of the Plaintiffs' employment period").) Defendant Matheny is in possession of Plaintiffs' time records. (Doc. No. 11 at ¶¶ 16 (pg. 6), 31.)

As an arborist, Plaintiff Miller "load[ed] and unload[ed] the trucks with the equipment needed for the day and provid[ed] landscaping services for the Company's customers." (*Id.* at ¶ 11 (pg. 6).) Plaintiff Miller estimates he worked "a minimum of 40 hours per week and over 40 hours per week during peak season." (*Id.* at ¶ 15 (pg. 6).) He says a typical shift was 7:00 AM to 5:00 PM, five days per week. (*Id.* at ¶ 17 (pg. 6).) Plaintiff Miller's pay rate varied frequently. He began at $14.00 per hour. (*Id.* at ¶ 20 (pg. 7).) The rate was later changed to a salary of $1300.00 per week, then changed again to $22.00 per hour. (*Id.*) Some of Plaintiff Miller's work was "off the clock," and he was "not paid for the time when he loaded, unloaded, and cleaned the trucks at the beginning and end of the day" prior to 7:00 AM and after 5:00 PM. (*Id.* at ¶ 12 (pg. 6), ¶¶ 18, 20 (pg. 7).) Plaintiff Miller's thirty-minute meal break was deducted from his hours worked, even when Defendant Matheny knew he did not take a lunch break on a given day. (*Id.* at ¶¶ 22–23 (pg. 7).) Plaintiff Miller contends the Company "shaved" or improperly adjusted his time by reducing his hours worked. (*Id.* at ¶ 24.) He also says his pay was deducted for any damaged equipment or tools. (*Id.*) The Company terminated Plaintiff Miller upon receipt of an introductory letter from his counsel. (*Id.* at ¶ 25; *see* Doc. No. 72-5 (letter from counsel dated July 25, 2023).)

Plaintiff Smith estimates that he "regularly worked over 40 hours per week and sometimes worked over 10 hours in a day." (*Id.* at ¶ 30.) Plaintiff Smith's typical shift was 7:30 AM to 5:00 PM, five days per week, but "but it was not uncommon for him to work after 5:00 PM." (*Id.* at ¶ 32.) Plaintiff Smith estimates he regularly worked "at least" 45 hours per week (*Id.* at ¶ 35.) "Plaintiff Smith's rate of pay varied widely, often without notice of the changes in advance. He began at $15.00 per hour....At one point this moved up to a rate of $30.00 per hour." (*Id.* at ¶ 34.) Plaintiff Smith says he did not receive compensation for overtime work. (*Id.* at ¶ 36.) Plaintiff Smith's thirty-minute meal break was deducted from his hours worked even when Defendant knew he did not take a lunch break on a given day. (*Id.* at ¶ 38–39.) He contends the Company "shaved" or improperly adjusted his time by reducing his hours worked. (*Id.* at ¶ 40.) He also says his pay was deducted for any damaged equipment or tools. (*Id.*) Defendants terminated Plaintiff Smith upon receipt of an introductory letter from his counsel. (*Id.* at ¶ 41.)

Plaintiffs each bring claims for violations of the FLSA, 29 U.S.C. § 201, *et seq* (*id.* at ¶¶ 42–47) and the Colorado Wage Act ("CWA"), Colo. Rev. Stat. § 8-4-101 *et seq* (*id.* at ¶¶ 48–64, 75 (pg. 12), 76[4]).[5] Plaintiffs also allege retaliation under the FLSA (*id.* at ¶¶ 65 (pg. 13)–71) and CWA (*id.* at ¶¶ 72–75).

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[4] The Amended Complaint skips from paragraph 64 to 75. (*See* Doc. No. 11 at pg. 12.) Then, following paragraph 76, the Amended Complaint reverts back to paragraph 65 and proceeds sequentially to a second paragraph 75. (*Id.* at pg. 13–14.)

[5] The Amended Complaint also cites the Colorado Minimum Wage Act ("CMWA") as a basis for Plaintiffs' claims. At the time the Amended Complaint was filed, some courts suggested the CMWA was governed by a six year statute of limitation rather than the two to three year statute

Defendant Matheny has not appeared in this action and Plaintiffs seek default judgement against him. (Doc. No. 72.) Plaintiffs ask the Court to award (1) Plaintiff Miller $192,912.18 in wage claim damages and $12,825.00 in retaliation claim damages and (2) Plaintiff Smith $186,476.27 in wage claim damages and $8,550.00 in retaliation claim damages, minus any amounts "actually paid in settlement with [Mr. Rodriguez and the Company]." (*Id.* at 10, 19–20.) Plaintiffs also seek post-judgment interest and an order stating they are entitled attorneys' fees and costs—though they ask to be permitted to bring a separate motion regarding the specific amount of fees and costs to be awarded. (*Id.* at 20.)

LEGAL STANDARD

Default judgment is appropriate when a party fails to appear or otherwise defend a lawsuit. Fed. R. Civ. P. 55(a). In other words, default judgment is available "when the adversary process has been halted because of an essentially unresponsive party." *In re Rains*, 946 F.2d 731, 732 (10th Cir. 1991) (quotation omitted). "In that instance, the diligent party must be protected lest [it] be faced with interminable delay and continued uncertainty as to [its] rights." *Id*. at 732–33 (quotation omitted). The Clerk of Court may enter default judgment if the claim is for "a sum

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of limitation applied to the CWA. *See Perez v. By the Rockies, LLC*, 543 P.3d 1054, 1055, (Colo. Ct. App. 2023) ("[I]t would seem clear that the six-year limitations period applies [to CMWA claims]"). As such, Plaintiffs originally sought minimum wage damages for their unpaid work that occurred more than three years prior to the filing of this suit. (*See* Doc. No. 33 at 12–13.) However, the Colorado Supreme Court has since clarified that the CMWA's statute of limitation is the same as the CWA's. *See By the Rockies, LLC v. Perez*, 575 P.3d 445, 452 (Colo. 2025) ("[W]e conclude that the ... limitations period in the Wage Claim Act applies to claims that are brought under the Minimum Wage Act."). Accordingly, the damages alleged by Plaintiffs that are more than three years old are untimely under any statutory scheme, the instant Motion does not seek such damages, and the Court need not separately consider damages under the CMWA. (*See* Doc. No. 72 at 10 ("Plaintiffs have recalculated their damages since the filing of the original Motion for Default at Dkt. 33 given the intervening *Perez* ruling.").)

certain." Fed. R. Civ. P. 55(b)(1). In all other cases, as here, "the party must apply to the court for a default judgment." Fed. R. Civ. P. 55(b)(2).

In determining whether to enter default judgment, a court must first find it has jurisdiction. *Villoldo v. Republic of Cuba*, 659 F. Supp. 3d 1158, 1167–68 (D. Colo. 2023). If a court lacks jurisdiction—either subject matter over the action or personal over the defendant—default judgment cannot be entered. *Id*. at 1168. After confirming jurisdiction, a court must determine whether the well-pleaded allegations in the Complaint, along with any accompanying affidavits or exhibits, support a judgment on the claims against the defendant. *Id*.; *see also Bixler v. Foster*, 596 F.3d 751, 762 (10th Cir. 2010).

ANALYSIS

I. Jurisdiction

A. Subject Matter Jurisdiction

Plaintiffs' FLSA claims establish federal jurisdiction pursuant to 28 U.S.C. § 1331. The Court finds it appropriate to exercise supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367(a). *See* 28 U.S.C. § 1367(a) ("[I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.").

B. Personal Jurisdiction

Proper service is a jurisdictional prerequisite to litigation. *Jenkins v. City of Topeka*, 136 F.3d 1274, 1275 (10th Cir. 1998) ("Effectuation of service is a precondition to suit."). Without proper service, the Court lacks personal jurisdiction over a defendant. *Okla. Radio Assocs. v.*

Fed. Deposit Ins. Corp., 969 F.2d 940, 943 (10th Cir. 1992). Here, Plaintiffs filed an Affidavit of Service as to Defendant Matheny, indicating that on May 24, 2024, he was served via personal service upon Gilbert's Tree Service manager, Luis Garcia, at 11556 Colorado Highway 94, Colorado Springs, CO 80929. (Doc. No. 16; *see* Doc. No. 72-6 at 1 (indicating that as of October 4, 2024, Gilbert's Tree Service's principal place of business was 11556 Colorado Highway 94, Colorado Springs, CO 80929)); *see* Colo. R. Civ. P. 4(e)(1) (allowing for service upon an individual by personally serving the individual's "secretary, administrative assistant, bookkeeper, human resources representative or managing agent"). Based on this filing, the Court finds Defendant Matheny has been adequately notified of this action.[6] Accordingly, the Court turns to consider whether it has personal jurisdiction over Defendant Matheny.

"There are three ways in which a court may obtain personal jurisdiction over a defendant: consent by the parties, presence in the forum state, and actions by the defendant which affect people in the forum state." *Qwest Commc'ns Int'l, Inc. v. Thomas*, 52 F. Supp. 2d 1200, 1204 (D. Colo. 1999). "The requirement that a court have personal jurisdiction flows from the Due Process Clause." *Peay v. BellSouth Med. Assistance Plan*, 205 F.3d 1206, 1210 (10th Cir. 2000) (brackets, ellipses, and internal quotation marks omitted). "To exercise jurisdiction in harmony with due process, defendants must have minimum contacts with the forum state, such that having to defend a lawsuit there would not offend traditional notions of fair play and substantial justice." *Shrader v. Biddinger*, 633 F.3d 1235, 1239 (10th Cir. 2011) (brackets and internal quotation

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[6] The Court also notes Defendant Matheny's apparent address has been on file with the Court throughout this case, and the Court has sent copies of its docket entries to this address. (*See, e.g.*, Doc. Nos. 57; 65; 70.) Plaintiffs also represent that their filings, including the instant Motion, have been sent to the same address. (*See, e.g.*, Doc. Nos. 34; 62; 74.)

marks omitted). Minimum contacts may give way to specific or general jurisdiction. S*ee Intercon, Inc. v. Bell Atl. Internet Sols., Inc.*, 205 F.3d 1244, 1247 (10th Cir. 2000). General jurisdiction exists when the defendant's contacts with the forum are "so continuous and systematic as to render [it] essentially at home in the forum State." *Fireman's Fund Ins. Co. v. Thyssen Min. Const. of Canada, Ltd*., 703 F.3d 488, 493 (10th Cir. 2012) (alteration in original). Specific jurisdiction exists when a defendant purposefully directs its activities to residents of the forum, and the cause of action arises out of those activities. *See Melea, Ltd. v. Jawer SA*, 511 F.3d 1060, 1066 (10th Cir. 2007).

The Court has general personal jurisdiction over Defendant, who is domiciled in Pueblo West, Colorado. (*See* Doc. No. 72-1 (Pueblo County Assessor records indicating Defendant owns the property at 260 W Venturi Dr Pueblo West, CO 81007-3608)); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2853 (2011) ("[T]he paradigm forum for the exercise of general jurisdiction is the individual's domicile."). Accordingly, the Court turns to the substance of Plaintiffs' Motion.

II. Default Judgment

After entry of default, the Court must decide "whether the unchallenged facts constitute a legitimate cause of action" such that a judgment should be entered. *Bixler*, 596 F.3d at 762 (quoting 10A Charles A. Wright, Arthur R. Miller & Mary K. Kane, Federal Practice and Procedure § 2688, at 63 (3d ed.1998)). Accepting the well-pleaded allegations in the Amended Complaint as true, and for the reasons stated herein, the Court finds the allegations support entry of default judgment against Defendant.

A. Defendant Matheny was Plaintiffs' "employer."

To hold a defendant liable for alleged FLSA and Colorado wage law violations, the defendant must have acted as the plaintiff's "employer." To determine if an individual is an employer, the Court considers whether the individual: "(1) has the power to hire and fire the employee; (2) supervises and controls the employee's work schedule or conditions of employment; (3) determines the rate and method of payment; and (4) maintains employment records." *Inniss v. Rocky Mountain Inventory, Inc.*, 385 F. Supp. 3d 1165, 1168 (D. Colo. 2019). "Courts must consider the economic realities and the circumstances of the whole activity as no one factor is dispositive." *Miller v. Dirty Pit Craft House LLC*, 2024 WL 4110792, at *3 (D. Colo. Mar. 24, 2024).

Here, Plaintiffs allege Defendant Matheny had the power to hire and fire employees (Doc. No. 11 at ¶ 3 (pg. 5), set pay rates and employee schedules (*id.*), and held "substantial control over the functions of the company's employees" (*id.*). This is sufficient to find Defendant Matheny was Plaintiffs' employer under the FLSA and CWA. *See Vassel v. Littleton Auto Repair LLC*, 2024 WL 709800, at *3 (D. Colo. Feb. 21, 2024) (finding plaintiff had plausibly alleged the company owner/operator was an employer for the purpose of resolving a motion to dismiss); *see also Chao v. Hotel Oasis, Inc.*, 493 F.3d 26, 34 (1st Cir. 2007) ("The overwhelming weight of authority is that a corporate officer with operational control of a corporation's covered enterprise is an employer along with the corporation[.]").

B. Plaintiffs' allegations are sufficient to establish FLSA wage claim liability.

The FLSA provides covered workers[7] a guarantee of overtime payment for all hours worked in excess of forty in a given workweek. *See* 29 U.S.C. § 201, *et seq*. Specifically, an employee who is required to work more than forty hours per week shall "receive[ ] compensation for his employment in excess of the [forty hours] at a rate not less than one and one-half times the regular rate at which he is employed." 29 U.S.C. § 207(a)(1).

Moreover, to establish liability under the FLSA, a plaintiff must show that: (1) he was employed by the defendant during the relevant time; (2) in the plaintiff's work for the defendant, he was engaged in commerce or the production of goods for commerce, or he was employed by an enterprise engaged in commerce or the production of goods for commerce that had annual gross sales of at least $500,000; and (3) that the defendant failed to pay plaintiff overtime for all hours worked in excess of 40 hours in one or more workweeks. *See Marquez v. Amrg Holdings*, 2021 WL 3510765, at *2 (D. Colo. Aug. 10, 2021).

Plaintiffs allege they were employed by Defendant at all relevant times. (Doc. No. 11 at ¶¶ 13 (pg. 4), 17 (pg. 4), 4 (pg. 5).) Plaintiffs further allege that Defendant, via the Company, was "engaged in interstate commerce and/or the production of goods for commerce" and that the Company had annual gross revenues in excess of $500,000 during the relevant period. (*Id.* at ¶¶ 10 (pg. 3), 11 (pg. 3), 19 (pg. 5), 6 (pg. 5).) Finally, Plaintiffs allege they worked over 40 hours per week, explaining that they worked unpaid hours every day (pre and post work hours), and

[7] Certain employees are exempt from FLSA, but "exemption under FLSA is an affirmative defense for which the employer bears the burden of proof." *Kenney v. Helix TCS, Inc*., 284 F. Supp. 3d 1186, 1190 (D. Colo. 2018), *aff'd*, 939 F.3d 1106 (10th Cir. 2019) (citing *Dejesus v. HF Mgmt. Serv., LLC*, 726 F.3d 85, 91 n.7 (2nd Cir. 2013). "Thus, the Court need not consider whether any exemption under FLSA applies here" as Defendant Matheny has not appeared in this action to assert that defense. *Vassel v. Littleton Auto Repair LLC*, 2024 WL 709800, at n.2 (D. Colo. Feb. 21, 2024).

that time was deducted for breaks they never took. From that, Plaintiffs deduce that any time their pay stub shows 40 hours of work in one week, they necessarily worked overtime without any overtime pay. (*Id.* at ¶¶ 1 (pg. 1–2), 20–21 (pg. 7), 34–36.) Taking the well-pleaded allegations in the Amended Complaint as true, the Court finds Plaintiffs have sufficiently alleged that they worked for an employer subject to the FLSA, and that they were not properly compensated under the FLSA.

C. Plaintiffs' allegations are sufficient to establish Colorado wage claim liability.

The CWA provides that the "compensation for labor or service earned, vested, determinable, and unpaid" at the time of an employee's discharge are "due and payable immediately." C.R.S. § 8-4-109. If an employee is not paid their wages or compensation within fourteen days after sending a written demand, the employer is liable for the wages plus a penalty. *Id.*

Plaintiffs say their Complaint and Amended Complaint—which were served upon Defendants (*see supra* at 6–7)—functioned as their demand for back wages. (Doc. No. 72 at 14; *see also* Doc. No. 72-5 (Plaintiffs' counsel's July 25, 2023, letter to Defendants).) Courts in this District have recognized a civil complaint as a "written demand" under the CWA. *See Damitio v. Sushi Zanmai Inc.*, 2013 WL 136186, at *1 (D. Colo. Jan. 10, 2013); *UcPech v. Chez Thuy Corp.*, 2022 WL 4290474, at *11 (D. Colo. Sept. 16, 2022); *Fracasse v. Ablaze Energy*, 2016 WL 8577551, at *4 (D. Colo. July 1, 2016). No Defendant responded or otherwise engaged with Plaintiffs' written demand. (Doc. No. 11 at ¶¶ 75 (pg. 12)–76.)

Plaintiffs further allege that while they were employed by Gilbert's Tree Service, the company failed to pay overtime for weeks in which they worked over 40 hours (Doc. No. 11 at

¶¶ 51–56), failed to pay all earned wages when due (*id.* at ¶¶ 57–61), improperly made deductions from their wages (*id.* at ¶ 62), and failed to maintain accurate employee records or provide paystubs for each pay period (*id.* at ¶¶ 63–64). Accepting these factual allegations as true, the Court finds that Plaintiffs have pled claims for relief under the CWA and CMWA.[8] *See, e.g.*, *Peralta v. Taco Mex III Inc.*, 2018 WL 11624917, at *5 (D. Colo. Sept. 28, 2018).

D. Plaintiffs' allegations are sufficient to establish retaliation.

Finally, Plaintiffs bring retaliation claims under the FLSA and CWA. (Doc. No. 11 at ¶¶ 65–75 (pg. 14).) According to Plaintiffs, after being retained, counsel sent Defendants an introductory letter informing them Plaintiffs were pursuing certain back wages. (*Id.*) The letter is attached to Plaintiffs' Motion and is dated July 25, 2023. (Doc. No.72-5; *id.* at 1 ("This firm represents Tyriq Miller and Isaac Smith in their claim for underpaid wages owed to them pursuant to state and federal law against Gilbert's Tree Service.").) Plaintiffs say they were fired just days later, on August 2, 2023. (Doc. No. 11 at ¶¶ 10 (pg. 6), 25 (pg. 7), 27 (pg. 8), 41.)

"Both the [CWA] ... and the FLSA ... prohibit an employer from retaliating against an employee's invocation of wage protection rights." *Jones v. Peopleready Inc.*, 2022 WL 2176286, at *6 (D. Colo. June 16, 2022). To "establish a *prima facie* case of retaliation," a plaintiff must demonstrate: (1) he engaged in protected activity under the FLSA; (2) he suffered an adverse employment action contemporaneous with or subsequent to the protected activity; and (3) a

[8] Though the Court accepts the well-pleaded factual allegations, the Court also notes Plaintiffs attach certain evidence to the Motion in support of some of their allegations. For example, Plaintiffs submit pay stubs demonstrating their rates and methods of pay varied frequently. (Doc. Nos. 72-2; 72-3.) As Plaintiffs explain in their Motion, "[t]ypically when the quantity of hours was listed as being fewer than 40, the payment was listed as being at an hourly rate of between $20-$25 per hour. When the quantity of hours listed was ... exactly 40, the payment was listed as being a 'salary' (but of varying amounts week to week)." (Doc. No. 72 at 5–6.)

causal connection between the protected activity and the adverse employment action." *Ott v. Chacha in Art LLC*, 506 F. Supp. 3d 1133, 1144 (D. Colo. 2020) (citing *Pacheco v. Whiting Farms, Inc.*, 365 F.3d 1199, 1206 (10th Cir. 2004)). Courts have applied the same framework to CWA retaliation claims. *See, e.g.*, *Jones*, 2022 WL 2176286, at *6; *Ott*, 506 F. Supp. 3d at 1144.

"[P]rotected activity includes 'fil[ing] any complaint ... related to [the FLSA].'' *Inniss*, 385 F. Supp. 3d at 1169 (quoting 29 U.S.C. § 215(a)(3)). Here, counsel's letter expressly stated that Plaintiffs were pursuing "underpaid wages owed to them pursuant to state and federal law." (Doc. No. 72-5 at 1.) This type of communication is sufficiently similar to filing a claim because it is an express and formal assertion of rights. Thus, the protected activity prong is satisfied and the Court moves on to the second and third prong of the retaliation analysis.

Plaintiffs satisfy the second prong by alleging they were terminated following counsel's letter. (Doc. No. 11 at ¶ 25 (pg. 7), 41); *see Pacheco*, 365 F.3d 1199, 1206 (10th Cir. 2004) ("An adverse employment action is a detrimental change in the terms or conditions of employment, such as termination."). Further, the exceptionally short period between the letter being sent and Plaintiffs' alleged termination—a matter of days—is strong circumstantial evidence of a causal connection between the protected activity and adverse action, satisfying the third prong of the analysis. (*Compare* Doc. No. 72-5 (Plaintiffs' letter from counsel dated July 25, 2023), *with* Doc. No. 11 at ¶ 1 (saying Plaintiffs were fired August 2, 2023). *See O'Neal v. Ferguson Const. Co.*, 237 F.3d 1248, 1253 (10th Cir. 2001) ("A causal connection may be shown by evidence of circumstances that justify an inference of retaliatory motive, such as protected conduct closely followed by adverse action."); *Inniss*, 385 F. Supp. 3d at 1170 (noting "the Tenth Circuit has explained" that to prove a causal connection through temporal evidence alone requires "something between six weeks (or less) and three months"). Accordingly, the Court finds Plaintiffs have alleged *prima facie* claims for retaliation under the FLSA and CWA. Moreover, because Defendant has not appeared to offer a legitimate non-retaliatory reason for the adverse employment action, Plaintiffs are entitled to a default judgment.

III. Damages and Costs

Having determined that default judgment should be entered on each of Plaintiffs' claims, the Court must next determine the amount and character of Plaintiff's recovery. "A final default judgment cannot be entered against a party until the amount of damages has been ascertained." *Herzfeld v. Parker*, 100 F.R.D. 770, 773 (D. Colo. 1984) (citing 10 C. Wright, A. Miller & M. Kane, Federal Practice and Procedure: Civil § 2692 at 465–66 (1983)). Actual proof must support any default judgment for money damages. *See Klapprott v. United States*, 335 U.S. 601, 611–12 (1949).

Allegations regarding the amount of damages are deemed true only to the extent they are "capable of mathematical calculation." *Marcus Food Co. v. Dipanfilo*, 671 F.3d 1159, 1172 (10th Cir. 2011); *see Hunt v. Inter-Globe Energy, Inc.*, 770 F.2d 145, 148 (10th Cir. 1985) ("[A] court may enter a default judgment without a hearing only if the amount claimed is a liquidated sum or one capable of mathematical calculation."). Where the amount claimed is not "a liquidated sum or one capable of mathematical calculation," a court is required to hold an evidentiary hearing to determine the amount of damages. *Venable v. Haislip*, 721 F.2d 297, 300 (10th Cir. 1983). Here, the Court finds it has sufficient information to calculate the damages and an evidentiary hearing is not necessary. *See Marcus Food*, 671 F3d at 1171–72 (determining that the damages asserted in the complaint were sufficiently calculable to not require an evidentiary hearing).

As a threshold matter, an employer's compliance with section 211(c) "determines the burden of proof faced by a plaintiff in establishing the number of overtime hours worked." *McGrath v. Cent. Masonry Corp*., 2009 WL 3158131, at *6 (D. Colo. Sept. 29, 2009) "[W]hen an employer does not comply with section 211(c), a plaintiff need only meet the 'just and reasonable inference' burden of proof." *Solis v. Melt Brands Stores, LLC*, 2012 WL 364685, at *3 (D. Colo. Feb. 2, 2012). Here, Plaintiffs allege Defendants failed to make, keep, and preserve accurate records regarding the wages, hours, and other conditions of employment of Plaintiffs in violation of 29 U.S.C. § 211(c). (Doc. No. 11 at ¶¶ 63–64; *see* Doc. No. 72 at 10–11 (saying Plaintiffs only have access to some of their pay stubs)); 29 U.S.C. § 211(c) (saying employers are required to "make, keep, and preserve" records of their employees including, "wages, hours, and other conditions and practices of employment."). This is sufficient to trigger the lower burden of proof.[9] *See Vassel v. Littleton Auto Repair LLC*, 2024 WL 709800, at *5 (D. Colo. Feb. 21, 2024).

Another threshold consideration in the Court's damages calculation is the length of time that will apply to the calculation. The FLSA and CWA are subject to two-year statute of

[9] Plaintiffs do not actually cite section 211(c) in their Amended Complaint or Motion. They do, however, explicitly allege Defendants violated record keeping and sharing sections of the CWA in their Amended Complaint. (*See* Doc. No. 11 at ¶¶ 63–64); Colo. Rev. Stat. § 8-4-103(4) (requiring that "[e]very employer shall at least monthly, or at the time of each payment of wages or compensation, furnish to each employee an itemized pay statement"); *see also* Colo. Rev. Stat. § 8-4-103(4.5) (requiring "[a]n employer [to] retain records reflecting the information contained in an employee's itemized pay statement ... for a period of at least three years after the wages or compensation were due"). Moreover, the proposed order submitted by Plaintiffs *does* cite section 211(c). (Doc. No. 72-12 at 10.)

limitations which can be extended to three years for willful violations. C.R.S. § 8-4-122; 29 U.S.C. § 255(a). Plaintiffs' employment began during the summer of 2020, and this action was filed January 2, 2024. (Doc. No. 1.) Plaintiffs cabin the damages sought to the three-year statute of limitations period for willful violations—in this case, violations beginning January 2, 2021. (*See* Doc. No. 72 at 11.) Thus, the Court must first determine whether Plaintiffs adequately allege willfulness such that it should apply the three-year statute of limitation.

A "statute of limitations defense is an affirmative defense and is subject to waiver." *Herrera v. City of Espanola*, 32 F.4th 980, 1001 (10th Cir. 2022). Here, Defendant Matheny has not responded at all in this matter, much less raised any applicable affirmative defenses. Thus, arguably, the Court should find willfulness and apply the three year statute of limitation based merely upon Plaintiffs' allegation that the FLSA and CWA violations were willful. *See, e.g.*, *Lodos v. Empire Towing Corp.*, 2026 WL 685400, at *6, n. (D. Colo. Mar. 11, 2026) (applying the three-year FLSA statute of limitations where the plaintiff alleged the violations were willful and the defendants did not appear and thus "waived" the statute of limitations defense).

However, even setting aside Defendant Matheny's lack of appearance, the Court finds Plaintiffs have adequately demonstrated willful violations. In their affidavits, Plaintiffs state they were *never* paid for daily pre- and post- work hours, and it strains credulity to believe Defendant was unaware this was occurring or unaware that it was illegal. (*See* Doc. No. 72-9 at ¶¶ 8–9; Doc. No. 72-10 at ¶¶ 7–8.) Further, Plaintiffs declare that Defendant Matheny constantly changed Plaintiffs' rates of pay, routinely flipped between categorizing Plaintiffs as hourly or salaried employees in order to avoid overtime pay, and regularly shaved Plaintiffs' hours. (*See*

Doc. No. 72-9 at ¶¶ 5–7, 10; Doc. No. 72-10 at ¶¶ 4–6, 9; *see also* Doc. Nos. 72-2; 72-3 (Plaintiffs' paystubs).)

Moreover, the evidence suggests Defendant Matheny is aware of this action and still has not paid back wages or otherwise engaged in the case. Indeed, Plaintiffs' counsel's introductory letter was addressed to Defendant Matheny (Doc. No. 72-5), Defendant Matheny personally fired Plaintiffs (Doc. No. 72-9 at ¶ 12; Doc. No. 72-10 at ¶ 11), Defendant Matheny was served with process (Doc. No. 16), Plaintiffs and the Court have been sending all filings to Defendant Matheny's apparent address[10] (*see* Doc. No. 72-1; *see also* Doc. Nos. 45; 68), and a co-owner of the business, Mr. Rodriguez, appeared and settled the claims against him (*see* Doc. No. 69).

Based on Plaintiff's allegations and evidence, as well as the facts and circumstances surrounding this case, the Court finds willfulness, and will apply the three-year statute of limitations in its damages calculations. With those threshold considerations resolved, the Court moves on to calculate damages.

A. Back Pay

"In making an independent determination of the amount of damages, the court may rely on detailed affidavits or documentary evidence." *BMO Harris Bank N.A. v. Marjanovic*, 2021 WL 307501, at *4 (D. Colo. Jan. 29, 2021) (citations and quotation omitted). Here, Plaintiffs rely on their pay stubs to estimate they worked over 40 hours in "52–56%" of their workweeks. (Doc. No. 72 at 11 ("Of Miller's 16 paystubs, 9 of them (56%) listed 40 hours; the other 7, fewer. Similarly, of Smith's 21 legible paystubs, 11 of them (52%) listed 40 hours; the others, fewer."

[10] Plaintiffs also appear to have been emailing some of their filings directly to Defendant Matheny. (*See, e.g.*, Doc. No. 68.)

(internal citation omitted)); *see* Doc. Nos. 72-2; 72-3 (pay stubs).) Plaintiffs reach this estimate by concluding that *any* week in which their paystub documents 40 hours must have included unpaid overtime because they were *never* paid for "preliminary and postliminary work of about an hour a day." (Doc. No. 72 at 11; *see, e.g.*, Doc. No. 11 at ¶¶ 11–12 (pg. 6) (saying Plaintiff Miller's daily loading and unloading of the work truck took about an hour a day and was not counted by Defendants).) Moreover, Plaintiffs contend they had certain hours shaved off whenever they worked more than 40 hours, such that their paystub would only show 40 hours. (*Id.* at ¶¶ 24, 40; Doc. No. 72 at 11.) Plaintiffs further contend that in weeks they *did not* work overtime, they were not paid for seven hours of compensable time, and in weeks they *did* work overtime, they averaged 12 hours of unpaid overtime. (*Id.* at 11–13.) Plaintiffs put forward the following estimates:

1. They were underpaid five hours per week (one hour per day) <u>every week</u> for uncounted pre- and post-liminary work. (Doc. No. 72 at 11.)

2. They were underpaid an estimated 2.5 hours per week (30 minutes per day) every week for deducted, but untaken, break time. (*Id.*)

3. In any week Plaintiffs worked more than 40 counted hours,[11] an estimated five hours per week were shaved by Defendants in order to get their weekly hours down to 40.[12] (*Id.*)

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[11] "Counted hours" refers to non-pre/postliminary work and hours not deducted for breaks.

[12] Plaintiffs reach this estimate by noting their usual workday, excluding pre- and post work hours, went from 7:00 or 7:30 AM to 5:00 PM—a 9.5 or 10-hour day. (Doc. No. 42 at 2; *see* Doc. No. 72-9 at ¶¶ 8–9 (Miller affidavit) (saying Plaintiff Miller usually left for the first job site at 7:00 AM and finished at the last job site around 5:00 PM); Doc. No. 72-10 at ¶¶ 7–8 (Smith affidavit) (saying Plaintiff Smith usually left for the first job site at 7:00 AM and finished at the last job site around 5:00 PM).) This suggests Plaintiffs' hours were shaved by 7.5 to 10 hours during overtime weeks in which they worked five days. Plaintiffs then reduce the estimate to five hours per week as a "good faith reduction." (*Id.*)

Plaintiffs round their total uncounted hours estimate to seven hours in non-overtime weeks and 12 hours in overtime weeks.

In sum, based on these estimations and contentions, Plaintiffs conclude that "as a matter of just and reasonable inference necessitated by the lack of records," they worked overtime 56% of their workweeks and were not compensated for 12 hours of overtime during these weeks. (Doc. No. 72 at 11–12.) Further, in other workweeks, Plaintiffs say they were not compensated for 7 hours of non-overtime work. (*Id.*) Plaintiffs then cap their total number of workweeks to the three-year statute of limitations under the FLSA and Colorado wage laws. *See* 29 U.S.C. § 255(a); C.R.S. § 8-4-122. Accordingly, Plaintiffs count their weeks beginning January 2, 2021, rather than in the summer of 2020 when they were hired. (*See* Doc. No. 72 at 12–13). This results in Plaintiffs claiming 75.36 overtime weeks for Miller and 69.98 for Smith; as well as 59.21 non-overtime weeks for Miller and 64.59 for Smith. (*Id.*) Additionally, Plaintiffs estimate their average rate of pay to be $22.50 per hour, and, consequently, their time and a half overtime rate is estimated at $33.75. (Doc. No. 72 at 11–13.)

The Court finds Plaintiffs' estimates and calculations to be reasonable and sufficiently supported. Plaintiffs reasonably estimate the number of overtime and non-overtime weeks using the pay stubs available to them. Further, Plaintiffs have adequately supported their estimate of 7 unpaid hours in non-overtime weeks and 12 unpaid hours in overtime weeks by estimating five hours of unpaid pre- and post-liminary work per week, two hours of unused breaks, and five hours shaved during every overtime week. Indeed, these estimates appear somewhat conservative based on the allegations and affidavits presented. Moreover, Plaintiffs' use of a $22.50 per hour base rate of pay is reasonable and conservative. Based on the pay stubs available to Plaintiffs and presented to the Court (Doc. Nos. 72-2; 72-3), Plaintiffs' pay rates were commonly $22.50/hour, but also frequently exceeded this amount, and were rarely below it.

Based on these estimates, the Court calculates the following back pay amounts. (*See* Doc. No. 72-11.)

Overtime hours

Miller		Smith	
OT weeks:	75.36	OT weeks:	69.98
Unpaid OT hours/week:	12	Unpaid OT hours/week:	12
OT rate:	$33.75	OT rate:	$33.75
Est. Unpaid OT:	**$30,520.80**	**Est. unpaid OT:**	**$28,341.90**

Non-overtime hours

Miller		Smith	
Non-OT weeks:	59.21	Non-OT weeks:	64.59
Unpaid hours/week:	7	Unpaid hours/week:	7
Pay rate:	$22.50	Pay rate:	$22.50
Est. unpaid wages:	**$9,325.80**	**Est. unpaid wages:**	**$10,173.60**

Accordingly, the Court finds Plaintiff Miller is owed $39.846.60 in back pay and Plaintiff Smith is owed $38,515.50 in back pay.[13]

B. FLSA Liquidated Damages

"The FLSA provides for damages for failure to pay minimum wage or overtime." *Boyer v. Celerity Sols. Grp., LLC*, 482 F. Supp. 3d 1122, 1134 (D. Colo. 2020) (citing 29 U.S.C. §

[13] In the Motion, Plaintiff Smith also seeks an additional $200 for two $100 "deductions" made to his pay which he says was "the employer taking back a bonus it had paid him for driving to California." (Doc. No. 72 at 13; *see* Doc. No. 72-3 at 19–20 (showing $100 "deductions" noted on paystubs).) However, while the Amended Complaint makes various (mostly un-detailed) references to "improper deductions" (*see* Doc. No. 11 at ¶ 1), it does not contain any specific allegations regarding a bonus given to Plaintiff Smith driving to or from California. As such, the Court finds these damages insufficiently alleged and declines to recommend their award.

216(b) ("Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages.")); *see also Jordan v. U.S. Postal Serv.*, 379 F.3d 1196, 1202 (10th Cir. 2004) ("Liquidated damages are not a penalty exacted by the law, but rather compensation to the employee occasioned by the delay in receiving wages due caused by the employer's violation of the FLSA."). "Both unpaid wages and liquidated damages are the norm." *Boyer*, 482 F. Supp. 3d at 1134. The amount of liquidated damages is "an additional equal amount" to "the amount of [the employee's] unpaid minimum wages, or [the employee's] unpaid overtime compensation, as the case may be." 29 U.S.C. § 216(b).

Still, "an employer who violates sections 206 or 207 of the FLSA may avoid liquidated damages if he shows 'that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation.'" *Id.* (quoting 29 U.S.C. § 260). But the burden *is on the employer* to prove "by plain and substantial evidence, subjective good faith and objective reasonableness." *Burke v. Alta Colleges, Inc.*, 2014 WL 2882807, at *4 (D. Colo. June 25, 2014) (citing *Reich v. S. New Eng. Telecomm. Corp.*, 121 F.3d 58, 71 (2d Cir. 1997)). Thus, by their failure to appear, Defendants have failed to carry their burden of showing the FLSA violations were undertaken in good faith. *See Sergiyenko v. McCusker Holding Corp.*, 2018 WL 1508910, at *7 (D. Kan. Mar. 27, 2018) ("[H]aving defaulted, defendant has made no showing to avoid liquidated damages with evidence that it acted in good faith or reasonably believed that its actions did not violate the FLSA.").

Plaintiffs say they are due liquidated damages within this statutory period for unpaid overtime (calculated at 1.5 x the base rate of pay) and for any unpaid regular time (calculated at the federal minimum wage of $7.25). The Court finds Plaintiffs' calculations adequate and supported. *See Kimes*, 2024 WL 2864147, at *3; *Sergiyenko*, 2018 WL 1508910, at *7 (D. Kan. Mar. 27, 2018).

The Court calculates the following in FLSA liquidated damages. (*See* Doc. No. 72-11.)

Overtime

Miller		Smith	
OT weeks:	75.36	OT weeks:	69.98
Unpaid OT hours/week:	12	Unpaid OT hours/week:	12
OT rate:	$33.75	OT rate:	$33.75
OT liquidated damages:	**$30,520.80**	OT liquidated damages:	**$28,341.90**

Minimum wage

Miller		Smith	
Non-OT weeks:	59.21	Non-OT weeks:	64.59
Unpaid hours/week:	7	Unpaid hours/week:	7
Federal MW:	$7.25	Federal MW:	$7.25
MW liquidated damages:	**$3,004.98**	MW liquidated damages:	**$3,278.16**

Accordingly, the Court recommends Plaintiff Miller be awarded $33,525.78 in FLSA liquidated damages and Plaintiff Smith be awarded $31,620.06.

C. Colorado Statutory Penalties

Plaintiffs also seek statutory penalties under Colorado law. Under the CWA, "[i]f an employee is not paid their wages or compensation within fourteen days after sending a written demand, the employer is liable for the wages plus a penalty. *Kimes*, 2024 WL 2864147, at *5 (citing C.R.S. § 8-4-109). "An employer's failure to comply with the statute allows an employee to recover the greater of either: 'two times the amount of the unpaid wages or compensation or one thousand dollars." *Id.* (quoting C.R.S. § 8-4-109(3)(b)(I)). However, if "the employee can show that the employer's failure or refusal to pay wages or compensation was willful" the penalties are then increased to "the greater of three times the amount of the unpaid wages or compensation or three thousand dollars." C.R.S. § 8-4-109(3)(b)(II). A plaintiff may recover both FLSA liquidated damages and CWA statutory penalties. *See Evans*, 632 F. App'x 498 at (10th Cir. 2015) (collecting cases) (concluding that "an award of both a state statutory penalty and FLSA liquidated damages does not constitute a double recovery").

As noted, Defendant Matheny failed to respond or otherwise engage with Plaintiffs' written demand, entitling Plaintiffs to two times the amount of unpaid wages. But Plaintiffs seek three times the amount of unpaid wages, arguing Defendant Matheny's failure to pay was willful. (Doc. No. 72 at 10.) And because the Court has already concluded Defendant Matheny acted willfully, *see supra* at 15–17, Plaintiffs are entitled to three times their back pay under Colorado wage laws.

Miller		Smith	
CWA penalty base:	$39,846.60	CWA Penalty base:	$38,515.50
Willful penalty	x 3	Willful penalty	x 3
CWA penalty:	**$119,539.80**	**CWA penalty:**	**$ 115,546.50**

The Court recommends Plaintiff Miller be awarded $119,539.80 in CWA penalties and Plaintiff Smith be awarded $115,546.05.

D. Retaliation Damages

"Any employer who violates the [FLSA's retaliation provisions] shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of the [retaliation provisions] including without limitation ... the payment of wages lost." 29 U.S.C.A. § 216(b).

Plaintiffs seek their wages lost during the period between their retaliatory termination and finding new work.

In calculating their retaliation damages, Plaintiffs use a base rate of $22.50 per hour at 45 hours per week. In his sworn affidavit Plaintiff Miller declares he was out of work for six weeks following his termination, Plaintiff Smith says he was out of work for four weeks. (Doc. No. 72-9 at ¶ 13; Doc. No. 72-10 at ¶ 12.) The Court has already found a $22.50 base rate reasonable. *See supra* at 19–20. The Court further finds 45 hours per week to be a reasonable and conservative estimate as Plaintiffs state they generally worked 9.5 to 10 hour days (not including uncounted pre- and post work hours for about an hour per day or untaken half hour breaks), five days per week. (*See* Doc. No.72-9 at ¶¶ 8–10; Doc. No. 72-10 at ¶¶ 7–9.) Based on these inputs, the Court makes the following calculations of retaliation damages:

Miller		Smith	
Unpaid time ($22.50*40*6):	$5,400.00	Unpaid time ($22.50*40*4):	$ 3,600.00
Unpaid OT ($33.75*5*6):	$1,012.50	Unpaid OT ($33.75 * 5 * 4):	$675.00
Retaliation wage damages:	**$6,412.50**	**Retaliation wage damages:**	**$4,275.00**

Plaintiffs also seek liquidated damages in connection with their retaliation claim. Courts considering the issue of liquidated damages in connection with a retaliation claim consider such an award discretionary. *See Moore v. Appliance Direct, Inc.*, 708 F.3d 1233, 1239 (11th Cir. 2013) ("[T]he second sentence in section 216(b), which allows such damages 'as may be appropriate to effectuate the purposes of [the retaliation provision],' creates a separate, discretionary, standard of damages for retaliation claims." (quoting 29 U.S.C. § 216(b)); *Braswell v. City of El Dorado, Ark.,* 187 F.3d 954, 958 (8th Cir. 1999) (finding liquidated damages were mandatory as to an overtime claim but not in connection to a retaliation claim); *Blanton v. City of Murfreesboro,* 856 F.2d 731 (6th Cir. 1988).

Here, the Court finds the award of liquidated damages appropriate. Plaintiffs were fired just days after Defendants received a letter from Plaintiffs' counsel. (*See* Doc. No. 11 at ¶ 66.) This amounted to textbook and blatant retaliation with no good faith explanation. Under such conditions the award of liquidated damages is "appropriate to effectuate the purposes" of the FLSA's anti-retaliation provision. Thus, the Court recommends Plaintiffs be awarded liquidated damages equal to their retaliation back pay damages. *See Koellhoffer*, 858 F. Supp. 2d 1181, 1192 (D. Colo. 2012) ("Ordinarily, an employer who violates the FLSA is liable for both unpaid wages and an additional equal amount as liquidated damages.").

Miller		Smith	
Retaliation wage damages:	$6,412.50	Retaliation wage damages:	$4,275.00
Liquidated damages:	$6,412.50	Liquidated damages	$4,275.00
Total Retaliation damages:	**$12,825.00**	**Total Retaliation damages:**	**$8,550.00**

E. Attorney's Fees and Costs

Finally, the Court addresses Plaintiffs' reservation of rights in connection with attorney's fees and costs. (Doc. No. 72 at 19.) Under the FLSA and CWA, Plaintiffs are permitted an award of reasonable attorney fees and costs. C.R.S. § 8-4-110(1); 29 U.S.C. § 216(b). Here, the Court recommends granting Plaintiffs leave to file a motion for reasonable attorney's fees and costs incurred in connection with this litigation. *See Judson v. Black*, 2011 WL 3489695, at *3–4 (D. Colo. Aug. 9, 2011) (granting party an opportunity to seek an award of attorney's fees and costs after reservation of this right).

CONCLUSION

For the foregoing reasons, the Court **RECOMMENDS** the Plaintiffs' Motion for Default Judgment (as to Defendant John Matheny Only). (Doc. No. 72) be **GRANTED**. Specifically, the Court **RECOMMENDS**:

1. Plaintiffs be awarded default judgment on all claims.

2. Plaintiffs be awarded the following damages, minus any amounts received by Plaintiffs via their settlement with Mr. Rodriguez and the Company.

Miller	
Back pay:	$39.846.60
FLSA liquidated damages:	$33,525.78
CWA penalty:	$119,539.80
Retaliation:	$12,825.00
Total:	**$205,737.18**

Smith	
Back pay:	$38,515.50
FLSA liquidated damages:	$31.620.06
CWA penalty:	$115,546.50
Retaliation:	$8,550.00
Total:	**$194,232.06**

3. Plaintiffs be awarded post-judgment interest at a daily rate determined by the Clerk of Court.

4. Plaintiffs be permitted to file a motion seeking attorneys fees and costs.

The Clerk of Court is directed to mail a copy of this Recommendation to Defendant:

John Matheny
8525 Squirrel Creek Rd.
Fountain, CO 80817

ADVISEMENT TO THE PARTIES

Within fourteen days after service of a copy of the Recommendation, any party may serve and file written objections to the Magistrate Judge's proposed findings and recommendations with the Clerk of the United States District Court for the District of Colorado. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); *In re Griego*, 64 F.3d 580, 583 (10th Cir. 1995). A general objection that does not put the district court on notice of the basis for the objection will not preserve the objection for *de novo* review. "[A] party's objections to the magistrate judge's report and recommendation must be both timely and specific to preserve an issue for de novo review by the district court or for appellate review." *United States v. One Parcel of Real Prop. Known As 2121 East 30th Street, Tulsa, Okla.*, 73 F.3d 1057, 1060 (10th Cir. 1996). Failure to make timely objections may bar *de novo* review by the district judge of the magistrate judge's proposed findings and recommendations and will result in a waiver of the right to appeal from a judgment of the district court based on the proposed findings and recommendations of the magistrate judge. *See Vega v. Suthers*, 195 F.3d 573, 579-80 (10th Cir. 1999) (a district court's decision to review a magistrate judge's recommendation *de novo* despite the lack of an objection does not preclude application of the "firm waiver rule"); *One Parcel of Real Prop.*, 73 F.3d at 1059-60 (a party's objections to the magistrate judge's report and recommendation must be both timely and specific to preserve an issue for *de novo* review by the district court or for appellate review); *Int'l Surplus Lines Ins. Co. v. Wyo. Coal Ref. Sys., Inc.*, 52 F.3d 901, 904 (10th Cir. 1995) (by failing to object to certain portions of the magistrate judge's order, cross-claimant had waived its right to appeal those portions of the ruling); *Ayala v. United States*, 980 F.2d 1342, 1352 (10th Cir. 1992) (by their failure to file objections, plaintiffs waived their right to appeal the magistrate judge's ruling). *But see Morales-Fernandez v. INS*, 418 F.3d 1116, 1122 (10th Cir. 2005) (firm waiver rule does not apply when the interests of justice require review).

Dated this 8th day of June, 2026.

BY THE COURT:

Maritza Dominguez Braswell
United States Magistrate Judge