NO. 22-2183

In the United States Court of Appeals for the Eighth Circuit

MATTHEW A. KEZHAYA,

Appellant,

v.

CITY OF BELLE PLAINE, MINNESOTA,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA
DISTRICT COURT NO. 0:21-CV-00336-WMW

BRIEF OF APPELLEE CITY OF BELLE PLAINE, MINNESOTA

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SUMMARY

This Court has held repeatedly and unequivocally that seeking to relitigate the same claims against the same defendant after denial of leave to amend on the merits is sanctionable misconduct. Yet Appellant did just that. By filing a second action, Appellant multiplied the proceedings, resulting in additional hours expended by Belle Plaine's counsel to obtain dismissal of the frivolous complaint and seek corresponding sanctions. Following this Court's precedent, the district court imposed sanctions on Appellant under Rule 11. The district court determined attorney fees for additional work created by the frivolous suit was the appropriate sanction but reduced the fee sought by 50 percent.

The district court properly applied Eighth Circuit precedent and did not abuse its discretion by imposing attorney fees as Rule 11 sanctions. Belle Plaine submitted adequate documentation to establish the fees sought. But when the district court determined that the fees sought were excessive, it nonetheless acted within its discretion by imposing a percentage reduction. Appellant's arguments are contrary to precedent and meritless. This Court should affirm. Belle Plaine does not believe oral argument is necessary, but requests 10 minutes if it happens.

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STATEMENT OF THE ISSUES

1. Under Eighth Circuit precedent, a district court abuses its discretion by refusing to sanction a plaintiff or their counsel under Rule 11 for filing a frivolous lawsuit seeking to relitigate claims against the same defendant after denial of leave to amend in a prior lawsuit. Appellant filed a second lawsuit seeking to relitigate claims against Belle Plaine after denial of leave to amend. Did the district court err by sanctioning Appellant for filing a frivolous lawsuit under Rule 11?

   Prof'l Mgmt. Assocs., Inc. v. KPMG LLP,
   345 F.3d 1030 (8th Cir. 2003) (per curiam)

   King v. Hoover Grp., Inc.,
   958 F.2d 219 (8th Cir. 1992)

   Landscape Props., Inc. v. Whisenhunt,
   127 F.3d 678 (8th Cir. 1997)

   Meyer v. U.S. Bank Nat'l Ass'n,
   792 F.3d 923 (8th Cir. 2015)

   Fed. R. Civ. P. 11

2. Sanctions under Rule 11 must be limited to deter future misconduct, and a court has discretion to impose non-monetary sanctions but is not required to do so. The district court found that a sanction of attorney fees reasonably incurred responding to the Satanic Temple's frivolous lawsuit necessary to deter future misconduct and that a reprimand would have been insufficient. Did the district court abuse its discretion by imposing a sanction of attorney fees?

   Meyer v. U.S. Bank Nat'l Ass'n,
   792 F.3d 923 (8th Cir. 2015)

   Kirk Cap. Corp. v. Bailey,
   16 F.3d 1485 (8th Cir. 1994)

   Fed. R. Civ. P. 11

3. Where a party made no motion for recusal at the district court, the party seeking disqualification bears the burden of showing that the district judge plainly erred by failing to recuse herself and that failure to do so seriously affected the fairness, integrity, or public reputation of the proceedings. Appellant seeks reassignment for the first time on appeal and identifies a single fact question asked during a motion hearing as grounds for reassignment. Did the district judge plainly err by failing to sua sponte recuse herself?

Fletcher v. Conoco Pipe Line Co.,
323 F.3d 661 (8th Cir. 2003)

Liteky v. United States,
510 U.S. 540 (1994)

28 U.S.C. § 455

STATEMENT OF THE CASE

A. The district court dismissed all but one of the Temple's claims for failure to state a claim.

In April 2019, the Satanic Temple filed a complaint alleging ten claims against Belle Plaine, including state and federal constitutional violations and state tort claims, arising from Belle Plaine establishing and then rescinding a limited public forum in a City Park, and issuing and then cancelling a permit for the Temple to place a display in that City Park (*Satanic Temple I*).[1] The parties moved for judgment on the pleadings, and on July 31, 2020, the district court denied the Temple's motion, granted Belle Plaine's motion in part, and dismissed without prejudice all claims except the state law promissory estoppel claim.[2] The parties commenced discovery with respect to the remaining claim.

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[1]The substance of these claims is not at issue in this appeal. The facts and legal theories are discussed in detail in the consolidated substantive appeal, Case Nos. 21-3079, 21-3081.

[2] *Satanic Temple I*, D. Minn. No. 19-01122 (*TST I*), CITYAPP_023; R. Doc. 46, at 23.

B. The Temple moved for leave to amend the complaint after the deadline.

On December 4, 2020, after the deadline for motions to amend had passed and at the close of discovery, the Temple moved to amend the scheduling order and for leave to amend its complaint.[3] The accompanying proposed amended complaint included an "Explanatory Note" stating it was "intended to correct the pleading deficiencies identified in the Court's order of dismissal (without prejudice) of the constitutional issues," and it was based on the same factual allegations as the Temple's original complaint.[4] The proposed amended complaint reasserted three federal constitutional claims and added claims for violation of the Establishment Clause and Due Process Clause under state and federal law.[5]

C. The magistrate judge denied leave to amend the complaint.

The magistrate judge denied the Temple's motion for leave to amend on January 26, 2021, as part of an order addressing various motions.[6] The

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[3] CITYAPP_024–27; *TST I*, R. Doc. 64.

[4] CITYAPP_028–31; *TST I*, R. Doc. 64-1 ¶¶ 1–8 ("The core factual allegations are still the same.").

[5] CITYAPP_029; *TST I*, R. Doc. 64-1 ¶ 4–5.

[6] CITYAPP_098–128; *TST I*, R. Doc. 79.

magistrate judge found that the Temple failed to show good cause for leave to amend after the scheduling order deadline because the Temple's "mere professed intention of clarifying its original Complaint is insufficient to establish good cause," and "[a] party does not meet the good cause standard under Rule 16(b) if the relevant information on which it based the amended claim was available to it earlier in the litigation."[7] The magistrate judge observed that the Temple did "not argue that new facts ha[d] emerged in this case."[8] Instead, the Temple was "merely reasserting three of the same, but already dismissed, claims on the same, albeit more detailed, factual allegations," and although the Temple sought "to add two new theories of liability," those were likewise based on the same facts.[9] The magistrate judge concluded, "[n]othing in the record . . . indicates that these additional details and theories of liability could not have with due diligence been alleged in [the Temple's] original Complaint."[10] The magistrate judge also determined

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[7] CITYAPP_123–24; *TST I*, R. Doc. 79, at 26–27.

[8] CITYAPP_124; *TST I*, R. Doc. 79, at 27.

[9] *Id.*

[10] *Id.* The magistrate judge had likewise found the Temple did not show diligence in conducting discovery and provided no explanation for the delay,

that the proposed reasserted constitutional claims would be futile because they "fail[ed] to correct the deficiencies observed" in the order dismissing them.[11]

D. Before challenging the denial of leave to amend, the Temple filed a second lawsuit against Belle Plaine.

On February 4, 2021, after the magistrate judge denied leave to amend and before objecting to that denial, the Temple filed a second suit against Belle Plaine in the District of Minnesota (*Satanic Temple II*).[12] The complaint in the second suit also included an "Explanatory Note" stating that the claims were based on the same factual allegations as the complaint in *Satanic Temple I* and that "[a] version of this complaint was proposed as an amended complaint" in the first case.[13] The Explanatory Note stated that the complaint reasserted federal and state constitutional violations and added claims for violations of the federal and Minnesota Establishment Clause and

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and so denied the motion to amend the pretrial scheduling order with respect to discovery as well. CITYAPP_120–21; *TST I*, R. Doc. 79, at 23–24.

[11] CITYAPP_125; *TST I*, R. Doc. 79, at 28 n.9.

[12] *See* App. 3-215; *Satanic Temple II*, D. Minn. No. 21-336 (*TST II*), R. Docs. 1, 1-1 and 1-2.

[13] App. 3–4 ¶¶ 1–2; *TST II*, R. Doc. 1 ¶¶ 1–2.

Due Process Clause; newly identified a member of The Satanic Temple; and provided additional detail and clarification in several specific respects and "otherwise generally elucidate[d] on the factual details giving rise to this litigation."[14]

E. After the Temple filed a second lawsuit against Belle Plaine, the Temple objected to the magistrate judge's decision.

On February 9, 2021, after filing the second lawsuit, the Temple objected to the magistrate judge's decision. The Temple's objections explicitly declined to challenge the magistrate judge's findings and conclusions underlying the denial of leave to amend.[15] While the Temple objected to the magistrate judge's denial of its motion to amend the scheduling order's discovery deadlines, the Temple told the district court that its motion "to amend the scheduling order to permit the amendment of the complaint," was "mooted by the filing of the sister case, *Satanic Temple v. Belle Plaine*, 21-cv-336."[16] The Temple asserted that its motion to amend the complaint "should be denied as moot," because the Temple had "since filed

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[14] App. 4–5 ¶¶ 4–6; *TST II*, R. Doc. 1 ¶¶ 4–6.

[15] CITYAPP_139–50;*TST I*, R. Doc. 91.

[16] *See* CITYAPP_140; *TST I*, R. Doc. 91 at 2.

the sister case," and "whether the sister complaint has stated a claim is an issue better left for a motion to dismiss."[17]

F. The district court affirmed the magistrate judge's decision denying the Temple's motion for leave to amend the complaint.

The district court found that the Temple "forfeited" any objections to the magistrate judge's findings that the Temple failed to show good cause for leave to amend.[18] The district court further found that the record supported affirming the magistrate judge decision that the Temple lacked good cause for leave to amend because "most of the amended factual allegations in [the Temple's] proposed amended complaint [were] either matters of public record or involve facts that [the Temple] knew or had access to when it filed its original complaint."[19] For example, the proposed amended complaint[20] itself avers the revisions newly identify the fact and timing of "*publicly available* statements" by Belle Plaine city officials showing the purpose of

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[17] CITYAPP_148–49; *TST I*, R. Doc. 91, at 10–11.

[18] Add. 27; *TST II*, R. Doc. 38, at 24 (also filed in *TST I,* R. Doc. 109).

[19] *Id.*

[20] CITYAPP_028–96; *TST I*, R. Doc. 64–1.

closing the limited public forum.[21] And the Temple previously admitted that it obtained information in 2017—well before filing its initial Complaint in 2019—about the supposedly-new "off-the-record discussions and deliberations"[22] identified in the proposed amended complaint.[23] Accordingly, the district court agreed with the magistrate judge that the proposed amended complaint did not identify any facts to which the Temple did not have access prior to 2019.

Moreover, the district court concluded that the magistrate judge correctly viewed the proposed amendments as futile. The amended free

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[21] CITYAPP_030 ¶ 8(2); *TST I*, R. Doc. 64-1 ¶ 8(2) (emphasis added).

[22] *Id.* ¶ 8(3).

[23] *See, e.g.*, App. 44; *TST II*, R. Doc. 1 ¶ 226 ("In August 2017, TST obtained some of the City's internal emails about this matter by a public records request."); CITYAPP_097; *TST I*, R. Doc. 70-1 at 66 (Mills Decl. Ex. 9) (showing Tweet from August 21, 2017, by Temple co-founder Lucien Greaves linking to Belle Plaine emails obtained through records request); CITYAPP_129; *TST I*, R. Doc. 84-1 at 59 (Mills. Decl. Ex. 3 (deposition testimony of The Satanic Temple Corporate Designee, Lucien Greaves, acknowledging August 2017 Tweets regarding Belle Plaine emails); CITYAPP_152; *TST I*, R. Doc. 94-2 at 56, ¶ 7 (Decl. of Lucien Greaves) ("Evan Anderson and I coordinated the Minnesota Data Practices Act Request, which resulted in Dawn Meyer providing TST with three PDFs, consisting of several hundred pages of the City's emails. I have provided these emails to TST's attorney, Matthew A. Kezhaya.").

speech claim did not correct the deficiencies because the Temple failed to plausibly allege that Belle Plaine either (1) closed the limited public forum in a viewpoint discriminatory manner since the city closed it entirely, or (2) imposed any unreasonable viewpoint-discriminatory restrictions while the forum was open, as would be required to sustain the free speech claim.[24] The free-exercise amendments were also deficient because the allegations did not plausibly contradict Belle Plaine's constitutionally permissible complete closure of a limited public forum.[25] Lastly, the proposed Establishment Clause claim was not viable because the allegations showed that the Temple had an equal opportunity to place its display in the City Park (though it never did so), and the "allegations reflect[ed] that the Christian monument was a 'passive monument' that did not actively advance a particular religious doctrine or express hostility toward other religions."[26]

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[24] Add. 31; *TST II*, R. Doc. 38, at 28.

[25] Add. 32–33; *TST II*, R. Doc. 38, at 29–30.

[26] Add. 34–35; *TST II*, R. Doc. 38, at 31–32.

G. The district court dismissed *Satanic Temple II* as precluded by *Satanic Temple I* and imposed Rule 11 sanctions on Appellant for filing a frivolous second lawsuit.

Belle Plaine moved to dismiss *Satanic Temple II* as barred by res judicata and moved for Rule 11 sanctions against the Temple's counsel,[27] seeking attorney fees incurred responding to the second suit.[28] The district court consolidated these motions with pending motions in *Satanic Temple I*, including Belle Plaine's motion for summary judgment on the promissory estoppel claim and the Temple's objections to the magistrate judge order.

The court heard argument on all motions on April 27, 2021.[29] During the hearing, the district judge extensively probed the Temple's promissory estoppel theory[30] and the Temple's rationale for its duplicative claims—both

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[27] Before filing the sanctions motion, Belle Plaine's counsel served the Temple's counsel with the motion and supporting memorandum via email, requested they withdraw the complaint, and informed them that failure to withdraw the pleading in 21 days (as required by Rule 11(c)(2)) would result in Belle Plaine filing a motion to dismiss and a motion for Rule 11 sanctions. Belle Plaine's counsel received no response from the Temple's counsel. *See* CITYAPP_155; *TST II*, R. Doc. 20.

[28] CITYAPP_153; *TST II*, R. Doc. 17.

[29] *See* App. 482–555; *TST II*, R. Doc. 57 (also filed in *TST I*, R. Doc. 120).

[30] *See* App. 497–513; *TST II*, R. Doc. 57, at 16–32.

with respect to whether they were barred by res judicata and, if not, whether the Temple nonetheless failed to state claims under Rule 12(b)(6).[31]

The district court issued a decision on all motions on September 15, 2021.[32] The court granted Belle Plaine's motion for summary judgment on the promissory estoppel claim. The court also granted Belle Plaine's motion to dismiss and motion for sanctions in *Satanic Temple II*. The district court found that *Satanic Temple II* was barred by res judicata based on *Satanic Temple I* under this Court's well-settled law that denial of leave to amend has preclusive effect, as stated in *Professional Management Associates, Inc. v. KPMG LLP*, 345 F.3d 1030, 1032–33 (8th Cir. 2003) (per curiam). The district court granted sanctions because the Temple filed a frivolous second lawsuit in violation of clear precedent instead of pursuing its proper recourse following denial of its motion for leave to amend. The district court directed Belle Plaine to file a motion and supporting documentation of the attorney fees incurred.[33]

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[31] *See* App. 534–48; *TST II*, R. Doc. 57, at 53–67.

[32] *See* Add. 4–51; *TST II*, R. Doc. 38.

[33] Add. 49–51; *TST II*, R. Doc. 38, at 46–48.

H. The district court reduced attorney fees sought by 50 percent.

Belle Plaine filed a motion for attorney fees and submitted billing records as directed, and the district court issued a decision granting the motion in part on May 24, 2022.[34] The district court reduced Belle Plaine's requested fees by 50 percent, from $33,886.80 to $16,943.40.[35] The court found that Belle Plaine's response to *Satanic Temple II* included work duplicative of that done in *Satanic Temple I* and that the unique issues in the second case were neither novel nor complex, so the number of hours included in billing records was unreasonably excessive.[36] The court applied a percentage-based reduction because it found that the billing records were not conducive to precisely eliminating only redundant or otherwise excessive hours. The district court ordered that the Temple's counsel and their respective law firms[37] be jointly and severally liable, under Rule 11(c), for the sanctions imposed.[38]

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[34] Add. 52–66; *TST II*, R. Doc. 58.

[35] Add. 66; *TST II*, R. Doc. 58, at 15.

[36] Add. 65–66; *TST II*, R. Doc. 58, at 14–15.

[37] The Temple's local counsel withdrew from representation on September 28, 2021, (CITYAPP_157; *TST II*, R. Doc. 48), after the district

I. The Temple appealed.

The Temple appealed the district court's September 15, 2021 order, filing notices of appeal in both *Satanic Temple I* and *Satanic Temple II*, which were consolidated. This Court heard argument in that consolidated appeal on December 15, 2022. The Temple separately appealed the district court's May 24, 2022 order granting in part Belle Plaine's motion for fees. The separate attorney fee appeal is the subject of this briefing, which the Temple has treated as encompassing res judicata issues raised by the filing of *Satanic Temple II*.

SUMMARY OF LEGAL ARGUMENT

Appellant violated Rule 11(b) by filing *Satanic Temple II*. Under binding precedent, no reasonable and competent attorney would have believed in the merit of filing a second action seeking to relitigate the same claims against the same defendant after denial of leave to amend on the merits instead of challenging that denial. By filing *Satanic Temple II*, Appellant multiplied the proceedings and wasted judicial and party resources.

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court granted Belle Plaine's motion for sanctions but before the district court ordered the attorneys' fees.

[38] Add. 66; *TST II*, R. Doc. 58, at 15.

The district court correctly found *Satanic Temple II* barred by res judicata and granted Belle Plaine's motion for Rule 11 sanctions. The court did not abuse its discretion in finding that an award of attorney fees to Belle Plaine was the appropriate sanction to deter future similar misconduct. When the district court determined that the fees sought were excessive, it acted within its discretion in applying a percentage reduction. The district court likewise acted within its discretion by making Appellant personally liable for the sanctions.

The district court properly imposed Rule 11 sanctions, and this Court should affirm. If this Court reverses, however, Appellant has not shown that the district judge plainly erred by failing to recuse herself, and reassignment should not be ordered.

LEGAL ARGUMENT

I. The district court properly imposed Rule 11 sanctions on Appellant for filing a frivolous lawsuit.

Rule 11 requires a party to certify that "claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law." Fed. R. Civ. P. 11(b)(2). Counsel must "conduct a reasonable inquiry of the factual and legal basis for a claim before filing," and an attorney may be

subject to sanctions if a "reasonable and competent" attorney would not believe the merit of an argument. *Coonts v. Potts*, 316 F.3d 745, 753 (8th Cir. 2003).

The district court correctly applied this Court's precedent when it found that Appellant reasonably should have known that *Satanic Temple II* was a precluded frivolous lawsuit not supported by existing law, in violation of Rule 11(b)(2). The district court therefore did not abuse its discretion by imposing sanctions. *See, e.g.*, *Meyer*, 792 F.3d at 927 (reviewing finding that plaintiff filed frivolous second lawsuit and imposition of sanction for that conduct for abuse of discretion).

A. *Satanic Temple II* was barred by res judicata.

As an initial matter, the district court correctly determined that *Satanic Temple II* was barred by res judicata because denial of the Temple's motion to amend in *Satanic Temple I* operated as a final judgment on the merits and *Satanic Temple II* was based on the same causes of action. *See Elbert v. Carter*, 903 F.3d 779, 782 (8th Cir. 2018) (listing elements of res

judicata).[39] All grounds for relief asserted in *Satanic Temple II* either were or could have been raised in *Satanic Temple I*, and thus res judicata precluded the Temple from relitigating its claims in a second suit. *See Lane v. Peterson*, 899 F.2d 737, 741 (8th Cir. 1990) ("[R]es judicata precludes the relitigation of a claim on grounds that were raised or could have been raised in the prior action."). In this appeal, Appellant goes for yet another bite at the apple by repeating arguments already asserted in the consolidated merits appeal. This Court should find his theories unavailing, just as the district court twice did below when it correctly granted Belle Plaine's motion for sanctions and granted in part Belle Plaine's motion for attorney fees.

1. Denial of leave to amend was a final decision on the merits.

Eighth Circuit law for decades has held that the denial of a motion for leave to amend a complaint constitutes a final judgment on the merits. *See Prof'l Mgmt. Assocs.*, 345 F.3d at 1032–33 (holding that denial of leave to amend, based on plaintiff's noncompliance with procedural rules, was a

[39]Neither Appellant on appeal, nor the Temple below, disputes that the district court had jurisdiction over *Satanic Temple I* or that both suits involve the same parties; the other two res judicata factors are satisfied. *See Elbert*, 903 F.3d at 782.

judgment on the merits of the claims in the proposed amended pleading for purposes of res judicata); *King v. Hoover Grp., Inc.*, 958 F.2d 219, 222–23 (8th Cir. 1992) ("It is well settled that denial of leave to amend constitutes res judicata on the merits of the claims which were the subject of the proposed amended pleading."); *Poe v. John Deere Co.*, 695 F.2d 1103, 1105–08 (8th Cir. 1982) (affirming summary judgment for the defendant on res judicata grounds in suit arising out of the same nucleus of operative fact as the proposed amended complaint rejected by the district court in an earlier suit); *see also Landscape Props., Inc. v. Whisenhunt*, 127 F.3d 678, 683 (8th Cir. 1997) (discussing *Poe* and *King* and concluding that those cases "are dispositive" as to whether denial of a motion to amend the complaint is a final judgment on the merits for purposes of res judicata).

The magistrate judge denied the Temple's proposed amended complaint because the Temple did not show good cause to amend its complaint outside the deadline for amendments. The court found that the Temple's "mere professed intention of clarifying its original Complaint [wa]s insufficient to establish good cause," the proposed amended complaint did "not allege any 'new' facts which could not have with due diligence been asserted" in the original complaint, and the "proposed amended claims

fail[ed] to correct the deficiencies observed" in the district court's order granting in part Belle Plaine's motion to dismiss.[40] In accord with Eighth Circuit precedent, this denial of leave to amend operates as a final decision on the merits of the proposed amended claims. *See, e.g.*, *King*, 958 F.2d at 222–23 (denial of leave to amend has preclusive effect on "claims which were the subject of the proposed amended pleading").

Appellant's repeated reliance on *Kulinski v. Medtronic Bio-Medicus, Inc.*, 112 F.3d 368 (8th Cir. 1997), to argue there was no final judgment on the merits is yet again misplaced. In *Kulinski*, this Court addressed the distinction between dismissal for lack of jurisdiction and dismissal for failure to state a claim. *Id.* at 373. *Kulinski* explained that res judicata does not apply where the initial claim "was dismissed for lack of subject matter jurisdiction and was not on the merits." *Id.* at 373 n.3 (citing *Johnson v. Boyd–Richardson Co.*, 650 F.2d 147, 148 (8th Cir. 1981) ("[W]hen a dismissal is for 'lack of jurisdiction,' the effect is not an adjudication on the merits, and therefore the *res judicata* bar does not arise.")). In explaining this difference, *Kulinski*

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[40] CITYAPP_123–25; *TST I*, R. Doc. 79, at 26–28.

distinguished several cases, including *King*, 958 F.2d 219, involving an adjudication on the merits in the first suit. *See Kulinski*, 112 F.3d at 373.

The dismissal and denial of leave to amend in *Satanic Temple I* were for failure to state a claim—that is, on the merits. Subject matter jurisdiction has never been in question. Because *Kulinski* did not involve a dismissal on the merits, it does not apply. Rather, the caselaw cited in *Kulinski* involving a dismissal on the merits in the first suit controls. *See, e.g.*, *King*, 958 F.2d at 222–23. Not only was Appellant wrong about *Kulinski* when it filed *Satanic Temple II*, but Appellant's continued reliance on *Kulinski* to challenge an award of Rule 11 sanctions is ill-considered.

Finality is not undermined by the fact that a magistrate judge issued the denial. *See Curtis v. Citibank, N.A.*, 226 F.3d 133, 136, 140–41 (2d Cir. 2000) (holding that claims in a second lawsuit were precluded because magistrate judge denied leave to amend complaint to add those claims in first lawsuit). A magistrate judge has authority to decide a motion for leave to amend a complaint. 28 U.S.C. § 636(b)(1)(A). And though a magistrate judge cannot render a final decision on a dispositive motion, the preclusive effect of a denial of leave to amend is not derived from that decision being dispositive. *See N. Assurance Co. of Am. v. Square D Co.*, 201 F.3d 84, 88 (2d

Cir. 2000) (observing that "it is not the actual decision to deny leave to amend that forms the basis of the bar"). Rather, as the district court explained, the preclusive effect "is based on the requirement that the plaintiff must bring all claims at once against the same defendant relating to the same transaction or event."[41] *See id.* Here, the magistrate judge's denial of leave to amend operates as a "proxy to signify" that the Temple forfeited its claims due to its "failure to pursue all claims against" Belle Plaine "in one suit." *Id*. Denial of leave to amend in *Satanic Temple I* thus barred filing of *Satanic Temple II*. *See Curtis*, 226 F.3d at 136, 140–41.

Appellant's other arguments are likewise unavailing. Contrary to Appellant's assertion, (*see* App. Br. at 36), the court did not deny leave to amend only due to untimeliness; the magistrate judge found that the Temple failed to show good cause based on newly discovered facts and lacked due diligence, and, regardless, the magistrate judge determined the proposed amendments were futile.[42] But even if denial of leave to amend had been on

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[41] Add. 45; *TST II*, R. Doc. 38, at 42 (quoting *N. Assurance Co.*, 201 F.3d at 88).

[42] Appellant knows that the magistrate judge did not rely solely on timeliness grounds to deny the Temple's motion for leave to amend. When

timeliness grounds alone, it would still constitute a final decision on the merits. *See Prof'l Mgmt. Assocs.*, 345 F.3d at 1032 ("[E]ven when denial of leave to amend is based on reasons other than the merits, such as timeliness," it "constitutes res judicata on the merits of the claims which were the subject of the proposed amended pleading.").

Nor did the district court "explicitly preauthorize," (App. Br. at 30), *Satanic Temple II* when it initially dismissed all but one of the Temple's claims without prejudice. Though a plaintiff may be able to revise their allegations after dismissal without prejudice, a plaintiff must do so within the bounds of the scheduling order unless they can show good cause, including diligence in attempting to meet the scheduling orders deadlines, and a court need not allow futile amendments. Fed R. Civ. P. 16(b); *see also, e.g.*, *Harris v. FedEx Nat. LTL, Inc.*, 760 F.3d 780, 786 (8th Cir. 2014).[43] The

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the Temple told the district court that its motion to amend should be denied as moot based on the filing of *Satanic Temple II*, it observed the magistrate judge had "found undue delay" with respect to the motion for leave to amend and "*further found that the proposed amended complaint would be futile* for failure to correct some or all of the pleading deficiencies." CITYAPP_140; *TST I*, R. Doc. 91, at 2 (emphasis added).

[43] Showing good cause under Rule 16(b) is a threshold requirement for an amendment outside the time provided in a scheduling order, even though

Temple did not seek to amend its claims in a timely manner, did not show diligence, and did not demonstrate good cause. Also, the proposed amendments were futile.

2. While Appellant claims he learned new facts during discovery, Appellant actually had access to those facts before filing the first complaint.

Res judicata precludes relitigation against the same party of claims that were or could have been raised in a prior action. *Lane*, 899 F.2d at 741. Appellant claims that, "[t]hrough discovery and [his] independent investigation, [he] learned new facts," (App. Br. 15), which he maintains led him to believe he could seek leave to correct pleading deficiencies in *Satanic Temple I* and later file *Satanic Temple II*. But *Satanic Temple II* relied on the same set of facts as *Satanic Temple I* and included only grounds for relief that were or could have been included in the first action. Res judicata thus precluded the Temple from relitigating its claims in a second suit.

Rule 15(a)(2) provides that a court "should freely give leave when justice so requires." *See* 6A Wright & Miller, *Fed. Prac. & Proc.* § 1522.2 (3d ed. 2022) ("When a party moves for leave to amend outside district court's scheduling order, the rule governing scheduling orders, not the more liberal standard of the rule governing amendments before trial, governs and requires the party to show good cause to modify the schedule." (citing *Morrison Enters., LLC v. Dravo Corp.*, 638 F.3d 594 (8th Cir. 2011))).

As an initial matter, Appellant supports his "new facts" assertion with citations to district court discussion, not to evidence in the record showing discovery of new information. Appellant first cites a portion of the district court's September 15, 2021 order where the district court explained that the Temple already had access to evidence relied on to seek amendments to the scheduling order when the district court dismissed all but one of the Temple's claims on July 31, 2020, and a delay in seeking additional discovery was unjustified.[44] Appellant also cites the transcript from the April 27, 2021 hearing, where the district court asked, "didn't the city close the door [to the limited public forum] to everyone at the same time?" and Appellant responded, "No, this is a development that we learned in the past year. They did not close it to everyone at the same time. They arranged for the removal of the Christian monument before they notified TST that we are going to consider this rescission resolution."[45]

Moreover, the substance of the "new facts" to which Appellant alludes—facts about Belle Plaine's decision to close the limited public

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[44] *See* Add. 24; *TST II*, R. Doc. 38 at 21.

[45] App. 543; TST II, R. Doc. 57, at 62:7–13.

forum—were actually available to the Temple in 2017. First, the allegations about the Rescinding Resolution in *Satanic Temple II*, rely on matters of public record, such as a newspaper article, city council meeting discussions, and a press release from the city.[46] Or they rely on communications from the city directly to the Temple itself. Belle Plaine sent an email on July 14 "as a courtesy" to inform the Temple that the city council would be considering a resolution to "eliminate the Limited Public Form."[47] On July 18, 2017, the day after city council passed the resolution rescinding the limited public forum, Belle Plaine sent both a letter and another email to the Temple, including a copy of the resolution.[48]

Still other allegations rely on communications obtained through a pre-suit Minnesota Government Data Practices Act request in mid-July 2017.[49] In response to that request, Belle Plaine produced several hundred pages of

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[46] *See, e.g.*, App. 37–43; *TST II*, R. Doc. 1 ¶¶ 185–221.

[47] App. 197; *TST II*, R. Doc. 1-2, at 30.

[48] App. 202–06; *TST II*, R. Doc. 1-2, at 35–39; CITYAPP_133–34; *TST I*, R. Doc. 86-1, at 3–4.

[49] CITYAPP_152; *TST I*, R. Doc. 94-2, at 56 ¶ 7; *see also* https://www.muckrock.com/foi/belle-plaine-1139/emails-about-satanic-memorial-in-belle-plaine-veterans-memorial-park-40080/#file-145692 (Fin. Dir. emails regarding records request).

emails in early August 2017, which were then posted to a public website as part of a statement by the Temple, linked to a post on Twitter, and provided to Appellant by the Temple's co-founder.[50] Emails produced by Belle Plaine in August 2017 are included as exhibits to the complaint in *Satanic Temple II*, including complaints about the limited public forum from city residents and others,[51] and emails regarding the city council.[52]

In other words, the Temple had access to the information about Belle Plaine's decision to close the limited public forum starting in August 2017—*not* just in the "past year" as Appellant represented to the district court[53] or only through discovery and "independent investigation" as claimed here. (App. Br. at 15). Both the magistrate judge and district judge correctly determined the revised factual allegations in the proposed amended

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[50] *See* CITYAPP_097; *TST I*, R. Doc. 70-1, at 66; CITYAPP_152; *TST I*, R. Doc. 94-2, at 56 ¶ 7; https://www.muckrock.com/news/archives/2017/aug/21/satanic-memorial/

[51] *Compare, e.g.*, App. 104–67; *TST II*, R. Doc. 1-1 at 41–104, *with* https://www.muckrock.com/news/archives/2017/aug/21/satanic-memorial/.

[52] *Compare* App. 178; *TST II*, R. Doc. 1-2 at 11, *with* https://www.muckrock.com/foi/belle-plaine-1139/emails-about-satanic-memorial-in-belle-plaine-veterans-memorial-park-40080/#file-145692 (June 30, 2017 email).

[53] *See* App. 543; *TST II*, R. Doc. 57, at 62.

complaint were based on either matters of public record or facts that the Temple "knew or had access to when it filed its original complaint"[54] in April 2019. And the complaint in *Satanic Temple II* admits as much. The "Explanatory Note" states its "core factual allegations are still the same" as in the original complaint, and the new complaint merely "elucidates" the facts giving rise to the litigation.

Appellant's representation to this Court that he learned new facts through discovery and independent investigation lacks support in the record. And because no such facts were revealed, Appellant lacked good cause to amend the claims. *Satanic Temple II* was thus barred by res judicata because there was a final judgment on the merits in *Satanic Temple I* and all grounds for relief asserted in *Satanic Temple II* either were, or with diligence could have been, raised in *Satanic Temple I*.

B. Long-standing Eighth Circuit precedent establishes that Rule 11 sanctions were appropriate.

The Eighth Circuit has "repeatedly approved sanctions in cases where plaintiffs attempted to evade the clear preclusive effect of earlier judgments."

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[54] Add. 27; *TST II*, R. Doc. 38, at 24.

Meyer, 792 F.3d at 927. By filing *Satanic Temple II*, Appellant ignored binding precedent holding that denials of leave to amend have preclusive effect—and that filing a second case in such a circumstance will lead to sanctions. The district court did not abuse its discretion by imposing sanctions.

1. The district court would have abused its discretion by *not* imposing Rule 11 sanctions.

This Court has held that "a district court abuses its discretion by refusing to sanction a plaintiff and his counsel under Rule 11 for filing and maintaining a frivolous lawsuit when the plaintiff seeks to relitigate claims he had been denied leave to serve against the same defendant in an earlier lawsuit." *Prof'l Mgmt. Assocs.*, 345 F.3d at 1033 (citing *King*, 958 F.2d at 223; *Landscape Props.*, 127 F.3d at 683).

In *Professional Management Associates*, the plaintiff filed a second lawsuit against the same defendant after the district court denied leave to amend, using the rejected proposed amended complaint. *Id.* at 1032. The district court dismissed the second suit but summarily denied defendant's request for sanctions under Rule 11(b). *Id.* On appeal, this Court held, "given the well-settled law of res judicata under the circumstances in this case, [plaintiff's] counsel should have known" the second case was barred, and the

"district court thus abused its discretion in declining to sanction" plaintiff. *Id.* at 1033.

Here, too, Appellant should have known the well-settled law of res judicata in this Circuit and should have known that *Satanic Temple II* was barred by *Satanic Temple I*. The district court would have committed reversible error had it not sanctioned Appellant.

2. Appellant's argument for allowing the second suit was not merely unpersuasive; it was frivolous.

Under Rule 11, sanctions may be imposed when an attorney presents legal contentions that are neither "warranted by existing law" nor a "nonfrivolous argument for extending [or] modifying" existing law. *See* Fed. R. Civ. P. 11(b), (c). The Temple's theory behind *Satanic Temple II* was not merely "unpersuasive," (App Br. 28), it failed to follow clear Eighth Circuit law and lacked nonfrivolous argument for modifying precedent. By filing the second suit, Appellant violated Rule 11(b).

Appellant is wrong that the district court sanctioned him for offering an "unpersuasive" argument, namely his reliance on *Kulinski*, 112 F.3d 368. First, the district court did not sanction Appellant only based on his reliance on *Kulinski*. The district court sanctioned Appellant because he "should have known" that the Temple's second lawsuit was barred since the Eighth Circuit

has "repeatedly and unequivocally" held that sanctions are warranted when a plaintiff seeks to relitigate claims after a court denied leave to amend the claims.[55] Yet Appellant "improperly filed a second frivolous lawsuit," wasting the resources of the court and the parties.[56]

Second, a reasonable and competent attorney would not believe the merit of Appellant's reliance on *Kulinski*. *Kulinski* is specifically about dismissal for lack of subject matter jurisdiction, *see* 112 F.3d. at 373 n.3, which is not and has never been at issue in dismissal of the Temple's claims against Belle Plaine. Worse, Appellant focused on *Kulinski* to the exclusion of clearly-established binding precedent regarding denial of leave to amend on the merits—which is the key issue here—without any nonfrivolous argument as to why the court should not follow those cases. *See* Fed. R. Civ. P. 11(b)(2).

Appellant argues the sanction should be reversed, like the sanction in *Black Hills Institute of Geological Research v. South Dakota School of Mines & Technology*, 12 F.3d 737 (8th Cir. 1993). But this case is not like *Black Hills*. There, the district court had imposed Rule 11 sanctions on the plaintiff's

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[55] Add. 49–50; *TST II*, R. Doc. 38, at 46–47 (quoting *Prof'l Mgmt. Assocs.*, 345 F.3d at 1033).

[56] Add. 50; *TST II*, R. Doc. 38, at 47.

counsel because it found that plaintiff baselessly named an improper defendant. *Id.* at 744–45. This Court reversed, finding that the plaintiff had a plausible argument for naming the defendant, in part because "case law on this issue is sparse" and the Court would "not force [plaintiff's counsel] to bear the burden of Rule 11 sanctions" where the law is unclear. *Id.* at 745. Here, caselaw holding that denials of leave to amend on the merits have preclusive effect is not sparse. It is, instead, "well-settled." *Prof'l Mgmt. Assocs.*, 345 F.3d at 1033. Appellant had no plausible argument for filing the second suit.

Moreover, Appellant's decision to file *Satanic Temple II* defied civil procedure for challenging denial of leave to amend by a magistrate judge. Appellant claims he "filed every motion available to rein the ejected claims back into the first case." (App. Br. 32). Yet this is demonstrably inaccurate. The District of Minnesota Local Rules provide for objections to magistrate judge decisions, *see* Minn. L.R. 72.2(b), but Appellant forfeited the opportunity to object to the magistrate judge's finding that the Temple lacked good cause for leave to amend. If Appellant had taken that opportunity, he then could have appealed to this Court if the district judge affirmed denial of leave to amend. *See Arrigo v. Link*, 836 F.3d 787, 799 (7th

Cir. 2016) (recognizing it is "widely accepted that appeal is the plaintiff's only recourse when a motion to amend is denied"); *accord Poe*, 695 F.2d at 1107 (observing that plaintiff "could have appealed from the denial of her motion to amend [but] did not").

Instead of objecting and then appealing, Appellant argued that the motion for leave to amend was "mooted" by the filing of *Satanic Temple II*. Not so. By filing *Satanic Temple II*, Appellant disregarded binding precedent and attempted to thwart the district court's preclusive judgment—and multiplied the proceedings in the process. Appellant cannot elude precedent simply by filing a second lawsuit before the district court affirmed the magistrate judge's denial of leave to amend the complaint.

Appellant's decision to file *Satanic Temple II* was not objectively reasonable—it was frivolous, multiplied the proceedings, and resulted in a waste of resources. The district court did not abuse its discretion by granting Belle Plaine's motion for Rule 11 sanctions.

II. The district court did not abuse its discretion by imposing a sanction of attorney fees.

A. The district court did not abuse its discretion by imposing a monetary sanction.

If a court determines that Rule 11(b) has been violated, as it was here, "the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation." Fed. R. Civ. P. 11(c)(1). The sanction "must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated," Fed. R. Civ. P. 11(c)(4), and a "district court has discretion to impose non-monetary sanctions, but it is not required to do so," *Kirk Cap. Corp. v. Bailey*, 16 F.3d 1485, 1490 (8th Cir. 1994). The district judge found that a monetary sanction in the form of attorney fees reasonably incurred by Belle Plaine while responding to *Satanic Temple II* was necessary to deter repetition of Appellant's same or similar misconduct. Attorney fees were thus an appropriate sanction in this case, and the district court did not abuse its discretion by rejecting a reprimand as an alternative sanction.

Appellant offers this Court a distorted recounting of the district court's reasoning for the monetary sanction. First, Appellant avers the district judge "didn't even ask me [] about the steps my local counsel and I took to

determine that the second suit wasn't barred." (App. Br. 39). But the transcript, included in Appellant's Appendix, reveals the district court did probe Appellant's justification for the second suit. *See* App. 533–34, *TST II* R. Doc. 57, at 52–53 (asking about Appellant's reliance on Black's Law Dictionary instead of Eighth Circuit precedent for legal standard of finality); App. 536–37, *TST II* R. Doc. 57, at 55–56 (prompting Appellant to discuss his theory for why *Satanic Temple II* was distinguishable from *Satanic Temple I*).

Second, Appellant asserts he "was charged with precisely one count of frivolity: 'disregarding' the Magistrate's order by filing the second suit" and "the order offers no other explanation or discussion as to justify why the least punitive measure was a monetary sanction." (App. Br. 40). This is likewise inaccurate. When granting Belle Plaine's motion for sanctions, the district judge relied on Eighth Circuit precedent holding that seeking to relitigate claims after denial of leave to amend warrants Rule 11 sanctions and on Appellant's failure to follow the proper recourse after the magistrate judge denied the motion to amend.[57] Further, when the district court granted in part Belle Plaine's motion for fees, the district court also cited

[57] *See* Add. 49; *TST II*, R. Doc. 38, at 46.

Appellant's disregard of multiple court-imposed deadlines, lack of diligence in complying with deadlines, and untimely attempt to baselessly reassert claims in *Satanic Temple I*.[58]

Based on its direct knowledge of the proceedings, the district court adequately explained its reasons for Rule 11 sanctions and its conclusion that a monetary sanction was necessary for deterrence. This Court should affirm. *See Willhite v. Collins*, 459 F.3d 866, 869 (8th Cir. 2006) (instructing that this Court "give[s] substantial deference to the district court's determination as to whether sanctions are warranted because of its familiarity with the case and counsel involved."); *Meyer*, 792 F.3d at 928 (affirming monetary sanction).

B. The attorney fee award is not a windfall to Belle Plaine.

Without authority, Appellant maintains that an attorney fee award to Belle Plaine is a windfall because Belle Plaine has litigation insurance, and therefore its insurer, rather than Belle Plaine itself, is obligated to pay its attorney fees. But Rule 11(c) provides that a sanction may include payment of

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[58] *See* Add. 50; *TST II*, R. Doc. 38, at 47; *see also* Add. 56–57; *TST II*, R. Doc. 58, at 5–6.

the "reasonable attorney's fees and other expenses directly *resulting from* the violation" of Rule 11(b), and attorney fees "*incurred* for the motion" seeking sanctions itself. Fed. R. Civ. P. 11(c)(2), (4) (emphasis added). Rule 11 does not include a requirement that the moving party show it actually paid those fees for them to be imposed as a sanction. *See, e.g.*, *Superior Consulting Servs., Inc. v. Steeves-Kiss*, No. 17-6059, 2018 WL 2183295, at *2–3 (N.D. Cal. May 11, 2018) ("Rule 11 specifies that attorney's fees may be awarded for those fees that were 'incurred'; it does not require that they be 'paid.'").

In fact, attorney fees are awarded in a variety of cases without regard to whether a client paid their attorney. *See, e.g.*, *In re Lyubarsky*, 615 B.R. 924, 925 (Bankr. S.D. Fla. 2020) ("If a litigant is entitled to an award of attorney's fees, whether based on statute, procedural rule or contract, federal courts have awarded attorney's fees to parties, irrespective of the client's obligation to pay attorney's fees to the lawyer."); *Schafler v. Fairway Park Condo. Ass'n*, 324 F. Supp. 2d 1302, 1305 (S.D. Fla. 2004) (rejecting argument that indemnified litigants were not entitled to their share of attorney fees and holding that the plaintiff "may not rely on any insurance coverage that Defendants may have had in order to escape a fee award").

Appellant's argument that the fees are a windfall is thus contrary to the text of Rule 11 and contrary to generally applicable principles for attorney fee awards. Belle Plaine must establish the amount of attorney fees reasonably resulting from Appellant's sanctionable conduct, *see Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983), but it need not prove that it directly paid those fees.

C. The district court did not abuse its discretion in calculating the amount of reasonably incurred attorney fees.

Rule 11 allows for an award of reasonable attorney fees directly resulting from the violation. Fed. R. Civ. P. 11(c)(4). The starting point for calculating a reasonable fee is the "number of hours reasonably expended," "multiplied by a reasonable hourly rate." *Hensley*, 461 U.S. at 433. "The party seeking an award of fees should submit evidence supporting the hours worked and rates claimed." *Id.* A district court has "discretion in determining the amount of a fee award" because of its "superior understanding of the litigation." *Id.* at 437.

1. Belle Plaine provided adequate billing records.

In support of its motion for attorney fees, Belle Plaine submitted billing records accounting for 157.4 hours of work directly resulting from

Appellant's frivolous conduct, totaling $33,886.80 in fees.[59] While Appellant proclaims that the "sought-after $34,000 was palpably insane," (App. Br. 42), a look at the billing records, considering Appellant's vexatious conduct throughout this matter, shows otherwise.

Lead counsel for Belle Plaine submitted a declaration stating the work "was reasonable and necessary to the proper representation of the City," and that "any charges for work that was arguably unnecessary, excessive, or duplicative" were eliminated before submission of the billing records.[60] Detailed billing logs describe the work performed, including the task, topic, or issue and the stage of work; the billing logs do not include any entries describing work not directly related to the improperly filed *Satanic Temple II*.[61] Because of Appellant's decision to lodge a second complaint after the district court denied the Temple leave to amend, attorneys for Belle Plaine spent time reviewing the new complaint and setting a strategy for addressing

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[59] *See* Add. 61; *TST II*, R. Doc. 58, at 10.

[60] App. 296; *TST II*, R. Doc. 51 ¶ 6.

[61] *See generally* App. 298–306; *TST II*, R. Doc. 51-1.

and defeating the duplicative suit.[62] In addition to researching and writing two motions and accompanying memoranda, Belle Plaine's counsel prepared for oral argument on both.[63] And although the legal issues comprising those motions were not novel, the procedural status of the case was convoluted and uncommon—because Appellant vexatiously multiplied the proceedings—which necessitated careful consideration and increased time expended. Given these circumstances, the roughly $34,000 in attorney fees sought was reasonable and far from "palpably insane."[64]

Belle Plaine provided the court with adequate documentation to allow meaningful review. *See H.J. Inc. v. Flygt Corp.*, 925 F.2d 257, 260 (8th Cir. 1991) (finding billing records did not allow meaningful review where logs included only general entries such as "legal research," "trial prep," or "met w/

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[62] *See, e.g.*, App. 298–300; *TST II*, R. Doc. 51-1, at 1–3.

[63] *See* App. 304–06; *TST II*, R. Doc. 51-1, at 7–9.

[64] Notably, the hourly rates charged by Belle Plaine's counsel were well-below market rate. As the district court observed, "*all* of the rates claimed in Belle Plaine's filing, which have been discounted by more than 50 percent [from their standard hourly rate], are far below prevailing market rates in this District." Add. 62; *TST II*, R. Doc. 58, at 11. With Belle Plaine seeking fees based on such a steep discount below market rates, the total fee amount of $34,000 can hardly be objectively unreasonable.

client"); *Hensley*, 461 U.S. at 437 n.12 (counsel "not required to record in great detail how each minute of his time was expended," but "should identify the general subject matter"). Indeed, based on this Court's precedent, the district court would not necessarily have abused its discretion by awarding the full amount requested. *See, e.g.*, *Landscape Props., Inc.*, 127 F.3d at 684–85 (affirming attorney fees of $36,167.21 as Rule 11 sanction for filing frivolous lawsuit barred by res judicata); *see also Willhite*, 459 F.3d at 869 (affirming large fee award when necessary to deter future misconduct).

2. The district court did not abuse its discretion by applying a percentage reduction.

Despite the significant effort required by Belle Plaine's counsel to sort through Appellant's vexatious conduct and filings, the district court viewed some of the work performed as duplicative or redundant. The district court concluded that Belle Plaine's billing records failed to show why fees sought for duplicative work were reasonable, and the court decided to reduce the award. If the district court could have reasonably awarded the full amount of fees sought, it certainly did not abuse its discretion by awarding less. *Cf. Meyer*, 792 F.3d at 928 (concluding "district court did not abuse its discretion in imposing a monetary sanction that was significantly less than the attorneys' fees and expenses incurred" defending precluded suit).

But Appellant takes issue with the way the district court calculated the reduction, arguing that the district court did not adequately explain the award and instead estimated it. (App. Br. at 20 (stating the district court "inexplicably" awarded 50 percent of Belle Plaine's requested fees); *id.* at 41–42 (arguing district court "speculate[d], vaguely" and "estimate[d]" the proper fee).) The district court's decision to apply a percentage-based reduction was not, however, inexplicable, nor contrary to accepted means of reducing fees.

The district court explained that Belle Plaine's fee request was redundant and excessive because it had already "researched and drafted multiple briefs challenging the legal and factual viability of [the Temple's] claims" and "only 10 pages of [Belle Plaine's briefing in *Satanic Temple II* were] devoted to the issue of res judicata."[65] But the billing records were "insufficiently detailed to precisely eliminate only redundant or otherwise excessive hours expended."[66] Based on this explanation, the district judge applied a percentage-reduction.

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[65] Add. 63–64; *TST II*, R. Doc. 58 at 12–13.

[66] Add. 64–65; *TST II*, R. Doc. 58 at 13–14.

Percentage reductions are acceptable under the district judge's view of Belle Plaine's billing records. *See, e.g.*, *Miller v. Woodharbor Molding & Millworks, Inc.*, 174 F.3d 948, 950 (8th Cir. 1999) (directing the district court to either request more detailed billing *or* "consider a percentage reduction for inadequate documentation"); *Orduno v. Pietrzak*, 932 F.3d 710, 720 (8th Cir. 2019) (affirming attorney fee award calculated using percentage reduction based on excessive billing, overstaffing, lack of complex issues, and partial success on the merits because the court "afford[ed] great deference to a district court's on-the-ground assessment").

The district court thoroughly explained its analysis of Belle Plaine's billing records, including why it concluded a reduction was warranted and why that reduction would be on a percentage basis. This Court should defer to the district court's reasoning and affirm the fee award.

III. The Court should affirm the sanctions award of attorney fees, but if this Court reverses and remands, it should not order fee-shifting or reassignment

Appellant concludes with a grab-bag of issues raised for the first time on appeal. While this Court should affirm and not reach these issues, if the Court reverses or remands, none of Appellant's requests should be granted.

A. No grounds exist to order fee-shifting.

In his first scattershot argument, Appellant asks that, if the Court reverses sanctions, it remand with instructions for the district court to impose Rule 11 sanctions *on Belle Plaine* and order that Belle Plaine pay Appellant's costs in appealing the district court's sanctions order. (App. Br. 43.) Appellant contends Belle Plaine invoked Rule 11 to intimidate him and his co-counsel into dropping the Temple's claims, and that filing the sanctions motion was an abuse of court process. (App. Br. 44 (citing Fed. R. Civ. P. 11(c)(5)(A)).) Appellant offers no support beyond his personal perspective for this interpretation of the proceedings below. And given that the district court *granted* Belle Plaine's motion for Rule 11 sanctions based on Eighth Circuit precedent, filing that motion was not an abuse of court process.

Further, Appellant's assertion that Belle Plaine's "attorneys chose to make this case personal," (App. Br. 43), is nonsensical. Rule 11 explicitly allows for sanctions against an attorney personally to deter future violations of Rule 11(b). *See* Fed. R. Civ. P. 11(c)(1) ("[T]he court may impose an appropriate sanction on any *attorney*, law firm, or party[.]"). By imposing sanctions on Appellant, his co-counsel, and their law firms, the district court

followed Rule 11. This Court should neither reverse the sanctions against Appellant nor order sanctions against Belle Plaine.

B. The district judge did not plainly err by failing to sua sponte recuse herself.

Next, Appellant contends the district judge should have sua sponte recused herself and asks for the case to be reassigned. Despite asserting he has had concerns about the district judge's partiality since she asked a fact question at a hearing on April 27, 2021, (App. Br. at 17), Appellant did not seek recusal until appeal. When a recusal motion is not raised at the district court, this Court reviews for plain error only. *Fletcher v. Conoco Pipe Line Co.*, 323 F.3d 661, 663 (8th Cir. 2003). Plain error review is "narrow and confined to the exceptional case where error has seriously affected the fairness, integrity, or public reputation of the judicial proceedings." *Id.* (quoting *Chem-Trend, Inc. v. Newport Indus., Inc.,* 279 F.3d 625, 629 (8th Cir. 2002)).

A judge shall recuse herself from a case if her "impartiality might reasonably be questioned" or she "has a personal bias or prejudice concerning a party." 28 U.S.C. § 455(a), (b)(1). This Court applies an objective standard of reasonableness to determine whether recusal was required. *Fletcher*, 323 F.3d at 664. "[A] judge is presumed to be impartial

and the party seeking disqualification bears the substantial burden of proving otherwise." *Id.* (quoting *Pope v. Fed. Express Corp.*, 974 F.2d 982, 985 (8th Cir. 1992)). Appellant does not carry this burden, let alone establish plain error.

Out of the months of litigation, multiple hearings, and multiple orders issued, Appellant points to a single question asked by the district judge to support his claim of bias. A single question asked in the course of proceedings to probe the distinction between religious acts and "anti-religious" acts cannot sustain a bias or partiality challenge without evidence that the district judge held "deep-seated favoritism or antagonism that would make fair judgment impossible." *Liteky v. United States*, 510 U.S. 540, 555 (1994); *see also id.* ("[J]udicial remarks during the course of a trial that are critical or disapproving or, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge.").

Looking at the question in context illustrates that the district judge was seeking clarification on the factual allegations in *Satanic Temple II* as part of the Temple's opposition to Belle Plaine's motion to dismiss. The question arose during a discussion of the Temple's claim that Belle Plaine substantially burdened a religious act. After Appellant stated, "the purpose

of [the Temple's] monument was in part to communicate that we are TST, we exist, you should look into us, and we're patriotic too," the district judge asked, "religious patriotism is equated with religiosity?"[67] Appellant clarified that the case was about "free speech and it's a free exercise case," and the monument was "religiously motivated because of the pentagram," a well-known symbol of importance to Satanists.[68] The district judge then asked, "So it is religious because it is anti-religious?" to which Appellant tried to invoke the "judicial abstention doctrine," but the district judge clarified, "well, I'm just asking you to explain to me your analysis of why this is a religious act."[69] As the district judge herself stated, this line of questioning was simply intended to help the court engage in the Temple's argument.[70]

Even if the Court agrees with Appellant that the district judge's question somehow crossed a line, nothing in the record suggests that any bias prejudiced the Satanic Temple's substantial rights. Appellant identifies nothing in the numerous orders evidencing bias against the Satanic

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[67] App. 540; *TST II*, R. Doc. 57, at 59:6–8, 10–11.

[68] App. 540; *TST II*, R. Doc. 57, at 59:16–23.

[69] App. 541; *TST II*, R. Doc. 57, at 60:4–5, 7–11

[70] App. 541; *TST II*, R. Doc. 57, at 60:14–15.

Temple—other than his client losing its case. Appellant relies on another case involving the Temple, in which the District of Arizona concluded that the Temple is a religious organization. (App. Br. 45, 49–50 (citing *Satanic Temple v. City of Scottsdale*, No. 18-621, 2020 WL 587882 (D. Ariz. Feb. 6, 2020), *aff'd sub nom. Satanic Temple, Inc. v. City of Scottsdale*, 856 F. App'x 724 (9th Cir. 2021))); *see Satanic Temple*, 2020 WL 587882, at *6–7 (concluding that Temple member's beliefs were religious for purposes of religious discrimination claims). Appellant contends that because another court concluded the Temple is a religious organization the district judge in this case showed bias by questioning the religious nature of the Temple's efforts to erect a monument in the City Park. Yet after the Arizona court concluded that the Temple was a religious organization, the Temple still lost that case. *See Satanic Temple*, 2020 WL 587882, at *11. The fact that the Temple likewise lost here does not show deep-seated antagonism making fair judgment by the district judge impossible.

Based on this record, the district judge's impartiality cannot reasonably be questioned, and the district judge plainly did not err by failing to recuse herself.

C. The Rule 11 sanctions do not constitute First Amendment retaliation.

Appellant further asserts reassignment is needed "because the sanctions order was a textbook example of First Amendment retaliation." (App. Br. 53.) But Appellant offers no legal authority for the notion that Rule 11 sanctions can constitute First Amendment retaliation.[71] Nor does Appellant cite any textbook. Taken to its logical end, Appellant's theory means that any time a judge imposes sanctions, that judge has committed First Amendment retaliation, the sanctions should be reversed, and the case reassigned. No such legal theory exists. *See, e.g.*, *Pope*, 974 F.2d at 985–86 (remanding the issue of Rule 11 sanctions for reconsideration to same judge who issued initial sanctions order and rejecting appellants' request for reassignment of the case).

Even looking at this case in isolation, the sanction imposed does not deter accessing the courts, it deters misconduct in doing so. *See, e.g.*, Fed. R.

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[71] Appellant appears to know this argument requires suspending reasonable understanding of the law, as he acknowledges that a district judge would be immune from a claim of First Amendment retaliation. *See* App. Br. 53 (citing *Mireles v. Waco*, 502 U.S. 9, 12 (1991) for the premise that "judges are immune for judicial actions taken with jurisdiction and Judge Wright unquestionably had federal question jurisdiction to hear this case").

Civ. P. 11(c)(4). The district court concluded that Appellant engaged in misconduct and imposed Rule 11 sanctions to deter future misconduct. So long as Appellant's access of the courts is reasonably supported by law, Rule 11 sanctions have no deterrent effect.

CONCLUSION

This Court should affirm dismissal of the Temple's suit and affirm the Rule 11 sanctions.

Respectfully submitted,

Dated: January 4, 2023 **GREENE ESPEL PLLP**

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), the undersigned certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7). The brief was prepared using Microsoft Word in Office 365 using 14-point font size, which reports that the brief contains 10,039 words, excluding items listed in Fed. R. App. P. 32(f).

s/Monte A. Mills
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