No. 18-_____

In the Supreme Court of the United States

IN RE: DEEPWATER HORIZON

KYRT M. WENTZELL ET AL.,

Petitioners,

–v–

BP AMERICA, INCORPORATED; ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The district court, in MDL 2179, overseeing master discovery in the *Deepwater Horizon* oil spill litigation, issued PTO 60; requiring all plaintiffs to re-file each lawsuit directly into the MDL, regardless of whether they were already properly before the Court. The deadlines set out by PTO 60 were impossible to satisfy given the time constraints and concurrent settlement negotiations for tens of thousands of plaintiffs which clearly violated Due Process. As a result, the district court issued a series of rulings over a year's time clarifying which plaintiffs were deemed "in compliance" with PTO 60. Plaintiff-petitioners requested reconsideration along with similarly situated plaintiffs whose claims had been dismissed by order in July 2017. That November some plaintiffs were deemed to be compliant with PTO 60, and others were not. Those still deemed non-compliant appealed to the Fifth Circuit Court of Appeals. While on appeal, BP took the legal position that the petitioners' claims had been dismissed in a prior compliance order from 2016.

THE QUESTION PRESENTED IS

Whether the Court of Appeals erred in holding that the petitioners appeal to the Fifth Circuit was not timely filed.

PARTIES TO THE PETITION AND RULE 29.6 DISCLOSURE STATEMENT

Petitioners

Kyrt M. Wentzell; Individually; Kyrt M. Wentzell, Innovations d/b/a Chum Churn, SGI Land Company, LLC; Gary Pesce d/b/a Ocean Flex OMTS; Russell Lengacher; Nelson Mast; Luke Martin; Russell Lengacher; and James Glick were plaintiffs-appellants in No. 17-30936 below.

Kyrt M. Wentzell, Innovations d/b/a Chum Churn is not publicly traded nor does it have a publicly traded parent company that owns more than 10% of its stock.

Gary Pesce d/b/a Ocean Flex OMTS is not publicly traded nor does it have a publicly traded parent company that owns more than 10% of its stock

SGI Land Company, LLC, is not publicly traded nor does it have a publicly traded parent company that owns more than 10% of its stock

Respondents

BP America, Incorporated, BP P.L.C., BP Products North America Incorporated, BP Exploration and Production Incorporated; Transocean Limited, Transocean Deepwater, Incorporated, Transocean Offshore Deepwater Drilling, L.L.C., and Halliburton Energy Services, Incorporated were defendant-appellees in No. 17-30936 below.

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Petitioners Kyrt M. Wentzell; Individually; Kyrt M. Wentzell, Innovations d/b/a Chum Churn, SGI Land Company, LLC; Gary Pesce d/b/a Ocean Flex OMTS; Russell Lengacher; Nelson Mast; Luke Martin; Russell Lengacher (collectively, "Petitioners") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit and to reverse and remand the decision below.

OPINIONS BELOW

The Opinion of the Court of Appeals (App. *infra*, 1a) is not reported. Six relevant orders from the district court are not reported. (App. *infra*, 10a, 17a, 24a 28a, 35a, 92a). On order of the court of appeals denying reconsideration is unreported. (App. *infra*, 90a).

JURISDICTION

The judgment of the court of appeals was entered on April 18, 2018. The court of appeals denied timely petitions for rehearing on May 16, 2018. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION AND JUDICIAL RULES

- **U.S. Const. amend. V**

  No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

- **Fed. R. App. P. 4**
- **Fed. R. Civ. P. 60**

STATEMENT

In the decision below, the Fifth Circuit held that Petitioners claims were dismissed because their appeals were "not timely filed in compliance with PTO 60." (App. *infra*, 1a) The case comes from the MDL 2179 in which hundreds of thousands of plaintiffs brought claims against BP and other defendants responsible for the *Deepwater Horizon* oil spill on April 20, 2010. These cases consolidated into the MDL

2179 from multiple filings in various transferring state (via removal actions) and federal courts, as well as through direct actions into the proceedings.

In March of 2016, almost six years into the proceedings, the trial court issued P.T.O. 60 which required any unsettled plaintiff to file a new complaint into the MDL 2179 along with a sworn statement signed by the plaintiff themselves. (App. *infra*, 28a) These requirements set deadlines measured in days, usually 14, from any date of any settlement offer or recommendation emanating through a court assigned settlement program. These orders came after many years of inactivity, and the abbreviated deadlines imposed applied to all plaintiffs across the board, many of whom had moved, died, were working abroad and other aspects of displacement making immediate contact highly problematic for petitioners' counsel, which was handling thousands of these claims.

The MDL Court then issued a series of orders setting out which Plaintiffs were deemed compliant with P.T.O. 60. Petitioners along with several other plaintiffs moved for a reconsideration of the district courts July 2017 order. The reconsideration was granted for some plaintiffs, but not for the Petitioners. Petitioners timely appealed this final order dismissing their case November 2017. While on appeal, BP moved to dismiss the cases arguing that the deadline to appeal begin to run from one of the other orders clarifying compliance with PTO 60.

The decision of the Fifth Circuit to dismiss the cases on BP's motion is in direct contradiction of the actions and rulings made by the district court allowing some plaintiffs to be deemed compliant with PTO 60

as late as November 2017. This clearly indicates that Petitioners claims were not wholly extinguished by prior rulings related to PTO 60. This Court should grant review.

A. Factual Background

On April 20, 2010, the BP *Deepwater Horizon* drilling platform exploded off the coast of Louisiana, unleashing arguably the largest manmade disaster in American history. Cases were filed in every state on the Gulf Coast in hundreds of venues, both state and federal. On August 10, 2010, The Judicial Panel on Multi-District Litigation consolidated these cases in the MDL 2179 in the Eastern District of Louisiana. (ROA.17-30936.2197-ROA.17-30936.2216).

Even as the litigation was in its infancy, BP as a responsible party under the Oil Pollution Act of 1990 was charged with establishing a claims facility to resolve claims outside of Court. 33 U.S.C. 2701 § 1005(b). Initially, this process was done internally by BP, but latter it was outsourced to the Gulf Coast Claims Facility ("GCCF"). The GCCF administered claims from 2010 until early 2012.

On or about April 18, 2012, BP and the Plaintiff Steering Committee ("PSC") announced that an Economic and Property Damages Settlement ("Class Settlement") had been reached. (ROA.17-30936.4866-ROA.17-30936.5893). This settlement came in the form of a class action that encompassed large portions of the Gulf Coast Area. The Petitioners all opted out of, or were excluded from, the Class Settlement.

The Petitioners all filed demands for payment to BP which complied with the presentment requirements

found under the Oil Pollution Act. 33 U.S.C. 2713. In 2013, the Petitioners filed lawsuits as part of several omnibus filings in several venues around the Gulf Coast on behalf of nearly 10,000 plaintiffs represented by Brent Coon & Associates.

Petitioners SGI Land Company, LLC, Gary Pesce d/b/a Ocean Flex OMTS, Kyrt M. Wentzell, Individually, and Kyrt M. Wentzell, Innovations d/b/a Chum Churn were all initially included in two state court lawsuits filed in 2013 in Texas which included several hundred plaintiffs: Case No. 13-6009; JBS Packing, et al (ROA.17-30396.26946-ROA.17-0396.27117) and Case No. 13-6010; *Linda Lang Tran, et al.* (ROA.17-30936. 28453-ROA.17-30396.28496).

Petitioners Russell Lengacher, Nelson Mast, Luke Martin and James Glick were initially filed in Federal Court in the Northern District of Florida filed in Cause No. 2:13-cv-05367; *Royster Construction Co., Inc., et al* on 4/19/2013. (ROA.17-30936.24372-ROA.17-30936.24662).

The Petitioners cases, along with virtually every other case in the MDL, languished with no action taken on them until early spring 2016. Petitioners claims, along with tens of thousands of others represented by other counsel, remained essentially inactive for many years in this MDL after they were filed. Even after the creation of the Class Settlements in December 2012 and in spite of Brent Coon & Associates repeated requests with the Steering Committee and the Court to take more proactive roles regarding the disposition of these cases nothing happened until the spring of 2016.

On March 29, 2016 the Court issued Pre-Trial Order No. 60 ("PTO 60"). PTO 60 was unexpected by Appellant or Appellant's Counsel. It directed Petitioners (along with thousands of other plaintiffs represented by Brent Coon & Associates, and tens of thousands of plaintiffs represented by other firms) to either immediately settle or file new individual lawsuits, essentially in a month's time.

The timing and circumstances surrounding PTO 60 resulted in a mad scramble to comply, the consequences of which the MDL Court is still dealing with even today. Concurrently with these newly mandated timetables, the District Court established a "neutrals" program, which assigned recommended settlement values to tens of thousands of these remaining pending claims. As case values were hurriedly provided by the Court assigned "neutrals" (which included a panel comprised of the Court Magistrate, the Class Settlement Administrator and other dignitaries), the values were quickly passed along to claimants who could be located with the essential "pitch" of the MDL Court, which was accept this recommended non-negotiable offer, or file a new complaint with Court, fill out an additional individually signed form stating the basis of your claims, and pay yet another filing fee, and see what, if anything, happens next. These heavy handed tactics, combined with the onerous mandates of PTO 60 and several subsequent orders, resulted in the resolution of tens of thousands of cases. The docket is down to well less than a thousand active files still in the Court system and a few dozen that are on appeal. Most of these appeals, including this one, stem from the mad scramble to comply with PTO 60 by filing or settling

cases on patently unreasonable deadlines. These few remaining cases that arguably did not comply with the exact (and sometimes ambiguous) letter of PTO 60 should be given reasonable latitude and an opportunity to be heard, because the totality of the circumstances warrant it out of fairness to the parties, no one was prejudiced by any determination of lack of full compliance, and that a DEATH PENALTY sanction for inadvertent or accidental noncompliance of a single order of the MDL court violates due process and the sanctions authority of the Court.

From July of 2016 until November of 2017, the MDL district issued not one, but a series of PTO 60 Reconciliation/Compliance Orders. Initially, the district court signed an Order on June 7, 2016 to Show Cause Regarding Compliance with PTO 60. (App. *infra*, 24a). After Petitioners and BP responded, the Court issued its first order: Order Re: Compliance with PTO 60 dated July 14, 2016. (App. *infra*, 17a). The district court issued a second order: PTO 60 Reconciliation Order," Regarding All Remaining Claims in Pleading Bundle B1] dated December 16, 2016. (App. *infra*, 35a). The district court issued a third order: [As to the Remaining Cases in the B1 Pleading Bundle Following PTO 60, PTO 64, and the Moratorium Hold Opt-Out Order] dated July 9, 2017. (App. *infra*, 10a).

Brent Coon & Associates ("BCA") filed a Motion to Amend/Correct this July 9, 2017 Order on behalf of their clients Action Restoration, Inc., SGI Land Company, LLC, Ocean Flex OMTS, Wentzell Food Innovations d/b/a Chum Churn, Tommy's Gulf Seafood, Luke Martin, Nelson Mast, Russell Legacher, C-IV Ventures, Inc., James Glick, Jacob Glick, Loren Glick,

and Tien Thi Hoang on August 17, 2017. Several other firms, including several other appellants in this appeal filed similar responses to the Order. BP filed an omnibus response to the various law firms Motions on September 8, 2017. (ROA.17-30936.19044- ROA.17-30936.19085). In their response to BCA's motion BP acknowledged that five of the Plaintiffs listed in BCA's Motion to Amend/Correct were in fact compliant with PTO 60 (Tommy's Gulf Seafood, C-IV Ventures, Jacob Glick, Loren Glick, and Tien Thi Hoang). (ROA.17-30936.19044-ROA.17-30936.19085).

Eventually, the district court issued a fourth order following briefing on Motions to Reconsider the July 9, 2017 order: [As to the Motions for Reconsideration, Etc. of the PTO 64 Compliance Order] dated November 11, 2017. (App. *infra*, 92a). In its Order the Court granted and denied various portions of the Motions before it. As to the BCA Motion to Amend/Correct the Court dismissed claims for Action Restoration, Incorporated; James Glick; Russell Lengacher; Luke Martin; Nelson Mast; SGI Land Company, L.L.C.; Gary Pesce, d/b/a Ocean Flex OMTS; Kyrt M. Wentzell; and Kyrt M. Wentzell Innovations d/b/a Chum. Action Restoration, Incorporated has since settled, the remaining plaintiffs make up the Petitioners in this matter.

This final order is the one that Petitioners appealed in November 2017.

B. Proceedings Below

BP's Motion to Dismiss in the Fifth Circuit contends that Petitioners cases were dismissed the July 14, 2016 Order. The Fifth Circuit granted BP's Motion

to Dismiss on April 18, 2018. Petitioners attempted to file a Motion for rehearing with suggestion of *en banc* proceedings in order to insure that rulings among the various panels hearing appeals related to PTO 60 were consistent. However, because no ruling was made on the merits of Petitioners appeal the clerk forced the re-titling of the motion to a Motion for Reconsideration, which was denied on May 16, 2018. (App. *infra*, 90a)

REASONS FOR GRANTING THE PETITION

I. THE FALLOUT FROM PTO 60 CONTINUES EVEN TODAY

The apparent purpose of PTO 60 was to allow for the dismissal of the "B1" Bundle Master Complaint. The B1 Master Complaint was a procedural device that allowed for the filing of short form joinders by Plaintiffs directly into the MDL 2179 proceedings. PTO 60 was used to dismiss the B1 Master Complaint, while still allowing short form joinder plaintiffs some time file their own individual complaints. PTO 60 also required Plaintiffs who had not filed short form joinders, but had instead filed lawsuits with more than one plaintiff, to file a new individual lawsuit with a single Plaintiff.

PTO 60 was an undoubtedly ambitious order. It came out of the blue after many years of inactivity on these cases, and essentially required tens of thousands of cases to be filed in a month's time. Further more it required individual plaintiffs to sign a form personally. Without the form there was no way for even the most

assiduous attorney to comply with PTO 60. Fortunately, concurrent with the issuance of PTO 60 the Court established an equally ambitious program to settle cases and avoid the need to comply with PTO 60. Attorneys and staff for Petitioners immediately threw themselves into the attempt to do the impossible and comply with these orders. Dozens of additional staff were immediately hired at BCA and all hands worked seven days a week for nearly three months as the neutral program produced offers on a rapidly rolling process involving scores of communications and personal meetings with the neutral team in New Orleans. The net outcome of this massive undertaking, even with extreme time constraints involved, resulted in the resolution of over 7,300 claims handled by BCA and also resulted in the filing of approximately 200 additional individual complaints pursuant to PTO 60, even though every single claimant already was a plaintiff in a previously filed complaint or petition that had previously been transferred (over objection) to MDL 2179.

In the wake of PTO 60, it was clear that the Court would need to take some steps to clarify exactly who had complied with PTO 60, who had attempted to comply, and who had settled. With tens of thousands of claimants this was no simple task. It sparked a series of orders from the court, as well as assorted filings by plaintiffs and defense counsel in between each order.

BP/Appellant's argument is that prior compliance orders trump the deadlines plaintiffs operated under. If the matter was absolutely put to bed via the July 14, 2016 (Compliance) Order, then there should have

been no need for the second (Reconciliation) Order on December 16, 2016 issued, or the third (Compliance) Order on PTO 64 and PTO 60 on July 9, 2017. Nor should the district court have considered the motions by various plaintiff's in response to the July 9, 2017 order.

Instead, the District Court considered a number of Motions for Reconsideration in addition to the Petitioners, including five other plaintiff represented by Brent Coon & Associates. In November 2017, the district court deemed those five other BCA plaintiff's as PTO 60 compliant along with other plaintiffs represented by different firms. If the Petitioners cases were dismissed by the July 14, 2016 Order, as BP argued, then so were the other plaintiffs in the exact same position. Instead, nearly a year and half later the District Court explicitly allowed them back into the MDL. This is conclusive proof that the July 14, 2016 Order did not dismiss Petitioners case. The July 14, 2016 Order was merely the first of a series of orders because it treated the various order as exactly what they were, an ongoing attempt to clear up the confusion caused by the chaos created in the wake of PTO 60.

Ultimately, the Petitioners complied, or at the very least attempted to comply, in good faith with PTO 60 and the subsequent orders trying to sort out the chaos it caused. None of the Petitioners are specifically mentioned in the show cause order, nor are they mentioned in the July 14, 2016 Compliance Order. Petitioners were left in "no man's land" where the Court had not specifically marked them for dismissal, nor had BP moved for their specific dismissal.

On November 8, 2017 the MDL court issued a final order denying a motion for reconsideration brought by Petitioners SGI Land Company, LLC; Gary Pesce d/b/a Ocean Flex OMTS; Kyrt M. Wentzell; Individually and Kyrt M. Wentzell, Innovations d/b/a Chum Churn; Russell Lengacher; Nelson Mast; Luke Martin; Russell Lengacher; and James Glick. As a result Appellants' appeal on November 27, 2017 was a timely appeal under Federal Rule of Appellate Procedure 4 of the order that ultimately dismissed Petitioners cases.

II. DISMISSAL OF THE CASE VIOLATES DUE PROCESS

PTO 60 violated due process by imposing impossible deadlines on tens of thousands of plaintiffs. These plaintiffs, including approximately 10,000 represented by BCA, filed lawsuits for claims related to the *Deepwater Horizon* oil spill which occurred on April 20, 2010. The vast majority of these lawsuits were filed well before April 2013 because of the three year statute of limitations imposed by the Oil Pollution Act (OPA). All of the plaintiffs had previously complied with other OPA mandates, including submission of their claims and supporting documentation as required and allowing BP as the responsible party to evaluate the claim for the requisite 90 days prior to being allowed to pursue a court remedy (not surprisingly, BP failed to make an offer on ANY of the 10,000 plus claims filed in the OPA process by BCA). Subsequently, petitions and complaints were filed in various state and federal courts along the Gulf Coast on behalf of the affected Plaintiffs, all of which were eventually transferred to this MDL. These plaintiffs literally sat on the sidelines for a number of years while the MDL court dealt with numerous other issues (government

claims, class settlement issues, moratorium issues, etc.) related to the spill. PTO 60, issued on March 29, 2016, was the FIRST action taken by the court on behalf of these plaintiffs. After three to five years of waiting, PTO 60 suddenly required every single one of these plaintiffs to act by May 2 to file an individual lawsuit and to personally sign a sworn statement essentially verifying their claims. This was frankly redundant of the compliance mandates of the OPA and prior settlement information provided voluntarily by plaintiffs to the GCCF program initiated in 2010. This deadline was literally impossible to meet and yet was ONLY extended on cases that filed proper motions and had not yet received a recommended value from the neutral program. Meanwhile, the issuance of PTO 60, with no warning, on cases that had literally been sitting in a holding pen for years without any action—no discovery, no settlement negotiations, no trial date-resulted in mass bedlam. Law firms around the country scrambled to find clients after many years of inactivity. Many claimants were engaged in transient work in seasonal tourism and offshore activities such as commercial fishing at the time of the spill and frequently moved, changed contact information without notification and otherwise were difficult to track on a regular basis. Others died over the extended time frames involved, necessitating probate interaction and estate designations. Businesses impacted from the spill had often filed bankruptcy over the course of the litigation. In summary, finding the proper parties to each of 10,000 claims on only a few weeks notice after many years of inactivity was yeoman's work, inviting massive levels of electronic tracking efforts, detective work, blanket notices to long lists of alter-

native contacts, and other assorted mechanisms just to find the claimants. Some were completely out of pocket offshore plying their trades in commercial fisheries with no way to be contacted to sign any papers required by the Court on such abbreviated deadlines. Thousands were of Vietnamese or other foreign national designations, requiring onerous levels of transcription and interpretation, again on very compressed and unreasonable time tables.

The duty of an MDL Court is to provide "coordinated and consolidated pre-trial proceedings." 28 U.S.C. § 1407(a). Furthermore, the goal of transferring cases to an MDL Court is to "promote the just and efficient conduct of such actions. *Id.* Six years after the oil spill the Court instead mandated new filings directly into the Eastern District of Louisiana.

While Petitioners understand and recognize that an MDL judge must be given "greater discretion" to create and enforce deadlines in order to administer the litigation effectively, the Court's Orders must give reasonable timelines for compliance. *See Freeman v. Wyeth*, 764 F.3d 806, 810 (8th Cir. 2014). This necessarily included the power to dismiss cases where litigants do not follow the court's orders. *Id.* citing *Gaydos v. Guidant Corp. (In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, 496 F.3d 863, 866 (8th Cir. 2007)).

In spite of this, judicial efficiency does not mean that the litigation should become a drag race. PTO 60 did exactly that, after no action for nearly three plus years every single case was forced to jump to warp speed, virtually overnight. While this was not a major undertaking for any one single case, it was utter

chaos when multiplied by the tens of thousands of cases pending before the court at the time PTO 60 was issued.

A party may be sanctioned for the following under the court's inherent powers: for bad faith, willful disobedience of a court order, or fraud on the Court. *Chambers v. NASCO, Inc.*, 501 U.S. 32, at 45-56 (1991). "[A person] whom the court proposes to sanction must receive 1) specific notice of the conduct alleged to be sanction able and the standard by which that conduct will be assessed, and 2) an opportunity to be heard on that matter, and must be forewarned of the authority under which sanctions are being considered, and given a chance to defend himself against specific charges." *Wilson v. Citigroup, NA*, 702 F.3d 720, 725 (2d Cir. 2012). Here, there is no evidence that any non-compliance with PTO 60 was in bad faith or willful. Therefore dismissal of the cases are not proper.

Additionally, "§ 1407 not only authorizes the panel to transfer for coordinated or consolidated pretrial proceedings, but obligates the Panel to remand any pending case to its originating court when, at the latest, those pretrial proceedings have run their course." *In re Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 34 (1998). "Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated." 28 U.S.C. § 1407(a). The Supreme Court correctly points out that the word shall is mandatory in this instance. *In re Lexecon, Inc.*, 523 U.S. at 35. Dismissing the original action and requiring a new filing directly in the

Eastern District of Louisiana is simply an end-run around the mandates of 1407.

Any non-compliance by Appellant with the PTO 60 orders was not from any intentional act, or any effort to effectuate any delay or prejudice to any party. In fact, Appellant would show to the contrary, that wholesale efforts were made to comply with PTO 60, even while disagreeing with it, and do so in a manner that would further the efficiency of the judicial process by keeping these three conjoined cases together and yet segregated from the master complaint involving many hundreds of other unrelated claims that brought about their original presence before this Court. As set out above, Appellants made a good faith effort to comply with PTO 60. As a result, there is no prejudice or delay to any of the Parties as a result of any perceived defects in compliance with PTO 60.

Contumacious conduct is a "stubborn resistance to authority." *Darville v. Turner Indus. Grp., LLC*, 305 F.R.D. 91, 94 (M.D. La. 2015)(citing *McNeal v. Papasan*, 842 F.2d 787, 792 (5th Cir. 1988)). Such behavior can be established by a record of a Appellant failing to comply with multiple orders and rules of the court. *Darville*, 305 F.R.D. at 94 (citing *Callip v. Harris County Child Welfare Dept.*, 757 F.2d 1513, 1520-21 & n. 10 (5th Cir. 1985)). Such behavior goes beyond a failure to comply with a scheduling or pretrial order. *Id.*

The sort of delay contemplated in cases where there is involuntary dismissal with prejudice, is longer than even a few months, and characterized by significant periods of total inactivity. *See Millan v. USAA Gen. Indem. Co.*, 546 F.3d 321, 326–27 (5th Cir. 2008)

(citing *McNeal v. Papasan*, 842 F.2d 787, 791 (5th Cir. 1988)). Noncompliance with a single pretrial order which results in functionally no delay, as the entirety of the action is stayed, is not extreme enough to warrant the sanction of dismissal of the action. *See Darville v. Turner Indus. Grp., LLC*, 305 F.R.D. 91, 95 (M.D. La. 2015).

In addition to the two requirements discussed above, the Fifth Circuit "usually" looks for an aggravating factor. *Sealed Appellant v. Sealed Appellee*, 452 F.3d 415, 418 (5th Cir. 2006). Aggravating factors that favor dismissal include, delay directly attributable to the Appellant, instead of the Appellants' attorney; "actual prejudice to the defendant;" or "delay caused by intentional conduct." *Millan v. USAA Gen. Indem. Co.*, 546 F.3d 321, 326 (5th Cir. 2008); *Price v. McGlathery*, 792 F.2d 472, 474 (5th Cir. 1986); *see also Ford v. Sharp*, 758 F.2d 1018 (5th Cir. 1985); *Darville v. Turner Indus. Grp.*, *LLC*, 305 F.R.D. 91, 94 (M.D. La. 2015).

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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