UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

AUSTIN ROGER CARTER,

Plaintiff - Appellant,

v.

GENESIS ALKALI LLC;
GENESIS ENERGY LP;
CODY J. PARKER;
KRISTEN O. JESULAITUS;
TERRY HARDING,

Defendants - Appellees.

No. 22-8009
(D.C. No. 0:20-CV-00216-SWS)
(D. Wyo.)

ORDER

(Filed Mar. 17, 2022)

Before TYMKOVICH, Chief Judge, McHUGH, and MORITZ, Circuit Judges.

Pro se Appellant Austin Roger Carter seeks to appeal the district court's interlocutory order denying reconsideration of a magistrate judge's order denying Mr. Carter's motion to disqualify counsel for defendants. This court entered an order to show cause why the appeal should not be dismissed for lack of jurisdiction because the district court's order is not immediately reviewable. Mr. Carter has filed a response. Upon

consideration, we dismiss this appeal for lack of appellate jurisdiction.

This court generally has jurisdiction to review only final decisions of district courts. *See* 28 U.S.C. § 1291; *Riley v. Kennedy*, 553 U.S. 406, 419 (2008) (describing final decisions as those that end the litigation on the merits and leave nothing for the court to do but execute the judgment). The Supreme Court has held that "a district court's order denying a motion to disqualify counsel is not appealable under § 1291 prior to final judgment in the underlying litigation." *See Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 379 (1981) (court of appeals lacks jurisdiction over immediate appeal from order denying disqualification); *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 430-31 (1985) (orders on motions to disqualify counsel in civil cases do not fall within the "collateral order" exception to the final judgment rule).

Mr. Carter's case is ongoing in the district court and no final decision ending the litigation on the merits has been entered. Because the district court's order on Mr. Carter's motion to disqualify counsel is not appealable prior to final judgment, we lack jurisdiction over this appeal.

APPEAL DISMISSED

Entered for the Court

/s/ Christopher M. Wolpert
CHRISTOPHER M. WOLPERT,
Clerk

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

AUSTIN ROGER CARTER, Plaintiff - Appellant, v. GENESIS ALKALI LLC, et al., Defendants - Appellees.	No. 22-8009 (D.C. No. 0:20-CV-00216-SWS) (D. Wyo.)

ORDER

(Filed Feb. 10, 2022)

This matter is before the court upon the opening of this appeal. Plaintiff Austin Roger Carter appeals from the district court's February 8, 2022 Order denying "Plaintiff's Motion to Reconsider the Order Denying Plaintiff's Motion to Disqualify Counsel" [Doc No. 71]. The court is considering this matter for summary disposition because the district court's order is not immediately appealable and therefore this court lacks jurisdiction to consider this appeal. *See* 10th Cir. R. 27.3(B).

Appellate courts generally have jurisdiction to review only final decisions of district courts. 28 U.S.C. § 1291; *see also Riley v. Kennedy*, 553 U.S. 406, 419 (2008) (describing final decisions as those that end the

litigation on the merits and leave nothing for the court to do but execute the judgment). The United States Supreme Court has held that an order denying a motion to disqualify counsel is not immediately appealable and that the court of appeals lacks jurisdiction to consider immediate appeal from the order. *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 379 (1981) ("We hold that a district court's order denying a motion to disqualify counsel is not appealable under § 1291 prior to final judgment in the underlying litigation."; court of appeals lacks jurisdiction over immediate appeal from order); *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 431 (1985) (restating holding in *Firestone*).

Accordingly, **on or before February 24, 2022**, Appellant shall respond in writing why this appeal should not be dismissed for lack of appellate jurisdiction because the district court's order is not immediately appealable. If Appellant fails to file a response, or chooses to not file a response, the court may dismiss this appeal without further notice pursuant to 10th Cir. R. 42.1.

Alternatively, Appellant may move to voluntarily dismiss this appeal under Fed. R. App. P. 42(b) and may file a new appeal as necessary following final judgment. *See Firestone*, 449 U.S. at 377.

Briefing on the merits of this appeal is suspended pending further order of the court. *See* 10th Cir. R. 27.3(C).

Entered for the Court
CHRISTOPHER M. WOLPERT,
Clerk

/s/ Sunil N Rao
By: Sunil N. Rao
Counsel to the Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

AUSTIN ROGER CARTER, Plaintiff, vs. GENESIS ALKALI, LLC, GENESIS ENERGY L.P., CODY J. PARKER, KRISTEN O. JESULAITUS, AND TERRY HARDING Defendants.	Case No. 20-CV-216-S

ORDER DENYING PLAINTIFF'S MOTION TO DISQUALIFY COUNSEL [53]

(Filed Jan. 4, 2022)

This matter is before the Court on Plaintiff Austin Carter's Motion to Disqualify Defendants' counsel [ECF No. 53]. The Court, having carefully considered the filings and being fully advised, finds the Motion is untimely and Plaintiff fails to establish the existence of an attorney-client relationship.

BACKGROUND

This case is before the Court on Plaintiff's claims against Defendants asserting violations of Section 806 of the Corporate and Criminal Fraud Accountability

Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A ("SOX"), violations of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("the Dodd-Frank Act"), and defamation under Wyoming state law. [*See* ECF No. 1]. The suit stems from a SOX Act whistleblower complaint Plaintiff filed on December 19, 2019, with the Department of Labor, Occupational Safety and Health Administration ("OSHA"). [*See* ECF No. 1-1, pp. 3–8]. It is undisputed that OSHA did not resolve Plaintiff's complaint within 180 days of its filing, so Plaintiff has appropriately filed in this Court. *See* 18 U.S.C. § 1514A(b).

In 2016, Plaintiff began working as a Procurement Supervisor for Genesis Alkali ("Genesis"), a mining and production facility in Green River, Wyoming. [ECF No. 1 at 3]. In 2018, Plaintiff was promoted to Procurement manager. [*Id.*] After that promotion he began to suspect fraudulent activity occurring in Genesis' projects which he reported on two separate occasions. [*Id.* at 5]. In June 2019, after lodging his second complaint, Plaintiff's employment was terminated for alleged job-related performance issues. [*See* ECF No. 1-2, p. 75]. However, in order to complete its investigation of Plaintiff's latest complaint, Genesis rescinded Plaintiff's termination and retained him on administrative leave to facilitate the investigation. [*Id.*] After completing the investigation and finding no evidence of impropriety or ethical violations in June 2020, Genesis permanently terminated Plaintiff's employment. [*Id.*]

During the investigation, on December 10, 2019, Plaintiff filed a complaint with OSHA alleging SOX Act violations against Genesis. [See ECF No. 1-1, pp.

2–8]. After 180 days lapsed with no decision from OSHA, Carter informed the OSHA investigators he intended to file the matter in federal court, pursuant to his rights under the Act. [*Id.* at 2]. In doing so, Plaintiff brought claims against Genesis Energy L.P. and Genesis Alkali, LLC (collectively the "Genesis Defendants)[1] as well as Cody Parker, Fred von Ahrens, Edward T. Flynn, and Kristen Jesulaitus (collectively the "Individual Defendants"). [ECF No. 1, pp. 4–5]. On March 22, 2021, this Court entered an Order dismissing the defamation claims and the Dodd-Frank Act claims against all Individual Defendants, and the SOX Act claims against Fred Von Ahrens and Edward Flynn. [ECF No. 36]. However, the Court denied the Motion to Dismiss as to the SOX Act claims against Cody Parker, Terry Harding, and Kristen Jesulaitus. [*Id.*]

On April 20, 2021, Carter properly served and filed executed summons pertaining to the Genesis Defendants. [ECF No. 40]. The Genesis Defendants filed a partial Motion to Dismiss, asking this Court to dismiss the defamation and Dodd-Frank Act claims, which the Court granted. [ECF Nos. 42, 43, 48]. Plaintiff then brought the current Motion on October 7, 2021 seeking to have Defense counsel disqualified. [ECF No. 53]. After Plaintiff filed this Motion, the Court held multiple status conferences during which it discussed Plaintiff's efforts to retain counsel and extended the

[1] On or about September 1, 2017, Genesis Energy L.P. acquired Genesis Alkali, LLC (formerly known as Tronox Alkali Ltd.). [ECF No 1, p. 4].

Response and Reply deadlines for the instant Motion to allow Plaintiff time to do so. [*See* ECF Nos. 54, 56, 60]. Ultimately, Plaintiff was unsuccessful in retaining counsel and expressed he would prefer this Motion to be addressed before continuing efforts to find counsel.

In his Motion, Plaintiff argues this Court should disqualify Defendants' attorneys, Amanda Esch, Kelly Edwards, Kevin Grifffith, Nicole LeFave, and the law firms of Littler Mendelson, P.C. and Davis & Cannon, LLP, for an impermissible conflict of interest. [ECF No. 53, p. 1]. Plaintiff argues that he provided these attorneys with confidential communication under the guise of an attorney-client relationship. [*Id.* at 2]. Further Plaintiff argues Defense counsel is attempting to gain consent to again share the confidential communications via Defendants' proposed Protective Order [*Id.* at 3].

RELEVANT LAW

"Disposition of a motion to disqualify an attorney rests with the sound discretion of the trial court." *Gates Rubber Co v. Bando Chem. Indus.*, 855 F. Supp. 330, 334 (D. Colo. 1994). The Tenth Circuit has articulated a somewhat confounded legal standard governing motions to disqualify:

> Motions to disqualify are governed by two sources of authority. First, attorneys are bound by the local rules of the court in which they appear. Federal district courts usually adopt the Rules of Professional Conduct of

> the states where they are situated. Second, because motions to disqualify counsel in federal proceedings are substantive motions affecting the rights of the parties, they are decided by applying standards developed under federal law. *In re American Airlines, Inc.*, 972 F.2d 605, 610 (5th Cir.1992), *cert. denied sub nom. Northwest Airlines, Inc. v. American Airlines*, 122 L.Ed. 2d 659, 113 S. Ct. 1262 (1993). Therefore, motions to disqualify are governed by the ethical rules announced by the national profession and considered "in light of the public interest and the litigants' rights." *See Dresser*, 972 F.2d at 543.

Cole v. Ruidoso Mun. Schools, 43 F.3d 1373, 1383 (10th Cir. 1994).[2] In applying the above stated standard in *Cole*, the Tenth Circuit looked to New Mexico's rules of professional conduct and found that they were patterned off the ABA Model Rules. *Id.* at 1383. The court stated it believes the Model Rules "reflect the national standard to be used in ruling on disqualification motions." *Id.* Finally, the court compared the New Mexican rules to the ABA Model Rules and found they did not differ in any material way; therefore, case law applying ABA Model Rules is instructive. *Id.* at 1384.

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[2] The Court calls the standard confounding because it calls motions to disqualify substantive and then requires the Court to apply federal law instead of state law, where state law normally applies to substantive issues. Second, the Tenth Circuit states motions to disqualify are governed by the local rules of the court in which the attorney appears, but later states they are governed by the ethical rules announced by the national profession, which the Court takes to mean the ABA Model Rules of Professional Conduct.

Here, the United States District Court for the District of Wyoming has adopted the Wyoming Rules of Professional Conduct. U.S.D.C.L.R. 84.4(b). Plaintiff asserts violations of Wyoming Rules of Professional Conduct 1.6, 1.7, 1.9, and 1.10. In comparing the Wyoming Rules with the ABA Model Rules the Court finds they are the same.[3] Thus, as in *Cole*, case law interpreting the Model Rules is instructive.

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[3] *Compare* ABA Model Rule of Professional Conduct 1.6 ("(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).") *with* Wyoming Rule of Professional Conduct 1.6 ("(a) A lawyer shall not reveal confidential information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)."); *compare* ABA Model Rule of Professional Conduct 1.7 ("(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer."), *with* Wyoming Rule of Professional Conduct 1.7 ("(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer."); *compare* ABA Model Rule of Professional Conduct 1.9 ("(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent

RULES 1.9 AND 1.10

The Wyoming Supreme Court laid out the elements which must be proven to establish a violation of Rule 1.9. *Magin v. Solitude Homeowner's Inc.*, 2011 WY 102 ¶ 11, 255 P.3d 920, 925 (Wyo. 2011) (citing *Simpson Performance Prods., Inc., v. Robert W. Horn, P.C.*, 2004 WY 69, ¶16, 92 P.2d 283, 287 (Wyo. 2004)). The elements are:

> First, there must have been a valid attorney-client relationship between the attorney and the former client. . . . Second, the interests of the present and former clients must be materially adverse. . . . Third, the former client must not have consented, in an informed manner, to the new representation. . . . Finally, the

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another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing."), *with* Wyoming Rule of Professional Conduct 1.9 ("(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing. For representation of another person in the same matter the former client's informed consent confirmed in writing shall be signed by the client."); *compare* ABA Model Rule of Professional Conduct 1.10 ("(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9. . . ."), *with* Wyoming Rule of Professional Conduct 1.10 ("(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9. . . .").

> current matter and the former matter must be the same or substantially related.

Id. The Tenth Circuit has adopted the same elements, though in a different order. *United States v. Stiger*, 413 F.3d 1185, 1196 (10th Cir. 2005). The Tenth Circuit articulates the elements as such: "(1) an actual attorney-client relationship existed between the moving party and the opposing counsel; (2) the present litigation involves a matter that is 'substantially related' to the subject of the movant's prior representation; and (3) the interests of the opposing counsel's present client are materially adverse to the movant." *Id.* (citing *Cole*, 43 F.3d at 1383). If a movant establishes the first two elements, "an irrebuttable 'presumption arises that a client has indeed revealed facts to the attorney that require his disqualification.'" *Stiger* 413 F.3d at 1196 (citing *Smith w. Whatcott*, 757 F.2d 1098, 1100 (10th Cir. 1985)).

Rule 1.10 of both the Wyoming Rules of Professional Conduct and the ABA Model Rules imputes conflicts of interest to lawyers working together in a firm. According to the Rule, no lawyers working in a firm can "knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9." Wyoming Rules of Prof'l Conduct r. 1.10. There are exceptions to Rule 1.10. If "the prohibition is based on a personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm," the firm is not disqualified. *Id.* Additionally, if "the prohibition is based on

Rule 1.9(a) or (b), and arises out of the disqualified lawyer's association with a prior firm" the entire firm is not disqualified if certain steps are taken. *Id.*

RULE 1.7

Rule 1.7 concerns conflicts of interest with current clients. The Rule provides that an attorney shall not represent a party where the representation will be directly adverse to another client. Wyoming Rules of Prof'l Conduct r. 1.7. It further provides that a lawyer cannot represent a party when "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer." *Id.* Comment six provides, "[l]oyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated." *Id.* at cmt 6.

Rule 1.6

Rule 1.6 prohibits the disclosure of confidential information relating to the representation of a client absent informed consent by the client, or other limited exceptions. Wyoming Rules of Prof'l Conduct r. 1.6. Comment one provides "[t]his Rule governs the disclosure by a lawyer of information relating to the

representation of a client during the lawyer's representation of the client." *Id.* at cmt. 1.

RULING OF THE COURT

The Court begins by noting Plaintiff's Motion to Disqualify is untimely. In *Marguerite A Walk Private Foundation Corporation v. Grand Teton Music Festival, Inc.*, this Court explained a delay in bringing a motion to disqualify is sufficient justification to deny the motion. 2017 WL 3449604, at *5 (D. Wyo March 8, 2017) ("The Tenth Circuit has recognized that late filing of a motion to disqualify justifies the summary rejection of the motions.") (citing *Redd v. Shell Oil Co.*, 518 F.2d 311, 315 (10th Cir. 1975)). In that case, the Court analyzed the delay by looking at the length of time that had passed since the movant was aware of the conflict as well as noting the Court had already heard a motion to dismiss and set a scheduling order, and the parties had already engaged in discovery. *Id.*

In this case, Plaintiff filed his Complaint in November 2020, nearly 11 months prior to his Motion to Disqualify. [ECF No. 1]. In fact, Plaintiff notes in his Motion that he acknowledged this conflict issue in his initial filing. [ECF No. 53, p. 4]. Further, Plaintiff references communications which occurred as early as June 2019. [See ECF No. 1, pp. 8–18]. Not only has significant time passed since Plaintiff has been aware of this alleged conflict, but this Court has ruled on multiple motions to dismiss and other various motions. [*See e.g.*, ECF Nos. 36, 39, 48, 51]. While the Court has not

yet entered a scheduling order, the Court finds the delay sufficient to justify denying the Motion to Disqualify.

Even if Plaintiff's Motion had been timely, Plaintiff has failed to establish an attorney-client relationship, which is required to find a violation of all rules asserted by Plaintiff. "To establish the existence of an attorney-client relationship, 'a party must show that (1) it submitted confidential information to a lawyer and (2) it did so with the reasonable belief that the lawyer was acting as the party's attorney.'" *Tri Cty. Tel. Ass'n v. Campbell*, 2017 WL 11497264, at *3 (D. Wyo. July 19, 2017) (quoting *Cole*, 43 F.3d at 1384). While Plaintiff makes assertions that he shared confidential information with Ms. Jesulaitus and Littler attorneys Earl Jones and Kelley Edwards, he fails to show he did so with the reasonable belief they were acting as his attorneys. In his Motion, Plaintiff attached various e-mail exchanges he had with Kristen Jesulaitus, Earl Jones, and Kelley Edwards. [ECF No. 53, pp. 18]. Though the e-mails contain discussions regarding Plaintiff's employment with and termination from Genesis, none of them indicate Plaintiff believed he was communicating with his attorney. [*Id.*] Plaintiff also provides voicemails from both Earl Jones and Dan Ramey, a third-party investigator. [ECF No. 62, pg. 12; ECF No. 58, p. 3]. These likewise do not indicate Plaintiff had an attorney-client relationship with Mr. Jones or anyone else. Further, Defendants provided an e-mail from Plaintiff to Earl Jones in which Plaintiff acknowledged that the documents provided to him by both

Genesis and Mr. Jones encouraged Plaintiff to have them reviewed by counsel. [ECF No. 58-2, p. 7]. In fact, Plaintiff stated that he was in the process of hiring counsel for his claims against Genesis and that until such time as he does so, he would be representing himself. [*Id.*]

Plaintiff also argues the "Legal Hold Notice" sent by Katherine Tweel, General Counsel for Genesis, establishes that he had an attorney-client relationship with Ms. Jesulaitus. He asserts that this identified Ms. Jesulaitus as an attorney and Plaintiff as a client, and thus evidences their attorney-client relationship. However, the "Legal Hold Notice" e-mail states "[i]f you have any questions or believe someone else should be added to the enclosed Attachment A distribution list as a potential contributor or custodian of information relevant to this matter, please contact me . . . " [ECF No. 62, p. 11]. Though Plaintiff did not provide any attachments to the e-mail, it can be inferred that this notice was simply to inform all individuals who may have information related to the potential litigation. This is insufficient to establish an attorney-client relationship, and thus there could have been no violation of Rules 1.7 or 1.9. Because there was no attorney-client relationship with either Mr. Jones or Ms. Edwards, no conflict of interest could have been imputed to either the Littler firm or Davis and Cannon. Therefore, there likewise could have been no violation of Rule 1.10.

Finally, Plaintiff argues that the Defendant's proposed protective order is an attempt to have Plaintiff give his informed consent to allow defense counsel to

reveal confidential information. However, as Defendants state, it is simply a "form order intended to protect confidential, trade secret, or proprietary information that may be produced by either party during this case from disclosure to the general public." [ECF No. 58, p. 8]. It is not an attempt to disclose confidential information in violation of Rule 1.6. Further, in the absence of an attorney-client relationship there can be no violation of Rule 1.6.

CONCLUSION

Plaintiff has failed to establish that an attorney-client relationship was ever established with any member of defense counsel. As such, he has not established violations of Wyoming Rules of Professional Conduct 1.6, 1.7, 1.9, or 1.10. Moreover, the Motion to Disqualify is untimely.

NOW IT IS THEREFORE ORDERED Plaintiff's Motion to Disqualify is DENIED.

IT IS FURTHER ORDERED Plaintiff's Motion to Reschedule the Telephonic Hearing is MOOT.

Dated this 4th day of January, 2022.

/s/ Kelly H. Rankin
Kelly H. Rankin
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

AUSTIN ROGER CARTER, Plaintiff, vs. GENESIS ALKALI, LLC and GENESIS ENERGY L.P., CODY J. PARKER, FRED VON AHRENS, EDWARD T. FLYNN, and KRISTEN O. JESULAITIS, Defendants.	Case No. 20-CV-216-SWS

ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION AND UPHOLDING MAGISTRATE JUDGE'S ORDER DENYING PLAINTIFF'S MOTION TO DISQUALIFY COUNSEL

(Filed Feb. 8, 2022)

On January 4, 2022, Magistrate Judge Rankin issued an *Order Denying Plaintiff's Motion to Disqualify Counsel.* (ECF No. 64.) On January 12, 2022, Plaintiff motioned this Court for reconsideration of the magistrate judge's order. (ECF No. 65.) Defendant responded (ECF No. 69) and Plaintiff replied (ECF No. 70). Having considered the briefs and being otherwise fully

informed, the Court finds Plaintiff's motion should be DENIED.

Background

This lawsuit originated with Plaintiff's SOX Act whistleblower complaint, originally filed with OSHA and subsequently filed in this Court. (ECF No. 1 at 1; ECF No. 1-1 at 3–8.) Although the case has yet to have an initial pretrial conference, this is the Plaintiff's third motion for reconsideration. (ECF No. 30; ECF No. 49; ECF No. 65.) Plaintiff originally submitted a motion to disqualify Defendants' attorneys: Amanda Esch, Kelley Edwards, Kevin Griffith, Nicole S. LeFave, and the entire law firms of Littler Mendelson and Davis & Cannon. (ECF No. 53 at 1.) Kelley Edwards, Kevin Griffith, Nicole S. LeFave, and Earl "Chip" Jones[1] are attorneys employed by Littler Mendelson, P.C., a Texas-based law firm. (ECF No. 7, 8, 19.) Amanda Esch works for Davis & Cannon as local Wyoming counsel in this case. (ECF No. 14.)

While Plaintiff's arguments in this motion are not entirely clear, he seemed to base his argument for disqualification on three premises. First, he argued he disclosed confidential information to Earl "Chip" Jones and Kelley Edwards during the internal investigation process preceding this complaint. (*Id.* at 2–3.) He was

[1] Earl Jones is no longer working on this case due to a medical condition. (ECF No. 58-2 at 5.) Kelley Edwards took his place as lead attorney for Genesis Energy in its discussions with Plaintiff. (ECF No. 58-3 at 2.)

under the impression he divulged confidential information to Jones and Edwards as part of an attorney-client relationship, but the attorneys used that same information to damage his reputation and prevent him from regaining employment. (*Id.*) Plaintiff alleged he disclosed information to Jones, which he thought was confidential but was later "unethically regurgitated" to a team of investigators in an "attempt to discredit" Plaintiff. (*Id. at* 5.)

Second, he imputed this conflict onto all Davis & Cannon attorneys, saying it is a "fundamental fact that Littler has no doubt shared confidential information with Davis and Cannon." (*Id.* at 4.) He later stated, "there has been an exchange of information from the Littler group to Davis & Cannon LLP and through Amanda F. Esch that similarly disqualifies them from representing any defendants." (*Id.* at 5.) Importantly, Plaintiff did not cite any evidence to prove this "fundamental fact."

Third, Plaintiff argued Nicole S. LeFave has attempted to "have Plaintiff sign an informed consent and waive his protection under Wyoming Court Rules" at the "11th hour[.]" (*Id.*) He states this informed consent stemmed from Jones and Edwards originally attempting to have Plaintiff sign a tolling agreement. (*Id.*) Plaintiff argues the attempts by defense counsel amount to a violation of Wyoming Rules of Professional Conduct. (*Id.*)

Plaintiff also addressed the alleged untimeliness of the motion, stating he brought the conflict issue to

the Court's attention in his initial filing. (ECF No. 53 at 4.) Upon review of Plaintiff's complaint, he does not raise the issue of disqualification. (*See* ECF No. 1 at 17.) At most, he alleges Genesis and Littler Mendelson "conspired to delay Plaintiffs [sic] complaint until he was ineligible to file with OSHA and they could take advantage of Plaintiff." (*Id.*) This conspiracy happened after Plaintiff worked with Genesis General Counsel and Earl Jones. (*Id.* at 16.) Nowhere in the initial complaint does Plaintiff attempt to disqualify the attorneys in this case.

Defendants responded, stating at all times Mr. Jones represented Genesis Energy, not Plaintiff as an individual. (ECF No. 58 at 3.) Defendants primarily asserted Plaintiff's *Motion to Disqualify* was untimely. (*Id.* at 6.) Even if his motion were timely, Defendants argued Plaintiff could not establish the existence of an attorney-client relationship. (*Id.* at 7.) This is clear from the email chain between Plaintiff and Mr. Jones, where Plaintiff stated he was in the process of hiring an attorney but represented himself until he could retain counsel. (*Id.* at 8.) Accordingly, the Wyoming Rules of Professional Conduct do not apply because Plaintiff was never Littler's client. (ECF No. 58 at 8.) He is also silent as to the substance of the "confidential information" provided to Mr. Jones. (*Id.* at 7.)

Plaintiff replied, saying he provided Jones, Jesuaitis "and presumably later" Kelley Edwards a substantial amount of material, including information about "Plaintiffs [sic] job performance and personnel files, highly confidential information, details about projects

and duties, detailed COBRA [Consolidated Omnibus Budget Reconciliation Act] information, and other personal information[.]" (ECF No. 62 at 2.) Defense counsel requested Plaintiff sign a waiver releasing this confidential information as part of discovery. (*Id.*) After he provided all this information, the investigation "turned out to be a sham audit/investigation as was the prospect of Plaintiff getting his position back."[2] (*Id.*) Plaintiff cited to a Legal Hold Notice as the document which established an attorney-client relationship between himself and Genesis Energy General Counsel. (*Id.* at 3.) Plaintiff also referenced audio files showing he "fully revealed detailed, personal, and intimate information" to Mr. Jones, demonstrating an attorney-client relationship existed. (*Id.* at 5.) Plaintiff contended his decades of experience dealing with contract formation show he understands the nature of a contractual attorney-client relationship. (*Id.* at 7–8.)

On January 4, 2022, the magistrate judge issued an *Order Denying Plaintiff's Motion to Disqualify*

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[2] The Court declines to address the merits of the investigation (ECF No. 62 at 4), as this issue is only before the Court on Plaintiff's *Motion to Reconsider Order Denying Plaintiff's Motion to Disqualify*. The scope of the review in this Order is narrowed to only address the facts relevant to this motion. Additionally, there seem to be contentions about the factual issue of whether Plaintiff was actually fired for job performance issues. (*See* ECF No. 58 at 2; ECF No. 62 at 2; ECF No. 65 at 2; ECF No. 70 at 2.) The Court similarly declines to address the merits of this factual issue. Nor will this Court infer from Ms. Jesulaitis' deposition that she has "obviously perjured herself to the Court on these issues" imploring the Court to "conclude she has lied" about the nature of her attorney client relationship. (ECF No. 70 at 2.)

Counsel. (ECF No. 64.) The Court began by stating all relevant rules of Professional Conduct. (*Id.* at 5–7.) As a preliminary matter, the Court stated Plaintiff's motion was untimely because he did not raise the issue until eleven months into litigation. (*Id.* at 7.) Significant time had passed since Plaintiff became aware of these alleged conflicts of interest and the court had ruled on various motions in the meantime. (*Id.* at 8.)

Even if Plaintiff's motion were timely, he failed to establish an attorney-client relationship existed. (*Id.*) The voicemails Plaintiff provided "do not indicate Plaintiff had an attorney-client relationship with Mr. Jones or anyone else." (*Id.*) Plaintiff's exhibit showing email exchanges between himself, Jones, and Edwards indicate he was communicating about his employment with Genesis, but nothing suggests he believed he was communicating with his own attorney. (*Id.*) He even let counsel know in the same email chain that he was in the process of hiring his own attorney and represented himself in the interim. (*Id.* at 8–9 (citing ECF No. 58-2 at 7)). Likewise, the Legal Hold Notice was insufficient to establish an attorney-client relationship—the "notice was simply to inform all individuals who may have information related to the potential litigation" in that matter. (*Id.* at 9.) After thoroughly evaluating all this evidence, the magistrate judge denied Plaintiff's motion. (*Id.* at 10.)

On January 12, 2022, Plaintiff filed the instant motion for reconsideration with this Court. (ECF No. 65.) "It is obvious that this Court is unilaterally taking into consideration Defendant's information as fact and

to the contrary on Plaintiff's information as it has been carefully considered[.]" (*Id.* at 2.) Plaintiff alleges the magistrate judge failed to carefully consider the filings and "show[ed] partiality and favoritism to Defendants and their attorneys, and discount[ed] Plaintiff's information as presented." (*Id.*) Plaintiff argues the magistrate judge incorrectly determined the Legal Hold Notice did not establish an attorney-client relationship. (*Id.* at 3.) Additionally, the voicemails show "Mr. Jones was negotiating on Plaintiff's behalf for his healthcare[,] . . . his employment and advising Plaintiff that he could participate in the investigation to preserve his job by divulging confidential information to Mr. Ramey to assist in that effort, information that was used to defame Mr. Carter." (*Id.*)

Additionally, Plaintiff contends the motion is not untimely because there were other instances of delay in the case, including the time it took for the Hon. Freudenthal to recuse herself from the case, the continuance of the initial pretrial conference, and delays caused by Defendants, including filing motions to dismiss. (*Id.* at 4.)

Defendants responded arguing Plaintiff does not have grounds for reconsideration and pointing out Plaintiff's "hair-trigger seeking of reconsideration of sound court rulings if the rulings go against him[.]" (ECF No. 69 at 2–3.) Defendants state the Court considered all the evidence and applicable law to correctly conclude Plaintiff could not establish an attorney-client relationship. (*Id.* at 4.)

Legal Standard

Upon timely objection to a magistrate judge's decision on a non-dispositive matter, the district judge will "modify or set aside any part of the order that is clearly erroneous or is contrary to law." Fed. R. Civ. P. 72(a); *see* 28 U.S.C. § 636(b)(1)(A); Local Civil Rule 74.1(a). The clearly erroneous standard "requires that the reviewing court affirm unless it 'on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Ocelot Oil Corp. v. Sparrow Indus.*, 847 F.2d 1458, 1464 (10th Cir. 1988) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)). "Under the 'contrary to law' standard, the district court conducts a plenary review of the magistrate judge's purely legal determinations, setting aside the magistrate judge's order only if it applied an incorrect legal standard." *Jensen v. Solvay Chem., Inc.*, 520 F. Supp. 2d 1349, 1351 (D. Wyo. 2007) (citing *Wyoming v. United States Dep't of Agric.*, 239 F. Supp. 2d 1219, 1236 (D. Wyo. 2002)). "In sum, it is extremely difficult to justify alteration of the magistrate judge's nondispositive actions by the district judge." 12 Wright, Miller & Marcus, *Federal Practice and Procedure* § 3069 (2d ed. 1997); *see also Hedquist v. Patterson*, 2017 WL 5247909 at 2 (D.Wyo. April 14, 2017).

Analysis

Plaintiff does not present any new arguments in his motion for reconsideration—he merely reargues

the magistrate judge appeared to take the Defendant's assertions as fact and feels this demonstrates the magistrate judge did not consider his arguments. (ECF No. 65 at 2.) However, based upon a complete review of the Magistrate Judge's Order (ECF No. 64) and applicable case law, Plaintiff fails to show the Magistrate's decision was clearly erroneous or contrary to controlling case law.

To be clear, Plaintiff's original motion to disqualify (ECF No. 53) was untimely. All instances Plaintiff cites to show delay, such as Defendants filing motions to dismiss and the previous Judge taking time to disqualify herself based on a conflict of interest, are routine filings in a civil case—not delays. Additionally, Plaintiff knew which attorneys represented defense counsel in January 2021. (*See* ECF No. 9; ECF No. 21.) Plaintiff does not give any reason why he needed to wait almost one year to file for disqualification of counsel. This should have been filed much earlier in the case, as soon as defense counsel entered their appearance. *See Redd v. Shell Oil Co.*, 518 F.2d 311, 315 (10th Cir. 1975) (holding late filing of a motion to disqualify alone warranted the district court's denial of the motion—the motion should have filed as soon as parties were aware of the potential conflict). As the court recognized in *Marguerite,* "a plausible claim of conflict must be resolved before the allegedly conflicted counsel or the court takes further action in the *case." Marguerite A. Walk Private Foundation Corporation v. Grand Teton Music Festival Inc.*, No. 16-CV-155, 2017 WL 3449604, at *5 (D. Wyo. Mar. 8, 2017) (quoting *Grimes v. District of Columbia*,

794 F.3d 83, 90 (D.C. Cir. 2015)). The Magistrate Judge's conclusion that Plaintiff's Motion to Disqualify was untimely is neither clearly erroneous or contrary to law, and his decision can be affirmed on this basis alone. However, that is not the only problem with Plaintiff's argument.

On the merits of Plaintiff's motion, the magistrate judge did not commit clear error. "Determining the existence of an attorney-client relationship depends on the facts and circumstances of each case and may be implied from the conduct of the parties, such as the giving of advice or assistance, or such as failing to negate the relationship when advice or assistance is sought if the attorney is aware of the reliance on the relationship." *Bangs v. Schroth*, 201 P.3d 442, 453 (Wyo. 2009) (internal citations omitted). The client's subjective belief that an attorney-client relationship exists is relevant to the evaluation of whether there was such a relationship. *Brooks v. Zebre*, 792 P.2d 196, 230 (Wyo. 1990) (Urbigkit, J. dissenting) (quoting *Matter of Pappas*, 768 P.2d 1160, 1167–68 (Ariz. 1988)). The attorney bears the burden of showing the client's belief of an attorney-client relationship is unreasonable. *Carlson v. Langdon*, 751 P.2d 344, 348 (Wyo. 1988).

The legal hold notice did not create an attorney-client relationship between Plaintiff and Genesis attorneys. A stamp of "confidential work product" at the top of a document does not automatically indicate the document creates an attorney-client relationship between the sending party and the receiving party. The legal hold notice simply asks Mr. Carter to retain

documents for potential litigation unrelated to this case. (ECF No. 65 at 8.) It would be unreasonable for Plaintiff to receive a general legal hold notice and assume this creates an attorney-client relationship between himself and the company lawyers.

Exhibit 1B is no more convincing. (*See* ECF No. 65 at 13.) There, the reporting procedures specifically outline that any violations should be reported to human resources or a Genesis Alkali lawyer. (*Id.*) Kristen Jesulaitis and Katherine Tweel are listed directly underneath as General Counsel for Genesis Alkali.[3] (*Id.*) It would be unreasonable for Plaintiff to read this document, listing both women as attorneys for the company, and assume he has an individual attorney-client relationship with them.

Moreover, the voicemails Plaintiff provided do not indicate an attorney-client relationship. (*See* ECF No. 62 at 12.) The voicemails provided are typical of voicemails people send and receive every day. The voicemails indicate intentions to touch base later or discuss scheduling meetings. The voicemails do not include confidential information, any indication of an attorney-client relationship, or even any statements which could be misconstrued by a party as creating an attorney-client relationship.

Neither does the email chain provided by Mr. Carter. (ECF No. 53 at 8–18.) The two exhibit email

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[3] An attorney for a corporation represents the corporate entity as a client and owes a duty to the corporate entity. *Bowen v. Smith*, 838 P.2d 186, 195 (Wyo. 1992).

chains between Mr. Jones, Ms. Edwards, and Plaintiff begin on June 17, 2019 and July 25, 2019. (*Id.* at 12, 18.) On August 20, 2019, Plaintiff emailed Mr. Jones stating he would be representing himself. (ECF No. 58-2 at 7.) Between June 17, 2019 and August 20, 2019, there are no emails which indicate Plaintiff thought he had an attorney-client relationship with Mr. Jones or Ms. Edwards. At most, Plaintiff states in an email to Ms. Edwards he is "a little confused about the whole situation and . . . a bit concerned about how things are 'shaking out.' (ECF No. 53 at 16.) He then asks Ms. Edwards to catch him up when she can—he does not ask for her advice, but merely an update on the situation. (*Id.*) In another email, he simply asks what his employment status is, which is a logical question to ask your employer but does not indicate Plaintiff thought he had an attorney-client relationship with Ms. Edwards. (*Id.* at 17.)

The emails do not show Plaintiff asking for advice or that the Mr. Jones and Ms. Edwards were aware Plaintiff was somehow relying on an attorney-client relationship. In fact, Plaintiff appears to take command of the situation through his emails, dictating what he plans to do and explaining what is in his best interest. (ECF No. 53 at 11; *see also id.* at 18.) Plaintiff also contends his call to the Genesis Hotline, which resulted in a call back from Ms. Jesulaitis, further establishes an attorney client relationship. (ECF No. 70 at 2.) Ms. Jesulaitis references this hotline call in her emails, and as previously discussed, nothing in the emails indicates an attorney client relationship.

Plaintiff's reply indignantly asserts Plaintiff cannot compete fairly in this case if Defendants can commit perjury by submitting false affidavits and declarations. (*Id.* at 34.) Plaintiff can produce evidence that corroborates his belief the affidavits and declarations are false, but Plaintiff has not produced any directly contrary evidence to rebut the statements in those documents. While it is unfortunate Plaintiff feels he had a personal attorney-client relationship with Genesis attorneys, based on the evidence, this belief was unreasonable. Moreover, this Court did not utilize the declarations or affidavits presented by Defendants in coming to a conclusion. On Plaintiff's exhibits alone, the Court affirms there was no attorney-client relationship. The magistrate judge sufficiently considered the facts, circumstances and applicable law in concluding no attorney-client relationship existed. Accordingly, this Court finds that the Magistrate Judge's order is neither clearly erroneous nor contrary to law.

Conclusion

Plaintiff did not demonstrate manifest injustice or clear error in the magistrate judge's original order. It is hereby

ORDERED that Plaintiff's *Motion to Reconsider the Order Denying Plaintiff's Motion to Disqualify Counsel* (ECF No. 65) is DENIED.

Dated this 8th day of February, 2022.

/s/ Scott W. Skavdahl
Scott W. Skavdahl
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

AUSTIN ROGER CARTER, Plaintiff, vs. GENESIS ALKALI, LLC, GENESIS ENERGY L.P., CODY J. PARKER, KRISTEN O. JESULAITUS, and TERRY HARDING, Defendants.	Case No. 20-CV-216-S

INITIAL PRETRIAL ORDER

(Filed Feb. 9, 2022)

On February 9, 2022, the Honorable Kelly H. Rankin, United States Magistrate Judge for the District of Wyoming, held an initial pretrial conference in the above-entitled matter. Pro se Plaintiff Austin Roger Carter participated as well as counsel for Defendants: Amanda Esch, Kevin Griffith, and Nicole LeFave. After hearing from the parties, the Court set forth the following trial schedule.

JURISDICTION AND VENUE—

The Court has jurisdiction over both the parties and the subject matter of this action, and venue is

properly in the United States District Court for the District of Wyoming. Proper service of process has been accomplished on all parties, and no parties are erroneously joined in or omitted from the action.

CONSENT TO TRIAL BY MAGISTRATE JUDGE—

The parties are all aware of the provisions of 28 U.S.C. § 636(c) and U.S.D.C.L.R. 73.1(a), and acknowledge that this case will proceed before the District Judge assigned hereto, and not before the Magistrate Judge. However, the parties are not precluded from consenting to trial before a Magistrate Judge anytime sixty (60) days prior to the trial date.

CLAIMS AND DEFENSES—

This case is before the Court on Plaintiff's claims against Defendants asserting violations of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A ("SOX"), violations of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("the Dodd-Frank Act"), and defamation under Wyoming state law. [*See* ECF No. 1]. The suit stems from a SOX Act whistleblower complaint Plaintiff filed on December 19, 2019, with the Department of Labor, Occupational Safety and Health Administration ("OSHA"). [*See* ECF No. 1-1, pp. 3–8]. It is undisputed that OSHA did not resolve Plaintiff's complaint within 180 days of its filing, so Plaintiff has appropriately filed in this Court. *See* 18 U.S.C. § 1514A(b).].

On March 22, 2021, this Court entered an Order dismissing the defamation claims and the Dodd-Frank Act claims against all Individual Defendants, and the SOX Act claims against Fred Von Ahrens and Edward Flynn. [ECF No. 36]. However, the Court denied the Motion to Dismiss as to the SOX Act claims against Cody Parker, Terry Harding, and Kristen Jesulaitus. [*Id.*] The Genesis Defendants later filed a partial Motion to Dismiss, asking this Court to dismiss the defamation and Dodd-Frank Act claims, which the Court granted. [ECF Nos. 42, 43, 48]. All defendants generally deny the remaining allegations and assert various affirmative defenses.

COMPLEXITY OF THE CASE—

The undersigned Judge is of the opinion that this is a non-complex case.

RULE 26(F) SCHEDULING CONFERENCE—

The parties have not yet complied with the requirements of Rule 26(f) of the Federal Rules of Civil Procedure.

SELF-EXECUTING ROUTINE DISCOVERY—

The parties shall complete self-executing routine discovery exchanges as required by U.S.D.C.L.R. 26.1(b) no later than March 4, 2022.

Pursuant to the January 24, 2014 General Order Regarding Discovery Motions, available at http://www.wyd.ucourts.gov/htmlpages/genorders.html, the parties shall confer regarding any discovery dispute, and in the event the parties cannot settle the discovery dispute on their own, counsel shall jointly contact Judge Rankin's Chambers prior to filing any written discovery motions.

THE PARTIES HAVE A CONTINUING DUTY TO SUPPLEMENT OR CORRECT ALL DISCOVERY DISCLOSURES OR RESPONSES IN ACCORDANCE WITH FED. R. CIV. P. 26(a) AND U.S.D.C.L.R. 26.1(c).

PROPOSED ORDERS—

All proposed orders regarding dispositive motions filed in this matter should be submitted to Judge Skavdahl's chambers in Word or WordPerfect format and emailed to ***wyojudgesws@wyd.uscourts.gov***.

All proposed orders regarding non-dispositive motions should be submitted to Judge Rankin's chambers in a Word or WordPerfect format and emailed to ***wyojudgekhr@wyd.uscourts.gov***.

AMENDMENT TO THE PLEADINGS—May 6, 2022

Any motions to amend the pleadings shall be filed on or before May 6, 2022.

EXPERT WITNESS DESIGNATION—

Plaintiff Designation Deadline—June 27, 2022

Defendant Designation Deadline—July 27, 2022

In accordance with U.S.D.C.L.R. 26.1(e), Plaintiff shall designate expert witnesses and provide Defendant with a complete summary of the testimony of each expert by June 27, 2022. PLAINTIFF'S DESIGNATION SHALL INCLUDE THE DESIGNATION OF ALL TREATING MEDICAL AND MENTAL HEALTH PROVIDERS WHO MAY OR WILL BE CALLED TO TESTIFY AT TRIAL IN PART OR IN FULL AS AN EXPERT WITNESS. In accordance with U.S.D.C.L.R. 26.1(e), Defendant shall designate expert witnesses and provide the Plaintiff with a complete summary of the testimony of each expert by July 27, 2022. These summaries SHALL include a comprehensive statement of the expert's opinions and the basis for the opinions. *See Smith v. Ford Motor Co.*, 626 F.2d 784 (10th Cir. 1980). This expert designation does not satisfy the obligation to provide an expert report under Federal Rule of Civil Procedure 26(a)(2)(B). Plaintiff may depose Defendant's experts after the discovery cutoff date, but must complete the depositions **fourteen (14) days** PRIOR to the final pretrial conference.

THE PARTIES SHALL SERVE UPON ONE ANOTHER, AND FILE WITH THE COURT, THEIR WRITTEN EXPERT AND SUMMARY REPORTS PURSUANT TO FED. R. CIV. P. 26(a)(2)(B) and (C).

The party designating the expert witness shall set forth all special conditions or requirements which the designating party or the expert witnesses will insist upon with respect to the taking of their depositions, including the amount of compensation the expert witness will require and the rate per unit of time at which said compensation will be payable. In the event counsel is unable to obtain such information to include in the designation, the efforts to obtain the same and the inability to obtain such information shall be set forth in the designation. U.S.D.C.L.R. 26.1(e).

LISTING OF OTHER WITNESSES—August 26, 2022.

The parties shall list all other witnesses that may be called at trial, other than the witnesses already identified in the initial disclosures and the expert witnesses to be designated as set forth above, on or before August 26, 2022. Such listing of witnesses shall include the name, address, and a summary of the expected testimony of each witness. Copies of such witness lists shall be filed with the Court. Witnesses not listed will be prohibited from testifying, absent consent of the Court for good cause shown. Testimony not reasonably set out in the summary may be disallowed on motion of the opposing party.

DISCOVERY CUTOFF DATE—October 10, 2022

The discovery cutoff date is October 10, 2022. All written discovery requests shall be served upon and received by opposing counsel on or before the discovery

cutoff date. All discovery depositions shall be completed by the discovery cutoff date. Subject to the limitations set forth in Fed. R. Civ. P. 32, trial depositions may be taken up to **seven (7) days** prior to the trial date.

DISPOSITIVE MOTIONS AND *DAUBERT* CHALLENGES[1]—

Filing Deadline – October 10, 2022

Response Deadline – October 24, 2022

Dispositive Motions Hearing – November 8, 2022 at 1:00 p.m.

The deadline for the parties to file all dispositive motions and *Daubert* challenges together with briefs and materials in support thereof is October 10, 2022. The parties shall file responsive briefs and materials on or before October 24, 2022. The parties shall strictly comply with all provisions of U.S.D.C.L.R. 7.1.

IF A DISPOSITIVE MOTION AND/OR *DAUBERT* CHALLENGE IS FILED EARLIER THAN THE ABOVE SCHEDULED DATE, THE RESPONDING PARTY MUST RESPOND IN ACCORDANCE WITH U.S.D.C.L.R. 7.1.

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[1] A "*Daubert* Challenge" refers to those challenges made to the validity or admissibility of an expert's opinion testimony based upon the requirements under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L.Ed.2d 469 (1993) and *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999).

The dispositive motions are hereby set for oral hearing before the Honorable Scott W. Skavdahl on November 8, 2022, at 1:00 p.m. in the Ewing T. Kerr Courthouse in Casper, Wyoming.

STIPULATIONS AS TO FACTS—January 5, 2023

The parties shall exchange proposals for stipulations as to facts in accordance with U.S.D.C.L.R. 16.1(b). The parties shall then confer and file with the Court their stipulations as to the facts in three (3) packets: packet #1 shall be those facts to which both parties agree, packet #2 shall include the facts to which Plaintiff seeks to stipulate and Defendant does not, and packet #3 shall include the facts to which Defendant seeks to stipulate and Plaintiff does not. The parties shall file these packets with the Court by January 5, 2023.

MOTIONS IN LIMINE—

Filing Deadline – January 5, 2023

Response Deadline – January 12, 2023

Motions in Limine or motions relating to the exclusion of evidence shall be filed no later than January 5, 2023. Responses shall be filed no later January 12, 2023. Unless otherwise determined, the Court will rule on any motions in limine at the final pretrial conference.

FINAL PRETRIAL CONFERENCE—January 18, 2023, at 1:00 p.m.

A final pretrial conference in this matter has been scheduled for 1:00 p.m. on January 18, 2023, at the Ewing T. Kerr Courthouse in Casper, Wyoming, before the Honorable Scott W. Skavdahl. Counsel for the parties shall appear in person.

BEFORE THE CONFERENCE, COUNSEL FOR REPRESENTED PARTIES ALL MUST AGREE UPON, PREPARE, AND SIGN A JOINT PROPOSED FINAL PRETRIAL ORDER PREPARED FOR JUDGE SKAVDAHL'S SIGNATURE IN THE FORMAT PROVIDED ON THE DISTRICT COURT WEBSITE UNDER CIVIL FORMS. THIS FORM WILL TAKE THE PLACE OF A FINAL PRETRIAL MEMORANDUM. If you cannot locate the form, please contact Judge Skavdahl's chambers. All represented parties are jointly responsible for the preparation of the proposed Joint Final Pretrial Order. A copy of the proposed order must be delivered directly to Judge Skavdahl's chambers (but not filed) via email to *wyojudgesws@wyd.uscourts.gov* or by U.S. Mail at least seven (7) days before the final pretrial conference.

WITNESS AND EXHIBIT LISTS MUST BE EXCHANGED BY THE PARTIES (BUT NOT FILED) AT LEAST TEN (10) DAYS BEFORE THE FINAL PRETRIAL CONFERENCE. Exhibit lists must be attached to, and witness lists must be included as part of, the proposed Final Pretrial Order in accordance with the instructions in the form order. The

parties are not required to list rebuttal witnesses or impeachment exhibits.

COPIES OF ALL EXHIBITS AS TO WHICH THERE MAY BE OBJECTIONS MUST BE BROUGHT TO THE FINAL PRETRIAL CONFERENCE. If an exhibit is not brought to the final pretrial conference and an objection to the exhibit is asserted, the exhibit may be excluded from evidence for noncompliance with this order. EXHIBITS MUST BE PREPARED FOR THE FINAL PRETRIAL CONFERENCE AND FOR TRIAL IN ACCORDANCE WITH THE FOLLOWING INSTRUCTIONS:

A. Marking of Exhibits: All exhibits must be marked by the parties before trial. The plaintiff(s) shall list and mark each exhibit with numerals and the number of the case, and counsel for the defendant(s) shall mark each exhibit intended to be offered with letters and the number of the case, e.g., Civil No.___, Plaintiff's Exhibit 1; Civil No. ___, Defendant's Exhibit A. In the event there are multiple parties, "plaintiff" or "defendant" and the surname or abbreviated names of the parties shall proceed the word "Exhibit," e.g., Defendant Jones Exhibit A, Defendant Smith Exhibit A, etc.

B. Elimination of Duplicate. The parties should compare the exhibits and eliminate duplicates. If more than one party wants to offer the same exhibit, then it should be marked with a number and listed as a joint exhibit on the exhibit list of the plaintiff(s).

C. Copies for the Court. Before trial, each party must supply the Court with one (1) hard

copy and one (1) electronic/digital copy of all exhibits to be used at trial. The hard copies of exhibits should be placed in a ringed binder with a copy of the exhibit list at the front and with each exhibit tabbed.

EXHIBIT LISTS—The parties' exhibit lists are to be prepared in the following format:

EXHIBIT NO.	DESCRIPTION	FILE NAME	OBJECTIONS (CITE FED.R.EVID)
		(e.g. *****.pdf)	
		(e.g. *****.jpeg)	

CATEGORY A, B, C	OFFERED	ADMIT/NOT ADMITTED (A)-(NA)*

* This column is for use by the trial judge at trial.

The following categories are to be used for objections to exhibits:

Category A. These exhibits are admissible upon motion of any party, and will be available for use by any party at any stage of the proceedings without further proof or objection.

Category B. These exhibits are objected to on grounds other than foundation, identification, or authenticity. This category should

be used for objections such as hearsay or relevance.

Category C. These exhibits are objected to on grounds of foundation, identification, or authenticity. This category should not be used for other grounds, such as hearsay or relevance. Failure to indicate objections to foundation shall be deemed to be a waiver of objections as to foundation for listed exhibits. Any party establishing foundation over objection may move for attorney fees and costs necessary to establish the foundation.

ANY COUNSEL REQUIRING AUTHENTICATION OF AN EXHIBIT MUST SO NOTIFY THE OFFERING COUNSEL IN WRITING WITHIN **FIVE (5) BUSINESS DAYS** AFTER THE EXHIBIT IS MADE AVAILABLE TO OPPOSING COUNSEL FOR EXAMINATION. Failure to do so is an admission of authenticity.

ANY EXHIBIT NOT LISTED ON THE EXHIBIT LISTS IS SUBJECT TO EXCLUSION AT TRIAL. THE COURT MAY DEEM ANY OBJECTION NOT STATED ON THE EXHIBIT LIST AS WAIVED.

JURY EVIDENCE RECORDING SYSTEM (JERS)—

The Court is implementing a new system for electronic submission of exhibits to the jury (or to the Court in the case of a bench trial). The jury evidence recording system (JERS) allows jurors to review evidence (documentary, photo, or video exhibits) on a

large plasma screen during deliberations. Attorneys should provide their trial exhibits in electronic format on a USB drive, DVD, or CD to the office of the Clerk of Court a minimum of seven (7) days prior to the start of trial.

All electronic evidence should be provided using the following formats:

- Documents and Photographs: .pdf, .jpg, .bmp, .tif, .gif
- Video and Audio Recordings: .avi, .wmv, .mpg, .mp3, .mp4, .wma, .wav

Regarding the file size of electronic evidence, individual files should not exceed 500MB. If possible, exhibits approaching or exceeding this size limit should be separated into multiple files. Parties may obtain additional information regarding the submission of electronic exhibits by contacting the Clerk's Office.

WITNESS LISTS—

The parties shall identify all witnesses they will call or may call and shall further identify whether each witness will testify in person, by deposition or by video tape.

In bench trials, Witness Statements shall be provided for expert witnesses and witnesses whose testimony involves significant technical matters, but no significant issues of credibility. Witness statements shall be prepared and used at trial in accordance with Judge Skavdahl's Procedure for Presentation of Direct

Testimony by Witness Statement, which is available on the Court's website under forms or by contacting Judge Skavdahl's chambers.

JURY TRIAL—February 6, at 9:00 a.m.

A jury trial is set before the Honorable Scott W. Skavdahl for 9:00 a.m. on February 6, 2023, in Casper, Wyoming, and is expected to last 4 days. This case is stacked #2 on the Court's docket. U.S.D.C.L.R. 40.1(a).

The parties shall exchange and file proposed voir dire questions, jury instructions and special verdict form no later than seven (7) days prior to the commencement of trial, subject to the right of counsel to supplement such requests during the course of trial on matters that cannot be reasonably anticipated. THE PROPOSED JURY INSTRUCTIONS AND SPECIAL VERDICT FORMS SHALL ALSO BE SUBMITTED DIRECTLY TO JUDGE SKAVDAHL'S CHAMBERS VIA E-MAIL TO *wyojudgesws@wyd.uscourts.gov*. The instructions must be formatted as a single document for Wordperfect or Word and shall include citations to authority.

At the same time as the filing of the jury instructions, the parties shall file a joint statement setting forth briefly and simply, in a noncontentious manner, the background of the case and the claims and defenses being asserted. The parties should make every effort to agree upon the language for the statement. To the extent the parties cannot agree, they should use the

following format: "Plaintiff contends. . . .; Defendant contends. . . ."

Settlement Possibilities—

The settlement possibilities of this case are considered by the undersigned Judge to be poor.

DATED this 9th day of February, 2022.

/s/ Kelly H. Rankin
Kelly H. Rankin
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

AUSTIN ROGER CARTER, Plaintiff, vs. GENESIS ALKALI, LLC, GENESIS ENERGY L.P., CODY J. PARKER, KRISTEN O. JESULAITUS, and TERRY HARDING, Defendants.	Case No. 20-CV-216

ORDER GRANTING DEFENDANTS' MOTION FOR PROTECTIVE ORDER [77]

(Filed Mar. 8, 2022)

This matter is before the Court on Defendants' Motion for Protective Order [ECF No. 77]. The Court, having carefully considered the Motion and being full advised, finds as follows:

Defendants indicated in their Motion that Plaintiff refused to agree to the Protective Order. Because Defendants filed their Motion for Protective Order on February 17, 2022, any response was due on or before March 3, 2022, pursuant to Local Rule 7.1(b)(1)(B). However, no response has been lodged as of the filing of this Order. The Local Rules further provide that

"[t]he Court may, in its discretion, consider the failure of a responding party to file a response within the fourteen (14) day time limit, or such other time limit as the Court may direct, as a confession of the motion." U.S.D.C.L.R. 7.1(b)(1)(B). The Court will, therefore, deem the failure to respond by Plaintiff as a confession thereof.

NOW, THEREFORE, IT IS ORDERED Defendants' Motion for Protective Order [ECF No. 77] is GRANTED and the proposed Protective Order shall be entered forthwith.

Dated this 8th day of March, 2022.

/s/ Kelly H. Rankin
Kelly H. Rankin
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

AUSTIN R. CARTER,	§	
Plaintiff,	§	
	§	
vs.	§	**Civil Action No.**
GENESIS ALKALI, LLC,	§	**20-CV-216-SWS**
GENESIS ENERGY L.P.,	§	
CODY J. PARKER,	§	
KRISTEN O. JESULAITIS,	§	
AND TERRY HARDING,	§	
	§	
Defendants.	§	

PROTECTIVE ORDER

(Filed Mar. 8, 2022)

In the course of this litigation, the Parties may seek disclosure of information which a Party or Non-Party considers to be of a confidential, trade secret and/or proprietary nature. As such, there exists a need to establish a mechanism to protect the disclosure of such confidential, trade secret and/or proprietary information in this action and to memorialize that any such information be used solely in connection with this litigation through the entry of a protective order. Therefore, the following terms shall exclusively govern the disclosure and use of confidential, trade secret and/or proprietary information provided in discovery in this action and in any related proceedings or appeals of this action by any Party or Non-Party.

The Court, having reviewed this *Stipulated Protective Order*, **FINDS AND ORDERS** that documents containing confidential, trade secret and/or proprietary nature information shall be subject to this *Stipulated Protective Order* as set forth below.

I. DEFINITIONS.

The following definitions apply in this *Stipulated Protective Order*:

A. "Confidential." The designation "CONFIDENTIAL" may be applied by a Party or Non-Party to any type of information that the Party or Non-Party believes, in good faith, constitutes, contains, reveals or reflects confidential, trade secret, or proprietary financial, business, technical, personnel-related, medical, personally identifying, or other confidential and/or highly sensitive information.

B. "Information." "Information" means all depositions, originals and copies of transcripts of depositions, exhibits, answers to interrogatories, responses to requests for admission, responses to requests for production of documents and all documents, materials, tangible things and information obtained by inspection of files or facilities, by production of documents or by identification of documents previously gathered by any Party of Non-Party in this action.

C. "Party." "Party" means every Party to this action and every director, officer and managing agent of every Party to this action.

D. "Non-Party." "Non-Party" means every person or entity not a Party to this action that provides information, either testimonial or documentary, for use in this litigation through discovery or otherwise.

E. "Order." "Order" means this *Stipulated Protective Order.*

F. "Protected Information." "Protected Information" means Information which has been designated as Confidential by any Party or Non-Party in this action.

II. TERMS OF THE STIPULATED PROTECTIVE ORDER.

A. Materials Subject to Designation. Any Information may be designated by the Party or a Non-Party producing the Information in conformity with the definitions set forth above.

B. Persons Having Access to Protected Information. Except as provided in Paragraphs D and E below, Protected Information that is designated as "CONFIDENTIAL" and all information derived therefrom (excluding such information derived lawfully from an independent source) shall not be disclosed in any way to any person or entity other than counsel of record for a Party, such counsel's staff, outside support, court reporters transcribing testimony in the case, the Parties to this action and those employees of the Parties who are assisting in the prosecution or defense of this action, the Court, and any such other person as

may be consented to, in writing, by the Party or Non-Party designating such Information as "CONFIDENTIAL."

The recipients of all Protected Information shall use such Information only for the purpose of this litigation, and shall not directly or indirectly use such Information for any business, financial, promotional or any other purpose.

C. Disclosure to Experts. Documents designated as "CONFIDENTIAL" may be shown to any experts, together with their supporting staff, who are retained by a Party for the purpose of assisting with this litigation. Any person who receives Protected Information pursuant to this paragraph shall signed the attached Exhibit A, Declaration and Agreement To Be Bound by Stipulated Protective Order.

D. Requests for Additional Disclosure. If any counsel of record desires to disclose any Protected Information to any person other than those permitted to have access under Paragraphs II, B, and C above, that counsel shall first obtain the written consent of the Party who designated the Information as Confidential (the "designating Party") through such Party's counsel of record. If such consent is denied or no response is received within three (3) business days, that counsel may seek leave of court to do so.

In the event the receiving Party is requested or required to disclose any Protected Information, it shall promptly notify the designating Party in writing of such request or requirement no fewer than five (5)

business days before making such required disclosure (or such lesser period of time as may be legally feasible), so that the designating Party may seek an appropriate protective order or waive compliance with this Order. Under the circumstances of any such requested or required disclosure, reasonable efforts shall be made to obtain from the party to whom disclosure is made written assurances of confidential treatment of the Protected Information.

E. Challenges to the Propriety of a Confidentiality Designation. A Party shall not be obligated to challenge the propriety of a confidentiality designation at the time made, and a failure to do so shall not preclude a subsequent challenge. In the event that any Party to this litigation disagrees at any stage of these proceedings with the designation of Protected Information, the Parties shall try first to resolve such dispute in good faith on an informal basis. If the dispute cannot be resolved, the objecting Party may seek appropriate relief from the Court. In the event that the Court finds that the Party making or opposing the motion did so in bad faith, the Court may award reasonable attorney's fees and costs incurred to the prevailing Party in any dispute involving a Confidentiality designation.

F. Manner of Designating Documents.

1. Redaction. A Party or Non-Party may redact Information in whole or in part that the Party or Non-Party believes, in good faith, constitutes, contains, reveals or reflects Protected Information that will or

likely could be made part of any publicly available filing with the Court. For redacted Protected Information which will be made part of a filing with the Court, the Parties will endeavor to work together, in good faith, to provide an unredacted version of the Protected Information to the Court, including through use of the Court's rules and procedures for filing documents and information under seal, as applicable. If any dispute arises between the Parties regarding redacted Protected Information, the Parties will first endeavor to work together, in good faith, to resolve the dispute before bringing the issue before the Court to resolve.

2. Paper Media. Paper documents produced by a Party or Non-Party may be designated as Protected Information by marking every page (as appropriate): "CONFIDENTIAL."

3. Non-Paper Media. Where Protected Information is produced in a non-paper media (e.g. native files, video tape, audio tape or other electronic media), the confidentiality designation as described in Paragraph G(1) above should be placed on the physical media, if possible, and its container, if any, so as to clearly give notice of the confidentiality designation. A Party producing electronic documents containing Protected Information in native format shall concurrently provide a list of the native files being produced, which list shall indicate whether each such native file has been designated "CONFIDENTIAL." To the extent that any receiving Party prints any native file containing Protected Information, such printouts will be marked as

described in Paragraph F(1) above by the receiving Party.

4. Physical Exhibits. The confidentiality status of a physical exhibit shall be indicated by conspicuously marking the physical exhibit with the appropriate confidentiality designation as described in paragraph G(1) above.

5. Written Discovery Responses. In the case of Protection Information incorporated into answers to interrogatories or requests for admission, an appropriate statement noting that some responses submitted contain a Confidentiality designation shall be placed on the first page of the document. Further, prefacing each individual answer or response that contains Protected Information, the designating Party shall insert their designation.

6. Depositions. Information disclosed at the deposition of a Party or of one of its current or former officers, directors, employees, agents, contractors or independent experts retained by a Party for purposes of this litigation may be designated by the Party as Protected Information. The Court Reporter shall designate the transcript or any part thereof "CONFIDENTIAL." If only parts of the transcript are designated as Protected Information, those portions of the transcript shall be separately bound and bear the appropriate designation, along with any corresponding exhibits designated "CONFIDENTIAL."

G. Disclosure of Protected Information by Receiving Party at a Deposition.

Subject to the terms of this Order, Protected Information may be disclosed by a receiving Party in a deposition, to the extent that its use is necessary, only at the depositions of:

1. Current directors, officers or employees of the designating Party;

2. Any person identified as a Fed R. Civ. P. (30)(b)(6) witness by the designating Party;

3. Any person employed by any affiliate company of either Party or employed by any non-affiliate company which has a business relationship with either Party, which person has prior knowledge of the Protected Information or has access to such Protected Information as a part of his or her normal duties and responsibilities;

4. An author, addressee or other person indicated on the face of the document as a lawful recipient of the document containing Protected Information;

5. A person clearly identified in prior discovery or by the deponent in his or her deposition as an author or recipient of the document containing Protected Information (without prior disclosure of the specific Protected Information);

6. An independent consultant, expert or advisor or other person who has been authorized under this Order to receive such Information; or

7. Any person for whom prior authorization is obtained from the designating Party or the Court.

H. Initial Failure to Designate Information. The initial failure of a Party to designate Information as "CONFIDENTIAL" in accordance with this Order shall not preclude any Party or Non-Party, at a later date, from so designating the documents or testimony and to require such documents or testimony to be treated in accordance with such designation from that time forward. If such Protected Information has previously been disclosed to persons no longer qualified after such designation, the disclosing Party shall take reasonable efforts to obtain all such previously disclosed Protected Information, and advise such persons of the claim of Confidentiality. Disclosure of the Information prior to its designation as Protection Information shall not be a violation of this Order.

I. Inadvertent Production of Privileged Information. This Order shall not preclude the Parties or their attorneys from making any applicable claims of privilege during discovery or at trial. If a producing Party inadvertently discloses to a receiving Party Information that is privileged, said producing Party shall promptly upon discovery of such disclosure so advise the receiving Party in writing and request that the item(s) of Information be returned, and no Party to this action shall thereafter assert that such disclosure waived any privilege. The receiving Party will return such inadvertently produced item(s) of Information and all copies thereof within ten (10) days of receiving a written request for the return of such item(s) of Information.

J. Filing Documents with the Court. All Protected Information sought to be filed or lodged with the Court, or any pleading or memorandum purporting to reproduce or paraphrase such Information, shall be submitted to or filed with the Court as "Non-Public" or by separate motion and for good cause shown, the documents may be "Filed Under Seal" pursuant to Court policy and the orders and procedures of the Court. Any redactions shall not simply utilize an electronic redaction method (e.g. Adobe Acrobat) without re-scanning the redacted document to ensure against any disclosure of the Protected Information or electronically flattening the file such that the underlying redacted text is not accessible.

K. Use in Court Proceedings. At trial or upon any motions or other proceedings, subject to the Federal Rules of Evidence or order of the Court, a Party may use any Protected Information for any purpose, including introduction into evidence, provided that adequate notice of such use is provided to each Party to obtain appropriate relief, if desired, from the Court.

L. No Effect on Party's Own Use. Nothing contained in this Order shall affect the right of a Party to disclose to its officers, directors, employees, partners or consultants or to use as it desires any Protected Information designated and produced by it as Confidential.

M. No Effect on Disclosure to Author or Addressees. Nothing contained in this Order shall affect the right of a Party to disclose any Protected

Information to the author(s) or addressee(s) of said document.

N. Effect on Discovery. This Order shall not preclude or limit the right of any Party to oppose discovery on any ground which would otherwise be available. No information may be withheld from discovery on the ground that the material to be disclosed requires protection greater than that afforded by this Order unless the Party claiming a need for greater protection moves for an order providing such special protection pursuant to Rule 26(c) of the Federal Rules of Civil Procedure.

O. Final Disposition of Action. Within 60 days of the final disposition of this action and exhaustion of all appellate rights by all Parties, each counsel of record shall upon request promptly return to counsel of record for the designating Party all Protected Information and all copies made thereof, or at the designating Party's written option the receiving Party may destroy all such documents. Notwithstanding the foregoing, each counsel of record shall be permitted to retain one copy of all pleadings submitted to the Court, deposition transcripts and exhibits thereto and attorney notes, irrespective of whether they contain Protected Information, but such attorney shall not disclose such material without further order of this Court.

P. Survival of Terms. Absent written modification of this Order by the Parties or further order of the Court, the provisions of this Order that restrict the disclosure and use of Protected Information shall survive

the final disposition of this litigation and continue to be binding on all persons subject to the terms of this Order.

IT IS SO ORDERED.

DATED this 8th day of March, 2022.

/s/ Kelly H. Rankin
Kelly H. Rankin
United States Magistrate Judge

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

AUSTIN R. CARTER,	§	
Plaintiff,	§	
vs.	§	**Civil Action No.**
GENESIS ALKALI, LLC,	§	**20-CV-216-SWS**
GENESIS ENERGY L.P.,	§	
CODY J. PARKER,	§	
KRISTEN O. JESULAITIS,	§	
AND TERRY HARDING,	§	
Defendants.	§	

DECLARATION AND AGREEMENT TO BE BOUND BY STIPULATED PROTECTIVE ORDER

1. My name is _____.
My address is _____.

I am employed as _____ (state position) by _____ (state name and address of employer).

2. I am aware that a Stipulated Protective Order (the "Protective Order") has been entered in the above case by the Arbitrator, and a copy thereof has been given to me. I have read and understand the terms of the Stipulated Protective Order. I agree to be bound by the terms of the Protective Order.

3. I promise that information designated as "Confidential" pursuant to the Stipulated Protective Order in this case will be used by me only in connection with the above-captioned Proceeding.

4. I agree to comply with the terms of the Stipulated Protective Order with regard to identification, return, sequestering and destruction of Protected Information.

5. I understand that any use or disclosure of information obtained by me from Protected Information in any manner contrary to the provisions of the Stipulated Protective Order may subject me to sanctions by the Court.

6. I agree to submit myself to the personal jurisdiction of the District Court for the District of Wyoming in connection with any proceedings concerning the Stipulated Protective Order.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this ___ day of _____, 2022, at _____.

_____
(Signature of Declarant)