No. 21-1568

In The
Supreme Court of the United States

AUSTIN ROGER CARTER,

Petitioner,

v.

GENESIS ALKALI, LLC; GENESIS ENERGY L.P.;
CODY J. PARKER; TERRY HARDING;
AND KRISTEN O. JESULAITIS,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court lacks jurisdiction over the questions presented in the Petition because they involve orders that are neither final nor appealable.

2. Whether the district court abused its discretion in denying a motion to disqualify counsel based on Petitioner's failure to carry his burden of demonstrating an attorney–client relationship existed between himself and any of Respondents' counsel, and when Petitioner delayed more than two years in asserting an alleged conflict of interest.

3. Whether the magistrate judge abused his discretion in refusing to stay the trial court proceedings pending the appeal of the district court's order denying the motion to disqualify counsel, when the court of appeals lacked jurisdiction over the appeal and would dismiss it.

PARTIES TO THE PROCEEDING

Petitioner Austin Roger Carter was the Plaintiff in the district court proceeding and the petitioner in the court of appeals proceeding.

Respondents Genesis Energy, L.P.; Genesis Alkali, LLC; Kristen O. Jesulaitis; Cody J. Parker; and Terry Harding were defendants in the district court proceeding and respondents in the court of appeals proceedings. Petitioner omitted Mr. Harding from the case caption, apparently in error.

Respondents Fred Von Ahrens and Edward T. Flynn are included in the Petition's caption in error. The district court previously dismissed all claims against Messrs. Von Ahrens and Flynn with prejudice on March 22, 2021. *See Carter v. Genesis Alkali, LLC, et al.*, No. 20-CV-216-SWS, ECF No. 36, at 21 (D. Wyo. Mar. 22, 2021). Petitioner did not appeal that order.

CORPORATE DISCLOSURE

Respondent Genesis Energy, L.P. has no parent corporation and is a publicly traded limited partnership. No publicly held corporation owns 10% or more of its stock.

Respondent Genesis Alkali, LLC is a wholly owned subsidiary of Genesis Energy, L.P. and is not a publicly traded company.

RELATED CASES

Carter v. Genesis Alkali, LLC, et al., No. 20-CV-216-SWS, 2021 WL 973448 (D. Wyo. Feb. 16, 2021)

Carter v. Genesis Alkali, LLC, et al., No. 20-CV-216-SWS, 2021 WL 7209885 (D. Wyo. Apr. 14, 2021)

Carter v. Genesis Alkali, LLC, et al., No. 20-CV-216-SWS, 2021 WL 7209884 (D. Wyo. June 2, 2021)

Carter v. Genesis Alkali, LLC, et al., No. 20-CV-216-SWS, 2021 WL 7209790 (D. Wyo. Aug. 26, 2021)

Carter v. Genesis Alkali, LLC, et al., No. 20-CV-216-SWS, 2022 WL 613167 (D. Wyo. Jan. 4, 2022)

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JURISDICTIONAL STATEMENT

The Court possesses jurisdiction to entertain this appeal by virtual of 28 U.S.C. § 1254. The Court lacks jurisdiction over the merits of the appeal because orders on motions to disqualify counsel and motions for a stay of the trial court proceedings are not final, appealable orders, nor are they properly the subject of an interlocutory appeal. 28 U.S.C. §§ 1291, 1292; *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 10 n.11 (1983).

STATUTES AND RULES INVOLVED

28 U.S.C. § 1291

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. § 1292(a)—Interlocutory decisions

> **(a)** Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:
>
> **(1)**
> Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2)
Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3)
Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.

Rule 8. Stay or Injunction Pending Appeal

(a) MOTION FOR STAY.

(1) *Initial Motion in the District Court.* A party must ordinarily move first in the district court for the following relief:

(A) a stay of the judgment or order of a district court pending appeal;

(B) approval of a bond or other security provided to obtain a stay of judgment; or

(C) an order suspending, modifying, restoring, or granting an injunction while an appeal is pending.

(2) *Motion in the Court of Appeals; Conditions on Relief.* A motion for the relief mentioned in Rule 8(a)(1) may be made to the court of appeals or to one of its judges.

(A) The motion must:

(i) show that moving first in the district court would be impracticable; or

(ii) state that, a motion having been made, the district court denied the motion or failed to afford the relief requested and state any reasons given by the district court for its action.

(B) The motion must also include:

(i) the reasons for granting the relief requested and the facts relied on;

(ii) originals or copies of affidavits or other sworn statements supporting facts subject to dispute; and

(iii) relevant parts of the record.

(C) The moving party must give reasonable notice of the motion to all parties.

(D) A motion under this Rule 8(a)(2) must be filed with the circuit clerk and normally will be considered by a panel of the court. But in an exceptional case in which time requirements make that procedure

> impracticable, the motion may be made to and considered by a single judge.
>
> (E) The court may condition relief on a party's filing a bond or other security in the district court.

STATEMENT OF THE CASE

In accordance with Rule 15.2 of the Supreme Court Rules, Respondents file this Response to address misstatements of fact and law included in the Petition. Petitioner has engaged in several years of protracted litigation against Respondents. His Petition misrepresents the proceedings below in material ways. But even if his Petition could be taken as fact, it should nevertheless be denied.

As a threshold matter, this Court lacks jurisdiction to hear this appeal because an order denying a motion to disqualify counsel and an order denying a motion for stay are not final appealable orders. 28 U.S.C. § 1291; *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 10 n.11 (1983). Nor are such orders properly the subject of interlocutory appeals. 28 U.S.C. § 1292.

But, even if the Court could consider the merits of the Petition, the lower court did not abuse its discretion in denying the motion to disqualify or refusing to stay this case pending Petitioner's appeal. Petitioner

failed to carry his burden of demonstrating an attorney-client relationship existed and failed to demonstrate the necessity of a stay. Consequently, because the Court lacks jurisdiction and the lower court did not abuse its discretion, the Petition should be denied.

REASONS FOR DENYING THE PETITION

I. Petitioner Misrepresents the Proceedings Below.

Pursuant to Rule 15.2 of the Supreme Court Rules, initially Respondents address misstatements of fact and law that bear on issues that would come before the Court if it granted the Petition. Even from a cursory review of the record, the inflammatory allegations in Petitioner's filing are provably false. Respondents provide the below summary to assist the Court in its review of the Petition.

A. Relevant Factual Background

Petitioner is a former employee of Respondent Genesis Alkali, LLC, a wholly owned subsidiary of Respondent Genesis Energy, L.P. Petitioner worked for Respondent Genesis Alkali in Green River, Wyoming as a Procurement Supervisor and, later, as Procurement Manager. ECF No. 1 ¶ 3.[1] He reported directly to

[1] Citations to the district court proceedings are made to the Electronic Case File Number assigned by PACER in the matter styled *Austin Roger Carter v. Genesis Alkali LLC, et al.*, Case No.

Respondent Cody J. Parker, Controller at Genesis Alkali, and his second-level manager was Respondent Terry Harding, Vice President of Finance. *Id.* Respondent Kristen O. Jesulaitis serves as General Counsel to Genesis Energy, L.P. *Id.* ¶ 18.

Petitioner's employment with Genesis Alkali ended on June 10, 2019 as a result of Petitioner's repeated failure to perform his job duties satisfactorily. *Id.* ¶ 23; ECF No. 1-2 at 60, 75. Unbeknownst to Respondents Parker and Harding—who made the decision to terminate Petitioner's employment—on May 29, 2019, Petitioner complained to Genesis Energy's corporate hotline. ECF No. 1 ¶ 19. To investigate Petitioner's hotline complaint fully, Genesis Energy, worked with Petitioner to stay on the payroll and receive certain benefits while he cooperated with the internal investigation into his complaint. ECF No. 58-1 ¶ 3; ECF No. 1 ¶ 34. Respondent Jesulaitis made clear to Petitioner that she represented the corporate entities and not Petitioner. ECF No. 58-1 ¶ 3. Respondent Jesulaitis further did not ask for or receive any confidential or attorney-client privileged information from Petitioner that reasonably would have formed the basis of a confidential attorney-client relationship. *Id.* ¶ 5.

To investigate Petitioner's complaint, Genesis Energy engaged outside counsel, Earl M. "Chip" Jones of Respondents' counsel's Dallas, Texas office. ECF No.

2:20-cv-00216-SWS, in the United States District Court for the District of Wyoming.

58-1 ¶¶ 3-4; ECF No. 58-2 ¶¶ 4, 6-7. The objective evidence in the record—including Petitioner's own statements in emails—establishes that, at all times, Jesulaitis and Jones represented Genesis Energy and Genesis Akali, and never acted as Petitioner's legal counsel in either his corporate or personal capacity. ECF No. 58-1 ¶¶ 3-5; ECF No. 58-2 ¶¶ 5, 10; ECF No. 58-2 at 7.

Specifically, on or about July 10, 2019, Petitioner and Jones spoke over the phone for the first time. ECF No. 58-2 ¶ 5. Jones represented to Petitioner that Jones was counsel for Genesis Energy and Genesis Alkali, not Petitioner. *Id.* Jones explained that Genesis Energy was conducting an internal investigation concerning Petitioner's allegations. *Id.* Jones also helped to coordinate a meeting between Petitioner and the third-party investigator Genesis Energy hired to investigate Petitioner's complaint. *Id.* ¶ 7. Jones did not seek any information from Petitioner that was privileged or needed to be kept confidential pursuant to the attorney-client privilege or for any other reason. *Id.* ¶ 10.

On or about July 30, 2019, as part of his discussions with Petitioner concerning Petitioner's cooperation with the internal investigation, Jones presented Petitioner with a tolling agreement that would toll any claims Petitioner believed he had or could assert against the Genesis Energy or Genesis Alkali arising from the termination of his employment. ECF No. 58-2 ¶ 8; ECF No. 1-2 at 72-73. Petitioner rejected the tolling agreement after having it reviewed "in depth" by

"several attorneys" of his own choosing. ECF No. 58-2 at 7 ("As suggested, I had the tolling agreement reviewed by several attorneys—in depth[.]").

Petitioner's own words in his email correspondence with Jones show that Petitioner was pursuing his own legal representation and, failing that, he chose to represent himself, as he does now before this Court. On August 20, 2019, Petitioner wrote Jones:

> [T]he documents that you and Genesis have provided me thus far suggested me having them reviewed by an attorney, I have had them reviewed (along with my claims)—by counsel, and therefore I am in the process of hiring counsel for the claims against Genesis. Until I have finalized my decision on who I will have represent me, I will be representing myself.

Id.

In the fall of 2019, Mr. Jones was diagnosed with a medical condition and went on indefinite medical leave. *Id.* ¶ 11. Kelley Edwards, based in Respondents' counsel's Houston, Texas office, took over as lead attorney for Genesis Energy in discussions with Plaintiff. ECF No. 58-3 ¶ 3. Edwards, like Jones before her, made clear to Petitioner that she represented Respondents and not Plaintiff. *Id.* ¶ 4. At no point did Edwards seek or obtain any information from Petitioner that would be privileged or confidential pursuant to the attorney-client privilege. *Id.* ¶ 6.

While Genesis Energy's internal investigation was pending, on December 10, 2019, Plaintiff filed his SOX whistleblower retaliation complaint with the Department of Labor, Occupational Safety and Health Administration ("DOL-OSHA"). ECF No. 1-1 at 2-8. Edwards represented Genesis Energy and Genesis Alkali during the DOL-OSHA investigation, together with Nicole LeFave of Respondents' counsel's Austin, Texas office. ECF No. 58-3 ¶¶ 3, 5. Respondents' counsel, on behalf of Genesis Energy and Genesis Alkali, submitted a position statement in response to Petitioner's complaint on July 10, 2020. *Id.* ¶ 5. Under OSHA's procedural rules, Plaintiff was provided with a copy of the position statement, which showed Respondents' counsel being adverse to him. ECF No. 1-1 at 20-37.

After 180 days elapsed with no decision from DOL-OSHA, Petitioner informed the investigator of his intent to file suit in the district court. *Id.* at 2. Notably, at no time during these proceedings before DOL-OSHA did Petitioner assert that Respondents' counsel ever acted as his own legal counsel or that Respondents' counsel had a conflict and should not able to represent Respondents adverse to Petitioner.

At the conclusion of Genesis Energy's internal investigation, on June 3, 2020, Plaintiff's employment was officially terminated. ECF No. 1-2 at 75; ECF No. 1 ¶ 35. During the pendency of the internal investigation, Plaintiff received his full salary and benefits, but performed no work, other than remaining available to cooperate with the internal investigation. ECF No. 1

¶ 34; ECF No. 1-2 at 75. His complaint was fully investigated and no fraudulent activity was uncovered. ECF No. 1-2 at 75.

B. Procedural History

Petitioner filed his lawsuit on November 25, 2020, 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 ("Dodd-Frank"), and defamation under Wyoming state law. ECF No. 1. Petitioner named as Defendants the Individual Defendants Fred Von Ahrens, Edward Flynn, and Respondents Jesulaitis, Parker, and Harding, as well as the corporate entities Genesis Alkali and Genesis Energy (hereinafter the corporate entities are referred to collectively as "the Genesis Entities").

The matter was originally assigned to the Honorable Nancy D. Freudenthal. ECF No. 2. The matter was reassigned to the Honorable Scott W. Skavdahl after the parties declined to waive a conflict on the part of Judge Freudenthal. ECF No. 26. Judge Freudenthal made no ruling on any matter during the time she served as the presiding judge—all matters determined prior to the case's reassignment were referred to the Honorable Kelly H. Rankin, the assigned magistrate judge. ECF Nos. 7-9, 19-20 (rulings made before reassignment).

Petitioner's original attempt to serve the Genesis Entities was defective. Mindful of Petitioner's *pro se* status, on January 26, 2021, Respondents filed a notice of defective service with the district court, to alert Petitioner and the court to Petitioner's failure to effectively serve the Genesis Entities. ECF No. 16. Rather than attempt to cure service, Petitioner filed a motion for default judgment against the Genesis Entities on February 5, 2021. ECF Nos. 24-25. Judge Skavdahl denied the motion for default judgment on February 16, 2021. ECF No. 28.

Petitioner then filed a motion to reconsider the court's order denying the motion for default judgment. ECF No. 30. On March 15, 2022, before the district court could rule on the motion, Petitioner appealed the order denying the motion for default judgment to the Court of Appeals for the Tenth Circuit. ECF No. 32. After affording Petitioner an opportunity to be heard as to why his appeal should not be dismissed for lack of jurisdiction, on April 7, 2021, the Tenth Circuit dismissed the appeal. ECF No. 37. The appellate court held it lacked jurisdiction over the appeal because the order denying the motion for default judgment was not a "final decision" and was not subject to review before the entry of a final judgment. *Id.* at 1-2. The district court then denied Petitioner's motion for reconsideration of the order denying his motion for default judgment on April 14, 2021. ECF No. 39.

While the parties litigated the default judgment issue, the Individual Defendants, after being served, filed a Rule 12(b)(6) motion to dismiss. ECF Nos. 5-6,

23. Petitioner did not respond to the motion and, on February 18, 2021, after the time for Petitioner to respond elapsed, the Individual Defendants renewed their motion to dismiss. ECF No. 29. On March 22, 2021, Judge Skavdahl granted the motion to dismiss in part, dismissing all claims against Individual Defendants Von Ahrens and Flynn, and dismissing the Dodd-Frank and defamation claims against Respondents Jesulaitis, Carter, and Harding. ECF No. 36 at 21. Notably, this order was entered while the Petitioner's appeal of the order denying his motion for default judgment was pending. Petitioner raised no issue with the district court entering this order while his appeal was pending, nor did he move to reconsider or appeal this order.

Petitioner successfully served the Genesis Entities on April 14, 2021, and on May 4, 2021, the Genesis Entities filed a Rule 12(b)(6) partial motion to dismiss the Dodd-Frank and defamation claims against them. ECF Nos. 40, 42. Judge Skavdahl granted this motion on June 2, 2021. ECF No. 48. On July 1, 2021, Petitioner filed a motion for reconsideration of this order. ECF No. 49. The district court denied the motion on August 26, 2021. ECF No. 51. All told, these rulings left only the SOX claim pending against Respondents.

After over 10 months of this preliminary litigation, this matter was set for an initial status conference to proceed on October 8, 2021. ECF No. 52, 54. The parties appeared and agreed, at Petitioner's request, to continue the initial status conference so Petitioner could seek and obtain legal counsel. ECF No. 54. The

continued status conference, held November 8, 2021, was continued, again at Petitioner's request, to allow Petitioner more time to seek and obtain legal counsel. ECF No. 56. On December 8, 2021, the parties convened once more, and the initial status conference again was continued by agreement for Petitioner to have even more time to seek and obtain legal counsel. ECF No. 60. On January 21, 2022, Petitioner sought, and received, a fourth continuance of the initial status conference for personal reasons. ECF No. 66-67. The initial status conference finally went forward on February 8, 2022 after four months' delay, more than 14 months after Petitioner filed his lawsuit. ECF No .75.

While seeking continuances to obtain counsel, Petitioner simultaneously prosecuted a motion to disqualify Respondents' counsel. He filed that motion on October 7, 2021, on the eve of the originally set initial status conference. ECF No. 53. Petitioner's motion was rooted in his mistaken belief about a proposed joint protective order that Respondents' counsel had presented to Petitioner. *See* ECF No. 53 at 19-29. Petitioner claimed the draft protective order would operate to waive "protections" to purportedly confidential information Petitioner claimed to have disclosed to Respondents' counsel during Genesis Energy's investigation.[2] But, the proposed joint protective order was simply a form order intended to protect from

[2] As set forth above, Respondents unequivocally deny that any such disclosure ever occurred and that any attorney-client relationship ever existed between Petitioner and Respondents' counsel.

disclosure to the general public any confidential, trade secret, or proprietary information of Respondents—and certain personal information belonging to Petitioner—that might be produced in the course of discovery by either party. *Id.* at 19. It did not ask Plaintiff to waive any conflicts of interest or any purported attorney-client relationship. *Id.* at 19-29.

Plaintiff refused to stipulate to the proposed protective order and instead filed his motion to disqualify counsel, incorrectly asserting therein that the protective order asked him to waive a purported conflict stemming from an alleged prior attorney-client relationship with Respondents' counsel—a relationship he admitted in his own emails, as set forth above, never existed. ECF 58-2 at 7.

After the parties briefed the motion to disqualify, Magistrate Judge Rankin denied the motion on January 4, 2022. ECF No. 64. On January 12, 2022, Petitioner sought reconsideration of Judge Rankin's order. ECF No. 65. Judge Skavdahl denied the motion for reconsideration on February 8, 2022. ECF No. 71. Petitioner then filed his second interlocutory appeal on February 9, 2022, minutes before the initial status conference was set to proceed. ECF No. 72.

The initial status conference went forward as scheduled on February 9, 2022. ECF No. 75. At the outset, Petitioner stated that he had filed an appeal of the rulings on the disqualification issue. Magistrate Judge Rankin acknowledged the pending appeal and stated that the hearing would go forward because Petitioner's

appeal was likely to be dismissed. Magistrate Judge Rankin entered an Initial Pretrial Order, setting the deadlines that would govern discovery and trial of this matter. ECF No. 75. The Tenth Circuit dismissed Petitioner's second appeal on March 17, 2022, as it had dismissed his first appeal, for lack of jurisdiction, holding the District Court's order on the disqualification motion was not appealable until entry of a final judgment in this matter. ECF No. 80.

Pursuant to the Initial Pretrial Order, Respondents attempted to engage in discovery. First, on February 17, 2022, Respondents moved for the entry of the protective order to which Petitioner refused to stipulate. ECF No. 77. The Court granted the motion on March 8, 2022. ECF No. 78. Respondents then served their Rule 26(a)(1) disclosures on March 4, 2022, pursuant to the court-ordered deadline. ECF No. 75 at 3. On April 15, 2022, Respondents served written discovery requests on Petitioner. His deadline to respond was May 18, 2022. To date, Petitioner has served no responses or objections, and he has produced no documents. On June 2, 2022, Respondents sent Petitioner a deficiency letter, noting his failure to provide his required Rule 26(a)(1) disclosures, and his failure to respond to written discovery. Respondents' counsel directed him to provide responses and documents by no later than June 15, 2022. Respondents' counsel further requested a date on which to take Petitioner's deposition. Given Petitioner's *pro se* status, Respondents suggested the deposition could go forward at the federal courthouse in Wyoming. To date, Petitioner has not

responded to the deficiency letter. Instead, he filed the instant Petition for Writ of Certiorari.

In his Petition, Petitioner grossly misrepresents the factual and procedural history of this case. But even assuming every word of his Petition were true, the writ cannot be granted because the Court lacks jurisdiction to hear this appeal and because the lower court acted at all times within the bounds of its discretion.

II. The Petition Should be Denied with Respect to the Disqualification Issue.

An order denying a motion to disqualify is not appealable until a district court enters final judgment in the underlying litigation. In the event the Court concludes such an order is reviewable on an interlocutory basis, the magistrate judge and district judge did not abuse their discretion in denying Petitioner's motion to disqualify.

A. The Court Lacks Jurisdiction Over an Interlocutory Appeal of an Order Denying a Motion to Disqualify.

1. An Order Denying a Motion to Disqualify Cannot Be Appealed Pursuant to Section 1291.

This Court has long held that a trial court order denying a motion to disqualify counsel in a civil case is not subject to immediate appeal. *Firestone Tire &*

Rubber Co. v. Risjord, 449 U.S. 368, 374 (1981). Courts of appeals are vested with "jurisdiction of appeals from all final decisions of the district courts of the United States. . . ." 28 U.S.C. § 1291. This Court's decisions have recognized "a narrow exception to the requirement" of a final judgment on the merits, limited to a "small class" of "collateral orders" that "conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and [are] effectively unreviewable on appeal from a final judgment." *Id.* at 374-75 (internal quotation marks and citations omitted).

In *Firestone*, this Court concluded an order denying a motion to disqualify counsel could not fall within the collateral order exception to § 1291 because such an order "plainly falls within the large class of orders that are indeed reviewable on appeal after final judgment, and not within the much smaller class of those that are not." *Id.* at 377. Justice Marshall, writing for a unanimous Court, explained:

> The propriety of the district court's denial of a disqualification motion will often be difficult to assess until its impact on the underlying litigation may be evaluated, which is normally only after final judgment. The decision whether to disqualify an attorney ordinarily turns on the peculiar factual situation of the case then at hand, and the order embodying such a decision will rarely, if ever, represent a final rejection of a claim of fundamental right that cannot effectively be reviewed following judgment on the merits.

Id. "[I]nterlocutory orders are not appealable 'on the mere ground that they may be erroneous.'" *Id.* at 378 (quoting *Will v. United States*, 389 U.S. 90, 98 n.6 (1967)). To hold otherwise "would constitute an unjustified waste of scarce judicial resources." *Id.*

Firestone's holding is unequivocal: "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." *Id.* at 379. "[T]he finality requirement embodied in § 1291 is jurisdictional in nature." *Id.* This Court, therefore, lacks jurisdiction to hear any appeal of the district court's ruling on the disqualification issue prior to final judgment being entered in this matter. Recognizing this controlling authority, the Tenth Circuit Court of Appeals properly dismissed Petitioner's appeal. *See* ECF No. 80 at 2 ("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."). This Court should deny the Petition for this reason.

2. An Order Denying a Motion to Disqualify Cannot Be Appealed Pursuant to Section 1292.

Although Petitioner also appears to maintain this appeal is proper pursuant to § 1292, the plain language of § 1292 makes clear it does not apply to

orders denying motions to disqualify. Instead, § 1292 provides that interlocutory appeals can be taken of interlocutory orders "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions . . . ;" "orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof . . . ;" and "decrees determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed." 28 U.S.C. § 1292(a). No such circumstance applies here. Section 1292 therefore does not provide a basis for this Court to exercise jurisdiction over Petitioner's appeal.

B. Denial of the Motion to Disqualify Was Not An Abuse of Discretion.

In the unlikely event the Court takes up the merits of Petitioner's appeal, the lower court correctly assessed that Petitioner's motion to disqualify (a) was untimely and (b) that Petitioner failed to establish the existence of an attorney-client relationship. ECF No. 64 at 7-9; ECF No. 71 at 7-11. A review of the reasoning in the lower courts' opinions shows the relevant legal standards were appropriately applied. As the District Court found, Petitioner waived his right to file the motion to disqualify because he waited more than two years to raise the disqualification issue. Petitioner further failed to carry his burden of demonstrating the existence of an attorney-client relationship.

Petitioner's arguments to the contrary misapprehend the legal standard and the court's procedures. Petitioner implies the district judge, in ruling on his motion for reconsideration, somehow erred in not considering the declarations Respondents supplied in response to Petitioner's motion to disqualify. Pet. at 19. Judge Skavdahl explained in his order that he did not review those documents in direct response to Petitioner's own assertion that the documents were perjured.[3] ECF No. 71 at 11. Moreover, the legal standard for establishing the existence of an attorney-client relationship requires a movant to show he submitted confidential information to an attorney and did so with the reasonable belief the attorney was acting as the movant's lawyer. ECF. No. 64 at 8 (quoting *Tri Cnty. Tel. Ass'n v. Campbell*, No. 17-CV-89-F, 2017 WL 11497264, at *3 (D. Wyo. July 19, 2017)). Petitioner contorts this legal standard in claiming the District Court asked him to "divulge what all he disclosed to the attorneys," Pet. at 18, when in reality the District Court was holding Petitioner to the appropriate legal standard.

Courts of appeals across the country review motions to disqualify for abuse of discretion. *See Kim v. Kimm*, 884 F.3d 98, 106 (2d Cir. 2018) ("We review the district court's failure to disqualify counsel for abuse of discretion." (citation omitted)); *Cornwell Entm't, Inc. v. Anchin, Block & Anchin, LLP*, 830 F.3d 18, 35 (1st Cir.

[3] Respondents disavow in the strongest terms any assertion that their submitted Declarations amounted to perjury or made any false statement.

2016) (" 'Because the district court is vested with the power and responsibility of supervising the professional conduct of attorneys appearing before it,' we review the District Court's decision regarding disqualification of counsel for an abuse of discretion." (quoting *Kevlik v. Goldstein*, 724 F.2d 844, 847 (1st Cir. 1984))); *Grimes v. District of Columbia*, 794 F.3d 83, 89 (D.C. Cir. 2015) (noting abuse of discretion standard applies to district court's denial of disqualification motion); *Chavez v. New Mexico*, 397 F.3d 826, 839 (10th Cir. 2005) ("We review a district court's decision on a motion to disqualify counsel for abuse of discretion."); *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1154 (8th Cir. 1999) (" 'The decision to grant or deny a motion to disqualify an attorney rests in the discretion of the [district] court, and we will reverse this determination only upon a showing of abuse of that discretion.' " (quoting *Harker v. Commissioner*, 82 F.3d 806, 808 (8th Cir. 1996))); *Lazy Oil Co. v. Witco Corp.*, 166 F.3d 581, 588 (3d Cir. 1999) ("A district court's denial of a motion to disqualify counsel is also reviewed for abuse of discretion." (citation omitted)); *Wexler v. City of Chicago*, 27 F.3d 570 (7th Cir. 1994) ("We review a motion to disqualify counsel for an abuse of discretion." (citation omitted)). Petitioner has shown no such abuse here. For this additional reason, his Petition should be dismissed.

III. The Petition Also Should be Denied With Respect to the Stay Issue.

Petitioner takes issue with the magistrate judge entering a case scheduling order and a protective order while his appeal of the disqualification order was pending. Assuming Petitioner even made a request for stay, denial of such a request is not appealable until a final judgment is entered in the underlying action. Petitioner argues the district court action should have been stayed automatically by virtue of his appeal. This argument also is in error on both the facts and the law. To obtain a stay, Petitioner was required to seek one. Granting, for sake of argument, that he did so, the magistrate judge did not abuse his discretion in denying a stay.

A. The Denial of a Stay Is Not a Final Order for Purposes of Sections 1291 or 1292.

Because a typical stay order merely delays litigation, rather than ends it, "a stay is not ordinarily a final decision for purposes of § 1291." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 10 n.11 (1983). "If a stay merely delays litigation and does not effectively terminate proceedings, it is not considered a final decision." *Crystal Clear Commc'ns, Inc. v. Sw. Bell Tel. Co.*, 415 F.3d 1171, 1176 (10th Cir. 2005) (citations omitted).

Nevertheless, this Court acknowledges an exception to this general rule: a stay may constitute a final

order if it operates to put a party "effectively out of [federal] court." *Moses H. Cone*, 460 U.S. at 9 n.8, 10 (quoting *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713, 715 n.2 (1962)). Yet, "[a]s the Supreme Court recognized in *Moses H. Cone*, most stay orders do not operate to put the plaintiff effectively out of federal court." *Crystal Clear Commc'ns*, 415 F.3d at 1176 (citing *Moses H. Cone*, 460 U.S. at 10 n.11). Such is the case here. Indeed, the Magistrate Judge's actions in denying a stay and entering a scheduling order and protective order are quite the opposite of putting Petitioner "effectively out of federal court." The orders serve to move Petitioner's case forward to adjudication on the merits of his claims. The exception recognized in *Moses H. Cone* simply is inapplicable here.

Similarly, § 1292 provides no basis for an interlocutory appeal of the magistrate judge's denial of a stay, as it is not one of the class of orders covered by that statute. 28 U.S.C. § 1292(a). This Court has long recognized that a stay order that "relates only to the conduct or progress of litigation before the court ordinarily is not considered an injunction and therefore is not appealable under § 1292(a)(1)." *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 279 (1988). No other provision of § 1292 potentially applies here. As such, the Court lacks jurisdiction to hear an appeal of any stay denial.

B. A Stay Pending Interlocutory Appeal Is Not Automatic.

Assuming this Court could engage with the merits of this issue, there are none. No rule of procedure or caselaw requires a district court to stay proceedings automatically pending an interlocutory appeal of an order denying a motion to disqualify counsel. Indeed, Federal Rule of Appellate Procedure 8(a) requires a party seeking a stay to move first in the district court for "a stay of the judgment or order of a district court pending appeal. . . ." Fed. R. App. 8(a)(1)(A). A party may also move for a stay in the court of appeals through the procedure set forth in Rule 8(a)(2). *See* Fed. R. App. 8(a)(2) (setting forth the required contents in a motion for stay in the court of appeals). Petitioner did not seek a stay in either the district court or the court of appeals, as Rule 8(a) requires.

In support of his contention that such stays are automatic, Petitioner references *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 429 (1985). Pet. at 8. Petitioner's reliance on *Koller* is misplaced. *Koller* involved allegations of misconduct against plaintiffs' counsel and a motion to disqualify plaintiffs' counsel filed by the defendant. *Koller ex rel. Koller v. Richardson-Merrell Inc.*, 737 F.2d 1038, 1040 (D.C. Cir. 1984), *vacated sub nom.*, *Richardson-Merrill, Inc. v. Koller*, 472 U.S. 424 (1985). The district court disqualified plaintiffs' counsel, not for conflict of interest, but because plaintiffs' counsel "attempted to thwart a true investigation of a crucial witness" and "deliberately

circumvented the court's pretrial evidentiary rulings." *Id.* at 1040-41 (internal quotation marks omitted).

Plaintiffs and their counsel appealed the order disqualifying plaintiffs' counsel to the United States Court of Appeals for the District of Columbia Circuit. *Id.* at 1049. "*On their emergency motion*, [the court] stayed all proceedings pending an expedited appeal." *Id.* (citation omitted) (emphasis added). Proceedings in *Koller* were not automatically stayed; rather, in keeping with Rule 8(a), plaintiffs and their counsel sought and obtained an order staying the proceedings. *Id.* Thus, *Koller* does not stand for the proposition that an interlocutory appeal of an order on a motion to disqualify counsel automatically stays proceedings in the lower court. Petitioner points to no other authority to support the proposition that such an appeal must result in an automatic stay. Instead, it is well-established that the party seeking a stay must move for one.

C. A Stay Pending Interlocutory Appeal Is Discretionary.

Mindful of Petitioner's *pro se* status, Respondents recognize that Petitioner raised the issue of his pending appeal with the Magistrate Judge in the February 9, 2022 hearing and indicated the hearing should not go forward due to the appeal.[4] The magistrate judge

[4] Respondents do not concede that this oral colloquy was sufficient to put the magistrate judge on notice that Petitioner sought a stay, but assume for the sake of argument that the oral request was sufficient to move the court to stay proceedings. Respondents further note that the Tenth Circuit "has repeatedly

acknowledged the pending appeal and opined that, based on his belief that the appeal would be dismissed, and in light of the already fourteen-month delay in entering a scheduling order, he would proceed to enter a scheduling order so the parties could proceed to litigate the merits of the case. The magistrate judge did not abuse his discretion in so doing.

"A stay is not a matter of right, even if irreparable injury might otherwise result." *Nken v. Holder*, 556 U.S. 418, 433 (2009) (quoting *Virginian Ry. Co. v. United States*, 272 U.S. 658, 672 (1926)). "It is instead 'an exercise of judicial discretion,' and '[t]he propriety of its issue is dependent upon the circumstances of the particular case.'" *Id.* (quoting *Virginian Ry. Co.*, 272 U.S. at 672-73). "The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." *Id.* at 433-34 (citations omitted).

Four factors govern consideration of a motion for stay: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Id.* at 434 (citation omitted); *see also Sec. Inv. Prot. Corp. v.*

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insisted that pro se parties follow the same rules of procedure that govern other litigants." *Hall v. Witteman*, 584 F.3d 859, 864 (10th Cir. 2009) (citation omitted).

Blinder, Robinson & Co., Inc., 962 F.2d 960, 968 (10th Cir. 1992) (articulating same factors).

Petitioner failed to make the requisite showing as to any of these factors. On the first factor, the Magistrate Judge specifically noted that Petitioner had not made any showing of a likelihood of success on the merits and that the appeal likely would be dismissed. Exercising their discretion, lower courts frequently deny stays pending appeals of orders on disqualification motions, noting such orders are "patently nonappealable." *See*, *e.g.*, *Warpar Mfg. Corp. v. Ashland Oil, Inc.*, 606 F. Supp. 866, 867-68 (N.D. Ohio 1985) (denying motion for stay because appeal of order on disqualification was appeal "from a patently nonappealable order"); *see also Whitney v. Kelley*, No. 5:16CV00353-KGB-JTK, 2017 WL 11478818, at *2 (E.D. Ark. Oct. 2, 2017) (denying motion to stay district court proceedings pending appeal of several non-final, unappealable orders including order to disqualify magistrate judge); *Rogler v. Fotos*, No. WDQ-14-228, 2015 WL 7253688, at *13 (D. Md. Nov. 17, 2015), *aff'd*, 668 F. App'x 462 (4th Cir. 2016) (denying motion for stay pending appeal of motion to disqualify because "an order denying a motion to recuse or disqualify is not an appealable interlocutory or collateral order" (citation omitted)); *Yetter Mfg. Co. v. Hiniker Co.*, No. 3-80 CIV. 373, 1981 WL 48184, at *4 (D. Minn. Jan. 23, 1981) ("In light of the fact that an order denying defendant's requested relief is not reviewable, a stay of these proceedings would serve absolutely no purpose.").

Petitioner made no showing on any of the other factors, nor did he attempt to do so. There is no prejudice to Petitioner in the lower court entering a scheduling order or protective order—these are standard case-management tools left to the trial court's discretion and serve only to move Petitioner's case forward to adjudication on the merits. Meanwhile, Respondents continue to be greatly prejudiced by Petitioner's unceasing filing of meritless appeals and refusal to engage in routine discovery, putting resolution of this matter further and further out of reach.

As to the final factor, the public interest favors expeditious resolutions of disputes, rather than expending scarce judicial resources on prolonged, futile appeals and diversions. As such, "[a] majority of the circuits which have considered the matter hold that a notice of appeal from a plainly nonappealable order may properly be ignored by the district court." *Cochran v. Birkel*, 651 F.2d 1219, 1222-23 (6th Cir. 1981) (reviewing cases). Indulging a stay under such circumstances permits a litigant to "'deprive the court of jurisdiction at any and every critical juncture' merely by filing a notice of appeal from any nonappealable order entered in the district court." *Id.* (quoting *Hodgson v. Mahoney*, 460 F.2d 326, 328 (1st Cir. 1972) (per curiam)); *see also United States v. Hitchmon*, 602 F.2d 689, 694 (5th Cir. 1979) (en banc) ("The contrary rule leaves the court powerless to prevent intentional dilatory tactics, forecloses without remedy the nonappealing party's right to continuing trial court jurisdiction,

and inhibits the smooth and efficient functioning of the judicial process.").

Because Petitioner did not meet his burden to establish the propriety of a stay, the magistrate judge properly exercised his discretion in entering the scheduling order and the protective order. *See Sec. Inv. Prot. Corp.*, 962 F.2d at 968 (holding district court's denial of stay was proper where movant failed to make required showing to establish need for stay).

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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