No. _____

IN THE

Supreme Court of the United States

GARY WAETZIG,

Petitioner,

v.

HALLIBURTON ENERGY SERVICES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

SPENCER J. KONTNIK
AUSTIN M. COHEN
KONTNIK | COHEN, LLC
201 Steele Street
Suite 210
Denver, CO 80206

VINCENT LEVY
Counsel of Record
KEVIN D. BENISH
BYRON J. HAZZARD
HOLWELL SHUSTER
& GOLDBERG LLP
425 Lexington Avenue
14th Floor
New York, NY 10017
(646) 837-5120
vlevy@hsgllp.com

Counsel for Petitioner

March 4, 2024

QUESTION PRESENTED

Federal Rule of Civil Procedure 60(b) empowers district courts, on just terms and under circumstances specified in that Rule, to "relieve a party or its legal representative from a final judgment, order, or proceeding."

The question presented, which has divided the courts of appeals, is whether a Rule 41 voluntary dismissal without prejudice is a "final judgment, order, or proceeding" under Rule 60(b).

PARTIES TO THE PROCEEDING

Petitioner Gary Waetzig was plaintiff in the district court and appellee below.

Respondent Halliburton Energy Services, Inc. was defendant in the district court and was appellant below.

RELATED PROCEEDINGS

- *Waetzig* v. *Halliburton Energy Services, Inc.*, No. 20-cv-00423, U.S. District Court for the District of Colorado. Judgment entered on August 3, 2022.
- *Waetzig* v. *Halliburton Energy Services, Inc.*, No. 22-1252, U.S. Court of Appeals for the Tenth Circuit. Judgment entered on September 11, 2023.

There are no other proceedings in state or federal courts, or in this Court, that are directly related to this case within the meaning of this Court's Rule 14(b)(1).

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

RELATED PROCEEDINGS ii

TABLE OF APPENDICES iv

TABLE OF AUTHORITIES v

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

I. Legal Background 3

II. Factual Background 5

III. Procedural Background 6

REASONS FOR GRANTING THE PETITION 12

I. The Courts of Appeals Are Divided On The Question Presented 12

II. The Question Presented Is Important 15

III. This Case Presents An Ideal Vehicle To Decide The Question Presented 17

CONCLUSION 18

TABLE OF APPENDICES

Appendix A
Opinion of the United States Court of Appeals for the Tenth Circuit (September 11, 2023).....1a

Appendix B
Memorandum Opinion and Order of the United States District Court for the District Of Colorado (August 3, 2022).....29a

Appendix C
Memorandum Opinion and Order of the United States District Court for the District Of Colorado (January 19, 2022).....49a

Appendix D
Order of the United States Court of Appeals for the Tenth Circuit (December 4, 2023).....65a

TABLE OF AUTHORITIES

Cases

Badgerow v. *Walters*,
596 U.S. 1 (2022) 11

Becker v. *Montgomery*,
532 U.S. 757 (2001) 15

Bell v. *New Jersey*,
461 U.S. 773 (1983) 13

Brody v. *Bruner*,
2024 WL 729654 (D. Colo. Feb. 22, 2024) 17

Cooter & Gell v. *Hartmarx Corp.*,
496 U.S. 384 (1990) 14

Derr v. *Swarek*,
766 F.3d 430 (5th Cir. 2014) 4

Gillespie v. *U.S. Steel Corp.*,
379 U.S. 148 (1964) 13

Gustafson v. *Alloyd Co.*,
513 U.S. 561 (1995) 9

Hulson v. *Atchison, Topeka & Santa Fe Ry. Co.*,
27 F.R.D. 208 (N.D. Ill. 1960) 9

In re Hunter,
66 F.3d 1002 (9th Cir. 1995) 15

Jacobellis v. *Ohio*,
378 U.S. 184 (1964) 10

Janssen v. *Harris*,
321 F.3d 998 (10th Cir. 2003) 7

La Buy v. *Howes Leather Co.*,
352 U.S. 249 (1957) 16

Love v. *Wal-Mart Stores, Inc.*,
865 F.3d 1322 (11th Cir. 2017) 15

Nelson v. *Napolitano*,
657 F.3d 586 (7th Cir. 2011) 14

Pedrina v. *Chun*,
987 F.2d 608 (9th Cir. 1993) 4

Pioneer Inv. Servs. Co. v. *Brunswick Assocs. Ltd. P'ship*,
507 U.S. 380 (1993) 15

Schmier v. *McDonald's LLC*,
569 F.3d 1240 (10th Cir. 2009) 11

Spring Creek Expl. & Prod. Co., LLC v. *Hess Bakken Inv., II, LLC*,
887 F.3d 1003 (10th Cir. 2018) 11

Warfield v. *AlliedSignal TBS Holdings, Inc.*,
267 F.3d 538 (6th Cir. 2001) 4

White v. *National Football League*,
756 F.3d 585 (8th Cir. 2014) 14

Williams v. *Frey*,
551 F.2d 932 (3d Cir. 1977) 14

Yesh Music v. *Lakewood Church*,
727 F.3d 356 (5th Cir. 2013) 7, 10, 12, 13, 15

Other Authorities

Advisory Committee Note to the 1946 Amendment of Rule 60(b) 4

James Wm. Moore & Elizabeth B. A. Rogers, *Federal Relief from Civil Judgments*, 55 Yale L.J. 623 (1946) 16

Charles Alan Wright & Arthur R. Miller, *Fed. Prac. & Proc.* § 2362 (4th ed.).....3, 4

Statutes and Rules

28 U.S.C. § 1254 1

Fed. R. Civ. P. 41 .....*passim*

Fed. R. Civ. P. 60 .....*passim*

Fed. R. Civ. P. 68 14

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The decision of the Court of Appeals for the Tenth Circuit is reported at 82 F.4th 918 and reproduced at Appendix ("Pet. App.") 1a. The decisions of the District of Colorado are unreported but the district court's decision on the merits of Petitioner's motion to vacate arbitration is available at 2022 WL 3153909. Both the decision to reopen the case pursuant to Rule 60(b) and the decision on the merits of Petitioner's motion to vacate are reproduced beginning at Pet. App. 29a and 49a.

JURISDICTION

The Tenth Circuit filed its published decision reversing the grant of Petitioner's motion to reopen the case and vacate the arbitration award on September 11, 2023. Pet. App. 1a. On December 4, 2023, the Tenth Circuit denied Petitioner's petition for rehearing and rehearing en banc. *Id.* at 65a. This petition is therefore timely, and the Court has jurisdiction under 28 U.S.C. 1254(1).

PROVISIONS INVOLVED

Federal Rule of Civil Procedure 41(a)(1) provides:

> (A) *Without a Court Order.* Subject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable federal statute, the plaintiff may dismiss an action without a court order by filing:
>
> (i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or
>
> (ii) a stipulation of dismissal signed by all parties who have appeared.
>
> (B) *Effect.* Unless the notice or stipulation states otherwise, the dismissal is without prejudice.

In addition, Federal Rule of Civil Procedure 60(b) reads, in relevant part:

> On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> . . . ; or
>
> (6) any other reason that justifies relief.

STATEMENT OF THE CASE

This case concerns whether Federal Rule of Civil Procedure 60(b) permits courts to reopen cases that are voluntarily dismissed under Federal Rule of Civil Procedure 41(a)(1). By its plain terms, the Rule 60(b) allows courts to "relieve a party . . . from a final . . . proceeding," yet the Tenth Circuit in the decision below interpreted a dismissal without prejudice—in circumstances where Petitioner could no longer bring his claims by filing a new complaint—to be neither "final" nor a "proceeding." In doing so, the Tenth Circuit created a conflict among circuit courts on an important issue of procedure.

I. Legal Background

Rule 41(a)(1)(A)(i) allows a plaintiff to "dismiss an action without a court order by filing[] a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment." The parties may also stipulate to dismissal under Fed. R. Civ. P. 41(a)(1)(A)(ii). By default, "[u]nless the notice or stipulation states otherwise, the dismissal is *without* prejudice." Fed. R. Civ. Pl. 41(a)(1)(B) (emphasis added). But where "the plaintiff previously dismissed any federal- or state-court action based on or including the same claim, a notice of dismissal operates as an adjudication on the merits." *Ibid.*

"The purpose of Federal Rule of Civil Procedure 41(a)(1) is to permit the plaintiff to dismiss an action voluntarily when no other party will be prejudiced." 9 Charles Alan Wright & Arthur R. Miller, *Fed. Prac.*

& Proc. § 2362 (4th ed.). Generally, no court order is required to effect the Rule 41(a)(1) dismissal; notice is the sole requirement, and "a 'district court's subsequent order to the same effect [is] superfluous.'" *Derr* v. *Swarek*, 766 F.3d 430, 440–41 (5th Cir. 2014) (quoting *Warfield* v. *AlliedSignal TBS Holdings, Inc.*, 267 F.3d 538, 541 (6th Cir. 2001)); *accord Pedrina* v. *Chun*, 987 F.2d 608, 610 (9th Cir. 1993) (holding district court lacked authority to require Rule 41(a)(1) dismissal by motion rather than notice).

In turn, Rule 60(b) allows a court, "[o]n motion and just terms," to "relieve a party or its legal representative from a final judgment, order, or proceeding" for reasons including "mistake, inadvertence, surprise, or excusable neglect" and "any other reason that justifies relief." Fed. R. Civ. P. 60(b)(1), (6). The word "final" was added to Rule 60(b) in 1946, as part of a broader effort to "reconstruct[]" the various legal and equitable procedures allowing relief from otherwise final proceedings, mechanisms that were "shrouded in ancient lore and mystery." Advisory Committee Note to the 1946 Amendment of Rule 60(b). According to the Committee Note, the 1946 addition of the word "final" was meant to "emphasize[] the character of the judgments, orders or proceedings from which Rule 60(b) affords relief." *Ibid.* Thus, "interlocutory judgments are not brought within the restrictions of the rule, but rather they are left subject to the complete power of the court rendering them to afford such relief from them as justice requires." *Ibid.*

II. Factual Background

In the District of Colorado, Petitioner Gary Waetzig sued his former employer, Respondent Halliburton Energy Services, Inc., alleging Respondent wrongfully terminated him in violation of the Age Discrimination in Employment Act. Respondent asserted that the claims were subject to arbitration. In view of that position, Petitioner voluntarily dismissed the District of Colorado lawsuit by filing a notice under Rule 41(a)(1)(A), and initiated an arbitration. By default, the dismissal was without prejudice.

The Arbitration Agreement ("Agreement") between Petitioner and Respondent articulated three conditions, which later became an issue in the district court. First, the Agreement stated that the arbitrator would give ten calendar days' notice to the parties in advance of any "hearing." Pet. App. 31a. Second, the Agreement required that a "record" of any hearing on the merits of a dispute be prepared, at Respondent's expense. *Id.* at 32a. Third, the Agreement required the arbitrator to "write a brief statement of the essential findings of fact and conclusions of law on which the award is based." *Id.* at 40a.

On May 28, 2021, the arbitrator's assistant requested that a telephone conference with the parties' counsel take place on June 2, 2021, five calendar days after the request was made. The assistant did not notify the parties of the topic of the conference. When the conference commenced, the

arbitrator announced that she would hear oral arguments on Respondent's motion for summary judgment. No recording of this hearing was made. Just a few hours after the hearing concluded, the arbitrator issued a ruling granting summary judgment in Respondent's favor, without providing any statement of the essential findings of fact or conclusions of law (the "Award").

Based on the arbitrator's failure to adhere to the Agreement's requirements for fair notice of a hearing, recording of a hearing, and an explanation of the basis of the Award, Petitioner moved in the District of Colorado to reopen his case and to vacate the Award.

III. Procedural Background

Petitioner moved to reopen his case and vacate the arbitration award on September 13, 2021. Pet. App. 40a. The motion was pending until June 8, 2022, when the district court ordered him to show cause as to why reopening the case was proper.

Following submissions from the parties, the district court concluded it would reopen Petitioner's case, reasoning that "a voluntary dismissal of a case without prejudice is a final proceeding within the meaning of Rule 60(b)[.]" *Id.* at 54a.

In so ruling, the district court first noted that "the effect of the filing of a notice of dismissal pursuant to Rule 41(a)(1)(i) is to leave the parties as though no action had been brought," and that, thereafter, "the district court loses jurisdiction over the dismissed

claims and may not address the merits of such claims or issue further orders pertaining to them." Pet. App. 53a (quoting *Janssen* v. *Harris*, 321 F.3d 998, 1000 (10th Cir. 2003)). The court noted, however, that Tenth Circuit case law permitted district courts invoking Rule 60(b) to vacate voluntary dismissals *with* prejudice, and it reasoned that the same rationale applied to notices of dismissal *without* prejudice. *Ibid.*

The district court also comprehensively reviewed case law from other circuits. Quoting the Fifth Circuit's analysis of the issue in *Yesh Music* v. *Lakewood Church*, 727 F.3d 356, 361–63 (5th Cir. 2013), the district court explained that "[Rule] 60(b) speaks of relief from a final 'proceeding' as well as a final 'judgment' or 'order'." Pet. App. 55a. Because "a plain reading of 'final' supports defining it as something which is practically 'finished,' 'closed,' or 'completed,'" a voluntary dismissal without prejudice was reasonably considered "final." *Ibid.*

In addition, the district court agreed with the Fifth Circuit that, although "the term 'proceeding' is indeterminate," a "proceeding does not necessarily require any [judicial] action," unlike a "judgment" or an "order." *Ibid.* The district court observed that numerous circuit courts had held that stipulated dismissals, which similarly do not require court intervention to take effect, were final proceedings that could be reopened under Rule 60(b). *Id.* at 54a–56a. The district court therefore concluded that it had authority to reopen Petitioner's case pursuant to Rule

60(b), because Petitioner had shown that his dismissal of the action without moving to stay or to administratively close the case was a mistake, Fed. R. Civ. P. 60(b)(1), or, in the alternative, because an intervening change in law would deny Petitioner any forum for review of the Award. See Fed. R. Civ. P. 60(b)(6).

In a later opinion, the district court concluded that the Award should be vacated because the arbitrator failed to provide advance notice of the summary-judgment hearing and to provide a "brief statement of the essential findings of fact and conclusions of law on which the award is based," prejudicing Respondent and exceeding the arbitrator's powers. Pet. App. 44a–45a.

Respondent appealed to the Tenth Circuit. A divided panel of that court reversed, concluding that "a voluntary dismissal without prejudice under Rule 41(a) divests the district court of subject-matter jurisdiction to consider a Rule 60(b) motion to reopen." Pet App. 4a.

The Tenth Circuit explained that a plaintiff "can only obtain relief under Rule 60(b) if his voluntary dismissal without prejudice under Rule 41(a) qualifies as a 'final judgment, order, or proceeding.'" *Id.* at 7a. Because the parties agreed that Petitioner's voluntary dismissal was not a "final judgment" or a "final order," the Court focused on the reference to "final proceeding[s]." *Ibid.*

Noting that Rule 60(b) does not define the term "proceeding," the Tenth Circuit consulted contemporary dictionaries, noting that there were "general" and "more specific" meanings of the term, but that the definitions were ultimately not conclusive. *Id.* at 8a–9a. The Court then turned to decades-old case law from the Northern District of Illinois, which invoked the *ejusdem generis* canon to conclude that a "final proceeding" should "'be confined to judicial determinations similar to the class of words specifically described,' *i.e.*, final judgments and final orders." *Id.* at 9a–10a (quoting *Hulson* v. *Atchison, Topeka and Santa Fe Ry. Co.*, 27 F.R.D. 208, 284 (N.D. Ill. 1960)). The court also cited the *noscitur a sociis* canon, holding that it could not interpret "final proceeding" with "a meaning so broad that it is inconsistent with its accompanying words." *Id.* at 10a (quoting *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 575 (1995)).

Based on these interpretive principles, the court concluded that "[t]he preceding terms 'final judgment' and 'final order' illuminate (and narrow) the meaning of 'final proceeding,'" such that "a final proceeding must involve, at a minimum, a judicial determination with finality." *Id.* at 11a. The court then distinguished a voluntary dismissal with prejudice—which it concluded was a "final judgment"—from a voluntary dismissal without prejudice.

The Tenth Circuit added that its prior opinions on Rule 60(b) and Rule 41(a)(1) dismissals all involved dismissals with prejudice and were thus inapposite.

Reviewing the law of other circuits, the panel acknowledged that the Fifth Circuit's opinion in *Yesh Music* found that "a proceeding does not necessarily require any such [judicial] action." Pet. App. 15a (citation omitted). The Tenth Circuit, however, agreed with the dissent in *Yesh Music*, which stated that a voluntary dismissal without prejudice "was not final" and "was not a proceeding," and that "simply filing a sheet of paper, as the plaintiffs [in *Yesh Music*] did with their notice of dismissal, did not qualify" as one. Pet. App. 16a (citing *Yesh Music*, 727 F.3d at 366–67 (Jolly, J., dissenting)).

Although the Tenth Circuit concluded that Petitioner's voluntary dismissal without prejudice was not a "final proceeding," it declined to provide a definition of that term, specifying that it was "a catchall, covering anything that does not result in an order or judgment but still involves a final, burdensome judicial determination." *Id.* at 20a. Ultimately, the Court concluded that "perhaps we will 'know it when [we] see it.' But we know that Mr. Waetzig's voluntary dismissal without prejudice is not it." *Ibid.* (quoting *Jacobellis* v. *Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring)).

Judge Matheson dissented, explaining that, "(1) as this court has recognized, a Rule 41(a)(1)(A)(i) dismissal is a proceeding, and (2) the dismissal was final when Mr. Waetzig filed his Rule 60(b) motion because he lacked a federal forum due to the arbitration and an intervening Supreme Court decision." *Id.* at 22a. (Matheson, J., dissenting). Judge

Matheson noted that a prior Tenth Circuit decision had identified a Rule 41(a)(1)(A)(i) dismissal with prejudice as a Rule 60(b) "proceeding." *Id.* at 23a–24a & n.1 (discussing *Schmier* v. *McDonald's LLC*, 569 F.3d 1240 (10th Cir. 2009)). He then explained that whether judicial action is required to effectuate finality is not determinative of what constitutes a "proceeding;" indeed, a Rule 41(a)(1)(A)(i) dismissal with prejudice also does not require judicial action, but counted as a "proceeding." *Ibid.*

Judge Matheson reasoned that a dismissal without prejudice may not be final when filed but "may later become final due to procedural developments," explaining that "finality is to be given a practical rather than a technical construction." *Id.* at 24a–25a (quoting *Spring Creek Expl. & Prod. Co., LLC* v. *Hess Bakken Inv., II, LLC*, 887 F.3d 1003, 1015 (10th Cir. 2018), *as revised* (Apr. 13, 2018)). Applying this principle, Judge Matheson reasoned that in this case there was a final proceeding because Petitioner was unable to file another complaint raising the same claims given that his underlying claim was resolved in arbitration. *Id.* at 27a. He also agreed that the Supreme Court's decision in *Badgerow* v. *Walters*, 596 U.S. 1 (2022), prevented Petitioner from filing a separate action challenging the Award under Section 10 of the Federal Arbitration Act ("FAA"). *Ibid.* Thus, Judge Matheson would have ruled that Petitioner's dismissal was a final proceeding under Rule 60(b). *Id.* at 28a.

REASONS FOR GRANTING THE PETITION

I. The Courts of Appeals Are Divided On The Question Presented

As the Tenth Circuit acknowledged, its decision conflicts with the Fifth Circuit's decision in *Yesh Music v. Lakewood Church*, 727 F.3d 356, 361 (5th Cir. 2013), which held that "a voluntary dismissal without prejudice can be considered a final proceeding" within the meaning of Rule 60. The Tenth Circuit's opinion also conflicts with decisions of the Third, Seventh, Eighth, and Ninth Circuits.

A. As noted, in the decision below, the Tenth Circuit held that a voluntary dismissal without prejudice effectuated by way of notice does not fall within Rule 60(b)'s ambit, and that a district court is without authority to reopen such an action, because "a final proceeding must involve, at a minimum, a judicial determination with finality." Pet. App. 11a. Despite consulting numerous sources to construe the term, the court declined to actually define the words "final proceeding," and instead based its holding on a limitation derived from the other two terms in Rule 60(b)—a "final order" or a "final judgment"—to identify the "minimum" requirement that there be a "judicial determination with finality." *Id.* at 10a–12a. Observing that there was no judicial determination here because a dismissal effectuated by way of a notice is self-executing, the Tenth Circuit reasoned that a district court is without authority to reopen a case that was previously dismissed without prejudice.

B. The Tenth Circuit has split from all other Circuits to consider the question – all of which have concluded that a notice or stipulation of dismissal can be subject to Rule 60(b) relief despite no judicial action being required to effectuate the prior dismissal.

Consider first the Fifth Circuit's decision in *Yesh Music*, which, as noted, the Tenth Circuit expressly declined to follow. There, in considering whether a Rule 41(a)(1)(A)(i) dismissal without prejudice could be a "final proceeding," the Fifth Circuit stated that "a plain reading of 'final' supports defining it as something which is *practically* 'finished,' 'closed,' or 'completed.'" 727 F.3d at 360 (emphasis added) (citing *Gillespie* v. *U.S. Steel Corp.*, 379 U.S. 148, 152 (1964) ("[T]he requirement of finality is to be given a practical rather than a technical construction.")). As the Fifth Circuit observed, "the requirement that a disposition be final does not necessarily mandate that it have been *irrevocably* judicially resolved." *Ibid.* & n.4 (emphasis added) (citing *Bell* v. *New Jersey*, 461 U.S. 773, 779 (1983) (itself holding, for purposes of appealability, that the possibility of further judicial involvement does not necessarily mean an order is not final)).

At least four other Circuits have reached conclusions at odds with the reasoning of the Tenth Circuit below. The Third Circuit has held that "[t]he dismissal of [a] suit was . . . a proceeding" that could be considered for reopening under Rule 60(b) where the dismissal was via a stipulation pursuant to Rule 41(a)(1)(A)(ii), which is effective upon filing and does

not require a judicial determination. *Williams* v. *Frey*, 551 F.2d 932, 935 (3d Cir. 1977), *abrogated on other grounds by Torres* v. *Oakland Scavenger Co.*, 487 U.S. 312 (1988); see also *Redman* v. *United States*, 2023 WL 8519210, at *2 (3d Cir. Dec. 8, 2023) ("Where, as here, a notice of voluntary dismissal has taken effect, the district court retains the authority to exercise its discretion to reinstate the voluntarily dismissed complaint under Federal Rule of Civil Procedure 60(b).").

The Seventh Circuit has also concluded that a district court has the authority to reopen a voluntary dismissal via Rule 60(b) (although the circumstances in that case did not warrant Rule 60(b) relief). *Nelson* v. *Napolitano*, 657 F.3d 586, 589 (7th Cir. 2011) ("We agree that there may be instances where a district court may grant relief under Rule 60(b) to a plaintiff who has voluntarily dismissed the action."). As the Seventh Circuit noted, "[a]lthough it is true that a suit that has been dismissed under Rule 41(a)(1)(A)(i) generally is treated as if it had never been filed, the Supreme Court and this court have recognized the limits of that characterization." *Ibid.* (citing *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 395 (1990)).

The Eighth Circuit has also concluded that a stipulated dismissal was a "final judgment" within the meaning of Rule 60(b) because it is "functionally equivalent" to an offer of judgment under Rule 68. *White* v. *National Football League*, 756 F.3d 585, 595–96 (8th Cir. 2014). That is so despite the absence of

"any involvement by the court" having been required to execute the dismissal. *Ibid.*

The Ninth Circuit similarly has ruled that "an acknowledgment of satisfaction of judgment" in a bankruptcy proceeding was "functionally equivalent to filing a voluntary dismissal" and therefore was a "judgment, order, or proceeding from which Rule 60(b) relief can be granted." *In re Hunter*, 66 F.3d 1002, 1004 (9th Cir. 1995).

II. The Question Presented Is Important

Before the decision below was decided, it was "broadly accepted that courts retain jurisdiction to consider motions to reopen the judgment under Rule 60(b) after a Rule 41(a)(1) dismissal." *Love* v. *Wal-Mart Stores, Inc.*, 865 F.3d 1322, 1328 (11th Cir. 2017) (Anderson, J., concurring) (citing *Yesh Music*, 727 F.3d at 363). Thus, prior to the decision below, litigants could be confident that, in specific circumstances, a court could revisit a matter later if they wished to withdraw a lawsuit.

The decision below, however, creates a circuit split and uncertainty in how the Federal Rules of Civil Procedure apply, which warrants the Court's review. See, e.g., *Becker* v. *Montgomery*, 532 U.S. 757, 762 (2001) ("We granted certiorari . . . to assure the uniform interpretation of the governing Federal Rules."); *Pioneer Inv. Servs. Co.* v. *Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 387 (1993) (resolving split among circuit courts regarding interpretation of Fed.

R. Bankr. P. 9006(b)(1)); *La Buy* v. *Howes Leather Co.*, 352 U.S. 249, 251 (1957) ("The importance of the question in the administration of the Federal Rules of Civil Procedure, together with the uncertainty existing on the issue among the Courts of Appeals, led to our grant of a writ of certiorari.").

Moreover, the question presented concerns the authority of district judges to enter rulings in certain cases that have come before them—and the effect of the Federal Rules on their authority. Before adoption of the Federal Rules, judges had the inherent authority to reopen cases and revise matters that had been assigned to them. James Wm. Moore & Elizabeth B. A. Rogers, *Federal Relief from Civil Judgments*, 55 Yale L.J. 623, 636 (1946). Rule 60(b) was meant to codify authority relevant to the question presented, specifically law governing the circumstances in which courts may provide judicial relief from orders, rulings, and proceedings. Given the decision below, the Court should grant certiorari and clarify the scope of federal courts' power under Rule 60(b).

Finally, the Tenth Circuit's decision creates a no-man's land for Rule 41(a) dismissals. In effect, the Circuit has concluded that Rule 60(b) impliedly limits the authority of judges to reopen matters, and deprives them of the authority to relieve a party from a mistake that caused the party to withdraw rather than stay a case, or from circumstances where—but for a change in the law—the dismissal would not have had the same effect as it has had on account of that

change. E.g., *Brody* v. *Bruner*, 2024 WL 729654, at *1 (D. Colo. Feb. 22, 2024) (citing the decision below).

III. This Case Presents An Ideal Vehicle To Decide The Question Presented

The question presented here is squarely implicated and was outcome-dispositive below. The Tenth Circuit created and applied its "judicial determination with finality" test, and dismissed Petitioner's claims for lack of jurisdiction because his prior dismissal was not a "judicial determination with finality." Pet App. 11a (emphasis omitted). In doing so, the Circuit created an acknowledged conflict with other circuit courts. And the decision below did not give any alternate or secondary holding.[1]

[1] The dissenting judge would have affirmed the district court's grant of Petitioner's motion to vacate under Rule 60(b)(6). Pet. App. 38a n.7.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

SPENCER KONTNIK
AUSTIN COHEN
KONTNIK | COHEN, LLC
201 Steele Street,
Suite 210
Denver, CO 80206

VINCENT LEVY
Counsel of Record
KEVIN D. BENISH
BYRON J. HAZZARD
HOLWELL SHUSTER
& GOLDBERG LLP
425 Lexington Avenue
14th Floor
New York, NY 10017
(646) 837-5120
vlevy@hsgllp.com

Counsel for Petitioner

APPENDIX

TABLE OF APPENDICES

Page

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, FILED SEPTEMBER 11, 2023 . . . . . 1a

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO, FILED AUGUST 3, 2022 . . . . . 29a

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO, FILED JANUARY 19, 2022 . . . . . 49a

APPENDIX D — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, FILED DECEMBER 4, 2023 . . . . . 65a

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, FILED SEPTEMBER 11, 2023

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 22-1252

GARY WAETZIG,

Plaintiff-Appellee,

v.

HALLIBURTON ENERGY SERVICES, INC.,

Defendant-Appellant.

Appeal from the United States District Court
for the District of Colorado
(D.C. No. 1:20-CV-00423-KLM)

Before **TYMKOVICH**, **MATHESON**, and **EID**, Circuit Judges.

TYMKOVICH, Circuit Judge.

Gary Waetzig commenced an age discrimination lawsuit in the District of Colorado against his former employer, Halliburton Energy Services, Inc. Because he was contractually bound to arbitrate his claim, he voluntarily dismissed his suit without prejudice under Federal Rule of Civil Procedure 41(a) and commenced arbitration. The arbitrator sided with Halliburton.

Dissatisfied with the outcome, Mr. Waetzig returned to federal court. But instead of filing a new lawsuit challenging arbitration, he moved to reopen his age discrimination case and vacate the arbitration award. Relying on Rule 60(b), the district court concluded it had jurisdiction to consider Mr. Waetzig's motion, reopened the case, and vacated the award.

Because we conclude the district court could not reopen the case under Rule 60(b) after it had been voluntarily dismissed without prejudice, we reverse. Under Federal Rules of Civil Procedure 41(a) and 60(b), a court cannot set aside a voluntary dismissal without prejudice because it is not a final judgment, order, or proceeding.

I. Background

In February 2020, Mr. Waetzig sued Halliburton for violating the Age Discrimination in Employment Act when it terminated him. Because he was contractually obligated to arbitrate any dispute with Halliburton, Mr. Waetzig voluntarily dismissed his suit without prejudice under Federal Rule of Civil Procedure 41(a)(1)(A)(i).[1] The case was administratively closed. The parties proceeded

1. "[T]he plaintiff may dismiss an action without a court order by filing a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment." Fed. R. Civ. P. 41(a)(1)(A)(i). And "[u]nless the notice . . . states otherwise, the dismissal is without prejudice. But if the plaintiff previously dismissed any federal-or state-court action based on or including the same claim, a notice of dismissal operates as an adjudication on the merits." Fed. R. Civ. P. 41(a)(1)(B).

to arbitration, where the arbitrator granted summary judgment to Halliburton.

Mr. Waetzig returned to federal court. But instead of filing a new complaint challenging the arbitrator's summary-judgment order under the Federal Arbitration Act, 9 U.S.C. § 10, he moved to reopen his case and vacate the arbitration award in favor of Halliburton. Section 10 of the FAA allows a court to vacate an arbitration award in certain situations, including when an arbitrator engages in prejudicial misconduct or exceeds his or her authority. Over Halliburton's objection, the district court agreed to reopen the age discrimination case. It relied on Rule 60(b), which allows a court to "relieve a party . . . from a final judgment, order, or proceeding" in certain circumstances.[2] Specifically, the court concluded that Rule 60(b) applied because (1) Mr. Waetzig mistakenly failed to stay the case pending arbitration rather than dismissing it, and (2) that mistake caused Mr. Waetzig to forfeit his ability to refile a new cause of action in federal court because of an intervening Supreme Court case interpreting FAA jurisdiction: *Badgerow v. Walters*, 596 U.S. 1, 142 S. Ct. 1310, 212 L. Ed. 2d 355 (2022).

Finding jurisdiction, the court vacated the arbitrator's order after concluding the arbitrator exceeded her

2. In relevant part, Rule 60(b) states, "On motion and just terms, the court may relieve a party or its legal representative from a *final judgment, order, or proceeding* for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect * * * (6) any other reason that justifies relief." Fed. R. Civ. P. 60(b) (emphasis added).

powers by not providing adequate notice of the summary-judgment hearing and not sufficiently explaining her decision in favor of Halliburton. The court remanded for further proceedings before a new arbitrator.

II. Analysis

This appeal presents an open question in this circuit: Can a district court use Rule 60(b) to vacate a plaintiff's voluntary dismissal without prejudice? While we review a district court's Rule 60(b) decision for an abuse of discretion, *Shields v. Pro. Bureau of Collections of Md., Inc.*, 55 F.4th 823, 830 (10th Cir. 2022), we review subject-matter jurisdiction de novo, *Navajo Nation v. Dalley*, 896 F.3d 1196, 1203 (10th Cir. 2018).

As we explain, a voluntary dismissal without prejudice under Rule 41(a) divests the district court of subject-matter jurisdiction to consider a Rule 60(b) motion to reopen.

A. New Case

Mr. Waetzig invites us to avoid the jurisdictional issue by treating his "Motion as a 'new case,' rather than part of an existing case." Aple. Br. at 10. In other words, because his "motion for vacatur contained the information that would be required for a new case under § 10" of the FAA, we should deem it a new complaint to set aside the arbitrator's summary-judgment order and simply determine whether the district court erroneously vacated the order. *Id.* at 11-12. And he points to our previous

observation that the "caption [of a brief or motion] should not control the outcome." *Elm Ridge Expl. Co. v. Engle*, 721 F.3d 1199, 1220 (10th Cir. 2013) (concluding "the Rule 59(e) motion here should be construed as a Rule 50(b) motion"); *see also Dodson Int'l Parts, Inc. v. Williams Int'l Co.*, 12 F.4th 1212, 1229 (10th Cir. 2021) (applying that principle when the district court treated a "brief as a motion to confirm the arbitration award").

Although creative, we decline Mr. Waetzig's invitation. For one thing, he did not make this request before the district court. For another, other issues would arise should we do so. For example, Halliburton, lacking notice that there was a new case, did not respond to Mr. Waetzig's motion as it would a complaint by formally answering the allegations, raising affirmative defenses, and potentially moving to dismiss.

Accordingly, we do not treat Mr. Waetzig's motion as a new complaint in a new case.

B. Rule 41 and Rule 60

We now turn to the two rules at the heart of this procedural puzzle—Federal Rules of Civil Procedure 41(a)(1)(A)(i) and 60(b).

The former allows a plaintiff to dismiss his suit before the defendant answers by filing a notice of dismissal. Fed. R. Civ. P. 41(a)(1)(A)(i). The dismissal is automatic, immediately divesting the district court of subject-matter jurisdiction. *Janssen v. Harris*, 321 F.3d 998, 1000 (10th

Cir. 2003) ("Under Rule 41(a)(1)(i), a plaintiff has an absolute right to dismiss without prejudice and no action is required on the part of the court."). Indeed, as we observed in *Janssen*,

> The [filing of a Rule 41(a)(1)(i) notice] itself closes the file. There is nothing the defendant can do to fan the ashes of that action into life and the court has no role to play. This is a matter of right running to the plaintiff and may not be extinguished or circumscribed by adversary or court. There is not even a perfunctory order of court closing the file. Its alpha and omega was the doing of the plaintiff alone. The effect of the filing of a notice of dismissal pursuant to Rule 41(a)(1)(i) is to leave the parties as though no action had been brought. Once the notice of dismissal has been filed, the district court loses jurisdiction over the dismissed claims and may not address the merits of such claims or issue further orders pertaining to them.

Id. (brackets in original) (quoting *Duke Energy Trading & Mktg., L.L.C. v. Davis*, 267 F.3d 1042, 1049 (9th Cir. 2001)). And the dismissal is without prejudice unless the notice states otherwise or the plaintiff previously dismissed a suit that included the same claim. Fed. R. Civ. P. 41(a)(1)(B).

Rule 60(b), on the other hand, allows the court to "relieve a party . . . from *a final judgment, order, or proceeding*" in certain circumstances. Fed. R. Civ. P. 60(b) (emphasis added). In a case like Mr. Waetzig's, the two rules work

together: The plaintiff can only obtain relief under Rule 60(b) if his voluntary dismissal without prejudice under Rule 41(a) qualifies as "a final judgment, order, or proceeding."

Here, no one asserts that we have a "final judgment"—the court never entered judgment in favor of Mr. Waetzig or Halliburton, adjudicated the merits of Mr. Waetzig's claim, or decided the rights of either party. Nor do we have a "final order"—Mr. Waetzig's dismissal was effective upon filing of the notice of dismissal, so the court did not need to file an *order* of dismissal.

The question then is whether a voluntary dismissal without prejudice is a "final proceeding" that can save it for Rule 60(b) consideration. Surprisingly, what constitutes a final proceeding under Rule 60(b) is an underdeveloped legal issue. Courts and commentators have generally only focused on when a court can grant relief from a final judgment or final order. For example, the pertinent section of *Moore's Federal Practice* is titled, "Rule 60(b) Applies to Final Judgments or Orders Only." 12 James Wm. Moore et al., *Moore's Federal Practice — Civil* § 60.23 (2023). Similarly, *Wright & Miller* begins its discussion of Rule 60 by noting the rule "regulates the procedures by which a party may obtain relief from a final judgment." 11 Charles Alan Wright et al., *Fed Prac. & Proc.* § 2851 (3d ed. Apr. 2023 update). And, of course, Rule 60 itself is titled, "Relief from a Judgment or Order."

And this sparse coverage makes sense. Because when all is said and done in a case--when all is final--a party is burdened by the court, and that burden generally comes

in the form of an order or judgment. In other words, usually no one needs to ponder whether a final proceeding occurs—a final order or final judgment tells us so.

But here, to give life to the language of the rule, we must endeavor to determine when and if we can still have a "final proceeding" where we have no final order or judgment. As always, we start with the text. *See Republic of Ecuador v. For Issuance of a Subpoena Under 28 U.S.C. § 1782(a)*, 735 F.3d 1179, 1183 (10th Cir. 2013) ("As with any exercise in statutory or rule interpretation, we start with the plain language of the text itself."). Rule 60(b) was adopted in 1937 using the phrase "judgment, order, or proceeding" but without the qualifier "final."[3] In 1946, "final" was added to "emphasize[] the character of the judgments, orders or proceedings from which [it] affords relief." Fed. R. Civ. P. 60 advisory committee's note to 1946 amendment. But the Federal Rules did not define the relevant terms.

Contemporary dictionaries provide some help. The Third (1933) and Fourth (1951) editions of *Black's*

3. The advisory committee's note to the 1937 adoption of Federal Rule of Civil Procedure 60 acknowledges that subdivision (b) "is based upon" California Code of Civil Procedure § 473, which at the time allowed a court to "relieve a party . . . from a judgment, order, or other proceeding taken against him." California law provides for "special proceedings," which include "[e]very other remedy" that is not a civil action. Cal. Civ. Proc. §§ 21, 23; *In re Roberts' Est.*, 49 Cal. App. 2d 71, 120 P.2d 933, 936 (Cal. Dist. Ct. App. 1942); *see also* Cal. Civ. Proc. § 1064 ("A judgment in a special proceeding is the final determination of the rights of the parties therein. The definitions of a motion and an order in a civil action are applicable to similar acts in a special proceeding.").

Law Dictionary invoke a "general" definition for "proceeding"—"the form and manner of conducting juridical business before a court or judicial officer; regular and orderly progress in the form of law; including all possible steps in an action from its commencement to the execution of judgment." They also invoke a "more particular" definition—"any application to a court of justice, however made, for aid in the enforcement of rights, for relief, for redress of injuries, for damages, or for any remedial object." The Third and Fourth editions also define "final" as "[d]efinitive; terminating; completed; conclusive; last" and notes that "in jurisprudence" the "word is generally contrasted with 'interlocutory.'"

But our inquiry does not end by simply looking up "final" and "proceeding" in a dictionary. As an older district court case recognized, we cannot read "final proceeding" in isolation. *Hulson v. Atchison, Topeka and Santa Fe Ry. Co.*, 27 F.R.D. 280, 284 (N.D. Ill. 1960). In *Hulson*, the court in considering the matter concluded that a "'final judgment, order, or proceeding' which may be the subject for relief under the provisions of Rule 60 means a judicial determination which has finality." *Id.* It was assuredly not, as at issue there, "a post-trial order attempting to extend time" to file a motion. *Id.* The court applied the *ejusdem generis* [4] canon of construction, concluding that a final proceeding "must be confined to *judicial determinations* similar to the class of words

4. The canon recognizes that when "general words follow an enumeration of two or more things, they apply only to persons or things of the same general kind or class specifically mentioned." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 199 (2012).

specifically described," *i.e.*, final judgments and final orders. *Id.* (emphasis added).

Indeed, "final proceeding" is preceded by two terms—"final judgment" and "final order"—that bear on its meaning (the *noscitur a sociis* canon: a word is known by its neighbors). Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 195 (2012); *In re McDaniel*, 973 F.3d 1083, 1097-98 (10th Cir. 2020) (explaining and applying *noscitur a sociis*); *see also Gooch v. United States*, 297 U.S. 124, 128, 56 S. Ct. 395, 80 L. Ed. 522 (1936) (noting the *ejusdem generis* canon "limits general terms which follow specific ones to matters similar to those specified"). Because "a word is known by the company it keeps," we cannot "ascrib[e] to one word a meaning so broad that it is inconsistent with its accompanying words." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575, 115 S. Ct. 1061, 131 L. Ed. 2d 1 (1995). And as we previously noted, Rule 60's title only mentions judgments and orders. *See* Scalia & Garner, *supra*, at 221 (acknowledging the title is a "permissible indicator[] of meaning"). Accordingly, we look to the meanings of "final judgment" and "final order."

Black's Third Edition defines "judgment" as "[t]he official and authentic decision of a court of justice upon the respective rights and claims of the parties to an action or suit therein litigated and submitted to its determination," and "final judgment" as a judgment that "puts an end to a suit." The Fourth Edition provides the same definition of "judgment" and a similar definition of "final judgment," only adding "or action" to the end.

Black's Third and Fourth editions define "order," relevant here, as "[e]very direction of a court or judge made or entered in writing, and not included in a judgment," and "final order" as an order that "either terminates the action itself, or decides some matter litigated by the parties, or operates to divest some right; or one which completely disposes of the subject-matter and the rights of the parties."

The preceding terms "final judgment" and "final order" illuminate (and narrow) the meaning of "final proceeding." Considering those terms, we are persuaded that *Hulson* got it right in concluding that a final proceeding must involve, at a minimum, a judicial determination with *finality*.[5] As when a court issues an

5. Because we are interpreting a legal term of art, we rely primarily on legal dictionaries. But we note that general dictionaries also support our conclusion. *Webster's New International Dictionary of the English Language* (2d ed. 1950) defines "final" generally as "[c]onclusive; decisive; definitive; as, a *final* judgment." And it also provides an extensive definition of "final" in the law: "Of an order, decision, judgment, decree, or sentence of a court, designating: Usually, one which ends the action or proceeding in the court that makes it, leaving nothing further to be determined by the court, or to be done except the administrative execution of the decision, judgment, etc." It defines "proceeding" generally as "[a]n act, measure or step in a court or business or conduct," and in the law as "[t]he course of procedure in an action at law" and "[a]ny step or act taken in conducting litigation." It defines "judgment" generally as "the opinion or decision given," and in the law as "the determination, decision, decree, or sentence of a court." And *Webster's* defines "order" generally as "a command; mandate; precept; direction," and in the law as, "[i]n its widest sense, any command or direction of a court" and "[u]sually, any direction of a judge or court entered in writing and not included in a judgment or decree."

order or enters a judgment, there must have been some sort of determination. For example, in the voluntary dismissal context, a voluntary dismissal *with prejudice* qualifies as a final judgment because there has been a judicial determination ending a case, even if only a constructive determination. *See Schmier v. McDonald's LLC*, 569 F.3d 1240, 1242 (10th Cir. 2009); *Yesh Music v. Lakewood Church*, 727 F.3d 356, 364 n.1 (5th Cir. 2013) (Jolly, J., dissenting) ("[A] dismissal *with prejudice* is an adjudication on the merits operating as a *final judgment*."). And there must be finality, so the matter has come to an end. And of course, because Rule 60(b) speaks to relief, the proceeding must have ended in a way that burdened the party invoking the rule.

Although we have not previously and precisely defined "final proceeding," similar issues have arisen on occasion. In our circuit, we have two cases that, although not entirely on point, shed some light on the consequences of a Rule 41 dismissal and its interplay with a Rule 60 motion.

In the first case, *Netwig v. Georgia Pacific Corp.*, the plaintiff sued the defendants in the District of Kansas. 375 F.3d 1009, 1009 (10th Cir. 2004). Before the defendants answered, the plaintiff dismissed his suit without prejudice and refiled in the District of Minnesota to avoid Kansas's statute of limitations. The defendants objected to proceeding in Minnesota and asked the court to either dismiss or transfer the case back to Kansas. The court agreed venue was proper in Kansas and transferred the case to Kansas under 28 U.S.C. § 1404(a). In Kansas, the original district court—over the plaintiff's objection—

reinstated the case under Rule 60(b), consolidated the Kansas and Minnesota cases, and dismissed the Kansas case under the statute of limitations and the Minnesota case under res judicata (the dismissal of the Kansas case was the prior decision).

We reversed. We concluded that because the plaintiff's "dismissal was effective upon filing," *id.* at 1011, the Kansas court "lacked jurisdiction to reinstate the Kansas case over [the plaintiff's] objection," *id.* at 1010. Accordingly, the Kansas case reinstatement was "a nullity," so we directed the district court to instead reinstate the Minnesota case. *Id.* at 1011. Although we recognized the plaintiff's argument that his dismissal was a "final proceeding" under Rule 60(b), we did not directly address it. *Id.* at 1010.

The second case is *Schmier v. McDonald's LLC*, 569 F.3d 1240. In that case, the plaintiff sued a McDonald's restaurant for discrimination and retaliation. He then voluntarily dismissed his complaint *with prejudice* under Rule 41(a)(1)(A)(i), thereby invoking the authority of the court. The district court denied his subsequent request to vacate the voluntary dismissal. On appeal, we distinguished *Netwig* because the *Schmier plaintiff* was trying to set aside his voluntary dismissal. "We kn[e]w of no reason to deny jurisdiction to a district court to consider granting a dismissing plaintiff relief under Rule 60(b)," so we "embrace[d] the proposition that a plaintiff who has dismissed his claim by filing notice under Rule 41(a)(1)(A)(i) 'may move before the district court to vacate the notice on any of the grounds specified in Rule 60(b).'" *Id.* at 1243

(quoting 8 Moore, *supra*, § 41.33[6][f]). But we ultimately affirmed because even though the court had jurisdiction, the plaintiff had not qualified for Rule 60(b) relief.[6]

At first glance, *Schmier* may appear to support a favorable outcome for Mr. Waetzig. Importantly, however, that case involved a dismissal *with prejudice*. Indeed, we observed, "*Like other final judgments*, a dismissal *with prejudice* under Rule 41(a)(1)(A)(i) can be set aside or modified under Federal Rule of Civil Procedure 60(b)." *Id.* at 1242 (emphases added). In other words, because the dismissal was with prejudice, it had finality and therefore qualified as a "final judgment" under Rule 60(b). And that meant the district court had jurisdiction to consider the plaintiff's motion to reopen. By contrast, the *Netwig* plaintiff dismissed without prejudice, so we could not fairly consider the dismissal to be a final judgment.[7]

---

6. In an unpublished order and judgment, a panel of this court cited *Schmier* to state that a plaintiff who had voluntarily dismissed his case without prejudice could, "as an alternative to refiling, seek to rectify the situation by moving in the district court for relief from the dismissal under Fed. R. Civ. P. 60(b)." *McKenzie v. AAA Auto Fam. Ins. Co.*, 427 F. App'x 686, 686 n.1 (10th Cir. 2011). But *McKenzie* lacks persuasive value: We made that assertion in a footnote without any substantive analysis of *Netwig, Schmier*, and other relevant authorities.

7. In *Netwig* and *Schmier*, we discussed an Alaska federal district court case that concluded a voluntary dismissal without prejudice is a final proceeding under Rule 60(b): *Noland v. Flohr Metal Fabricators, Inc.*, 104 F.R.D. 83 (D. Alaska 1984). There, after the plaintiff inadvertently dismissed his entire suit—instead of just dismissing one defendant—the court concluded the voluntary dismissal was a final proceeding and granted the plaintiff relief

Other courts have pondered whether a voluntary dismissal qualifies as a final proceeding. Among the circuits, the Fifth Circuit has the most robust consideration of the question. In *Yesh Music v. Lakewood Church*, the court concluded that a voluntary dismissal without prejudice is a final proceeding under Rule 60(b). 727 F.3d at 361-63. There, the plaintiffs sued the defendants in a Texas federal district court, voluntarily dismissed without prejudice, quickly refiled in a New York federal district court, voluntarily dismissed the second suit without prejudice, and then successfully moved to reinstate their Texas suit under Rule 60(b).[8]

The defendants appealed, and the Fifth Circuit affirmed because the first voluntary dismissal without prejudice was a final proceeding. It observed that "[w]hile judgments and orders might imply the involvement of a judicial action, a 'proceeding' does not necessarily require any such action . . . and may be used to describe the entire course of a cause of action or any act or step taken in the cause by either party." *Id.* at 361.

---

under Rule 60(b). *Id.* at 85-88. In *Netwig*, after noting *Noland* was not binding, we distinguished it because the *Noland* plaintiff requested relief, while the *Netwig* plaintiff did not. 375 F.3d at 1010. In *Schmier*, we did the opposite. 569 F.3d at 1243. Because *Noland* did not meaningfully analyze the term "final proceeding," *see* 104 F.R.D. at 85-86, we likewise find it unpersuasive here.

8. The court only considered whether the plaintiffs could use Rule 60(b) to revive the Texas suit without considering whether the New York dismissal—a second dismissal that operated as a dismissal with prejudice—barred their efforts. *See Yesh Music*, 727 F.3d at 364 n.1 (Jolly, J., dissenting).

But Judge Jolly dissented. He believed a voluntary dismissal without prejudice could not be a final proceeding because (1) it was not final (after all, the plaintiffs could, and there did, refile), and (2) it was not a proceeding (simply filing a sheet of paper, as the plaintiffs did with their notice of dismissal, did not qualify). *Id.* at 366-67 (Jolly, J., dissenting). He then went on to distinguish the cases relied upon by the majority, noting that only two of them involved the same type of dismissal at issue and those two only provided sparse analysis. *Id.* at 367-69.

As Judge Jolly observed, other circuits have generally addressed this issue in a perfunctory manner. In *Williams v. Frey*, for example, the Third Circuit stated that the dismissal at issue "was, in [its] view, a proceeding, and it was clearly final," meaning the district court could reopen the case. 551 F.2d 932, 935 (3d Cir. 1977). But the court's analysis of "final proceeding" did not extend beyond its conclusion. And in *Nelson v. Napolitano*, the Seventh Circuit concluded, without determining whether there was a final proceeding, that "there may be instances where a district court may grant relief under Rule 60(b)" for a voluntary dismissal without prejudice. 657 F.3d 586, 589 (7th Cir. 2011). Regardless, it found relief was not warranted there. *Id.* at 589-91.

On the opposite side of the issue lies the Ohio Supreme Court, which considered the question under its analogous state procedural rule. In *Hensley v. Henry*, the plaintiff voluntarily dismissed his suit without prejudice before successfully petitioning the trial court to reopen the

case. 61 Ohio St. 2d 277, 400 N.E.2d 1352, 1353 (Ohio 1980).[9] Assuming the trial court had jurisdiction, the Ohio Supreme Court relied on *Hulson* to conclude that because a dismissal without prejudice is not an adjudication on the merits, it is "not a final judicial determination from which Civ. R. 60(B) [could] afford relief." *Id.* at 1353-54.[10]

Other courts also follow *Hulson*. For example, a Florida bankruptcy court rejected the argument that a sale of patents was a Rule 60(b) final proceeding, because a final judgment, order, or proceeding requires "a judicial determination which has finality." *In re Fulks*, 343 B.R. 701, 707 (Bankr. M.D. Fla. 2006). But there, "[t]he proposed sale was never presented for th[e] Court's consideration,

---

9. The dismissal occurred the morning of trial, which was permitted under Ohio's equivalent of Federal Rule of Civil Procedure 41(a):

> (A)n action may be dismissed by the plaintiff without order of court (a) by filing a notice of dismissal at any time before the commencement of trial * * *. Unless otherwise stated in the notice of dismissal * * * , the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court, an action based on or including the same claim.

Hensley, 400 N.E.2d at 1353 n.2 (quoting Ohio Civ. R. 41(A)). The timing of the dismissal does not impact *Hensley*'s persuasive value here, because like Mr. Waetzig's dismissal, it was done without court involvement and without prejudice.

10. Like Federal Rule 60(b), the Ohio rule allowed a court to "relieve a party or his legal representative from a final judgment, order or proceeding." Ohio Civ. R. 60(B).

no Motion was filed to approve the sale and, of course, no Order was ever entered to approve the sale." *Id.*

C. A Rule 41(a) voluntary dismissal without prejudice is not a final proceeding.

After considering the text of Rule 60(b) and the relevant precedents, we conclude that Mr. Waetzig's voluntary dismissal without prejudice does not qualify as a final proceeding.

Start with a judicial determination—there was none. The dismissal was automatic upon filing the necessary notice, meaning "no action [was] required on the part of the court." *Janssen*, 321 F.3d at 1000. Although there was an administrative closing by the clerk's office, no judicial officer was involved in any way. In short, a judicial officer never did anything, let alone determined anything. And unlike in *Schmier*, there was no final judgment because there was no dismissal with prejudice.

Nor was there the requisite finality. Again, the dismissal in *Schmier* was final because it was with prejudice. The plaintiff could not refile his suit. *See Styskal v. Weld Cnty. Bd. of Cnty. Comm'rs*, 365 F.3d 855, 859 (10th Cir. 2004). But a plaintiff can usually refile after a dismissal without prejudice, even doing so the next day. *See Yesh Music*, 727 F.3d at 358 (noting the plaintiffs refiled the day after voluntarily dismissing their suit without prejudice). Although the dismissal may have brought a particular lawsuit with its own unique case number to a close, the overarching dispute between the parties has not been

resolved. *See id.* at 366 (Jolly, J., dissenting). No rights have been determined. And no one has been *burdened* by court action, a requirement for Rule 60(b) *relief*. By choosing to dismiss without prejudice, the plaintiff is leaving the door open for a future suit. This remains true even if it appears the plaintiff is unlikely to succeed by refiling his suit. A future occurrence—like a change in the law after dismissal—cannot boomerang back in this situation, turning a voluntary dismissal without prejudice into a final judgment, order, or proceeding.[11]

Although we can say the dismissal here was not a final proceeding, it is harder to say what would be a final proceeding that does not culminate in a final judgment or order from which a party may seek relief.[12] Perhaps "final

---

11. The instant and automatic effect of a Rule 41(a)(1)(A)(i) voluntary dismissal without prejudice counsels toward evaluating finality under Rule 60(b) at the moment the plaintiff filed the requisite notice. *See Yesh Music*, 727 F.3d at 367 (Jolly, J., dissenting). Indeed, in this situation it is the plaintiff's *chosen dismissal* that he asks the court to "undo." At the time of the dismissal, Mr. Waetzig's claim had not been resolved through arbitration. And the Supreme Court did not decide *Badgerow* until March 2022, well after the dismissal and after Mr. Waetzig first asked the district court to vacate the dismissal in *September 2021*. True, we have "recognized that a dismissal without prejudice can have the practical effect of a dismissal with prejudice if the statute of limitations has expired." *AdvantEdge Bus. Grp., L.L.C. v. Thomas E. Mestmaker & Assocs., Inc.*, 552 F.3d 1233, 1236 (10th Cir. 2009). But Mr. Waetzig never addressed any statute of limitations issues in his response brief.

12. As part of our inquiry into the appropriate meaning of final proceeding, we deployed corpus linguistics, *i.e.*, we looked at databases containing "real-world language to see how" this term has

proceeding" is a catchall, covering anything that does not result in an order or judgment but still involves a final, burdensome judicial determination.[13] And perhaps we will "know it when [we] see it." *Jacobellis v. Ohio*, 378 U.S. 184, 197, 84 S. Ct. 1676, 12 L. Ed. 2d 793 (1964) (Stewart, J., concurring). But we know that Mr. Waetzig's voluntary dismissal without prejudice is not it.

---

been "used in written or spoken English." *State v. Rasabout*, 2015 UT 72, 356 P.3d 1258, 1275 (Utah 2015) (Lee, A.C.J., concurring in part and in the judgment). But our search yielded no fruit. The Corpus of Historical American English did not return any results for "final proceeding." Using a collocation—looking for instances where "final" is used in proximity with "proceeding—was also unavailing when it came to defining a final proceeding. And although we had a little more luck when it came to results from the BYU Law Corpus of Supreme Court Opinions of the United States, none shed light on the possible meaning of "final proceeding" within Rule 60(b). The lack of helpful results bolsters our conclusion that it will be the rare case when there is a burdensome final proceeding without a judgment or order.

13. One commentator, when analyzing Ohio's analogous procedural rule, suggested a "final proceeding" refers to independent special proceedings that might arise by rule or statute. J. Patrick Browne, *The Finality of an Order Granting a Rule 60(B) Motion for Relief from Judgment: Some Footnotes to* GTE Automatic Electric, Inc. v. Arc Industries, Inc., 26 Clev. State L. Rev. 13, 172 (1977). "Since the Rules are intended to apply to special statutory proceedings to the extent that they are not by their nature clearly inapplicable, it can be argued that the word 'proceeding' has reference to special statutory proceedings." *Id.* (footnote omitted). Another possibility is that the term covers proceedings on "motions," "discovery," "intervention," "and the like." *Id.* at 173. But of course, "Normally, [such] proceedings . . . are concluded by an order." *Id.*

Accordingly, the district court could not entertain Mr. Waetzig's attempt to set aside his dismissal, and it erred in granting him Rule 60(b) relief.

III. Conclusion

For the foregoing reasons, we reverse the district court.

MATHESON, Circuit Judge, dissenting.

Mr. Waetzig filed a notice of dismissal without prejudice under Federal Rule of Civil Procedure 41(a)(1)(A)(i). He later moved to reopen the case and vacate the dismissal under Rule 60(b) so he could challenge the arbitration of his dispute with Halliburton. This appeal asks whether the district court could reopen the case and consider Mr. Waetzig's Rule 60(b) motion. The answer turns on whether Mr. Waetzig's earlier voluntary dismissal was a "final proceeding" under Rule 60(b).

The majority opinion concludes the dismissal was (1) not a proceeding and (2) not final because it was without prejudice when filed. But, (1) as this court has recognized, a Rule 41(a)(1)(A)(i) dismissal is a proceeding, and (2) the dismissal was final when Mr. Waetzig filed his Rule 60(b) motion because he lacked a federal forum due to the arbitration and an intervening Supreme Court decision.

The majority would measure finality when Mr. Waetzig filed his Rule 41(a)(1)(A)(i) motion. But, as explained below, the finality of the dismissal should be assessed when Mr. Waetzig filed the Rule 60(b) motion. Under this view, a court determines the finality of a proceeding under Rule 60(b) at the time it is asked to review that proceeding—not when the proceeding occurred.

As the majority notes, Mr. Waetzig could have refiled his case the day after he voluntarily dismissed it, but the relevant question is whether he could have refiled when he moved for relief under Rule 60(b). He could not, so the dismissal was final. I therefore respectfully dissent.

Appendix A

A. *Rule 60(b) and Rule 41(a)(1)(A)(i), Proceeding, and Finality*

Rule 60(b) states "the court may relieve a party or its legal representative from a final judgment, order, or proceeding." Rule 41(a)(1)(A)(i) provides a plaintiff may dismiss a case without party consent or a court order by filing "a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment." "Unless the notice . . . states otherwise, the dismissal is without prejudice." Fed. R. Civ. P. 41(a)(1)(B).

1. Proceeding

In *Schmier v. McDonald's LLC*, 569 F.3d 1240 (10th Cir. 2009), we considered a Rule 41(a)(1)(A)(i) dismissal to be a Rule 60(b) "proceeding," stating that we "embrace the proposition that a plaintiff who has dismissed his claim by filing notice under Rule 41(a)(1)(A)(i) may [seek relief under Rule 60(b).]" *Id.* at 1243 (quotations omitted). We further held that if the dismissal was with prejudice, it is "final" so a plaintiff may challenge it under Rule 60(b). *Id.* at 1242.[1] The question here, then, is whether Mr.

1. In *Schmier*, the plaintiff filed a Rule 41(a)(1)(A)(i) notice voluntarily dismissing his federal employment discrimination claims with prejudice following a settlement with the defendant. 569 F.3d at 1241. He later sought relief from the voluntary dismissal under Rule 60(b), "complaining about the behavior of [the defendant] with respect to [the] settlement agreement that led to the dismissal." *Id.* Although we determined the plaintiff "ha[d] not shown entitlement to relief under any provision of Rule 60(b)," we recognized the district court could reopen the case under Rule 60(b). *Id.* at 1243.

Waetzig's Rule 41(a)(1)(A)(i) dismissal without prejudice had become "final" when he filed his Rule 60(b) motion.

2. Finality

As a general rule, a plaintiff's voluntary dismissal without prejudice is not "final." *Amazon, Inc. v. Dirt Camp, Inc.*, 273 F.3d 1271, 1275 (10th Cir. 2001). The "critical determination" for finality is whether a plaintiff has been "effectively excluded from federal court under the present circumstances." *Jackson v. Volvo Trucks N. Am., Inc.*, 462 F.3d 1234, 1238 (10th Cir. 2006) (quotations omitted).

A without-prejudice dismissal that is non-final when filed may later become final due to procedural developments. Our analogous cases support this point. For example, we have used this approach to assess whether orders are final for 28 U.S.C. § 1291 appellate jurisdiction. In *Spring Creek Exploration & Production Co., LLC v. Hess Bakken Investment, II, LLC*, 887 F.3d 1003 (10th Cir. 2018), we determined the non-final dismissal without

---

This runs counter to the majority's view that "proceeding" in Rule 60(b) must involve a "judicial determination." Maj. Op. at 9. Consistent with *Schmier*, a plaintiff, without court involvement, may file a Rule 41(a)(1)(A)(i) notice of dismissal with or without prejudice. The majority quotes *Janssen v. Harris*, 321 F.3d 998 (10th Cir. 2003), for the point that "no action is required on the part of the court" for a Rule 41(a)(1)(A)(i) dismissal without prejudice, *id.* at 1000, but the same is true for a with-prejudice voluntary dismissal. Under *Schmier*, the latter is a "proceeding" under Rule 60(b), and the majority's suggestion that it is a "constructive" judicial determination lacks authority. Maj. Op. at 11.

prejudice in that case had become final when we exercised appellate jurisdiction because the dismissed claims were resolved in arbitration during the pendency of the appeal. *Id.* at 1016.[2] "Mindful that finality is to be given a practical rather than a technical construction," we concluded "[w]hatever jurisdictional problems once extant, at [that] juncture we [were] satisfied that all claims between the parties [had] now been finally resolved." *Id.*

Another example arises when a district court dismisses some of the plaintiff's claims with prejudice, the plaintiff dismisses the remaining claims without prejudice, and the plaintiff then attempts to appeal the court's with-prejudice dismissal. A circuit court would generally lack jurisdiction because the district court's decision is not final. *See Eastom v. City of Tulsa*, 783 F.3d 1181, 1184 (10th Cir. 2015). But if later those plaintiff-dismissed claims cannot be reasserted (e.g., the statute of limitations has run on the claims that were dismissed without prejudice), their earlier dismissal without prejudice may be functionally equivalent to a dismissal with prejudice. *See Jackson*, 462 F.3d at 1238. In *Jackson*, we said that "where parties appeal non-final orders, the [district] court's subsequent issuance of an order explicitly adjudicating all remaining

2. In *Spring Creek*, the district court dismissed or granted summary judgment on some but not all of the plaintiff's claims. 887 F.3d at 1013. "Rather than proceed to trial on the [remaining] claims, the parties jointly moved to dismiss the remaining claims without prejudice, as all preferred to arbitrate them instead." *Id.* The plaintiff then appealed the dismissal and summary judgment orders. *Id.* The agreed-upon arbitration took place "[c]ontemporaneous[ly] with the parties' briefing in this court." *Id.*

claims may cause [the] case to ripen for appellate review." *Id.* (quotations omitted).

Other circuits recognize that circumstances may permit a party to seek relief under Rule 60(b) for an earlier voluntary dismissal without prejudice. For example, in *Yesh Music v. Lakewood Church*, 727 F.3d 356 (5th Cir. 2013), the Fifth Circuit said that "the weight of the caselaw . . . supports the conclusion that a dismissal without prejudice can be considered a final proceeding" subject to relief under Rule 60(b). *Id.* at 361.[3] *See also* 8 James William Moore et al., Moore's Federal Practice § 41.33[6][i] (3d ed. 2012) ("The court retains jurisdiction to consider a motion by the plaintiff to vacate a notice of dismissal under Rule 60(b).").

B. Finality of Mr. Waetzig's Dismissal

When the district court granted Mr. Waetzig's Rule 60(b) motion to reopen the case, his voluntary dismissal had become final.

---

3. *See also Nelson v. Napolitano*, 657 F.3d 586, 589 (7th Cir. 2011) (holding a plaintiff's voluntary dismissal without prejudice under Rule 41(a)(1)(A)(i) "does not deprive a district court of jurisdiction for all purposes" and "a district court retains jurisdiction to consider a Rule 60(b) motion following a voluntary dismissal"); *Williams v. Frey*, 551 F.2d 932, 935 (3d Cir. 1977) (holding because Rule 60(b) "speaks of relief from a final 'proceeding'" and a Rule 41 dismissal without prejudice was "a proceeding, and it was clearly final . . . the [district] court had the power to reopen the dismissed suit"), *abrogated on other grounds by Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 108 S. Ct. 2405, 101 L. Ed. 2d 285 (1988).

First, Mr. Waetzig was not "free to file another complaint raising th[e] same claims" as his original complaint because the Age Discrimination in Employment Act claim had been resolved in arbitration. *Cook v. Rocky Mountain Bank Note Co.*, 974 F.2d 147, 148 (10th Cir. 1992); *see also Spring Creek*, 887 F.3d at 1016 (district court's order was final despite voluntary dismissal without prejudice because the dismissed claims "ha[d] been finally resolved in arbitration" and "[we]re not subject to further proceedings in court" (quotations omitted)).

Second, he could not file a separate action challenging the arbitration proceedings under § 10 of the Federal Arbitration Act ("FAA") because, after the arbitration in his case, the Supreme Court decided *Badgerow v. Walters*, 596 U.S. 1, 142 S. Ct. 1310, 212 L. Ed. 2d 355 (2022), which held "[a] federal court may entertain an action brought under the FAA only if the action has an independent jurisdictional basis." *Id.* at 1316 (quotations omitted). The Court also clarified the grounds in the FAA for vacating arbitral awards "do not themselves support federal jurisdiction." *Id.* Mr. Waetzig therefore could not initiate a separate proceeding under the FAA to challenge the arbitration.[4]

---

4. The majority discusses our decision in *Netwig v. Georgia Pacific Corp.*, 375 F.3d 1009 (10th Cir. 2004). There, the plaintiff voluntarily dismissed his case under Rule 41(a)(1)(A)(i) without prejudice. *Id.* at 1010. The defendant sought to reinstate the case under Rule 60(b) over the plaintiff's objection. *Id.* We defined the issue as "whether a court may invoke Rule 60(b) to reinstate a voluntarily dismissed case *over [the] plaintiff's objection*." *Id.* (emphasis added). We said doing so would be improper because "[t]he

In sum, the relevant time to assess finality of the Rule 41(a)(1)(A)(i) dismissal was when the Rule 60(b) motion was filed. When Mr. Waetzig filed his Rule 60(b) motion, (1) the completion of arbitration between Mr. Waetzig and Halliburton and (2) the Supreme Court's intervening decision in *Badgerow* "effectively excluded [him] from federal court," making the Rule 41(a)(1)(A)(i) dismissal a final proceeding under Rule 60(b).[5] *Spring Creek*, 887 F.3d at 1015.[6]

C. *Conclusion*

The district court correctly held that Mr. Waetzig could reopen his case by seeking relief from the voluntary dismissal under Rule 60(b).[7]

---

filing of a Rule 41(a)(1)(i) [dismissal] . . . is a matter of right running to the plaintiff and may not be extinguished or circumscribed by adversary or court." *Id.* at 1011 (quotations omitted) (first alteration in original). Thus, *Netwig* held a defendant cannot use Rule 60 to undermine a plaintiff's right under Rule 41(a)(1)(A)(i) to voluntarily dismiss their claim. *Id.* It did not bear on whether a Rule 41 dismissal without prejudice could be "final."

5. When the district court vacated Mr. Waetzig's voluntary dismissal under Rule 60(b), its federal question jurisdiction derived from Mr. Waetzig's original case. *See* 28 U.S.C. § 1331; App., Vol. I at 9 (Mr. Waetzig's complaint invoking federal question jurisdiction).

6. This court's precedent and the practical effect of procedural developments make it unnecessary to address the majority's textual analysis.

7. I would also affirm the district court's grant of the motion to vacate under Rule 60(b)(6).

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO, FILED AUGUST 3, 2022

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 20-cv-00423-KLM

GARY WAETZIG,

Plaintiff,

v.

HALLIBURTON ENERGY SERVICES, INC.,

Defendant.

August 3, 2022, Decided
August 3, 2022, Filed

Kristen L. Mix, United States Magistrate Judge.

ORDER

ENTERED BY MAGISTRATE JUDGE KRISTEN L. MIX

This matter is before the Court on **Plaintiff's Motion to Reopen and Vacate Arbitration Award Granting Defendant's Motion for Summary Judgment** [#11] (the "Motion"). The portion of the Motion [#11] that sought

to reopen the case was granted by Order [#25] on July 19, 2022. The Court now addresses the portion of the Motion [#11] that seeks to vacate the arbitration award. The Court has reviewed the Motion [#11], the Response [#16], the Reply [#17], the case file, and the applicable law, and is sufficiently advised in the premises. For the reasons set forth below, the Motion [#11] is **granted** as to the request to vacate the arbitration award, and the case is remanded for further proceedings in arbitration. The case is **administratively closed** pursuant to D.C.COLO. LCivR 41.2.

I. Background

Plaintiff Gary Waetzig commenced this action in February 2020. Plaintiff alleged that his termination by Defendant Halliburton Energy Services, Inc. in September 2017 violated the Age Discrimination in Employment Act. *See Compl.* [#1].

In April 2020, the case was voluntarily dismissed by Plaintiff so that the parties could pursue arbitration. On May 28, 2021, the parties were advised that JAMS Arbitrator Florine L. Clark ("Arbitrator Clark") wanted to hold a telephone conference. *See Pl.'s Ex. 12* [#11-2] at 1. The telephone conference was held on Wednesday, June 2, 2021. Plaintiff asserts that "[n]o notice was provided to [ ] counsel regarding the subject matter for the June 2, 2021 telephone conference." *See Kontnik Decl.* [#11-13]. During the telephone conference, Arbitrator Clark told the parties that she wished to conduct a hearing regarding Defendant's Motion for Summary Judgment [#11-8] and

asked the parties to present oral arguments. *Motion* [#11] at 5. The telephone conference lasted 37 minutes, and was not recorded. *Motion* [#11] at 5; *Kontnik Decl.* [#11-13]. At the conclusion of the telephone conference, Arbitrator Clark granted Defendant's Motion for Summary Judgment [#11-8]. *See Order* [#11-1]. As Plaintiff notes, Arbitrator Clark provided no explanation for her ruling. *Motion* [#11] at 7; *see also Order* [#11-1].[1]

Plaintiff seeks to vacate Arbitrator Clark's Order, which Plaintiff contends is an arbitration award, pursuant to 9 U.S.C. § 10 of the Federal Arbitration Act ("FAA"). Plaintiff argues as the basis of its Motion [#11] that Arbitrator Clark exceeded her powers under the arbitration agreement ("Agreement"), prejudiced Plaintiff, and acted in manifest disregard of the law. *Motion* [#11] at 6. Plaintiff additionally argues that "the Arbitrator ignored two other important provisions in the Agreement that render the Award void." *Id.* First, the Agreement required Arbitrator Clark to provide ten calendar days' notice in advance of any hearing. *Id.; see also Agreement* [#11-6] at 17. The telephone conference,

---

1. The full text of Arbitrator Clark's Order Granting Respondent's Motion for Summary Judgment states:

> The undersigned arbitrator has reviewed the pleadings and exhibits in this matter. A hearing was held on June 2, 2021 for the purpose of hearing oral arguments. After reviewing and hearing such arguments, Respondent's Motion for Summary Judgment is GRANTED.

Order [#11-1].

however, was scheduled only three calendar days in advance, not including the federal holiday, and notice was not given that a hearing would be held on Defendant's Motion for Summary Judgment [#11-6]. *Id.; Kontnik Decl.* [#11-13] ¶ 2. Second, the Agreement requires "a record of any hearing on the merits of a dispute." *Motion* [#11] at 8; *Agreement* [#11-6] at 14. Arbitrator Clark failed to have the telephone conference recorded, violating the Agreement. *Id.* Plaintiff argues that the arbitrator's failure to provide proper notice or record the hearing renders the award void. *Motion* [#11] at 7. Plaintiff additionally asserts that Arbitrator Clark's failure to adhere to the parties' Agreement implicates the *functus officio* doctrine,[2] barring her from proceeding further in the case if the arbitration award is vacated. *Id.* at 8.

Defendant argues that Plaintiff's Motion [#11] should be denied on several bases. *Response* [#16] at 1. First, Defendant asserts that Plaintiff failed to timely file and properly serve notice. Second, Defendant asserts that the Agreement provides that arbitration is the exclusive means of resolving the instant dispute. *Id.* at 6-8. Third, Defendant contends that even if this dispute is properly before the Court, Plaintiff conflates the terms "order" and "award," and argues that the Agreement did not require Arbitrator Clark to provide any explanation of the "essential findings of fact and conclusions" in her decision.

2. The doctrine of *functus officio* is a "Latin term for 'task performed'[,]" and is shorthand for the common-law rule that, once an arbitrator has issued a final award and thus discharged his or her office, that arbitrator lacks any continuing power to revise the award or issue a new one." *Kennecott Utah Copper Corp. v. Becker*, 186 F.3d 1261, 1270 n.4 (10th Cir. 1999) (citation omitted).

Id. at 11. Fourth, Defendant argues that Plaintiff conflates the term "conference" with the terms "hearing" and "proceedings," and avers that Arbitrator Clark was not required to issue a written statement, provide ten days' notice, or record the telephone conference. *Id.* at 9. Finally, Defendant argues that the grounds Plaintiff relies on for vacating Arbitrator Clark's Order are not encompassed by Section 10(a) of the FAA. *Id.* at 12.

II. Standard of Review

The Court's review of an arbitrator's decision "is strictly limited; this highly deferential standard has been described 'as among the narrowest known to the law.'" *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 932 (10th Cir. 2001) (quoting *ARW Exploration Co. v. Aguirre*, 45 F.3d 1455, 1462 (10th Cir. 1995)). Courts employ "this limited standard of review and exercise caution in setting aside arbitration awards because one 'purpose behind arbitration agreements is to avoid the expense and delay of court proceedings.'" *Bowen*, 254 F.3d at 932 (quotation omitted). Thus, "[m]indful of the strong federal policy favoring arbitration, a court may grant a motion to vacate an arbitration award only in the limited circumstances provided in § 10 of the FAA . . . or in accordance with a few judicially created exceptions." *Id.*

Section 10 of the FAA identifies four grounds on which an arbitration award may be vacated by a district court:

> (1) where the award was procured by corruption, fraud, or undue means;

> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
>
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or any other misbehavior by which the rights of any party have been prejudiced; or
>
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a).

Acting in manifest disregard of the law is one of the "judicially crafted exception[s] to the general rule that arbitrators' 'erroneous interpretations or applications of law are not reversible.'" *Bowen*, 254 F.3d at 932 (citation omitted). "[M]anifest disregard of the law" is exhibited when an arbitrator demonstrates "willful inattentiveness to the governing law." *DMA Int'l, Inc. v. Qwest Commc'ns Int'l, Inc.*, 585 F.3d 1341, 1344 (10th Cir. 2009) (citation omitted). "An arbitrator's failure to abide by procedural rules when arriving at the arbitral award may [also] support a manifest disregard of the law challenge." *Hosier v. Citigroup Glob. Mkts., Inc.*, 835 F. Supp. 2d 1098, 1105 (D. Colo. 2011).

III. Analysis

A. Whether the Motion is Properly Before the Court

1. Whether the Court Should Resolve the Dispute at Issue

The Court first addresses Defendant's argument that Plaintiff's Motion [#11] is not properly before the Court because the dispute at issue is subject to arbitration under the Agreement. *Response* [#16] at 8. Defendant based this argument on the fact that the Agreement states that any dispute between the parties "shall be finally and conclusively resolved through arbitration under this Plan and the Rules, instead of through trial before a court." *Id.; see Agreement* [#11-6] at 5. Plaintiff argues that the Agreement clearly confers jurisdiction on the federal courts under the Federal Arbitration Act ("FAA"). *See Reply*. [#17] at 4.

The Court agrees with Plaintiff, finding that Plaintiff's Motion [#11] is properly before the Court. As Plaintiff notes, he is not requesting that this Court assume jurisdiction to rule on the merits of Defendant's Motion for Summary Judgment [#11-8] or the underlying dispute, or to conduct further proceedings or a trial. *Reply* [#17] at 4. Instead, Plaintiff is seeking to enforce the terms of the Agreement [#11-6] which confers jurisdiction on the federal courts under the FAA in connection with "any actions to compel, enforce, vacate or confirm proceedings, awards, orders of an arbitrator, or settlements under the

Plan or the Rules." *Id.* at 7. Thus, while the Agreement [#11-6] makes clear that all disputes must be resolved through arbitration instead of through trial, the Court has jurisdiction to "compel, enforce, vacate or confirm" Arbitrator Clark's decision.[3] *Id.* at 7. Enforcing the Agreement directly aligns with the FAA's purpose. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625-26, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985) ("[T]he preeminent concern of Congress in passing the [FAA] was to enforce private agreements into which parties had entered, a concern which requires that we rigorously enforce agreements to arbitrate.") (citation and internal quotation marks omitted).

2. Whether Plaintiff Failed to Properly Serve Notice of the Motion

Defendant also contends that Plaintiff failed to properly serve notice of the Motion [#11] when Plaintiff sent notice via email on September 14, 2021. *Response* [#16] at 6. Defendant notes as to that issue that the FAA requires service be made in the same manner as prescribed by law for service of notice of a motion in the same court. *See* 9 U.S.C. § 12. Fed. R. Civ. P. 5 requires that service may only be effected via electronic means if

3. Defendant argues that arbitration is the "exclusive means" for resolving disputes involving the Agreement, distinguishing "disputes" from other unspecified forms of disagreement. *Response* [#16] at 7-8. The Court finds that the Agreement [#11-6] confers jurisdiction on the federal courts under the FAA to enforce the terms of the Agreement without regard to how the disagreement may be characterized.

the person consenting in writing, and an email to counsel is insufficient without express consent. Defendant notes that "it had not consented to electronic service for this Court proceeding . . . ." *Id.* at 7. This argument is also rejected.

It is true that Rule 5 requires written consent for effecting service of process via electronic means. Fed. R. Civ. P. 5(b)(2)(F); *see also IKON Glob. Mkts. Inc. v. Appert*, No. C11-53RAJ, 2011 U.S. Dist. LEXIS 155108, 2011 WL 9687842, at *2 (W.D. Wash. July 28, 2011) ("No federal rule . . . permits a party to accomplish service by sending an email to a party who has not consented to service by email."). However, Plaintiff's notice was adequate under the terms of the Agreement [#11-6], which expressly states that "the Parties and the arbitrator may . . . use facsimile transmission, e-mail or other written forms of electronic communication to give any notices required by [the] Rules." *Id.* at 16. Parties are "free to structure their arbitration agreements as they see fit." *Volt Information Sciences v. Board of Trustees*, 489 U.S. 468, 479, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989). By consenting to the Agreement, Defendant consented in writing to receive notice via e-mail. *Id.* Thus, the Court finds that Plaintiff's email serving Defendant with notice was not deficient.

B. Whether Arbitrator Clark's Order Constitutes an Award and If So, Whether the Award Should be Vacated

The Court next addresses Defendant's argument that the Order of Arbitrator Clark is not an "award" and that the contractual requirements relied on by Plaintiff

are not applicable. Related to that argument, Defendant asserts that Plaintiff did not timely file the Motion [#11], and thus waived the right to seek to vacate the arbitration order. The Court then turns to Plaintiff's argument on the merits—that Arbitrator Clark exceeded her powers, prejudiced Plaintiff by not following the contractual requirements, and acted in manifest disregard of the law.

1. Whether Arbitrator Clark's Order is an Award and the Related Timeliness of the Motion [#11]

Defendant contends that Arbitrator Clark's decision is an "order" rather than an "award," because the Agreement distinguishes the two terms. *Response* [#16] at 11. As a result, Defendant asserts that the Motion [#11] and notice of the Motion [#11] was untimely under 9 U.S.C. § 12. *Id.* at 6. Plaintiff argues, on the other hand, that Arbitrator Clark's order was an "award" for purposes of the Agreement and the FAA, and that the Motion [#11] was timely under JAMS Rule 24(k) which expands the date that an award is final and thus expands the period to provide notice of a motion . *Reply* [#17] at 2-3. Plaintiff contends, among other things, that "it would be unreasonable, and contrary to established Tenth Circuit precedent, to allow the Arbitrator to circumvent her contractual obligation to issue an explained award because she simply labeled the award an 'order.'" *Id.*

The Court finds that Arbitrator Clark's Order granting Defendant's Motion for Summary Judgment [#11-6] is an "award" within the meaning of the Agreement

[#11-6]. The Court first notes that this is supported by the Scheduling Orders issued in the arbitration proceeding which contemplated only the issuance of an interim and final award. *See, e.g., Scheduling Order* [#11-3] at 5. Arbitrator Clark did not issue a separate interim award, nor did she subsequently issue a final award. For all intents and purposes, the record indicates that Arbitrator Clark's Order was intended to serve as the final resolution of the age discrimination claim, and Defendant does not contend otherwise. Accordingly, it must be deemed an award within the meaning of the Scheduling Orders. The Court further finds that it would be unreasonable to preclude Plaintiff from being able to seek review of the award as contractually permitted simply because it is called an order rather than an award. Defendant's argument would permit the Arbitrator to circumvent her contractual obligations to, among other things, issue an award that "provides a brief statement of the findings of fact and conclusions of law in which the award is based." *Agreement* [#11-6] at 5. The Supreme Court has made clear that the parties "may specify by contract the rules under which the arbitration will be conducted[,]" and courts should "'rigorously enforce' such agreements according to their terms . . . [to] give effect to the contractual rights and expectations of the parties." *Volt*, 489 U.S. at 479.

This finding means that Defendant's argument that the Motion [#11] is untimely must be rejected. Defendant argues in that regard that Plaintiff did not file the Motion [#11] within three months of the Order of June 2, 2021, or by September 2, 2021, as required by 9 U.S.C. § 12, and that he thus waived the right to challenge the Award. *Response*

[#16] at 6. Plaintiff asserts, and the Court agrees, that the Motion [#11] filed on September 13, 2021 was timely in accordance with JAMS Rule 24(k). *Reply* [#17] at 3. The Arbitrator's Scheduling Order [#11-3] specifically states that the parties are subject to an agreement to arbitrate, and that the JAMS Rules apply to the proceeding. *Id.* ¶¶ 4, 5. The Agreement [#11-6] to arbitrate also states that the JAMS rules are applicable. Pl.'s Ex. 6 [#11-6] at 10. JAMS Rule 24(k) [#11-2] states "[t]he Award is considered final, for purposes of . . . a judicial proceeding to enforce, modify or vacate the Award pursuant to Rule 25, fourteen [ ] calendar days after service . . . ." *Id.* at 10. Applying JAMS Rule 24(k), the Award was not finalized until June 16, 2021, extending the three-month limitations period through September 16, 2021. The Motion [#11], filed on September 13, 2022, was thus timely.

2. Whether the Award Should Be Vacated

Plaintiff argues that Arbitrator Clark violated the Agreement and thus exceeded her powers when she failed to provide a "brief statement of the essential findings of fact and conclusions of law on which the award is based." *Id.* at 7; *Agreement* [#11-6] at 17. Plaintiff asserts additionally that Arbitrator Clark violated the JAMS Rules [#11-2] and JAMS Minimum Standards [#11-7], which also state that the Award shall contain "a concise written statement of the reasons for the Award, stating the essential findings and conclusions on which the Award is based." The Scheduling Order specifically stated that the award "shall be prepared in accordance with the Agreement, the FAA and the [JAMS] Rules . . . ." *Motion*

[#11] at 3; *Scheduling Order* [#11-3] at 5.[4] Plaintiff also argues that Arbitrator Clark violated other provisions of the Agreement, including: (1) the provision that notice of any hearing must be given at least ten calendar days in advance; and (2) the provision that required a hearing to be recorded. Plaintiff thus asserts that in addition to exceeding her powers, Arbitrator Clark prejudiced Plaintiff and acted with manifest disregard of the law. *Motion* [#11] at 7-8.

Defendant responds that Arbitrator Clark did not violate the terms of the Agreement and therefore did not exceed her powers. *Response* [#16] at 8. Defendant bases this on the fact that the Agreement distinguishes between "conferences" and "hearings and/or proceedings[,]" and that each type of meeting adheres to different procedural requirements. *Id.* at 9. Defendant asserts that the telephone conference was a "conference" rather than a "hearing" or "proceeding," held to discuss summary determination on Defendant's written motion as permitted by the Agreement. *Id.; see also Agreement* [#11-6]. Defendant also argues that an "award" follows the conclusion of a "proceeding" and not the conclusion of a "conference," *see id.* 17 ¶ 25, suggesting that conferences determine summary disposition while hearings and proceedings determine evidentiary matters. *Response* [#16] at 10. Finally, Defendant asserts that Arbitrator

4. JAMS requires that all arbitration agreements comply with its Minimum Standards, and JAMS will not accept an arbitration matter if the arbitration agreement in question does not comply with its minimum standards. *See Motion* [#11] at 4, Ex. 7 at 2, ¶ B.

Clark was not required to provide ten-day notice of, or a recording of, the telephone conference because those requirements apply only to "hearings." *Id.* at 9.

Turning to the Court's analysis, Defendant is correct that the Agreement [#11-6] distinguishes between "conferences" and "hearings." *See, e.g., id.* at 12-13. Thus, the Agreement [#11-6] provides that an arbitrator may "notice and hold conferences for the discussion and determination of any matter which will expedite the process, including . . . [s]ummary (i.e., prehearing) determination, upon written motion of either Party and after opportunity for response by the nonmoving Party, of legal issues that dispose of the entire Dispute or any aspect of the Dispute." *Id.* at 12-13. The Agreement [#11-6] also provides that conferences and hearings may, in the discretion of the arbitrator, be conducted by telephone or by written submission. *Id.* at 13. The notice and recording provisions of the Agreement [#11-6] apply only to hearings. *Id.* at 12, 14-15.

While the record was unnecessarily muddled as to this issue in the arbitration proceeding, the Court finds that a "hearing" rather than a "conference" was held. Thus, while an email [#11-12] from the case manager informed the parties that the arbitrator wanted to hold a "phone conference[,]" Plaintiff asserts and Defendant does not contest that Arbitrator Clark informed the parties at the beginning of the proceeding, without any prior notice, that she was holding an oral *hearing* on Defendant's Motion for Summary Judgment [#11-8]. *See Motion* [#11] at 5; *Kontnik Decl.* [#11-13] at ¶¶ 2-3. Arbitrator Clark

reinforced this intent by stating in the Order [#11-1] that she held a "hearing on June 2, 2021." Because Arbitrator Clark herself referred consistently to the proceeding as a hearing; the Court finds that the email from a case manager about a "conference" is not controlling.

Because the Court finds that Arbitrator Clark conducted a hearing prior to issuing the Award, the Court now turns to whether she exceeded her powers, prejudiced Plaintiff, or acted in manifest disregard of the law by violating the express terms of the Agreement [#11-6]. Again, the Supreme Court has held that "parties are generally free to structure their arbitration agreement as they see fit." *Volt*, 489 U.S. at 479. The *Volt* Court noted that "[j]ust as they may limit by contract the issues which they will arbitrate, . . . so too may they specify by contract the rules under which the arbitration will be conducted." *Id.* Thus, parties "wish[ing] to avoid the supposedly random chance that the arbitration panel would not show its work" may explicitly "contract[ ] for a fully explained award." *Mid Atl. Cap. Corp. v. Bien*, 956 F.3d 1182, 1196 (10th Cir. 2020). The parties' intentions control, as "an arbitrator derives his or her powers from the parties' [decision] to forgo the legal process and submit their disputes to private dispute resolution." *Stolt-Nielsen S. A.*, 559 U.S. at 682. Thus, the parties have a "right to arbitration according to the terms for which [they] contracted." *W. Emps. Ins. Co. v. Jefferies & Co.*, 958 F.2d 258, 261 (9th Cir. 1992). An arbitrator's award "'cannot be upheld if it is contrary to the express language of the contract.'" *Barnard v. Com. Carriers, Inc.*, 863 F.2d 694, 697 (10th Cir. 1988) (quotation omitted).

Here, Defendant does not dispute that if a hearing was held, the Agreement [#11-6] required Arbitrator Clark to provide a "brief statement of the essential findings and conclusions." *Id.* at 17. This was also required by the JAMS Rules [#11-2] and Minimum Standards [#11-7], as discussed previously. The word "essential" is not defined in the Agreement [#11-6]; thus, the Court must accord the term its "'ordinary meaning.'" *Kan. Penn Gaming, LLC v. HV Props.*, 662 F.3d 1275, 1287 (10th Cir. 2011); *see also Fundamental Admin. Servs., LLC v. Patton*, 504 F. App'x 694, 700 (10th Cir. 2012) (stating that the Court can look to a dictionary to "find the common or ordinary definition of a term"). The term "essential" has been defined as "of the utmost importance: BASIC, INDISPENSABLE, NECESSARY." https://www.merriam-webster.com/dictionary/essential ; *see also* https://www.dictionary.com/browse/essential (defining "essential" as "absolutely necessary; indispensable").

The Court finds that Arbitrator Clark did not include any explanation of the Award; accordingly, she did not make the necessary, indispensable findings as required to conclude that summary judgment should be granted. Arbitrator Clark did not discuss any findings or conclusions supporting her findings, or state why she granted Defendant's Motion. *Award* [#11-1]. Arbitrator Clark also did not make any findings, identify the controlling law, or provide any analysis during the hearing. *Kontnik Decl.* [#11-13] ¶ 4. While the Court recognizes that the Agreement [#11-6] and the arbitration rules only require a "brief" or "concise" statement explaining the reasons for the Award, and not a detailed explanation, *see, e.g.*,

Hale v. Stanley, 571 F. Supp. 3d 872, 2021 WL 5299790, at *7 (S.D. Ohio 2021), here Arbitrator Clark provided no statement explaining the basis for the Award. *Award* [#11-1]. Accordingly, Arbitrator Clark violated the Agreement [#11-6], as well as the JAMS Rules and JAMS Minimum Standards. Her failure to comply with the Agreement [#11-6] means that the award must be vacated because it exceeded the arbitrator's powers. *See, e.g., W. Emps. Ins. Co.* 958 F.2d at 262 ("By failing to provide Western with findings of fact and conclusions of law, the NASD panel clearly failed to arbitrate the dispute according to the terms of the arbitration agreement[,]" and exceeded its authority under 9 U.S.C. § 10(a)). In so doing, Arbitrator Clark acted outside the scope of her contractually delegated authority, thereby exceeding her powers and prejudicing Plaintiff under Section 10 of the FAA. *Cf. Cox v. Dex Media, Inc.*, 2021 U.S. Dist. LEXIS 57933, 2021 WL 1165523, at *10 (D. Colo. Mar. 26, 2021) (finding that the arbitrator stated the essential findings and conclusions where the arbitrator "explained her findings regarding the plaintiff's presentation of a prima facie case, the alleged legitimate, nondiscriminatory reason that the defendant presented for its decision, why the arbitrator concluded that this reason was a pretext for discrimination, and her conclusion from this that the defendant violated the ADEA, and discussed evidence that supported these findings), *aff'd*, .No. 21-1156, 2022 U.S. App. LEXIS 21418, 2022 WL 3079102 (10th Cir. Aug. 3, 2022).

This error was compounded by the fact that notice of the hearing was not given as required by the Agreement [#11-6]. Instead, notice of a conference was provided only

three calendar days before the hearing. More importantly, Plaintiff was not given NO notice that Arbitrator Clark actually intended to have a hearing to determine the merits of the Motion for Summary Judgment [#11-8] until the commencement of the hearing, and thus arguably had no time to prepare. The Court finds that this violation of the Agreement [#11-6] prejudiced Plaintiff within the meaning of 9 U.S.C. § 10(a)(3), and when combined with the failure to have the hearing recorded, exceeded Arbitrator Clark's powers within the meaning of 9 U.S.C. § 10(a)(4).

Accordingly, Plaintiff's Motion [#11] seeking to vacate the Award is **granted**. The case must be remanded for arbitration consistent with the Agreement [#11-6]. The arbitrator must hold a new hearing where adequate notice is given, ensure that the hearing is recorded, and issue an award that provides a brief statement of the essential findings and conclusions as required by the Agreement [#11-6]. The next question is whether the case should be remanded to Arbitrator Clark or to a new arbitrator. Thus, the Court turns to that issue, which is impacted by the *functus officio* doctrine.

C. Whether Arbitrator Clark's Powers are Exhausted Functus Officio

Plaintiff contends that Arbitrator Clark's failure to adhere to the Agreement implicates the *functus officio* doctrine. *Motion* [#11] at 8. The doctrine applies "'when arbitrators have executed their award and declared their decision[;]'" at that point "they are '**functus officio**' [and] have no power or authority to proceed further." *United*

Steelworkers of Am., AFL-CIO-CLC v. Ideal Cement Co., 762 F.2d 837, 842 (10th Cir. 1985) (quotation omitted). Plaintiff further asserts that while there are certain recognized exceptions to the *functus officio* doctrine,[5] no exception applies in this case. According to Plaintiff, the doctrine of *functus officio* will be implicated if the Award is vacated, because Arbitrator Clark will be required to reset the motion for a hearing on Defendant's Motion for Summary Judgment [#11-8], since notice was not properly given in the first instance, reexamine the Award in light of the hearing, and make new findings of fact and conclusions of law, subjecting her subsequent award to additional judicial scrutiny. *Motion* [#11] at 9-12.

The Court finds that the *functus officio* doctrine applies here, as Arbitrator Clark executed an award and declared the decision. Defendant did not contest or even address this issue. While the Court may have been authorized to remand to Arbitrator Clark to correct a mistake if the only error was failure to provide "a brief statement of the essential findings and conclusions[,]" *see Green v. Ameritech Corp.*, 200 F.3d 967, 977 (6th Cir. 2000), the Court finds that this is not possible given the procedural errors in not giving adequate notice of the hearing and not recording the hearing. Accordingly, the Court agrees that the *functus officio* doctrine applies, and a new arbitrator must be selected.

---

5. The three exceptions are "to correct mistakes, complete awards which were not final, and clarify ambiguities." *Id.* at 1271 (citation and internal quotation marks omitted).

IV. Conclusion

Based upon the foregoing,

IT IS HEREBY **ORDERED** that Plaintiff's Motion [#11] is **GRANTED**. Accordingly, the Award in this case is **VACATED**.

IT IS FURTHER **ORDERED** that this case is **REMANDED** to arbitration to be held in accordance with this Order.

IT IS FURTHER **ORDERED** that a new arbitrator must be selected, as Arbitrator Clark is barred from further action on this matter under the doctrine of *functus officio*.

IT IS FURTHER **ORDERED** that this case is **ADMINISTRATIVELY CLOSED** during the pendency of the arbitration, subject to being reopened for good cause pursuant to D.C.COLO.LCivR 41.2. Good cause shall include a request to reopen the case in connection with a motion to vacate, modify, or correct an arbitration award. 9 U.S.C. § 12.

Dated: August 3, 2022

/s/ Kristen L. Mix
Kristen L. Mix
United States Magistrate Judge

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO, FILED JANUARY 19, 2022

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 20-cv-00423-KLM

GARY WAETZIG,

Plaintiff,

v.

HALLIBURTON ENERGY SERVICES, INC.,

Defendant.

ORDER

ENTERED BY MAGISTRATE JUDGE KRISTEN L. MIX

This matter comes before the Court on the **Order to Show Cause** [#18] issued on June 8, 2022, and **Plaintiff's Motion to Reopen and Vacate Arbitration Award Granting Defendant's Motion for Summary Judgment** [#11] ("Plaintiff's Motion"). The Court has reviewed Plaintiff's Response to the Order to Show Cause [#19] and Defendant's Reply [#20], the Motion [#11], the Response [#16] to the Motion and the Reply [#17], the entire case file, and the applicable law, and is sufficiently advised in

the premises. For the reasons set forth below, the Order to Show Cause [#18] is **discharged**.[1] Further, the portion of Plaintiff's Motion [#11] that seeks to reopen the case is **granted**. The portion of Plaintiff's Motion [#11] that seeks to vacate the arbitration award shall be addressed in a subsequent order.

I. Background

Plaintiff Gary Waetzig commenced this action in February 2020. Plaintiff alleged that his termination by Defendant Halliburton Energy Services, Inc. ("Defendant") in September 2017 violated the Age Discrimination in Employment Act. *See Compl.* [#1].

In April 2020, Plaintiff filed a Notice of Voluntary Dismissal without Prejudice [#8], stating that the parties agreed to commence arbitration. *Id.*[2] On April 13, 2020, the Court dismissed the case. *Minute Order* [#9]. The parties proceeded to arbitration, and on June 2, 2021, the arbitrator issued an Order Granting Defendant's Motion for Summary Judgment. *Motion* [#11], Ex. 1.

The instant Motion [#11] was filed on September 13,

1. This case has been referred to the undersigned for all purposes pursuant to D.C.COLO.LCivR 40.1(c) and 28 U.S.C. § 636(c), on consent of the parties. *See* [#23, #24].

2. The Arbitration Agreement at issue states that "[a]ll Disputes not otherwise settled by the Parties hall be finally and conclusively resolved through arbitration under this Plan and the Rules, instead of through trial before a court." *Pl.'s Mot.* [#11], Ex. 6 at 5.

2021. Plaintiff requests in the Motion [#11] that the Court reopen this case for good cause to determine whether the arbitration award should be vacated. Plaintiff also argues that the arbitration award be vacated pursuant to 9 U.S.C. § 10 of the Federal Arbitration Act ("FAA"), on the basis that that Arbitrator Clark exceeded her powers under the Agreement by not stating her essential findings of fact and conclusions of law, prejudiced Plaintiff, and acted in manifest disregard of the law. *Motion* [#11] at 6-7. Neither party addressed in their briefing on Plaintiff's Motion [#11] whether the Court had jurisdiction to consider the Motion given that the case had been voluntarily dismissed by Plaintiff pursuant to Fed. R. Civ. P 41(a)(1)(A)(i).

As the Court must *sua sponte* satisfy itself that it has jurisdiction, *Shaw v. AAA Eng'g & Drafting Inc.*, 138 F. App'x 62, 67 (10th Cir. 2005), the Court raised the jurisdictional issue in its Order to Show Cause [#18]. The Court noted that Plaintiff did not move to stay or administratively close the case, or request that the Court retain jurisdiction to review the arbitration award. Instead, as noted previously, Plaintiff filed a Notice of Dismissal [#8] to dismiss the case without prejudice pursuant to Fed. R. Civ. P 41(a)(1)(A)(i) so that the parties could arbitrate the case, and the case was dismissed.

As the Order to Show Cause [#18] highlighted, "'[a] case that is dismissed is fundamentally different from a case that is closed.'" *Id.* at 3 (quoting *In re Brooks*, No. 17-13033-SAH, 2018 WL 735931, at *2 (W.D. Okla. Feb. 6, 2018)); *see also ATAC Corp. v. Arthur Treacher's, Inc.*, 280 F.3d 1091, 1099 (6th Cir. 2002) (stating that a stay

coupled with closing the case differs from a dismissal order because it "suggests that the district court perceives that it might have more to do than execute the judgment once arbitration has been completed"). A dismissal without prejudice generally means that the plaintiff "may, if appropriate, file a new case addressing the issues raised in his prior dismissed case." *See, e.g., Stine v. Wiley*, No. 06-cv-02105-WYD-KLM, 2010 WL 3516634, at *1 (D. Colo. Aug. 10, 2010). In light of this, Plaintiff was ordered to show cause in writing why the Court should not deny the Motion [#11] to the extent that Plaintiff moves to reopen the case, and require that Plaintiff file a new case to the extent he seeks to vacate the arbitration award.

Plaintiff's Response [#19] to the Order to Show Cause [#18] asserts that the Court has authority to reopen this case under Fed. R. Civ. P. 60(b)(1) and (6) based on a change in intervening law, excusable neglect, and mistake. *See, e.g., id.* Plaintiff further argues that if the Court denies Plaintiff's request to reopen in the Motion [#11] and requires him to file a new case, that case will, because of an intervening change in law, either be dismissed for lack of subject matter jurisdiction or be barred by the statute of limitations. *Id.* Defendant asserts, on the other hand, that there is no basis to reopen the case because the Notice of Dismissal [#8] dismissed the case, leaving the Court without jurisdiction, and there is no valid court order of dismissal to set aside. *Reply to Order to Show Cause* [#20] at 2-3. Defendant also argues that Plaintiff's reasons for reopening the case based on Rule 60(b), including the reliance on the Supreme Court's decision in *Badgerow* as a change in intervening law, are without merit. *Id.* at 3-4.

Appendix C

II. Analysis

A. Whether this Court has Jurisdiction to Reopen the Case

The Court first addresses the Order to Show Cause [#18] and Defendant's argument that the case cannot be reopened because there is no valid court order to set aside. Defendant cites *Lundahl v. Halabi*, 600 F. App'x 596, 603 (10th Cir. 2014), which held that "dismissal is effective at the moment the notice [of dismissal] is filed with the clerk, and an order granting dismissal is superfluous, a nullity, and without procedural effect." Thus, while an Order [#9] dismissing the case was entered in this case in connection with the Notice of Dismissal [#8] ("Notice"), Defendant argues that the Court lost jurisdiction immediately upon the filing of the Notice [#8], and there is no enforceable order that can be vacated. *See Reply* [#20] at 2-3.

The Court acknowledges that "'[t]he [filing of a Rule 41(a)(1)(i) notice] itself closes the file'" and "'the court has no role to play.'" *Janssen v. Harris*, 321 F.3d 998, 1000 (10th Cir. 2003) (quotation omitted). The *Janssen* court further held that."'[t]he effect of the filing of a notice of dismissal pursuant to Rule 41(a)(1)(i) is to leave the parties as though no action had been brought . . . .the district court loses jurisdiction over the dismissed claims and may not address the merits of such claims or issue further orders pertaining to them.'" *Id.* (quotation omitted). *Jansen* would appear to support a finding that the Court does not have jurisdiction to reopen the case.

There is an exception, however, when a plaintiff seeks to reopen a case dismissed with prejudice by notice pursuant to Fed. R. Civ. P. 41(a)(1)((A)(i). In that circumstance, the dismissal with prejudice operates as a final adjudication on the merits, and is thus a final judgment. *Schmier v. McDonalds LLC*, 569 F.3d 1240, 1242 (10th Cir. 2009). The *Schmier* court went on, without further distinguishing between a dismissal with or without prejudice, to "embrace the proposition that a plaintiff who has dismissed his claim by filing notice under Rule 41(a)(1)(A)(i) 'may move before the district court to vacate the notice on any of the grounds specified in Rule 60(b).'" *Id.* at 1243 (quotation omitted); *see also Smith v. Phillips*, 881 F.2d 902, 904 (10th Cir. 1989) (holding that "'[a]n unconditional dismissal [in a case where dismissal was with prejudice] terminates federal jurisdiction except for the limited purpose of reopening and setting aside the judgment of dismissal within the scope allowed by [Rule] 60(b)'") (quotation omitted). The question becomes whether the Tenth Circuit would apply that rationale to a notice of dismissal without prejudice. The Court believes that it would.

As explained in a decision by the Fifth Circuit, the weight of the case law from other circuits that have considered whether a voluntary dismissal of a case without prejudice is a final proceeding within the meaning of Rule 60(b) have found that it is. *Yesh Music v. Lakewood Church* 727 F.3d 356, 361-63 (5th Cir. 2013) (citing, *e.g., Williams v. Frey*, 551 F.2d 932, 934-35 (3rd Cir. 1977); *Nelson v. Napolitano*, 657 F.3d 586, 589 (7th Cir. 2011)). The Fifth Circuit noted, for example, the Third Circuit's decision

on that issue in *Williams* which held that "'[Rule] 60(b) speaks of relief from a final 'proceeding' as well as a final 'judgment' or 'order'. The dismissal of the suit was, in our view, a proceeding, and it was clearly final. In sum, the court had the power to reopen the dismissed suit.'" *Id.* (quoting *Williams*, 551 F.2d at 934-35). The Fifth Circuit also pointed to the fact that, "without distinguishing between voluntary dismissals with and without prejudice, the Ninth Circuit and Tenth Circuit have also broadly found that a voluntary dismissal "is a judgment, order, or proceeding from which Rule 60(b)relief can be granted.'" *Id.* (quoting *In Re Hunter*, 66 F.3d 1002, 1004-05 (9th Cir. 1995) and *Smith*, 881 F.2d at 904). Similarly, the Fifth Circuit noted that the Fourth Circuit, Sixth Circuit, and Supreme Court have all found that when a claim is voluntarily dismissed pursuant to a Rule 41(a)(1)(A)(ii) stipulated dismissal, the court retains the ability to vacate that dismissal under Rule 60(b)(6). *Id.* (citations omitted).[3]

The Fifth Circuit in *Yesh Music*, found, like the Third Circuit, that a voluntary dismissal without prejudice

3. Stipulated dismissals under Rule 41(a)(1)(A)((ii), like unilateral dismissals under Rule 41(a)(1)(A)(i), require no judicial action or approval, are effective automatically upon filing, and are presumptively without prejudice. *Id.* Based on this, the Fifth Circuit stated that "these courts have impliedly determined that a voluntary dismissal without prejudice is a final proceeding subject to vacatur under Rule 60(b)." *Id.* The Court notes that subsequent to the *Yesh Music* ruling, the Eighth Circuit has also, despite prior rulings, found that "our sister circuits have the better of this issue" and "agree[d] with those circuits that have held that a stipulated dismissal constitutes a "judgment" under Rule 60(b). *White v. Nat'l Football League*, 756 F.3d 585, 594-95 (8th Cir. 2014).

under Rule 41(a)(1)(A)(1) was a final proceeding subject to vacatur under Rule 60(b). *Id.,* 727 F.3d at 360. The court explained that "a plain reading of 'final' supports defining it as something which is practically 'finished,' 'closed,' or completed.'" *Id.* Thus, "[u]nless a plaintiff acts to re-file her claim in the future, a Rule 41(a)(1)(A) voluntary dismissal terminates, closes, and ends her cause of action, and it can rightly be considered 'final.'" *Id.* Moreover, the Fifth Circuit explained that voluntary dismissal of a case was a "proceeding" within the meaning of Rule 60(b), noting that "[w]hile judgments and orders might imply the involvement of a judicial action, a 'proceeding' does not necessarily require any such action." *Id.* "Rather, '[t]he term 'proceeding' is indeterminate," and may be used to describe the entire course of a cause of action or any act or step taken in the cause by either party.'" *Id.* (quotation omitted). The Court finds this analysis persuasive and adopts it here.

Consistent with the above cases, and since the Tenth Circuit's decision in *Schmier*, the Tenth Circuit has indicated in an unpublished opinion that a plaintiff who subsequently decides that he should not have dismissed a case without prejudice (pursuant to a notice filed under Rule 41(a)(1)(A)(i)) could, "as an alternative to refiling, seek to rectify the situation by moving the district court for relief from dismissal" under Rule 60(b). *McKenzie v. AAA Triple Auto Family Ins.,* 427 F. App'x 686, 687 n. 1 (10th Cir. 2011). This provides further support for the Court's finding that a notice of dismissal should be construed as a final proceeding which can be vacated pursuant to Rule 60(b).

The Court further finds instructive the Eighth Circuit's analysis in *White v. Nat'l Football League*, 756 F.3d 585 (8th Cir. 2014). The *White* court considered whether a stipulated dismissal under Rule 41(a)(1)(A)(ii) was a "judgment, order, or proceeding" under Rule 60(b). *Id.* at 594-96. A stipulated dismissal, like a dismissal under Rule 41(a)(1)(A)(i), is executed "without any involvement by the court." *Id.* at 595. The court found that a stipulated dismissal was final for purposes of Rule 60(b), stating that "the concerns that underlie Rule 60(b) are equally as present after a stipulated dismissal as they are after a court-ordered end to litigation." *Id.* at 595-96. "The Rule is designed to prevent injustice by allowing a court to set aside the unjust results of litigation." *Id.* In addition, the court stated:

> The Rules give no indication that the drafters were concerned with how those results come about, nor do we see why such a distinction should matter. The Federal Rules "should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed.R.Civ,P. 1; *see also Matter of Am. Precision Vibrator Co.*, 863 F.2d 428, 429 (5th Cir.1989) ("Equitable considerations mandate that we interpret the Federal Rules of Civil Procedure liberally to avoid miscarriages of justice."), and Rule 60(b) in particular "should be liberally construed when substantial justice will thus be served ....

Id.

The same analysis would appear to apply to a notice of dismissal under Rule 41(a)(1)(A)(i). The Court can discern no reason why the concerns that underlie Rule 60(b) would not also apply to a notice of dismissal where equitable concerns have been raised as in this case. Like a stipulated dismissal, a notice of dismissal under Rule 41(a)(1)(A)((i) is executed without any involvement of the court, *see id.,* and a court order is superfluous. *Lundahl*, 600 F. App'x at 603.

Accordingly, the Court finds that it has jurisdiction to consider Plaintiff's request to reopen the case (and vacate the dismissal) pursuant to Rule 60(b). The Order to Show Cause [#18] is thus **discharged**.

B. Whether the Requirements of Rule (60)(b) Are Met

The threshold question regarding jurisdiction does not, however, resolve the issue of whether Plaintiff has met the high burden required to reopen a case under Rule 60(b). *See Servants of Paraclete v. Doe*, 204 F.3d 1005, 1009 (10th Cir. 2000) (stating that while "[a] district court has discretion to grant relief as justice requires under Rule 60(b), . . .such relief is 'extraordinary and nay be granted only in exceptional circumstances'") (quotation omitted). Plaintiff argues that relief is appropriate under Rule 60(b)(1) and (6) based on a change in intervening law, excusable neglect, and mistake. *See Resp. to Order to Show Cause* [#19].

After careful consideration, the Court finds it is appropriate to exercise its discretion to reopen the case

under Rule 60(b)(1) and (6). First, the Court finds that Plaintiff appears to have made a careless mistake when he dismissed the action pursuant to Fec. R. Civ. P. 41(a)(1)(A)(i) without moving to stay or administratively close the case. Plaintiff evidently did not know the significance of this in connection with limiting his ability to reopen the case when he filed the Notice of Dismissal, and believed that the Court retained jurisdiction over the case regarding the arbitration agreement. *See Kontnik Decl,* [#19-2] ¶¶ 2-4. Courts have found that relief may be appropriate under Rule 60(b)(1) "where, as here, a party makes an 'honest mistake'" in dismissing an action under Rule 41. *Haddad v. Trans Digital Techs., Inc*, No. 12–cv–740–RWT, 2013 WL 12246354, at *2 (D. Md. Aug. 8, 2013) (citing *Jolin v. Castro*, 238 F.R.D. 48, 50 (D. Conn. 2006) (reopening a case after a Rule 41(a) dismissal under Rule 60(b) where plaintiff's counsel made an "honest mistake" in misreading a notice from the court)); *see also Marine Office of America Corp. v. Lake River Corp.*, No. 81-C-4291, 1987 WL 16898, at *3 (N.D. Ill. Sep. 8, 1987) (finding that counsel's honest mistake about the meaning and purpose of his stipulation to entry of judgment may justify relief under Rule 60(b), but denying motion on other grounds).

Alternatively, the Court finds that Plaintiff is entitled to relief under Rule 60(b)(6). The Tenth Circuit has described Rule 60(b)(6) "'as a grand reservoir of equitable power to do justice in a particular case.'" *Johnson v. Spencer*, 950 F.3d 680, 700-01 (10th Cir. 2020) (quotation and internal quotation marks omitted). Although "the rule should be liberally construed when substantial justice

will thus be served,' . . . 'relief under Rule 60(b)(6) is extraordinary[,]'" reserved for exceptional circumstances, and may be granted "'only when such action is necessary to accomplish justice.'" *Id.* at 701 (quotations omitted); *see also State Bank v. Gledhill*, 76 F.3d 1070, 1080 (10th Cir. 1996) (quotation omitted). The Tenth Circuit has "sometimes found such extraordinary circumstances to exist when, after entry of judgment, events not contemplated by the moving party render enforcement of the judgment inequitable." *Cashner v. Freedom Stores*, 98 F.3d 572, 579 (10th Cir. 1996). The Court finds that is precisely the situation here. Plaintiff asserts that due to an intervening change in law, if he is required to file a new case it will either be dismissed for lack of subject matter jurisdiction or be barred by the statute of limitations. *Resp. to Order to Show Cause* [#19] at 1-4.

The intervening change in law is based on the Supreme Court's decision in *Badgerow v. Walters*, 142 S. Ct. 1310 (March 31, 2022). *Resp. to Order to Show Cause* [#19] at 1-2. The *Badgerow* decision was issued after the case was terminated, and after Plaintiff filed his Motion to Reopen and Vacate Arbitration Award [#11].[4] The *Badgerow* decision first confirmed that the FAA's authorization of a petition to compel arbitration or to confirm or vacate an arbitration award does not itself create jurisdiction

4. Although the Tenth Circuit had not decided the issue, Plaintiff notes that his decision to seek relief from the arbitration award under the FAA in federal court through his Motion [#11] was consistent with the rule of law in the First, Second, Fourth, and Fifth Circuit Courts of Appeals and the plain wording of the FAA at the time.

for a federal court to resolve the matter, and that there must be an "independent jurisdictional basis." *Id.* at 1314. The Court then stated that it had found as to petitions to compel arbitration under Section 4 of the FAA that the text of Section 4 "instructs a federal court to 'look through' the petition to the 'underlying substantive controversy' between the parties—even though that controversy is not before the court." *Id.* (quoting *Vaden v. Discover Bank,* 556 U.S. 49, 62 (2009)). If the underlying dispute falls within the court's jurisdiction, then the court may rule on the petition to compel regardless of "whether the petition alone could establish the court's jurisdiction." *Id.* The question presented to the Supreme Court in *Badgerow* was whether this look-through approach also applied to Sections 9 and 10 of the FAA relating to petitions to confirm or vacate the arbitration award, as is at issue in this case. Resolving a split amongst the lower courts, the Supreme Court held as a matter of first impression that the "look through" approach did not apply to Sections 9 and 10 of the FAA relating to petitions to confirm or vacate arbitration because they "lack Section 4's distinctive language directing a look-through, on which *Vaden* rested." *Badgerow*, 142 S. Ct. at 1314-15.

The Second Circuit recently explained the ramifications of the holding in *Badgerow*:

> This holding has ramifications when a district court dismisses a case after compelling arbitration because a dismissal will certainly require a district court to find an independent jurisdictional basis whenever a new FAA

> petition arises from the same case. *A stay, however, may enable the court and the parties to sidestep these consequences.*

Bissonnette v. LePage Bakeries Park St., LLC, 33 F.4th 650, 661 (2d Cir. 2022) (emphasis added).

Thus, prior to *Badgerow*, if Plaintiff's request to reopen in the Motion [#11] was denied, Plaintiff may have been able to refile the case or alternatively, request relief under the savings clause of F.R.C.P. 60(d)(1). However, due to the Supreme Court's holding in *Badgerow*, Plaintiff does not now have this recourse because a new action in federal court will deprive this Court of jurisdiction. *See Badgerow*, 142 S. Ct. 1310; *see also Sindar v. Garden*, 284 Fed. Appx. 591, 596 (10th Cir. 2008) (discussing the application of the saving clause). Plaintiff also cannot refile in state court due to the statute of limitations. *See* 9 U.S.C. § 12; *see also Chilcott Entertainment L.L.C. v. John G. Kinnard Co., Inc.*, 10 P.3d 723, 725-27 (Colo. App. 2000) (strictly interpreting the deadline to file under the FAA). Accordingly, unless the Court allows Plaintiff to reopen the case, Plaintiff will, effectively, be deprived of a remedy in connection with his petition to vacate the arbitration award. The Court finds that this constitutes an extraordinary circumstance, and that allowing relief *under* Rule 60(b) is "necessary to accomplish justice." *Johnson*, 950 F.3d at 1300-01. Events not contemplated by Plaintiff after entry of judgment, in this case the Supreme Court's decision in *Badgerow*, "render enforcement of the judgment inequitable." *Id*; *see Yesh Music v. Lakewood Church*, No. 4:11–CV–03095, 2012 WL 2500099, *4-5 (S.D.

Tex. June 27, 2012) (in case where plaintiff voluntarily dismissed the case without prejudice under Rule 41(a)(1)(A)(1), the court found that "the circumstances of this case warrant utilization of this Court's reservoir of equitable power under Rule 60(b)(6) because Plaintiffs mistakenly operated with the understanding that this case would proceed in a different court; "[a]s the parties had come to this agreement, it is appropriate to vacate the voluntary dismissal pursuant to Rule 60(b)(6)as failing to do so would cause a manifest injustice"), *aff'd*, 727 F.3d 356 (5th Cir. 2013)

Further, it appears that Plaintiff did not make a conscious, deliberate choice to dismiss the case in a manner that precluded reopening, but closed it only so the parties could proceed to arbitration. *See Cashner*, 98 F.3d at 580 (holding that "the broad power granted by [Rule 60(b)(6)] is not for the purpose of relieving a party from free, calculated and deliberate choices he has made); *Resp. Order to Show Cause, Ex. 1, Conferral*. Based on the foregoing, Plaintiff's request to reopen the case, which the Court construes as a motion to reopen under Rule 60(b), is **granted**. Court review was a material term of the arbitration agreement, and it is undisputed that Plaintiff contemplated the Court would retain jurisdiction over the arbitration award. *See Resp. Order to Show Cause* [#19] at 3, 8; Ex. 2; *Kontnik Decl,* ¶¶ 2-4. The Court also finds that Defendant would not be unfairly prejudiced if the Court granted relief under Rule 60(b). Reopening the case would be consistent with the arbitration agreement that provides for court review, and Defendant would be left in the same position as contemplated by the parties when the case was dismissed.

Based on the foregoing, Plaintiff's request to reopen the case, which the Court construes as a motion to reopen under Rule 60(b), is **granted**.

IV. Conclusion

In conclusion,

IT IS HEREBY **ORDERED** that the Order to Show Cause is **DISCHARGED**, as the Court has subject matter jurisdiction to consider Plaintiff's request to reopen the case in Plaintiff's Motion [#11].

IT IS FURTHER **ORDERED** that the portion of Plaintiff's Motion [#11] which seeks to reopen the case is **GRANTED** pursuant to Rule 60(b)(1) and Rule 60(b)(6). The Clerk of Court shall **REOPEN** the case.

IT IS FURTHER **ORDERED** that the portion of Plaintiff's Motion [#11] which seeks to vacate the arbitration award is **TAKEN UNDER ADVISEMENT**, to be addressed in a subsequent order.

Dated: July 19, 2022

BY THE COURT

/s/ Kristen L. Mix
Kristen L. Mix
United States Magistrate Judge

APPENDIX D — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, FILED DECEMBER 4, 2023

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 22-1252
(D.C. No. 1:20-CV-00423-KLM)
(D. Colo.)

GARY WAETZIG,

Plaintiff-Appellee,

v.

HALLIBURTON ENERGY SERVICES, INC.,

Defendant-Appellant.

ORDER

Before **TYMKOVICH**, **MATHESON**, and **EID**, Circuit Judges.

Appellee's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied. Judge Matheson voted to grant panel rehearing but did not call for a poll.

Entered for the Court

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