NO. _____

In the Supreme Court of the United States

KOHN LAW GROUP, INC.,
Petitioner,
v.
AUTO PARTS MANUFACTURING MISSISSIPPI INC.,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

DONALD ALAN WINDHAM, JR.
BALCH & BINGHAM, LLC
188 East Capitol Street
Suite 1400
Jackson, MS 39201
601-965-8178

ROBERT E. KOHN
Counsel of Record
KOHN LAW GROUP, INC.
100 Wilshire Boulevard
Suite 700
Santa Monica, CA 90401
310-917-1011
rkohn@kohnlawgroup.com

Counsel for Petitioner

September 27, 2018

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

1. What is the standard for judging allegations of civil contempt of an injunction or other disputed order, as distinct from a consent decree? Is it the same "four corners" standard that governs a claim of contempt for allegedly violating a consent decree – as the First and Second Circuits both have held, and the Fourth and Seventh Circuits essentially agree? *See United States v. Armour & Co.*, 402 U.S. 673, 682 (1971). Or, is the Fifth Circuit correct in holding that a district court is entitled to "flexibility" when interpreting "reasonably understood terms" that are not expressed in the *actual* terms of the order itself, to vindicate the unexpressed purposes of the same judge who rendered the order?

This Court has never squarely extended *Armour* to non-consent orders or explicitly overruled the holding in *McComb v. Jackonville Paper Co.*, 336 U.S. 187 (1949), that "[i]t does not lie in their mouths to say that they have an immunity from civil contempt because the plan or scheme which they adopted was not specifically enjoined." *Id.* at 192. The Federal Circuit, en banc, has held *McComb* remains binding.

2. What is the standard of appellate review of a district court's interpretation of its own non-consent order when imposing civil contempt sanctions?

The Fifth Circuit here performed an "abuse of discretion" review of the applicability of an interpleader discharge and injunction order to the undisputed conduct of the alleged contemnor. Pet. App. 2-3. Other Fifth Circuit decisions, as well as decisions in the Second, Ninth and Federal Circuits, have called this "a question of law" to be reviewed "*de novo*."

3. Can interpleader be allowed, when the allegedly adverse creditor-claimants are asserting different debts allegedly owed by an interpleading plaintiff? If so, does the interpleader remedy protect the debtor-plaintiff from defending or paying independent liabilities that exceed the "stake" it put forward in the action for interpleader?

The Fifth Circuit here held interpleader is proper, even though the creditor-claimants in the action were claiming different debts allegedly owed. *See* Pet. App. 70-71 & n.9. The traditional rule of equity, which remains in the Second, Third and Ninth Circuits, holds that interpleader prevents multiple recoveries only where there are not multiple obligations. The district court nevertheless enforced the interpleader injunction beyond the deposited stake, and the Fifth Circuit affirmed.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The Petitioner is Kohn Law Group, Inc. The Respondent is Auto Parts Manufacturing Mississippi Inc. (or "APMM").

Kohn Law has no parent corporations. No publicly traded company owns 10% or more of the stock of Kohn Law.

APMM is believed to be a wholly-owned subsidiary of Toyota Motor Corporation.

Defendants King Construction of Houston, LLC and Noatex Corporation did not participate in the post-dismissal civil contempt proceedings and were not parties to the subsequent appeal.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION, STATUTES, LEGISLATIVE MATERIALS

RULES

OTHER AUTHORITIES

Kohn Law Group, Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals on May 31, 2018 is reported at 725 Fed. Appx. 305. *See* Pet. App. 1-3. The district court's opinion imposing sanctions against Kohn Law and in favor of Auto Parts Manufacturing Mississippi Inc. (or "APMM") is reported at 258 F. Supp. 3d 740. *See* Pet. App. 4-43. The accompanying Order and Judgment (Pet. App. 44-45) is reproduced in 258 F. Supp. 3d at 840. Two earlier district court opinions about the alleged contempt are at 235 F. Supp. 3d 794 and 2016 WL 7165964; the accompanying order of October 6, 2016 (Pet. App. 49-50) is reproduced in 235 F. Supp. 3d at 804, and the accompanying order of December 7, 2016 (Pet. App. 47-48) is reproduced in 2016 U.S. Dist. LEXIS 170319 *1-2. A previous order, setting an evidentiary hearing on APMM's claim of contempt against Kohn Law, is unreported. Pet. App. 51-52.

The district court's opinion (Pet. App. 82-94) granting APMM the interpleader discharge and injunction order – the order that Kohn Law allegedly violated – was reported at 73 F. Supp. 3d 680. By that order (reproduced in 73 F. Supp. 3d at 687), APMM was "DISCHARGED from the case." Pet. App. 95-96. Three weeks later, the district court also dismissed APMM's interpleader allegations against Kohn Law, under Rule 12(b)(6) of the Fed. R. Civ. P., in an opinion

at 2014 WL 1217766. *See id.* at *5 (ROA.3092).[1] The district court's subsequent order dismissing the case without prejudice, and distributing APMM's registry deposit of $260,410.15 pursuant to a settlement agreement signed by the remaining parties – the Defendants King Construction of Houston, LLC and Noatex Corporation – was unreported. *See* Pet. App. 79-81.

No parties appealed the dismissal of APMM's interpleader allegations against Kohn Law or the subsequent distribution of the registry funds and dismissal of the case. The Fifth Circuit affirmed the discharge and injunction, and dismissed King from the appeal of that order (pursuant to its settlement with Noatex), in a revised opinion at 782 F.3d 186. Pet. App. 54-78. This Court denied a petition for certiorari by Noatex and Kohn Law without opinion. 577 U.S. __, 136 S. Ct. 330.

JURISDICTION OF THIS COURT

This Court has jurisdiction to review the judgment of the United States Court of Appeals by writ of certiorari as provided in 28 U.S.C. § 1254(1). This Petition is timely under Rule 13.1 of this Court's rules, after the denial of Kohn Law's petition for rehearing en banc on June 29, 2018. Pet. App. 97-98. The rehearing petition was timely filed on June 13, 2018, after the Fifth Circuit panel's opinion in May 31, 2018.

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[1] "ROA.___" refers to page ___ of the electronic Record on Appeal of the sanctions in Fifth Circuit case no. 17-60450.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article III, § 1 of the Constitution vests in this Court and the inferior federal courts only "[t]he judicial Power of the United States."

The Fifth Amendment provides that "[n]o person shall * * * be deprived of life, liberty, or property, without due process of law * * *."

The federal interpleader statute descends, with only minor amendments, from the Act of January 20, 1936, Pub. L. No. 74-422, 49 Stat. 1096 [hereinafter the "Interpleader Act"]. As codified now:

> **(a)** The district courts shall have original jurisdiction of any civil action of interpleader or in the nature of interpleader filed by any person * * * having in his or its custody or possession money or property of the value of $500 or more, or having issued a note, bond, certificate, policy of insurance, or other instrument of value or amount of $500 or more, or providing for the delivery or payment or the loan of money or property of such amount or value, or being under any obligation written or unwritten to the amount of $500 or more, if
>
> (1) Two or more adverse claimants, of diverse citizenship * * *, are claiming or may claim to be entitled to such money or property, or to any one or more of the benefits arising by virtue of any note, bond, certificate, policy or other instrument, or arising by virtue of any such obligation; and if (2) the plaintiff has deposited such money or property or has paid the amount

> of or the loan or other value of such instrument or the amount due under such obligation into the registry of the court, there to abide the judgment of the court, * * *, conditioned upon the compliance by the plaintiff with the future order or judgment of the court with respect to the subject matter of the controversy.
>
> **(b)** Such an action may be entertained although the titles or claims of the conflicting claimants do not have a common origin, or are not identical, but are adverse to and independent of one another.

28 U.S.C. § 1335.

> In any civil action of interpleader or in the nature of interpleader under section 1335 of this title, a district court may issue its process for all claimants and enter its order restraining them from instituting or prosecuting any proceeding in any State or United States court affecting the property, instrument or obligation involved in the interpleader action until further order of the court. * * *.
>
> Such district court shall hear and determine the case, and may discharge the plaintiff from further liability, make the injunction permanent, and make all appropriate orders to enforce its judgment.

28 U.S.C. § 2361.

The Mississippi statutes cited by APMM in its original Complaint for Interpleader (*see* Pet. App. 103-108) – as in force on the September 23, 2011 date of the

relevant "Laborer's and Materialman's Lien and Stop Notice" – are reproduced in Pet. App. 99-102. The "Laborer's and Materialman's Lien" law included Miss. Code Ann. §§ 85-7-131 and 85-7-135. The "Stop Notice" law was Miss. Code Ann. § 85-7-181. King had invoked those two distinct remedies, by recording a combined document and mailing it to APMM on September 23, 2011. *See* Exhibit "A" to the original Complaint for Interpleader (ROA.57-92).

STATEMENT OF THE CASE

The sanctions imposed in favor of APMM and against Kohn Law turn upon the meaning of "relating to the interpleader fund," as that phrase was used in the discharge and injunction order and the accompanying opinion of March 3, 2014. Pet. App. 94, 96. King, Noatex and Kohn Law were enjoined "from filing any proceedings against [APMM] relating to the interpleader fund without an order of this Court allowing the same." *Ibid.* Within the four corners of the order and the accompanying opinion, nothing was said about dismissing Kohn Law's previously-filed action in California against APMM to collect debts allegedly owed by APMM to Noatex. Nothing was said about amending the claims in the action, seeking discovery, pursuing summary judgment, or collecting those debts.

There is gloss to the discharge and injunction order, in the Fifth Circuit's opinion affirming it. Pet. App. 54-78. The Fifth Circuit affirmed, even after the district court distributed the registry funds pursuant to the King-Noatex settlement, because "[b]oth claimants sought the amount APMM deposited with the court registry" and "King's claim stemmed directly from its

relationship with Noatex and from work on the same construction project." Pet. App. 70-71. Critically, the Fifth Court also rejected the argument by Noatex and Kohn Law, "that the claimants' debts must be the same." *Id*. at 70 n.9. "Rather," the court of appeals reasoned, " '[a] case of interpleader then arises where the same subject, whether debt, duty *or thing* is claimed.' " *Id*. (quoting the English chancery case of *Glyn v. Duesbury*, 11 Sim. 139, 148 (Ch. 1840); emphasis added). "Here, *the same fund* was claimed by both Noatex and King." *Id*. (emphasis added). King and Noatex were both seeking payment from the same deposit by APMM of funds in the amount of $260,410.15. In doing so, however, each was asserting a different debt allegedly owed by APMM, even though here (as in the *Glyn* case itself) the two debts arose from the same project, and even though the unpaid *amount* of each debt was claimed to be the same.

This case was just like *Glyn*, except for the opposite result. The Vice Chancellor refused interpleader of "the 76*l*. 7*s*. 2*d*." that Mr. Glyn had deposited into registry. *See* 11 Sim. at 144-45, 148-49. The two debts relating to construction of Glyn's new house were not the same – and thus, interpleader was refused – because, even supposing the architect had sued at law and recovered "the whole amount," that would not prevent the plumber's assignee from suing too, and recovering the whole amount of his claim too, "even although the amounts might be the same." *Id.* at 149. In another case like the one here, interpleader was refused in *Bradley v. Kochenash*, 44 F.3d 166, 168-69 (2d Cir. 1995). Here, when the district court decided to allow interpleader, it discharged APMM "from the case" (*see* Pet. App. 94) – not from any particular debt

– and it acknowledged that APMM could owe more than the amount of its $260,410.15 deposit *in* the case. Pet. App. 87-88 & n.3. In fact, APMM itself said the discharge and injunction would not protect APMM from being sued later and separately for its independently claimed debts, if the King-Noatex settlement were to be implemented by distributing the registry funds without adjudicating the two claims. Pet. App. 144, 163. The Fifth Circuit did not disagree, when it affirmed the order "relating to the interpleader fund" anyway. Pet. App. 70-71 & n.9. This Court denied certiorari to review the affirmance. 577 U.S. __, 136 S. Ct. 330.

Kohn Law obtained leave of court in California to file a First Amended Complaint (the "FAC") against APMM on December 3, 2015. The California district court then concluded on February 3, 2016 that APMM's reliance on the discharge and injunction to defeat the amended claims could not be resolved "as a matter of law," and invited summary judgment motions to resolve it. Instead, the district court in Mississippi enforced the injunction by ordering Kohn Law to dismiss its claim for the debt allegedly owed by APMM to Noatex, and fined Kohn Law $373,692.50 for the attorney's fees and expenses incurred by APMM, mostly to defend the claims in California. The Fifth Circuit affirmed. Doing so conflicts with the "four corners" rule in other circuits for civil contempt of non-consent orders and injunctions. *See, e.g., United States v. Saccoccia*, 433 F.3d 19, 28 (1st Cir. 2005). It also conflicts with the rule in other circuits that "where the stakeholder may be independently liable to one or more claimants, interpleader does not shield the stakeholder * * * from liability in excess of the stake." *E.g., Lee v.*

W. Coast Life Ins. Co., 688 F.3d 1004, 1011 (9th Cir. 2012). Kohn Law now petitions for certiorari again.

I. The "Laborer's and Materialman's Lien and Stop Notice"

APMM sued on November 15, 2011 for interpleader of "funds" comprising "the sum of $260,410.15" that King was claiming, in "a Stop Notice" issued "[p]ursuant to Miss. Code Ann. §§85-7-181 and -131." Pet. App. 104, 106-07 (¶¶ V, X, XI). Under the Stop Notice law in § 85-7-181, King had frozen $179,707.40 in APMM's hands, which Noatex had claimed was owed by APMM to Noatex as of September 23, 2011 – the date of King's notice. *See Noatex Corp. v. King Constr., LCC*, 732 F.3d 479, 482 (5th Cir. 2013) (affirming the unconstitutionality of the Stop Notice law to bind the $179,707.40 owed by APMM to Noatex). *But see id.* at 488 (noting "the absence of any determination * * * as to the respective rights of the parties involved—APMM and Noatex—beyond * * * holding that the stop notice procedure invoked by King was unconstitutional"). As an alternative to the Stop Notice law in § 85-7-181 (Pet. App. 100-102), King was claiming on September 23, 2011 the sum of $260,410.15 for "materials and services furnished by [King] to [APMM's] property" – upon an alleged contract between APMM and King itself – under the Laborer's and Materialman's Lien law in § 85-7-131 (Pet. App. 99-100). *See* page 6 of the Laborer's and Materialman's Lien and Stop Notice from King to APMM (ROA.62).

Under those two laws, APMM could owe two sets of invoices, for two different sets of contracts. Section 85-7-135 (Pet. App. 100) provided that a lien under § 85-7-131 "shall exist only * * * when the contract * * * is

made by the owner, or by his agent" – exactly what King was claiming on page 6 of the Laborer's and Materialman's Lien and Stop Notice to APMM. The Fifth Circuit explained that "King was claiming, in the alternative, that it had a direct contractual relationship with APMM, a claim it later dropped." Pet. App. 56 n.1. In contrast, § 85-7-181 provided the stop notice remedy for "subcontractors" by freezing money due a "contractor." *Chic Creations v. Doleac Elec. Co.*, 791 So. 2d 254, 259 (Miss. Ct. App. 2000) (en banc). King eventually dropped its Stop Notice too – thereby, dropping its claim under § 85-7-181 to any money allegedly due Noatex under its own contracts with APMM – after the district court in a consolidated action had declared the Stop Notice law unconstitutional. *See Noatex Corp. v. King Constr., LLC*, 864 F. Supp. 2d 478, 483-91 (N.D. Miss. 2012), *aff'd in relevant part*, 732 F.3d 479 (5th Cir. 2013). King's lawyer wrote a letter, "in compliance with" the declaratory ruling, to drop its Laborer's and Materialman's Lien and Stop Notice entirely. ROA.4953-4954. Instead of asserting the Stop Notice claim under § 85-7-181, King affirmatively denied being a subcontractor of Noatex (as a § 85-7-181 claim would have required), and King argued Noatex itself had no valid contracts with APMM – so no debts were owed to Noatex. *See* pp.10–13, *infra*.

Meanwhile, Kohn Law sued APMM in California on September 18, 2012 to enforce its law firm charging lien against APMM's unpaid debts allegedly owed to Noatex, which King had tried to bind by invoking § 85-7-181. Kohn Law represented Noatex as counsel in the action to declare the Stop Notice law in § 85-7-181 invalid. APMM then filed an amended interpleader

complaint in Mississippi, naming Kohn Law as a co-defendant, and attaching a copy of the California complaint by Kohn Law as Exhibit "A." ROA.2074-2103. The Fifth Circuit affirmed the unconstitutionality of § 85-7-181 on October 10, 2013. *See* 732 F.3d at 484-87. The district court in Mississippi dismissed APMM's interpleader allegations against Kohn Law under Rule 12(b)(6) on March 24, 2014, when Kohn Law was also "**DISMISSED AS A PARTY** to the proceeding." 2014 WL 1217766, *5-6, *8 (ROA.3092-3094, 3096). No party appealed that dismissal.

II. The Discharge and Injunction, and What Followed.

The discharge and injunction "relating to the interpleader fund" allowed APMM's requested interpleader, "* * * concerning the amount of $260,410.15, which APMM contends it owes, thus meeting the $500 amount-in-controversy requirement of § 1335(a)." Pet. App. 87. Noatex and Kohn Law had argued that, "because of the distinct contractual relationships asserted, APMM might owe * * * both sets of unpaid invoices, [which] is $520,820.30." ROA.2590-2591. But the district court allowed interpleader, even though – and partly because – APMM might owe more than its deposit in the case:

> The Court has not yet determined the respective rights of the parties as to the money; the only ruling in this respect to date is that the stop notice procedure invoked by King Construction was unconstitutional. *See Noatex Corp. v. King Constr., LCC*, 732 F.3d 479, 488 (5th Cir. 2013).

Pet. App. 88. Therefore, interpleader was allowed, because "[t]he claimants have independently expressed their claims of entitlement to the money at stake":

> Noatex and Kohn Law Group agree that APMM owes at least the amount in the Court registry but argues that APMM could owe some additional disputed sums to King * * *. The Court finds that this argument * * *, if anything, only highlights the "claims of the conflicting claimants" that are "adverse to and independent of one another," which is obviously expected in an interpleader action. See 28 U.S.C. § 1335(b).

Id. & n.3. Three weeks later, the district court dismissed APMM's interpleader allegations against Kohn Law, when it held "the purported lien will only come into play if Noatex is found to have rights in the fund, which may or may not happen." 2014 WL 1217766, *5 (ROA.3092). The same decision denied King summary judgment, too, citing "several genuine disputes of material fact, including but not limited to the circumstances of the contractual relationship between King Construction and Noatex, that preclude dismissal at this juncture." *Id.* *6 (ROA.3094). "Thus, the second stage of this interpleader action may not be fully adjudicated at summary judgment; the interpleader action must proceed to trial." *Ibid.*

There was no "second stage" adjudication and no trial of the interpleader action. King and Noatex settled their differences. APMM then complained that distributing the registry funds pursuant to the King-Noatex settlement – without such an adjudication – would leave APMM unprotected from being sued by

either of its two creditors. Pet. App. 144. This was so, as APMM argued, because:

> "The stake marks the outer limits of the stakeholder's potential liability where the respective claimants' entitlement to the stake is the sole contested issue; however, where the stakeholder may be independently liable to one or more claimants, interpleader does not shield the stakeholder from tort liability, nor from liability in excess of the stake."

Id. at 159 (quoting *Lee*, 688 F.3d at 1011). Nevertheless, the district court on December 4, 2014 implemented the King-Noatex settlement by dividing the registry funds in accordance with their settlement terms, and the court dismissed the case "WITHOUT PREJUDICE." Pet. App. 80. No party appealed the distribution and dismissal order.

Understanding the subsequent California litigation that Kohn Law was sanctioned for pursuing requires understanding the previous litigation in Mississippi. APMM disputed in Mississippi that APMM had any valid contract with Noatex – and, thus, APMM asserted that Noatex had no claim to the interpleader fund. Pet. App. 115-117; *see also Noatex v. King*, 732 F.3d at 485 n.4 (declining to address the same argument by King). Instead, APMM argued on September 19, 2012 that "the interpleaded funds" could be payment on its direct contract with King, as claimed by King when it invoked the Laborer's and Materialman's Lien law under the § 85-7-131. Pet. App. 112-113 & n.2. Flip-flopping seven months later, APMM alleged in the Amended Complaint for interpleader that King "was a subcontractor of Noatex" – an allegation that King

immediately denied, in an Answer on April 25, 2013. *Compare* Pet. App. 122 (¶ V) *with* Pet. App. 128 (¶ 5). King then moved for summary judgment on May 6, 2013 to establish "its entitlement to the $260,410.15 currently held in the Court's registry," on the basis of King's invoices and billing statement as of September 23, 2011 for $260,410.15 (*see* Pet. App. 139-140) – which the district court denied on March 24, 2014, for several genuine disputes of fact. *See* 2014 WL 1217766, *6 (ROA.3094). Citing *Summerall Elec. Co. v. Church of God*, 25 So. 3d 1090, 1093 (Miss. Ct. App. 2010), the King summary judgment motion argued that APMM's debts to Noatex were "null and void," assertedly because Noatex had no license to enter construction contracts in Mississippi. Pet. App. 133-139. APMM itself had advanced the same assertion, when it disputed having any valid contracts with Noatex. If APMM's contract with Noatex were void, then a Stop Notice claim by King under § 85-7-181 was worthless. *See Summerall*, 25 So. 3d at 1093.

The validity of the APMM-Noatex contracts was never adjudicated. Instead, King and Noatex entered into a settlement agreement that obviated deciding either party's claim or its opponent's dispute of the claim. Without purporting to resolve anyone's claims, King and Noatex agreed to split the registry deposit between themselves. APMM objected to their settlement. *See* Pet. App. 153-156 (summarizing and quoting the agreement). The Fifth Circuit concluded, when it affirmed the discharge and injunction, that "[t]he district court did not—and in light of the settlement agreement, will not—opine on whether, in the absence of the Stop Notice statute, King could have succeeded on its claims in the second stage." Pet. App. 69.

III. The California Action, and the Sanctions Here.

The district court in California allowed Kohn Law to amend its claims against APMM. On December 3, 2015, the court determined:

> Here, all factors weigh heavily in favor of amendment. First, Defendant will suffer no prejudice as evidenced by its Statement of Non-Opposition. Second, Plaintiff wasted almost no time in filing the Motion to Amend after the Court lifted stay and held its status conference on October 5, 2015. Third, amendment is not futile, as Plaintiff seeks to clarify and "update" the Complaint, which was filed prior to the rulings of the Mississippi district court and the Fifth Circuit. Specifically, Plaintiff seeks to include allegations establishing that it does not wish to recover against the interpleader fund but that it instead seeks to recoup debts Defendant purportedly owes to a third party. (Motion to Amend at 2). Among other things, the proposed amendment is designed to avoid a violation of the injunction imposed in the Mississippi interpleader action. Amendment is therefore not futile.

2015 WL 12698430, *1 (ROA.3784-3785). Kohn Law argued in California that the injunction "relating to the interpleader fund" was inapplicable to its amended claims against APMM, under the Ninth Circuit's *Lee* decision and *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 533-35 (1967), as discussed and applied by *Lee* in 688 F.2d at 1010-13. *See* ROA.3427-3445; ROA.3452-3463; ROA.3659-3671. Because of the King-

Noatex settlement, the district court in California on February 3, 2016 found itself unable to rule otherwise, "as a matter of law" under Rule 12(b)(6) – and so the court invited "summary judgment motions" to be filed. 2016 WL 6517085, *6 (ROA.3706).

Only Kohn Law moved for summary judgment (*see* ROA.4833-4853), which APMM opposed by citing "evidence, [which] at a minimum, raises issues of material fact" (ROA.8359). As the California district court had explained, Kohn Law was continuing to pursue APMM's debts to Noatex " 'in the amount of $260,410.15.' " *See* 2016 WL 6517085, *6 (ROA.3705) (quoting FAC ¶ 20). Noatex had contracted to sell APMM tools, supplies and equipment, including installation of some equipment at APMM's factory. As of the date of King's stop notice on September 23, 2011, a sum of $179,707.40 had already become due to Noatex. *See Noatex v. King*, 732 F.3d at 482 (affirming the unconstitutionality of the Stop Notice law in § 85-7-181). In answering the amended complaint in California, "APMM admits that Noatex continued to deliver tools and supplies to APMM after September 23, 2011, pursuant to additional orders from APMM." ROA.3791 (¶ 26). According to written statements of their account, when APMM sued King and Noatex for interpleader on November 15, 2011, Noatex was claiming that APMM owed $221,249.04 on the basis of orders from APMM to Noatex. ROA.4071-4100 (collecting the Noatex invoices through Dec. 12, 2011) and ROA.4109-4112 (statements listing all the Noatex invoices by date). Furthermore, "APMM admits that at a meeting on January 23, 2012, an account was stated between Noatex and APMM in the amount of $313,781.56 owed to Noatex." ROA.3789 (¶ 9).

None of that $313,781.56 that APMM admits having owed to Noatex on January 23, 2012 was for anything (labor or materials) that King allegedly provided. According to uncontradicted deposition testimony by the president of Noatex, the unpaid Noatex invoices had not billed APMM for anything that King claimed to be owed. ROA.3896-3929. During their meeting, APMM and Noatex agreed to additional charges and credits – and none of those charges involved goods or services provided by King, either. ROA.3945. Then, as APMM admitted in California, "APMM made payments to Noatex in February 2012 that reduced the unpaid balance to $260,410.15 on those invoices." ROA.2368 (¶ 10).

Rather than seek summary judgment in California, APMM moved on April 14, 2016 to reopen the Mississippi interpleader case and enforce the injunction against Kohn Law. ROA.3388-3768. In response to this motion, the district court in Mississippi "reviewed the first amended complaint" in the California action against APMM "and the comprehensive, well-reasoned Orders of the United States District Court for the Central District of California in that same case." Pet. App. 52. Having reviewed them, together with "all proceedings heretofore conducted in this Court and the Fifth Circuit," the district court in Mississippi decided to set an evidentiary hearing. *Id*. A day-long hearing was held with dozens of exhibits admitted. Pet. App. 164-183. The court issued a 32-page opinion, the gist of which was its conclusion that "[t]he crux" of the FAC in the California action "is the amount that was frozen by the stop notice, that is, the amount of the interpleader fund." 235 F. Supp. 3d at 801 (ROA.5403). This

analysis was the opposite of the California district court's own interpretation of the pleading in California, *see* 2016 WL 6517085, *6 (ROA.3706), and the opposite of Kohn Law's explicit pleading too. *See* FAC ¶¶ 21.a-b, 27 (ROA.3490-3491, 3493). Disregarding all that, the Mississippi district court concluded that Kohn Law violated the injunction by opposing dismissal of the action in California and proceeding with the litigation of the amended claims as pleaded in the FAC, including the motion for summary judgment. 235 F. Supp. 3d at 799 (ROA.5399); *see* Pet. App. 49-50. Reconsideration was denied by an opinion and order on December 7, 2016. *See* 2016 WL 7165964; Pet. App. 47-48.

In another 32-page opinion on June 14, 2017 – based upon the same conduct by Kohn Law – the court imposed a fine of $373,692.50 for attorney's fees and expenses incurred by APMM, and also ordered that Kohn Law must move to dismiss with prejudice all California claims against APMM upon pain of $100 per day of coercive sanctions. *See* Pet. App. 4-43 and 44-46. In footnote 4 of the sanctions opinion, the district court re-drafted the discharge and injunction opinion's above-quoted discussion of "the money" deposited by APMM and *Noatex v. King* (Pet. App. 88) to now mean "the money frozen by the stop notice." Thus:

> * * * the Fifth Circuit Court of Appeals affirmed the Court's determination that Mississippi's Stop Notice statute was facially unconstitutional due to the lack of procedural safeguards that amounted to a facially unconstitutional deprivation of property without due process. *See Noatex Corp. v. King Constr. of Houston, L.L.C.*, 732 F.3d 479 (5th Cir. 2013). This ruling did not

> include a determination as to any of the rights of the parties to *the money frozen by the stop notice*.

Pet. App. 7 n.4 (emphasis added). The Fifth Circuit affirmed. Pet. App. 1-3.

> The district court did not abuse its discretion in sanctioning Kohn Law. We conclude that Kohn Law violated the district court's injunction, and that injunction was sufficiently clear under our precedent to sustain the civil sanctions;[5] even if the district court's injunction did not "expressly prohibit[ ]"[6] Kohn Law's conduct, though we think it did, we also reject the assertion that this would work a constitutional harm.[7]

Id. at 2-3. In footnote 5 of its opinion, the Fifth Circuit said: "*See, e.g.*, *Am. Airlines, Inc. v. Allied Pilots Ass'n*, 228 F.3d 574, 578 (5th Cir. 2000)." For the quoted language in the body of the opinion – holding that conduct may treated as contempt even if *not* expressly prohibited – footnote 6 cited *Hornbeck Offshore Servs., LLC v. Salazar*, 713 F.3d 787, 792 (5th Cir. 2013). Footnote 7 cited "*Gucci Am., Inc. v. Weixing Li [sic]*, 768 F.3d 122, 143 (2d Cir. 2014) (describing a 'salutary rule' deployed in Second Circuit that any ambiguity in orders forming the basis of contempt must 'redound to the benefit of the person charged with contempt')." *See* Pet. App. 2-3 nn.5-7.

REASONS FOR GRANTING THE PETITION

This Court has not squarely addressed whether the same "four corners" standard for judging alleged contempt of a consent decree also applies to alleged contempt of a non-consent order or injunction. In 1971, the Court held that "the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it." *Armour*, 402 U.S. at 682. In 1994, the Court considered a non-consent injunction in a labor dispute, and held that only "contempts involving discrete, readily ascertainable acts, such as turning over a key or payment of a judgment, properly may be adjudicated through civil proceedings * * *." *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 831-34 (1994). However, the Court has not explicitly overruled its 1949 decision in *McComb* – which also involved a labor injunction – holding that "[i]t does not lie in their mouths to say that they have an immunity from civil contempt because the plan or scheme which they adopted was not specifically enjoined." 336 U.S. at 192.

In a 2011 patent case, the Federal Circuit declared, "we find the Supreme Court's decision in *McComb* binding." *TiVo Inc. v. EchoStar Corp.*, 646 F.3d 869, 887 (Fed. Cir. 2011) (en banc). The Fifth Circuit holds that "a district court is entitled to a degree of flexibility in vindicating its authority against actions that, while not expressly prohibited, nonetheless violate the reasonably understood terms of the order." *Hornbeck*, 713 F.3d at 792. In conflict, other circuits hold "[t]he test is whether the putative contemnor is able to ascertain from the four corners of the order precisely

what acts are forbidden." *See, e.g.*, *Saccoccia*, 433 F.3d at 28.

The circuits are also split concerning whether a discharge under the Interpleader Act can be enforced in such a way as to protect the debtor from independent liabilities in excess of the amount of the deposit required by § 1335(a). The Ninth Circuit in *Lee* held it cannot be enforced in such a way. *See* 688 F.3d at 1011-13. The Second Circuit in *Bradley* held such an order cannot even be granted, under the interpleader provision in Rule 22 of the Fed. R. Civ. P. *See* 44 F.3d at 169. The Third and Seventh Circuits agree, under the Interpleader Act. "Interpleader is designed to prevent multiple recoveries only where there are not multiple obligations[.]" *Bradley*, 44 F.3d at 169 (cited by *Lee*, 688 F.3d at 1013 n.8). Only the Fifth Circuit disagrees. *See* Pet. App. 70-71 & n.9.

Only this Court can resolve these conflicts. Each of them is important and recurring. This case is a sound vehicle in which resolve all three of them at once. The petition for a writ of certiorari should therefore be granted.

I. The Decisions Below Conflict with Other Courts of Appeals

The Fifth Circuit's standard of "flexibility" in the interpretation of a non-consent order, and its approval of contempt enforcement for "reasonably understood terms" that are not expressed in the *actual* terms of the order itself, conflict with other courts of appeals that have held an order cannot form the basis for contempt unless the parties can ascertain from its four corners precisely what acts are forbidden or commanded.

According to the Fifth Circuit's *Hornbeck* precedent, which it applied here (Pet. App. 2-3 & n.6):

> Though the court order must be clear, a court "need not anticipate every action to be taken in response to its order, nor spell out in detail the means in which its order must be effectuated." *Am. Airlines, Inc. v. Allied Pilots Ass'n*, 228 F.3d 574, 578 (5th Cir. 2000). The order must "state its terms specifically; and describe in reasonable detail . . . the act or acts restrained or required," Fed. R. Civ. P. 65(d), but a district court is entitled to a degree of flexibility in vindicating its authority against actions that, while not expressly prohibited, nonetheless violate the reasonably understood terms of the order.

713 F.3d at 792 (ellipses added by *Hornbeck*). Apart from the Federal Circuit's en banc opinion in *TiVo*, only Eleventh Circuit seems to hold anything similar, by holding that " '[i]n determining whether a party is in contempt of a court order, the order is subject to reasonable interpretation … ' " – though, at the same time, the order " ' … may not be expanded beyond the meaning of its terms absent notice and an opportunity to be heard.' " *Ga. Power Co. v. NLRB*, 484 F.3d 1288, 1291 (11th Cir. 2007) (quoting *Riccard v. Prudential Ins. Co.*, 307 F.3d 1277, 1296 (11th Cir. 2002)). In direct conflict, the First, Second, Fourth and Seventh Circuits all have adopted essentially the same "four corners" standard that this Court adopted for alleged violations of consent orders in *Armour*, 402 U.S. at 682. Thus, when civil contempt of a non-consent order is alleged in the First Circuit,

> * * * "the test is whether the putative contemnor is 'able to ascertain from the four corners of the order precisely what acts are forbidden.' " *Goya Foods, Inc. v. Wallack Mgmt. Co.*, 290 F.3d 63, 76 (1st Cir. 2002) (quoting *Gilday v. Dubois*, 124 F.3d 277, 282 (1st Cir. 1997)). The purpose of this "four corners" rule is to assist the potential contemnor by narrowly cabining the circumstances in which contempt may be found. * * * Along the same lines, 'we must read any ambiguities or omissions in . . . a court order as redounding to the benefit of the person charged with contempt.' *NBA Properties[, Inc. v. Gold]*, 895 F.2d [30,] 32 [(1st Cir. 1990)] * * *.
>
> Finally, if the "clear and unambiguous" test is to have any content, it cannot be applied in the abstract. The question is not whether the order is clearly worded as a general matter; instead, the "clear and unambiguous" prong requires that the words of the court's order have clearly and unambiguously forbidden *the precise conduct on which the contempt allegation is based*. *See Perez v. Danbury Hosp.*, 347 F.3d 419, 424 (2d Cir. 2003) (rejecting district court's finding that an order was clear and unambiguous where the district court "appeared to rule in a vacuum and failed to evaluate whether the order was 'clear and unambiguous' with reference to the conduct in question").

Saccoccia, 433 F.3d at 28. "Thus," in the Second Circuit too, "unless the parties can 'ascertain from the four corners of the order precisely what acts are forbidden,' the order cannot form the basis for

contempt." *Gucci Am., Inc. v. Bank of China*, 768 F.3d 122, 143 (2d Cir. 2014) (quoting *King v. Allied Vision, Ltd.*, 65 F.3d 1051, 1058 (2d Cir. 1995); internal quotation marks omitted). The rule is no different in the Fourth and Seventh Circuits, where "[c]ivil contempt is an appropriate sanction if we can point to an order of this Court which 'sets forth in specific detail an unequivocal command' which a party has violated." *In re G.M. Corp.*, 61 F.3d 256, 258 (4th Cir. 1995) (quoting *Ferrell v. Pierce*, 785 F.2d 1372, 1378 (7th Cir. 1986)); *accord Stotler & Co. v. Able*, 870 F.2d 1158, 1163 (7th Cir. 1989) (quoting the same holding in *Ferrell*). The Fifth Circuit's decision here conflicts with those cases, because nothing within the four corners of the discharge and injunction commanded Kohn Law to dismiss the pending California action or prohibited Kohn Law from opposing dismissal of the action, amending the complaint in California, suing APMM for liabilities allegedly owed solely to Noatex, seeking discovery, or pursuing summary judgment – the precise acts for which the district court in Mississippi imposed contempt sanctions.

The "abuse of discretion" standard of appellate review that the Fifth Circuit applied here (Pet. App. 2-3) and in some of its other cases also conflicts with decisions in the Second, Ninth and Federal Circuits. "The district court's underlying factual determinations are reviewed for clear error, but questions of law, including interpretation of the order, are reviewed de novo." *U.S. Polo Ass'n v. PRL USA Holdings, Inc.*, 789 F.3d 29, 33 (2d Cir. 2015) (citing *Latino Officers Ass'n v. City of New York*, 558 F.3d 159, 164 (2d Cir. 2009)). "The interpretation of an injunction and its application to undisputed facts is, however, a question of law

subject to *de novo* review." *United States v. Washington*, 761 F.2d 1419, 1421 (9th Cir. 1985) (citing *Vertex Distrib., Inc. v. Falcon Foam Plastics, Inc.*, 689 F.2d 885, 892 (9th Cir. 1982)). "As with any other legal instrument, interpretation of the terms of an injunction is a question of law we review de novo." *Abbott Labs. v. TorPharm, Inc.*, 503 F.3d 1372, 1382 (Fed. Cir. 2007) (citing *Laitram Corp. v. NEC Corp.*, 115 F.3d 947, 951 (Fed. Cir. 1997)). Here, there were no disputed facts, since the litigation conduct of Kohn Law in the California action was all subject to judicial notice and undisputed. By reviewing the contempt determination under an abuse of discretion standard instead of *de novo*, the Fifth Circuit's affirmance conflicts with those other circuit decisions, for the same reason why "as a matter of law" the California district court was unable to resolve the issue in APMM's favor. *See* 2016 WL 6517085, *6 (ROA.3706).

No less importantly, the Fifth Circuit's affirmance of the discharge and injunction order itself "relating to the interpleader fund" and the subsequent civil sanctions enforcing the order – including the directive to dismiss the California claims against APMM with prejudice – also conflict with decisions of the Second, Third, Seventh and Ninth Circuits, which have held that "[i]nterpleader is designed to prevent multiple recoveries only where there are not multiple obligations[.]" *Bradley*, 44 F.3d at 169; *see also Wash. Elec. Co-op., Inc. v. Paterson, Walke & Pratt, P.C.*, 985 F.2d 677, 680 (2d Cir. 1993) (applying the same rule); *U.S. Fire Ins. Co. v. Asbestospray, Inc.*, 182 F.3d 201, 211 (3d Cir. 1999); *John Hancock Mut. Life Ins. Co. v. Beardslee*, 216 F.2d 457, 460-61 (7th Cir. 1954); *Lee*, 688 F.3d at 1011. The Ninth Circuit in *Lee* refused to

enforce such an order in a way that *would* protect the plaintiff beyond the "stake" itself. *See* 688 F.3d at 1011-13. The Mississippi district court's enforcement, and the Fifth Circuit's affirmance of that enforcement, conflict directly with *Lee*.

II. The Decisions Below Are Incorrect in Ways that Are Important and Recurring.

The district court held that Kohn Law "violated the Court's permanent injunction by pursuing the California district court case against APMM, including filing a first amended complaint, engaging in discovery, and filing a motion for summary judgment." Pet. App. 24-25. There is no factual dispute that Kohn Law did indeed file its FAC and did indeed argue its motion for summary judgment, based on the discovery. But, there was nothing within the four corners of the discharge and injunction on March 3, 2014 that even mentioned the pending action in California – much less, prohibited Kohn Law from filing an amended complaint, pursuing a motion for summary judgment, or seeking to recover the debts allegedly owed independently by APMM to Noatex after distribution of the registry funds and dismissal of the interpleader case on December 4, 2014. The decisions below are erroneous, in three important ways.

A. The courts below erred by looking beyond the four corners of the discharge and injunction.

Except for *McComb*, this Court has adopted standards for contempt "as a protection against the arbitrary exercise of official power." *See Bloom v. Illinois*, 391 U.S. 194, 202 (1968). The flexibility of

McComb and circuit-level cases like *TiVo*, *Hornbeck* and *American Airlines* – and this case – leads to arbitrary results, because judges may reasonably disagree about how to apply it. In *Hornbeck*, two federal judges agreed that a contempt had occurred, and two other federal judges disagreed. *See* 713 F.3d at 796 (Elrod, J., dissenting from the reversal of contempt). In *TiVo*, five appellate judges disagreed with the finding of contempt of the "disablement" provision in the injunction – partly, because they viewed reliance on *McComb* as "untenable." *See* 646 F.3d at 894-95 (Dyk, J., dissenting from the affirmance of contempt). Arbitrariness also plagued the contempt decision here. The California district court allowed Kohn Law to amend its complaint against APMM, because "[a]mong other things, the proposed amendment is designed to avoid a violation of the injunction imposed in the Mississippi interpleader action." 2015 WL 12698430, *1 (ROA.3784-3785). Dismissal of the action against APMM was unwarranted, despite the discharge and injunction, "because the Mississippi action resulted in a settlement, not a determination as to which party was entitled to the funds." 2016 WL 6517085, *6 (ROA.3706). The Mississippi district court described those California orders as "comprehensive, well reasoned[,]" when setting the evidentiary hearing. Pet. App. 52. Thereafter, however, it disregarded them – and the Fifth Circuit disregarded them, too.

That was arbitrary, and it conflicts with this Court's decisions before and after *McComb*. The district court's discharge and injunction and the Fifth Circuit's affirmance specifically held that interpleader was proper even though – indeed, partly because – the

claims to "the fund" by King and Noatex were different and independent of one another. Pet. App. 88 & n.3; Pet. App. 69-70 & n.9. APMM's interpleader allegations against Kohn Law were even dismissed, after the district court held "the purported lien will only come into play if Noatex is found to have rights in the fund, which may or may not happen." 2014 WL 1217766, *5 (ROA.3092). Then to hold Kohn Law in *contempt* of the discharge and injunction, by holding the claimants were always asserting the same debts after all – *i.e.*, the debts allegedly owed by APMM to Noatex that King had once tried to bind with its Stop Notice under § 85-7-181 (*see* 235 F. Supp. 3d at 801 (ROA.5403); Pet. App. 7 n.4) – can only be described as arbitrary.

Civil contempt is a "potent weapon," *Int'l Longshoremen's Ass'n v. Phila. Marine Trade Ass'n*, 389 U.S. 64, 76 (1967), that is inappropriate if "there is a fair ground of doubt as to the wrongfulness of the defendant's conduct," *Cal. Artificial Stone Paving Co. v. Molitor*, 113 U.S. 609, 618 (1885). Therefore, except for "direct" contempts occurring in the district court's physical presence, in *Bagwell* the Court held that only "contempts involving discrete, readily ascertainable acts, such as turning over a key or payment of a judgment, properly may be adjudicated through civil proceedings * * *." *See* 512 U.S. at 833-34. Any other rule would be "out of accord with our usual notions of fairness and separation of powers." *Id.* at 840 (Scalia, J., concurring). This is partly because, when judging a contempt requires "elaborate and reliable factfinding," the same judge who issued the injunction cannot (and need not) be trusted to do the judging. *See id.* at 833-34.

> Such contempts do not obstruct the court's ability to adjudicate the proceedings before it, and the risk of erroneous deprivation from the lack of a neutral factfinder may be substantial.

Id. at 834 (citing *Green v. United States*, 356 U.S. 165, 214-15 (1958) (Black, J., dissenting)). Here, the district court's contempt proceeding from April 14, 2016 to June 14, 2017 was elaborate. But, unless the four corners of the injunction explicitly command or prohibit the precise conduct alleged to constitute the violation, there is no contempt. *See Armour*, 402 U.S. at 682; *Saccoccia*, 433 F.3d at 28. The contempt sanctions are incorrect, because the four corners of the discharge and injunction relating to the interpleader fund said nothing relating to the California action.

B. The court of appeals erred by not interpreting the discharge and injunction *de novo*.

Only review *de novo* is consistent with an appellate court's institutional role when, as here, the facts are undisputed and resolving a charge of contempt turns upon interpreting the terms of the district court's order or injunction. *See Salve Regina College v. Russell*, 499 U.S. 225, 231-33 (1991) (discussing an appellate court's "institutional advantages" in giving legal guidance). Furthermore, plenary review on appeal is essential to check a district court's departure from the requirement that only "explicit and precise" commands can be enforced by civil contempt. *See McComb*, 336 U.S. at 195 (Frankfurter, J., dissenting). This is because, "[u]nlike most areas of law, where a legislature defines both the sanctionable conduct and the penalty to be imposed, civil contempt proceedings leave the offended

judge solely responsible for identifying, prosecuting, adjudicating, and sanctioning the contumacious conduct." *Bagwell*, 512 U.S. at 831. *De novo* review is necessary to shift the ultimate responsibility away from the offended district judge.

In contrast with the *de novo* standard in the Second, Ninth and Federal Circuits (*see* pp.20–25, *supra*), the Fourth and Sixth Circuits hold that appellate review is "even *more* deferential because district courts are in the best position to interpret their own orders." *See JTH Tax, Inc. v. H & R Block E. Tax Servs. Inc.*, 359 F.3d 699, 705 (4th Cir. 2004) (emphasis added). According to this view, a district court is "obviously" better able interpret its own order. *See Satyam Computer Servs. v. Venture Global Eng'g, LLC*, 323 Fed. Appx. 421, 430 (6th Cir. April 9, 2009) (quoting *Zevitz v. Zevitz (In re Zevitz)*, 2000 U.S. App. LEXIS 25283, at *4 (6th Cir. Sept. 28, 2000)). The Fifth Circuit adopted the same view in *Ala. Nursing Home Ass'n v. Harris*, 617 F.2d 385 (5th Cir. 1980), saying "[g]reat deference is due the interpretation placed on the terms of an injunctive order by the court who issued and must enforce it." *Id.* at 388. On the other hand, the Fifth Circuit's own *Hornbeck* decision held " 'the interpretation of the scope of the injunctive order[ ] is a question of law to be determined by the independent judgment of this Court.' " 713 F.3d at 792 (quoting *Drummond Co. v. Dist. 20, United Mine Workers*, 598 F.2d 381, 385 (5th Cir. 1979); brackets added by *Hornbeck*); *see also Test Masters Educ. Servs. v. Robin Singh Educ. Servs.*, 799 F.3d 437, 452 (5th Cir. 2015) (the same, quoting *Hornbeck*). In short, the circuits are split (and the Fifth Circuit itself is split),

three different ways. This Court's review is needed to resolve the splits.

C. Under the law of interpleader, the decisions below mis-interpret the discharge and injunction "relating to the interpleader fund."

The discharge and injunction "relating to the interpleader" can only be understood in relation the law of interpleader. *Tashire* holds "the mere existence of such a fund cannot, by use of interpleader, be employed to accomplish purposes that exceed the needs of orderly contest with respect to the fund." 386 U.S. at 534. "There is not a word in the legislative history suggesting such a purpose." *Id.* at 535 n.17 (citing S. Rep. No. 558, 74th Cong., 1st Sess. (April 15, 1935)). That holding was the basis for the Ninth Circuit's conclusion that "interpleader does not shield the stakeholder ... from liability in excess of the stake." *Lee*, 688 F.3d at 1011 (citing *Tashire*). Under § 1335 and *Tashire*, distributing the interpleader fund pursuant to the King-Noatex settlement (as the court ordered on December 4, 2014) meant that the injunction does not protect APMM from defending or paying its independent liabilities in excess of the fund. This is so, because of the distinct contractual relationships asserted by King and by Noatex. APMM might owe some or all of both sets of unpaid invoices, possibly amounting to $520,820.30, not just a single deposit of $260,410.15.

Jurisdiction under § 1335(a) (as currently codified) is defined by the deposit. When Congress conferred that jurisdiction in the Interpleader Act, it "heavily depended" upon work by Zechariah Chafee, Jr. *See*

Tashire, 386 U.S. at 535 n.17. Chafee's article Modernizing Interpleader, 30 Yale L.J. 814 (1921) (cited in *Tashire*, 386 U.S. at 533 n.15) was "the principal monograph" leading to the act. *See* Hazard & Moskovitz, An Historical and Critical Analysis of Interpleader, 52 Calif. L. Rev. 706, 707 n.7 (1964). As Chafee viewed it: " 'The office of an interpleader suit … is not to protect a party against a *double liability*, but against double vexation in respect of *one* liability.' " 30 Yale L.J. at 818-20 (quoting *Crawford v. Fisher*, 1 Hare 436, 441 (Ch. 1842)). Chafee criticized *Glyn* for proposing that, "[w]here the claims made by the defendants are of different amounts, they can never be identical," as required for interpleader. *See* 11 Sim. at 148 (discussed in 30 Yale L.J. at 824). But he never questioned the inverse proposition – and *Glyn*'s traditional holding – that "[t]he amount may be the same, and the debt may be different," which precluded interpleader of "the 76*l*. 7*s*. 2*d*." or "[t]he money." *See* 11 Sim. at 144-45, 148-49. Chafee and the Congress, therefore, never intended plaintiffs would be able to "limit their total financial exposure to the value of the stake" (*see Lee*, 688 F.3d at 1013), when their alleged debts could amount to more. They never even considered interpleader relief would reach beyond the deposit itself.

Instead, Congress expected a court would only "make the injunction permanent" after a second stage to "determine the case" (28 U.S.C. § 2361) – a determination that did not happen here. So APMM was correct, when it objected to the settlement distribution of the deposit. Pet. App. 144, 157-63. No such determination occurred when the Fifth Circuit construed the injunction as "permanent," even though

"[t]he district court did not explicitly term its order a 'permanent' or 'preliminary' injunction." Pet. App. 63. With no such determination, the injunction does not protect APMM from defending (or paying) its independent liabilities.

Contrary to the Fifth Circuit's affirmance of the discharge and injunction, the word "interpleader" in the federal Interpleader Act means the traditional remedy for a plaintiff "subjected to *conflicting* claims by two or more persons growing out of *a single obligation* previously incurred." S. Rep. No. 558, *supra* at 2 (emphases added). Under Article III, this Court has held that only Congress, and not the courts themselves, may expand the equity powers of the federal courts. *See Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 333 (1999). Traditionally, claims were not "the fit subject of a bill of interpleader," if the plaintiff "by contract with either [of the claimants] have made himself liable in any event to either." J. Story, *Equity Pleadings*, § 293 at 289 & n.(*a*) (10th. ed. 1892) (citing American cases). The Second, Third, Seventh and Ninth Circuits all adhere to that equitable view. *See* pp.20–25, *supra*. The Fifth Circuit's erroneous departure from equity when it affirmed the discharge and injunction here explains – indeed, it dictated – the California district court's conclusion that APMM was not protected by the discharge and injunction "as a matter of law." This was because "the FAC clearly alleges that the money Plaintiff seeks to recover was not interpleaded and never paid to Noatex" – which was (and still is) legally plausible, despite the discharge and injunction "relating to the interpleader fund" (Pet. App. 94, 96) – because the district court in Mississippi had

acknowledged APMM could owe more than $260,410.15 as contended by APMM (Pet. App. 87-88 & n.3), and "because the Mississippi action resulted in a settlement, not a determination as to which party was entitled to the funds." *See* 2016 WL 6517085, *6 (ROA.3706).

III. These Questions Are Important and Squarely Raised by This Case

This case squarely presents the continued vitality of *McComb* for this Court's review – unlike *TiVo*, which settled without reaching this Court. *See TiVo Inc. v. EchoStar Corp.*, 429 Fed. Appx. 975 (Fed. Cir. May 10, 2011) (refusing to vacate the en banc opinion, post-settlement). The *Bagwell* standard for finding indirect civil contempt of an injunction, the four corners rule in other circuits, the non-viability of *McComb*, and the *de novo* standard of appellate review were all briefed in the appeal of the contempt sanctions. They are questions of recurring importance – as demonstrated by the persistent splits of circuit authority. This case squarely raises them for review, regardless of the "unpublished" status of the Fifth Circuit's opinion affirming the sanctions order, because the same splits exist in the published cases – including the ones cited in footnotes 5-7 of the affirmance (Pet. App. 2-3) and *TiVo*. The Court reviews unpublished and published opinions. *See, e.g.*, *Lamps Plus, Inc. v. Varela*, __ U.S. __, 138 S. Ct. 1697 (2018); *Martinez v. Illinois*, 572 U.S. 804, __-__, 134 S. Ct. 2070, 2076-77 (2014); *Holland v. Jackson*, 542 U.S. 649, 655 (2004).

APMM urged the Fifth Circuit that "any issue about coercive sanctions is moot." *See* Appellee's Brief at 1 (citing *In re Hunt*, 754 F.2d 1290 (5th Cir 1985)). The

fine of $373,692.50 is certainly not moot. The coercive sanction that compelled Kohn Law to dismiss the California action is not moot, because, the parties continue to "have a concrete interest" in Kohn Law's quest for reversal. *See Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (citation and quotation marks omitted). If the sanctions were reversed, then Kohn Law could seek relief from the dismissal in California. *See* Fed. R. Civ. P. 60(b)(5) (authorizing relief, if "the judgment … is based on an earlier judgment that has been reversed or vacated"). That is a concrete interest, potentially worth up to $260,410.15 (plus interest) if the California district court were to rule that Noatex is owed any money on its disputed APMM contracts. Also, Kohn Law could recover $2,100 of coercive fines that it paid into the Mississippi registry on July 6, 2017. See Docket No. 368 in the interpleader action. That is a concrete interest, too.

The interpleader question is also recurring and important. The *Tashire* rule and its implementation by the Ninth Circuit in *Lee* as a limitation on the enforcement of an interpleader order were briefed in the appeal of the contempt sanctions. Additionally, this Court can consider and decide whether interpleader was properly allowed in the first place – when King and Noatex/Kohn Law were not asserting the same debts – or properly affirmed, despite the previous denial of certiorari. An order denying certiorari reflects no decision on the merits by this Court. Thus, whether the discharge and injunction order was improper can be raised here and decided now – if this Petition is granted now – because "[a] petition for writ of certiorari can expose the entire case to review." *Christianson v. Colt Indus. Operating Corp.*,

486 U.S. 800, 817-18 (1988) (citing *Panama R. Co. v. Napier Shipping Co.*, 166 U.S. 280, 283-84 (1897)). When an injunction is held to be improper, an award of civil contempt sanctions for allegedly violating the injunction is also improper. *Worden v. Searls*, 121 U.S. 14, 25-26 (1887). The interpleader issue entire raises a recurring question about the nature and extent of interpleader protection, which this Court has not addressed since *Tashire* in 1967.

> If a procedural rule such as the one of interpleader had to answer only for a typical case, most discussions of the rule, and certainly this one, would be exercises. Yet life heaves up atypical situations, and from them stem atypical cases about which something has to be done. The issue then is not whether the rule is adequate for ordinary cases, but whether it is supple enough and precise enough to afford fair guidance for disposition of the extraordinary case.

Hazard & Moskovitz, *supra*, 52 Calif. L. Rev. at 707. At the same time, "[t]he remedy of interpleader should, of course, be a simple, speedy, efficient and economical remedy." *Hunter v. Fed. Life Ins. Co.*, 111 F.2d 551, 557 (8th Cir. 1940). Here, it was not. If this case shows anything, the lower courts need this Court's guidance now.

CONCLUSION

A writ of certiorari should issue.

Respectfully submitted,

DONALD ALAN WINDHAM, JR.
BALCH & BINGHAM, LLC
188 East Capitol Street
Suite 1400
Jackson, MS 39201
601-965-8178

ROBERT E. KOHN
Counsel of Record
KOHN LAW GROUP, INC.
100 Wilshire Boulevard
Suite 700
Santa Monica, CA 90401
310-917-1011
rkohn@kohnlawgroup.com

Counsel for Petitioner

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