

APPENDIX

APPENDIX

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APPENDIX A

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 17-60450

[Filed May 31, 2018]

AUTO PARTS MANUFACTURING)
MISSISSIPPI, INCORPORATED,)
)
Plaintiff – Appellee)
)
v.)
)
KOHN LAW GROUP, INCORPORATED,)
)
Defendant – Appellant)

Appeal from the United States District Court
for the Northern District of Mississippi
USDC No. 1:11-CV-251

Before HIGGINBOTHAM, SOUTHWICK, and COSTA,
Circuit Judges.

PER CURIAM:*

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

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In this case, Kohn Law Group, Inc. (“Kohn Law”) challenges the district court’s determination that it violated an injunction against pursuing actions related to an interpleader fund and the district court’s subsequent decision to impose civil sanctions on that basis.

A finding for civil contempt for the violation of an injunction requires the contemnor to have violated “a definite and specific order of the court requiring him to perform or refrain from performing a particular act or acts with knowledge of the court’s order.”¹ We review a district court’s decision to impose civil contempt on that basis for abuse of discretion.² The district court’s finding that the contemnor violated an order must be supported by “clear and convincing evidence,”³ but we accept particular factual determinations as true unless they are clearly erroneous.⁴

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

¹ *Travelhost, Inc. v. Blandford*, 68 F.3d 958, 961 (5th Cir. 1995) (quoting *SEC v. First Fin. Grp. of Tex., Inc.*, 659 F.2d 660, 669 (5th Cir. 1981)).

² See *Hornbeck Offshore Servs., LLC v. Salazar*, 713 F.3d 787, 792 (5th Cir. 2013).

³ *Id.*

⁴ See *id.*

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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 Kohn Law’s other arguments against the imposition of civil sanctions are similarly lacking in merit.

We affirm the district court’s imposition of civil sanctions.

⁵ See, e.g., *Am. Airlines, Inc. v. Allied Pilots Ass’n*, 228 F.3d 574, 578 (5th Cir. 2000).

⁶ *Hornbeck*, 713 F.3d at 792.

⁷ See *Gucci Am., Inc. v. Weixing Li*, 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”).

APPENDIX B

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
ABERDEEN DIVISION**

CIVIL ACTION NO. 1:11-cv-00251-GHD-SAA

[Filed June 14, 2017]

AUTO PARTS MANUFACTURING)
MISSISSIPPI INC., a Mississippi)
corporation)
PLAINTIFF)
)
v.)
)
KING CONSTRUCTION OF)
HOUSTON, LLC, a Mississippi)
limited liability company; NOATEX)
CORPORATION, a California)
corporation; and KOHN LAW)
GROUP, INC., a California)
corporation)
DEFENDANTS)

MEMORANDUM OPINION

Presently before the Court is Movant Auto Parts Manufacturing Mississippi, Inc. (“APMM”)’s¹ motion for

¹ The Court notes that Auto Parts Manufacturing Mississippi Inc. was terminated as a party plaintiff in this cause on March 3, 2014.

the imposition of coercive and compensatory sanctions [328] against Respondent Kohn Law Group, Inc. (“Kohn Law Group”).² Kohn Law Group has filed a response, and APMM has filed a reply. In addition, before the Court is Kohn Law Group’s motion for a stay pending appeal of any compulsory or coercive sanctions that may be ordered [346]. APMM has filed a response to that motion, and Kohn Law Group has filed a reply. Both of these motions are ripe for review. Upon due consideration, the Court is ready to rule.

I. Factual and Procedural History

Although this complex interpleader action has been closed by reason of settlement since October 20, 2014, the Court finds it necessary to set forth the factual and procedural background.³

APMM entered into a contract with Noatex Corporation (“Noatex”) for Noatex to construct an auto parts manufacturing facility in Guntown, Lee County, Mississippi, near Toyota Motor Manufacturing, Mississippi, Inc. in Blue Springs, Mississippi. Noatex subcontracted with King Construction of Houston, LLC (“King Construction”), a Mississippi limited liability company, to provide some materials and labor for the construction.

² The Court notes that Kohn Law Group, Inc. was terminated as a party defendant in this cause on March 24, 2014.

³ To a great extent, the genesis of this complex litigation arose from a fee dispute between the current Respondent and its original client, Noatex Corporation.

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In the case *sub judice*, Noatex alleged that APMM owed it money for goods and services that Noatex provided to APMM under the contract. Noatex questioned some of the invoices submitted to it by King Construction pertaining to the subcontract work. In response to this billing dispute between Noatex and King Construction, King Construction notified APMM on September 23, 2011, pursuant to Mississippi's "Stop Notice" Statute, Mississippi Code § 85-7-181, that Noatex owed King Construction \$260,410.15 and that King Construction was filing a "Laborer's and Materialman's Lien and Stop Notice" in the Chancery Court of Lee County, Mississippi. The stop notice bound the disputed funds in APMM's hands to secure invoice claims that Noatex allegedly owed to King Construction. *See* MISS. CODE ANN. § 85-7-181 ("[T]he amount that may be due . . . shall be bound in the hands of such owner for the payment in full . . ."). King Construction's filing of the stop notice in the *lis pendens* record of the chancery court had the effect of establishing King Construction's lien priority over the property that was the subject of the dispute. *See id.* § 85-7-197. APMM later deposited the \$260,410.15 in the registry of the Chancery Court of Lee County.

The dispute resulted in three lawsuits, one of which was the case *sub judice*.⁴ APMM originally filed this

⁴ The other two lawsuits were a declaratory judgment action and breach of contract action. Noatex filed the declaratory action (No. 3:11-cv-00137) against King Construction and its principal Carl King, challenging the facial constitutionality and constitutionality-as-applied of the Stop Notice statute. The State of Mississippi intervened to defend the constitutionality of its statute. United States Magistrate Judge S. Allan Alexander issued a declaratory

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action in the Chancery Court of Lee County to determine ownership of the disputed funds subject to King Construction's stop notice, naming both Noatex and King Construction as defendants. In December of 2011, Noatex removed this action to this Court. APMM deposited the money into the Court registry and filed an amended complaint in interpleader [135] naming Kohn Law Group as an additional defendant. APMM then filed a motion to discharge itself as a disinterested stakeholder in the action.

On March 3, 2014, this Court entered an Order [236] and memorandum opinion [237], finding that the action was a 28 U.S.C. § 1335 interpleader in which three parties claimed entitlement to the fund: King Construction on one side and Noatex and Kohn Law Group on the other side. The Court discharged APMM as a disinterested stakeholder in the interpleader action and ordered that King Construction, Noatex,

judgment in favor of Noatex, concluding that Mississippi Code § 85-7-181 violated due process and that King Construction's stop notice thus had no effect on the funds APMM had deposited in the Court's registry. On appeal, *inter alia*, 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.

In the other suit (No. 3:11-cv-00152), Noatex sued King Construction for breach of contract in this Court claiming damages in excess of \$500,000, but that action was dismissed when this Court granted Noatex's motion to voluntarily dismiss its breach of contract action without prejudice.

and Kohn Law Group were “enjoined from filing any proceedings against APMM relating to the interpleader fund without an order of this Court allowing the same.” *See* Ct.’s Order Granting APMM’s Mot. Dismiss or Discharge Pl. [236] at 1.

While the interpleader action was pending, on September 18, 2012, Kohn Law Group commenced the California district court case on the basis of diversity jurisdiction, seeking recovery pursuant to Section 9607(a) and subdivision (3) of the California Commercial Code and characterizing Kohn Law Group as a creditor, Noatex as a debtor, and APMM as the account debtor that allegedly owed Noatex the amount at stake in the interpleader action. This Court notes that in the hearing on APMM’s motion to enforce permanent injunction in the case *sub judice*, this Court took judicial notice of, *inter alia*, all filings in the California district court case.

The California district court stated in its Order dated December 11, 2012:

Practically speaking, Kohn [Law Group]’s Complaint asks this Court to short-circuit the ongoing Mississippi interpleader action as to this \$260,410.15 and award the funds to Kohn [Law Group]. APMM’s Motion asks this Court to dismiss (or alternatively to stay) Kohn [Law Group]’s attempt to do so. The Court declines to dismiss the action but will enter a stay . . . until the Mississippi interpleader action is resolved.

. . .

To the extent Noatex is entitled to the \$260,410.15, Kohn [Law Group] properly may

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litigate this lawsuit to collect that amount from APMM. However, given the ongoing Mississippi interpleader action, at this stage the Court will not interject itself to adjudicate the question at the heart of that action – i.e., whether Noatex is entitled to the \$260,410.15. A stay of these proceedings in favor of the ongoing Mississippi interpleader action therefore is appropriate. Significantly, if Kohn [Law Group] is joined as a party, the Mississippi court may award Kohn [Law Group] the \$260,410.15 as part of the interpleader action. Alternatively, if Kohn [Law Group] is correct, and APMM cannot maintain the interpleader action, then the stay soon may be lifted.

Ct.'s Order [23 in No. 2:12-cv-08063-MWF-MRW] at 3-4, 5. At that time, unquestionably, Kohn Law Group sought recovery related to the interpleader. However, at that time, this Court had not yet entered its permanent injunction.

This Court entered that permanent injunction on March 3, 2014 in its Order discharging APMM as a plaintiff in the interpleader. The Court specifically permanently enjoined “[King Construction, Noatex, and Kohn Law Group] from filing any proceedings against APMM relating to the interpleader fund without an order of this Court allowing the same.” *See* Ct.'s Order Granting APMM's Mot. Dismiss or Discharge Pl. [236] at 1. The validity of this Court's permanent injunction was upheld by the Fifth Circuit Court of Appeals in the published opinion *Auto Parts Manufacturing Mississippi, Inc. v. King Construction of Houston, L.L.C.*, 782 F.3d 186 (5th Cir.), *cert. denied sub nom.*

Noatex Corp. v. Auto Parts Manufacturing Mississippi Inc., 136 S. Ct. 330, 193 L. Ed. 2d 230 (2015).

In the case *sub judice*, Defendants Noatex and Kohn Law Group filed motions to dismiss Kohn Law Group, and this Court granted those motions insofar as the same requested the dismissal of Kohn Law Group as a claimant to the interpleader fund, finding that APMM failed to plead facts that would plausibly show an existing conflict between Kohn Law Group and any other claimant. The Court noted in its memorandum opinion [244] relative to the same that Kohn Law Group had already brought the action in the United States District Court for the Central District of California to enforce its asserted lien against Noatex in the event that this Court found that Noatex had rights in the interpleader fund. Subsequently, the parties entered into an agreement to settle the dispute. Under the terms of the settlement agreement, which is made part of the public record of the case *sub judice*, see Settlement Agreement & Mutual Release [263-1], the interpleader fund was disbursed as follows: not less than \$109,750 to King Construction and not less than \$150,660.15 to Noatex with any additional funds in the registry to be distributed equally between King Construction and Noatex. *See id.* at 6 ¶¶ 2-3.

Despite the fact that this Court entered its permanent injunction on March 3, 2014, Kohn Law Group continued to pursue the California district court case against APMM. On December 3, 2015—one year and nine months after the permanent injunction went into effect—Kohn Law Group filed its first amended complaint in the California district court case. *See* No. 2:12-cv-08063-MWF-MRW Docket Sheet [328-1] at 3;

Kohn Law Grp.'s First Am. Compl. [66 in No. 2:12-cv-08063-MWF-MRW]. After APMM filed a motion to dismiss the first amended complaint in that case, Kohn Law Group filed an opposition to the same. *See* No. 2:12-cv-08063-MWF-MRW Docket Sheet [328-1] at 4. Subsequently, the parties engaged in discovery. *See id.*

On April 14, 2016, in the case *sub judice*, APMM filed a motion to reopen this case and enforce this Court's permanent injunction [282].

In the California district court case, on April 26, 2016, Kohn Law Group filed an *ex parte* application for a temporary restraining order [93], requesting that the California district court enjoin APMM from filing "duplicative litigation" in Mississippi. The California district court subsequently entered an Order stating that the issue of whether Kohn Law Group's first amended complaint in the California district court case violated said permanent injunction was for this Court to decide, particularly because this Court can enforce its permanent injunction and prohibit Kohn Law Group from prosecuting this action. *See* Ct.'s Order Denying Kohn Law Group's *Ex Parte* Applic. TRO [96 in No. 2:12-cv-08063-MWF-MRW] at 3.

In the case *sub judice*, on June 23, 2016, the Court entered an Order [289] granting APMM's motion to reopen case and placing the case upon the Court's active trial docket to ascertain whether Kohn Law Group had violated the terms of this Court's permanent injunction.

In the California district court case, on July 11, 2016, Kohn Law Group filed a motion for summary judgment wherein Kohn Law Group requested

summary judgment and the entry of judgment in its favor in the amount of the interpleader, \$260,410.15. *See* No. 2:12-cv-08063-MWF-MRW Docket Sheet [328-1] at 7; Kohn Law Grp.'s Mot. Summ. J. [107 in No. 2:12-cv-08063-MWF-MRW] at 2.⁵

In the case *sub judice*, the Court held an evidentiary hearing on APM's motion to enforce permanent injunction on August 23, 2016, and allowed post-hearing briefing on the motion. On October 6, 2016, the Court entered an Order [320] and memorandum opinion [321] granting APM's motion for enforcement of the permanent injunction [282], finding that Kohn Law Group had violated this Court's permanent injunction by continuing to pursue litigation against APM in the United States District Court for the Central District of California in the case styled *Kohn Law Group Inc. v. Auto Parts Manufacturing Mississippi Inc., et al.*, No. 2:12-cv-08063-MWF-MRW (C.D. Calif. 2012). This Court held that Kohn Law Group was in civil contempt, but could purge itself of contempt by ceasing and desisting pursuit of the aforementioned case by filing a motion to dismiss with prejudice all claims in the California district court. The Court withheld the matter of imposition of sanctions for thirty days following the date of the Order and

⁵ The allegations in Kohn Law Group's first amended complaint evidencing civil contempt through violation of this Court's permanent injunction and the arguments by Kohn Law Group in its motion for summary judgment that evidence civil contempt through violation of this Court's permanent injunction are set forth on pages 11-15 of this Court's memorandum opinion [321] granting APM's motion for enforcement of permanent injunction. That analysis is incorporated by reference herein.

memorandum opinion. Subsequently, on December 12, 2016, APMM filed the present motion for the imposition of coercive and compensatory sanctions against Kohn Law Group [328], which, as mentioned above, the parties have fully briefed.

In the California district court case, on January 20, 2017, Kohn Law Group filed a 20-page opposition to APMM's motion to stay that case; in its opposition, Kohn Law Group requested that the California district court rule on Kohn Law Group's motion for summary judgment "without further delay." *See* Kohn Law Grp.'s Opp'n to APMM's *Ex Parte* App. Stay Case Pending Dismissal [131 in No. 2:12-cv-08063-MWF-MRW] at 8, 18. The California district court then entered an Order staying the action until this Court ruled on the issue of civil contempt sanctions. *See* Ct.'s Order Staying Action Pending Final Merits Decision in Miss. Action [133 in No. 2:12-cv-08063-MWF-MRW].

In the case *sub judice*, on February 3, 2017, Kohn Law Group filed a motion to stay pending appeal of any compulsory or coercive sanctions that may be ordered [346], which the parties have also fully briefed.

With the foregoing factual and procedural background in mind, the Court sets forth a background of the pertinent law.

II. Background of the Pertinent Law

As the Court has stated in prior opinions in the case *sub judice*, interpleader offers a procedural protection for the stakeholder willing to deposit the amount into the court registry from the expenses and risks of defending the action; the idea is that the stakeholder gives up the money and allows those among whom the

dispute really exists to fight it out at their own expense, and in turn, the stakeholder is shielded from the liability of defending multiple possible lawsuits. *See Tittle v. Enron Corp.*, 463 F.3d 410, 423 (5th Cir. 2006) (“The legislative purpose of an interpleader action is to remedy the problems posed by multiple claimants to a single fund, and to protect a stakeholder from the possibility of multiple claims on a single fund.”); *Wausau Ins. Cos. v. Gifford*, 954 F.2d 1098, 1100 (5th Cir. 1992); *Corrigan Dispatch Co. v. Casa Guzman, S.A.*, 696 F.2d 359, 364 (5th Cir. 1983).

The Court “has broad powers in an interpleader action.” *See Rhoades v. Casey*, 196 F.3d 592, 600 (5th Cir. 1999); 7 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1714 (3d ed. 2001). Title 28 U.S.C. § 2361 “expressly authorizes a district court to enter an order restraining claimants ‘from instituting or prosecuting any proceeding in any State or United States court affecting the property . . . involved in the interpleader action until further order of the court.’ ” *Auto Parts Mfg. Miss., Inc.*, 782 F.3d at 195 (quoting 28 U.S.C. § 2361). “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. Although Rule 65 of the Federal Rules of Civil Procedure generally governs the issuance of injunctions and restraining orders, Rule 65 “do[es] not modify . . . 28 U.S.C. § 2361, which relates to . . . injunctions in

actions of interpleader or in the nature of interpleader[.]” FED. R. CIV. P. 65(e)(2).⁶

In the case *sub judice*, this Court “enjoined [King Construction, Noatex, and Kohn Law Group] from filing any proceedings against APMM relating to the interpleader fund without an order of this Court allowing the same.” See Ct.’s Order Granting APMM’s Mot. Dismiss or Discharge Pl. [236] at 1. As stated above, the Fifth Circuit Court of Appeals upheld the validity of the permanent injunction in the published opinion *Auto Parts Manufacturing Mississippi, Inc. v. King Construction of Houston, L.L.C.*, 782 F.3d 186, 192 (5th Cir.), *cert. denied sub nom. Noatex Corp. v. Auto Parts Manufacturing Mississippi Inc.*, 136 S. Ct. 330, 193 L. Ed. 2d 230 (2015).

In accordance with the interpleader statute and the issuance of a permanent injunction, this Court may “make all appropriate orders to enforce its judgment.” See 28 U.S.C. § 2361; *Rhoades*, 196 F.3d at 600-01. See also *Peacock v. Thomas*, 516 U.S. 349, 356-57, 116 S. Ct. 862, 133 L. Ed. 2d 817 (1996) (federal court has “inherent power to enforce its judgments”); *Wesch v. Folsom*, 6 F.3d 1465, 1470 (11th Cir. 1993) (“When a court issues an injunction, it automatically retains jurisdiction to enforce it.”).

⁶ Rule 65(e)(2) does not apply to Rule 22 interpleader actions. See 7 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2958 (3d ed. 2001). However, this interpleader action was a 28 U.S.C. § 1335 statutory interpleader, not a Rule 22 interpleader. See Ct.’s Mem. Op. [237] Granting APMM’s Mot. Discharge or Discharge Pl. [175] at 4-6. Therefore, this distinction is immaterial.

As explained in this Court’s memorandum opinion [321] granting APMM’s motion for enforcement of the permanent injunction [282], Kohn Law Group has violated this Court’s permanent injunction by pursuing litigation against APMM in the California district court case. Thus, as demonstrated in the Court’s memorandum opinion [321] granting APMM’s motion for enforcement of the permanent injunction [282], Kohn Law Group is in civil contempt of the Court’s permanent injunction.

“A court’s ability to punish contempt is thought to be an inherent and integral element of its power and has deep historical roots.” WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 2960. Contempt authority is a power “necessary to the exercise of all others.” *Int’l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 831, 114 S. Ct. 2552, 129 L. Ed. 2d 642 (1994) (“Courts independently must be vested with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates, and to preserve themselves and their officers from the approach and insults of pollution.”); *see Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764, 100 S. Ct. 2455, 65 L. Ed. 2d 488 (1980) (contempt powers are “the most prominent” of court’s inherent powers “which a judge must have and exercise in protecting the due and orderly administration of justice and in maintaining the authority and dignity of the court”). “Upon a finding of contempt, [as in the case *sub judice*,] the district court has broad discretion in assessing sanctions to protect the sanctity of its decrees and the legal process.” *See DeStephano v. Broadwing Commc’ns, Inc.*, 48 F. App’x 103, 2002 WL 31016599, at *2 (5th Cir. 2002) (per curiam) (citing *Am. Airlines, Inc.*

v. Allied Pilots Ass'n, 228 F.3d 574, 585 (5th Cir. 2000)).

III. Parties' Arguments

APMM argues in its motion for sanctions that the Court should impose both coercive and compensatory sanctions against Kohn Law Group for contempt. Specifically, APMM requests that the Court impose coercive sanctions in the form of a daily assessment from and after November 8, 2016 in an amount to be set by this Court and to be paid by Kohn Law Group into this Court's registry until litigation in the California district court case is finally concluded, either through Kohn Law Group's dismissal with prejudice or exhaustion of any appeals filed by Kohn Law Group. APMM further requests that the Court impose compensatory sanctions payable to APMM by a date set by the Court for attorneys' fees and expenses incurred by APMM. APMM argues in its motion that any good faith on Kohn Law Group's part in filing the first amended complaint or the motion to reverse and revise in the California district court case is irrelevant and does not protect against compensatory sanctions in the form of attorneys' fees. APMM also argues that Kohn Law Group should be required to post a bond in the amount of at least \$300,000 (or any amount approved by the Court) as security for payment of sanctions and that if Kohn Law Group is required to post such bond APMM does not oppose a stay of the imposition of sanctions pending appeal. Finally, APMM requests that this Court prohibit Kohn Law Group from filing any notice of appeal or other pleading in either the case *sub judice* or the California district court case until such time as a bond has been posted.

Kohn Law Group argues in response that the Court should not award attorneys' fees to APMM, because "there is no contempt by Kohn Law [Group]" and "because the request for attorney[s'] fees (itself) demonstrates the absence of any contempt by Kohn Law [Group]" in that "no more than a single motion by APMM would have been needed if indeed the debts sought by Kohn Law [Group] were the same as the interpleader fund." Kohn Law Grp.'s Mem. Br. Supp. Resp. Opp'n to APMM's Mot. Sanctions [335] at 4, 5. Kohn Law Group further argues that APMM offers no testimony to provide a basis for concluding that the rates were in line with the market for the services provided. Kohn Law Group maintains that APMM fails to demonstrate the lodestar amount and further that "no reasonable client would pay Baker and Hostetler's rates for such a small matter in Los Angeles (or Mitchell, McNutt & Sam's rates in Tupelo, either)"; Kohn Law Group maintains that "[APMM's] claimed fees of \$208,697.71, without even going to trial, in a case worth no more than \$260,410.15 (plus interest), prove that to be true." *Id.* at 7-8.⁷ Kohn Law Group further argues that "all of the hours that may have been devoted to enforcing the injunction here in Mississippi were also duplicative of some of the work done by APMM's lawyers in the California action" on the issue of whether Kohn Law Group's California district court case sought to recover the interpleader fund; thus, Kohn Law Group maintains that none of

⁷ The amount Kohn Law Group references here as the maximum amount at stake in the California district court case, "\$260,410.15 (plus interest)," was the exact amount of the interpleader in the case *sub judice*.

the Mississippi legal fees are compensable. *Id.* at 8. Kohn Law Group argues that “[m]uch [of] the other California work of APMM’s counsel there was also unnecessary,” including pursuing certain defenses and discovery and filing a motion to dismiss. *Id.* at 9-10. Next, Kohn Law Group provides lengthy arguments against the propriety of coercive sanctions. *See id.* at 15-19. Finally, Kohn Law Group argues that any sanctions should be stayed pending appeal, because Kohn Law Group contends it has “a strong likelihood of success on appeal.” *Id.* at 22.

In its motion for a stay pending appeal of any compulsory or coercive sanctions that may be ordered [346], Kohn Law Group requests that the Court stay any order that would compel or coerce the dismissal of the California district court case against APMM pending appeal to review that order and further stay any potential fines from accruing to coerce a dismissal until disposition of the anticipated appeal. Kohn Law Group presents several arguments in support of its position. APMM objects to the motion as premature, but states that it does not oppose a stay solely as to an order directing Kohn Law Group to dismiss the California district court case. Upon due consideration of all of the foregoing, the Court finds as follows.

IV. Analysis and Discussion

“Federal courts possess certain ‘inherent powers . . . to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.’” *Goodyear Tire & Rubber Co. v. Haeger*, — U.S. —, —, 137 S. Ct. 1178, 1186, — L. Ed. — (2017) (quoting *Link v. Wabash R. Co.*, 370 U.S. 626, 630-31, 82 S. Ct. 1386, 8 L. Ed. 2d 734 (1962)). “That authority includes ‘the ability to

fashion an appropriate sanction for conduct which abuses the judicial process.’” *Id.* (quoting *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44-45, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991)). Such sanctions may be imposed even after an action is no longer pending. *Fleming & Assocs. v. Newby & Tittle*, 529 F.3d 631, 637-38 (5th Cir. 2008) (citing *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 395, 110 S. Ct. 2447, 110 L. Ed. 2d 359 (1990)); *see also Willy v. Coastal Corp.*, 503 U.S. 131, 139, 112 S. Ct. 1076, 117 L. Ed. 2d 280 (1992).

“The district court has broad discretion in the assessment of damages in a civil contempt proceeding.” *Am. Airlines, Inc.*, 228 F.3d at 585 (internal quotation marks and citations omitted). “ ‘Judicial sanctions in civil contempt proceedings, may in a proper case, be employed for either or both of two purposes: to coerce the defendant into compliance with the court’s order, and to compensate the complainant for losses sustained.’” *Id.* (quoting *United States v. United Mine Workers of Am.*, 330 U.S. 258, 303-04, 67 S. Ct. 677, 91 L. Ed. 884 (1947)). *See also Norman Bridge Drug Co. v. Banner*, 529 F.2d 822, 827 (5th Cir. 1976) (“Compensatory civil contempt reimburses the injured party for the losses and expenses incurred because of his adversary’s noncompliance.”); *Lance v. Plummer*, 353 F.2d 585, 592 (5th Cir. 1965) (“[R]emedial or coercive sanctions may be imposed . . . , such as are designed to compensate the complainant for losses sustained and coerce obedience for the benefit of the complainant.”).

“Courts for centuries have possessed the inherent power to enforce their lawful decrees through the use of coercive sanctions in civil contempt proceedings.”

Scott v. Hunt Oil Co., 398 F.2d 810, 811 (5th Cir. 1968). “[C]oercive’ sanctions [are] designed to make a party comply with a court order.” *Goodyear Tire & Rubber Co.*, 137 S. Ct. at 1186 n.4. When shaping coercive sanctions, the Court takes into account “the character and magnitude of the harm threatened by the continued contumacy,” “the probable effectiveness of [the] suggested sanction in bringing about the result desired,” and “the amount of [the party in contempt’s] financial resources and the consequent seriousness of the burden to that particular defendant.” See *United Mine Workers of Am.*, 330 U.S. at 303-04, 67 S. Ct. 677. Coercive sanctions are “avoidable through obedience.” *Bagwell*, 512 U.S. at 827, 114 S. Ct. 2552.

Furthermore, the Court may “‘order[] the award of attorneys’ fees for compensatory purposes’ where a party ‘necessarily expended [fees] in bringing an action to enforce’ the injunction.” See *Matter of Skyport Glob. Commc’ns, Inc.*, 661 F. App’x 835, 841 (5th Cir. 2016) (per curiam) (quoting *Cook v. Ochsner Found Hosp.*, 559 F.2d 270, 272 (5th Cir. 1977)); see also A.S. KLEIN, ANNOTATION, ALLOWANCE OF ATTORNEYS’ FEES IN CIVIL CONTEMPT PROCEEDINGS, 43 A.L.R.3d 793, § 2 (1972) (“Almost without exception it is within the discretion of the trial court to include, as an element of damages assessed against the defendant found guilty of civil contempt, the attorneys’ fees incurred in the investigation and prosecution of the contempt proceedings.”). In order to impose compensatory sanctions in the form of attorneys’ fees, the Court must specifically find that the party “acted in bad faith.” See *Goodyear Tire & Rubber Co.*, 137 S. Ct. at 1186 (citing *Chambers*, 501 U.S. at 45, 111 S. Ct. 2123); *In re Hermesmeier*, No. 16-11189, --- F. App’x ---, 2017 WL

1683073, at *3 (5th Cir. May 2, 2017) (per curiam) (citing *In re Goode*, 821 F.3d 553, 559 (5th Cir. 2016)). “Bad faith may be found in actions that led to the litigation as well as in the conduct of the litigation, including the failure to comply with court orders.” *In re Mot. Sanctions Against Meyers*, No. 4:12-MC-015-A, 2014 WL 1910621, at *16 (N.D. Tex. May 9, 2014); see *In Re W. Fid Mktg., Inc.*, No. 4:01-MC-0020-A, 2001 WL 34664165, at *19 (N.D. Tex. June 26, 2001). Such a sanction imposed in a civil contempt proceeding “must be compensatory rather than punitive in nature.” *Goodyear Tire & Rubber Co.*, 137 S. Ct. at 1186. The United States Supreme Court has instructed:

[T]he court can shift only those attorney’s fees incurred because of the misconduct at issue. Compensation for a wrong, after all, tracks the loss resulting from that wrong. So as we have previously noted, a sanction counts as compensatory only if it is “calibrate[d] to [the] damages caused by” the bad-faith acts on which it is based. [*Bagwell*, 512 U.S. at 834, 114 S. Ct. 2552]. A fee award is so calibrated if it covers the legal bills that the litigation abuse occasioned. But if an award extends further than that—to fees that would have been incurred without the misconduct—then it crosses the boundary from compensation to punishment. Hence the need for a court, when using its inherent sanctioning authority (and civil procedures), to establish a causal link-between the litigant’s misbehavior and legal fees paid by the opposing party.

That kind of causal connection . . . is appropriately framed as a but-for test: The complaining party ... may recover “only the portion of his fees that he would not have paid but for” the misconduct. *Fox v. Vice*, 563 U.S. 826, 836, 131 S. Ct. 2205, 180 L. Ed. 2d 45 (2011); see *Paroline v. United States*, 572 U.S. —, —, 134 S. Ct. 1710, 1722, 188 L. Ed. 2d 714 (2014)

This but-for causation standard generally demands that a district court assess and allocate specific litigation expenses—yet still allows it to exercise discretion and judgment. The court’s fundamental job is to determine whether a given legal fee—say, for taking a deposition or drafting a motion—would or would not have been incurred in the absence of the sanctioned conduct. The award is then the sum total of the fees that, except for the misbehavior, would not have accrued.

Id. at 1186-1187 (footnote omitted). The Supreme Court has indicated that “[i]n exceptional cases,” a trial court may shift all of the party’s fees in a suit “in one fell swoop” when “literally everything the [party in contempt] did—‘his entire course of conduct’ throughout, and indeed preceding, the litigation—was ‘part of a sordid scheme’ to defeat a valid claim”; in such a case, the district court can reasonably conclude that all legal expenses in the lawsuit “were caused . . . solely by [his] fraudulent and brazenly unethical efforts.” *Id.* at 1187-1188 (quoting *Chambers*, 501 U.S. at 51, 57, 58, 111 S. Ct. 2123). In *Lubrizol Corp. v. Exxon Corp.*, 957 F.2d 1302 (5th Cir. 1992), the Fifth

Circuit affirmed a sanction of \$2,424,462.04 in attorneys' fees and expenses for an entire course of litigation for the plaintiff's failure to comply with an order directing it to submit specific information to the court. *Id.* at 1304.

Regardless of whether a court imposes coercive sanctions or compensatory sanctions or both, "[a]s a general rule, a court imposing sanctions 'must use the least restrictive sanction necessary to deter the inappropriate behavior.'" *In re Hermesmeier*, 2017 WL 1683073, at *4 (quoting *In re First City Bancorporation of Tex. Inc.*, 282 F.3d 864, 867 (5th Cir. 2002)).

In the case *sub judice*, Kohn Law Group has demonstrated a clear and egregious disregard of the Court's permanent injunction and subsequent finding of violation and contempt by continuing to pursue the litigation against APMM in the United States District Court for the Central District of California. APMM detailed Kohn Law Group's bad-faith conduct to the Court in the evidentiary hearing on the motion to enforce the permanent injunction, as well as in its briefing in support of civil contempt and sanctions. APMM supported its arguments with clear and convincing evidence, including the docket sheet and various filings in the California district court case. Per the parties' request at the hearing, this Court took judicial notice of all the filings in the California district court case. As explained in detail in the Court's memorandum opinion [321] granting APMM's motion to enforce the permanent injunction, Kohn Law Group 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. That bad-faith conduct has continued to the present day. As set forth in detail in the factual and procedural background above, even after this Court entered its Order and memorandum opinion finding Kohn Law Group in civil contempt in the case *sub judice*, Kohn Law Group filed a 20-page document in the United States District Court for the Central District of California, requesting that the California district court rule on Kohn Law Group's motion for summary judgment "without further delay." *See* Kohn Law Grp.'s Opp'n to APMM's *Ex Parte* App. Stay Case Pending Dismissal [131 in No. 2:12-cv-08063-MWF-MRW] at 8, 18.

Kohn Law Group had only to obey the injunction and the Court's order to cease and desist pursuit of the California district court litigation to purge itself of contempt. Furthermore, but for Kohn Law Group's conduct, APMM's attorneys' fees would not have been incurred. The Court therefore makes the specific finding that Kohn Law Group acted in bad faith.

In this Court's October 6, 2016 Order [320] granting APMM's motion for enforcement of permanent injunction, the Court ordered that Kohn Law Group was in civil contempt and could purge itself of contempt by ceasing and desisting pursuit of the California district court case against APMM. The Court directed Kohn Law Group that it could purge itself of contempt "by filing a motion to dismiss with prejudice all claims in the California district court case." Ct.'s Order [320] at 1. Kohn Law Group's continued pursuit of that litigation was and is in flagrant violation of this Court's

permanent injunction and constitutes contempt warranting sanctions.

The Court is troubled by Kohn Law Group's utter disregard for the Court's permanent injunction and subsequent Orders. As the Court stated in an earlier memorandum opinion, the Court's Orders are not a mere filament. "[A] district court may use its inherent power to sanction conduct that is in direct defiance of the sanctioning court or constitutes disobedience to the orders of the judiciary." *In re Mot. Sanctions Against Meyers*, 2014 WL 1910621, at *16 (citing *Positive Software Sols., Inc. v. New Century Mortg., Corp.*, 619 F.3d 458-60 (5th Cir. 2010)).

In light of Kohn Law Group's flagrant disobedience of the Court's permanent injunction and Order finding Kohn Law Group to be in civil contempt, the Court finds that coercive sanctions should be imposed. The Court therefore assesses coercive sanctions of \$100 per day to be paid from the date of this memorandum opinion and corresponding Order and Judgment until such date as this Court enters an Order that Kohn Law Group has purged itself of civil contempt. The Court's *de minimis* award of coercive sanctions takes into account the award of compensatory damages that shall also be imposed in this memorandum opinion and corresponding Order and Judgment. The Court will only enter an Order finding that Kohn Law Group has purged itself of civil contempt if the following two conditions are met: (1) Kohn Law Group files a motion to dismiss with prejudice all claims in the case styled *Kohn Law Group Inc. v. Auto Parts Manufacturing Mississippi Inc., et al.*, No. 2:12-cv-08063-MWF-MRW (C.D. Calif. 2012); and (2) Kohn Law Group files a

notice in the case *sub judice* attaching an order of dismissal with prejudice signed and entered by the United States District Court for the Central District of California in the case styled *Kohn Law Group Inc. v. Auto Parts Manufacturing Mississippi Inc., et al.*, No. 2:12-cv-08063-MWF-MRW (C.D. Calif. 2012).

In addition, the Court hereby uses its inherent power to impose compensatory sanctions against Kohn Law Group in the form of attorneys' fees and costs to be paid to APMM. Although Kohn Law Group argues that APMM's defense in the California district court case was duplicative of its pursuit of contempt and sanctions in this Court, this argument is without merit. APMM's pursuit of a finding of contempt and sanctions in this Court was justified, given Kohn Law Group's continuing violation of this Court's permanent injunction in pursuing litigation against APMM in the California district court case. The legal representation of APMM in the California district court case was also necessary, given Kohn Law Group's continued pursuit of that litigation against APMM. Kohn Law Group argues in its brief that the proceeding in California is a "small matter" and challenges the amount of attorneys' fees requested by APMM on this basis. Kohn Law Group has never treated either the interpleader or the California district court case against APMM concerning the interpleader as "small matters," but has instead proceeded as if millions of dollars were at stake. As a result, the actions have been multiplied and amplified primarily by the continued pursuit of litigation against APMM by Kohn Law Group. This pursuit was taken with much vigor, and thus, it is both understandable and reasonable that APMM would defend itself with equal vigor. Therefore, Kohn Law

Group's arguments fail to persuade this Court that APMM's legal representation was duplicative or superfluous.

The Fifth Circuit uses the "lodestar" method to calculate reasonable attorneys' fees, multiplying the number of hours spent on the matter by a reasonable hourly rate for such work in the community. *Cantu Servs., Inc. v. Frazier*, No. 16-31035, 2017 WL 1089508, at *3 (5th Cir. Mar. 22, 2017) (citing *Combs v. City of Huntington, Tex.*, 829 F.3d 388, 392 (5th Cir. 2016)). Reasonable hourly rates are typically calculated through affidavits by attorneys practicing in the community in which the district court is located. *Tollett v. City of Kemah, Tex.*, 285 F.3d 357, 368 (5th Cir. 2002). "In calculating the lodestar, '[t]he court should exclude all time that is excessive, duplicative, or inadequately documented.' " *Combs*, 829 F.3d at 392. "[T]here is a 'strong presumption' that the lodestar figure is reasonable." *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 554, 130 S. Ct. 1662, 1673, 176 L. Ed. 2d 494 (2010).

After calculating the lodestar figure, the Court must consider the twelve *Johnson* factors, which are as follows: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional

relationship with the client; and (12) awards in similar cases. *Cobb v. Miller*, 818 F.2d 1227, 1231 n.5 (5th Cir. 1987) (citing *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974)).

In the case *sub judice*, APMM attaches the following supporting documentation to its motion: (1) the docket sheet of the California district court case from and after September 17, 2015; (2) the declaration of Martha Stegall, Mississippi counsel for APMM in the case *sub judice*, with attached invoice summaries detailing legal services by Ms. Stegall and Otis R. Tims of Mitchell, McNutt & Sams, P.A. from and after October 1, 2015—the month after the stay was lifted in the California district court case—in the amount of \$164,994.79; and (3) the declaration of Michael Matthias, counsel for APMM in the California district court case, with attached invoice summaries purportedly detailing legal services by Mr. Matthias and Blythe Gollay of Baker & Hostetler LLP from September of 2015 through October 31, 2016 in the amount of \$208,697.71. In addition, APMM has filed 163 pages of invoices detailing the charges included in the earlier filed invoice summaries. Upon thorough review of these entries, the Court finds that the documentation supports the reasonableness of APMM's attorneys' fees and hourly billing rates for the legal representation and also supports the *Johnson* factors.

According to Ms. Stegall's declaration, she is a partner in the law firm of Mitchell, McNutt & Sams, P.A. and has practiced in the State of Mississippi since 1989 in all state and federal courts, including the United States Supreme Court. Ms. Stegall declares that Mr. Tims is a partner in the law firm of Mitchell,

McNutt & Sams, P.A., and that Mr. Tims has practiced law in the State of Mississippi since 1985 in all state and federal courts, including the United States Supreme Court. Ms. Stegall declares that she has been involved in and tried numerous civil litigation cases, is familiar with the usual and customary rates charged by attorneys practicing law in federal courts for the Northern District of Mississippi, and that these usual and customary rates are \$250 to \$300 per hour.

To further support that the fees requested in the case *sub judice* are customary hourly billing rates, APMM has also submitted to the Court the declaration of Thomas A. Wicker, who declares he is a Mississippi attorney who has practiced law since January 3, 1980, and is admitted to practice in all state courts and many federal courts, including the United States District Courts for the Northern and Southern Districts of Mississippi, the Fifth Circuit Court of Appeals, the Eleventh Circuit Court of Appeals, and the United States Supreme Court. Wicker's Decl. [339-1] ¶¶ 1-2. Mr. Wicker further declares that he is familiar with hourly billing rates of attorneys practicing in the United States District Court for the Northern District of Mississippi, has "been involved in cases in which attorneys' fees have been applied for an award[,] and ha[s] provided affidavits and/or declarations in support of awards of attorneys' fees in other cases." *Id.* ¶ 4. Mr. Wicker declares that \$250 is a "reasonable and customary" hourly billing rate "in a standard civil case in north Mississippi" and that "[h]igher rates have been allowed in similar litigation in the United States District Courts for the Northern and Southern Districts of Mississippi." *Id.* ¶ 5.

In addition to the declarations of Ms. Stegall and Mr. Wicker, the undersigned has considered his own knowledge of customary hourly billing rates for attorneys in the State of Mississippi. Over the Court's lengthy career, the Court has addressed the matter of attorneys' fees in dozens of cases in the State of Mississippi. Ms. Stegall accurately states the customary hourly billing rates of attorneys in the community as between \$250 and \$300, particularly given the legal experience of Ms. Stegall and Mr. Tims. Thus, the fees requested by APMM for Mississippi counsel's legal representation are based on customary hourly billing rates in the community.

Not only are the hourly billing rates commensurate for local attorneys with similar experience, however, the time spent on these matters was necessary, given the nature of the cases. In Ms. Stegall's declaration and arguments in the briefs supporting the request for attorneys' fees, she states that Kohn Law Group's continuous pursuit of litigation against APMM necessitated APMM's pursuit of the contempt proceeding against Kohn Law Group, including preparing and filing motions and supporting briefs; taking depositions in California of Robert E. Kohn, principal of Kohn Law Group, and of Osamu Nishiyama, President of Noatex Corporation; and preparing for and participating in the hearing on the motion for contempt. In addition, Ms. Stegall declares that she and Mr. Tims provided assistance to APMM's counsel in APMM's defense in the California district court case, including providing information concerning details of the interpleader lawsuit, as well as relevant documentation; reviewing pleadings and discovery filed in the California district court case; and counseling

APMM representatives concerning the status of the California district court case. The motion, briefing, declaration of Ms. Stegall, attached invoice summaries, and invoices detail legal services provided by Ms. Stegall and Mr. Tims from October 1, 2015 through November 30, 2015 in the amount of \$164,994.79.

The lodestar calculation for Ms. Stegall is her \$225 hourly billing rate multiplied by the total number of hours expended. Although Ms. Stegall does not specify in her declaration the total number of hours she expended, each detailed invoice indicates the particular number of hours Ms. Stegall expended for that particular period of time. In adding the total number of hours expended on each invoice, Ms. Stegall expended a total of 324.8 hours. Invoices [353] at 1-66. Therefore, Ms. Stegall's lodestar is \$225 multiplied by 324.8 total hours, which is \$73,080.

The lodestar calculation for Mr. Tims is his \$225 hourly billing rate multiplied by the total number of hours expended. Although Ms. Stegall similarly does not specify in her declaration the total number of hours expended by Mr. Tims, each detailed invoice indicates the particular number of hours Mr. Tims expended for that particular time period. In adding the total number of hours expended on each invoice, Mr. Tims expended a total of 385.2 hours. *Id.* at 1-66. Therefore, Mr. Tims' lodestar is \$225 multiplied by 385.2 hours, which is \$86,670.

Therefore, the total lodestar for the Mitchell, McNutt & Sams, P.A. attorneys is \$159,750.

The costs requested by Mitchell, McNutt & Sams, P.A. include the following: (1) payments to the PACER

Service Center for court records, *id.* at 7, 16, 20, 27, 33, 38, 43, 49, 57, 60, 66; **(2)** copies, *id.* at 7, 12, 16, 20, 27, 33, 39, 43, 49, 57, 60; **(3)** long-distance telephone calls, *id.* at 7, 12, 27, 33, 38, 43, 49 56-57, 60, 66; **(4)** Lexis and other online computer research, *id.* at 12, 16, 27, 56-57; **(5)** travel costs, including mileage, airfare, lodging, meals, parking, *id.* at 56-57; **(6)** deposition transcript and videography, *id.* at 57, 60; and **(7)** postage, *id.* at 57, 60.

APMM further requests that the Court impose compensatory sanctions payable to APMM by a date set by this Court for attorneys' fees and expenses incurred by APMM after the stay was lifted in the California district court case from September 17, 2015 through October 31, 2015 in the amount of \$208,697.71. In support of this request, Michael Matthias, counsel for APMM in the California district court case, submits his declaration with attached invoice summaries detailing legal services by Mr. Matthias and Blythe Gollay of Baker & Hostetler LLP in the amount of \$208,697.71. Mr. Matthias declares that he is the supervising attorney handling the California district court case, that he has represented APMM since the commencement of that action, and that he is familiar with the time and other records maintained by Baker & Hostetler LLP in the matter and can attest to their authenticity and accuracy. Mr. Matthias further declares that he has practiced civil litigation primarily in the business and commercial area. Mr. Matthias declares that in 2015 his hourly billing rate for this matter was \$690 and that in 2016 his hourly billing rate was \$720. Mr. Matthias declares that APMM is also represented by Ms. Golay, an associate at Baker & Hostetler LLP whose 2015 hourly billing rate was \$330

and 2016 hourly billing rate was \$350. Mr. Matthias states that in his lengthy experience in the practice of law in the State of California, and particularly in Los Angeles, he has become familiar with the billing rates of attorneys at numerous law firms. Mr. Matthias declares that based upon this knowledge the respective billing rates of himself and Ms. Golay are commensurate with Los Angeles' firms' rates for attorneys with similar experience.

In addition to Mr. Matthias' declaration, APMM has also submitted to the Court the declaration of Kim Karelis, whom APMM has retained to provide an expert opinion concerning the customary hourly billing rates of California attorneys. *See* Karelis's Decl. [339-2] ¶ 1. Ms. Karelis declares that she is a partner of the law firm Ropers, Majeski, Kohn & Bentley, which has offices in Los Angeles (where she is based), San Francisco, Redwood City, San Jose, New York City, and Boston. *Id.* ¶ 2. Ms. Karelis further declares that she is an attorney licensed to practice before all courts of the State of California, the United States District Court for the Central District of California, and the Ninth Circuit Court of Appeals. *Id.* Ms. Karelis declares that she has "broad experience regarding legal fee disputes involving complex commercial matters that include disputed hourly rates" and has also "during the past 25 years . . . reviewed hundreds of attorney invoices in [her] capacity of coverage counsel for numerous insurance companies" *Id.* ¶¶ 3, 4. Ms. Karelis provides a detailed explanation of customary hourly billing rates, *see id.* ¶¶ 8-23, and declares that Mr. Matthias's hourly billing rates in 2015 and 2016 accurately reflect his 31 + years of experience in the State Bar of California, and that Ms. Golay's hourly

billing rates in 2015 and 2016 accurately reflect her four-to-five years of experience in the State Bar of California. Id. ¶¶ 18-19, 23. The Court finds that based on all of the forgoing APMM has demonstrated that the hourly billing rates of Mr. Matthias and Ms. Golay are customary for that community.

Furthermore, APMM has demonstrated the necessity of legal representation in these matters. In Mr. Matthias's declaration, he states that Kohn Law Group's continuous pursuit of litigation against APMM in California has necessitated the filing of several motions, including motions to dismiss, a motion for protective order, and a motion to compel Kohn Law Group to respond to discovery requests. Mr. Matthias also declares that the California litigation has necessitated responses to Kohn Law Group's supplemental requests pertaining to these motions, as well as responses to Kohn Law Group's motions against APMM. Finally, in this respect, Mr. Matthias declares that the California litigation has entailed numerous in-person meetings, conferences, hearings, and extensive discovery production, as well as assistance to APMM's Mississippi attorneys in the case *sub judice*. The attached invoice summaries and separately filed detailed invoices support that the total amount of legal fees and expenses incurred by APMM for Mr. Matthias's and Ms. Golay's legal representation totals \$208,697.71 for 502.7 hours of service at their respective hourly billing rates. Mr. Matthias states that he believes these fees are reasonable given the extensive motion practice of the California district court case and the case *sub judice*.

The lodestar calculation for Mr. Matthias is as follows. Although Mr. Matthias does not specify in his declaration the total number of hours he expended by year, each detailed invoice indicates the particular number of hours Mr. Matthias expended for that particular time period. In adding the total number of hours expended on each invoice in 2015, the lodestar calculation for Mr. Matthias is his \$690 hourly billing rate multiplied by the total number of hours expended in 2015, 24.3 hours. Invoices [353-1] at 1-20. Therefore, Mr. Matthias's lodestar for 2015 is \$16,767. In adding the total number of hours expended on each invoice in 2016, the lodestar calculation for Mr. Matthias is his \$720 hourly billing rate multiplied by the total number of hours expended that year, 50.9 hours. *Id.* at 21-97. Therefore, Mr. Matthias's lodestar for 2016 is \$36,648.

The lodestar calculation for Ms. Golay is as follows. Although Mr. Matthias does not specify in his declaration the total number of hours Ms. Golay expended by year, each detailed invoice indicates the particular number of hours Ms. Golay expended for that particular time period. In adding the total number of hours expended on each invoice in 2015, the lodestar calculation for Ms. Golay is her \$330 hourly billing rate multiplied by the total number of hours expended in 2015, 71 hours. *Id.* at 1-20. Therefore, Ms. Golay's lodestar for 2015 is \$23,430. In adding the total number of hours expended on each invoice in 2016, the lodestar calculation for Ms. Golay (referred to in certain invoices as Blythe Kochsiek, likely following a marriage) is \$350 hourly billing rate multiplied by the total number of hours expended that year, 332.9 hours. *Id.* at 21-97. Therefore, Ms. Golay's lodestar for 2016 is \$116,515.

In addition, in finding and adding together all pertinent entries, the Court has found that Baker & Hostetler LLP staff also billed a total of \$5,705 in 2016 for 23.6 hours pertaining to billing, discovery, and pleadings in the California district court case. *Id.* at 45, 56, 60, 61, 64, 65, 69, 71, 81, 82, 83, 87, 89, 93, 94.

Therefore, the total lodestar for Baker & Hostetler LLP for 2015 is \$40,197, and the total lodestar for Baker & Hostetler LLP for 2016 is \$158,868. The total lodestar for Baker & Hostetler LLP for 2015 and 2016 is \$199,065.

The costs requested by Baker & Hostetler LLP include the following: (1) postage, *id.* at 3, 8, 41-42; (2) online legal research, *id.* at 8, 14, 19-20, 25, 32, 52, 61, 74, 75, 83-84, 90; (3) ground transportation to attend hearings and status conferences, *id.* at 8, 32, 41-42, 83-84; (4) copies, *id.* at 14, 25, 32, 83, 84; (5) utilization of messenger service to deliver documentation to United States District Court for the Central District of California, *id.* at 19-20, 25, 32, 41-42, 61, 83, 84, 90; (6) electronic court fees, *id.* at 25, 52, 83, 84, 97; (7) court reporter fees for deposition transcript and videography of Robert Kohn, *id.* at 90; and (8) business meals during the deposition of Nishiyama, *id.* at 90.

In carefully examining the line items of the detailed invoices in light of the *Johnson* factors, the Court finds that APMM's legal counsel expended reasonable time on these tasks, which were necessary to the proceedings. Based on all of the foregoing, the Court finds that the lodestar figure is reasonable and that APMM's counsel's billing documentation reflects

reasonable time—not excessive, duplicative, or inadequately documented time.

The Court also finds that the costs enumerated in these detailed invoices should be awarded. *See N.L.R.B. v. Concordia Elec. Co-Op, Inc.*, No. 95-60404, 1999 WL 1411474, at *9 (5th Cir. Nov. 9, 1999) (footnote omitted) (“A court may award costs and attorney’s fees in a civil contempt case.”); *Dow Chem. Co. v. Chem. Cleaning, Inc.*, 434 F.2d 1212, 1215 (5th Cir. 1970), *cert. denied*, *Chem. Cleaning Inc. v. Dow Chem. Co.*, 402 U.S. 945, 91 S. Ct. 1621, 29 L. Ed. 2d 113 (1971) (“[t]here are contempt cases in abundant number holding that a court has discretion to award reasonable attorney’s fees and other expenses necessary to make an innocent party whole”). The Court is satisfied by the details of the services provided in the invoices that these fees were necessary and proper given the conduct of Kahn Law Group in pursuing litigation against APMM.

In the case *sub judice*, “the sanction issued . . . [seeks] to protect the sanctity of judicial decrees and the legal process.” *See Am. Airlines, Inc.*, 228 F.3d at 585. “If recalcitrant litigants may subject their opponents to increased costs and delays with impunity, public confidence in the courts will be eroded. The public expects that litigants who willfully disregard court orders will not benefit from doing so.” *Faulkner v. Kornman*, No. MISC. 10-301, 2012 WL 864574, at *3 (Bankr. S.D. Tex. Mar. 13, 2012). “Courts do not sit for the idle ceremony of making orders and pronouncing judgments, the enforcement of which may be flouted, obstructed, and violated with impunity, with no power in the tribunal to punish the offender.” *Waffenschmidt*

v. Mackay, 763 F.2d 711 (5th Cir. 1985) (citing *Berry v. Midtown Serv. Corp.*, 104 F.2d 107, 110 (2d Cir. 1939)). “In our complex society, there is a great variety of limited loyalties, but the overriding loyalty of all is to our country and to the institutions under which a particular interest may be pursued.” *United Mine Workers*, 330 U.S. at 306, 67 S. Ct. 677. “Essentially, the sanction restores [APMM] to where they were before they incurred attorneys’ fees in an attempt to ensure compliance with the injunction.” *See Matter of Skyport Glob. Commc’ns, Inc.*, 661 F. App’x at 841; *see also Cook*, 559 F.2d at 272. To this end, the Court imposes compensatory sanctions in the form of attorneys’ fees and costs against Kohn Law Group to be paid to APMM in the total amount of \$373,692.50 by July 15, 2017.

Finally, the Court examines Kohn Law Group’s motion for a stay pending appeal of any sanctions that may be ordered [346]. Kohn Law Group requests that the Court stay any directive to dismiss the California action immediately pending an appeal of the Court’s imposition of civil contempt sanctions. Kohn Law Group argues that no bond is necessary to protect APMM during the pendency of any such appeal. APMM has stated that any appeal should be accompanied by a good and sufficient supersedeas bond or security. In examining the factors established by case law, as well as the parties’ arguments, the Court finds as follows.

The Court retains power to enforce its civil contempt orders and judgments unless the Court issues a stay by supersedeas bond to be given upon or after filing the notice of appeal. *See* FED. R. CIV. P. 62(d); *United States v. Revie*, 834 F.2d 1198, 1205 (5th Cir.

1987); *Brown v. Braddick*, 595 F.2d 961, 965 (5th Cir. 1979). “The taking of an appeal does not by itself suspend the operation or execution of a district-court judgment or order during the pendency of the appeal. Thus, the appellant who desires a stay of the lower federal court’s action while the appeal is pending must seek an independent stay or injunctive order.” 16A CHARLES ALAN WRIGHT, *ET AL.*, FEDERAL PRACTICE AND PROCEDURE § 3954 (4th ed. 2017). “Rule 8(a) [of the Federal Rules of Appellate Procedure] governs the procedure for seeking a stay . . . from the court of appeals in a civil case.” *Id.* Rule 8(a) provides in pertinent part that “[a] party must ordinarily move first in the district court for . . . a stay of the judgment or order of a district court pending appeal” FED. R. APP. P. 8(a)(1)(A).

“A stay is not a matter of right, even if irreparable injury might otherwise result. It is instead an exercise of judicial discretion, and the propriety of its issue is dependent upon the circumstances of the particular case.” *Nken v. Holder*, 556 U.S. 418, 433, 129 S. Ct. 1749, 173 L. Ed. 2d 550 (2009) (internal quotation marks and citations omitted). “A stay is an ‘intrusion into the ordinary processes of administration and judicial review The parties and the public, while entitled to both careful review and a meaningful decision, are also generally entitled to the prompt execution of orders’” *Id.* at 427, 129 S. Ct. 1749 (internal quotation marks and citation omitted). The Court decides whether to grant a stay pending appeal based on: “(1) whether the stay applicant has made a strong showing that [it] is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay

will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” See *Chafin v. Chafin*, 568 U.S. 165, 133 S. Ct. 1017, 1027, 185 L. Ed. 2d 1 (2013) (quoting *Nken*, 556 U.S. at 434, 129 S. Ct. 1749); *Moore v. Tangipahoa Parish Sch. Bd.*, 507 F. App’x 389, 392 (5th Cir. 2013) (per curiam) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776, 107 S. Ct. 2113, 95 L. Ed. 2d 724 (1987)); *Taylor Diving & Salvage v. U.S. Dep’t of Labor*, 537 F.2d 819, 821 n.8 (5th Cir. 1976). “The first two factors of the . . . standard are the most critical.” *Nken*, 556 U.S. at 434, 129 S. Ct. 1749.

First, Kohn Law Group has failed to make a strong showing that it will succeed on the merits of any appeal. Kohn Law Group was and is in clear contempt of this Court’s permanent injunction; upon that basis, civil contempt sanctions are warranted. Second, Kohn Law Group has failed to show it will be irreparably injured absent a stay. Finally, as set forth in detail above, the public interest lies in the prompt issuance of these compensatory sanctions against Kohn Law Group. Therefore, the factors weigh against granting the stay. The Court thus finds that Kohn Law Group’s motion for stay must be denied. If Kohn Law Group wishes to pursue the issue, “the proper procedure is to apply to the court of appeals for a stay rather than appeal the district court order.” See 16A CHARLES ALAN WRIGHT, *ET AL.*, FEDERAL PRACTICE AND PROCEDURE § 3954.

V. Conclusion

In sum, the Court finds as follows. Movant Auto Parts Manufacturing Mississippi, Inc.’s motion for the imposition of coercive and compensatory sanctions

[328] against Respondent Kohn Law Group, Inc. is GRANTED.

Respondent Kohn Law Group, Inc.'s motion for a stay pending appeal of any compulsory or coercive sanctions that may be ordered [346] is DENIED.

Respondent Kohn Law Group, Inc. is in civil contempt and shall pay civil contempt sanctions as ordered in this Court's Order accompanying this memorandum opinion. As set forth in this Court's accompanying Order:

1. Respondent Kohn Law Group, Inc. shall pay to the attorneys of record in the case *sub judice* for Movant Auto Parts Manufacturing Mississippi, Inc. compensatory sanctions in the form of attorneys' fees and costs in the total amount of \$373,692.50 on or before July 15, 2017.
2. Respondent Kohn Law Group, Inc. shall immediately file a motion to dismiss with prejudice all claims in the United States District Court for the Central District of California case styled *Kohn Law Group Inc. v. Auto Parts Manufacturing Mississippi Inc., et al.*, No. 2:12-cv-08063-MWF-MRW (C.D. Calif. 2012). Respondent Kohn Law Group, Inc. shall then file a notice in the case *sub judice* attaching an order of dismissal with prejudice signed and entered by the United States District Court for the Central District of California in the case styled *Kohn Law Group Inc. v. Auto Parts Manufacturing Mississippi Inc., et al.*, No. 2:12-cv-08063-MWF-MRW (C.D. Calif. 2012).

3. Respondent Kohn Law Group, Inc. shall pay coercive sanctions of \$100 per day to this Court's registry from the date of this memorandum opinion and corresponding Order and Judgment until such time as this Court has entered an Order finding that Respondent Kohn Law Group, Inc. has purged itself of civil contempt, such payments to be made on or before the fifth calendar date of each month hereafter.

An Order and Judgment in accordance with this opinion shall issue this day.

THIS, the 14th of June, 2017.

/s/Glen H. Davidson
SENIOR U.S. DISTRICT JUDGE

APPENDIX C

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
ABERDEEN DIVISION**

CIVIL ACTION NO. 1:11-cv-00251-GHD-SAA

[Filed June 14, 2017]

AUTO PARTS MANUFACTURING)
MISSISSIPPI INC., a Mississippi)
corporation)
PLAINTIFF)
)
v.)
)
KING CONSTRUCTION OF)
HOUSTON, LLC, a Mississippi)
limited liability company; NOATEX)
CORPORATION, a California)
corporation; and KOHN LAW)
GROUP, INC., a California)
corporation)
DEFENDANTS)
)

ORDER AND JUDGMENT

Pursuant to an opinion entered this day, the Court
ORDERS AND ADJUDGES as follows:

1. Movant Auto Parts Manufacturing Mississippi, Inc.'s motion for the imposition of coercive and compensatory sanctions [328] against

Respondent Kohn Law Group, Inc. is GRANTED.

2. Respondent Kohn Law Group, Inc.'s motion for a stay pending appeal of any compulsory or coercive sanctions that may be ordered [346] is DENIED.
3. Respondent Kohn Law Group, Inc. is in civil contempt.
4. Respondent Kohn Law Group, Inc. must pay civil contempt sanctions as detailed below:
 - a. Respondent Kohn Law Group, Inc. must pay to the attorneys of record in the case *sub judice* for Movant Auto Parts Manufacturing Mississippi, Inc. compensatory sanctions in the form of attorneys' fees and costs in the total amount of **\$373,692.50 on or before July 15, 2017.**
 - b. Respondent Kohn Law Group, Inc. must immediately file a motion to dismiss with prejudice all claims in the United States District Court for the Central District of California case styled *Kohn Law Group Inc. v. Auto Parts Manufacturing Mississippi Inc., et al.*, No. 2:12-cv-08063-MWF-MRW (C.D. Calif. 2012). Respondent Kohn Law Group, Inc. must then file a notice in the case *sub judice* attaching an order of dismissal with prejudice signed and entered by the United States District Court for the Central District of California in the case styled *Kohn Law Group Inc. v. Auto Parts Manufacturing*

Mississippi Inc., et al., No. 2:12-cv-08063-MWF-MRW (C.D. Calif. 2012).

- c. Respondent Kohn Law Group, Inc. shall pay coercive sanctions of **\$100 per day** to this Court's registry from the date of this memorandum opinion and corresponding order until such date as this Court enters an Order finding that Respondent Kohn Law Group, Inc. has purged itself of civil contempt, subject payments to be made **on or before the fifth calendar date of each month hereafter.**

SO ORDERED AND ADJUDGED, this, the 14th day of June, 2017.

/s/Glen H. Davidson
SENIOR U.S. DISTRICT JUDGE

APPENDIX D

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
ABERDEEN DIVISION**

CIVIL ACTION NO. 1:11-cv-00251-GHD-SAA

[Filed December 7, 2016]

AUTO PARTS MANUFACTURING)
MISSISSIPPI INC., a Mississippi)
corporation)
PLAINTIFF)
)
v.)
)
KING CONSTRUCTION OF)
HOUSTON, LLC, a Mississippi)
limited liability company; NOATEX)
CORPORATION, a California)
corporation; and KOHN LAW)
GROUP, INC., a California)
corporation)
DEFENDANTS)

**ORDER DENYING DEFENDANT KOHN LAW
GROUP, INC.'S MOTION TO REVISE AND
REVERSE THE COURT'S MEMORANDUM
OPINION AND ORDER GRANTING MOTION
FOR ENFORCEMENT OF
PERMANENT INJUNCTION**

App. 48

Pursuant to a memorandum opinion issued this day, Kohn Law Group's motion to revise and reverse [322] the Court's Order and memorandum opinion granting APMM's motion for enforcement of permanent injunction [282] is **DENIED**.

SO ORDERED, this, the 7th day of December, 2016.

/s/Glen H. Davidson
SENIOR U.S. DISTRICT JUDGE

APPENDIX E

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
ABERDEEN DIVISION**

CIVIL ACTION NO. 1:11-cv-00251-GHD-SAA

[Filed October 6, 2016]

AUTO PARTS MANUFACTURING)
MISSISSIPPI INC., a Mississippi)
corporation)
PLAINTIFF)
)
v.)
)
KING CONSTRUCTION OF)
HOUSTON, LLC, a Mississippi)
limited liability company; NOATEX)
CORPORATION, a California)
corporation; and KOHN LAW)
GROUP, INC., a California)
corporation)
DEFENDANTS)
)

**ORDER GRANTING PLAINTIFF AUTO PARTS
MANUFACTURING MISSISSIPPI, INC.'S
MOTION FOR ENFORCEMENT OF
PERMANENT INJUNCTION**

Pursuant to a memorandum opinion entered by the Court on this day, the Court ORDERS the following:

1. Auto Parts Manufacturing Mississippi's motion to reopen and for enforcement of injunction against Kohn Law Group, Inc. [282] is GRANTED;
2. the Court finds Defendant Kohn Law Group, Inc. to be in CIVIL CONTEMPT of the Court's permanent injunction dated March 3, 2014;
3. Defendant Kohn Law Group, Inc. may purge itself of this contempt citation by ceasing and desisting pursuit of the litigation styled *Kohn Law Group, Inc. v. Auto Parts Manufacturing Mississippi Inc., et al.*, No. 2:12-cv-08063-MWF-MRW, which is currently pending in the United States District Court for the Central District of California. This may be accomplished by filing a motion to dismiss with prejudice all claims in the California district court case; and
4. the Court withholds the matter of imposition of sanctions until 30 days after the date hereof.

SO ORDERED, this, the 6th of October, 2016.

/s/Glen H. Davidson
SENIOR U.S. DISTRICT JUDGE

APPENDIX F

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
ABERDEEN DIVISION**

CIVIL ACTION NO. 1:11-cv-00251-GHD-SAA

[Filed June 23, 2016]

AUTO PARTS MANUFACTURING)
MISSISSIPPI INC., a Mississippi)
corporation)
PLAINTIFF)
)
v.)
)
KING CONSTRUCTION OF)
HOUSTON, LLC, a Mississippi)
limited liability company; NOATEX)
CORPORATION, a California)
corporation; and KOHN LAW)
GROUP, INC., a California)
corporation)
DEFENDANTS)
)

ORDER SETTING HEARING ON
PERMANENT INJUNCTION

The Court has reviewed Plaintiff Auto Parts Manufacturing Mississippi, Inc.'s motion to reopen the case *sub judice* and for enforcement of the Court's permanent injunction against Defendant Kohn Law

Group, Inc. [282], as well as the response and reply relative to the same. The Court has also reviewed all proceedings heretofore conducted in this Court and the Fifth Circuit Court of Appeals. In addition, the Court has also reviewed the first amended complaint filed in the United States District Court for the Central District of California in the action styled *Kohn Law Group, Inc. v. Auto Parts Manufacturing Mississippi Inc., et al.*, No. 2:12-cv-08063-MWF-MRW, and the comprehensive, well-reasoned Orders of the United States District Court for the Central District of California in that same case.

To the extent that the California Plaintiff Kohn Law Group, Inc. seeks to recover funds that heretofore have been the subject of this interpleader action, the same is a violation of this Court's permanent injunction. To the extent that the California Plaintiff Kohn Law Group, Inc. seeks recovery over and above or in excess of the interpleader funds, the same is not in violation of this Court's permanent injunction. It is obvious that a determination must be made as to the subject matter of the California district court case as it relates to the subject matter of this interpleader action. At this juncture, this Court is of the opinion that an evidentiary inquiry must be made as to whether the California district court action constitutes a violation of said permanent injunction.

ACCORDINGLY, the Court will set an evidentiary hearing to address the foregoing issues at the earliest convenient date.

App. 53

SO ORDERED, this, the 23rd day of June, 2016.

/s/Glen H. Davidson
SENIOR U.S. DISTRICT JUDGE

APPENDIX G

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

**No. 14-60217
Cons. w/ 14-60287**

[Revised May 8, 2015]

AUTO PARTS MANUFACTURING)
MISSISSIPPI, INCORPORATED,)
a Mississippi Corporation,)
)
Plaintiff - Appellee)
)
v.)
)
KING CONSTRUCTION OF)
HOUSTON, L.L.C., a Mississippi)
Limited Liability Company,)
)
Defendant - Appellee)
)
v.)
)
NOATEX CORPORATION,)
a California Corporation; KOHN)
LAW GROUP, INCORPORATED,)
)
Defendants - Appellants)

Appeals from the United States District Court
for the Northern District of Mississippi

Before HIGGINBOTHAM, CLEMENT, and
HIGGINSON, Circuit Judges.

STEPHEN A. HIGGINSON, Circuit Judge:

No member of the panel nor judge in regular active service having requested that the court be polled on Rehearing En Banc, the petition for Rehearing En Banc is DENIED. *See* Fed. R. App. P. and 5th Cir. R. 35. Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. We amend the prior opinion, 782 F.3d 186, and the amended opinion is as follows:

Noatex Corp. (“Noatex”) and Kohn Law Group, Inc. (“Kohn”) appeal two district court decisions in an interpleader action brought by Auto Parts Manufacturing Mississippi, Inc. (“APMM”) that named Noatex, King Construction of Houston, L.L.C. (“King”), and Kohn as claimants. Appellants claim that the district court erred in discharging APMM from the action, enjoining all parties from filing any proceedings relating to the interpleader fund without a court order, and in denying their motion to compel arbitration.

FACTS AND PROCEEDINGS

APMM contracted with Noatex to build an automotive parts factory in Guntown, Mississippi. Noatex hired King as subcontractor to provide services and materials to Noatex. A dispute arose between Noatex and King over the quality of King’s work and payments allegedly due to King. On September 23,

2011, King filed a Stop Notice pursuant to Mississippi's Stop Notice statute, Miss. Code Ann. § 85-7-181 (repealed 2014).¹ King informed APMM that Noatex owed King \$260,410.15. The Stop Notice had the effect of binding APMM to hold the disputed funds to secure the payments that Noatex allegedly owed to King. *See id.* On October 18, 2011, Noatex filed a complaint in the U.S. District Court for the Northern District of Mississippi against King and its principal alleging that the Stop Notice statute was unconstitutional for violating due process.² On November 30, 2011, Noatex filed a second action in federal district court against King and its principal alleging breach of contract, negligence, and conversion. *Noatex Corp. v. King Constr. of Hous., LLC*, No. 3:11-cv-00152 (N.D. Miss. Nov. 30, 2011), ECF No.1.³

¹ King also claimed entitlement to the funds under the Materialman's Lien statute. Miss. Code Ann. § 85-7-131. King was claiming, in the alternative, that it had a direct contractual relationship with APMM, a claim it later dropped.

² Noatex's action challenging the constitutionality of the Stop Notice statute proceeded separately. In that action, the district court declared the Stop Notice statute facially unconstitutional. *Noatex Corp. v. King Constr. of Hous., LLC*, 864 F. Supp. 2d 478 (N.D. Miss. 2012). This court affirmed, *Noatex Corp. v. King Constr. of Hous., L.L.C.*, 732 F.3d 479 (5th Cir. 2013), and the Mississippi legislature subsequently repealed the statute. Neither the district court nor this court found that the Stop Notice statute's unconstitutionality determined the rights of the parties; thus the resolution of the Stop Notice action did not resolve this interpleader action. *See id.* at 488.

³ The district court granted a motion to voluntarily dismiss the breach of contract action without prejudice. *Noatex Corp. v. King*

On November 15, 2011, APMM filed a complaint for interpleader against King and Noatex in Mississippi state court. APMM alleged that it was a disinterested stakeholder of the \$260,410.15, disclaimed any further right to the funds, alleged that it could be exposed to double liability from the claims of multiple claimants, and alleged that it was unable to determine which of King's and Noatex's claims were valid. APMM asked the court for permission to tender the funds to the court, and asked that the court determine the claimants' rights to the interpleaded funds and enjoin King, Noatex, and any other person from instituting an action against APMM for recovery of the funds. On December 5, 2011, Noatex removed the interpleader complaint to federal district court, noting that "APMM is only a nominal party." Soon after, APMM deposited \$260,410.15 into the district court's registry.

In April 2012, the district court granted King's motion to remand due to lack of complete diversity between the parties. *Noatex Corp. v. King Constr. of Hous., LLC*, 864 F. Supp. 2d 478, 483 (N.D. Miss. 2012). In December 2012, the district court withdrew its remand, finding that APMM could have commenced the case in federal court under 28 U.S.C. § 1335. The court directed APMM to redeposit the interpleader funds with the court, and APMM complied.

While the interpleader action was on remand, Noatex's counsel, Kohn, filed suit against APMM in the U.S. District Court for the Central District of California. Kohn alleged that Noatex had defaulted on

Constr. of Hous., LLC, No. 3:11-cv-00152 (N.D. Miss. Aug. 27, 2013), ECF No. 51.

its obligations to pay for legal services. Kohn claimed that an October 5, 2011 engagement agreement between Kohn and Noatex (“Engagement Agreement”) “confer[red] a lien in favor of Kohn Law upon APMM’s obligations to pay Noatex the amount of \$260,410.15,” that took priority over any other liens against Noatex. The Engagement Agreement also contained an arbitration clause:

Except to the extent otherwise required by the Mandatory Fee Arbitration Act or other similar law, any dispute arising from this engagement shall be resolved by binding arbitration as provided by the rules of ADR Services, Inc. and in the Century City office of ADR Services, Inc. . . .

The California action was stayed “in favor of the ongoing Mississippi interpleader action.”⁴ APMM moved to join Kohn to the interpleader action on the ground that Kohn claimed attorneys’ fees owed by Noatex related to the APMM construction project and the only sums paid for such project were interpleaded. APMM filed an amended complaint adding Kohn as a defendant.

APMM filed a motion for discharge as a disinterested stakeholder, which Noatex and Kohn—but not King—opposed. In their joint opposition and in a joint motion to dismiss, Noatex and Kohn argued that APMM and King were bound by the

⁴ Kohn has appealed the stay order to the Ninth Circuit. *Kohn Law Grp. v. Auto Parts Mfg. MS*, No. 13-55023 (9th Cir. argued Feb. 6, 2015).

Engagement Agreement to arbitrate this dispute and that the district court proceedings should be stayed pending arbitration. Noatex and Kohn also argued that the interpleader complaint failed to allege a claim for relief between Noatex, Kohn, and King.

On March 3, 2014, the district court granted APMM's motion to dismiss or discharge. The court found that the requirements for statutory interpleader under 28 U.S.C. § 1335 had been satisfied. The district court rejected Noatex's and Kohn's arguments that the discharge should be stayed pending arbitration and that APMM could not be discharged because it owed interest on the fund. It decided that the appropriate action was to discharge APMM as a disinterested stakeholder and proceed to determine the respective rights of the claimants. The district court discharged APMM and enjoined King, Noatex, and Kohn from filing any proceedings against APMM relating to the interpleader fund without authorization from the court.

On March 17, 2014, the district court denied Noatex and Kohn's motion to compel arbitration and to stay the proceedings pending arbitration, without prejudice to possible future arbitration between Noatex and Kohn.⁵ The court found that Noatex and Kohn had waived their right to arbitration by substantially invoking the judicial process to King's detriment, that the motion to compel arbitration was not timely since it was filed after the commencement of the interpleader

⁵ The district court did not directly address arbitration as it applied to APMM, since it had discharged APMM two weeks earlier. Still, most of the court's reasoning is equally applicable to APMM.

action, that no valid agreement bound King to arbitrate, and that this dispute was beyond the scope of any agreement to arbitrate.

Noatex and Kohn appealed the discharge order, as well as “all matters inextricably bound up” with that decision—over ten additional district court decisions. They also appealed the district court’s denial of their motion to compel arbitration and to stay the action pending arbitration.

On March 24, 2014, the district court dismissed Kohn from the action, finding that any possible claims that Kohn had to the interpleader funds were not ripe because any lien depends on Noatex having rights in the fund. The district court also found Kohn’s dismissal proper because Kohn’s claim was asserted after the interpleader action was commenced. No party has appealed Kohn’s dismissal.

On October 20, 2014, after the appeals were fully briefed, King and Noatex informed the district court that they had reached a settlement, and the district court dismissed the action without prejudice, retaining “complete jurisdiction to vacate this order and to reopen the action upon cause shown that settlement has not been completed and further litigation is necessary.” *Auto Parts Mfg. Miss. v. King Constr. of Hous., LLC*, No. 1:11-cv-00251 (N.D. Miss. Oct. 20, 2014), ECF No. 262. King and Noatex filed a joint settlement motion with this court asking this court to distribute the registry funds according to the terms of settlement (\$109,750 to King and \$150,660.15 to Noatex) and to dismiss the appeals solely as against King. This panel dismissed the appeal for lack of jurisdiction, noting that we do not have jurisdiction to

distribute the funds. The district court granted King's and Noatex's subsequent motion to distribute the registry funds and dismissed the action without prejudice. *Id.*, ECF No. 264. The district court's distribution order did not address the injunction, and APMM filed a "motion to reopen and for clarification" that asked the district court to explicitly state that the injunction remains in effect. *Id.*, ECF No. 265. Noatex and Kohn opposed APMM's motion. *Id.*, ECF No. 266.

This complicated procedural history leaves the following issues to be resolved on appeal: 1) appellants' motion to dismiss the appeals solely as to King; 2) APMM's invitation to dismiss the appeals in their entirety as moot, and, if granted, appellants' contingent motion to vacate the district court's injunction; 3) appellants' appeal of the district court's order discharging APMM and enjoining appellants from filing any proceedings related to the interpleader funds; and 4) appellants' appeal of the district court's denial of their motion to compel arbitration and to stay the interpleader action pending arbitration.

DISCUSSION

I.

To begin, appellants move to dismiss the appeals as to King after King's settlement agreement with Noatex and the district court's distribution of the interpleader funds. Neither King nor APMM opposes the motion.⁶

⁶ APMM asks that this court go further and dismiss the appeals in their entirety. We decline this invitation, because issues remain as to APMM. *See infra* Section II.A. Appellants' alternative motion to vacate is therefore denied as moot.

Accordingly we grant appellants' motion to dismiss the appeals as to King.

II.

Next, we address appellants' appeal of the district court's order discharging APMM and enjoining appellants from filing any proceedings relating to the interpleader funds. We have jurisdiction pursuant to 28 U.S.C. § 1292(a), which grants this court jurisdiction to hear the appeal of an interlocutory order granting an injunction. Our review "extends only to those parts of an interlocutory order that relate to the grant of an injunction." *Ass'n of Co-op. Members, Inc. v. Farmland Indus., Inc.*, 684 F.2d 1134, 1138 (5th Cir. 1982). In reaching its injunction, the district court relied on its determinations that APMM was a disinterested stakeholder, that APMM had deposited the interpleader funds, and that there were adverse claims to the fund. Thus, we review the district court's discharge order in full, including the finding that the statutory requirements for interpleader were met.

A.

The parties dispute the effect on our jurisdiction of the district court's distribution of funds and dismissal of the case. APMM contends that the distribution has mooted the appeal because the interpleader funds have been distributed and because, by settling, Noatex and King have abandoned any competing claims to the funds. Noatex and Kohn agree that the request for distribution of funds is moot, but maintain that their appeal of the injunction has not been mooted. They argue that the appeal of the injunction's validity is a live issue, evidenced by Kohn's intent to bring action

against APMM and APMM's motion for clarification in the district court as to the continued applicability of the injunction.

Our jurisdiction depends on whether the injunction is still in effect; if the injunction is no longer in effect, the challenge to the injunction is moot and we need not consider it. The question boils down to whether the injunction was permanent or preliminary. Permanent injunctions survive dismissal of the case; preliminary injunctions do not. *See Venezia v. Robinson*, 16 F.3d 209, 211 (7th Cir. 1994) ("A preliminary injunction cannot survive the dismissal of a complaint."); *Rice v. Johnson*, 35 F. App'x 389 (5th Cir. 2002) (unpublished) (same); 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2947 (3d ed.). The answer is not immediately obvious; the district court ordered that appellants "are enjoined from filing any proceedings against Plaintiff relating to the interpleader fund without an order of this Court allowing the same." The district court did not explicitly term its order a "permanent" or "preliminary" injunction. This confusion caused APMM to file a motion in district court to clarify the continued operation of the injunction.

We hold that the district court issued a permanent injunction that survives the subsequent order of dismissal. Several considerations lead us to reach this conclusion. First, APMM requested a *permanent* injunction in its arguments in the district court, and appellants explicitly recognized—and opposed—APMM's request for a *permanent* injunction. The district court considered these arguments before issuing the injunction. Second, the district court relied

on 28 U.S.C. § 2361, which authorizes a district court to issue a permanent injunction in an interpleader action when it discharges a plaintiff from further liability. *See* 28 U.S.C. § 2361; *see also* *Guy v. Citizens Fid. Bank & Trust Co.*, 429 F.2d 828, 831 (6th Cir. 1970) (construing an injunction restraining interpleader defendants from prosecuting any action against plaintiff to be a permanent injunction). Third, it makes good sense for an injunction connected to discharge of an interpleader plaintiff to be permanent. Imposing an injunction that lasts only for the duration of the interpleader action is inconsistent with interpleader’s purposes of enabling “the plaintiff-stakeholder to avoid the burden of unnecessary litigation or the risk of loss by the establishment of multiple liability when only a single obligation is owing.” *Hussain v. Bos. Old Colony Ins. Co.*, 311 F.3d 623, 631 (5th Cir. 2002) (internal quotation marks and citations omitted). A permanent injunction is necessary to give meaning to the plaintiff’s discharge and to encourage interpleader actions. *See In re Bohart*, 743 F.2d 313, 325 (5th Cir. 1984) (“[I]nterpleader statutes and rules are liberally construed to protect the stakeholder from the expense of defending twice, as well as to protect him from double liability.” (internal quotation marks and citation omitted)).

Because appellants request vacatur of the permanent injunction, there is still a live issue before this court, and the challenge to the district court’s injunctive relief is not moot.⁷

⁷ Appellants, somewhat inconsistently, contend that APM’s motion for the district court to clarify its dismissal order to explicitly state that all interpleader defendants remain enjoined

B.

We review the district court's grant of injunctive relief in an interpleader action for abuse of discretion. *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Karp*, 108 F.3d 17, 23 (2d Cir. 1997); *Metro. Life Ins. Co. v. Kubichek*, 83 F. App'x 425, 430 (3d Cir. 2003). To the extent it is a legal question, the underlying issue of whether the statutory requirements for interpleader have been met is reviewed de novo. *See Tex. Commerce Bank Nat'l Ass'n v. Florida*, 138 F.3d 179, 181 (5th Cir. 1998).

C.

Before we address whether the district court abused its discretion in discharging APMM and enjoining the claimants from filing any claims relating to the interpleader funds, we determine whether the requirements for maintaining an interpleader action have been met. There are two types of interpleader: rule interpleader pursuant to Fed. R. Civ. P. 22 and statutory interpleader under 28 U.S.C. § 1335. They differ in jurisdictional requirements but not in substance. *See* 7 Charles Alan Wright, Arthur R. Miller

from pursuing APMM for the interpleader funds was a Fed. R. Civ. P. 59(e) motion to alter or amend the judgment, and therefore this court lacks jurisdiction over the appeal. We disagree. Appellants are appealing the injunction contained in the order granting APMM's motion to dismiss or discharge. APMM's motion to clarify does not seek to amend or alter the order appealed from, but rather asks to clarify a separate order of dismissal that has not been appealed. APMM's motion therefore does not strip this court of jurisdiction to consider the appeal of the injunction. *See Birdsong v. Wrotenbery*, 901 F.2d 1270, 1272 (5th Cir. 1990).

& Mary Kay Kane, Federal Practice and Procedure § 1703 (3d ed.). 28 U.S.C. § 1335 grants a district court jurisdiction over an interpleader action if: 1) the plaintiff files an action concerning an amount of \$500 or more; 2) the plaintiff deposits the funds at issue into the registry of the court; 3) two or more adverse claimants claim or may claim to be entitled to the funds; and 4) those claimants are minimally diverse. *See* 28 U.S.C. § 1335(a). “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(b). Interpleader actions proceed in two stages.

In the first stage, the district court decides whether the requirements for rule or statutory interpleader action have been met by determining if there is a single fund at issue and whether there are adverse claimants to that fund. If the district court finds that the interpleader action has been properly brought the district court will then make a determination of the respective rights of the claimants.

Rhoades v. Casey, 196 F.3d 592, 600 (5th Cir. 1999) (citation omitted). Whether the statutory requirements for interpleader have been met squarely concerns only the first stage of interpleader. A court considers the merits of the claimants’ claims to the fund and the proper distribution of the fund only if the statutory elements for an interpleader action are met. *See id.*

Appellants do not dispute that the action meets most of the elements of statutory interpleader. APMM

filed an action concerning \$260,410.15 and deposited that sum with the registry of the court. APMM named as claimants King (a Mississippi citizen), Noatex (a California citizen), and later Kohn (a California citizen), satisfying § 1335's minimum diversity requirement.⁸ See *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 530 (1967) (“[Section 1335] has been uniformly construed to require only ‘minimal diversity,’ that is, diversity of citizenship between two or more claimants, without regard to the circumstance that other rival claimants may be co-citizens.”). The only disputed element is whether two or more adverse claimants claim, or may claim, entitlement to the funds. Tellingly, appellants concede that, at the time of filing—and when Noatex removed the action to federal court—the district court had jurisdiction over the interpleader action because all of § 1335's requirements were then met. Appellants concede that, at that time, “the Stop Notice issued by King Construction had represented an adverse claim against obligations exceeding \$500 that APMM owes to Noatex.” Appellants contend that, although the district court retained jurisdiction that was established at the time of removal, interpleader became improper when the district court held the Stop Notice statute unconstitutional. At that point, appellants argue,

⁸ The district court's discharge ruling primarily considered King's and Noatex's claims to the interpleader funds. The district court subsequently dismissed Kohn from the action, finding that Kohn did not occupy an adverse position vis a vis Noatex. No party has appealed Kohn's dismissal and we proceed on the assumption that King and Noatex are the only potentially adverse claimants. This assumption does not change our analysis.

APMM no longer faced the prospect of multiple adverse claims against the interpleaded funds.

Appellants' argument, based heavily in traditional theories of equity, is that APMM currently faces only *separate* obligations to King and to Noatex. Thus, the argument goes, APMM is not subject to the possibility of multiple claims for the same funds, making interpleader improper. Despite the distribution of funds, appellants continue to reserve their rights to pursue separate claims for the portion of the interpleaded funds that was distributed to King. Essentially, appellants argue that King's claim was implausible and without merit because King's Stop Notice was vacated after the statute was declared unconstitutional. The district court's interpleader jurisdiction is determined at the time the interpleader complaint is filed. *See Walker v. Pritzker*, 705 F.2d 942, 944 (7th Cir. 1983) ("[I]nterpleader jurisdiction is determined at the time suit is filed and subsequent events do not divest the court of jurisdiction once properly acquired"); *Smith v. Widman Trucking & Excavating, Inc.*, 627 F.2d 792, 799 (7th Cir. 1980) (holding that, in a statutory interpleader action, "if jurisdiction exists at the outset of a suit, subsequent events will not divest the court of jurisdiction"). But even assuming that later events could divest the district court of its interpleader jurisdiction, the facts in this case would continue to show that interpleader jurisdiction existed. Although the unconstitutionality of the Stop Notice statute no longer permitted King to unilaterally impound the funds via the operation of the Stop Notice statute, King still stated a claim to those funds. APMM, faced with the claim—and Noatex's claim—was permitted to deposit the disputed funds

and maintain an action for interpleader. Appellants confuse the two stages of interpleader. It is not for the district court, in determining whether interpleader is proper, to consider whether the competing claims are meritorious. In fact, “in the usual case, at least one of the claims will be quite tenuous. . . . [N]othing more is implied than that the claims alleged must meet a minimal threshold level of substantiality.” 7 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1704 (3d ed.). “[E]ven the mere ‘threat of multiple vexation by future litigation provides sufficient basis for interpleader.’” *Tittle v. Enron Corp.*, 463 F.3d 410, 424 n.10 (5th Cir. 2006) (quoting *Corrigan Dispatch Co. v. Casa Guzman, S.A.*, 696 F.2d 359, 364 (5th Cir. 1983)). Statutory interpleader under § 1335 is especially liberal, permitting a valid interpleader action if two claimants “*may claim to be entitled to*” the interpleader funds, even if there is not yet a claim. 28 U.S.C. § 1335(a)(1) (emphasis added).

The 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. The first stage of interpleader only is concerned with whether multiple claims have been asserted, or may be asserted, against a disinterested stakeholder, not whether those claims have merit. *See Rhoades*, 196 F.3d at 601 (finding a proper interpleader action where multiple parties informed a stakeholder that they claimed a pool of benefits). Appellants have conceded in the district court, even after the Stop Notice statute was declared unconstitutional, that King at least claimed a right to the interpleader funds. In support of

its motion to stay the case pending arbitration, appellants argued that “[u]nder the circumstances of this action for interpleader, King Construction of Houston, LLC must also arbitrate *its claim* of asserted equitable rights to the interpleader fund.”

There is also a “single, identifiable fund” that is the subject of the interpleader. *Rhoades*, 196 F.3d at 600 n.8 (citing *Wausau Ins. Cos. v. Gifford*, 954 F.2d 1098, 1100 (5th Cir. 1992)). Appellants argue that, whatever claim King had against Noatex, it was not a claim against the interpleaded funds. They characterize King as a general creditor whose claim is against APMM generally but not tied to the interpleader funds. Appellants rely on *Airborne Freight Corp. v. United States*, 195 F.3d 238 (5th Cir. 1999) to argue that King and Noatex assert rights to different debts.⁹ In *Airborne*, this court held that a stakeholder could not force a general creditor to limit satisfaction of its judgment to specified funds to which other creditors asserted claims. *Id.* at 242. There, the claims of the general creditor and the other creditors stemmed from unrelated transactions, which was another reason not to require satisfaction from a single stake. *Id.* at 239. *Airborne* is easily distinguished. Neither Noatex nor King is a general creditor of APMM. The claims are not merely unrelated claims that arise separately against

⁹ Appellants also rely heavily on English Court of Chancery cases, most notably *Glyn v. Duesbury*, 11 Sim. 139 (Ch. 1840). Even if relevant, *Glyn* does not support appellants’ claim that the claimants’ debts must be the same. Rather, “[a] case of interpleader then arises where the same subject, whether debt, duty or thing is claimed.” *Id.* at 148. Here, the same fund was claimed by both Noatex and King.

APMM. Both claimants sought the amount APMM deposited with the court registry. King's claim stemmed directly from its relationship with Noatex and from work on the same construction project. Appellants contend that they sought payment under purchase order contracts between APMM and Noatex, and that their contracts do not mention or involve King. Again, this is an argument about the validity of King's claims and does not implicate the district court's decision that interpleader was a proper vehicle for this action.¹⁰

Faced with King's and Noatex's competing claims, APMM reasonably concluded that it was subject to multiple suits from adverse claimants seeking the same \$260,410.15. APMM deposited the disputed sum with the registry of the court, thereby instituting and maintaining an interpleader action as permitted by 28 U.S.C. § 1335.

D.

Having found the district court did not err in finding the statutory requirements of § 1335 interpleader met, we review its decision to discharge APMM and to enjoin the parties for abuse of discretion. The district court's discharge and injunction readily follow from its findings on statutory interpleader, and we affirm.

¹⁰ It is admittedly more difficult to determine if claims are for the same fund when the claims are for money and not for a unique piece of property; money is fungible. But we have upheld interpleader before when money was at stake. *See, e.g., Tittle*, 463 F.3d at 423–25.

In an interpleader action, the district court “may discharge the plaintiff from further liability.” 28 U.S.C. § 2361; *see also* 7 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1714 (3d ed.) (“When the court decides that interpleader is available, it may issue an order discharging the stakeholder, if the stakeholder is disinterested.”). “A district court has broad powers in an interpleader action.” *Rhoades*, 196 F.3d at 600. APMM met the requirements of Section 1335 and disclaimed any right to the funds; there was no reason to keep APMM in a dispute solely between the adverse claimants. *See Tittle*, 463 F.3d at 423 (quoting Wright, Miller & Kane for the proposition that a disinterested stakeholder who is willing to tender the disputed funds “is not to be obliged to be at the expense and risk of defending an action; but, on giving up the thing . . . , *he is to be relieved, and the Court directs that the persons between whom the dispute really exists shall fight it out at their own expense*”).

28 U.S.C. § 2361 also expressly authorizes a district court to enter an order restraining claimants “from instituting or prosecuting any proceeding in any State or United States court affecting the property . . . involved in the interpleader action until further order of the court.” 28 U.S.C. § 2361; *see also Rhoades*, 196 F.3d at 600–01. The district court was well within its discretion to protect APMM—a disinterested stakeholder—from other suits seeking the interpleader funds. *See In re Bohart*, 743 F.2d at 325 (“[I]nterpleader statutes and rules are liberally construed to protect the stakeholder from the expense of defending twice, as well as to protect him from

double liability.” (internal quotation marks and citation omitted)).

Appellants present no argument why APMM should not be discharged besides arguing that interpleader itself is unwarranted. We therefore find that the district court did not abuse its discretion in discharging APMM from the action and in enjoining claimants from filing proceedings against APMM relating to the interpleader funds.

III.

Noatex and Kohn also appeal the district court’s denial of their motion to compel arbitration and to stay the interpleader action pending arbitration. We have jurisdiction over this appeal pursuant to 9 U.S.C. § 16(a). Noatex and Kohn sought to compel APMM and King to arbitrate the entire interpleader dispute on the basis of an arbitration clause in the Engagement Agreement between Noatex and its law firm, Kohn. The district court denied the motion on numerous grounds, including: 1) appellants waived their right to arbitrate by substantially invoking the judicial process; 2) appellants’ motion was untimely; and 3) the arbitration agreement between Noatex and Kohn did not require APMM and King to arbitrate this dispute. Noatex and Kohn argue that their appeal is not moot because, if this court finds that arbitration should have been compelled, we have the authority to vacate the district court’s discharge order and injunction. Further, appellants contend that Noatex’s claim for fees and costs incurred while Kohn was a party should be arbitrated. Because there is a live controversy, we will decide the merits of the appeal. We agree with the district court that the arbitration agreement did not

require APMM to arbitrate this dispute, so we need not reach the district court's other grounds for denying the motion.¹¹

A.

We review a district court's denial of a motion to compel arbitration and denial of a stay pending arbitration de novo. *JP Morgan Chase & Co. v. Conegie ex rel. Lee*, 492 F.3d 596, 598 (5th Cir. 2007); *Texaco Exploration & Prod. Co. v. AmClyde Engineered Prods. Co.*, 243 F.3d 906, 908 (5th Cir. 2001). We review for abuse of discretion a district court's determination of whether equitable estoppel may be invoked to compel arbitration. *Bridas S.A.P.I.C. v. Gov't of Turkmenistan*, 345 F.3d 347, 360 (5th Cir. 2003). "To constitute an abuse of discretion, the district court's decision must be either premised on an application of the law that is erroneous, or on an assessment of the evidence that is clearly erroneous." *Grigson v. Creative Artists Agency, L.L.C.*, 210 F.3d 524, 528 (5th Cir. 2000).

B.

Whether APMM has agreed, or is otherwise bound, to arbitrate is a threshold question for the court. "[B]ecause arbitration is a matter of contract, where a party contends that it has not signed any agreement to arbitrate, the court must first determine if there is an agreement to arbitrate before any additional dispute

¹¹ In their briefs, prior to settlement, appellants also argued that King is bound to arbitrate. Because we have dismissed King from these appeals, we need not consider appellants' argument that King's defense of its entitlement to interpleader funds compels King or APMM to arbitrate.

can be sent to arbitration.” *Will-Drill Res., Inc. v. Samson Res. Co.*, 352 F.3d 211, 218 (5th Cir. 2003). To determine whether the parties have agreed to arbitrate this claim, we ask “(1) whether there is a valid agreement to arbitrate between the parties; and (2) whether the dispute in question falls within the scope of that arbitration agreement.” *Pers. Sec. & Safety Sys. Inc. v. Motorola Inc.*, 297 F.3d 388, 392 (5th Cir. 2002). These are separate inquiries; while the strong federal policy favoring arbitration applies to the scope of an arbitration agreement, “the policy does not apply to the initial determination whether there is a valid agreement to arbitrate.” *Banc One Acceptance Corp. v. Hill*, 367 F.3d 426, 429 (5th Cir. 2004); *see also Westmoreland v. Sadoux*, 299 F.3d 462, 465 (5th Cir. 2002).

i.

We first decide whether there was a valid agreement to arbitrate between the parties. Kohn and Noatex, as signatories to the Engagement Agreement, have agreed to arbitrate certain disputes between them. The Engagement Agreement is an agreement for Kohn to provide legal services to Noatex and is signed only by Noatex and Kohn. It is undisputed that APMM is not a signatory to the contract containing the arbitration clause. Where some written agreement to arbitrate exists, we have recognized several theories for binding a non-signatory to an arbitration agreement. *See The Rice Co. (Suisse), S.A. v. Precious Flowers Ltd.*, 523 F.3d 528, 536–37 (5th Cir. 2008). Appellants contend that one of these theories—equitable estoppel—requires APMM to arbitrate, notwithstanding

APMM's status as a non-signatory to the Engagement Agreement.

The parties dispute which body of law—federal, California, or Mississippi—applies to the question of whether equitable estoppel binds APMM to the arbitration clause. We need not resolve this question because APMM is not bound under any estoppel standard. *See Washington Mut. Fin. Grp., LLC v. Bailey*, 364 F.3d 260, 267–68 (5th Cir. 2004) (under federal law, a non-signatory is bound to arbitrate when it sues “based upon” the contract); *JSM Tuscany, LLC v. Superior Court*, 123 Cal. Rptr. 3d 429, 445 (Cal. Ct. App. 2011) (under California law, a non-signatory is bound to arbitrate when pursuing a claim that is “dependent upon or inextricably intertwined” with the contract obligations); *Scruggs v. Wyatt*, 60 So. 3d 758, 770 (Miss. 2011) (under Mississippi law, a non-signatory is bound to arbitrate when its claims are “directly dependent” on the contract).

Appellants argue that APMM can establish the existence of “conflicting claims”—a prerequisite to its interpleader action—only by reference to the Engagement Agreement. However, APMM can establish—and has established—the existence of conflicting claims necessary for interpleader by referencing the dispute between King and Noatex alone, without reference to the Engagement Agreement. Statutory interpleader requires the assertion of two or more claims to the same fund. *See* 28 U.S.C. § 1335(a)(1); *Rhoades*, 196 F.3d at 600 (holding that the statutory requirements for interpleader are met if there are adverse claimants to a single fund). Here, claims were asserted by Noatex

and King; interpleader did not depend on including Kohn's claims to the fund. Thus, while the language of the Engagement Agreement may have been *sufficient* to establish conflicting claims—of Noatex and Kohn—it was not *necessary*. Appellants concede this point by arguing that “APMM and King Construction are bound to arbitrate, *even though the amended interpleader complaint is also pleaded and disputed on alternate grounds that do not reference the engagement agreement.*” Claims cannot be inextricably intertwined with, directly dependent on, or based on a contract if they can be shown without reference to the contract.

We also note that this case does not fit the rationale of the equitable estoppel exception. APMM is not trying to “hav[e] it both ways” by seeking to hold Noatex and Kohn liable pursuant to a contract that contains an arbitration provision and, at the same time, deny arbitration's applicability. *Bailey*, 364 F.3d at 268. We see no unfairness in refusing to compel a non-signatory party to arbitrate a dispute based on an arbitration clause contained in an attorney engagement agreement signed by two other parties. Because APMM has not agreed to arbitrate disputes with Noatex and Kohn, and is not required by equitable estoppel to arbitrate, we affirm the district court's denial of appellants' motion to compel arbitration and to stay the proceedings. *See First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 942 (1995) (“[A] party who has not agreed to arbitrate will normally have a right to a court's decision about the merits of its dispute . . .”).

ii.

Because we find that APMM did not agree to arbitrate this dispute and that equitable estoppel does

not compel it to arbitrate, we need not address whether the scope of the agreement includes the interpleader suit. *See Tittle*, 463 F.3d at 419 (determining scope of arbitration clause only because there was no dispute that parties were subject to a valid agreement to arbitrate). We also do not reach the district court's alternative grounds for denying appellants' motion to compel.

CONCLUSION

For the foregoing reasons, we AFFIRM the district court's discharge of APMM and its accompanying injunction. We also AFFIRM the district court's denial of appellants' motion to compel arbitration and to stay proceedings pending arbitration. King Construction is DISMISSED from these appeals. Appellants' alternative motion to vacate the district court's rulings is DENIED.

APPENDIX H

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
ABERDEEN DIVISION**

CIVIL ACTION NO. 1:11-cv-00251-GHD-SAA

[Filed December 4, 2014]

AUTO PARTS MANUFACTURING)
MISSISSIPPI INC., a Mississippi)
corporation)
PLAINTIFF)
)
v.)
)
KING CONSTRUCTION OF)
HOUSTON, LLC, a Mississippi)
limited liability company; and)
NOATEX CORPORATION,)
a California corporation)
DEFENDANTS)

**ORDER GRANTING JOINT MOTION TO
REOPEN CASE FOR LIMITED PURPOSE OF
DISTRIBUTING REGISTRY FUNDS
PURSUANT TO SETTLEMENT AGREEMENT**

Presently before the Court is the parties' joint motion to reopen this case for the limited purpose of distributing the registry funds [263] pursuant to Section 3 of the parties' settlement agreement and

mutual release [263-1] dated October 14, 2014. Upon due consideration, the Court finds that the motion is well taken.

ACCORDINGLY, it is HEREBY ORDERED that

- (1) This action is reopened, solely for the limited purpose of distributing the registry funds pursuant to Section 3 of the parties' settlement agreement and mutual release [263-1] dated October 14, 2014;
- (2) In accordance with that settlement agreement and mutual release, the Clerk shall distribute not less than \$109,750.00 to King Construction of Houston, LLC, and not less than \$150,660.15 to Noatex Corporation;
- (3) Any additional moneys held in the registry shall be distributed equally between King Construction of Houston, LLC and Noatex Corporation;
- (4) Payment of the King Construction of Houston, LLC distribution is to be made by check payable and delivered to the law firm of Deas & Deas, LLC. Payment of the Noatex Corporation distribution is to be made by check payable and delivered to the law firm of Kohn Law Group, Inc.;
- (5) This action is DISMISSED WITHOUT PREJUDICE; and
- (6) This case is CLOSED.

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SO ORDERED, this, the 4th day of December 2014.

/s/Glen H. Davidson
SENIOR JUDGE

APPENDIX I

**IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI
ABERDEEN DIVISION**

CIVIL ACTION NO. 1:11-cv-00251-GHD-SAA

[Filed March 3, 2014]

AUTO PARTS MANUFACTURING)
MISSISSIPPI INC., a Mississippi)
corporation)
PLAINTIFF)
)
v.)
)
KING CONSTRUCTION OF)
HOUSTON, LLC, a Mississippi)
limited liability company; and)
NOATEX CORPORATION, a)
California Corporation; and KOHN)
LAW GROUP, INC., a California)
corporation)
DEFENDANTS)
)

**MEMORANDUM OPINION GRANTING AUTO
PARTS MANUFACTURING MISSISSIPPI INC.'S
MOTION TO DISMISS OR
DISCHARGE PLAINTIFF**

Presently before the Court in this stormy
interpleader action is a motion to dismiss or discharge

plaintiff [175] filed by Plaintiff Auto Parts Manufacturing Mississippi Inc. (“APMM”). Upon due consideration, the Court finds that the motion should be granted and that APMM should be dismissed from the case.

A. Factual and Procedural Background

APMM contracted with Noatex Corporation (“Noatex”) for Noatex to construct an auto parts manufacturing facility in Guntown, Mississippi. Noatex subcontracted with King Construction of Houston, LLC (“King Construction”) to provide some materials and labor for the construction. Noatex alleges that APMM owes it money for goods and services that Noatex provided to APMM under the contract. Noatex questions some of the invoices submitted to it by King Construction pertaining to the subcontract work. In response to this billing dispute between Noatex and King Construction, King Construction notified APMM on September 23, 2011, pursuant to Mississippi’s “Stop Notice” Statute, Mississippi Code § 85-7-181 (the “Stop Notice statute”), that Noatex owed King Construction \$260,410.15 and that King Construction was filing a “Laborer’s and Materialman’s Lien and Stop Notice” in the Chancery Court of Lee County, Mississippi. On the date of notification, APMM owed Noatex \$179,707.40. The stop notice bound the disputed funds in APMM’s hands to secure invoice claims that Noatex allegedly owed to King Construction. *See* MISS. CODE ANN. § 85-7-181 (“[T]he amount that may be due . . . shall be bound in the hands of such owner for the payment in full”). King Construction’s filing of the stop notice in the *lis pendens* record of the chancery court had the effect of establishing King Construction’s lien priority

over the property that was the subject of the dispute. See Mississippi Code § 85-7-197. APMM later deposited the \$260,410.15 in the registry of the Chancery Court of Lee County.

This dispute resulted in three lawsuits, one of which is the case *sub judice*.¹ APMM filed this action in the Chancery Court of Lee County to determine ownership of the disputed funds subject to King Construction's stop notice, naming both Noatex and King Construction as defendants. In December of 2011, Noatex removed this action to this Court. APMM deposited the money into Court registry. The interpleaded funds are currently impounded in the Court's registry pending disposition.

¹ The other two lawsuits are a declaratory action and breach of contract action. Noatex filed the declaratory action (3:11-cv-00137-SAA) against King Construction and its principal Carl King, challenging the facial constitutionality and constitutionality-as-applied of the Stop Notice statute. The State of Mississippi intervened as a defendant to defend the constitutionality of its statute. United States Magistrate Judge S. Allan Alexander issued a declaratory judgment in favor of Noatex, concluding that § 85-7-181 violated due process and that King Construction's stop notice thus had no effect on the funds APMM had deposited in the Court's registry. On appeal, *inter alia*, the Fifth Circuit 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. This ruling did not include a determination as to any of the parties' rights to the money frozen by the stop notice. In the other suit (No. 3:11-cv-00152-SAA), Noatex sued King Construction for breach of contract in this Court claiming damages in excess of \$500,000, but that action was dismissed when this Court granted Noatex's motion to voluntarily dismiss its breach of contract action without prejudice.

On May 23, 2013, APMM filed the present motion to discharge [175] itself as a disinterested stakeholder in this action. Subsequently, Noatex and Kohn Law Group filed a joint response in opposition to the motion, but King Construction did not file a response in opposition to the motion. APMM filed a reply. The motion is now ripe for review.

B. Analysis and Discussion

The Court “has broad powers in an interpleader action,” including the power to discharge the plaintiff who is a disinterested stakeholder. 28 U.S. C. § 2361; *Rhoades v. Casey*, 196 F.3d 592, 600 (5th Cir. 1999); 7 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1714 (3d ed. 2001). Interpleader offers a procedural protection for the stakeholder willing to deposit the amount into the court registry from the expenses and risks of defending the action; the idea is that the stakeholder gives up the money and allows those among whom the dispute really exists to fight it out at their own expense and in turn the stakeholder is shielded from the liability of defending multiple possible lawsuits. *See Tittle v. Enron Corp.*, 463 F.3d 410, 423 (5th Cir. 2006) (“The legislative purpose of an interpleader action is to remedy the problems posed by multiple claimants to a single fund, and to protect a stakeholder from the possibility of multiple claims on a single fund.”); *Wausau Ins. Cos. v. Gifford*, 954 F.2d 1098, 1100 (5th Cir. 1992); *Corrigan Dispatch Co. v. Casa Guzman, SA.*, 696 F.2d 359, 364 (5th Cir. 1983).

Traditionally, the stakeholder filed a bill of interpleader and neither asserted an interest in the fund nor contested the extent of the liability; instead,

the stakeholder brought the money or property into court and was discharged, leaving the court to determine the rights of the adverse claimants to the money or property. *See Texas v. Florida*, 306 U.S. 398, 406, 59 S. Ct. 563, 83 L. Ed. 817 (1939); 7 CHARLES A. WRIGHT, ARTHUR R. MILLER & MARY K. KANE, *FEDERAL PRACTICE & PROCEDURE* § 1702 (3d ed. 2001). *See generally* Ralph V. Rogers, *Historical Origins of Interpleader*, 51 YALE L.J. 924 (1942); Zechariah Chafee, Jr., *Modernizing Interpleader*, 30 YALE L.J. 814 (1921). Courts gradually adopted a bill in the nature of interpleader, wherein the stakeholder asserted an interest in the fund or denied liability to one or more of the claimants but called upon the court to exercise its jurisdiction to guard against the risks of loss from the prosecution in independent suits of rival claims. *See Texas v. Florida*, 306 U.S. at 406-07, 59 S. Ct. 563.

From this background, two types of interpleader were developed: statutory interpleader under The Federal Interpleader Act of 1936, 28 U.S.C. § 1335, and traditional equitable interpleader under Rule 22 of the Federal Rules of Civil Procedure. Both types of interpleader encompass the traditional bill of interpleader and bill in the nature of interpleader and have different requirements. *See Haynes v. Felder*, 239 F.2d 868, 871 (5th Cir. 1957). Section 1335 interpleader requires only a \$500 amount in controversy, minimal diversity among the claimants,² venue in any district

² Minimal diversity is “diversity of citizenship between two or more claimants.” *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 530, 87 S. Ct. 1199, 18 L. Ed. 2d 270 (1967). The language of § 1335 requires no more than “‘minimal diversity,’ that is, diversity of citizenship between two or more claimants, without regard to

where any claimant resides, and nationwide service of process. 28 U.S.C. §§ 1335, 1397, 2361. Rule 22 interpleader requires a \$10,000 amount in controversy, complete diversity among the stakeholder and the claimants unless a federal question is present, avenue where all plaintiffs or all defendants reside or where the claim arose, and statewide service of process. 28 U.S.C. §§ 1332(a)(1), 1391(a); FED. R. CIV. P. 4.

The Fifth Circuit Court of Appeals has instructed:

An interpleader action typically involves two stages. In the first stage, the district court decides whether the requirements for rule or statutory interpleader action have been met by determining if there is a single fund at issue and whether there are adverse claimants to that fund. 7C WRIGHT, MILLER & KANE, FEDERAL PRACTICE & PROCEDURE 2d § 1714 (1986). If the district court finds that the interpleader action has been properly brought[,] the district court will then make a determination of the respective rights of the claimants.

Rhoades, 196 F.3d at 600.

In the case *sub judice*, the Court finds that the requirements for § 1335 interpleader have been met. First, APMM, a corporation, commenced this interpleader action concerning the amount of \$260,410.15, which APMM contends it owes, thus meeting the \$500 amount-in-controversy requirement of § 1335(a). Second, three claimants claim entitlement

the circumstance that other rival claimants may be co-citizens.”
Id., 87 S. Ct. 1199.

to the fund: King Construction (Mississippi resident) on one side, and Noatex and Kohn Law Group (both California residents) on the other side. Although Noatex and Kohn Law Group argue that APMM cannot show that King Construction asserts any claim to the interpleader fund, the Court finds this argument is baseless. 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. of Houston, L.L.C.*, 732 F.3d 479, 488 (5th Cir. 2013). The claimants have independently expressed their claims of entitlement to the money at stake.³ Indeed, the Court finds that the only Article III case or controversy here exists between these claimants. Thus, two or more adverse claimants are present who claim entitlement to the fund and are minimally diverse, as required by § 1335(a)(1). Finally, APMM has deposited the money into the Court registry, there to abide the judgment of the Court, as required by § 1335(a)(2). The requirements for statutory interpleader have been met. Thus, the Court turns to the other arguments by

³ 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 Construction. However, King Construction has not filed any response in opposition to APMM's motion for discharge as a disinterested stakeholder. The Court finds that this argument by Noatex and Kohn Law Group, 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).

Noatex and Kohn Law Group against discharge of APMM as a disinterested stakeholder.

First, Noatex and Kohn Law Group argue that APMM cannot be discharged at this juncture because the case should be stayed pending arbitration of an engagement agreement between Kohn Law Group and Noatex and cites to its motion to stay the case for arbitration [177]. The Court is of the opinion that the motion for discharge should be ruled on prior to the motion to stay the case for arbitration, particularly since the proposed arbitration arises out of an agreement between Kohn Law Group and Noatex and does not pertain to King Construction. The Court notes that it will address the merits of the motion to stay for arbitration at a later date.

Second, Noatex and Kohn Law Group argue that APMM cannot be discharged because APMM is responsible for interest on the fund for the four-month period between remand of this action to state court and deposit of the money into the state-court registry, during which time Noatex sought a recall of the remand order at both the trial and appellate levels. In examining this issue, the Court turns to the principles of law that govern interest in interpleader actions.

“The usual and general rule is that any interest on an interpleaded and deposited fund follows the principal and is to be allocated to those who are ultimately to be the owners of that principal.” *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 162, 101 S. Ct. 446, 66 L. Ed. 2d 358 (1980) (citing cases); *see, e.g., James Talcott, Inc. v. Allahabad Bank, Ltd.*, 444 F.2d 451, 463 (5th Cir.), *cert. denied sub nom. City Trade & Indus., Ltd. v. Allahabad Bank, Ltd.*, 404

U.S. 940, 92 S. Ct. 280, 30 L. Ed. 2d 253 (1971); *Murphy v. Travelers Ins. Co.*, 534 F.2d 1155, 1165 (5th Cir. 1976). The rule that “interest follows principal” has been established under English common law since at least the mid-1700s. *Phillips v. Washington Legal Found Beckford v. Tobin*, 524 U.S. 156, 165, 118 S. Ct. 1925, 141 L. Ed. 2d 174 (1998) (citing 1 Ves. Sen. 308, 310, 27 Eng. Rep. 1049, 1051 (Ch. 1749) (“[I]nterest shall follow the principal, as the shadow the body”)). The law is well established that if the plaintiff in an interpleader action does not bring the money into court, the plaintiff will be charged with interest on the money. *See Seth Spring & Sons v. S. Carolina Ins. Co.*, 21 U.S. 268 (1823). However, the law is also well established that a plaintiff who deposits money into the court registry at the commencement of the interpleader action should not be required to pay interest on the fund unless he is chargeable with any delays occurring during the litigation. *See Groves v. Sentell*, 66 F. 179, 181 (5th Cir. 1895).

With all the foregoing in mind, the Court turns to the circumstances of this particular case. On November 15, 2011, APMM commenced this interpleader action in the Chancery Court of Lee County, noting in its complaint for interpleader that “[APMM], as a disinterested stakeholder, would show that it has no further claim to the funds to be interpleaded, and is prepared to tender the funds [at issue] unto the Court for the benefit of Defendants herein and all other potential claimants.” Pl.’s Com pl. [2] ¶ 11. On December 5, 2011, the case was removed to this Court. On December 23, 2011, APMM filed a motion to deposit funds into the Court registry [16]. Noatex filed a response in opposition to the motion contending that

APMM could not establish risk of double liability or vexation as is required for a single obligation upon a single fund in interpleader, and APMM filed a reply in support of its position. On February 1, 2012, the Magistrate Judge granted APMM's motion to deposit funds into the Court registry. *See* Ct.'s Order [35]. The next day, APMM deposited the amount disputed, \$260,410.15, into the Court registry.⁴

On April 12, 2012, the Magistrate Judge entered an Order [56] remanding the case to the Chancery Court of Lee County and directing the Clerk of this Court to refund the money deposited into the Court registry. Accordingly, on May 14, 2012, the Clerk of the Court returned the money deposited into the Court registry to APMM's counsel. Apparently, on September 26, 2012, APMM tendered a deposit of the money to the Chancery Court of Lee County. Check [117-1] at 1. On December 5, 2012, the Magistrate Judge entered an Order [89] vacating its prior remand Order and directing, *inter alia*, that APMM re-deposit into the Court registry the amount at issue in the case, \$260,410.15. On December 11, 2012, APMM re-deposited the disputed amount into the Court registry; the remark on the docket indicates "Receipt #MSN100001367 in the amount of \$260,410.15 deposited in the Registry of the Court." Thereafter, the amount has been in the Court registry.

Thus, the amount in controversy was in limbo—not in the Court registry—from May 14, 2012 until

⁴ The Court notes that Noatex and Kohn Law Group have not argued that APMM should be liable for any delay in initially depositing the amount into the Court registry.

September 26, 2012. Noatex and Kohn Law Group contend that APMM is liable for 1.5% interest for each month in that four-month period due to APMM's "delay." As support for their position, Noatex and Kohn Law Group cite *Laws v. New York Life Insurance Co.*, 81 F.2d 841 (5th Cir.), *modified on other grounds*, 82 F.2d 811 (5th Cir. 1936), a case brought by an insurance company to determine rights of the party creditors to proceeds from a life insurance policy. *Laws* was a case "in the nature of a bill of interpleader" wherein the plaintiff insurance company continued to use the amount admitted to be due under the subject policy during the suit, rather than depositing the amount into the registry of the court. The *Laws* plaintiff did not file a motion to be discharged as a disinterested stakeholder. The Fifth Circuit found that the plaintiff was liable for the interest that had accrued on the money during the litigation. *Id.* at 843–44. Obviously, *Laws* is distinguished from this case, as here APMM filed a complaint in interpleader, deposited the money at issue into the Court registry after its motion to do so was granted, and twice moved the Court to be discharged as a disinterested stakeholder.⁵

In this case, the Court finds that APMM is not liable for any "delay" during the four months the money would have accrued interest in a court registry. APMM did not seek remand; King Construction did. And during the subject four-month period, APMM had no choice but to wait as Noatex challenged the Magistrate

⁵ APMM first filed a motion for discharge [39] on February 6, 2012; the motion was never ruled on by the Magistrate Judge because the case was remanded to state court shortly after that motion was filed.

Judge's remand order and attempted to appeal the decision to the Fifth Circuit. APMM was not at fault in receiving the money released to it by the Court; frankly, it had no choice in the matter. Until the case had a forum, the money had to be in the hands of APMM, as the money had been deposited into the interpleader fund by APMM. It is apparent to this Court that during that subject four-month period it was necessary for APMM to await a ruling resolving whether the interpleader matter would be heard in state or federal court to determine whether the money should be deposited into the registry of the Chancery Court of Lee County or this Court. At no point in that four-month period did any of the claimants contend that APMM was liable for interest on the money while it was in limbo. For all the foregoing reasons, the arguments by Noatex and Kohn Law Group in opposition to APMM's motion for discharge are not well taken. The Court finds that discharge is proper at this juncture.

APMM filed a complaint in interpleader, tendered the amount in controversy to the Court registry, and remained neutral as to the proper distribution of the fund. APMM has effectively "relinquishe[d] all interest in" the interpleaded fund and has never contested its obligation to pay the amount in the fund. *See Tittle*, 463 F.3d at 424 (citing *Texas v. Florida*, 306 U.S. at 406-07, 59 S. Ct. 563). All that now remains is the dispute among the claimants (King Construction, Noatex, and Kohn Law Group) over the appropriate allocation of the fund. Because the Court finds that APMM has brought a proper § 1335 interpleader action in which it is merely a disinterested stakeholder, APMM's motion for discharge [175] shall be granted.

C. Conclusion

In sum, Plaintiff Auto Parts Manufacturing Mississippi Inc.'s motion to discharge [175] is GRANTED; Plaintiff Auto Parts Manufacturing Mississippi Inc. is DISCHARGED from the case; and Defendants King Construction of Houston, LLC, Noatex Corporation, and Kohn Law Group, Inc. are enjoined from filing any proceedings against Plaintiff relating to the interpleader fund without an order of this Court allowing the same.

An order in accordance with this opinion shall issue this day.

THIS, the 3 day of March, 2014.

/s/Glen H. Davidson
SENIOR JUDGE

APPENDIX J

**IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI
ABERDEEN DIVISION**

CIVIL ACTION NO. 1:11-CV-00251-GHD-SAA

[Filed March 3, 2014]

AUTO PARTS MANUFACTURING)
MISSISSIPPI INC., a Mississippi)
corporation)
PLAINTIFF)
)
v.)
)
KING CONSTRUCTION OF)
HOUSTON, LLC, a Mississippi)
limited liability Company; and)
NOATEX CORPORATION, a)
California corporation; and KOHN)
LAW GROUP, INC., a California)
corporation)
DEFENDANTS)

**ORDER GRANTING AUTO PARTS
MANUFACTURING MISSISSIPPI INC.'S MOTION
TO DISMISS OR DISCHARGE PLAINTIFF**

Pursuant to an opinion issued this day, it is hereby
ORDERED that

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- (1) Plaintiff Auto Parts Manufacturing Mississippi Inc.'s motion to discharge [175] is GRANTED;
- (2) Plaintiff Auto Parts Manufacturing Mississippi Inc. is DISCHARGED from the case; and
- (3) Defendants King Construction of Houston, LLC, Noatex Corporation, and Kohn Law Group, Inc. are enjoined from filing any proceedings against Plaintiff relating to the interpleader fund without an order of this Court allowing the same.

SO ORDERED, this, the 3 day of March, 2014.

/s/Glen H. Davidson
SENIOR JUDGE

APPENDIX K

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 17-60450

[Filed June 29, 2018]

AUTO PARTS MANUFACTURING)
MISSISSIPPI, INCORPORATED,)
)
Plaintiff - Appellee)
)
v.)
)
KOHN LAW GROUP, INCORPORATED,)
)
Defendant - Appellant)

Appeal from the United States District Court
for the Northern District of Mississippi

ON PETITION FOR REHEARING EN BANC

(Opinion 05/31/2018, 5 Cir., ____ , ____ F.3d ____)

Before HIGGINBOTHAM, SOUTHWICK, and COSTA,
Circuit Judges.

PER CURIAM:

- (✓) Treating the Petition for Rehearing En Banc as
a Petition for Panel Rehearing, the Petition for

Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

- () Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/Patrick Higginbotham
UNITED STATES CIRCUIT JUDGE

*Judge GRAVES did not participate in the consideration of the rehearing en banc.

APPENDIX L

STATUTES

Miss. Code Ann. § 85-7-131 [as in force on Sept. 23, 2011].¹ Extent of lien generally

Every house, building, water well or structure of any kind, and any fixed machinery, gearing or other fixture that may or may not be used or connected therewith, * * * shall be liable for the debt contracted and owing, for labor done or materials furnished or equipment rented or leased, or architectural engineers' and surveyors' or contractors' service rendered about the erection, construction, alteration or repairs thereof; and debt for such services or construction shall be a lien thereon. The architects, engineers, surveyors, laborers, rental or lease equipment suppliers and materialmen and/or contractors who rendered services and constructed the improvements shall have a lien therefor. * * * Such lien shall take effect as to purchasers or encumbrancers for a valuable consideration without notice thereof, only from the time of commencing suit to enforce the lien, or from the time of filing the contract under which the lien arose, or notice thereof, in the office of the clerk of the chancery court, as hereinafter stated; delivery of material to the job is prima facie evidence of its use therein, and use of water from a water well is prima facie evidence of acceptability of the well. In the case of

¹ As amended by Miss. Laws 2010, Ch. 372, § 1 (July 1, 2010); later amended by Miss. Laws 2014, Ch. 487, § 18 (April 11, 2014).

oil and gas wells, such lien shall take effect as to purchasers or encumbrancers for a valuable consideration without notice thereof, only from the time of filing notice of such lien as provided by Section 85-7-133.

Miss. Code Ann. § 85-7-135 [as in force on Sept. 23, 2011].² Persons favored by lien

The lien declared in Section 85-7-131 shall exist only in favor of the person employed, or with whom the contract is made to perform such labor or furnish such materials or furnish such rental or lease of equipment or render such architectural service, and his assigns, and when the contract or employment is made by the owner, or by his agent, representative, guardian or tenant authorized, either expressly or impliedly, by the owner.

Miss. Code Ann. § 85-7-181 [as in force on Sept. 23, 2011].³ Amount due; written notice

When any contractor or master workman shall not pay any person who may have furnished materials, labor or rental or lease equipment used in the erection, construction, alteration, or repair of any house, building, structure, fixture, boat, water craft, railroad, railroad embankment, the amount due by him to any subcontractor therein, or the wages of any journeyman, rental or lease equipment supplier or laborer employed

² As amended by Miss. Laws 2010, Ch. 372, § 2 (July 1, 2010); repealed by Miss. Laws 2014, Ch. 487, § 24 (April 11, 2014).

³ As amended by Miss. Laws 2010, Ch. 372, § 3 (July 1, 2010); repealed by Miss. Laws 2014, Ch. 487, § 24 (April 11, 2014).

by him therein, any such person, subcontractor, journeyman, laborer or rental or lease equipment supplier may give notice in writing to the owner thereof of the amount due him and claim the benefit of this section; and, thereupon the amount that may be due upon the date of the service of such notice by such owner to the contractor or master workman, shall be bound in the hands of such owner for the payment in full, or if insufficient then pro rata, of all sums due such person, subcontractor, journeyman, rental or lease equipment supplier or laborer who might lawfully have given notice in writing to the owner hereunder, and if after such notice, the contractor or master workman shall bring suit against the owner, the latter may pay into court, the amount due on the contract; and thereupon all persons entitled hereunder, so far as known, shall be made parties and summoned into court to protect their rights, contest the demands of such contractor or master workman and other claimants; and the court shall cause an issue to be made up and tried and direct the payment of the amount found due in accordance with the provisions hereof; or in case any person entitled to the benefits hereof, shall sue the contractor or master workman, such person so suing shall make the owner and all other persons interested, either as contractors, master workmen, subcontractors, laborers, journeymen, rental or lease equipment suppliers or materialmen, so far as known, parties to the suit (and any such party not made a party in any suit hereunder authorized may intervene by petition), and, thereupon the owner may pay into the court the amount admitted to be due on the contract or sufficient to pay the sums claimed, and the court shall cause an issue to be made up and award the same to the person lawfully entitled; in either case the owner shall not be

liable for costs; but if the owner, when sued, with the contractor or master workman, shall deny any indebtedness sufficient to satisfy the sums claimed and all costs, the court shall, at the instance of any party interested, cause an issue to be made up to ascertain the true amount of such indebtedness and shall give judgment and award costs, and reasonable attorney's fees, according to the rights of the several parties in accordance herewith. In case judgment shall be given against such owner, such judgment shall be a lien, from the date of the original notice, and shall be enforced as other liens provided in this chapter. The owner shall not be liable in any event for a greater amount than the amount contracted for with the contractor.

* * *

APPENDIX M

**IN THE CHANCERY COURT OF
LEE COUNTY, MISSISSIPPI**

CAUSE NO. 11-1657-41-M

[Filed November 15, 2011]

AUTO PARTS MANUFACTURING)
MISSISSIPPI INC., A Mississippi)
Corporation)
PLAINTIFF)
)
V.)
)
KING CONSTRUCTION OF)
HOUSTON, LLC, A Mississippi)
limited liability company, AND)
NOATEX CORPORATION,)
a California Corporation)
DEFENDANTS)

COMPLAINT FOR INTERPLEADER

COMES NOW Plaintiff, Auto Parts Manufacturing Mississippi Inc., a Mississippi corporation, (“APMM”), by and through counsel, and pursuant to Mississippi Rule of Civil Procedure 22, would show unto the court as follows:

I.

Plaintiff Auto Parts Manufacturing Mississippi Inc. is a Mississippi corporation authorized to do and doing business in the State of Mississippi, with its principal place of business in Guntown, Mississippi.

II.

Defendant Noatex Corporation is a foreign corporation with its principal place of business in Torrance, California which may be served through National Registered Agents, Inc., its registered agent for service of process, at 840 Trustmark Building, 248 E. Capitol Street, Jackson, MS 39201.

III.

Defendant King Construction of Houston, LLC, is a Mississippi limited liability company authorized to do and doing business in the State of Mississippi, which may be served through Carl King, its registered agent for service of process, at 252 CR 101, Houston, Mississippi 38851.

IV.

Noatex Corporation is prime contractor on various ongoing construction projects on properties owned by APMM. Defendant King Construction of Houston, LLC is subcontractor on one of these projects.

V.

Pursuant to Miss. Code Ann. §§85-7-181 and -131, on or about September 23, 2011, King Construction filed in the Office of the Chancery Clerk of Lee County, Mississippi a Stop Notice, a copy of which is attached

hereto as Exhibit “A,” asserting a lien in the amount of \$260,410.15 for payment allegedly owed it by Noatex. A copy of the Stop Notice was served on APMM.

VI.

Noatex has questioned the validity and amount of invoices submitted for payment by King Construction. Further, Noatex has taken the position that only the sum of \$179,707.40, which it alleges was the amount owed by APMM to Noatex on the day the Stop Notice was filed, was arguably captured by the Stop Notice, instead of the \$260,410.15 alleged in the Stop Notice. Conversely, the Stop Notice states that King Construction “serves notice that any advances of money made to said owners or payments made by the owners or by any other parties responsible for the payment of labor and material to any other suppliers, materialman or laborers, shall be made at the peril of the parties making such advancement or payment.”

VII.

Noatex has filed a Complaint for Declaratory Relief in federal court asserting that Mississippi’s Stop Notice statute, Miss. Code Ann. §85-7-181, is invalid on its face and as applied to Noatex because the statute does not provide constitutionally-required minimum procedural safeguards and, therefore, the Stop Notice is void and without effect upon funds in the hands of APMM that Noatex alleges are owned to it by APMM. Attached hereto as Exhibit “B,” is a copy of the Complaint for Declaratory Judgment filed on October 18, 2011.

VIII.

On October 24, 2011, Noatex filed a Motion for Summary Judgment in the declaratory judgment proceeding. To date there is no ruling on the Motion for Summary Judgment.

IX.

M.R.C.P. 22 provides that interpleader is appropriate where a party may be exposed to double or multiple liability from the claims of multiple claimants. Both Noatex and King Construction claim entitlement to the subject funds and APMM is unable to determine which claim is valid. Pursuant to Noatex's request for declaratory relief, the federal district court has been requested to determine the constitutionality of §85-7-181 and validity of the Stop Notice. Should the federal district court find the Stop Notice to be valid, the position taken by Noatex will further require a determination of whether all \$260,410.15 claimed by King Construction was captured by the Stop Notice, or only the funds owed by APMM to Noatex on the day the Stop Notice was filed, if the latter, what that amount is. APMM avers that it is proper for this Court to determine by court order which defendant is entitled to the interpleaded funds or whether the interpleaded funds should be divided between the defendants and, if so, in what amounts.

X.

In order to prevent a multiplicity of suits, Plaintiff is prepared to tender unto the Court the sum of \$260,410.15, being the amount claimed in the Stop Notice. As far as Plaintiff is aware, Defendants are the

only parties who have or may have a claim to any portion of the interpleaded funds.

XI.

Plaintiff, as a disinterested stakeholder, would show that it has no further claim to the funds to be interpleaded, and is prepared to tender the funds unto the Court for the benefit of Defendants herein and all other potential claimants. Defendants should be required to establish their claims, and to notify Plaintiff and this Court of any other parties who may also have a claim to the interpleaded funds by assignment or otherwise.

WHEREFORE PREMISES CONSIDERED,
Plaintiff prays as follows:

(1) That this Court authorize Plaintiff to interplead the sum of \$260,410.15 into the registry of this Court;

(2) That this Court investigate and question the Defendants to determine if there is any other person or entity that has or may have an interest in the interpleaded funds, whether by assignment or otherwise, and if so, to order joinder of such persons or entities as party defendants;

(3) That this Court enjoin all of the Defendants and all other persons claiming by, through or under any of them, from instituting any action against the Plaintiff for the recovery of any or all of the interpleaded funds;

(4) That on the hearing in this matter, the interpleaded funds be disbursed as this Court may determine appropriate; and

(5) That, pursuant to M.R.C.P. 22(b), upon deposit of the interpleaded funds into the court registry, this Court enter an order discharging Plaintiff from liability as to claims thereto and the lien of King Construction. This action shall continue as between or among claimants of the funds.

Plaintiff Auto Parts Manufacturing Mississippi Inc. prays for such other general relief to which it may be entitled.

AUTO PARTS MANUFACTURING
MISSISSIPPI INC., Plaintiff

BY: /s/Otis R. Tims
OTIS R. TIMS
MSB # 8221
MARTHA BOST STEGALL
MSB # 3701

OF COUNSEL:

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105 SOUTH FRONT STREET
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TUPELO, MISSISSIPPI 38802-7120
(662) 842-3871

APPENDIX N

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI**

NO. 1:11CV00251-SAA

[Filed September 19, 2012]

AUTO PARTS MANUFACTURING)
MISSISSIPPI INC., A Mississippi)
corporation)
PLAINTIFF)
)
VS.)
)
KING CONSTRUCTION OF)
HOUSTON, LLC, a Mississippi)
limited liability company, and)
NOATEX CORPORATION, a)
California Corporation)
DEFENDANT)

MEMORANDUM BRIEF IN SUPPORT OF
PLAINTIFF’S RESPONSE TO NOATEX
CORPORATION’S MOTION FOR
CLARIFICATION OF ORDER REMANDING
TO STATE COURT

By Order dated August 23, 2012, the Fifth Circuit Court of Appeals remanded this proceeding to the federal district court for the limited purpose of “afford[ing the federal district court] an opportunity to

clarify its order of remand, specifically whether the case was remanded for want of jurisdiction or for procedural irregularities in removal.” (Docket No. 73). On August 27, 2012, Noatex Corporation (“Noatex”) filed a *Motion for Clarification of Order Remanding to State Court*. (Docket No. 69)

In contrast to the scope of the Court of Appeals remand, Noatex’s *Motion for Clarification* (Docket No. 69) and supporting *Memorandum of Law* (Docket No. 71) request the federal district court to vacate its order of remand to state court, dismiss the interpleader action that Noatex removed to federal district court, and direct payment to Noatex of the interpleaded funds.¹

Without question, Noatex’s motion asks this Court to act far beyond the narrow limits of the task assigned to it by the Court of Appeals. Noatex insists that its expansive demand can be granted by this Court under authority of *In re Shell Oil Co.*, 932 F.2d 1523, 1527-28 (5th Cir. 1991). Whether *In re Shell* controls the question of the scope of this Court’s power in the case *sub judice*, can only be determined after this Court answers the question posed by the Court of Appeals.

¹ The funds APMM interpleaded into the registry of the federal district court were returned to APMM’s counsel by the federal district court after the Court entered its order remanding the interpleader action to Lee County Chancery Court. The funds will be tendered into the registry of the court once APMM knows in which court the interpleader action will proceed, i.e., whether Noatex’s petition for writ of mandamus is successful in having remand recalled. For ease of reference, however, the funds are referenced herein as the “interpleaded funds.”

But this is a red herring. Noatex is using the reviewability issue of *In re Shell* to mask the fact that its request for sweeping relief relies on a mischaracterization of the Court's April 12, 2012 rulings and requires the Court to ignore important factual developments pertinent to disposition of the interpleader action. For the additional reasons outlined below, Noatex's motion should be denied.

1. Contrary to Noatex's Assertion, the Federal District Court Has Not Ruled on Entitlement of Any Party to the Interpleaded Funds

This controversy arises from this Court's rulings on April 12, 2012. The Court had before it three related cases - Noatex's tort claim action against King Construction of Houston, LLC ("King Construction") and Carl King (Civil Action No. 3:11cv152), Noatex's declaratory judgment action against King Construction and Carl King (Civil Action No. 3:11cv137) and this interpleader action removed to federal district court by Noatex. The order of April 12, 2012 (Docket No. 56) ruled on various motions that had been filed in each of the consolidated cases, including King Construction's Motion to Remand filed in the interpleader action. The instant motion concerns the interpleader action.

In this motion, Noatex requests the federal district court to decree that APMM should distribute the interpleaded funds to Noatex, claiming

"[t]his Court has already *held* on April 12, 2012 that APMM owed Noatex the \$260,410.15 amount that Plaintiff Auto Parts Manufacturing Inc. seeks to interplead. *See* Docket No. 56 at pp. 2-3 & n. 6."

(Docket No. 71, p. 2, emphasis added). But Noatex's assertion that the court made a factual finding that Noatex is entitled to the funds is a gross exaggeration.

The district court's only ***ruling*** in the interpleader action was to grant King Construction's Motion to Remand the interpleader action to Lee County Chancery Court. (Docket No. 56, p. 7-8).

But Noatex boldly seizes upon phrases used by the Court to describe procedural developments in the interpleader case and inflates these background descriptions into a "***holding***" that Noatex now insists disposes of the interpleader case. To the contrary, the Court's recital in the FACTS section of its order that the interpleaded funds were "owed to Noatex," (Docket 56, n. 6), was not a ruling as to distribution of the funds but was instead a recognition by the Court that under Mississippi's Stop Notice statute (which, in the same order, the Court ruled to be facially unconstitutional (Docket No. 56, p. 20)), the funds at issue would have been paid by APMM, as owner, to Noatex, as contractor, but for the Stop Notice.²

Moreover, Noatex's argument that it is entitled to the interpleaded funds ignores that the Laborer's and

² As the Court stated in ruling on the constitutionality of the Stop Notice statute, "Noatex challenges the constitutionality of Mississippi Code Annotation §85-7-171, which allows a subcontractor [here, King Construction] to deliver notice to the owner of a project [in this case APMM] of its claim against the contractor [Noatex] and bind the funds *owed to the contractor* by the owner." (Docket No. 56, p. 9) As noted, the Court did not have before it King Construction's alternate claim to the interpleaded funds under §85-7-131.

Materialmen's Lien and Stop Notice filed by King Construction included an alternative claim to the funds held, and later interpleaded, by APMM, a claim under Section 85-7-131 of the Mississippi Code, in which King Construction asserted against APMM a claim as a direct contractor instead of as a subcontractor of Noatex. *See*, Docket No. 2, Exhibit "A," p. 6 ("Noatex Corp. for an on behalf of [APMM] entered into a contract with [King Construction] to furnish material and services").

Not only has the Court never ruled on who is entitled to the interpleaded funds, it has never had before it King Construction's alternate claim to the funds under Mississippi's Materialman's Lien statute, Miss. Code Ann. §85-7-131, under which King Construction claims to have a direct contractual relationship with APMM regarding claimed unpaid sums. King Construction has not withdrawn its alternative claim to the interpleaded funds under §85-7-131. Unless and until King Construction withdraws its claim under §85-7-131, the need for interpleader remains -- regardless of the ruling on the constitutionality of the Stop Notice statute -- since APMM continues to be faced with competing and conflicting claims to the same funds.

Noatex's assertion that the Court has held Noatex is entitled to receive the interpleaded funds is disingenuous and wrong.

2. The Number of Conflicting Claims Faced by APMM and Warranting Interpleader Has Increased

APMM has paid all invoices billed by Noatex for the conveyor project except those underlying the interpleaded funds.³ Subsequent to removal by Noatex of the interpleader action, other companies hired by Noatex to work on the project have made claims against APMM to funds they claim they are owed.

On February 27, 2012, Apex Conveyor Manufacturing, LLC, (“Apex”) filed a Laborer’s and Materialman’s Lien pursuant to Miss. Code Ann. §85-7-131, alleging that Apex was owed \$288,526.90 under a contract entered into with Apex by Noatex for and on behalf of APMM. See, Exhibit “A” attached hereto.

On April 18, 2012, counsel representing Southern Automation and Controls, Inc. and Apex wrote counsel for APMM concerning resolving claims for unpaid invoices issued by each vendor to Noatex.

On May 1, 2012, counsel for Cooper Electrical Controls, Inc. (“CEC”) wrote a letter to APMM’s counsel, asserting that CEC is owed \$51,866.23 on purchase orders from Noatex to CEC.

³ In May, 2012, Noatex submitted to Noatex a statement for an additional \$484,371.75 in invoices it claims are owed. APMM does not owe any of the invoices listed in the May, 2012 Statement, which had been previously submitted by Noatex to APMM, processed by APMM, and on which APMM and Noatex reached a written agreement in January, 2012 signed by principals of both APMM and Noatex.

On August 14, 2012, APMM was contacted by a representative of Kobelco Advanced Coating requesting payment on three purchase orders issued to it by Noatex.

The interpleaded funds are the only funds unpaid by APMM on the construction project on which these various companies were engaged by Noatex to perform work. Once it is finally determined in which court interpleader will proceed -- whether State or federal district court -- APMM will move to amend its complaint for interpleader to join these other companies.

3. Action Before the Mississippi State Board of Contractors Removes Any Argument by Noatex That It Has a Valid Claim to the Interpleaded Funds.

Noatex's *Motion for Clarification* failed to make the Court aware of events that occurred since removal of the interpleader action, events that defeat any claim Noatex can make to the interpleaded funds.

On April 11, 2012, based on a complaint by King Construction that Noatex had entered into a construction contract with APMM in excess of \$50,000 without having a Certificate of Responsibility as required for general contractors by Section 31-3-1, et seq., of the Mississippi Code, the Mississippi State Board of Contractors determined Noatex was in violation of §31-3-21, agreed to accept a settlement payment from Noatex of \$18,000.00, and required Noatex to obtain a Certificate of Responsibility. On July 11, 2012, the State Board of Contractors rescinded

its April 11, 2012 agreement with Noatex and instead issued a civil penalty against Noatex.⁴

These facts—together with the application of Chapter 3 of Title 31 of the Mississippi Code—nullify any contractual basis for Noatex’s claim to the interpleaded funds. These matters must be considered by the Court in determining the right to the interpleaded funds. Section 31-3-1, et seq.,⁵ pertains to contractors involved on public and private projects in the State of Mississippi. Section 31-3-1 defines “contractor” as follows:

Any person contracting or undertaking as prime contractor, subcontractor or sub-subcontractor of any tier to do any erection, building, construction, reconstruction, repair, maintenance or related work on any public or private project; however, “contractor” shall not include any owner of a dwelling or other structure to be constructed, altered, repaired or improved and not for sale, lease, public use or assembly, or any person duly permitted by the Mississippi State Oil and Gas Board, pursuant to [§ 53-3-11] to conduct operations within the state, and acting pursuant to said permit.

⁴ This information is accessible on the website of the Mississippi Board of Contractors.

⁵ “The purpose of Chapter 3, Title 31, Mississippi Code of 1972, is to protect the health, safety and general welfare of all persons dealing with those who are engaged in the vocation of contracting and to afford such persons an effective and practical protection against incompetent, inexperienced, unlawful and fraudulent acts of contractors.” Miss. Code Ann. §31-3-2.

A Certificate of Responsibility is “a certificate numbered and held by a contractor issued by the board under the provisions of this chapter after payment of the special privilege license tax therefor levied under this chapter.” *Id.* A contractor’s failure to have a Certificate of Responsibility when required causes the contract awarded to that contractor to be null and void. Noatex was required to have a Certificate of Responsibility to undertake the APMM conveyor project. As stated in §31-3-15:

No contract for public or private projects shall be issued or awarded to any contractor who did not have a current certificate of responsibility issued by said board at the time of the submission of the bid, or a similar certificate issued by a similar board of another state which recognizes certificates issued by said board. **Any contract issued or awarded in violation of this section shall be null and void.**

(emphasis added).

Noatex’s admission in April, 2012 to the State Board of Contractors that it did not have the required certificate of responsibility means its contractual relationship with APMM is null and void. Because the admission of Noatex before the State Board of Contractors removes any issue of whether it had a valid and enforceable contract with APMM, Noatex no longer has any basis to continue to pursue a claim to the interpleaded funds (as well as any claim under the May, 2012 Statement). Accordingly, Noatex has no right to the relief requested in its motion, and the motion should be denied.

CONCLUSION

Wholly apart from questions of the Court's power to revisit its April 12, 2012, remand decision in the present context, the basis on which Noatex seeks relief is a mischaracterization of the scope of the Court's April 12, 2012, rulings. In addition, granting the relief Noatex requests would require the Court to ignore factual developments subsequent to April 12 that have great bearing on the validity of Noatex's claim to the interpleaded funds in this case. Noatex's motion should be denied.

Respectfully submitted, this the 19th day of September, 2012.

AUTO PARTS MANUFACTURING
MISSISSIPPI INC., Plaintiff

BY: /s/ Otis R. Tims
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MARTHA BOST STEGALL, MSB # 3701

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*[Certificate of Service Omitted in the
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APPENDIX O

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF MISSISSIPPI**

No. 11:CV00251-SAA

[Filed April 24, 2013]

AUTO PARTS MANUFACTURING)
MISSISSIPPI, INC.,)
A Mississippi Corporation,)
PLAINTIFF)
)
VS.)
)
KING CONSTRUCTION OF)
HOUSTON, LLC, a Mississippi)
limited liability company,)
DEFENDANT/)
CROSS CLAIMANT)
)
and)
)
NOATEX CORPORATION,)
a California corporation,)
DEFENDANT/)
CROSS CLAIMANT)
)
and)

COMES NOW Plaintiff, Auto Parts Manufacturing Mississippi Inc., a Mississippi corporation, (“APMM”), by and through counsel, and pursuant to permission by this court, and files this Amended Complaint, and for cause says as follows:

Plaintiff Auto Parts Manufacturing Mississippi Inc. is a Mississippi corporation authorized to do and doing business in the State of Mississippi, with its principal place of business in Guntown, Mississippi.

Defendant Noatex Corporation is a foreign corporation with its principal place of business in Torrance, California which has been served with process through National Registered Agents, Inc., its registered agent for service of process, at 840 Trustmark Building, 248 E. Capitol Street, Jackson, MS 39201.

Defendant King Construction of Houston, LLC (“King Construction”), is a Mississippi limited liability company authorized to do and doing business in the State of Mississippi, which has waived service of process.

IV.

Kohn Law Group, Inc. (“Kohn”) is a foreign corporation that has done business in this State pursuant to an agreement with Noatex performed in part in this State, via its principal, Robert E. Kohn, who has appeared in Mississippi federal district court representing Noatex in related proceedings concerning the interpleaded funds and the construction projects giving rise to the dispute between Noatex and King Construction. Joinder of Kohn Law Group, Inc. has been ordered by this Court pursuant to Order and to Memorandum Opinion dated April 23, 2013. Kohn Law Group, Inc. may be served with process as provided by the Federal Rules of Civil Procedure

V.

Noatex Corporation was prime contractor on various construction projects on property owned by APMM located in Guntown, Lee County, Mississippi. Defendants King Construction was a subcontractor of Noatex that provided services and/or materials on one or more of these projects.

VI.

Through court pleadings and otherwise, Noatex has acknowledged that it acted as general contractor for APMM on certain construction projects, and King Construction has acknowledged that it was a subcontractor of Noatex.

VII.

On or about September 23, 2011, King Construction filed in the Office of the Chancery Clerk of Lee County,

Mississippi a Materialman's and Laborer's Lien and Stop Notice asserting, inter alia, a claim under Miss. Code Ann. §85-7-181 in the amount of \$260,410.15 for payment allegedly owed King Construction, as subcontractor, by Noatex, as general contractor. The amount of \$260,410.15 is the total amount of invoices submitted by King Construction to Noatex, which invoices were attached by King Construction as a composite exhibit to its Materialman's and Laborer's Lien and Stop Notice, and which King Construction alleges are unpaid by Noatex.

VIII.

APMM filed this interpleader action on November 15, 2011 concerning the \$260,410.15 sum set forth in King Construction's Stop Notice (hereinafter "the interpleader funds").

IX.

On September 18, 2012, Kohn Law Group, Inc. filed a lawsuit against APMM and Does 1-10 in the United States District Court for the Central District of California, Western Division, seeking to enforce alleged account debt obligations that Noatex asserts APMM owes to Noatex under §9607(a)(3) of the California Commercial Code. A copy of the complaint filed by Kohn Law Group, Inc. against APMM is attached hereto as Exhibit "A." The complaint seeks judgment in the principal amount of \$260,410.15, which equals the sum of the interpleaded funds, as payment of attorney's fees Kohn Law Group, Inc. alleges Noatex owes it pursuant to a

written engagement agreement of October 7, 2011 between Kohn Law and Noatex [that]

confers a lien in favor of Kohn Law upon APMM's obligations to pay Noatex the amount of \$260,410.15. Kohn Law's contractual lien upon APMM's obligations to pay Noatex the amount of \$260,410.15 has precedence over any other liens, including any liens arising by judgment against Noatex or by attachment.

See, Exhibit "A," ¶¶ 14-15.

X.

Each of the Defendants claims entitlement to the interpleaded funds. Because Defendants make conflicting claims, APMM cannot determine who should receive the interpleaded funds.

XI.

In order to prevent a multiplicity of suits, Plaintiff has tendered unto the Court the sum of \$260,410.15. As has been determined by this court in its Memorandum Opinion of April 23, 2013, Defendants are the only parties who have or may have a claim to any portion of the interpleaded funds.

XII.

Plaintiff, as a disinterested stakeholder, would show that it has no further claim to the funds to be interpleaded. Defendants should be required to establish their claims.

WHEREFORE PREMISES CONSIDERED,
Plaintiff prays as follows:

(1) That this Court investigate and question the Defendants to determine the interest, if any, of each in the interpleaded funds;

(2) That this Court enjoin all of the Defendants and all other persons claiming by, through or under any of them, from instituting any action against the Plaintiff for the recovery of any or all of the interpleaded funds; and

(3) That Plaintiff be dismissed as a disinterested stakeholder; and

(4) That on the hearing in this matter, the interpleaded funds be disbursed as this Court may determine appropriate.

Plaintiff Auto Parts Manufacturing Mississippi Inc. prays for such other general relief to which it may be entitled.

AUTO PARTS MANUFACTURING
MISSISSIPPI INC., Plaintiff

BY: /s/ Otis R. Tims
OTIS R. TIMS, MSB # 8221
MARTHA BOST STEGALL, MSB # 3701

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* * *

*[Certificate of Service Omitted in the
Printing of this Appendix]*

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APPENDIX P

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION**

Case No. 1:11-cv-00251-SA-DAS

[Filed April 25, 2013]

AUTO PARTS MANUFACTURING)
MISSISSIPPI, INC.)
PLAINTIFF)
)
vs.)
)
KING CONSTRUCTION OF)
HOUSTON, LLC and NOATEX)
CORPORATION)
DEFENDANTS)
)
KING CONSTRUCTION OF)
HOUSTON, LLC)
CROSS-PLAINTIFF)
)
vs.)
)
NOATEX CORPORATION)
CROSS-DEFENDANT)
)

**ANSWER OF KING CONSTRUCTION OF
HOUSTON, LLC TO AMENDED COMPLAINT OF**

**AUTO PARTS MANUFACTURING
MISSISSIPPI, INC.**

COMES NOW, King Construction of Mississippi, LLC (“King”) and files this its answer to the Amended Complaint filed by Auto Parts Manufacturing Mississippi, Inc. (“APMM”) stating as follows:

ANSWER TO NUMBERED PARAGRAPHS

1. Admitted.
2. Admitted.
3. Admitted.
4. Admitted.
5. King Construction admits that it was hired by Noatex to perform work on behalf of Noatex and/or APMM at the Guntown, Mississippi APMM facility and that it provided services and materials in the course of that project. King Construction denies that Noatex was the prime contractor for construction projects, inasmuch as Noatex, upon information and belief, did not possess the requisite certificates of responsibility to permit it to serve as a prime contractor under Mississippi law.
6. King admits that Noatex has claimed to have been acting as a general contractor on some occasions in pleadings filed in this and other proceedings, and admits that it was acting, it believed, as a subcontractor for Noatex at the time it contracted to perform work at the Guntown, MS APMM facility.
7. Admitted.
8. Admitted.

9. Admitted.

10. King admits that APMM asserts it cannot determine who should receive the interpled funds. King admits that each of the Defendants, directly or indirectly, has indicated that it is entitled to all or part of the interpled funds.

11. King admits that, pursuant to the Court's Memorandum Opinion of April 23, 2013, Defendants are the only parties that have currently made claims against the fund that are to be permitted to participate in this action.

12. King admits that APMM has declared itself to be disinterested in the interpled funds. King further admits that it is required to establish its claims.

13. King responds to the final, unnumbered paragraph of the Amended Complaint, beginning with "WHEREFORE", as follows:

(1) With regard to the first sentence of the final, unnumbered paragraph, King is not required to file a response.

(2) With regard to the second sentence of the final, unnumbered paragraph, King is not required to file a response.

(3) With regard to the third sentence of the final, unnumbered paragraph, King is not required to file a response.

(4) With regard to the fourth sentence of the final, unnumbered paragraph, King is not required to file a response.

(5) With regard to the fifth sentence in the final, unnumbered paragraph, King is not required to file a response.

AND NOW, having responded to all allegations of Plaintiff's Amended Complaint, King Construction would show unto the Court the following affirmative defenses:

FIRST AFFIRMATIVE DEFENSE

KING provided \$260,41.15 in construction services, labor and materials to the construction of the APMM facility in Guntown, MS under its agreement with Noatex. King is entitled to full payment, plus costs, attorneys' fees, and prejudgment interest, for its work, to be paid to the extent possible from the registry funds.

Respectfully submitted this the 25th day of April 2013.

BY: /s/ W. Lawrence Deas

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*ATTORNEY FOR KING
CONSTRUCTION OF HOUSTON, LLC*

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* * *

*[Certificate of Service of Service Omitted in the
Printing of this Appendix]*

APPENDIX Q

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION**

Case No. 1:11-cv-00251-SA-DAS

[Filed May 6, 2013]

AUTO PARTS MANUFACTURING)
MISSISSIPPI, INC.)
PLAINTIFF)
)
vs.)
)
KING CONSTRUCTION OF)
HOUSTON, LLC and NOATEX)
CORPORATION)
DEFENDANTS)
)
KING CONSTRUCTION OF)
HOUSTON, LLC)
CROSS-PLAINTIFF)
)
vs.)
)
NOATEX CORPORATION)
CROSS-DEFENDANT)
)

**KING CONSTRUCTION'S MEMORANDUM IN
SUPPORT OF ITS MOTION FOR SUMMARY
JUDGMENT ON PLAINTIFF'S COMPLAINT**

**FOR INTERPLEADER AND DISTRIBUTION
OF REGISTRY FUNDS**

King Construction of Houston, LLC (“King”) submits this memorandum in support of its Motion for Summary Judgment on Plaintiff’s Complaint for Interpleader and Distribution of Registry Funds (“King’s Motion”). As set forth in the accompanying motion, King is the only claimant with a valid and enforceable claim against the \$260,410.15 currently held in the registry of the Court, as the other defendants, Noatex Corporation (“Noatex”) and Kohn Law Group, Inc. (“Kohn”) are prohibited from advancing any legal or equitable claim against the interpled fund due to Noatex’s violation of the licensure requirements of Miss. Code § 31-3-1, *et seq.*, which render the agreement between Auto Parts Manufacturing Mississippi, Inc. (“APMM”) and Noatex null and void. Accordingly, King is entitled to judgment as matter of law, and should be awarded the registry funds.

SUMMARY JUDGMENT IN INTERPLEADER

As the Court notes in its April 23, 2013 Opinion, interpleader actions are a two-stage affair. The first stage involves the determination by the Court that there is a single fund at issue and that there are adverse claimants to that fund. *Rhoades v. Casey*, 196 F.3d 592, 600-01 (5th Cir. 1999). Once this determination is made, the Court then moves on to determine the respective rights of the claimants. *Id.* Where there is no genuine issue of material fact, as here, this second stage may be resolved upon a motion for summary judgment and the Court may

subsequently issue any order necessary to enforce its judgment. *Id.*

ARGUMENT AND AUTHORITEIS

I. NOATEX'S CONTRACT WITH APMM WAS ILLEGAL AND VOID

A. Legal Requirements for Contractors in Mississippi.

A contractor performing work in the State of Mississippi on a job costing more than \$50,000.00 must possess a certificate of responsibility authorizing the contractor to perform work of the type called for by the contract. *see* Miss. Code §31-3-1, *et seq.* Pursuant to Miss. Code §31-3-13, the Mississippi State Board of Contractors (“MSBOC”) is empowered “to adopt rules and regulations setting forth the requirements for certificates of responsibility, the revocation or suspension thereof, and all other matters concerning same.” *United Plumbing & Heating Co. v. AmSouth Bank*, 30 So.3d 343, 346 (Miss.Ct.App. 2009); Miss. Code §31-3-13.

It is “unlawful for any person who does not hold a certificate of responsibility issued under this chapter, or a similar certificate issued by another state recognizing such certificate issued by the State of Mississippi, to submit a bid, enter into a contract, or otherwise engage in or continue in this state in the business of a contractor.” Miss. Code § 31-3-21. Any party violating these requirements shall be “guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not more than One Thousand Dollars (\$1,000.00), or imprisonment for not more than six (6) months, or by both such fine and imprisonment.” Miss.

Code § 31-3-21. Additionally, any contract entered into by a party that does not possess an appropriate certificate of responsibility “is null and void.” Miss. Code § 31-3-15.

B. Noatex did not have the required Certificate of Responsibility.

The possibility that Noatex might have violated Mississippi Code provisions regarding contractors was first raised in APMM’s Response to Noatex’s Motion for Clarification of Order of Remand (Dkt. No. 76), which was filed on September 19, 2012. There, APMM argued that Noatex had admitted violating the licensure statutes and that its contractual relationship with APMM was therefore void. *Id.*, p. 6. In its reply, filed September 24, 2012, Noatex flatly denied the allegation:

APMM now urges that Noatex has no ‘valid and enforceable contract with APMM and (thus) APMM says that Noatex “has no right” to receive payment of the \$260,410.15 that APMM had commenced this action to interplead. These contentions are legally mistaken, because building a conveyor system in California and delivering it to Mississippi without a contractor’s certificate of responsibility does not violate §31-3-15 as a matter of law. *Contrary to APMM’s factually unsupported contentions, the Mississippi State Board of Contractors made no determination otherwise.*

Noatex Corporation’s Reply in Support of Motion for Clarification of Order Remanding to State Court, p. 12 (Dkt. No. 76)(emphasis added).

Noatex's denial was, to be charitable, less than candid. Miss. Code § 31-3-15 reads:

§ 31-3-15. Certificates of responsibility required to bid.

No contract for public or private projects shall be issued or awarded to any contractor who did not have a current certificate of responsibility issued by said board at the time of the submission of the bid, or a similar certificate issued by a similar board of another state which recognizes certificates issued by said board. Any contract issued or awarded in violation of this section shall be null and void.

Id.

On July 11, 2012, more than two months prior to Noatex's denial, the MSBOC issued Findings of Fact and Conclusions of Law and Order specifically holding that:

Having considered evidence and testimony in this matter, the Board finds by clear and convincing evidence that Noatex Corporation submitted a bid, entered into a contract or otherwise engaged in the business of a contractor at the Auto Parts Manufacturing Mississippi facility in Guntown, Mississippi... Noatex Corporation engaged in commercial construction when they were not properly licensed to do so... *IT IS HEREBY ORDERED AND ADJUDGED that Noatex Corporation submitted a bid, entered into a contract or otherwise engaged in the business of a valid*

certificate of responsibility in violation of Miss. Code. §31-3-21.

MSBOC Findings of Fact and Conclusions of Law, July 11, 2012. (Exhibit A)¹

Miss. Code § 31-3-21, cited in the excerpt above, provides the MSBOC with enforcement powers and declares violations of the certificate of responsibility provisions set forth in the preceding sections unlawful. §31-3-21 additionally makes such violations misdemeanor criminal offenses punishable by fines, incarceration, or both. *See* Miss. Code §31-3-21. Pursuant to these powers, the MSBOC assessed a fine against Noatex in the amount of \$171,662.64. Exhibit A. The facts supporting the fine, which was the largest permitted by law, are set forth in the Order and in the reports filed by the MSBOC investigator assigned to the Noatex matters. *See* Investigator Reports, attached as Exhibits 3 and 4 to King's Motion.

Inarguably, the July 11, 2012 Order of the MSBOC constituted a binding administrative decision that: (1) Noatex violated the licensure provisions of the Mississippi Code, including §31-3-15; (2) Noatex did not have the requisite certificate of responsibility for the work it performed at APMM, and; (3) Noatex's contract with APMM was entered into in violation of the law and therefore void. Noatex did not appeal this decision,

¹ On October 10, 2012, Noatex was again found guilty of Code Violations by the MSBOC, which issued a second Findings of Fact and Conclusions of Law and Order holding that Noatex had violated Miss. Code §31-3-13 by failing to pay Southern Automation and Controls, another subcontractor. A copy of this Order is attached as Exhibit B to King's Motion.

which it might have done pursuant to Miss. Code §31-3-23, and is bound by its terms. *see Jackson State Univ. v. Upsilon Epsilon Chapter of Omega Psi Phi Fraternity, Inc.*, 952 So.2d 184 (Miss. 2007)(decision of administrative body not reviewable if not timely appealed); *Smith v. University of Mississippi*, 797 So.2d 956 (Miss. 2001) (same).

II. NOATEX'S ILLEGAL CONTRACT CANNOT BE ENFORCED

In Mississippi, a Court will not enforce a contract that is made in violation of the law or that is otherwise against public policy. *see Price v. Purdue Pharma Co.*, 920 So.2d 479, 484-85 (Miss. 2006); *see also Lowenburg v. Klein*, 87 So. 653, 654 (Miss. 1921). “No principle of law is better settled than that a party to an illegal contract cannot come into a court of law and ask to have his illegal objects carried out.” *Lowenburg, supra* at 654. “Courts will not, even with the consent of the parties, enforce an illegal contract,” nor can an agreement void as against public policy be saved by the doctrines of ratification or estoppel. *Id.* This rule applies even where its application would lead to a seemingly unfair result by benefitting one of the parties to the invalid agreement at the expense of the other. *Id.*

The maxim stated in *Price* and *Lowenburg* applies with equal force in the instant case. Because it did not obtain a certificate of responsibility, it was illegal for Noatex to contract with APMM to perform work at the Guntown facility, and their agreement is void per statute. *see* Miss. Code §§ 31-3-15 and 31-3-21. Noatex has been found guilty of violating the law. *see* Exhibit A. The law Noatex violated, furthermore, was enacted

to promote a specified public policy – “to protect the health, safety and general welfare of all persons dealing with those who are engaged in the vocation of contracting.” Miss. Code § 31-3-2 (Declaration of legislative intent).

In light of these facts, Noatex may not pursue a claim against the interpled fund. Such an effort is precisely what *Lowenburg* and *Price* prohibit – the use of this Court to obtain the benefits of an unlawful contract. Likewise, Kohn’s derivative claim also fails, because where the contract between an owner and a contractor is null and void, as here, the owner owes the contractor nothing. *see Summerall Electric Co., Inc. v. Church of God*, 25 So.3d 1090, 1093 (Miss.Ct.App. 2010). Even assuming, *arguendo*, that Kohn’s contract with Noatex, coupled with the provisions of California Commercial Code § 9607(a)(3), gives Kohn the right to collect amounts owed to Noatex, there are no amounts legally owed to Noatex by APMM and that right is meaningless as concerns this interpleader action.

III. AS THE ONLY DEFENDANT WITH A VALID CLAIM, KING IS ENTITLED TO THE INTERPLED FUND.

As Noatex and Kohn are prohibited as a matter of law from pursuing any claim against the registry funds, King is the sole defendant with a valid claim. Where there is only one remaining defendant, “the disputed funds go to the last remaining claimant.” *Rapid Settlements, Ltd. v. U.S. Fidelity and Guar. Co.*, 672 F.Supp.2d 714, 718 (D.Delaware 2009)(holding that where all but one claimant defaults or withdraws, fund goes to the last remaining claimant). King, furthermore, has presented the Court with substantial

evidence demonstrating its entitlement to the \$260,410.15 currently held in the Court's registry, including purchase orders, invoices and communications attached as Exhibits 1 through 5 to King's Answer and Cross Claim (Dkt. No. 12). King submits that the legal issues presented in its motion are fully and clearly defined, and that there remain no disputed issues of material fact that would prevent the Court from rendering a judgment in favor of King as a matter of law.

CONCLUSION

Based on the foregoing, King respectfully submits that it is entitled to summary judgment on Plaintiff's Complaint for Interpleader and that the \$260,410.15 currently held in the registry of the Court should be distributed to King.

Respectfully submitted this the 6th day of May 2013.

KING CONSTRUCTION
OF HOUSTON, LLC

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*[Certificate of Service Omitted in the
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APPENDIX R

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

Case No. 14-60217

C/W

Case No. 14-60287

[Filed November 3, 2014]

AUTO PARTS MANUFACTURING)
MISSISSIPPI, IN CORPORATED,)
a Mississippi Corporation,)
Plaintiff-Appellee)
)
v.)
)
KING CONSTRUCTION OF)
HOUSTON, L.L.C., a Mississippi)
Limited Liability Company,)
Defendant-Appellee)
)
v.)
)
NOATEX CORPORATION,)
a California Corporation; KOHN)
LAW GROUP, INCORPORATED,)
Defendants-Appellants)

**RESPONSE TO JOINT SETTLEMENT MOTION
OF NOATEX AND KING CONSTRUCTION**

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INTRODUCTION

The Joint Settlement Motion of Noatex and King Construction requests this Court to order the district court to distribute the interpleader fund. The purported settlement is constructed in such a way as to leave each of the three interpleader defendants free to continue to pursue separate claims against APMM for the funds APMM has interpleaded into the court's registry. The Joint Motion wholly disregards the district court's discharge of APMM and injunction against the interpleader defendants, enjoining each of them from filing any proceedings against APMM related to the interpleader fund except upon court order allowing such a proceeding. The Joint Motion seeks to eviscerate statutory interpleader and, for reasons shown below, must be denied.

A. Summary of Procedural History

Because the instant motion is confusing and difficult to understand, an overview of the procedural context in which the motion is made is warranted.

These consolidated appeals arise from an interpleader action filed by Appellee APMM in Mississippi state court after receipt from Appellee King Construction of Houston, L.L.C. of a document styled "Laborer's and Materialman's Lien and Stop Notice" (the "Lien and Stop Notice"). Attached by King to the Lien and Stop Notice were twenty invoices that had been submitted by King to Noatex Corporation (but not to APMM) totaling \$260,410.15. ROA.47-82.

APMM, an auto parts manufacturer, contracted with Noatex to build and install a conveyor line in its plant in Guntown, Mississippi. Noatex hired King as a

subcontractor. ROA.2154-2158, 2241-2243. *See*, n. 11, *infra*.

King's Lien and Stop Notice invoked both Sections 85-7-181 and 85-7-131 of the Mississippi Code. Section 85-7-181 -- declared unconstitutional after the interpleader action was commenced and funds were deposited by APMM into the court's registry -- was commonly referred to as the Stop Notice statute, while §85-7-131 was commonly referred to as the Materialman's Lien statute.¹ Because King could not prevail under both code sections, since the Stop Notice statute (before being declared unconstitutional) was available only to subcontractors and the Materialman's Lien Statute was available only to those in a direct contractual relationship with a construction project owner, King took alternative positions in the Lien Stop Notice, asserting either that it was a contractor with a direct contractual relationship with APMM (through Noatex as APMM's agent) and therefore entitled to payment of \$260,410.15 from APMM under the Materialmen's Lien statute, or that it was a subcontractor of Noatex entitled, under the Stop Notice statute, to bind in the hands of APMM the \$260,410.15 that King was owed by Noatex. King has never claimed that APMM and Noatex jointly owed it these funds.

¹ In reaction to the ruling in *Noatex Corp. v. King Constr. of Houston, L.L.C.*, 732 F.3d 479 (5th Cir.2013), which upheld a declaration that Mississippi's Stop Notice statute was unconstitutional, in 2014 the Mississippi legislature enacted a new statutory scheme pertaining to protection of liens of contractors, subcontractors and others arising out of construction projects. *See*, Miss. Code Ann. §85-7-401, et seq.

Faced with the competing claims of King and Noatex, in November 2011, APMM filed the interpleader action in Mississippi state court interpleading the sum of \$260,410.15, and naming King and Noatex as interpleader defendants. Instead of filing an answer and seeking to prove its claim to the interpleader fund, Noatex initiated three years of procedural demands for release of the interpleader fund without judicial review. Dealing with these demands for release of the fund without following established judicial processes has cost the parties and the courts untold amounts. The instant motion is yet another such demand.

As its first procedural maneuver, Noatex removed the interpleader action to federal district court pursuant to 28 U.S.C. § 1335, the Federal Interpleader Act. To support removal Noatex had to assert a position that it later sought to deny (including through the instant motion), i.e., that there are adverse claims to a single fund, which is a requirement of §1335. It was only *because there are adverse claims to a single fund* that it was permissible for Noatex to invoke the district court's jurisdiction under § 1335. Noatex expressly acknowledged the existence of adverse claims and that APMM's interpleader complaint was sufficient to state a claim, when Noatex successfully opposed the district court's remand of the Interpleader Case to Mississippi state court. Noatex argued in its *Memorandum of Law in Support of Opposition to Motion to Remand*:

This action lies plainly within this Court's original jurisdiction because APMM's complaint seeks to interplead \$260,410.15 which is "money or property of the value of \$500 or more," and

because Noatex and King Construction are two “adverse claimants, of diverse citizenship,” who “are claiming or may claim to be entitled to such money” 28 U.S.C. § 1335.

* * *

The allegations of APM’s complaint show that Noatex and King Construction are citizens of different states, and that they **claim adverse interests in the \$260,410.15 amount** that King Construction purported to bind in APM’s hands, or potentially in the court registry, under Section 87-5-181. As explained in *Mid-American Indemnity Co. v. McMahan*, 666 F.Supp. 926, 928 (S.D.Miss. 1987), such allegations are sufficient for asserting original jurisdiction under 28 U.S.C. §1335 now that APM has proceeded to deposit the money on February 3, 2012.

* * *

[APM’s] complaint is subject to original jurisdiction **because all the requirements of 28 U.S.C. §1335 are met.**

ROA.661-663 (emphasis added). Noatex was correct: But for the existence of adverse claims to the same fund, federal jurisdiction would not have existed under §1335, and Noatex would not have been able to remove (and successfully oppose remand) in reliance upon § 1335.

King filed an Answer to the interpleader complaint, stating, “King Construction provided \$260,410.15 in

labor and materials to the construction of the APMM facility in Guntown, Mississippi as a subcontractor to Noatex,” and claiming entitlement to the funds to the exclusion of Noatex. ROA.140-142; 2096-2097. (emphasis added). King made no claim to the funds on the basis that it had a direct contractual relationship with APMM.

Also included with King’s Answer was a Cross-claim against Noatex, alleging counts of breach of express and implied contract and collection of open account, among others, and alleging damages of, and requesting judgment against Noatex for, \$260,410.15, along with pre- and post-judgment interest, attorney’s fees and costs, and punitive damages. ROA.141-148.

Noatex did not file an Answer to the interpleader complaint and, instead, only filed a series of pleadings, both in the district court and before this Court, seeking a ruling or mandate ordering that the interpleader fund be distributed to Noatex to the exclusion of King.²

In September 2012, Kohn Law Group, Inc., counsel for Noatex, filed a separate lawsuit directly against APMM in California federal district court, alleging it has a lien on the interpleader fund pursuant to a contract for legal services between Kohn and Noatex,³

² More detail concerning the procedural history in the interpleader case, including various, largely duplicative, pleadings filed by Noatex seeking to gain possession of the interpleader fund, are detailed in APMM’s and King’s appellee briefs filed before this Court in these consolidated appeals.

³ The District Judge observed, “The engagement agreement between Kohn Law Group and Noatex . . . provides that Kohn Law

and seeking a judgment against APMM awarding to Kohn the interpleader fund held in the Mississippi district court's registry. ROA.2071. Magistrate Judge S. Allan Alexander granted APMM's motion to file an amended complaint to join Kohn as an interpleader defendant based on Kohn's claim of entitlement to the interpleader fund asserted in Kohn's California lawsuit against APMM, observing, "Kohn has asserted a claim in another federal court against the funds interpleaded in this case and alleges that it has an interest to these specific funds at stake in this case." ROA.2043-2044.

King filed an Answer to the amended interpleader complaint. (Because King's answer to the amended interpleader complaint did not repeat its previously asserted cross-claim against Noatex, Noatex has taken the position that King's cross-claim against Noatex for judgment of \$260,410.15 no longer exists, an issue which has not been adjudicated.) Neither Noatex nor Kohn filed an Answer to the amended interpleader complaint. Instead, Noatex and Kohn, separately and jointly, filed various pleadings before the district court

Group will 'represent [Noatex] , , , ' but that '[t]o secure the Client's [Noatex's] obligations to the Firm [Kohn Law Group], it is further agreed that the Firm [Kohn Law Group] shall have a lien upon any claim arising from the subject of this engagement, including without limitation any money, property[,] or other things of value received or to be received (directly or indirectly) pursuant to any settlement or compromise based on such claim or any award made or to be made in the Client's [Noatex's] favor by any tribunal based on such a claim, including any payment or award of costs or attorney fees." ROA.3082-3083 (brackets original, ellipses added).

and this Court seeking a ruling/mandate ordering that the interpleader fund be distributed to Kohn.⁴ *See*, n. 2.

No interpleader defendant has asserted a counterclaim against APMM alleging liability independent of the interpleader funds.

Almost two and one-half years after the interpleader lawsuit was filed, Senior District Judge Glen H. Davidson rendered two rulings which gave rise to Noatex's appeals: First, on March 3, 2014, the district court discharged APMM as a disinterested stakeholder and enjoined Noatex, King Construction and Kohn Law Group "from filing any proceedings against [APMM] relating to the interpleader fund without an order of this Court allowing the same." ROA.3019, 3029. Second, on March 17, 2014, Judge Davidson denied Noatex's and Kohn's joint motion seeking to compel APMM and King into arbitration

⁴ The most recent pleading was filed in this Court in Case No. 14-60217 on July 15, 2014, entitled, Motion (1) to Expedite Processing and Disposition on Appeal, and (2) for Alternative Treatment as a Petition for A Writ of Mandamus, wherein Noatex and Kohn requested this Court to either directly order distribution, or mandate distribution by the district court, of the interpleader funds to Kohn. If distribution was not directly ordered on expedited consideration, then Noatex and Kohn requested this Court to "exercise its discretion to treat their appeal as a mandamus petition . . . [and] treat this Motion as the petition [for mandamus], and consider their appellate briefs as briefing in support of the petition." On August 8, 2014, this Court denied this motion.

with Noatex and Kohn in California concerning the interpleader fund.⁵ ROA.3019, 3029.

On March 24, 2014, Judge Davidson also denied King's motion for summary judgment which argued King was entitled to distribution of the interpleader fund to the exclusion of Noatex and Kohn, denied in part Noatex's and Kohn's motions to dismiss which requested distribution of the interpleader funds to Kohn to the exclusion of King, and granted in part Noatex's and Kohn's motions to dismiss by dismissing Kohn as a party. ROA.3075-3087. In dismissing Kohn as a party, Judge Davidson reasoned, *inter alia*, Kohn's "purported lien will only come into play *if* Noatex is found to have rights in the fund, *which may or may not happen*. Such a hypothetical contingency is not ripe for adjudication." ROA.3083. (emphasis added).

B. The Consolidated Appeals

1. Case No. 14-60217

The Noatex/Kohn appeal of the March 3, 2014 discharge/injunction ruling is Case No. 14-60217. In this appeal, Noatex and Kohn raise the issue of whether the district court erred in granting injunctive relief in favor of APMM, and also impermissibly seek to expand the limited appellate review of a grant of

⁵ Noatex and Kohn argued that an arbitration clause in their Engagement Agreement for legal services was not limited to disputes between them concerning payment of attorney's fees and was broad enough to encompass both whether APMM's interpleader action was proper in the first instance, i.e., whether there were adverse claims to a single fund, and which of the interpleader defendants is entitled to the interpleader funds. The arbitration issue is briefed in Case No. 14-60287.

injunctive relief by seeking reversal or vacatur of at least thirteen other rulings listed in the Notice of Appeal that denied requests by Noatex and/or Kohn for dismissal of the interpleader action and distribution of the interpleader fund to either Noatex or Kohn. The Conclusion in the Noatex/Kohn Appellants' Brief in Case No. 14-60217 sets forth the relief sought, as follows:

If there is to be a stay in deference to arbitration, as sought in Case No. 12-60287, then the Court should vacate the discharge and injunction order of March 3, 2014, together with the impound order of December 5, 2012,⁶ and remand with directions to distribute the registry funds as Noatex and Kohn Law Group requested.

Otherwise, the Court should reverse the discharge and injunction order; render the dismissal of the complaint with prejudice; and remand with directions to distribute the registry funds as requested by Noatex and Kohn Law Group, and to address whether to award them attorney's fees.

Case No. 14-60217 is fully briefed.

⁶ The "impound order" is the Noatex/Kohn characterization of the district court order vacating the order of remand, and directing APM to re-deposit the interpleader funds into the district court's registry. ROA. 1250-1252.

2. Case No. 14-60287

The Noatex/Kohn appeal of the March 17, 2014 ruling denying the motion to compel arbitration is Case No. 14-60287. The Conclusion in the Noatex/Kohn Appellants' Brief in Case No. 14-60287 sets forth the relief sought, as follows:

The Court should reverse the ruling of March 17, 2014 that denied the stay [for arbitration]. The Court should also vacate the holdings that construed the scope of the arbitration agreement and found waiver as a result of the litigation in California, or else reverse them. The rulings of March 3, 2014 and March 24, 2014 should be vacated, and the case should be remanded with directions to stay the action until after arbitration has been had in accordance with the engagement agreement.

Case No. 14-60287 is fully briefed.

C. The Terms of the Settlement Agreement and Mutual Release

The Settlement Agreement addresses four lawsuits (three of which are summarized in *Noatex*, 732 F.3d at 483) : APMM's interpleader action; Noatex's declaratory judgment action which resulted in the ruling that Mississippi's Stop Notice statute was unconstitutional, *see, Noatex, supra*; Noatex's breach of contract action against King; and the fourth, Kohn's action against APMM filed in California district court, interestingly identified in the Settlement Agreement as

“the Debt Collection Action.”⁷ The Settlement Agreement acknowledges that the interpleader fund constitutes money that was deposited into the court’s registry by APMM “in response to the Stop Notice.” Settlement Agreement, p. 3, Recital G. The Settlement Agreement also acknowledges that both Noatex and King claim entitlement to the interpleader fund, to the exclusion of the other. *Id.* But the Settlement Agreement goes on as follows:

H. * * * Nothing in this Agreement is intended to release APMM from any liability, including liability asserted by Kohn Law in the Debt Collection Action.

* * *

4. This Agreement does not establish or resolve whether the registry deposit is or ever was owed by APMM, wholly or in part, either to Noatex or to King Construction. APMM is not one of the Parties to this Agreement.

The Parties do agree that the King Construction allocation shall not be deemed or credited as a payment against APMM’s debts or other obligations owing to Noatex, as to which Kohn Law holds a lien. Likewise, the allocation to Noatex shall not be deemed or credited as a payment against APMM’s debts or other

⁷ The California district court stayed this lawsuit pending resolution of APMM’s interpleader lawsuit. Kohn has appealed this ruling to the Ninth Circuit Court of Appeals. *Kohn Law Group, Inc. v. APMM*, Case No. 13-55023 (9th Circuit Court of Appeals).

obligations owing to King Construction, as to which Webb Sanders⁸ asserts a lien. As against APMM, the Parties agree and intend that the distributions of the registry funds should be deemed and credited first as payments by APMM to each of the respective Parties of their costs, including attorney's fees, if any costs are to be awarded against APMM. [cit.omit.] **Regardless of any award of costs, both of the Parties reserve and intend to pursue their separate claims against APMM, including interest.**

* * *

5. * * * a. King Construction reserves the right to seek from APMM any or all of the \$260,410.15 amount that is claimed to be owed by APMM for labor and materials provided by King Construction, including interest thereon;

b. Subject to the lien of Kohn Law, Noatex reserves the right to seek from APMM any or all of the \$260,410.15 amount of APMM's debts owed to Noatex that APMM withheld as of February 2, 2012⁹ for tools, supplies and equipment interest thereon;

⁸ Webb Sanders is one of the law firms that represented King during the course of this litigation.

⁹ On February 1, 2012, the district court granted APMM's Motion to Deposit Funds, and the funds were tendered on February 3, 2012. ROA.612, 627. Presumably, the February 2, 2012 date referenced in the Settlement Agreement pertains to APMM's tender into the court's registry of the interpleader funds

* * *

d. Noatex reserves the right to seek costs from APMM, including attorney's fees, in the Interpleader Action;

* * *

6. Nothing in this Agreement is intended to waive the right to enforce arbitration against APMM.

Settlement Agreement, pp. 3, 6-9 (emphasis added).

These "Settlement Agreement" terms blatantly attempt to usurp the authority of the court invoked by APMM when it filed its interpleader action.

Interpleader actions proceed in two stages, the first to determine if interpleader is warranted, and the second to determine which claimant is entitled to distribution of the interpleader fund. The two-stage process of interpleader was explained in *Rhoades v. Casey*, 196 F.3d 592, 600-601 (5th Cir. 1999) as follows:

A district court has broad powers in an interpleader action. An interpleader action typically involves two stages. In the first stage, the district court decides whether the requirements for rule or statutory interpleader action have been met by determining if there is a single fund at issue and whether there are adverse claimants to that fund. Wright, Miller & Kane, *FEDERAL PRACTICE & PROCEDURE: Civil 2d* § 1714 (1986). If the district court finds that the interpleader action has been properly brought the district court will then make a

determination of the respective rights of the claimants. *Id.* When there is no genuine issue of material fact the second stage may be adjudicated at summary judgment, and if there is a trial each claimant must prove their right to the fund by a preponderance of the evidence. *Id.* After entering a judgment in the interpleader action the district court also has the power to make all appropriate orders to enforce its judgment. 28 U.S.C. §2361. In an interpleader action the district court may also enter an order restraining the claimants from instituting any proceeding affecting the property until further order of the court.

With their Joint Settlement Motion, Noatex (and Kohn) and King seek to nullify the protection to which APMM is entitled under 28 U.S.C. § 1335 against those actions by the claimants that have been enjoined by the district court. As will be demonstrated below, this attempted nullification would require the court to abandon principled decision making.

King's Attempt to Avoid the District Court's Injunctive Order

King's *Lien and Stop Notice* claimed King was owed \$260,410.15 - period. King has never asserted that there are other debts that may be owed to it by anyone related to construction of APMM's facility. Although King asserted alternate bases for entitlement to the funds in its *Lien and Stop Notice* - either as a

contractor of APMM or as a subcontractor of Noatex¹⁰ - since interpleader litigation commenced, King has consistently argued its claim to the interpleader funds is as subcontractor of Noatex, and not as contractor of APMM. Indeed, it was because of the contractor/subcontractor relationship between Noatex and King that King filed its Stop Notice, and based on this relationship that Noatex successfully obtained a declaratory judgment that the Stop Notice statute was unconstitutional, a declaration that Noatex has argued renders it entitled to the interpleader funds.¹¹

Further, it was because of the Noatex/King contractor/subcontractor relationship that the district court determined that King might have an equitable claim to the interpleader fund notwithstanding the adjudication that the Stop Notice statute is unconstitutional (ROA.2046-2053), a ruling about which Noatex has bitterly complained in, *inter alia*, Noatex's Response to King's Motion for Summary

¹⁰ Each statement in the Settlement Agreement asserting that King claimed APMM *and* Noatex owed King \$260,410.15 (see, e.g., Recitals D. and G.) is inaccurate and misleading. “[i]t is generally accepted in this action that the \$260,410.15 that has been interpled by [APMM] is owed *either* to King *or* Noatex.” See Docket No. 145 at ¶ 1(b) (emphases added).

¹¹ As stated by Noatex in its Response to King's Motion for Summary Judgment, “APMM was the ‘owner’ of a factory construction project in Guntown, Mississippi. Noatex was the ‘contractor’ whose money King Construction sought to attach under § 85-7-181. * * * That declaratory judgment also established that APMM's obligations to pay the \$260,410.15 amounts represents the property of Noatex, and it is conclusive against King Construction.” ROA.2363, 2372.

Judgment. ROA.2373-2375. Although, prior to the filing of the interpleader action, King asserted an alternate position under §85-7-131 in its *Lien and Stop Notice*, King has not, in the more than three years since interpleader litigation commenced, asserted a claim to the interpleader funds based on an owner/contractor relationship with APMM, the existence of which must be not only alleged but proved in order to prevail on a claim under §85-7-131.

If, indeed, King had a contractual relationship with APMM for work performed or materials provided and has a good faith claim that APMM breached that contract constituting, as described in the Settlement Agreement, “APMM’s debts or other obligations owing to King Construction,” then such claim necessarily would be unrelated to the work performed and materials provided in King’s capacity as subcontractor of Noatex. In that event, King could certainly file a lawsuit against APMM based on that claim if such claim is not barred. As to the interpleaded funds, however, King’s pleadings establish that the basis for its claim to those funds is as subcontractor of Noatex. *See e.g., Lee v. W. Coast Life Ins. Co.*, 688 F.3d 1004, 1011 (9th Cir. 2012)(“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.”)

Thus, if King has a legitimate claim against APMM other than King’s claim to the \$260,410.15 interpleader fund, it should assert such a claim. But it cannot by

agreement with Noatex/Kohn appropriate and divide among them the \$260,410.15 interpleader fund and then seek to recover it again from APMM.

Noatex's (and Kohn's) Attempt to Avoid the District Court's Injunctive Order

In an attempt to get this Court to circumvent the district court's ruling outside of the appeal process, Noatex/Kohn provide in the Settlement Agreement that after distribution of the \$260,410.15 interpleader fund, Noatex can still assert claims against APMM for payment for "tools, supplies and equipment." The first time Noatex asserted the basis for its claim to the interpleader funds as being for payment of tools, supplies and equipment was in Noatex's *Memorandum Brief in Support of Response to [King's] Motion for Summary Judgment*, filed May 23, 2013, wherein Noatex stated, among other things, (1) **"On the merits** [i.e., the second phase of interpleader], if the Court chooses to consider the merits, the King MSJ is barred by the holdings in three interpleader cases [cits. omit.]. * * * Rather than reaching the merits, however, the Court should stay this action until after arbitration." (emphasis added) (2) "King Construction would only be entitled to share in this particular fund if King Construction had already obtained a judgment against Noatex, and a judgment lien against the money, before APMM commenced the action." (3) That declaratory judgment [affirmed in *Noatex, supra*] also established that APMM's obligations to pay the \$260,410.15 amounts [sic] represents the property of Noatex, and it is conclusive against King Construction." (4) "The issue here is identical: does APMM owe money to Noatex? The answer is yes, and King Construction, as a mere

unsecured creditor of Noatex, has no rights in that property.” (5) “APMM owes the \$260,410.15 to Noatex. * * * [Noatex’s lack of a certificate of responsibility required by Miss. Code Ann §31-3-15 is irrelevant because] no COR [certificate of responsibility] in Mississippi is required for selling tools, supplies, or equipment. * * * All but one of the relevant invoices from Noatex to APMM were for orders to provide tools, supplies or equipment.”

These arguments by Noatex highlight that Noatex and King each claim entitlement to the entirety of the interpleader funds to the exclusion of the other, and are now improperly attempting divide the interpleader funds among all interpleader defendants while also pursuing litigation against APMM asserting these very same claims, in violation of the district court’s injunction.

The invoices referenced by Noatex in its Response to King’s Motion for Summary Judgment were first produced as exhibits in support of its Response to King’s Motion for Summary Judgment. Of course, if the district court determines that King’s equitable lien is superior to that of the claim of Noatex for tools, supplies and equipment, and King is, therefore, entitled to distribution of the interpleader funds, then Noatex cannot turn around and sue APMM for payment of the invoices upon which it bases its claim to the interpleader funds. Yet, the Settlement Agreement attempts to reserve the “right” to do so.

Because the purpose of interpleader is to protect the stakeholder from having to determine at its peril which claimant is entitled to the stake and also from the expense of litigation pertaining to claims to the stake,

claimants to the stake may not file a claim against the stakeholder unless that claim is independent of the claims to the stake. *Lee, supra*. “Were the defendants in an interpleader action permitted to carry forward with counterclaims [or claims in other lawsuits] against the stakeholder based upon the same interpleader fund, the very purpose of the interpleader action would be utterly defeated.” *Commerce Funding Corp. v. Southern Financial Bank*, 80 F. Supp. 2d 582, 585 (E.D. Va. 1999). The Settlement Agreement attempts to by-pass the requirement that to receive any of the interpleader fund an interpleader defendant must prove its claim to the interpleader fund. Instead, the Settlement Agreement seeks to distribute the interpleader fund among the interpleader defendants while reserving the “right” of all interpleader defendants, including Kohn, to separately pursue litigation against APMM asserting the claims they have made to the interpleader funds. If this were permissible, then the mechanism of interpleader, whether rule or statutory, would be rendered worthless.

Instead, as explained by *Rhoades, supra*, distribution of interpleader funds cannot occur without a determination by the district court of which claimant has proven its claim to the funds and is entitled to distribution thereof. Just as interpleader does not protect the stakeholder from liability independent of adverse claims asserted to the funds, it does protect the stakeholder from continued litigation by claimants to the stake whose claims fail.

D. Conclusion

The Joint Settlement Motion of Noatex and King Construction is an improper attempt by these parties to usurp the requirement and authority of the district court to determine the respective asserted rights of Noatex and King to the interpleader fund, and to ignore rulings already rendered by the district court in connection with the first phase of interpleader that discharged APMM as the disinterested stakeholder and enjoined Noatex, King Construction and Kohn Law Group “from filing any proceedings against [APMM] relating to the interpleader fund without an order of this Court allowing the same,” (ROA.3019). The Joint Settlement Motion and request that this Court direct the district court to distribute the funds to Noatex and King while allowing them to continue to embroil APMM in litigation over their respective asserted claims, should be denied.

/s/ Martha Bost Stegall

Otis R. Tims
Martha Bost Stegall
Counsel for Plaintiff-Appellee
AUTO PARTS MANUFACTURING
MISSISSIPPI INC.

* * *

*[Certificate of Service Omitted in the
Printing of this Appendix]*

APPENDIX S

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI
ABERDEEN DIVISION**

CIVIL MINUTES - GENERAL

Case No. 1:11cv251-GHD

Place Held: ABERDEEN

**Style: AUTO PARTS MANUFACTURING
MISSISSIPPI v KOHN LAW GROUP, INC.**

Date & Time Began: 8/23/16, 9:56 A.M.

Date & Time Ended: 8/23/16, 5:23 P.M.

Total Time: 5 hr 41 min

PRESENT:

**HONORABLE GLEN H. DAVIDSON,
SENIOR JUDGE**

Raye Long	Phyllis McLarty
Courtroom Deputy Clerk	Official Court Reporter

Attorney(s) for Plaintiff(s):	Attorney(s) for Defendant(s):
Martha Bost Stegall, Tupelo, MS	Donald Alan Windham, Jr., Jackson, MS
Otis R. Tims, Tupelo, MS	Robert E. Kohn, Santa Monica, CA

PROCEEDINGS: Hearing on Motion to Enforce
Permanent Injunction

DOCKET ENTRY:

Hearing held. Evidence entered. Court directed briefing
schedule and took matter under advisement.

DAVID CREWS, CLERK

By: /s/ Raye Long
Raye Long, Courtroom Deputy

APPENDIX T

AO 187 (Rev. 7/87) Exhibit and Witness List

United States District Court

***Northern District of Mississippi
ABERDEEN DIVISION***

***Exhibit and Witness List
CASE NO. 1:11cv251-GHD***

***AUTO PARTS MANUFACTURING MISSISSIPPI
v
KOHN LAW GROUP, INC.***

<i>Presiding Judge GLEN H. DAVIDSON</i>				<i>Plaintiff's Attorneys - Martha Bost Stegall, Otis R. Tims</i>	<i>Defendant's Attorneys - Donald Alan Windham, Jr., Robert E. Kohn</i>
<i>Hearing Date(s) August 23, 2016</i>				<i>Court Reporter: Phyllis McLarty</i>	<i>Courtroom Deputy Raye Long</i>
<i>PLF. No.</i>	<i>DEF. No.</i>	<i>DATE OFFER- ED</i>	<i>MARK- ED</i>	<i>ADMIT- TED</i>	<i>DESCRIPTION OF EXHIBITS* AND WITNESSES</i>
<i>21</i>		<i>8/23/ 16</i>	<i>X</i>	<i>X</i>	<i>MS Doc. No. 12, King Construction's</i>

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<i>PLF. No.</i>	<i>DEF. No.</i>	<i>DATE OFFER- ED</i>	<i>MARK- ED</i>	<i>ADMIT- TED</i>	<i>DESCRIPTION OF EXHIBITS* AND WITNESSES</i>
					<i>Answer and Defenses</i>
<i>5</i>			<i>X</i>	<i>X</i>	<i>KLG's First Amended Complaint ("FAC") CA Doc. No. 66,</i>
<i>10</i>			<i>X</i>	<i>X</i>	<i>KLG's Response to First Set of Interrogatories dated June 22, 2016',</i>
<i>9</i>			<i>X</i>	<i>X</i>	<i>Joint Report of Discovery Planning Conference under Rule 26(1) CA Doc. No. 84,</i>
	<i>33</i>		<i>X</i>	<i>X</i>	<i>APMM Responses ton Interrogatories - KDE 108</i>
	<i>34</i>		<i>X</i>	<i>X</i>	<i>APMM Further Responses to Interrogatories - KDE 107</i>
	<i>35</i>		<i>X</i>	<i>X</i>	<i>APMM Amended Further Responses to Interrogatories - Contained in KDE 102</i>

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<i>PLF. No.</i>	<i>DEF. No.</i>	<i>DATE OFFER- ED</i>	<i>MARK- ED</i>	<i>ADMIT- TED</i>	<i>DESCRIPTION OF EXHIBITS* AND WITNESSES</i>
33			X	X	<i>Portions of Deposition of Nishiyama with Exhibits D 25 and D 12</i>
	27		X	X	<i>Complaint of Noatex v King Construction - KDE 113</i>
	28		X	X	<i>Answer of King Construction - KDE 112</i>
	29		X	X	<i>Noatex Supplemental Initial Disclosures KDE 111</i>
	1		X	X	<i>Quotation by Noatex - Osamu Deposition Exhibit 1 ("ODE 1")</i>
	2		X	X	<i>APMM's Purchase Orders to Noatex - ODE 2</i>
	3		X	X	<i>Noatex's Invoices to APMM - ODE 3 through ODE 3-29</i>
	4		X	X	<i>Handwritten Agreement - Jan. 23, 2012 - ODE 4</i>

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<i>PLF. No.</i>	<i>DEF. No.</i>	<i>DATE OFFER- ED</i>	<i>MARK- ED</i>	<i>ADMIT- TED</i>	<i>DESCRIPTION OF EXHIBITS* AND WITNESSES</i>
	5		X	X	<i>Translation of Exhibit 4 - ODE 5</i>
	6		X	X	<i>Invoice from APMM - 155,231.00 - ODE 6</i>
	7		X	X	<i>Invoice 111230-11 - 124,112.70 - ODE 7</i>
	8		X	X	<i>Invoice CR111230- 13 - 10,000.00 - ODE 8</i>
	9		X	X	<i>Invoice 111230-09 - 55,178.25 - ODE 9</i>
	10		X	X	<i>Invoice 111230-10 - 3,789.00 - ODE 10</i>
	11		X	X	<i>Noatex Statement to APMM - Dec. 21, 2011 - ODE 11</i>
	12	8/23/16	X	X	<i>Noatex Statement to APMM - Jan. 23, 2012 - ODE 12</i>
	13		X	X	<i>King's Letter Filing Lis Pendens, with Laborer's and Materialman's lien</i>

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<i>PLF. No.</i>	<i>DEF. No.</i>	<i>DATE OFFER- ED</i>	<i>MARK- ED</i>	<i>ADMIT- TED</i>	<i>DESCRIPTION OF EXHIBITS* AND WITNESSES</i>
					and Stop Notice - ODE 13
	14		X	X	Invoice from Noatex - Mar. 6, 2012 - ODE 14
	15		X	X	Noatex Statement to APMM - May 2, 2012 - ODE 15
	16		X	X	Settlement Agreement and Mutual Release - ODE 16
	17		X	X	Sept. 26, 2012 Email - ODE 17
	18		X	X	Engagement Letter (Redacted) - ODE 18
	19		X	X	Registry Accounting - ODE 19
	20		X	X	Customer Ledger - APMM - ODE 20
	21		X	X	May 1, 2012 Email - ODE 21
	22		X	X	May 15, 2012 Email - ODE 22
	23		X	X	Translations of Exhibit 22 - ODE 23

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<i>PLF. No.</i>	<i>DEF. No.</i>	<i>DATE OFFER- ED</i>	<i>MARK- ED</i>	<i>ADMIT- TED</i>	<i>DESCRIPTION OF EXHIBITS* AND WITNESSES</i>
	24		X	X	June 21, 2012 Email - ODE 24
	25		X	X	Nishiyama May 23, 2013 Declaration - ODE 25, Kohn Deposition Exhibit 103 ("KDE 103")
	26		X	X	Paid King Invoices ODE 26 - 1 through 26-8
	38		X	X	Complaint for Interpleader - Mississippi Litigation 1:11cv251 Doc. 2 ("MLD 2")
	39		X	X	Laborer's and Materialman's Lien and Stop Notice - MLD 7
	40		X	X	Plaintiff's Memorandum Brief in Support of Response to Motion to Dismiss Noatex Corporation - MLD 20

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<i>PLF. No.</i>	<i>DEF. No.</i>	<i>DATE OFFER- ED</i>	<i>MARK- ED</i>	<i>ADMIT- TED</i>	<i>DESCRIPTION OF EXHIBITS* AND WITNESSES</i>
	41		X	X	Plaintiff's Reply Brief in Support of Motion for Order Directing Payment into Registry - MLD 29
	42		X	X	Feb. 1, 2012 Order - MLD 35
	43		X	X	Plaintiff's Reply Brief in Support of Motion to Discharge - MLD 53
	44		X	X	April 12, 2012 Order - MLD 56
	45		X	X	Noatex Corporation's Memorandum of Law in Support of Motion to Reconsider Order Remanding to State Court - MLD 58
	46		X	X	Memorandum Brief in Support of Plaintiff's Response to Noatex Corporation's

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<i>PLF. No.</i>	<i>DEF. No.</i>	<i>DATE OFFER- ED</i>	<i>MARK- ED</i>	<i>ADMIT- TED</i>	<i>DESCRIPTION OF EXHIBITS* AND WITNESSES</i>
					Motion for Clarification of Order Remanding to State Court - MLD 76
	47		X	X	Dec. 5, 2012 Order MLD 89
	48		X	X	Noatex Corporation's Memorandum of Law in Support of Motion for Voluntary Dismissal Without Prejudice - Noatex Law Suit 3:11cv152 Doc. 47
	49		X	X	Amended Complaint - MLD 135
	50	8/23/16	X	X	King Constructions's Memorandum in Support of its Motion for Summary Judgment on Plaintiff's Complaint for Interpleader and

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<i>PLF. No.</i>	<i>DEF. No.</i>	<i>DATE OFFER- ED</i>	<i>MARK- ED</i>	<i>ADMIT- TED</i>	<i>DESCRIPTION OF EXHIBITS* AND WITNESSES</i>
					Distribution of Registry Funds - MLD 146
	51		X	X	Response of Auto Parts Manufacturing Mississippi Inc. To Noatex Corporation's Motion to Dismiss - MLD 174
	52		X	X	Memorandum in Support of Motion to Discharge Plaintiff - MLD 176
	53		X	X	Reply Brief in Support of Motion to Discharge Plaintiff - MLD 209
	54		X	X	Response of Auto Parts Manufacturing Mississippi Inc. To Kohn Law Group's Corporation's Motion to Dismiss - MLD 211

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<i>PLF. No.</i>	<i>DEF. No.</i>	<i>DATE OFFER- ED</i>	<i>MARK- ED</i>	<i>ADMIT- TED</i>	<i>DESCRIPTION OF EXHIBITS* AND WITNESSES</i>
	55		X	X	Notice of Non- Opposition to Motion for Voluntary Dismissal Without Prejudice - Noatex Law Suit Doc. 50
	56		X	X	APMM's Response Brief in Opposition to Motion to Expedite Distribution of the Registry Funds, and to Set a Status Conference and Request for Oral Argument - MLD 222
	57		X	X	Joinder in APMM's Response Brief in Opposition to Motion to Expedite Distribution of the Registry Funds, and to Set a Status Conference and Request for Oral Argument - MLD 223

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<i>PLF. No.</i>	<i>DEF. No.</i>	<i>DATE OFFER- ED</i>	<i>MARK- ED</i>	<i>ADMIT- TED</i>	<i>DESCRIPTION OF EXHIBITS* AND WITNESSES</i>
	58		X	X	Plaintiff's Second Motion to Amend Complaint - MLD 224
	59		X	X	Memorandum Brief in Support of Plaintiff's Second Motion to Amend Complaint - MLD 225
	60		X	X	Plaintiff's Reply Brief in Support of Second Motion to Amend Complaint - MLD 230
	61		X	X	Memorandum Opinion Granting Auto Parts Manufacturing Mississippi Inc.'s Motion to Dismiss or Discharge Plaintiff - MLD 237
	62		X	X	March 24, 2014 Memorandum Opinion - MLD 244

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<i>PLF. No.</i>	<i>DEF. No.</i>	<i>DATE OFFER- ED</i>	<i>MARK- ED</i>	<i>ADMIT- TED</i>	<i>DESCRIPTION OF EXHIBITS* AND WITNESSES</i>
	63		X	X	Sept. 30, 2014 Case Management Order - MLD 257
	64		X	X	Reponse to Joint Settlement Motion of Noatex and King Construction - Fifth Circuit Document (Case No. 14-60217) 00512823453
	65		X	X	November 20, 2014 Order - Fifth Circuit Document 00512844405
	66		X	X	Order Granting Joint Motion to Reopen Case for Limited Purpose of Distributing Registry Funds Pursuant to Settlement Agreement - MLD 264
	67		X	X	Judgment - Fifth Circuit Document 00513112236
	68		X	X	Reporter's Transcript of

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<i>PLF. No.</i>	<i>DEF. No.</i>	<i>DATE OFFER- ED</i>	<i>MARK- ED</i>	<i>ADMIT- TED</i>	<i>DESCRIPTION OF EXHIBITS* AND WITNESSES</i>
					Proceedings - MLD 286-1
	69		X	X	Order Granting Plaintiff's Motion to Amend and Denying Defendant's Motion to Dismiss as Moot - California Litigation Document (CLD) 65 (Civil Action No. 2:12cv8063)
	70		X	X	First Amended Complaint - CLD 66
	71	8/23/16	X	X	Order Denying Motion to Dismiss First Amended Complaint, or in the Alternative, to Transfer - CLD 80
	72		X	X	Defendant's First Amended Answer to Plaintiff's First Amended Compaint - CLD 83

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<i>PLF. No.</i>	<i>DEF. No.</i>	<i>DATE OFFER- ED</i>	<i>MARK- ED</i>	<i>ADMIT- TED</i>	<i>DESCRIPTION OF EXHIBITS* AND WITNESSES</i>
	73		X	X	Joint Report of Discovery Planning Conference Under Rule 26(f) - CLD 84
	74		X	X	Reporter's Transcript of Scheduling Conference on March 21, 2016
	75		X	X	Notice of Motion and Plaintiff's Motion for Summary Judgment; and Memorandum of Point and Authorities - CLD 107
	77		X	X	King's Letter to Chancery Clerk Vacating Laborer's and Materialman's Lien and Stop Notice - May 23, 2012
	78		X	X	Defendant's Opposition to Plaintiff's Motion

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<i>PLF. No.</i>	<i>DEF. No.</i>	<i>DATE OFFER- ED</i>	<i>MARK- ED</i>	<i>ADMIT- TED</i>	<i>DESCRIPTION OF EXHIBITS* AND WITNESSES</i>
					for Summary Judgment; Memorandum of Points and Authorities
	79		X	X	California Court Ruling on Attorney/Client privilege
1			X	X	APMM's Motion to Dismiss - CAD No. 51
2			X	X	KLG's Opposition to Motion to Dismiss - CAD No. 61
3			X	X	KLG's Motion to Amend (excluding Ex. A thereto) - CAD No. 55
4			X	X	APMM's Statement of Non-Opposition - CAD No. 59
6			X	X	APMM's Motion to Dismiss First Amended Complaint - CAD No. 67

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<i>PLF. No.</i>	<i>DEF. No.</i>	<i>DATE OFFER- ED</i>	<i>MARK- ED</i>	<i>ADMIT- TED</i>	<i>DESCRIPTION OF EXHIBITS* AND WITNESSES</i>
7			X	X	KLG's Response to Motin to Dismiss FAC - CAD No. 71
8			X	X	Order Denying Motion to Dismiss FAC - CAD No. 80
11			X	X	KLG's Response to First Set of Requests for Production dated June 26, 2016
12			X	X	KLG's Notice of Motion and Motion for Summary Judgment - CAD No. 107
13			X	X	KLG's Original Complaint - CAD No. 1
14			X	X	Declaration of Kiyoshi Tsuchyia - CAD No. 67-4
15			X	X	Order Denying Plaintiff's Ex Parte Application for TRO - CAD No. 96
16			X	X	KLG's Supp. Opposition to Defendant's

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<i>PLF. No.</i>	<i>DEF. No.</i>	<i>DATE OFFER- ED</i>	<i>MARK- ED</i>	<i>ADMIT- TED</i>	<i>DESCRIPTION OF EXHIBITS* AND WITNESSES</i>
					Motion to Dismiss - CAD's No. 76
22			X	X	Order of February 8, 2012 - MSD No. 43
23			X	X	Order of December 4, 2012 - MSD No. 89
24			X	X	Noatex Statement dated December 21, 2011 - MSD No. 108-4
25			X	X	Noatex's Evidentiary Objections - MSD No. 111
26			X	X	King Construction's Motion for Summary Judgement - MSD No. 145
27		8/23/16	X	X	Noatex/KLG Opposition to Motion for Summary Judgment - MSD No. 178

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<i>PLF. No.</i>	<i>DEF. No.</i>	<i>DATE OFFER- ED</i>	<i>MARK- ED</i>	<i>ADMIT- TED</i>	<i>DESCRIPTION OF EXHIBITS* AND WITNESSES</i>
28			X	X	Noatex/KLG Memorandum Brief in Support of Opposition - MSD No. 180
29			X	X	Noatex Invoices - MSD No. 181-91
30			X	X	Noatex/Kohn Memorandum in Support of Opposition to Motion to Discharge Plaintiff - MSD No. 202
31			X	X	Order and Memorandum of March 3, 2014 - MSD No. 236-37
32			X	X	Order and Memorandum of March 24, 2014 - MSD No. 243-44