No. 18-408

In the Supreme Court of the United States

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

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

REPLY BRIEF FOR PETITIONER

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SUMMARY OF REPLY

The Opposition confirms certiorari is warranted in this case, despite arguing otherwise. *Amici curiae* Federal Bar Association SDNY Chapter, *et al.* also support certiorari. To assure fair notice and neutrality of decisionmaking, and to prevent arbitrary expansions of judicial power, only "contempts involving discrete, readily ascertainable acts, such as turning over a key or payment of a judgment, properly may be adjudicated through civil proceedings * * *." *See Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 831-34 (1994). The Opposition makes no mention of *Bagwell* – and thus, it does not disagree *Bagwell* stands in conflict with the sanctions here and *McComb v. Jacksonville Paper Co.*, 336 U.S. 187 (1949). The "flexibility" in the Fifth Circuit[1] – which it applied here (Pet. App. 2-3 & nn.5-6) – is *McComb*'s "generality." *See* 336 U.S. at 191. Two additional circuits still follow *McComb*: *Inst. of Cetacean Research v. Sea Shepherd Conservation Soc'y*, 774 F.3d 935, 954 (9th Cir. 2014) (where the offended Ninth Circuit found contempt of its own injunction), and *TiVo Inc. v. EchoStar Corp.*, 646 F.3d 869, 887 (Fed. Cir. 2011) (en banc). But only the "four corners" rule in the other circuits (Pet. 21-23) comports with *Bagwell*. By arguing civil contempt is proper here under *McComb* – without disagreeing the sanctions are improper under *Bagwell* – the Opposition confirms this case is the perfect vehicle to resolve the conflict.

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[1] *Hornbeck Offshore Servs., LLC v. Salazar*, 713 F.3d 787, 792 (5th Cir. 2013); *Am. Airlines, Inc. v. Allied Pilots Ass'n*, 228 F.3d 574, 578 (5th Cir. 2000).

Certiorari is further warranted to resolve the conflict over the appellate review standard. Certiorari is warranted, too, over whether interpleader can be allowed when different debts are being asserted independently against the plaintiff – even when the amount of each alleged debt is the same as the amount of the plaintiff's deposit – and if so, whether an interpleader injunction can be enforced to protect the plaintiff from liability in excess of the deposit.

THIS CASE SQUARELY PRESENTS THE QUESTIONS IN THE PETITION

The district court below imposed sanctions for civil contempt, and also for "Kohn Law Group's bad-faith conduct" as detailed by APMM "in the evidentiary hearing * * * as well as in its briefing in support of civil contempt and sanctions." Pet. App. 24. Correctly, the Opposition does not contend the bad-faith holding would justify denying certiorari. *See* Sup. Ct. R. 15.2. The bad-faith holding relied on the allegedly contumacious acts of not dismissing the California action, but instead opposing dismissal (which the California district court denied), and amending and pursuing the action (with leave of court in California), including the summary judgment motion (which the court in California encouraged filing). So, reversing the holding of contempt based on the same acts would also mean reversing the bad-faith holding.

I. The Standard for Civil Contempt

The Opposition does not disagree the day-long evidentiary hearing, the dozens of exhibits, and the months of briefing and consideration – by the same Mississippi district court which issued the order that

allegedly was violated – all show the alleged contempt was not "discrete" or "readily ascertainable" under *Bagwell*. The Fifth Circuit held, "even if the district court's injunction did not 'expressly prohibit[ ]' Kohn Law's conduct, though we think it did, we also reject the assertion that this would work a constitutional harm." Pet. App. 3 (brackets added by the court; footnotes and citations omitted). There is harm under *Bagwell*, because the injunction "relating to the interpleader fund" said nothing about the already-pending California action that Kohn Law was sanctioned for pursuing, nor anything about dropping pursuit of APMM's unpaid debts allegedly owed to Noatex. Pet. 10-13, 25-28. Though the Fifth Circuit thinks it did, the Opposition (tellingly) does not disagree it didn't. It did not.

Instead, the Opposition confirms certiorari is warranted, when it just urges the Court not "to disavow the reasoned ruling of *McComb*." Opp. 37. In *McComb*, just like this case:

> None of the practices now complained of and for which plaintiff asks the Court to adjudge the defendants in civil contempt were specifically enjoined by the judgment[s] * * * although most of the practices were in existence at the time these orders were entered.

Walling v. Jacksonville Paper Co., 69 F. Supp. 599, 601 (S.D. Fla. 1947), *aff'd*, 167 F.2d 447, 450 (5th Cir. 1948), *rev'd*, 336 U.S. at 192-93. APMM argues overruling *McComb* in this case would "impose an unrealistic standard that no contempt of an injunction can occur unless the action undertaken was expressly and specifically described as being prohibited." Opp.

37. There is nothing unrealistic about an interpleader injunction expressly specifying the obligation – if only a single obligation is being claimed. *See Nat'l Union Fire Ins. Co. v. Olympia Holding Corp.*, 140 Fed. Appx. 860 (11th Cir. July 21, 2005) (contempt of injunction barring "any action affecting the proceeds of the policy"). There is nothing unrealistic about refusing to enforce any order, beyond the four corners of "the express terms of the decree." *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 574-75 (1984) (reversing "specific performance" of a consent decree).

"Ambiguity lurks in generality and may thus become an instrument of severity." *McComb*, 336 U.S. at 196 (Frankfurter, J., dissenting). The discharge and injunction purposely did not identify a single debt allegedly owed by APMM. King and APMM both argued (and the State of Mississippi agreed) no debts were owed to Noatex. The district court equivocated, by saying "[t]he Court has not yet determined the respective rights of the parties as to the money" (Pet. App. 88), and "the purported lien [of Kohn Law] will only come into play if Noatex is found to have rights in the fund, which may or may not happen" (ROA.3092; 2014 WL 1217766, *5). The court of appeals affirmed (Pet. App. 70 n.9), even though Noatex and King were (by the time of the rulings in March 2014) seeking payment entirely on different invoices, for different goods, labor and materials they allegedly provided APMM. Pet. 5-6, 8-9.

II. The Standard of Appellate Review

There is conflict between the circuits, and within the Fifth Circuit, over the standard of appellate review. Pet. 23-24, 28-30. Some decisions hold – contrary to the entire rationale of *Bagwell* – that " '[g]reat deference is due the interpretation placed on the terms of an injunctive order by the court who issued and must enforce it.' " *Med. Assoc. of Ga. v. Wellpoint, Inc. (In re Managed Care)*, 756 F.3d 1222, 1234 (11th Cir. 2014) (quoting *Ala. Nursing Home Ass'n v. Harris*, 617 F.2d 385, 388 (5th Cir. 1980)). Others hold (though, without mentioning *Bagwell*) "the interpretation of the scope of the injunctive order[ ] is a question of law to be determined by the independent judgment of [the reviewing] Court." *Hornbeck*, 713 F.3d at 792 (citation and quotation marks omitted). Others, like the decision here, apply an undifferentiated "abuse of discretion" standard. Pet. App. 2; *United States v. Ali*, 874 F.3d 825, 829 (4th Cir. 2017).

Kohn Law argued the standard in its opening brief and on pages 1-2 of the petition for rehearing en banc. APMM contends "[i]t is apparent" from the opinion "that the Fifth Circuit did conduct a *de novo* review." Opp. 38. The only thing apparent is the overlooked topic sentence: "The district court did not abuse its discretion in sanctioning Kohn Law." Pet. App. 2. Yes, the opinion did cite *Hornbeck* in footnotes 2-4 and 6. *Id.* at 2-3. However, its only statement of the standard of review was: "We review a district court's decision to impose civil contempt on that basis for abuse of discretion." *Id.* at 2.

III. The Question of Interpleading Different Debts of the Same Amount

APMM now concedes interpleader is inappropriate when the defendants are asserting different alleged debts. Opp. 39; *see* Pet. 6-7 and 30-33. That traditional rule is the opposite of what APMM urged below, what the discharge and injunction ruling held, and what the Fifth Circuit affirmed. APMM urged interpleader *because* there were two alleged debts – including specifically King's direct contract claim invoking Miss. Code Ann. § 85-7-131 against APMM for $260,410.15. *E.g.*, ROA.342-343 & n.2 (citing King's reliance on § 85-7-131 to show "APMM is exposed to 'double or multiple liability' to the two claimants/defendants, making interpleader proper"); ROA.2653 n.3. *But see Bradley v. Kochenash*, 44 F.3d 166, 168 (2d Cir. 1995) ("the protection against 'double or multiple liability' * * * is protection only against double or multiple liability that is unjustifiable because the plaintiff has but a single obligation."). The lower courts agreed with APMM.

When APMM filed for interpleader on November 15, 2011, it did face competing claims to "the money bound by King's Stop Notice" under § 85-7-181. Opp. 4. At the same time, APMM also faced the independently-asserted debt of $260,410.15 allegedly owed directly to King. Thirty months later, King said, "King Construction, Noatex and Kohn had each, independently, advanced claims against the $260,415.10 deposited in the registry." *See* Appellee's Brief of June 30, 2014 [2014 WL 3427765] at 6. APMM would owe King (or not), depending on what labor and materials King actually provided to APMM and

whether a direct contractual relationship existed between them. *See Summerall Elec. Co. v. Church of God*, 25 So. 3d 1090, 1094-96 (Miss. Ct. App. 2010). Those issues were independent of whether Mississippi's contractor licensing law nullified (or not) the separate APMM-Noatex contracts. APMM's potential liabilities were therefore independent of one another and greater than $260,410.15 – as the discharge and injunction expressly held. Pet. App. 88 & n.3.

A. King denied it was claiming APMM's debts owed to Noatex as a subcontractor of Noatex's under § 85-7-181.

King lost the action over debts owed by APMM to Noatex on April 12, 2012, when the "stop notice [was] vacated in its entirety" and declared to have "no effect on the funds that have been withheld by APMM." ROA.719; 864 F. Supp. 2d at 490-91. That ruling – coupled with APMM's insistence on continuing the case for interpleader – forced King into arguing the APMM-Noatex contracts were "null and void," so APMM would owe no debts to Noatex. Pet. App. 139. Obviously, making this argument meant King and Noatex were not asserting the same debts. The declaratory ruling had made King's claim under § 85-7-181 against debts owed to Noatex "clearly groundless." *See* Chafee, Modernizing Interpleader, 30 Yale L.J. 814, 819 & n.18 (1921). Therefore, APMM's continued action made King "a dummy" (*see id.* at 820) for APMM's own denial of any debts to Noatex (Pet. App. 115-117).

King's argument (the same as APMM's) meant King could collect nothing as a subcontractor of Noatex's. Pet. 13. For that reason, King "denie[d] that Noatex was the prime contractor * * * under Mississippi law."

Pet. App. 128, ¶ 5. *But see* Opp. 22. The Opposition vaguely asserts Noatex "was prime contractor on certain construction projects at APMM's plant" and that Noatex "in turn, hired King * * * as subcontractor." Opp. 2. Noatex did hire King to help install some equipment. *See* ROA. 84, 86 (the two orders from Noatex to King for $1,620 of labor and inspection services). None of the unpaid $260,410.15 debts that Kohn Law pursued in California included paying Noatex for anything provided by King – not "as subcontractor" nor as any other kind of vendor. *See* Pet. 15-16. That is undisputed in the Opposition. It too refutes that King and Noatex supposedly were asserting the same debts.

B. APMM knew it allegedly owed different alleged debts.

Kohn Law never argued King supposedly was claiming to be owed $260,410.15 by Noatex and another $260,410.15 by APMM. *But see* Opp. 23. As Kohn Law correctly argued:

> APMM is liable for the $260,410.15 that APMM withheld from Noatex on the basis of the stop notice law * * *, and APMM may also be liable for the additional $260,410.15 that King Construction seeks to recover.

ROA.2659 (filed June 20, 2013); *see also, e.g.*, ROA.3806-3807 (filed May 12, 2016). As APMM itself said, "* * * King Construction asserted against APMM a claim as a direct contractor instead of as a subcontractor of Noatex." Pet. App. 113. APMM argued for interpleader, based upon " ' * * * the debt contracted and owing' " by APMM directly to King, as

a contractor of APMM's. ROA.2653 n.3 (quoting § 85-7-131). Meanwhile, King's answer to the amended complaint (Pet. App. 127-130) and its motion for summary judgment (Pet. App. 132-141) nowhere claimed to be a subcontractor of Noatex, and they nowhere invoked § 85-7-181 or any other claim against debts owed by APMM to Noatex.

King never withdrew its claim that $260,410.15 was owed by APMM on King's invoices. The settlement reserved that very claim. ROA.3137-3318 (Recitals D and G) and 3141-3144 (§§ 4-5 and 5.a.). APMM itself said, "King Construction has not withdrawn its alternative claim to the interpleaded funds under §85-7-131." Pet. App. 113. King had withdrawn its Laborer's and Materialman's Lien under § 85-7-131, in the same letter that also withdrew the Stop Notice filing. ROA.4953-4954. But dropping the lien did not mean dropping APMM's contractual liability to King. *Falkner v. Stubbs*, 121 So. 3d 899, 904 (Miss. 2013) (judgment rendered "for breach of contract only").

C. APMM complained the settlement agreement would leave it unprotected from the independent claims alleged.

APMM complained the settlement would leave APMM unprotected from its independently-claimed debts. *But see* Opp. 23-24. APMM complained:

> 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.

Pet. App. 162.

True, APMM moved to "clarify" the order (Pet. App. 79-81) dismissing the interpleader case. *See* ROA.3153. The court clarified nothing. Commanding Kohn Law to dismiss the action in California or abandon pursuing APMM's debts to Noatex would not have clarified anything; rather, that would have modified the previous orders, to accomplish what they expressly did not do. *See United States v. Atlantic Refining Co.*, 360 U.S. 19, 23 (1959) (rejecting a similar argument for "interpretation" of a consent decree). The court instead denied APMM's motion on April 22, 2015, calling it "moot," and adding, "[i]n the opinion of this Court, the case *sub judice* has been fully resolved." ROA.3342-3343. Resolving "the case" did not determine whether APMM's deposit was money owed either to King or to Noatex, wholly or partly.

D. The FAC alleged APMM's debts owed to Noatex were not interpleaded.

The California district court correctly held, "the FAC clearly alleges that the money Plaintiff seeks to recover was not interpleaded and never paid to Noatex." 2016 WL 6517085, *6 (ROA.3706). This was the opposite of the Mississippi district court's interpretation. *But see* Opp. 24-26. The court in

Mississippi opined that FAC ¶¶ 4, 8 (ROA.3488-3489) pleaded King's invocation of the lien statute in §§ 85-7-131 and -135 had bound APMM's debts owed to Noatex. *See* ROA.5403; 235 F. Supp. 3d at 801. Those statutes said nothing about binding any debts (Pet. App. 99-100), and King never claimed they did bind APMM's debts to Noatex. Filing a lien under §§ 85-7-131 and -135 always meant asserting a contract with the landowner, such as APMM. *Brown v. Gravlee Lumber Co.*, 341 So. 2d 907, 909-10 (Miss. 1977). This was alleged in FAC ¶¶ 21.a-b, 27, and (as the Opposition does not disagree) the Mississippi district court's interpretation was literally the opposite. Pet. 16-17.

Re-characterizing APMM's deposit as "the money frozen by the stop notice" (Pet. App. 7 n.4) – *i.e.,* owed to Noatex – was also the opposite of APMM's own contention and King's dummy argument, which the State of Mississippi advanced too:

> [T]he State contested Noatex's standing to bring this [declaratory] suit based on Noatex's apparent failure to obtain a "certificate of responsibility" for the subject construction project pursuant to Miss. Code Ann. § 31-3-15, which would render the subcontractor's contract with the general contractor void and prohibit the subcontractor from maintaining a breach of contract action.

Noatex Corp. v. King Constr., L.L.C., 732 F.3d 479, 485 n.4 (5th Cir. 2013). Noatex had argued APMM did owe Noatex. ROA.2368-2392. The court in California correctly found there was "not a determination as to which party was entitled to the funds." 2016 WL 6517085, *6 (ROA.3706).

CONCLUSION

The sanctions present the conflict in this Court's decisions and among the circuits over *McComb* and the four corners rule. There is, also, a conflict in the Fifth Circuit and others over the standard of appellate review. By granting injunctive relief "relating to the interpleader fund" and discharging APMM "from the case" – when King and Noatex were no longer claiming the same debts allegedly owed by APMM *in* the case – the order created ambiguity and uncertainty. By imposing civil sanctions, arbitrarily, the courts below disregarded the separation of powers and due process holding of *Bagwell*.

Courts today are conflicted over the traditional rule against interpleader when different debts are claimed. *See* Maloney, Interpleader of Maritime Claims, 92 Tul. L. Rev. 1063, 1063-64 (May 2018) (discussing the cases). Here, the lower courts allowed a "needlessly long and complicated interpleader saga" (Opp. 15), when they broke the rule that only Congress should expand the traditional offices of equity. *See Petrella v. MGM*, 572 U.S. 663, ___, 134 S. Ct. 1962, 1974-75 (2014) (equitable laches). This recurring problem was not solved by *State Farm Fire & Cas. Co. v. Tashire,* 386 U.S. 523 (1967), as the Opposition does not disagree (nor even mention *Tashire*). Pet. 30-35. Therefore, certiorari "may serve to make clear the law of interpleader." *See Glyn v. Duesbury*, 11 Sim. 139, 147 (1840).

Respectfully submitted,

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