UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI

Will McRaney,

Plaintiff,

v.

The North American Mission Board of the Southern Baptist Convention, Inc.,

Defendant.

Case No. 1:17-cv-00080-GHD-DAS

MEMORANDUM IN SUPPORT OF PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION "TO RECONSIDER AND VACATE"

NAMB's amended motion (Doc. 123)[1] is styled as a request for the Court "to reconsider and vacate" an order concerning third-party discovery, entered in November 2018, which granted a motion by third-party the Baptist Convention of Maryland/Delaware ("BCMD"), to quash a document subpoena issued by NAMB. *See* Doc. 50 (the "Third-Party Discovery Order"). However, as discussed below, NAMB actually seeks more than to vacate the Third-Party Discovery Order. NAMB's motion asks that the Court "order BCMD to comply fully with the [2018] subpoena" issued by NAMB. Doc. 123 at 2.

NAMB's motion is rife with procedural defects, distortions, and disregard for applicable legal standards.

For the reasons detailed below, the motion should be denied.

BACKGROUND

Plaintiff's Lawsuit and Claims Against NAMB

In April 2017, Dr. Will McRaney filed a lawsuit in Mississippi state court against the North American Mission Board of the Southern Baptist Convention, Inc. ("NAMB"), a non-profit corporation organized under the laws of Georgia. The lawsuit makes claims for interference with business relationships, defamation, and intentional infliction of emotional distress, and alleges past and ongoing economic and non-economic harm. NAMB's alleged conduct occurred both during and after McRaney was employed by a separate, autonomous organization—BCMD—which is not a party to McRaney's lawsuit. McRaney is not, and never has been, an employee of NAMB.

[1] NAMB filed an amended motion (Doc. 123) two days after filing its original motion (Doc. 120), which failed to comply with L.U.CIV.R. 7(b)(10). NAMB's amended motion appears to violate another Local Rule. L.U.CIV.R. 45(e) provides that "[m]otions regarding subpoenas will be considered discovery motions and are governed by the procedural requirements that govern discovery motions." However, NAMB's amended motion does not conform with L.U.CIV.R. 37(a)'s requirements.

Dismissal of Plaintiff's Lawsuit Against NAMB and Reinstatement by the Fifth Circuit

After McRaney's state court lawsuit was removal to federal court, NAMB convinced this Court to dismiss the complaint for lack of subject matter jurisdiction. A multi-year appellate process then ensued, during which the Fifth Circuit reversed and reinstated McRaney's case, and the Supreme Court of the United States denied NAMB's request for review.

Proceedings in the District Court Since July 2021

More than four years after this case began, the parties returned to this Court in July 2021, to finally commence discovery and adjudicate the merits of McRaney's complaint against NAMB.

On August 23, 2021, Magistrate Judge Sanders conducted a case management conference, after which he entered a case management order. *See* Doc. 82. Discovery commenced more than one year ago. Plaintiff's expert reports have already been served. *See* Doc. 133 & 134. All discovery is scheduled to conclude on December 30, 2022. *See* Doc. 111. A jury trial is set for April 10, 2022. *See* Doc. 96.

ARGUMENT

NAMB cites no Federal Rule of Civil Procedure or Local Rule authorizing its motion "to reconsider and vacate" the Court's Third-Party Discovery Order, issued nearly four years ago. NAMB's memorandum in support of the motion invokes Federal Rule of Civil Procedure 60(b)(6). *See* Doc. 121 at 3. A motion under that Rule "must be made within a reasonable time," Fed. R. Civ. P. 60(c)(1), and is granted "only if extraordinary circumstances are present." *Johnson v. Okolona Mun. Separate School Dist.*, 2010 WL 1848924 at *3 (N.D. Miss. 2010) (quoting *Hess v. Cockrell,* 281 F.3d 212, 216 (5th Cir. 2002)); *see also Heirs of Guerra v. U.S.*, 207 F.3d 763, 767 (5th Cir. 2000) ("A court may grant relief under 60(b)(6) only under extraordinary circumstances.").

A. Rule 60(b) applies to final orders

By its terms, Rule 60(b) applies to *final* orders: "On motion and just terms, the court may relieve a party or its legal representative from a *final* judgment, order, or proceeding for the following reasons…."). Fed. R. Civ. P. 60(b) (emphasis added). NAMB fails to address this textual limitation of the Rule, or explain how the Rule applies to its motion given that language.[2]

A Federal Rule is "as binding as any statute duly enacted by Congress," *Bank of Nova Scotia v. United States*, 487 U.S. 250, 255 (1988), and courts "are not free to alter it except through the process prescribed by Congress in the Rules Enabling Act." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 861 (1999); *see also Harris v. Nelson*, 394 U.S. 286, 298 (1969) (Courts "have no power to rewrite the Rules by judicial interpretations."); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997) ("The text of a rule ... limits judicial inventiveness.").

B. NAMB's motion was not "made within a reasonable time"

A Rule 60(b)(6) motion may only be considered if "made within a reasonable time." Fed. R. Civ. P. 60(c). NAMB's motion fails to meet that requirement.

NAMB asks the Court to "reconsider" and then "vacate" an order entered nearly four years ago. NAMB could have filed a conditional cross-appeal of the Third-Party Discovery Order with the Fifth Circuit after McRaney's complaint was dismissed. *See Art Midwest Inc. v. Atlantic Limited Partnership XII*, 742 F.3d 206 (5th Cir. 2014) (discussing conditional cross-appeals). NAMB elected not to do so.

[2] BCMD cites Federal Rule of Civil Procedure 54(b) as a source of authority for reconsideration. *See* Doc. 132 at 2. However, that Rule's terms govern judgments, and adjudication of "claims or the rights and liabilities" of parties—and does not appear applicable to an order regarding third-party discovery.

But even if the failure to file a conditional cross-appeal were excusable, NAMB's delay in filing this motion is not.

The Supreme Court denied NAMB's request for review on June 29, 2021. *See* Doc. 73. On July 8, 2021, this Court issued an order lifting the stay on these proceedings. *See* Doc. 74. Days later, a case management conference was scheduled for August 2021. *See* Doc. 75. Immediately following that conference, a case management order was entered on August 23, 2021. *See* Doc. 81, 82. Under the original case management order, discovery was to conclude by March 28, 2022. *See* Doc. 82 at 4. That deadline was moved to October 28, 2022 (Doc. 100 at 4), and then moved again, to December 30, 2022, after NAMB requested to extend the deadlines, which Plaintiff did not oppose, and the Court approved. *See* Doc. 111.

NAMB makes no mention of Rule 60(c)(1), and no effort to establish it complied with the Rule. Instead, NAMB effectively concedes it could have filed this motion *long ago*—once the stay of proceedings was lifted, and discovery resumed, following the Supreme Court's denial of review—contending the Fifth Circuit's decision is the basis for the relief sought in its motion. *See* Doc. 121 at 2-3 (motion should be granted under the "same logic" as employed by the Fifth Circuit in this case); *see also id*. at 5 ("Accordingly, the law of the case, as outlined by the Fifth Circuit, requires BCMD's participation in this litigation and reversal of the Order quashing NAMB's subpoena.").

Filing its motion now—fourteen months after the stay of proceedings was lifted; more than a year into discovery; two weeks before the deadline for Plaintiff's expert reports (today, September 30); and near the discovery deadline—NAMB failed to satisfy the requirement that a Rule 60(b) motion be filed "within a reasonable time."

C. There are no "extraordinary circumstances" warranting the relief sought under Rule 60(b)(6)

Even if Rule 60(b)(6) applies to this motion, and even if the motion were not untimely, NAMB's motion should be denied because there are no "extraordinary circumstances" warranting the relief sought.

Once again, NAMB fails to acknowledge the standard applicable to its motion—never mentioning it must establish that "extraordinary circumstances" exist in order to obtain the relief sought.

As the movant, NAMB bears the burden of showing this requirement is satisfied. *See Diaz v. Stephens*, 731 F.3d 370, 374 (5th Cir. 2013) (movant is required to establish "extraordinary circumstances"). It clearly cannot do so—and has not even tried.

D. NAMB seeks relief well beyond "vacating" the Third-Party Discovery Order

NAMB's motion is styled as a request for the Court "to reconsider and vacate" the Third-Party Discovery Order, but NAMB actually seeks much more: it asks that the Court "order BCMD to comply fully with the [2018] subpoena . . . ." Doc. 123 at 2; *see also* Doc. 121 at 5. That request is improper.

The Third-Party Discovery Order decided *only* BCMD's motion to quash. *See* Doc. 50. NAMB did not move to compel, and cannot obtain under the guise of "reconsideration" relief it has never sought.

NAMB also ignores that the Third-Party Discover Order resolved a *specific* dispute over a *specific* document subpoena, served in 2018. *See* Doc. 50 at 2 (quashing "[t]he subject subpoena"). *That dispute is over*. No reconsideration is necessary or warranted. If NAMB wants to serve

BCMD with a *new* subpoena for documents, it is free to do so.[3] If BCMD objects to any such request, it is free to say so. Their dispute, if it comes to a court, will be adjudicated with each side able to argue about the relevance (or irrelevance) of the Fifth Circuit's decision in this case to the third-party discovery request. And Plaintiff will have an opportunity to respond to the positions of NAMB and BCMD in any such filings.[4] But we are not there.[5]

E. The 2018 subpoena at issue in the Third-Party Discovery Order was defective because it called for the production of documents more than 100 miles from BCMD's location

A subpoena may call for the production of documents "at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person." Fed. R. Civ. P. 45(c)(2)(A). NAMB issued a defective subpoena to BCMD in September 2018, calling for the production of BCMD's documents in Ridgeland, Mississippi, well outside the 100-mile limit, given that BCMD is based in Columbia, Maryland. *See* Doc. 37-1 at 14.

That error led to a further error. Rule 45 specifies that a motion to quash be filed in "the court for the district where compliance is required." Fed. R. Civ. P. 45(d)(3)(A). Had the subpoena properly called for production within 100 miles of BCMD's location, BCMD would have been *required* to file its motion to quash in the district where compliance was required—likely the District of Maryland. But because NAMB improperly demanded production of documents in Mississippi, the motion to quash was consequently filed in this Court based on that error.

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[3] As of this filing, NAMB has not provided notice that it intends to serve a new document subpoena on BCMD.

[4] BCMD's response to NAMB's motion contains numerous misstatements about the "ministerial exception" and "ecclesiastical abstention" (*see* Doc. 132 at 2-4). But the Court need not reach those because NAMB's motion should be denied for the reasons set forth in this memorandum.

[5] It is obvious that if NAMB wants discovery from BCMD it must issue a new subpoena. Rule 45 affords subpoena recipients (and other parties to the litigation) certain rights, which cannot be given short shrift by demanding now a response to a subpoena issued more than four years ago. The Rules set out a process, which NAMB should be required to follow.

Perhaps NAMB and BCMD coordinated to have their discovery "dispute" land in this Court, rather than elsewhere. There is evidence suggesting it. For example:

- NAMB issued a subpoena demanding the production of documents outside Rule 45's 100-mile limit, even though it easily could have called for production in Maryland, where BCMD is located, or in nearby Washington, DC (where NAMB's counsel have an office);
- BCMD strenuously resisted the subpoena, moving to quash (Doc. 37, 38) but neglected to raise this glaring defect in the subpoena; and
- NAMB then *joined* BCMD's motion to quash *NAMB's own subpoena* (Doc. 45).

But even if NAMB merely made an innocent mistake in drafting the subpoena, and even if BCMD merely overlooked this obvious objection, the fact is that the motion to quash belonged—at least in the first instance[6]—in another federal court. That is yet another reason for the Court to decline NAMB's request to revisit this Court's four-year-old Third-Party Discovery Order.

F. NAMB's motion mischaracterizes the Fifth Circuit's decision in this case

On top of its other defects, NAMB's motion features a self-serving mischaracterization of the Fifth Circuit's decision in this case.

As an initial matter, let there be no confusion: The Fifth Circuit's decision in this case did not address, or even mention, NAMB's subpoena to BCMD. As noted, NAMB elected to not file a conditional cross-appeal, and the Third-Party Discovery Order was not before the Court of Appeals. NAMB cannot contend otherwise.

As for the purported relevance of the Fifth Circuit's decision to NAMB's motion, NAMB distorts the opinion of the Court of Appeals, claiming the Fifth Circuit "*required* NAMB to present 'evidence' of 'valid religious reasons' for any of NAMB's alleged actions." Doc. 123 at 1

[6] "When the court where compliance is required did not issue the subpoena, it may transfer a motion under this rule to the issuing court if the person subject to the subpoena consents or if the court finds exceptional circumstances." Fed. R. Civ. P. 45(f).

(emphasis added); *see also* Doc. 121 at 1. Not so. Not even close. Here is what the Fifth Circuit actually said:

> ***If*** further proceedings and factual development reveal that McRaney's claims cannot be resolved without deciding ***purely ecclesiastical questions***, the court is free to reconsider ***whether*** it is appropriate to dismiss some or all of McRaney's claims. ***NAMB*** broadly objects that it ***may*** have "valid religious reason[s]" for ***its*** actions. On remand, ***if*** NAMB presents evidence of these reasons ***and*** the district court concludes that it cannot resolve McRaney's claims without addressing these reasons, then there ***may*** be cause to dismiss. Were such a broad statement alone sufficient to warrant dismissal at this stage, however, religious entities could effectively immunize themselves from judicial review of claims brought against them.

McRaney v. North American Mission Board of the Southern Baptist Convention, Inc., 966 F.3d 346, 350-51 (5th Cir. 2020) (emphasis added; footnote and internal citations omitted).

To the extent NAMB is suggesting the Fifth Circuit has already decided the need for, or propriety of, discovery from BCMD, NAMB's assertion is wrong.[7]

* * * *

There is "no valid factual foundation for NAMB's First Amendment defense in this case." That is explained in an expert report by Dr. Barry Hankins, a professor at Baylor University, who has spent decades researching, writing and teaching about Baptists and Southern Baptists, Christianity in America and the relationship between Church and State. *See* Doc. 133-1 at 14). But NAMB's First Amendment defense is not currently before the Court. That can be addressed at an appropriate time after discovery.

[7] Dr. McRaney disagrees with NAMB's claim it cannot defend itself without discovery from BCMD. Leaving aside that a substantial part of his claims are based on NAMB's conduct *after* his termination from BCMD (*see*, *e.g.*, Complaint, ¶ XIV: NAMB "has continued a course of conduct designed to interfere with the business and contractual relationships of Plaintiff McRaney and various third parties"), the claims concerning Dr. McRaney's termination are about *NAMB's* conduct. Moreover, Dr. Raney has produced documents in his possession about his termination. And NAMB's lack of diligence pursuing discovery from BCMD after remand belies its insistence on the need for such discovery.

NAMB's attempt to again draw the Court into premature adjudication of NAMB's First Amendment arguments should be rejected.

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Respectfully Submitted,

Scott E. Gant

William Harvey Barton, II
BARTON LAW FIRM, PLLC
3007 Magnolia Street
Pascagoula, MS 39567
Phone: (228) 769-2070
harvey@wbartonlaw.com

Scott E. Gant
BOIES SCHILLER FLEXNER LLP
1401 New York Avenue, NW
Washington, DC 20005
Phone: (202) 237-2727
sgant@bsfllp.com