

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION**

PEN AMERICAN CENTER, INC., ET AL., PLAINTIFFS, VS. ESCAMBIA COUNTY SCHOOL BOARD, DEFENDANT.	CASE NO.: 3:23-CV-10385-TKW- ZCB
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**PLAINTIFFS' OPPOSITION TO BOARD MEMBERS'
MOTIONS TO QUASH AND FOR PROTECTIVE ORDERS**

INTRODUCTION

The Court should deny as untimely the Motions to Quash and for Protective Orders filed by individual Escambia County School Board members Kevin Adams (Dkt. 210), Paul H. Fetsko (Dkt. 212), Patricia Hightower (Dkt. 213), William Slayton (Dkt. 214), and David Williams (Dkt. 215). Although Plaintiff noticed the Board members' depositions well over a year ago, the Board members opted not to move for a protective order until now. If the Court does not find the Board members' Motions untimely, it should deny them on substantive grounds: the Board members assert they cannot be deposed based on legislative privilege, an argument the Court has already rejected. *See* Dkt. 155 at 3–7 (holding the decision to remove or restrict books “is functionally an administrative act,” not a legislative one).

Plaintiffs properly noticed the Board members' depositions in May 2024. The Board members never, until now, sought a protective order under Rule 26(c). While the Board sought a protective order based on legislative privilege, the Court held in November 2024 this privilege does not foreclose the Board members' depositions. When the Board and Board members appealed, the Eleventh Circuit held the Board members lacked standing because they failed to file motions on their own behalf or otherwise participate in the proceedings before this Court.

The Board members seem to argue their failure to timely move for protective orders is excused by the stay issued by this Court pending resolution of the appeal.

But this ignores the period between May 2024, when the depositions were noticed, and November 2024, when a partial stay went into effect after the Board and Board members had already filed notice of appeal. A motion under Rule 26(c) is generally considered untimely when not filed before the noticed deposition date; here, nearly six months elapsed after the notices were served and before the partial stay.

The Board members confuse matters by styling their pending Motions, in part, as motions to quash the deposition subpoenas that Plaintiffs issued in August 2024. The parties agree, however, that these subpoenas were unnecessary. While the Board members quote from emails between counsel relating to the subpoenas, none of these are relevant because the Board members' time to move for protective orders began with the service of the deposition notices in May 2024, not the subpoenas in August. The Board members have given no good cause for their failure to move under Rule 26(c) during the six months after their depositions were noticed, and their pending Motions should therefore be denied as untimely.

Alternatively, if the Court does not deny the Motions as untimely, it should deny them on the merits. The Court has already held the legislative privilege does not extend to decisions to restrict or remove school-library books. Dkt. 155 at 3–7. The Board members' Motions recapitulate arguments the Court has already rejected, without giving any basis for reconsideration, and should be denied on this basis.

PROCEDURAL HISTORY

On May 31, 2024, Plaintiffs served on the Board notices of deposition for each of the individual Board members, noticing a deposition date of June 28, 2024. Dkt. 82-1. As the Board members are effectively the Board’s officers, no subpoenas were necessary. *See, e.g., Brunson v. PHH Mortgage Corp.*, 342 F.R.D. 315, 320 (M.D. Fla. 2022) (“a corporation is responsible for producing its officers, managing agents, and directors if notice is given; a subpoena for their attendance is unnecessary, and sanctions may be imposed against the corporation if they fail to appear”); Wright & Miller, 8A Federal Practice and Procedure § 2103 (3d ed.) (same); Fed. R. Civ. P. 37(b)(2)(A).¹

On June 21, 2024, the Board moved for a protective order, arguing the Board members are protected by legislative privilege; the testimony sought is irrelevant; and the Board members are protected by the apex doctrine. Dkt. 82. The Board did not say the deposition notices were defective or that subpoenas were necessary. *Id.* The individual Board members did not move for a protective order or otherwise appear. The Magistrate Judge denied the Board’s motion, noting the Board failed to indicate whether individual Board members were invoking legislative privilege, a protection that “is personal to the legislator.” Dkt. 98 at 6.

¹ The Board agreed no subpoenas were necessary. *See* Dkt. 197-1 at Ex. 4 (Aug. 15, 2024 email from Nicole Smith to Shalini Agarwal (“Perhaps we could have done a better job of explaining that Defendant did not require them”—i.e., subpoenas)).

On August 2, 2024, the Board filed a renewed motion for a protective order (Dkt. 107), now accompanied by a declaration from each Board member confirming his or her “intent to assert the legislative privilege here.” Dkt. 107-1–5. The Board members did not, however, make appearances or motions on their own behalf. In its renewed motion, the Board noted Plaintiffs had “not served any subpoenas for the Board members’ depositions,” but the Board did not make the absence of subpoenas a basis for its renewed motion. Dkt. 107 at 2.

On August 15, 2024, Plaintiffs served renewed deposition notices, along with deposition subpoenas for each of the individual Board members out of an abundance of caution. Dkt. 197-1 at Ex. 4 (Aug. 15, 2024 email from Ellinor Heywood to Nicole Smith). The Board’s counsel had agreed to accept service of the subpoenas. *Id.* After the Board’s counsel indicated the Board would move to quash, Plaintiffs’ counsel opined that a motion to quash was unnecessary because the Court would resolve the substantive question of whether legislative privilege applied in ruling on the Board’s already-pending motion for a protective order. *Id.* (Aug. 15, 2024 emails between Shalini Agarwal and Nicole Smith). The Board’s counsel requested an extension of time to respond to the subpoenas “until after the court rules on the pending motions”—which were then before the magistrate judge—noting that “in the event the Board decides to appeal the ruling, we’d want the opportunity to preserve the motion to quash issue.” *Id.* (Aug. 29, 2024 email from Nicole Smith to Shalini

Agarwal). Defense counsel did not purport to represent the individual Board members. *Id.* Plaintiffs' counsel indicated that Plaintiffs took no position on an extension, reiterating that Plaintiffs viewed a motion to quash as unnecessary. *Id.* (Aug. 29, 2024 email from Shalini Agarwal to Nicole Smith).

In October 2024, the Magistrate Judge granted the Board's renewed motion, issuing a protective order based on legislative privilege. Dkt. 138. When Plaintiffs appealed that ruling to this Court, the Board again made no argument that Plaintiffs' deposition notices were insufficient, and the Board members again did not appear or otherwise participate. Dkt. 151. On appeal, this Court vacated the Magistrate Judge's order, holding legislative privilege does not bar the Board members' depositions because "the removal/restriction decision involves the case-by-case application of the standards in state law and school board policy to a specific book, not the formulation of general standards that apply to all books," making this decision administrative—not legislative—in nature. Dkt. 155 at 3–7.

On November 26, 2024, the Board and the Board members appealed the Court's ruling on legislative privilege to the Eleventh Circuit. Dkt. 157. The next day, this Court issued a partial stay, administratively staying summary judgment and *Daubert* deadlines and staying the Court's order regarding the Board members' depositions, but expressly deferring a decision on staying the entire case. Dkt. 160. On January 13, 2025, the court stayed the entire case pending the resolution of this

interlocutory appeal. Dkt. 170. On July 15, 2025, the Eleventh Circuit—after noting that the court has “a special obligation to satisfy ourselves of our own jurisdiction before proceeding to the merits of an appeal”—held (1) the Board lacked standing to invoke legislative privilege on behalf of its members; and (2) the individual Board members lacked standing to pursue an interlocutory appeal because they had “failed to participate in the case below.” Dkt. 192; *see also id.* at 12 (emphasizing that “the Board members did not appear, brief, argue, or in any other way participate in the proceedings below”).

The first time *the individual Board members*—as opposed to the Board—have challenged the deposition notices and subpoenas is in the pending Motions to Quash and for Protective Orders filed August 22, 2025. Dkt. 210, 212–15. These Motions are based on an argument this Court has already rejected—i.e., that the legislative privilege shields the Board members from testifying about the decision to remove or restrict books. *See, e.g.,* Dkt. 212 (Fetsko Mot.) at 21–32.² The Board members say that if the Court concludes the Motions are time-barred, they “could still invoke the [legislative] privilege at deposition,” *id.* at 9 n.3—notwithstanding that the Court has already held the privilege does not apply in these circumstances.

² Although the five Board members filed separate Motions, they make identical arguments, and Plaintiffs cite to Mr. Fetsko’s (Dkt. 212) as illustrative.

ARGUMENT

The Board members’ Motions should be denied because they are untimely, and because they are based on a theory of legislative privilege this Court has already evaluated and rejected.

1. *The Board members’ Motions are untimely.*

Rule 26(c)(1) says, in relevant part, that “[a] party *or any person* from whom discovery is sought may move for a protective order” Fed. R. Civ. P. 26(c)(1) (emphasis added). Here, Plaintiff properly noticed depositions of individual Board members well over a year ago on May 31, 2024, and the Board members opted not to move for a protective order until now. The Board members cannot show good cause for their delay in seeking protective orders, and the Court should deny their Motions as untimely.

“A motion for protective order is generally untimely if it was made after the date the discovery material was to be produced.” *LSM Techs. PTY Ltd. v. Sy-Klone Co.*, No. 22-cv-1019-BJD-MCR, 2023 WL 5934538, at *4 (M.D. Fla. Aug. 17, 2023) (quoting *Morock v. Chautauqua Airlines, Inc.*, No. 07-cv-210-T-17-MAP, 2007 WL 4322764, at *1 (M.D. Fla. Dec. 11, 2007)). Most courts require a motion for a protective order relating to a deposition be filed before the deposition date—if not earlier. *See, e.g., OMS Nat’l Ins. Co. v. Turbyfill*, No. 14-cv-622-MCR-CJK, 2015 WL 11109378, at *1 (N.D. Fla. Aug. 3, 2015) (motion untimely when filed

four days before deposition date); *CCB LLC v. Banktrust*, No. 10-cv-228-LAC-EMT, 2010 WL 4038740, at *1 (N.D. Fla. Oct. 14, 2010) (protective order must be sought before deposition date); *Epic Sports & Entm't, Inc. v. Triller Hold Co.*, No. 24-cv-81052, 2025 WL 1913189, at *1 (S.D. Fla. Apr. 24, 2025) (motions must be filed at least ten days prior to deposition date); *Kanter v. Continental Airlines, Inc.*, No. 09-cv-80954, 2010 WL 11601555, at *2 (S.D. Fla. Apr. 16, 2010) (motion untimely where filed five weeks after service of deposition notices); *see also* Wright & Miller, 8A Federal Practice and Procedure § 2035. A court may, however, grant an untimely motion if the moving party establishes “good cause” for the delay. *See, e.g., Andrews v. CSX Transp., Inc.*, No. 06-cv-704-J-32HTS, 2009 WL 10670852, at *1 (M.D. Fla. Jan. 7, 2009) (denying motion for protective order as untimely where movant failed to show good cause for delay).

Here, the Board members not only failed to move for a protective order prior to the noticed deposition date of June 28, 2024, but in the five months that followed before they chose to appeal this Court’s order. They have not offered good cause for this delay, and their Motions should be denied as untimely.

a. The Board members could have sought a protective order between May and November 2024 yet failed to do so.

As outlined above, Plaintiffs served the Board with deposition notices for the Board members in May 2024, noting a deposition date of June 28. On November 26, 2024, the Board and Board members filed a notice of appeal; the following day, this

Court partly stayed the case pending resolution of the Board and Board members' interlocutory appeal. Dkt. 160. In their pending Motions, the Board members claim they "must be afforded the opportunity to file motions on their own behalf asserting legislative privilege." Dkt. 212 at 4. In fact, they already had such an opportunity: the six-month period between May through November 2024. Instead, they elected to do nothing throughout that period, and instead chose to appear for the first time by filing a notice of appeal from this Court's order.³

Absent a showing of good cause, a six-month delay in seeking a protective order clearly renders such a motion untimely. Although district courts have adopted different rules regarding the timeliness of a motion under Rule 26, they generally agree that a motion for a protective order in connection with a deposition must be filed before the noticed deposition date. *See, e.g., Turbyfill*, 2015 WL 11109378, at

³ That the Board members decided to appeal this Court's order alongside the Board demonstrates they were aware of the possibility of appearing on their own behalf and separate from the Board. The Board apparently focused on that aspect of *In Re Hubbard* that provides, in certain circumstances, for interlocutory appeal by non-parties, 803 F.3d 1298, 1305 (11th Cir. 2015), but failed to focus on the fact that the non-parties in that case had in fact participated in the proceedings below, *id.* at 1303-04. *See also Kimberly Regenesys, LLC v. Lee Cnty.*, 64 F.4th 1253, 1260-64 (11th Cir. 2023) (non-party who did not participate below cannot appeal). Neither the Board members' lack of familiarity with Eleventh Circuit precedent, nor their choice to file a notice of appeal instead of moving to intervene, for certification under 28 U.S.C. § 1292(b), and/or for reconsideration of this Court's opinion, excuses their untimely Motions.

*1; *Banktrust*, 2010 WL 4038740, at *1. The Board members cite no authority to suggest a months-long delay may be excused under any circumstances.

b. The Board members have not established good cause for delay.

While courts recognize that a delay in moving for a protective order may be excused by “good cause,” the Board members do not address good cause explicitly. However, they seem to argue their Motions remain timely because “[i]n its renewed motion for protective order [filed on August 2, 2024], the Board presented arguments as to why it was permitted to raise the legislative privilege on behalf of the Board members,” and Plaintiffs did not challenge these arguments. *See, e.g.*, Dkt. 212 at 6–7. “Thus,” according to the Board members, “there was no need for additional and unnecessary motion practice by the individual Board members,” a fact Plaintiffs “conceded” when Plaintiffs’ counsel said it was unnecessary for the Board to move to quash the deposition subpoenas Plaintiffs served on August 15, 2024. *Id.*

This discussion of Plaintiffs’ subpoenas is a red herring. As explained above, and as the Board has agreed, Plaintiffs were never obligated to subpoena the Board members; it was sufficient to serve deposition notices on the Board. *See* pg. 4, *supra*. Plaintiffs’ counsel asserted it was unnecessary for the Board to move to quash in part because Plaintiffs believed *the subpoenas* were unnecessary, since Plaintiffs had already served valid deposition notices. Dkt. 197-1 at Ex. 4 (Aug. 15, 2024 email from Shalini Agarwal to Nicole Smith). The Board has never claimed otherwise;

indeed, their pending Motions recognize the subpoenas were superfluous. *See, e.g.*, Dkt. 212 at 7. The email exchanges between the parties' counsel make clear they were focused not on whether the Board members were or were not obligated to appear, but only on whether separate motions practice was required with respect to the subpoenas in light of the pending motion for protective order directed at the deposition notices. Dkt. 197-1 at Ex. 4. This Court also accepted the sufficiency of the notices when it vacated the Magistrate Judge's protective order. Dkt. 155.

Thus, the clock for the Board members to move for a protective order under Rule 26(c)(1) began to tick when the deposition notices were served in May 2024. Although *the Board* moved for a protective order on June 21, 2024, *the Board members* did not. Moreover, the Board's June 2024 motion contained no indication the Board members were seeking to invoke legislative privilege; indeed, this is one reason the Magistrate Judge denied the motion. Dkt. 98 at 6 (explaining that the legislative privilege is personal in nature). While *the Board* filed a renewed motion for a protective order, accompanied by declarations from individual Board members that they wished to invoke the privilege, *the Board members* again failed to move on their own behalf. Dkt. 107.

Rule 26(c)(1) is clear: any person from whom discovery is sought may move for a protective order. The Board members could have moved for a protective order in June 2024, after the deposition notices were served; or in July 2024, after the

Magistrate Judge denied the Board’s initial motion for a protective order, Dkt. 98;⁴ or in August 2024, when Plaintiffs served renewed deposition notices, Dkt. 197-1 at Ex. 4; or in November 2024, after Plaintiffs appealed the Magistrate Judge’s order to this Court; or at any other time before the Board members chose to file a notice of appeal and this Court issued a partial stay in late November 2024. Instead, they sat on the sidelines throughout these proceedings, and then filed an interlocutory appeal—which the Eleventh Circuit rejected for the precise reason that the Board members “failed to participate in the case below.” Dkt. 192 at 2.

The Board members now seek to confuse matters by styling their Motions, in part, as motions to quash the deposition subpoenas Plaintiffs issued in August 2024. Indeed, the Board members’ Motions largely ignore the deposition notices, focusing instead on events and correspondence relating to the subpoenas. *See, e.g.*, Dkt. 212 at 2–9, 16–21. However, by the time Plaintiffs issued the subpoenas on August 15, 2024, any motion for a protective order by the Board members was already arguably untimely, since by that time two and a half months had elapsed since Plaintiffs served the deposition notices. When the Board members argue that “any delay in filing ... can be considered excusable,” they focus on the period after the Court’s partial stay

⁴ Indeed, the Magistrate Judge’s order expressly noted it was “without prejudice to any nonparty’s ability to move to quash a subpoena,” clearly signaling that the Board members themselves might wish to appear. Dkt. 98 at 7 n.2.

in November 2024, without explaining why they should be excused from failing to move during the six months prior. *See, e.g., id.* at 19.

It is true, of course, that the Board itself sought a protective order under Rule 26(c). Dkts. 82, 107. But the distinction between the Board and its members is not a formality. The Magistrate Judge made this clear in his July 2024 order denying the Board's initial motion, which explained legislative privilege is personal to individual members. Dkt. 98.⁵ More importantly, the Eleventh Circuit affirmed this distinction in its ruling on appeal, when it held the Board members lack standing to pursue an interlocutory appeal because they "did not appear, brief, argue, or in any other way participate in the proceedings below." Dkt. 192 at 12. That the Board tried to obtain a protective order does not excuse the Board members' repeated failures to do so.

Plaintiffs' decision to not contest whether the Board appropriately asserted the legislative privilege (Dkt. 133 at 31:08-15) also does not excuse the Board members' repeated failures to appear or participate. First, Plaintiffs' concession had nothing to do with appellate standing or whether the Board's invocation of the privilege on behalf of its members would be sufficient to sustain an interlocutory appeal. It was focused solely on whether the substantive question of the privilege's application was properly before the Magistrate Judge (and this Court). Second, Plaintiffs have no

⁵ Judge Winsor reached the same conclusion in *Parnell v. School Board of Lake County*, No. 4:23-cv-414-AW-MAF (N.D. Fla. July 10, 2024), Dkt. 163, when he denied without prejudice the Board's motion for a protective order.

obligation to take litigation positions that ensure the availability of interlocutory appeal for the Board. If the Board were concerned with the availability of such an appeal, it should have ensured it and its members took the steps necessary to pursue appellate review. Nothing Plaintiffs did or said prevented the Board members from appearing and participating or excuses their delay in moving for protective orders.⁶

If the Board members continue to believe this Court is wrong, and that the legislative privilege extends to testimony on decisions to remove or restrict books, they have the option of refusing to answer questions on this topic, with the Board accepting any sanctions the Court may impose as a result. Fed. R. Civ. P. 37(b)(2) (identifying permissible sanctions against a party if its “officer, director or managing agent ... fails to obey an order to provide or permit discovery”); *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 111 (2009); *Brunson*, 342 F.R.D. at 320 (“a corporation is responsible for producing its officers, managing agents, and directors if notice is given and *sanctions may be imposed against the corporation* if they fail to appear” (emphasis added)).

⁶ Similarly, that Plaintiffs chose to highlight the lack of appellate jurisdiction in their Eleventh Circuit brief does not excuse the Board members’ failure to appear before filing a notice of appeal. The Eleventh Circuit has a “constitutional obligation to independently ensure [its] own subject matter jurisdiction exists,” Dkt. 192 at 12, and presumably would have identified the absence of jurisdiction in any event. That the Eleventh Circuit cancelled oral argument and issued a per curiam opinion at least suggests it did not view this as a close or difficult question.

The Board members claim this result would be inconsistent with the Eleventh Circuit’s holding that “government officials may appeal from [a] discovery order itself without waiting for contempt proceedings to be brought against them.” Dkt. 212 at 18 (quoting *In re Hubbard*, 803 F.3d at 1305). But this implies government officials are exempt from the requirement that a Rule 26 motion be timely filed—a proposition expressly rejected by the Eleventh Circuit in the Board members’ appeal. Plaintiffs do not, of course, assert the Board members could *never* have sought a protective order and then appealed; rather, Plaintiffs argue they should have moved between May and November 2024, instead of waiting until after the Eleventh Circuit had already rejected their appeal on standing grounds. The Board members had ample opportunity to seek a protective order during the summer and fall of 2024—and then, if necessary, pursue an interlocutory appeal. They elected not to do so, and their pending Motions should therefore be denied as untimely.

2. *The Court has rejected the Board members’ legislative privilege theory.*

As noted above, this Court has already held that legislative privilege does not foreclose the Board members’ depositions because the decision to remove or restrict books is administrative rather than legislative. Dkt. 155 at 3–7. This ruling was and is correct, and the Board members offer no viable grounds for reconsideration.

The Board members argue the law of the case doctrine does bar their pending Motions because the Eleventh Circuit did not consider the merits of their privilege

argument, and instead rejected their appeal on standing grounds. *See, e.g.*, Dkt. 212 at 11–12. While it is true that the Eleventh Circuit did not rule on whether legislative privilege applies under these circumstances, this does not disturb the fact that *this Court* has already resolved the issue. The Board members are requesting, in essence, that this Court reconsider its own prior ruling.

Generally, reconsideration is only appropriate to correct “manifest errors of law or fact” or to present “newly-discovered evidence.” *Arthur v. King*, 500 F.3d 1335, 1343 (11th Cir. 2007). Courts grant motions for reconsideration based upon “(1) an intervening change in controlling law, (2) the availability of new evidence, and (3) the need to correct clear error or manifest injustice.” *Sanzone v. Hartford Life & Accident Ins. Co.*, 519 F. Supp. 2d 1250, 1256 (S.D. Fla. 2007). The Board members’ Motions do not address any of these factors. *See, e.g.*, Dkt. 212 at 21–32. Instead, they reiterate arguments the Board made in its response to Plaintiffs’ appeal of the Magistrate Judge’s protective order, Dkt. 151, which this Court has already considered and rejected, Dkt. 155.

In the absence of any intervening change in controlling law, new evidence, or the need to correct “clear error or manifest injustice,” the Board members have not identified any basis for this Court to reconsider its ruling on legislative privilege. If the Court finds that the Board members’ pending Motions are timely, it should deny them on precisely the same grounds that it vacated the Magistrate Judge’s protective

order in November 2024. *See* Dkt. 155. To the extent necessary, Plaintiffs hereby incorporate the arguments in support of their appeal of the Magistrate Judge’s order, Dkt. 143, and at oral argument on that appeal, Dkt. 156 at 73-142.

As noted above, the Board members say that if the Court denies their Motions as time-barred, they “could still invoke the [legislative] privilege at deposition.” *See, e.g.*, Dkt. 212 at 9 n.3. If the Court denies the Motions, regardless of the basis for the denial, the Court should make clear the Board members’ invocation of the legislative privilege will subject the Board to appropriate sanctions without the need for further motions practice regarding the application of the privilege to this case.

CONCLUSION

The Board members’ Motions to Quash and for Protective Orders (Dkt. 210, 212–215) are untimely and should be denied on this basis. Alternatively, if the Court does not deny the Motions as untimely, it should deny them because the Court has already held legislative privilege does not extend to the decision to restrict or remove books, and the Board members have supplied no basis to reconsider this ruling.

RULE 7.1 CERTIFICATION

Plaintiffs certify that this Opposition contains 4,334 words, excluding those portions that do not count toward the word limit.

Respectfully submitted,

Dated: September 5, 2025

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