UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
ANGEL DILLARD,	:	No. 6:11-cv-1098-JTM-KGG
	:	
Defendant.	:	

UNITED STATES' OPPOSITION TO
DEFENDANT'S MOTION FOR RECONSIDERATION

The United States of America, through the undersigned counsel, hereby opposes Defendant's Motion for Reconsideration of this Court's August 7, 2012 Order . Def.'s Mot. Recons., ECF No. 114. Defendant has not demonstrated anything near the exceptional circumstances necessary to gain relief under her Motion, for the Court's Order was correctly decided. Thus, Defendant's Motion should be denied.

NATURE OF THE PROCEEDINGS

Defendant Angel Dillard sent a letter to Dr. Mila Means, a physician training to provide abortions in Wichita, Kansas. The letter contained threatening statements, including: "Thousands of people are already looking into your background, not just in Wichita, but from all over the US. They will know your habits and routines. They will know where you shop, who your friends are, what you drive, where you live. You will be checking under your car everyday-because maybe today is the day someone places an explosive under it." Am. Compl. ¶ 15, ECF No. 19. The letter went on to reference Dr. George Tiller, who was murdered by an anti-abortion

activist: "Maybe you don't realize the consequences of killing the innocent. If Tiller could speak from hell, he would tell you what a soulless existence you are purposefully considering, all in the name of greed." *Id.* at ¶ 16. Defendant's letter associates herself with the threats: "**We** will not let this abomination continue without doing everything **we** can to stop it." *Id.* at ¶ 17 (emphasis added). The United States filed this action under the Freedom of Access to Clinic Entrances Act ("FACE"), 18 U.S.C. § 248, seeking civil remedies to address this threat. Defendant moved to dismiss and the Court denied Defendant's motion to dismiss on December 21, 2011. Mem. Order, ECF No. 30.

Defendant filed a counterclaim against the United States. Def.'s Am. Answer, ECF No. 46. The United States moved to dismiss, pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. Mot. Dismiss, ECF No. 52. In responding to the United States' motion to dismiss her initial counterclaim, Defendant essentially conceded that she had not alleged a proper jurisdictional basis for this Court to hear her counterclaim, but argued that she could remedy the pleading deficiencies by filing an amended counterclaim, Def.'s Resp. Pl.'s Mot. Dismiss Countercl., ECF No. 70, and therefore filed a motion to amend her counterclaim. Def.'s Mot. Amend Countercl., ECF No. 69. The United States opposed Defendant's motion to amend, arguing that amendment would be futile because the basis for the amended counterclaim was both jurisdictionally deficient and substantively meritless. Pl.'s Opp'n Def.'s Mot. Amend Countercl., ECF No. 84. In its August 7, 2012 Order, the Court granted the United States' motion to dismiss and denied Defendant's motion for leave to amend. Mem. Order, ECF No. 111. Defendant now asks the court to reconsider that Order. Def.'s Mot. Recons., ECF No. 114.

ARGUMENT

Defendant seeks reconsideration pursuant to Local Rule 7.3 or relief pursuant to Fed. R. Civ. P. 60. Def.'s Mot. Recons. at 1. Defendant fails to articulate the standards associated with either rule, though—perhaps because it is clear that she cannot meet them.

Under D.Kan. Rule 7.3(b), "[a] motion to reconsider must be based on: (1) an intervening change in controlling law; (2) the availability of new evidence; or (3) the need to correct clear error or prevent manifest injustice." Relief under Fed. R. Civ. P. 60(b), meanwhile, is extraordinary and may only be granted in exceptional circumstances. *Servants of Paraclete v. Does,* 204 F.3d 1005, 1009 (10th Cir.2000). "A litigant shows exceptional circumstances by satisfying one or more of Rule 60(b)'s six grounds[1]." *Van Skiver v. United States,* 952 F.2d 1241, 1243-44 (10th Cir.1991). A movant cannot use Rule 60(b) to reargue the merits of the underlying judgment, nor can the Rule be used as a substitute for appeal. *United States v. 31.63 Acres of Land,* 840 F.2d 760, 761 (10th Cir.1988). Whether under the Local Rule or the Federal Rule, the resolution of a motion for reconsideration is "committed to the sound discretion of the court." *Kinney v. Holder*, No. 11-4176-JTM, 2012 WL 1893557, at *1 (D. Kan. May 23, 2012) (Marten, J.).

Here, because the Court's Order dismissed Defendant's counterclaim, that Order was dispositive, and thus Defendant can only move the Court to reconsider it pursuant to Fed. R. Civ. P. 60. *See Trackwell v. United States Gov't.*, No. 04-4168-SAC, 2005 WL 2921586, at *1 (D.

[1] The six grounds for Rule 60(b) relief are: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief. *See* Fed.R.Civ.P. 60(b).

Kan. 2005). But Defendant has not—and cannot—show the exceptional circumstances necessary to gain relief under the Rule. In fact, Defendant's motion consists entirely of arguments which were previously raised by Defendant and rejected by the Court.

Principally, Defendant contends that she should have been permitted to amend her counterclaim to allege that, by bringing this lawsuit, the United States infringed upon her religious freedom rights and interfered with her exercise of religious ministries, in violation of the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb-1. Defendant contends that the Court erred in determining that she could not bring a claim under RFRA because of lack of jurisdiction. But as the United States acknowledged in its Opposition to Defendant's Motion to Amend her Counterclaim, and as the Court noted in its Order, RFRA could theoretically provide an avenue for Defendant to obtain non-monetary relief. *See* Pl.'s Opp'n to Def.'s Mot. Amend Countercl. 6-7, ECF No. 84; Mem. Order 6-7, ECF No. 111. Here, though, Defendant lacked standing to assert such a claim, which would have been meritless in any event. Thus, as the Court found, even though it might have had jurisdiction to address some of Defendant's claims, "dismissal remains appropriate because the defendant's conclusory claims of violations of her religious rights fail to state a claim on the merits." *Id.* at 7-8. The Court therefore denied Defendant's motion for leave to amend as futile, "given that [the amended claims] would in any event be subject to dismissal." *Id.* at 9. Such a determination was proper, and demonstrates that the Court was aware of Defendant's arguments and found them meritless.

Even if the Court were to reconsider Defendant's arguments now, despite the fact that they simply rehash her earlier position, it should reach the same conclusion that it expressed in its Order—namely, that Defendant's counterclaim was meritless, and any amendment would have been futile, for the amended counterclaim would have been subject to dismissal as well.

Defendant's argument in support of her motion for reconsideration essentially contends that the Court did not fully consider her allegation that, as a result of the United States' case against her, her church and jail ministries have been burdened, in violation of RFRA. [1] However, as demonstrated in the United States' Opposition to Defendant's Motion to Amend Her Counterclaim, ECF No. 84, Defendant would have no standing to bring a counterclaim for her supposed injuries, because they were not caused by the United States. In order for a party to have standing, the alleged injury must be "fairly traceable to the challenged action." *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2752 (2010). Here, any burden on Defendant's church and jail ministries has come about as a result of decisions made by church and jail officials, rather than through any action of the United States, which has not requested that she lose her jail or church ministry positions. Standing does not exist where, as here, the "line of causation … is attenuated at best [and] the injury to respondents is highly indirect and results from the independent action of some third party not before the court." *Allen v. Wright*, 468 U.S. 737, 757 (1984) (citation omitted) (internal quotation marks omitted).

For substantially the same reasons, even if Defendant had standing, she would have failed to state a claim, because a substantial burden under RFRA cannot be based on the actions of a third party, but must be imposed by the government itself. Moreover, the burden must be substantial enough that it coerces an individual to act contrary to his or her religious beliefs. *See Thiry v. Carlson*, 78 F.3d 1491, 1495 (10th Cir. 1996) (holding that RFRA's "substantial burden" requirement should be interpreted based on the definition in *Lyng v. Northwest Indian*

[1] Defendant also takes issue with the supposed burdens of discovery requests propounded by the United States, but the proper response to such alleged burdens would be a motion for a protective order, rather than a counterclaim.

Cemetery Protective Ass'n, 485 U.S. 439, 450-51 (1988) (stating in relevant part that the incidental effects of otherwise lawful government programs "which may make it more difficult to practice certain religions" but which do not "coerce individuals into acting contrary to their religious beliefs" do not substantially burden the exercise of religion)). Here, any incidental burden on Defendant's religious exercise not only failed to meet the substantiality threshold, but resulted from the actions of third parties—the church and jail ministries with which Defendant was associated. This type of attenuated burden is not cognizable under RFRA.

CONCLUSION

Defendant has not raised any compelling reasons for the Court to grant relief from its Order. Rather, Defendant seeks merely to re-argue an issue on which the Court produced a sound, reasonable, and considered opinion after full briefing. Therefore, Defendant's Motion should be denied.

Dated: September 4, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 4, 2012, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF, which will provide notice of such filing to all registered parties.

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