IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

SAMUEL K. LIPARI,	)	
	)	
Appellant,	)	
	)	
v.	)	**Case No. 09-3203**
	)	
U.S. BANCORP and U.S. BANK NATIONAL ASSOCIATION,	)	
	)	
	)	
Appellees.	)	

APPELLEES' MOTION TO DISMISS APPELLANT'S NOTICE OF APPEAL AND FOR AWARD OF SANCTIONS FOR FRIVOLOUS APPEAL

This appeal should be dismissed and appellees should be awarded their attorneys' fees for having to file this motion to dismiss his frivolous notice. Appellant's notice of appeal is his **fourth** meritless attempt to appeal a district court's interim order denying remand and transferring venue (this Court previously dismissed his appeals on October 9, 2008, November 11, 2008 and January 23, 2009). Appellees U.S. Bancorp and U.S. Bank National Association, pursuant to Fed. R. App. P. 27 and Eighth Circuit Local Rule 47(A), again move to dismiss the appeal. There is no case, lawsuit, order or judgment from a district court within this Circuit from which the appellant can seek appellate review here. Moreover, because this appeal is so barren of merit, appellees request an award of attorneys' fees as a sanction pursuant to Fed. R. App. 38. As grounds for this motion, appellees state:

1. On April 4, 2007, the District Court for the Western District of Missouri denied plaintiff's motion for remand and granted defendants' motion to transfer venue to the District of Kansas. (Exhibit A.) The Western District then closed its case. (*See* Exhibit B, stating "WARNING: CASE CLOSED on 04/04/2007".) The case thereafter was litigated to a final judgment in the District of Kansas and appeal taken to the Tenth Circuit Court of Appeals. *See* 2009 WL 2055125 (10th Cir., July 16, 2009).

2. On September 5, 2008, appellant filed his first notice of appeal from the Western District of Missouri's April 4, 2007 interim order denying appellant's motion for remand and transferring this case to the District of Kansas. This Court dismissed the appeal on October 9, 2008. (Exhibit C.) Appellant filed a second notice of appeal on October 16, 2008 attempting to obtain review of the same interim order. This Court dismissed the second appeal on November 11, 2008 (Exhibit D). The Court also denied appellant's motion to recall the mandate in Case No. 08-3428 issued upon dismissal of the second appeal. Lipari then filed a third appeal notice from the April 2007 District Court order transferring the case to the District of Kansas. That appeal was likewise dismissed. (Exhibit E.)

3. Like each of the three prior attempts, this notice of appeal seeks review of the Western District of Missouri's "order to transfer the concurrent jurisdiction state claims to the Kansas District Court when the removal from state court was obtained through fraud on [the District] [C]ourt and federal jurisdiction

was exclusively in the US Tenth Circuit Court of Appeals. . . . [The appellant] also appeals [the District] [C]ourt's refusal to abstain under the 'first to file' rule." (Notice of Appeal at p. 1.)

4. Plainly, this Court does not have jurisdiction. After the transfer, this matter proceeded in the United States District Court for the District of Kansas, within the appellate review jurisdiction of the Tenth Circuit Court of Appeals. This case has not pended within a district court of the Eighth Circuit for nearly two and one-half years.

5. The District Court for the Western District of Missouri did not certify its April 2007 order—*sua sponte* or at appellant's request—for immediate interlocutory appeal under 28 U.S.C. § 1292(b). Nor is the interim order one of the types that is immediately appealable under 28 U.S.C. § 1292(a). Appellant also did not file a writ request in this Court asking that the District Court be prohibited from accomplishing the transfer set forth in its April 4, 2007 order.

6. Following the entry of a final judgment by the Kansas District Court, the Tenth Circuit Court of Appeals affirmed all rulings of the district court. 2009 WL 2055125 (10th Cir., July 16, 2009.) Its mandate issued August 18, 2009.

7. Because the Eighth Circuit Court of Appeals lacks jurisdiction, the appeal should be dismissed. Eighth Circuit Local Rule 47A(b).

8. Moreover, because the appeal is wholly frivolous, appellee should be awarded a judgment for its attorneys' fees incurred pursuant to Fed. R. App. 38.

The attorney fees incurred and sought as a sanction are set forth in the attached declaration. (Exhibit F.)

BACKGROUND

The appellant's litigation with these defendants has consumed nearly seven years and is reflected in numerous orders and decisions. *See*, *e.g.*, *Medical Supply Chain, Inc. v. US Bancorp. et al.*, 2003 WL 21479192 (D. Kan., June 16, 2003), *aff'd* 112 Fed. Appx. 730 (10th Cir. 2004); *Medical Supply Chain, Inc. v. Novation, et al.*, 419 F. Supp.2d 1316 (D. Kan. 2006), *appeal dismissed* 508 F.3d 572 (10th Cir. 2007); *Lipari v. U.S. Bancorp*, 2008 WL 4190784 (D. Kan., Sept. 4, 2008), *aff'd* 2009 WL 2055125 (10th Cir., July 16, 2009). The latter suit, that is purportedly the subject of this appeal, was filed in Missouri state court in 2006, removed to federal court and transferred to the United States District Court for the District of Kansas in 2007. *See* Exhibit A; *see also* 2008 WL 4190784. A final judgment was entered and affirmed on appeal. 2009 WL 2055125. Nevertheless, Lipari seeks (again) to appeal the Western District of Missouri's April 4, 2007 order.

BASIS FOR DISMISSAL

The appeal should be dismissed because this Court lacks jurisdiction to hear it. In his notice of appeal, Mr. Lipari purports once again to challenge an interim order of the United States District Court for the Western District of Missouri, namely its April 2007 decision denying remand and ordering transfer. However,

the Western District of Missouri's order is not separately appealable from the Kansas District Court's final judgment. *See Midwest Motor Express, Inc. v. Central States Southeast and Southwest Pension Fund*, 70 F.3d 1014, 1016 (8th Cir. 1996) (transfer orders generally not immediately reviewable); *Saab v. Home Depot U.S.A.*, 469 F.3d 758, 759 (8th Cir. 2006) (orders denying remand ordinarily not immediately appealable).[1]

Even if appellant could have sought review of the order denying remand and transferring this matter to the District of Kansas, either by interlocutory appeal or extraordinary writ,[2] his notice of appeal to this Court now—nearly 30 months after the case has been transferred to and litigated to finality in the Kansas District Court and Tenth Circuit Court of Appeals—is untimely and plainly without merit. *See Integrated Health Servs. of Cliff Manor, Inc. v. THCI Company, LLC*, 417 F.3d 953, 957 (8th Cir. 2005). Mr. Lipari litigated this case in Kansas and filed an appeal to the Tenth Circuit Court of Appeals. It affirmed the District Court and, in particular, the Tenth Circuit opinion specifically addressed the jurisdiction point that Mr. Lipari purports to make in his notice. 2009 WL 2055125 *1 (finding no jurisdictional defects). Lipari chose not to challenge on appeal the § 1404 transfer

[1] The district court did not certify the order for appeal under 28 U.S.C. § 1292(b) and the order is not otherwise immediately appealable under 28 U.S.C. § 1292(a).

[2] While these procedures may have been available to Mr. Lipari at the time the case was pending in the Western District of Missouri, *see Koehler v. Green*, 370 F. Supp.2d 904, 906 n.1 (E.D. Mo. 2005), he cannot rely upon them now.

of the case to the District of Kansas. Thus, he has waived any possible argument. He has no right to seek a second bite of the apple in any court of his choosing and at any time he chooses, let alone to seek the piecemeal review of interim district court orders. The notice of appeal should be dismissed.

REQUEST FOR SANCTIONS

Appellant's filing of four successive appeal notices is wholly improper, particularly when this Court already has dismissed the prior attempts three times. There is no basis for appellant's current appeal. Mr. Lipari cannot seek relief in this Court where the Missouri federal court had lost its jurisdiction nearly two and a half years ago. *See Integrated Health Servs. of Cliff Manor, Inc.*, 417 F.3d at 957; *Midwest Motor Express, Inc*., 70 F.3d at 1016; *In re Nine Mile Ltd.*, 673 F.2d 242, 243 (8th Cir. 1982). Moreover, there is no final judgment or appealable order from the Western District of Missouri. Having no legal or factual basis, the appeal is frivolous.

Although Mr. Lipari has filed a motion to proceed *in forma pauperis*, this should not dissuade the Court from protecting its docket and stopping future abuses. Successive notices of appeal as here are wasteful of the Court's resources and costly to the appellants. In support of their request for attorney fees, the declaration of the undersigned is submitted herewith as Exhibit F. Sanctions of $700 should be awarded under Fed. R. App. 38. *See* Exhibit G, *Medical Supply*

Chain, Inc. v. U.S. Bancorp, Order dated Dec. 30, 2004 at pp. 7–9 (awarding sanctions for frivolous appeal in prior matter).

WHEREFORE, appellees U.S. Bancorp and U.S. Bank National Association request that this Court dismiss appellant's appeal, for sanctions in the amount of attorneys' fees of $700 in preparing this motion and for such other relief as the Court deems just and proper.

/s/ Mark A. Olthoff
MARK A. OLTHOFF MO #38572
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ATTORNEYS FOR APPELLEES
U.S. BANCORP AND U.S. BANK
NATIONAL ASSOCIATION

CERTIFICATE OF SERVICE

The undersigned attorney certifies that a true and correct copy of the above and foregoing was delivered via United States mail, postage prepaid, this 28th day of September, 2009, to:

Mr. Samuel K. Lipari
803 S. Lake Drive
Independence, MO 64053

Appellant

/s/ Mark A. Olthoff
Attorney for Appellees U.S. Bancorp and
U.S. Bank National Association

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

SAMUEL K. LIPARI, Plaintiff,	)	
v.	)	Case No. 06-1012-CV-W-FJG
U.S. BANCORP and U.S. BANK NATIONAL ASSOCIATION, Defendants.	)	

ORDER

Currently pending before the Court is plaintiff's Motion to Remand (Doc. # 6); plaintiff's Motion for a More Definite Statement (Doc. # 10); plaintiff's Motion to Vacate Case Management Order (Doc. # 11); defendants' Motion for Leave to File Excess Pages (Doc. # 15); defendant's Motion to Dismiss or in the Alternative to Transfer (Doc. # 16) and plaintiff's Motion to Stay Further Proceedings Pending Appeal (Doc. # 18).

I. BACKGROUND

On October 22, 2002, Medical Supply Chain, Inc. ("Medical Supply") filed an action in the United States District Court for the District of Kansas alleging both state and federal claims Medical Supply Chain, Inc. V. U.S. Bancorp, N.A. et al., Case 02-2539, ("Medical Supply I"). On June 16, 2003, Judge Murguia dismissed the federal claims with prejudice and dismissed the state claims without prejudice. This decision was affirmed by the Tenth Circuit. The second case brought by plaintiff was Medical Supply Chain Inc. v. General Electric Company et al., Case No. 03-2324 which was filed on June 18, 2003 ("Medical Supply II"). On January 29, 2004, the Court granted

defendants' Motions to Dismiss. The Tenth Circuit affirmed the dismissal of these claims on July 26, 2005. Medical Supply then filed an identical action in the Western District of Missouri on March 9, 2005 captioned Medical Supply Chain, Inc. v. Neoforma, Inc. (05-210-CV-W-ODS) ("Medical Supply III"). In that case, U.S. Bancorp and U.S. Bank National Association were named again as defendants in the Complaint which also alleged violations of state and federal law. On June 15, 2005, Judge Ortrie Smith transferred Medical Supply III to the District of Kansas. On March 7, 2006, Judge Murguia granted defendants' motion to dismiss. Medical Supply appealed this order to the Tenth Circuit where it remains pending. On November 28, 2006, Samuel Lipari filed the instant action in Jackson County Circuit Court against U.S. Bancorp, NA and U.S. Bank NA (Jackson County Case No. 0616-CV-32307). On December 13, 2006, the defendants removed the action to this Court on the basis of diversity. Defendants now move to dismiss plaintiff's case or alternatively to transfer it to the District of Kansas pursuant to 28 U.S.C. § 1404 (a). Plaintiff did not respond to the Motion to Dismiss or Alternatively to the Motion to Transfer.

II. STANDARD

28 U.S.C. § 1404(a) provides, "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." The Court in Houk v. Kimberly-Clark Corp., 613 F.Supp. 923, 927 (W.D.Mo. 1985), stated that "[i]n any determination of a motion to transfer under § 1404(a), the plaintiff's choice of a proper forum is entitled to great weight, and will not be lightly disturbed." The Court also observed:

> It is incumbent upon the party seeking transfer to make a clear showing

> that the balance of interests weighs in favor of the proposed transfer, and unless that balance is strongly in favor of the moving party, the plaintiff's choice of forum should not be disturbed. . . . Where the balance of relevant factors is equal or only slightly in favor of the movant, the motion to transfer should be denied.

Id. at 927 (internal citations omitted).

In Enterprise Rent-A-Car Co. v. U-Haul International, Inc., 327 F.Supp.2d 1032 (E.D.Mo. 2004) the Court stated:

> In determining whether or not to transfer venue, the Court must consider the three general categories of factors stated in §1404(a): (1) the convenience of the parties, (2) the convenience of the witnesses, and (3) whether the transfer would be in the interest of justice.

Id. at 1045 citing Terra Int'l, Inc. v. Mississippi Chem. Corp., 119 F.3d 688, 691 (8th Cir.), cert. denied, 522 U.S. 1029, 118 S.Ct. 629, 139 L.Ed.2d 609 (1997).

III. DISCUSSION

A. Motion to Transfer

Defendants state that this is the third lawsuit stemming from the same operative facts where Medical Supply Chain or Mr. Lipari have named U.S. Bancorp and U.S.Bank as the defendants.[1] Defendants state that federal courts have consistently and uniformly ordered section 1404(a) transfers to other federal district courts when related lawsuits are pending in the transferring court. In Prudential Insurance Co. of America v. Rodano, 493 F.Supp. 954 (E.D.Pa. 1980), the Court stated:

> The most compelling reason for transfer is that it would best serve the interests of justice. The presence of two related cases in the transferee forum is a substantial reason to grant a change of venue. The interests of justice and the convenience of the parties and witnesses are ill-served

[1]Neither U.S. Bancorp nor U.S. Bank Association were named as defendants in Case 03-2323.

> when federal cases arising out of the same circumstances and dealing with the same issues are allowed to proceed separately. The substantial likelihood that this case will be consolidated with the two related cases pending in the United States District Court of Maryland, sitting at Baltimore, weighs heavily in favor of transfer.

Id. at 955.

Defendants do not discuss whether it would be more convenient for the witnesses and parties if this case were transferred to the District of Kansas. However, because the locations of the two courthouses are relatively close, the Court does not find that transferring this case would play a major factor for either the parties or the witnesses. Additionally, the Court finds that the interests of justice would be better served if this case were transferred to the District of Kansas. That district has become extensively familiar with the plaintiff and his various lawsuits over the years. Transfer of this case would conserve judicial resources and avoid the risk of potentially conflicting rulings from different courts.

As mentioned previously, the plaintiff's choice of forum is entitled to great deference. However, the Court finds that the balance of interests in this case weighs strongly in favor of transferring this case due to the extensive previous history that plaintiff has had with his various cases in the District of Kansas. Therefore, because the District of Kansas is a proper alternative forum, this Court hereby **GRANTS** defendants' Motion to Transfer this case to the District Court of Kansas (Doc. # 16).

B. Motion to Remand

Plaintiff moves to remand this case because he states that the Kansas District

Court still has jurisdiction over his state law claims[2]. Plaintiff also states that diversity jurisdiction does not exist. Plaintiff does concede that the Supreme Court has determined that national bank associations are to be treated as residents of the state in which they have their main office, but he argues that this does not save the defendants' removal from being frivolous. He states that diversity jurisdiction still does not exist, despite the movement of the pendant claims to state court. Plaintiff states that claims were filed against the Missouri domiciled defendant Shugart, Thompson & Kilroy as a defendant. Thus, he argues that the presence of this defendant destroys diversity jurisdiction.

Defendants state in opposition that the Motion to Remand should be denied because diversity jurisdiction exists between the parties and the removal was proper. Defendants note that there is no Missouri defendant who was named in plaintiff's state court petition. In his state court petition filed on November 28, 2006, plaintiff named only U.S. Bancorp and U.S. Bank, both of whom are considered Minnesota residents. Additionally, defendants note that the District Court in Kansas did not retain jurisdiction over plaintiff's state law claims, but rather dismissed these claims without prejudice.

The Court agrees with defendants and finds that the removal was proper and diversity jurisdiction exists between the parties. Accordingly, the Court finds no basis for remanding this action and therefore **DENIES** plaintiff's Motion to Remand (Doc. # 6).

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[2] It is unclear how this argument would support remanding this case to the Jackson County court.

III. CONCLUSION

The Court **GRANTS** defendants' Motion for Leave to File Excess Pages (Doc. # 15); **DENIES** as **MOOT** plaintiff's Motion to Reconsider the Court's Case Management Order (Doc. # 11); **DENIES** as **MOOT** plaintiff's Motion to Stay (Doc. # 18); **DENIES** plaintiff's Motion for a More Definite Statement (Doc. # 10); **DENIES** plaintiff's Motion to Remand (Doc. # 6) and **GRANTS** defendants' Motion to Transfer this Case to the District Court of Kansas (Doc. # 16).

Date: 4/4/07
Kansas City, Missouri

S/ FERNANDO J. GAITAN, JR.
Fernando J. Gaitan, Jr.
United States District Judge

Mark Olthoff

From: ecfMOW.notification@mow.uscourts.gov
Sent: Friday, September 18, 2009 3:01 PM
To: cmecf_atynotifications@mow.uscourts.gov
Subject: Activity in Case 4:06-cv-01012-FJG Lipari v. US Bancorp, NA et al Transmission of Notice of Appeal Supplement to US Court of Appeals

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U.S. District Court

Western District of Missouri

Notice of Electronic Filing

The following transaction was entered on 9/18/2009 at 3:01 PM CDT and filed on 9/18/2009
Case Name: Lipari v. US Bancorp, NA et al
Case Number: 4:06-cv-01012-FJG
Filer:
WARNING: CASE CLOSED on 04/04/2007
Document Number: 38

Docket Text:
TRANSMISSION of Notice of Appeal Supplement to US Court of Appeals, 8th Circuit via electronic mail. Related document [37] Notice of Appeal,. (Crespo, Wil)

4:06-cv-01012-FJG Notice has been electronically mailed to:

Andrew M. DeMarea ademarea@polsinelli.com, docketing@polsinelli.com, gschafer@polsinelli.com, jherl@polsinelli.com

Mark A. Olthoff molthoff@polsinelli.com, docketing@polsinelli.com, jthies@polsinelli.com, mogrady@polsinelli.com, msirinek@polsinelli.com

4:06-cv-01012-FJG It is the filer's responsibility for noticing the following parties by other means:

Samuel K. Lipari
297 NE Bayview
Lee's Summit, MO 64064

The following document(s) are associated with this transaction:

Document description: Main Document
Original filename:n/a
Electronic document Stamp:
[STAMP MOWDStamp_ID=875559776 [Date=9/18/2009] [FileNumber=2853824-0]

[55d8f7de4c464674317f8bcaf16f9042c83f8c43e03745ab685bf834528da71b83398
9f14ff2e311282325b658704467f260c46f3705c9da2894b9d10b3f2e21]]

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 08-3087

Samuel K. Lipari,

Plaintiff - Appellant

v.

US Bancorp, NA; US Bank NA,

Defendants - Appellees

Appeal from U.S. District Court for the Western District of Missouri - Kansas City
(4:06-cv-01012-FJG)

JUDGMENT

The motion of appellee for dismissal of this appeal is granted. The appeal is hereby dismissed. See Eighth Circuit Rule 47A(b).

October 09, 2008

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 08-3428

Samuel K. Lipari,

Plaintiff - Appellant

v.

US Bancorp, NA; US Bank NA,

Defendants - Appellees

Appeal from U.S. District Court for the Western District of Missouri - Kansas City
(4:06-cv-01012-FJG)

JUDGMENT

The motion of appellee for dismissal of this appeal is granted. The appeal is hereby dismissed. See Eighth Circuit Rule 47A(b).

November 11, 2008

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 08-3984

Samuel K. Lipari,

Plaintiff - Appellant

v.

US Bancorp, NA; US Bank NA,

Defendants - Appellees

Appeal from U.S. District Court for the Western District of Missouri - Kansas City
(4:06-cv-01012-FJG)

JUDGMENT

The motion to dismiss this appeal for lack of jurisdiction has been considered by the Court and is granted.

January 23, 2009

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

SAMUEL K. LIPARI,	)	
	)	
Appellant,	)	
	)	
v.	)	**Case No. 09-3203**
	)	
U.S. BANCORP and U.S. BANK NATIONAL ASSOCIATION,	)	
	)	
	)	
Appellees.	)	

DECLARATION OF MARK A. OLTHOFF

I, Mark A. Olthoff, pursuant to 28 U.S.C. § 1746, declare as follows:

1. I am a member of this Court's bar and practice at Polsinelli Shughart PC, located at 120 W 12th Street, Kansas City, Missouri. I am one of the attorneys representing the Appellees in the above-entitled action. I am also the attorney who drafted the Motion to Dismiss to which this Declaration is attached.

2. I have personal knowledge of the matters stated herein.

3. I performed 2.0 hours of work in researching, drafting and filing the Motion to Dismiss. I completed this work at a rate of $350.00 per hour. I am an attorney with extensive experience in litigation and, in particular, the litigation filed by the appellant. This rate is fair and reasonable when compared to other attorneys in the Kansas City area of similar age and experience.

4. The attorney's fees incurred are true, accurate, and reasonable.

5. On behalf of Appellees, the amount of $700 is sought as a sanction for filing a frivolous appeal as the costs incurred for filing the motion to dismiss.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 25th day of September, 2009.

Mark A. Olthoff

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

MEDICAL SUPPLY CHAIN, INC.,

Plaintiff-Appellant,

v.

US BANCORP, NA; US BANK PRIVATE CLIENT GROUP; CORPORATE TRUST; INSTITUTIONAL TRUST AND CUSTODY; MUTUAL FUND SERVICES, LLC.; PIPER JAFFRAY; ANDREW CESERE; SUSAN PAINE; LARS ANDERSON; BRIAN KABBES; UNKNOWN HEALTHCARE SUPPLIER,

Defendants-Appellees.

No. 03-3342

ORDER
Filed December 30, 2004

Before **McCONNELL**, **HOLLOWAY**, and **PORFILIO**, Circuit Judges.

On November 8, 2004, we entered an order and judgment affirming the district court's dismissal of plaintiff's complaint alleging, among other things, violations of the Sherman Act, 15 U.S.C. §§ 1-37a, and of the USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001). In the order and judgment, we

directed plaintiff and plaintiff's counsel, Bret D. Landrith, Esq., to show cause why they, jointly or severally, should not be sanctioned pursuant to Fed. R. App. P. 38 for pursuing a frivolous appeal. Plaintiff and Mr. Landrith were given an opportunity to file objections to the proposed sanctions, and they have done so. Based upon our review, we conclude that Mr. Landrith's objections on his own behalf are inadequate to avoid sanctions. We further conclude, however, that given the nature of the claims presented, plaintiff is not as culpable as its counsel and, therefore, plaintiff should not bear the burden of sanctions.

Mr. Landrith objects to sanctions on the ground that the appellate arguments he advanced on plaintiff's behalf had merit. In particular, he maintains that he was correct when he argued that the district court erroneously applied a heightened pleading standard to the Sherman Act claims and that he was correct when he argued that the district court erroneously failed to recognize a private right of action in the USA PATRIOT Act for the claims asserted in the amended complaint.

The district court found that the allegations underlying the Sherman Act claims were inadequate on several grounds, any one of which would have justified dismissal. Section 1 of the Sherman Act prohibits contracts, combinations, or conspiracies in restraint of trade. 15 U.S.C. § 1. In his response to the show cause order, Mr. Landrith focuses on only one of the district court's grounds for

dismissal of the § 1 claim: that the amended complaint did not adequately allege the participation of two or more independent actors in the alleged contract, combination, or conspiracy. Mr. Landrith contends that the district court applied a heightened pleading standard by ignoring the fact that defendant "Unknown Healthcare Supplier" qualified as an actor economically independent from the other defendants, all of whom were related to US Bancorp.

Our review shows that the district court did not apply a heightened pleading standard to the amended complaint. Rather, Mr. Landrith's reliance on the naming of an "Unknown Healthcare Supplier" as a defendant ignores the fact that the allegations concerning this unknown defendant were completely speculative. The very existence of such a defendant, whom the amended complaint described as an entity "believed to be a supplier or purchasing organization who has communicated with US Bancorp NA, its employees or its subsidiaries about [plaintiff] for the purpose of obstructing or delaying [plaintiff's] entry into commerce," Amended Complaint, para. 30, had no factual support in the amended complaint. Allegations of an agreement between one or more of the defendants and the chimerical defendant Unknown Healthcare Supplier certainly were not sufficient to establish a § 1 violation. Mr. Landrith makes no comment on the other failings the district court found in the allegations of the § 1 claim, any one of which also would have justified the claim's dismissal.

The district court also found numerous flaws in the allegations relating to a violation of § 2 of the Sherman Act, which prohibits monopolization of trade. 15 U.S.C. § 2. There are two elements of a monopoly offense under § 2, the first of which is "possession of monopoly power in the relevant market." *United States v. Grinnell Corp.*, 384 U.S. 563, 570 (1966). The district court found that plaintiff failed to allege facts necessary to establish the first element, including the exercise of monopoly power, the identity of a relevant product market, and the identity of the relevant geographic market.

In his response to the show cause order, Mr. Landrith raises only one brief argument in support of the § 2 allegations, and again that argument is misplaced. Citing *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), as "[t]he leading case imposing § 2 liability for refusal to deal with competitors," Mr. Landrith argues that US Bancorp's refusal to provide escrow services to plaintiff evidenced illegal anticompetitive behavior. Answer to Show Cause on Sanctions, at 3 (quotation omitted). *Aspen Skiing Co.* is quite inapposite, however, not the least because plaintiff and US Bancorp are not competitors.

The Court in *Aspen Skiing Co.* was concerned with whether the refusal of an established monopolist to cooperate with a smaller competitor in a marketing arrangement could be found to violate § 2. In answering that question, the Court noted that "the right of a monopolist to deal with whom he pleases" is qualified,

and that the exercise of that right "as a purposeful means of monopolizing interstate commerce is prohibited by the Sherman Act." 472 U.S. at 602, 603 (quotation omitted). One of the many problems with the amended complaint here was that it did not adequately allege facts that could establish US Bancorp as a monopolist in a relevant market in the first instance.

Plaintiff tried to shore up these weaknesses on appeal by arguing that a liberal reading of the complaint revealed that the relevant geographic market was national and that there were two relevant product markets: healthcare supplies and capitalization of healthcare technology companies. US Bancorp does not even compete in the healthcare supplies market, however, much less is it capable of monopolizing that market. Similarly, whatever the alleged market of "capitalization of healthcare technology companies" may be, it is clear that it is one in which plaintiff neither does nor intends to compete.

Plaintiff's arguments on appeal did little to address the many grounds for dismissal of the Sherman Act claims articulated by the district court, and Mr. Landrith's response to the show cause order does even less. The appeal of the Sherman Act claims was frivolous, and Mr. Landrith has provided no justification for its pursuit.

Plaintiff's appeal also challenged the district court's dismissal of three claims alleged under the USA PATRIOT Act. It did so despite the fact that the

allegation of those claims prompted the district court to remind Mr. Landrith of his obligations under Fed. R. Civ. P. 11(b)(2), and to advise him to "take greater care in ensuring that the claims he brings on his clients' behalf are supported by the law and the facts." Memorandum & Order of June 16, 2003, at 11.

The first of the USA PATRIOT Act claims sought to impose liability for defendants' failure to adequately train their employees on the provisions of the Act or to designate a compliance officer as provided for in section 352 of the Act (modifying 31 U.S.C. § 5318(h)(1)). The second claim alleged that by denying plaintiff escrow services, defendants misused their authority and used excessive force as enforcement officers under the Act. The third claim alleged that by denying plaintiff escrow services, defendants engaged in "domestic terrorism" as that term is defined in 18 U.S.C. § 2331, as modified by section 802 of the Act. The district court determined that plaintiff had no standing to assert the first of these claims, that there was no private right of action in the Act for any of these claims, and that the allegations of the third claim were "completely divorced from rational thought," Memorandum & Order of June 16, 2003, at 14-15.

Ignoring all but one of the grounds articulated by the district court, plaintiff argued on appeal that the district court erred in dismissing the USA PATRIOT Act claims because the Act does in fact provide a private right of action for those claims. In his response to the show cause order, Mr. Landrith repeats the

arguments advanced on appeal. He boldly declares that he declines to accept this panel's "revisionist pronouncement about the lack of a private right of action in the USA PATRIOT Act," and he argues that the Act contains at least two private rights of action. Answer to Show Cause on Sanctions, at 4.

The two sections of the Act to which Mr. Landrith points are section 223 (codified at 18 U.S.C. § 2712), which relates to civil actions against the United States, its officers or employees, and section 355 (amending 12 U.S.C. § 1828(w)), which limits the immunity available to a financial institution and its employees when voluntarily disclosing suspicious activity in an employment reference if the disclosure is made with malicious intent. Even if these two sections did create private rights of action under the Act for some types of conduct, a matter we need not decide here, neither creates a private right of action for the conduct alleged in the amended complaint, and counsel's reliance on them is frivolous.

Once again, the arguments advanced on appeal in support of the USA PATRIOT Act claims not only failed to address all the grounds for dismissal articulated by the district court, but they were themselves frivolous. Mr. Landrith's response to the show cause order only magnifies these deficits.

Rule 38 provides that if we determine that an appeal is frivolous, we may "award just damages and single or double costs to the appellee." Sanctions under

Rule 38 serve two purposes: not only do they "punish the offender as a deterrence to future misconduct; but, with equal importance, they . . . compensate a party who has had to finance the defense of a groundless action." *Braley v. Campbell*, 832 F.2d 1504, 1516 (10th Cir. 1987) (Moore, J., dissenting).

An appeal may be frivolous as filed or as argued. *See Finch v. Hughes Aircraft Co.*, 926 F.2d 1574, 1578-79 (Fed. Cir. 1991). This appeal was both. Keeping in mind that as between a party and its attorney, the impact of a sanction should be felt by the one(s) at fault, we conclude that only Mr. Landrith, and not plaintiff, should bear the burden of sanctions here. "[A]n attorney must realize, even if a party does not, that the decision to appeal should be a considered one, taking into account what the district judge has said, not a knee-jerk-reaction to every unfavorable ruling." *Braley*, 832 F.2d at 1513 (en banc) (quotation omitted). Mr. Landrith's response to the show cause order demonstrates that he did not make the considered judgment required before taking an appeal here, nor has he considered what the district court, or this court, has said before advancing his arguments.

As a sanction under Rule 38, we assess attorney fees and double costs against Mr. Landrith. Procedures for the taxation of costs shall be in accordance with Fed. R. App. P. 39(d) and (e). The case shall be REMANDED to the district court to determine the amount of attorney fees to be awarded as a sanction.

Entered for the Court
PATRICK FISHER, Clerk

By:
Deputy Clerk