FILED
United States Court of Appeals
Tenth Circuit

August 4, 2023

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MONTGOMERY AKERS,

Defendant - Appellant.

No. 21-3226

Appeal from the United States District Court
for the District of Kansas
(D.C. No. 2:04-CR-20089-KHV-1)

Katayoun A. Donnelly, Azizpour Donnelly LLC, Denver, Colorado, for Defendant-Appellant.

Jared S. Maag, Assistant United States Attorney (Dustin J. Slinkard, United States Attorney, James A. Brown, Assistant United States Attorney, with him on the brief), District of Kansas, Topeka, Kansas, for Plaintiff-Appellee.

Before **PHILLIPS**, **MURPHY**, and **ROSSMAN**, Circuit Judges.

MURPHY, Circuit Judge.

Montgomery Akers appeals from a district court order imposing upon him a $40,000 punitive sanction for advancing frivolous arguments and assertions in a request for release pending appeal (the "Motion"). Akers claims the district court erred in

imposing any sanction given its determination the Motion was not wholly frivolous. Alternatively, even assuming the imposition of a sanction was appropriate, Akers argues the district court erred when it failed to consider the reasonableness of the amount of the sanction by reference to the standard set out in *Farmer v. Banco Popular of North America*, 791 F.3d 1246, 1259 (10th Cir. 2015). This court rejects the assertion that imposition of a punitive sanction is only appropriate when the whole of a pleading, motion, or filing is frivolous. The district court's findings are, however, insufficient for appellate review of the reasonableness of the amount of the sanction. The matter must, therefore, be remanded to the district court for further proceedings. Accordingly, exercising jurisdiction pursuant to 28 U.S.C. § 1291, this court **affirms** in part and **remands** the matter to the district court for further proceedings consistent with this opinion.[1]

BACKGROUND

Akers is a chronic abuser of the federal court system. *See, e.g.*, *Akers v. Sandoval*, No. 95-1306, 1996 WL 635309, at *2 (10th Cir. 1996) (unpublished disposition) (rejecting Akers's argument he is "merely litigious, not abusive" and affirming filing

[1] In an order entered, sua sponte, on October 13, 2022, this court concluded "appointment of counsel and additional briefing would be helpful in this appeal." We further concluded, having reviewed Akers's motion to proceed on appeal in forma pauperis, that Akers was "financially eligible for appointment of counsel" under the Criminal Justice Act, 18 U.S.C. § 3006A. Given this determination, Akers's motion to proceed on appeal in forma pauperis is, hereby, **granted**. *See McIntosh v. U.S. Parole Comm'n*, 115 F.3d 809, 812-13 (10th Cir. 1997) (holding that to proceed on appeal in forma pauperis, an appellant must have (1) a financial inability to prepay the appellate filing fee and (2) advanced a "reasoned, nonfrivolous argument on the law and facts in support" of his appeal).

restrictions imposed by the United States District Court for the District of Colorado); *United States v. Akers*, 377 F. App'x 834, 835 (10th Cir. 2010) (unpublished disposition) ("Mr. Akers is no stranger to this court. Although he pleaded guilty in 2005 to one count of wire fraud and entered into a plea agreement that contained a waiver of his right to appeal or collaterally attack his sentence, he has filed a number of appeals with this court."); *United States v. Akers*, 740 F. App'x 633, 635 (10th Cir. 2018) (unpublished disposition) (upholding sanction against Akers and simply noting as follows: "[W]e decline to assist Akers in further wasting judicial resources with extensive discussion. We agree with the district court that filing sanctions were appropriate."). The ultimate genesis of the instant dispute is Akers's conviction, pursuant to a guilty plea entered in 2005, to a single count of wire fraud. *See generally United States v. Akers*, 261 F. App'x 110 (10th Cir. 2008) (unpublished disposition).[2] Following that conviction, the district court imposed a sentence of 327 months' imprisonment, a considerable upward departure from the otherwise applicable guidelines range. *Id.* at 113-14. This court affirmed on direct appeal. *Id.* at 116 ("Akers has no regard for the rights of others. In contrast, his sentence was considered and imposed in a manner that fully respected his rights. The sentence imposed was ultimately and exquisitely reasonable-just desserts for one who has dedicated his life to victimizing others."). Thereafter, this court dismissed for lack of jurisdiction Akers's appeal from the denial of the 28 U.S.C. § 2255 motion he filed to

[2] At the time of the events underlying his wire-fraud conviction, Akers was serving a 105-month sentence following conviction on fourteen counts of bank fraud and one count of uttering and possessing a counterfeit security with intent to deceive. *See generally United States v. Akers*, 215 F.3d 1089, 1093 (10th Cir. 2000).

challenge his wire fraud conviction. *United States v. Akers*, 384 F. App'x 758, 759 (10th Cir. 2010) (holding Akers's notice of appeal was untimely). This court also enforced in numerous appeals the waiver of appellate and collateral rights set out in Akers's plea agreement and, thereby, dismissed numerous post-conviction challenges to his conviction. *Akers*, 377 F. App'x at 835-37 (dismissing one such motion and recounting other such dismissals).

In 2012, Akers filed yet another motion purporting to challenge his conviction. R. Vol. 1 at 70 (noting Akers filed on June 25, 2012, "Defendant's Motion For Mandatory Preliminary Injunction En Route To A Permanent Preliminary Injunction Against The Named Government Respondent(s) To This Action"). Interpreting this motion as asserting certain executive officials were interfering with Akers's right to access the courts, the district court summarily denied the motion. *Id.* ("[Akers's] claim of lack of access must be brought as a separate civil rights action. The claim is not properly included in this criminal action."). The district court then moved on to explore the imposition on Akers of filing restrictions. *Id.* at 70-72. It noted that since this court affirmed Akers's sentence in 2008, *Akers*, 261 F. App'x at 116, Akers's repetitive and frivolous motions had led to a significant waste of judicial resources. *Id.*[3] Accordingly,

[3] The district court ruled as follows:

> More than four years ago, on January 16, 2008, the Tenth Circuit Court of Appeals affirmed defendant's sentence of 327 months in prison. Defendant has filed a barrage of motions which challenge collateral matters related to his criminal case. Since the Tenth Circuit affirmed defendant's sentence, this Court and the Tenth Circuit have collectively issued some 26 orders related to defendant's numerous

based on its inherent powers, the district court proposed imposing the following monetary sanctions for any of Akers's future frivolous filings: "[I]f defendant files any document in this criminal case which the Court deems frivolous, the Court will sanction defendant a minimum of $500.00 for each violation and may impose further restrictions on his future filings in the District of Kansas." R. Vol. 1 at 72. The district court implemented its sanctions order in 2013, after considering and rejecting Akers's objections thereto. *United States v. Akers*, No. 04-20089-01-KHV, 2013 WL 11324208, at *1 (D. Kan. Aug. 7, 2013). This court concluded the district court's sanctions order, which merely informed Akers that any future frivolous filing in his criminal case would result in a monetary penalty, was entirely consistent with the district court's "inherent power and discretion 'to fashion an appropriate sanction for conduct which abuses the judicial

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> motions and appeals. *See* District Court Orders (Doc. ## 248, 277, 280, 282, 283, 291, 292, 306, 321, 328, 335, 366, 375, 384, 388, 390, 393, 396) filed between March 5, 2008 and April 30, 2012; Tenth Circuit Orders (Doc. ##265, 310, 313, 363, 370, 371, 386, 404) filed between July 28, 2008 and May 25, 2012. Defendant has filed numerous civil suits throughout the country in an attempt to argue collateral issues. Nearly all of plaintiff's filings have been duplicative, vexatious and/or meritless. Enough is enough. . . .
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> . . . . Defendant certainly does not have a good faith expectation of prevailing on his claims. Defendant is not represented by counsel, and this fact has led to numerous abusive filings. Defendant's filings have caused an unnecessary burden on judicial resources. The Court has been taxed by processing defendant's numerous filings and drafting orders which explain well-established concepts and legal principles that defendant surely understands.

R. Vol. 1 at 71-72 (citation omitted).

process.'" *United States v. Akers*, 561 F. App'x 769, 771 (10th Cir. 2014) (quoting *Chambers v. NASCO, Inc*., 501 U.S. 32, 44-45 (1991)).

Akers was undaunted by the district court's sanctions order. In early 2017, he sought to reopen his § 2255 proceeding, recycling numerous claims previously rejected by the district court. *See generally United States v. Akers*, No. 04-20089-01-KHV, 2017 WL 2591517, at *1-3 (D. Kan. June 15, 2017). The district court denied the motion to reopen for reasons it had previously, and repeatedly, stated on the record. *Id.* at *1-2. Furthermore, consistent with its earlier sanctions order, the district court imposed upon Akers a $500 sanction. *Id.* at *2 ("In light of this Court's prior rulings involving similar claims, defendant's combined motion to recuse and to reopen habeas proceeding (Doc. #457) includes fanciful factual allegations and legal theories."); *see also id.* at *2 n.3 (recounting the kinds of frivolous arguments Akers had continued to assert in motion after motion). The district court also warned Akers it would begin imposing monetary sanctions on an increasing scale:

> [I]f defendant files any further document in this criminal case which the Court deems frivolous, the Court will sanction defendant a *minimum* of $1,000.00 for the next violation, a *minimum* of $5,000.00 for a third violation, a *minimum* of $10,000.00 for a fourth violation, and a *minimum* of $20,000.00 for a fifth and subsequent violations. If defendant files any document which raises frivolous arguments which this Court or the Tenth Circuit has previously addressed, the Court will summarily dismiss the document and impose sanctions without further notice.

Id. at *3. This court affirmed, noting the arguments Akers made in opposition to the district court's order were barely worth discussion. *Akers*, 740 F. App'x at 635 ("[W]e decline to assist Akers in further wasting judicial resources with extensive discussion.

We agree with the district court that filing sanctions were appropriate. We are not persuaded by any of the arguments Akers advances in his briefing or in the several motions he has filed in this court." (citation omitted)). We also cautioned Akers that future frivolous appeals might result in the imposition of appellate filing restrictions. *Id.*

In 2019, the district court issued an omnibus order disposing of six motions filed by Akers. *United States v. Akers*, No. 04-20089-01-KHV, 2019 WL 5864789, at *1 (D. Kan. Nov. 08, 2019).[4] In a comprehensive order, the district court dismissed for lack of jurisdiction or denied each of the six motions, imposed punitive sanctions, and proposed filing restrictions limiting Akers's ability to proceed pro se. *See generally id.* at *1-13. In so doing, the district court began by noting that "[i]n addition to numerous post-conviction motions filed in this criminal matter, [Akers has throughout the country] filed

[4] Referencing the titles Akers gave his motions, the district court described them as follows:

> This matter is before the Court on defendant's Motion To Void The Original Habeas Proceedings In This Case Based Upon A Lack Of Subject-Matter Jurisdiction (Doc. #475) filed March 18, 2019, defendant's Motion For Appointment Of The Federal Public Defender Per Standing Order 18-3 (Doc. #476) filed March 18, 2019, defendant's Motion To Amend The Restitution Order (Doc. #477) filed March 18, 2019, defendant's Motion For Status Update Regarding Doc. #475 Filed On March 28, 2019 (Doc. #481) filed July 10, 2019, Defendant's Motion In Notifying The District Court That He Is Being Interfered With And Being Denied The Ability To Retain And Secure Licensed Counsel To Represent Him Concerning Docket [Nos.] 475, 476, 477, 478, 479 [And] 480 Before This Court (Doc. #482) filed July 15, 2019 and defendant's Motion For Leave To Proceed On Appeal Without Prepayment Of Costs Or Fees (Doc. #485) filed October 21, 2019.

Akers, 2019 WL 5864789, at *1.

multiple civil suits involving this case against his former attorney, the undersigned judge, the prosecutor, the FBI case agent, deputy U.S. Marshals and others. . . . In the pending motions, defendant seeks essentially the same relief that this Court and other courts have repeatedly denied." *Id.* at *2-3. Indeed, in the District of Kansas and this court alone, the number of orders and opinions related to Akers's wire-fraud conviction had risen to 47. *Id.* at *11. Nearly all of those filings, as well as the various other collateral civil suits Akers filed around the United States, were "duplicative, vexatious and meritless." *Id.* And, because the six motions before it also "contain[ed] numerous statements or arguments that [were] frivolous," *Id.* at *9, the district court imposed further punitive sanctions:

> Because defendant has filed at least six documents that contain frivolous arguments, the Court sanctions defendant in a total amount of $76,000.00, which reflects the minimum amount set forth in the Memorandum Opinion and Order (Doc # 466) for each violation (i.e. $1,000 for the first subsequent violation, $5,000 for the second, $10,000 for the third and $20,000 each for the fourth, fifth and sixth subsequent violations). While defendant shall remain subject to *a minimum* sanction of $20,000.00 for each document filed in this criminal case that is frivolous, the Court intends to impose progressive sanctions above this minimum amount for future violations and such sanctions will increase exponentially for each subsequent violation.

Id. at *10.

This court affirmed the district court's omnibus order on appeal. *United States v. Akers*, 807 F. App'x 861, 867 (10th Cir. 2020) (unpublished disposition). We began by recognizing the limited nature of Akers's appeal. *Id.* at 863 (noting that although Akers purported to appeal "all of the rulings of the district court," his brief "did not explain the basis for his appeal of some of the district court's rulings"). *Id.* As to Akers's challenge

to the district court's dismissal of his motion to void his original § 2255 proceedings, this court denied Akers a certificate of appealability and dismissed his appeal because "reasonable jurists could not debate that the district court was correct in treating [Akers's] motion as an unauthorized second or successive § 2255" motion. *Id.* at 864. As to the district court's imposition of sanctions, we noted Akers only challenged the imposition of a sanction as to the motion to void and, even as to that sanction, did not appeal the amount of the sanction. *Id.* at 865. Noting that "legal frivolousness includes both 'inarguable legal conclusions' and 'fanciful factual allegations'" this court concluded the district court did not abuse its discretion in imposing the challenged sanction:

> Akers has previously raised the arguments he raised in his [motion to void] numerous times and been told that they are without merit. . . . In light of his continued persistence despite previous court orders, we conclude that the district court did not abuse its discretion in imposing sanctions for [Akers's] frivolous . . . motion.

Id. (alterations and quotations omitted). And, as this court had done previously, "[w]e caution[ed] Akers that future frivolous appeals concerning the conviction and sentence at issue here may result in summary disposition without discussion and/or an order requiring him to show cause why this court should not impose both appellate filing restrictions and sanctions." *Id.* at 867; *see also id.* at 867 n.4 (explaining there exists no constitutional right to prosecute in federal courts frivolous or malicious actions and that federal courts could regulate such practices by imposing a variety of sanctions and restrictions). This court further noted that Akers's pro se status did not shield him from such sanctions. *Id.* at 868.

Having recounted the ultimate genesis of the instant dispute, this court turns to its immediate origin. In 2020, Akers filed a motion seeking compassionate release. *See* 18 U.S.C. § 3582(c)(1)(A). The district court dismissed that request, concluding Akers failed to exhaust his administrative remedies. *United States v. Akers*, No. 04-20089-01-KHV, 2021 WL 809297, at *1-2, *5 (D. Kan. March 3, 2021). Akers filed both a notice of appeal, R. Vol. 3 at 79-81, and a request, via the Motion, for release on bond pending the resolution of his appeal, *id.* at 83-91. Notably, a substantial portion of the Motion, *id.* at 87-90, again raised the fanciful and meritless challenges to Akers's wire-fraud conviction that have been repeatedly condemned by both the district court and this court. The district court denied the Motion. *Id.* at 96 ("[B]ecause defendant has not shown that his appeal raises a substantial question of law or fact likely to produce a reversal, a new trial, a sentence with no custody component or a reduced sentence that is shorter than the anticipated life of the appeal, the Court overrules defendant's motion for release."). The district court further concluded the Motion made "numerous statements or arguments that are frivolous." *Id.* at 96.[5] Consistent with its prior notices to Akers, the district court

[5] The district court summarized those frivolous arguments as follows:

> *See* Defendant's Motion For Release On Appeal Bond (Doc. #510) at 5 (defendant "not legally indicted before a grand jury"); *id.* ("factually impossible" for him to commit wire fraud); *id.* (sentenced outside of statutory maximum); *id.* (court lacked jurisdiction to order restitution); *id.* (plea was taken "fraudulently"); *id.* at 6 (judge, prosecutor and court-appointed defense counsel "conspired in 2000 to steal" checks sent to defendant and used their official positions to cover up actions); *id.* at 7 (defendant "actually innocent" of criminal misconduct); *id.* (judge and prosecutor "fabricated the criminal information" against defendant and perpetrated fraud); *id.* at 7-8 (prosecutor coached chief witness against

concluded an escalating sanction was necessary and, therefore, it sanctioned Akers in the amount of $40,000. *Id.* at 97.[6]

In a brief order, this court affirmed the district court's denial of Akers's request for release pending appeal. *United States v. Akers*, 851 F. App'x 135, 135 (10th Cir. 2021) (per curiam) (unpublished disposition). As to the question of the $40,000 sanction, however, we remanded for the district court to revisit the award. *Id.* As reasons for the remand, this court noted (1) the district court did not address each argument raised by Akers in the Motion and did not conclude the Motion as a whole was frivolous; and (2) we could not "say that the arguments in support of [the Motion] are wholly frivolous." *Id* at 136.

On remand, the district court reimposed the $40,000 sanction. *United States v. Akers*, No. 04-20089-01-KHV, 2021 WL 5505456, at *1 (D. Kan. Nov. 24, 2021). Although it "recognize[d] that defendant's motion for release on appeal as a whole and

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> defendant to provide false testimony at sentencing about his background and alleged criminal activity).

R. Vol. 3 at 96-97.

[6] *See* R. Vol. 3 at 97 ("The Court cautioned defendant that he remained subject to a minimum sanction of $20,000.00 for each document filed in this criminal case that is frivolous and that the Court intended to impose progressive sanctions above this minimum amount for future violations and such sanctions would increase exponentially for each subsequent violation. Prior sanctions and filing restrictions have not deterred defendant from asserting frivolous allegations. Accordingly, based on the frivolous allegations and legal theories in Defendant's Motion For Release On Appeal . . . , the Court sanctions defendant in the amount of $40,000.00." (citation omitted)).

some arguments in the motion are not frivolous," it ruled the sanction nevertheless was warranted:

> [Akers's] motion includes numerous statements or arguments that are frivolous. Defendant, who the Court has repeatedly warned, cannot escape sanctions for frivolous arguments and legal theories simply by combining them in the same document with non-frivolous arguments. Prior sanctions of $76,000.00 and filing restrictions have not deterred defendant from asserting frivolous allegations. In light of the history of this case including numerous warnings from this Court and the Tenth Circuit, the Court again sanctions defendant $40,000.00 for the frivolous allegations and legal theories in Defendant's Motion for Release on Appeal Bond (Doc. #510) filed March 25, 2021.

Id.; *see also id.* at *1 n.1 (recounting, as set out above in note 5, the undisputedly frivolous arguments set out in the Motion); *id.* at *1 n.2 (incorporating by reference its decision in *Akers*, 2019 WL 5864789, at *1, which order "sets forth the history of this case and defendant's assertion of numerous legal arguments that were duplicative, vexatious and meritless"); *id.* at *1 n.3 (describing the litigation history set out at length above in this opinion and specifically noting this court's statement in *Akers*, 561 F. App'x at 771, that the district court had warned Akers that "if he filed frivolous claims in the future it would impose a monetary sanction, which it unquestionably has the power to do"). [7]

[7] To the extent Akers's pro se opening brief, *see supra* n.8, could be read as claiming the district court's order on remand is inconsistent with this court's mandate in *Akers*, 851 F. App'x at 135, we reject the assertion. This court's decision did not definitively order the district court to impose sanctions only if it concluded the Motion was entirely frivolous. *See id.* Rather, expressing concern that the district court had not addressed all of Akers's arguments or whether the Motion as a whole was frivolous, we remanded for further consideration. On remand, the district court clarified that, under its interpretation of its sanctions orders, it could sanction Akers for making frivolous arguments or assertions, even if he combined them with non-

DISCUSSION

Akers appeals the district court's renewed order imposing upon him a $40,000 sanction for the filing of the Motion. He raises two arguments on appeal.[8] First, he

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frivolous arguments. This court affirms, as set out more fully below, that such an order is entirely consistent with the district court's inherent authority.

[8] To be more accurate, we should state that the briefs filed by appointed counsel raise two issues on appeal. *See supra* n.1 (noting this court, sua sponte, appointed counsel on Akers's behalf). Prior to this court's order appointing counsel, Akers filed a pro se opening brief. Furthermore, after counsel was appointed, Akers has continued filing documents in this court, specifically including a request to file a supplemental brief. The gist of these filings is Akers's desire to have this court address and resolve this appeal based on the same frivolous arguments he has repeatedly raised regarding the validity of his wire-fraud conviction and the resulting 327-month sentence. Akers possesses neither a constitutional right to represent himself on appeal nor a right to hybrid representation. *McKaskle v. Wiggins*, 465 U.S. 168 (1984) (no constitutional right to hybrid representation); *Martinez v. Court of Appeal of California*, 528 U.S. 152 (2000) (no constitutional right to self-representation on direct criminal appeal). He does, however, possess a statutory right to proceed in federal court pro se. 28 U.S.C. § 1654 ("In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein."). It is certainly true that Akers did not seek appointment of counsel. He has not, however, moved this court to reconsider its order appointing counsel. Nor has he asked this court to limit the issues considered on appeal to those set out in his pro se filings. We think, given this history and the lack of meaningful briefing on the applicability of § 1654 to situations like the instant case, this is not the appropriate case to opine on these issues. Thus, rather than deny Akers's pending motions on the basis that he is disentitled to file such motions because he is represented by counsel, we consider them on the merits. *Cf. United States v. Gillis*, 773 F.2d 549, 560 (4th Cir. 1985) (holding that there was no violation of the statutory right to self-representation when "counsel was appointed to brief the case and present oral argument, while appellant was allowed to submit a supplemental brief"). All Akers's pending motions are **denied** because they seek to raise on appeal indisputably frivolous legal arguments and fanciful factual assertions that this court has repeatedly rejected. Likewise, this court summarily rejects the attacks on the validity of his wire-fraud conviction and resulting sentence. In so doing, "we decline to assist Akers in further wasting judicial resources with extensive discussion." *Akers*, 740 F. App'x at 635.

asserts that because the Motion was not wholly frivolous, the district court could not impose upon him a sanction for its filing. Second, he asserts that even if the imposition of some kind of sanction was valid, the district court erred in not considering whether the amount of the sanction was appropriate measured by the factors set out in *Farmer*, 791 F.3d at 1256.[9] This court reviews for abuse of discretion an award of sanctions under the district court's inherent powers. *Id.* "A district court abuses its discretion when it (1) fails to exercise meaningful discretion, such as acting arbitrarily or not at all, (2) commits an error of law, such as applying an incorrect legal standard or misapplying the correct legal standard, or (3) relies on clearly erroneous factual findings." *Id.*

This court rejects Akers's assertion that federal courts lack inherent authority to impose sanctions when a relevant filing, motion, or pleading contains a mix of frivolous and nonfrivolous assertions. Akers has not cited a single case supporting such a limitation and this court has not discovered any such authority. Furthermore, such a rule would do substantial damage to the ability of federal courts "to manage their own affairs

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[9] Because the issue was not raised by Akers, either in his pro se opening brief or in the briefs filed by appointed counsel, this court does not consider what role bad faith might or must play when a district court imposes non-attorneys'-fees-based punitive sanctions in a criminal case pursuant to its inherent authority. *See Chambers*, 501 U.S. at 45-46 (recognizing appropriateness, in civil litigation, of relying on inherent power to impose sanctions for bad faith conduct by a party by entering an award of attorneys' fees); *see id.* at 47 "([W]hile the narrow exceptions to the American Rule effectively limit a court's inherent power to impose attorney's fees as a sanction to cases in which a litigant has engaged in bad-faith conduct or willful disobedience of a court's orders, many of the other mechanisms permit a court to impose attorney's fees as a sanction for conduct which merely fails to meet a reasonableness standard.").

so as to achieve the orderly and expeditious disposition of cases." *Chambers*, 501 U.S. at 43; *see also id.* ("Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum in their presence, and submission to their lawful mandates."); *see also Farmer*, 791 F.3d at 1257-58 (rejecting assertion that in awarding attorneys' fees for abusing the judicial process, the district court was obligated to account for and sanction only those instances during the litigation that amounted to misconduct). In light of the extensive history in this matter, Akers's inclusion of a slew of frivolous factual assertions and legal arguments in the Motion constitutes an abuse of the judicial process. *Id.* at 1257 ("A district court's inherent power to sanction reaches beyond the multiplication of court proceedings and authorizes sanctions for wide-ranging conduct constituting an abuse of process."). The rule advocated for by Akers would leave the district court, and this court in turn, without any way to remedy Akers's abuses. *See Chambers*, 501 U.S. at 46 ("[W]hereas each of the other mechanisms [for dealing with recalcitrant or abusive litigants] reaches only certain individuals or conduct, the inherent power extends to a full range of litigation abuses. At the very least, the inherent power must continue to exist to fill in the interstices.").

In concluding the federal courts have inherent authority to impose punitive sanctions even when a relevant filing, motion, or pleadings is not wholly frivolous, we take comfort in the rule applicable to sanctions issued pursuant to Federal Rule of Civil Procedure 11. In that context, we have explicitly held that "a pleading containing both frivolous and nonfrivolous claims may violate Rule 11." *Dodd Ins. Servs., Inc. v. Royal Ins. Co. of Am.*, 935 F.2d 1152, 1158 (10th Cir. 1991); *see also Reed v. Great Lakes Cos.,*

Inc., 330 F.3d 931, 936 (7th Cir. 2003); *Antonious v. Spalding & Evenflo Cos., Inc.*, 275 F.3d 1066, 1075 (Fed. Cir. 2002); *Townsend v. Holman Consulting Corp.*, 929 F.2d 1358, 1362-63 (9th Cir. 1990) (en banc). To conclude otherwise would allow a party with one or more meritorious claims to "pepper" a pleading with "wholly frivolous" claims, "for that party would be assured that the weight of his meritorious claim(s) would shield him from sanctions." *Dodd Ins. Servs.*, 935 F.2d at 1158 (quotation omitted). Although the district court here relied on its inherent powers, rather than Rule 11, *Dodd*'s rationale is sufficiently analogous to apply. *Cf. King v. Fleming*, 899 F.3d 1140, 1150 (10th Cir. 2018) (upholding application of precedent from other sanction contexts to Rule 11 violations).

The district court acted well within the limits of its inherent power in imposing a sanction on Akers for the inclusion of frivolous arguments and assertions in the Motion, but it erred when it failed to create a sufficient record for this court to undertake the type of review mandated by *Farmer*, 791 F.3d at 1259. When "a court sanctions a recalcitrant party for his abuse of process by an award of fees and costs, sound principles govern our review." *Id.*[10] First, the amount of the sanction must be reasonable. *Id.* Second, the sanction "must be the minimum amount reasonably necessary to deter the undesirable behavior." *Id.* "[T]hird, because the principal purpose of punitive sanctions is

[10] Although *Farmer* involves an award of attorneys' fees and costs, this court viewed the award "as a punitive sanction in the nature of a fine and review[ed] it accordingly." 791 F.3d at 1159. Because the same considerations at play in *Farmer* are also relevant to the propriety of a sanction that does not involve an award of attorneys' fees, the guideposts adopted in *Farmer* are equally applicable here.

deterrence, the offender's ability to pay must be considered." *Id.* Finally, "[d]epending on the circumstances, the court may consider other factors as well, including the extent to which bad faith, if any, contributed to the abusive conduct." *Id.*

Akers affirmatively argues the district court's order is devoid of information relevant to, and in consideration of, the factors identified in *Farmer*. The government's brief halfheartedly contests that assertion. Gov't Response Br. at 15 ("While the district court did not engage in a talismanic invocation of the *Farmer* principles, the court's order reflected an appreciation of those principles."). Akers has the best of this argument. Other than an indication Akers would be subject to a rapidly escalating schedule of sanctions, there is nothing in the district court's order addressing the reasonableness of the instant $40,000 penalty. For that same reason, there is nothing in the record allowing this court to judge whether the sanction is the least amount necessary to deter Akers's undesirable behavior. Indeed, there is nothing in the record to indicate these rapidly escalating sanctions have had any impact on Akers's behavior.[11] The repeated ineffectiveness of a sanction certainly invites at least some discussion as to whether its continued application, especially in an escalated fashion, is reasonable. Finally, there is no discussion in the district court order of Akers's ability to pay. In fact, based on the information before this court, there is room for substantial doubt whether Akers's indigent status and advanced age render him unlikely to ever pay even a fraction of the

[11] Moreover, the district court did not consider how this sanction should or will interact with the filing restrictions it imposed in *Akers*, 2019 WL 5864789, at *13.

sanctions imposed. Again, this invites at least some analysis of the reasonableness of the instant $40,000 sanction.

It is worth emphasizing that "[b]ecause of their very potency, inherent powers must be exercised with restraint and discretion. A primary aspect of that discretion is the ability to fashion an appropriate sanction for conduct which abuses the judicial process." *Chambers*, 501 U.S. at 44-45 (citation omitted). For that reason, it is vitally important that when imposing an inherent-authority based sanction, district courts create a record that will allow this court to conduct the type of review specified in *Farmer*. The order on review lacks that information. Nor is it appropriate, as hinted by the government, for this court to examine the record in the first instance and make the determinations necessary to satisfy the considerations identified in *Farmer*. "[T]o do so would overstep the bounds of our review for abuse of discretion and enter the realm of de novo review." *Fox v. Maulding*, 16 F.3d 1079, 1082 (10th Cir. 1994).

CONCLUSION

The district court's imposition of a punitive sanction on Akers is **AFFIRMED**. The matter is, however, **REMANDED** to the district court to reconsider the amount of the sanction in light of the non-exclusive factors set out in *Farmer*, 791 F.3d at 1259.