P.O. Box 1601
Sandusky, Ohio 44871

September 21, 2010

Michelle M. Davis
Case Manager
United States Court of Appeals
for the Sixth Circuit
100 East Fifth Street, Room 540
Potter Stewart U.S. Courthouse
Cincinnati, Ohio 45202-3988

Re: Appeal Nos. 10-3843 & 10-4119

Dear Ms. Davis:

I am writing to inform you that I believe the amended notice of appeal in Appeal No. 10-3843 has been wrongly docketed as a completely new and separate appeal, Appeal No. 10-4119.

On June 22, 2010, the District Court for Northern Ohio dismissed my complaint with prejudice in case 3:09-cv-2560 and entered judgment accordingly. In its June 22, 2010 dismissal order, the District Court also awarded the defendants attorneys' fees and costs, to be specifically determined by the District Court in a later order upon submission of bills by defendants. However, the District Court did not inform me when it would issue the later order of a specific award, and in fact ultimately issued it *after* the 30 days to appeal the June 22, 2010 dismissal-and-general-award order/judgment had expired. As a result, I had to—to be timely in my appeal of the June 22, 2010 dismissal-and-general-award order/judgment—and did, file a notice of appeal on July 9, 2010, listing the orders, judgments, etc. appealed from as including the June 22, 2010 dismissal and general award, as well as any future order of a specific award. In my July 9, 2010 notice of appeal, I also specifically reserved the right to amend my notice of appeal to include, by specific reference, the actual order of a specific award once it was issued. When I filed my July 9, 2010 notice of appeal with the District Court, I paid the $455 filing fee. My July 9, 2010 notice of appeal was docketed as Appeal No. 10-3843. On August 23, 2010—again, more than 30 days beyond the dismissal and general award—the District Court issued its order of a specific award. On September 9, 2010—within 30 days of the August 23, 2010 order of a specific award—I filed an amended notice of appeal with the District Court. The September 9, 2010 amended notice of appeal was *identical* to the July 9, 2010 original notice of appeal, except that the former expressly identified the August 23, 2010 order of a specific award as the future order of a specific award. I did not pay a filing fee to the District Court for the amended notice of appeal. Today, I received your letter dated September 13, 2010, indicating that my amended notice of appeal was actually docketed as a separate and new appeal, Appeal No. 10-4119, and

that this new appeal would be dismissed unless I paid a filing fee for the amended notice of appeal by September 27, 2010.

My amended notice of appeal should not have been docketed as a separate and new appeal and assessed a separate and new filing fee, but should have been accepted as an amendment of the existing docketed appeal for which I had already paid a filing fee. This is obviously so for several reasons. First, FRAP 4(a)(4)(B)(iii) plainly, expressly, and unequivocally states that "[n]o additional fee is required to file an amended notice." As a separate provision, it has no limitation to amended notices based on just the motions listed above it. *Cf.* Owen v. Harris County, Texas, Nos. 09-20479/10-20063, 2010 U.S. App. LEXIS 17850 at * 5 (5th Cir. Aug. 26, 2010) ("More significantly, although the placement of the prohibition within rule 4(a)(4) is curious, the absolute and plain language of the subsection—"[n]o additional fee is required to file an amended notice" of appeal—is both compelling and difficult to avoid. We conclude, therefore, that no fee can be required for any amended notice of appeal, irrespective of whether it pertains to a post-judgment motion.") (court of appeals held that appellant should not have had to pay second filing fee for amended notice of appeal). Second, even if FRAP 4(a)(4)(B)(iii) is limited to one of the enumerated motions, Plaintiff's amended notice is arguably based on one of the enumerated motions—FRAP 4(a)(4)(A)(ii)'s motion "to amend or make additional factual findings under Rule 52(b)." See FRCP 52(b) ("On a party's motion filed no later than 28 days after the entry of judgment, the court may amend its findings—or make additional findings—and may amend the judgment accordingly."). The defendants' post-June 22, 2010-order/judgment application (motion) for specific attorneys' fees and costs were motions for the District Court to make findings regarding the amount of attorneys' fees and costs they had allegedly incurred. Third, it would be grossly illogical, unjust, and inefficient to treat an amended notice of appeal in such a situation as mine as a second appeal. The final order/judgment entered in this case and triggering the 30-day appeal clock was the June 22, 2010 order/judgment of dismissal with prejudice and general award of fees and costs. The August 23, 2010 order of a specific award was not itself a judgment—it was not entered separately as a judgment, see docket—but was simply a post-judgment order in execution or aid of or relating back to the June 22, 2010 order/judgment. Under FRAP 4(a)(1)(A), I *had* to file a notice of appeal of the June 22, 2010 order/judgment by July 22, 2010. I could *not* have waited until August 23, 2010—when the District Court eventually issued its order of a specific award—and then filed a notice of appeal of everything, as clearly such a later filing would have been beyond the 30 days and considered untimely. Thus, it was not my error as a party that the later order could not be specifically—beyond a general future reference and reservation—included in the original notice, but rather (with all due respect) the District Court's error for not timely ruling on the specific award before the 30 days, and thus I should not be penalized by having to pay a second filing fee *and costs of a duplicate appeal.*

A duplicate appeal would also be a simple waste of time and money for both the Court and me, as well as for the defendants. There is no new or stand-alone issue really to be appealed or being appealed here with the amended notice of appeal. Again, the August 23, 2010 specific award—which is mentioned by name in the amended notice of appeal—related back to the June 22, 2010 general award which was included in the original notice of appeal. Moreover, and critically, I expressly mentioned the future specific award in my original notice of appeal:

> Any pending or future order and entry of judgment of a specific award of fees and costs to Defendants based on or connection with the above and Defendants' applications for same. Plaintiff specifically reserves the right to amend this notice to include same.

July 9, 2010 Notice of Appeal at ¶ 4. It simply makes no sense to break up a single case into two separate appeals. I am not getting or seeking a "free" appeal here, but merely administratively updating an appeal I already filed and paid for.

The only two Sixth Circuit cases (unpublished[1]) which I found on the matter of a second filing fee for an amended notice recognize this distinction between an amended notice of appeal which merely administratively relates back, and an amended notice of appeal that does not relate back. In each of those Sixth Circuit cases, the original or first appeal was actually terminated or addressed on the merits already by the time the amended notice of appeal was filed, so that there was indeed or effectively a new appeal with the amended notice of appeal. See Thompson v. Caruso, Nos. 05-2681/06-1385, 2006 U.S. App. LEXIS 32794 (6th Cir. Oct. 10, 2006) ("In fact, when the notice of appeal was filed for case number 06-1385, Plaintiffs had already filed their appellate brief for case number 05-2681."); Perotti v. Wilkinson, 90 Fed. Appx. 884, 886 (6th Cir. Feb. 4, 2004) ("First, Perotti voluntarily dismissed his initial interlocutory appeal before he paid any appellate filing fee and before the district court entered its final judgment granting summary judgment for defendants. Similarly, Perotti's notice of appeal taken from the district court's order that denied his motion for relief from the earlier imposition of the appellate filing fee was not filed until after this court dismissed Perotti's underlying appeal for want of prosecution."). In this case, my original appeal was not disposed of at the time I filed the amended notice of appeal. My original appeal has not even been briefed yet.

Indeed, treating my amended notice of appeal as a separate new appeal would have disastrous effect. It would expose the parties to competing, conflicting appellate decisions. If I paid the second filing fee and the panel hearing the first appeal decided in my favor on the general award, and the panel hearing the second appeal decided in defendants' favor on the specific award, or vice versa, there would be no settlement of the matter and arguably no precedent for proceeding further on appeal.

Please inform me as soon as possible what the Clerk's office intends to do.

Thank you.

Sincerely,

James E. Pietrangelo, II

James E. Pietrangelo, II

cc: William Lang & Margaret Koesel (via email)

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[1] Since I am not briefing the Court itself and time is of the essence, I will forgo including copies of these decisions. I should not have to be filing double briefs. This is an administrative matter that should never have occurred and I refuse to be penalized for it. Should this matter not be fixed at the docket level, I will of course brief the Court.