No. 05-_____

In the Supreme Court of the United States

BRET D. LANDRITH, ATTORNEY-PETITIONER

v.

US BANCORP NA.
US BANK
The PIPER JAFFRAY COMPANIES
JERRY GRUNDHOFFER
ANDREW CESERE
SUSAN PAINE
BRIAN KABBES
UNKNOWN HEALTHCARE SUPPLIER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR BRET D. LANDRITH IN SUPPORT

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QUESTION PRESENTED

Whether an argument the USA-PATRIOT Act, Pub. L. 107-56 express language in § 355 granting a private right of action for malicious suspicious activity reports and Congress' *in pari materia* express and implied good faith qualifications in §§ 314(b) and 351 deny immunity for intentional misuse of the act (over which circuits are in conflict) is *sua sponte* sanctionable without review?

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LIST OF PARTIES

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and before the United States Court of Appeals for the Tenth Circuit. The attorney petitioner here is Bret D. Landrith and the appellant below was Medical Supply Chain, Inc.

The respondents here and appellees below are US Bancorp, NA.

US Bank, US Bancorp Piper Jaffray, Jerry A. Grundhofer, Andrew Cesere

Susan Paine, Lars Anderson, Brian Kabbes, Unknown Healthcare Supplier

TABLE OF AUTHORITIES

USA PATRIOT Act 5,7,8,11, 12, 13

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OPINIONS BELOW

The Court of Appeals opinion sought to be appealed is *Medical Supply Chain Inc. v. US Bancorp N.A. et al*, Case No. 03-3342 (10 C.A. 2004). The District Court opinion is *Medical Supply Chain, Inc. v. U S Bancorp, NA*, 2003 WL 21479192, (D. Kan. 2003). The appellate sanction order, memorandum and order and trial court order are attachments 1-3.

JURISDICTION

The Court of Appeals denied en banc rehearing of its judgment on February 10, 2005. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

USA PATRIOT Act, Pub. L. No. 107-56 §§ 314, 351 and 355

Annunzio-Wylie Anti-Money-Laundering Act 31 U.S.C. Section 5318(g)(3)

STATEMENT OF THE CASE

This is a petition for review of *sua sponte* sanctions against the petitioner based on an appeal of the dismissal of Medical Supply Chain, Inc.'s (Medical Supply) federal Sherman Antitrust Act §§1 and 2 claims against the defendants on a Fed.R.Civ.P. 12 (b)(6) motion, prior to the commencement of discovery. The petitioner argued that the threat of a USA PATRIOT Act suspicious activity report should be enjoined as a form of

Sherman §2 prohibited monopolization where the bank and investment bank participated in agreements to restrain trade in the market for hospital supplies with Medical Supply's competitors Novation and Neoforma.

A. Factual Background

The action arose when US Bank, a subsidiary of US Bancorp NA broke an agreement to provide escrow accounts Medical Supply sought to use to capitalize its entry into the national market for hospital supplies.

The national market for hospital supplies has been the subject of three successive US Senate Judiciary Antitrust Subcommittee hearings on April 30, 2002, July 16, 2003 and September 14, 2004 regarding the lack of competition and the unavailability of venture capital due to the control of the two dominant hospital supplier group purchasing organizations Novation, LLC and Premier.

Medical Supply Chain, Inc. had previously sought investment banking services from Piper Jaffray, then a subsidiary of US Bancorp NA with 70% of its venture funds concentrated in investments in hospital supplier companies. Piper Jaffray refused to return Medical Supplies calls, prompting Medical Supply with the advice of consultants to create its own capitalization program utilizing escrowed funds and fees from its prospective marketing representatives like the excluded mountain in *Aspen Skiing*.[1]

US Bank's trust department evaluated Medical Supply's business plan and the first ten candidates. US Bank, already Medical Supply's business account provider agreed to provide the escrow accounts and requested changes to the escrow contract and altering the placement of the funds of a company owned by US Bancorp NA. Medical

[1] *Aspen Skiing Company v. Aspen Highlands Skiing Corporation*, 472 U.S. 585, 105 S.Ct. 2847, 86 L.Ed.2d 467 (1985)

Supply made the changes and the defendant Brian Kabbes, Vice President of the US Bank Trust office approved the changes via email and orally, knowing that Medical Supply was awaiting his approval before sending them to the candidates.

Brian Kabbes then called Medical Supply to break what Medical Supply argues is a written contract under the ESIGN Act 15 U.S.C. §§ 7001 *et seq*. stating the bank's reason for doing so was the USA PATRIOT Act "know your customer" provisions. In recorded conversations and letters up the chain of command of US Bancorp NA, Medical Supply confirmed it was USA PATRIOT Act "know your customer" provisions that were used as the business justification for the refusal to deal. Medical Supply informed the bank defendants that this justification was a pretext, that this provision did not apply to domestic trust accounts and had not yet been established by US Treasury regulation. Medical Supply also established in the recorded conversations that US Bancorp Piper Jaffray was continuing to provide escrow accounts to other new customers and that the defendants were doing business with other hospital suppliers.

B. Proceedings Below

Medical Supply brought suit for injunctive and declaratory relief to prevent the loss of $300,000.00 it would forfeit without the promised escrow accounts, and seeking prospective relief to prevent US Bank from filing a malicious suspicious activity report under the USA PATRIOT Act to restrain competition in the nationwide hospital supply market. The complaint alleged the US Bancorp defendants refused to deal with Medical Supply because of its participation in the hospital supply market in conspiracy, combination and agreement with a defendant Unknown Healthcare Supplier along with

Novation, LLC and Neoforma, Inc. Both of which were identified as coconspirators but not named as defendants.

The trial court ruled that Medical Supply was not entitled to relief because there was no private right of action under the USA PATRIOT Act and Medical Supply failed to allege a conspiracy between two legally independent entities.

Medical Supply timely sought reconsideration pointing out the Unknown Hospital Supplier defendant and the identified coconspirators Novation, LLC and Neoforma, Inc. alleged to have been in publicized exclusionary agreements with the US Bancorp Piper Jaffray defendants. Medical Supply also pointed out the express language of the USA PATRIOT Act providing for a private right of action. However the trial judge denied reconsideration.

The petitioner as sole counsel for Medical Supply appealed on these same grounds to the Tenth Circuit Court of Appeals. The Appellate Court without finding of law or fact upheld the trial court, stating again that the there was no private right of action created by the USA- PATRIOT Act and ordered the petitioner to show cause why he should not be sanctioned.

The petitioner made a timely response showing at law the sufficiency of Medical Supply's antitrust claims including the complaint's allegations of identified coconspirators that were legally separate entities from US Bancorp Piper Jaffray defendants and the express language of the USA PATRIOT Act creating several private rights of action.

The Tenth Circuit panel responded by *sua sponte* sanctioning the petitioner with attorney's fees and double costs, the most severe sanction available to it. The appellate

panel refused to reconsider its opinion and the sitting judges of the circuit en banc denied the petitioner review of the *sua sponte* sanction.

REASONS FOR GRANTING THE WRIT

The petitioner raises the following reasons that this court should grant review:

I. A Conflict Between Two Circuits And A Circuit and State Supreme Court Exists

A split in Circuits and the Arkansas Supreme Court exists over whether a good faith requirement exists for safe harbor immunity from civil liability. Cases recognizing liability in the absence of good faith are *Lopez v. First Union Nat. Bank of Florida*, 129 F.3d 1186 (C.A.11 (Fla.), 1997) and *Bank of Eureka Springs v. Evans*, 353 Ark. 438, 109 S.W.3d 672 (Ark. 2003). Cases opposing bad faith liability are *Stoutt v. Banco Popular De Puerto Rico*, 2003 C01 48 (USCA1, 2003) *Lee v. Bankers Trust Co*., 166 F.3d 540, 544-45 (2d Cir. 1999).

The USA PATRIOT Act provides for voluntary sharing of information among financial institutions under a safe harbor from liability. To encourage the free-flow of data, Congress created in Section 314(b) a broad safe harbor from any civil liability to any person pursuant to any law, regulation, contract or other legally enforceable agreement, provided that a financial institution complies with four basic procedures set forth in the regulations: Banks must annually file a specified form of notice of intent to share information with the Financial Crimes Enforcement Network, or Fincen; share such information only with other institutions or associations of institutions that have filed such a notice; maintain procedures to adequately protect the security and confidentiality of the information; and use it only for detecting, identifying, and reporting on activities that May involve terrorism or money laundering, and determining whether to establish or

maintain an account or to engage in a transaction. Medical Supply's complaint alleged in detail that US Bank was not complying with the requirement of maintaining procedures to prevent abuse and the loss of Medical Supply's confidential business information.

Though the language creating the safe harbor is broad and the required procedures are fairly simple, it is still unresolved how "safe" the safe harbor is. Courts should impose a good-faith standard with respect to the sharing of information, but doing so subjects a bank to potential liability. Insight into the appropriate judicial action comes from the pre USA PATRIOT Act interpretations of the earlier version of the safe harbor protecting an institution that files a suspicious-activity report to an agency in accordance with the Annunzio-Wylie Anti-Money-Laundering Act of 1992. Banks must file a SAR when a known or a suspected violation of law or a suspicious transaction related to money laundering has occurred according to certain statutory thresholds and may voluntarily file one for other suspicious activities not captured by those thresholds. The law provides that a bank filing an SAR is not liable to any person for the disclosures or for failing to notify the person involved in the transaction of them. One line of cases interpreting the Annunzio-Wylie safe harbor had provided that a bank must have a good-faith suspicion of a violation before it discloses information related to the suspected money laundering or other potential crime. In *Lopez v. First Union Nat'l Bank* and *Coronado v. BankAtlantic Bancorp., Inc*., both at 129 F.3d 1186, 1195 (11th Cir. 1997), a court held that the safe harbor was not intended to provide blanket immunity for disclosures. In the related action *Coronado v. BankAtlantic Bancorp, Inc*., the court held that it did not apply because the bank, which had notified law enforcement of suspicious activity and granted

federal agents access to about 1,100 accounts, had not shown that it had determined in good-faith that there was a connection between the activity and the disclosures.

Bank of Eureka Springs v. Evans, 353 Ark. 438, 109 S.W.3d 672 (Ark. 2003) most closely resembles the circumstances of the present case. In *Bank of Eureka Springs,* the court found the bank had filed a suspicious activity report in an attempt to have its client criminally prosecuted without cause so that it might take his property. The court found the bad faith conduct deprived the bank of immunity for the SAR. Medical Supply alleges that US Bank sought to file a malicious suspicious activity report to restrain competition in the market for hospital supplies where US Bancorp NA and Piper Jaffray were actively participating in agreements to exclude internet marketplaces like Medical Supply from undercutting Novation, LLC and Neoforma, Inc.'s maintenance of artificially inflated hospital supply prices.

Other courts, however, have expressly declined to impose the good-faith standard and reasoned that the plain language of the safe harbor provision of Annunzio-Wylie described an unqualified privilege with no mention of good faith or similar requirement. The courts in both *Lee v. Bankers Trust Company*, and most recently in *Stoutt v. Banco Popular de Puerto Rico*, concluded that the provision does not limit protection to disclosures based on a good-faith belief that a violation has occurred. The split in judicial opinion over whether the Annunzio-Wylie safe harbor includes an implicit requirement that a bank making a disclosure must first make its own good-faith determination raises general concern about the scope of these safe harbors. Like the Annunzio-Wylie safe harbor, the USA PATRIOT Act's safe harbor and the regulations implementing it contain no explicit qualifications as to the scope of the liability on the basis of good-faith

determinations. In contrast, other parts of the USA PATRIOT Act specifically include standards limiting the applicable safe harbor, such as in Section 355 which provides that with respect to an employment reference, an institution shall not be shielded from liability if a disclosure is made with "malicious intent." On the basis of the express provision for civil liability under Section 355 of the USA PATRIOT Act the petitioner believed his client had a cause of action for antitrust injunctive relief to prevent the filing of a suspicious activity report. Moreover, in section 314(a) of the act, Congress included specific standards with respect to information shared among financial institutions, regulators and law enforcement, and described the information subject to such disclosures as "reasonably suspected based on credible evidence of engaging in terrorist acts or money laundering activities." The Patriot Act's safe-harbor section does not contain any similar modifiers of reasonable suspicions or credible evidence, though the final portion of section 314(b) does except from the safe harbor violations of the section generally. This court should resolve whether courts apply a good-faith standard in application of the safe harbor. Until clear parameters are established, banks are likely not to voluntarily participate in information sharing and are required to make careful determinations about what is shared.

II. IMPORTANT CONGESSIONAL PUBLIC POLICY IS DEFEATED BY USA PATRIOT ACT BAD FAITH IMMUNITY

Medical Supply's complaint sought to enjoin conduct that costs health insurers and the government healthcare finance programs Medicare and Medicaid over twenty billion dollars a year in hospital supply distribution inefficiency. This loss is based on the complaint's citation of the defendant investment bank Piper Jaffray's study revealing the savings an internet marketplace like Medical Supply would realize.

The trial court and Court of Appeals believed that the USA PATRIOT Act immunity could not be overcome, even for prospective injunctive relief and that no provision of the USA PATRIOT Act provided for private civil liability. This court has long contradicted this view:

> "It is settled law that '(i)mmunity from the antitrust laws is not lightly implied.' *People of State of California v. Federal Power Comm'n*, 369 U.S. 482, 485, 82 S.Ct. 901, 903—904, 8 L.Ed.2d 54. *United States v. Borden Co.*, 308 U.S. 188, 198 199, 60 S.Ct. 182, 188—189, 84 L.Ed. 181; *United States v. Southern Pac. Co*., 259 U.S. 214, 239—240, 42 S.Ct. 496, 501—502, 66 L.Ed. 907. This canon of construction, which reflects the felt indispensable role of antitrust policy in the maintenance of a free economy, is controlling here."

United States v. Philadelphia National Bank, 374 U.S. 321, 83 S.Ct. 1715, 10 L.Ed.2d 915 (1963).

Medical Supply's cause is controversial because it's an action seeking an injunction against the filing of a USA PATRIOT Act suspicious activity report in furtherance of a boycott US Bancorp and Piper Jaffray participated in with coconspirators identified in the complaint as Novation, a healthcare Group Purchasing Organization ("GPO") competitor of Medical Supply's in the hospital supply market identified in the complaint with its captive e-commerce marketplace Neoforma, Inc. competing with Medical Supply on the web. The court using the wrong standard believed US Bank, US Bancorp NA and Piper Jaffray could not violate antitrust laws in Medical Supply's market since they did not sell hospital supplies:

> "However, in Aquatherm the plaintiffs did not name (or even identify) the alleged co-conspirators who participated in the relevant market. In this case, SBS alleges a conspiracy between HBC, a clear market participant, and CC. Nothing in our case law suggests that a conspiracy must be limited solely to market participants so long as the conspiracy also involves a market participant and the non-participant has an incentive to join the conspiracy. Cf. *Spectators' Communication Network, Inc. v. Colonial Country Club*, 253 F.3d 215, 222 (5th Cir. 2001) ("[W]e conclude that there can be sufficient evidence of a combination or conspiracy when one

> conspirator lacks a direct interest in precluding competition, but is enticed or coerced into knowingly curtailing competition by another conspirator who has an anticompetitive motive."). In its brief, CC correctly points out that Spectators involved a group boycott with multiple conspirators, thereby giving the non-participant defendant the power to injure the plaintiff." [emphasis added]
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> *Spanish Broadcasting System of Florida, Inc. v. Clear Channel Communications, Inc.*, No. 03-14588 (Fed. 11th Cir. 6/30/2004) (Fed. 11th Cir., 2004).

III. THE USA PATRIOT ACT'S MISUNDERSTOOD GRANT OF IMMUNITY PREJUDICES THE RIGHTS OF LITIGANTS

The appellate panel's sanction order "relying on a materially incorrect view of the relevant law" based on the mistake first that no private rights of action were created by the USA PATRIOT Act and secondly that a reasonable challenge to the trial court's ruling on coconspirators could not be raised. The appellate panel's order of sanctions was contrary to the standard in *Cooter Gell v. Hartmarx Corporation*, 496 U.S. 384 at 402, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990) and therefore an abuse of discretion. The decision also contradicts controlling case law of the Tenth circuit regarding the prohibition of dismissal when there is a discoverable unknown defendant *(Krueger v. Doe*, 162 F.3d 1173 (C.A.10 (Okla.), 1993) and plurality of actors through expressly identified but unnamed coconspirators (*Olsen v. Progressive Music Supply, Inc*., 703 F.2d 432 at pg. 435 (C.A.10 (Utah), 1983) as described infra. The en banc "appellate court would be justified in concluding that, in making such errors, the district court [here, the hearing panel] abused its discretion." *Cooter Gell v. Hartmarx Corporation*, 496 U.S. 384 at 402. "If the appeal is not frivolous under this standard, Rule 38 does not require the appellee to pay the appellant's attorney's fees." *I.d* at 407.

The basis for the Tenth Circuit's incongruous rulings in reaction to a challenge to the USA PATRIOT Act is likely the national emergency the USA PATRIOT Act legislation sought to address. The Tenth Circuit had recently recognized the limitation of immunity at common law where one who reports suspected criminal conduct already has a privilege, but a privilege often taken to require both a reasonable basis for the report and good faith in *Murphree v. U.S. Bank of Utah, N.A*., 293 F.3d 1220, 1222-23 (10th Cir. 2002).

CONCLUSION

Whereas for the above stated reasons, the petitioner Bret D. Landrith respectfully requests that the court grant certiorari over this matter or in the alternative to remand the action back to district court for discovery and further development.

Respectfully submitted,

S/ Bret D. Landrith

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