CASE BEING CONSIDERED FOR TREATMENT PURSUANT TO
RULE 34(j) OF THE COURT'S RULES

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 09-5080
Consolidating No. 09-5161

GREGORY S. HOLLISTER,

Plaintiff-Appellant,

v.

BARRY SOETORO,
in his capacity as a natural person; de facto President in posse; and as de jure President in posse, also known as Barack Obama, et al.,

Defendants-Appellees.

On Appeal From the United States District Court
for the District of Columbia

BRIEF FOR APPELLEES PRESIDENT BARACK OBAMA AND VICE PRESIDENT JOSEPH BIDEN

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September 4, 2009

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Cir. R. 28(a)(1), President Barack Obama and Vice President Joseph Biden ("President Obama and Vice President Biden") submit this Certificate as to Parties, Rulings, and Related Cases.

(A) ***Parties and Amici.*** Gregory S. Hollister ("Hollister") was the plaintiff in the district court and is the appellant in this Court. President Obama and Vice President Biden were the defendants in the district court and are the appellees in this Court. There were no intervenors or amicus curiae in the district court. There are no intervenors or amicus curiae in this Court.

(B) ***Rulings Under Review.*** Hollister appeals the March 5, 2009 memorandum and order of the United States District Court for the District of Columbia (Robertson, J.) granting President Obama's and Vice President Biden's motion to dismiss. The memorandum is reported at 601 F. Supp. 2d 179 (D.D.C. 2009) and is in the Appendix at 217-221. Hollister also appeals the March 24, 2009 memorandum order of the United States District Court for the District of Columbia (Robertson, J.) sanctioning Hollister's counsel, which is reported at 258 F.R.D. 1 (D.D.C. 2009) and is in the Appendix at 262-273.

(C) ***Related Cases.*** President Obama and Vice President Biden know of no other "related cases" as that term is defined in D.C. Cir. R. 28(a)(1)(C).

However, Philip J. Berg, an attorney who signed Hollister's complaint and additional pleadings, has been the plaintiff in several other suits that challenge the qualifications of President Obama under the Natural Born Citizen Clause. *See, e.g.*, *Berg v. Obama*, 574 F. Supp. 2d 509 (E.D. Pa. 2008), *appeal docketed*, No. 08-4340 (3d Cir. Oct. 30, 2008); *Berg v. Obama*, No. 08-cv-1933 (D.D.C. filed Nov. 7, 2008).

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Cases

TABLE OF AUTHORITIES
(continued)

TABLE OF AUTHORITIES
(continued)

TABLE OF AUTHORITIES
(continued)

Statutes

Regulations and Rules

Other Authorities

COUNTERSTATEMENT OF JURISDICTION

Pursuant to 28 U.S.C. § 1291, this Court has jurisdiction over the consolidated appeals of the March 5, 2009 order granting President Obama's and Vice President Biden's motion to dismiss (App. 217-222)[1] and the March 24, 2009 memorandum order of reprimand (App. 262-273).

COUNTERSTATEMENT OF ISSUES PRESENTED

1. Whether dismissal of Hollister's complaint was proper under Fed. R. Civ. P. 12(b)(6) because he failed to state a plausible interpleader claim with adverse claimants and a tangible stake.

2. Whether the district court should have dismissed the complaint for lack of standing under Fed. R. Civ. P. 12(b)(1).

3. Whether the district court acted within its discretion by sanctioning Hollister's counsel for filing a frivolous suit.

STATUTES AND REGULATIONS

The addendum to Hollister's brief[2] contains relevant statutory and regulatory provisions.

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[1] "App. __" references are to the Appendix filed with Hollister's brief.
[2] Citations to Hollister's brief are abbreviated "Br. __."

COUNTERSTATEMENT OF FACTS

In a complaint filed on December 31, 2008, Gregory S. Hollister alleged that he is a retired Colonel from the United States Air Force and is part of the "Individual Ready Reserve," which "means he is subject to Presidential recall for the rest of his life." (App. 9-10). As a result, Hollister alleged that he owes a "duty" to obey lawful orders of the President as Commander-in-Chief. (App. 11). Hollister made the preposterous and entirely baseless allegation that President—then Senator—Obama may not be eligible to serve as President under Article II, Section 1, Clause 5 of the U.S. Constitution, because President Obama may not be a "natural born" citizen. (App. 11-12).

Based on these allegations, Hollister contended that *if* President Obama issues an order to reinstate Hollister to active duty, Hollister will not know whether to obey or disregard the order given his alleged uncertainty regarding the President's citizenship status. (App. 20). Hollister asserted a single interpleader claim for relief under 28 U.S.C. § 1335 and Fed. R. Civ. P. 22. (App. 23-26). Hollister named President Obama and Vice President Biden as alleged claimants to the supposed "property" at issue—i.e., the duties Hollister contends he owes the President as Commander-in-Chief. As part of his interpleader claim, Hollister requested as a remedy, among other things, a

declaration of whether President Obama is constitutionally eligible to be President of the United States under the Natural Born Citizen Clause, U.S. Const. art. II, § 1, cl. 5. (App. 26-28).

The same day Hollister filed the complaint, he also filed a "Motion to File Interpleader and Deposit Funds with the Court" and a motion to allow counsel Philip J. Berg[3] and Lawrence Joyce—both of whom had signed the complaint (App. 28) —to appear pro hac vice. (App. 2, 35-41). The district court denied the "Motion to File Interpleader and Deposit Funds" as frivolous and held the pro hac vice motions in abeyance. (App. 65).

On January 26, 2009, President Obama and Vice President Biden moved to dismiss the complaint under Fed. R. Civ. P. 12(b)(1) and 12(b)(6). (App. 42-52). On February 9, 2009, Hollister filed an amended complaint asserting two claims: a claim for statutory interpleader under 28 U.S.C. § 1335 (App. 83) and a claim under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971). (App. 87). As part of these claims, Hollister requested declaratory and injunctive relief, including, again, a declaration of whether President Obama is

[3] Berg has filed numerous frivolous lawsuits and motions in other courts alleging essentially the same claims as the one raised in this case. *See, e.g.*, *Berg v. Obama*, 574 F. Supp. 2d 509 (E.D. Pa. 2008), *appeal docketed*, No. 08-4340 (3d Cir. Oct. 30, 2008); *Berg v. Obama*, No. 08-cv-1933 (D.D.C. filed Nov. 7, 2008).

eligible to serve as President of the United States (App. 90). In response to Hollister's amended complaint, the district court ruled on February 11, 2009 that "[p]laintiff's amended complaint . . . adds nothing to the original complaint except rhetoric and legal theory and creates no obligation upon the defendants to respond to it." (App. 118).

On March 5, 2009, the district court granted President Obama's and Vice President Biden's motion to dismiss under Fed. R. Civ. P. 12(b)(6) for failure to state a claim. (App. 217-222).[4] The district court also ordered Hollister to

[4] Notably, courts throughout the nation have dismissed similar suits filed by Berg and by others. *See*, *e.g.*, *Berg v. Obama*, 574 F. Supp. 2d 509 (E.D. Pa. 2008), *appeal docketed*, No. 08-4340 (3d Cir. Oct. 30, 2008); *Wrotnowski v. Bysiewicz*, 958 A.2d 709, 713 (Conn. 2008) (dismissing case regarding Obama for lack of statutory standing and subject matter jurisdiction); *Stamper v. United States*, 2008 WL 4838073, at *2 (N.D. Ohio Nov. 4, 2008) (dismissing suit regarding Obama and McCain for lack of jurisdiction); *Roy v. Fed. Election*, 2008 WL 4921263, at *1 (W.D. Wash. Nov. 14, 2008) (dismissing suit regarding Obama and McCain for failure to state a claim); *Marquis v. Reed*, No. 08-2-34955 SEA (Wash. Super Ct. Oct. 27, 2008) (dismissing suit regarding Obama); *Hollander v. McCain*, 566 F. Supp. 2d 63, 71 (D.N.H. 2008) (dismissing suit regarding McCain on standing grounds); *In re John McCain's Ineligibility to be on Presidential Primary Ballot in Pa.*, 944 A.2d 75 (Pa. 2008); *Lightfoot v. Bowen*, No. S168690 (Cal. Dec. 5, 2008) (Original Proceeding) (denying petition for writ of mandate/prohibition and stay); *Robinson v. Bowen*, 567 F. Supp. 2d 1144, 1147 (N.D. Cal. 2008) (dismissing suit regarding McCain for lack of standing and lack of a state court remedy); *Constitution Party v. Lingle,* 2008 WL 5125984, at *1 (Haw. Dec. 5, 2008) (unpublished) (dismissing election contest challenging Obama's Nov. 4, 2008 victory); *Martin v. Lingle*, No. 08-1-2147 (Haw. Oct. 22, 2008) (Original Proceeding) (rejecting original writ petition regarding Obama on several

show cause why John Hemenway, Hollister's local counsel, should not be sanctioned for filing a frivolous suit. (App. 221-222). After Hollister filed two responses to the order to show cause (App. 223-250, 252-261), the district court issued a memorandum order on March 24, 2009 finding that Hemenway had violated Fed. R. Civ. P. 11(b) (App. 272) and reprimanding him "for his part in the preparation, filing, and prosecution of a legally frivolous suit" (App. 273).

On March 16, 2009, Hollister filed a notice of appeal of the March 5, 2009 order of dismissal (App. 251), and Hemenway appealed the reprimand order on April 17, 2009 (App. 274).

SUMMARY OF ARGUMENT

Hollister's claims fail as a matter of law because he used interpleader as a pretext to try to obtain a ruling on the Natural Born Citizen Clause. The interpleader claim is not plausible on its face because Hollister did not allege that there are adverse claimants to his intangible duty to be called into active service, and Hollister did not establish that this "duty" creates a legitimate interpleader stake. As a result, Hollister failed to state a claim under Fed. R. Civ. P. 12(b)(6).

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grounds); *Cohen v. Obama*, 2008 WL 5191864, at *1 (D.D.C. Dec. 11, 2008) (dismissing suit regarding Obama on standing grounds).

Further, Hollister's outlandish theory of personal injury does not meet the Constitution's standing requirement for an injury in fact. Therefore, the district court should have dismissed Hollister's complaint under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction in addition to dismissing the complaint under Fed. R. Civ. P. 12(b)(6) for failure to state a claim.

Finally, the district court did not abuse its discretion in sanctioning Hollister's counsel. The reprimand was based on a finding that the complaint was not founded on a non-frivolous argument for extending, modifying, or reversing existing law or for establishing new law, and it was procedurally proper because the court issued a show cause order before reprimanding Hollister's counsel.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY DISMISSED HOLLISTER'S COMPLAINT UNDER FED. R. CIV. P. 12(b)(6)

A. Standard of Review

This Court reviews de novo the district court's ruling on a Fed. R. Civ. P. 12(b)(6) motion to dismiss, construing the complaint liberally, and granting plaintiff the benefit of all inferences that can be derived from the facts alleged. *Barr v. Clinton*, 370 F.3d 1196, 1199 (D.C. Cir. 2004).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, ___ U.S. ___, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The plaintiff must provide more than "a formulaic recitation of the elements of a cause of action." *Twombly*, 550 U.S. at 555.

B. Hollister Failed to State an Interpleader Claim Under Fed. R. Civ. P. 12(b)(6)

There are two types of federal interpleader: (1) "statutory interpleader" under 28 U.S.C. § 1335, and (2) "rule interpleader" under Fed. R. Civ. P. 22. Both statutory and rule interpleader allow "a party who fears being exposed to the vexation of defending multiple claims to a limited fund or property that is under his control a procedure to settle the controversy and settle his obligations in a single proceeding."[5] Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, 7 *Federal Practice & Procedure* § 1704, at 540 (2d ed. 2001) ("FP & P"); *see Commercial Union Ins. Co. v. United States*, 999 F.2d 581, 583 (D.C. Cir. 1993); *Star Ins. Co. v. Cedar Valley Express, LLC*, 273 F. Supp. 2d 38, 40

[5] In interpleader, the party filing suit is generally referred to as the "stakeholder," the parties named as defendants are referred to as the "claimants," and the fund or property that is the subject of the action is referred to as the "stake."

(D.D.C. 2002). Interpleader is typically used in insurance cases, where the plaintiff holds property on behalf of another but does not know to which of several adverse parties the property should be transferred. *See, e.g., Star Ins. Co.,* 273 F. Supp. 2d 38; *Nwachukwu v. Karl,* 223 F. Supp. 2d 60 (D.D.C. 2002); *Guardian Life Ins. Co. of Am. v. Madole*, 48 F. Supp. 2d 26 (D.D.C. 1999).

An interpleader action typically progresses in two "stages." In the first stage, the court determines whether interpleader is appropriate based on the facts of the case. 4 James Wm. Moore et al., *Moore's Federal Practice* § 22.03[1][a] (3d ed. 1999). If the stakeholder passes the first stage, the court then adjudicates the merits of the adverse claims and distributes the stake in the second stage. *Id.*

The two types of interpleader are functionally the same. *See id*. § 22.03[3]. The "central distinction" between statutory and rule interpleader is jurisdictional. *See Commercial Union Ins. Co.*, 999 F.2d at 584. Statutory interpleader provides the district courts with original jurisdiction over cases where there are two or more claimants to a contested fund of $500 or more, and at least two of those claimants are of diverse citizenship. In contrast, rule interpleader is a procedural device that confers no subject matter jurisdiction.

See id. (citing *Morongo Band of Mission Indians v. Cal. State Bd. of Equalization*, 858 F.2d 1376, 1381 (9th Cir. 1988)). .

As the party seeking interpleader, Hollister has the burden to allege facts supporting interpleader's required elements. *Dunbar v. United States*, 502 F.2d 506, 511 (5th Cir. 1974); *Star Ins. Co.*, 273 F. Supp. 2d at 41; *see also* 7 FP & P § 1714, at 626. Because Hollister failed to meet this burden, the district court properly dismissed Hollister's complaint for failure to state a claim under Fed. R. Civ. P. 12(b)(6).[6] For the reasons described below, this Court should affirm.

1. Hollister failed to state a claim because his alleged "stake" is an intangible duty not subject to interpleader

In order to sustain an interpleader, there must be a "stake" or a "res"—"money or property of the value of $500 or more, . . . a note, bond, certificate, policy of insurance, or other instrument of value or amount of $500 or more, . . . or . . . any obligation written or unwritten to the amount of $500 or more." 28 U.S.C. § 1335(a). In his complaint, Hollister asserted that his duty to serve in the armed forces, if ordered to do so by the President, constituted "property" for purposes of the interpleader statute.

[6] While Hollister raises several jurisdictional arguments in his brief, s*ee, e.g.*, Br. 1-6, they are inapposite. The district court assumed, without analysis, that it had jurisdiction over Hollister's claims, and dismissed Hollister's suit for failure to state a claim under Rule 12(b)(6). (*See* App. 219).

As the district court properly found when it dismissed this matter, an intangible duty is not "property" under the interpleader statute. Courts that have considered an intangible stake have resoundingly rejected it as a basis for interpleader. For example, in *Bankers Trust Co. v. Mfrs. Nat'l Bank of Detroit*, 139 F.R.D. 302, 307 (S.D.N.Y 1991), Judge Mukasey emphasized that interpleader requires a res like a fund or thing of value, stating:

> The "right, duty and power to manage a fleet of railcars" is not, properly speaking, a stake under the interpleader statute[.] . . . The stake requirement contemplates that there exist something analogous to a distinct fund or other thing of value subject to competing claims. . . . Although this case involves one aspect of a complex dispute involving multiple parties and multiple claims, *statutory interpleader is an inappropriate means of concentrating the entire dispute because the purported stake is not analogous to a distinct fund or other thing of value*.

Id. at 307 (emphasis added) (internal citations omitted). Similarly, in *Murphy v. Travelers Ins. Co.*, 534 F.2d 1155, 1159 (5th Cir. 1976), the Fifth Circuit explained the policy reason behind requiring specific identifiable property as a necessary foundation for interpleader.[7]

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[7] "The plain language of the statute [28 U.S.C. § 1335(a)] clearly refers to tangible property interests or interests evidenced by a 'note, bond, certificate, policy of insurance' or other similar intangible document of definite, ascertainable value. An inchoate, uncertain claim for attorney's fees or chose [sic] in action asserted against the general assets of a party rather than specific, identifiable 'property' is not a proper subject for interpleader relief. Adopting appellant's reasoning . . . would unduly broaden federal interpleader jurisdiction

On appeal, Hollister does not argue that the district court erred in rejecting his claim that his duty is not "property" under the statute. Instead, for the first time, he argues that his alleged stake fits within the meaning of "obligation" under 28 U.S.C. § 1335. *See* Br. at 6-10; 28 U.S.C. § 1335(a). Hollister waived this argument by not raising it in the district court. *See Dist. of Columbia v. Air Florida, Inc.*, 750 F.2d 1077, 1084 (D.C. Cir. 1984) ("It is well established that issues and legal theories not asserted at the District Court level ordinarily will not be heard on appeal.").

But even if this Court addresses the argument on the merits, it must fail. The fact that on appeal Hollister tries to characterize his "duty" as an "obligation" under 28 U.S.C. § 1335(a), rather than "property" as he did in the district court, is a distinction without a difference because the stake itself has not changed. Regardless of how Hollister labels the stake, it is an intangible duty that is not analogous to a distinct fund or thing of value, which is necessary to invoke federal interpleader.

The language from 28 U.S.C. § 1335(a) that Hollister contends applies to his alleged stake—"or being under any obligation written or unwritten to the amount of $500 or more"—was added to the Interpleader Act of 1936 and

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to include virtually any contingent or inchoate claim which might ultimately be the subject of litigation." *Murphy*, 534 F.2d at 1159.

remains in the present statute. 28 U.S.C. § 1335; *see* Zechariah Chafee, Jr., *The Federal Interpleader Act of 1936: I*, 45 Yale L.J. 963, 968 & n.26 (1936). While the legislative history behind the "obligation" provision is "scant," *NYLife Distribs., Inc. v. Adherence Group, Inc.*, 72 F.3d 371, 382 (3d Cir. 1995), a 1935 Senate Report makes it clear that the addition of the term "obligation" was intended to add certain types of financial instruments:

> Under existing interpleader law, which is limited to certain kinds of insurance obligations, the subject matter is limited to money or property or bonds or policies of insurance or certificates of membership. Under the amended bill the subject matter is extended by the addition of notes, certificates, or other instruments. Loans are also included because insurance companies are frequently confronted by two adverse claimants of the right to borrow under policies. There are also embodied "obligations," which would include informal contracts and probably tort obligations where the stakeholder is only a technical tort-feasor. Provision is also made for a claimant of a benefit of any of the above, which would include disputes over the right to the cash surrender value of an insurance policy.

See S. Rep. No. 558, 74th Cong., 1st Sess. 1, at 5-6 (1935). In a 1936 article, Professor Chafee, the architect of the 1936 Act, indicates that the "obligation" provision covers three scenarios: (1) claims resulting from construction contracts where a surety does not know whether it is obligated to pay the general contractor or subcontractor; (2) *unwritten* obligations for the payment of money; and (3) tort obligations where the right to tangible property is in

dispute. Chafee, *The Federal Interpleader Act of 1936: I*, *supra*, at 971-72. Professor Chafee explains:

> The words "being under any obligation written or unwritten to the amount of $500 or more" take care of other obligations which are not embodied in a formal promise to pay money, like a life insurance policy, a bond or a note. This third type will take care of claims arising out of building contracts between contractors and subcontractors. It will also take care of unwritten obligations such as debts. The word "obligation" seems broad enough to include tort obligations where the stakeholder is only a technical tortfeasor and so will not be barred from relief on the ground that the controversy is due to his own wrongdoing.

Id. at 971-72. None of the scenarios described by Professor Chafee or expressed in the 1935 Senate Report are analogous to Hollister's claim and Hollister has made no showing that Congress intended to cover the type of intangible duty he is claiming. Hollister has not cited a single case on appeal concluding that his type of intangible stake meets the statutory meaning of "obligation," or otherwise satisfies the requirements of rule or statutory interpleader. The Court should affirm the district court's dismissal of Hollister's claim.

2. Hollister failed to state an interpleader claim because President Obama and Vice President Biden are not adverse claimants

A prerequisite to surviving the first stage of an interpleader action under either rule or statutory interpleader is the presence of two or more adverse

claimants. Statutory interpleader requires that "[t]wo or more *adverse claimants* . . . are claiming or may claim to be entitled to . . . money or property[.]" 28 U.S.C. § 1335(a)(1) (emphasis added). Similarly, "[a]s the language of Rule 22 makes clear, '[a] prerequisite for permitting interpleader is that *two or more claimants must be 'adverse' to each other.*'" *United States v. High Tech. Prods., Inc.*, 497 F.3d 637, 642 (6th Cir. 2007) (quoting 7 FP & P § 1705).

A bedrock principle of interpleader is that there must be an *actual controversy* between the claimants in order to satisfy the "adversity" requirement. *See Treinies v. Sunshine Mining Co.*, 308 U.S. 66, 72 (1939) (stating interpleader presumes "that there is a real controversy between the adverse claimants"); 7 FP & P, § 1705, at 550 (stating that the adversity "requirement is not met when one of the claims clearly is devoid of substance, or . . . liability is groundless"); Zechariah Chafee, Jr., *Broadening the Second Stage of Federal Interpleader*, 56 Harv. L. Rev. 929, 985 (1943). The mere pretense of adverse claimants to a stake is legally insufficient to support an interpleader claim.

In this case, the district court dismissed Hollister's action because Hollister did not show that President Obama and Vice President Biden are

adverse claimants to the alleged stake. (*See* App. 272). In his complaint, Hollister failed to allege *facts* that President Obama and Vice President Biden are adverse claimants. Hollister offered only *speculation*. Accordingly, his allegations raise only the pretense of adversity. (*See, e.g.*, App. 24 (Complaint at ¶ 52) ("Plaintiff knows that each of the Defendants . . . *may have competing rights between themselves* to the property rights in these duties") (emphasis added); *id*. at 84 (Amended Complaint at ¶ 58 (same)).

On appeal, Hollister again offers nothing more than speculation to support interpleader. Although he asserts "[t]hey [President Obama and Vice President Biden] are rival claimants to my obligation," this statement is nothing more than *ipse dixit*. *See* Br. at 10. There is no showing in the record whatsoever that President Obama and Vice President Biden are in any way vying for the right to call Hollister into active service. Indeed, Hollister conceded in his complaint that it is pure conjecture that there is even more than one claimant. (*See* App. 20 (Complaint at ¶39) (stating that claims "might come, possibly in contradictory manner, from more than one source of authority")). And Hollister has not plead with any certainty whether a claim to his "stake" will ever be made. (*See* App. 18, 20, 21-24 (Complaint at ¶¶ 34, 40,

44, 47)). Hollister's contention that there are adverse claimants does not rise "above the speculative level." *Twombly*, 550 U.S. at 555.

Hollister brought this case to litigate the issue of the President's citizenship. In so doing, he has named President Obama and Vice President Biden as unwilling litigants to an interpleader action, based only on a frivolous pretense of adversity. Courts faced with similar claims have rejected them. *See Indianapolis Colts v. Mayor & City Council of Balt.*, 733 F.2d 484, 488 (7th Cir. 1984) ("Another way to state our objection to the maintenance of this case under the interpleader statue is that there is no stake[.] . . . [W]hile the City of Baltimore is indeed asserting a right to take over the team through the eminent-domain power, the Capital Improvement Board is not. It is just a lessor of the stadium."); *Bierman v. Marcus*, 246 F.2d 200, 203 (3d Cir. 1957) ("Actually, what has been done in this suit has been to misuse interpleader, based on mere pretense of adverse claims to a fund, to obtain jurisdiction of controversies other than entitlement to that fund."); *Xerox Corp. v. Nashua Corp.*, 314 F. Supp. 1187, 1190 (S.D.N.Y. 1970) ("The court is not prepared to cast Xerox and RCA in the role of unwilling litigants where, upon substantial grounds, they challenge the validity of the basis upon which Nashua seeks to force them into adversary positions, while Nashua presents only its bare conclusions in support

of its position."). The district court properly dismissed Hollister's complaint under Fed. R. Civ. P. 12(b)(6) for failing to satisfy interpleader's adversity requirement.[8]

3. Hollister's amended complaint does not alter the district court's Fed. R. Civ. P. 12(b)(6) dismissal

The district court properly granted President Obama's and Vice President Biden's motion to dismiss despite the fact that Hollister filed an amended complaint while the motion to dismiss was pending. Hollister's amended complaint added a cause of action under *Bivens* and eliminated the rule-based interpleader claim. Hollister now challenges the district court's alleged failure to consider the *Bivens* claim and the rule interpleader theory. *See, e.g.*, Br. at 4. In so doing, he is trying to have it both ways: he wants the Court to consider the *Bivens* claim that was *raised* for the first time in his amended complaint and also consider Fed. R. Civ. P. 22 interpleader, which was *dropped* in the amended complaint. In any event, neither of these claims bear merit.

[8] The lack of adversity also warrants affirming the district court's dismissal based on justiciability concerns. Federal courts may not decide a case unless there is an actual dispute between adverse litigants. *See, e.g.*, *United States v. Johnson*, 319 U.S. 302, 304 (1943).

a. Hollister failed to state an actionable *Bivens* claim

On appeal, Hollister asserts that the amended complaint was filed as a matter of course under Fed. R. Civ. P. 15(a) and therefore the district court erred in failing to allow Hollister to proceed with the claims asserted in the amended complaint. This is not so. "Where . . . [an] amended pleading suffers from the same defects as the original and does not change the legal theories underlying the motion to dismiss, courts have the discretion to 'consider the motion as being addressed to the amended pleading,' because '[t]o hold otherwise would be to exalt form over substance.'" *Ellipso, Inc. v. Mann*, 460 F. Supp. 2d 99, 103 (D.D.C. 2006) (quoting 6 FP & P § 1476). As the district court found, the amended complaint "add[ed] nothing to the original complaint except rhetoric and legal theory and creates no obligation upon the defendants to respond to it." (App. 118).

Even if the district court abused its discretion, however, any error was harmless, because the *Bivens* claim, like the interpleader claim, fails to state a claim as a matter of law. Although Hollister's *Bivens* claim is not a model of clarity, he appears to be asserting U.S. Const. art. II, § 1, cl. 5 as the constitutional clause underpinning the claim. (*See* App. 90). The Supreme Court, however, has severely restricted when a plaintiff can proceed under

Bivens. "In *Bivens*—proceeding on the theory that a right suggests a remedy—this Court 'recognized for the first time an implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights.' Because implied causes of action are disfavored, the Court has been reluctant to extend *Bivens* liability 'to any new context or new category of defendants.'" *Iqbal*, 129 S. Ct. at 1947 (quoting *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 66, 68 (2001)). The Supreme Court has not extended *Bivens* to claims based on U.S. Const. art. II, § 1, cl. 5. Nor has Hollister even asserted an individual "right" under U.S. Const. art. II, § 1, cl. 5 for which he can seek redress.

Given the legal insufficiency of Hollister's *Bivens* claim, any error with respect to the amended complaint is harmless because "a district court need not be made to reconsider an amended complaint that fails to state a claim upon which relief could be granted, or that would otherwise fail as a matter of law." *James V. Hurson Assocs., Inc. v. Glickman*, 229 F.3d 277, 283 (D.C. Cir. 2000).

b. The District Court properly dismissed Hollister's complaint based on statutory interpleader

Hollister also contends that the district court failed to address his rule-based interpleader claim in the March 5, 2009 order. *See* Br. at 4. This argument fails for two reasons.

First, in his Amended Complaint, Hollister dropped his rule interpleader claim. (*See* App. at 83-85). Hollister acknowledges this point in his brief. *See* Br. at 3 (stating "the allegations of proceeding under Rule 22 are in the record but were then dropped out but they are in the record and should have been considered"). Once Hollister amended his complaint, that claim had no legal effect, and the district court was not obligated to address it. *See, e.g.*, *Owens v. Republic of Sudan*, 412 F. Supp. 2d 99, 117 (D.D.C. 2006); 6 FP & P § 1476, at 556-57.

Even if the district court erred by failing to address the rule interpleader claim, such error was harmless. As described above, the central difference between rule interpleader and statutory interpleader is jurisdictional. *See Commercial Union Ins. Co.*, 999 F.2d at 584. Because the district court dismissed the matter on a Fed. R. Civ. P. 12(b)(6) motion, and not based on jurisdiction, the district court's rationale for dismissal applies with equal force to Hollister's rule interpleader claim. This Court should affirm the district court's dismissal of Hollister's claims.

II. HOLLISTER LACKS STANDING TO ASSERT HIS CLAIMS

A. Standard of Review

This Court reviews a litigant's standing before the federal courts de novo. *See Renal Physicians Ass'n v. U.S. Dep't of Heath & Human Servs.*, 489 F.3d 1267, 1273 (D.C. Cir. 2007).

B. The District Court Should Have Dismissed the Complaint for Lack of Article III Standing

The district court assumed, without analysis, that it had jurisdiction over Hollister's claims. (App. 219). In making its ruling, the district court did not address President Obama's and Vice President Biden's argument that Hollister lacked constitutional standing to pursue his claims. *(*App. 47-48). Standing "is an essential and unchanging part of the case-or-controversy requirement of Article III," *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), and this Court may address it sua sponte. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006).

As the party asserting federal jurisdiction, Hollister has the burden to allege facts demonstrating all three elements necessary for Article III standing. *See id.*; *Young America's Found. v. Gates*, 573 F.3d 797, 799 (D.C. Cir. 2009). *First*, Hollister must demonstrate that he has suffered an "injury in fact,"—i.e., an invasion of a legally-protected interest that is "concrete and particularized"

and "actual or imminent," not "conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (internal quotation marks and citations omitted). *Second*, Hollister must establish "a causal connection between the injury and the conduct complained of—the injury has to be 'fairly trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] . . . some third party not before the court.'" *Id.* at 560 (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)). *Third*, Hollister must show a substantial likelihood that the requested relief will be redressed by a favorable decision; mere speculation is not enough. *Id.*; *see also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. Inc.*, 528 U.S. 167, 180-81 (2000).

Hollister has not met this burden. In his complaint, Hollister did not allege *facts* demonstrating that he has suffered an "injury in fact." While Hollister alleged in his complaint that he "is literally caught between a rock and a hard place," *he did not allege that he has personally suffered any injury*. (*See* App. 34 (Complaint at ¶ 34)). In addition, even if Hollister's peculiar claims built on a hypothetical recall to active military duty are taken at face value, Hollister engaged in the rankest speculation: He does not even allege a basis for believing that his return to duty is likely, much less probable. Instead, Hollister's allegations expressly concede that his renewed service is pure

conjecture at this point. (*See, e.g.*, App. 18 (Complaint at ¶ 34) ("*If reactivated*, he comes under a duty to obey lawful orders."); *id.* at 19-23 (Complaint at ¶¶ 37, 40, 44, 47)).

Given the remoteness of the possibility that Hollister's hypothetical will come to pass, Hollister cannot even get past the first requirement for standing—injury in fact. *See, e.g.*, *Bates v. Rumsfeld*, 271 F. Supp. 2d 54, 62 (D.D.C. 2002) ("Because the likelihood that Bates will be subjected to the administration of AVA is remote, as is the situation for the other similarly situated plaintiffs who are no longer on active duty, they cannot satisfy *Lujan's* first prong."). Nor has he alleged that any injury was caused by President Obama or Vice President Biden, or that any such injury can be redressed by a decision from this Court. Accordingly, this Court should dismiss this matter for lack of standing.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN REPRIMANDING HOLLISTER'S COUNSEL FOR FILING A FRIVOLOUS SUIT

A. Standard of Review

This Court reviews sanctions imposed by a district court under Fed. R. Civ. P. 11 for abuse of discretion. *Rafferty v. NYNEX Corp.*, 60 F.3d 844, 851 (D.C. Cir. 1995) ("We 'apply an abuse-of-discretion standard in reviewing all

aspects of a district court's Rule 11 determination.'") (quoting *Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384, 405 (1990)).

B. The District Court Did Not Abuse Its Discretion by Reprimanding Hollister's Counsel

As part of its March 5, 2009 memorandum decision, the district court ordered Hollister's local counsel, John Hemenway, to show cause why he should not be sanctioned under Fed. R. Civ. P. 11(b) for filing a frivolous complaint or for filing the complaint for an improper purpose. (*See* App. 220-221). After considering Hollister's response to the order to show cause, the district court (1) concluded that "Mr. Hemenway's suit was not a suit in interpleader or in the nature of interpleader"; (2) concluded that the suit was "legally frivolous"; (3) found that Hollister had "violated at least Rule 11(b)(2)"; and (4) issued a reprimand sanction. (*See* App. 272-73). Contrary to Hemenway's arguments on appeal, the district court's Fed. R. Civ. P. 11 rulings were legally and procedurally sound and this Court should affirm the district court's order of reprimand.

As discussed in Section I above, Hollister's interpleader claim does not fit within the four corners of statutory or rule interpleader: President Obama and Vice President Biden are not adverse claimants, and Hollister did not assert a "stake" that is subject to interpleader relief. Notably, Judge Robertson

documented how Hemenway made arguments that were not supported by authority or, worse, cited to authority that did not support the stated propositions. The claims advanced by Hemenway were not "warranted by existing law," and he has not shown either in the district court or on appeal that there was a "nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law." Fed. R. Civ. P. 11(b)(2). The district court acted within its discretion in finding that Hemenway violated Rule 11.

Nor did the district court abuse its discretion in choosing to sanction Hemenway with a reprimand. Federal District Courts exercise "virtually untrammeled" discretion in fixing the sanction to be imposed under Rule11 provided the "sanctions are appropriate to the facts of the case." *Hilton Hotels Corp. v. Banov*, 899 F.2d 40, 46 (D.C. Cir. 1990) (internal quotation marks and citations omitted); *see also Figueroa-Ruiz v. Alegria*, 905 F.2d 545, 549 (1st Cir. 1990) ("As an alternative to monetary sanctions, district courts may admonish or reprimand attorneys who violate Rule 11 where such a course of action is appropriate."); Fed. R. Civ. P. 11 advisory committee's notes (1993 amendments) (stating "[t]he court has available a variety of possible sanctions to impose for violations, such as . . . reprimand"). The district court weighed the facts of the case and the totality of circumstances, including mitigating

factors like Hemenway's past public service, and concluded that a reprimand was sufficient to deter Hemenway from filing future suits. (*See* App. 272-273).

Finally, while Hemenway asserts that he should have been granted a hearing before the district court imposed the reprimand, Br. at 12, the district court's procedure in implementing the sanctions was proper. As the advisory committee notes to the 1993 amendments to Fed. R. Civ. P. 11 explain, a hearing is not required before a court imposes sanctions sua sponte: "The power of the court to act on its own initiative is retained, but with the condition that this be done through a show cause order." The district court in this case followed the show cause procedure before imposing sanctions. Accordingly, this Court should affirm the district court's order.

IV. NONDISPOSITIVE ISSUES RAISED IN HOLLISTER'S OPENING BRIEF

In his opening brief, Hollister requests review of three nondispositive issues: (1) the district court's denial of the Motion to File Interpleader and Deposit Funds with the Court; (2) the district court's decision to hold in abeyance the motions for pro hac vice admission; and (3) the district court's reference to other litigation in its March 5, 2009 order. *See* Br. at 13-14 (issues 1, 6-8).

The first two issues relate to the district court's February 4, 2009 order in which the court denied the Motion to File Interpleader and Deposit Funds with the Court as frivolous and held the motions for admission of Philip Berg and Lawrence Joyce pro hac vice in abeyance "until the Court . . . had the opportunity, in open court, to examine their credentials, their competence, their good faith, and the factual and legal bases of the complaint they have signed." (App. 65). Both of Hollister's notices of appeal failed to identify the February 4, 2009 order as required by Fed. R. App. P. 3(c)(1)(B). Accordingly, the Court should decline to review the February 4, 2009 order.

Even if the Court considers the three issues identified above, however, they do not impact the outcome of the district court's judgment. First, the district court's denial of Hollister's Motion to File Interpleader and Deposit Funds with the Court (App. 35-41) does not affect the district court's dismissal because the court considered the merits of Hollister's interpleader claim in its March 5, 2009 order. Moreover, it is unclear what relief Hollister was seeking through the motion. (*See* App. 35-41). Assuming Hollister moved to deposit his "stake" with the district court, the court's denial of this motion does not change the court's ultimate conclusion that the interpleader claim failed as a matter of law.

Second, it was within the district court's discretion to hold Phillip Berg's and Lawrence Joyce's motions for pro hac vice admission in abeyance. Under the rules of the District Court for the District of Columbia, attorneys may enter an appearance to appear pro hac vice not as a matter of right, but only with joint local counsel and with the *permission* of the district court, *see* D.D.C. Local Civ. R. 83.2(d), and the presiding judge is given discretion to police admission to the court's bar. *See, e.g.*, *Groper v. Taff*, 717 F.2d 1415, 1418 (D.C. Cir. 1983); *In re Bell*, 371 F. Supp. 111, 112 (D.D.C. 1974). Further, plaintiff experienced no prejudice as a result of the district court's decision. The February 4, 2009 order did not deter Berg and Joyce from signing six filings (*see* App. 28, 94-95, 136, 181, 213, 215), and Hollister did not request oral argument (*see* App. 120). *See* D.D.C. Local Civ. R. 78.1.

Finally, Hollister takes exception to the district court's reference to court proceedings outside of the record. Contrary to Hollister's assertion, the district court acted well within its discretion by taking notice of the other cases brought by Berg. *See, e.g.*, *Veg-Mix, Inc. v. U.S. Dep't of Agric.*, 832 F.2d 601, 607 (D.C. Cir. 1987) ("'[I]t is settled law that the court may take judicial notice of other cases including the same subject matter or questions of a related nature

between the same parties.'") (quoting *Fletcher v. Evening Star Newspaper Co.*, 133 F.2d 395, 395 (D.C. Cir. 1942); *see also* Fed. R. Evid. 201(b).

CONCLUSION

For all of the foregoing reasons, this Court should affirm the district court's dismissal of Hollister's claims and find that the district court did not abuse its discretion by reprimanding Hemenway for filing a frivolous complaint.

DATED : Sept. 4, 2009

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE WITH RULE 32(a)

Pursuant to Fed. R. App. P. 32(a) and D.C. Cir. R. 32(a), I hereby certify that this brief contains 6,532 words, excluding the parts exempted by the rules, and has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in Times New Roman 14-point typeface.

DATED: Sept. 4, 2009

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

GREGORY S. HOLLISTER,

Appellant,

v.

BARRY SOETORO, in his capacity as a natural person; de facto President in posse; and as de jure President in posse, also known as Barack Obama, et al.,

Appellees.

No. 09-5080
Consolidating No. 09-5161

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of September, 2009, I caused to be served by electronic filing (or, if he has not consented to electronic service, by first class mail) a copy of the Appellees' brief in this case on the following counsel for appellant Gregory S. Hollister:

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