

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

THOMAS E. SCHERER,

Plaintiff,

v.

**MERCK & CO., DAVID R. BARRY/
UNITED STATES OF AMERICA, and
STATE OF KANSAS,**

Defendants.

No. 05-2019-CM

MEMORANDUM AND ORDER

Plaintiff Thomas E. Scherer brought this pro se action against defendants Merck & Co., David R. Barry/United States of America, and the State of Kansas. The court dismissed this case on January 18, 2006. The case is now before the court on plaintiff's Motion for a Waiver of the Five-Dollar Filing Fee for Filing a Writ of Certiorari(sic) (Doc. 209). Because plaintiff fails to meet his burden to show why such a waiver is necessary, plaintiff's motion is denied.

The relevant statute, 28 U.S.C. § 1917, states:

Upon the filing of any separate or joint notice of appeal or application for appeal or upon the receipt of any order allowing, or notice of the allowance of, an appeal or of a writ of certiorari \$5 shall be paid to the clerk of the district court, by the appellant or petitioner.

Although plaintiff devotes a lengthy argument to statutory construction and argues that "it is possible the United States Supreme Court could refuse to docket a costly and timely writ of certiorari because [plaintiff] did not pay these statutory required five dollar docketing fees in advance," basic legal research would have revealed that both Supreme Court and Tenth Circuit case

law reject his argument. “Untimely payment of the fee [does] not vitiate the validity of the notice of appeal.” *Brennan v. U.S. Gypsum Co.*, 330 F.2d 728, 728 (1964) (citing *Parissi v. Telechron, Inc.*, 349 U.S. 46, 47 (1955)). Moreover, plaintiff has not indicated that he has met any of the preconditions listed in the statute for the filing fee to apply. Plaintiff references an application for a sixty-day extension to file a petition. Such an application does not trigger the filing fee.

IT IS THEREFORE ORDERED that plaintiff’s Motion for a Waiver of the Five-Dollar Filing Fee for Filing a Writ of Certorari(sic) (Doc. 209) is denied.

Dated this 30TH day of May 2007, at Kansas City, Kansas.

s/ Carlos Murguia
CARLOS MURGUIA
United States District Judge