

ORDERED.

Dated: January 12, 2017



Karen S. Jennemann
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION
www.flmb.uscourts.gov

In re)	
)	
NORTH AMERICAN CLEARING, INC.,)	Adv. No. 6:08-ap-00145-KSJ
)	
Debtor.)	
)	

ORDER AWARDING SANCTIONS AGAINST RICHARD GOBLE

Robert Gilbert, the Liquidating Trustee of North American Clearing, Inc., and the Securities Investor Protection Corporation (“SIPC”) both ask this Court to assess monetary sanctions under an Eleventh Circuit Court of Appeals order sanctioning creditor, Richard Goble, for filing a frivolous appeal. The *sole issue* before the Court is the proper sanction to award against Mr. Goble under Federal Rule of Appellate Procedure 38, as directed by the Eleventh Circuit Court of Appeal and the United States District Court for the Middle District of Florida.

Goble filed an appeal to the Eleventh Circuit on April 8, 2016.¹ Trustee then moved to dismiss the appeal for lack of jurisdiction and for sanctions.² After several responses, replies, and motions between the parties,³ the Eleventh Circuit Court of Appeals dismissed Goble’s appeal for lack of jurisdiction and ruled the Trustee was entitled to sanctions finding “Mr. Goble’s appeal was

¹ Doc. No. 777, ¶ 8.
² Doc. No. 777, Exh. A.
³ Doc. No. 777, Exhs. B, C, D, E, F.

plainly meritless, and it appears from the totality of his various actions and appeals that he has abused the judicial system in order to prolong proceedings and frustrate their resolution.”⁴ The Eleventh Circuit remanded the Trustee’s Motion for Sanctions to the District Court to assess the award.⁵ The District Court, in turn, remanded the Motion for Sanctions to this Court.⁶ Goble moved for Rehearing at the Eleventh Circuit that was denied.⁷

The Eleventh Circuit assessed sanctions against Mr. Goble under Federal Rule of Appellate Procedure 38. This rule provides: “[i]f a court of appeals determines that an appeal is frivolous ... [the court may] award just damages and single or double costs to the appellee.”⁸ Trustee and SIPC contend the amount of damages for a frivolous appeal are the attorneys’ fees and costs incurred by the appellee in defending that unjustified appeal.⁹ They alternatively analyze the lodestar factors showing that the fees incurred in defending the frivolous appear were reasonable. Trustee seeks a sanction of \$29,450.70, attaching the billing records for himself and his counsel.¹⁰ SIPC requests a sanction of \$6,401, established by its attorneys billing records.¹¹

Goble opposes these amounts arguing the Eleventh Circuit did not specifically assess attorneys’ fees and costs in its sanction order or order that any dollar amount was merited.¹² Goble is partially correct. The Eleventh Circuit Court of Appeal ordered sanctions and then directed this Court to calculate the appropriate sanction to award under Rule 38. In doing so, the Court spent

⁴ Doc. No. 777, Exh. G.

⁵ Doc. No. 777, Exh. G.

⁶ Doc. No. 774.

⁷ The Eleventh Circuit Court of Appeals case number is 16-11574. The Order dismissing Mr. Goble’s Motion for Rehearing was entered on September 8, 2016.

⁸ Fed. R. App. P. 38.

⁹ *Kennedy Sky-Lites, Inc.*, 865 F. 2d 1254, 1255 (Fed. Cir. 1989).

¹⁰ Doc. No. 777, Exh. H.

¹¹ Doc. No. 786.

¹² Doc. No. 794. Goble also argues that his appeal was not frivolous and that he never intended to file a frivolous appeal. As stated earlier, the Eleventh Circuit Court of Appeals already has determined the appeal was frivolous and that sanctions are appropriate. Goble also renews various arguments he raised in past litigation. None of these arguments are relevant to the amount of sanctions he now should pay for this current frivolous appeal.

considerable time reviewing the billing records of the Trustee, his counsel, and SIPC's lawyers and Goble's challenges to certain of the time entries.¹³

The Eleventh Circuit previously has assessed both *actual*¹⁴ and *reasonable*¹⁵ attorneys' fees and costs incurred as a sanction for a frivolous appeal. Here, the two standards coincide. The *actual* attorneys' fees and costs incurred are *reasonable*. The *actual* fees and costs are set forth in the parties' billing records. A determination of whether they are *reasonable* requires the Court to consider the number of hours that could be reasonably expended on the litigation related to the frivolous appeal and then multiply that hourly figure by a reasonable hourly rate. In conducting this analysis, the Court considers the twelve factors outlined in *Johnson v. Georgia Highway Express, Incorporated*.¹⁶

Trustee's counsel did not duplicate efforts. Trustee and Trustee's counsel billed 74.3 hours. Trustee's counsel largely relied on the expertise of Mr. Michael Sloan in defending the appeal. A majority of the time entries, 46.6 hours, were recorded by Mr. Sloan.¹⁷ SIPC's counsel billed only 17.7 hours.¹⁸ SIPC's counsel did not duplicate efforts. SIPC's counsel defended their client in the appeal and these efforts were not duplicative of the Trustee's or his lawyer's efforts. Each time

¹³ Doc. Nos. 777, 786, 794.

¹⁴ See *S.E.C. v. Pension Fund of Am. L.C.*, 379 F. App'x 832, 836 (11th Cir. 2010) ("We conclude that Solera should be sanctioned by being required to pay the attorney's fees and costs incurred by the receiver in connection with this appeal.").

¹⁵ *Merritt v. Lake Jovita Homeowner's Ass'n, Inc.*, 358 F. App'x 47, 50 (11th Cir. 2009) ("Because the Merritts' appeal is clearly frivolous, pursuant to Rule 38, we award to appellees double costs and reasonable attorney's fees incurred by reason of this appeal, to be paid by appellants[.]"); *Pelletier v. Zweifel*, 987 F.2d 716, 717 (11th Cir. 1993) ("Because Pelletier's appeal was also patently frivolous, we awarded Zweifel, under [Rule 38] 'double costs and a reasonable attorney's fee for opposing Pelletier's appeal.'"); *United States v. A Single Family Residence & Real Prop. Located at 900 Rio Vista Blvd., Fort Lauderdale*, 803 F.2d 625, 632 (11th Cir. 1986) ("Therefore, pursuant to [Rule 38] we award to appellee double costs and reasonable attorney's fees incurred by reason of this appeal to be paid by appellant Heidi.").

¹⁶ 488 F.2d 714 (5th Cir. 1974), *overruled on other grounds by Blanchard v. Bergeron*, 489 U.S. 897, 90 (1989). Those twelve factors are: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

¹⁷ Doc. No. 777, Exh. H.

entry directly related to defending the frivolous appeal Goble filed. The fees and costs are exactly the basis to measure the cost Goble should pay as a sanction for his actions.

Goble objects to the hourly rates charged by the attorneys and the Trustee. However, considering the expertise and experience of each attorney involved, the Court finds that the rates charged are reasonable. This Court repeatedly has allowed approximately these hourly rates for the almost eight year pendency of this case, and the rates reflect a 10% reduction from what the Trustee and his counsel usually charge.¹⁹ Trustee's counsel also did not bill for the time spent in preparing its Motion for Sanctions or responding to Goble's Motion for Rehearing in the Eleventh Circuit, all of which constitute a substantial concession on their part.²⁰ The appeal, albeit frivolous, was costly because it involved complex procedural issues—like the effect of Mr. Goble's interlocutory appeal on the proceedings in the District Court and how much leeway would be given to a *pro se* litigant.²¹ The Court will not entertain Mr. Goble's request for an evidentiary hearing with these sanctions. None is needed; an evidentiary hearing only would increase the sanctions awarded against Mr. Goble.

Accordingly, it is

ORDERED:

1. The Trustee's Motion for Sanctions (Doc. No. 777) is **GRANTED**.
2. \$29,450.70 is awarded against Goble in favor of the Trustee and his counsel.
3. SIPC's Joinder in the Motion for Sanctions (Doc. No. 786) is **GRANTED**.
4. \$6,401 is awarded against Goble in favor of SIPC's counsel.
5. Goble is directed to make this payment within 30 days of the entry of this order. If the amount is not timely paid, the Trustee and SIPC shall submit proposed and

¹⁸ Doc. No. 786, Exh. D.

¹⁹ Doc. No. 777, pp. 9-10.

²⁰ Doc. No. 777, p. 6.

²¹ Doc. No. 777, p. 8.

separate Final Judgments upon which execution shall lie and interest at the federal rate shall accrue.

5. Goble's Motion for an Evidentiary Hearing (Doc. No. 794) is **DENIED** as unnecessary.
6. Goble's Judicial Notice that the Recent Appeals Court Decision on Sanctions is not a Final Decision and Response to the Motion for Sanctions (Doc. No. 789) is **DENIED** as moot.

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Attorney, Hywel Leonard, is directed to serve a copy of this order on all interested parties and file a proof of service within three days of entry of the order.