

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

IN RE:

JOHN P. MESSINA, doing business as
THE LAW OFFICE OF
JOHN P. MESSINA,
Debtor – Appellant

No. 10-3240

U.S.C.A. – 7th Circuit
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**MOTION OF APPELLEE, AMERICAN CITRUS PRODUCTS CORPORATION,
FOR SANCTIONS PURSUANT TO RULE 38**

Appellee, American Citrus Products Corporation, pursuant to Rule 38 of the Fed. R. App. P., respectfully requests that this Court sanction the appellant, John P. Messina, for pursuing a frivolous appeal. In support, American Citrus states:

1. This is Messina's third full appeal to this Court of a contempt decision that was rendered against him in 1995. In each of the two previous appeals, the contempt decision was unanimously affirmed. In the second appeal, this Court found that Messina's arguments were "frivolous" and he was sanctioned pursuant to Rule 38 of the Fed. R. App. P.
2. On October 29, 2010, American Citrus filed a motion in this Court seeking to prevent Messina from contesting issues that already had been rejected in his prior appeals. That motion was denied, but this Court stated: "The appellee is free to address the impropriety of any issues raised by the appellant in its response brief." American Citrus provided Messina with a specific warning that he refused to heed. Accordingly, American Citrus submits that serious sanctions are warranted.

3. On June 9, 1995, Judge James B. Zagel issued findings of fact and conclusions of law holding Messina in contempt for willful and repeated violations of confidentiality orders and a seal order. *Grove Fresh Distributors, Inc. v. John Labatt, Ltd.*, 888 F.Supp. 1427 (N.D. Ill. 1995).

4. Messina appealed the contempt decision. It was unanimously affirmed in an unpublished opinion. 134 F.3d 374 (7th Cir. 1998). The petition for writ of certiorari to the United States Supreme Court was denied. 525 U.S. 988 (1998).

5. Rather than pay the monetary sanctions that were imposed by Judge Zagel, Messina filed for protection in bankruptcy court. During the course of the disposition of the bankruptcy proceedings, Messina repeated some of the same misconduct that resulted in the initial contempt judgment. He filed pleadings that publicly disclosed information protected by the confidentiality and seal orders. Messina made no attempt to comply with the procedures established in Judge Zagel's contempt decision to avoid further violations. At that point, those procedures already had been sustained by this Court.

6. Messina's improper disclosure resulted in the second contempt petition before Judge Zagel. Messina was again found to have violated the district court's orders and was ordered to pay petitioner's attorneys fees.

7. Messina used the second contempt proceeding again to contest the initial contempt judgment. Messina filed a motion seeking recusal of Judge Zagel, who Messina alleged exhibited an "unremitting bias." Messina supported this contention, in part, by insisting that Judge Zagel had issued findings about Messina's conduct leading to the imposition of the seal that were unwarranted. Messina also asserted that Judge Zagel issued inconsistent rulings related to Messina's status as an attorney for Grove Fresh.

8. Messina also sought to vacate the initial contempt judgment through a motion filed pursuant to Rule 60(b)(6) of the Fed. R. Civ. P. Among other reasons, Messina argued that he had been prejudiced because failure to maintain a proper record had deprived him of the ability to appeal. Judge Zagel denied Messina's motions for recusal and to vacate the contempt judgment.

9. Messina appealed the denial of his motions. Once again, this Court unanimously affirmed Judge Zagel's decisions and the basis for the original contempt judgment. Messina's petition for rehearing and suggestion for rehearing en banc were denied. 299 F.3d 635 (7th Cir. 2002). Messina's petition for a writ of certiorari to the United States Supreme Court was denied. 538 U.S. 907 (2003).

10. This Court did not merely reject Messina's contentions. This Court stated that Messina had failed to heed warnings against future abuse of the legal system. The Court stated that Messina's appeal was an attempt to repackage prior appeals and pursue claims that "had been unsuccessfully litigated numerous times in both this Court and in the district court, . . ." Accordingly, this Court found Messina's appeal to be "frivolous." Messina was sanctioned pursuant to Rule 38 of the Fed. R. App. P., and ordered to pay \$1,500 "for his abuse of the litigation process and the frivolous nature of his appeal." 299 F.3d at 642.

11. In his current appeal to this Court, which is now his third, Messina ostensibly challenges the non-dischargeability decision of the bankruptcy court. In pursuing that challenge, however, Messina again contests the factual basis of Judge Zagel's rulings related to the contempt judgment. He again asserts that the rulings concerning his status as a Grove Fresh attorney were improper. He again claims the assembly and maintenance of the district court record deprived him of the ability to pursue interlocutory appeals. He again insists that Judge Zagel's findings of

fact and conclusions of law constituted an unfair recitation of the underlying events. This time, however, instead of focusing on the alleged “unremitting bias” of Judge Zagel, Messina contends these arguments support the conclusion that the appellees and their lawyers had “unclean hands” and therefore are not entitled to judgments and rulings in their favor.

12. Messina already has been sanctioned by the district court for his appeal of the bankruptcy court decision. In his appeal to the district court, Messina insisted that the factual and legal basis of the contempt judgment must be reviewed in detail. Messina inundated the district court with literally thousands of pages of pleadings and documents related to the contempt proceedings. Messina included essays focused on what he characterized as result-oriented judging and his critique of fictional writing he deemed relevant to his appeal. Messina directed the court to his web site which is styled: “Virtual Courtroom: Challenging Deceitful Lawyers & Result-Oriented Judges.” www.JPM-Law-Chicago.com.

13. Judge Gettleman sustained the bankruptcy court and refused to review in detail Messina’s factual and legal arguments aimed at the contempt judgment. In addition, the district court joined the chorus of sanctions against Messina. The court found that “Messina has once again used the instant appeal to re-litigate the confidentiality orders, contempt proceedings and Contempt Order.” This conduct violated both Rule 11 of the Fed. R. Civ. P. and 28 U.S.C. § 1927. Messina was “directed to pay American Citrus’s attorneys fees and costs incurred in connection with this appeal.” Despite Judge Gettleman’s ruling, Messina is again attempting to re-litigate those issues in this Court.

14. Also, in his current appeal to this Court, Messina falsely certified that “the Appendix [to his brief] contains all of the material required by Seventh Circuit Rule 30(a) and 30(b).” Seventh Circuit Rule 30(b)(1) requires the appellant to include “copies of any other

opinions, orders, or oral rulings in the case that address the issues sought to be raised.” Messina, however, failed to include a copy of this Court’s decision in 2002 which addressed and rejected the same issues Messina has raised in his current appeal. In fact, this Court’s 2002 decision is not mentioned or cited anywhere in Messina’s brief or appendix.

15. Accordingly, American Citrus submits that Messina’s current appeal is “frivolous” and violates Rule 38. American Citrus respectfully requests that Messina be ordered to reimburse American Citrus for the attorneys fees and costs incurred as a result of his misconduct.

16. To pursue his protracted course of misconduct, Messina has largely ignored the financial penalties that have been imposed against him. Although some amounts have been paid, most have not. Moreover, the financial penalties that have been imposed represent only a fraction of the expenditures that have been required to address his misconduct. There was no order, for example, that required reimbursement for expenditures in the bankruptcy court or for those incurred to respond to either of his two prior appeals to this Court.

17. Financial penalties based only on reimbursement for some of the expenditures caused by Messina simply have not been effective. Those reimbursement penalties have not deterred Messina to this point; reimbursement penalties cannot reasonably be expected to prevent future misconduct. Accordingly, American Citrus seeks severe sanctions against Messina to prevent future abuse.

18. American Citrus submits that this Court can look to Rule 11 of the Fed. R. Civ. P. for guidance in interpreting and applying Rule 38 of the Fed. R. App. P. *Hill v. Norfolk & W. Ry. Co.*, 814 F.2d 1192, 1200 (7th Cir. 1987); *Foley v. Fix*, 106 F.3d 556, 558 (4th Cir. 1997);

Smith v. McLeod, 946 F.2d 417, 418 (5th Cir. 1991). American Citrus requests that this Court consider imposing remedies authorized by Rule 11 to prevent future misconduct by Messina.

19. Rule 11(c)(4) authorizes the imposition of sanctions that are sufficient to deter repetition of the conduct or comparable conduct. Making this determination, the Court is authorized to review whether the current misconduct is part of a pattern. *Vollmer v. Publishers Clearing House*, 248 F.3d 698, 610 (7th Cir. 2001); *Grebiskes v. Universities Research Association, Inc.*, 417 F.3d 752, 758 (7th Cir. 2005).

20. In Messina's case, there is overwhelming evidence of a protracted course of conduct to disregard court orders and harass the defendants from the *Grove Fresh* litigation. Judge Zagel noted that Messina pursued his own agenda, and that observation continues to remain accurate and relevant. The tortured history of this litigation establishes conclusively that Messina will not hesitate to ignore any court order with which he disagrees. Monetary sanctions designed to reimburse respondents are ineffective and insufficient – either to deter Messina or fully compensate the respondents.

21. Accordingly, American Citrus requests that Messina be ordered to pay a multiple of the attorneys fees and costs expended by the respondents to this appeal. American Citrus requests that Messina be ordered to pay three times the amount of the attorneys fees and costs incurred. Petitioner submits this order is necessary to attempt to achieve deterrence from additional misconduct and secure compliance with court orders, directions and warnings.

22. In addition to the provisions of Rule 11, the petitioner submits that an order requiring payment of a multiple of the fees and costs incurred to secure deterrence is authorized by this Court's inherent authority to protect its jurisdiction and enforce its orders. *Support*

Systems International, Inc. v. Mack, 45 F.3d 1185 (7th Cir. 1995); *Grebisles v. Universities Research Association, Inc.*, *supra*. Clearly, Messina has disregarded this Court's warnings and sanctions issued in 2002.

23. Messina has failed to pay a substantial portion of the monetary sanctions that already have been imposed against him. He has continued this pattern of disobedience while ignoring the sanctions imposed to confront and deter that defiance. Accordingly, American Citrus respectfully requests that Messina be ordered to pay all of the sanctions, including applicable interest, that already have been imposed. At a minimum, Messina should be barred from any court filing unless and until all such sanctions have been paid. *Support Systems International, Inc., v. Mack*, *supra*.

24. Rule 11(c)(4) and this Court's inherent power authorize sanctions that include non-monetary directives. American Citrus submits that additional orders are justified and necessary to deter Messina from continued abuse of the litigation process.

25. American Citrus requests that this Court exercise its inherent authority to enter an order prohibiting Messina, or anyone on his behalf, from initiating or pursuing any legal proceedings whatsoever in any federal or state court that are related in any way to the *Grove Fresh* litigation or any of the subsequent proceedings. The petitioner also requests a warning that violation of the order will result in serious sanctions, including the possibility of criminal contempt. To this point, the record is clear that civil contempt and reimbursement sanctions simply have not been effective in deterring Messina from additional misconduct.

26. This Court's authority extends to prohibiting vexatious litigation. Such an order would not violate Messina's constitutional rights because it would not prevent his access to the

courts for other matters, which presumably would be appropriate. See e.g., *In the Matter of Lamar Chapman*, 328 F.3d 903 (7th Cir. 2000); *Dreis & Krump Manufacturing Co. v. International Association of Machinists and Aerospace Workers, District No.8*, 802 F.2d 247 (7th Cir. 1986); *Srivastava v. Marion County Election Board*, 2005 WL 406387 (7th Cir. 2005).

27. American Citrus respectfully requests that this Court consider the brief of the Appellees filed in response to Messina's appeal in further support of this motion.

Accordingly, American Citrus respectfully requests that this Court impose sanctions against Messina for his repeated and blatant violation of Rule 38 of the Fed. R. App. P.

Dated: February 22, 2011

Respectfully submitted,

By: 

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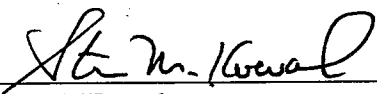
CERTIFICATE OF SERVICE

I, Steven M. Kowal, hereby certify that I caused a copy of the foregoing Motion of American Citrus Products Corporation For Sanctions Pursuant to Rule 38 to be served via U.S. Mail and by electronic mail on February 22, 2011.

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