

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

DONALD H. RUMSFELD, Secretary of Defense Appellant and Cross-Appellee v. FREEDOM, NY, INC. Appellee and Cross-Appellant	Case No. 02-1105,-1130
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**MOTION FOR DAMAGES FOR
APPELLANT’S FRIVOLOUS APPEAL**

Pursuant to Rule 38 of the Federal Rules of Appellate Procedure (“FRAP”), Appellee moves this Court to award it damages for Appellant’s filing a frivolous appeal. FRAP Rule 38 reads as follows:

Rule 38. Frivolous Appeal - Damages and Costs

If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to appellee.

In its decision of May 22, 2003 (Exhibit A), this Court expressly found that “[Appellant’s] final basis for appeal, that the Board’s decision was arbitrary and capricious because it conflicted with an earlier decision of the Board, *is frivolous*.” (Emphasis supplied). The Court’s decision, page 21.

Appellee was severely damaged by Appellant’s frivolous appeal of that ruling of the Board. First, Appellant expended considerable time and effort in responding to that portion of Appellant’s brief. But for the inclusion of the frivolous contentions in the brief, Appellee would

not have had to expend that time and resources. Appellee should be compensated for its attorneys' fees and other costs expended in dealing with Appellant's frivolous contentions. The additional unnecessary legal time and expenses is calculated below as a percentage of Appellee's main brief and reply brief.

Second, the need to respond to Appellant's frivolous argument in the brief caused Appellee to be severely constrained in making its arguments in the brief. Appellee had significant difficulty in meeting the 14,000 word limitation for its main brief and still do justice to the points to be argued in its brief. Indeed, Appellee's problems in meeting the word limitation and still doing justice to the arguments it needed to make in its brief caused it to file a motion to expand the allowable words. Appellee's Unopposed Motion to File an Extended Brief. Exhibit B. Appellee's response to the Government's brief took over 4 pages (*see* the damages discussion, below) which could have been used to expand and improve its other arguments. Possibly the 4 1/3 more pages of argument could have resulted in the Court giving greater consideration to Appellee's arguments which suffered from the lack of space. Perhaps the Court would not have felt constrained to give Appellee's other arguments "short shrift" ("We have considered the other points argued by the contractor and the Government and find them to be without merit." The Decision, page 25).

Apart from the possibility that the availability of over 4 more pages of brief might have affected the result, Appellee was damaged in that it had to expend significant additional effort in scaling down the brief to meet the mandatory word count. This effort took considerable attorney time to accomplish, which would not have been necessary but for Appellant's frivolous appeal. It is impossible to calculate precisely how much additional effort went into scaling down

the brief, summarizing portions of the argument, removing words from sentences to save on the word count, and re-editing multiple times. With all of that additional unnecessary effort, Appellee got the word count down to 13,996 words, *i.e.*, with no room to spare. *See* Appellee's brief, July 18, 2002, page 60. Appellee's conservative estimate of the unnecessary time and effort expended in cutting down its main brief, caused by the need to respond to the frivolous portion of Appellant's appeal, is ten percent (10%) of its total cost of preparing its main brief.

The Amount of Appellee's Damages

Appellee has calculated the first part of its damages by measuring the portion of the briefs it was necessarily required to prepare in order to respond to Appellant's frivolous argument. Appellee has calculated the amount of total pages of the initial (main) brief to be 57 ½ pages and the amount of pages required for Appellee to respond to Appellant's frivolous appeal grounds to be 18/23 of page 51, all of page 52, 53 and 54 and 11/22 of page 55. The total length of the initial (main) brief was 57 ½ pages. Accordingly, Appellee unnecessarily prepared 7.4479% of the total brief. Thus, Appellee submits that it is entitled to 7.4479% of the total costs of preparing its main brief. The calculation of this 7.4479% is enclosed as Attachment C.

Appellee has also calculated the percentage of its reply brief that pertained to the frivolous appeal grounds. Appellee calculated that 6/26 of page 3, all of page 4 and 17/23 of page 5 were in response to frivolous appeal grounds. The total reply brief was 16 ½ pages. Accordingly, 11.9387% of the legal fees and other total costs of Appellee's reply brief should be awarded Appellee. *See* Attachment C for the calculation.

Appellee's expenses for the preparation of the main brief are detailed in Attachment D. They are summarized in a spread sheet enclosed as Attachment E. The total expenses are as follows:

Legal fees	\$189,915.00
Paralegal expenses	2,808.00
Other expenses	<u>3,496.51</u>
Total fees and expenses	<u>\$196,219.51</u>

The total amount spent to prepare the main brief, \$196,219.51, multiplied by 7.4479% (per Attachment C) is \$14,614.24.

Appellee's expenses for the preparation of the reply brief are detailed in Attachment F. They are summarized in Attachment E. The total expenses are as follows:

Legal fees	\$13,957.50
Paralegal expenses	400.00
Other expenses	<u>1,184.06</u>
Total fees and expenses	<u>\$15,541.56</u>

The total amount spent to prepare the reply brief, \$15,541.56, multiplied by 11.9387% (per Attachment C) is \$1,855.46.

The second part of Appellee's damages, *i.e.*, the extra cost of the effort to scale down the main brief to meet the word count due to the unnecessary use of a significant portion of the brief to respond to Appellant's frivolous argument, is estimated conservatively at ten percent (10%) of the effort expended on the brief. Thus, of the \$196,219.51 expended on the main brief, \$19,622 is requested for this portion of the damages.

Costs of Motion Preparation

Appellee submits that the costs of preparing this motion for damages should be recoverable from Appellant under Rule 38, as well.

The costs of preparing this motion are approximately as follows:

Legal fees	\$2,100.00
Paralegal expenses	2,280.00
Other expenses	<u>170.00</u>
Total fees and expenses	<u>\$4,550.00</u>

CONCLUSION

Appellee comes before this Honorable Court and prays that damages be awarded as follows:

Unnecessary portion of Main Brief	\$14,614
Unnecessary portion of Reply Brief	1,855
Additional costs expended in scaling down the brief	19,622
Expenses of motion	<u>4,550</u>
	<u>\$40,641</u>

Appellee prays that this Honorable Court include in the judgment any and all other amounts it deems just and proper under the circumstances.

Respectfully submitted,

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Dated: June 5, 2003