

**In the
Supreme Court of the United States**

JOEL DOUGLASS, ET AL.,
Petitioners,

v.

DAVID HIRSHON, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the First Circuit

RESPONDENT’S MOTION FOR DAMAGES AND COSTS

MARSHALL J. TINKLE
Counsel of Record
Thompson, MacColl & Bass, LLC, P.A.
15 Monument Square, 4th FL
P.O. Box 447
Portland, ME 04112-0447
Tel. 207-774-7600
mtinkle@thomport.com

October 19, 2023

Counsel for Respondents

NOW COMES Respondent David Hirshon, by and through his counsel, and pursuant to Supreme Court Rule 42.2 respectfully moves this honorable Court for an award of damages and costs for the filing of a frivolous petition. In support of this motion, Respondent states as follows:

The petition for a writ of certiorari is frivolous. The only somewhat unconventional aspect of this case was how barren the amended complaint was of any allegations that could plausibly state a cognizable claim against respondents. When respondents filed their Rule 12(b)(6) motion, petitioners filed a response to which they appended a multitude of documents that had not been referenced, let alone attached to, the amended complaint (Petition, App. 6a-7a, 39a). As the First Circuit noted on appeal, they never moved to further amend the complaint, nor did they articulate any reason why the court “could or should consider the attachments in ruling on the motion to dismiss” (App. 7a, 15a). Naturally, the court refused to consider these materials and granted the motion to dismiss.

The sole basis of this petition is petitioners’ contention that the First Circuit should have subjected this refusal to *de novo* review, rather than applying an abuse of discretion standard. Yet the First Circuit was careful to point out that “the plaintiffs *concede* that an abuse of discretion standard applies...” (App. 14a) (emphasis supplied). Indeed, in their brief to the First Circuit, petitioners framed this particular issue as “Did the District Court abuse its discretion when it refused

to consider documents that were public records, or not directly challenged by anyone attached to the Response in Opposition to the Motion to Dismiss?” And they proceeded to argue in the same brief that the court “abused its discretion when it refused to consider documents that were not attached to the Amended Complaint but referenced in the Response in Opposition to the Motion to Dismiss”

In these circumstances, no court of appeals has ever suggested that a trial court is required as a matter of law to consider extrinsic materials on a Rule 12(b)(6) motion. Contrary to petitioners’ assertion, there is no split among the circuits.

Rule 42.2 provides that when a petition for a writ of certiorari is frivolous, the Court may award the respondent “just damages” and single or double costs. Such an award is appropriate here. *See, e.g., Hatch v. Reliance Insurance Co.*, 1986 U.S. LEXIS 2273 (Jan. 13, 1986); *Hyde v. Van Wormer*, 1985 U.S. LEXIS 4466 (Nov. 18, 1985).

WHEREFORE, Respondent David Hirshon requests an award of just damages and costs.

Respectfully submitted,

/s/ Marshall J. Tinkle
Marshall J. Tinkle
Counsel for Respondents
15 Monument Square, 4th FL
P.O. Box 447
Portland, ME 04112-0447

CERTIFICATE OF SERVICE

I, Marshall J. Tinkle, attorney for Respondents, hereby certify that I have caused one copy of the within Motion for Damages and Costs to be served on the following by first class mail, postage prepaid pursuant to Supreme Court Rule 29:

Robert C. Andrews
ROBERT C, ANDREWS ESQUIRE, P.C.
91 Auburn Street, PMB 1155
Portland, ME 04103

Date: October 23, 2023

/s/ Marshall J. Tinkle
Marshall J. Tinkle
Thompson, MacColl & Bass, LLC, P.A.
15 Monument Square, 4th FL
P.O. Box 447
Portland, ME 04112-0447
Tel. 207-774-7600
mtinkle@thomport.com