UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 26-10443

Appeal from a Final Order of the United States
District Court for the Southern District of Florida
Case No. 0:25-cv-61909-RS

Federated Foundation Trust,
Appellant,

v.

Daniel J. Stermer as Receiver/Termination Trustee
For the Heron Pond Condominium Association, Inc.,
Appellee.

APPELLANT'S RESPONSE IN OPPOSITION TO APPELLEE'S MOTION FOR RULE 38 SANCTIONS

INTRODUCTION

Appellee seeks sanctions under Fed. R. App. P. 38 based on the assertion that this appeal is frivolous and pursued for delay. The Motion should be denied. First, an appeal is sanctionable only when it is "without arguable merit either in law or fact." See *Bilal v. Driver*, 251 F.3d 1346 (11th Cir. 2001); *Battle v. Central State Hospital*, 898 F.2d 126 (11th Cir. 1990). Appellant's appeal does not meet that standard. It presents record-based disputes about whether summary receivership sale procedures were administered in a manner consistent with due process and equitable receivership norms, and it seeks ordinary appellate relief.

Second, Appellee's "delay" narrative is refuted by Appellant's conduct in this Court: when Appellee moved for an expedited appeal schedule, Appellant promptly agreed—specifically to avoid prolonging the appeal—and filed its initial merits brief within the agreed timeframe, even though the Court had not adopted the parties' proposed schedule.

Appellant then filed its Reply Brief and Response to Sanctions Motion the very next day after Appellee's Brief and Motion were filed. Though this may be a dangerous position to take without doing significant research, Appellant would guess that this appeal may actually have been one of the fastest Eleventh Circuit appeals ever fully briefed, ***WITHOUT*** an order requiring such speed.

Third, the sanctions request is an improper attempt to convert merits disputes (waiver/preservation, qualification, and adequacy of due process procedures) into punishment. That is not what Rule 38 is for.

Statement of Relevant Procedural Facts (Refuting "Delay")

1. Appellee requested expedited merits briefing. (11th Cir. Doc. 3, filed Feb. 11, 2026)
2. Appellant promptly concurred[1] in Appellee's proposed schedule. (11th Cir. Doc. 9, filed Feb. 13, 2026.
3. Appellant then filed its initial merits brief in accordance with that agreed timeframe, even though the Court had not endorsed/adopted the parties' proposed timeframe, specifically to avoid any unnecessary delay.

[1] Undesigned Counsel tried to agree even earlier, but was travelling and District Court Counsel had already advised undesigned appellate counsel that he was conflicted out from continuing in this matter as Federated's counsel. Appellate counsel was unable to file anything on the plane, until the clerk authorized filings, the following day, which is when the Response was filed.

Solomon Radner <solomon@radnerlawgroup.com> Thu, Feb 12, 7:50 PM

to heronpondreceiver, dstermer, brich, MNiles, pavron, Benjamin

Good Evening Team Stermer,

My apologies about the late email, but I have been traveling non-stop for the past three days and am actually sending this email from a plane as we are preparing to take off. Hopefully before the flight attendant makes me put down my laptop.

Just as an FYI, I do not object to expedited briefing and I actually agree that it make sense. I can likely have my brief filed within 7 days.

Will efile a non-objection once I am in the air, assuming of course the wifi works.

Thanks

4. Appellant then filed its Reply Brief and Response to the instant Sanctions motion, the very next day after they were filed, again specifically to avoid any unnecessary delay.

These facts are simply incompatible with Appellee's claim that the appeal was instituted or prosecuted to "delay" proceedings.

ARGUMENT

I. Rule 38 sanctions require a truly frivolous appeal; this appeal has arguable merit in law and fact.

Rule 38 permits this Court, after notice and an opportunity to respond, to award "just damages and single or double costs" if the appeal is frivolous. Fed. R. App. P. 38; see also 28 U.S.C. § 1912 (authorizing damages and costs for delay in limited circumstances).

The Eleventh Circuit's test is demanding: an appeal is frivolous only if it is "without arguable merit either in law or fact." *Bilal v. Driver*, 251 F.3d 1346 (11th Cir. 2001); *Battle v. Central State Hospital*, 898 F.2d 126 (11th Cir. 1990).

This appeal clears that threshold:

• Appellant's claims are grounded in the record (including the sale hearing transcript) and challenge the adequacy and fairness of procedures used to resolve a contested, outcome-determinative bidder-qualification dispute, including a property of which Appellant already owns more than 30% and fears losing a substantial monetary sum, should this sale proceed.

• Appellant invokes established due-process *principles for notice and meaningful opportunity to be heard, including Mullane v. Central Hanover Bank & Trust Co*., 339 U.S. 306 (1950); *Armstrong v. Manzo*, 380 U.S. 545 (1965); *Fuentes v. Shevin*, 407 U.S. 67 (1972); and the balancing framework in *Mathews v. Eldridge*, 424 U.S. 319 (1976).

• Appellant's arguments also rely on controlling Eleventh Circuit receivership due-process authority recognizing that summary proceedings are permissible only when they provide a meaningful opportunity to present claims and defenses, especially where facts are disputed: *S.E.C. v. Elliott,* 953 F.2d 1560 (11th Cir. 1992); *S.E.C. v. Torchia*, 922 F.3d 1307 (11th Cir. 2019).

Whether Appellant ultimately prevails is a merits question; it does not render the appeal sanctionable.

II. Appellee's "improper purpose/delay" theory fails as a matter of record and common sense.

Appellee's Motion asserts the appeal was filed "to delay" a court-approved sale and extract leverage. That is not merely disputed; it is affirmatively contradicted by Appellant's conduct in this Court.

When Appellee sought expedited appellate treatment, Appellant promptly agreed to Appellee's proposed schedule and deadlines (including a request that the appeal be decided within 30 days – a request for which undersigned counsel had

and has reservations, due to a concern that this Court may see that as the parties overstepping.)

Appellant then filed its opening brief according to that accelerated schedule—even though the Court had not adopted the proposed schedule.

Lastly, Appellant filed its Reponses to the Sanctions Motion and its Reply Brief, the very next day after Appellee filed its papers, again specifically to move things along as quickly as possible; the very opposite of delay.

Appellant's actions are categorically inconsistent with any claim that Appellant is trying to prolong the appeal.

III. Appellee's motion improperly attempts to repackage merits disputes as "frivolousness."

Appellee's sanctions motion largely tracks its merits brief: waiver/preservation, bidder qualification, harmlessness, and asserted adequacy of the hearing.

1. Waiver/preservation is not a Rule 38 shortcut.

Appellee contends that Appellant waived issues based on counsel's sale-hearing statement and alleged non-preservation. Appellant disputes the scope and legal effect of that statement and maintains its objections preserved a process-based challenge to its exclusion from bidding and the procedures used to approve a sale predicated on that exclusion.

Even if Appellee's waiver theory is ultimately accepted, that would support affirmance—not sanctions—because waiver itself is routinely litigated on appeal and often depends on nuanced record and doctrinal questions.

2. This appeal invokes, rather than defies, controlling receivership due-process precedent

Appellee argues the hearing afforded adequate opportunity because Appellant declined cross-examination and did not present evidence. Appellant's position is that the procedures employed did not adequately adjudicate a disputed, dispositive gatekeeping determination and that the hearing's structure (including the compressed "all-or-nothing" jail ultimatum) underscores the risk of erroneous deprivation.

That dispute falls squarely within the due-process inquiry articulated in *S.E.C. v. Elliott*, 953 F.2d 1560 (11th Cir. 1992) (summary proceedings can satisfy due process only if they afford notice and meaningful opportunity to be heard, including presenting evidence where facts are in dispute, and prejudice is shown) and *S.E.C. v. Torchia*, 922 F.3d 1307 (11th Cir. 2019) (summary receivership proceedings must still afford due process, including meaningful opportunity to present claims and defenses).

Similarly, Appellant's reliance on core due-process principles of meaningful notice and hearing is anchored in Supreme Court authority. See Mu*llane v. Central Hanover Bank & Trust Co*., 339 U.S. 306 (1950) (notice reasonably calculated to

apprise interested parties and afford opportunity to object); *Armstrong v. Manzo*, 380 U.S. 545 (1965) (hearing must be meaningful and not shift burdens in a way that fails to restore the party's position); *Fuentes v. Shevin*, 407 U.S. 67 (1972) (absent extraordinary circumstances, opportunity to be heard should precede deprivation); and *Mathews v. Eldridge*, 424 U.S. 319 (1976) (balancing of interests, risk of error, and value of safeguards).

Appellee's disagreement with how those principles apply here is not a basis for sanctions.

3. Appellee's reliance on cases where sanctions were imposed underscores how different this case is.

Appellee's motion cites sanctions jurisprudence illustrated by appeals that are "utterly" without foundation or harassing in nature. See, e.g., *Bonfiglio v. Nugent*, 986 F.2d 1391 (11th Cir. 1993) (sanctions context where the appeal was deemed wholly frivolous).

This appeal is not of that character. It challenges the fairness and adequacy of procedures in a receivership sale—an area where controlling precedent expressly recognizes due-process constraints and fact-sensitive inquiry. See *S.E.C. v. Elliott*, 953 F.2d 1560 (11th Cir. 1992); *S.E.C. v. Torchia*, 922 F.3d 1307 (11th Cir. 2019).

IV. Appellee's Rule 38 rhetoric underscores why sanctions must be denied, not imposed.

Appellee labels the appeal "frivolous," but the Eleventh Circuit's frivolousness standard turns on whether a position is "without arguable merit either in law or fact." *Bilal v. Driver*, 251 F.3d 1346 (11th Cir. 2001) (citing Bat*tle v. Central State Hospital*, 898 F.2d 126 (11th Cir. 1990)).

Federated's arguments are anchored in controlling receivership due-process precedent (*Elliott/Torchia*) and foundational due-process authority (*Mullane/Armstrong*).

That is the opposite of "without arguable merit."

V. The Court should deny the request to expand this sanctions dispute into collateral fee litigation.

Appellee requests a fee-and-cost remand and characterizes the appeal as frivolous. Given the arguable legal and factual bases for Appellant's positions—and the expedited posture Appellant affirmatively supported—there is no justification to convert this appeal into collateral sanctions litigation.

To the extent Appellee gestures at other sanction mechanisms (e.g., 28 U.S.C. § 1927), that is not properly before the Court on this Rule 38 motion and does not supply a basis for Rule 38 relief.

Thus, Federated will not address those arguments, <u>because</u> they are not properly before this Court.

CONCLUSION

Appellee has not carried its burden to show this appeal is "without arguable merit either in law or fact." *Bilal v. Driver*, 251 F.3d 1346 (11th Cir. 2001); *Battle v. Central State Hospital*, 898 F.2d 126 (11th Cir. 1990). This appeal presents legitimate, record-based disputes about the adequacy of receivership sale procedures and the meaningful opportunity to be heard contemplated by *S.E.C. v. Elliott*, 953 F.2d 1560 (11th Cir. 1992) and *S.E.C. v. Torchia*, 922 F.3d 1307 (11th Cir. 2019), underpinned by core due-process authority including *Mullane v. Central Hanover Bank & Trust Co*., 339 U.S. 306 (1950), *Armstrong v. Manzo*, 380 U.S. 545 (1965), *Fuentes v. Shevin*, 407 U.S. 67 (1972), and *Mathews v. Eldridge*, 424 U.S. 319 (1976). Finally, Appellee's assertion that this appeal is pursued for delay is refuted by Appellant's immediate agreement to expedited briefing and its timely filing under the parties' proposed schedule, even without a Court-endorsed schedule. Accordingly, Appellee's Motion for Rule 38 sanctions should be denied.

Respectfully Submitted,

/s/ Solomon M Radner
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Dated: Feb. 27, 2026

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a), I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a) because it contains no more than ***1,964*** words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a).

This brief complies with the typeface requirements of Fed. R. App. P. 32 and the type style requirements of Fed. R. App. P. 32 because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman, 14, double-spaced.

/s/ Solomon M Radner
Solomon M. Radner
Radner Law Group, PLLC
Counsel for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on Feb. 27, 2026, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notice of such filing to all registered CM/ECF users, and I certify that all participants in this case are registered CM/ECF users and will be served via the CM/ECF system.

/s/ Solomon M Radner
Solomon M. Radner
Radner Law Group, PLLC
Counsel for Appellant