UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

SMALL JUSTICE LLC, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 1:13-cv-11701-DJC
	)	
XCENTRIC VENTURES LLC,	)	
	)	
Defendant.	)	

BRIEF OF PUBLIC CITIZEN, INC.
AS AMICUS CURIAE IN OPPOSITION TO
DEFENDANT'S MOTION FOR APPEAL BOND
Leave to file granted on December 16, 2015

Plaintiff Richard Goren, a local lawyer, was the subject of severe criticism on "Ripoff Report," the online forum for consumer commentary owned by defendant Xcentric Ventures. Mr. Goren, who claims that the criticism was false and defamatory, thought that he had found a clever way to evade the statutory immunity from suit that operators of interactive computer services enjoy against plaintiffs who complain about content that the services' users write for posting on the interactive service. His strategy was to (1) secure an uncontested judgment in a libel suit against the actual poster, (2) use that judgment to execute on the poster's copyright in the content that the poster authored, then (3) register that copyright and to proceed against the interactive service by invoking the intellectual property exception to section 230 of the Communications Decency Act. Addressing Xcentric's motions to dismiss and for summary judgment, the Court has rejected Goren's strategem.

Amicus curiae Public Citizen, Inc. believes that section 230 is a vital component of the system of online free speech, and that Goren's strategy, if successful, would create a roadmap that would enable other targets of criticism posted on other online message boards to evade section 230 and force the removal of postings even when there is serious reason to doubt the soundness of the

defamation claims of the plaintiff who was the target of criticism. Consequently, Public Citizen (along with a second proposed amicus, the Electronic Frontier Foundation) has already solicited consent from the two sides for an amicus brief on appeal in support of this Court's judgment, although for reasons somewhat different from those articulated by the Court.

Even though Public Citizen believes that the judgment of dismissal should be affirmed, it is concerned that Xcentric is trying to leverage its claim for attorney fees under the Copyright Code to deny Goren and the other plaintiffs a fair chance to secure appellate review of the judgment, including some issues of first impression in the First Circuit. Xcentric has applied for an award of more than $120,000 in attorney fees and costs, DN 139, and in support of its motion for an appeal bond, DN 138, it notes that plaintiffs' response to Xcentric's previous motion for an award of attorney fees rested in part on Goren's averment that a judgment in the amount of $70,000, sought in the previous motion, would be "potentially ruinous" and "financially devastating." *Id.* at 5; DN 112 ¶ 7. Xcentric noted that plaintiff DuPont has already been impoverished by a judgment in a different case. Motion at 6. Xcentric speculates that plaintiffs might be unable to pay a judgment for appellate attorney fees on top of the judgment that it expects for fees to date in this Court, *id.* at 5, and objects to having to spend money defending the appeal if it likely will not be able to collect on a later fee judgment. In effect, Xcentric hopes to make it financially impossible for Goren to appeal. The likelihood both that this is Xcentric's objective, and that Xcentric's wish is likely to succeed, is confirmed by the fact that, in the Court of Appeals, Xcentric has filed a consented-to motion to stay indefinitely the deadline for its principal appellate brief on the ground that, if both the motion for attorney fees and the motion for an appeal bond are granted, plaintiffs-appellants may be fiscally unable to pursue their appeal and hence Xcentric might be spared the need to file its brief.

A bond for the purpose of eliminating an appeal is a misuse of the appeal bond process. Xcentric relies on cases that stand for the proposition that an appeal bond is properly imposed to protect the appellant against the risk of nonpayment where the appellant's assets are located outside the effective reach of the district court. *Adsani v. Miller*, 139 F.3d 67, 75 (2d Cir. 1998). Moreover, as Xcentric shows, some circuits hold that the payment secured can include a possible award of attorney fees for the appeal. *Id*. at 72-75.[1] But many appellate courts have warned against allowing the judgment winner to insulate itself from an appeal by imposing a financial hardship that the judgment loser cannot meet. "Allowing [district courts] to impose high Rule 7 bonds where the appeals might be found frivolous risks impermissibly encumbering appellants' right to appeal[.]" *Azizian v. Federated Department Stores*, 499 F.3d 950, 961 (9th Cir. 2007) (citation, internal quotation marks, and source's alteration marks omitted); *accord In re Am. President Lines*, 779 F.2d 714, 718 (D.C. Cir. 1985) ("While, in the federal scheme, appeals found to be frivolous cannot command judicial respect, those possessing merit are normally a matter of right. Courts accordingly must be wary of orders, even those well-meaning, that might impermissibly encumber that right." (footnotes omitted)); *Clark v. Universal Builders*, 501 F.2d 324, 341 (7th Cir. 1974) ("[A]ny attempt by a court at preventing an appeal is unwarranted and cannot be tolerated.") *Adsani* itself, one of Xcentric's principal authorities in support of its motion for an appeal bond, indicates that the trial

[1]The circuits are divided on the question whether attorney fees are among the "costs" that may be secured by an appeal bond. *Compare Adsani* (allowing a bond the includes the anticipated amount of appellate attorney fees) *with In re American President Lines*, 779 F.2d 714, 716, 719 (D.C. Cir. 1985) (excluding anticipated appellate attorney fees from bond amount); *Hirschensohn v. Lawyers' Title Ins. Corp.*, 1997 WL 307777, at *1-*2 (3d Cir. 1997) (same). Like the Third Circuit, the First Circuit has addressed the issue only in an unpublished disposition. *Int'l Floor Crafts v. Dziemit*, 420 Fed. App'x 6, 17 (1st Cir. 2011) (bond amount may include amount of anticipated appellate attorney fees).

court must take the appellant's ability to pay into account, 139 F.3d at 79; the risk of nonpayment in that case did not stem from the appellant's lack of assets (and hence any anticipated inability to pay), but rather her lack of assets in the United States where they would be exposed to execution.

Although there is no constitutional right to appeal, Congress has given parties a statutory right to appeal, and that right should not be encumbered by the imposition of high financial hurdles. Indeed, as the Second Circuit recognized in *Adsani*, 139 F.3d at 78-79, imposing cost requirements that impede appeals by those who cannot afford those costs can raise serious concerns under the Equal Protection and Due Process clauses. *See also American President Lines*, 779 F.2d at 718 ("Courts . . . must be wary of orders, even those well-meaning, that might impermissibly encumber [the appellate] right."). Just as a party that litigates against an in forma pauperis adversary bears the risk that it will be unable to recover its litigation costs, a party that successfully impoverishes its adversary through an award of attorney fees bears the risk that, if it is held entitled to additional fees on appeal, it will be unable to recover those fees. That risk is no reason to bar a plaintiff from obtaining its appeal as of right in the court of appeals.

Amicus recognizes that the First Circuit has held that an appeal bond requirement can be justified if the district court concludes that the appellant's appeal might be frivolous, *Sckolnick v. Harlow*, 820 F.2d 13, 15 (1st Cir. 1987), just as, indeed, permission to proceed in forma pauperis may be denied if the action is frivolous. *Lee v. Clinton*, 209 F.3d 1025, 1026 (7th Cir. 2000); *Watson v. Caton*, 984 F.2d 537, 539 (1st Cir. 1993). But even assuming that the Court grants Xcentric's motion for an award of attorney fees, it will not have necessarily found that Goren's lawsuit or appeal was frivolous. Although Xcentric uses the term "frivolous" in its attorney fee motion, its authority says only that "'objective unreasonableness' [is a factor deserving] substantial weight in

the determination of whether to award attorneys' fees.'" *Yankee Candle Co. v. Bridgewater Candle Co.*, 140 F. Supp. 2d 111, 115 (D. Mass. 2001) (citing *Lotus Dev. Corp.*, 140 F. 3d 70, 74 (1st Cir. 1998)). Moreover, if the Court finds the suit to have been objectively unreasonable, the request to impose an appeal bond would rest on the proposition that an appeal from the attorney fee award as well as from the dismissal of Goren's claims on the merits would likely be frivolous. Goren's copyright claims might well be deemed "objectively unreasonable," but for different reasons than those given by the Court in its summary judgment ruling—the fundamental flaw in his copyright theories is that he is attempting to deploy copyright law to accomplish the objective of suppressing creative work rather than protecting the financial incentive for creating that work. But finding the underlying lawsuit objectively unreasonable is not tantamount to finding that his appeal from the dismissal of the suit, and from a possible award of attorney fees, is a frivolous one.

CONCLUSION

Defendant's motion to require plaintiffs to post an appeal bond should be denied.

Respectfully submitted,

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