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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

IN RE: YAHOO MAIL LITIGATION

No. 5:13-cv-04980-LHK

**PLAINTIFFS' REPLY IN FURTHER
SUPPORT OF MOTION FOR APPEAL
BOND AND REQUEST TO VACATE
HEARING**

Fed. R. App. P. 7

Date: December 22, 2016
Time: 1:30pm
Location: Courtroom 8
280 South 1st Street
San Jose, CA 95113

1 **I. INTRODUCTION**

2 Serial pro se objector Patrick S. Sweeney, Esq. filed a baseless objection to the settlement of this
3 action without a reasonable and competent inquiry and for an improper purpose (the “Sweeney
4 Objection,” ECF No. 194). This Court rejected the Sweeney Objection on standing and merits grounds.
5 *In re Yahoo Mail Litig.*, No. 13-CV-4980-LHK, 2016 WL 4474612, at *7 (N.D. Cal. Aug. 25, 2016)
6 (“The information obtained from the discovery, along with the record in this case, demonstrate that
7 Sweeney’s objection lacks merit.”). Thereafter, Mr. Sweeney filed a frivolous Notice of Appeal on
8 September 26, 2016, *see* ECF No. 207, and plaintiffs-appellees moved for a modest appeal bond in the
9 amount of \$2,000. ECF No. 211 (the “Appeal Bond Motion”); *see also* ECF No. 211-2 (certificate of
10 service on Mr. Sweeney via email and U.S. Mail). Mr. Sweeney’s deadline to respond to the Appeal
11 Bond Motion was October 25, 2016, but to date nothing appears on the docket. Plaintiffs-appellees
12 therefore respectfully request that the Court vacate the hearing scheduled for December 22, 2016 and
13 grant the Appeal Bond Motion on the current record.

14 **II. RELEVANT SUPPLEMENTAL BACKGROUND**

15 Following Mr. Sweeney’s Notice of Appeal, the Ninth Circuit docketed the case on September
16 30, 2016, entered appearances, and set deadlines. *See* Court of Appeals Docket No. 16-16759, 9th Cir.
17 ECF No. 1. On October 3, 2016, the Court of Appeals issued an order requiring Mr. Sweeney to pay his
18 filing fee, or file a motion to proceed in forma pauperis, or show cause why the appeal “should not be
19 dismissed for failure to prosecute.” 9th Cir. ECF No. 2-1. His deadline to comply with the Court of
20 Appeals’ order was October 24, 2016, but to date, there is no indication on the docket that Mr. Sweeney
21 has complied.

22 **III. IT IS APPROPRIATE TO VACATE THE DECEMBER 22 HEARING AND GRANT**
23 **THE APPEAL BOND MOTION ON THE CURRENT RECORD**

24 *A. Mr. Sweeney Has Provided No Evidence of Inability to Pay the Bond.*

25 An appellant’s ability to pay is a factor in determining whether to impose an appeal bond, and
26 this factor “is grounded in due process concerns.” *Schulken v. Washington Mut. Bank*, 09-cv-02708-
27 LHK, 2013 WL 1345716, at *4 (N.D. Cal. Apr. 2, 2013). Where (as here) an appellant fails to rebut
28 evidence of his ability to pay, such failure “weighs in favor of a bond.” *Id.* Furthermore, when the

1 amount of the appeal bond is limited to taxable costs that the unsuccessful appellant would have to pay
2 anyway, a bond does not deprive the appellant of due process. *Tennille v. Western Union Co.*, 774 F.3d
3 1249, 1257-58 (10th Cir. 2014) (\$5,000 appeal bond).

4 Plaintiffs-appellees have produced evidence of Mr. Sweeney's ability to pay a bond. *See*
5 *generally* Appeal Bond Motion, ECF No. 211. Mr. Sweeney was served with the Appeal Bond Motion,
6 *see* ECF No. 211-2, but has failed to rebut the evidence therein or otherwise respond in any fashion.
7 Plaintiffs-appellees also request a modest \$2,000 bond, an amount lower than bonds imposed in this
8 District in similar circumstances. *See, e.g., Schulken*, 2013 WL 1345716, at *6 (imposing \$5,000 appeal
9 bond on an objector appellant). Finally, because Mr. Sweeney has failed to dispute the evidence of his
10 ability to pay, the hearing scheduled for December 22, 2016 is no longer necessary. *See, e.g., Hill v.*
11 *State St. Corp.*, 09-cv-12146-GAO, 2015 WL 1734996, at *3 (D. Mass. Apr. 16, 2015) (imposing appeal
12 bond on serial class action objectors 35 days after motion filed, and without a hearing).

13 *B. Mr. Sweeney Poses a Risk of Nonpayment for Appellees' Costs.*

14 As outlined in the plaintiffs-appellees' reply in further support of their motion for sanctions, ECF
15 No. 212, Mr. Sweeney has a documented history of ignoring court orders and the risk of non-payment is
16 substantial. For example, Mr. Sweeney willfully failed to obey a court order to pay court costs
17 associated with a bankruptcy case that he himself initiated. Appeal Bond Motion, ECF No. 211 at 5.
18 That violation of the bankruptcy court's order is one of the bases asserted by the Wisconsin Office of
19 Lawyer Regulation in support of disbarment. ECF No. 212 at 5. Worse, as noted above, Mr. Sweeney is
20 currently in violation of the Court of Appeals' order to pay the filing fee *in this very case*. It is unclear if
21 Mr. Sweeney is even prosecuting the appeal any longer, but if he were to pay the filing fee and if the
22 Court of Appeals were to accept late payment, it is particularly appropriate to require a modest appeal
23 bond to ensure payment of costs.

24 **IV. CONCLUSION**

25 For all the foregoing reasons, plaintiffs-appellees' Motion for Appeal Bond should be granted.
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1 Dated: November 1, 2016

Respectfully submitted,

2 **KAPLAN FOX & KILSHEIMER LLP**

GIRARD GIBBS LLP

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By: /s/ Daniel C. Girard

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18 **ATTESTATION STATEMENT**

19 I, Daniel C. Girard, am the ECF User whose ID and password are being used to file the
20 foregoing Statement. In compliance with Civil L.R. 5-1(i)(3), I hereby attest that all counsel concur in
21 this filing.

22 /s/ Daniel C. Girard

23 Daniel C. Girard

